

The Practitioner Perspective on Access to Justice for Social Rights: Addressing the Accountability Gap

Katie Boyle, Diana Camps,
Kirstie English and Jo Ferrie

Access to Justice For Social Rights
Addressing The Accountability Gap

Research report
May 2022

UNIVERSITY of
STIRLING



Research team

Dr Katie Boyle is Associate Professor of International Human Rights Law at the University of Stirling and Principal Investigator responsible for delivery of the project and this report. Dr Diana Camps is Social Rights Research Fellow at the University of Stirling responsible for the qualitative research strand of the project and delivery of this report. Mx Kirstie English is Social Rights Research Fellow at the University of Stirling and responsible for the thematic analysis of the qualitative data and Dr Jo Ferrie is Senior Lecturer in Sociology at the University of Glasgow and a member of the Expert Advisory Group on Research Methods. Dr Ferrie contributed to the shaping of the methodological framework and was instrumental to completion of the project

Acknowledgments

We would like to thank our funder, the Nuffield Foundation, and in particular Imogen Parker, Ash Patel and Rob Street for supporting the work and providing feedback on our approach, including throughout the rigorous application process. Thanks are also due to the anonymous peer reviewers of our outline submission and the Nuffield Foundation Trustees who provided invaluable feedback on earlier iterations of our research proposal. We are indebted to the members of our Expert Advisory Groups each of whom supported the development and delivery of the project at various stages in immeasurable ways – all views expressed are the authors' own and should not be affiliated with our EAG members or other associate partners. We are grateful to a number of key contributors to the delivery of this report including Aidan Flegg, Gaurav Mukherjee, Dan Farley and Hannah Miller each of whom played a critical role in bringing the report to realisation. Finally, we must thank our research participants who gave their time and expertise so generously in order for this study to materialise. We are forever grateful to them for telling us their stories and for the invaluable work they do every day to support rights holders seeking access to justice for social rights.

The Expert Advisory Group on Social Rights consisted of the following members:

Paul Hunt, Jeff King, Aoife Nolan, Colm O'Connell, Rory O'Connell, Anashri Pillay and Bruce Porter.

The Expert Advisory Group on Research Methods consisted of the following members:

Michael Adler, Alphonso del Percio, Michelle Donnelly and Jo Ferry.

The Expert Advisory Practitioner Panel consisted of the following members:

Meghan Abraham, Les Allamby, Matthey Blow, Jamie Burton, Kavita Chetty, Carla Clarke, Grey Collier, Eleanor Deeming, Ciara Fitzpatrick, Kevin Hanratty, Ali Harris, Simon Hoffman, Alan Miller, Ursula O'Hare, Katie Palmer, Ash Patel, Katherine Perks, Imogen Richmond-Bishop and Mhairi Snowden.

The Nuffield Foundation is an independent charitable trust with a mission to advance social well-being. It funds research that informs social policy, primarily in Education, Welfare, and Justice. It also funds student programmes that provide opportunities for young people to develop skills in quantitative and scientific methods. The Nuffield Foundation is the founder and co-funder of the Nuffield Council on Bioethics, the Ada Lovelace Institute and the Nuffield Family Justice Observatory. The Foundation has funded this project, but the views expressed are those of the authors and not necessarily the Foundation. Visit www.nuffieldfoundation.org

Contents

1. Introduction	6
Research questions and structure of report	13
2. Theoretical and conceptual framework	14
A legal and discursive approach to social rights policy	14
Critiques of social rights adjudication	14
Principles of adjudication	16
A three-dimensional theory of justice: Distribution, recognition and representation	17
Why discourse?	18
The bifurcation of rights	20
Street-level bureaucracy and governmentality	21
Governmentality and neoliberal rationalities	22
Different framings of ‘access to justice’ and ‘effective remedies’	22
Theoretical and methodological tools	26
3. Methodological approach and data	29
Identifying and selecting the research sample	29
Qualitative data overview	30
Approach to data collection and design of research instruments	32
Research instruments: Interview field guide and web-based survey	33
The interview field guide	33
Web-based survey: ‘Social Rights Protections across the Four UK jurisdictions’	33
Qualitative semi-structured interviews with practitioners	34
Approach to data analysis	35
Thematic analysis	35
A critical approach to discourse and policy	36
Researcher reflexivity and ethics	38
Overview of data analysis	39
4. Data analysis: Navigating gaps and spaces	41
Part I: Impact of the Covid-19 pandemic on social rights	41
Access to social security	42
Access to adequate housing	43
Access to food and fuel	44
Part II: Case Studies	46
Scotland: Lock change evictions of those seeking asylum in Glasgow	46
Practitioners’ perspectives on section 6 of the Human Rights Act	50
Not an automatic waiver of human rights but cause for concern	52
Conflicts between reserved and devolved power	55
Conditions for asylum seekers: Insights from practitioners on the ground	55

England: Digitisation, algorithms and the direct impact on social security provisions	56
Mandatory reconsideration and tribunal hearing	57
Barrier to participation	57
The benefit cap: Work incentivisation - SSWP v Johnson	58
Lack of incorporation of international human rights protections	59
Automation and algorithms	63
<i>A call for greater parliamentary scrutiny</i>	64
Pantellerisco on appeal: A failure to provide a remedy	65
Wales: Closer to Government but with variable impact	67
Challenges for social rights protections related to the devolution settlement for Wales	67
<i>Limited powers to address poverty and funding</i>	67
<i>Different laws, limitations to lawmaking and delays in adoption and implementation</i>	68
Identified groups most impacted and (made) marginalised	70
Fragmentation of services across Wales	72
<i>Lack of recognition in services on the interrelationship of rights</i>	73
Closer to government	73
Legal routes to a remedy	74
<i>Limited powers under devolution</i>	74
<i>Lack of knowledge in seeking a remedy and limited legal expertise</i>	76
<i>Lack of funding for legal advice and representation</i>	76
The right to food and free school meal provision	78
Northern Ireland: Terminal illness criteria impede access to benefits	79
How to define “terminally ill”?	81
The individual remedy granted by the High Court: Was it sufficient?	83
Resilience: Fighting for a collective remedy	84
The right to adequate housing in Northern Ireland	84
<i>Outdated fitness standards in the private rental sector</i>	86
Part III. The access to justice journey	89
Summary infographic	89
The access to justice journey	90
Awareness and resources	91
Legal consciousness barrier: (Un)awareness of rights	91
Access to information, advice and advocacy	92
Access to appropriate independent specialist advice	95
Emotional barriers: Fear of retribution	97
Intersectionality of rights: Clustered injustice	98
Challenging rights: The need for advocacy, legal aid and legal representation	99
Legal routes to a remedy: Shortage of legal expertise	99
Lack of Funding	100
Complexity of the justice system: Getting stuck in ‘administrative mud’	103
Adjudication of social rights: Incorporation of international human rights law	104
Strategic litigation: Individual versus public interest	105
Justice = Access to an effective remedy	107
Practitioner perspectives on what constitutes an effective remedy	109
<i>Accessibility</i>	109
<i>Affordability</i>	110
<i>Timeliness</i>	110
<i>Effectiveness</i>	111

A missing feedback loop	114
Tribunal data	116
Social security	116
Immigration/ asylum	119
Part IV: Contestation: Competing logics and policy mechanisms	121
Competing discourses: Immigration and Scottish housing law	123
The outsourcing of government functions: Gaps in accountability	126
Contraventions of human rights	127
Prejudicial practices and the absence of penalties: Privatised housing	128
Technologies: Assessments, Automation and Algorithms	130
Medical assessments	130
Disproportionate impacts: Mental health	132
Arbitrary and discretionary decision making	132
Automation and digitisation	133
Algorithmic decision making	133
Poorly reasoned policy	135
The distribution of resources: Entitlement as ‘commodity’ versus ‘right’	136
The reproduction of valuation discourses: ‘worthiness’	138
Complexity and fragmentation	141
5. Conclusions	144
Reclaiming the narrative: From voice to agency	145
6. Key findings and recommendations	148
Limitations and future research	151
Appendix 1: Transcription key	153

List of Tables

Table 3.1: Research participants

Table 3.2: Thematic analysis

Table 4.1: Scotland case study participants

Table 4.2: England case study participants

Table 4.3: Wales case study participants

Table 4.4: Northern Ireland case study participants

Table 4.5: Social security and child payment (Total)

Table 4.6: % of cases cleared at hearing upholding decision/ finding in favour of claimant

Table 4.7: Personal Independence Payment (by Case No)

Table 4.8: Personal Independence Payment (%)

Table 4.9: First Tier Immigration decisions allowed and dismissed (%)

List of Figures

Figure 4.1: First Tier Social Security Appeals (by Case No)

Figure 4.2: First Tier Social Security Appeals (%)

Figure 4.3: Personal Independence Payment (by Case No)

Figure 4.4: Personal Independence Payment (%)

Figure 4.5: First Tier Immigration Tribunals (%)

1. Introduction

This report examines access to justice for social rights across the UK drawing on legal and empirical data across each of the UK's jurisdictions. Social rights form part of the international human rights framework, including the right to housing, the right to food and fuel and the right to social security.¹ State parties who have signed up to the international framework are under an obligation to protect these rights in the domestic context, this includes the UK.² As part of its international obligations the UK is required to provide access to an effective remedy if there is a failure to meet these obligations.³ We adopt a conceptualisation of access to justice using this international human rights law lens (that remedies are “accessible, affordable, timely and effective”)⁴. The research therefore examines whether people in the UK who experience a violation of the rights to housing, food, fuel or social security are able to access effective remedies to address that violation. We interviewed practitioners in each of the UK's jurisdictions to better understand the access to justice journey for social rights. As this report demonstrates, it became clear that the UK and its devolved jurisdictions consists of a complex (legal) framework that intersects with international and domestic laws and institutions, politics, public services and the third sector, e.g. non-governmental agencies (NGOs) that serve and work with rights holders seeking to access justice. Our report recognises that the research we undertook barely touches the surface of access to justice for social rights violations and we hope this report serves as the basis for numerous future studies to enquire further and deeper into an increasingly emergent field of innovative interdisciplinary study. Ultimately, the aim of the research and the report seeks to better equip those who support rights holders accessing justice for social rights claims – there is a significant accountability gap in this respect across the UK and a pressing need to address this gap.

The bureaucratic and administrative system has a legal and operational arm, which operate on both an ideological and operational level and intersects with the third sector in the provision of social welfare services. We draw attention to the complex ways in which different types of knowledge and mechanisms intersect to organise society in particular ways and (re)produce inequalities and barriers for accessing justice for social rights. We also shed light on forms of resistance to shape alternative (discourse) approaches for more equal and substantive access to social rights. Lastly we seek to identify where structural or systemic issues create a legal accountability gap for the protection of social rights and the means of accessing justice for a violation.

It is the latter of these objectives which moves traditional understandings of bureaucratic justice and administrative justice⁵ firmly into the human rights sphere. In other words, our aim is not to review the system in practice in the context of its bureaucratic or

1 International Covenant on Economic, Social and Cultural Rights 1966, UN General Assembly resolution 2200A (XXI) of 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3. Articles 9-14 cover the rights to social security, housing, food, health & education. Our study is concerned with the rights to social security (Art 9) and an adequate standard of living (Art 11) including food, housing and fuel.

2 The UK ratified the International Covenant on Economic, Social and Cultural Rights in 1976.

3 CESCR General comment 9, 3 December 1998, E/C.12/1998/24; The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, [1998] 20 Human Rights Quarterly, 691, para.23.

4 Ibid., para. 9.

5 Jerry Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press, New Haven, 1983), Michael Adler, “Understanding and Analyzing Administrative Justice” in Michael Adler ed., *Administrative Justice in Context* (Hart, Oxford, 2010); Robert Kagan “Varieties of Bureaucratic Justice” in Nicolas Parrillo ed., *Administrative Law from the Inside Out: Essays on the Themes in the Work of Jerry Mashaw* (Cambridge UP, 2016); Marc Hertogh, “Through the Eyes of Bureaucrats: How Front-line Officials Understand Administrative Justice” in Michael Adler ed., *Administrative Justice in Context* (Hart, Oxford, 2010); Simon Halliday and Colin Scott, “A Cultural Analysis of Administrative Justice” in Michael Adler ed., *Administrative Justice in Context* (Hart, Oxford, 2010); Joe Tomlinson and Robert Thomas, “Administrative justice – A primer for policymakers and those working in the system” UK Administrative Justice Institute (September 9, 2016). For a brief discussion of these approaches see Paul Daly, *Thinking about Administrative Justice: the Power of Mashaw's Models*, Administrative Law Matters, 1 November 2019, available at https://www.administrativelawmatters.com/blog/2019/11/01/thinking-about-administrative-justice-the-power-of-mashaws-models/#_ftn8

administrative operation (whether that be bureaucratic rationality, professional treatment, moral judgment, managerial, consumerist or market based), but to apply a critical lens that assesses whether whichever model is employed is fit for purpose in ensuring justice for violations of social rights. The focus is therefore more closely tied to the second and third of Buck, Kirkham and Thompson's three strands of administrative justice: getting it right, putting it right, and setting it right.⁶ By focussing on access to justice, we are concerned with how public and administrative law addresses violations of social rights in terms of putting it right (addressing the violation) and setting it right (ensuring it does not happen again). This requires an analysis that reaches beyond administrative decision-making and turns towards appeals, complaints, ombuds procedures, tribunals and, ultimately, the role of the court.⁷

Our project therefore seeks to address one of the key gaps in the literature and practice in the UK by providing alternative perspectives on an often neglected area of law domestically, where the national discourse is aligned with a narrative that assumes social rights are non-justiciable, cannot legitimately be enforced by the court, contravene parliamentary supremacy and are aspirational in nature.⁸ It may be helpful to note from the outset, this position is outdated domestically, comparatively and internationally.⁹ Social rights law is often misunderstood and under-utilised across the UK's legal jurisdictions,¹⁰ something which the data demonstrates as evident in first tier advice services all the way through to legal framings applied at times by solicitors and barristers working across social rights issues. Whilst public and administrative law, and in particular social welfare law, engage with social rights across areas such as health, social care, education, social security, housing and social services they do not traditionally embrace broader conceptual frameworks that encompass the full international human rights framework. When economic and social rights are addressed in the public and administrative law sphere they tend to feature under the aegis of something else.¹¹ Put differently, our discourse around social rights is dominated by existing domestic human rights structures which marginalise social rights as forming administrative entitlements under limited statutory frameworks (with no normative dimension or minimum core threshold), as aspects of civil and political rights or of formal equality.¹²

Whilst it may be unlikely that there is impetus for a paradigmatic shift in the constitutional framing of enforcing rights in areas of economic and social policy at the national level,¹³ it is not an impossibility. Indeed, whilst the Supreme Court has shown its reluctance to engage in merits-based review of social rights enforcement, it has also accepted the legalisation of international human rights law by way of incorporation,¹⁴ something that is already underway at the devolved level and that could ultimately rebalance the UK's

6 Trevor Buck, Richard Kirkham, Brian Thompson, *The Ombudsman Enterprise and Administrative Justice* (Ashgate, Surrey, 2011).

7 International human rights law recognises that effective remedies may be secured through administrative mechanisms and need not always require a judicial remedy. Indeed administrative remedies can provide adequate and appropriate effective remedies if configured to do so. Nonetheless, and particularly in the absence of social rights standards informing administrative law, the UN Committee on Economic, Social and Cultural Rights confirms that if a right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary. 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.9

8 Katie Boyle *Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020) at 2

9 Boyle, *Economic and Social Rights Law* n8; K Boyle, "Models of Incorporation and Justiciability of Economic, Social and Cultural Rights" (2018) Scottish Human Rights Commission.

10 See Paul Hunt, 'Social Rights Are Human Rights BUT THE UK SYSTEM IS RIGGED' (2017) Centre for Welfare Reform, available at <www.centreforwelfarereform.org/uploads/attachment/584/social-rights-are-human-rights.pdf>

11 Katie Boyle and Edel Hughes, 'Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights', (2018) *International Journal of Human Rights* Vol 22. 43-69

12 *ibid*

13 See the recent decisions from the Supreme Court raising a red flag that the court should not intervene in such areas such as *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26 where Lord Reed at para.162 draws a line on the role of the court intervening in what is perceived as failed political campaigns

14 REFERENCES (Bills) by the Attorney General and the Advocate General for Scotland - *United Nations Convention on the Rights of the Child and European Charter of Local Self-Government (Incorporation) (Scotland)* [2021] UKSC 42 (06 October 2021)

positioning on social rights enforcement. The state's reluctance to address the social rights gap has meant that shifting sands beneath the surface are re-orientating constituent parts of the UK towards a substantive rights based model of the rule of law, whilst the national political discourse is focussed on regression and diminution of existing protection. This includes retreating from European Convention on Human Rights (ECHR) under the Human Rights Act (HRA) 1998¹⁵, subject to consultation at the time of writing¹⁶, and the judicial enforcement of human rights post-IRAL review.¹⁷ The devolved trajectories may ultimately compel the UK to address this normative gap or, alternatively, lead to greater state fragmentation in a fragile unitary state.¹⁸ The dominant narrative of rejecting social rights as legal rights is subject to challenge at both the devolved level and emerging discourses from civil society and oppositional parties at the national level¹⁹ providing an opportunity to ensure evidence-led research informs potential reform to address this accountability gap.

The practical implications of the lack of social rights enforcement manifests in a litany of social rights violations across multiple areas as demonstrated in the qualitative data. The project is primarily concerned with addressing gaps in access to justice for social rights violations. When engaging with practitioners often there is little distinction drawn between access to justice as constituting access to a legal process to address that violation, or access to the social right provision itself. It may therefore help to reflect on the areas where social rights violations are most keenly felt, and how the absence of access to justice and effective remedies exacerbates this.

Those who experience violations of social rights are those who are mostly likely to be excluded from hegemonic structures of power. They face intersectional structural discriminations and barriers on the basis of immigration status, disability, gender, age, ethnicity and socio-economic disadvantage among others. They may be at risk of homelessness, face significant debt, experience in-work poverty, or be fleeing domestic abuse. Clustered injustice recognises that people in such positions often experience multiple synchronous clusters of legal problems for which the traditional 'single issue' lawyering approach is ill-equipped.²⁰ Their situation is therefore compounded by the fact that social rights violations are often systemic in nature but the legal system is individualised and siloed into distinct 'legal problems'.²¹ They may live below absolute and relative poverty measures and do not have access to appropriate legal, financial or emotional resources to challenge the social rights violations they encounter (social welfare by way of example is excluded from legal aid provision). The accountability gap for social rights comes into sharp focus when they are viewed as the sole responsibility of the legislative and executive branch and in a legal framework that does not prescribe any normative or legal value to social rights as legal rights. The following key examples bring these issues to the fore, each of which represent the clear limitations and challenges the

15 Following the Independent Human Rights Act Review Report, available at <https://www.gov.uk/guidance/independent-human-rights-act-review#the-panels-report>

16 Human Rights Act Reform: A Modern Bill of Rights (Responses due by 8 March 2022), available at <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights>

17 Independent Review of Administrative Law Report available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf resulting in the highly contentious Judicial Review and Courts Bill

18 Boyle, *Economic and Social Rights Law* n8 at 136

19 At the national level examples of counter-discourses that are emerging are indicative of movements claiming social rights as legal rights. See for example recent statements by David Lammy (Labour) on incorporation of social rights and the link with accountability for social rights violations, such as Grenfell and Windrush: David Lammy speech: "Human rights are an integral part of Labour's mission", 7 July 2021, available at <https://labourlist.org/2021/07/human-rights-are-an-integral-part-of-labours-mission-lammys-speech/>

20 Luke Clements, *Clustered Injustice and the Level Green* (LAG 2020)

21 *ibid* at 2

UK justice system faces in resolving social rights violations:

- the Grenfell housing tragedy²²,
- the removal of free school meals for children during Covid²³,
- the proliferation of food banks²⁴,
- the removal of the £20 Universal Credit (UC) uplift²⁵,
- the imposition of the benefit cap in housing and social welfare provision,
- the two child social security limit,
- the debt crisis for those below the poverty line,
- the section 21 housing eviction process,
- the lack of substantive standards for repair in rental housing,
- the increased outsourcing of public services without regulation of human rights compliance,
- the outsourcing of government functions and digitisation of decision making around benefit entitlement,
- the risk to life by way of destitution,
- the hostile immigration environment,
- the crippling impact of austerity and
- the increase in inequality and poverty and the decimation of legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO').

The 'Daniel Blake' phenomenon has given rise to a greater attention to the litany of issues in social rights violations, some of which have been subject to judicial review and others which have featured as part of wider public discourse. The devolved jurisdictions regularly deploy 'mitigation measures' to counteract some of the most severe austerity cuts²⁶ but this has not bucked the poverty trend with poverty in Scotland, Wales and England

22 In which the right to adequate housing as a key violation has consistently been overlooked

23 The reliance on public figures such as Marcus Rashford to address this gap served to demonstrate the absence of a right to food, or the prohibition of retrogressive measures. Compare for example, the South African Constitutional Court's ability to respond in *Equal Education and Others v Minister of Basic Education and Others* (22588/2020) [2020] ZAGPPHC 306

24 Again as a breach of the right to food, with no routes to remedy for a violation

25 The UN Special Rapporteur on Poverty flagged this as breach of international human rights law <https://www.theguardian.com/society/2021/sep/16/unconscionable-universal-credit-cut-breaks-human-rights-law-says-un-envoy>

26 For example, whilst those who have had their claim for asylum refused in England are no longer eligible for support (no recourse to public funds), in Scotland additional mitigation measures are taken to ensure that everyone, including those whose immigration status is precarious, can access health care on the same basis. The Scottish Government has stepped in to ensure that the bedroom tax is not applicable in Scotland through the deployment of discretionary housing payments and that the benefit cap is mitigated through measures such as the Scottish Child Payment. Likewise, in Northern Ireland, additional mitigation social security packages have been introduced to mitigate the severity of UK austerity policies, such as the bedroom tax and benefit cap. Similar calls for devolved social security in Wales are now taking place.

increasing year on year since 2016 (Northern Ireland has seen a slight decrease overall).²⁷ Research indicates that austerity has resulted in 50,000 more deaths in the past 5 years²⁸ and that there is a growing chasm in life expectancy for those from poorer socio-economic demographics.²⁹

This project therefore seeks to ask whether and how the access to justice gap for social rights in the UK can be addressed. Social rights are under-protected in the UK legal system. There is no constitutional setting for rights, not least social rights. Of course, social rights are not beyond the reach of court rooms, tribunals, ombudsmen or complaints mechanisms, however for the moment, their enforcement is entirely dependent on being made possible under the rubric of something else. The role of the court plays an important part in our reflections as an important accountability forum for resolving disputes around the provision of social rights. That is not to say that the role of the court is necessarily the most appropriate forum. Alternative routes through the legislative and executive branches may be more appropriate – perhaps even leading to political impetus to better protect social rights, as is evident in the UK’s devolved jurisdictions.³⁰ And when accountability is required, the project considers whether this might happen through more immediate complaints mechanisms, tribunals, ombudsmen, alternative dispute resolution or through the roles played by inspectorates and regulators as part of a wider-accountability sphere.³¹ We recommend a more prominent role for each of these alternative routes to justice in resolving social rights disputes drawing on both procedural and substantive standards, however we recognise this requires a clear statutory remit to do so.

In relation to the latter, an over-reliance on alternative mechanisms in the UK context immediately falls prey to an insurmountable hurdle. If social rights do not enjoy legal status in domestic law, there is no room for substantive enforcement, nor is it the role of such bodies to respond to this gap. So whilst tribunals, for example, can perform an important fact finding role in assessing statutory entitlement, they cannot currently assess whether statutory entitlement complies with normative (social rights) standards. This can be compared to the transformative potential of alternative routes to justice where social rights norms are recognised and upheld. A recent report by the Ombudsman on Housing is indicative of best practice in demonstrating the role that this sector can play in avenues to social rights justice.³² Using the statutory framework for social housing³³

27 Joseph Rowntree Foundation, Poverty levels and trends in England, Wales, Scotland and Northern Ireland, data available at <https://www.jrf.org.uk/data/poverty-levels-and-trends-england-wales-scotland-and-northern-ireland>

28 Andre Gregory, 'Austerity in England linked to more than 50,000 extra deaths in five years', *The Guardian*, 14 October 2021 available at <https://www.theguardian.com/society/2021/oct/14/austerity-in-england-linked-to-more-than-50000-extra-deaths-in-five-years>

29 Denis Campbell, 'Life expectancy gap in England' a growing chasm' exacerbated by Covid', 10 October 2021, *The Guardian*, available at <https://www.theguardian.com/society/2021/oct/10/life-expectancy-gap-england-growing-covid>

30 The legal constitutionalisation and adjudication of rights can help support pathways to social justice, among other avenues Virginia Montouvalou in Conor Gearty & Virginia Mantouvalou, *Debating Social Rights*, (Hart 2011) and Paul O'Connell, 'Human Rights: Contesting the Displacement Thesis' (2018) 69 Northern Ireland Legal Quarterly 1, 19-35. In addition, it must be noted that the end result of other avenues may indeed lead to the legalisation of social rights – for example, where civil society pressure coalescing with political impetus results in human rights reform that embeds social rights as legal rights (such as evident in Scotland and Wales).

31 For a discussion on accountability in this space see the leading work of Tom Mullen, 'Access to Justice in Administrative Law and Administrative Justice', in E. Palmer et al (eds) *Access to Justice, Beyond the Policies and Politics of Austerity* (Bloomsbury 2016); Nick O'Brien, Administrative Justice in the Wake of I, Daniel Blake, *The Political Quarterly* 89 (1) 2018; Margaret Doyle and Nick O'Brien, *Reimagining Administrative Justice: Human Rights in Small Spaces* (Palgrave, 2019); Nick O'Brien and Mary Senevirante, *Ombudsmen at the crossroads: the legal services ombudsman, dispute resolution and democratic accountability* (Palgrave, 2017); Jerry Mashaw, *Bureaucratic Justice, Managing Social Security Disability Claims* (Yale University Press, 1985), Michael Adler, 'Social Security and Social Welfare' in Cane, P & Kritzer, (eds.), *The Oxford Handbook of Empirical Legal Research* (OUP 2010), R. Thomas and J. Tomlinson, 'Current Issues in administrative justice: examining administrative review, better internal decisions, and tribunal reform', ESRC technical report, (November 2016) and David Barrett, 'The Regulatory Space of Equality and Human Rights Law in Britain: The Role of the Equality and Human Rights Commission' (2019) 38 *Legal Studies* 247-265

32 Housing Ombudsman urges zero tolerance approach on damp and mould, 26 October 2021, available at <https://www.housing-ombudsman.org.uk/2021/10/26/housing-ombudsman-urges-zero-tolerance-approach-on-damp-and-mould/>

33 Drawing upon the standards on what is considered to be a decent home, including the Decent Homes Standard (updated in 2006) and the Homes (Fitness for Human Habitation) Act 2018

and its powers to examine systemic issues³⁴ the Housing Ombudsman examined 410 complaints regarding damp and mould involving 142 landlords over a two-year period and found that there was systemic maladministration in up to 64% of complaints handled.³⁵ In addition, the report identifies a systemic problem with ‘inference of blame’ that suggests poor housing standards are a result of ‘lifestyle’ choice.³⁶ The report makes a number of recommendations for landlords including a zero-tolerance approach to damp and mould, an investigative approach to identifying problems (rather relying on reporting by residents); ensuring that initial response to complaints do not automatically apportion blame on residents; an improved and effective complaints policy, with clear compensation and redress.³⁷ Whilst the report does not cover all potential violations (the remit of the ombudsman does not cover the private rental sector for example) this report is indicative of the potential transformative role ombuds, regulators and tribunals can play in responding to systemic social rights violations when there is a clear mandate and will to do so.

The legislative and executive branch are primarily responsible for social rights provision, and must make difficult decisions in relation to resource allocation. However, in order for a fully functioning multi-institutional approach to operate (between legislative, executive and judicial branches), the court must be available as a last resort as the only branch sufficiently independent to hold both the legislature and the executive to account should human rights compliance fall short. The role of the court is indispensable to social rights protection, albeit as a safeguard rather than a radical actor. The project therefore focusses attention on the adjudication journey in relation to social rights, reflecting on a number of case studies to try and better understand the access to justice journey from violation through to (effective) remedy. Reflecting on the ‘journey’ can help identify what goes well and what goes wrong for those cases that do proceed, as well as identify where gaps exist for social rights violations that are impeded from undergoing any journey to justice at all.

This project addresses the specific area of the right to *an adequate standard of living*, which includes the right to adequate housing, the right to social security and the right to freedom from poverty (including fuel poverty and food deprivation). Initial analysis³⁸ identified that social security, housing, and food and fuel poverty as areas of primary concern across each of the UK legal jurisdictions. In addition, Boyle’s³⁹ detailed analysis of the legal framework in each of the UK’s devolved areas points to particular tensions in each of the jurisdictions, which facilitated drawing out a specific focus in each jurisdiction around the three core social rights deficits identified.

Drawing on the empirical data collected, we aim to recommend practical solutions to address different types of access to justice, whilst we do not look at the specific needs of different categories of groups we do highlight the gaps in access that disproportionately

34 Housing Ombudsman Service, Systemic Framework, March 2021, available at <https://www.housing-ombudsman.org.uk/wp-content/uploads/2021/03/Housing-Ombudsman-Systemic-Investigations-Framework-.pdf>

35 Housing Ombudsman Service, Spotlight on: Damp and mould, It’s not lifestyle, October 2021, available at <https://www.housing-ombudsman.org.uk/wp-content/uploads/2021/10/Spotlight-report-Damp-and-mould-final.pdf> at 2 and 53

36 Ibid at 4

37 Ibid at 5-7

38 The research team identified the prevalence of issues occurring in the Legal Problem and Resolution Survey (LRPS) (2017) available at <https://www.gov.uk/government/publications/legal-problem-and-resolution-survey-2014-to-2015> and analysed this together with the concluding recommendations of the UN CESCR, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, 14 July 2016, E/C.12/GBR/CO/6

39 Boyle, *Economic and Social Rights*, n8

impact on different kinds of vulnerable groups⁴⁰. Furthermore, we hope that the insights we have gained from speaking to practitioners across the various UK jurisdictions will provide illustrations of best practice from devolved areas that may serve as benchmarks for other jurisdictions in the UK and internationally.⁴¹ In order to achieve these goals, it is crucial to understand not only the (legal) frameworks for social rights protections, but also the historical, social and discursive dynamics that construct the current situation.

It is of crucial importance to consider the social factors that have constructed the contemporary environment in which social rights have been backgrounded. The fact that social rights are not made explicit in laws and policies, Paul Hunt argues, robs rights holders of their own power and, by extension, a legitimate voice. It is a dynamic of power that allocates the knowledge of how social rights are included, or not, to the domain of those in authority.⁴² It is important therefore to examine which discourses within the broader social and legal context give power to mechanisms of invisibilisation, and which counter discourses could be produced to give social rights protection its proper place within a human rights framework. Thus, language or discourse, we argue, constitute both the problem and the potential solutions regarding increasing accountability for social rights in the devolved areas of the UK.

The research project asks why rights holders encounter barriers in accessing justice when violations of social rights occur, how access to justice can be improved and what further research is required to address this gap. The aim of this project is to gain a better understanding of practitioner's experiences in helping people access justice for violations of social rights. We measure standards of those issues against expectations of international law, and want to understand what remedies, if any, are available in those areas and where domestic law falls short. The research team also aims to give back to practitioners, a broader picture and clearer understanding of what is happening across each part of the UK, where the major systemic gaps are and what solutions might be found. We hope that the insights gained will help identify immediate measures for improvement, as well as long term structural changes. The qualitative research data generated in our interviews help inform the proposed methods for how best to improve the law and how better to facilitate access to justice.

40 The research team acknowledges that marginalised/ minoritised groups are not homogenous and that the nature of challenges, as well as barriers to access to justice, may differ significantly. Although our empirical data (practitioner interviews) foreground particular groups of people facing certain (unique) challenges, these accounts merely provide glimpses of insight; it is beyond the scope of the project to address the diversity of needs/ hurdles of specified groups in a structured and comprehensive manner. In this report, the term 'vulnerability' is used in the sense of 'being made vulnerable' by systems/ processes that marginalise and disenfranchise, not as an inherent trait of individuals.

41 Boyle, SHRC (2018) n8; Boyle and Hughes, (2018) n11

42 Hunt n10

Research questions and structure of report

The three main research questions guiding this study are as follows:

- a) **Why** do people encounter barriers in accessing justice when violations of social rights occur?
- b) **How** can accessing justice for violations of social rights be improved?
- c) **What** further research might be taken next?

To address these research questions, we used an innovative case method approach embedded in legal cases in different jurisdictions that entailed semi-structured interviews with practitioners at each level of the support network (charity/ advice sector, lawyer, barrister). Each of the case studies engage with multiple social rights, and have facilitated as a gateway to understanding the intersectional barriers that rights holders face in their journey to access an effective remedy for social rights violations. Our geographical case studies will be explained in greater detail in Part II of Chapter 4. In addition, the research team developed a web-based survey titled '*Social Rights Protections across the Four UK jurisdictions*'. Further details are provided in Chapter 3.

Ontologically the project is concerned with the experiences, perspectives, testimonies, understandings, knowledge, interpretations and underlying causes of social rights violations, as experienced by those engaged in supporting rights holders. These entail a variety of advocates, legal or otherwise, whom we refer to as 'practitioners'. In addition, the study is concerned with current processes, practices, rules, legal structures and constitutional arrangements as they exist (domestic, international and comparative), and in relation to how they may be developed in future (through processes of legal change). The communities engaged in the project are those who sit outside of the decision making system, rather than the decision makers themselves, and the data gathered aims to understand the impact of decision making rather than review it.

Epistemologically, our study is concerned with exploring deep and rich contextual experiences of the communities in a multifaceted way to provide a nuanced, complex, multidimensional picture of the potential barriers faced in accessing justice for violations of social rights. The project is embedded in theoretical frameworks that engage with critical legal theory, critical discourse theory, qualitative research and deliberative democracy. The project adopts an interpretivist approach to the data generated through primary empirical research and both a legally positivist and critical approach to the examination of the legal system.

In the sections that follow, we will first lay out our theoretical and conceptual framework underpinning this project (Chapter 2), followed by further details on our methodological approach, entailing the various steps we employed to gather our empirical evidence and providing an overview of the data (Chapter 3). We will then delve into the analysis of our data, by first addressing the impact of the Covid-19 pandemic from the practitioners' perspective (Chapter 4, Part I). We go on to set out our jurisdictional case studies (Chapter 4, Part II) and then further analyse the phenomena that emerged from the data (Chapter 4, Parts III and IV). We provide our conclusions in Chapter 5 and end our report with a set of recommendations and project limitations/ suggestions for further research in Chapter 6.

2. Theoretical and conceptual framework

A legal and discursive approach to social rights policy

Our theoretical approach addresses critiques of social rights adjudication drawing from principles of deliberative democracy theory.⁴³ The approach to the qualitative data was framed using these principles to guide our semi-structured interviews. We then analysed and theorised our findings using a critical discourse lens. From the outset of the research project the theoretical framework recognised the social rights accountability gap as an issue in both the literature and practice across the UK. Critiques of social rights as legal rights are not unique to the UK jurisdiction and, in many respects, the critiques associated with social rights adjudication appear throughout the literature and practice in jurisdictions that grapple with whether or not to constitutionalise or legalise social rights as legal rights. In brief, the critiques of social rights adjudication can be understood as constituting four waves: (i) the anti-democratic critique (that social rights are polycentric and the courts are not the appropriate democratic forum for their resolution), (ii) the indeterminacy critique (that social rights are indeterminate and that their vagueness hinders effective enforcement), (iii) the incapacity critique (that courts are ill-equipped to deal with complex matters of economic and social policy and lack the expertise for resolving such disputes) and (iv) the pro-hegemonic critique (that social rights adjudication in practice results in the court acting as a pro-hegemonic exercise of power, further exacerbating existing inequalities in the distribution of resources).⁴⁴

Critiques of social rights adjudication

Whilst addressing these critiques requires careful consideration, they do not present as insurmountable barriers to effective social rights adjudication. A response to the anti-democratic critique proposes that whilst courts should remain a means of last resort, they must perform a democratic function in holding other branches to account when violations of rights occur and that democratic legitimacy is struck by balancing appropriate weak v strong⁴⁵ forms of review depending on the circumstances. In other words, sometimes courts should adopt deferential roles in the adjudication of social rights, requiring states to justify their approach, adopting weak review mechanisms such as limited tests of irrationality, and ordering declarators that are deferential in nature rather than usurping the role of the legislature or executive. In other circumstances, particularly when there is a violation of a fundamental norm, where the applicant's dignity or a social minimum is breached, courts can perform more interventionist forms of review, enhanced forms of scrutiny and issue outcome-orientated orders. A moderate typology suggests striking a balance and using an aggregate of appropriate remedies as a means of responding to

⁴³ Boyle, *Economic and Social Rights Law* (n8), develops principles derived from deliberative democracy to address the critiques of social rights adjudication

⁴⁴ For a discussion on the vast academic literature examining the waves of ESR critiques see Boyle *ibid* Ch 1

⁴⁵ Tushnet's dyadic categorisation, Mark Tushnet, 'Weak Courts, Strong Rights' *Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, Oxford, 2008), at 23

social rights violations.⁴⁶ This approach is familiar (although arguably under-utilised) by the UK judiciary. For example, judicial review can act as an important safeguard in cases of destitution or risk to life, where an aggregate of remedies provides immediate interim relief, together with deferential orders to revisit the decision making process on a longer time-frame with courts performing a supervisory role.⁴⁷

Responses to the indeterminacy critique propose that courts, along with other actors in a multi-institutional framework should perform a role in giving meaning and content to rights. Young tells us social rights adjudication is nothing more than finding consensus between epistemic communities – including the legislature, executive and judiciary – around the meaning of rights.⁴⁸ It is in the dialogue between epistemic communities (legislative, executive, judicial) that social rights adjudication can help give meaning to rights, a role that Michelman argues courts should not abdicate.⁴⁹ The UK Supreme Court's decision in *SC* risks amounting to a form of abdication in relation to those causes whereby majoritarian politics cannot (by way of representative democracy) provide marginalised⁵⁰ or minority groups with routes to justice through the legislative and executive branches.⁵¹ Lord Reed warns against pursuing remedies through the courts for failed political campaigns urging the judicial branch to maintain a clear distinction between the political and judicial realms.⁵² Does this position risks further marginalising those who do not enjoy majoritarian power? If so, it ultimately risks the court entrenching hegemonic structures of inequality. Rather than completely abdicate its role in this regard, Tushnet argues courts must strike the right balance so that it does not 'debase dangerously the entire currency of rights and the rule of law' by failing to engage with the meaning and content of social rights.⁵³

Responses to the indeterminacy critique also argue that courts must have clear instructions on their role, whether in the constitution or in enabling statutory frameworks, as well as having regard to appropriate sources in interpreting social rights, including both international human rights law and comparative law, both of which can offer normative frames of reference when interpreting domestic law.⁵⁴ Responses to the incapacity critique follow a similar vein; courts must equip themselves with the relevant expertise and evidence to assess compliance with social rights, including the deployment of *amicus curiae*, as well as drawing on a broad range of sources. In addition, court procedures must adapt to better facilitate collective responses to systemic problems.

46 César Rodríguez-Garavito and Diana Rodríguez-Franco, *Radical Deprivation on Trial, the Impact of Judicial Activism on Socioeconomic Rights in the Global South* (CUP 2015) at 10

47 By way of example, see the case of *QH v Secretary of State for the Home Department* [2020] EWHC 2691 (Admin) (07 October 2020)

48 Kathrine G. Young, *Constituting Economic and Social Rights* (OUP 2012) at 8

49 Frank Michelman, Socioeconomic Rights in Constitutional Law: Explaining America Away, (2008) *International Journal of Comparative Constitutional Law* 6(3&4): 663-86 at 683

50 The research team acknowledges that marginalised/ minoritised groups are not homogenous and that the nature of challenges, as well as barriers to access to justice, may differ significantly. Although our empirical data (practitioner interviews) foreground particular groups of people facing certain (unique) challenges, these accounts merely provide glimpses of insight; it is beyond the scope of the project to address the diversity of needs/ hurdles of specified groups in a structured and comprehensive manner

51 *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26 Lord Reed at para.162 draws a line on the role of the court intervening in what is perceived as failed political campaigns

52 *ibid* para.162

53 *ibid*

54 See South African Constitution

Responses to the pro-hegemonic critique argue that courts can act as an important mechanism and ‘institutional voice’ for those who are politically disenfranchised.⁵⁵ Legal processes should take steps to embrace counter-majoritarian adjudication.⁵⁶ This can be constituted along the lines of broader rules around standing, enhanced opportunities for third party or strategic litigation, and enabling collective class actions or group proceedings.⁵⁷ More appropriate remedies are required to help the court embrace this role, such as the deployment of structural remedies when systemic issues arise.⁵⁸ In other words, the often systemic nature of social rights violations requires new remedial responses that go beyond individual relief (structural remedies are a type of hybrid remedy that can offer individual and systemic relief potentially involving multiple applicants and multiple defendants).⁵⁹

Principles of adjudication

The research suggests that principles of adjudication can offer responses to the critiques of social rights. For example, the principles of accessibility, participation, deliberation and fairness can counter-act the anti-democratic, incapacity and indeterminacy critiques.⁶⁰ The principles of counter-majoritarianism can guide responses to the pro-hegemonic critique through enhanced responses to systemic violations. And the principle of effective and appropriate remedial relief can countenance critiques around democratic legitimacy and pro-hegemonic critiques. These principles, derived from deliberative democracy theory, offer a lens through which to view the building blocks of access to justice from initial violation through to effective remedy:

Access: barriers of access to legal processes require to be removed including prohibitive costs, access to legal aid, advice, advocacy, representation as well as sufficiently broad tests of standing

Participation: rights holders are often unable to meaningfully participate in complex legal process nor are they included in decisions around the outcomes of those processes. Even in situations adapted for litigants in person, equality of arms concerns arise when rights holders are often entering into disputes with parties represented with legal representation at tribunal level or summary court.

Deliberation: for normative application of rights enforcement adjudicators require to deliberate on rights with reference to appropriate sources including international and comparative law in addition to domestic, as well as between institutions horizontally (executive, legislative, judicial branches) and vertically (local, devolved, national and international institutions).

55 Jeff King, *Judging Social Rights* (Cambridge University Press 2011); Colm O’Cinneide ‘The constitutionalisation of economic and social rights’ and Frank I. Michelman, ‘Constitutionally binding social and economic rights as a compelling idea: reciprocating perturbations in liberal and democratic constitutional visions’ in García et al. (eds.) *Social and Economic Rights in Theory and Practice, Critical Inquiries* (Routledge 2015) at 261-262 and 279-280; Nolan et al *The Justiciability of Social and Economic Rights: An Updated Appraisal* (Human Rights Consortium March 2007); Montouvalou n30

56 David Landau, ‘The Reality of Social Rights Enforcement’, (2012) 53 *Harvard International Law Journal* 189

57 See the potential of class actions discussed by Michael Molavi, *Collective Access to Justice - Assessing the Potential of Class Actions in England and Wales*, (BUP 2021)

58 Landau (2012) n56 and Rodríguez-Garavito and Rodríguez-Franco n46

59 Gaurav Mukherjee, Briefing: Effective Remedies & Structural Orders For Social Rights Violations, Nuffield Access to Justice for Social Rights, Addressing the Accountability Gap (January 2022).

60 For a discussion on how principles of deliberative democracy help address the critiques of social rights adjudication see Boyle n8 Ch 1

Fairness: adjudication requires to draw on both procedural as well as substantive concepts of fairness, requiring a more intense engagement with the merits of decisions as well as the decision-making process. In the UK this means expanding our conception of ‘reasonableness’ beyond irrationality or *Wednesbury* reasonableness. International human rights law suggests the adoption of proportionality-inflected reasonableness.

Counter-majoritarian: ideally adjudication processes facilitate collective responses to systemic social rights violations meaning processes are adapted to enable third party, strategic litigation and class actions/ multi-group proceedings to avoid the systemic problem falling as a burden on the individual.

Remedial: effective and appropriate remedies require a rethink in terms of both individual and collective relief, moving beyond individual compensation based relief to guarantees of non-repetition and wider collective or structural remedies that draw on an aggregate of weak v strong review and remedial relief.

The qualitative data in the study suggests that access to justice perspectives are often focussed on the first of the principles - whether or not access to legal processes is possible (which aligns with a narrower conception of access to justice in the literature and practice). The research suggests that concerns around access (legal aid, advice, advocacy and representation) are absolutely fundamental to ‘access to justice’ as the first hurdle on the access to justice journey. However, by taking a step back from the first hurdle and viewing access to justice as a broader journey, it becomes clearer that other access to justice barriers are hidden from view. In other words, even if access to legal aid, advice and representation are fully addressed, this would not necessarily mean access to justice was fully enabled. The principles of social rights adjudication can act as important building blocks that should be considered when designing or reforming access to justice mechanisms along the access to justice journey.

A three-dimensional theory of justice: Distribution, recognition and representation

Theoretically, we also find value in Nancy Fraser’s three-dimensional theory of justice.⁶¹ Her point of departure is that the most general meaning of justice is parity of participation⁶². Fraser’s view of justice as participatory parity goes hand in hand with principles of deliberative democracy. She says that on the one hand, the principle of participatory parity is an *outcome* notion, “a substantive principle of justice by which we may evaluate social arrangements: the latter are just if and only if they permit all the relevant social actors to participate as peers in social life”. On the other hand, Fraser says, participatory parity is also a *process* notion, which specifies “a procedural standard by which we may evaluate the democratic legitimacy of norms: the latter are legitimate if and only if they can command the assent of all concerned in fair and open processes of deliberation, in which all can participate as peers”.⁶³ Embedded in this duality is an inherent reflexivity that allows us to problematise both substance and procedure. In other words, this approach can expose the unjust background conditions that skew decision making processes and barriers to access to justice, as well as the unjust procedures that generate unequal outcomes.

61 Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (Columbia University Press 2009) at 16

62 The research team acknowledges Fraser’s monistic viewpoint, framing justice around the principle of parity in participation and do not preclude other conceptualisations of justice. For a theoretical critique, see Christopher F Zurn, Review: Scales of Justice: Reimagining Political Space in a Globalizing World by Nancy Fraser (2012) *Social Theory and Practice* 38(1) 165

63 Fraser n61 at 29

Fraser's theory of justice entails the economic dimension of distribution, the cultural dimension of recognition and the political dimension of representation.⁶⁴ Fraser posits that overcoming injustice means dismantling institutionalised obstacles that prevent people from participating on par with others, related to two particular types of injustice. On the one hand, full participation can be impeded by economic structures that deny people the resources they need in order to interact with others as peers, constituting distributive justice or maldistribution. On the other hand, parity may be obstructed by institutionalised hierarchies of cultural value that deny them the requisite standing, in which case people suffer from status inequality or misrecognition.⁶⁵ Fraser defines these as problems of class structure and status. Furthermore, she elaborates a third dimension of justice, related to the political constitution of society – representation. Although Fraser presents the dimensions of distribution, recognition and representation as different facets of justice, our data show that they are also closely interlinked.

Another important element of Fraser's theory is "the politics of framing",⁶⁶ which is closely tied to the dimension of 'representation'. Framing is an exercise of boundary setting, of delimiting actions and interpretations; it centres on issues of membership and procedure, relating to matters of social belonging. We have already highlighted how questions around the justiciability of social rights frames them in a particular manner and limits the ways in which these rights can be adjudicated. The data show that the politics of framing proceeds simultaneously on multiple levels; on one level there are efforts to redress "first order" injustices of maldistribution, misrecognition⁶⁷ and political mis-representation. On a second level, movements aim to redress "meta-level" injustices of misframing by reconstituting the "who" of justice.⁶⁸ Our analysis teases out these injustices. We now direct attention to discourse, which allows us to examine more closely the frames and mis-framings that sometimes impede access to justice.

Why discourse?

Our approach to analysing the data is underpinned by our understanding that all meaning is created through discourse, and furthermore, that discourse and thought are mediated by power relations, which are socially and historically situated.⁶⁹ These tenets help us evaluate and better understand how certain groups in society are privileged over others, and more importantly how to address change in terms of the mechanisms that hinder access to justice and effective remedies, as well as empower individuals to disrupt unjust practices. This approach builds upon conceptions of rights as constructs of deliberative democracy⁷⁰ and deliberative dialogue theory. As identified by Karen Zivi, rights claiming can be a performative act in a deliberative democratic framework and an important component of citizenship: the democratic practice of rights claiming is important, not because it guarantees a certain legal, political or social outcome, but because it involves individuals in developing the skills of citizenship whilst also reimagining the contours of community and (re)defining who is included.⁷¹

64 *ibid* at 16

65 *Ibid*

66 *ibid* at 22; also see Deborah Tannen, *Framing in Discourse* (Oxford University Press, 1993)

67 Also see Bourdieu's notion of *méconnaissance* (misrecognition); Pierre Bourdieu, *Language and symbolic power* (Oxford, 1991)

68 Fraser n61 at 25

69 Joe L Kincheloe and Peter McLaren, 'Rethinking Critical Theory and Qualitative Research' in Norman Denzin and Yvonna Lincoln (eds), *Handbook of qualitative research* (2nd edn, Sage, 2000) 291; Jan Blommaert, *Discourse: A Critical Introduction* (Cambridge University Press 2005)

70 For example, see the competing conceptions of rights formation under proceduralism or substantive deliberation in different constitutional settings; Seyla Benhabib, 'Reason-Giving and Rights-Bearing: Constructing the Subject of Rights' (2013) 20 *Constellations* (2013) 38. See also Montouvalou (2011) n30 and King (2011) n55

71 Karen Zivi, *Making Rights Claims: A Practice of Democratic Citizenship* (OUP 2012) p.113

Language, or discourse, plays a key role in processes of social differentiation and the construction of inequality.⁷² The seminal work of Dell Hymes⁷³ reminds us that language forms may be equal in substance, but there may be significant differences with how language actually works in society. This linguistic inequality, and consequently, much social inequality is the result of an inability to perform certain discourse functions on the basis of available and accessible resources. That is to say that differences in the use of language, or how and which discourses are mobilised, often quite systematically translates into inequalities between individuals.⁷⁴ Our data show that not all members of society have access to language or discourse in the same way, resulting in significant impact on the realisation of social rights and the ability to access an effective remedy. We examine how practitioners mobilise different discourses in relation to rights claims, and how these forms of knowledge may promote or uphold social rights. In contrast, we also seek to better understand which discourses intersect and potentially undermine access to justice for social rights, and which discourses resist and challenge dominant and disenfranchising discourses.

Social actors produce and reproduce discourses in ways that correlate with a particular position within social and political structure. Therefore, we direct attention to discourses, not only because they reflect representations, but because discourses can be seen as “practices that systematically form the objects of which they speak”.⁷⁵ This Foucauldian perspective recognises the ways in which knowledge circulates and functions, and it is through discourse that claims to knowledge and truth are produced.⁷⁶

The notions of discourse and ideology are often conflated, as it is difficult to explicitly disentangle their close links. In other words, in the mobilisation of discourses, certain ideological conceptions are concomitantly invoked, albeit unconsciously or implicitly. However, one benefit of directing attention to how particular discourses (representations) are articulated together in unique ways is that it helps to shed light on the (dis)alignments with specific ideologies. In this sense, ideologies function as “underlying” conceptual frames that become salient in discourse.⁷⁷ Similarly, discourse may be conceived of as a site of ideology⁷⁸ or, more concretely, that discourse is the “most tangible manifestation of ideology”.⁷⁹

As Alistair Pennycook⁸⁰ succinctly explains, discourses are indelibly connected to power, knowledge and truth, but they neither represent nor obscure truth and knowledge in the interests of pre-given powers (as in the case of many versions of ideology). We follow Foucault’s interest in directing attention to the processes by which claims to knowledge or truth are produced.⁸¹ His fundamental interest was not in truth but ‘truth claims’; seeing “historically how effects of truth are produced within discourses which in themselves

72 Susan Gal, ‘Language and political economy’ (1989) 18 *Annual Review of Anthropology*; Judith Irvine and Susan Gal, ‘Language Ideology and Linguistic Differentiation’ in Paul V. Kroskrity (ed), *Regimes of language: ideologies, politics, and identities* (School of American Research 2000)

73 See for instance: Dell Hymes, ‘Inequality in Language: Taking for granted’ (1992) 8(1) *Working Papers in Educational Linguistics*

74 Blommaert n69 at 71

75 Michel Foucault, *The Archaeology of Knowledge* (A M Sheridan Smith tr, Harper and Row 1972) 49

76 Foucault rejected the concept of ideology, preferring the term discourse; Michel Foucault, ‘Truth and Power’ in *Power/ Knowledge: Selected Interviews and Other Writings, 1972-1977* (Pantheon 1980)

77 Kathryn A Woolard, *Singular and Plural: Ideologies of Linguistic Authority in 21st Century Catalonia* (Oxford University Press 2016) at 16

78 Blommaert n69

79 Jan Blommaert and Jef Verschuere, ‘The Role of Language in European Nationalist Ideologies’ in Paul V Kroskrity and Kathryn A Woolard (eds), *Language Ideologies: Practice and Theory* (Oxford University Press 1998) at 26

80 Alistair Pennycook, *Critical Applied Linguistics: A Critical Introduction* (Lawrence Erlbaum Associates 2001)

81 Ibid

are neither true nor false".⁸² Producing knowledge, in other words, is never neutral but mobilised for specific purposes.

The bifurcation of rights

For example, we are interested in how the bifurcation of two separate treaties following the Universal Declaration of Human Rights⁸³ saw civil and political rights enshrined in the International Covenant on Civil and Political Rights⁸⁴ (ICCPR), and economic, social and cultural rights enshrined in the International Covenant on Economic, Social and Cultural Rights⁸⁵ (ICESCR). This separation led to misconceptions and erroneous 'truth claims' about the lesser status of the ICESCR. Indeed, the literature has long since dispelled these myths⁸⁶, and the operation of economic, social and cultural rights as enforceable legal rights has been realised in practice in different constitutional and regional settings throughout the globe.⁸⁷ Nonetheless, the trajectories of social rights enforcement has had to overcome a major hurdle in that 'much of the doctrinaire debate about economic, social, and cultural rights throughout the second half of the last century sprang from a legal fiction: that of the separation of human rights into two distinct sets.'⁸⁸ Many of the remnants of this legal fiction are often invisible and structural in the UK's legal constitutional framing of rights and thus play out in the everyday setting of individual lived experience manifesting as challenges in securing social rights justice.

A discourse analytic approach helps us to make visible discourses embedded in practice that are linked to structures of authority and executed through a variety of specific techniques, including those discourses that marginalise, undermine, or are wielded in order to hinder social rights protection. The data show that the realisation of social rights is not only about operational processes of determining entitlement and eligibility, but are in fact processes of valuation and categorisation that sort people into pre-determined categories by means of various tools and mechanisms. These processes are not neutral but value-laden, influenced by wider socio-political currents and, as the data show, (re) produce difference and embed inequalities. Furthermore, these practices are situated at the intersection of different sectors and scales of social structure. It is a fragmented system that interlinks governments, legal frameworks and the third sector. In the UK, there is an even greater level of fragmentation due to different constitutional arrangements and legal frameworks under devolution. The large-scale undertaking of providing public services is also dispersed, provided by nearly half a million civil servants across cities in England, Wales, Scotland and Northern Ireland. This governing "at a distance"⁸⁹ is constituted in various apparatuses, programmes, documents and procedures to give effect to the goals and logics of government.

82 Foucault (1980) n76 at 118

83 Universal Declaration of Human Rights, United Nations General Assembly resolution 217 A (III) of 10 December 1948.

84 UN General Assembly, International Covenant on Civil and Political Rights, resolution 2200A (XXI) of 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

85 International Covenant on Economic, Social and Cultural Rights 1966, UN General Assembly resolution 2200A (XXI) of 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3. The UDHR, ICCPR and the ICESCR are collectively known as the International Bill of Rights.

86 See Boyle n8 Ch 2, Philip Alston et al., 'The Nature and Scope of states Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156, at 159; Sally-Anne Way, 'The Myth and Mystery of US History on Economic, Social, and Cultural Rights: The 1947 United States Suggestions for Articles to Be Incorporated in an International Bill of Rights', (2014) 36 Human Rights Quarterly 869 – 897; Daniel J. Whelan & Jack Donnelly, *The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight*, 29 (2007) Human Rights Quarterly 908; Daniel Whelan, *Indivisible Human Rights* (University of Pennsylvania Press 2010); Mathew Craven, *The International Covenant on Economic, Social, and Cultural Rights, A Perspective on its Development*, (Clarendon Press OUP 1995)

87 For a discussion on this see K Boyle, SHRC (2018) n8

88 Mónica Feria Tinta, 'Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions' (2007) 29 Human Rights Quarterly 431, 432

89 Nikolas Rose and Peter Miller, 'Political Power beyond the State: Problematics of Government' (1992) 43(2) BJS at 181; also see Nancy Fraser's discussion on Postfordist modes of regulation: Fraser n61 at 118

Street-level bureaucracy and governmentality

On an operational level, the system may be best described as ‘street level bureaucracy’,⁹⁰ a term that encapsulates the challenges and often paradoxical reality of the provision of public services that calls for treating all rights holders alike in their claims on government, and at the same time must be able to respond to individual needs. ‘Bureaucracy’ thus points to the entailed rules, procedures and structures of authority, whilst ‘street-level’ acknowledges that much of the decision-making takes place away from a perceived centre of authority in more informal settings.⁹¹ Importantly for our discussion, the rights holders that are clients in street-level bureaucracies are customarily non-voluntary. So even though potential welfare recipients ‘voluntarily’ apply for services, this can hardly be considered voluntary if they have no other means to meet their needs. The poorer the person, Michael Lipsky says, the more likely that person will be a non-voluntary client of not one but multiple street-level bureaucracies.⁹²

This resonates with our empirical data that show that rights holders seeking help in accessing a social right or challenging a rights violation, generally have many intersecting problems suffering from clustered injustice.⁹³ The inherent intersectionality of social rights is one of the identified challenges in the current operational and legal frameworks, a point that we will return to. Moreover, the fact that an individual client in a street-level bureaucracy is a non-voluntary participant creates a power imbalance, as they are also subject to potential sanctions and other punitive measures for non-compliance embedded in strict rules and regulations. In addition, our analysis shows that these power inequalities impact greatly on an individual’s capacity to create legitimacy for themselves in their fight for an effective remedy for a social rights violation.

In order to explain the tensions and conflicts that emerge across the data, it is imperative to be cognisant of how contemporary neoliberal logics and practices have been instrumental in the promotion of new forms of identity and subject formation, and thereby new forms of governance and governmentality⁹⁴ in the era of neoliberal globalisation.⁹⁵ Large scale processes, such as the provision of public services, are inextricably linked with governance and political economy. Directing attention to governmentality helps to make visible the various ways power operates, multi-directional and relational,⁹⁶ not only as macro regulations of the State, but at micro levels of diverse practices.⁹⁷ Contemporary scholarship on governmentality and political economy generally conceives of these activities as dynamic, historically situated, and often contradictory, processes of knowledge mobilisation.⁹⁸ These dynamics, as we demonstrate through our analysis, become visible in circulating discourses.

90 Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (Russell Sage Foundation 2010)

91 *ibid* at xii

92 *ibid* at 54

93 Clements n20

94 Michel Foucault, ‘Governmentality’ in Graham Burchell and Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press 1991)

95 It is not possible in the context of this report to do justice to the vast literature and research on neoliberalism, globalisation, political economy and governmentality. However, we felt it necessary to acknowledge that our discussion on social rights is inextricably embedded in the political project of neoliberal globalisation, as it results in particular rationales being mobilised in discourse around the notion of social rights and the adjudication journey

96 M C J Stoddart, M. C. J., ‘Ideology, Hegemony, Discourse: A Critical Review of Theories of Knowledge and Power (2007) 28 Social Thought & Research 191 <www.jstor.org/stable/23252126>

97 Alistair Pennycook, ‘Language policy and docile bodies: Hong Kong and governmentality’ in James W Tollefson (ed), *Language Policies in Education: Critical Issues* (Lawrence Erlbaum Associates 2002)

98 Alfonso Del Percio and Mi-Cha Flubacher and Alexandre Duchêne, ‘Language and Political Economy’ in Ofelia García, Nelson Flores, and Massimiliano Spotti (eds), *The Oxford Handbook of Language and Society* (Oxford University Press 2017)

Governmentality and neoliberal rationalities

Despite the vastness of the concept of neoliberalism, it is still a useful analytical term for interpreting the tensions between the governance of the bureaucratic structure providing welfare rights provisions in the UK, on the one hand, and the realisation of social rights and access to an effective remedy, on the other. The neoliberal project represents a specific kind of valorisation that is rooted in economics, also referred to as the “economization of democracy”.⁹⁹ Neoliberal rationalities permeate social life in ways that are unconscious and internalised, shaping our norms and conduct. Neoliberalism has been instrumental in promoting new forms of identity and subject formation, moving from collective to individual subjectivities and cultivating individual responsibility.

These neoliberal and capitalist rationalities are intimately connected to the operational arm of the governing system for social welfare. The data show that neoliberal values of efficiency, cost reduction, control and compliance become visible in the workings of the system by means of a number of different mechanisms and tools: increased outsourcing of public services, automation and digitisation, testing and assessments, audits and (discretionary) funding. The system operates with strict rules, regulations and procedures that determine entitlement to (and distribution of) social security, housing, food and fuel. These determinations are not subject to independent normative value-based standards based on international human rights law to which the state has agreed to be bound, which creates a major accountability gap in the bureaucratic system.

From our perspective, the concept of governmentality also draws our attention to the ways in which power influences the ‘self’, by the internalisation of specific discourses by individuals. We see this in the valuation practices and discourses across the data that frame the ‘worthiness’ of individuals and particular groups of people in particular ways. In turn, these valuation discourses are sometimes internalised by practitioners and rights holders. This echoes Foucault’s interpretation of governmentality as government’s approaches to shape human conduct by calculated means.¹⁰⁰ Our data show how this manifests, which helps us understand some of the recurring themes and various discourses that are foregrounded. In our analysis, we show that there are competing logics at play that become visible in local struggles and tensions around conceptions of entitlement, welfare, poverty and justice. Furthermore, we demonstrate how the various ways in which the systematic categorisation and filtering of information and people is facilitated by a number of different tools and mechanisms, impacting on the access to justice journey.

Different framings of ‘access to justice’ and ‘effective remedies’

Access to justice as a field of law and practice can often mean different things to different epistemic communities. This in and of itself is problematic because discourse around the field of study can draw on significantly varying definitions potentially undermining a common understanding. Access to justice literature and practice has made significant progress in advancing effective access to legal processes, including issues around advice, information, awareness raising, legal consciousness, advocacy, removing discriminatory barriers, identifying unmet legal needs, co-locating services, demonstrating the social determinants of legal problems and the social impact when they go unaddressed.¹⁰¹ These advancements are critical to ensuring unhindered and effective access to appropriate

99 Wendy Brown ‘Who is not a neoliberal today?’ (Tocqueville 21, 18 January 2018) <Wendy Brown: “Who is not a neoliberal today?” - Tocqueville21> accessed 7 January 2022

100 ‘conduire des conduites’ [conduct of conduct]; Michel Foucault, *Dits et Écrits IV* (Gallimard 1994) at 237

101 See for example the ground breaking work of Hazel Genn, ‘When Law is Good for Your Health: Mitigating the social determinants of health through access to justice’ (2019) 72(1) *Current Legal Problems* 159-202. There is vast literature on issues on effective access to (procedural) justice see Hazel Genn, *Paths to Justice* (Hart 1999), Marjorie Mayo et al, *Access to Justice for Disadvantaged Communities* (Policy Press 2015), Ellie Palmer et al, *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart 2016)

non-judicial and judicial processes, i.e. access to (procedural) justice. In this project we have widened the access to justice lens to constitute a broader conception of justice that includes substantive protection of social rights, meaning we are interested in both the procedural and substantive components of the access to justice journey and in particular whether the outcomes of the journey can be deemed effective.

To borrow from discourse theory – ‘access to justice’, or ‘justice’ in and of itself, could be framed as an ‘empty signifier’ in that it is a pursuit, rather than a prescriptive end.¹⁰² Justice, and the means of achieving it, can be understood and framed in different ways as an (impossible) ideal that societies seek to achieve – meaning whilst the end is never fully realised, its absence compels an ongoing struggle to achieve it and, in that process, people prescribe different meanings to the end-goal.¹⁰³ This is of course equally applicable to the elusive terminology around ‘social justice’ as a ‘feel good’ term that everyone can subscribe to without any concrete or shared definition as to what it constitutes.¹⁰⁴ In this sense, ‘access to justice’, or ‘access to social justice’, as well as ‘effective remedies’ are contested spaces that our research project seeks to better understand.

It is the pursuit of the (ideal social) justice, including the means of accessing it, that gives rise to an empty signifier where different actors and epistemic communities impose their own meanings and connotations in realising this ultimate aim, as evidenced in the empirical data. In the meantime, the overall direction of the literature and practice evolves in the context of seeking to achieve justice – giving rise to the access to justice discourse. Different conceptualisations may not be immediately familiar with those working within the access to justice field from different perspectives. There is therefore a conceptual difficulty in framing ‘access to justice’.

There are two important lessons to be taken from this framing. The first is the pitfall and dangers associated with different epistemic communities attaching different meanings to terminology that is understood and conceived of in different, and sometimes opposing ways – potentially to the detriment of those whose marginalisation means they are furthest from accessing (some form of) justice. By way of example, what does access to justice mean for the person who is in-work poverty, relying on food banks and living in housing that is uninhabitable? The data reveal that various tiers of advice from street-level bureaucracy through to advice centre, lawyer and barrister each view these social rights violations in distinct ways, none of which may ultimately address the complexity of the rights holder’s predicament.

The second is around managing expectations of achieving what ultimately is a never-ending journey. In other words, the empty signifier analogy helps remind the reader that it is the lack of justice (the absence of justice and the means of achieving it) which creates the empty signifier around which progress is made. Injustice is the absence of justice and whilst discourses emerge to close the gap, or fill the absence, the struggle to do so never fully materialises. Once again, the data suggest diverging perspectives of what is meant by ‘justice’ or a satisfactory outcome of a legal process will diverge significantly across the experience of rights holder, advice sector, legal sector and other. Those closer to the violation are primarily concerned with addressing the violation and securing access to a particular service or provision, the perspective of those closer to the law reflect an acute

¹⁰² although the fullness and universality of society is unachievable, its need does not disappear: it will always show itself through the presence of its absence. Ernesto Laclau, *Emancipation* (Verso, 1996) at 53

¹⁰³ “even if the full closure of the social is not realisable in any actual society, the idea of closure and fullness still functions as an (impossible) ideal. Societies are thus organised and centred on the basis of such (impossible) ideals.” David Howart, Aletta J. Norrnval and Yannis Stavarakakis *Discourse theory and political analysis, Identities, Hegemonies and Social Change* (MUP 2000) at 8

¹⁰⁴ David Piachaud, *Social justice and public policy: a social policy perspective* (Policy Press, 2008) at 33

awareness of the limitations of the law in relation to social rights provision and the limited remedies for a breach.

The tensions in the qualitative data around how to prescribe meaning to social rights and access to justice are also evident in the literature. For example, scholars invoke both narrow and broad definitions that pertain to 'access to justice' and 'effective remedies'. Mullen for example argues that a narrow conception of access to justice is when 'remedies' are available or exist, whereas a broader conception is about whether those 'remedies' can be easily accessed.¹⁰⁵ 'Effective remedies' he clarifies include tribunals, ombuds, complaint procedures and various hybrids, including public-inquiry based decision processes.¹⁰⁶ Access to justice under this definition concerns the availability of easily accessible remedies to address wrongs.¹⁰⁷ By remedies, Mullen is referring to legal processes, rather than the efficacy or remedial relief offered as an outcome of such processes and an 'effective remedy' is defined as a right to challenge in an independent forum that is truly accessible.¹⁰⁸

A broader lens on access to justice includes effective access to legal processes that result in effective outcomes. Garth and Cappalletti, at the conception of the access to justice movement, argued that "[f]irst, the system must be equally accessible to all; second, it must lead to results that are individually and socially just."¹⁰⁹ According to Shelton, remedies are the processes by which arguable claims are heard and decided, whether by courts, administrative agencies, or other competent bodies (aligning with Mullen's account), as well as the outcome of the proceedings and the relief afforded the successful claimant (addressing Garth and Cappalletti's second aim – leading to results that are individually and socially just).¹¹⁰ Our reconceptualisation of access to justice begins with the violation of a right and ends in an effective remedy for that violation. This requires a renewed focus on what is meant both in terms of effective legal processes (international human rights law suggests that they require to be "accessible, affordable, timely and effective")¹¹¹ as well as effective and substantive outcomes of those processes.¹¹²

The international position makes clear that remedies for violations of social rights ought to be available at the domestic level, and that this should include access to justiciable remedies. Judicial remedies are often cited as a prerequisite of the successful application of a right in international law.¹¹³ Many argue that without judicial sanction, a right is without merit.¹¹⁴ A blanket refusal to acknowledge the justiciable nature of the rights is considered arbitrary:

¹⁰⁵Tom Mullen, 'Access to Justice in Administrative Law and Administrative Justice', in E. Palmer et al (eds) *Access to Justice, Beyond the Policies and Politics of Austerity* (Bloomsbury 2016) at 70

¹⁰⁶ibid

¹⁰⁷ibid

¹⁰⁸ibid at 71

¹⁰⁹Bryant Garth and Mauro Cappalletti, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective', (1978) *Buffalo Law Review*, 181-208, at 188

¹¹⁰Dina Shelton, *Remedies in International Human Rights Law* (OUP 1999) at 7

¹¹¹UN 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. 9.

¹¹²Remedies should be effective "in practice as well as in law", Council of Europe, 'Guide on Article 13 of the European Convention on Human Rights, Right to an effective remedy', European Court of Human Rights, 31 August 2021, available at https://www.echr.coe.int/Documents/Guide_Art_13_ENG.pdf para.44

¹¹³For example, Article 2(3) of the ICCPR provides for an effective remedy determined by judicial, administrative or legislative authorities. General Comment 9 n117 provides administrative remedies may be adequate with an ultimate right of judicial appeal.

¹¹⁴Alston et al n87 ; Hans Kelsen, *Pure Theory of Law* (1967), at 125-126; Vierdag, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights* [1968] 9 *Netherlands Yearbook of International Law* 69

“The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.”¹¹⁵

The UN Committee on Economic, Social and Cultural Rights has repeatedly urged the UK to full legal effect to ICESCR in its domestic law asking ‘that the Covenant rights are made justiciable, and that effective remedies are available for victims of all violations of economic, social and cultural rights.’¹¹⁶ Examples of appropriate remedies for violations of international human rights law include restitution, compensation, rehabilitation, satisfaction, effective measures to ensure cessation of the violation and guarantees of non-repetition, public apologies, public and administrative sanctions for wrongdoing, instructing that human rights education be undertaken, ensuring a transparent and accurate account of the violation, reviewing or disapplying incompatible laws or policies, use of delayed remedies to facilitate compliance, including rights holders as participants in development of remedies and supervising compliance post-judgment.¹¹⁷ As discussed in Part III (Chapter 4) we explain how practitioners conceive of effective remedies, including the need to move beyond compensation, the importance of an apology for wrong-doing, and the need to take steps to stop the violation happening again to anyone else.

Shelton emphasises the potential for remedies to provide compensatory or remedial justice; to play a part in condemnation of the violation or retribution; as a form of deterrence; and as playing a part in restorative justice or reconciliation.¹¹⁸ Roach suggests an effective remedy serves three functions: it places the applicant in, as far as possible, in the same position as they were prior to the occurrence of the alleged rights violation, it enables ongoing compliance and it ensures that future violations of the right in question do not occur through a) deterrence, and b) an attempt at addressing the feature of a legal system that caused the violation in the first place.¹¹⁹

We suggest that adjudicators must be equipped to strike a balance and use an aggregate of appropriate remedies as a means of responding to social rights violations including both individual and collective relief.¹²⁰ This aligns with calls in the literature and practice to rethink the role of remedies in economic and social rights cases:

‘[t]he challenge of enforcing ESC rights may require some re-thinking of the traditional idea that remedies must be immediate and track the contours of the right and the violation, and that the courts can order one shot remedies that achieve corrective justice.’¹²¹

115 UN General Comment 9 n117 at para.10

116 Concluding observations of the UNCESCR’s Forty-second session, 4 - 22 May 2009 Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas dependencies, 12 June 2009, E/C.12/GBR/CO/5, at para.3

117 UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147

118 Shelton n116 at 10-15.

119 Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (CUP 2021) 2-5.

120 Rodríguez-Garavito and Rodríguez-Franco n46 at 10

121 Kent Roach, ‘Crafting Remedies for Violations of Economic, Social and Cultural Rights’ in John Squires, Malcolm Langford, Bret Thiele (eds.), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights*, (University of New South Wales Press 2005) 111-126, at 111.

Shelton argues that although the ‘remedies for cases involving social rights will often be classical remedies, such as compensation and declarations of wrongdoing, more often general and structural remedies will be necessary.’¹²² This is not a novel legal dilemma Shelton notes.¹²³ And Roach expands on this:

*‘An over simplified understanding of the remedies for civil and political rights as simple corrective remedies that have no distributive effects is a barrier to effective remedies for socio-economic rights. Many traditional political and civil rights require complex dialogic relief with distributional implications to be effective. Once this is recognised then the remedial process that is required to enforce socio-economic rights will appear much less anomalous, albeit no less complex.’*¹²⁴

An innovative approach to remedies is therefore required to fully embrace the potential of social rights adjudication.¹²⁵

Our interdisciplinary approach, which is embedded in the intricate links between discourse and ideology, helps to examine both the procedural and substantive claims on access to justice for social rights. Analytically, we examine how the notion of justice as an ‘empty signifier’ is filled with various, often competing, meanings by employing a critical approach to discourse analysis. This criticality directs attention to the role of power, particularly in terms of outcomes and impact. Jan Blommaert says that “[t]he deepest effect of power everywhere is *inequality*, as power differentiates and selects, includes and excludes. An analysis of such effects is also an analysis of the conditions for power – of what it takes to organise power regimes in societies” (original emphasis).¹²⁶ He urges us to focus on language as “an ingredient of power processes resulting in, and sustained by, forms of inequality, and how discourse can be or become a justifiable object of analysis, crucial to an understanding of wider aspects of power relations”.¹²⁷ Examples of critical approaches to discourse and power can be found in diverse fields of scholarly enquiry, including sociology, sociolinguistics, critical anthropology, language policy and planning (LPP), discourse studies and others. In the next section we highlight some of the interdisciplinary work that inspired our analysis, as well as theoretical and methodological tenets we found helpful in examining our empirical data.

Theoretical and methodological tools

A variety of critical approaches address questions of inequality and (in)justice by examining the complexity and unfolding processes of a broad range of intersecting social issues and discourses. Research agendas have increasingly paid attention to the relationship between language/ discourse and society and its links to social inequalities and injustice, power asymmetry, politics, social privileges, and so forth. These areas of scholarly enquiry contribute to our understanding of how relationships of inequality are discursively (re) produced, enacted and organised by institutions and actors, through the mobilisation

¹²²Dinah Shelton, ‘Remedies and Reparation’ in Malcolm Langford et al, (eds) *Global Justice, State Duties, The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) 367-390, at 380.

¹²³Ibid.

¹²⁴Kent Roach, ‘The Challenges of Crafting Remedies for Violations of Economic, Social and Cultural Rights, in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008) 46-58, at 58.

¹²⁵Roach *ibid* and n125, Shelton n116, Boyle n8

¹²⁶Blommaert n69 at 2

¹²⁷*ibid*

of forms of knowledge, justifying and legitimating particular activities, and resulting in certain outcomes. Dominant narratives and discourses are also challenged by different social actors, showing evidence of resistance and resilience and offering alternate ways to engage to promote social justice and address the needs and concerns of disenfranchised or vulnerable groups.¹²⁸

For instance, ongoing work in critical sociolinguistics investigates the ways language and labour/ work are intertwined with capitalism and social inequality.¹²⁹ Various studies have looked at the role of language and training programs, and the various tactics, logics and forms of expertise that govern processes of migration and migrant workers.¹³⁰ Additional attention has been directed to processes of racialisation and marginalisation within the labour market,¹³¹ transnational labour¹³² and challenging gendered work identities.¹³³ More applied branches of sociolinguistic research, such as LPP and studies on bilingualism / multilingualism,¹³⁴ also address concerns around the distribution of (linguistic) resources in society¹³⁵ related to education,¹³⁶ nationalism and national identities,¹³⁷ minoritised languages¹³⁸ and disability.¹³⁹ The various works centre on issues such as discourse, language, governmentality, migration and inequality and provide important insights about how notions of access, distribution and participation are constituted through the interplay of complex and dynamic processes, often in subtle ways.

128 ibid at 8

129 Cf. Elisabeth Barakos, 'Language Policy and Governmentality in Businesses in Wales: A Continuum of Empowerment and Regulation' (2016) 35(4) *Multilingua*, 361; Elisabeth Barakos, *Language Policy in Business: Discourse, Ideology and Practice* (John Benjamins Publishing Company 2021); Alfonso del Percio, 'Language, the Political Economy and Labor' in J Stanlaw (ed), *The International Encyclopedia of Linguistic Anthropology* (Wiley 2020); Mi-Cha Flubacher and Alexandre Duchêne and Renata Coray, *Language Investment and Employability: The Uneven Distribution of Resources in the Public Employment Service* (Palgrave Macmillan 2018)

130 Cf. Diana Camps, 'Restraining English Instruction for Refugee Adults in the United States' in E M Feuerherm and V Ramanathan (eds), *Refugee Resettlement in the United States: Language, Policy, Pedagogy* (Multilingual Matters 2016); Alfonso Del Percio and Sarah Van Hoof, 'Enterprising Migrants: Language and the Shifting Politics of Activation' in Mi-Cha Flubacher and Alfonso Del Percio (eds), *Language, Education and Neoliberalism: Critical Studies in Sociolinguistics* (Multilingual Matters 2017); Beatriz P Lorente, *Scripts of Servitude: Language, Labor Migration and Transnational Domestic Work* (Multilingual Matters 2018)

131 Tina Shrestha, 'Learning English, Speaking Hindi: The Paradox of (Language) Integration Among Nepalis in the United States' in Emily Feuerherm and Vaidehi Ramanathan (eds), *Refugee Resettlement in the United States: Language, Policies and Pedagogies* (Multilingual Matters 2016)

132 Beatriz P Lorente, 'The Making of "Workers of the World": Language and the Labor Brokerage State' in Alexandre Duchêne and Monica Heller (eds), *Language in late capitalism: Pride and profit* (Routledge 2012)

133 D Warriner, "'The Days Now is very Hard for My Family": The negotiation and construction of gendered work identities among newly arrived women refugees (2004) 3(4) *Journal of Language, Identity, and Education* 279

134 cf. Monica Heller, *Bilingualism: a social approach* (Palgrave Macmillan, 2007)

135 Blommaert n69 at 10

136 cf. Flubacher and Del Percio (2017) n136; Monica Heller and Marilyn Martin-Jones (eds), *Voices of Authority: Education and Linguistic Difference* (Ablex Publishers 2001); Francis M Hult, 'Nexus analysis as scalar ethnography for educational linguistics' in M Martin-Jones & D Martin (eds), *Researching multilingualism: Critical and ethnographic perspectives* (Routledge 2017); M Källkvist and F M Hult, 'Multilingualism as Problem or Resource? Negotiating Space for Languages Other than Swedish and English in University Language Planning' in M. Kuteeva and K Kaufhold and N Hynninen (eds), *Language Perceptions and Practices in Multilingual Universities* (Palgrave Macmillan 2020)

137 cf. Adrian Blackledge, 'The discursive construction of national identity in multilingual Britain' (2020) 1(1) *Journal of Language, Identity & Education* 67; Leonie Cornips and Ad Knotter, 'De Uitvinding van Limburg: De Territorialisering van Geschiedenis, Taal en Identiteit [Inventing Limburg: Territory, History, Language and Identity]' in A Knotter and W Rutten (eds), *Studies over de Sociaal-Economische Geschiedenis van Limburg LXI* (WBOOKS/Sociaal Historisch Centrum voor Limburg 2016); Ruth Wodak, 'Discourses about nationalism' in John Flowerdew and John E. Richardson (eds), *The Routledge Handbook of Critical Discourse Studies* (Routledge 2018)

138 cf. Diana M J Camps, 'Legitimizing Limburgish: The Reproduction of Heritage' in Pia Lane and James Costa and Haley De Korne (eds), *Standardizing Minority Languages: Competing Ideologies of Authority and Authenticity in the Global Periphery* (Critical Studies in Multilingualism 13, Routledge 2018) 66; Alexandra Jaffe, 'Minority Language Movements' in Monica Heller (ed), *Bilingualism: A Social Approach* (Palgrave Macmillan 2007); Bernadette O'Rourke and Sara Brennan, 'Regimenting the Gaeltacht: Authenticity, Anonymity, and Expectation in Contemporary Ireland' (2019) 66 *Language & Communication* 20

139 Christine Ashby, 'Whose "Voice" is it Anyway?: Giving Voice and Qualitative Research Involving Individuals that Type to Communicate' (2011) 31(4) *Disability Studies Quarterly*

These studies inspire our own work, as similar dynamics are also evident in conversations with practitioners around the provision and adequacy of services, allocation of funding and access to effective remedies for social rights violations concerning social security, housing, food and fuel. A closer examination of how various discourses are intertwined provides greater insight into access to justice and the adjudication of social rights. The above mentioned studies provide multiple tools and diverse theoretical and methodological angles for the analysis of multi-layered phenomena. As such, our multidisciplinary approach is particularly suitable for examining the multi-faceted nature of social rights protection frameworks across the UK jurisdictions.

3. Methodological approach and data

The research project has received invaluable support from three Expert Advisory Groups, set up to facilitate continuous expert advice and stakeholder engagement. These advisory groups entail an Expert Advisory Group on Social Rights Legal Expertise, an Expert Advisory Group on Research Methods and an Expert Advisory Group of practitioners supporting those with lived experience, hereafter referred to as the Practitioner Panel. Each of these groups have contributed vital support and insights to the project to ensure a high level of quality and rigor. Notably, their specific expertise has been invaluable at different stages of the project, namely by providing expert input to help us narrow our focus of enquiry, provide feedback on our theory and methods, and help us find suitable practitioners for our interviews.¹⁴⁰

Before delving any further, it is crucial to briefly explain how the onset of the Covid-19 pandemic impacted on our field work and necessitated certain changes in our approach. The onset of the Covid-19 pandemic in March 2020 forced us to re-assess our methodological approach and determine how our project would engage with the challenges produced by the ongoing epidemic, as well as develop strategies to mitigate its impact, particularly on our fieldwork.

Due to Covid-19 travel restrictions and social distancing measures enacted to combat the spread of the virus, the project faced health and safety risks in relation to fieldwork travel. In response, we moved our engagement with participants and stakeholders online, adjusted our research instruments to include the Covid-19 crisis as part of our research strategy and adapted our work environment and practices to work from home as a team.

On the basis of government advice, many practitioner offices throughout the UK, such as advice centres for instance, closed their physical doors to reduce virus spread but continued to engage with their clients via web chat and telephone. The research team was concerned that the Covid-19 crisis would affect our ability to secure interviews with practitioners. Our engagement with practitioners, however, was not impacted and the necessary change to video interviews reduced the timeline and cost for empirical data collection¹⁴¹.

In addition to how we engaged with research participants, it also became clear that we needed to re-evaluate our research questions to identify ways to adapt our project to the new climate in which we found ourselves. In response to this, we adapted our field guide to include two questions that addressed the new reality of the Covid-19 crisis. Further details will follow in the section on research instruments.

Identifying and selecting the research sample

The research team deemed it crucial to access research participants in those places where access to social rights on the ground were at stake and where the tensions around

¹⁴⁰The report does not reflect the views of any of the members of the EAG and all views or errors remain those of the authors.

¹⁴¹The research team does recognise that despite certain advantages of virtual interviews, such as flexibility and cost-savings of travel, in-person interviews do generally allow for a higher level of personal engagement. Some contextual information is lost in virtual interviews, including the ability to read body language. We are confident, however, that the virtual mode of interviewing still allowed for collecting rich data, fulfilling the aims of the project.

social rights were most visible. The Working Advisory Group on Research Methods was instrumental in helping us to narrow the focus of our enquiry, challenging our own subjectivities and urging us to closely reflect on our terminology.

In order to find relevant research participants for each case study we considered two crucial questions: firstly, *who* are the people that are trying to develop solutions on the ground, and under which conditions do they operate, and secondly, what are the *processes* that permit or prevent people from accessing their social rights and an effective remedy? This meant identifying spaces in which the enforcing practice, or rather the need to enforce social rights and accessing a remedy for a violation, became salient.

These questions informed selecting a deliberate and robust sample by narrowing our enquiry to specific legal cases addressing a particular social rights violation. We then identified study participants who either played a direct role in the selected cases, at different levels of the adjudication process, or were involved in work closely related to the issues at stake in each legal case. We selected specific legal cases in England, Scotland and Northern Ireland. In the jurisdiction of Wales, the research team adopted a broader approach to field work, as our initial field work exercises determined that a distinct Welsh litigation culture is not as strong as in the other UK nations, the reasons for which are discussed in the Welsh case study below.

To find suitable participants to interview, we used a non-probability sampling technique, relying on our networks and the 'snowball method'.¹⁴² We also received helpful input from our Practitioner Panel with regard to suitable study participants. This advice was gathered through the means of 'informal discussions' with individual members from our Practitioner Panel. Given that Covid-19 restrictions prevented us from moving forward with our planned face-to-face Practitioner Panel meeting, the informal discussions provided a valuable way of engaging with experts in each of the UK jurisdictions. These conversations helped to target our focus on specific issues/ cases for each jurisdiction and helped us to identify suitable participants for our interviews. In some instances, an informal discussion resulted in a semi-structured interview with the same individual. These preliminary conversations were conducted between April and November 2020 via Microsoft Teams, but not audio recorded.

We selected practitioners for the interviews whose work closely engaged with people facing issues related to housing, social security and/ or fuel poverty and food poverty. We asked to speak to them to better understand which types of issues people face and their experiences in supporting them. What help (if any), from their perspective, could be provided when people have difficulties in these areas.

Qualitative data overview

As indicated above, we conducted informal virtual discussions with eleven practitioners across the four jurisdictions to gain better insight into each jurisdiction and help us 'narrow the field'. We then interviewed 26 practitioners, 16 women and 10 men. Ten were legal practitioners, including 8 solicitors, 1 barrister and 1 Queen's Counsel (QC). Six were welfare rights advisers and the remaining 10 were comprised of consultants, activists, researchers, policy developers and volunteers. Practitioners who were working in research or policy had worked or worked concurrently with rights holders.

¹⁴²James S Coleman, 'Relational analysis: The study of social organizations with survey methods' (1958) 17(4) *Human Organization* 28; Leo A Goodman, 'Snowball Sampling' (1961) 32(1) *The Annals of Mathematical Statistics*

Table 3.1: Research Participants¹⁴³

Research Participants
Scotland Carole Consultant & Activist, NGO for human rights
Scotland Kelly Solicitor specialising in women/ children/ immigration, NGO for Legal Service
Scotland Julie Solicitor specialising in asylum/ immigration, NGO for Legal Service
Scotland Freya Solicitor, NGO for Housing
Scotland Erica Solicitor, Human Rights Public Body
Scotland Jonas Solicitor related to <i>Serco</i> case
Scotland Abigail Evictions Caseworker, NGO for Asylum Seekers
England Andrea Welfare Benefits Adviser related to <i>Pantellerisco</i> case
England Roland QC related to <i>Pantellerisco</i> case
England Miles Welfare Rights Adviser, NGO to combat child poverty
England Jane Welfare Rights Adviser, NGO to combat child poverty
England Claire Solicitor related to <i>Pantellerisco</i> case
England Tobias Barrister related to <i>Pantellerisco</i> case
Wales Matthew Solicitor, Private Law Firm
Wales Seth Researcher, Think Tank (Social Rights)
Wales Sam Policy Developer, NGO for children and youth
Wales Eva Development Manager, NGO to combat child poverty
Wales David Researcher, NGO to battle inequality
Wales Kim Programme Manager, NGO to combat food poverty
Wales Rose Welfare Rights Adviser, Local County
Northern Ireland Josie Chief Executive, NGO for housing
Northern Ireland Chloe Volunteer
Northern Ireland Oliver Solicitor, NGO for Legal Services
Northern Ireland Rowan Welfare rights adviser, NGO for Cancer Patients
Northern Ireland Kamilla Welfare Rights Adviser, NGO Local Community
Northern Ireland Esther Housing Activist, NGO for Human Rights

The practitioner semi-structured interviews were conducted between August 2020 and February 2021, using the Microsoft Teams platform, abiding by the University of Stirling's strict security and ethical requirements. All of the interviews were audio recorded for the purpose of transcription. The data was transcribed using NVivo transcription software and, due to recurring technical problems and poor quality automated transcriptions, a private transcription service.

¹⁴³In order to ensure the protection of our participants' identities, all individual names used in this report are pseudonyms.

The interviews were conducted in a phenomenological way, in order to get at the 'lifeworld' of the practitioners being interviewed¹⁴⁴. This focusses attention on the ways practitioners make sense of their own work and the challenges they, as well as their clients, face. It allows practitioners to express the meanings they attribute to their own experiences. Interviews were facilitated in a manner that fostered developing a collaborative relationship between interviewer and interviewee.¹⁴⁵

Approach to data collection and design of research instruments

Common to qualitative research is the challenge of how to operationalise the concepts chosen as the object of study. This is a crucial component of the fieldwork, as the questions we ask determine the type of data we generate from our participants. But, unlike quantitative analysis which requires definitions to be refined at the start, our concepts and how to best operationalise them continue to emerge throughout the qualitative data collection and analysis process.¹⁴⁶ As explained in the introduction, the 'access to justice' journey and the principles of adjudication provided the building blocks for operationalising the concepts and issues we sought to investigate and informed our thinking about what would entail a fair and just legal process for upholding social rights. These building blocks underpin the questions formulated in the field guide and facilitated examining what *participation* and *remedial action* might mean in different constitutional settings, how *accessibility* is to be conceived and facilitated, what kind of intra-state or supranational *deliberative mechanisms* exist/ will develop or what supervisory roles might be played by different institutional actors?¹⁴⁷ How does the principle of *access* materialise on the ground, in the daily practices of practitioners working with rights holders? To answer these questions and gain a deeper understanding of the (legal) processes involved in accessing justice for social rights, including access to an effective remedy, means having conversations with practitioners and listening to their viewpoints and experiences.

Developing our research questions for practitioners with varied levels of understanding of the law meant translating complex and technical legal terms into language more accessible to different stakeholders. It was anticipated that even amongst legal practitioners there might be variability in their knowledge and understanding around social rights, as it is an often overlooked area of law. This meant that legal practitioners themselves may not be fully aware of the full body of law, or international legal framework, that engage with social rights. The fact that one of the researchers did not have a background in law proved to be an advantage in interviewing a wide range of practitioners. It allowed her to embrace an open and collaborative form of interviewing, being able to ask for clarifications when needed, without being perceived as trying to 'trip up'¹⁴⁸ practitioners engaged with the system.

144 T Groenewald, 'A Phenomenological Research Design Illustrated' (2004) 3 International Journal of Qualitative Methods

145 A Oakley, *From Here to Maternity* (Penguin 1981)

146 Matthew DeCarlo 'Operationalization' (Pressbooks, Scientific Inquiry in Social Work, 2018) <<https://scientificinquiryinsocialwork.pressbooks.com/>> accessed 7 January 2022

147 Boyle, *Economic and Social Rights Law*, n8 at 266

148 Jennifer Mason, *Qualitative Researching* (Sage 2018)

Research instruments: Interview field guide and web-based survey

The interview field guide

Constructing a useful field guide for the interviews was challenging in the sense that our research questions sought answers to complex legal questions, yet needed to be simple enough to generate authentic data that reflected the practitioner's experiences rather than explicit knowledge relating to practices and the legal system.

It is equally important to consider that casework can be a very scripted process, often dictated by an institution's rules and practices,¹⁴⁹ which influences and constructs local practices. We needed to be mindful that certain practitioners may not attend to the legal framework in the way that we anticipate. As such, it is not the purpose of the interview to ask this in an explicit way but for our analysis to determine what knowledge and tools practitioners draw on, based on the narratives collected. As reflexive researchers, it is important to be conscious of, and explicit about, our own epistemological assumptions, reflecting carefully on the categories that we (re)produce.

The questions in the interview field guide were divided into four broad categories inspired by the 'access to justice' building blocks and principles of adjudication. Although the field guide was developed and used as an important tool for facilitating the semi-structured interviews, the conversations were also allowed to develop and flow organically to generate narratives that allowed participants to talk and reflect on their own practices and experiences. This was facilitated by the opening question that asked: "what does it mean to do what you do?" We found that this provided a gateway to the conversation that allowed each practitioner to frame answers in their own way, bringing to the fore the elements that they thought important. The goal was to elicit a narrative that would allow ideas to emerge that were meaningful to the practitioner.

Some of the questions were loosely organised around the concepts of accessibility and fairness, and additional questions addressed participation and effective remedies. Questions also asked practitioners to look to the future. The interview also created space for practitioners to raise any additional issues they would like to discuss and make final comments or add to the topics discussed.

As stated earlier, we also amended our questionnaire to include questions related to the impact of the Covid-19 pandemic. We asked practitioners whether the current Covid-19 situation had an impact on them and their work and, if this were the case, to explain in what ways. Furthermore, we asked whether the practitioners anticipated any sustained impact of the pandemic on the way they conduct their work and on social rights more broadly.

Web-based survey: 'Social Rights Protections across the Four UK jurisdictions'

In addition to the field guide developed for individual interviews, the research team developed a web-based survey to be distributed to practitioners across the four UK jurisdictions.¹⁵⁰ Our aim was to collect additional data to triangulate with our legal and interview data sources, but time limitations and unforeseen circumstances prevented us from distributing the survey widely. A small pilot study was completed by distributing a request for survey participants through the National Association of Welfare Rights Advisors

149Lipsky n91

150The research team submitted an amendment to our original ethics application to the GUEP, which was approved on 20 July 2020.

(NAWRA) network in August 2020. We received 15 responses from advisers willing to complete the survey, and had a 46% return rate entailing seven completions of the online survey.

All respondents worked in the advice sector: five for a community organisation/ NGO or charity, one for local authority and 1 for a hospital or healthcare provider. Geographical distribution showed that five participants were based in England, one in Wales and one in Scotland. No submissions were received from Northern Ireland. Participants were nearly split 50/50 in terms of gender with 4 males completing the survey and 3 females.¹⁵¹ With regard to their level of experience, 57.2% of respondents reported between 11-25 years of experience. 28.6% reported more than 25 years experience and only 14.3% reported experience between one to five years. More than 85% of respondents reported educational qualifications of a Bachelor's or Master's degree. All respondents stated their willingness to participate in an interview, if required. One respondent from the Welsh jurisdiction was contacted for follow up and participated in a virtual interview.

Although the survey sample is too small to be considered representative, the responses received iterated many of the same challenges and concerns expressed by the practitioners we interviewed. These included direct and ongoing impacts of the Covid-19 pandemic, reported challenges regarding the complexity of the welfare system, ineffective infrastructure and processes, and difficulties with accessing decision makers and complaints procedures. In addition, respondents reported specific disadvantaged groups related to physical disability and mental health, including addictions and neurological/ developmental disorders such as autism. Elaborating on specific barriers for access to justice, one of the respondents eloquently summarised these as “*justice delayed, justice suspended, justice ignored*”.¹⁵² This sentiment resonates strongly with the empirical data collected in our interviews with practitioners and we will return to these points in our data analysis (Chapter 4).

Qualitative semi-structured interviews with practitioners

Semi-structured interviews were used as the main tool for collecting introspective data, or rather get insights into the historical bodies¹⁵³ of practitioners to learn about their experiences, beliefs, habits, practices professional training, inter alia. The concept of the *historical body* comes from the work of Kitarō Nishida, and is akin to Pierre Bourdieu's term *habitus*, “a disposition to act in practiced ways”.¹⁵⁴ Researcher interest in the historical body is in the life experiences of individual social actors and the ways in which they embody their personal beliefs, assumptions, and experiences. We can imagine the historical body as “a lifetime of personal habits [that] come to feel so natural that one's body carries out actions seemingly without being told”.¹⁵⁵

151 In support of inclusivity, the gender category included a third choice for ‘other/ prefer not to say’, but this option was not chosen by respondents.

152 Survey: ‘Social Rights Protections across the Four UK Jurisdictions’ 632813-632804-64688016

153 Kitarō Nishida, ‘The Historical Body’, *A series of two Lectures presented to the Shinano Philosophical Society at the Public Hall of the Nagano City women's Technical School* (NKZ XIV 1937); Ron Scollon and Suzanne Wong Scollon, *Nexus Analysis: Discourse and the Emerging Internet* (Routledge 2004)

154 Pierre Bourdieu, ‘Cultural Reproduction and Social Reproduction’ in J Karabel and A H Halsey (eds), *Power and Ideology in Education* (Oxford University Press 1977); Pierre Bourdieu, ‘Social Space and Symbolic Power’ (1989) 7 *Sociological Theory*; for a conceptual overview as well as critiques and limitations, see Diane Reah, ‘“It's All Becoming a Habitus”: Beyond the Habitual Use of Habitus in Educational Research’ (2004) 25(4) *British Journal of Sociology of Education*

155 Ron Scollon and Suzanne Wong Scollon, *Nexus Analysis: Discourse and the Emerging Internet* (Routledge 2004) at 13

Our historical bodies are not static entities, but are shaped within various discourse systems, which are constituted as particular forms of discourse, socialisation practices and social relationships.¹⁵⁶ Within this research, engagement with the historical bodies of practitioners is pertinent to appreciate how their individual embodied knowledge and experience intersects with other discourses made relevant and meaningful in the work they do.

Approach to data analysis

Our approach to the qualitative data we collected was not designed with a predetermined intent to prove or disprove any particular hypothesis, rather, in keeping with a critical analytic approach, it developed from the bottom up. We are inspired by qualitative approaches that adopt a self-reflexive stance and recognise the data as (co)-constructed by the researchers and researched, rather than entailing a mere process of 'discovery'.¹⁵⁷ Reflexivity not only requires researchers to be transparent in the decisions they make in the research process, but also be self-critical in their engagement with complex social phenomena, such as social justice, inclusion and exclusion, by closely reflecting on theory, knowledge (production) and practice.¹⁵⁸ As is common in qualitative research, our data analysis was an iterative and recursive process, which began with a deductive thematic analysis, teasing out general themes from the interview responses.

Thematic analysis

In a deductive approach, the search for themes is theory driven, in this case primarily centring on the above mentioned principles of adjudication with access to justice framed as a journey.¹⁵⁹ The benefit of this approach is that it can assess the access to justice journey in relation to social rights, while maintaining the flexibility of thematic analysis which can identify important new lines of enquiry throughout the analysis process and provide in-depth insights into the case studies.¹⁶⁰

In the first stage of analysis, all the interviews collected were coded and analysed individually, drawing on the 'access to justice' building blocks and principles of adjudication.¹⁶¹ In addition, the potential impacts from the Covid-19 pandemic were included in the analysis. The principles provided a framework for approaching the data with questions that could tease out how the various concepts materialise in practice. As outlined above, these questions informed our field guide and also guided the data analysis. We formulated questions for each of the building blocks and principles, as presented in the table below (Table 3.2).

156 Ron Scollon and Suzanne Wong Scollon, 'Intercultural communication: A discourse approach' (2001) 21 *Language in Society*; Ron Scollon and Suzanne Wong Scollon, *Nexus Analysis: Discourse and the Emerging Internet* (Routledge 2004)

157 Simone Plöger and Elisabeth Barakos, 'Researching linguistic transitions of newly-arrived students in Germany: insights from Institutional Ethnography and Reflexive Grounded Theory' (2021) 16(4) *Ethnography and Education* 405

158 Alastair Pennycook, 'Introduction: Critical Approaches to TESOL' (1999) 33(3) *TESOL Quarterly*

159 J Fereday and E Muir-Cochrane, 'Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development' (2006) 5 *International Journal of Qualitative Methods*

160 L S Nowell and others, 'Thematic Analysis: Striving to Meet the Trustworthiness Criteria' (2017) 16 *International Journal of Qualitative Methods*

161 Boyle, *Economic and Social Rights Law*, n8

Table 3.2: Thematic analysis

Access	How is accessibility imagined and implemented in regards to housing, social security and food/ fuel poverty, and what does access to justice or access to a remedy mean when there are problems with the provision of these services?
Participation	Can everyone participate in decisions that impact them when seeking to access justice? What enables participation? What are the barriers to participation? Are those most impacted by issues and/ or marginalised across lines of oppression able to participate?
Deliberation	Are there clear dialogues occurring within multi-institutional frameworks across legislative, executive, judicial branches? Is there accessible information about these dialogues? Are they inclusive and do they lead to outcomes that meet people's social rights?
Compliance	How can the issues people face be challenged? Are there set mechanisms for doing this? Are these mechanisms satisfactory?
Enforcement	What does review and enforcement mean in practice, in each of the four UK jurisdictions?
Fairness	Are there suitable means to challenge fairness in the system?
Counter-majoritarian	Can the solutions to these issues, legal and otherwise, be utilised for everyone or only a select few? How can systems prevent elite driven litigation?
Accountability	How are institutions held to account? Are there adequate mechanisms for this?
Effective remedies	Are remedies implemented? Are these remedies effective? By whose standard are they effective?
Covid-19	What impact has the Covid-19 pandemic had on practitioners and on the realisation of social rights?

A critical approach to discourse and policy

After the thematic analysis was completed, the data was analysed again using a critical discursive perspective in order to draw out specific tensions and contestations. It is precisely at junctures of conflict and struggle that we need to engage with local realities and probe more deeply to uncover exactly what is at stake. A dynamic research approach facilitates examining the protections in place as they relate to social rights, and evaluate not only what is explicitly stated in legal documents, but consider how the mandate to protect social rights is taken up and negotiated by different social actors across UK jurisdictions. This widens the focus from compliance or non-compliance and questions of accountability, which highlight the identified gaps, to a broader understanding of how those gaps are constituted in practice and what will be required to close them. Directing our attention to those specific moments where competing tensions are evident, will help us dig deeper to better understand the processes that may lie underneath the surface.

Elisabeth Barakos and Johann Unger make a convincing argument advocating for a discursive approach: *“in order to account for and analyse the multiple layers of [...] policy and*

*its concomitant impact, we need to theoretically, methodologically, and empirically engage with policy in terms of both structure and agency, and this is made possible by applying various forms of critical and discursive analysis to [...] policy situations”.*¹⁶²

Discursive approaches are valuable for analysing how laws and policy governing social rights protections in the UK impact on rights holders, because it draws attention to the intertextual and interdiscursive links between discourses, as expressed in legal doctrine and articulated by practitioners in the field.

Several concepts integral to discourse analysis would be helpful at this stage, including notions of entextualisation, intertextuality and interdiscursivity. A discursive approach to analysis looks closely at language and how it shapes meaning and understanding. Foucault provides the conceptual frame for understanding how language is a socially constructed object and urges us to reflect on how discourse production is instrumental to social change. A useful tool for analysing discourse/ policy is *entextualisation*, which refers to the process by which discourses are taken from one context and transferred to a new context, thereby creating a new discourse.¹⁶³ However, in this process, an ‘ideology of fixed text’ interacts with discourse practices that may extend or alter the original text.¹⁶⁴ These ‘reformulations’ (re)frame the text through other discursive practices and representations; they may be incomplete and open to interpretation. It is this space for interpretation or possible entextualisations inherent in the original text that gives it validity; any attack on its meaning may be framed as a misinterpretation or misrepresentation not a fault with the original text, which is seen as neutral (we provide an example of this in Chapter 4, through a closer examination of the interpretation of section 6 HRA). Policy texts emerge in a variety of political processes and in this sense entextualisation in policy documents represents a discursive trace of political debates. The resulting discourses that circulate are considered metadiscourse, or rather discourse about the discourse, reflecting the social reality of how social rights, in this case, should be perceived. Once again, ideologies become a salient factor in how discourses in policy texts are entextualised.

Thus, text and context must not be treated as mutually exclusive units, but must be seen as closely connected. This may be achieved by drawing on the concept of *intertextuality*,¹⁶⁵ referring to the notion that each text is situated in relation to other texts and to the structures of language itself. Essentially, the words we use are already imbued with meaning and value, because they have been used countless times before. Simply put, “intertextuality refers to the fact that whenever we speak we produce the words of others, we constantly cite and re-cite expressions, and recycle meanings that are available. Thus every utterance has a history of (ab)use, interpretation, and evaluation, and this history sticks to the utterance”.¹⁶⁶

Our words, therefore, are not neutral and intertextuality allows us to look beyond the immediate context to see how expressions relate to ways of use, including more implicit ways such as indirect speech.¹⁶⁷ The use of language, constructing thoughts and ideas in specific ways, produces certain types of discourse. Interdiscursivity, thus, refers to the connections between discourses, such as types of discourses, register or style.¹⁶⁸

¹⁶² Elisabeth Barakos and Johann W Unger, *Discursive approaches to language policy* (Palgrave Macmillan 2016)

¹⁶³ Blommaert n69

¹⁶⁴ *ibid* at 201

¹⁶⁵ M M Bakhtin, *The dialogic imagination: Four essays* (University of Texas Press 1981)

¹⁶⁶ Blommaert n69 at 46

¹⁶⁷ Norman Fairclough, *Analysing Discourse: Textual analysis for social research* (Routledge 2003)

¹⁶⁸ Blommaert n69 at 72

Important for our discussion here is that on account of inherent power relations and potential inequalities, access to contextual spaces, such as those characterised by professional and social status, are often curtailed. Although meaning making in communication is shared between the speaker and listener, it is not necessarily allocated equally or fairly due to disparities in power relations (we share examples of this in Chapter 4 in relation, for instance, to medical assessment procedures for certain social security benefits). The notion of context, and the related term *contextualisation*,¹⁶⁹ are also key concepts for understanding how meaning is created and how particular linguistic resources, including types of discourse produced, are particularly pertinent in situations where power asymmetries prevail. In this sense, the process of contextualisation is not necessarily negotiable if “somebody [imposes] a particular contextualisation on somebody else’s words”.¹⁷⁰ The recognition that not everyone is allocated equal ‘voice’ is particularly pertinent in relation to the provision of social rights. As the data show, the adjudication journey for social rights is fraught with inequality and marginalisation and getting one’s voice heard can be very difficult. Discourse, as a social phenomenon, is thus often a site of contestation, where inequalities and differences become visible. Directing attention to discourse also helps to uncover the implicit ideologies that have become submerged in the experiences and practices of different actors, such as practitioners, rights holders and duty bearers.

Researcher reflexivity and ethics

The notion of ‘voice’, or rather a lack thereof, became salient in the ways that practitioners spoke about advocating for their clients and helping them address social rights violations. In contemporary societies, Blommaert says, “issues of voice become all the more pressing, they become more and more of a problem to more and more people. Voice is the issue that defines linguistic inequality (hence, many other forms of inequality)”.¹⁷¹ The silencing of voices is an iterative theme across the data, related to the inability for certain social actors to claim a legitimate voice. Directing attention to discourse is therefore important for better understanding of how being able to make oneself heard and understood may be prevented, or even purposely undermined, by other dominant discourses and mechanisms.

It also prompted our own reflections as researchers about what it means to ‘give voice’ to others. Bogdan and Biklen define giving voice as “empowering people to be heard who might otherwise remain silent”.¹⁷² Christine Ashby urges us to question whether we are really giving voice, if it is ours to give, and ask who benefits from the telling.¹⁷³ She offers several critical points of reflection on how we, as researchers, engage with a process of ‘giving voice’. Ashby cautions that the practice of giving voice may in fact “reinforce the very systems of oppression that it seeks to redress”.¹⁷⁴ By the nature of our positions as academics/ lawyers/ researchers, hierarchies of power and privilege are re-inscribed when we presume to give voice to someone else, regardless of our intentions. Reflexivity means

169 We draw on John Gumperz’s seminal concept of ‘contextualisation’, which accounts for the ways in which people make sense in interaction, as well as a recognition of the links between language form and social/ cultural patterns; cf. John Gumperz, *Discourse Strategies* (Cambridge University Press 1982); John Gumperz, ‘Contextualization Revisited’ in P Auer and A DiLuzio (eds), *Contextualization of language* (John Benjamins 1992)

170 Blommaert n69 at 45

171 *ibid* at 5

172 R C Bogdan and S K Biklen, *Qualitative Research for Education* (Allyn & Bacon 1998) at 204

173 Christine Ashby, ‘Whose “Voice” is it Anyway?: Giving Voice and Qualitative Research Involving Individuals that Type to Communicate’ (2011) 31(4) *Disability Studies Quarterly*

174 *ibid*

recognising that as researchers we occupy multiple spaces of privilege and power,¹⁷⁵ bringing our own perspectives to bear on the data. In Kathryn Woolard's words, there is no perspective from "nowhere",¹⁷⁶ meaning that the voices we present to be heard by others are not objective truths, but mediated and interpreted in the process of our research and analysis¹⁷⁷.

In our conclusions, we return to this point with suggestions on how to reclaim the narrative for social rights, and how to move from 'giving' voice to facilitating voice and agency. In line with others, we adopt the view that our role as researchers is "not necessarily in giving a voice to somebody or advocating for someone, but rather in integrating oppressed and marginalised voices into dominant discourses"¹⁷⁸ and to make visible the policy mechanisms and practices that perpetuate a system of inequality.

Overview of data analysis

As explained earlier, the research team adopts a broad conception of the term 'access to justice'. We encourage others to revisit definitions that go beyond challenging barriers to access to include a substantive component (i.e. that relate to both process and outcome). This conception of access to justice suggests that the access to justice journey is complete when it results in fair processes leading to an effective remedy, or rather a process and an outcome that addresses social rights violations in an adequate and comprehensive way.¹⁷⁹ Justice materialises in the ways that laws and policies are enacted by a variety of social actors and institutions, and the sections that follow show how the 'access to justice' journey materialises through the ways in which actions, processes and discourses articulate together, resulting in specific outcomes.

We separate our analysis into four distinct sections. Firstly, we begin by foregrounding the impact of the Covid-19 pandemic, which has had unprecedented impact on people worldwide. However, the pandemic has, and continues to have, a disproportionate impact on the poor and others who have been marginalised in society and are struggling to access justice for social rights (Chapter 4, Part I).

Secondly, drawing on narratives from practitioners, we present our four case studies to illustrate how barriers to accessing justice for social rights occur across the four UK jurisdictions. With the exception of Wales, each of the geographical case studies engages with a specific legal case. As an analytical tool, case studies are sometimes criticised for lacking generalisability and applied relevance. Their value can be found, however, in "thick descriptions"¹⁸⁰ that, although not broadly generalisable, shed light on specific phenomena, or 'flashes of insight' into people's experiences.¹⁸¹ Our semi-structured interviews serve as the main analytical tool for collecting this introspective data. Engaging with practitioners

175 Simone Plöger and Elisabeth Barakos, 'Researching linguistic transitions of newly-arrived students in Germany: insights from Institutional Ethnography and Reflexive Grounded Theory' (2021) 16(4) *Ethnography and Education* 411

176 Kathryn A Woolard, 'Language and Identity Choice in Catalonia: The Interplay of Contrasting Ideologies of Linguistic Authority' in K. Süselbeck, U Mühlischlegel, & P Masson (eds), *Lengua, nación e identidad. La regulación del plurilingüismo en España y América Latina* [2008] Iberoamericana

177 Joe L Kincheloe and Peter McLaren, 'Rethinking Critical Theory and Qualitative Research' in Norman Denzin and Yvonna Lincoln (eds), *Handbook of qualitative research* (2nd edn, Sage, 2000) 291

178 Simone Plöger and Elisabeth Barakos, 'Researching linguistic transitions of newly-arrived students in Germany: insights from Institutional Ethnography and Reflexive Grounded Theory' (2021) 16(4) *Ethnography and Education* 414

179 Bearing in mind that what is deemed effective can vary depending on the circumstances, meaning for example, sometimes the deployment of deferential remedies that refer a matter back to the decision-maker can constitute effectiveness, at other times, more interventionist remedies may be required.

180 Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books 1973)

181 Mason n184

helps us to learn more about their experiences, beliefs, habits, practices, and professional training. It provides an important window into a multifaceted understanding, knowledge and experience of social rights for those assisting rights holders (Chapter 4, Part II).

Thirdly, we present the various barriers and hurdles rights holders face in the access to justice journey for social rights. In our interviews, practitioners were asked to reflect on the adequacy of access to justice processes, as well as the efficacy of outcomes of these processes. Their insights, in tandem with our legal analysis, help us to discuss the various elements that are required along “the adjudication journey”. By examining the full breadth of the journey that rights holders undertake, we hope to broaden our understanding of “mechanisms of exclusion”¹⁸² that permeate not only daily life, but also across social institutions, programs and approaches to governance. Such mechanisms of exclusion are made visible across the data, sometimes very clearly through, for instance, the Home Office policy of No Recourse to Public Funds (NRPF), which disproportionately impacts on those seeking asylum in the UK. At other times, exclusion and marginalisation materialises in more subtle ways, through a lack of transparency and accountability that creates unequal access to rights and resources (Chapter 4, Part III).

Lastly, we return to the data, drawing on our critical discursive lens, teasing out specific areas of conflict and contestation to examine more closely the social and discursive dynamics at play that underpin the barriers rights holders face in the adjudication journey (Chapter 4, Part IV).

Our combined interdisciplinary lens facilitates the identification of gaps across the UK social rights protection frameworks and sheds lights on the intersecting social and discursive currents. Following our conclusions (Chapter 5), we present our key findings and a set of recommendations on the steps that can be taken to close these gaps (Chapter 6).

¹⁸²Jacqueline Urla, *Reclaiming Basque: Language, Nation and Cultural Activism* (University of Nevada Press 2012)

4. Data analysis: Navigating gaps and spaces

Part I: Impact of the Covid-19 pandemic on social rights

Two major features of the pandemic that impacted on social rights were the unprecedented rise in unemployment and government's lock down strategy that prioritised staying home to reduce the pandemic's effect on public health. As will be explained further in the following sections, the impact of job losses and reduced income resulted in a massive increase in applications for social security. Combined with government's priority of home isolation, it also led to more people struggling to access food.

Emergency powers granted during the pandemic also prompted changes in legislation and policy, particularly in relation to homelessness, security of tenure and the rights of asylum seekers. For practitioners in advice service roles this created an ever-changing landscape, increasing difficulties in ensuring their clients got the best and most up to date advice. This was further worsened by an increase in the number of people needing advice, overwhelming advice centres that were already overstretched.

Practitioners reported that the Covid-19 pandemic disproportionately affected certain groups of people, including women, those from LGBTQ+ groups and from black and minority ethnic communities, and *"has shone a focus on the inequalities that were there before and are now even more stark"* (Scotland | Carole | Consultant & Activist, NGO for human rights). Another practitioner also noted the differential impact of the pandemic, stating,

"we live in such an unequal society, you know, where even with the pandemic, you know, for some people it means hey, they've saved a huge amount of money, they haven't had their season ticket to pay, they haven't been going out drinking or going to the restaurant, the theatre, they're getting all that free via Zoom or they're having their Ubers delivering their food, and [...] they're not having to pay extortionate amounts for wine in a restaurant, they can just buy it cheaply in Tesco's. So, you've had some people who've saved a huge amount, and you've [...] had some people who were already suffering just suffering even more" (England | Claire | Solicitor related to *Pantellerisco* case).

This immense social divide, inequality of experiences and disproportionate impact on those most marginalised by the system has made the need for adequate and effective social rights provisions even more apparent.

The pandemic and the entailed shift to remote working has also had logistical impacts on practitioners and the way they conduct their work and engage with clients. Most practitioners reported that adjustments to different ways of delivering services were implemented quite quickly, but that there were drawbacks to not being able to engage with people directly.

Rose, an experienced welfare rights advisor in Wales recalled that she had quite a few awkward telephone conversations where she felt that the mode of telephone communication caused potential miscommunication. She said,

“oh no, I don’t think they understood that there was sympathy in my voice, or that there was compassion in my voice in quite the same way as if I was in the room with them. And that’s sometimes-, that’s really hard. And I mean, I’m aware of that, so I’m trying really hard, you know, to do that on the phone. You know, I’m trying hard to make people-, because most of what I have to do is try and make, I need people to trust me. Because I’m going to be their advocate. And so I need them to understand that I’m not part of the people who turned them down” (Wales | Rose | Welfare Rights Adviser, local county).

For practitioners who advocate for rights holders, it was thus expressed that it can be difficult to achieve the same level of trust outside face-to-face settings. New modes of remote working also impacted on the time dimension of delivering services, slowing down processes at a time that advice services were inundated with increased needs for support. Furthermore, impacts were felt in each of the social rights areas related to access to social security, access to adequate housing and access to food and fuel.

Access to social security

The large number of people applying for Universal Credit drew attention to the complexity of the application system and the consequences of people not seeking specialist advice. Claire, a solicitor in England who was involved with the *Pantellerisco* legal case, stated that at the beginning of the pandemic, around 3.5 million people claimed universal credit within the space of approximately six weeks. This was in part due to a message from government that Universal Credit was available. In response, Claire said, quite a lot of people, without seeking advice, used the digital platform to apply for Universal Credit. However, people were impacted by differences between tax credits and Universal Credit, both in terms of capital threshold as well as differences in being subject to the benefit cap. Claire explained that as long as a person is on working tax credits they are not subject to the cap. However, when someone goes into Universal Credit they have to be earning, even in the middle of a pandemic. So, people would apply and then suddenly realise that they were either worse off on Universal Credit or did not qualify for Universal Credit.

“Because of the way it’s been set up you can’t then go back onto tax credits, so, they were stuck by the system and there was real pandemonium about this. And eventually DWP put a little warning [...] on the gov.uk page [...] ‘you might lose’, but clearly people were still going through because they weren’t necessarily you know reading all the blurb. So, it eventually got to the point where on your application process for UC, on the first page of the actual application you have to tick a box saying, ‘you’ve read and understood that applying for this would mean that your legacy benefits, including tax credits, stop even if you’re not actually entitled to UC’. Um, but it’s a situation where if people had gone to a welfare rights advisor they would have very quickly done a better off calculation, pointed them out to, you know, the advantages and the disadvantages between tax credits and Universal Credit and if someone on tax credits had a significant amount of savings, that would disqualify them from Universal Credit [...] people just weren’t doing that, because people are dealing with online, you know, applications the whole time and it just seems to [be] another one of those” (England | Claire | Solicitor related to *Pantellerisco* case).

The example demonstrates how the pandemic drew attention not only to the complexities in the Universal Credit application system, but also the importance of independent specialist advice services. In addition, Claire notes the application of the benefits cap in Universal Credit and the need to be earning. The benefit cap is meant to incentivise working, but it calls into question why it remained in force during the pandemic when far less work was available.

In addition, another practitioner noted how the sudden increase of Universal Credit applications may have resulted in challenges of internal administration for the Department of Work and Pensions (DWP). Jane, a welfare rights adviser in England noted that *“during the pandemic you’ve had a lot of DWP staff redirected to processing new claims. So those people on the ground are less likely to know the intricacies”* (England | Jane | Welfare Rights Adviser, NGO to combat child poverty). Jane proffered that lack of training within DWP may have exacerbated poor decision making and injustice in relation to accessing social security during the pandemic. The (in)adequacy of decision making processes and structures is a recurring theme, which is addressed in greater detail in the sections that follow.

An additional barrier identified was the impact on procedures for challenging problems, such as tribunals. At the onset of the pandemic, tribunals were suspended but adaptations were then made to allow for conducting remote hearings. However, it increased the time line for accessing justice through an appeals route, processes already identified as challenging and inadequate prior to the pandemic. Kamilla, a welfare rights adviser in Northern Ireland, explained that prior to Covid-19, a nine to ten month wait for an appeal hearing was not unusual. *“Now with Covid”, she said, “I have appeal decisions from mid- 2018 [...] it’s two years that the people have been waiting because, you know, this year basically [...] nothing’s happened so, I don’t know, I think there was a Zoom meeting there about two months ago with the appeals service and I think at that stage they thought that there was about six and a half thousand appeals waiting to be heard in Northern Ireland [...] we haven’t actually had any appeals heard. There was two telephone hearings, we got the dates for those and they were both adjourned, actually. So I have actually not had any appeals since prior to the lockdown in March”* (Northern Ireland | Kamilla | Welfare Rights Adviser, NGO local community).

Clearly, the ongoing crisis has added additional pressure on a system that was already having difficulty coping, with significant consequences for rights holders who are essentially left in limbo with no access to an effective remedy.

Access to adequate housing

Some of the emergency protective measures put in place during the pandemic provided slight amelioration for those who were homeless, as well as those facing potential eviction from their homes raising questions about justification for rights violations under normal circumstances. Implementation of these measures is not likely to last and further emphasises both the inadequacy of social rights protections and impending retrogressive steps that will result on regression in breach of international human rights law.¹⁸³ Any violation of a right because of a deliberate retrogressive measure can only be justified in the most exceptional of circumstances and States must be able to explain that the action is reasonable, proportionate, non-discriminatory, temporary, that it does not breach the minimum core obligation and that all other potential alternatives were considered.¹⁸⁴ The data also show specific examples of how the pandemic intersects with a lack of social rights protections, exacerbating unjust circumstances for people who have no access to a remedy.

Chloe, a volunteer in Northern Ireland, shared the story of a woman who had already been battling the local council and Northern Ireland Housing Executive for more than eight weeks to address a rat infestation and had been unable to stay in her flat during that time. It reached a point where Chloe and a local charity stepped in to pay for her hotel accommodation. Chloe said,

¹⁸³Retrogressive steps are incompatible with international human rights obligations save for exceptional circumstances

¹⁸⁴Committee on Economic, Social and Cultural Rights, ‘Letter from CESCR Chairperson to States Parties in the context of the economic and financial crisis’, 16 May 2012.

“it got to the point last week where [name of charity] and then myself personally paid for [name] to stay in a Premier Inn, because she could not stay in her flat and they were offering temporary accommodation, but it was a hostel and [...] she’s a single person, single lady and [...] she’s got a lot of anxiety and she doesn’t want to share a room or share like bathroom facilities, particularly in the current time of Covid, because her mum’s very ill. She’s not able to stay with her mum because she is so ill and she’s just being very careful about where she stays. It’s just-, ((whispering)) oh my God, it is exasperating, like actually exasperating!” (Northern Ireland | Chloe | Volunteer).

Chloe’s example demonstrates how already inadequate responses to a clear housing violation and an inability to obtain an effective remedy, was worsened by the health risks of the pandemic, increasing individual suffering and risking further marginalisation.

Access to food and fuel

The Covid-19 pandemic created more food insecurity and lifted the veil of poverty in local communities. When discussing the significance of the pandemic in relation to food poverty, David, a researcher in Wales, said,

“food in particular has become a significant issue [...] those individuals, those families who have become food insecure, that’s my term, as a result of the pandemic either because they can’t afford food, given loss of income due to impact of Covid-19 or because [...] they’ve been shielding or self-isolating and so on. But I think the crisis and the responses to the crisis, and particularly the kind of community responses to the crisis, has also shone a spotlight on many other people within those communities who were experiencing food insecurity before the crisis occurred and I think it’s been ((sighs)) long-term but a kind of wake-up call for many people [...] who thought they knew their communities, actually realising there was a lot more hidden poverty within their community that they weren’t aware of that predated the crisis” (Wales | David | Researcher, NGO to battle inequality).

This highlights that rather than creating an entirely new issue, the pandemic has revealed an existing food poverty problem. In addition, the pandemic has brought to the fore how certain members of the community, such as those seeking asylum in the UK, are disproportionately impacted with respect to access to food. The pandemic has made it even more difficult to access food and essential items due how these provisions are provided for in the form of an ‘Aspen Card’. This is a debit payment card given to UK asylum seekers by the Home Office. Those seeking asylum with ongoing applications (called ‘Section 95’) can withdraw cash on their card. People with ‘failed’ applications (known as ‘Section 4’) can only use it as a debit card. One of the dilemmas is that an Aspen Card can only be used in specified retailers, such as Asda for instance.

Abigail discussed the practical impacts on those who are considered to be ‘failed asylum seekers’ in receipt of Section 4 support. She said that it has been particularly difficult for people during Covid-19, because if you do not live near an Asda and you are unable to make arrangements with people to swap an Aspen Card for cash to buy food elsewhere, your access to food and essential items is severely curtailed. Those kinds of flexibilities, Abigail said, *“have evaporated with Covid”* (Scotland | Abigail | Evictions Caseworker, NGO for Asylum Seekers). Although some community connections have strengthened during the pandemic, for others the impact of lock down and self-isolation has meant greater difficulty in forging community relationships and accessing the basic needs that are essential to survival.

As a final point, the pandemic also foregrounded questions around the appropriateness and efficacy of certain policies. When discussing rights to employment for asylum seekers,¹⁸⁵ Esther, who is a housing activist in Northern Ireland, noted how the pandemic could be utilised to draw attention to the issue. She explained,

“we’re in the midst of a pandemic obviously and, like, we’ve dozens, you know, hundreds of doctors and nurses and health, health trained professionals, some of whom have begged to volunteer and can’t even volunteer. Do you know what I mean, so [...] we’re talking about bringing the military in to help our NHS staff, you know, well there’s people here and that have been here for years and that want to help and that are, you know, trained and qualified, and, you know, some doctors in war [...] and we’re not giving them the right to help in a pandemic” (Northern Ireland | Esther | Housing Activist, NGO for human rights).

Currently, people seeking asylum in the UK are effectively prohibited from working. They can only apply to the Home Office for permission to work if they have been waiting for a decision on their asylum claim for over 12 months and only for jobs that are on the Government’s restricted Shortage Occupation List. Esther argued that the Covid-19 pandemic has highlighted the under-utilisation of talent and skills, particularly with respect to the medical profession, and joins her voice with many others calling for a change in policy. It is argued that the current policy is “nonsensical” and leaves people “frozen in poverty”.¹⁸⁶ This is one example of UK policies not meeting minimum standards of international human rights. Others include the aforementioned benefit cap, discussed in greater detail in the English case study (Chapter 4, Part II).

Poorly reasoned policies, as well as the lack of policy implementation and enforcement are key themes across the data and are addressed in greater detail in the following sections. The interrelated nature of social rights is also vital to understanding the gaps and spaces in each of the UK jurisdiction’s social rights framework that bar access to justice. The key themes outlined here emphasised the intersection of the Covid-19 pandemic with identified problems obstructing access to justice for social rights, entailing practical challenges for practitioners and barriers to routes to justice, as well as drawing attention to pre-existing problems.

In this first part, we focussed on the impact of the Covid-19 pandemic, as this constituted the wider social context for our study. The section highlights how practitioners coped with various logistical challenges amidst unprecedented circumstances, anticipating that impacts of the pandemic on social rights will continue to be felt for some time to come. We showed how each of our focus areas of right to food/ fuel, right to adequate housing and right to social security were significantly impacted. The data overwhelmingly show that the pandemic greatly affected the practitioners we interviewed, not only on how they conducted their work by adapting to non-face-to-face methods, but also on the nature of their work in terms of impact and scope. Due to the pandemic’s impact on businesses/ employment, citizens who never before needed access to social services suddenly found themselves thrust into precarity and in need of public assistance. Our conversations with practitioners highlighted how the crisis exacerbated existing inequalities and shortcomings in the UK welfare safety net and overburdened third sector organisations in meeting the needs of rights holders. We now turn our attention to our geographical case studies.

¹⁸⁵ For more information, see ‘#LIFTTHEBAN: GIVE PEOPLE SEEKING ASYLUM THE RIGHT TO WORK’ (Refugee Action) < Lift the Ban - Refugee Action (refugee-action.org.uk)>

¹⁸⁶ *ibid*

Part II: Case Studies

The geographical case studies we present here are framed by the practitioners' narratives across each of the UK jurisdictions, loosely focussed on a specific legal case (with the exception of Wales). Although we discussed practitioners' involvement with the legal cases, where relevant, we also discussed matters related to the broader context in which social rights are realised (or not). Rather than relying on our own interpretations, we draw on their words and insights to illustrate various challenges encountered in different 'access to justice' journeys.

- In **Scotland**, we hear from practitioners involved in legal cases related to a lock change evictions policy targeting those seeking asylum in Glasgow. The main focus is on the *Ali* case.¹⁸⁷
- In **England**, we spoke with practitioners regarding the *Pantellerisco* case¹⁸⁸, which revolved around the benefit cap policy under Universal Credit.
- In **Wales**, for reasons explained in the introduction, we did not investigate a particular legal case, but considered the broader context for social rights.
- In **Northern Ireland**, we gained insights from practitioners on the *Cox* case¹⁸⁹, related to terminal illness.

After illustrating our case studies, Part III and Part IV of the chapter expand on the narratives provided here, delving deeper into the themes that emerged using our critical legal-discourse lens.

Scotland: Lock change evictions of those seeking asylum in Glasgow

Table 4.1: Scotland case study participants

Scotland Carole Consultant & Activist, NGO for human rights
Scotland Kelly Solicitor specialising in women/ children/ immigration, NGO for Legal Service
Scotland Julie Solicitor specialising in asylum/ immigration, NGO for Legal Service
Scotland Freya Solicitor, NGO for Housing
Scotland Erica Solicitor, Human Rights Public Body
Scotland Jonas Solicitor related to <i>Serco</i> case
Scotland Abigail Evictions Caseworker, NGO for Asylum Seekers

¹⁸⁷ *Ali (Iraq) v Serco Ltd* [2019] CSIH 54

¹⁸⁸ *R (Pantellerisco and others) v SSWP* [2020] EWHC 1944 (Admin)

¹⁸⁹ *Cox, Re Application for Judicial Review* [2020] NIQB 53 (22 October 2020)

In July 2018, *Serco*, the private company contracted by the UK Home Office to provide accommodation to people seeking asylum living in Glasgow, announced a new evictions policy. This policy entailed that they would change the locks on people's homes if they were no longer eligible for asylum support, which would, in turn, force them into street homelessness. *Serco's* actions raised public outcry and mobilised the legal sector and frontline agencies to step in to help those impacted.

In Scotland, the research team interviewed seven practitioners who all played an active and supportive role in the legal cases that were raised to challenge the lock change evictions, as well as being engaged in work tied more broadly to the social rights context in Scotland. The practitioners included five legal practitioners (solicitors), an evictions caseworker working with an NGO advocating for asylum seekers, as well as a consultant with a grassroots organisation.

The two key legal cases discussed are the *Ali* case¹⁹⁰ and the *Saeedi* case.¹⁹¹ We approach these cases from the practitioners' perspectives, gaining insights at different stages of the adjudication journey, as well as various viewpoints due to their expertise in either immigration law, housing law or other professional background. The *Ali* case was an ordinary action raised in the Court of Session in August 2018 arguing that it was unlawful for *Serco* to evict people without first obtaining a court order, contravening Scots housing law as well as human rights law. The *Saeedi* case was a judicial review lodged with the Court of Session shortly after the *Ali* case in October 2018, arguing that the lock changes were unlawful because of non-compliance with human rights law and the government's public sector equality duty under the Equality Act 2010.¹⁹²

The *Serco* cases effectively challenged two separate issues: first, challenging *Serco's* decision to enact evictions by lock change without obtaining an eviction order and secondly, arguing that *Serco*, as a private company, should be treated as a public authority for the purpose of section 6 HRA, because its functions, providing accommodation for those within the asylum system, were of a public nature. The *Ali v Serco* case represents the contested interpretation of section 6 of the HRA. Section 6 HRA sought to ensure that private bodies performing public functions would require to comply with the ECHR. However, in 2007 in the *YL v Birmingham*¹⁹³ case the House of Lords held that a private care home did not perform functions of a public nature and was not a 'hybrid' public authority for the purposes of the Act.¹⁹⁴ The UK Parliament responded by enacting section 145 of the Social Care Act 2008 to clarify that private care homes exercise a function of a public nature when providing accommodation and personal care. This is a narrow expansion of the test meaning any other service outwith the scope of residential care would be subject to the narrow test applied in *YL*. The *YL* test has prevailed through subsequent case law (see below).¹⁹⁵

190 *Ali (Iraq) v Serco Ltd* [2019] CSIH 54

191 A separate legal case sisted pending the outcome of *Ali v Serco*; *ibid*

192 The *Saeedi* case was settled out of court in the intervening period, as Mr *Saeedi* was granted leave to remain.

193 *YL v Birmingham City Council* [2007] UKHL 27

194 *YL ibid*

195 Section 145 of the 2008 Act was repealed and replaced by section 73 of the Care Act 2014. In Scotland, section 73 of the 2014 Act provides that personal care in residential accommodation paid for by the local authority under sections 12, 13A, 13B and 14 of the Social Work (Scotland) Act 1968 meets the threshold of a function of a public nature and therefore engages section 6 of the HRA. This provision does not apply to children under 18 and excludes adults facing destitution subject to section 115 of the Immigration and Asylum Act 1999 (exclusion from benefits).

In subsequent case law the *YL* precedent has been reinterpreted and can be understood as constituting ‘no single test of universal application’.¹⁹⁶ Case law has focussed in particular on four overarching factors¹⁹⁷ in the determination of whether a private provider performs a public function for the purposes of section 6 HRA thus constituting a ‘hybrid’ public authority: First, is the service publicly funded? (if yes, it may engage section 6 but does not include a commercial contract where the motivation of the service provider is to secure profit); Second, does the service relate to the performance of a statutory function? (if yes, it may engage section 6 but does not include publicly funded contracts of a private nature such as for religious or commercial purposes); Third, is the private provider taking the place of central government or local authorities in providing a public service? (if yes, it may engage section 6 but must be ‘governmental in nature’); Fourth, is the provision of the service a public service? (if yes, it may engage section 6 but does not cover services provided by ‘private schools, private hospitals, private landlords and food retailers’).¹⁹⁸ The *YL* precedent means that there is a focus on the motivation of the service provider in the determination of the act. Thus, ultimately, in the Scottish *Ali v Serco* case the motivation of the service provider to make profit superseded the performance of the public function to provide housing in a human rights compliant way.¹⁹⁹ An appeal to the Supreme Court was made in the *Ali* case, however, permission for appeal was refused. The ‘motivation’ aspect of the test sets a worrying precedent.

A tentatively broader definition of the four factor approach in *YL (2007)* (drawn from *Aston Cantlow (2004)*²⁰⁰ and applied in *R (Weaver) (2010)*²⁰¹, is found in the case of *TH (2016)*²⁰² and applied in *Cornerstone (2020)*²⁰³. In the *TH* case the court expands the four factors to include a further two questions: Fifth, to what extent is the body democratically accountable? and Sixth, would the allegations, if made against the United Kingdom, render it in breach of its international law obligations? This expanded test would provide a much broader basis for human rights compliance when obligations of the state are contracted out. However, the *Ali v Serco* case in Scotland did not explicitly refer to the *TH* case in the judgments of the Outer or Inner House of the Court of Session.

In the first of two judgments in April 2019 the Outer House of the Court of Session considered that *Serco*’s service to provide housing to destitute asylum seekers was “*the implementation by the UK of its international obligations to provide essential services to destitute people seeking asylum*”.²⁰⁴ The court held that the provision of housing formed a function that is ‘governmental in nature’ (satisfying the third factor) and that *Serco* therefore constituted a hybrid body under HRA, meaning a successful outcome for the applicant. However, on appeal in November 2019 the Inner House (Scotland’s highest civil court), did not consider the international obligations dimension, neither in relation to the governmental nature of the duties, nor in relation to whether the allegations would render the UK in breach of its international obligations. Instead, Lady Dorrian concluded that,

¹⁹⁶ Lord Nicholls *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v. Wallbank & Anor* [2003] UKHL 37 at para 12

¹⁹⁷ See *R (Weaver) v London and Quadrant Housing Trust* [2010] 1 WLR 363 para.35-38

¹⁹⁸ *ibid*

¹⁹⁹ *Ali v Serco* [2019] CSIH 54 at para 23

²⁰⁰ *Aston Cantlow* n235 at 75

²⁰¹ *R (Weaver)* n236

²⁰² *TH v Chapter of Worcester Cathedral, Bishop of Worcester in his Corporate Capacity v Worcestershire County Council* [2016] EWHC 1117 (Admin)

²⁰³ *The Queen on the Application of Cornerstone (North East) Adoption and Fostering Service Ltd v The Office for Standards in Education, Children’s Services and Skills* [2020] EWHC 1679 (Admin). This judgment was delivered on 7 July 2020 and there is an appeal outstanding.

²⁰⁴ *Ali v Serco* [2019] CSOH 34 at para 31

*“the state cannot absolve itself of responsibility for such public law duties as the provision of accommodation to asylum seekers by delegating its responsibility to private bodies. If arrangements are made with a private company to provide accommodation, responsibility for the exercise of the public law duty is not delegated, but remains with the Home Secretary”.*²⁰⁵

Whilst it is correct that responsibility remains with the state, the state has also sought to extend obligations to private actors under section 6 of the HRA. In other words, the judgment fails to acknowledge the legislative aim of regulating the private body when performing a public function. This 2019 judgment adopts a much narrower definition of the 2007 YL precedent than in subsequent case law, including *Cornerstone* (2020), *TH* (2016) and *LW v Sodexo* (2019).²⁰⁶ In the latter of these cases the court found that the Secretary of State for Justice had failed in his duty to provide adequate or effective supervision or monitoring of strip searching of female and transgender prisoners to ensure compliance with Article 8 and Article 3 ECHR. In this case, the private contractor, *Sodexo Ltd* had already settled out of court conceding that it owed the claimants positive obligations to ensure ECHR compliant search procedures under the ECHR.²⁰⁷ Thus, both the private contractor (the hybrid public authority) and the Secretary of State had obligations under the ECHR by virtue of the HRA and, in relation to the latter, as a state party to the treaty. This approach would have seen the *Ali v Serco* judgment acknowledge that both the Secretary of State, as well as the private provider of accommodation, were required to act in a human rights compliant way thus rendering the eviction of the asylum seekers unlawful. This case therefore provided us a unique opportunity to better understand the experience of practitioners seeking to support asylum seekers and their right to adequate housing in what is very much a contested legal space where devolved housing law and reserved immigration law coalesce around a contested interpretation of the section 6 HRA.

The solicitors we interviewed generally specialised in either housing law or immigration law, but given the rights holders impacted were asylum seekers, the *Serco* related cases brought together the migration sector and the housing sector around a shared aim (*Julie, Freya*). *Serco's* actions very quickly mobilised the creation of a coalition (lawyers and non-lawyers) to work together to address the pressing challenges that suddenly caused more than 300 individuals to face homelessness and destitution. Julie, a solicitor who specialises in asylum and immigration, called it “a social justice collaboration” (*Julie*), as all involved were inspired by a shared desire to address the human rights violations. Another solicitor, Jonas, said, “I think, principally, on the face of it, they are housing cases, but they are just so inextricably linked with asylum law and asylum support, etc., such that, effectively, the way that I view them is as human rights cases, rather than one or the other” (*Jonas*).

Jonas explained that from his perspective, the unfortunate issue was that the *Ali* case was quite narrow in scope. By comparison, the *Saeedi* case, he said, was by way of judicial review much wider and a forum in which additional evidence could be lodged.

“The beauty of raising proceedings in that particular format”, Jonas said, *“is that additional evidence regarding, for example, prevalence of mental health issues in asylum seekers can be founded upon, rather than effectively a black letter interpretation of how the law is written, it's more a case of how the law should be. And so I think the Saeedi case would have been a good vehicle for achieving what was sought for this vulnerable client base”* (*Jonas*).

²⁰⁵ *Ali v Serco* [2019] CSIH 54

²⁰⁶ *LW v Sodexo Ltd, Secretary of State for Justice* [2019] EWHC 367 (Admin)

²⁰⁷ *ibid* at para.4

Unfortunately, the *Saeedi* case was sisted to await the outcome of the *Ali* case, as *Ali v Serco* was the leading case, which ultimately concluded that that the lock changes were deemed lawful. In the intervening period, Mr Saeedi was granted leave to remain and so his case was not continued following the outcome of *Ali v Serco*. This was a criticism of the practitioners who noted that the process of sisting the *Saeedi* case was fatal to the success of that case, which was in turn frustrating because the judicial review could have included a much broader set of evidence than the ordinary action under *Ali v Serco*. Although accepting of the outcome of the case, practitioners disagreed with the court's interpretation of section 6 HRA in relation to accountability for upholding human rights.

On the one hand, despite the court's verdict in favour of *Serco* and the Home Office, the lock change evictions appear to have stopped. This may be largely attributed to public outcry, which led Mears Group, now the designated entity to house asylum seekers in Glasgow, to publicly state that they do not have a policy of changing locks. Practitioners noted that this does not mean that evictions have stopped altogether, it merely means that the lock change style of evictions is unlikely to be happening at the moment, which may provide asylum seekers some more space to seek support when faced with eviction. This is an example of social rights adjudication with 'symbolic impact' where, despite the applicants losing the case, there has been a longer term symbolic or material change beyond the judgment itself.²⁰⁸ Importantly, the broader issues of housing rights and evictions for those seeking asylum have not been fully addressed in law. However, in the meantime, the campaigning and coalition of practitioners associated with the cases led to greater awareness and potential attitudinal changes over time, linking to Zivi's argument about the importance of rights claiming as a performative act, even when success is not immediate.²⁰⁹ Indeed, it is an example of rights claiming that has helped reshape the narrative and redistribute power incrementally, leading to empowerment in other rights claiming moments. For example, in Glasgow in May 2021, an impromptu protest following a Home Office attempt to evict two Indian nationals during Eid saw a stand-off between the Home Office and a crowd of local residents who would not let the immigration van leave. This civic-led zero-tolerance policy to forced evictions of asylum seekers made headline news across the globe.²¹⁰

Practitioners' perspectives on section 6 of the Human Rights Act

Section 6 of the HRA refers to the acts of public authorities. It was argued that the HRA should apply to those carrying out public functions, such as the housing of asylum seekers, regardless of being a public or private body. This argument was based on section 6 of the Act that states "[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right" (section 6(1)) and that "a 'public authority' includes any person certain of whose functions are functions of a public nature" (section 63(b)). A practitioner explained the operation of this principle as follows: "*private bodies, when they are performing functions of a public nature, are also caught by the Human Rights Act. And that is basically to fulfil the principle that a state can't contract out of its human rights obligations and that the principle is really like when you're standing in the shoes of the state then you also must comply with their human rights obligations*" (Erica).

²⁰⁸For a discussion on this see Rodríguez-Garavito and Rodríguez-Franco n46 at 17-21

²⁰⁹Zivi n71

²¹⁰Libby Brooks, "A special day": how a Glasgow community halted immigration raid', *The Guardian* 14 May 2021; Antoria Noori Farzan, 'Hundreds of protesters block immigration van, forcing Scottish officials to release men detained in raid', *Washington Post*, 14 May 2021; Pablo 'Pampa' Sainz, 'Un muro humano en Glasgow frena la deportación de solicitantes de asilo', *El Salto*, 14 May 2021; 'Écosse. Une manifestation contre les services d'immigration pour empêcher des expulsions', *Ouest-France*, 13 May 2021. The protest was named as one of the ten most influential protests to make a difference in 2021, *Upday News*, available at <https://news.upday.com/uk/10-protests-from-2021/>

As discussed above, the Court of Session (in the Outer House judgment) had, in fact, determined that *Serco* was exercising functions of a public nature and therefore would have to meet human rights standards, which were violated by the lock change evictions. The Home Office, however, appealed that point with what is referred to as a cross-appeal and the Inner House overturned the decision of the Outer House. The Inner House concluded that due to being a private company, *Serco* was not exercising a public function and therefore was not obliged to comply with the HRA themselves (Erica). The court relied on an interpretation of public authority that excluded private bodies whose motivation was primarily for profit.²¹¹ An attempt was made to appeal the verdict with the Supreme Court, which was refused. No reasons for the refusal are given as part of the legal process. This was disappointing for the practitioners involved in the case.

The interviewer asked Erica, who works as a solicitor for a human rights public body, to explain how the decision was overturned. Erica appreciated that the provision in the HRA is relatively uncontroversial, but how the provision has been applied and interpreted over the years by the courts, she says, has been problematic. “The whole idea of it”, she says, “is that you should look at-, and everything in the intention of parliament at the time when the Human Rights Act was going through, is that you should look at the function. So it doesn’t matter, if this company is a private company and if they’re for-profit and they have shareholders and essentially they look very much like a private entity [...] if they look at a function, so in this case it would be the provision of accommodation and other support to asylum seekers, if that function is of a public nature then any exercising that function they are obliged to comply with the Convention” (Erica).

These arrangements are also referred to as ‘hybrid public authorities’. Erica thought that it was quite clear that the provision of the HRA was specifically intended to hold companies such as *Serco* to account, but the court in this instance, unfortunately, took a very restrictive approach to the provision of the HRA. Rather than taking a functional approach, the courts adopted a motivational approach that looked at *Serco*’s institutional nature as a for-profit company, rather than looking at the functions *Serco* were performing (Erica). Drawing on our critical discourse lens, we further extend our analysis on the recontextualisation of section 6 HRA in Section IV of this chapter. The practitioners we interviewed did not agree with the court’s approach and analysis. Erica would have liked an opportunity for the public authority point to have been argued in the Supreme Court, because she believes that it is an issue of “massive public importance”, particularly because of the prevalence of outsourcing and privatisation²¹² in the delivery of public services (Erica). It would have been helpful for the Supreme Court to look at the issue again “in fresh light” to clarify how section 6 of the HRA should be interpreted (Erica).

Another solicitor, Freya, who specialises in housing issues, iterated Erica’s concern about the potential broader implications of the verdict, saying that what may be more widely problematic “is the finding that *Serco* were not a public authority for human rights purposes, and in the context of housing when public authorities increasingly contract out, you know, whether it’s the provision of accommodation or the provision of support for housing, all of those things, you know, are brought into question. So that decision on that front is quite alarming” (Freya).

211 This is a contested position and arguably erroneously applies previous precedent on the interpretation of section 6. For a discussion on this see Katie Boyle, *The Right to an Effective Remedy and Accountability in the Privatisation of Public Services: United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* European Human Rights Law Review, 2020 (6), pp. 610-623

212 Outsourcing and privatisation are similar terms, often used interchangeably, but fundamentally different. When governments engage a nongovernmental unit (for-profit or non-profit) to provide services or carry out functions that the government would normally do itself, e.g. through a contract with an external provider, this is called outsourcing. To avoid confusion and ambiguity, we will primarily use the term outsourcing in this report to refer to the ways in which government engages with other (private) actors to perform government functions, such as medical assessments.

The following subsections further explicate the expressed concerns, particularly as they relate to the outsourcing of public services.

Not an automatic waiver of human rights but cause for concern

The key concern here was that the government could avoid their human rights obligations by outsourcing public functions out to private bodies. However, Erica noted that, *“although the Serco decision is disappointing and we disagree with the Court’s analysis, it doesn’t mean that no private companies or nobody is caught by the Human Rights Act. So I think we were very clear to point out that actually the Court was looking at Serco in a particular context, so that doesn’t necessarily mean that, it has wide-reaching human rights implications for all private providers that may be exercising public functions”* (Erica).

In other words, although the law sided with *Serco* in this instance, it does not mean that all private companies executing public functions will be granted an automatic waiver on their accountability for human rights (as discussed above). However, the verdict is still disconcerting because, Erica said,

“it definitely creates uncertainty and confusion, which is not good, particularly from an individual person perspective. It could potentially create a two-tier human rights system whereby if whatever you need is provided directly by the state then there’s no question that they have to comply with human rights obligations. But then if you happen to be in a different postcode or something-, or in some other situation whereby, through no fault of your own, that service that you need that the state is obliged to provide you, is provided by a private company, then there’s less clarity over that [...] if you’re a body that isn’t sure as to whether you’re caught by the Human Rights Act or not, then that surely has an impact on how you actually provide those services and functions [...] it’s not just about courts, it’s not just about redress to the courts. Like, human rights should come in way upstream and actually influence what you do and influence like how you deliver those services [...] they’re [human rights] there so that you create better services, you create better policy [...] but, you know, the situation has been created where many people maybe will just be like ‘we’ll just act like we’re not’ and then if someone like challenges on it, like that’s not a sustainable and acceptable situation” (Erica).

This indicates that although the *Serco* judgment does not have universal application, it can still have wide ranging impact and create greater confusion surrounding human rights obligations and less influential power over the behaviour of private organisations. This has a longer term material impact. In other words, the verdict creates a space that does not inherently support and promote social rights. Rather than encouraging and advancing a human rights based approach, based on international human rights standards, which includes principles of equality and non-discrimination, participation and accountability, the court’s decision creates an opening for private companies to ‘see what they can get away with’, rather than developing the capacities of ‘duty-bearers’ to meet their obligations. As both Erica and Freya indicated, it causes great concern with respect to increased outsourcing of government public functions, embedding potential inequalities in the system, dependent on your postcode or individual circumstances.

Abigail, one of the practitioners who worked directly with asylum seekers facing evictions due to *Serco*’s lock change policy, expressed great concern about the practices of private companies without sufficient regulation and oversight. Abigail was discussing concerns around asylum support, and the importance of it for people to buy basic needs such as food. She shared examples of how some asylum seekers had their support stopped due to mistakes on the part of the Home Office or housing provider, but that there was no recognition or apology for the mistakes that had massive impact on the lives of individuals.

She said, *“this system is kind of constructed in such a way- or like the fact that the contracts are by private bodies, with very little oversight, kind of means that it’s- ((half sighs)) if they were left to their own devices I think it would just, you know, spiral into these like very unfair and very cruel and inhumane systems. And that’s kind of like why I can really see the continuity between how the housing system works, normally, and to [...] things like putting people in barracks now under Covid [...] there is a continuity between those things and also, you know, how housing managers operate when they basically have to kind of carry out these like very cruel decisions and they’re the ones that have to deal face-to-face with people and they’re probably not paid very well and-, you know, it is a recipe for cruelty”* (Abigail).

Abigail raises the point that the implementation of ‘the system’ is undertaken by individuals who themselves are likely not paid well and merely performing a job.²¹³ Combined with inherent discrimination, it is not difficult to understand how current practices reproduce the inhumane treatment of individuals. On this point, the *Ali* case addressed the inhumane treatment of asylum seekers, challenging any justification of that treatment on the grounds of a person’s immigration status. The asylum seekers in question are referred to as refused or failed asylum seekers, although a more neutral description would be to say that it refers to a person seeking asylum whose asylum application has been unsuccessful and subsequent appeals have been unsuccessful. This is also referred to as ‘appeals rights exhausted’.

The reality, however, is that many of those categorised as ‘failed asylum seekers’ will ultimately be granted refugee status. Julie explains, *“this drives my conviction [...] mostly when people tell me that they’re refugees, I believe that mostly that is probably true, even if they’re failed asylum seekers because they’re case is stalled and with enough time and the right lawyer, almost all of them will be granted refugee status and so what does that mean, it isn’t that the lawyers are lying, it’s a lack of resource at the right time. It’s- it’s a lack of representation”* (Julie). She further explained that under international law they may still be refugees, which means that the State still has obligations. *“It’s our British rules”*, she says, *“that have kind of broken up the system, if you like, in this way, and then created barriers to access, to support”* (Julie).

Freya highlighted that a claim for asylum is in itself *“a human rights and access to justice issue”*. She explained that between being appeal-rights-exhausted and a person being in a position to submit a further claim, often months would pass, usually due to trying to find an immigration lawyer and trying to get the evidence they needed, whether that was from the country-of-origin or elsewhere (Freya). Proving their status is also closely tied to having the necessary resources and appropriate legal representation.

The asylum seekers who faced eviction following *Serco’s* lock change announcement had no recourse to public funds, were not allowed to work and had no other sources of support. Erica discussed the implications of this within the context of the *Serco* case through an international human rights lens. She states that in the *Ali* case arguments were made invoking Article 8 of the European Convention on Human Rights, which is the protection of the right to private home and family life. In addition, Erica goes on to say that the argument made by Ms Ali’s lawyers was that *Serco’s* actions and threat of destitution combined with circumstances that prevent a person from access to work, access to homelessness services and other supports amounts to a contravention of Article 3, which protects against torture and inhumane and degrading treatment, constituting a grievous human rights violation. The nature of them being asylum seekers actually made them more vulnerable to human rights abuses (Erica). Another solicitor, Jonas, echoed what Erica said, stating that,

“I think the fallout of the Ali case, um, is that there are so many individuals here that are effectively relying on friends or are vulnerable to exploitation, the Home Office doesn’t necessarily have any proposal to remove them to-, or detain them, they will effectively just leave them, and it’s inhumane I feel [...] if an individual is in this country and you’re not going to remove them, then to suggest that it’s their own fault that they’re in destitution, to me, is barbaric and I think the reality is that the State should do more to safeguard the individual’s rights, to avoid breach of their human rights, particularly when you’re considering Article 3 considerations. But I think that very powerful points are almost lost in rhetoric, this rhetoric of ‘we’ve got someone who is safe to return to their country and they’re just simply choosing not to’, a judge has said that they’re not credible. These are the observations that I find that are led to justify, effectively, just leaving people to starve” (Jonas).

The examples here demonstrate how immigration status has been used as a justification for the rights-violating treatment of asylum seekers. As explained earlier, the process for requesting asylum is a complex one, which requires considerable evidence and legal representation. Although a person may be denied asylum does not mean they cannot submit a new case and be granted asylum in future, meaning that the label of “failed asylum seeker” is neither an objective nor a permanent category. Yet, it is used as justification for not meeting people’s basic social rights. We take up the point around immigration legal status and associated framings in further analysis in Part IV of this chapter.

One other piece of legislation, which may have had some traction in the *Serco* case, was the Equality Act (2010). Jonas expressed regret that the *Saeedi* case did not get heard, recognising that there were some matters, particularly in relation to the Equality Act, that simply could not have been raised in the context of the *Ali* case because of its nature as an ordinary application (Jonas). Jonas said that *“the principal basis of the petition in the Saeedi case was founding upon a breach in terms of public sector equality duty”* (Jonas). Namely, the argument was that there had been a failure to have due regard to the need to advance equality of opportunity, as would have been the case in relation to persons with the protected characteristic of disability and those without that protected characteristic.

One of the fundamental issues, Jonas said, is that the public sector equality duty is non-delegable. He goes on to explain,

“so, within the context of this case, what we-, what we experienced was that effectively ((sighing)) the Home Office are contracting out their obligations to asylum seekers. That, the principal obligation is on the Home Office, may choose to contract out privately and then effectively try to distance themselves from the decisions that would breach an individual’s rights in terms of the Equality Act by suggesting that they had nothing to do with it. The law is such that it’s non-delegable, that duty, and so it wouldn’t have been a defence. And throughout that particular case there were calls upon Serco, calls upon the Home Office, to provide information about any form of assessment that was carried out, and the effect that it would have on people with a protected characteristic prior to the introduction of the policy, um, radio silence! ((both half laugh)) was effectively the response” (Jonas). Jonas expressed that, from his perspective, that was *“single-handedly the most unfortunate aspect of this case, that there was quite clearly a policy, from our perspective, which was unlawful”* (Jonas). However, because the *Saeedi* case was sisted, there was no opportunity to *“ventilate those particular arguments”* (Jonas).

The test and sist approach (i.e. where all related cases are paused whilst the lead case is heard) presents a significant hurdle in access to justice when dealing with a systemic issue in which a number of people are impacted by a structural failure but their cases are not heard simultaneously. One of the key contributions of the literature in response to systemic issues is that more attention should be paid to designing justice systems that can respond to a systemic issue collectively.²¹⁴ Indeed, in Scotland, the deployment of structural orders for systemic issues forms part of the recommendations of the First Minister's Advisory Group and National Taskforce on Human Rights Leadership.²¹⁵ Boyle has also recommended new procedures for collective cases such as class actions when multiple applicants experience violations as a result of a systemic issue, something which may be made possible under the new group proceedings framework.²¹⁶

Conflicts between reserved and devolved power

As observed in other jurisdictions, the *Serco* case drew attention to the inherent tensions and conflicts between reserved and devolved powers, in the ways that asylum/ immigration law intersected with housing law. It was generally accepted by the practitioners we interviewed that there is a will to make things better in Scotland, which contrasts with the 'hostile environment' being promoted by the UK Government's Home Office, and that Scotland is more progressive in housing law compared to England. But, one of the practitioners noted, "*the UK Government is making immigration policy which is constraining the powers of the Scottish Government or causing really bad outcomes in Scotland where the Scottish government is legally responsible*" (Julie).

Conditions for asylum seekers: Insights from practitioners on the ground

The final key point to underscore about the Scottish case study concerns the living conditions and broader challenges individuals seeking asylum face day to day. Although the *Serco* case revolved around the injustices of the lock change eviction policy, it became clear from speaking to practitioners that the lock changes were merely the tip of the iceberg. Some of the other issues that were highlighted in the interviews were that asylum seekers are only allowed up to £1000 of possessions in their home, losing asylum support after 28 days of a claim being refused or accepted, money being provided via a card that can only be used at certain locations, often not including public transport, and not being allowed to leave their homes for more than six days at a time. All of these constraints make life for asylum seekers more difficult and create barriers to accessing justice. Abigail stated that,

"there's the kind of large, overarching injustices but then there's all these like tiny examples and sometimes those to me are like what really speak to the larger injustices of the situation, because the tiny ones are so absurd and so, like, petty and have to be built on so many different, like things of policy kind of meeting together? Um, that stop people in all these like tiny ways from just being a normal human being" (Abigail).

A better understanding of the difficult living conditions of asylum seekers helps to underscore that social rights should not be categorised as luxuries, but minimum requirements for treating people with humanity and dignity. This sentiment is expressed strongly by practitioners, but currently absent from many policies and service provisions, eluding justice for social rights.

²¹⁴ Boyle, *Economic and Social Rights Law* n8 at 38-39; Rodríguez-Garavito and Rodríguez-Franco n46; Landau n56

²¹⁵ See First Minister's Advisory Group on Human Rights Leadership (Edinburgh, 2018) available here: <https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf> and the National Taskforce for Human Rights Leadership Report (Edinburgh 2021) available at <https://www.gov.scot/publications/national-task-force-human-rights-leadership-report/documents/>

²¹⁶ Boyle SHRC (2018) n8

The Scotland case study drew on practitioner insights into some of the broader dynamics observed across the data that include challenges related to the outsourcing of government functions and the intersections of reserved and devolved frameworks, in this instance immigration and housing. The Scottish context also raised significant concerns regarding the inhumane treatment of those seeking asylum. Despite a commitment in Scotland to treat people in ways that honour their humanity and dignity, UK Home Office policy and ideology curb efforts to realise these goals.

England: Digitisation, algorithms and the direct impact on social security provisions

Table 4.2: England case study participants

England Andrea Welfare Benefits Adviser related to <i>Pantellerisco</i> case
England Roland QC related to <i>Pantellerisco</i> case
England Miles Welfare Rights Adviser, NGO to combat child poverty
England Jane Welfare Rights Adviser, NGO to combat child poverty
England Claire Solicitor related to <i>Pantellerisco</i> case
England Tobias Barrister related to <i>Pantellerisco</i> case

In 2013, the benefit cap was introduced in England, which imposes a limit on the total amount of benefit a person can receive. In September 2019, judicial review proceedings were issued on behalf of Ms Sharon Pantellerisco, a single parent, and her three children. The judicial review challenged the approach adopted by the Secretary of State for Work and Pensions (SSWP) to the calculation of the benefit cap in the Universal Credit statutory scheme. The case was heard in May 2020.

To be exempt from the cap, claimants must be working at least 16 hours per week earning the national living wage. Despite meeting the designated threshold, Ms Pantellerisco's benefits were still capped as she was paid on a four-weekly basis, rather than by calendar month. As the judgment²¹⁷ explains: "A year has 13 4-week periods in it, but 12 monthly assessment periods. Therefore [...] everyone paid on a 4-weekly cycle will, each year, have eleven Universal Credit assessment periods in which they receive one thirteenth of their annual salary, and one assessment period in in which they receive two thirteenths of their salary".

Thus, as the assessment period for Universal credit is calculated as a calendar month, and Ms Pantellerisco was paid on a 4 week cycle rather than monthly, DWP computer system undercounted her wages eleven out of twelve assessment periods, subjecting her to the benefit cap.

Judgment was given in July 2020, with the court finding in Sharon Pantellerisco's favour – i.e. that the algorithm used to calculate entitlement was flawed, irrational and therefore unlawful. At the time the interviews were conducted, the SSWP were in the process of appealing to the Court of Appeal and the practitioners awaited next steps. In a very disappointing outcome, the appeal was heard and judgment was given in October 2021, allowing the SSWP's appeal. Permission to appeal to the Supreme Court was refused by the Court of Appeal. We will return to this point at the end of this section.

²¹⁷R (*Pantellerisco and others*) v SSWP [2020] EWHC 1944 (Admin)

This case study draws out some unique aspects of the case by drawing on insights from practitioners at different stages of the adjudication journey, ranging from frontline advice to QC. We interviewed six practitioners, four of whom were directly involved in the case, including a welfare rights adviser who supported Sharon Pantellerisco, a solicitor, a barrister and a Queen's Counsel (QC), both recognised for their legal expertise in social security. In addition, we gained perspectives from two additional welfare rights advisers.

The judicial review case is only one component of Sharon Pantellerisco's journey to address the violation of her social rights. Insights from the welfare rights adviser, Andrea, shed light on the processes and procedures that preceded the judicial review proceedings. Andrea was Sharon Pantellerisco's first point of contact when she attended the food bank where Andrea works. Andrea describes the situation as follows, *"it was a lady that had attended the food bank and through no fault of her own she was on working and child tax credits. She had a breakup and was then- had to apply for universal credit because of that change in circumstances. And the way universal credit is calculated is that they calculate it as a monthly income. And with this particular client, she was paid every four weeks, so whilst she was working the required hours and earning the minimum wage that meant she should be exempt from the benefit cap, due to the way that universal credit calculated they calculated her four weekly earnings as a monthly earning, so they determined she actually fell under the cap. And she lost initially, because there were four children on the claim initially²¹⁸, she was losing seven hundred pounds a month and they applied that, yes, they applied that instantly to her, so all of a sudden she found herself 700 pounds a month in finance worse off"* (Andrea).

Mandatory reconsideration and tribunal hearing

When DWP initially (mis)calculated Sharon Pantellerisco's hours and wages and determined that she would be subject to the benefit cap, DWP immediately applied the cap and thereby reduced Sharon Pantellerisco's income by £700 per month overnight, even though she should have been exempt. DWP's regulations indicate that a person should be given a 9 month grace period, so that there is time to prepare for their earnings to be reduced. However, in Sharon Pantellerisco's case, the grace period was not granted, because using the same monthly income calculation, DWP determined that she did not meet the earnings threshold in the 12 months prior and was therefore ineligible for the grace period.

To challenge this, Andrea raised a mandatory reconsideration, which essentially asked DWP to review their decision. DWP responded that their calculations were correct, as they were based on monthly earnings, and stated that a calculation based on 4-weekly earnings was not possible. At that point, Andrea adopted a two-pronged approach. She appealed to the First Tier Tribunal on two issues, the unlawful application of the benefit cap and DWP's negligence in not applying the 9 month grace period. In addition, she sought out further legal advice, which resulted in Sharon Pantellerisco's case being taken on for judicial review. The tribunal proceedings were then paused to await the outcome of the judicial review.

Barrier to participation

Eventually, Andrea managed to get DWP to overturn the grace period and pay Sharon Pantellerisco a lump sum for the money she was due. *"Unfortunately"*, Andrea said, *"because she had an overpayment of tax credits previously, they deducted all of that from her straight away"* (Andrea). Although Andrea acknowledged that the overpayment needed to be paid

²¹⁸When the judicial review was issued, Ms Pantellerisco's eldest child was 19 and had finished school; she still lived at home with her three younger siblings.

back, rather than taking the deduction all at once, Sharon Pantellerisco could have paid it back at twenty pounds a month which, Andrea said, would have been acceptable. Andrea explained,

“whilst I understand we have to pay the overpayment it just seems wrong to- for that to have- because [she] had been struggling, she had to rely on support for, you know, not just from us [the food bank] but to help with fuel and also to help with the school uniforms for the children so [...] I think they should not take it all in that lump sum, and they do it all the time with everybody, so they don't- they don't look at the fact that people might have rent arrears or mortgage arrears because of their actions in the first place” (Andrea).

So, whilst there was no disagreement with regards to paying back the overpaid tax credits, there could have been some consideration on the part of DWP to not take a lump sum, but arrange a gradual repayment scheme. This example demonstrates that these processes are not participatory for rights holders and often lack consideration or consider fundamental human dignity. The burden of DWP decisions is most acutely felt by the individual who is not given any opportunity to participate in processes that have direct and significant impact. In addition, as Andrea pointed out, the reason rights holders end up in even more precarious financial situations, accumulating additional debts, is a result of benefit mistakes that then take a very long time to resolve.

The notion of participation was also raised in relation to the judicial review. The interviewer asked Andrea to what extent Sharon Pantellerisco was able to engage with the legal proceedings and she responded, *“Sharon did start off with it, but she couldn't understand it, so I think again that was because it was all legal jargon” (Andrea)*. The QC we interviewed, Roland, echoed the sentiment that by the time litigation reaches the level of judicial review, there is not much engagement with rights holders themselves. He said, *“at the level at which I get involved in advocacy on these sort of point of laws or issues, the answer is not very much, to be honest, I mean, it does become a conversation between lawyers or the judge” (Roland)*. Roland acknowledged that *“there's a lot of awareness about the need for claimants to be involved”*, but that if he were identifying a problem with regard to participation, it would be at the local level, rather than in the appellate system (Roland). The barriers around participation and access to advice will be taken up in greater detail in a broader discussion Part III of this chapter.

In the next section, we address the specific issue that was contested in Sharon Pantellerisco's case, which involved the application of a benefit cap due to a monthly calculation of her working hours and wages, whilst she was paid on a 4-weekly basis.

The benefit cap: Work incentivisation - *SSWP v Johnson*²¹⁹

All the practitioners agreed that, on the face of it, the issue seemed almost absurd. The mere fact that someone who is paid 4-weekly is subject to the benefit cap, whilst a person working the same number of hours, at the same pay rate but paid monthly would not be subject to the benefit cap, seems rather senseless. The *Pantellerisco* judicial review came on the back of another benefit cap case, which was unsuccessful in May earlier that year.²²⁰

Claire, the solicitor, who took on the case, explained,

²¹⁹ *Secretary of State for Work And Pensions v Johnson & Ors* [2020] EWCA Civ 778 (22 June 2020)

²²⁰ *DA & Ors, R (on the application of) v Secretary of State for Work and Pensions* [2019] UKSC 21 (15 May 2019) concerning lone parents subject to the benefit cap. Despite the policy, intended to incentivise work, having a disproportionate and damaging impact on the claimants and their children, the court held (by a 5-2 majority) that the discrimination was objectively justified and not manifestly without reasonable foundation.

“it was May last year we had lost the benefit cap case, the Supreme Court one, the one challenging it in relation to lone parents generally [...] and then in June I pick up Sharon’s case, and it’s just well, yeah, you know, it doesn’t matter that we’ve just lost the benefit cap case, this is perverse, purely because of the way her employer pays her, you know, she’s benefit capped. That wasn’t, you know, that was never the intention of the benefit cap. The benefit cap is all about work incentivisation, even though they still apply it during the middle of a pandemic, but we know that’s a side issue, well that’s a separate issue, but [...] this is about incentivising you to work with an employer who pays monthly rather than four-weekly” (Claire).

In addition to pointing out the flawed reasoning regarding the application of the benefit cap to Sharon Pantellerisco, she also refers to the broader purpose of the benefit cap as an incentivisation measure to encourage people to work. At another point in the interview, Claire pointed out that, aside from the challenge raised on Sharon Pantellerisco’s behalf, there are wider concerns regarding the fairness of the legislation itself. Seventy percent of those being affected by the benefit cap, prior to the Covid-19 pandemic, were lone parents, she said, and she questioned the validity of a work incentivisation measure that disproportionately singles out lone parents for such punitive treatment (Claire). Moreover, she goes on to say, the benefit cap is inadequate in terms of level of subsistence benefit. It was recognised, she said, that it pushes families well below the poverty line (indeed this point was accepted by the Supreme Court²²¹), underscoring broader concerns about its inadequacy and the lack of accessibility to meaningful benefits (Claire).

This key point is indicative of the legal vacuum in terms of minimum thresholds and normative standards in social rights protection. This legal vacuum can be seen in cases where lawyers are relying on ECHR arguments when the ECHR is not a treaty that recognises the full breadth of human rights, and so practitioners cannot rely on the substantive standards or content of other treaties such as ICESCR. In other words, the inadequacy of the social rights provision was not the subject of the case as there is no stand-alone right to an adequate standard of living. Rather the focus of the case was whether applying the cap could be justified on the basis of work incentivisation, despite its discriminatory impact on lone parents whose right to private and family life was engaged.

Lack of incorporation of international human rights protections

A theme that has emerged across the jurisdictions concerns the difficulties encountered in litigating social rights issues. Claire raised her concerns regarding previous cases litigated up to the Supreme Court to challenge the benefit cap. The limitation, she said, is that because the International Covenant on Economic, Social and Cultural Rights has not been incorporated into domestic law, solicitors are limited in the way they can challenge the unfairness of the benefits system. The main way of challenging them is through Article 14 discrimination claims under the European Covenant on Human Rights (ECHR), *“so, Article 14 in conjunction with A1P1²²² and then Article 8²²³ potentially, and you know, it’s putting a round peg into a square hole”* (Claire). The lack of incorporation of international human rights instruments was raised as a barrier by a number of practitioners.

The incorporation of international human rights law into the domestic legal system occurs when there is a domestication of international norms coupled with access to an effective remedy for a violation.²²⁴ Sometimes incorporation can be direct – such as through direct

221 *ibid* para.35-37

222 Article 1 of the first Protocol to the European Convention on Human Rights (ECHR) (A1P1), which applies in the UK by virtue of the Human Rights Act 1998 (HRA 1998)

223 Article 8: Respect for private and family life, Human Rights Act 1998 (HRA 1998)

224 Boyle *Economic and Social Rights Law* n8 at 41

reference to an international treaty.²²⁵ Sometimes incorporation can be indirect, such as through the constitutionalisation or legalisation of a right mirroring an international normative standard implicitly but not explicitly. And sometimes incorporation of a right can be sectoral, where for example the right to adequate housing is provided for under housing legislation, or the right to social security under social security legislation. Essentially domestic incorporation of international norms, be that direct, implicit or sectoral, should be both derived from and inspired by the international legal framework and should at all times be coupled with an effective remedy for a violation of a right.²²⁶ Forms of legal integration that do not facilitate access to a remedy for a violation of a right cannot amount to incorporation but should be defined as a means of implementation, rather than incorporation.²²⁷

The devolved legislatures across the UK have already taken significant steps to either implement or incorporate international human rights obligations into domestic devolved law under the devolved competence to 'observe and implement international obligations'.²²⁸ In Scotland the First Ministers Advisory Group²²⁹ and the National Taskforce²³⁰ for Human Rights Leadership has recommended a human rights Act for Scotland that incorporates economic, social, cultural and environmental rights (discussed below). The Senedd (the Welsh Parliament) has set out plans to follow suit.²³¹ In 2021, the Scottish Parliament unanimously passed the UNCRC Incorporation (Scotland) Bill incorporating the UN Convention on the Rights of the Child into devolved Scottish law. The UK government challenged the legislation in the Supreme Court, however, although the court decided that the Bill requires technical changes relating to devolved competence²³², there is no "issue with the Scottish Parliament's decision to incorporate the UNCRC" into devolved law.²³³

In Wales, the Senedd has increased protection of international human rights through the Rights of Children and Young Persons (Wales) Measure 2011 placing a duty on devolved bodies to have due regard to the UN Convention on the Rights of the Child and is now considering a similar approach to the UN on the Rights of Persons with Disabilities (as well as plans for a national taskforce exploring further incorporation through a Human Rights Act for Wales). In both Scotland and Wales, the socio-economic equality duty has

225 See for example the constitution of Argentina (Article 25) or the Norwegian Human Rights Act 1999

226 Boyle SHRC (2018) n8 at 14. See also UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19. Para.77-80; UN Basic Principles, n123. See also 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.4.

227 For example the model employed by the Welsh Assembly under Rights of Children and Young Persons (Wales) Measure 2011 is a form of legal integration, rather than incorporation, of the UN Convention of the Rights of the Child. This is because the legislation requires Ministers to have 'due regard' to the treaty, rather than a 'duty to comply' meaning there is no remedy for non-compliance. The due regard duty is procedural rather than substantive.

228 Under paragraph 3 of Schedule 2 of the Northern Ireland Act 1998 International relations, including relations with territories outside the UK, the European Communities (and their institutions) and other international organisations and extradition, and international development assistance and co-operation are excepted matters (i.e. beyond the legislative competence of the NI Assembly). However, an exemption to this excepted matter is the competence to observe and implement international obligations, obligations under the Human Rights Convention and obligations under Community law. Under Section 98 of the NI Act 'international obligations' are defined as 'any international obligations of the UK other than obligations to observe and implement Community law or the Convention rights.' Similar conditions apply in Wales and Scotland. Schedule 7A para.10(3)(a) Government of Wales Act 2006 exempts 'observing and implementing international obligations' from reserved matter of international relations and foreign affairs. Schedule 5 para.7(2)(a) of Scotland Act 1998 exempts 'observing and implementing international obligations' from foreign affairs reservation

229 First Minister's Advisory Group (FMAG) n254

230 National Taskforce n254

231 <https://research.senedd.wales/research-articles/where-next-for-human-rights-in-wales/> See Hoffman, S.; Nason, S.; Beacock, R.; Hicks, E. (with contribution by Croke, R.) (2021). *Strengthening and advancing equality and human rights in Wales*. Cardiff: Welsh Government, GSR report number 54/2021 Available at: <https://gov.wales/strengthening-and-advancing-equality-and-humanrights-wales> for detailed recommendations

232 Removing provisions relating to the UK Parliament and UK Ministers

233 *REFERENCES (Bills) by the Attorney General and the Advocate General for Scotland - United Nations Convention on the Rights of the Child and European Charter of Local Self-Government (Incorporation) (Scotland) [2021] UKSC 42 (06 October 2021) para.4*

now been devolved and has been commenced in Scotland as the Fairer Scotland Duty²³⁴ – meaning designated devolved bodies, including the Scottish Ministers, must have due regard to addressing socio-economic inequality when undertaking their duties (section 1 of the Equality Act 2010 has never been commenced in England). With increased devolution Scotland has also passed the Social Security (Scotland) Act 2018 and whilst the legislative scheme does not fully incorporate or enshrine the right to social security as recognised in international law²³⁵ it does declare social security as a human right required for the realisation of other rights. The Social Security Commission established under the 2018 Act is responsible for oversight of the scheme and may take international human rights instruments into consideration, in particular ICESCR and associated UN General Comments.²³⁶ In Northern Ireland the Ad Hoc Committee on a Bill of Rights is revisiting the peace agreement commitment to design a Bill of Rights for the particular circumstances of Northern Ireland. The Northern Ireland Human Rights Commission's proposals, following a ten year participatory process, recommended the incorporation of economic, social, cultural and environmental rights as part of this renewed framework building on ECHR protections.²³⁷ The Northern Ireland Assembly has already taken steps to implement international human rights into the devolved framework. The Commissioner for Older People Act (Northern Ireland) 2011 requires the Commissioner to have regard to the United Nations Principles for Older Persons when carrying out his/her functions²³⁸ and the Commissioner for Children and Young People (Northern Ireland) Order 2003 requires the Commissioner to have regard to the UN Convention on the Rights of the Child in exercising his/her functions.²³⁹

Incorporation is by no means a panacea, equally it comes with important questions around how to make any particular model work in practice for the particular constitutional circumstances of the state.²⁴⁰ Nonetheless, its benefits mean creating an accountability framework in which decision-making relating to the provision of social rights can be examined with reference to normative standards – at the very least requiring the state to justify its approach to economic and social policy when social rights violations occur.

The model adopted in Scotland goes beyond direct incorporation of international treaties and recommends embedding a number of international norms and comparative best practice beyond the Scotland Act 1998/ Human Rights Act 1998 model. For example, reasonableness as a means of review is to be interpreted more widely than the domestic form of *Wednesbury* reasonableness (irrationality)²⁴¹, lowering the bar for findings of incompatibility and aligning with jurisprudence in South Africa²⁴², as well as the reasonableness test under OP-ICESCR.²⁴³ It recommends that the new statutory framework place human dignity as the value which underpins all human rights forming

²³⁴The Equality Act 2010 (Authorities subject to the Socio-economic Inequality Duty) (Scotland) Regulations 2018 SSI No.101

²³⁵it does not directly incorporate Article 9 ICESCR

²³⁶Social Security (Scotland) Act 2018

²³⁷Northern Ireland Human Rights Commission, Bill of Rights for Northern Ireland, Advice for the Secretary of State (2008) <http://www.nihrc.org/uploads/publications/bill-of-rights-for-northern-ireland-advice-to-secretary-state-2008.pdf> at 170

²³⁸Section 2(3)(b)

²³⁹section 6(3)(b)

²⁴⁰See Boyle, *Economic and Social Rights Law*, n8

²⁴¹Boyle SHRC (2018) n8

²⁴²*Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) <http://www.saflii.org/za/cases/ZACC/2000/19.html>

²⁴³<https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx> for a discussion on the 'proportionality-inflected' broader reasonableness review adopted by the Committee see Sandra Liebenberg, *Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol*, *Human Rights Quarterly*, Volume 42, Number 1, February 2020, pp. 48–84, p.72. See also Katharine G. Young, *Proportionality, Reasonableness, and Economic and Social Rights*, in *Proportionality: New Frontiers, New Challenges* 248, 268–71 (Vicki C. Jackson & Mark Tushnet (eds., 2017) at 269; Wojciech Sadurski, *Reasonableness and Value Pluralism in Law and Politics*, in *Reasonableness and Law*, at 129, 131–34; Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* 186–191 (2012)

a purposive foundation for interpretation, in this case aligning with constitutions and jurisprudence in South Africa²⁴⁴, Germany²⁴⁵ and Colombia²⁴⁶ among others.

There are also proposals for enhanced access to justice mechanisms that address barriers relating to costs, standing, legal advice and advocacy. The report recommends that remedies should be accessible, affordable, timely, and effective.²⁴⁷ Regulators, inspectorates, ombudsmen and complaint-handlers should systematically embed human rights standards or approaches into their ways of working as part of everyday accountability.²⁴⁸ And when other mechanisms fail, the judiciary should issue appropriate and effective orders to deal with violations, including guarantees of non-repetition.²⁴⁹

The report recognises that further work on access to justice is required, suggesting that the framework could provide for the full range of appropriate remedies under international law, including targeted remedies such as structural interdicts.²⁵⁰ The potential development of structural interdicts to respond to systemic issues²⁵¹ aligns with social rights jurisprudence in South Africa²⁵², Kenya²⁵³, Colombia²⁵⁴, the US²⁵⁵ and Canada²⁵⁶ among others. It forms part of the recommendations of the Academic Advisory Panel²⁵⁷, the Scottish Human Rights Commission²⁵⁸, the Bonavero Institute of Human Rights report²⁵⁹ and is supported by the empirical data in this project and our work on structural remedies for systemic issues.²⁶⁰

244 *Mahlangu and Another v Minister of Labour and Others* (CCT306/19) [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 ILJ 269 (CC); 2021 (2) SA 54 (CC) (19 November 2020) <http://www.saflii.org/za/cases/ZACC/2020/24.html>

245 Ingrid Leitjen, 'The German Right to an *Existenzminimum*, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection', (2019) (16)(1) German Law Journal 23

246 Colombian Constitutional Court, Decision T-025 of 2004 https://www.brookings.edu/wp-content/uploads/2016/07/colombia_t-025_2004.pdf

247 National Taskforce n254 Recommendation 21

248 Ibid Policy Objective 22

249 Ibid Policy Objective 25

250 Ibid Recommendation 25

251 Katie Boyle, Academic Advisory Panel Briefing Paper Access to Remedy – Systemic Issues and Structural Orders 30 November 2020, available at <https://storre.stir.ac.uk/retrieve/83ce5341-cc71-43dd-98ad-72be806d9a10/BOYLE%20Systemic%20Issues%20and%20Structural%20Orders%20Briefing%20Paper.pdf>

252 *Equal Education and Others v Minister of Basic Education and Others* (22588/2020) [2020] ZAGPPHC 306; [2020] 4 All SA 102 (GP); 2021 (1) SA 198 (GP) (17 July 2020) <http://www.saflii.org/za/cases/ZAGPPHC/2020/306.html>

253 Available at <https://katibainstitute.org/wp-content/uploads/2021/01/Petition-3.2018-MituBell.pdf> For a discussion on this recent case see Victoria Miyandazi, 'Setting the Record Straight on Socio-Economic Rights Adjudication: Kenya Supreme Court's Judgment in the Mitu-Bell Case', (*Oxford Human Rights Hub*, 1 February 2021) available at <http://ohrh.law.ox.ac.uk/setting-the-record-straight-on-socio-economic-rights-adjudication-kenya-supreme-courts-judgment-in-the-mitu-bell-case/>

254 Manuel José Cepeda Espinosa and David Landau, *Colombian Constitutional Law: Leading Cases* (OUP 2017) see chapter 6 on social rights

255 Katharine Young, 'A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review', (2010) 8(3) International Journal of Constitutional Law 385

256 Kent Roach, *Constitutional Remedies in Canada*, (2nd ed. Canada Law Book, 2013)

257 Boyle, Academic Advisory Panel Briefing Paper Access to Remedy n290

258 Boyle, SHRC (2018) n8 and Scottish Human Rights Commission, 'Adequate and Effective Remedies for Economic, Social and Cultural Rights Background briefing paper for the National Taskforce on Human Rights Leadership' (SHRC, December 2020) available at <https://www.scottishhumanrights.com/media/2163/remedies-for-economic-social-and-cultural-rights.pdf>

259 Manuel Cepeda et al, The Development and Application of the Concept of the Progressive Realisation of Human Rights, Report to the Scottish National Taskforce for Human Rights Leadership, (Bonavero Institute, December 2020)

260 Mukherjee n59

Incorporation and justiciability of ESR is part of mainstream political reform and civil society discussions on constitutional change in Scotland, Wales and Northern Ireland and is emerging in civil society discussions²⁶¹ and political interventions²⁶² at the national level. The long-held rejection by the UK²⁶³ of creating legally enforceable economic and social rights protections through direct or indirect or sectoral incorporation is becoming more difficult to justify as it constitutes a significant accountability gap for the state. The data reflects a frustration about trying to access justice for social rights but having to rely on mechanisms that are not designed to reflect the full international legal framework, such as the ECHR – meaning the ‘round peg in a square hole’ analogy is indicative of a national human rights legal framework that is not functioning for the protection of social rights. We recommend steps are taken to address this accountability gap across the UK.

Automation and algorithms

We now return to the calculations of Sharon Pantellerisco’s hours and wages that ultimately resulted in an unfair outcome and violation of her right to social security. Sharon Pantellerisco’s employer was a “Real Time Information” (RTI) employer, meaning that information about its employees is passed from the employer to HMRC and from them to DWP. In other words, it is an automated process that reports earnings directly from HMRC to DWP. As, Tobias, the barrister involved put it, “it’s rather a sophisticated operation” (Tobias). The way Sharon Pantellerisco’s wages were calculated wrongly was on account of an algorithm, which did not take into account the frequency of Sharon Pantellerisco’s income. According to Tobias, this was not because that information was not available to DWP, but because it was not made use of. He said,

“say a person is paid every four weeks. How do we know that they’re actually being paid every four weeks? Other than it’s not just that they happen to only do 28 days work in that 31-day period, well, the answer is because their own PAYE system tells them [...] it’s just that they [DWP] couldn’t be bothered to plug that into the system. They collect all the data that they need to be able to see that this is a person who is working the specified amount, but they then have a sort of crappy, ultra-simplified approach to deciding what a person is earning, which fails to make use of that data” (Tobias).

Of course the challenge is that the government have invested in a computer program, which is now proven to be unfit for purpose, but are extremely reluctant to change it. Key evidence from HMRC in the case demonstrated that DWP was in receipt of all of the information they required as part of the RTI provided by HMRC. It was this latter point that proved fatal to SSWP’s case in the initial judgment when Justice Darnham concluded:

“The importance of ensuring that the payment system can be automated is clear and not in dispute. During the hearing, much the most powerful consideration in favour of maintaining the status quo was the suggested difficulty in collecting and deploying the data necessary to enable the calculation of earned income in relevant assessment periods to be carried out automatically when payment had been made on a four-weekly basis. But that difficulty substantially disappeared when the further evidence was obtained from Ms Hargreaves and Ms Krahé. There was little evidence that the SSWP ever focussed on the lunar month problem, as opposed to the general benefit of

261 See for example the work of Just Fair, Sustain UK, Nourish Scotland, the Food Foundation, the work of the Northern Ireland Human Rights Consortium and Scottish Human Rights Consortium as well as all of the national human rights institutions, in particular the Scottish Human Rights Commission’s programme of work on economic, social and cultural rights: <http://www.scottishhumanrights.com/economic-social-cultural-rights/>

262 See for example recent statements by David Lammy (Labour) on incorporation of social rights and the link with accountability for social rights violations, such as Grenfell and Windrush: David Lammy speech: “Human rights are an integral part of Labour’s mission”, 7 July 2021, available at <https://labourlist.org/2021/07/human-rights-are-an-integral-part-of-labours-mission-lammys-speech/>

263 For a full discussion on this see Boyle, *Economic and Social Rights* n8

a universally applicable monthly assessment period, and nothing to suggest the possibility of solving that problem was ever considered and rejected. In those circumstances, it seems to me that the outcome of the balance is obvious and irresistible. I cannot see how any reasonable Secretary of State could have struck the balance in the way the SSWP has done in this case".²⁶⁴ The practitioner perspective noted the importance of this evidence to the outcome of the case:

"I think the judge refers to the witness, the evidence of a woman called Helen Hargreaves [...] who gave- provided [representation for the Claimants] with evidence about pay cycles, how common it was to be paid monthly, how common it was to be paid fortnightly, um, what the Revenue, HMRC, were told by employers as a matter of routine and one of the pieces of evidence that she was able to produce in response partly to what the DWP said at the hearing was the information that the nature of a pay cycle was automatically referred by the employer to HMRC. So, in other words, HMRC could know, even if it chose not to read it, it could know whether you were paid monthly, fortnightly, or weekly or whatever. And once you've got there then it became very unreal for the Department to say, well, we just couldn't design a computer system to deal with it. They had the information. And they got the information without any extra hassle, it was being automatically supplied to them (2 sec) and all they had to do was apply it properly. That was quite important, because otherwise you're back in the judge being very resistant to the idea that you could tell the court-, tell the DWP how to spend hundreds of millions of pounds designing a computer system, however odd the result. If you read the judgement, I mean one of the things to watch is that information about what HMRC were being told (2 sec) I think the judge refers to it at the end, that's one of the things that did make a difference. I mean, you know, at the end of the hearing I was a bit bothered the judge had been persuaded by the DWP that the problems with computerisation were so big that we ought to lose, but, um, we did in the end crack that with the material from Helen Hargreaves" (Tobias).

The absurdity of refusing to use information being supplied as a matter of routine became all the more indefensible when balanced with the competing position that Sharon Pantellerisco seek to change the way in which she has paid. As noted by Tobias,

"Well, we had pretty good evidence from-, again from Helen Hargreaves, but [...] also from Sharon herself- of just about how impossible that was. I mean[...] at that level, the Department's case is pretty unconvincing really, because I mean the truth is that Sharon was being paid as a carer, by a local authority whose own payment cycles would be monthly, sorry, would be four-weekly. They couldn't change it unless they changed their whole payment system to a monthly basis, which would muck up all sorts of other contracts. So it was a pretty impractical suggestion that she go to the employer and ask them to change the payment cycle and the judge wasn't particularly attracted by it. So in terms of holding decision makers to account, I suppose that's what it comes down to when we're talking about whether or not to hold DWP to account for changing their algorithms and changing their program" (Tobias).

A call for greater parliamentary scrutiny

One way to avoid such costly errors is to increase pre-legislative scrutiny. Tobias said, *"if I could pass a law, it would be to require much greater parliamentary scrutiny of the detail of law [...] it shouldn't be the case that when lawyers come to a situation, it emerges that we're the first people to think about it"* (Tobias). Particularly with regard to social security legislation, Tobias cautioned that *"the amount of time people spend thinking about it and their practical opportunities to change it are very limited [...] if you look at how long the subcommittee that addresses social security legislation has spent looking at an instrument that effectively affects millions of people and the government billions of pounds of public expenditure, you're not going to say, well, it's like an hour and a half or something"* (Tobias).

In other words, a crucial component for achieving more just and fair outcomes is to allocate greater time for parliamentary scrutiny and the ability to amend regulations as part of pre-legislative scrutiny. More extensive scrutiny is a way to achieve better decision making. *“We have millions and billions of pounds of public expenditure designed to protect the welfare of lots of very, very, very vulnerable people”*, Tobias said, *“and that’s a huge public concern”* (Tobias). Effectively, the recognition that a policy is flawed should occur before reaching court.

We now return to the outcome of the case. By a judgment handed down on 20 July 2020, Garnham J had found in Ms Pantellerisco’s favour, declaring that:

“[T]he calculation required by regulation 82 (1) (a) read together with regulation 54 of the Universal Credit Regulations 2013 is irrational and unlawful in so far as employees who are paid on a four weekly basis (as opposed to a calendar monthly basis) are treated as having earned income of only 28 days’ earnings in 11 out of 12 assessment periods a year”.²⁶⁵

Despite a positive outcome, it did not immediately provide an effective remedy for Sharon Pantellerisco, as the SSWP put in an application to the Court of Appeal, which meant more waiting.

“The Court of Appeal is notoriously slow”, Claire said, “because it’s under-staffed, over-worked, and Covid-19 has just exacerbated that situation even more. So even though permission to appeal the application went in sometime in July after the judgement and refused permission to appeal by the High Court itself, you know, we’re still waiting for a decision on whether they’re going to be granted permission” (Claire).

So, when the interviews were concluded, there had not yet been any progress with respect to a potential appeal and no materialisation of any potential remedy for Ms Pantellerisco.

Pantellerisco on appeal: A failure to provide a remedy

In a disappointing outcome, Ms Pantellerisco lost in the Court of Appeal on 8 October 2021, when the Court of Appeal overturned the judgment of Garnham J.²⁶⁶ The court, relying on the SC²⁶⁷ case, stated that intensity of review on the grounds of irrationality (unreasonableness) should be restricted in cases concerning economic and social policy, meaning such cases are not open to challenge on the grounds of irrationality “short of the extremes of bad faith, improper motive or manifest absurdity”.²⁶⁸ This is an extremely high threshold, and demonstrates a reluctance of the court to interfere on economic and social policy areas despite violations of social rights.²⁶⁹ On this basis the Court of Appeal took a deferential approach in *Pantellerisco* relying on evidence provided by DWP that the department operates a “test and learn philosophy” suggesting that steps to correct the legislative scheme could be taken as part of the test and learn approach – i.e. that a remedy via executive or legislative avenues would be more appropriate.²⁷⁰

265 R (*Pantellerisco and others*) v SSWP [2020] EWHC 1944 (Admin)

266 R (*Pantellerisco and others*) v SSWP [2021] EWCA Civ 1454

267 R (SC) v *Secretary of State for Work and Pensions* [2021] UKSC 26, [2021] 3 WLR 428

268 R (*Pantellerisco and others*) v SSWP [2021] EWCA Civ 1454 para.58 referring to Lord Reed in SC [*ibid*] who cites Lord Bridge in *R v Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521

269 It should be noted that Lord Underhill in an earlier case noted that the threshold is not insuperable: *“The threshold for establishing irrationality is very high, but it is not insuperable. This case is, in my judgment, one of the rare instances where the SSWP’s refusal to put in place a solution to this very specific problem is so irrational that I have concluded that the threshold is met because no reasonable SSWP would have struck the balance in that way.”* SSWP v *Johnson & Ors* [2020] EWCA Civ 778 (22 June 2020) para107

270 R (*Pantellerisco and others*) v SSWP [2021] EWCA Civ 1454 para 90

Lord Underhill in delivering the judgment concluded that it is not the role of the court to judge the extraordinary complexity of a system that involves a range of practical and political assessments even when “some features of such a system produce hard, even very hard results, in some individual cases”.²⁷¹ He further clarifies

*“I would add that the very complexity and difficulty of the exercise is bound to mean that following the implementation of the scheme it may become clear with the benefit of experience that some choices could have been made better. But it does not follow that the legislation was in the respect in question irrational as made, or that it would be irrational not to correct the imperfections once identified: the court cannot judge the lawfulness of such schemes by the standard of perfection”.*²⁷²

When Claire made her statement regarding the delay related to the appeal at the time of the interview in December 2020, five months had already passed since the judgment. Andrea, the welfare rights advisor, had shared that she first began working with Sharon Pantellerisco in February 2019. This means that when the appeal judgment was handed down in October 2021, Sharon Pantellerisco’s fight for social justice had taken more than two and a half years, and ultimately, she received no effective remedy.

The outcome of the case is a loss, not only for Sharon Pantellerisco, but for every other person who is paid regularly but not monthly, and thereby subjected to capping of their welfare benefits. The court accepted that DWP operate a ‘test and learn philosophy’²⁷³, but the qualitative data suggest that there is no evidence of ‘test and learn’ being implemented in practice. As the practitioner involved in the case identified, *“the government said, in response to the Work and Pensions select committee, um, they did say that they were looking into it. But, you know, they said they were looking into it when I first took on Sharon’s case and that was over, well over a year ago, and they’ve done nothing about it. Um, but it’s set up a system that depends- has so much of its real-time information feed and not being prepared to make adjustments in relation to that”* (Claire).

Claire’s final comment underlines that there has been no effective remedy available through legislative, executive or judicial pathways. The England case study drew our attention to processes of automation and the deployment of algorithms in decision making. Furthermore, it raised our awareness about the difficulties in engaging in the access to justice journey, in terms of resilience and participation. As further analysis will show, these dynamics are not unique to the English context.

²⁷¹R (Pantellerisco and others) v SSWP [2021] EWCA Civ para 59

²⁷²ibid

²⁷³R (Pantellerisco and others) v SSWP [2021] EWCA Civ 1454 at 27 and 90

Wales: Closer to Government but with variable impact

Table 4.3: Wales case study participants

Wales Matthew Solicitor, Private Law Firm
Wales Seth Researcher, Think Tank (Social Rights)
Wales Sam Policy Developer, NGO for children and youth
Wales Eva Development Manager, NGO to combat child poverty
Wales David Researcher, NGO to battle inequality
Wales Kim Programme Manager, NGO to combat food poverty
Wales Rose Welfare Rights Adviser, Local County

It became clear early on in the study that the Welsh context was unique due to increased limitations of devolved powers compared to the other UK jurisdictions, particularly in relation to social security and justice policy. Unlike Scotland and Northern Ireland, Wales forms part of a single legal jurisdiction with England. Although Wales has a separate devolved legal framework to England, the area of justice is reserved and so the administrative legal system, the courts and tribunals and the types of remedies available for violations of rights fall under the jurisdiction of Westminster. Early field work suggested that Wales does not have as distinct a litigation culture compared to the other UK jurisdictions. We therefore adapted our approach to consider the general context for social rights and access to justice in Wales, rather than focus on one specific legal case.

Challenges for social rights protections related to the devolution settlement for Wales

With the exception of one participant, the practitioners interviewed raised various challenges related to the devolution settlement for Wales. In this section we will broadly map out the various aspects related to devolution that impact on the framework for social rights protections, service provisions, processes of implementation and available pathways for challenging social rights violations. There are complexities in terms of the powers and responsibilities the Welsh government has and how it interacts with decision making processes in England, which means that it is not always clear to determine which government is doing what (Seth).

For the purpose of this discussion, it is important to distinguish the relevant social rights arenas where Wales has been granted more devolved powers, which include health and social services (and social care), education and housing. Nationality, immigration and asylum remain a reserved power, but this pertains to all of the UK jurisdictions. The three areas that are not devolved in Wales, and most pertinent to understanding the local context for social rights, are social security, justice and policing.

Limited powers to address poverty and funding

One practitioner, Sam, notes that the challenges around devolution is one of the biggest impacts on his work. The fact that there are a number of policy areas that are not devolved to Wales means complexities in terms of the powers and responsibilities that the Welsh government have, as well as how that interacts with decision making processes in England. This is particularly significant in relation to the poverty agenda, he goes on to say, because the Welsh government have very limited powers in terms of welfare benefits and no powers around social security. This means that *“the power [the Welsh government] have to make a real difference to low income family situations in Wales is fairly limited”* (Sam). He

recognises that the Welsh government do have a strategy and laws around child poverty, which extends to other areas around a number of protected characteristics groups. Sam states that his organisation works with the Welsh government to keep them to task, but recognises that *“lots of big complex issues sit outside the power of Wales”* (Sam).

Another practitioner working in the arena of the right to food, notes that the Welsh government relies predominantly on central government for its funding and has limited capacity to borrow money. Kim states *“we have nearly a third of children in Wales living in poverty, and we have a government that, you know, relies predominantly on central government for its funding and doesn’t really have particular powers in terms of borrowing money either so we’re-, you know, kind of at the mercy of central government”* (Kim).

In response to the interviewer’s question to elaborate on tensions between the legal framework in England and Wales, another concern regarding funding was raised by Sam in relation to Brexit. Sam stated,

“you may well know that Wales is a net beneficiary of EU structural funds [...] and of course we could well lose a significant amount of funding in Wales that we’ve had from Brussels over a number of years. And, of course, all the decision making process around continuation funding under a new scheme has all been taking place elsewhere. So, whilst the Welsh government have and, I guess the other devolved nations have been round the table, where they’ve been able to put in their case, the decisions are all resting in Westminster in terms of that and, I guess, that links to, you know, the powers around human rights and the risk to some of the rights that children and young people currently enjoy from protections in Europe. There’s still a great deal of uncertainty around those” (Sam).

Different laws, limitations to lawmaking and delays in adoption and implementation

Another area that received significant attention across the data is Wales’ limitation in making laws, as well as differences in laws between England and Wales. Sam, whose work focusses on children and families, notes that slightly different laws between England and Wales cause complexities, for instance for shared parenting arrangements, *“so courts are having to take into account different pieces of legislation across England and Wales sometimes, depending on the situation”*. This also leads to completely different outcomes, dependent on jurisdiction (Sam).

In Wales there is greater emphasis on children’s rights compared to other parts of the UK (with the recent exception of Scotland). Matthew, a solicitor, attributed this difference to *“the incorporation of the rights of the child from the UN convention, that’s enshrined in Welsh law, but that’s not necessarily in England so those are [...] key differences which we’re starting to use now”* (Matthew). Having fully incorporated international human rights law can make a significant difference not only in how the law can be used, but also to increase accountability. It is important to note that although the Rights of Children and Young Persons (Wales) Measure 2011 integrates the UN Convention on the Rights of the Child (UNCRC) into the devolved legislative process in Wales and helps with policy implementation, the duty that is placed on Ministers is one of *“due regard”*. This is not sufficient to meet the threshold of legal incorporation because ultimately, there is no remedy for a violation of the treaty and so no accountability for failure to comply. Rather what the duty does is encourage compliance, rather than make it a mandatory legal requirement. Nonetheless, the terminology ‘incorporation’ is used by practitioners when discussing the integration of the treaty under the devolved legislation.

One additional challenge raised regarding working between two different frameworks involves significant delays in passing and implementing laws. One example comes from Seth, who works for a Think Tank focussed on social rights issues. He shared that the *Renting Homes (Wales) Act (2016)*, which introduces a number of changes to tenancy laws, including increased tenant protections by banning retaliatory evictions, was delayed coming into force and had still not been enacted at the time of the interview in late 2020. This delay was, in part, due to engagement with the Ministry of Justice (Seth). So, despite being a piece of legislation related to housing, which is mostly devolved, its interaction with justice policy lengthened the process for implementation. He further notes, “*you’ve got lots of really good, well-meaning, kind of legislation. The proof will be when it actually is implemented, and people are actually able to use it, you know, to protect their rights*” (Seth), iterating that efficient policy processes that foster swift implementation are key to upholding people’s rights.²⁷⁴

Again, this relates back to the earlier point around implementation through weaker duties such as “due regard” rather than full incorporation with legal remedies for violations. The duty to have due regard creates a procedural obligation to consider the treaty as part of decision making processes, whereas a duty to comply would require substantive compliance. There is an important distinction to be made between procedural v substantive obligations and how well-meaning legislation can ultimately fail to result in any substantive change.

Seth highlighted that Wales is more focussed on tenants’ rights than England, not because Wales changed the law, but because England moved away from a tenant focussed model, whilst Wales moved towards it. This is one example of divergence in jurisdictions with regard to social rights, as a result of devolution. Referring to legislation for children’s rights, Sam also referred to delays with the *Children (Abolition of Defence of Reasonable Punishment) (Wales) Act 2020*, saying,

“that took about ten years legal wrangling and working out whether we had the powers to do that, or not. So, that’s why, you know, there was an intention from our government about 10, 15 years ago to introduce that- and it’s taken that long-to, kind of, lawyers in Wales to work with the lawyers in Westminster to work out whether it sits within social care or criminality. Eventually it fell to us, so we could implement the act” (Sam).

The example highlights the complexities, and perhaps competing priorities from Ministers in Wales and England.

Challenges were also raised for the refugee sector due to having no powers around immigration. Sam stated that strategies for assisting asylum seekers and refugees are therefore targeted predominantly around services like education, health and housing, those areas where Wales has some power to make changes (Sam). This iterates tensions between housing and immigration policy, which were also particularly tangible within the Scotland case study.

The most detailed account of tensions between the Welsh and English legal frameworks came from a practitioner who works as one of the few public law solicitors in Wales. A piece of Welsh legislation that features prominently across the data, *The Well-being of Future Generations Act (2015)*, focusses on sustainable development and wellbeing goals for

²⁷⁴This sentiment was echoed in Northern Ireland. Esther said, “*It’s easy to get those public appearances and public declarations of support. It’s extremely difficult to see actual change and movement. So, how do you translate that kind of public expressions or like informal expressions, like unanimously pass motions and to bring about any actual change, you know*” (Northern Ireland | Esther | Housing Activist, NGO for Human Rights).

Wales. The interviewer asked Matthew whether he could describe the interactions between the broader UK legislation and Welsh laws, and whether he could identify any particular conflicts when there is engagement with two different frameworks. In his response, Matthew described the tensions that arose when *The Wellbeing of Future Generations Act (2015)* was used in a test case in 2019.²⁷⁵ He said that on a practical level, the biggest problem in Wales is that we have some unique Welsh laws which are based on Welsh policies and

“a direction of travel, if you like, of Welsh Government, but then what happens is, when you-when you run a case on to test that out, the Judge who comes in has parachuted in from England [...] is a High Court Judge from England, who comes, who just turns up [...] probably a former, you know, commercial QC [...] who lives in London and he won't have a clue about where this case is, where this policy has come from and the classic example is, we have something in Wales called the Well-being of Future Generations Act [...] It's the only case that's raised that Welsh law and we tried it; Judge comes wafting in from England, he was a very nice chap but he just said, this Act is wholly aspirational, has no application to individuals, doesn't apply. So then you say to yourself, what is the point of this Act? You know, what is an old QC went on record [...] saying, the Act is pointless right [...] that's an example [...] but I wonder if we'd have had a Welsh Judge, a Welsh speaking, you know, a Judge from Wales who had heard all about the genesis of this Act and everything and was rooted in knowing about communities up the Welsh Valleys, I wonder if there would have been a difference. But that was a real, that's a real problem we've got, that Judges come in and they just don't know what's going on because they don't know the context of some of this legislation and I think that's a real problem for Wales” (Matthew).

Matthew's example goes to show how a mere word, 'aspirational', uttered by someone in a position of power, a High Court judge from England, has the capacity to completely undermine a unique piece of Welsh legislation that has important meaning for the people of Wales. Matthew's comments suggest that the English judge is perceived as an outsider to the local community, lacking local (cultural) knowledge and authenticity. In other words, the 'parachuted' judge wields enormous power in a jurisdiction in which they are not fully embedded in the legal context or framework of devolution. This highlights how differences in legislation and cultures across jurisdictions can have significant consequences and a direct material impact on how particular legislation is understood.

Identified groups most impacted and (made) marginalised

The interviewer asked each participant if they could identify any patterns, or particular challenges for certain groups of people, related to issues around social security, housing and access to food and fuel. The answers from practitioners included the following:

Disability (Matthew, Seth, Sam, Eva, David, Rose), physical and mental, including autism (David), learning challenges (David, Rose), neurodevelopmental difficulties (David), addictions (Rose); particularly families with disabled children or another disabled family member (Eva)

Seth remarks that the increased risk factors due to disability may include (potential) reduced ability to work, additional living costs (perhaps needing an additional bedroom for a carer), increased transportation cost, due to requirements to travel by taxi rather than public transport, as well as a lack of adaptable housing. He estimates that there are approximately seven hundred thousand people in poverty in Wales, which is about a quarter of the population. About half of them, he states, live in families where one person has a disability (Seth).

²⁷⁵ Williams, R (on the application of) v Caerphilly County Borough Council [2019] EWHC 1618 (Admin) (24 June 2019)

Matthew, who is a solicitor, reflects on how groups are marginalised when schools and libraries, for instance, are closed or moved. He states, *“for them [disadvantaged groups], I think, the biggest problem often is access, and so when something changes, their access ability changes, and then often that’s maybe not understood by the decision makers as well as it should be”* (Matthew).

Mental health challenges appear to be particularly difficult, especially because of stigma and difficulties for people to provide evidence of the impact of mental illness on their daily lives. Rose estimates that approximately 80% of people she represents at tribunal have mental health problems. She said: *“it is the reality that the people who kind of most fall foul, if you like, or most get negative decisions are often people with mental health problems. Also, some people with learning disabilities, or a combination of both, but definitely-, and lots of people with addiction problems”* (Rose). Rose said that, over the years, she had seen a big increase in addictions, particularly heroin use in her area of South Wales. Long term users, she said, develop quite serious physical and mental health problems as a result of those addictions. It is difficult for them to access support services, are often hard to reach and sometimes difficult to work with for various reasons related to negative experiences, distrust and paranoia (Rose).

Children (Sam), particularly from disadvantaged backgrounds (Matthew)

According to Sam, children are also particularly disadvantaged if they also have additional protected characteristics, such as children in low income families, asylum seeking children, children in the care system, young carers and disabled children (Sam). Another group at higher risk are children and young people who have additional educational needs, with people often describing a sense of *“having to battle or fight to access services”* (David). Sam states that Wales has a high number of children coming into the care system, greater than most other parts of the UK. However, he thinks that this is a positive response in terms of people raising concerns and issues around safeguarding and child protection (Sam).

Minority ethnic background (Seth)

Although based on limited data, Seth states that the data they do have shows that those from a minority ethnic background are more at risk of living in poverty, and are at risk of living in overcrowded housing and bad quality housing. He is quick to point out though that the highest number of families living in poverty are white working families (Seth).

Refugees/ asylum seekers and others with no recourse to public funds (David, Kim)

Pointing out the difficulties experienced by asylum seekers, David remarks: *“it really draws into sharp focus, while the current social safety nets are, I would argue, inadequate and you can see that in the number of people who claim welfare benefits who are still in poverty, but if you look at those who’ve got much more restricted entitlements to welfare benefits like asylum seekers, refugees, um, those denied recourse to public funds, it really puts [it] in sharp relief”* (David).

Kim notes that those with no recourse to public funds includes two and a half thousand children (Kim).

Other groups that are at higher risk of poverty are lone parents (Eva, Kim), families on means tested benefits (Eva), people working in the low paid manufacturing sector or on zero hour contracts (Kim) and people with low skills/ qualifications (David). It is recognised though that there is intersectionality between these broad categories, as well as gender and educational dimensions, and that those with overlapping protected characteristics will be at further increased risks. The limitations of devolved powers in Wales has a direct impact on service provision and delivery, service implementation and the routes available for challenging problems when they arise.

Fragmentation of services across Wales

Social security is not devolved in Wales and in order to counteract the impact of austerity and inadequate social security support from the UK Government, the Welsh government has allocated significant funding to mitigate the impact under specific areas of devolved policy such as food, housing or health. Seth estimated that this amounts to approximately four hundred million pounds, which to put into context, he said, is the same amount DWP spend on Job Seekers Allowance and Universal Credit in Wales combined. He recognises this is *“a huge amount of money”*, relatively speaking, but *“it’s not working for enough people”* (Seth). One reason for this, Seth thinks, is that the system lacks a single point of access. This point is iterated by other practitioners as well. Eva stated that unlike Scotland, which has essentially devolved quite significant parts of its social security system, *“Wales is just in this weird halfway place”* (Eva). Eva had earlier in the conversation referred to the Welsh benefits system as *“nebulous”*, which she then explained as follows: *“what has really characterised the system I think is, um, the fact that it’s just been so incremental and [...] a lot of it is just reactive kind of ((small laugh)) and that’s what I mean about being incoherent in terms of, you know [...] it’s just little bits and pieces”* (Eva).

Specific services, such as council tax reduction schemes for instance, are provided in different ways by local authorities, so there is no uniformity across Wales for the provision of various types of services. Eva provided another example regarding the provision of free school meals, saying that although there is a legal obligation to provide these meals and eligibility criteria set at a national level, how the provision is administered, including the value of the meal, is usually decided at local authority level (Eva). This means that in one local authority, a child may have a daily allowance of £2.35 and in another authority it’s £2.90. The frameworks around the provision of free breakfast in primary schools also allows discretion to individual schools to decide whether or not to offer it.

In response to the interviewer’s question on the accessibility of services and whether or not people know where to go to get help, Sam responded that quite a lot of advice in Wales is fragmented, but *“in a positive way”*, he says, *“we don’t have, like, a one-stop shop service as advice in Wales which is- in some ways, that would be good if there was one point of call, but sometimes, you know, it’s giving families and children the flexibility to engage with different services. So, I think there’s a great deal of promotion that goes on, in terms of, those services”* (Sam).

Sam feels that precisely because of limitations of powers in Wales, a lot of attention is directed to building awareness and signposting to services to ensure families know there is help and support available to them. He describes the support and services as a *“kind of mitigation services”* with a strong element around prevention, particularly around early years and preventing problems escalating. However, when financial issues and fuel poverty link to lack of income, the powers of Welsh government are significantly reduced in helping that. Although there’s lots of support and interventions for families, Sam says, *“it does not lift them out of low income”* (Sam).

He also recognises that there are geographical differences in being able to access support, as it is more difficult to scale up services in rural areas. Sam said, *“we would hope- we would try ((half laugh)) as in most areas, you hope there isn’t a postcode lottery to services, but we know that there is- but that’s not necessarily rural-urban, but I get the nature is there’s more service face-to-face in urban settings”* (Sam).

Lack of recognition in services on the interrelationship of rights

Another way that the notion of fragmentation came to the fore in the interviews is through a lack of recognition of the interrelationship of rights, not from the individual practitioners we spoke to, but the welfare system more generally. The interviewer asked Seth regarding some of the main challenges people had with respect to accessing their right to social security. He responded that current responses can be quite siloed in their approach.

“if you’ve got a crisis, be that with housing, for example, you’re in rent arrears, the first port of call tends to be to your social landlords. By the time you come to get advice centrally, your housing situation has entirely been sorted, because your social landlord, they’re a housing organisation, they know every last bit of housing welfare support you’re entitled to. What doesn’t happen very well, at the moment though, is that we’re not very good then at transferring that person to make sure that they then also get free school meals if they’ve got children, that they get, you know, so, it’s really quite siloed, and, yeah, that’s something I think, yeah, that’s a big barrier. If we could shift some of that that could, you know, have a big impact” (Seth).

The notion of siloed approaches was also echoed by Kim, as she reflected on challenges within her own work focussed on the right to food. She said that one of the big challenges is having a very global food system, with more than fifty percent of the food in Wales coming from “*across the water*”, and that those processes are influenced by a small number of powerful institutions.

“That is very challenging”, she said, “when you’re trying to-, to make change in one little part of the world ((laughs)) so I guess that’s one challenge at a macro level, and then at a micro level trying to get people to come out of their silos is very, very difficult ((clicks tongue)) you know, so working with government, how do you get people who are doing, you know, agricultural policy talking to people who are doing food manufacturing policy talking to people in ((inhales), you know, welfare team and talking to people in the health team and, you know. So trying to get those different strategies linked up is really challenging and government are not good at doing it” (Kim).

She explains that the food poverty issue is difficult because nobody wants to talk about, it is not being measured sufficiently well in Wales, and “*it’s very difficult to find the right space to have the conversations that are actually going to make a difference*” (Kim). She highlights the intersections with manufacturing and retail sectors, which often do not pay a living wage, leading to food poverty and the need for staff to access food banks. The food industry “*absolutely has a part to play in these discussions*”, she says, so one of the challenges is to make the food poverty business everybody’s business (Kim).

One of the themes that resonates across the Welsh data, is that although Wales has a wide variety of programs and services to address people’s needs, it is constrained in its delivery and implementation mechanisms by a lack of coordination across local authorities. In addition, the ways in which local authorities implement services differently, creates additional difficulties for rights holders to know where to turn for advice and the processes involved for challenging a problem when required. We return to this topic throughout our discussions and analysis.

Closer to government

One advantage Wales has due its small size as a devolved nation is a sense of being closer to government. A number of the practitioners felt that in Wales people feel more able to engage their government over issues they face, using their local councils as a source of information and solutions. The interviewer asked Sam, whose work closely engages

with children, youth and families, to what extent information is taken up at a higher level. In other words, does the two-way communication result in change? Sam's answer acknowledged that it is difficult to assess whether the government has taken on board suggested changes after *"they've had a couple of conversations"* (Sam), but sometimes the impact is visible. Sam recounted an event that took place just a few months earlier.

"We convened a group of young people to meet with our first minister just before Christmas, at his request. I mean, it came out quite late in the day but we managed to get a good group of young people together, um, and they raised a number of issues around mental health, schools returning. And we did see- you know, he did refer to that and his education minister referred to engagement he'd had with young people fairly recently, in terms of informing his decisions around Covid. Young people also then raised, at that meeting, that they weren't getting sufficient information around Covid in a child-friendly manner. Within a week, we had a meeting of senior comms leads across Welsh government, um, officials. So, one concrete example of how things can get changed, and we are influencing and I think that's when we go to these large meetings, at a government level, there's a good attendance rate because people will attend, because they know that we will have ministers on the call, senior officials. It's not all great, I won't pretend, it isn't, because it's all about individuals, isn't it, at the end of the day? [...] if you can work well with a couple officials, you can make some in-roads" (Sam).

Eva also describes the conventional ways for engaging with government, such as writing consultation responses to committees or attempting to speak to individual politicians. Several times a year, her organisation is able to communicate with civil servants through the anti-poverty coalition, where concerns can be raised and government can respond. She also echoes Sam's concerns that if the Welsh government don't want to listen to the committees and engage with *"very sensible evidence based recommendations"*, progress is halted (Eva).

Sam's example shows an alternative route²⁷⁶ to justice outside of legal processes, that when individuals directly impacted by social rights issues participate in consultation processes, there can be positive outcomes. However, Sam and Eva also recognise that there are limitations, as implementation and progress are dependent on individuals being responsive to change and taking action.

Legal routes to a remedy

The interviewer asked each of the interview participants how people can assert their rights when violations occur, and whether there are legal means for doing so. The shared perspective from the practitioners we spoke to is an apprehension for going down a legal court route for solving problems related to poverty, in large part because such an approach is hindered by limited powers under devolution, a lack of knowledge from rights holders about their rights and the means to challenge a problem, a lack of legal expertise, as well as limitations to funding for legal processes. Several participants expressed that there is just no appetite for it.

Limited powers under devolution

Kim said: *"I'm just not sure that we've got the-, whether it's the appetite or the teeth for the legal thing"* (Kim). Sam iterates the same sentiment and links it to the complexities of the justice system. *"I would say there's not an appetite for it, I guess, in government at the moment and I*

²⁷⁶We adopt the term 'routes to justice' to mean pathways/ avenues to access justice, including pathways to secure an effective remedy.

guess it may well be because of the trying to get pieces of legislation through where there has to be engagement with England on, as with the defence and reasonable punishment, our social services act took a number of years to go through. Where there's other pieces of legislation that go through a lot quicker, where- where almost everything is devolved to Wales [...] you know we can make changes a lot quicker, where we have the powers, where we have to try and engage with England, it just slows down the process" (Sam).

Although there are efforts in Wales to adopt a more human rights based approach, there are no redress mechanisms to challenge decisions for children, Sam says. *"We have rights legislation in Wales, currently, for children, but that doesn't, um, you know, there's no opportunities for redress mechanism, linked to that, um, and opportunities for children, or professionals on behalf of children, to challenge decisions that have been made at a government level around children's rights more broadly".* He goes on to say that the Welsh government took the 'due regard' approach because the 'redress' approach links into the court system and the complexities surrounding it. He said that there are continued calls for legislation akin to what's being done in Scotland, but that it explains why laws are as they currently are. In his opinion, *"ministers are very much looking at what's within their powers and what sits outside their powers" (Sam).*

David also recognises that access to legal routes for challenging a problem varies depending on the issue in question. He points to a legal framework in relation to refugees and organisations, such as the Welsh Refugee Council, who will provide legal advice to help people to assert their rights, albeit *"a very fraught and complex field"*, he admits (David).

In addition, David said, there is significant legislation in relation to special educational needs and more recourse to legal remedies than there is in other areas (David). *"It feels in other areas, but I'm not an expert"*, he said, *"that there is less recourse to it. Um, I mean, I suppose it depends on how clear the legal rights are"* (David). He explains that there are legal duties in relation to the provision of alternative education, and that local authorities can be challenged if it is deemed that provisions are inadequate and the legal obligations are not being met.

"So there are obviously areas where there are legal rights that can be asserted, um, in relation to some- particularly around education, but less so in relation to poverty. And I guess there's a legal framework in terms of what your rights are in relation to universal credit but the perception is that it feels, but I'm not an expert on this area and I'm sure others would have views on it, that DWP has much more discretion about who gets support and who doesn't, what you can be sanctioned for and so on and-, you know, it's not an area I've looked at but I don't hear as much about legal cases being brought to, kind of, challenge those decisions" (David).

David's point about *"how clear the legal rights are"* is particularly significant with respect to enforcement. In order to uphold rights, they must be clearly defined, which offers an important counter discourse to the critique that social rights are not justiciable due to being vague. The indeterminacy critique can be counteracted by recognising the role different epistemic communities play in their interpretation. It is the responsibility of the legislature to ensure rights are clearly defined, and equally, courts should not abdicate their role in giving meaning and content to rights.²⁷⁷

²⁷⁷ Frank Michelman, Socioeconomic Rights in Constitutional Law: Explaining America Away, (2008) *International Journal of Comparative Constitutional Law* 6(3&4): 663-86, at 683; Kathrine G. Young, *Constituting Economic and Social Rights* (OUP 2012) at 30; Colm O'Conneide 'The constitutionalisation of economic and social rights' in García et al. (eds.) *Social and Economic Rights in Theory and Practice, Critical Inquiries* (Routledge 2015) at 274; Boyle n at 14

Lack of knowledge in seeking a remedy and limited legal expertise

Kim points out that another reason legal remedies are not accessible is due to lack of knowledge, both on the part of rights holders and legal knowledge of those offering advice, relating to the legal consciousness barrier (the first barrier in the access to justice journey). Rights holders often do not recognise that they have rights, nor do they possess the knowledge about where to turn to challenge a problem. She said: *“the general feeling is that people don’t tend to challenge their rights because they don’t know how to and, you know, actually you need somebody there with a lawyer’s hat on or whatever to help you do that, and I’m not sure that we’ve necessarily got that expertise in Wales, I don’t know.* She also wondered whether it might be because in Wales they are *“a bit closer to the political process and a bit closer to having conversations with people”*, or if it is a matter of being too polite. Perhaps, she said, people just do not know that they have those rights or that there are not enough activism type organisations that are supporting that push (Kim).

Rose, who has worked in the advice sector for nearly 25 years, and now works solely to assist people with challenging benefits decisions, also pointed out that the provision of specialist advice is inadequate to meet the demands of clients, especially since this demand has increased. She said that there are more organisations that will help people at initial stages, although she recognises that those services are also under resourced with demand vastly outstripping supply (Rose).

With regard to housing rights, Seth identified a lack of knowledge and awareness on where to turn for help. Referring to the *Renting Homes (Wales) Act 2016*, Seth noted that when the Act comes into force, it should improve the situation for tenants but, he said, there will still be a reliability on people going to court to enforce their rights, and he wondered whether people actually know that that sort of recourse is available to them (Seth). He suspected that in most cases, rights holders would need to seek out support from agencies to begin the process of resolving their problem and getting a remedy. When that does not happen and landlords are not challenged for behaving in ways that violate a person’s right to adequate housing, they will likely get away with it and problems continue. Adequate and accessible mechanisms for challenging problems are thus imperative to hold bad landlords to account (Seth).

Lack of funding for legal advice and representation

Access to legal funding is significant barrier raised across the data for all jurisdictions and will be explored in greater detail in Part III of this chapter. However, this section will briefly outline the challenges raised specifically within the Welsh context. Rose recalls that approximately 10 years ago, there was a change in community legal service, where funding for solicitors to represent clients at benefit tribunals was pulled which, she said, had a large impact, resulting in significantly reduced access to funding. As Rose works for the local authority, her clients do not have to pay for legal advice and tribunal representation but, she says, only some decisions within social security have a legal right to challenge, a host of other decisions do not have a right to appeal. *“Those are ones where you need to speak to somebody, in that department, and persuade them that they’re not applying the policy correctly, or that they’ve made a mistake. You know, sometimes it’s just about, they’ve made mistakes, or something was a mistake on a form”* (Rose).

Sam raised access to legal aid as *“a huge concern for people in Wales as well as England”* and as a barrier to legal mechanisms for upholding social rights (Sam). Kim expressed the same notion when she said, *“if you do have a challenge around your rights, usually you’re economically challenged, so then how do you go about getting that support to deal with it?”* (Kim).

In England and Wales, legal aid has historically functioned as a pillar of the welfare state.²⁷⁸ The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) has effectively ended legal aid provision for legal problems encountered in relation to debt, welfare benefits, employment, education, most housing disputes, private family law, non-asylum immigration, clinical negligence, consumer or contract disputes and criminal injury.²⁷⁹ Whilst exceptional case funding is available on the grounds of a breach of human rights, the definition of human rights is restricted to those falling within the ambit of the ECHR or retained EU law, excluding most economic and social rights by extension.²⁸⁰ LASPO does not impede a case being taken on these grounds, but the practical effect is that people who cannot afford to access justice will be prevented from doing so.²⁸¹ In other words, LASPO is the manifestation of a 'conscious decision to substantially withdraw public funding for the support of the justice system and for promoting access to justice.'²⁸² One of the key calls in the literature is to address the legal aid crisis.²⁸³ The dismantling of legal aid has led to "a court system facing collapse, a legal system facing disordered change, and litigants left to steer through the rough waters of legal dispute without the guidance of legal advice and assistance".²⁸⁴

In his work as a solicitor, Matthew and his colleagues have found that legal aid was not being made available for any Covid-19 challenge cases. When the interviewer asked why that was the case, Matthew answered, "*well, because who's in charge of the Legal Aid Agency? It's the government, isn't it? (Half laughs) so the government giving people money to sue the government, so no*" (Matthew).

Clearly, when people do not have the means to bear those kinds of legal costs themselves, they are barred from securing a legal remedy. But Matthew recognises that this also causes potential other problems. People may use strategies of crowd funding or attempt to raise money privately, but those approaches also risk undermining the legal aid system, as Matthew reckons that the response from legal aid will be, "*why do we need to have legal aid if people can crowd fund all the time*" (Matthew). In this sense, the Covid-19 crisis has exposed another problem in legal funding.

In addition, Matthew iterates the perception expressed by other practitioners that people do not know that they can exercise their right in the legal context, and that they may not realise that legal aid is still available, "*even though it can be hard work to get it, people just don't know these things*", he says (Matthew). He thinks it is important to get awareness out to people and notes that when particularly disadvantaged groups engage with local authority agencies, they are often dissuaded from seeking legal help. He said, "*they'll say, you don't want to bother with a lawyer*" (Matthew).

Likewise, Matthew questioned whether the third sector are well informed to guide people to seek legal advice. He referred to Shelter as an example of an organisation doing valuable work in regard to homelessness, but stated that he had spoken with other people working for charity organisations who were less informed about legal rights and remedies. He said,

²⁷⁸the original conception of the early legal aid scheme was seen as 'one of the great pillars of the post-welfare state' Moore and Newbury, *Legal Aid in Crisis*, at 17 as per Lord Beecham HL Debate 19 May 2011: Col 1535

²⁷⁹For a full list of scope changes, see schedule 1 of LAPSPO and the practical 'bible on legal aid', The Legal Aid Handbook 20/21. V Ling et al [2021] *Legal Aid Handbook* Legal Action Group

²⁸⁰Section 10(3)(a) LASPO 2012

²⁸¹Sarah Moore and Alex Newbury, *Legal Aid in Crisis, Assessing the Impact of Reform* (BUP, 2017), "The cuts to legal aid don't thwart litigiousness: they simply mean that some people are disallowed access to the law when pursuing justice." at 13

²⁸²LAPSPO led to a conscious decision to substantially withdraw public funding for the support of the justice system and for promoting access to justice. Genn at 13

²⁸³Moore and Newbury n320

²⁸⁴ibid at 76

“I’ve spoken to people in charity sometimes and they don’t even know anything about judicial review or they don’t know about legal aid, they just don’t know, it’s like- so they’re kind of- obviously people are coming to them with their issues and they might say to them, ‘oh well, we’ll try and write a letter to the local authority or something’. They never give them the legal option because they’re not aware of it, you know, and [...] that’s part of the problem” (Matthew).

The right to food and free school meal provision

Although the research team did not set out to focus attention on one particular issue, many of the practitioners in the Welsh case study worked in areas addressing children’s rights and food poverty and, as such, access to these rights were discussed quite intensively. We will briefly describe the response of the Welsh government at the onset of the Covid-19 pandemic with regard to the provision of free school meals for eligible families.

The Welsh government were *“very proactive”* (Kim) in the first Covid-19 lockdown in spring 2020 to continue its support of families who receive free school meal provision over the Easter holiday. Funding and guidance was made available for local authorities to provide those meals in one of three ways: vouchers, cash or meal delivery. Some local authorities opted for cash payments and others adopted a mixed approach (Kim). The Welsh government then made the commitment very quickly to provide that support all the way through to the Easter holidays 2021. This was before the Marcus Rashford thing kicked off, Kim laughs (referring to the Marcus Rashford campaign, urging the UK government to reverse a decision not to provide free school meals during the summer holidays 2020).

The program has provided some protection for children who are receiving school meals, but there are large numbers of children still going hungry. Kim quotes figures that show that there are seventy thousand children in Wales who are living in poverty, who are not eligible for free school meals. Those children are not getting free school meals at school nor over the holidays. The big concern, Kim says, is that Brexit is coming down the line, along with a potential 18% increase in food prices, and *“it’s going to cause massive problems for those families”* (Kim). The reason for this is that the cut-off criteria for being eligible for free schools meals is family earnings of less than £7,400 a year. Based on the forthcoming statistics from the Cost of the School Day project, Wales is definitely the worst performing country amongst the four nations, she says. She calls for a four nations’ appraisal to assess how much money per child is being invested by the governments and how much protection is actually being provided. Because at the moment, she says, it feels like they are providing a section of families *“with fairly good support and then another subsection with absolutely no support whatsoever”* (Kim), indicating unequal access to food for some families. Kim’s example also highlights issues in identifying need and the shifting context created by Brexit.

One other aspect to the provision of school meals worth noting is related to the delivery of services and whether local authorities choose to provide vouchers, cash payments, or food parcels. Organisations, such as the one Eva works for, campaign for a ‘cash first’ approach to alleviating food poverty, which is what people on the receiving end generally prefer. Eva states,

“we want to see the direct value being transferred to families so that they can maximise the amount available and buy their own food and this is something that the people we’ve done research with have overwhelmingly said that’s what they prefer and it works best. So, although people are happy with food parcels, vouchers and things on the whole, there’s always quite a significant minority whose needs aren’t met by those schemes of support. So, you know, we really

want to see cash first” (Eva). Eva describes significant resistance from some local authorities to provide cash support and great difficulty in changing mindsets.

The Welsh context has raised significant challenges related to the devolved frameworks under devolution, with unique impacts on Wales with regard to meeting social rights. Wales also shows how alternative pathways can sometimes lead to positive change – these routes appear to be explored more consistently in Wales due to a general shared feeling of being ‘closer to government’. However, another dynamic expressed through interviews with practitioners was the notion of fragmentation on various levels, a point we will return to in greater detail.

Northern Ireland: Terminal illness criteria impede access to benefits

Table 4.4: Northern Ireland case study participants

Northern Ireland Josie Chief Executive, NGO for housing
Northern Ireland Chloe Volunteer
Northern Ireland Oliver Solicitor, NGO for Legal Services
Northern Ireland Rowan Welfare rights adviser, NGO for Cancer Patients
Northern Ireland Kamilla Welfare Rights Adviser, NGO Local Community
Northern Ireland Esther Housing Activist, NGO for Human Rights

The practitioner interviews within the Northern Ireland case study loosely focussed on the *Cox*²⁸⁵ legal case, which challenged Regulation 2 and Schedule 9, paragraph 1 of the Universal Credit Regulations (Northern Ireland) 2016 made under the Welfare Reform (Northern Ireland) Order that in order to automatically and immediately qualify for UC and Personal Independence Payment (PIP) on the ground of terminal illness, an applicant has to demonstrate that their death could reasonably be expected within six months.

In addition, the practitioner interviews illuminate the specific context for social rights in Northern Ireland, impacted by the aftermath of The Troubles and political instability due to suspension of the National Assembly. These factors are identified as closely linked to a particularly dire housing situation in Northern Ireland, which we will be discussed later in this case study.

We interviewed six practitioners, half of whom had a connection to the *Cox* legal case, including one solicitor and two welfare rights advisers. In addition, we interviewed an activist with a human rights NGO, the chief executive of an NGO for housing and a volunteer assisting those in need.

In late 2018, Lorraine Cox was diagnosed with motor neurone disease, a progressive neurological condition for which there is no effective treatment or cure. She was given an estimated life expectancy of two to five years and advised that as her illness progressed, her loss of motor function would become more severe and her care and mobility needs would increase. Ms Cox applied for Universal Credit and PIP. If a medical practitioner had certified that she could reasonably be expected to die within six months, the ‘special rules on terminal illness’ would have applied and she would have been immediately entitled to universal credit and to PIP at the enhanced rate for help with daily living and the standard rate for mobility. However, because her life expectancy exceeded six months,

²⁸⁵ *Cox, Re Application for Judicial Review* [2020] NIQB 53 (22 October 2020)

there was a qualifying period of six months, and she had to undergo assessments to prove the existence of functional impairment. Therefore, it was not until mid-2019 that she established her entitlement to the benefits.

At the time of making her application for PIP in March 2018, Lorraine Cox's symptoms were less severe than they would be a year later when it was determined that she was entitled to the benefit. Kamilla was the welfare rights adviser who met Lorraine Cox when she requested help in raising a mandatory reconsideration after her initial application for PIP was denied. The mandatory reconsideration awarded her eight points, which gave her the standard daily living allowance of approximately £8 per week. Ms Cox then decided to move forward with making an appeal and when she received her appeal bundle, she returned to Kamilla for assistance and representation at the tribunal.

Kamilla recalled that the evidence showed that her illness mostly affected the left side of her body. Because the criteria for PIP are so strict, Kamilla said, decisions are not based on the type of illness or condition a person has, but how it impacts on them.

“so they [Department for Communities] made the decision because she could drive, because she could do things, albeit slowly, and she had the use of her other hand, this was all [...] they were basing the decision on, you know, that, you know, she could only get eight points. And the consultant that she was under, you know, he said in all his letters how progressive her type of motor neurone was [...] I've met Lorraine in person, I think it was probably August-September time 2018 and then I would have met her a couple of times in between that, you know, coming for an appeal prep and every time I met her, I could see a deterioration in her. And because PIP is so strict [...] any deterioration after the date of decision won't be considered” (Kamilla).

This is a crucial point, because for degenerative illnesses, such as motor neurone disease, the full extent of the illness is not considered. Kamilla explained that Lorraine Cox made her claim in March 2018 and received a decision in July that year. However, her appeal was not heard until April the following year, more than a year from when she made her initial claim. Kamilla recalled the event as follows:

“We went to the appeal and I remember going into the panel and speaking to them before Lorraine came in and I said to them, you know, I said like is there no way round this? You know, obviously the girl has motor neurone, it's a progressive disease. Of course, there's going to be a deterioration in 12 months and I remember the legal member saying to me [...] I don't call them by their first name and they don't call me by my first name and I remember him just looking at me and he shook his head and he says, [name of the practitioner being interviewed] I was up half the night last night going through this case and going through it and going through it again and he says, our hands are tied. He says, they are tied, and he says, I know, he says, this girl, you know, obviously she's going to be getting worse and worse and worse and it's awful. And I could see the empathy in him. And he would be a hard nut panel member, you know, but that day, you know, you could see that he had wracked his mind, you know, he had really thought and he said, if I could give her any more, he says, I'd give her the whole thing. He says, I would, you know, but we're bound by the law of the benefit” (Kamilla).

The six-month waiting period linked to the definition of terminal illness had been raised as a point of concern by other practitioners some time before the Cox case was identified as a potential opportunity to address problems with access to PIP.

How to define “terminally ill”?

Rowan, who works as a benefits advisor at a cancer hospital, had flagged a problem with the policy’s determining criteria for who is considered ‘terminally ill’ and thought it should be evaluated. He said, *“part of our job is to escalate things [...] what we would do then is to escalate it to the Law Centre to say ‘right, you know, there’s an issue here with how the social security system’s working, it doesn’t seem fair or logical and you know, is there a legal recourse to try and get that changed?’”* (Rowan).

Rowan said that prior to taking the issue to the law centre, however, he had participated in a quarterly meeting at the Department for Communities with representatives of PIP to raise the issue. This occurred shortly after the results were published of an independent review on how the PIP assessment was working in Northern Ireland (also referred to as the Walter Rader report).²⁸⁶ Rowan recalled that most of the points raised in the assessment were accepted by the Department for Communities, but *“what they said was that the one that recommended that the terminal illness six-month definition [be] removed and done on a clinical assessment, they said that they couldn’t. They said it was interesting but they couldn’t make a decision on it because there was no minister”* [the local assembly was suspended during that period] (Rowan). At that point, Rowan approached Oliver, who was a solicitor at the law centre.

Oliver recalled when Rowan came to him regarding the 6-month rule, stating how unfair it was and asking whether there was merit for a legal challenge. Oliver agreed that there was but needed a client to take the case forward. At the same time, according to Oliver, Lorraine Cox herself had been campaigning on the issue and had provided input to the All-Party Parliamentary Group (APPG) for Terminal Illness, raising awareness of issues around terminal illness in Parliament.²⁸⁷ Oliver became aware of Lorraine Cox when he heard her speaking to the BBC with the frontline organisation supporting her about what happened to her in the PIP case. *“We identified her as a client”,* he said, *“and we made contact and said, we might be able to take a case here”* (Oliver). As such, Oliver said, there were multiple organisations involved in the case before it went to the High Court. According to Rowan, the welfare benefits advisor who raised the issue with the law centre, there had been consideration of using a cancer patient for the case, but it was determined that terminal cancer prognoses are fairly straightforward. The degenerative nature of motor neuron disease, on the other hand, clearly illustrated why the current decision making criteria were not fit for purpose, as non-cancer conditions, such as motor neuron disease, have unpredictable trajectories that make accurate prognoses and time scales difficult to assess.

On 7 July 2020, in the case of *Cox*, the High Court found that Regulations made under the Northern Ireland (Welfare Reform) Act 2015 resulted in an outcome that was *‘manifestly without reasonable foundation’*.²⁸⁸ The court found that there had been a violation of Article 14, Article 8 and Article 1 Protocol 1 ECHR. The court invited the parties to take time to digest the contents of the judgment and invite them to jointly present the court with an agreed draft final Order dealing with the questions of the appropriate remedies and costs.²⁸⁹

²⁸⁶ ‘Independent Review of the PIP Assessment Process in Northern Ireland - Report and Response’ (Department for Communities, 20 November 2018) < [Independent Review of the PIP Assessment Process in Northern Ireland - report and response](https://www.communities-ni.gov.uk/independent-review-of-the-pip-assessment-process-in-northern-ireland-report-and-response) | Department for Communities (communities-ni.gov.uk)> accessed 17 January 2022

²⁸⁷ ‘Inquiry into Legal Definition of Terminal Illness’ (Marie Curie, 2022) < <https://www.mariecurie.org.uk/policy/appg-for-terminal-illness/legal-definition-of-terminal-illness>> accessed 17 January 2022

²⁸⁸ *Cox*, *Re Judicial Review* [2020] NIQB 53 (7 July 2020) at para104

²⁸⁹ *Ibid* para109

In Oliver's own words, the High Court ruled there was discrimination in the Cox case: *"there's the group of people who have a diagnosis that they're likely to die within six months, but subsequently live beyond those six months and continue to receive the benefit, and then the group who are terminally ill but aren't diagnosed that they're likely to die within six months. So, the different treatment was found by the court to be discriminatory"* (Oliver). At this time, Lorraine Cox was also awarded more points, gaining access to a more appropriate amount of PIP. However, it took 2 years to receive this outcome. Following the judgment, the Northern Ireland Assembly considered the case and passed a motion that the six month criterion for terminal illness be removed from the Regulations (although this made no immediate change to the application of the existing Regulations).²⁹⁰

The Department for Communities appealed the judgment of the High Court and on 3 August 2021 the Court of Appeal gave judgment in favour of the Department,²⁹¹ meaning Lorraine Cox ultimately lost the case. The Court of Appeal recognised that her circumstances fell within the ambit of Article 14, however concluded that the difference in treatment between Lorraine Cox and a person suffering from a progressive illness whose death was reasonably expected within six months was justified. The reasoning of the court is summarised as follows:

- "Ms Cox's case is about whether and where to draw the line within the welfare system.
- Parliamentary consideration was given to the definition of 'terminally ill' in 1990 and 2010. Evidence indicated that the system operated well in practice until recently.
- There is no dispute that some special provision is necessary for those who might die as a result of a progressive illness in the course of the application process for benefits.
- Extension of the SRTI to those with a progressive illness as a consequence of which death can reasonably be expected, would change the basis of the award from needs based to determination by diagnosis.
- There is an element of clinical judgement involved in the determination of prognosis and this is an adequate and acceptable tool in the circumstances.
- One of the options open to policy makers is to have a test based wholly on clinical judgement. The court is not, however, in a position to consider factors, such as the robustness of compliance with a needs based approach, the risk of diagnostic variability and impact on budget, which would be required to alter the current policy."²⁹²

Lord Chief Justice Morgan concluded that *"[t]he legislature has been involved in a detailed consideration of where to draw the line in this welfare benefit in 1990 and 2010. There has been continuing review of that decision since 2018. The Minister intends to submit a further proposed amendment to the Northern Ireland Assembly which will provide an opportunity for debate and reflection by the legislature. This is an area where considerable weight should be given to the views of the primary decision maker. These choices are for the political process and not for the courts"*.²⁹³

²⁹⁰ Official Report, (Hansard), Tuesday 6 October 2020, Volume 131, No 4

²⁹¹ *Department for Communities and Department for Work and Pensions v. Lorraine Cox* [2021] NICA 46

²⁹² For a discussion on the history of the case law and associated Ministerial announcements, see <https://www.lawcentreni.org/case-digest/department-for-communities-and-department-for-work-and-pensions-v-lorraine-cox-2021-nica>

²⁹³ Cox n331 [2021] NICA 46 para.73

In June 2021, shortly before the judgment was issued, the Communities Minister Deirdre Hargey outlined her plans to extend the terminal illness provision to 12 months.²⁹⁴ The Court of Appeal noted this Ministerial intervention in its judgment.²⁹⁵ To date, there has been no amendment made to the 2016 Regulations.

In December 2021, the *Social Security (Terminal Illness) Bill [NIA 47/17-22]*²⁹⁶ commenced its passage as Bill of the Northern Ireland Assembly (discussed further below). The Bill adopts a 12 month rule for terminal illness. The wider 12-month definition aligns more with that used by the health service in Northern Ireland and the General Medical Council (GMC) for end-of-life care.²⁹⁷ However, the Bill stops short of the Walter Rader's assessment process recommendation (2018) that the clinical judgment of a medical practitioner, indicating that the claimant has a terminal illness, should be sufficient to allow special rules to apply, which is the approach adopted in Scotland. Speaking on behalf of the Committee of Communities, Kellie Armstrong, Member of the Legislative Assembly (MLA) and Chair of the Assembly All Party Group on Disability, commented that *"although the Committee fully supports the Minister in bringing forward this very important legislation as a very welcome first step, I hope that it will not be too long before we see the Department gather the data that it needs in order to look further at a clinical judgement model. We welcome the Minister's comment that the legislation is a staging post"*.²⁹⁸

It is thus hoped that further legislative reform will take place in future to align the approach in Northern Ireland with the Social Security Scotland model. Whilst extending the six-month criterion to 12 months will benefit some people, it will undoubtedly still exclude others facing terminal illness with a predicted life expectancy beyond 12 months. This is a particularly salient point, given that Lorraine Cox was given two to five years to live and would still have been excluded from the extended provision. In addition to the barriers faced for Lorraine Cox to secure the appropriate level of PIP support, it is clear that the process to do so took far too long, a challenge that will be taken up in further detail in further analysis.

The individual remedy granted by the High Court: Was it sufficient?

The interviewer asked Kamilla, who had worked closely with Lorraine Cox, whether being awarded the higher PIP benefit was a sufficient remedy. Was it a good enough outcome? Kamilla strongly felt that the remedy was ineffective.

"Well, it's good that she's got the higher rate, but no I think from the beginning she should have got the special rules. She shouldn't have had to fight this for two years, like she's wasted two years of her life on the benefits system and it just doesn't make sense, it doesn't make sense that a young woman, and with three children who she's bringing up on her own, [she] should have been using those two years productively with her children, has been focussed on the system. And nobody can ever give her, or those two children, those two years back. They're gone" (Kamilla).

²⁹⁴ 'Communities Minister Hargey to Extend Terminal Illness Provision in Social Security Benefits (Department for Communities, 30 June 2021) <<https://www.communities-ni.gov.uk/node/52431>>

²⁹⁵ Cox n331 [2021] NICA 46 para.32

²⁹⁶ 'Social Security (Terminal Illness) Bill: Second Stage' (mySociety, 7 December 2021) <<https://www.theyworkforyou.com/ni/?id=2021-12-07.2.15&s=terrorism>>

²⁹⁷ ibid

²⁹⁸ ibid

The interviewer asked Rowan the same question and he answered that he believed that the court case was a first step, but did not think it would make any difference to her.

“It’s helping people going forward, he said, and it really just depends on the outcome of the work that’s being done by the minister in the department. You know, if they come back and say ‘yes, anybody who is viewed as being a terminally ill patient by their consultant or a specialist nurse, then absolutely, but you just never know [...] they’ve all unintended consequences. If that is the case, then, you know, does the government then review the benefits system and how they deal with- you know, because at the moment if someone’s viewed as terminally ill and has less than six months, they pull out all the stops and everything’s done straightaway for them. Will they continue to do that if there’s [...] you know, a lot more people [...] meeting that definition?” (Rowan).

Rowan recognises that Lorraine Cox herself will receive little benefit from the challenge she took on, as she is not likely to live long enough to see the process come to a satisfactory conclusion that prevents others from facing the same difficulties. He also raises an important concern about whether changing the definition in legislation will ultimately prompt changes to the benefits system if it is perceived that too many people will then qualify under the special rules.

Resilience: Fighting for a collective remedy

The Cox legal case also demonstrates another important aspect crucial to undertaking a legal case such as this, where it is clear from the start that the fight is going to provide minimal personal gain. It is clear that the cost to Lorraine Cox has been extremely high, given she spent two years of her very limited time span in legal proceedings. Not every individual has the will, strength and capacity to undertake such an endeavour, but Kamilla said that there was no stopping Lorraine Cox, describing her as “*headstrong*” and unwilling to drop the case despite the fact she was unlikely to receive a satisfactory remedy. “*She’s like a dog with a bone*”, Kamilla said laughingly, “*and she’s just not letting it go*” (Kamilla). It is thus an important point to consider the burden on an individual level and the associated difficulty in finding someone who is able and willing to see the entire process through.

Despite the forthcoming partial successful legislative outcome of a prolonged legal process, questions remain as to the effectiveness of this remedial approach for Lorraine Cox, insofar as her route to justice did not resolve the violation nor did it result in substantive change for those impacted by the legislation either through executive, legislative or judicial pathways (to date). The remedial gap in this case is particularly pertinent given the length of time exhausted by the applicant who only had a limited period of time to live due to her terminal illness.

The right to adequate housing in Northern Ireland

We now turn to the challenges expressed by practitioners in Northern Ireland regarding access to adequate housing, drawing attention to problems with respect to the availability of social housing, low housing standards, particularly in the private rental sector, tenants’ rights, as well as the historic legacy of the unfair distribution of housing between nationalist and unionist communities (with the former still disproportionately impacted).

The interviewer asked Esther, who works as a housing activist with a human rights NGO, what she perceived to be some of the most difficult issues to address. She said,

“housing is a huge one, especially in Northern Ireland because, like, it’s so intertwined with so many other issues, you know. We’re not just talking about, you know, gentrification or, like, you know, people being priced out of areas or land banking, all those kind of things and the lack of social housing that all cities are dealing with. We’re also dealing with, you know, the legacy of The Troubles and the fact that still today, you know, there’s huge discrimination in housing in Belfast in the north, and that you know, that’s been called out by the UN by, you know, the European Council for human rights, but it’s very hard to actually kind of really tackle head on in Northern Ireland. So, just for example, like in an area of Belfast where the Build Homes Now campaign was started, you have an area of the city which is kind of a mosaic of majority kind of unionist protestant communities and nationalist Catholic communities. So it’s kind of, it’s street by street almost kind of thing, but [...] 94 per cent of the housing need in North Belfast is for Catholic families, minority Catholic and minority families” (Esther).

These local tensions were foregrounded by all the practitioners we interviewed. Josie, head of a housing NGO, echoed concerns about the long waiting lists for social housing, which are exacerbated in particular areas. She said that the waiting list for social housing falls at just under forty thousand and the trend over the year showing that the number is still growing. She estimates that approximately fifteen hundred new social houses are built per year, all undertaken by housing associations. However, *“to seriously tackle the waiting list”*, Josie said, *“they need to be doing at least double that”* (Josie). In line with Esther’s comments about the difficulties related to sectarian tensions, Josie explained:

“even if you could build a hundred extra homes tomorrow, you’ve got to be able to build them in the right place for them to relieve that [pressure] do you understand what I’m saying? You need this, but sometimes the land, available land, isn’t where the pressure for housing is the greatest, and it’s not as easy as saying [...] just move to the other side of Belfast because that’s where the land is and we’ll build houses [...] because it’s just not as easy as that” (Josie).

Josie went on to say that the three groups whose access to social housing is disproportionately impacted are young people (under the age of 35) on low incomes, people from black Asian minority ethnic communities and lone parents. Some of them are excluded from the social housing list because they are not eligible, she says, but mostly it is because they do not attract sufficient points to qualify for social housing and are therefore pushed into the private rental sector. And this is where Josie believes are even greater difficulties to access what she would consider a secure and decent home, because in that sector, she said, are the poorer standards and poorer regulations (Josie).

Despite the fact that many more households are living in the private rented sector than in the social rented sector, the sector lacks a regulatory framework and tenants have virtually no protection. The interviewer asked her why the private rental sector is so unregulated and she answered, *“we have a lot of private landlords who also sit in our assembly, you know [...] ideologically there’s a view that it’s the private sector and the government shouldn’t intervene, you know. So, there’s all those, and then put on top of that the disruptions to the policy and legislative making processes”* (Josie). The latter point is also closely linked to extremely low and outdated housing standards in Northern Ireland.

Outdated fitness standards in the private rental sector

Josie explains that fitness standards are extremely low compared to the rest of the UK and there is no security of tenure. The current fitness standards, Josie said, date back to the early 1990s, meaning that the condition of a home which meets these standards is actually very poor. For example, *“one socket in a room is considered to be an adequate provision of heating, you know. So, one socket in a room that would allow you presumably to plug in an electric heater or something is considered to be adequate heating. Now, if you happened to need that socket for anything else so, you know [...] that’s pretty basic, isn’t it, I think in this era?”* (Josie).

Josie expressed frustration that the outdated standards are tied, at least in part, to the fact that due to political dispute, the Northern Irish Assembly did not sit for years at a time, impacting on processes to advance political change. She said, *“It’s like we’ve been talking about these things for years, and literally, literally there’s about to be a change and then suddenly you have no assembly for four years and nothing happens, nothing happens, it just all goes into limbo”* (Josie).

Furthermore, in terms of access to justice and opportunities to challenge social rights violations within the private sector, Josie highlighted that things are *“significantly worse”* for private tenants than those in social housing. Even with mechanisms in place to protect social housing tenants, access to justice is not guaranteed, she says. Josie lauds that within the social rented sector there are quite well-established kinds of frameworks for redress, *“both internally, within the social landlords themselves”*, she says, *“but then even outside of that, because there’s obviously the ombudsman. And also there’s access to the courts. So you know, if landlords are trying to bring possession claims against social tenants, that has to go to the court, so therefore there is an opportunity to defend the action and there’s also the opportunity to appeal. There’s you know, access”* (Josie).

However, she quickly points out that it is not necessarily a level playing field, because inevitably the landlord will be represented by probably quite a professional highly-paid legal, whereas on many occasions the tenants may not even turn up. And if they do, Josie says, it is unlikely they will be represented. In fact, Josie says, *“most of them don’t even turn up because we find that they’re encouraged by the landlord not to turn up, you know, because the landlord kind of indicates to them that it’s not really worth their while, because this is a fait accompli, you know, yeah”* (Josie). It is clear from Josie’s comments that simply having mechanisms in place to access court proceedings is not enough when there is a complete absence of equality of arms.

This lack of equality of arms was also noted in the Scottish case study in relation to housing and eviction cases.

“we sometimes forget, or there’s sometimes a perception that these are eviction cases that are just about non-payment of rent and all that is required is negotiation of repayment arrangements, when these are actually legal proceedings with lawyers acting for the landlords and rarely lawyers acting for the tenants. So the statistics on people who are accessing lawyers to represent them, are, you know, are stark. Yet when you have a lawyer in who is looking at the paperwork and who is identifying whether things are done properly, i.e. when equality of arms are there, it makes a stark difference to somebody, as I say, keeping their house or not. Or at least, how their case is dealt with” (Freya).

This would appear to represent a cross-jurisdictional issue with regard to unmet legal needs in terms of access to appropriate legal support in relation to the right to adequate housing.

Another barrier identified in Northern Ireland is that many private landlords are now refusing to accept people whose income is social security benefits, driven by changes in the housing allowance under Universal Credit, which is less generous than the housing benefit it replaces. The '*no DSS approach*' (no Department of Social Security approach), as it is referred to, operates covertly, as landlords will not openly admit to this, but Josie knows that it is happening, constituting a significant barrier to adequate housing based on the source of a person's income.

The limits placed upon legal and political progress in Northern Ireland is intertwined with ongoing tensions related to sectarianism, creating additional challenges for accessing justice for social rights in Northern Ireland. The case study highlighted how narratives about the conditionality of rights led to unfit, dehumanising practices and limited access to effective remedies. These dynamics mirror challenges faced by various groups of rights holders across jurisdictions.

The case studies we presented have each provided glimpses of wider issues across the social welfare landscape. Each of the case studies illustrated examples of processes and mechanisms that work together to constitute the jurisdictional frameworks for social rights. We now delve into our analysis to examine more closely the various elements that work together to constitute these local frameworks for the provision of social rights, as well as routes to an effective remedy when rights violations occur.



7

6

5

4

3

2

1

Part III. The access to justice journey

Summary infographic

1. Consciousness/ being in the dark about your rights and how to claim them

Even although a social rights violation occurs, people might not know and they might not know where to go. Social rights relating to areas such as housing, social security, poverty, health, employment, education etc are not treated as legal rights and often people do not have any awareness of them as "human rights".

2. Resources to help traverse the journey

People need access to financial, legal and emotional resources to claim their rights. Without appropriate financial, legal and emotional resources there can be insurmountable hurdles to accessing justice.

The system is not currently operating to provide people with the help they need to navigate the system.

3. Fear of retribution for resolving issue

Once they get advice people may still be reluctant to fight a case, because they are worried there will be retribution. Unfortunately the research suggests that this fear is sometimes justified in practice. This is really problematic for people who are already marginalised by the system.

4. Getting stuck in 'administrative mud' when trying to use alternative routes to justice

People can try and resolve without relying on courts. For example, by going to Ministers directly, by trying complaints mechanisms and appeals processes, or by going to a tribunal or an ombudsman.

Sometimes, these can result in success for the individual.

However, often times they can result in the person getting stuck in 'administrative mud' where they can't easily get to a resolution and they don't have the help they need to make sure they know that they may have the right to challenge the decision.

5. Even if you manage to finally get to a legal forum, those legal processes can also be paved with difficulties

Access to a remedy in a court should vindicate people who have faced a human rights violation. The court should be able to look at their case and uphold their rights and provide a remedy. However, it is paved with difficulty.

First, the legal framework is not strong enough to ensure that social rights are properly recognised in law. This means that the UK's international obligations are not upheld in domestic courts. And it means that even for those people who finally get to court, they might not actually be able to rely on the social right they are entitled to as a legal right.

Sometimes the rights might be protected but often it relies on lawyers trying to find passageways by using other 'boats' to cross the incorporation lake – for example they can use arguments based on ECHR rights or equality law, but they cannot rely on international treaties that have not been incorporated, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Convention on the Rights of the Child (UNCRC) or the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).

6. Reaching an effective remedy is never guaranteed

Finally, for those who do get towards the end of the journey there is hope at the end of the tunnel that there could be a remedy and that the remedy is effective. To be effective in practice access to justice should be accessible, timely and affordable. Likewise, the remedies awarded, should be effective and appropriate in practice, ensure non-repetition and help change poor practice if the issue is systemic. There is therefore a distinction between individual remedies (fix the problem for one person) and collective remedies (fix the problem for everyone effected).

7. Feedback loop improved communication to stop violation in first place

If the case identifies an issue that is a problem or error in decision-making processes/ that applies to more than one person/ that causes widespread violations – is this issue or error communicated back into the decision-making process?

This means there should be improved communication to stop violations continuing to happen earlier on in the decision-making process. It is also an important way of ensuring that the system gets fixed for everyone and is not just a fire fighting exercise of dealing with one individual problem at a time without fixing the overall system. In this sense a feedback loop can help others avoid the arduous access to justice journey enabling fast routes to remedies once a lead case has identified a recurring violation.



The access to justice journey

Access to justice has often been understood in a narrow sense, relating to the most fundamental barriers people face in having a chance to access a legal process such as access to advice, access to legal representation and access to legal aid. Whilst overcoming these barriers are absolutely key to enabling people to access justice, the research also revealed that the access to justice journey requires us to take a step back and view a much broader perspective. There are significant gaps that require to be addressed across this journey to enable change.

The easiest way of explaining the gap between the narrow and broad understanding of access to justice is to think of the journey as crossing a large mountain range. In order to reach the first summit those at the start of the journey must contend with the immediate barriers they face. On the journey to access justice, the initial barriers may be the only ones that are visible. However, once the first peak is reached, there are more peaks that come into view. This briefing explains how to broaden our conception of access to justice beyond those initial barriers towards a conceptualisation of access to justice that results in an effective remedy for a violation.²⁹⁹

²⁹⁹Bringing access to justice in line with international obligation to provide an effective remedy for a violation, CESCR General comment 9, 3 December 1998, E/C.12/1998/24; The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, [1998] 20 Human Rights Quarterly, 691, para.23.



Awareness and resources

The start of any journey calls for a level of general awareness in order to engage with the processes entailed, as well as a variety of resources in order to undertake that journey. The adjudication journey for social rights is no different. In this section, we examine the basic tenets required to successfully navigate the road to justice. What are social rights and what do they mean for the person facing a difficult situation? Do people generally recognise that the problems they are facing are rights issues, and if so, do they know where to turn for help? The practitioners we interviewed shared their insights.

Legal consciousness barrier: (Un)awareness of rights

Practitioner insights revealed that a lack of awareness of rights serves as a barrier to accessing justice for social rights and securing a remedy, because if a person does not know what their rights are, they may not seek justice when their rights are violated. Foremost, rights holders must be aware of their entitlements, know where to get help, and have the capacity and resources to engage with advice and navigate the entailed processes.

Carole, was involved in The Leith Housing Project³⁰⁰, which ran from 2015 to 2019, and addressed poor housing conditions in Leith, north Edinburgh. She recalled that when she spoke to tenants about the problems they faced, there was little awareness that the housing violations they faced were in fact breaches of their human rights. Carole said, *“when we went into Leith and we chatted to people about their right to housing and they were like ‘right to housing, what are you talking about?’, you know, ‘what do you mean we’ve got a right to housing?’ They didn’t know that that was there and they thought that it was all about lawyers taking human rights cases. So the narrative about human rights [...] wasn’t very clear, that this could be in practice, for people”* (Scotland | Carole | Consultant & Activist, NGO for human rights).

³⁰⁰ ‘Housing Rights in Practice: Lessons Learned from Leith’ (Scottish Human Rights Commission, May 2020) <https://www.scottishhuman-rights.com/media/2029/housin-project-report-vfinal-may-2020.pdf> accessed on 17 January 2022

The example demonstrates not only that a lack of awareness of social rights may prevent further steps being taken to realise those rights, but also that common conceptions of human rights and social rights vary, often based on wrong assumptions. The lack of legal consciousness means that many social rights violations go unchallenged, meaning that we must reclaim the narrative around human rights in order to improve access to justice.

In the course of conversation, Chloe, a volunteer in Northern Ireland, lamented that the responsibility for providing people's basic needs is often pushed either onto charities or the individual, rather than being provided by the State, but that people generally do not understand that they have fundamental social rights. Furthermore, in the social and political space, social rights have been undermined and weakened. She said, *"people's social right, there's- on the ground there is none, there is none [...] and also, I think people don't understand [...] what their rights are [...] that they do have these fundamental social rights [...] they've been undermined since, you know, between civil and political rights and social rights, you know, social rights are definitely the poor cousin, but I think it has just become, you know, a point where it's desperate and yet politicians, I don't think, are being held to account for it, you know, you don't see it on the news enough [...] poverty is not reported on. Poverty figures aren't reported on. It's frustrating"* (Northern Ireland | Chloe | Volunteer).

Chloe raises several important points, not only highlighting a general level of unawareness on the part of the individual, but also more broadly, that the rights protections framework in the UK has relegated the protection of these rights to the margins. Her insight iterates Boyle's³⁰¹ assertion that the bifurcation of rights has led to ESC rights not being treated as independent legal rights, but often being subsumed under civil and political rights, diminishing their perceived importance and attention. We assert the notion that 'social rights are radical', meaning that in the UK context there are prevailing examples of social rights not being met, accompanied by narratives that justify these failings by classifying certain groups of people as 'undeserving' of social rights and dignity. We return to this point again.

As our analysis shows, various social factors and discourses construct the contemporary environment in which these rights are backgrounded. One of the aims of the project is to challenge disempowering discourses and reclaim the narrative to promote a more equitable system for upholding social rights. Furthermore, without an awareness of rights and a recognition that the State has a responsibility to meet those rights, processes of accountability cannot begin. We now move on to discuss access to information, advice and advocacy.

Access to information, advice and advocacy

Asking for help when facing a problem is not a straightforward process and taking the first step of seeking information and advice can be daunting and scary for individuals. Eva, who works for an NGO tackling child poverty in Wales summed up a number of challenges people might face.

"I think a lot of people just don't know where to turn [...] I think services often struggle to be there when people need them because people typically get to a place of crisis, so they're living in vulnerable circumstances and they're dealing day to day with extreme-, multiple extremely

301 Boyle, *Economic and Social Rights Law* n8

stressful life events that are pushing them to that point, you know, where they are at risk of destitution. And if they're not engaged with agencies, and we're seeing this a lot in the pandemic, these aren't people who are problems, you know ((laughs)) to society. So, they don't have a social worker; they might not be working or engaged getting any help from mental health, you know, service providers and so on. You have to be quite ill to meet the threshold to be allowed to even kind of get support from those teams. So, lots of people just aren't on the radar. And people, because of the stigma and the social kind of pressures of not admitting that you need help and, you know, poverty's highly stigmatised, you know, in our society, and people don't reach out for help. Well, they don't even know where to turn" (Wales | Eva |Development Manager, NGO to combat child poverty).



So, in the first instance, people may feel too ashamed and embarrassed to reach out for help or might not know where to turn for assistance, if they are not already engaged with a service provider who can point them in the right direction. In addition, finding information online can be equally problematic as “digital exclusion is a huge thing still in many parts of Wales”, Eva said. In addition, one of the points she and others have been trying to convey to the Welsh government through the last twelve months is that supports, such as the Discretionary Assistance Fund (DAF), should be advertised better. She explains that “they [Welsh government] put lots of extra money into it and introduced new flexibilities to make it easier for people in the pandemic who had fallen on hard times because of the pandemic, to access, but they won't promote it. They won't give it a name that's recognisable. For lots of people even spelling the word ‘discretionary’ is challenging. If you type in the words emergency money into Google [...] it comes up with loads of payday loans and [...] sort of try and put yourself in the shoes and think through the process of someone who's in need of that support and how you find it if you don't have an external partner or organisation taking you through, it's very hard to do, so, that's one thing I think, you know" (Wales | Eva |Development Manager, NGO to combat child poverty).

The points raised here point to challenges of access due to digital poverty, as well as difficulties finding relevant information when assistance programs are not made visible in a way that is accessible to the people those programs are meant to target. Challenges to digital exclusion were also iterated by other participants, including Wi-Fi dead zones in rural areas, limited data allowances on mobile phones and lack of access to computers due to library closures.

The interviewer asked Eva what suggestions had been provided to government for making support programs and services more visible and she answered,

“I think the language can be challenging. It’s also when people do find information about it, like they have produced a booklet now that kind of sets out all the places you can go for financial support [...] because we have this very, as I say, nebulous and complex means-tested system, it’s a big document ((laughs) and it’s like if you were in crisis you’re not going to sit there and read thirteen pages, even if it’s nicely designed and laid out; it’s just not what you need. And then even within that, you know, the language that they use to describe the DAF, you know, so ‘a fund of last resort’ [...] you find your way to the web pages and you’re lucky enough to get there, the first kind of three pages just try to put you off applying by telling you, you know, all the reasons why you can’t have it and it’s not even- to me it’s not even really factually completely correct and they haven’t updated it. Because they’ve introduced these new flexibilities but [...] it’s not clearly communicated that actually you are allowed to apply for it if you’ve got your children at home from school and you can’t afford to keep the heating on, you know, but [...] it feels like [they] erect barriers to prevent people from knowing about it and then seeing that they’re eligible and applying. And then of course once people do apply, you know, you might be turned down completely discretionarily. And that’s where you get into the point of, where’s the right of appeal, how can you contest that when people are in crisis or in, you know, really difficult circumstances. The chances I think of anyone ((laughingly)) being able to actually navigate that process without the support of a welfare rights organisation is quite low” (Wales | Eva | Development Manager, NGO to combat child poverty).

Eva’s account is illustrative of the number of challenges a person may encounter, not least being that even when a person actually finds a program that may be helpful to them, the application process and language used may deter them from actually applying. Notwithstanding a person may very well qualify for services or benefit, they cannot determine if they are indeed eligible. Framing the DAF as “*a fund of last resort*” would make many a person question whether or not their circumstances are actually dire enough to warrant asking for help. Even when programs are designed to help people in need, a person’s dignity is eroded in the process. Moreover, when someone does apply, they might be turned down “*completely discretionarily*”, as Eva aptly put it. The discretionary nature of services is indicative of broader concerns surrounding current provisions for social rights which, due to their perceived lack of justiciability, are not promoted as rights but as commodities. The notions of ‘entitlements as rights’ versus ‘entitlements as commodities’, are rooted in different ideological conceptualisations. We address this further in greater depth in Part IV of the chapter.

The example provided does allow us to segue to the next dilemma a person might face, how to challenge a decision. So, for instance, a person is refused discretionary support or has an application for a welfare benefit denied, how do they find a solution, or remedy, to their problem? Some people might be able to navigate that path on their own, but according to the practitioners we spoke to, most people will require specialist advice to chart a course forward.

Access to appropriate independent specialist advice

It will be helpful to briefly explain the various components of the advice sector.

Organisations such as Citizens Advice Bureau have been providing independent social welfare advice for more than eight decades in the UK, although in recent years capacity of the sector has been severely curtailed due to funding cuts and closures, constituting a major barrier to accessing justice. Advice agencies provide free information and advice to the public on a wide range of issues including debt, housing, welfare benefits, employment, family issues, asylum and immigration, and the like. Their tasks range from helping people fill in forms and applications to specialist legal advice and representation at tribunals and court. The welfare benefits advisers that we spoke to either worked for independent advice centres, charities or local community/ county advice agencies. Frontline support is generally referred to as First Tier Welfare Rights Advice. Some practitioners in the advice sector may only provide general information and signpost to other organisations if they are not qualified to address a problem.

Rowan, who works as a benefit adviser at a cancer hospital in Northern Ireland, highlighted some of the difficulties with the application process for benefits under social security. He highlighted that one of the reasons people need to be able to access advice and support is for assistance with complex and lengthy application processes. Some of his clients are elderly, which also increases their need for support in completing the necessary application forms. He recalled assisting an elderly lady to apply for Attendance Allowance, a benefit designed to help with extra costs when a person has a disability severe enough that they need someone to look after them. He said that the application process triggered entitlements to other benefits, which required a total of five different forms to be filled in. Rowan said that without advice, she would have never been able to access those benefits, because unless someone is familiar with the system, they would “*never, never spot them*”. Rowan said, “*Universal Credit was supposed to streamline things for working age people [...] it's not universal and it's certainly not easy, you know, the application process, and following it through is by no means simple*” (Northern Ireland | Rowan | Welfare rights adviser, NGO for Cancer Patients). He laughingly said you only have to pick one wrong box for everything to go awry.

In addition, he said, the application was completed in January that year, and the client only received her benefit in November, a ten month wait. Despite backdating the benefit to time of application, Rowan recognised that people have a financial need when they apply and the long delays do not meet people’s needs. The interviewer asked him what a ‘proper’ system would look like and Rowan answered “*well, one single online application, you know, where, if you want to apply for social housing tick a box, if you need benefits, you tick a box*” (Northern Ireland | Rowan | Welfare rights adviser, NGO for Cancer Patients). A streamlined application system would be much better, he thought.

Rowan’s account encapsulates the sentiments of many of the practitioners we spoke to about the difficulties in navigating the system, which is further exacerbated by frequent changes in rules and regulations that complicate access. This was also highlighted in the above section on impacts of the Covid-19 pandemic, as emergency measures and changes in legislation complicated an already difficult to navigate landscape.

Other advisers are able to provide much more in depth guidance and advice. In this study, when practitioners referred to ‘specialist advice’, they generally meant practitioners who are better equipped to help people challenge their problems through internal complaints procedures, such as mandatory reconsiderations and appeals. Although the majority are not qualified lawyers, they undertake advice at a level where very detailed knowledge

of the law and case law is required. If a person has exhausted all avenues to achieve an effective remedy through the routes of internal complaints procedures and tribunals, they may seek a legal solution to their problem. At this point, additional support may be available from what is termed Second Tier Welfare Rights Advice. Support at this level generally comes from law centres and other agencies who have legally qualified staff who can take on 'cases' for further legal challenges through the court.

Practitioners emphasised the importance of independent advice, as rights holders generally do not know the appropriate procedures for challenging decisions. In the case of social security benefits decisions, DWP does not usually provide details on how to challenge decisions, making it difficult for people to participate, as explained by Andrea, the welfare benefits adviser involved in the *Pantellerisco* legal case. She highlighted a lack of awareness and understanding about processes and procedures when a person gets turned down for a disability benefit, for example. She said, *"the next stage is that they have to apply for mandatory reconsideration and what most people do is they just phone up and they say 'I want a mandatory reconsideration'. Now that's not enough, unfortunately. But they're not told that. They're not really given that advice by the DWP, so when that happens, nothing changes"* (England | Andrea | Welfare Benefits Adviser related to *Pantellerisco* case). Claire, the solicitor in *Pantellerisco*, iterated the same sentiment when she said, *"DWP, you know, is very clear; it gives information but it doesn't give advice"* (England | Claire | Solicitor related to *Pantellerisco* case).

In addition, benefit claimants often do not understand that a mandatory reconsideration is only the first step in challenging a decision. It is often assumed that if they have been refused again, they have exhausted all of their options. Andrea also outlines the tasks involved in the mandatory reconsideration process, which require producing additional evidence, such as a healthcare report, and a full written submission outlining which elements of the decision are being challenged and why. Andrea states that at that point, DWP often change their decision and that her agency has a very high success rate with mandatory reconsiderations because of their approach. Reflecting on the internal complaints mechanisms, Andrea said, *"I use the word fight, it shouldn't be a fight, but then that's how it often does seem that you really try to, you know, drag concessions and just humane behaviour out of DWP."* (England | Andrea | Welfare Benefits Adviser related to *Pantellerisco* case).

It became very clear that the process of composing a written submission to challenge a decision requires significant knowledge and skills that she deemed many of her clients not to have, providing a barrier to participation in the decisions that impact them. In addition, the lengthy mandatory reconsideration procedure is a key barrier to access, discouraging people from seeking out legal avenues to justice after mandatory reconsideration, never resolving their social rights issues.

The next stage would be to appeal the decision, but Andrea said that the thought of an appeal or tribunal hearing scares people, as they have never had to go through such a process before. Another challenge raised regarding the tribunal process, as indicated earlier by Kamilla, the time scale for tribunal hearings is very long. Andrea said that in her area, the waiting list prior to the pandemic was eleven to twelve months, which is one of the challenges in doing her work. Andrea said, *"we can support with certain things and we do support as much as we can with that, but say, for example, trying to get cases listed quickly at tribunal. You can't do it. You have to go on a waiting list [...] and no matter and even if they get into rent arrears, they could face eviction during that period of time. I've had clients that have actually been evicted because they've been relying on that money coming in to support their sort*

of standard of living and their needs. So we're constantly hitting that, we can't push that. We are working within the legal system and it's whatever length of time it takes to do that. And there's nowhere for people to go" (England | Andrea | Welfare Benefits Adviser related to *Pantellerisco* case).

Andrea said that she and her colleagues try to mitigate those problems by contacting the gas company, for instance, if someone has run out of money for electricity, and even give money from their own personal pockets when there are families and children involved. *"There's nowhere for them to go if the system says no. You can't magic money for people, you know"*, says Andrea. Andrea's account illustrates how long waiting times have real and immediate consequences for rights holders, resulting in rent arrears, evictions and not having adequate income to buy food and basic necessities such as fuel for heating.



Emotional barriers: Fear of retribution

Fear wielded by those in authority serves as a particularly powerful weapon to deter individuals from seeking help or advice. Methods of intimidation, such as seen in the private housing sector (Scotland, Northern Ireland) through fears/ threats of eviction and lock changes, intersect with toxic immigration rhetoric. These examples illustrate how "systems of thought" become "systems of action",³⁰² or stated differently, how ideology translates into operation or practice.

Freya, a solicitor, expressed that people *"might never approach the authority because they're worried that they're going to be deported or detained, because they think they're illegal"* (Scotland | Freya | Solicitor, NGO for Housing). Abigail shared that it is difficult to assure people that nothing will happen if they complain, because sometimes things do happen, so that fear is not always misplaced. She said, *"sometimes things do happen when people complain [...] and they're the ones that deal with it, I don't deal with it"* (Scotland | Abigail | Evictions Caseworker, NGO for Asylum Seekers). She went on to relay a story of a woman she

³⁰²Nikolas Rose and Peter Miller, 'Political Power beyond the State: Problematics of Government' (1992) 43(2) BJS 181

worked with during the *Serco* lock change evictions. Abigail and her colleagues were working with lawyers to represent clients in court. The court had placed an interim interdict, which meant that a person could not be moved until the *Ali* legal case had been decided, but Abigail received a call from the woman saying that *Serco* said she would be evicted that day. Abigail recalled the conversation:

“so I called Serco and was like ‘are you aware that there’s an interim interdict on this property and you will be breaking the law if you move her?!’ And they didn’t know! And they were like ‘oh thank you for telling us!’ like ‘she won’t be moved’. But then there’s this kind of system in place where if somebody doesn’t move, either when they come to evict you or they come to move you to a different property, it’s called a ‘Failure to Travel’. So if you refuse to get in the van and go, they issue a Failure to Travel message to the Home Office and then your asylum support stops. So even though they would have been breaking the law if they had moved her, they still issued the Failure to Travel notice, so then her asylum support stopped” (Scotland | Abigail | Evictions Caseworker, NGO for Asylum Seekers).

Abigail’s account shows clear barriers to accessing justice. Later in the interview, Abigail mentioned that the woman who experienced this did eventually get her support reinstated, but it took six weeks and she never got the money from those weeks backdated. During that time, she was left legally unable to work and with no money. Ramifications such as this make seeking justice not only difficult but dangerous as well.

Building awareness and capacity is futile without accountability related to the ‘fear factor’. Fear of retaliation or eviction is real and can happen even if you are fully within your right. Rights can only be fully claimed with mechanisms of oversight and accountability, and commitments to addressing underlying dynamics of racism and discrimination.

Intersectionality of rights: Clustered injustice

One of the most difficult issues facing the advice sector is the inherent interrelationship of rights, meaning that rights violations in one arena often create a snowball effect, impacting on multiple rights and needs for individuals and families.

We asked Eva, who currently works to address child poverty, if she could identify particular challenges in terms of accessing services and navigating the welfare system. She previously worked for Citizens Advice and shared that their service users are not typical of the general population, in that they tend to have multiple problems. She said,

“people come in and they tend to have like three or four problems ((laughs)) by the time they make it through the door, so they’ll have a housing issue, it will often be a debt issue or a benefit issue, and then, you know, as you’re unpicking it and actually, you know, the caseworkers have to kind of work quite a long time to help people get things back in order [...] I think what welfare advisors at Citizens Advice would say [...] that their caseloads are more complex in recent years; people are more likely to have multiple issues that are making each of them worse. So, welfare reform, problems with the conditionality of Universal Credit, triggering mental health issues which make it more difficult then for them to manage tenancies, to pay their council tax [...] all these things snowball. And then you miss your appointment with your work coach, and then you get sanctioned [...] it tends to start with problems with the welfare system and then it tips over and it becomes problems with just all aspects of your life, and really quite quickly as well [...] it was problems with benefits that were the initial thing that moves them on from a place of stability and coping [...] in quite a short space of time to be not coping with lots of things [...] I think it’s hard to understate how much benefits going wrong can really just make everything else worse” (Wales | Eva | Development Manager, NGO to combat child poverty).

The example provided by Eva is not unique in our data set, but reflects the various stories that materialise in different ways across the four UK jurisdictions. It emphasises how human rights issues cluster together, with people facing multiple, synchronous and often ongoing problems. Luke Clements refers to this as ‘clustered injustice’,³⁰³ an apt term for describing the phenomena that have become salient across the data. For those who are disadvantaged, whether due to disability, poverty/ low income, homelessness or precarious immigration status, the problems they face are intricately linked together, further affecting emotional wellbeing and mental health, increasing financial precarity and eroding people’s resilience to the point that they give up on seeking support/ effective remedy.

Although the intersection of rights most often amplifies challenges for individuals, sometimes the consequences are positive. The aforementioned Leith Housing Project serves as a fitting example of empowerment and what can be achieved when awareness of human rights is promoted and residents themselves begin advocating for their right to adequate housing to improve their living conditions.³⁰⁴ Carole related that although the work revolved around housing, one of the outcomes was that residents reported better mental health. Carole said *“that intersectionality of rights is actually quite interesting and important as well. You might go in with one idea that ‘we’ll support you on this issue’, but actually the unintended consequences, as you know, because rights are interdependent, it can have a much more holistic, kind of amplified impact”* (Scotland | Carole | Consultant & Activist, NGO for human rights).

Challenging rights: The need for advocacy, legal aid and legal representation

Each of the case studies demonstrate that advocacy and support has been an essential ingredient in legal processes to access a remedy. Claire, who was the solicitor in the *Pantellerisco* case, commented on the benefit of liaising with Andrea, the welfare rights adviser. Especially because Claire had to engage with clients remotely, she stated that it was helpful having Andrea on the ground to “interpret” things with Sharon Pantellerisco. It aided communication and enabled client engagement with the legal process by helping them understand what was happening and providing reassurance during a distressing time.

Legal routes to a remedy: Shortage of legal expertise

Specialised advice to access legal routes to justice was identified as important across all four case studies. Complexity of cases, particularly those relating to two areas of law, such as immigration and housing, can be particularly challenging when it comes to addressing violations. Finding available lawyers and accessing legal aid to afford them are key barriers in terms of utilising legal routes to justice. Freya expressed concern that there is not enough specialist/ legal expertise. She said,

“So, if it’s about services that can provide advice and help people challenge and have their rights enforced, I’m worried. [...] I obviously look at it through the lens of like legal advice, and that’s not to say all these cases- most housing issues and homeless issues in Scotland will be dealt with without a solicitor, but at the end of the day, in the context of homelessness, for example, it’s judicial review that’s the remedy, where you would need a solicitor. And in many of these

³⁰³ Clements n20

³⁰⁴ Unfortunately, despite awareness and capacity raising, the conversation did not change the narrative of the local authority: *“one of the key issues that came out of the project was that the local authority never engaged with this as a human rights process, nor did they ever engage that there was a right to housing [...] it was like pulling teeth with them and we never actually got there in terms of culture change or institutional change”* (Scotland | Carole | Consultant & Activist, NGO for human rights)

eviction cases it is court proceedings. We're overly reliant, not 'overly reliant', we are dependent on charities and you know, Citizens Advice Bureau and all of these organisations are doing everything that they possibly can. We have to ask ourselves [...] why is there not a body of social security lawyers there to tease out what are really complex areas of law. Social security, like immigration law, changes all of the time" (Scotland | Freya | Solicitor, NGO for Housing).

Julie also reflected on the Scottish context with respect to access to justice and ways of getting an adequate remedy for a violation. She expresses her views on ensuring adequate funding of advice services and legal practitioners. She notes that,

"at first level, our processes require people to have lawyers representing them to get- really to get satisfaction, to get them what they need. Um, and there are not enough such lawyers in Scotland. And I do not see there being enough such lawyers any time soon, to be honest. And something needs to radically change about how we fund and train our lawyers, for there to be enough lawyers. And I would also add, that the fact that there aren't enough lawyers is the consequence of a long and concerted campaign and a set of decisions made by subsequent governments to reduce social ((half laughs)) justice law! I mean there's no- like no other way to see that, so the first thing would be [...] more people who can provide direct advice and information at the front lines, lawyers or not, so ((laughing)) stop under-funding your advice services basically!" (Scotland| Julie | Solicitor specialising in asylum/ immigration, NGO for Legal Service).

The above quotes highlights that access to legal advice and representation is key in order to fully utilise legal routes to justice. This is particularly important because there is already too much pressure placed on charities to meet rights holders' needs. In addition, there is a need for expertise in highly specialised and complex areas of law, such as social security. However, access to adequate funding provides the next major hurdle in pursuing legal avenues to justice. Without legal aid, many rights holders cannot afford to pursue legal remedies, and without legal representation they would likely be unsuccessful.

Lack of Funding

Funding is an essential component to accessing justice and is raised as a barrier across each of the sectors involved in social rights: the legal and operational arms of government, as well as the third sector. Legal aid is absolutely essential to adjudicating social rights and is flagged as one of the biggest barriers to accessing justice. This is true in regard to a legal case seeking an individual remedy, but especially pertinent with respect to strategic litigation cases that are seeking a collective remedy.

Claire, one of the solicitors interviewed, described the importance of legal aid with respect to strategic litigation, stating that any risk of having to pay the government's cost would outweigh anything that could be personally gained from the case. Legal charities can take on pro bono cases, but the risk remains of a client having to pay the Secretary of State's costs if they are unsuccessful.

"So legal aid provides cost protection. It means that if a case is unsuccessful, essentially it's the legal aid agency who steps into the client's shoes and one bit of government pays the other bit of government, you know. It's all a bit of emperor's new clothes type thing, but legal aid provides clients cost protection, and that's what I want. I don't want to be saying, 'well you know, do you want to get involved in this case, you know, which will benefit you but actually benefits [more] people, and actually, you know, there's x, y and z risk. And they'll just go, 'what?'" (England | Claire | Solicitor related to *Pantellerisco* case).

Without legal aid, risk bars access to legal processes for an individual, when required, to

obtain an effective remedy. In addition, it's important for addressing greater public interest issues. It is unfair to expect individuals in precarious financial positions to taken on the risk of cases which may have more structural benefits than individual benefits for them. It is for that reason that Claire stated that she only accepts clients with legal aid. Claire shared that although rights holders who are in receipt of Universal Credit should qualify for legal aid, she is concerned that may not always be the case due to government cost cutting. Other practitioners also noted that due to the *Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) (2012)* fewer people have access to legal aid, which prevents their access to justice. As explained earlier in the Wales case study, LASPO applies to legal aid provision in England and Wales and has greatly reduced legal aid provision for legal problems encountered in relation to economic and social rights. In addition, there is a plethora of issues associated with appropriate expertise and advice deserts across England and Wales.³⁰⁵

Whilst the position with legal aid in Scotland and Northern Ireland is much better placed to respond to a broader set of legal needs than under the statutory framework in England and Wales, individuals will still face potential hurdles in financing a legal case. The criteria for civil legal aid in Scotland undergoes a number of tests including a means test, a capital test, and a consideration of the merits as to whether it is reasonable to fund advice and assistance by way of representation. A change in 2011 increased the limits for an applicant's disposable income to £25,000, meaning 70-75% of adults in Scotland meet the criteria to receive some legal aid.³⁰⁶ Merits testing is also in place in Scotland, where the test applied is a consideration of 'reasonableness'. The Scottish Legal Aid Board (SLAB) offer a brief description of the factors they will consider, from 'the estimated prospect of success for the case [and] of practical change as a result of a positive outcome from the case where the remedy available is not a financial one' as well as 'prospects of financial recovery, the degree of risk of the court action being mature, [and] the estimated cost of the case'.³⁰⁷

The Scottish Legal Aid system works on an inclusive basis that is demand led,³⁰⁸ rather than the exclusionary approach adopted in England and Wales under *Legal Aid, Sentencing and Punishment of Offenders Act 2012*. This approach means there is a wider scope of issues that can be funded – a key strength of the Scottish system. Nonetheless, there has been a decrease in overall legal aid funding in Scotland (16% over the last 3 years) and this has inadvertently created potential barriers through the increasingly likelihood of advice deserts both geographically and in the sufficiency of the numbers of solicitors providing a particular services within a specialist field of law.³⁰⁹ The reluctance of private providers to engage in these fields may be as a result of the complexity and unsustainability of this work as a field of private practice. For example, some providers of civil legal assistance must subsidise their work via other private practice or grants, meaning not every hour worked on legal aid cases is paid – an unsustainable model. Respondents to a Scottish Government consultation on legal aid reform highlighted concerns that housing, debt, employment, domestic abuse, immigration and asylum were areas currently poorly

305 See work of Law Society of England and Wales (2021) in raising awareness of 'legal aid deserts' through their campaign. Available at: <https://www.lawsociety.org.uk/en/campaigns/legal-aid-deserts>. See also J Wilding (2019) 'Droughts and Deserts: A report on the immigration legal aid market' Right to Remain. Full report available at: <https://righttoremain.org.uk/legal-aid-droughts-and-deserts-new-report-by-dr-jo-wilding/>.

306 Law Society of Scotland Legal Assistance in Scotland: Fit for the 21st century discussion paper. See Evans who provides an estimate of 70% in 2018. M Evans (2018) 'Rethinking Legal Aid: An Independent Strategic Review' Scottish Government [p19].

307 SLAB Website 'Overview of reasonableness factors'. Available at: <https://www.slab.org.uk/guidance/overview-of-reasonableness-factors/>.

308 2019-2020 SLAB Annual Report and Accounts, (SLAB 2020), <https://www.slab.org.uk/app/uploads/2020/11/2019-20-SLAB-Annual-Report-and-Accounts.pdf>

309 Scottish Government Consultation, Legal Aid Reform Consultation Analysis, (Scottish Government 2020), available at <https://www.gov.scot/publications/legal-aid-reform-scotland-consultation-response/pages/4/>

served by private providers (meaning an overreliance on already stretched third sector organisations) and that gaps in funding exist across these areas, for example in relation to reasonable adjustments for people with disabilities, or in responding to mental health issues that can intersect with all of the above.³¹⁰

In Northern Ireland legal aid has been and continues to be provided in a similar fashion as when it was first established by the *Legal Aid, Advice and Assistance (Northern Ireland) Order* in 1981. Eligibility for civil legal aid in Northern Ireland is like Scotland and its broad scope is provided for by the 2003 order with exception laid forth in schedule 2.³¹¹ These exceptions remain consistent with the 1981 Act and original intentions of civil legal aid provision, though as with Scotland caused by the realities of devolution, there remains a structural barrier to scope. The dispute in Northern Ireland must be a matter of Northern Ireland law, leaving matter of law from England & Wales as well as European Court of Human Rights cases out of scope.³¹² Moreover, Northern Ireland, like England & Wales, has Exceptional Case Funding (ECF) in place with funding granted if failure to provide legal aid would be a breach of the individual's rights under the European Convention or enforceable EU rights or if the risk of such a breach makes funding appropriate.³¹³ Means and merits testing applies in a similar fashion with social security payments also considered under 'passporting'. However, Northern Ireland has put in place, since 2009, lower limits than Scotland which likely provide a hurdle for some seeking to access civil legal aid for social rights disputes. The Legal Services Agency Northern Ireland (LSANI) board determines any grant of legal aid based on the merits of the case. *Article 14(2A) of the 2003 Order* requires an individual to show reasonable grounds for taking, defending or being party to the proceedings of a case before legal aid may be granted. Despite clear requirements within the legislation there must be guidance for how merits testing is carried out, this is yet to be published by the Northern Ireland Department of Justice.

The provision of legal aid in Northern Ireland changed in 2019 with the introduction of Legal Aid Management System (LAMS) by the LSANI. LAMS moved the entire legal aid application process to a digital system. This switch, as when many fundamental services are digitised, experienced difficulties as noted by Law Society in Northern Ireland.³¹⁴ There was concern it would act as a barrier to those seeking legal aid as well as a further administrative hurdle for practitioners to surpass when making an application. Though it is in its infancy, thus far, there is no evidence to suggest that the introduction of digital legal aid provision through LAMS has acted to reduce the provision of civil legal aid. Spending has not been adversely impacted, nor has there been a reduction in registered practitioners who provide civil legal aid.³¹⁵ Northern Ireland faces similar concerns to Scotland and England and Wales in relation to the provision of specialist legal advice in social welfare areas by a sufficient number of practitioners widely dispersed geographically.

310 Ibid

311 Access to Justice (Northern Ireland) Order 2003. Civil Representation is only available for proceedings before certain courts and tribunals set out in paragraph 2 of Schedule 2 of the 2003 Order. Even where proceedings are before one of the listed courts or tribunals, they may still be excluded because of their subject matter. These exclusions are set out in Schedule 2 of the 2003 Order

312 The Civil Legal Services (Scope) Regulations (Northern Ireland) 2016

313 B Politowski, G G Grimwood & Y Sallberg 'Civil Legal Aid: England & Wales, Scotland and N Ireland compared' House of Commons Research Briefing (2016)

314 <https://www.lawsoc-ni.org/legal-aid-digitalisation>

315 LSANI [2020] 'Annual Report and Accounts'. Available at: <https://www.niauditoffice.gov.uk/sites/niao/files/media-files/lsani-annual-report-and-accounts-2019-2020.pdf>.

Moreover, lack of legal aid/ appropriate funding schemes functions as a common policy mechanism, in that it intersects with policy aims and greatly curtails access to securing an effective remedy. How funding is allocated provides a fairly accurate picture of how authoritative values are distributed.³¹⁶ By way of example, we recall Matthew's account that legal aid was not being made available for any Covid-19 challenge cases and that social welfare is excluded from legal aid provision. The lack of access to appropriate funding mechanisms for undertaking a legal challenge is another tool for reproducing an inequality in arms and solidifying existing structures of power and control.



Complexity of the justice system: Getting stuck in 'administrative mud'

Often times people may prefer or be required to resolve a dispute through an informal route to justice. This could be for example, through a complaints process or alternative resolution process. Formal legal processes also exist via tribunals, ombudsmen and courts. Whilst there are many positives to encouraging resolution through alternative routes, there are also potential setbacks to the complexity of the pathways available and the danger that people can get 'stuck' in 'administrative mud' (Wales | Matthew | Solicitor, Private Law Firm). What is not always clear is: what is the best route to justice for an individual in the particular circumstances, and how they can reach a satisfactory and timely remedy. As a general rule it would be expected that alternative routes to justice are exhausted before a legal case can be raised. It may be either a legal requirement or more appropriate to seek a route to a remedy via a tribunal, ombudsman or other complaint process in the first instance. However, the longer and more drawn out the various legal processes the more ineffective that route to justice can become as it will struggle to meet the adequacy metrics of a timely and affordable process. These routes to justice can create a complex web that is difficult to navigate, and most likely impossible to do so without specialist legal advice. Advice services are stretched and services face the continuing threat of funding cuts³¹⁷

³¹⁶F Rizvi and B Lingard, *Globalizing Educational Policy* (Routledge 2009)

³¹⁷Martin Williams, 'U-turn: Closure-threatened Glasgow Citizens Advice Centres Set to get Vital Funding...but (Glasgow, The Herald, 17 September 2020) <https://www.heraldsotland.com/news/18726063.u-turn-closure-threatened-glasgow-citizens-advice-centres-set-get-vital-funding/> accessed 17 January 2022

meaning it becomes less and less likely people on the ground get the help they need to help them navigate the complexity of the access to justice journey. Collaborative partnerships between several different actors are needed to help with access to justice and further consideration is required in order to best support such partnerships, including help with co-locating services as well as ensuring genuinely sustainable funding models.



Adjudication of social rights: Incorporation of international human rights law

The case studies outlined in Part II of the chapter have raised challenges with respect to the adjudication of social rights related to the devolved frameworks and differences, intersections and limitations under devolution. The other identified hurdle to drawing on the international human rights framework for social rights revolves around the incorporation of rights (also see England case study). Roland, a QC, voiced his perspective on the application of international law:

*“The additional gain to the argument, in my experience as an advocate, on the international conventions is often quite limited [...] obviously they [economic and social rights] don’t really stand on their own in the ECHR, they’re not incorporated, so they’re not part of domestic law. They can obviously illuminate the arguments that you might have about nationality or discrimination in domestic law or even buttress the argument with references to international obligations. My own experience, that’s just been where I’m coming from recently, it’s quite difficult to really gain much added value as an advocate for the international conventions to social and economic rights and you can’t litigate them by themselves because not incorporated” (England | Roland | QC related to *Pantellerisco* case).*

Unless a law is fully incorporated, it is unlikely to hold much value in terms of accessing a remedy to a social rights issue. It was made clear in the case studies that the extent to which international laws are incorporated differs across the UK. As detailed in the Wales case study, the UNCRC has been enshrined in Welsh law but not in English law

(Wales | Matthew | Solicitor, Private Law Firm). Practitioners voiced support for processes of incorporation and also raised red flags about the limitations of such processes. For example, in relation to economic and social rights specifically Roland remarked,

“[t]he problem, if you’re dealing with the European Convention, ECHR, obviously you do have a body of case law which a court- an English court, a domestic court, can deal with, understand and apply, even if it kind of wants to change it or modify it or whatever. If you’re starting with just, say, the UNCR, then there’s no track record. I mean, there are some dispute mechanisms under the Conventions themselves [...] oversight by committees, but it’s very much more difficult to get the very general statements in the Conventions to bear on a specific domestic social security model. The court tends to think it’s not getting very much help by being told (2 sec) that everyone has a right to social security law, yeah, fine, but ((half laughs)), um, where does that really take one in terms of the disputes one actually has” (England | Roland | QC related to *Pantellerisco* case).

This interpretation of the meaning and content of rights draws on the indeterminacy critique, in that social rights are too vague to materialise into justiciable entitlements. This critique is a remnant of the separation of civil and political rights and economic, social and cultural rights. Much like civil and political rights (CPR), economic, social and cultural rights (ESCR) require courts to play an important role in giving meaning and content to rights, and further statutory elaboration on international instruments can help guide the court in this respect (i.e. it is not an insurmountable hurdle). Likewise the reference to the lack of jurisprudence overlooks the wealth of comparative (both constitutional and regional) human rights jurisprudence on economic and social rights including jurisprudence by the European Social Committee under the European Social Charter to which the UK is a party. It is crucial to understand that *“[w]ithout the appropriate legal structures and institutional mechanisms in place to adequately address [the ESR accountability] gap we leave the burden and the brunt of ESR violations to be addressed by those at the front line who are essentially left without appropriate means to support those who need it most”*.³¹⁸

This concern materialised as a dominant theme across our data, highlighting the burden felt by those in frontline advisory positions, with ever-increased needs and dwindling resources. This has become particularly salient during the Covid-19 pandemic, which has shone a spotlight on an already fragile welfare system.

Strategic litigation: Individual versus public interest

Our Northern Ireland case study is a prime example of how a legal case (*Cox*) can serve wider public interest, or rather, have implications for the welfare or well-being of the general public. Despite *Cox* ultimately losing the case, the longer term material impact led to a proposed change to the definition of terminal illness to allow easier access to PIP. This result could have positive benefits for many other people, making it easier to access financial help when they desperately need it. However, strategic litigation places an enormous burden on one individual who, in the case of Lorraine Cox, did not gain very much personally from the case. Rather, with sheer determination, she sacrificed two years of her already curtailed life fighting for a cause she believed in.

Given the burden on the individual rights holder, practitioners expressed it challenging to find the ‘right case’ for addressing more systemic issues. One of the practitioners summed it up well. In this excerpt, Josie is referring to appeals related to homelessness decision letters when someone is denied ‘homelessness’ status³¹⁹. She said:

³¹⁸Katie Boyle, *Economic and Social Rights Law* n8 at 235

³¹⁹There are strict criteria a person has to meet to be designated as homeless.

“whereas there’s many cases where you would really love to have the opportunity to get it into court to have the issues heard and aired because then it could be more helpful beyond the individual, that’s not a decision that you can make on behalf of the person, you know, you just can’t [...] if you’re in that situation and somebody said to you, no okay, we will accept you’re homeless, obviously you’re going to say that’s great, thanks very much, and that’s what people do. They’re not going to say, well hold on, I want to make an important legal point here” (Northern Ireland | Josie | Chief Executive, NGO for housing).

Josie highlights the key challenges in terms of addressing wider issues of public interest in relation to social rights. The interest of an individual rights holder and broader public interest are often not the same. An individual remedy might rectify the violation, but does not challenge the wider legal issue or prevent repetition or recurrence for others. Given the time commitment and emotional burden, it is a decision that cannot be made on behalf of an individual. In order to ensure genuine participation of individuals in legal processes, there requires to be a step-change in terms of how to support the advice, representation and advocacy they require. It also calls for a re-focus on how formal legal processes can better respond to individual needs, as well as systemic problems, together with substantive standards that reflect international human rights law. As social rights violations are often systemic in nature, we recommend finding ways of improving routes to collective advocacy and collective cases to alleviate the burden on individuals.

Other examples raised were the *O’Donnell* case,³²⁰ which challenged the legislation for bereavement support in Northern Ireland (Northern Ireland | Oliver | Solicitor, NGO for Legal Services). Mr O’Donnell was refused bereavement support when his wife died, because legislation required Mrs O’Donnell to have made national insurance contributions for her husband to be entitled to the benefit. However, Mrs O’Donnell had never been able to work due to a life-long disability. The Court ruled that:



“it was manifestly unreasonable to suggest that a severely disabled person could be incentivised to work if their disability prevented it. The Court also said that creating an exception for such persons did not undermine the contributory principle and that the severity of the measure was disproportionate to its likely benefits. The Court therefore concluded that in order to make the section 29(1)(d) of the 2015 Act compatible with the ECHR it should be read to treat the contribution condition as being met if the deceased was unable to comply with section 30(1) throughout their working life due to disability.”³²¹

This case exemplifies how the judgment impacts beyond the individual due to a resulting change in legislation.

Justice = Access to an effective remedy

A broader lens on access to justice includes effective access to legal processes that result in effective outcomes. According to Shelton, remedies are the processes by which arguable claims are heard and decided, whether by courts, administrative agencies, or other competent bodies as well as the outcome of the proceedings and the relief afforded the successful claimant (leading to results that are individually and socially just).³²²

In relation to social rights, this requires a reconceptualisation of access to justice that begins with the violation of a right and ends in an effective remedy for that violation. This requires a renewed focus on what is meant both in terms of effective legal processes (international human rights law suggests that they require to be “accessible, affordable, timely and effective”)³²³ as well as effective outcomes of those processes.³²⁴ The international legal position asserts that ‘where there is a right, there is a remedy’ based on the principle of *ubi ius ibi remedium*.³²⁵ The Maastricht Guidelines on violations of economic, social and cultural rights recommend that the right to an effective remedy encompasses violations of economic and social rights as well as civil and political rights. The Guidelines assert that any person or group that is subject to violation of a social right should have access to effective judicial or other appropriate remedies at both international and national levels.³²⁶

States are under a duty to provide access to an effective remedy if there is a failure to meet the obligations imposed by international human rights law. This includes facilitating access to a legal remedy in court if necessary, implying the existence of both a substantive and procedural duty toward rights-bearers on the part of state parties.³²⁷ Remedies may

³²¹ Desmond Rutledge, ‘Social Welfare Update: Denial of Bereavement Support Payment to Family of a Deceased Woman who had been Unable to Work and Pay NI Contributions due to Severe Disability Breached ECHR’ (Garden Court Chambers, 26 January 2021) <https://www.gardencourtchambers.co.uk/news/social-welfare-updates/social-welfare-update-denial-of-bereavement-support-payment-to-family-of-a-deceased-woman-who-had-been-unable-to-work-and-pay-ni-contributions-due-to-severe-disability-breached-echr> accessed 17 January 2022

³²² Shelton n116 at 7

³²³ 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.9

³²⁴ Remedies should be effective in practice as well as in law

³²⁵ The formulation of this principle was first established in 1928 by the Permanent Court of International Justice in the *Chorzów Factory* case where the court held that reparations ought to ‘wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.’ *Chorzów Factory*, 1928 P.C.I.J. (ser. A) No. 17, at 47. The International Law Commission’s draft articles on state responsibility require states to make reparations for wrongful acts (G.A. Res. 56/83, Annex art. 30 and 31, U.N. Doc. A/RES/56/83/Annex (Jan. 28, 2002)) reflecting the principle first formulated in *Chorzów*. This area of law is concerned with state responsibility between states rather than between state and individual, however, it is increasingly applying to the area of international human rights regarding the relationship between state and individual and to wrongful acts committed against the international community, Shelton n116 Chapter 2

³²⁶ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, [1998] 20 Human Rights Quarterly, 691, para 23

³²⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, E/1992/23 para.17; Shelton n116

also include administrative, judicial, and legislative actions. The three functional aims for a remedy under the existing literature³²⁸ are: a) its capacity to place the right-holder in the same place prior to the social right violation (restitutive), b) ensure ongoing compliance with a social right (equilibration), c) engage with the feature of the legal system that caused the rights violation (non-repetition). Remedies should also be appropriate, sufficient, and accessible.³²⁹ Domestic remedies for social rights violations usually take three broad forms: individual, programmatic, and hybrid. A singular focus on any one of these will produce certain problems: courts that focus solely on individual cases may jeopardise relief for a broader class of petitioners, while leaving intact a systemic feature of a legal system that may require attention, thereby being unable to ensure non-repetition of the rights violation. Likewise, delivering only systemic relief may leave individuals without access to a remedy. The world over, hybrid remedies that combine individual and systemic relief have been the most 'effective' kind, while also being capable of engaging with structural constitutional principles like the separation of powers and parliamentary sovereignty that seek to constrain judicial power in jurisdictions like the UK.

Hybrid remedies of the kind referred to above may also take the form of collective litigation in situations involving multiple complainants and multiple duty bearers.³³⁰ Such 'dialogic' forms of judicial remedies are especially suited to claims involving social rights, which may often require an institutional expertise that courts may not be seized of, while also being capable of dialling down the heat between reserved v devolved competencies or different institutional actors responsible for different social service provision. In such kinds of remedies, courts can act as an intermediary between different rights holders and duty bearers to find an effective remedy that requires multiple duty bearers to respond as part of a structural interdict.

The structural interdict can operate as a response to a systemic problem identified in either an individual case that identifies a wider systemic problem, in relation to a public interest case raised on behalf of a group by a key stakeholder or representative body, or in response to multi-party group proceedings where several litigants are facing the same systemic issue. Comparative best practice suggests that facilitating group proceedings is a helpful way of addressing economic, social, cultural and environmental rights (ESCER) violations because such violations are often collective in nature.³³¹ The idea is that where many people are facing the same issue in relation to housing, health, social security etc. they should be able to group together in a group proceeding in order to seek a remedy that addresses the systemic violation. These type of cases usually involve multiple applicants (petitioners) and enable the court to review whether the state can remedy a systemic problem engaging multiple stakeholders and multiple defendants in the same case.

Structural cases:

- (1) affect a large number of people who allege a violation of their rights, either directly or through organisations that litigate the cause;
- (2) may implicate multiple parties found to be responsible for pervasive public policy failures that contribute to such rights violations or may be the sole responsibility of a single department; and

³²⁸Roach n125

³²⁹*Jawara v The Gambia*, (2000) AHRLR 107 (ACHPR 2000) at para 32

³³⁰Mukherjee n59

³³¹Landau n56

(3) involve structural interdicts, i.e., enforcement orders whereby courts instruct various government agencies to take coordinated actions to protect the entire affected population and not just the specific complainants in the case³³²

(4) seek to ensure guarantees of non-repetition, ensuring cessation of the violation in the longer-term

Practitioner perspectives on what constitutes an effective remedy

One of the key questions asked in the interviews was how practitioners conceptualised effective remedies. This section will discuss what counts as an effective outcome in the eyes of the practitioners. Close analysis of their responses shows that practitioners often conflated the notion of ‘an effective remedy’ with ‘access to justice’, highlighting that these distinctions are not always clear cut and easy to dissect. Their responses echoed what are deemed to be suitable outcomes of effective legal processes in international human rights law, based on principles of accessibility, affordability, timeliness and effectiveness.³³³ We elaborate on the practitioners’ responses to give further insight to the knowledge and understanding that practitioners draw on in their work with rights holders

Accessibility

For some of the practitioners, access to an effective remedy meant access to adjudication processes, such as better appeal rights/ ways to challenge a social rights violation, strategic litigation and access to legal representation. Some practitioners advocated for direct access to tribunals, expressing preference for taking an appeal to the Commissioner for Social Security (Northern Ireland) rather than the High Court. One of the Scotland case study practitioners stated *“I think it’s positive that you’ve got a right of appeal to the Social Security Tribunal, that’s not like a judicial review procedure, it’s a specific right of appeal to a court that comes from that statute. So I think more of that is [...] necessary”* (Scotland | Erica | Solicitor, Human Rights Public Body).

Access to an effective remedy was also expressed as having awareness and access to front line advice, both legal and non-legal. Kelly responded that an effective remedy *“can be something as simple as information and it can go all the way up through to sometimes you need a case. So you need to have a well-resourced, specialist legal sector that are there [...] to take these cases, so it can be simple as access to information - so people have informed consent, you know, ‘OK, I’ll do that’. But it goes all the way up to being able to implement or enforce the rights that these individuals have and that could go as far as a judicial review or a strategic test case, in order to change some of these systems”* (Scotland | Kelly | Solicitor specialising in women/ children/ immigration, NGO for Legal Service).

Practitioners also highlighted that an effective remedy cannot be accessed if there are no clear and simple pathways to challenge a violation, calling for *“a clearer route for people to access legal remedies for social rights in particular”*, without needing to go through a complex and difficult bureaucratic claims process. Chloe said that for housing, social security, managing health and social care and immigration, it is difficult to know what route to go down. This includes lawyers, Chloe said, *“particularly those lawyers that aren’t well versed i:n social welfare issues”* (Northern Ireland | Chloe | Volunteer).

332 César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, (2011) 89 *Texas Law Review* 1669-1698, at 1671

333 Shelton n116 at 7, para 9

Eva also acknowledged that there are many different bodies and schemes for appealing, so that it is hard to know where to turn. *“It’s not clear to people. You can never know, I think, as an individual citizen or resident rather, you know, of Wales, what steps you’re supposed to take ((laughs)) and who’s supposed to help you, and for even for sort of fairly well-informed and experienced advisors this can be difficult”* (Wales | Eva | Development Manager, NGO to combat child poverty).

Affordability

The notion of affordability was raised specifically in regard to judicial review, which was not deemed to be an effective remedy due to cost and should be treated as a ‘remedy of last resort’, after other options such as lower courts and tribunals have been exhausted (Scotland | Erica | Solicitor, Human Rights Public Body). In addition to the financial barrier, Erica identified another cost entailed in judicial review proceedings – the emotional burden.

“I would say even in a relatively, like, personally privileged position that I am in, like I would very much think twice about, if something happened to me, say like, something to do with my daughter’s education or [...] if she was disabled or something and I wanted to challenge the support and stuff that was made available to her, like I would really, really, really think hard about whether I would want to go down the route of a judicial review, or something, or a court case. So I feel like if I think that, in my position of being a lawyer, knowing about human rights, being relatively like financially okay and stuff like that [...] what is that if [...] people in my position think ‘oh god I would never do that!’ [...] what does that say about that being an okay remedy as for the general population?” (Scotland | Erica | Solicitor, Human Rights Public Body).

Erica emphasises how the great financial and emotional strain of court proceedings pose a significant barrier to accessing justice.

Timeliness

We have already highlighted how the Cox case demonstrates the importance of accessing a remedy in a timely manner, given Lorraine Cox’s terminal illness. Long time scales and delays act as a deterrent and barrier to obtaining an effective remedy. There was broad consensus amongst practitioners that timeliness was of the utmost importance for a remedy to be considered effective, citing court of appeal delays as especially problematic. Even when a rights holder is successful at tribunal, receiving an individual remedy can be significantly delayed. Rose, a welfare rights adviser in Wales said, *“it [getting a remedy] should be automatic, it should be unquestioned, but that can take quite a lot of time. And so, for me, from [...] like an administrative point of view, that takes a bit of, you know, a lot of, often phone calls, and letters, and things like that, to make sure that people do actually get [it], after successful tribunals”* (Wales | Rose | Welfare Rights Adviser, Local County).

Time was measured not only in how long rights holders were left without a solution, but it also referred to the time commitment required to obtain a remedy due to the number of hoops a person must jump through and the toll it takes on the individual. These routes to ‘justice’ wear people down and lead them to accept unsatisfactory solutions. We shared Chloe’s account of a women who had been seeking a remedy for a housing violation and unable to find a solution (see Northern Ireland case study). Chloe said,

“You, know, ‘cause I think people just get weary. Like I know [name of client] just wants a new house now, so the housing executive in the next week offer her a new flat that like meets what she wants in a home, and she can be safe there, she will take it. That will be her remedy. So she won’t seek to get the eight weeks rent that she has missed or, for example, have her arrears waived because of what she has gone through, or, you know, I don’t think she’ll seek any other redress because she’s so worn down by the whole thing” (Northern Ireland | Chloe | Volunteer).

The way the adjudication journey reduces people’s resilience by wearing them down acts as a deterrent and impedes access to effective remedies. In addition, Chloe felt that her client should have received an immediate alternative solution in response to the housing violation. We explained in the Northern Ireland case study that Chloe’s client had been offered shared accommodation, but it was highly unsuitable due to her mother’s vulnerabilities to Covid-19 and her own anxieties.

Esther, housing activist in Northern Ireland, iterated Chloe’s interpretation stating that an effective remedy entails an immediate solution in response to a violation. She said: *“if someone is homeless then their [...] right to adequate housing, they’re living in a hostel, then I mean unless I’m being too obvious, the obvious remedy is that a house is secured for them to live in. Or if someone has damp and that damp is making their child sick, the obvious remedy to that, you know, right to health, adequate housing, is that that damp is fixed or they’re moved to an alternative safe accommodation (.) you know”*. Furthermore, she recognised that one can have local, national and international human rights legislation in place, but *“until that damp is actually fixed, that means nothing to that family, you know”* (Northern Ireland | Esther | Housing Activist, NGO for Human Rights). It is through an effective remedy that social rights are realised.

Effectiveness

Practitioner judgments on the effectiveness of a remedy were influenced by a number of different factors related to damages/ financial compensation, whether or not amendments were made to legislation, restitution, acknowledgment of liability/ fault, apologies, accountability and enforcement, clear and simple pathways to challenge a violation, minimum core requirements, clear boundaries of entitlement and requirements for feedback.

Practitioners felt that as a minimum an effective remedy would provide the amount of money rights holders “lost out on”, meaning that a successful outcome would backdate payments of social security benefits missed. In the case of the rat infestation, it would entail compensation for eight weeks rent paid whilst unable to remain in own accommodation. Ideally, compensation would be paid for undue stress caused, delays and any private monies spent on legal representation. But practitioners widely recognised that financial compensation is generally not enough. Julie said, *“that’s just a limitation in terms of how far law gets you ((laughing)) I suppose!”* (Scotland | Julie | Solicitor specialising in asylum/ immigration, NGO for Legal Service).

Erica recognised another important element of an effective remedy stating that, *“you could get compensation, but another part of [an] effective remedy is like restitution [...] to the extent possible, you should be restored to the position that you were in had that rights violation not happened to you, but compensation won’t necessarily do that, so you might need educational, counselling, health measures - like various other things to be put in place”* (Scotland | Erica | Solicitor, Human Rights Public Body).

In addition, Erica and others raised the importance of an apology or acknowledgement of wrong-doing. She went on to say, *“to some people, a finding of liability, like is important - so like a finding of fault and then comes with that the apology. And then obviously [...] human rights law has got stuff to say about what an apology should be as well. So like, I think that the important thing would be- and to a lot of people as well, like that public aspect of it [...] of having that sort of ‘day in court’ is important for access to justice”* (Scotland | Erica | Solicitor, Human Rights Public Body).

The acknowledgment of liability, of wrong-doing, is essential for fostering a new culture of responsibility and accountability that upholds human rights. This is also intimately tied to the enforcement of rights. Eva reflected on the framework for social rights in Wales and commented *“I mean with something like the socioeconomic duty there’s essentially-, it doesn’t- there’s no real kind of enforcement, you know. It’s another one of these things, like we have lots of these frameworks in Wales that don’t actually give any power to- ((laughs)) there’s no actions, you know. They can make recommendations. Lots of bodies and commissioners and things that can recommend things and, you know, even the ombudsman they can recommend that the council does- they don’t have to do it. They can just ignore it if they want, and so yeah you get to that point where it’s like, well who actually does enforce accountability [...] and the system- the system that we’ve got at the moment, I mean there’s so much more that needs to be done. And if you took a rights based approach first and foremost I think that would really help, where everyone designing the system and administering the system for the people who are actually, you know, on the receiving end of these systems, you know what to expect ((Laughter)) but, you know, and also then be able to seek recourse when it doesn’t work well”* (Wales | Eva | Development Manager, NGO to combat child poverty).

Enforcement can only be mandated if social rights are legally embedded in ways that enable effective remedies for violations. These legal protections also require the definition of minimum core thresholds and normative standards, in accordance with international human rights standards, to ensure that social rights provisions are adequate. This relates to our discussion with Josie, chief executive with a housing NGO in Northern Ireland, about low fitness standards (see Northern Ireland case study). She explained that due to outdated fitness standards, one socket in a room is considered adequate heating. Many people, particularly those with low incomes, rely on electric heaters for warmth, but a typical fitness issue is that when the house is freezing it becomes damp. Josie said,

“that’s probably our most typical kind of case in terms of disrepair and fitness would be this lack of heating, and then condensation, damp throughout the house, and then all the kind of potential health ramifications that come with that, particularly if you have young children. Now, you see, there’s very, very, very little in law that we can do about that, because it’s not actually breaking any- you know, that is complying with the standards, so it’s very hard to do anything. I mean, that’s never getting into any court because there’s no challenge for it. And in those sort of cases you just have to work with environmental health officers who try to-, you know, they will kind of serve notices on landlords to try to get them to take action (.) not install heating or not upgrade heating, but just to maybe take action on [...] the symptoms rather than the cause, but it’s not really a satisfactory solution” (Northern Ireland | Josie | Chief Executive, NGO for housing).

Josie’s example demonstrates that in order to access an effective remedy, provisions must meet minimum core obligations in line with standards in international human rights law (indeed international human rights law requires going beyond minimum standards). In addition, one of the practitioners raised the necessity for clear boundaries of entitlements, in order for an individual rights holder to assess whether or not their rights have been upheld. Eva explains that most of the support available in Wales is discretionary, so it is

based on a subjective assessment of someone's circumstances, meaning it is heavily means tested, the process is very degrading for people and many people cannot apply because they are not able to provide the types of documentation that are required in the process.

"But it's very hard for people to know whether or not they've been turned down or their award is not what it should be if it's not clearly stated exactly what the boundaries of eligibility are. And that's because it is, you know, very much up to the person, you know, and it's an obscure process [...] people can't- ((laughs)) you know, it's impossible to know whether your rights have been upheld, or whether you are being unfairly treated because fairness isn't-, you don't know what it is, means to be fair. And so, you know, that, first step of giving people the information about what their rights are so that they can understand that their rights aren't being upheld is missing" (Wales | Eva | Development Manager, NGO to combat child poverty).

Matthew, a solicitor in Wales advocated that courts are the best safety net, sharing concerns that alternative routes to an effective remedy might get stuck in administrative procedures.

"courts are the best remedy, because if you try and introduce some kind of ombudsman or commissioner or something [...] something that might not work rea(h)lly, I don't know [...] I think the courts are the best safeguard, the best safety net, but the problem is access to funding and access to lawyers who know what they're doing because there aren't that many, again in Wales, there's literally two or three lawyers like me [...] I think access to justice both in funding and knowing and lawyers is the problem, but I think ultimately it should be the courts who decide these things because they're so important and I think if you try and add, you know, another-another type of ombudsman or something like that, it'll just get mired in the administrative mud, actually" (Wales | Matthew | Solicitor, Private Law Firm).

Erica made a similar comment to say that an ombudsman or regulatory kind of function might not properly deal with issues and merely create an additional tier, further exacerbating concerns about the timeliness of remedies (Scotland | Erica | Solicitor, Human Rights Public Body).

In terms of providing effective collective remedies, practitioners called for amendments to legislation. For instance, in the *Pantellerisco* case, legislation should be amended so that if a person is working 16 hours at national living wage, their earnings are converted into a monthly amount to get over the benefit cap threshold or, alternatively, the threshold is amended (England | Claire | Solicitor related to *Pantellerisco* case). Claire not only called for a collective remedy, but also for an individual remedy that would pay Sharon back payments for the time that the grace period was finished but she was still being affected by the benefit cap. In addition to her "legal answer", Claire would have liked to see an apology from DWP for the hardship caused to rights holders, such as *"the humiliation of being reduced to using a food bank"*. She said, *"you'd never be able to ask the court here for that, but [...] how can a remedy go beyond, you know, purely what the court would order?"* (England | Claire | Solicitor related to *Pantellerisco* case).

Rowan, welfare rights adviser in Northern Ireland, stated that an effective remedy in the *Cox* case would be a change to the definition and assessment criteria of terminal illness in Northern Ireland. In relation to asylum support, Jonas said that the reform of provisions for asylum support would constitute an effective remedy: *"there's too low a level paid currently from my perspective, so without going into the particulars I would say that reform is, is always the highest and probably best way of achieving what we're seeking rather than through the courts necessarily [...] yeah I think reform, but that may be driven by legal action"* (Scotland | Jonas | Solicitor related to *Serco* case).

Finally, Rose responded to our question regarding her interpretation of an effective remedy, which entailed a discussion around apologies and whether she had experienced receiving apologies for wrong-doing in the course of her many years as a welfare rights adviser. She said,

“there never is any apology, and as I say, more worrying than that is, there isn’t [any] feedback. So because they’re not getting feedback, they’re not getting the tribunal coming back to them and saying, look, we have overturned this decision because you failed to take account of this piece of evidence. Or, you misinterpreted this piece of evidence or you misinterpreted this bit of the law or there’s never any of that feedback. And that’s, to me, that’s a real issue [...] I’m not naive enough to think that that would turn everything around, but I think it could have some, in a small way, it could, you know, there might be some decision makers who could actually-, I think if it was drawn to their attention, that they’re always making a certain type of mistake, or they’re always ignoring a certain piece of evidence, or underestimating a certain aspect of a case, or something like that. I just think, well, possibly, you know. And also, it could expose that there might be- because we don’t always, we don’t get to know the names of the individuals who have made the decisions. But, you know, I see lots of bad decisions – are they being made by a whole variety of people across the board, or is there actually a handful of people making bad decisions, and there are lots of them making good decisions. I don’t know, because that’s what I’m not privy to. So, that would be very interesting, if there was-, if I could have confidence that the Government department concerned was actually taking that side of things seriously. If they were prepared to be a bit more self-critical and analyse decisions, and analyse results. And think, well actually, have we, are we not training our staff well enough, are we not, you know. But, there you go ((laughs)). I can but dream ((laughs))” (Wales | Rose | Welfare Rights Adviser, Local County).

Rose had identified a key mechanism that is currently absent from the current tribunal system that provides the means for social rights violations to be challenged.

A missing feedback loop

Presently, the data show that there are no feedback mechanisms at tribunal level to stop identified flaws from recurring – meaning flawed decision making can continue unabated. This means that even if a rights holder is able to secure an individual remedy for a violation, if this occurred due to a systemic issue, there are currently no clear mechanisms to feed back into the system and prevent re-occurrence of social rights violations. O’Brien identifies that this is due to the “significant time lapse between the events complained about and the tribunal decision, the tribunal can offer little more than a form of retrospective and individualised fire-fighting; any strategic fire-watching, meaningful and dialogic engagement with officials, or future fire prevention are largely beyond its remit”.³³⁴

Jane, a welfare adviser in England commented that, “I think the tribunals arrive at the right answer most of the time. And the quality of their decision making is pretty good, but I don’t think that there’s any real mechanism for feeding back to decision makers what was wrong with their decision. Certainly there’s no mechanism at the individual decision maker level. Like the individual decision maker who made a decision in [name] Benefits Service Centre will never know that that decision was overturned ultimately, like unless they stumble across the case some time later” (England | Jane | Welfare Rights Adviser, NGO to combat child poverty).

³³⁴Nick O’Brien, Administrative Justice in the Wake of I, Daniel Blake, The Political Quarterly, Vol. 89, No. 1, January–March 2018 (2018)

If there is no communication after a problem has occurred, that problem will continue, offering no protection for rights holders. This constitutes a very large accountability gap in the current legal framework for social rights. It violates the counter-majoritarian principle that should be embedded within an appropriate framework for upholding social rights.



Our elaboration on the different elements of the access to justice journey shed light on the intersecting challenges and explains why, for rights holders, and arguably for practitioners too, the adjudication feels like an arduous journey crossing a mountain range. Not everyone is equipped to make the access to justice journey, and many people do not make it to the end. More work is required to better equip people, to improve the processes and for the cases that do make it to an effective resolution, to find ways to feedback into the system to ensure change for everyone. The latter of these aims aligns with Buck, Kirkham and Thompson's notion of 'setting it right'.³³⁵

This concept of systemic failures in decision making requiring correction ran through each of the case studies, often touched upon as a theme relating to poor decision making (injustice because of incompetence) versus deliberate culture of refusal (injustice because of intended obstruction). Whilst it was not clear to what degree incompetence or obstruction informed decision making practices, practitioners were often left wondering about "perverse" and "absurd" decisions.

Tribunal data³³⁶

Failures in decision making are reflected in the number of decisions overturned on appeal in relation to housing, social security and asylum cases.³³⁷ In this section, we present statistical data regarding First Tier tribunal decisions for social security and child payments (See Tables 4.5/ 4.6 and Figures 4.1/ 4.2). We also share a subset of the social security data showing appeals related to the Personal Independent Payment benefit (See Tables 4.7/ 4.8 and Figures 4.3/ 4.4). The social security statistics are presented below in tables and figures showing total case numbers, as well as percentages.

We also present data of First Tier Immigration decisions allowed and dismissed. These statistics are expressed in percentages (see Table 4.9 and Figure 4.5).

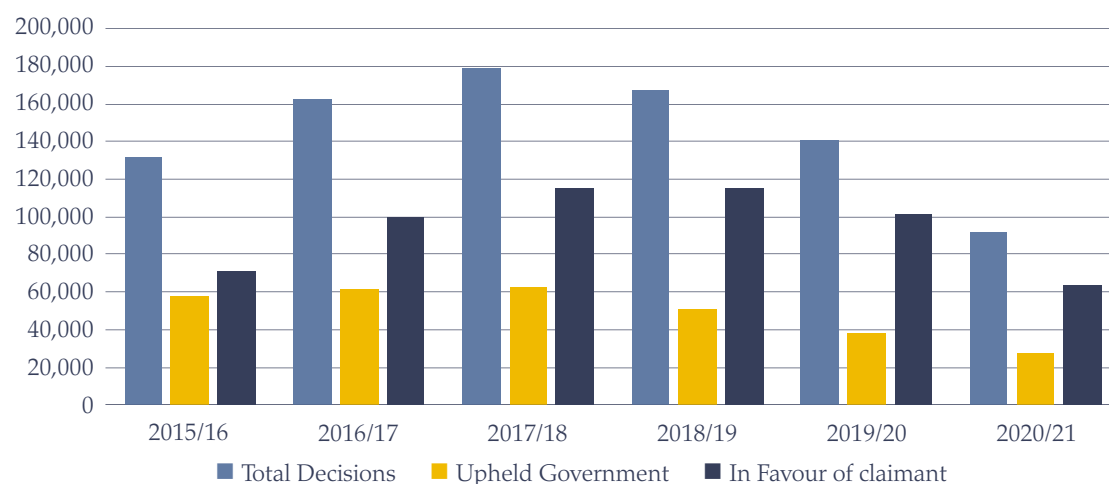
All the statistics cover financial years 2015/16 to 2020/21.

Social security

Table 4.5: Social Security and Child Payment (Totals)

Financial Year	Total Decisions	Upheld Government	In Favour of claimant
2015/16	131,319	57,895	72,374
2016/17	162,369	61,601	99,616
2017/18	178,849	62,231	115,303
2018/19	167,184	50,498	115,459
2019/20	140,986	38,662	101,261
2020/21	91,809	27,122	64,077
Sum	872,516	298,009	568,090

Figure 4.1: First Tier Social Security Appeals (by Case No)



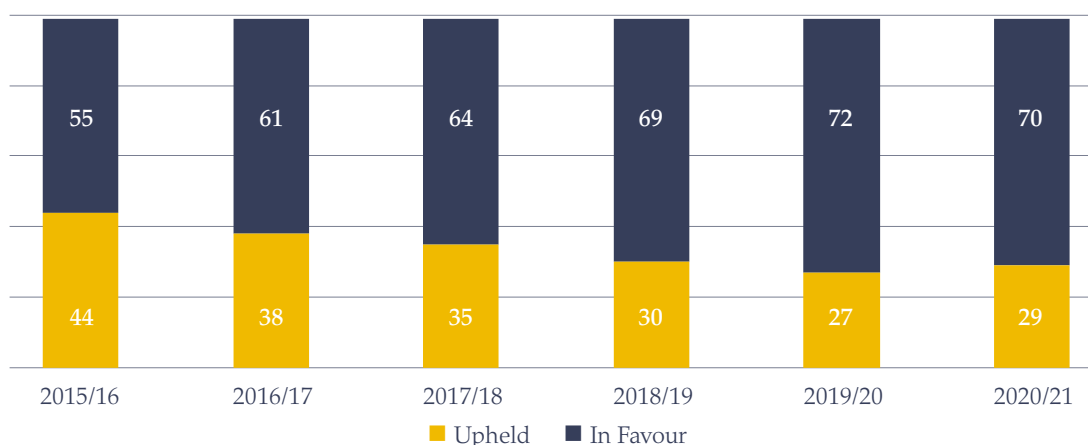
³³⁶We are grateful to Aidan Flegg for collating and presenting statistics based on the MoJ (2021) 'Tribunal statistics Quarterly: July to September 2021'. Available at <<https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2021>>

³³⁷We do not include housing statistics here, as we found the processes of challenging housing decisions to not be very transparent, leading to great difficulty to find representative tables and figures

Table 4.6: % of cases cleared at hearing upholding decision or finding in favour of claimant.

Year	Upheld	In Favour
2015/16	44	55
2016/17	38	61
2017/18	35	64
2018/19	30	69
2019/20	27	72
2020/21	29	70
Average	33.833333	65.166667

Figure 4.2: First Tier Social Security Appeals (%)



The social security tribunal data, as seen in Tables 4.5/ 4.6 and Figures 4.1/ 4.2 show that in financial year 2020/21 out of 91,809 appeal decisions made at First Tier Social Security Tribunals, 27,122 decisions were upheld for government, whereas 64,077 decisions were made in favour of the claimant. This means that 70% of government decisions were overturned. From financial years 2015/2016 to 2020/2021, these statistics show an increasing trend of poor decision making, with the number of decisions overturned and granted in favour of claimants steadily increasing, albeit with a small reduction in 2020/21 compared to the previous year (2019/20). However, even the latest figures show that government only got their decisions right the first time - 29% of the time – an unsustainable decision making model.

Given the contentious nature of medical assessment procedures for social security benefits, such as PIP, we have also included these statistics (Tables 4.7/ 4.8 and Figures 4.3/ 4.4)

Table 4.7: Personal Independence Payment (by Case No)

Year	Upheld	In favour	Total
2015/16	19112	30226	49747
2016/17	24074	45697	70329
2017/18	26289	56971	83886
2018/19	21984	61476	83954
2019/20	17711	59090	77156
2020/21	13171	41751	55006

Figure 4.3: Personal Independence Payment (by Case No)

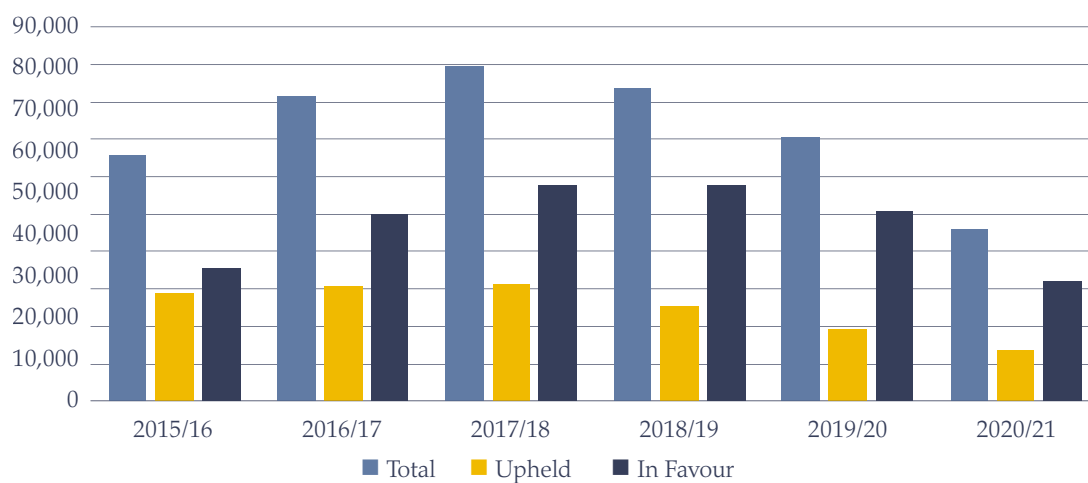
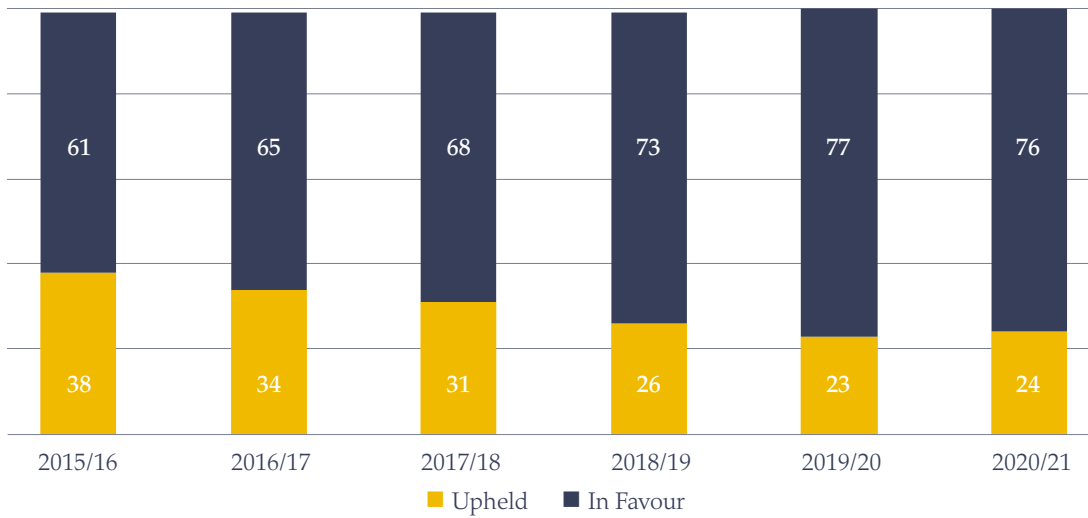


Table 4.8: Personal Independence Payment (%)

Year	Upheld	In Favour
2015/16	38	61
2016/17	34	65
2017/18	31	68
2018/19	26	73
2019/20	23	77
2020/21	24	76

Figure 4.4: Personal Independence Payment (%)



The number of appeals upheld for government with respect to applications for PIP is dismal. There has been a steady increase (slight 1% decrease between 2020/21 and 2019/20) in decisions made in favour of claimants. With less than 25% of decisions upheld for government, these statistics lend proof to our qualitative findings that decision making processes, especially medical assessment procedures, are unfit for purpose. The impact of unjust decisions made in relation to initial applications results in a lengthy and arduous journey for rights holders with significant consequences. The processes and procedures for the evaluation of PIP applications requires close scrutiny and review to produce fairer processes and outcomes. In response to claims that the PIP process is unfit for purpose the DWP has said it supports “millions of people a year” and “the vast majority of PIP cases were not appealed”.³³⁸ This defensive position runs contrary to the “test and learn” philosophy claimed by DWP as evidence of a responsive approach to ‘setting it right’ in the *Pantellerisco* case.

Immigration/ asylum

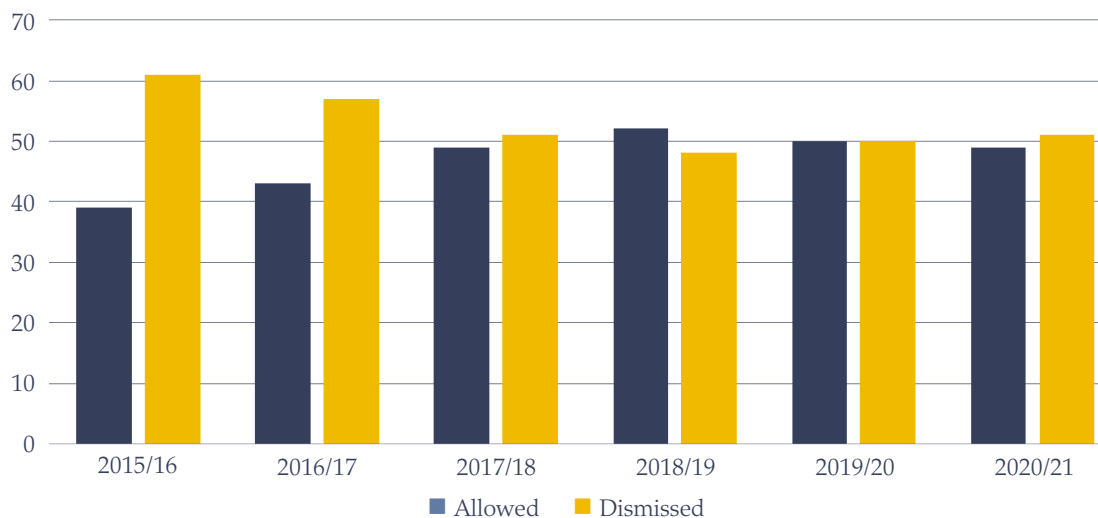
We have also included the following statistics regarding immigration decisions at the First Tier Immigration Tribunal (see Table 4.9 and Figure 4.5 for further details).

Table 4.9: First Tier Immigration decisions allowed and dismissed (%)

Year	Allowed (%)	Dismissed (%)
2015/16	39	61
2016/17	43	57
2017/18	49	51
2018/19	52	48
2019/20	50	50
2020/21	49	51

³³⁸Alex Homer, ‘Seven out of 10 win benefits challenges at tribunal’, *BBC News*, 24 September 2021, available at <https://www.bbc.co.uk/news/uk-58284613>

Figure 4.5: First Tier Immigration Tribunals (%)



Although the number of overturned decisions for immigration/ asylum cases are not as extreme as those for social security cases, the trend from 2015/16 to 2020/21 shows that, on average, 47% of decisions are in favour of the claimant. This is still nearly half of all decisions made in immigration cases, demonstrating flaws in decision making processes for immigration and asylum too.

Erica expressed her views this way,

“I mean I think the cynical part of me would say, you know, that these things are designed the way they are because they hope by rejecting more people than people just won’t appeal it, they won’t challenge it, so therefore if they are not having to pay x amount of money and therefore they think they are saving money. But, in reality, if you have that many decisions overturned, that- that logic doesn’t apply anymore, like the success on appeal rates are so high that basically a lot of the people with lived experience were like ‘I expect to be denied what I’m entitled to at first and then I will get that-, chances are that [I] might get that on appeal’. But you have to have the mental and emotional capacity to do that” (Scotland | Erica | Solicitor, Human Rights Public Body).

This section has shown how tribunals play an important avenue for challenging social rights violations. However, the large number of decisions overturned on appeal point to flawed decision making practices. Moreover, there are currently no adequate mechanisms for feeding information back into the system to avoid the repetition of rights violations.

In this part of the chapter, we presented our analysis of the data as an adjudication/ access to justice journey. This framing allowed us to draw together the rich data we collected showing the various barriers and hurdles that rights holders must overcome in order to successfully traverse the path towards an effective remedy. We illustrated how this journey is best explained as crossing a mountain range. Although one may be able to identify initial barriers that hinder the start of the journey, such as the need for information or advice, other hurdles blocking the path only become visible as one progresses the journey.

The analysis shows that essential components for the journey include developing legal consciousness, access to appropriate independent specialist advice, advocacy and legal representation and access to legal aid. The journey, however, is intersected by a number of

different factors: inadequate mechanisms for challenging decisions; lack of legal expertise; complexity; fragmentation (including decentralisation and outsourcing); barriers to adequately address the intersectionality of rights; challenges in the adjudication of rights due to the status of social rights, i.e. not legally embedded in domestic law, and structural injustice and discrimination. Insights from practitioners also draw our attention to the fact that decision making processes, particularly at the tribunal stage, are missing an important feedback mechanisms to stop the recurrence of social rights violations. These combined barriers, the data show, undermine attempts to reach the summit – access to an effective remedy.

Part IV: Contestation: Competing logics and policy mechanisms

The case studies have provided ‘snapshots’ or glimpses of wider issues across the social welfare landscape. Each of the case studies provides examples of processes and mechanisms that work together to constitute the current (legal) framework for social rights. We interpret these workings of governance for the provision of social rights as the mechanics of a complex system with many interrelated components: humans, technologies, institutions, governments, non-governmental organisations and charities, as well as discursive and ideological currents embedded within a broader socio-political context.

As brought to the fore in the case studies, different constitutional arrangement under devolution result in different legal frameworks, contributing to an already fragmented system for the provision of social welfare. Laws and policies governing this arena are also influenced by broader ideological currents. The case studies we presented highlighted a number of contentious issues with respect to specific policies/ legal cases in each of the jurisdictions, with evidence of poorly reasoned policies. We also identified various challenges with respect to legal processes related to the inadequacy of complaints mechanisms, the adjudication of rights and limited funding. In contrast to neoliberal rationalities that underpin many of the workings of the operational welfare system, legal expertise for social rights is rooted in a central concern for the protection and realisation of rights, emphasising the principles of equality and non-discrimination, participation and inclusion. This means that every person has the right to participate in and access information relating to the decision-making processes that affect their lives and well-being.

In order for rights holders to access their social rights and participate in the (legal) frameworks governing public services and social welfare, they need awareness, information, advice and advocacy. The data show that the services provided by practitioners, including welfare rights advisers, charities, legal practitioners, volunteers and activists are absolutely essential. Unfortunately, the capacity of the third sector has been severely impacted by austerity measures, resulting in funding cuts and closures of advice centres and law centres. By way of example, in the midst of the Covid-19 pandemic, five Citizens Advice Bureau (CAB) centres in Glasgow faced closure. Although they appear to have been saved from that fate, the centres still face significant funding cuts.³³⁹ The Covid-19 pandemic has illuminated some of the challenges facing, not only the third sector, but the realisation of social rights more broadly.

³³⁹Ruth Suter, ‘Five Glasgow Citizens Advice Bureaux Saved from Closure’ (Glasgow, Glasgow Times, 17 September 2020) <<https://www.glasgowtimes.co.uk/news/18728745.five-glasgow-citizens-advice-bureaux-saved-closure/>> accessed 17 January 2022

We now turn back to the data to discuss in greater detail the broader concerns and challenges that emerged from the data. We do this by drawing attention to various mechanisms, made visible through discourse, that we believe sustain the current framework and often facilitate injustice. We take inspiration from the work of Elana Shohamy³⁴⁰ and Nikolas Rose³⁴¹ who, each in their own way, provide ways of thinking, as well as practical tools, for empirically investigating the production and legitimation of knowledge and evaluating how laws and policy materialise in practice. Our discursive approach to policy includes a conceptual frame that directs attention to the social construction of knowledge.

Nikolas Rose's work, expanding Foucault's notion of governmentality, empirically investigates how different types of knowledge and expertise articulate with practical techniques in constructing 'governable subjects'. Rose directs attention to how diverse elements, such as authorities, technologies and strategies, work together to create specific realities and particular subjectivities.³⁴² In brief, these elements urge us to ask questions about who gets to define certain phenomena to be problems and determine the criteria of proof required? Which kinds of tools are used to make judgments? Are there conflicts between different claims to authority? What kind of subjectivities are promoted, and what kind of strategies are adopted? As we show in our analysis, tensions across the data alert us to relationships between various dynamics that articulate together in the current framework for the protection of social rights.

Similarly, Elana Shohamy urges us to pay attention to different mechanisms that intersect with stated policy and impact on practice, creating and perpetuating "de facto" policies. These overt and covert mechanisms are used mostly, but not exclusively, by those in authority and the effects and consequences of these mechanisms, she says, often lead to violations of democratic processes and rights.³⁴³ Examples of such mechanisms might be strict rules and regulations or means of assessment and testing. Funding allocations can also serve as a policy mechanism that counteracts stated policies.³⁴⁴

Considering the influence of policy mechanisms and techniques helps us to recognise and identify various dynamics across our data that interconnect with laws/ policy/ public services and create the daily realities of policy in action 'on the ground'. Thus, examining how policy mechanisms intersect with legal provisions and practice helps us to better understand how policy is "*both text and action, words and deeds, it is what is enacted as well as what is intended*".³⁴⁵

Policy mechanisms are situated between broader ideologies in the public space and practice. Ideologies are expressed as wider circulating discourses, include myths, propaganda, coercion and stigma. Our data show how ideology and policy mechanisms transect with limitations of the legal framework for upholding social rights. In combination, these different factors work together to sustain a highly complex and fragmented system, resulting in barriers to accessing justice for social rights by preventing full participation and access to an effective remedy. We now return to our data to examine moments of tension where different logics and discourses intersect, making competing mechanisms visible.

340 Elana Shohamy, *Language Policy: Hidden agendas and new approaches* (Routledge 2006)

341 Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge University Press 1999)

342 *ibid* at xi-xii

343 Elana Shohamy, *Language Policy: Hidden agendas and new approaches* (Routledge 2006) at xv

344 Camps n136 at 54

345 Stephen Ball, *Education Reform: A Critical and Post-structuralist Approach* (PA Open University Press 1994) at 10

Competing discourses: Immigration and Scottish housing law

One of the clearest examples of how fragmentation of the (legal) framework for social rights intersects with practice is the lock change eviction policy in Glasgow (Scotland case study). The notion of fragmentation is constituted not only in conflict between reserved and devolved law, but also in the outsourcing of public services. These mechanisms are also intimately linked to ideological conceptions, which become salient through discourse. The analysis that follows identifies different discourses that are foregrounded in the data.

The lock change eviction policy resulted in a clash between Scottish housing policy and UK immigration policy. These tensions became visible in the competing dynamics and logics produced through discourse. Practitioners in Scotland advocating on behalf of asylum seekers challenged the policy on the basis that it contravened housing law in Scotland by failing to obtain a court order to authorise the evictions, nor did the policy comply with human rights law. On a practical level, practitioners expressed that immigration policy curbed the powers of the Scottish government by preventing Scotland from acting in a way that adhered to its principles of ‘making things better’, which contrasts sharply with the racialised ‘hostile environment’ policy promoted by the UK Government’s Home Office.

More importantly, the tensions identified here make visible competing dynamics rooted in different rationalities and ideologies. The sentiment of making things better referred to commitments in Scotland to uphold human rights. This alignment with principles of human rights, as embedded in international human rights law, can be interpreted as a *human rights discourse*. We demonstrate in our analysis how the human rights discourse is promoted in other parts of the data, but first we discuss how it intersects in the Scottish case study with another dominant discourse that comes to the fore through a single word: ‘failed asylum seeker’.

We explain by drawing attention to the first line of the *Ali* judgment of the Inner House, Court of Session, which states: “*The appellant is a failed asylum seeker*”.³⁴⁶ Although this has become the default terminology used by the UK Home Office for describing individuals who have exhausted their appeal rights, it is by no means a neutral term. The practitioners we spoke preferred not to use the term, favouring the designation ‘appeal rights exhausted asylum seekers’ or ‘(potential) refugee’. Julie said, “*you would hear me say ‘this is a refugee’ or ‘this is potentially a refugee’ because in law that is true [...] what we’re seeing at the end of the process is they’re recognised as a refugee*” (Scotland| Julie | Solicitor specialising in asylum/ immigration, NGO for Legal Service). Also, describing those seeking asylum as “a person seeking asylum” foregrounds the humanity of the person rather than their status. Although a person may be denied asylum does not mean they cannot submit a new case and be granted asylum in future, meaning that the label of “failed asylum seeker” is neither an objective nor a permanent category. Designations such as refugee, migrant and (failed) asylum seeker are determinations of status, granted by authorities, which allow or restrict access to particular resources. These labels are generally not used in uniform ways, particularly in the media, often conflating terms and confusing meanings.³⁴⁷

Bridget Anderson reminds us that immigration and citizenship are “not simply about legal status, but fundamentally about status in the sense of worth and honour—that is, membership of the community of value. The debates around immigration are about the

³⁴⁶ *Ali (Iraq) v Serco Ltd* [2019] CSIH 54

³⁴⁷ It is outwith the scope of this report to discuss the legacy of legal distinctions between (types of) migrants and citizens. Moreover, challenges around legal status, labelling and framings are not unique to the UK context. For more information, see for instance, Emily Feuerherm and Vaidehi Ramanathan, *Refugee Resettlement in the United States: Language, Policies and Pedagogies* (Multilingual Matters 2016)

contours of the community of value as much as they are about trade-offs and economic impacts".³⁴⁸ In relation to the realisation of social rights, it is important to acknowledge the importance of legal designations, as these political framings play a significant role in constructing the contours of who is included and who is excluded in collective imaginations of 'who' is entitled to justice.³⁴⁹ Our interest is in the (mis)framings that impede access to justice, both in terms of the constitutional framing of social rights, as well as the framing of particular groups of rights holders and the consequential impact on the access to justice journey. On the latter point, those seeking asylum in the UK can be considered one such category of people whose 'representation'³⁵⁰ delimits their range of actions/ possibilities in claiming social rights.

Furthermore, it is vital to recognise that asylum seeking processes themselves are difficult and highly contested procedures. For instance, there is a significant body of critical sociolinguistic research examining how discriminatory practices of using asylum seekers' linguistic background often limits access to refugee status.³⁵¹ The UK Home Office's 'hostile environment' ideology is visible in efforts currently underway to reform the immigration/ asylum system and introduce the highly contested Nationality and Borders Bill.³⁵² Numerous human rights organisations and immigration lawyers have raised serious concerns about undermining human rights and breaching international and domestic laws.³⁵³ Furthermore, as pointed out by Julie in the Scottish case study, the ability to make a successful claim to asylum is connected with access to advice, support and legal representation, a journey also fraught with difficulties. In fact, the high number of asylum cases overturned at the First Tier Immigration Tribunal (for further details, see the statistics in Part III of the chapter) suggests that, through its policies and procedures, the UK Home Office 'constructs' failed asylum seekers.

The term "failed asylum seeker", in particular, strips individuals of any legitimacy and imbricates them in a semantic web of varying meanings, placing them in complex societal structures through their relationship to other (il)legitimate groups.³⁵⁴ It is an ideological framing that is intimately linked to the UK Home Office's 'hostile environment' policy and invokes wider discourses of fears around illegal entry/ immigration, 'bogus refugees',³⁵⁵ (un)belonging and national identity, costs to tax payers, losses of UK jobs, inter alia. This in turn may invoke perceived associations and traits, such as criminality, fraudulence and dishonesty. In other words, the term failed asylum seeker becomes synonymous with negative representations that instantly qualify someone as a specific type of person and, as we show through the data, a person who is not 'deserving' of humane treatment. Operating on a logic of difference, we refer to this as a *valuation discourse*, constituted in oppositions of deserving and undeserving.

We suggest that the 'failed asylum seeker' designation prevails with the UK Home Office, because it fits their rhetoric and ideological framing of those seeking asylum in the UK and

348 Bridget Anderson, *Us & Them: The Dangerous Politics of Immigration Control* (Oxford University Press, 2013)

349 Fraser n61

350 *ibid*

351 cf. Jan Blommaert, 'Language, Asylum and the National Order' (2009) 50(4) *Current Anthropology* and Diana Eades, 'Testing the Claims of Asylum Seekers: The Role of Language Analysis' (2009) 6(1) *Language Assessment Quarterly*

352 'Nationality and Borders Bill' (UK Parliament) <<https://bills.parliament.uk/bills/3023>> accessed 9 January 2022

353 Sophie Morris, 'What is the Nationality and Borders Bill, why is it so Controversial and what do MPs Want to Change?' *Sky News* (9 December 2021) <<https://news.sky.com/story/what-is-the-nationality-and-borders-bill-why-is-it-so-controversial-and-what-do-mps-want-to-change-12488364>> accessed 9 January 2022

354 Emily Feuerherm and Vaidehi Ramanathan, 'Introduction to Refugee Resettlement in the United States: Language, Policies and Pedagogies' in *Refugee Resettlement in the United States: Language, Policies and Pedagogies* (Multilingual Matters 2016) 1-17

355 The term 'bogus refugee' is "nonsensical", because the status of refugee is only conferred after completing a successful application; C Gabrielatos and P Baker, 'Fleeing, Sneaking, Flooding: A Corpus Analysis of Discursive Constructions of Refugees in the UK press, 1996-2005' (2008) 36(1) *Journal of English Linguistics* 31

serves as a justification for not meeting people's basic social rights. In this sense, upholding social rights appears to be a radical act. This is further exacerbated by other mechanisms, such as the outsourcing of public services and elements of street-level bureaucracy in the form of routinised low paid work.

The 'hostile environment' policy is powerful in the ways that ideology becomes practice through a variety of rules and regulations that marginalise a large group of people on account of their immigration status. Asylum seekers whose applications are refused are stripped of any support as they have no recourse to public funds and homelessness support. Any asylum support via means of an Aspen card is further constrained by not allowing cash access under Section 4 (see the Scotland case study). As Abigail explained, asylum seeker possessions cannot exceed £1000 value. If the Home Office checks, which Abigail says they sometimes do, asylum support is stopped (Scotland | Abigail | Evictions Caseworker, NGO for Asylum Seekers). Of course, people may very well have possessions that exceed the designated limit due to generous donations, including electronics, but those items do not provide for the daily necessities of life.

Furthermore, those seeking asylum are closely monitored to ensure they do not leave their homes for more than a few days at a time. Abigail provided accounts of housing managers changing the locks on people's homes when they were away, on the pretext that the person had abandoned the property. She said it was difficult to explain to people that they could not go and stay with their friends, especially if they were living in houses where there was not any power or heating.

"Because if people don't have jobs [asylum seekers do not have legal permission to work], like they want ((laughing)) they want to fill their time! They just want to be normal people! Like they want to ((laughs)) feel good so they go and stay with their friends. And then you're having to be like [...] 'please make sure you're going home' [...] you shouldn't have to say to someone like 'you're not supposed to be away from your home for six days' because it's, what's the word, I don't know, well it's just so controlling" (Scotland | Abigail | Evictions Caseworker, NGO for Asylum Seekers).

In addition, Abigail's comment about the controlling nature of Home Office policies reflect the type of surveillance/ disciplinary practices of governmentality brought to the fore in Foucault's work. This is evident in how the ideological valuation of those seeking asylum filtered into operational language used by housing providers, through use of the terms 'positive and negative moves-ons', correlating with a person's immigration status and related availability of support. Abigail explained that when the housing provider refers to 'positive moves-ons', that means the person got a positive decision on their claim to asylum and are moving on. 'Negative move-ons', on the other hand, identify people who received a negative decision on their asylum claim. She went on to say,

"with the 'positive move-ons', it's like there's quite a clear path, even though there's lots of failings in that path as to what people will do, once they've got status, but with the 'negative move-ons', it's kind of like, 'well they have to go and then, we don't know what'. Like, no one knows what! ((both laugh)) And so it's like this sort of vagueness and I think it's really amplified by that language of 'negative move-on', it's [...] sort of vague [...] but at the same time operational" (Scotland | Abigail | Evictions Caseworker, NGO for Asylum Seekers).

Abigail's examples illustrate the interdiscursive connections between the language of the UK Home Office and the operational language of housing providers. It exposes the more insidious side of the 'hostile environment' and valuation discourses, in that the

rules and regulations carried out in practice amount to the creation of particular subject positions and reflect operations of power at micro levels of practice. Other scholars have drawn attention to how forms of expertise and disciplining activities function to construct particular ways of being, such as becoming employable workers³⁵⁶ or productive citizens.³⁵⁷ What has been illuminated in these examples is not merely a difference in authority and decision making power but a clash in ideology, which was made salient through discourse. The 'hostile environment' policy/ discourse pervaded even legal proceedings (the *Ali* case), which is one arena that should be free of bias. However, Dennis Klinck's writing makes clear that the 'us' versus 'them' dynamic is not new, not even in the court of law. Klinck³⁵⁸, on reflecting on the contribution of Lord Denning, a major, often controversial, English judicial figure (1899-1999), provides numerous examples of similar value-laden interpretations conveyed in court proceedings and judgments over his long career. Discourses thus make visible the ideological workings that often run below the surface.

Valuation discourses feature prominently across the various UK jurisdictions, not only with respect to immigration status, but also related to low income, disability, mental health challenges, addictions and criminal record. We will return to these discourses throughout our analysis, discussing them as they intersect with other discourses that are foregrounded in the data.

The outsourcing of government functions: Gaps in accountability

In this section, we raise important considerations around the various ways a lack of accountability is constituted through different and intersecting policy mechanisms. We continue the conversation around the *Serco* case, drawing out a number of different issues, but then extend our conversation to other connections across the data, related to the outsourcing of medical assessments and the private housing sector.

Privatisation and outsourcing are hallmarks of neoliberal rationalities and the entailed lack of oversight and accountability was the biggest problem identified by practitioners. This concern was raised by various practitioners with regard to the lock change evictions, but also raised the veil on a number of unjust practices around the provision of services to those seeking asylum, including provisions for housing and asylum support.

Abigail, an evictions case worker, explained that there was a common practice of harassment, with housing managers turning up at people's homes and asking them to leave. Often, out of fear, people would leave but they had nowhere to go. Due to their status, asylum seekers who have exhausted their appeal rights don't have access to homelessness services, and Glasgow only has one shelter for asylum seekers, with limited capacity and only catering to men.³⁵⁹ Abigail also felt that the lack of oversight and accountability combined with low wages facilitated housing managers carrying out cruel decisions, such as evictions, in routinised fashion without any empathy or concern for human dignity (Scotland | Abigail | Evictions Caseworker, NGO for Asylum Seekers). Routines and standardised practices and operations are illustrative of the mechanics of street-level bureaucracy.

356 Alfonso Del Percio, 'Engineering Commodifiable Workers: Language, Migration and the Governmentality of the Self' (2018) 17 *Language Policy*; Mi-Cha Flubacher and Alexandre Duchêne and Renata Coray, *Language Investment and Employability: The Uneven Distribution of Resources in the Public Employment Service* (Palgrave MacMillan 2018)

357 Alfonso Del Percio, 'The Governmentality of Migration: Intercultural Communication and the Politics of (Dis)placement in Southern Europe' (2016) 51 *Language & Communication*

358 Dennis R. Klinck, "'This Other Eden': Lord Denning's Pastoral Vision' (1994) 14(1) *Oxford Journal of Legal Studies* 25

359 A smaller project catered to women, but did not have its own premises, so it entailed finding spaces in people's homes (Scotland | Abigail | Evictions Caseworker, NGO for Asylum Seekers).

Another important point is that becoming homeless makes it nearly impossible to carry on with an asylum claim, so *Serco's* eviction efforts not only undermined a person's safety by thrusting them into destitution and homelessness, but also potentially prevented them from completing the asylum seeking process to obtain refugee status and their right to remain in the UK.

Contraventions of human rights

A major element of the Scottish legal case revolved around the outsourcing of public services to the private provider, *Serco*. In a disappointing outcome of the case, *Serco* was found not to be a public authority for human rights purposes, because the court's analysis prioritised *Serco's* institutional nature as a for-profit company, rather than looking at the functions *Serco* were performing. As highlighted in the case study, the verdict raised alarm for the various practitioners we interviewed because of the prevalence of outsourcing in the delivery of public services and concerns that it could result in a two-tier human rights system (Scotland | Erica | Solicitor, Human Rights Public Body). It creates the potential of inequity in service provisions, meaning that if services are provided directly by government, they must comply with human rights standards, whereas if they are provided by a private company, there is less clarity about their obligations and leaves the door wide open for injustice.

We explained in the case study that the *Serco* verdict has a material impact that extends far beyond the conclusion of the case. More broadly, the failure to hold *Serco* to account does not encourage and advance a human rights based approach in line with international human rights standards. Instead, it opens the door to future injustice by creating a space for private companies to potentially shirk their human rights responsibilities, rather than increasing the capacities of 'duty-bearers' to meet their obligations. It is clear that contradicting logics, in this instance, advance neoliberal rationalities over principles of human rights.

In this section, we take a closer look at Erica's comments regarding section 6 of the Human Rights Act, where she explains that the way the principle has been applied and interpreted has been problematic. We draw on the theoretical constructs of entextualisation to explain how the perceived original "intention of parliament" (text in bold font for emphasis) is transformed into another legitimate interpretation. Erica states:

*"Section 6 of the Human Rights Act says that all public authorities, so all public bodies, must act in compliance with the European Convention on Human Rights. So that's fine, but then there's a provision of that which says that [...] private bodies, when they are performing functions of a public nature, are also caught by the Human Rights Act. [...] that's to fulfil the principle that a state can't contract out of its human rights obligations and that the principle is really like when you're standing in the shoes of the State then you also must comply with their human rights obligations. So I think that's line fine and relatively uncontroversial, but how that provision has been applied and interpreted over the years by the courts has been problematic [...] The whole idea of it is that you should look at- and everything in the intention of parliament at the time when the Human Rights Act was going through, is that you should look at the **function**. So it doesn't matter, like, if this company is a private company and if they're like for-profit and they have shareholders and essentially they look very much like a private entity, if they're performing [...] a function, so in this case it would be the provision of accommodation and other support to asylum seekers, if that function is of a public nature then any exercising that function, they are obliged to comply with the convention"* (Scotland | Erica | Solicitor, Human Rights Public Body, our emphasis).

Although Erica believes that the intention of parliament, at the time the HRA was created, was to look at function, by means of the *Serco* legal proceedings, others have been able to produce meanings that recontextualise the 'original' text and allow for ideological repositioning. Processes of recontextualisation transform discourses, thereby taking on new or different meanings. An ideology of fixed text, the perception that a text-artefact is a stable, clear and precise semantic unit, underpins the construction of a space that allows different parties to produce legitimate entextualisations of the source text.³⁶⁰ There is close interaction between linguistic ideologies - the ideology of fixed text - and broader social and political ideologies.³⁶¹ Blommaert states that "[p]ower resides in this interplay between an ideology of fixedness and practices of re-entextualisation, for it is precisely through this interplay that authority in the domain of interpretation of texts can be managed and channelled".³⁶² The new interpretation of section 6 HRA in the *Serco* case receives legitimacy from the outcome of the legal process that upholds this meaning as valid. The entailed transformation in meaning had significant impact on the outcome of the *Serco* case. Although this interpretation may not be applied unilaterally to similar instances in future, some legitimacy has been created for this interpretation of section 6 HRA, which, as stated earlier, could facilitate future injustice.

These various tensions illustrate how mechanisms of law, policy, rules and procedures intersected with ideological conceptions of worthiness, expressed through 'hostile environment' and valuation discourses. The outsourcing of services and lack of oversight further exacerbated transgressions of human rights.

Prejudicial practices and the absence of penalties: Privatised housing

Practitioners across the various jurisdictions raised concerns regarding the private housing sector, particularly with respect to security of tenure and fitness standards. Our Northern Ireland case study presents many of these challenges, so we will not iterate them here. However, we would like to draw attention to the intersecting mechanisms in the privatised housing sector that the Northern Ireland case study revealed. Concerns about the lack of a regulatory framework and consistent oversight and accountability for the private housing sector echo problems encountered by practitioners in the Scotland case study.

Josie, head of an NGO for housing in Northern Ireland, expressed the increased vulnerability of people in the private rental sector, as there is no security of tenure. Even if someone has been a model tenant, she said, they can be asked to leave at any time under a 'no fault eviction'. In addition, high levels of harassment and illegal evictions, combined with inadequate mechanisms of redress, create precarious circumstances for people. There are clear legal processes related to eviction that call for a 28-day notice period followed by due process through the courts. However, Josie said, "*a number of landlords for a variety of reasons choose not to operate that process ((small laugh)) and basically just illegally evict their tenants, so don't give them the required notice or harass them to such an extent that they're forced to leave*" (Northern Ireland | Josie | Chief Executive, NGO for housing).

There are legal protections against harassment and illegal eviction, but it is not enforced in practice, she said.

³⁶⁰Blommaert n69 at 187

³⁶¹Ibid at 201

³⁶²Ibid at 202

“whilst there’s an offence of harassment and illegal eviction that requires the environmental health staff of the local council to prosecute the landlord, I could count on two hands the number of prosecutions that have ever been brought. And those that have been brought if you look at what happens to the landlords it’s pitiful and it’s insulting. And the environmental health know that [...] so they have a number of arguments for not taking action. One is that they don’t have the resources and they have other priorities. Two is that actually they think that by prosecuting landlords and by landlords seen to be getting maybe a two hundred pound fine or something it’s actually not discouraging the practice [...] Why would that put you off? [...] I know quite a lot of staff who work in environmental health who are so frustrated by this. So, in many cases they decide that it’s probably in everybody’s interests for them not to bring the prosecutions, because it’s just highlighting how inept and how inadequate the fines are” (Northern Ireland | Josie | Chief Executive, NGO for housing).

Josie’s account illustrates how the absence of accountability and oversight facilitates unjust practices that violate people’s right to adequate housing. Josie thought that a landlord licensing scheme, akin to the one utilised in Scotland, could improve the situation in Northern Ireland by having means to punish landlords with more appropriate consequences, such as losing their license. Legal protections and mechanisms for redress are only accessible and useful when there is a culture of accountability. As Josie said, not only are consequences for private landlords rarely enforced, merely promoting their enforcement would not be enough, as the penalties themselves are not an adequate means to change behaviour. Threatening landlords with a mere £200 fine not only upholds appalling practices, but undermines a rights based approach to the provision of social rights.

Other alarming practices highlighted related to housing in Northern Ireland included the ‘No DSS Approach’, denying housing to those whose main income consists of social security benefits, as well as landlords asking for rental deposits for social housing. In addition, Josie raised concern regarding a new recommendation that is going to be implemented in relation to applicants for social housing. Although this provision relates to social housing and not the private rental sector, we will raise it here because the new measure will target a specific portion of the population and relates to broader discursive currents that circulate across jurisdictions.

Josie explained, *“I’ve been talking to you about people who are actually coming through the statutory homeless route, but this recommendation, this is a new proposal which the minister has given the go-ahead to, which is now going to come into the system, but I think needs probably new regulations [...] and that is that if you’re an applicant for social housing and [...] you’re assessed and you’re on the waiting list waiting for your house, and you’ve x number of points and you’re basically waiting for your turn to come, that if you’re involved in any behaviour which, you know, is of a persistent nature which suggests, and I think this is really controversial ((laughs)), which suggests that you may not be a suitable tenant, then you can be deferred from the list” (Northern Ireland | Josie | Chief Executive, NGO for housing).*

As Josie suggests, the wording in the document is ambiguous, as phrasings such as “of a persistent nature” leave lots of room for recontextualisation, meaning that different interpretations may result in different outcomes. Josie addressed this concern, saying the reason the recommendation was controversial was because it lacked definition and clarity. She then gave her interpretation of the recommendation, saying

“what they’re obviously targeting is- well I can tell you because I kind of know the whole rationale behind it, they’re talking about people mainly, this is what it says, people who are temporarily

housed in hostels who exhibit antisocial behaviour [...] their rationale is, these people are problematic, we don't want them as our tenants, get them off the list [...] that's where it's coming from. But of course it doesn't explicitly say this is about, you know, people living in hostels and antisocial behaviour. So, there is that whole issue about, you know, how do you define, you know, [...] what test has to be applied, what is the burden of proof, you know, is there no opportunity to kind of have it reviewed or revisited [...] I think it's very controversial actually [...] obviously we're saying you'd have to have, you know, comprehensive guidance on how this is going to be applied [...] if you're going to leave this to individual decision makers to make such subjective decisions which have such enormous consequences for people's future" (Northern Ireland | Josie | Chief Executive, NGO for housing).

The data make clear that subjective and discretionary decision making generally results in poor decisions with enormous negative consequences for individuals. Furthermore, we see once again intersections between mechanisms of procedure, outsourcing of functions, and ideological instantiations of the valuation discourse that categorises people according to their perceived worth, for instance those who receive benefit income not being worthy candidates for private housing.³⁶³ This sentiment is perhaps even more salient in the example regarding potential new social housing policy that will penalise perceived antisocial behaviour of those temporarily housed in hostels. Hostels are often the only housing option to those facing homelessness, including those seeking asylum, so this policy once again targets a portion of the population already at risk and reproduces racialised and marginalising discourses. The lack of clarity in the proposed recommendation embeds various entextualisations that can be wielded in future by individual decision makers, fuelled by different ideological positionings. Combined with the potentiality of limited oversight and accountability, as well as unclear routes for challenging decisions, this raises a red flag for possible rights violations in the future and barriers to effective remedies.

Technologies: Assessments, Automation and Algorithms

Medical assessments

An enduring theme across the interviews with practitioners involved challenges related to the medical assessments required for benefits, such as PIP and ESA. We discuss here how assessments function as a technological tool used in the categorisation and hierarchisation of people, and are part and parcel of valuation processes. We argue that ideological conceptions and stigma of mental health result in systemic discrimination and difficulty in accessing benefits for certain rights holders. In addition, medical assessment services are contracted out to private entities, further fragmenting and obscuring the processes involved. Additionally, the data show that arbitrary and subjective decision making result in a high percentage of errors, as evidenced by the high number of appeals for PIP that result in positive outcomes for clients (see statistical data in Part III of the chapter), raising further concerns about the adequacy of accountability structures and influences of ideological conceptions of mental health.

It is common practice that the medical assessment process is subcontracted to an assessment provider, a private organisation, whose assessors are employed to carry out a functional assessment to determine entitlement to benefits. Oliver, a solicitor, reported

³⁶³The authors recognise that there is also a financial component to decision making, due to a reduced housing benefit under Universal Credit.

that an enquiry in Northern Ireland³⁶⁴ found that the medical reports produced by the local contractor, Capita, were being audited and potential changes were made to reports without clients being made aware of it. There was evidence that an auditor would assess a report, identify quality issues and then make recommendations for change. Oliver warned that it is an *“inequality of arms issue that people are unaware of this key piece of evidence being edited, and it’s important that they are made aware of that”* (Northern Ireland | Oliver | Solicitor, NGO for Legal Services). Oliver explained that there are several levels of audit, one conducted internally, as well as a wider audit done by the Department (Northern Ireland) or DWP. The example provided referred to an internal audit by the assessment provider, assessing the quality of reports of new assessors, amounting to nearly twenty percent of reports deemed to be of unsatisfactory quality. This figure is extremely disconcerting, as these assessments serve as important evidence and perform a gatekeeping function to determine who can access sickness or disability related benefits.

In addition, auditing practices, which Nikolas Rose and Peter Miller³⁶⁵ call political technologies, are emblematic of neoliberal governmentality, reflecting practices aimed at identifying inefficiencies and improving quality, following market-type rationalities. It *“governs people through a relentless pursuit of economic efficiency, deregulation, outsourcing, and privatization; it involves marketisation and the privileging of competition over cooperation, as well as increasing emphasis on calculative practices aimed at promoting individualisation and responsabilisation.”*³⁶⁶

One of the main concerns expressed by practitioners is that claimants often report that what they say during their medical assessments is not always represented in the final report. Some of the welfare rights advisers, who often accompany clients to their assessment appointments, experienced this themselves and reported that it was impossible to challenge the content of a medical report, as those appointments are not routinely recorded. This highlights a clear power imbalance in favour of the assessment provider, and by extension DWP, because the textual output, i.e. the medical assessment report, cannot be challenged. The absence of an audio or video recording means that a challenge to the contents of a report are reduced to the ‘word’ of the assessor versus the ‘word’ of the claimant, a dynamic that is highly unequal in power. The claimant, therefore, is unable to produce any ‘legitimate’ evidence to counter the ‘truth’ entextualised in the report. The textual authority of the report is legitimated by bureaucratic processes that designate the assessment provider/ DWP to be legitimate actors in the decision making process, and this legitimacy grants them the power to control a (constructed) space of allowed interpretations.³⁶⁷ The lack of transparency of medical assessments, combined with the power such an assessment takes on in written form, warrants close oversight and accountability to ensure fair and unbiased decision-making.

Privatisation and the outsourcing of government functions thus creates a legal accountability vacuum meaning individuals cannot access transparent processes to participate and challenge potentially unlawful or erroneous assessments. This lack of transparency and accountability is further impacted by the lack of legal normative human rights standards in the private space. In other words, the *Serco* decision potentially renders privatised public service provision beyond even the most basic human rights protections.

364 ‘Concerns Raised over NI PIP Assessments’ (samedifference1, 30 November 2017) <https://samedifference1.com/2017/11/13/concerns-raised-over-ni-pip-assessments/>

365 Nikolas Rose and Peter Miller, ‘Political Power beyond the State: Problematics of Government’ (1992) 43(2) BJS

366 Alfonso Del Percio, ‘Audit as Genre, Migration Industries, and Neoliberalism’s Uptakes’ in C Chun (ed), *Applied Linguistics and Politics* (Bloomsbury 2022)

367 Blommaert n69 at 186

*Disproportionate impacts: Mental health*³⁶⁸

Rose, a welfare rights adviser in Wales, reflected on the appeals she undertakes with clients and reported that approximately 80% of people she represents at tribunal have mental health problems (see Wales case study). The majority of those appeals are benefit decisions, challenging a sickness/ disability test result. She explains the problem like this:

“for me, there is some inherent discrimination against people with mental health problems within those tests, so trying to fit people with mental health problems into those tests is more difficult. It is often more straightforward, if somebody has a physical disability, to apply those rules to them. Now you know, the Government would say, oh no, no, no, we’re not discriminating against people with mental health [issues], but over the years, I’ve done my job, I have seen that the way that they assess them- [...] so the kind of evidence they require [...] so if somebody has got arthritis, often they’ll want to see x-rays, you know, they’ll often want to say, is there a record that someone’s had x-rays, and do the x-rays show that there is arthritis, yes or no [...] and with diabetes, there might be records of what somebody’s blood sugars are and things like that. So there’ll be easier ways, if you like, to confirm a level of someone’s functioning or disability. With mental health it is more difficult, to sort of decide, whether that mental health really disrupts somebody’s functioning and ability to do certain activities, but I do find that they’re very loathe to accept people’s own evidence, which is what you need to do with mental health” (Wales | Rose | Welfare Rights Adviser, Local County).

Rose highlights two separate issues, first that the medical assessments themselves are not designed for evaluating psychiatric disorders, making it difficult to slot into the pre-established criteria for physical illnesses. Secondly, because mental health challenges are an invisible illness in many ways, it is important to listen to individuals being assessed, as they know best how their illness impacts on their daily functioning. An additional challenge, identified by practitioners, is the difficulty in obtaining the required medical evidence, due to lack of capacity (and funding) of mental health services, with reported wait times for a mental health diagnosis exceeding two years (England | Andrea | Welfare Benefits Adviser related to *Pantellerisco* case).

Arbitrary and discretionary decision making

Rose’s comment that there is resistance to accepting people’s own evidence, reflects wider discourses of mistrust and stigma around mental health. This distrust also translates into practice and poor decision-making, as evidenced by examples from the data. For instance, Andrea, welfare benefits adviser, recalled the story of a lady who had a severe sight impairment related to a brain tumour. She was required to undergo a reassessment for her PIP benefit and was denied on the basis that her hair was neatly honed (she wore a wig) and was wearing lipstick (England | Andrea | Welfare Benefits Adviser related to *Pantellerisco* case). Not only did this assessment process violate a person’s dignity, the erroneous and subjective decision making resulted in an immediate halt of benefits, which resulted in rent arrears. The client was not able to use public transport and could no longer afford taxis. As a result, she became housebound, which affected her mental health. *“The whole thing just started to snowball completely [...] we got it overturned, but [...] it should never have happened in the first instance”*, Andrea said.

Other examples entailed a young man with severe mental illness whose application for Employment and Support Allowance was turned down. This occurred because the General Practitioner (GP) mistakenly submitted medical evidence for another patient. Although it was blatantly obvious that the information received from the GP was a mistake

³⁶⁸Mental health refers to different psychiatric conditions and also includes learning challenges and neurological/ developmental disorders, such as autism, ADHD etc.

(i.e. reference to hip replacements), DWP ignored it and refused the application on the basis that the medical evidence did not support the claim. It took ten months, with the assistance of his welfare benefits adviser, for the young man to have his ESA benefits reinstated (England | Andrea | Welfare Benefits Adviser related to *Pantellerisco* case).

Iterations of subjective decision making without merit are found across the data. Importantly, due to the interrelationship of rights, the infringement on one social right, such as access to social security, has a knock on effect on other areas of a person's life and wellbeing. Moreover, the high number of overturned decisions at tribunal are an important indicator that decision-making processes and the entailed accountability structures are inadequate.

Current medical assessment tools are constructed as instruments that unfairly categorise physical and psychiatric conditions in a hierarchy that places physical illnesses at the top. These instruments are unfair, unfit for purpose and must be adapted to adequately assess all types of illness in order to interrupt systemic discrimination against those with mental health conditions and provide access to social rights and justice for all.

Automation and digitisation

Automation and digitisation are also hallmark features of a neoliberal system and common approach to governing a bureaucratic system, as standardised systems often increase productivity and reduce cost. Practitioners, however, raised several concerns ranging from digital exclusion to significant errors in decision making.

Online application processes entail barriers for those who do not have digital access. It is often assumed that in our digital age, people can access online platforms, but for a significant portion of the population this is not easy due to data and Wi-Fi limitations, lack of computers and mobile phones. In speaking about some library closure legal cases, Matthew said, *“people always think library cases are about books, but they're absolutely not about books”* (Wales | Matthew | Solicitor, Private Law Firm). He fittingly described how libraries (and schools) still serve important functions for people to access public services, employment and schooling. Their closure, felt acutely during the Covid-19 pandemic lockdown, impeded access to digital platforms. In addition, when it comes to applying for social security benefits online, for instance, people often do not grasp the importance of the task as an application process to a legal entitlement and, without independent advice, mistakes are often made that can result in a denial of benefits or take a long time to resolve. The importance of access to independent information and advice is highlighted once again.

Algorithmic decision making

Algorithmic tools are another form of technology in the categorisation and sorting of information and people. Identified problems regarding the use of algorithms entail concerns of discrimination and unfairness, information protection and (lack of) opacity and transparency.³⁶⁹ The literature on 'algorithmic accountability' questions whether and how algorithms can be made more transparent and explainable in order to facilitate accountability when their use adversely affects human rights or causes other types of societal harms.³⁷⁰ McGregor, Murray and Ng argue that international rights law provides a suitable framework. Although not a panacea, a human rights based approach to

³⁶⁹L Edwards & MVeale, 'Slave to the Algorithm? Why a 'Right to an Explanation' is Probably not the Remedy you are Looking for (2017) 16 Duke Law & Technology Review 18

³⁷⁰Lorna McGregor and Daragh Murray and Vivian Ng, 'International Human Rights Law as a Framework for Algorithmic Accountability' (2019) 68 ICLQ 309

algorithmic accountability offers an organisational scheme to identify factors that States and businesses should take into account in order to avoid undermining or violation human rights.³⁷¹

A recently published Review into Bias in Algorithmic Decision Making attempted to address some of these concerns, but acknowledged the well-established risk that algorithmic systems can lead to biased decisions.³⁷² On the point of transparency in the public sector, the review recommends “a mandatory transparency requirement on all public sector organisations using algorithms that have a *significant* influence on *significant* decisions affecting individuals”³⁷³ (our emphasis).

Although this appears to be a sensible recommendation, the word “significant” (repeated twice), is vague and ambiguous, leaving a large space for multiple entextualisations/interpretations of what would constitute “significant influence” and how “significant decisions” are to be defined. The review recognised precedent of failures in large-scale, although not all algorithmic, decision-making processes that caused impacts on a large number of individuals, citing fitness-to-work assessments for disability benefits and immigration case-working. The authors of the review cautioned about the significant impact decisions made at scale by public sector organisations can have if they go wrong, urging for the highest standards of transparency and accountability.

For Sharon Pantellerisco, algorithmic decision making resulted in errors and loss of income related to the benefit cap policy, with no effective remedy at the conclusion of very long legal proceedings. With regard to the government’s computer program, Tobias expressed frustration that DWP did not make use of all the information they had at their disposal to create a better, more nuanced, program. He recommended increased levels of parliamentary scrutiny and Miles echoed suggestions for legal input and greater interaction between lawyers and programmers at the design stage to avoid built in bias.

“For certain categories of cases where you knew that the decision the computer was needing to make was probably one that would need human oversight, [...] you’d filter them out to an expert decision maker. And like none of those things really seem to happen [...] I mean, it would be both design and also training [...] you can see in the design of like their [DWP] flagship benefit, Universal Credit, that what’s happened is in the room at the stage they designed their computer system, you’ve got some policy people and you’ve got some programmers, and the policy people have at some point talked to lawyers and think they’ve understood what’s going on, but you haven’t got any lawyers in the room when they’re actually designing the system. And what you end up with is a system that’s not compliant with the rule of law. Like it doesn’t do the things that it would be required to do and it can’t from the ground up do those things, because you’re sort of taking it back to the premise of design, it’s not designed to actually do the things that it’s supposed to do” (England | Miles | Welfare Rights Adviser, NGO to combat child poverty).

In the *Pantellerisco* case the court, on appeal, accepted that the algorithm for calculating benefit entitlement was lawful, despite the algorithm discriminating between those paid on a lunar cycle and those paid every 4 weeks. An important factor in the court’s decision was the fact DWP exercised what it termed a “test and learn philosophy”.³⁷⁴ Despite the High Court finding the operation of the flawed algorithm irrational, and therefore

371 Ibid at 313

372 ‘Review into Bias in Algorithmic Decision Making’ (Centre for Data Ethics and Innovation, November 2020) <[Review_into_bias_in_algorithmic_decision-making.pdf](#)> accessed on 17 January 2022

373 Ibid at Ch 9

374 Lord Justice Underhill, *Pantellerisco v SSWP* [2021] EWCA Civ 1454, para 90

unlawful,³⁷⁵ on appeal Lord Justice Underhill stated “[W]here that happens, it does not in my view automatically follow the legislation was irrational [...] it cannot be the case that whenever imperfections in a legislative scheme are corrected by amendment in the light of experience of the original version is to be characterised as irrational on the basis that it should have been got right first time round.”³⁷⁶ The court adopted a deferential approach, referring the matter back to DWP so that the test and learn philosophy could operate in practice. The data overwhelming suggests that the ‘test and learn philosophy’ provided by DWP’s witness statement is not something that operates well as a matter of practice. The Court of Appeal in *Pantellerisco* has left open the door for a finding of irrationality if DWP does not take steps to resolve the problem now that it has been identified.³⁷⁷ However, this approach leaves both Sharon Pantellerisco and all others impacted by the flawed algorithm facing a continued social rights violation without an effective remedy to date, noting that the issue first arose in July 2019.

Poorly reasoned policy

Each of the case studies provided examples of poorly reasoned or unjust policies. The benefit cap policy did not only fall short in regard to its approach to income, but it was deemed to provide an inadequate level of subsistence and had a disproportionate impact on lone parents. On an ideological level, there are interdiscursive links between the framing of the benefit cap as a benefit structured to incentivise working and government’s motivations behind the benefit, as expressed on the government website by Department of Work and Pensions Secretary Iain Duncan Smith introducing the benefit cap in 2013.³⁷⁸ He said:

“Returning fairness to the welfare state in this country is long overdue. We will always be there to support those who need help, but the days of blank cheque benefits are over and the benefit cap is a key part of this.

We need a system that no longer traps people in a cycle of dependency and is fair for the hardworking taxpayers who fund it.

Seventy years after Beveridge helped establish Britain’s welfare state, we are restoring public trust in it. We are ensuring it is there as a safety net for those who need it but that no-one can claim more than the average household earns in work” (our emphasis).

Smith’s words encapsulate not merely a negative view towards those seeking benefit assistance, but constructs a long history of handouts and welfare fraud by stating that “returning fairness to the welfare state in this country is long overdue”. By referring to a “system that no longer traps people in a cycle of dependency”, he not only accuses claimants of being dependent on government, as opposed to being autonomous, he also undermines their agency by claiming they are “trapped” by the system. He then addresses an invisible audience of British tax payers to assure everyone that the government will provide a “safety net” for those who truly need and deserve help, but will ensure that no one gets more than they deserve, i.e. “claim more than the average household earns in work”.

375 Mr Justice Garnham, *Pantellerisco v SSWP* [2020] EWHC 1944 (Admin) para 88

376 *ibid*

377 *ibid*

378 ‘National Introduction of Benefit Cap Begins’ (Department for Work and Pensions, 15 July 2013) <National introduction of benefit cap begins - GOV.UK (www.gov.uk)>

There are clear interdiscursive links between discourse expressed by the then Secretary of State for Work and Pensions and similar discursive currents that permeate the data in the form of the valuation discourse of 'worthiness'. The example shows the intersection of policy and broader ideological (mis)conceptions that have real and immediate impact on rights holders.

The distribution of resources: Entitlement as 'commodity' versus 'right'

We see recurring tensions across the data between the neoliberal concept of entitlements as commodities and human rights based interpretations of rights. We saw in the case of asylum seekers in Glasgow that even basic provisions for food were made difficult to access due to restricted usage of the Aspen card (no cash) related to immigration status (Section 4). An unwillingness to provide support in the form of cash was also raised in the Wales case study in relation to the provision of food for children and young people. The conflict was particularly salient in a discussion with Eva, Wales development manager, around school meals and voucher programs.

Eva said, *"the reason that most people don't have enough food is not because there's a lack of food, it's because they have a lack of money. Even in the pandemic that was the key thing"* (Wales | Eva | Development Manager, NGO to combat child poverty). She explained that, as an organisation, they campaign for a cash first approach to alleviating food poverty. They want to see the direct value being transferred to families so that they can maximise the amount available and buy their own food. She said that based on their research, people overwhelmingly said that's what they prefer and it works best. She said, *"although people are happy with food parcels, vouchers and things on the whole, there's always quite a significant minority whose needs aren't met by those schemes of support so, you know, we really want to see cash first, and so the option has been available to local authorities to provide cash payments"* (Eva). Eva explained that through their consultations with hundreds of families, they heard numerous examples of why direct provision of food boxes or other schemes do not work well. She tried to feed that information back to local authorities and encourage them to consider making cash payments, but received significant resistance from local authorities.

"the lack of interest ((laughingly)) to say the least in what people on the receiving end of the services think about it is really shocking to me. Because [...] I think that sort of mind-set is like well, you know, beggars can't be choosers really, you know [...] we just need to do what's operationally best for us at the local authority; it doesn't matter if it's not meeting people's needs very well ((laughs)) [...] it's not our top priority really and that's quite hard I think, you know, in terms of who's been wanting to hear [...] as an antipoverty solution cash is best, but trying to communicate that or trying to advocate on behalf of people who were having problems with the system is really challenging" (Wales | Eva | Development Manager, NGO to combat child poverty).

The researcher pressed Eva for her interpretation as to why local authorities are reluctant to provide cash. Eva said, *"for me, it's rooted in the stigma, it's a discriminatory attitude towards people in poverty. It's rooted in a belief that people in poverty are poor because they are incapable of managing money and they may be negligent as parents. So, the idea that if you give people money it will be spent on something other than [...] what it's intended for. I've done research this year which absolutely disproves that [...] there are huge amounts of evidence national, internationally in developing countries and across the UK that when you give people money, particularly when you call that money, you know, 'child benefit' or 'child payment' it gets spent on children or if you call it 'free school meal money' they spend it on food. And that's what I found*

very much in the work I've done in the South Wales Valleys. I asked parents what they used the cash payment they had for and they use it to buy food, and then they were able to talk about how it had helped them budget more effectively with the remaining money that they had that [...] so they could actually afford to buy better quality meals, fruit and vegetables, things like that, they could eat themselves, they could buy learning resources for their children. So, you know, all these benefits that just a box of, you know, kind of catering supplies just doesn't ((laughs)) provide at all" (Wales | Eva | Development Manager, NGO to combat child poverty).

Once again, we see intersections with ideological conceptions expressed as discourses of worthiness. The way the valuation discourse manifests here is through the structuring of programs that keep power and control with government, as poor individuals are deemed incapable of making good decisions, handling money and parenting. These mechanisms work together to result in structural discrimination. Furthermore, Eva elaborated to say that she feels that it is rooted quite deeply in the design and administration of a lot of local welfare systems in Wales and in local authority level. She continued:

"it really sticks with me going to a consultation event for Welsh government, they were doing a review of their child poverty plan and it was kind of a stakeholder event just before the pandemic where we had a group of roundtables, you know, people talking about what the welfare system for Wales should look like. And the amount of people, who worked so- they were really obsessed with fraud, they were really obsessed with making sure [...] there was no opportunity for people who didn't really deserve it to get it [...] they were like, must eliminate dependencies, all these kinds of real myths, not grounded in empirical evidence ((laughs)) not grounded at all in what it's actually like, and really discriminatory against people on low incomes, really stigmatising attitudes towards families affected by poverty and really poor understanding of what the needs of those families are. But these were people, some of them quite senior, just talking in terms, you know, that actually I find quite offensive about casting aspersions, you know, on the kind of trustworthiness of people. And talking about how you need to design welfare systems to exclude or punish or control or coerce people ((laughter)) so that they stop being undesirable, you know, rather than seeing a kind of rights based approach which [...] we all have an entitlement and we need to work now to get it to as many people as possible. So, you know, that's kind of a contrary thing but it's just I'm really conscious of those stigmatising attitudes because it's what we work against with the children and young people in our project, you know, it's the thing that makes their life so hard is that judgement on them and their parents" (Wales | Eva | Development Manager, NGO to combat child poverty).

In Eva's narrative, the valuation discourse is expressed as distrust, a fear of people fraudulently making a claim on the welfare system. We can see clear interdiscursive links with the comments made by the former Department of Work and Pensions Secretary Iain Duncan Smith regarding the benefit cap policy. Resistance to cash payments appears to be rooted foremost in discrimination and misguided conceptions of welfare and welfare recipients. Furthermore, some policy makers present at the meeting felt the need to design welfare systems with punitive measures, focussed on exclusion, control and coercion. Once again we see glimpses of social control tactics that Foucault exposed in his work. These discriminatory attitudes stand in stark contrast to rights based approaches that frame entitlements as rights for everyone, rather than commodities for some, at the behest of personal discretion.

Our intention here is not to say that all discretionary systems of resource distribution are inherently unequal and contravene human rights approaches. Practitioners, namely in Wales, were divided on the issue of discretionary approaches to welfare provisions. Some voices advocated for a discretionary approach, because it allows for some flexibility and

tailoring to specific needs, others lamented the fragmentation of services inherent in discretionary funding schemes, and the entailed difficulties in meeting everyone's needs. The caution we raise with respect to discretionary approaches to resource distribution is rooted in concerns around discretionary, and often arbitrary, decision making processes. Discretionary resource distribution approaches are a fitting example of governing "at a distance"; fragmentation of the system raises concerns about gaps in oversight and accountability.

The reproduction of valuation discourses: 'worthiness'

An important element of achieving social justice is interrupting or countering disempowering and disenfranchising discourses. Our analysis in the previous sections shows how practitioners go to great lengths to advocate for their clients with aims of meeting their needs and securing successful outcomes for social rights violations. In this section, we show that even though practitioners may actively oppose and challenge dominant negative discourses, at times these discourses, or rather the dynamics that underlie them, are unwittingly reproduced. Moreover, the data show how rights holders themselves reproduce negative dominant discourse in efforts to create legitimacy for themselves. We illustrate this through a few examples, first showing how practitioners position themselves in relation to particular discourses. A way of conveying this positionality is expressed in the analytical concept of 'stance'.³⁷⁹ Stancetaking is instrumental in the drawing of social boundaries, a component integral to processes of differentiation and categorisation. A closer evaluation of the stances taken up by the practitioners is valuable in understanding the knowledge they draw on in their daily work and progressing social rights for the clients they serve.

In the previous section on the adjudication journey, we spoke with Eva in Wales regarding access to information and advice and she relayed that during the pandemic many people were forced to seek help who might not have needed assistance previously. She described that people would not necessarily know how to access help if they were not already linked in with agencies or service providers. We repeat the excerpt in part here, drawing attention to the words distinguished in bold text.

*"I think a lot of people just don't know where to turn [...] I think services often struggle to be there when people need them because people typically get to a place of crisis, so they're living in vulnerable circumstances and they're dealing day to day with extreme-, multiple extremely stressful life events that are pushing them to that point, you know, where they are at risk of destitution. And if they're not engaged with agencies, and we're seeing this a lot in the pandemic, **these aren't people who are problems, you know ((laughs)) to society**. So, they don't have a social worker; they might not be working or engaged getting any help from mental health, you know, service providers and so on. You have to be quite ill to meet the threshold to be allowed to even kind of get support from those teams. So, lots of people just aren't on the radar (Wales | Eva | Development Manager, NGO to combat child poverty).*

In her statement, Eva clearly aligns herself with the position that the people she is referring to are *not* "problems" to society. What is implicit is that her comment sits in dialogical relation to other discourses that *do* characterise certain people as "problems to society". This is by no means a critique of Eva; the example merely makes visible how our words often signal other discourses. Here it makes salient the interdiscursive connections to broader circulating discourses, in this case a valuation discourse, which creates opposing categories with people who are characterised as problems on one end of the spectrum, and

³⁷⁹ Alexandra Jaffe, *Stance: Sociolinguistic Perspectives* (Oxford University Press 2009) at 3

those that are not on the other. We share this example as a note of caution, because in her efforts to oppose the valuation discourse, Eva in fact, reproduces the binary distinctions that fuel the constant drive for legitimation to prove one's worthiness. Rights claiming, we argue can help reshape the narrative and empower rights holders.

The following example from Rose is more explicit about her engagement with the valuation discourse of 'worthiness', in which she acknowledges circulating discourses and takes an unequivocal opposing stance, refusing to participate in the hierarchisation of people.

"I'm lucky in that everybody I work with in my team- it's a small team-, but everybody is very dedicated, and very committed to, um, the sort of, the ethos of our team. Which is to [...] do all we can to maximise people's income and to do that in a sort of non-judgemental way. I think that what sometimes creeps in from management above us is that they do actually want us to be more judgemental. There is a bit of a- a thing of- people don't always use the term, but what they're getting at is there's a sort of deserving and an undeserving poor? And so, sometimes what they want us to do is, they want us to do more work with sort of pensioners, that they see as deserving, because there's [...] quite a paternalistic kind of view of poorer pensioners. It's not that I don't think poorer pensioners need advice, I definitely think they do, and I think they miss out on benefits as much as anyone else. But there's [...] you know, the sort of heroin addicts with mental health problems that I was talking about earlier, they miss out on benefits a lot. But they're not- in the views of some people they're not as deserving? Whereas for me it's, you know, I do my job because I think it's crucial that people aren't judgemental and that people approach work like that and think this is somebody in need. I'm not gonna put them in a- a pecking order of whether I thought they brought some of this on themselves or not. And invariably, I think once people start going down that road, I think, really, so many of the people I deal with, when you ask them about their upbringing, their family, so many have been in care, or been abused as children, or have very chaotic or you know very difficult family circumstances. And, you know, as I say, it's not surprising, sometimes that people then have ended up with addictions, or living on the street [...] or, you know, alcohol or whatever, those things [...] they're all in a bit of a circle or a pattern, if you like. And so, for me, that's why I think it's so important to be able to offer services to those that present themselves, rather than deciding, you know, that actually this group of people is maybe more fashionable to help, this group of people, or whatever. But, so that to me is sort of changing some of the perceptions of the people above and certainly those who make decisions about funding and, you know, et cetera, et cetera" (Wales | Rose | Welfare Rights Adviser, Local County).

Rose's example shows how the valuation discourses can sometimes be very visible in the steering from upper management, for instance, reproducing categories of worthiness that differentiate between poor pensioners and poor heroin addicts. One cannot challenge the valuation discourse by articulating convincing arguments that the heroin addict or person seeking asylum is worthy of help. The only way to subvert the prevalent valuation discourse, is to not engage in the processes of categorisation it calls for, and instead adopt a human rights based discourse.

Our final example shows how the prevalence of the valuation discourse results in rights holders internalising the valuation discourse themselves. We asked Miles whether he thought rights holders recognised their challenges in accessing their social security rights as rights violations. He responded that claimants' idea of fairness or unfairness was more related to not having their needs met, in terms of immediate material interest, but that the notion of fairness was generally not cast in terms of rights or justice. We then asked whether a rights based conversation would help people access their rights, or whether

there might be other ways of talking about it that would make it more accessible for people to feel that they have a right to access. Miles responded,

“Very- very often, yeah it would-, I think, it would be better [...] the claimant will feel a sense of injustice, of unfairness, um, but also (5 secs) you get claimants who feel undeserving. And then (.) the way in which they articulate their sense of justice is by distinguishing themselves from what they see as the general undeserving case (1 sec) So, they totally accept that, uh, entitlement to social rights aren’t rights, that’s how they think about it, they think it’s a privilege. Like, you know, you deserve this if you’re good. And then they try to like distinguish themselves into that group. So, they end up, I mean that’s very divisive amongst claimants. So, when you get a claimant go, you know, yeah I know most people are faking this but I’m not, I’m genuine, if it wasn’t for all the fakers they would have believed me. Right, so their entire way in which they see their case is like through hostility to other claimants. And, I mean, this is really interesting for a welfare rights advisor who sees a hundred of these people who all think that their case is the fair one but everyone else’s is bad. Like (3 secs) I mean it’s quite often I’ll have to explain to someone well look (.) you know, a person who doesn’t make that transition, who just doesn’t feel worthy at all, I have to explain, well look, what the law says is if you meet those conditions you get it. And you do meet those conditions, it’s just they haven’t believed you. Do you not think this is true about yourself? Yes, it is true. Well, there you’re entitled. Um, and you get people who are incredibly grateful for being assisted in a case. And you have to say, all I did was assist you to show that you meet the conditions; you haven’t got anything special from me other than satisfaction of your legal rights. And I think people often appreciate that (1 sec) but they don’t move to thinking that way in general.

Miles describes how many rights holders interpret that entitlements to social rights are not rights but a privileges, meaning they feel the need to distinguish themselves as someone who deserves the entitlement. This, in turn, takes the shape of differentiating oneself from others who are ‘less worthy’, creating divisions amongst claimants. The account described by Miles resonates with Sukhwant Dhaliwal and Kirsten Forkert’s³⁸⁰ research in which they also observed a tendency of recent migrants and people from established ethnic minorities to make a distinction between deserving and undeserving or good and bad migrants/ citizens in a bid for recognition and legitimacy. Rather than disrupting the divisive narrative of the valuation discourse, Miles’ account of the benefit claimants creating divisions between the deserving and undeserving, reproduces negative discourse. We asked Miles why he thought that claimants have such a negative image of themselves and accessing services.

“that’s how services, these services are presented in the media [...] you know, that’s the dominant way in which these things are discussed (.) There’s two ways of dealing with it when you’re actually one of those people: you can either accept the dominant way and then make yourself an exception [...] which is like an easier thing to do than reject the entire way in which it’s discussed. Um, and I think yeah, for a lot of people the first route is easier. You don’t-, you have to disagree with less. But rather than like disagreeing with the whole way in which something is in general discussed you’re saying oh yeah, yeah, that’s all correct, it’s just I’m different, it’s an easier option than saying, actually benefit claimants are humans (.) maybe they should be treated like humans” (England | Miles | Welfare Rights Adviser, NGO to combat child poverty).

Miles points to dominant discourses in the media as one of the drivers of benefit claimants’ perceptions of themselves and others. The internalisation of the valuation discourse may also serve as an example of governmentality and its capacity for power to influence the self

and shape human conduct.³⁸¹ The power of producing particular “representations of the world”, or discourses, resides not in the words themselves but in the perceived legitimacy of the person, government or other entity, uttering them. Bourdieu’s notion of *symbolic violence* and Gramsci’s concept of *cultural hegemony*³⁸² are also relevant in expressing the ideological-hegemonic aspect of power that operates covertly below the surface. In their work they aimed to explain how and why subordinate groups accept as legitimate the power of the dominant. Susan Gal explains, “[t]he capacity of language to denote, to represent the world, is not considered transparent and innocent...but is fundamentally implicated in relations of domination. [...] Control of the representation of reality is not only a source of social power but therefore also a likely locus of conflict and struggle”.³⁸³

We shared these examples to draw attention to the power of discourse and the ways it can be used to perpetuate and (re)produce inequalities, but can also be harnessed to counter dominant disempowering discourses.

Complexity and fragmentation

In our data, elements of fragmentation include different constitutional arrangements under devolution, and to a lesser extent Brexit.³⁸⁴ Challenges related to devolution included intersections between reserved and devolved law, including limited decision making power (see Wales case study), as well as different case law and legislation between jurisdictions and related tensions/ conflicts. Fragmentation of the framework governing social rights also comes to the fore through the outsourcing of social services and housing, automation/ digitisation and discretionary funding schemes. One of the enduring elements of power is complexity and fragmentation.

Social welfare systems are “*tremendously complicated [...] a feature of all social welfare systems everywhere*”, Miles said. He goes on to explain: “*They’re designed to cater for poverty in its diverse forms and to manage poverty in its diverse forms. And therefore they need to be complicated to alleviate poverty just enough, in just the right way, and just the right places*” (England | Miles | Welfare Rights Adviser, NGO to combat child poverty). The competing pressures within the State, Miles believes, are to cut costs on the one hand, but have a complex system on the other, and they don’t fit. The way he sees it, the government tries to simplify the running of this complex bureaucratic system by removing expertise from their decision makers. He said, “*if you get like lowest grade of civil servant, largely computerise their job and then present them with a complex system it doesn’t work*” and does not produce the intended results. The researcher asked how to mitigate this problem and he answered that “*they [government] could spend more on administration, like significantly more*” (England | Miles | Welfare Rights Adviser, NGO to combat child poverty).

This complexity and its management is one of the overarching themes across the data, which is constituted in manifold policies and procedures, difficult and lengthy application processes, frequent changes to rules and regulations, obscurity, poor visibility of available services and programs, complicated and lengthy complaints procedures and a lack of cognisance of the interrelationship of social rights and people’s needs.

381 ‘conduire des conduites’ [conduct of conduct]; Michel Foucault, *Dits et Écrits IV* (Gallimard 1994) 237

382 Antonio Gramsci, *Selections from Political Writings (1921-1926); with Additional Texts by Other Italian Communist Leaders* (Lawrence and Wishart, 1978)

383 Susan Gal, ‘Language and political economy’ (1989) 18 *Annual Review of Anthropology* at 348

384 The impact of Brexit did not feature prominently in the data, but was raised in the context of direct impacts on EU and other foreign nationals (Julie), as well as in relation to loss of funding, such as EU structural funds (Sam). For a detailed overview of the various risks to economic and social rights protections in the UK due to Brexit, see Boyle, *Economic and Social Rights Law* n8 and Tobias Lock, ‘Human Rights Law in the UK after Brexit’, *Public Law* (2017) 117

We briefly highlighted the complexity of Universal Credit, which came to the fore during the Covid-19 pandemic when government promoted Universal Credit as a resource, but failed to make clear that there are significant differences with legacy benefits, such as tax credits, which resulted in people applying who were either not eligible, losing existing benefits, or became worse off.

The complex and fragmented ways of the governing system for realising and upholding social rights in the UK, warrants all the more that access to information, advice and advocacy, as well as legal representation is made readily available. Our conversations with practitioners already brought to the fore the shortage of lawyers across jurisdictions to address social rights violations. This was noted not only by legal practitioners, but by welfare rights advisers too, as the burden is acutely felt by those on the front lines of providing support.

In addition to a shortage in legal expertise, Julie discusses how, in her opinion, the design of the justice system is not well aligned with people's needs and daily realities. She says,

“from my perspective, you know, law is for the people and our courts are for addressing- for creating accountability and addressing and fixing problems that happen. And your procedures, your processes, should probably be ones that are fitted around, you know, what we know about how people are. So their level of literacy, the barriers they face, you know, the time that they have off work to do things. You know, how much it might cost to start a case, how much it costs to continue a case, if you are needing them to show up for 20 hours over the course of a year. Our justice system is not designed like that and I see very little that is written about redesigning it in that way! The discussions we have about our justice system are about saving money. They're about efficiency, they're about people [...] this government dangerously talks about people wasting time in the justice system and they're looking to reduce the volume of cases. It's seen as an infrastructure cost and the value of justice is not taken into account” (Scotland | Julie | Solicitor specialising in asylum/ immigration, NGO for Legal Service).

Julie's comments reflect her awareness of the prevalence and ubiquity of ideological rhetoric in line with neoliberal ways of governing, which direct primary attention to values of cost-saving and efficiency. We are indeed fighting an uphill battle if the perception of government is that “people are wasting time in the justice system”, rather than seeing the courts as a mechanism of accountability for ensuring social rights compliance. Julie and her organisation adopt a human rights based perspective in their work and she questions how a human rights based approach to justice and accountability can be implemented. She says,

“if we succeed in incorporating economic and social rights in Scotland [...] and there are remedies, then slowly, over time, human rights lawyers like me and [name of other practitioner] will chip away, will use that as a tool ((laughs)) to chip away. But it will always be- it will always be using the stick. It will always be defended by governments, so they will have to defend those cases and the gains will be limited. The right way round is the other way, is to re-evaluate what we do, but it's byzantine and anyone who has been through the justice system or has a friend who's been through the justice system, will be astonished and surprised at how inaccessible it is” (Scotland | Julie | Solicitor specialising in asylum/ immigration, NGO for Legal Service).

Julie highlights an important point, raised by other practitioners, that merely garnering legal status for social rights is not enough without a) adequate accountability structures and b) changing the conversation. One of the prevailing insights from our work is that reclaiming the narrative for social rights is essential for affecting enduring change to how social rights are perceived and understood, and thereby create pathways for securing effective remedies when violations occur.

In this last part of the chapter, we approached the data again with a critical discursive lens to locate moments of conflict and contestation that make visible competing tensions. These tensions were evident in intersecting discourses, as well as in the deployment of different tools and mechanisms that intersected with law and policy. The data also showed how reproduction of the valuation discourse undermined practitioners' efforts in promoting social rights and resulted in rights holders themselves internalising valuation discourses in an effort to create legitimacy and distinction for themselves.

5. Conclusions

The project team set out to investigate empirically how social rights are realised in practice, and how legal frameworks across UK jurisdictions protect social rights and facilitate access to an effective remedy when rights violations occur. Social rights violations significantly impact on human wellbeing and the enjoyment of a decent life with dignity. Social rights form part of the international human rights framework, including the right to housing, the right to food and fuel and the right to social security. Under international frameworks, the UK has an obligation to protect these rights in the domestic context.³⁸⁵ As part of its international obligations the UK is required to provide access to an effective remedy when social rights violations occur, including access to a legal remedy in court, if necessary.³⁸⁶

Interwoven with legal analysis, this report presents our empirical findings from data collected through individual semi-structured interviews with a variety of legal and non-legal practitioners across the four UK jurisdictions. We adopted a combined legal and discourse analytic approach, in order to better understand conceptions of justice and address gaps in the current legal framework. A critical discourse lens illuminated how barriers to social justice are socially and discursively produced and, more importantly, how understanding these dynamics can inform practice and chart ways forward to create legitimacy for social rights in the UK.

In our analysis, we have shown how competing logics and discourses were made visible in local struggles and tensions around conceptions of entitlement, welfare, poverty and justice. The processing and sorting of information and people through various strategies of valuation creates hierarchies that are organised according to the perceived worthiness of individuals, further marginalising those who already struggle to access and participate in the 'system'. In this sense, we see competing rationalities around the notion of 'entitlements', framed on the one hand as (scarce) resources or commodities that must be carefully managed and rationed by the State and being made available to some according to discretion and, on the other hand, as social/ human rights that are universal and entitle all human beings to the basic *right* to an adequate standard of living, which includes food, housing, health, social security, education and employment.

The increased outsourcing of public services raised significant concerns around gaps in accountability, often resulting in contraventions of human rights. This was made salient in the *Serco* case around recontextualisation of section 6 HRA. Technological tools, such as medical assessments, automation and digitisation and the use of algorithms also facilitated barriers to access and social injustice for rights holders. These mechanisms also illustrated negative impacts of arbitrary and discretionary decision making, as well as evidence of poorly reasoned policies. In addition, challenges around housing made clear that prejudicial practices, combined with poor oversight and accountability mechanisms, impeded access to justice for the right to adequate housing. The various mechanisms and tools highlighted in our analysis are embedded within a complex, fragmented and multi-layered system of governance.

³⁸⁵The UK ratified the International Covenant on Economic, Social and Cultural Rights in 1976.

³⁸⁶CESCR General comment 9, 3 December 1998, E/C.12/1998/24; The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22–26, 1997, [1998] 20 Human Rights Quarterly, 691, para.23.

Across all dimensions of the analysis, one enduring and resonating element was the silencing of voices. It points to the inequality embedded in a system that structurally, and often intentionally, undermines the voices of its citizens. This manifests itself through discourse and makes visible a complex web of tools, mechanisms and practices, embedded within a fragmented and multi-layered system of governance. Our analysis examined how the systematic categorisation and filtering of information and people is facilitated by various mechanisms³⁸⁷ that have disproportionate negative impact on certain groups of people, including women, children, lone parents, minority ethnic groups, persons seeking asylum and those struggling with disability, mental health and learning disabilities. We showed how these processes intersect with wider discursive currents, related to immigration, austerity, Brexit, sectarianism and Covid-19, to name but a few, often resulting in the (re)production of stigma, prejudice and exclusion. These discursive factors are, as Zinaida Miller³⁸⁸ cautions, not to be treated as separate from our enquiry but closely entangled with how laws and policy provide the contours of the social rights protection frameworks across the UK and the access to justice journey. These dynamics are enmeshed with how social rights are provided, the goals and procedures of the UK welfare system, based in law and policy.³⁸⁹ Fragmentation of the system and governing “at a distance” complicates embedding adequate mechanisms for consistent and appropriate oversight and accountability, but is of utmost importance for upholding social rights.

Concerted efforts must be directed to reclaiming the narrative for social rights: a) as justiciable rights in and of themselves and b) in ways that mobilise counter discourses that subvert the dominant valuation discourse along the axis of deserving and non-deserving.

Reclaiming the narrative: From voice to agency

As Zivi reminds us, change may not always be immediately visible, but incremental change will challenge the dominant narrative. She urges us to think of “both rights and democracy as ongoing, always unfinished projects, rather than as stable objects or specific procedures”.³⁹⁰ In that sense, the performative practice of rights claiming helps to provide the contours of democracy.

*“Though rights claiming may not end social and political practices that many find objectionable, though it may not guarantee protection against grievous harm or ensure the desired degree of freedom from external forces, and though it may challenge majoritarian decision making, it is, nonetheless, a practice through which we come to be democratic citizens. Rights claiming, understood as a performative practice of persuasion, provides an opportunity for individuals and groups to form and share ways of seeing the world; to shed light on and reimagine ways of thinking, being, and doing; and to take an active role in the political life of a community”.*³⁹¹

Rights claiming is a strategy of ‘giving voice’; an attempt to make visible and disrupt dominant mechanisms of power and privilege that serve to marginalise. It is clear from the data that not having a voice is not a question of skill or ability, it is a question of power. Our analysis clearly shows that remaining silent is often the product of being silenced, not having a platform on which your voice is heard or taken into consideration. Practitioners

³⁸⁷Elana Shohamy, *Language Policy: Hidden agendas and new approaches* (Routledge 2006)

³⁸⁸Zinaida Miller, ‘Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice’ (2008) 2 *The International Journal of Transitional Justice*

³⁸⁹ibid at 274 on transitional justice in Argentina

³⁹⁰Zivi n71 at 115

³⁹¹ibid

relayed story after story of people getting worn down by a system that often provides no legitimate ways to make one's voice heard (for instance, the inability to challenge errors in medical assessment reports). Blommaert reminds us that in bureaucratic practice, centring institutions play an important gatekeeping function by regulating access to contextualising spaces and having the power to assign people particular bureaucratic identities, such as 'an asylum seeker', 'an urgent case for social welfare' or a 'criminal'³⁹². These ascribed social identity categories are not necessarily negotiable, and as the data on asylum seekers has shown, certain labels and identities are infused with dominant racialised perspectives that de-legitimate particular voices.

It is essential, however, that rights claiming goes hand in hand with addressing the complex structures and processes that produce suffering and entrench existing power relations. Advocacy and raising legal consciousness is meaningless without efforts to address the structural inequalities that give rise to silencing certain voices. As our analysis has illustrated, disempowering discourses are also closely linked to mechanisms that perpetuate discriminating practices. In turn, accountability for those practices depend, in part, on the legal framework and proper legal mechanisms to create accountability for social rights compliance.

We relayed earlier that as a research team we adopt the stance that rights claiming and giving voice is best facilitated by efforts to integrate oppressed and marginalised voices into dominant discourse, as well as making visible the policy mechanisms and practices that perpetuate an unequal system.³⁹³ We aimed to examine how practitioners mobilise different discourses to achieve their aims in relation to rights claims, and how these forms of knowledge promote or uphold social rights. In contrast, we also sought to better understand which discourses intersect and potentially undermine access to justice for social rights, and which discourses resist and challenge dominant and disenfranchising discourses.

Discursive currents mobilised ideological conceptions of human rights, as well as discourses of valuation and categorisation. The data also showed how reproduction of the valuation discourse can potentially undermine practitioners' efforts in promoting social rights and result in rights holders themselves internalising and reproducing valuation discourses in an effort to create legitimacy and distinction for themselves. The practitioners' (unconscious) reproduction of binary categories of worthiness and unworthiness potentially undermines the work they undertake to empower rights holders. Therefore, we raise awareness of this in order to avoid unwittingly participating in practices of 'Othering', essentialising or categorising that reproduce dominant valuation discourses. The only way to subvert dominant valuation discourses centred on notions of (un)worthiness is to base entitlements in rights, not contrasting categories of worth.

In terms of facilitating agency,³⁹⁴ we reimagine the relationship between rights holders and practitioners in which everyone recognises the performative, interdependent and contextually bound nature of voice. In other words, practitioners can, and as made evident across the data, *do* encourage the agentive powers of the individual rights holder, by providing a context or environment in which the person feels they have something to

392 Jan Blommaert, *Discourse: A Critical Introduction* (Cambridge University Press 2005) at 206

393 Simone Plöger and Elisabeth Barakos, 'Researching linguistic transitions of newly-arrived students in Germany: insights from Institutional Ethnography and Reflexive Grounded Theory' (2021) 16(4) *Ethnography and Education* 414

394 Christine Ashby, 'Whose "Voice" is it Anyway?: Giving Voice and Qualitative Research Involving Individuals that Type to Communicate' (2011) 31(4) *Disability Studies Quarterly*

say and the listener possesses the skills to 'hear' them.³⁹⁵ In order to disrupt the inherent inequalities and the silencing of voices in the access to justice journey, practitioners could widen their skill set with additional discourse training to best empower individuals that have been marginalised within the UK welfare system to access their social rights.

Reshaping the narrative for social rights is also an attempt to reconstruct the frames, in an effort to democratise the processes by which frameworks of justice are drawn and revised. This project set out to examine the various barriers rights holders encounter on the journey to justice for social rights. If access to justice for social rights is to be realised in the UK, attending to both structural inequalities as well as a keen understanding of social and discursive barriers is necessary. The ways in which social rights have historically been made invisible has to be overcome by reclaiming the narrative for social rights, by recognising and addressing the tools and mechanisms that block the access to justice journey, and by embedding social rights as legal rights in the UK. This will provide pathways to justice for social rights that include not only 'access', but meaningful ways of participating in frameworks that can lead to social justice and effective remedies.

Transformative movements challenge injustice not only by making salient areas that warrant change or improvement, they challenge the very assumptions on which dominant frames are based. They push the conversation towards more democratic arenas to entertain arguments about the frame. At the UK national level, the frame for the protection of social rights is monopolised by outdated conceptions that assume social rights are non-justiciable, cannot legitimately be enforced by the court, contravene parliamentary supremacy and are aspirational in nature. Transformative movements thus challenge the meta-political activity of frame setting,³⁹⁶ calling for institutionalised parity of participation to include additional voices in deliberations and decisions that construct the 'who' entitled to justice.

As was made clear in our analysis, the UK Home Office 'hostile environment' policy, at a national level, is instrumental in constructing the 'who' entitled to justice, which specifically excludes those seeking asylum in the UK. This dominant discourse, and the concomitant conception of who has a right to claim rights in the UK, has direct impact on the frameworks that protect and govern social rights provisions. Current processes and procedures also alienate other groups of rights holders, such as those suffering from mental health challenges, by means of inadequate medical assessment instruments and procedures. Although the devolved jurisdictions are on a trajectory to enhance human rights and access to justice, the intersections between reserved and devolved law limit participation in conversations about the frame setting for human/ social rights. Thus, reshaping the narrative on social rights needs to happen on multiple scales, in order to facilitate transformative change and the redistribution of power.

We now share our key findings and recommendations (Chapter 6). We conclude the report with limitations of the study and suggestions for further research.

395 Z Rossetti and others, 'I Like Others to Not Try to Fix Me': Recognizing and Supporting the Agency of Individuals with Developmental Disabilities (2008) 46(5) *Intellectual and Developmental Disabilities* 364

396 Fraser n 61 at 26

6. Key findings and recommendations

1. Social rights are legal rights. Social rights form part of the international human rights framework, including the right to housing, the right to food and fuel and the right to social security. The UK has signed up to the international framework and is under an obligation to protect these rights in the domestic context. As part of its international obligations the UK is required to provide access to an effective remedy if there is a failure to meet these obligations. The lack of legal recognition in the UK causes significant challenges for accessing justice for violations of social rights including the rights to housing, food, fuel and social security.
2. Greater emphasis should be placed on practitioners and rights holders reclaiming narratives around social rights as legal rights to enable new discourses to emerge that are focused on redistributing power. Whilst this might not always result in transformative change, a reluctance to do so can mean getting stuck in a system that does not recognise social rights as legal rights, where rights holders and practitioners can end up reproducing narratives that exclude and marginalise. Reclaiming the narrative is about transformative and incremental change over time by reclaiming the power and voice to challenge a system laden with structural inequality that is not functioning in a way that upholds social rights. All avenues and pathways to remedies should be exhausted – political, legislative and judicial. It would be helpful to develop (discourse) training and education programmes on reframing narratives that marginalise and develop empowering narratives that reclaim social rights as legal rights.
3. Devolution of areas of economic and social policy have created divergence on social rights provision and social rights compliance. Whilst the devolved jurisdictions struggle to comply with social rights, they are mostly politically committed to more progressive trajectories (with the exception of Northern Ireland where human rights progression is both a requirement of the peace process, but also politically contested). Processes of progressive human rights protection, including economic, social, cultural and environmental rights in Scotland and Wales may mean England and Northern Ireland fall behind social rights protections and access to justice mechanisms available in other parts of the UK. Devolved jurisdictions can embrace promoting the use of devolved powers to challenge narratives that marginalise or reproduce social rights violations.
4. Legal incorporation of international human rights law can help enhance accountability for violations of social rights. There are different processes of incorporation occurring across each part of the UK. The UK Government and Westminster Parliament is the only UK parliament and government considering reducing rights protection whilst each of the devolved parliaments and governments are engaged in processes that are seeking to enhance human rights protection, including social rights. At the national level examples of civil society and political counter-discourses are emerging claiming social rights as legal rights. This provides an opportunity for evidence-led research to continue to inform national discussions. As part of the recommendations relating to discourse and narrative we further recommend that civil society organisations, practitioners, rights holders and other stakeholders who are engaged in social rights campaigns use the language of social rights to make these claims.

5. We encourage a reconceptualisation of access to justice as an area of study and practice that moves beyond an understanding that is primarily concerned with equal access to legal processes to a definition that includes effective remedies as a result of those processes. Whilst removing barriers that impede access to legal processes are of fundamental importance to access to justice, the discipline should also engage with the normative framework and the outcomes of these processes in terms of adequacy and efficacy. This is a significant gap in both literature and practice. We use normative social rights standards and the concept of effective remedies derived from international human rights law to bridge this gap, including the use of structural orders to respond to systemic violations.
6. People face multiple hurdles on the route to access justice. Each of these hurdles require to be addressed to ensure accountability for violations of social rights. Accessibility should be determined by the diversity of needs of those with the least access rather than accessibility of the majority (bearing in mind that there is no homogenous group but may be many different groups requiring different access needs). For example, online information may be accessible for most people but not those without any access to the internet. In a similar vein, the needs of collective cases for children will differ from the needs of those with other characteristics such as persons with different disabilities or ethnic minority communities. More research is needed to address the specific needs of different specified groups in accessing justice including children, ethnic minorities, people with physical and mental disabilities, among others each of which will have diversified needs.
7. Legal consciousness presents as a significant gap in enabling access to justice. There requires to be awareness raising campaigns in the public sphere identifying social rights as legal rights and providing people with information and education on their rights and how to claim them, including highlighting where there are gaps in provision – i.e. informing the public discourse if legal avenues are available and also when they are not, if social rights protections fall short.
8. The justice system should provide the resources needed to access justice for social rights including:
 - a) Access to first tier advice in a place that is accessible. Funding and support for first tier advice across all social rights, ideally co-located in physical premises where rights holders already engage (such as GP/ food banks/ CAB/ schools/ places of work/ libraries etc.)
 - b) Recognise the psychological and emotional burden, including fear of retribution, required to pursue a case and address the individual burden, enabling and promoting collective complaints and collective remedies wherever possible.
 - c) Provide people with advocacy services to ensure they are able to meaningfully participate in their case.
 - d) Provide access to legal aid. Fund legal aid for violations of social rights through properly funded legal aid schemes and salaried expert lawyers in social welfare law.
 - e) Provide access to legal representation. Ensure lawyers specialise in social rights areas of law, that they are located across jurisdictions including rural v urban divide. Enhance law curriculums in Law Schools to ensure adequate training in social rights (including housing, employment, social security and social welfare law, international and regional economic and social human rights law & access to justice – students should have opportunities to undertake legal placements with legal advice centres and similar). The justice system cannot rely on partial-funding – lawyers should be paid for the time spent on the case. Consider expanding

salaried law centres that do not rely on case by case applications for funding. Change the objective of the funding – funding should not be solely dependent on a realistic prospect of financial gain but realistic prospect of social rights compliance.

- f) Facilitate collaboration between different sectors of advice (street level/ first tier/ lawyer/ barrister) – a joined up approach to support rights holder participate and navigate complexity of avenues.
 - g) Recognise and respond to clustered injustice – legal issues cannot be siloed into stand-alone problems. Social rights violations are often clustered and the violation of one right can impact on the protection and enjoyment of another creating a snowball effect. The justice system requires to adapt to recognise and respond to clustered injustice.
 - h) Recognise and respond to the different needs of different groups. The above steps are not a ‘one-size fits all’ approach and more research is required to respond to the collective needs of specified groups.
9. Alternative routes to justice including internal complaints and appeals should not unduly delay access to a remedy for a violation of a social right (for example, mandatory reconsideration under the DWP system is not working in practice).
 10. Enhance potential of alternative routes to justice via immediate complaints mechanisms, ombudsmen, tribunals, the role of regulators and inspectorates. By changing the remit of these bodies to include social rights standards access to justice can be enabled without recourse to courts. Each of these alternative routes could adapt to recognise issues such as clustered injustice and systemic problems as well as learn from lessons regarding effective remedies and structural responses.
 11. Encourage exploring routes to justice (via parliament committees / direct to government or responsible Minister / engage directly with civil servants) whilst recognising these routes do not sufficiently ensure accountability when things go wrong, meaning other accountability mechanisms are essential and courts should be available as means of last resort.
 12. Ensure legal routes to remedy are configured to adjudicate social rights issues. Courts are often reluctant to engage in matters of economic and social policy, however, by failing to engage with the content of rights and the means of enforcing them the court risks abdicating its role as an accountability mechanism.
 13. Develop and enhance our understanding of what constitutes an ‘effective remedy’ for a violation of a social right. Effective remedies should be accessible, timely and affordable and lead to effective outcomes. To the extent possible, remedies should also ensure non-repetition. At the moment, even those applicants who are ‘successful’ in reaching a legal remedy do not necessarily receive an effective one (meaning the violation goes unaddressed or is inadequately addressed).
 14. Develop and enhance public interest or collective remedies that help address a social rights violation for all those who are experiencing it rather than focussing on individual relief for one individual case (including responding to the specific needs of different groups). In cases where the nature and extent of the collective remedy are unclear, encourage the development of remedies in collaboration with the litigants and coordinate branches of government.

15. Ensure that decisions at tribunal level and other administrative accountability mechanisms are fed back into decision-making processes (a feedback loop) to improve decision-making processes and prevent ongoing and systemic unlawful decision-making.
16. Privatisation and outsourcing of decision-making (where the state delegates the decision-making process to a private body) creates an accountability gap for social rights violations that requires to be addressed (for example, it is very difficult to challenge unlawful decisions by privatised benefit medical assessments). Both the state and the private decision maker should be accountable for human rights violations.
17. The outsourcing of services often creates an accountability gap for social rights violations that needs to be addressed (for example, section 6 HRA is unclear and requires clarification when the state delegates responsibility for service provision such as housing to private providers, likewise section 6 does not adequately cover social rights provision outside the scope of the ECHR). Both the state and the private service provider should be accountable for human rights violations.
18. Digitisation of decision making creates an accountability gap for social rights violations where algorithms are not designed to account for social rights compliance (either deliberately or inadvertently overlooked as part of the planning process). Algorithms should be adopted using inclusive rather than exclusionary frameworks.

Limitations and future research

- The empirical data (practitioner interviews) foreground particular groups of people facing certain (unique) challenges, providing glimpses of insight. It is beyond the scope of the project, however, to address the diversity of needs/ hurdles of specified groups in a structured and comprehensive manner. Future research could delve deeper into group specific challenges to develop specific and tailored approaches for social rights adjudication, including participative and collective complaints mechanisms and group proceedings that address the needs of specified groups.
- The study focussed on three specific social rights domains: access to adequate housing, access to food and fuel, and access to social security. Future studies can broaden their focus to include other social rights areas, such as health, education and employment. This is particularly important in the context of the indivisible nature of rights as defined in international human rights law and because the empirical data demonstrates that rights violations are often not siloed into standalone issues in real life. The justice system is not currently responding to clustered injustice and more research is required on how best to meet this legal need.
- We developed an online survey to gain additional perspectives from a broader range of practitioners, and conducted a small pilot study. Due to time and resource constraints, we were unable to fully utilise the survey research instrument. Future studies would benefit from triangulating qualitative data with additional qualitative and quantitative data sources to give as broad a picture as possible of the challenges faced in accessing justice for social rights.

- Qualitative interviews with practitioners have drawn our attention to a number of different challenges encountered in the adjudication journey for social rights. These conversations focussed on their insights and experiences, yielding rich data for analysis. However, what may be obscured is who is missing from the conversation. Whose voices have been silenced to such an extent that they do not have access to the adjudication journey at all? Future research would benefit from examining what or who is missing.
- Equally our focus on empirical data brought to the fore particular issues with the justice system but did not give equal weighting to the various avenues to justice available to rights holders – with some avenues discussed in more depth than others. The project in many respects provides flashes of insight into an emerging area of research that requires continued deeper analysis. What may be obscured, for example, is what avenues might be absent from the discussions, such as access to justice via ombuds procedures or more immediate complaints mechanisms. Whilst some practitioners raised concerns about the efficacy of these processes by extension the cases that are resolved early on, where there may be good practice, may be excluded from the data because of their success. Examples emerged of some good practice for example in relation to the Housing Ombudsman undertaking an investigation into systemic issues relating to mould and damp (even although this is in and of itself within a limited remit). Other mechanisms that arose in the context of complaints mechanisms was the importance of collective complaints processes to the decision-making body. These are examples where there is scope for further research drawing on the outputs of this study in relation to both the barriers along the access to justice journey as well as the normative and substantive framework with regard to improved outcomes for rights holders.
- The project adopted a unique interdisciplinary approach, combining a critical legal and discourse lens on social rights law, policy and practice. This work has demonstrated how combining these approaches in analysis offers a unique perspective on societal challenges that bridge different fields, requiring multi-disciplinary perspectives to develop new and innovative solutions. Given the wide scope of the current work, future studies can develop this further by narrowing the scope and delving deeper or alternatively deploying different interdisciplinary perspectives that offer new critical insights.

Appendix 1: Transcription key

(.)	micro pause; a notable pause but of no significant length
(2 sec)	timed pause; a pause long enough to time
-	- after letters indicates that a word has been cut off before completion
?	raising intonation
<u>really</u>	underscored text denotes a raise in volume or emphasis
ye:s	: indicates a prolonged sound
hum(h)our	bracketed (h) denotes laughter within the talk
[...]	omitted speech
[]	overlap
((sighs))	double brackets indicate contextual information
[explanation]	explanatory information added or details removed for anonymity

The Access to Justice for Social Rights: Addressing the Accountability Gap project explores the barriers faced by rights holders in accessing justice for violations of social rights across the UK. The project seeks to better understand the existing gaps between social rights in international human rights law, and the practice, policy and legal frameworks across the UK at the domestic level. It aims to propose substantive legal solutions – embedding good practice early on in decision making as well as proposing new legal structures and developing our understanding of effective remedies (proposing substantive change to the conception of ‘justice’ as well as the means of accessing it).

Documents in this series:

1. The Practitioner Perspective on Access to Justice for Social Rights: Addressing the Accountability Gap
2. Briefing - ESC Rights Part One : International Legal Obligations - An explainer
3. Briefing - ESC Rights Part Two: The Right to Social Security in the UK - An explainer
4. Briefing - ESC Rights Part Three: The Right to Adequate Housing in the UK - An explainer
5. Briefing - ESC Rights Part Four: The Right to Food in the UK - An explainer
6. Briefing: Thematic Analysis on Access to Justice for Social Rights: An explainer
7. Briefing: A Comparative Study of Legal Aid and the Social Rights Gap
8. Briefing: Effective Remedies & Structural Orders for Social Rights Violations
9. Briefing: Legal and Discursive Interdisciplinary Approach to Social Rights in the UK
10. Briefing: The Access to Justice Journey

Written by:

Katie Boyle, Diana Camps, Kirstie English and Jo Ferrie

Organisation details

Dr Katie Boyle | katie.boyle@stir.ac.uk

<https://www.stir.ac.uk/about/faculties/arts-humanities/law-and-philosophy/>

[law-research/human-rights/access-to-justice-for-social-rights/](https://www.stir.ac.uk/about/faculties/arts-humanities/law-and-philosophy/law-research/human-rights/access-to-justice-for-social-rights/)

Published May 2022, © Katie Boyle

Access to Justice For Social Rights
Addressing The Accountability Gap

Research report

May 2022