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# Legal protection against destitution in the UK: the case for a right to a subsistence minimum

Mark Simpson,\*  Gráinne McKeever† and Ciara Fitzpatrick‡

In a 2003 Supreme Court judgment, Lord Hoffmann argued that in the absence of a guaranteed minimum standard of living, many other rights are reduced to ‘a mockery’. Given research findings that 2.4 million UK residents experienced destitution in 2019, this article considers whether a social floor exists in law and the implications of its absence or weakness for the standard of human rights protection in the UK. The common law, social rights treaties and the European Convention on Human Rights can each play a role in identifying a minimum standard of living, but with variable precision, generosity and enforceability – and subject to the sovereign legislature setting its own social floor, including one that may render people destitute. With an analysis of the case law revealing clear weaknesses in protection against destitution, the authors argue that a specific statutory duty is required to address this failure of rights protection.

## INTRODUCTION

Research published by the Joseph Rowntree Foundation (JRF) since 2016 has provided a consensual definition of destitution (that is, one developed with and approved by members of the public),<sup>1</sup> and measured the extent to which destitution, by this definition, exists in the UK.<sup>2</sup> The most recent research found that during 2019 at least 2.4 million UK residents experienced destitution – that is, they were unable to meet their most basic needs for shelter, food, heat, light, clothing and hygiene from their own resources for themselves. This article looks behind this headline to consider the impact of destitution on people’s human rights and explores the extent to which the persistence of extreme poverty in a modern welfare state ought to be regarded as a failure of human rights protection. In Lord Hoffman’s view: ‘Human rights are the rights essential to

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- 1 For critical discussion of the consensual method, see the various articles in (1987) 16 *Journal of Social Policy*.
- 2 Suzanne Fitzpatrick, Glen Bramley, Filip Sosenko, Janice Blenkinsopp, Sarah Johnsen, Mandy Littlewood, Gina Netto and Beth Watts, *Destitution in the UK* (York: Joseph Rowntree Foundation, 2016); Suzanne Fitzpatrick, Glen Bramley, Filip Sosenko, Janice Blenkinsopp, Sarah Johnsen, Mandy Littlewood, Gina Netto and Beth Watts, *Destitution in the UK 2018* (York: Joseph Rowntree Foundation, 2018); Suzanne Fitzpatrick, Glen Bramley, Janice Blenkinsopp, Jenny Wood, Filip Sosenko, Mandy Littlewood, Sarah Johnsen, Beth Watts, Morag Treanor and Jill McIntyre, *Destitution in the UK 2020* (York: Joseph Rowntree Foundation, 2020).

the life and dignity of the individual in a democratic society ... I think it is well arguable that human rights include the right to a minimum standard of living, without which many of the other rights would be a mockery.<sup>3</sup> It is argued here that the experience of destitution may in itself represent a direct infringement of certain human rights and has potential to fatally undermine the enjoyment of other rights.

It is possible to point to specific rights in international and European treaties that seem to confer protection against destitution: the rights to social security and to an adequate standard of living in Articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>4</sup> and the right to social assistance in Article 13 of the European Social Charter (ESC).<sup>5</sup> However, each of these instruments carries limited weight in the UK legal system (see discussion below). Failure to take instruments for the protection of social and economic rights as seriously as those for protecting civil and political rights could itself be termed a weakness of the UK's approach to human rights protection.<sup>6</sup> Accordingly, there is no clearly expressed obligation on the state to ensure an adequate standard of living or otherwise avoid causing destitution. What we might look for, and have on occasion seen, is the interpretation of human rights that have been incorporated into UK law or the application of common law principles in a way that recognises the need to avoid or mitigate against the experience of destitution.<sup>7</sup> Lord Hoffmann's words point to a need to consider whether destitution reflects, or brings about, a failure of the state's human rights regime in its own terms. If destitution is demonstrably a threat to the rights protected by the European Convention on Human Rights (ECHR), then it should not be necessary to rely on the dramatic and (outside Scotland) currently unlikely step of greater social rights protection being incorporated into domestic law to establish that public bodies are subject to a duty to protect against it.<sup>8</sup>

This article aims to develop an understanding of destitution as a socio-legal problem, to which law has potential to form part of the solution. In doing so, it

3 *Mathews v Ministry of Defence* [2003] UKHL 4; [2003] 2 WLR 435 at [26] per Lord Hoffmann.

This was a supporting judgment to the leading opinion in the case, delivered by Lord Bingham.

4 International Covenant on Economic, Social and Cultural Rights (General Assembly resolution 2200A (XXI), 16 December 1966).

5 European Social Charter (Turin, 18 October 1961).

6 Keith Ewing, 'The Unbalanced Constitution' in Tom Campbell, Keith Ewing and Adam Tomkins, *Sceptical Essays on Human Rights* (Oxford: OUP, 2001).

7 See discussion below and the dissenting judgments in *R on the application of SG v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449.

8 The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill was carried unanimously through the Scottish Parliament in March 2021, although the Supreme Court has ruled that this Bill is beyond the legislative competence of the Scottish Parliament, as set out in Scotland Act 1998, ss 29, 30 and 33: *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill*; *Reference by the Attorney General and the Advocate General for Scotland – European Charter of Local Self Government (Incorporation) (Scotland) Bill* [2021] UKSC 42; [2021] 1 WLR 5106. However, the devolution of social security competences to Scotland has allowed the embedding of the principles of dignity and respect into the Social Security (Scotland) Act 2018, which defines social security as a human right: see Mark Simpson, Gráinne McKeever and Ann Marie Gray, 'From Principles to Practice: Social Security in the Scottish Laboratory of Democracy' (2019) 26 JSSL 13.

first outlines the increased academic interest in the impact of austerity measures adopted in the wake of the 2008 economic crisis,<sup>9</sup> epitomised by the landmark destitution studies commissioned and published by the Joseph Rowntree Foundation.<sup>10</sup> It then moves from considering the work of social scientists in understanding destitution to a rigorous examination of law's contribution to defining, preventing or mitigating destitution. Various pieces of legislation exist that in some fashion define destitution (chiefly, the Immigration and Asylum Act 1999 and related secondary legislation), confer powers upon public authorities that could be used to relieve or address the consequences of extreme poverty (including the Children Act 1989) or might form the basis of an obligation on the state to guarantee a social minimum (Human Rights Act 1998). However, these definitions, powers and duties can be very general in nature and it is necessary to turn to case law for a fuller understanding of the extent to which causing or failing to relieve destitution might breach legal standards in the UK.

To that end, the authors conducted a systematic review of UK case law in search of a basis for a legal definition of destitution. The review draws on an original dataset of 595 domestic UK judgments that have included consideration of destitution and related issues of hardship and benefit sanctions. This consists predominantly of immigration and asylum-related cases since 1999 and social security cases since 1996, after which sanctions became an everyday feature of the social security vocabulary. By showing how the courts have applied what can be very general statutory provisions in light of the state's overarching human rights and common law obligations, these cases illuminate the extent to which UK law imposes a duty on public authorities to protect against extreme poverty or its consequences. To a large extent, they reveal the weakness of litigation (and therefore of the statutory and human rights bases on which cases are brought) in shoring up the social and economic rights of individuals facing the most precarious and desperate of circumstances. The review subsequently looked further back in time to consider the extent to which earlier social assistance regimes – national assistance and its successor supplementary benefit, which in turn was replaced by income support and subsequently universal credit – may have provided stronger protection against destitution, whether on paper or in practice.

Overall, the article finds that, as currently applied, common law, social rights treaties (to the limited extent that these are recognised as 'law' in the UK) and the ECHR collectively provide inadequate protection to those in or facing destitution. This paucity of provision forms a barrier to the enjoyment of other rights. The article acknowledges the value and ambition of human rights, but our analysis exposes their limitations in the face of 2.4 million people experiencing destitution, and the need to provide a bridge between ambition and

9 Michael Adler, *Cruel, Inhuman or Degrading Treatment? Benefit Sanctions in the UK* (Cham: Palgrave, 2018); Jamie Redman and Del Roy Fletcher, 'Violent Bureaucracy: a Critical Analysis of the British Public Employment Service' (2022) 42 CSP 306.

10 See Fitzpatrick and others (2016), n 2 above; Fitzpatrick and others (2018), n 2 above; Gráinne McKeever, Mark Simpson and Ciara Fitzpatrick, *Destitution and Paths to Justice* (London: Legal Education Foundation/York: Joseph Rowntree Foundation, 2018). See also Welfare Conditionality, *Final Findings Report: Welfare Conditionality Project 2013-18* (York: Welfare Conditionality, 2018).

protection. Multiple means of bridging this gap could be explored – including (most obviously) by improving the social security system, as the part of the welfare state that bears primary responsibility for protecting UK nationals and permanent residents against severe poverty.<sup>11</sup> The focus here, though, is on the potential for statutory recognition of the importance of protecting people against destitution to provide impetus for the improvement of various welfare systems while simultaneously demonstrating a more expansive understanding of the state's human rights commitments than hitherto shown.

### DEFINING, MEASURING AND EXPLAINING DESTITUTION IN AN ADVANCED WELFARE STATE

Concern about the extreme manifestation of poverty in the UK has been a growing feature of academic discourse, prompted by increasing evidence of individuals unable to meet their basic human needs.<sup>12</sup> The first systematic attempt to establish, through a hybrid of expert and consensual means, a definition of destitution and to use this definition to explore the extent, causes and experience of destitution came in 2015.<sup>13</sup> A dual definition was devised.

Box 1: Expert-consensual definition of destitution devised by Fitzpatrick and others<sup>14</sup>

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People are destitute if:

a) They have lacked two or more of these six essentials over the past month, because they cannot afford them:

- shelter (have slept rough for one or more nights)
- food (have had fewer than two meals a day for two or more days)
- heating their home (have been unable to do this for five or more days)
- lighting their home (have been unable to do this for five or more days)
- clothing and footwear (appropriate for weather)
- basic toiletries (soap, shampoo, toothpaste, toothbrush).

b) Their income is so extremely low that they are unable to purchase these essentials for themselves, and they lack sufficient savings to make up for the income shortfall:

- £70 per week for a single adult (after housing costs)
  - £95 for a lone parent with one child
  - £105 for an adult couple
  - £145 for a couple with two children
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11 Katie Boyle and Aidan Flegg, *The Right to Social Security in the UK – An Explainer* (London: Nuffield Foundation, 2022).

12 To a considerable extent, this growing interest reflects the well-publicised growth in the number of food banks and food bank users, assumed to be a symptom of growing food poverty: see Abhaya Jitendra, Emma Thorogood and Mia Hadfield-Spoor, *Early Warnings: Universal Credit and Foodbanks* (London: Trussell Trust, 2017); Rachel Loopstra and Doireann Lalor, *Financial Insecurity, Food Insecurity, and Disability: the Profile of People Receiving Emergency Food Assistance from the Trussell Trust Foodbank Network in Britain* (London: Trussell Trust, 2017). See also Arnab Bhattacharjee and Elena Lisauskaite, 'COVID-19 Impacts on Destitution in the UK' (2020) 253 NIER R77-R85; Adler, n 9 above, ch 6.

13 Suzanne Fitzpatrick, Glen Bramley, Janice Blenkinsopp, Sarah Johnsen, Mandy Littlewood, Gino Netto, Filip Sosenko and Beth Watts, *Destitution in the UK: an interim report* (York: Joseph Rowntree Foundation, 2015).

14 Methods are described in *ibid*; income thresholds reflect the updated figures in Fitzpatrick and others (2020), n 2 above.

The most recent *Destitution in the UK* study (the third of its kind) found 2.4 million people were destitute according to this definition and in contact with crisis services at some point during 2019 – others may have been destitute but not in contact with any crisis service. It is worth stressing that these households were not ‘merely’ poor, but lacked ‘the minimum level of material wellbeing required before people are plunged into despair’.<sup>15</sup> Around 57 per cent of the destitute population were deprived of food, 49 per cent of clothing, 47 per cent of toiletries, 40 per cent of heating, 21 per cent of lighting and 21 per cent of shelter to at least the extent set out in the box above. More than 30 per cent reported having no income from any source.<sup>16</sup> Secondary analysis of qualitative data from the second wave study (2017–18) found destitution is often the result of a cluster of legal and non-legal problems, with specific legal issues in the realms of social security, housing and debt typically acting as the last straw that tips a household from severe poverty into destitution.<sup>17</sup> A fourth wave is currently underway, as poorer households in the UK struggle to navigate what has become widely referred to as a ‘cost of living crisis’.<sup>18</sup>

While Fitzpatrick and others’ research was pioneering in academic terms, it was not the first attempt to define destitution in the UK – indeed other contemporary definitions exist and would presumably produce different conclusions about the number of destitute households. From a social research perspective, Seebohm Rowntree’s definition of primary poverty can be seen as an attempt to set a destitution threshold for the early 20<sup>th</sup> century. For a household to be classed as poor by this measure, ‘nothing must be bought but that which is absolutely necessary for the maintenance of physical health.’<sup>19</sup> Logically, an income below the primary poverty line must be insufficient to sustain physical health – not far removed from Fitzpatrick and others’ broad definition of destitution as inability to afford ‘the absolute essentials that we all need to eat, stay warm and dry, and keep clean.’<sup>20</sup> More recently, the 2010–15 coalition government introduced a measure of ‘severe poverty’ into the Households Below Average Income survey, referring to households with an income of less than 50 per cent of the median and experiencing material deprivation.<sup>21</sup> However, it is not clear that this is intended to equate to destitution.

15 Jeremy Waldron, ‘John Rawls and the Social Minimum’ (1986) 3 *Journal of Applied Philosophy* 21, 30.

16 Fitzpatrick and others (2020), n 2 above.

17 McKeever and others, n 10 above.

18 See Peter Hourston, ‘Explainer: Cost of Living Crisis’ *Institute for Government* last update 4 August 2022 at <https://www.instituteforgovernment.org.uk/explainers/cost-living-crisis> (last accessed 12 August 2022).

19 Benjamin Seebohm Rowntree, *Poverty A Study of Town Life, Centennial Edition* (Bristol: Policy Press 2000) 133–134.

20 Fitzpatrick and others (2016), n 2 above, 2.

21 HM Government, *A New Approach to Child Poverty: Tackling the Causes of Disadvantage and Transforming Families’ Lives* Cm 8061 (2011), 22.

## THE LEGAL BASES OF PROTECTION FROM DESTITUTION IN THE UK

Beyond the social science definition, it is possible to (tentatively) identify legal definitions of destitution. Notably, the Home Secretary is subject to a duty to protect asylum seekers from destitution,<sup>22</sup> which flowed originally from the requirement in EU law that member states ‘ensure a standard of living adequate for the health of [asylum] applicants and capable of ensuring their subsistence.’<sup>23</sup> To this end, the asylum support scheme provides accommodation plus a weekly cash or voucher payment – although this is only available if essential needs cannot be met by any other lawful means. Strictly speaking, under the Immigration and Asylum Act 1999 asylum support is a payment to be made to persons who are ‘destitute or likely to become destitute’ rather than a sum that has been established as the destitution threshold. Destitution itself has the broader definition of lacking ‘adequate accommodation or any means of obtaining it’ or inability to ‘meet ... other essential living needs’.<sup>24</sup> Nonetheless, litigation has revealed that the level of support has in principle been established (however implausibly) with reference to a defined, though non-statutory, list of essential non-housing costs a household is expected to incur.<sup>25</sup> This list is more precise in its description of potential beneficiaries’ essential needs than that set out above, albeit covering broadly the same categories of basic needs, but at £37.75 per person per week, regardless of age,<sup>26</sup> asylum support is less generous in terms of the income it deems certain households require to meet those needs.<sup>27</sup>

The law (via the Asylum Support Regulations 2000) does recognise destitution as a phenomenon, but this definition only applies in certain specified circumstances.<sup>28</sup> The Court of Appeal does not recognise the standard set by the immigration and asylum legislation as a destitution threshold for the purposes of assessing the adequacy of social security benefits.<sup>29</sup> Social security law (via the Universal Credit Regulations 2013) provides its own concept of ‘hardship’, which broadly equates to destitution in that it refers to inability to ‘meet [one’s] immediate and most basic and essential needs’,<sup>30</sup> and a further definition of

22 Immigration and Asylum Act 1999, s 95; Asylum Support Regulations 2000 no 704.

23 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ L 31/18, 06.02.2003), art 13; a revised version of the Reception Directive was enacted in 2013, but does not apply to the UK, Ireland or Denmark – Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ L 180/96, 29.6.2013).

24 Immigration and Asylum Act 1999, s 95.

25 *R on the application of Refugee Action v Secretary of State for the Home Department* [2014] EWHC 1033 (Admin); [2014] ACD 99 – the list of essential items appears at [50].

26 Asylum Support Regulations 2000 no 704, reg 10, as amended by Asylum Support (Amendment) Regulations 2018 no 30, reg 2.

27 Fitzpatrick and others’ destitution threshold for smaller households will be higher than the £37 allocated to an asylum seeker, but this outcome may be flipped for larger households. Asylum support adds £37 for each member of the household. The Fitzpatrick definition adds £20 per child (or £25 in some cases), so as the number of children increases, eventually asylum support becomes more ‘generous’.

28 Asylum Support Regulations 2000 no 704, reg 23.

29 *R (on the application of SG) v Secretary of State for Work and Pensions* [2014] EWCA Civ 156; [2014] HRLR 10 at [101]–[105] per Lord Dyson MR, Longmore LJ and Lloyd Jones LJ.

30 Universal Credit Regulations 2013 no 376, reg 116.

destitution (in relation to visa and immigration concessions for victims of domestic violence) exists as having ‘no access to funds or [being] reliant on a third party to pay for ... essential living costs such as basic accommodation and food’.<sup>31</sup> However, each of these definitions only applies in very specific circumstances – the former to claimants of out-of-work benefits who are subject to a financial sanction and meet other conditions, the latter to non-UK national domestic violence victims who would normally have no recourse to public funds.

It can be argued that destitution has been, at least in part, a legally-created problem in the UK. A dedicated system for providing limited support to asylum seekers only became necessary as a result of the progressive reduction of non-nationals’ access to mainstream social assistance following the introduction of income support – from which various categories of ‘person from abroad’ were excluded – in 1988.<sup>32</sup> Since 2010, growing levels of destitution among UK nationals have been associated with the freezing of already parsimonious benefit rates, increasingly restrictive access to disability and incapacity benefits and an unprecedented spike in financial sanctions for non-compliance with work-related conditions to which social security claimants are subject, as well as additional barriers to appeal rights.<sup>33</sup> The most obvious solution to the problem of destitution would therefore seem to be addressing these structural problems in the social security system. The JRF research shows clearly how social security is implicated in the experience of destitution and it is not difficult to find economic analyses that point to the need to raise benefit levels to prevent more claimants from becoming destitute.<sup>34</sup> Yet even if the social security safety net was improved, it is unlikely to reach a level of repair that would catch all circumstances, and further reinforcements would benefit those who will continue to slip through the net. A central question for this article, then, is the extent to which the law might offer a partial solution in the form of protection against destitution, either as a complement or alternative to other measures. Given the extent to which basic human needs – rights – are impacted by destitution, it is appropriate to consider whether there can be a rights-based solution to miti-

31 UK Visas and Immigration, ‘Victims of domestic violence (DDV) concession’ (London: UK Visas and Immigration, 2013).

32 Income Support (General) Regulations 1987 no 1967, reg 21; sch 7 para 17; for discussion of the political context see Peter Billings, ‘Alienating Asylum Seekers: Welfare Support in the Immigration and Asylum Act 1999’ (2002) 9 JSSL 115.

33 Adler, n 9 above; Sheona York, ‘“The Law of Common Humanity”: Revisiting *Limbuella* in the “Hostile Environment”’ (2017) 31 JIANL 308; Ciara Fitzpatrick, Gráinne McKeever and Mark Simpson, ‘Conditionality, Discretion and T.H. Marshall’s “Right to Welfare”’ (2019) 41 JSWFL 445 – note that sanctioning trends were generally downward from 2014 for jobseeker’s allowance and from 2017 for universal credit, until the suspension of jobseeking conditionality in the early stages of the coronavirus pandemic.

34 Robert Joyce, Heidi Karjalainen, Peter Levell and Tom Waters, ‘The Cost of Living Crunch’ *Institute for Fiscal Studies* 2022 at <https://ifs.org.uk/publications/15905> (last accessed 21 July 2022); Abigail Davis, Donald Hirsch, Matt Padley and Claire Shephard, *A Minimum Income Standard for the United Kingdom in 2021* (York: Joseph Rowntree Foundation, 2021); Torsten Bell, Adam Corlett and Daniel Tomlinson, *To Govern is to Choose* (London: Resolution Foundation, 2021); Mike Brewer, Karl Handscomb, Gavin Kelly, James Smith and Lalitha Try, *Social Insecurity: Assessing Trends in Social Security to Prepare for the Decade of Change Ahead* (London: Resolution Foundation, 2022).



gate this impact, whether by conferring an individual right to relief or as the foundation for an adequate, (near-) universal social minimum.

## Methods

In order to understand the extent to which UK law currently provides rights-based protection against destitution, the authors conducted a systematic review of case law. The judgments emerging from the review provide insight into what legislative provisions, human rights and common law principles have been drawn on by those constructing legal arguments for protection against destitution and how the courts have responded. This initially used the search terms ‘destitute OR destitution’, which produced over 2,100 hits. The authors added the filter terms ‘private and family life’, ‘health and social security’, ‘human rights’, ‘local government’ and ‘public law’, then excluded cases prior to 2000, as neither of the two key pieces of primary legislation – the Human Rights Act 1998 and the Immigration and Asylum Act 1999 – would have been in force. This left 428 cases. The main search brought up few social security cases, despite benefit issues being identified as the most common cause of destitution in the JRF study and the overlap between the definition of destitution in the immigration and asylum legislation and the eligibility criteria for a jobseeker’s allowance or (particularly) universal credit hardship payment.<sup>35</sup> A separate search was carried out for ‘hardship’, applying the filter ‘social security’. This produced 149 hits, of which 80 were cases heard after the introduction of jobseeker’s allowance in 1996, not appearing among the 428 post-2000 cases in the main search.<sup>36</sup> A final search used the term ‘sanction’, again applying the filter ‘social security’. However, most of the cases retrieved used the word ‘sanction’ in a context other than a jobseeker’s allowance or universal credit sanction and only a further three made any contribution to the analysis. Following the exclusion of cases in which the search terms only appear as one of the parties’ names, judgments of the lower courts in Scotland and cases in which the keywords were used in a different context from that with which the investigation was concerned, and the inclusion of a couple of particularly important older cases cited in those retrieved through the review, the following themes were covered in the case law:

- the definition of destitution and/or essential needs (46 cases)
- appeals against removal from the UK on the basis that it would result in destitution (43 cases)
- support sought from a public authority on the basis of destitution (109 cases)
- destitution as a barrier to the enjoyment of the individual’s rights (18 cases)

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35 Jobseeker’s Allowance Regulations 1996 no 207, part ix; Universal Credit Regulations 2013 no 376, part 8 ch 3.

36 The cut-off of 1996 was applied because the introduction of jobseeker’s allowance brought sanctions (the temporary suspension of a benefit payment for breach of claimant obligations) into the social security vocabulary.

- social security or social assistance (29 cases)
- applications to set aside or amend a contract or order if enforcement would result in destitution (six cases)
- the power of the executive or legislature to impose destitution (five cases)
- criminal law (three cases)

These themes span decisions based on common law, social rights treaties and rights under the ECHR. The article also refers to a small number of judgments handed down after the initial review was carried out.

### Common law rights

The statutory definition of destitution in the Immigration and Asylum Act 1999 extends to a number of other contexts,<sup>37</sup> but has not gained recognition as a universal destitution threshold,<sup>38</sup> nor does it establish any right to protection against destitution for anyone other than asylum seekers who follow the correct procedure for registering their claim.<sup>39</sup> Ideally, the value of a legal definition of destitution would be in marking out a recognised minimum subsistence standard that the state must guarantee for everyone lawfully present within its territory. Such a social floor is a feature of various national constitutions, whether as an enforceable right or a non-justiciable principle.<sup>40</sup> While the UK lacks a codified constitution, it has been suggested that there is a natural or common law right to protection against starvation at least.<sup>41</sup> If such a right does exist, though, it can be whittled away by statute.

Some measure of common law protection against destitution has been traced back to Magna Carta, which prohibits disproportionate fines and deprivation of the means of livelihood,<sup>42</sup> through settled persons' right to support from the parish under the Poor Law<sup>43</sup> (although whether the Poor Law was in any way

37 Asylum Support Regulations 2000 no 704, reg 23.

38 *R (on the application of SG) v Secretary of State for Work and Pensions* n 29 above at [101]-[105] per Lord Dyson MR, Longmore LJ and Lloyd Jones LJ.

39 Asylum seekers who register their claims late are entitled to support only to the extent necessary to avoid breach of ECHR, art 3, which may be at a still lower level – Immigration and Asylum Act 1999, s 4.

40 Katie Boyle, 'Constitutionalising a Social Minimum as a Minimum Core' in Toomas Kotkas, Ingrid Leijten and Frans Pennings (eds), *Specifying and Securing a Social Minimum in the Battle Against Poverty* (Oxford: Hart, 2019); Katie Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (Oxford: Routledge, 2020). See also the German Basic Law, Arts 1 and 20(1), which proclaim the right to a minimum standard of living in accordance with human dignity and the social state principle. The German constitutional court has long recognised that creating the conditions for leading an independent and fulfilling life is part of the state's constitutional responsibilities. See Valery Gantchev 'Judgment of the German Constitutional Court on the (Un)constitutionality of Welfare Sanctions' (2019) 21 EJSS 378.

41 *R v Inhabitants of Eastbourne* (1803) 4 East 103; *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275.

42 Derry Irvine, 'The Spirit of Magna Carta Continues to Resonate in Modern Law' (2003) 119 LQR 227.

43 Lorie Charlesworth, 'The Poor Law: a Modern Legal Analysis' (1999) 6 JSSL 79; Michelle Stoker, 'Bentham's Proposals for Reform of the Poor Law' (1994) 1 UCL Juris Rev 173. See also Webb

a rights-based system can be questioned),<sup>44</sup> to long-running debates about the enforceability of contracts that would have the effect of leaving a party destitute, or that could only have been agreed to because of destitution.<sup>45</sup> The argument that the common or natural law confers, or ought to confer, protection against destitution continues to be made.<sup>46</sup> The Hobbesian view that starvation excuses essentially any action taken in the interests of survival has not taken root in the UK's criminal law,<sup>47</sup> but academics have argued,<sup>48</sup> and the law in some circumstances accepts,<sup>49</sup> that the need to survive is a legitimate consideration in sentencing decisions. For present purposes, the most important cases concern Lord Ellenborough's proposal that 'the law of humanity, which is anterior to all positive laws, obliges us to afford [people] relief, to save them from starving.'<sup>50</sup> This principle underpinned the Court of Appeal's decision that Secretary of State had acted *ultra vires* in denying any form of support to failed asylum seekers. However, despite the view of Simon Brown LJ that 'the Regulations necessarily contemplate for some a life so destitute that to my mind no civilised nation can tolerate it',<sup>51</sup> the 'law of humanity' could not override the right of parliament to reinstate the same provisions through primary legislation.<sup>52</sup> Subsequently, the 'law of humanity' was found to place limits on the extent to which public authorities could deprive a family of its means of subsistence in accordance with EU terrorism legislation.<sup>53</sup> More recently, in a judgment

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and Webb referencing *R v Curtis R v Curtis* [1873] 27 *Law Times Reports* 792 and *Clark v Joslin* [1873] 27 *Law Times* 762 as having established that 'Under the poor law it was a misdemeanour for an officer to refuse relief & it was understood that an indictment for manslaughter would lie if the pauper died as a result': Sidney Webb and Beatrice Webb, *English Local Government: English Poor Law History* (London and New York, NY: Longmans, Green and Company, 1927).

- 44 Robert S. Shiels, 'The Tay Bridge Disaster and the Major Personal Injury Claim' (2015) 122(Feb) Rep B 4; Fitzpatrick and others, n 33 above.
- 45 John Kruse, 'Enforcement Law Reform and the Common Law' (2008) 27 CJK 494; *Simpson v Hartropp* [1744] Willes 512; *Bissett v Caldwell* [1791] Peake 50; J.L. Barton, 'The Enforcement of Hard Bargains' (1987) 103 LQR 118.
- 46 Danny Friedman, 'A Common Law of Human Rights: History, Humanity and Dignity' (2016) 4 EHRLR 378; David Feldman, 'The Nature and Significance of 'Constitutional' Legislation' (2013) 129 LQR 343.
- 47 *Re A (Children)* [2001] 2 WLR 480.
- 48 Susan Easton, 'Dangerous Waters: Taking Account of Impact in Sentencing' (2008) 2 Crim LR 105; Victor Tadros, 'Poverty and Criminal Responsibility' (2009) 43 *Journal of Value Inquiry* 391; Jeffrey Reiman and Paul Leighton, *The Rich get Richer and the Poor get Prison* (Abingdon: Routledge, 2017).
- 49 Modern Slavery Act 2015, s 45; for discussion, see Susan Edwards, 'Coercion and Compulsion – Re-imagining Crimes and Defences' (2016) 12 Crim LR 876.
- 50 *R v Inhabitants of Eastbourne* n 41 above, 107 per Lord Ellenborough.
- 51 *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* n 41 above, 292–293 per Simon Brown LJ; note that, despite citing verbatim the reference to Lord Ellenborough's judgment that appears in this case, the majority judgment in *R (on the application of O) v Secretary of State for the Home Department* [2022] UKSC 3; [2022] 2 WLR 343 at [37]–[39] per Lord Hodge treats that case as turning on the fundamental common law right of access to justice rather than any right to a subsistence standard of living.
- 52 Asylum and Immigration Act 1996, ss 8–11.
- 53 *R on the Application of Othman v Secretary of State for Work and Pensions* [2001] EWHC Admin 1022; Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000 (OJ L 67/1), art 2.

handed down in the midst of the global coronavirus pandemic, the ‘law of humanity’ was at the heart of determining when the imposition of ‘no recourse to public funds’ (NRPF) could be in breach of Article 3 ECHR, as one of the legal principles that should be applied to the construction of parliamentary intent. The High Court found Home Office guidance to be unlawful since it failed to make clear that the condition of NRPF could be lifted when there was a risk of destitution, rather than only when destitution had manifested itself. The case is notable for asserting that a common law protection from inhuman and degrading treatment by denial of resources would exist ‘even in the absence of Article 3’.<sup>54</sup>

The second strand of the debate around a possible common law protection from destitution largely concerns whether it would be unreasonable to uphold a contract or other legal arrangement, to apply a criminal sanction or to deny access to a public service. Legally, a decision to do so would be unreasonable if it were ‘so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.’<sup>55</sup> This is a high bar to surmount, and one that changes over time as social attitudes evolve.<sup>56</sup> If public opinion in the UK or democratic societies across the world were overwhelmingly of the view that it was unacceptable for the state to subject people to destitution, then a decision with that effect might be regarded as unreasonable: ‘the Courts would intervene in an executive decision, even one with internal logic, if they took the view that it was in outrageous defiance of common law standards of decency.’<sup>57</sup> Simon Brown LJ’s view that regulations contemplating ‘a life for some so destitute that no civilised nation could tolerate it’ must be *ultra vires* surely follows similar logic;<sup>58</sup> however, this is not the logic that underpins a range of policy decisions and other judgments.

### Social rights treaties

If it is possible to debate what rights the common law does or does not confer, there is less ambiguity around the intention of multiple human rights instruments to protect against destitution – particularly those whose focus is on

54 *R (on the application of W) v Secretary of State for the Home Department* [2020] EWHC 1299 (admin); [2020] 1 WLR 4420 (*W*) at [61] per Bean LJ and Chamberlain J.

55 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 WLR 1174, 1196 per Lord Diplock.

56 *R v Ministry of Defence ex p Smith* [1996] 2 WLR 305.

57 Michael Beloff and Helen Mountfield, ‘Unconventional Behaviour? Judicial Uses of the European Convention in England and Wales’ (1996) 5 EHRLR 467, 479.

58 In South Africa, the constitutional court assesses the conformity of the state with its constitutionally protected social rights through an assessment of the reasonableness of policy and legislation made with a view to their realisation, in a context of limited resources and competing political priorities, albeit that its interpretation of reasonableness is not necessarily identical to the UK courts’: See Anashri Pillay, ‘Courts, Variable Standards of Review and Resource Allocation: Developing a Model for the Enforcement of Social and Economic Rights’ (2007) 6 EHRLR 616.

social and economic rights.<sup>59</sup> The European Social Charter (ESC) is the sister of the European Convention on Human Rights (ECHR), but unlike the ECHR the Charter has not been incorporated into UK domestic law. The original 1961 Charter (as opposed to the Revised European Social Charter of 1996) has, however, been ratified by the UK. Article 13(1) confers ‘an individual right of access to social assistance in circumstances . . . when no other means of reaching a minimum income level consistent with human dignity are available.’<sup>60</sup> Eligibility may not be time limited and while benefits may be reduced for non-compliance with reasonable work-related conditions, this may not result in ‘the loss of basic means of subsistence’.<sup>61</sup> The International Covenant on Economic, Social and Cultural Rights (ICESCR) is another international treaty focused on protecting the enjoyment of social rights, which again has been ratified by the UK but not incorporated. Like the ESC, the first of the minimum core obligations under Article 9 of the ICESCR (the right to social security) requires that people are able to access subsistence needs, here defined as ‘essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.’<sup>62</sup> The definition developed by Fitzpatrick and others dovetails with a number of other specific social rights. The housing related requirement, that people should have ‘shelter’ and should not have to sleep rough, is at face value fairly minimal. When combined with the requirements for heating and lighting, though, it begins to look something more like the right to adequate housing within Article 11 ICESCR, which expects housing not only to be habitable, but to meet current cultural and technological requirements.<sup>63</sup> It arguably falls short of the standards in Article 31 ESC, which encompasses security of tenure, absence of overcrowding and facilities like water, sanitation and waste disposal.<sup>64</sup> Article 31 ESC has been successfully used to challenge the use of destitution as a tool to force Roma migrants to leave France,<sup>65</sup> but as it features in the Revised Charter it does not strictly bind the UK,<sup>66</sup> which has only ratified the original text – Article 16 of which (the right to family protection) may imply a less explicit right to housing. The expectation that people should have at least two meals per day is in keeping with the right to adequate (that is, nutritionally and culturally acceptable) food, also conferred by Article 11 ICESCR, and with Article 11(1) ESC, which requires protection

59 This category is taken here to include instruments with a dual focus on civil/political and social/economic rights, such as the Convention on the Rights of the Child.

60 *European Roma Rights Centre (ERRC) v Bulgaria* (complaint 48/2008) [2009] 49 EHRR SE12 at [38].

61 *ibid* at [41].

62 Committee on Economic, Social and Cultural Rights, ‘General Comment no 19: the Right to Social Security (art 9)’ (39<sup>th</sup> session, 2007) (Geneva: United Nations, 2007).

63 Committee on Economic, Social and Cultural Rights, ‘General Comment no 4: the Right to Adequate Housing (art. 11 (1) of the Covenant)’ (sixth session, 1991) (Geneva: United Nations, 1991).

64 European Committee of Social Rights, *Conclusions 2003 – France – Article 31(1)* (Strasbourg: Council of Europe, 2003).

65 *Centre on Housing Rights and Evictions (COHRE) v France* (complaint 63/2010) [2012] 54 EHRR SE5.

66 Article 31 is also used as an aid to interpretation of art 16 (the right to family protection), which appears in the 1961 Charter and is accepted by the UK.

from causes of ill-health. Weather-appropriate clothing and basic toiletries also help protect against causes of ill-health. The problem, from the point of view of using human rights as a tool to address destitution, is that neither the Charter nor ICESCR forms part of UK law, and their requirements are not consistently reflected in relevant fields of domestic law.<sup>67</sup>

The UK, of course, is not alone in having been slower to embrace constitutional protection of social rights. Goldmann observes that the common view in the post-World War 2 period was that ‘protecting social rights was a task for national welfare systems ... [O]ne needs to understand the Universal Declaration of Human Rights as setting out a program for domestic welfare states, rather than as a compendium of judicially enforceable individual social rights.’<sup>68</sup> While some other states have moved on, the key test for the UK courts remains whether ECHR rights are affected. Edwards and Billings argue that the ECHR ‘should be read to give effect to the other international obligations of the UK, particularly those obligations arising under [ICESCR], the Universal Declaration on Human Rights and the European Social Charter’ under the broader banner of protecting human dignity.<sup>69</sup> The courts have been slow to adopt this approach, except in their use of the UN Convention on the Rights of the Child (UNCRC) as an aid to interpretation of the right to respect for family life;<sup>70</sup> even on this front, progress has been halted by the Supreme Court’s decision in *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and others* that unincorporated conventions do not apply to domestic law.<sup>71</sup> The still more ambitious approach advocated by Lord Kerr, that ratified human rights treaties should have direct effect,<sup>72</sup> seems even further from gaining widespread judicial acceptance.<sup>73</sup> The Scottish Parliament has voted unanimously to incorporate the UNCRC into domestic law thus placing a

67 Mark Simpson, ‘Assessing the Compliance of the UK Social Security System with the State’s Obligations Under the European Social Charter’ (2018) 18 HRLR 745.

68 Matthias Goldmann, ‘Contesting Austerity: Genealogies of Human Rights Discourse’ MPIL research paper 2020–09 at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3561660](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561660) (last accessed 22 July 2022).

69 Richard Edwards and Peter Billings, ‘Safeguarding Asylum Seekers’ Dignity: Clarifying the Interface Between Convention Rights and Asylum Law’ (2004) 11 JSSL 83, 95.

70 Mark Simpson, ‘Social Rights, Child Rights, Discrimination and Devolution: Untangling the Web’ (2018) 40 JSWFL 3.

71 *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and others* [2021] UKSC 26; [2021] 3 WLR 428. See Charlotte O’Brien, ‘Inevitability as the new Discrimination Defence: UK Supreme Court Mangles Indirect Discrimination Analysis while Finding the Two-child Limit Lawful’ *Oxford Human Rights Hub* 26 July 2021 at <https://ohrh.law.ox.ac.uk/inevitability-as-the-new-discrimination-defence-uk-supreme-court-mangles-indirect-discrimination-analysis-while-finding-the-two-child-limit-lawful/> (last accessed 22 July 2022).

72 *R on the application of SG v Secretary of State for Work and Pensions* n 7 above at [243–257]. See Gráinne McKeever, ‘Scrutinising Social Security Law and Protecting Social Rights: Lord Kerr and the Benefit Cap’ in Brice Dickson and Conor McCormick (eds), *The Judicial Mind: a Festschrift for Lord Kerr of Tonaghmore* (Oxford: Hart, 2021).

73 There are some, albeit limited, exceptions to judicial reluctance to use unincorporated treaties including *In the matter of NP* [2020] EWCOP 44 where the Court of Protection used CRPD, art 19 (the right to live independently and be included in the community) to inform its decision as to what was in P’s best interests, noting that although ‘the CRPD has not been incorporated into English and Welsh law, the court should pay it due regard given the UK’s ratification’.

judicially enforceable prohibition on Scottish public authorities (excluding the parliament) acting contrary to the Convention.<sup>74</sup> However, the nature of the devolution settlement limits the extent to which this Bill will serve to protect children from destitution, and not just on the basis of the UK government's successful challenge to the Scottish parliament's competence to enact the Bill.<sup>75</sup> Although the UNCRC includes a right to an adequate standard of living, the limited extent of the Scottish parliament's social security powers may limit the scope for incomes to be topped up at devolved level to the extent necessary to ensure its realisation for all children.

## European Convention on Human Rights

The ECHR clearly has domestic force, most of its component rights having been incorporated into UK law through the Human Rights Act 1998. Unlike the social rights treaties mentioned above, however, the ECHR contains no provision that can be interpreted as providing explicit protection against destitution. Collins J, citing Lord Ellenborough's contention that the state is subject to a natural law duty to do just this,<sup>76</sup> argues that 'it would be surprising if the standards of the ECHR were below those believed 200 years ago to be applicable as the law of humanity.'<sup>77</sup> Yet the European Court of Human Rights (ECtHR) has traditionally been reluctant to read specific social entitlements into the Convention rights,<sup>78</sup> despite recognising their close connection to civil and political rights.<sup>79</sup>

In the 21<sup>st</sup> century, O'Conneide suggests that some degree of protection for social rights, and protection from destitution, has 'begun to take solid doctrinal shape', driven in large measure by the UK courts.<sup>80</sup> If this were indeed the case, the ECHR would clearly offer a firmer foundation for a social floor of this kind,

74 United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill [as passed] SP Bill 80B, Session 5 (2021); see also Nicola Hogg, '2020 and Beyond: Children's Rights in Scotland' (2020) 65 *JLSS* 26; The Scottish government plans to incorporate four further human rights treaties in law, including the International Covenant on Economic, Social and Cultural Rights – Scottish Government, 'New Human Rights Bill' News release, 12 March 2021 at <https://www.gov.scot/news/new-human-rights-bill/> (last accessed 22 July 2022).

75 *Reference by the Attorney General and the Advocate General for Scotland - United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill; Reference by the Attorney General and the Advocate General for Scotland - European Charter of Local Self Government (Incorporation) (Scotland) Bill* [2021] UKSC 42; [2021] 1 *WLR* 5106. See Joshua Rozenberg, 'How Competent is Scotland's Parliament?' *A Lawyer Writes* 14 April 2021 at [https://rozenberg.substack.com/p/how-competent-is-scotlands-parliament?utm\\_campaign=post&utm\\_medium=web&utm\\_source=copy](https://rozenberg.substack.com/p/how-competent-is-scotlands-parliament?utm_campaign=post&utm_medium=web&utm_source=copy) (last accessed 22 July 2022).

76 *R v Inhabitants of Eastbourne* n 41 above.

77 *R (on the application of Q) v Secretary of State for the Home Department* [2003] *EWHC* 195 Admin at [72] per Collins J.

78 Andrew Williams, 'The European Convention on Human Rights, the EU and the UK: Confronting a Heresy' (2013) 24 *EJIL* 1157; Dimitrios Kagiarios, 'Vulnerability as a Path to a "Social Minimum"?' An analysis of ECtHR jurisprudence' in Kotkas, Leijten and Pennings (eds), n 40 above, 246.

79 *Airey v Ireland* (A/32) [1979-80] 2 *EHRR* 305.

80 Colm O'Conneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights' (2008) 5 *EHRLR* 583, 584.

since public authorities in the UK are prohibited from acting contrary to the Convention unless required to do so by primary legislation and the courts are required to interpret all legislation in such a way as to be compatible with the Convention if at all possible.<sup>81</sup> It would also offer a clear means of holding the executive and legislature accountable for such legislation, as the courts can make a declaration of incompatibility<sup>82</sup> – something they have been reluctant to do in respect of other human rights treaties. However, when the case law is examined, it is evident that – while O’Cinneide is correct to observe that genuine doctrinal progress has been made – the ECHR has not been interpreted as requiring protection from destitution in all circumstances, rather that the consequences of destitution can in some circumstances include the violation of certain rights within the ECHR. This means the state can be required to step in and help individuals meet their or their children’s subsistence needs, but the demands of the ECHR can often be satisfied while still leaving the household below either of the destitution thresholds set out above. The Joint Committee on Human Rights argues that it is ‘difficult to envisage a case where a person could be destitute without there being a threat of a violation of Articles 3 [the prohibition of inhuman or degrading treatment] and/or 8 [the right to respect for private and family life] of the ECHR,’<sup>83</sup> but the courts have repeatedly shown themselves willing to accept that individuals can be destitute without infringement of either article (see discussion below)

Despite its limitations, the ECHR has a role to play, if not in preventing destitution then certainly in requiring minimal protection against its most extreme manifestations. There are clear examples of rights protected by the ECHR whose enjoyment would in practice be curtailed, if not rendered impossible, by the most extreme forms of poverty. Correspondingly, these rights can carry an implicit obligation on the state to protect against, or at least ameliorate, destitution in some circumstances. While a claim against the state for the protection of social rights most obviously arises when a ‘degree of degradation ... significantly below [the statutory] definition of destitution’ brings about a risk of violation of Article 3 (prohibition of torture, inhuman or degrading treatment or punishment),<sup>84</sup> the UK judiciary may be slightly more receptive than their Strasbourg counterparts to the possibility of a positive right to a minimum – or minimal – income under Article 8 (right to respect for private or family life), at least where the welfare of children is at stake. It is also not too great a leap to imagine that breach of Article 6 (the right to a fair trial) could in some circumstances flow from destitution. This potential to use the ECHR to protect against inhuman or degrading treatment, to ensure respect for family life, and the access to justice protection offered by Article 6 ECHR requires some detailed examination, to understand the extent to which the ECHR could thereby protect against destitution.

81 Human Rights Act 1998, ss 3, 6.

82 Human Rights Act 1998, s 4.

83 Cited by Anthony Bradley, ‘Judicial Independence Under Attack’ (2003) PL 397, 407.

84 *R (on the application of S) v Secretary of State for the Home Department* [2003] EWCA Civ 1285; [2003] UKHRR 1321 at [8] per Kennedy LJ.



*Inhuman and Degrading Treatment*

The judgment in *W* suggests both the courts and the government now treat it as uncontroversial that inhuman and/or degrading treatment, which is prohibited by Article 3 ECHR, can result from ‘lack of resources.’<sup>85</sup> However, the bar for violation of Article 3 is set very high and requires a two-part test. First, destitution would have to result in inhuman and degrading living conditions. This outcome is certainly possible, but not inevitable, and is generally assessed on a case-by-case basis. Second, the inhuman and degrading conditions would have to result from either treatment by the state or the state’s failure to discharge a positive obligation to prevent such treatment by someone else. While O’Cinneide suggests the state has a positive obligation to protect from destitution those who are in a position of dependence on it,<sup>86</sup> the Article 3 case law points to a conservative interpretation of what this means practically.

As a headline definition, ‘treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being.’<sup>87</sup> Denial of a person’s most basic needs appears to be a relatively straightforward test. The judgments in *Limbuella*, concerning the state’s breach of Article 3 ECHR for its failure to provide food and accommodation to asylum seekers who had no means of supporting themselves, overlap with the JRF definition of destitution, referring to inability to access shelter, food, warmth, somewhere safe to sleep and hygiene facilities.<sup>88</sup> When this occurs at a level which can be judged ‘to a seriously detrimental extent’ is less clear, particularly in cases where it cannot be proven that the state has deliberately set out to inflict pain or suffering. Williams’s proposition that ‘suffering is the unspoken precondition for human rights’ is certainly apt.<sup>89</sup> It is suggested that treatment becomes degrading when it ‘humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance.’<sup>90</sup> The point at which this threshold is passed will vary: some individuals might be able to sleep rough for a period without experiencing degradation, as long as they are in good health and have sufficient food and access to washing facilities,<sup>91</sup> while for others street homelessness would immediately breach Article 3 (typically because of their physical or mental health)<sup>92</sup> and some might suffer degradation before reaching the point of sleeping rough.<sup>93</sup> Hickinbottom J has suggested that ‘in the ordinary course the [Article 3] threshold may be crossed if, as a result of a withdrawal of support ... a person was obliged to sleep in

85 *R (on the application of W) v Secretary of State for the Home Department* n 54 above at [60] per Bean LJ and Chamberlain J.

86 O’Cinneide, n 80 above.

87 *R (On the Application of Limbuella) v Secretary of State for the Home Department* [2005] UKHL 66; [2005] WLR 1014 at [7] (Lord Bingham).

88 *RM v Secretary of State for the Home Department* [2017] EWHC 1262 (Admin).

89 A.T. Williams, ‘Human Rights and Law: Between Sufferance and Insufferability’ (2007) 123 LQR 133, 137.

90 *Pretty v UK* [2002] 35 EHRR 1.

91 *R (on the application of Zardasht) v Secretary of State for the Home Department* [2004] EWHC 91 (Admin); *R (on the application of S) v Secretary of State for the Home Department* n 84 above.

92 *R on the application of GS v Camden LBC* [2016] EWHC 1762 (Admin).

93 *R (On the Application of Limbuella) v Secretary of State for the Home Department* n 87 above.

the street, or was seriously hungry, or was unable to meet the most basic requirements of hygiene.<sup>94</sup> If homelessness were to interfere with the treatment regime for a chronic illness, resulting in pain, this could be further evidence of degrading treatment.<sup>95</sup> The High Court decision in *W* has potential to bring greater clarity and consistency as it hints at the use of ‘destitution’ (as defined by the 1999 Act) as a more precisely defined proxy for ‘inhuman or degrading treatment’.<sup>96</sup> The caveat to this is that the same judgment acknowledges that in *Limbuella* the Supreme Court specifically declines to equate destitution with degrading treatment;<sup>97</sup> a decision of the higher courts will be required to instil confidence that destitution should automatically be regarded as degrading.

Identifying when degradation results from treatment by the state is also complex, particularly when degrading living conditions are more readily attributable to omissions (such as failure to provide financial support) than acts. Fredman asserts that all destitution ultimately results from state action, because it is the state that enforces the property laws that prevent the penniless accessing food and shelter.<sup>98</sup> The courts, though, have not come close to accepting this view – if they did, it would potentially imply a far-reaching positive obligation to protect against destitution. Nonetheless, the decision in *Limbuella* makes clear that failure on the part of the state to provide support to a destitute individual or class of people cannot always be regarded as mere inaction, but constitutes ‘treatment’ if support would be available to other classes of person in similarly destitute circumstances. The regime for late asylum seekers (people who fail to register their claim for asylum as soon as practically possible upon arrival in the UK), which excludes them from the paid labour market, social security and the support available to other asylum seekers, is recognised to constitute treatment because the state takes a deliberate decision to exclude one group from services and opportunities to access earned income that it provides to others.<sup>99</sup> Or, as Harvey puts it, the state put in place ‘a law and policy framework that deliberately engineers poverty and destitution ... [D]eprivation of human rights by design.’<sup>100</sup> On the other hand, failure to provide asylum seekers with a guaranteed right to housing does not constitute treatment if no such right is provided to citizens.<sup>101</sup> Meanwhile, an individual who purports to have grounds for asylum, but has not registered a claim, may be unable to argue that non-receipt of support results from any action on the part of the state, when the ‘true’ cause is his or her own inaction.<sup>102</sup> Failed asylum seekers are even further removed

94 *R on the application of EW v Secretary of State for the Home Department* [2009] EWHC 2957 [Admin] at [85] per Hickinbottom J.

95 *R on the Application of N v Lambeth LBC* [2006] EWHC 3427 (Admin).

96 *R (on the application of W) v Secretary of State for the Home Department* n 54 above.

97 *ibid* at [42] and [71] per Bean LJ and Chamberlain J.

98 Sandra Fredman, ‘Human Rights Transformed: Positive Duties and Positive Rights’ (Aut 2006) PL 498.

99 *R (On the Application of Limbuella) v Secretary of State for the Home Department* n 87 above at [6] per Lord Bingham; [56] per Lord Hope; see also *R (on the application of Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364; [2003] 3 WLR 365 at [57] per Lord Phillips MR.

100 Colin Harvey, ‘Refugees and Human Rights: the Future of International Protection in the United Kingdom’ (2015) 6 EHRLR 595.

101 *R on the application of EW v Secretary of State for the Home Department* n 94 above.

102 *NA (Sudan) v Secretary of State for the Home Department* [2016] EWCA Civ 1060; [2017] 3 All ER 885.

from protection since the High Court determined that the Secretary of State owes no duty under Articles 2, 3 or 8 ECHR to provide accommodation, either on the grounds of protecting a failed, homeless asylum seeker during a global pandemic or as a specific obligation owed to the public at large.<sup>103</sup> Instead, the court recognised the broad discretion the state was to be provided in order to balance difficult policy decisions.

With the case law in this area dominated by immigration and asylum cases, it is unclear whether someone left destitute by, for example, the withdrawal of a social security benefit or the five-week waiting period for a first universal credit payment, would be viewed as the victim of ‘treatment’ by the state or whether the absence of any legal bar to paid employment would relieve the state of any positive obligation under Article 3. Although the destitute individual will normally be required to attempt to meet his or her essential needs by other means before the state has a responsibility to do so, the state is not necessarily entitled to ‘wait and see’ whether degradation occurs rather than intervening earlier to prevent it.<sup>104</sup> If an individual has no access to the labour market, no access to social security, no familial support network and it is well known that charitable provision is overstretched, ‘case-by-case decision-making ... cannot reasonably be regarded as a sufficient discharge of the Secretary of State’s responsibilities.’<sup>105</sup> Ultimately, Feldman’s interpretation of *Limbuela* as a statement that ‘Article 3 guarantees ... protection against destitution and degradation’ still seems over-optimistic.<sup>106</sup> At best, thanks in part to the activism of the UK courts,<sup>107</sup> of which the judgment in *W* can perhaps be viewed as the next, incremental step forward, the article can be used to compel a state to take action against destitution in certain narrow circumstances: where the treatment by the state or its failure to discharge a positive obligation to prevent such treatment by someone else results in inhuman and degrading living conditions which denies the most basic needs of any human being, humiliating them, debasing them or putting their moral or physical resilience in danger.

### *Respect for Family Life*

Article 8 ECHR similarly confers no right to protection from destitution, but destitution can give rise to circumstances that result in breach of the article, particularly the right to respect for family life.<sup>108</sup> When a ‘family unit’ is affected and particularly when ‘the welfare of children is at stake, article 8 may

103 *R (Secretary of State for the Home Department) v First-tier Tribunal (Social Entitlement Chamber)* [2021] EWHC 1690 (Admin); [2022] 1 WLR 22.

104 The approach endorsed in *R (on the application of Q) v Secretary of State for the Home Department* n 99 above; see also *R (on the application of W) v Secretary of State for the Home Department* n 54 above at [42] per Bean LJ and Chamberlain J.

105 *R (on the application of Limbuela) v Secretary of State for the Home Department* [2004] EWCA Civ 540; [2004] 3 WLR 561 at [125] per Carnwath LJ.

106 Feldman, n 46 above, 346.

107 Derry Irvine, ‘A British Interpretation of Convention Rights’ (Apr 2012) PL 237; Bharat Malkani, ‘A Rights-Specific Approach to Section 2 of the Human Rights Act’ (2012) 5 EHRLR 516.

108 See O’Cinneide, n 80 above.

require the provision of welfare support in a manner which enables family life to continue.<sup>109</sup> Any decision taken without regard for the welfare of affected children would potentially contravene Article 8 ECHR.<sup>110</sup>

This is an example of the Human Rights Act 1998 compelling authorities to exercise powers in a particular way. Local authorities in England are subject to a specific duty to provide accommodation for children in need,<sup>111</sup> and a general duty to safeguard and promote the wellbeing of children in need, including the promotion of their upbringing by their families.<sup>112</sup> In some cases, there may be a choice to make between accommodating the child alone through fostering or promoting his or her wellbeing by supporting the whole family. In 2003, Lord Nicholls was a dissenting voice in the House of Lords in arguing that Article 8 is likely, in many (or most) cases, to require the latter approach on the basis that the child's 'basic need' will usually be for 'accommodation with his parent.'<sup>113</sup> The Court of Appeal would soon adopt Lord Nicholls' approach, concluding that where children are affected the state is subject to an obligation to relieve poverty if 'necessary to allow family life to continue'<sup>114</sup> or if children are at risk of street homelessness.<sup>115</sup> This interpretation appears to be more readily accepted by the courts today,<sup>116</sup> albeit that the minimum level of support required by Article 8, that which is necessary to enable family life to continue, may be less than would be required to prevent destitution.<sup>117</sup> A 'minimum level of humanitarian support'<sup>118</sup> might suffice to uphold the principle that 'if the Council are seeking to keep the family together when that is in the children's interests and to respect their Convention rights, it would make no sense to leave the adults to starve.'<sup>119</sup>

The burden Article 8 places on public authorities in terms of a positive duty to maintain the destitute, then, is potentially very limited. The London Borough of Southwark was found to have discharged its duty to support children in need through the provision of emergency accommodation and assistance with other

109 *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406; [2004] 2 WLR 603 at [43] per Lord Woolf CJ; *R (on the application of JS) v Secretary of State for Work and Pensions* [2013] EWHC 3350 (QB); [2014] PTSR 23 at [66] per Elias LJ.

110 Borders, Citizenship and Immigration Act 2009, s 55.

111 Children Act 1989, s 20.

112 Children Act 1989, s 17 – interestingly, this duty was at the heart of the *W* case discussed at n 54 above, but the High Court was not convinced by arguments based on Article 8 (with Article 14), finding for the applicant solely on the basis of Article 3.

113 *R (on the application of G) v Barnet LBC* [2003] UKHL 57; [2003] 3 WLR 1194 at [55] per Lord Nicholls.

114 *Anufrijeva v Southwark LBC* n 109 above.

115 *R on the Application of N v Greenwich LBC* [2016] EWHC 2559 (Admin).

116 *R on the Application of PK v Harrow Council* [2014] EWHC 584 (Admin); although it appears to be acceptable to accommodate one parent separately from the other parent and children – *R (MK (Iran)) v Secretary of State for the Home Department* [2011] EWCA Civ 671; [2012] 1 WLR 765; *R on the Application of MK, TM v Secretary of State for the Home Department* [2010] EWHC 1002 (Admin); *R on the Application of Grant v Lambeth LBC* [2004] EWHC 1524 (Admin).

117 *R (C and Others) v Southwark LBC* [2016] EWCA Civ 707; [2016] HLR 36.

118 *R (Mensah and Bello) v Salford County Council* [2014] EWHC 3537 (Admin); [2015] ACD 46 at [53] per Lewis J; *R on the application of C, T, M, U v Southwark LBC* [2014] EWHC 3983 (Admin).

119 *R on the Application of: PO, KO, RO v Newham LBC* [2014] EWHC 2561 (Admin); [2015] PTSR D1 at [47] per Howell QC.

essential needs for a Nigerian family evicted from their home, even though the family clearly remained destitute. The council argued that ‘although overcrowded ... the room [provided] was assessed as providing basic care needs for the family during a period of temporary accommodation.’ On the other hand, a doctor considered that the accommodation was having a ‘deleterious impact’ on the children’s health and schooling, while an environmental health inspection found ‘the rodent infestation in the property represented a Category 1 hazard under the Housing Health and Safety Rating system.’

The court found the choice of accommodation was ‘regrettable’ but not unlawful, having enabled family life and education to continue and ‘basic needs for shelter and sustenance’ to be met.<sup>120</sup> As Edwards and Billings observe, to the very limited extent that Article 8 embodies a right to housing,<sup>121</sup> the right is ‘quantitative not qualitative.’<sup>122</sup> The decision that it was not necessary to provide financial support for additional pregnancy-related needs, toiletries, snacks or travel for the children during school holidays was also upheld.

### *Access to Justice and Other Rights*

Prior to and since the enactment of the Human Rights Act, the courts have been alive to the possibility that destitution might act as a barrier to obtaining a fair hearing in the determination of one’s rights, protected by Article 6 ECHR. It is for that reason that the Bach Commission recommended a new, legally enforceable right to justice, as part of a ‘Right to Justice Act.’ The Act would principally create a new right for an individual to ‘receive reasonable legal assistance without costs they cannot afford’, alongside a new independent body to promote and develop the right.<sup>123</sup> While such legislative provision remains beyond reach, the courts have given consideration to the problem that such legislation would aim to address. In 1997 the Court of Appeal found the Secretary of State could not remove late and failed asylum claimants’ eligibility for social assistance through secondary legislation in part because to force them out of the UK by destitution would be to render ‘nugatory’ their procedural right to claim asylum and to appeal an adverse decision,<sup>124</sup> although primary legislation achieving the same ‘sorry state of affairs’ was subsequently introduced.<sup>125</sup> Similarly, whereas in *M* the High Court found section 17 of the Children Act 1989 could only be used to provide support for a short period

120 *R on the application of C, T, M, U v Southwark LBC* n 118 above at [10], [13], [51], [53] per Cheema QC; see also *R (C and Others) v Southwark LBC* n 117 above.

121 Hale suggests the ECtHR is also ‘developing a duty not to deprive a person of the home he already has,’ but no positive obligation to supply a home to the individual who lacks one – Brenda Hale, ‘Common Law and Convention Law: the Limits to Interpretation’ (2011) 5 EHRLR 534, 541; see *Connors v United Kingdom* [2005] 40 EHR 9; *McCann v United Kingdom* [2008] 47 EHRR 40.

122 Edwards and Billings, n 69 above, 105.

123 Bach Commission, *The Right to Justice* (London: Fabian Society, 2017). See also Boyle (2020), n 40 above, ch 1.

124 *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* n 41 above, 289 per Simon Brown LJ.

125 *ibid*, 293 per Simon Brown LJ. Such a sorry state of affairs can also be a policy rather than legislative provision, as was the case in *FB (Afghanistan) and Medical Justice v Secretary State for the*

pending removal once a household had been found to have no right to remain in the UK,<sup>126</sup> the Court of Appeal ruled that support must be available until the conclusion of the applicant's appeal, as it would be treated as abandoned if she left the UK.<sup>127</sup> In particular, if the appeal raises issues under Article 8 and is not clearly futile, then Article 8 includes an implied procedural right that the person concerned should be able to see the appeal through, which may require the provision of accommodation or financial support.<sup>128</sup> However, there is no right to support to enable one to remain in the UK in order to pursue an appeal that is 'clearly specious' or that could be continued from outside the country.<sup>129</sup>

Other ECHR provisions have shown briefer glimpses of potential to offer protection against destitution, in narrow circumstances. The right to life, protected by Article 2 ECHR, has been recognised as a relevant consideration in cases where there is a risk that destitution might lead an HIV positive mother to breastfeed because of inability to afford formula milk.<sup>130</sup> The review did not reveal any cases in which destitution has been found to result in an actual breach of Article 2, but some jurisdictions more readily accept that the right to life may include a right to the necessary resources for a life in dignity.<sup>131</sup> Notably, no attempt was made to advance arguments based on the right to life in a UK case concerning a claimant who starved to death following the automatic termination of a benefit award due to non-attendance at an appointment. Although this was an opportunity to explore the possibility of a positive obligation to relieve destitution in extreme circumstances, ultimately the case turned on technical points about the reasonableness of placing the burden of proof on the claimant to demonstrate good reason for failure to comply with conditions for benefit receipt.<sup>132</sup> This in itself may reflect a lack of confidence on the part of the applicant's legal team that arguments based on any right to protection from or duty to prevent destitution were worth pursuing. Any such lack of confidence would appear well founded given the subsequent decision that Article 2 did not require the coroner to investigate what the High Court judge described as 'shocking' failures on the part of the Department for Work and Pensions in

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*Home Department* [2020] EWCA Civ 1338; [2021] 2 WLR 839, where the Court of Appeal held that the Home Office's Judicial Reviews and Injunctions Policy which gave a 'removal notice window' of between 72 hours and one week before an individual would be removed from the UK was unlawful insofar as it gave rise to a real risk of preventing access to justice.

126 Applying the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 no 3078.

127 *R (on the application of M) v Islington LBC* [2004] EWCA Civ 235; [2005] 1 WLR 884.

128 *R (on the application of KA (Nigeria) v Essex County Council* [2013] EWHC 43 (Admin); [2013] 1 WLR 1163.

129 *R (on the application of K) v Lambeth LBC* [2003] EWCA Civ 1150; [2004] 1 WLR 272 at [50] per Lord Phillips MR.

130 *R (on the application of T) v Secretary of State for Health* [2002] EWHC 1887 (Admin).

131 Fredman, n 98 above; Ruvi Ziegler, 'No Asylum for 'Infiltrators': the Legal Predicament of Eritrean and Sudanese Nationals in Israel' (2015) 29 JIANL 172; see *Franic Caralie v Union of Territory of Delhi* [1981] 1 SCC 608; LCA 4905/98 *Gamzu v Yishaiyahu*, 55(3) PD 360, 375-376 (IsrSC).

132 *R on the application of Turner v Secretary of State for Work and Pensions* [2021] EWHC 465 (Admin); [2021] PTSR 1312.

the period preceding the suicide of a claimant whose employment and support allowance award had been terminated.<sup>133</sup>

The ECtHR has also held that a fee charged to individuals subject to immigration control wishing to marry must be waived on behalf of destitute couples; the UK's failure to do so breached Article 12 (the right to marry) and Article 14 in conjunction with Articles 12 and 9 (freedom of religion).<sup>134</sup> There are also examples from case law of rights derived from EU law indirectly conferring a right to a minimal level of support,<sup>135</sup> but given that free movement and residence rights for EU citizens in the UK who do not have settled status are likely to be eroded in the coming years these now form a poor basis on which to advocate a more general right to freedom from destitution.

### PROTECTING AGAINST DESTITUTION?

Ultimately, despite the limitations of the ECHR, it appears that the Human Rights Act 1998 has served to increase the range of scenarios in which a duty to prevent, relieve or mitigate the effects of destitution does apply. Various public authorities hold powers that can be used to this effect. By requiring authorities to act in accordance with the ECHR, unless prohibited from doing so by primary legislation,<sup>136</sup> the Act has been held to convert some of these discretionary powers to provide support into duties to do so where this is necessary to prevent violation of an individual's Convention rights.<sup>137</sup> This has been particularly evident in the field of immigration and asylum, within which the Secretary of State has discretion to support 'able-bodied destitute' asylum seekers whose claim fails and others with no right to remain in the UK.<sup>138</sup> This discretion must be exercised if necessary to avoid a breach of the individual's ECHR rights,<sup>139</sup> but the support is not intended to prevent destitution<sup>140</sup> and does not encompass all essential needs, a deliberate policy decision to 'emphasise the precarious and temporary nature of the failed asylum-seeker's stay in the UK and the imminence of their departure.'<sup>141</sup> Powers to provide for the children of people with no recourse to public funds or for 'infirm destitute'

133 *Dove v HM Assistant Coroner for Teesside and Hartlepool* [2021] EWHC 2511 (Admin); [2021] ACD 121 at [34] per Farbey J.

134 *O'Donoghue v United Kingdom* [2011] 53 EHRR 1.

135 *Sanneh v Secretary of State for Work and Pensions* [2015] EWCA Civ 49; [2015] 3 WLR 1867; *R (on the application of HC) v Secretary of State for Work and Pensions* [2017] UKSC 73; [2017] 3 WLR 1486.

136 Human Rights Act 1998, s 6.

137 *R (on the Application of Limbuela) v Secretary of State for the Home Department* n 87 above; for discussion, see Keith Puttick, 'Strangers at the Welfare Gate: Asylum Seekers, "Welfare" and Convention Rights after Adam' (2005) 19 IANL 214.

138 Immigration and Asylum Act 1999, s 4.

139 Sheona York and Nancy Fancott, 'Enforced Destitution: Impediments to Return and Access Section 4 "hard cases" support' (2008) 22 JIANL 5.

140 *R (on the application of C and Others) v Southwark LBC* n 117 above; *R (on the application of MK (Iran)) v Secretary of State for the Home Department* n 116 above; Immigration and Asylum (Provision of Services or Facilities) Regulations 2007 no 3627; *R (on the Application of AW (Kenya) v Secretary of State for the Home Department* [2006] EWHC 3147 (Admin); [2007] ACD 33.

141 York and Fancott, n 139 above, 20.

persons subject to immigration control may be similarly converted into duties.<sup>142</sup> All this said, there are hints in the case law that the common law offers comparable protection where there is a threat to family life or a risk of degrading treatment. Perhaps the strongest statement to this effect comes from Collins J, who, having held that the ‘law of humanity’ prohibited the cutting off of all financial support bar child benefit to a family because of one member’s alleged links to terrorism (overriding EU law in the process), stated that it was unnecessary even to consider the effect of the Convention rights.<sup>143</sup> That the law of humanity confers comparable rights to, but stands above, the ECHR has been a recurring theme since the courts belatedly picked up on Lord Ellenborough’s proclamation, although in other cases the two have been yoked together.<sup>144</sup>

Where social security payments to people facing extreme hardship are concerned, no evidence was found of the courts drawing on human rights obligations to require the state to cast the safety net of last resort wider, or to make it more generous. Claimants whose income is reduced for non-compliance with benefit conditions (which will normally result in destitution according to the JRF definition) can seek a hardship payment, but these are contingent on compliance with set conditions and inability to access familial support.<sup>145</sup> Meanwhile, discretionary support for individuals facing crises for other reasons is, in England at least, a non-core local government function, typically only available until an annual budget has been exhausted and not offered at all by some local authorities.<sup>146</sup> Mainstream social assistance, too, is implicated in exposing people to destitution as they struggle to navigate a legally and structurally complex landscape of means-tested benefits, including the transition from the ‘legacy’ system to Universal Credit.<sup>147</sup> Claimants are increasingly expected to access support via a digitalised system, in an environment where face-to-face advice provision and legal assistance has been greatly depleted.<sup>148</sup> This can frustrate efforts to seek poverty relief (for example by the digitally excluded), reinforcing the need to bridge the gap in human rights protections to meet the basic needs of those who are destitute.

142 Children Act 1989, s 17(10); see *R (on the application of W) v Lambeth London Borough Council* [2002] EWCA Civ 613; [2002] 2 All ER 901; *R on the Application of PO, KO, RO v Newham LBC* n 119 above; National Assistance Act 1948, s 21.

143 *R on the Application of Othman v Secretary of State for Work and Pensions* n 53 above at [51], [56] per Collins J – Othman was barred from receiving any public funds as an individual directly connected with Osama Bin Laden or the Taliban, in accordance with Council Regulation (EC) No 467/2001 (as amended by Commission Regulation (EC) No 2062/2001(OJ L 277/25)).

144 G. Whyte, ‘Lord Ellenborough’s Law of Humanity and the Legal Duty to Relieve Destitution’ (2018) 60 *Irish Jurist* 1.

145 Universal Credit Regulations 2013 no 376, reg 116; Jobseeker’s Allowance Regulations 1996 no 207, reg 140. See Adler, n 9 above, ch 6.

146 Damon Gibbons, *The Decline of Crisis and Community Care Support in England: Why a New Approach is Needed* (London: Centre for Responsible Credit, 2017); National Audit Office, *Local Welfare Provision* (London: NAO, 2016); Iain Porter, *Nowhere to Turn: Strengthening the Safety Net for Children and Families Facing Crisis* (London: Children’s Society, 2019); Jed Meers, ‘Forms of Fettering: Application Forms and the Exercise of Discretion in the Welfare State’ (2019) 42 *JSWFL* 221.

147 Neville Harris, *Law in a Complex State: Complexity in the Law and Structure of Welfare* (Oxford: Hart, 2013); Sam Royston, *Broken Benefits: What’s Gone Wrong with Welfare Reform* (Bristol: Bristol University Press, 2017).

148 McKeever and others, n 10 above.



## TOWARDS A SPECIFIC RIGHT TO PROTECTION AGAINST DESTITUTION

It can certainly be argued that one of the suitable ambitions – if not the key functions – of human rights is to ‘protect ... the weak, the powerless, the destitute, the undeserving’.<sup>149</sup> The CJEU suggests that ‘to have one’s most basic needs catered for is ... an essential right which cannot depend on the legal status of the person concerned’.<sup>150</sup> McCrudden argues that the protection of human dignity – the ‘very essence’ of the ECHR<sup>151</sup> – requires protection from inhuman and degrading treatment and the opportunity to satisfy one’s essential needs;<sup>152</sup> Feldman that dignity ‘may generate duties on public authorities to provide assistance to those who would otherwise be left destitute’;<sup>153</sup> and Whyte that dignity overlaps with elements of both the ‘law of humanity’ and ‘Catholic social teaching’ that impose upon the state a ‘duty to promote the right to avoid destitution’.<sup>154</sup>

However, as the preceding sections highlight, the UK currently recognises no absolute legal obligation to prevent destitution; indeed, Dupre suggests that the limited extent to which the ECHR protects against destitution undermines its potential to uphold human dignity.<sup>155</sup> In particular, there is no right to a home or to financial assistance to achieve a given standard of living and no protection against expulsion to a state where one’s standard of living would be lower, as long as means of subsistence are available.<sup>156</sup> Nor, conversely, does a British national who has not been habitually resident in the UK gain access to social assistance simply because he or she is forced to return to the UK by destitution.<sup>157</sup>

Small, though real, doctrinal steps towards the recognition of the ECHR as a vehicle for some degree of social rights protection have not yet been transformed into an effective shield for people who experience destitution. Furthermore, there is a risk that such progress as has been made might grind to

149 Aidan O’Neill, ‘Judging Democracy: the Devolutionary Settlement and the Scottish Constitution’ (2004) 8 Edin LR 177, 182.

150 *Centre public d’action sociale d’Ottignies-Louvain-la-Neuve (CPAS) v Abdida* [2015] 1 WLR 3109.

151 *Pretty v United Kingdom* n 90 above at [65]; the veracity of this statement is contested in Williams, n 78 above.

152 Christop McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 EJIL 665.

153 David Feldman, ‘Human Dignity as a Legal Value: Part 2’ (spr 2000) Public Law 61, 61.

154 Whyte, n 144 above, 28.

155 Catherine Dupre, ‘Unlocking Human Dignity: Towards a Theory for the 21st Century’ (2009) 2 EHRLR 190. See also the Social Security (Scotland) Act 2018, which embeds the principle of dignity and respect: Simpson and others, n 8 above.

156 *Hussein v Netherlands and Italy* [2013] 57 EHRR SE1; *AB (Jamaica) v Secretary of State for the Home Department* [2007] EWCA Civ 1302; [2008] 1 WLR 1893; *Januzi v Secretary of State for the Home Department* [2006] UKHL 5; [2006] 2 WLR 397; *R on the application of Tabrizagh v Secretary of State for the Home Department* [2014] EWHC 1914 (Admin).

157 *R on the application of Couronne v Crawley Borough Council* [2007] EWCA Civ 1086; [2008] 1 WLR 2762. The position may be different in other states – Stendahl and Swedrup suggest that Sweden does recognise ‘positions of social destitution that in themselves trigger a public responsibility to act,’ even if the level of support available to non-nationals can be limited: Sara Stendahl and Otto Swedrup, ‘A Social Minimum for Whom? Making a Case for a Normative Pattern of Pragmatic Decency’ in Kotkas, Leijten and Pennings (eds), n 40 above, 47.

a halt. A consultation on the reform of the Human Rights Act 1998 into a ‘modern Bill of Rights’ envisages measures to simultaneously ‘mitigate the incremental expansion of rights driven by [the ECtHR]’ and ‘address the risk of domestic courts running ahead of the ECtHR jurisprudence,’<sup>158</sup> although plans to legislate are currently on hold.<sup>159</sup> Other rights that might offer more explicit protection carry too little weight in UK law. The general weakness of human rights in our domestic jurisprudence is that it can only enshrine minimal personal entitlements rather than challenge structural causes leading to distributive unfairness or the power disparities that sustain this systemic inequality.<sup>160</sup> Moreover, the minimum entitlement is clearly set at an extremely low level. Commenting on one of a series of ECHR-focused judicial reviews of the household benefit cap, Lammasniemi asks: ‘can the state ever justify inflicting extreme poverty and hunger on those who are dependent on it? The Supreme Court disappointingly answers that question in the affirmative.’<sup>161</sup> The review of case law undertaken for this article underlines the need for the UK to afford citizens and other lawful residents a statutory right to protection against destitution.<sup>162</sup> Fitzpatrick and others’ finding that 2.4 million people in the UK experienced destitution in 2019 represents a strong basis from which to argue that welfare systems designed to provide a safety net to prevent the worst excesses of poverty have not been effective enough. Given that the UK’s existing human rights framework has not prevented this state of affairs, there is a need to consider how that framework might be changed or supplemented to underpin the development of more effective social and legal protection against the worst forms of poverty. This is the gap that a statutory duty to protect against destitution might help fill.

### The historic duty and its erosion

There is historical precedent for a form of statutory protection against destitution in the UK. The historic duty to relieve destitution, flowing from the Poor Laws, was enshrined in ‘modern’ form in the National Assistance Act 1948. This imposed an explicit duty on the state (via the National Assistance Board) ‘to assist persons in Great Britain who are without resources to meet their requirements, or whose resources ... must be supplemented in order to meet their requirements’. The Ministry of Social Security Act 1966 conferred a ‘right to benefit’ upon ‘every person ... whose resources are insufficient to meet his requirements’ and gave the Supplementary Benefits Commission (SBC) authority to provide ‘benefit ... by way of a single payments to meet an exceptional

158 Ministry of Justice, *Human Rights Act Reform: a Modern Bill of Rights* CP 588 (2021) 59

159 Jessica Elgot, ‘Liz Truss Halts Dominic Raab’s Bill of Rights Plan’ *Guardian* 7 September 2022 at <https://www.theguardian.com/law/2022/sep/07/liz-truss-halts-dominic-raab-bill-of-rights-plan> (last accessed 20 September 2022). The impact of Raab’s return to the position of Secretary of State for Justice in October 2022 remains to be seen

160 See Virginia Mantouvalou, ‘Welfare-to-Work, Structural Injustice and Human Rights’ (2020) 85 MLR 929.

161 Laura Lammasniemi, ‘The Benefit Cap and Infliction of Poverty’ (2019) 41 JSWFL 368, 370.

162 McKeever and others, n 10 above.

need'.<sup>163</sup> By the 1960s the principle of 'the positive, personal and beneficent use of discretionary powers' was well established in a context where 'the public, the politicians and the administration fully accept the legitimacy of the claims [for the relief of poverty], take them seriously and give them a high degree of priority.' As a result, the 'less than legal' right to last-resort protection against extreme poverty in practice felt like something that was 'not an act of grace, but the satisfaction of a right, even if not strictly a legal right'.<sup>164</sup>

Case law reinforced the basic principle that the state had a duty to ensure, by some means, that those lawfully resident in the UK could meet their requirements by bridging any gap between the household's available resources and its needs, although it was not necessarily bound to do so through the provision of cash.<sup>165</sup> The statutory duty first began to be eroded through the exclusion of those on strike due to a trade dispute.<sup>166</sup> Regulations made in 1980 largely excluded strikers and their families from supplementary benefit.<sup>167</sup> The SBC's policy had been to only make payments to strikers or their families in very restricted circumstances, but the new Regulations mandated that no payments were to be made to a disqualified claimant, removing the only means by which a single striker could have obtained benefit at a minimal level. Further regulations permitted payments where this was the 'only means' of preventing 'serious damage or serious risk to the health or safety of any member of the assessment unit',<sup>168</sup> drawing the assessment criteria very tightly.<sup>169</sup> In Donnison's analysis this was the point where the government broke with 'a centuries old tradition that those who administer the poor laws must in last resort prevent people from starving, no matter what the cause of their plight'.<sup>170</sup> Further erosion of the scope of protection from severe poverty would follow in subsequent years. A gradually increasing range of non-UK nationals were unable to claim income support, the successor to supplementary benefit, with restrictions on access to paid employment and some other benefits introduced in the same period.<sup>171</sup> The Social Fund, introduced in 1986, provided a discretionary system of loans and payments for one-off expenses, but was abolished in 2012,<sup>172</sup> with powers devolved to local authorities in England and regional legislatures in Scotland,

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163 National Assistance Act 1948, s 4; Ministry of Social Security Act 1966, ss 4, 7; Supplementary Benefits Act 1976, ss 1, 3.

164 T.H. Marshall, 'The right to welfare' in *The right to welfare and other essays* (London: Heinemann, 1981) 89.

165 *Supplementary Benefits Commission v Jull; Y v Supplementary Benefits Commission* [1981] AC 1025, 1031 per Viscount Dilhorne; 1037 per Lord Salmon.

166 Ministry of Social Security Act 1966, s 10.

167 Supplementary Benefit (Trade Disputes and Recovery from Earnings) Regulations 1980, S.I. 1980 No. 1641.

168 Supplementary Benefit (Single Payments) Regulations 1980, S.I. 1980 No. 985, amended by Supplementary Benefit (Miscellaneous Amendments) Regulations 1980 S.I. 1980 No. 1649.

169 Supplementary Benefit (Urgent Cases) Regulations 1980, S.I. 1980 No. 1642.

170 David Donnison, *The Politics of Poverty* (Oxford: Martin Robertson, 1982).

171 Income Support (General) Regulations 1987, S.I. 1987 No. 1967, reg 21; sch 7 para 17; Asylum and Immigration Act 1996, ss 8-11.

172 Social Security Act 1986, part III; Welfare Reform Act 2012, s 70.

Wales and Northern Ireland – though crucially without any legal duty to replace the abolished national scheme or a ring-fenced budget.<sup>173</sup>

### Dimensions of a modern duty

The proposal, then, is at once an appeal for the UK to live up to at least the minimum core obligations of the human rights it has signed up to respect by ratifying the various international instruments, and to reinstate in some form the last-resort protection against destitution formerly provided for in national systems for the relief of poverty. Definitively establishing the parameters of the duty and developing an initial draft Bill will be a significant piece of work in its own right, but some key considerations and an initial appraisal of the likely pros and cons of different approaches can be presented here. In particular, it will be necessary to establish a definitive definition of destitution, identify a duty bearer and decide on the nature of the duty. At face value it seems likely that discretionary support must play some role in protection against destitution, but the extent and nature of this role also demands consideration.

At a conceptual level, the basic choice for a definition of destitution is between income- or deprivation-based models. A deprivation-based definition would imply that it is possible to have no income at all but avoid destitution as long as basic needs for shelter, food, heat, light, clothing and hygiene can be met by some means. This is the approach adopted in the asylum support system and for universal credit hardship payments. While a duty to protect from destitution so defined would not be without value, it legitimises delegation of responsibility from the state to the charitable sector to the extent that it is able to provide such essentials.<sup>174</sup> This would be problematic from a human dignity or social citizenship perspective which encompasses basic rights rather than reliance on ad hoc charitable support.<sup>175</sup> It is also vulnerable to substandard application of emergency relief duties, as the Asylum Support Regulations have demonstrated. An income-based definition, if based on income after housing costs, has the advantage of simplicity but faces the problem that what is sufficient to meet basic needs in one part of the UK might not be elsewhere. Energy costs are higher than average in Northern Ireland and remote parts of Scotland, while living costs are generally higher in greater London. The Minimum Income Standard (MIS) embodies a more ambitious vision for poverty prevention than mere protection against destitution, but in setting a single, UK-wide standard it exemplifies the methodological problem with which a statutory destitution threshold would have to contend. Proposals exist for geographical variations to

173 See Gráinne McKeever, Jonny Currie, Ciara Fitzpatrick, Kevin Higgins, Ursula O'Hare, Gerry McConville and Mark Simpson, *Independent Review of Discretionary Support* (Belfast: Department for Communities, 2022); Porter, n 146 above.

174 *R (on the Application of Limbuela) v Secretary of State for the Home Department* n 87 above.

175 Ciara Fitzpatrick, Gráinne McKeever and Mark Simpson, 'Conditionality, Discretion and T.H. Marshall's "right to welfare"' (2019) 41 JSWFL 445; Luke Graham, 'Destitution as a Denial of Economic, Social and Cultural Rights: Addressing Destitution in the UK through a Human Rights Framework' (PhD thesis, Lancaster University, 2021).

the MIS, for example to reflect the specific circumstances of island communities, and these could be equally relevant to a future destitution duty.<sup>176</sup> Alternatively there might be a more cohort-specific or outcome-based approach which would accommodate the variance in unavoidable expenditure on certain essentials at the household level, including for example the need for higher ambient temperature for people with certain impairments.<sup>177</sup>

A strength of Fitzpatrick and others' definition is that it combines deprivation and income-based models. A single adult with an income over £70 per week is still destitute if that is insufficient to meet his or her basic needs, as is a household whose basic needs are satisfied but not from its own income or savings. This definition also benefits from the legitimacy of having been developed in partnership with both experts and the general public. It therefore represents a strong candidate for adoption as the legally recognised definition, or at the very least offers a model for a definition that combines income and deprivation factors, even if there is room to debate the final list of essential items or income threshold. In practice, there is considerable overlap between Fitzpatrick and others' list of essential items and the other obvious candidates – the items recognised as essentials for the purpose of the Asylum Support Regulations 2000, social security hardship provisions and especially the minimum essential needs identified by the Committee on Economic, Social and Cultural Rights.<sup>178</sup>

The questions of the nature and location of the duty are linked. Various existing models – a duty to have due regard to the desirability of eliminating destitution,<sup>179</sup> a duty to develop a strategy to address destitution<sup>180</sup> or a duty to reduce the prevalence of destitution to a maximum level<sup>181</sup> – could play a role in mainstreaming the prevention of destitution into policy development and political accountability. However, none of these would offer the destitute individual a route to compel public authorities to provide support in his or her case, and the possibility of this kind of litigation could in itself have a mainstreaming function. Our ultimate aspiration is that the envisaged duty should encompass something resembling an individual right not to suffer destitution, although this does not automatically mean the other models have no role to play. This leaves a basic choice between a negative duty (to avoid taking action that would result in destitution) and a positive duty (to take measures to relieve destitution). A negative duty would risk offering only weak protection against destitution as it might suffer from the same shortcoming as Article 3 ECHR – the difficulty of proving that the state had *caused* destitution through its positive action, as opposed to failing to provide support with destitution resulting from a health condition, labour market exclusion, family breakdown, non-compliance

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176 See Scottish Government, *The National Islands Plan: Plana Nàiseanta nan Eilean* (Edinburgh: Scottish Government, 2019).

177 Rachel Statham, Henry Parkes and Russell Gunson, *Securing a Living Income in Scotland: Towards a Minimum Income Guarantee* (Edinburgh: IPPR Scotland, 2021).

178 Committee on Economic, Social and Cultural Rights, n 62 above – some of the essentials identified are provided free at the point of use in the UK while others mirror Fitzpatrick and others' definition.

179 Modelled on Equality Act 2010, s 149.

180 Modelled on Northern Ireland Act 1998, s 28E.

181 Modelled on Child Poverty Act 2010, part 1 (as enacted).

with benefit conditions or migration decisions. A positive duty would offer stronger protection, but could be problematic if it compelled any and every public authority with a power that could be used to prevent or relieve destitution to do so. The case law review showed that in those cases where Article 8 ECHR results in a positive duty to provide financial support, the vehicle for this is frequently a residual welfare power held by local government under the Children Act 1989 or National Assistance Act 1948, all too often following a ‘lamentable’ legal battle between authorities, neither disputing the individual’s right to support, but each arguing that the other is responsible.<sup>182</sup> Besides being unedifying, the need to await the outcome of such litigation before receiving relief would not be in the interests of a destitute household. It also seems unrealistic to look to local government as the primary duty bearer, given its already-constrained resources<sup>183</sup> and the uneven geographic distribution of destitution.<sup>184</sup> A better option might be to impose a positive duty on selected authorities – the Secretary of State for Work and Pensions and Department of Communities (Northern Ireland) in most cases, as the authorities responsible for social security; the Home Secretary in the case of certain immigrant groups. Other authorities could be subject to a negative duty – important due to the prevalence of public authorities’ pursuit of debts as a trigger for destitution.<sup>185</sup>

The nature and location of the duty will also impact on the enforceability of the duty, or perhaps more accurately the different duties. Again, it is not possible to be definitive at this point, but some fundamental features of enforcement can be considered. An individual right to protection against destitution would become another line of argument in social security or immigration appeals and judicial reviews, or in actions to recover public debt, particularly where it takes the form of a negative duty to avoid imposing destitution. A preventative mechanism that duty bearers were obliged to adhere to would create a legal and political accountability framework: legal through judicial scrutiny on whether the duty was properly considered and implemented, and political in requiring scrutiny of government policies and draft legislation to ensure compatibility with the destitution duty. This ‘mainstreaming’ approach has already been adopted elsewhere (albeit with limited success), including in equality legislation<sup>186</sup> and more recently in the devolved social security principles the Scottish government has committed itself to.<sup>187</sup> The legal enforcement mechanism would be through judicial review, a tried and tested route to accountability, that has the advantage of being able to challenge both individual and systemic problems. Its weakness, however, is that it is costly and time consuming, and while it may have greater structural impact it offers little in the way of immediate relief to those who may be destitute.

182 *RW v Sheffield City Council* [2005] EWHC 720 (Admin) at [26] per Gibbs J.

183 Jed Meers, ‘Discretion as Blame Avoidance: Passing the Buck to Local Authorities in “Welfare Reform”’ (2019) JPSJ 41; Porter, n 146 above.

184 Fitzpatrick and others (2020), n 2 above.

185 McKeever and others, n 10 above.

186 In Britain, through the Equality Act 2010, and in Northern Ireland through the Northern Ireland Act 1998.

187 Social Security (Scotland) Act 2018, asp 9 s1.

Discretion appears to have an unavoidable role to play in the granting of awards to relieve destitution. First, this is because of the variability of the cost of essential goods at regional and household level. Second, because a sum that allows access to ongoing essential needs and no more will, by definition, not cover a significant one-off (but equally essential) cost like white goods or urgent home repairs. There are advantages of discretionary support schemes in being able to respond to the immediacy of a claimant's need, providing a reliable way of getting cash or in-kind support to people quickly, although the more robust the duty to prevent destitution through a statutory right to income adequacy the less reliance on discretionary support would be needed.<sup>188</sup> There are inevitably disadvantages of discretion – most notably for our purposes in substituting an administrative power for a legal right, and concern that this last resort option would become an inevitable destination. For Titmuss, overreliance on discretion represented the complete destruction of an inherited right to social security,<sup>189</sup> but this perspective was formed long before the Human Rights Act 1998. The review of case law shows that, where mainstream provision is grossly inadequate in its generosity or coverage, a power to provide discretionary support can become a duty to do so if required to prevent degrading treatment. A duty to protect against destitution could serve to raise the baseline at which a 'discretionary' power must be exercised to wherever the destitution threshold is set, regardless of whether there is a risk of degradation. This might well remain an imperfect system of social protection, in need of reform to address the structural causes of severe poverty,<sup>190</sup> but even if reforms are effected a defined social minimum below which the state should not allow residents to fall would remain desirable.

Building a statutory duty would not mean immediate, absolute protection of UK residents from destitution. Such a protection is not constitutionally possible, since parliament – as the sovereign legislature – could always bring in primary legislation with the effect of rendering some people destitute, or indeed to whatever end it chose. Existing primary legislative provisions with this effect would remain in force. The duty would promote the interpretation of legislation in a way that is more favourable to those at risk of destitution, where the wording allows this, and might affect public authorities' use of powers that have potential to cause, prevent or relieve destitution. For example, the duty would not override the benefit sanctions regime set out in the Welfare Reform Act 2012, but could push decision makers to tread more carefully when imposing a sanction or to award hardship payments more liberally. Something resembling such a duty existed in the past; in one sense we are arguing that we should revert to what has been before, tracked from the Poor Law, through the law of humanity, through discretionary powers to the National Assistance Board and the Supplementary Benefit Commission, that allowed Marshall to

188 David Donnison, 'Supplementary Benefits: Dilemmas and Priorities' (1976) 5 JSP 337; David Donnison, 'Against Discretion' (1977) 41 *New Society* 534.

189 Richard Titmuss, 'Welfare "Rights", Law and Discretion' (1971) 42 PQ 113.

190 Luke Graham, *International Human Rights Law and Destitution: An Economic, Social and Cultural Rights Perspective* (Oxford: Routledge, 2022).

conclude that ‘the relief of the poor, the care of those who are unable to care for themselves, is among the unqualified objects of public duty’.<sup>191</sup>

A right to be protected from destitution is also a movement towards a system that protects dignity under which the state can no longer justify inflicting extreme poverty and hunger on those who are dependent on it.<sup>192</sup> A statutory duty could add value by: defining and centralising the role of the duty bearer; raising the bar on the expectation of a minimum standard of living; setting a statutory benchmark to expand the legal interpretation of what it is reasonable to expect the state to provide; reinforcing the common law duty of humanity that has been recently resurrected; and generalising protection against destitution to the whole population rather than to a specific set of circumstances.

And while our argument is for primary legislation that protects against destitution, this is merely a means to an end. The investment of energy and intellect should not be in whether social rights are better protected by human rights or in statute – those in destitution will not care and we should not either. The focus should be on the importance of providing protection now. Human rights have not yet delivered that protection but that fight for progress can still continue. Meanwhile we argue for a more direct re-implementation of the state’s duty, which might simultaneously serve as a step towards the sectoral incorporation of minimum core international obligations in respect of social rights.<sup>193</sup>

## CONCLUSION

The causes of destitution in the UK are many, with the austerity measures introduced after the financial crash of 2008 heavily implicated, particularly in key areas of social security, housing and food security. It seems almost trite to argue that there should not be individuals in the UK who are destitute by any common understanding of that concept and yet that is an argument that we have failed in law to make. Systems of social and legal protection have been weakened by successive governments’ prioritisation of personal as opposed to state responsibility, heightened by but not restricted to austerity and post-pandemic provisions that limit the financial and public resources available to those without independent means of survival. The trite argument therefore becomes turned on its head – it is no longer an obvious position that destitution should not exist but rather the obvious statement is that the state has enabled destitution by design.

We have set out the difficulties in identifying a legal definition of destitution, drawing from immigration and social security legislation that gives some specific consideration to the concept. Beyond these statutes, our original dataset of judgments provides rigorous evidence that neither the common law, the human rights framework nor sectoral welfare legislation provides effective protection against destitution and its effects of destitution, except in extreme circumstances.

191 Marshall, n 164 above, 84.

192 Gantchev, n 40 above.

193 See Boyle (2020), n 40 above.



The high threshold interpretations of ECHR provisions on inhuman and degrading treatment, respect for family life and access to other linked rights means they offer remedies for destitution rarely and to a limited extent. Other rights at face value have greater potential to offer solutions to the social, legal and economic problem of destitution, but for this to happen those rights need to carry more weight in the UK context. We argue that this can be pursued through a statutory duty to protect against destitution. We also recognise, however, that if we could litigate our way out of destitution then we would have done so by now. Given that we cannot do this in the current legal context, providing an individual right to protection against destitution must be a priority.

Any recommendation for a ‘right’ to protection from destitution will be vulnerable to Moyn’s accusation of lacking ambition, ambivalence towards inequality or acting as the ‘handmaiden of neoliberalism’.<sup>194</sup> We accept Mantouvalou’s argument that legal reform will not root out the deep structural problems that result in destitution,<sup>195</sup> and acknowledge that a bare right to protection from destitution would address the symptoms rather than the ‘root causes of social suffering’.<sup>196</sup> But, like Mantouvalou, we see a role for law in remedying the symptoms of structural injustice that law itself has created.<sup>197</sup> More urgently, when those symptoms – inability to afford basic essentials like shelter, food, heat, light and hygiene, utter social exclusion, exposure to myriad legal problems, risk of degrading treatment and denial of any measure of human dignity – are suffered by 2.4 million people, society is faced with an emergency that requires a response, even if at the minimal end of the scale. The riposte to Moyn is straightforward. The argument about legitimate and illegitimate sources of inequality, acceptable and unacceptable degrees of inequality and the role of the state in addressing poverty and inequality can and should continue.<sup>198</sup> The authors agree that greater ambition on that front would be welcome, but the destitute cannot and should not have to wait for that debate to play out before their most basic needs are met. In the present circumstances, to say that the trigger for an absolute right to support should be destitution rather than inhuman or degrading treatment already shows a level of ambition, but this need not shut the door on arguments for the ‘perpetual improvement’ of living conditions at the bottom of the income distribution.<sup>199</sup>

This article has made clear that the case for human rights as protection against destitution is not open and shut. There has been progress in utilising the poten-

194 Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, MA: Harvard University Press, 2018). See also Michael Adler, ‘The Social Minimum in the Context of Inequality’ in Kotkas, Leijten and Pennings (eds), n 40 above, 71; Malcolm Torry, ‘An Essential Dimension of the Social Minimum’ in Kotkas, Leijten and Pennings (eds), *ibid*; Goldmann, n 68 above.

195 Mantouvalou, n 160 above.

196 Samuel Moyn, ‘A Powerless Companion: Human Rights in the Age of Neoliberalism’ (2014) 77 *Law and Contemporary Problems* 147, 159.

197 Mantouvalou, n 160 above; V. Mantouvalou, ‘In Support of Legalisation’ in C. Gearty and V. Mantouvalou, *Debating Social Rights* (Oxford: Hart, 2011).

198 David Bilchitz, ‘What is the Relationship between Minimum Thresholds and Distributive Justice?’ in Kotkas, Leijten and Pennings (eds), n 40 above.

199 See Luke Graham, ‘The Right to Continuous Improvement of Living Conditions as a Response to Poverty’, Jessie Hohmann and Beth Goldblatt (eds), *The Right to the Continuous Improvement of Living Conditions: Responding to Complex Global Challenges* (Oxford: Hart, 2021).

tial of civil and political rights to protect social rights, yet such progress has been hard won and more limited than is necessary to tackle the problem. These limitations mean other solutions are required, and there is no conflict with human rights working hand in hand with other protections. Transforming the human rights arguments that dignity requires protection from inhuman and degrading treatment, and the opportunity to access one's essential needs, into statutory recognition of what the state considers to be destitution and the necessity of preventing it leads to our proposal for destitution specific legislation. We do not presume this to be the only or definitive solution, or one that is immune from sovereign parliaments removing such protections, but equally a law against destitution is no more vulnerable than any other rights protected under statute, including those protected by the Human Rights Act 1998. What it would provide, however, is a legally enshrined starting point for systemic change, building on the state's human rights commitments to offer meaningful (if still minimal) protection to those who remain most at risk of destitution.