

Destitution and paths to justice

Executive Summary

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Introduction

This report is one of a number of follow-ups to Fitzpatrick et al's (2016) ground-breaking research on destitution in the UK. Published alongside an update to the original findings on the nature, extent and experience of living a destitute existence in one of the world's richest economies, its primary task is to explore legal dimensions to destitution. This includes developing a legally-grounded definition of destitution, examining the role of legal or justiciable problems in the research participants' pathways to destitution and the role (or potential role) of legal interventions in finding a path out of destitution as well as the barriers to a legal solution.

The first of these tasks involves an analysis of primary legal sources – legislation, case law and human rights treaties ratified by the UK. The remainder draw to a large extent on the set of qualitative interviews carried out for Fitzpatrick et al's (2018) second major study of destitution, with reference also made to legal and academic work on how socio-economically disadvantaged people experience and deal with justiciable problems. The interview data produced valuable insights into the relationship between (a lack of) legal advice and representation, and pathways into and out of destitution, including the barriers to advice seeking and the limitations of legal intervention as a solution. Most interviewees had engaged in some form of advice seeking, although it should be noted that the nature of recruitment through crisis services – including advice providers – automatically excluded from the study destitute individuals who had never sought any form of support or intervention. However, the analysis also revealed rich data on the wider links between destitution and legal problems; the role of each in contributing to the other; the inextricable connection between destitute households' legal and non-legal problems and the possibility of shared solutions to legal problems and destitution.

How is destitution defined in law?

The legal sources that most explicitly define destitution centre on the establishment of a system of support for asylum seekers in the Immigration and Asylum Act 1999. The primary Act provides no more than the bare-bones definition that destitution means lacking the means of accessing adequate accommodation or other essential needs. However, a subsequent judicial review brought by Refugee Action provides an exhaustive list of things the Secretary of State and High Court collectively consider to represent essential needs. Meanwhile, secondary legislation provides for payment of a weekly allowance (currently £37.75) that is supposed to enable recipients to access those essential needs that are not provided with their housing, although the outcome of the judicial review suggests that the amount paid is not, in fact, adequate for this purpose.

Human rights law and housing legislation provide some guidance on standards of fitness, space requirements and security of tenure that under normal circumstances characterise adequate housing. What constitutes adequate accommodation for the purposes of avoiding destitution is not explicitly defined, but it is clear that these normal standards need not be met, particularly in relation to security of tenure. For recipients of asylum support, provision of accommodation includes utility bills, local taxes, basic furniture, white goods, kitchen utensils, cutlery and crockery plus cots, high chairs or sterilising equipment as required. The other items recognised as essentials by the Secretary of State and the court are:

- sufficient food
- essential toiletries
- access to primary healthcare and urgent secondary treatment
- means to travel to appointments
- means of communication with emergency services
- access to education for children and a contribution to wider socialisation costs
- suitable clothing
- household cleaning products
- nappies and formula milk
- non-prescription medication
- a minimum level of social participation.

The list of essential needs and the weekly allowance derived from the asylum support system are not necessarily recognised as a statutory destitution threshold in non-asylum contexts. Social security legislation provides a less-detailed, sparser list of essential needs, consisting of accommodation, heating, food, hygiene and clothing; lack of access to which is one of the preconditions to a hardship payment for a sanctioned claimant.

The legal definition and the JRF definition

It is not unusual for legal definitions of poverty to differ from social science definitions, and there are differences between the legal definition of destitution presented here and the expert-consensual definition from Fitzpatrick et al's study. The former is based on the things recognised by the judiciary as essential needs. While an allowance is specified by Regulations to assist asylum seekers to access these essentials, a person will only be considered destitute if unable to resource these essential needs by any lawful means. If the individual is able to secure access through charitable or family donations, for example, they would not – under the legal definition – be considered destitute. Fitzpatrick et al's definition is based on items proposed by a panel of experts and endorsed by a majority of survey participants as essential items, accompanied by an income threshold necessary to afford them. By this definition, a person is destitute if unable to access two or more essential needs or if unable to afford all essentials from his or her own resources. The public consensus is that if an individual can only access essential needs through charitable or family support then he or she is destitute.

The broad domains of destitution (shelter, food, heating, lighting, clothing, footwear and basic toiletries) are common across the legal and the Joseph Rowntree Foundation (JRF) definitions, but there are some differences between the list of essential items within different domains. The income threshold for the JRF definition is set at £70 for a single adult, £100 for a couple and £20 per child. This is higher per adult but lower per child than the level of asylum support, so that smaller households in receipt of asylum support will have an income below the JRF threshold, but those with three or more children will have an income significantly higher than the JRF threshold.

The state's duty to prevent/relieve destitution

Although the state has various *powers* to alleviate or prevent destitution, it is not always subject to a *duty* to support a destitute individual, or one at risk of destitution. The courts have acknowledged the possible existence of a common law obligation on the state to prevent destitution, but this cannot prevent Parliament passing legislation that imposes destitution on certain people. Some classes of people must be protected from destitution – notably asylum seekers under EU law. For others a duty to provide support only arises when living conditions risk violating rights protected by the European Convention on Human Rights (ECHR). The ECHR requires states to protect people from inhuman and degrading treatment (Article 3) and to respect their right to family life (Article 8). Neither article guarantees protection against destitution or confers an absolute right to any income. Both are likely to encompass some guarantee of shelter, but this need not meet the standards of adequacy that apply in the asylum support system. The ECHR also shares the weakness of the common law; that its protections can be overridden by primary legislation if Parliament wishes.

A legal perspective on routes into destitution

The pathway to destitution does not consist of a single, readily identifiable 'cause', but is characterised by a cluster of problems that contribute to and/or flow from destitution. The issues experienced can be broken down into underlying sources of vulnerability to destitution and triggers of destitution.

The underlying sources of vulnerability experienced by the destitute research participants most often related to family matters; health or disability and loss of employment; low-paid and insecure employment or labour market exclusion. Whichever source of vulnerability was experienced, the result tended to be reduced income and/or increased living costs, placing the individual at risk of destitution if one of the subsequent triggers occurred.

The triggers of destitution tended to be justiciable problems – legal problems that could have a legal resolution. Most participants experienced problems with social security benefits and unsustainable debt was also widespread. In many cases the ultimate manifestation of destitution was in housing problems, with inadequacy of income and indebtedness resulting in rent arrears, insecurity of tenure or inability to move on from unsuitable accommodation.

Social security

Apart from a small number of non-UK interviewees, all research participants were claiming income replacement and/or disability benefits at the time of or until shortly before their interview. Their experiences were frequently at odds with the ideal of social security as a rights-based guarantor of a minimum standard of living. Various interviewees had been unable to access benefits to which they seemed likely to have an entitlement, were found ineligible for benefits they thought they should be able to claim or experienced fluctuations of income linked to changes in their health, sanctions or deductions for overpayments or debts. Knowledge of possible entitlements, the application process and the basis on which decisions could be challenged was often limited. There was a strong perception that the system was arbitrary and unaccountable. The prospect of transitioning to Universal Credit (UC) was a source of dread for some, chiefly because of the prospect of a delay between application and first payment, and because of concerns about the online application and claim management process. Positive experiences were also evident: there were examples of smooth application processes, successful appeals and extremely helpful Jobcentre Plus staff. Universal Credit, too, was more eagerly anticipated by those interviewees who had cycled in and out of low-paid work, who hoped it would mean fewer interruptions of income compared to Jobseeker's Allowance.

Debt

Interviewees struggled to meet their essential needs on a very low income and many accumulated debts, through borrowing or an inability to pay rent or household bills in full. These day-to-day costs were much more often the cause of indebtedness than what might be termed 'irresponsible' borrowing. Social security issues could also result in debt as claimants were forced to seek advance payments, budgeting loans and crisis loans, or had to pay back overpayments. Some interviewees felt they had fallen victim to predatory lenders, or to housing providers who levied additional charges for furniture or certain services. Interviewees' assessment of whether their debt was a problem depended less on how much they owed, than on their ability to meet monthly repayments and how tenaciously they were pursued by creditors. Public bodies tended to be viewed as the least-forgiving lenders: more likely than others to initiate legal proceedings and less likely to agree to debt relief. Private creditors varied dramatically in their treatment of debtors, but water and energy suppliers were often praised for their flexible and supportive approach to dealing with arrears. Unfortunately, customers with pay-as-you-go meters could find it harder to reach a favourable arrangement, as a portion of any credit added to the meter would automatically be deducted for repayment of arrears. Ironically, recent attempts to pay off arrears could also disqualify customers from debt-reduction schemes.

Debt was not always recognised as a legal issue, resulting in many interviewees attempting to negotiate with creditors with limited support and varying degrees of success. Overall, this was an area in which advice seeking was relatively common, although normally this only occurred at a crisis point. The most favourable outcome, achieved by a number of interviewees, was the conclusion of a debt relief order (DRO), although this was not necessarily a universally-available option because of the associated charge. Further, the extent to which a DRO improved the situation could be dependent on creditors' willingness to be covered by it; certain key creditors, notably local government, were often unwilling.

Housing

Housing is recognised as an essential need – arguably *the* essential need – in both the JRF definition and the legal definition of destitution. Housing problems, including rent arrears, unfitness, risk of eviction and homelessness, were equally central to research participants' experiences of destitution. Inability to afford adequate accommodation tended to flow from insufficient social security benefits and the prevalence of rent arrears meant

there was also a close connection between housing issues and debt. Street and hidden homelessness had been experienced by some interviewees. Falling back on friends and relatives was thought to be becoming less feasible due to social security reforms that discourage housing benefit claimants from renting accommodation with a spare bedroom.

The same set of social security reforms lay at the heart of some interviewees' affordability problems, with both social and private tenants penalised for under-occupancy. Securing smaller accommodation could be difficult due to lack of availability, and might mean moving to a different local government district and losing contact with support or advice workers. Discretionary Housing Payments were not always available and sometimes covered only a small fraction of the shortfall in rent. Affordability was not the only serious housing concern: some interviewees described ill-treatment by landlords as well as living in properties they considered patently unfit for human habitation, a perspective confirmed in two cases by environmental health intervention.

Social security and destitution

The prevalence of social security problems as a trigger for destitution means there is merit in more closely examining some of the key benefit-related issues that played a role in pushing research participants towards destitution. Benefit delays and sanctions were, respectively, experienced by 29% and 19% of Fitzpatrick et al's (2018) survey respondents and by a number of interviewees. These income shocks could come on top of existing vulnerabilities resulting from subsistence on out-of-work benefits whose level barely exceeds the JRF destitution threshold for an adult and has fallen in real terms since 2012, compounded by cuts to housing and (more recently) child-related benefits. While it is not suggested that destitution is intentionally designed into the social security system, the interviewees' experiences provide ample evidence that protection from destitution is not a given.

Between 16% (income-based Employment and Support Allowance) and 44% (income-based Jobseeker's Allowance) of all people who are potentially eligible for a means-tested benefit in the UK fail to claim the benefit. While reasons can be complex and varied, there was strong evidence that research participants did not claim income replacement or disability benefits because they did not realise they might be eligible. System prompts to encourage individuals to apply for particular benefits relevant to their circumstances either did not exist or were not reliable.

There is a clear role for expert advice in helping people understand their potential social security entitlements and to navigate the application process. The length of time taken to complete a form could be problematic for claimants with no home internet connection, who had to contend with time-limited computer access at the library or across an unreliable mobile connection. Frequent reassessments and re-applications, along with fluctuations in circumstances necessitating moves between different benefits could lead to claimant anxiety and delayed payments. These problems came on top of existing financial precarity and the work of coping with an often-chaotic life, so that interviewees could lack the cognitive bandwidth to deal with their social security problems. External advice could be of great help in overcoming the various barriers to making a successful claim, but was often sought only as a last resort. Where claims were unsuccessful, it was not always clear why decisions to appeal (or not) were taken. Research on social security tribunals indicates that there is merit in appealing, with success rates around 70% for some benefits, and that appeals are more likely to succeed if the applicant attends an oral hearing with expert support.

Given the potential for sanctions and delays to trigger destitution, there is a particular need for advice and support here. Interviewees lacked awareness of why benefit payments had been interrupted and what could be done to avoid or resolve this. While there were examples of supportive practice by Jobcentre staff seeking to help claimants who struggled to meet their jobseeking obligations, there was evidence of inconsistencies within the system, compounding claimants' lack of awareness of their rights and obligations.

Legal support for problems of destitution

An individual's vulnerability to a cycle of legal problems mirrors the vulnerability to the cluster of destitution problems that our interviewees faced: debt, ill health, labour market exclusion, and housing. There are identifiable intervention points that could conceivably assist with many of the difficulties in resolving the problems faced by our interviewees. These intervention points sit alongside recognisable patterns of advice-seeking behaviour in the general population predicated on lack of awareness of legal rights or assistance to enforce them. For

interviewees, these barriers were exacerbated by the immediate need to focus on the consequence rather than cause of the problem. The need to prioritise survival strategies meant interviewees were unable to adopt strategic approaches to problem resolution.

Interviewees often relied on self-help, but this was limited in its effectiveness and could be expensive and time consuming. Where interviewees sought external help, they faced barriers in identifying and accessing advice providers who could assist with their problems. Interviewees reported difficulties in getting access to advice organisations, which had limited capacity both in terms of being able to provide appointments or support and in relation to the range of legal problems that interviewees experienced. Access was also limited by geographical and economic isolation as well as digital exclusion, which multiplied further when the necessary advice sources are not equipped to assist in overcoming an individual's emotional fatigue and lack of legal capability. The advice landscape in England and Wales has faced particular challenges, due to the significant reductions in funding under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which was intended to deliver greater efficiency in the justice system. There has been a move away from funding face-to-face advice and an expansion of telephone advice, reducing the physical presence of advice organisations; however, this shift in provision has not been matched with the development of a public awareness campaign and therefore the concerns about poor legal knowledge, evidenced in this research, are intensified by the emergence of 'advice deserts' and limitations on the services that interviewees accessed. This has meant that early intervention for justiciable issues is less likely, which in turn means that it becomes more difficult to avoid the triggers for destitution.

The absence of a visible and coherent legal services market meant that the pathway to advice for interviewees involved convoluted routes leading to and from the Jobcentre, food bank, Housing Association, council, social worker and GP, indicating the need for a multiplicity of advice provision, responsive to where the individual's advice seeking is focused. Individuals were referred to, or came across, a range of advice services, from voluntary to private sector, but there was very limited evidence of legal aid being used to finance legal resolution, and a worrying perception among interviewees that legal aid no longer existed. There were some concerns about the quality or appropriate 'fit' of advice provision, particularly in relation to online advice. Since destitute individuals' legal issues form part of, and are inseparable from, a wider cluster of problems, a legal intervention is not, in itself, likely to be a solution. Nonetheless, there is potential for legal and other forms of expert advice and support to help individuals experiencing destitution to improve their situation, particularly in the key fields of social security, debt and housing.

Case studies on destitution and paths to justice

The two case studies drawn from our interviews demonstrate how the time, energy and cognitive bandwidth required to survive destitution and the associated cluster of problems can leave little scope for addressing the problems, or even recognising those that might have a legal solution. For each interviewee, social security problems represented the most immediate trigger of destitution. Some of these problems flowed from policy design – curbs on housing benefit entitlement. Others related to the administration of the system – the operation of the sanctions regime; the difficulty of proving where children are permanently resident and the deduction of considerable debt repayments from an already-low income. Both 'Jennifer' and 'Rebecca' had sought legal or other specialist advice on some of their problems, with some success in bringing about a resolution. However, the fragmented nature of advice provision – with providers limited to assisting with certain issues, clients in a defined geographical area or certain classes of people – limited the possibility of really engaging with the range of problems in the interviewees' clusters. For the most part, it remained the responsibility of the individual to determine that s/he had a problem that might call for expert advice and to identify an organisation that might be able to assist.

Key recommendations

1. A statutory duty on destitution

Primary legislation should establish a clear definition of destitution and a duty on public authorities to protect all persons lawfully present in the UK from destitution.

The huge diversity of problems that contribute to, flow from and are entrenched by destitution demonstrates that the response to destitution needs to be a holistic one across the key domains of destitution (shelter, food, heating, lighting, clothing, footwear and basic toiletries). The first recommendation addresses the need for a

shared understanding of what destitution is and a common purpose of preventing it across government and the public sector. There is already some shape to a legal definition, primarily informed by the asylum support regime and the social security regulations, but adopting the JRF definition has the advantage of having been tested with the public and according with the views of experts. Providing a legal frame for something that has already achieved public consensus makes best use of the law as a normative tool, to embed cultural change in society and across government. This report therefore recommends that the JRF definition of destitution is given statutory force.

2. Resourcing legal interventions

Resources should be targeted on the potential for justiciable problems to be identified by co-locating advice provision with crisis and support services, and resourcing advisers to address the multiple causes of justiciable problems that trigger destitution.

To make a legal definition more meaningful, individuals need to be able to enforce their right to be free from destitution. This requires access to justice, which itself is frustrated by the experiences of destitution. The interviewees in our study experienced a wide range of difficulties, rather than suffering a single justiciable problem; pointing to the need to understand and respond to problem clusters. Enabling advisers to identify the multiplicity of problems destitute individuals have, and to support the resolution of these interconnected issues, would facilitate more effective interventions, dealing with both cause and consequence. Given that the problems most likely to trigger destitution are in social security, housing and debt, there should be a partial reinstatement of legal aid to cover these issues. This would resource legal and voluntary sector advisers to at least tackle these core problem clusters, and deal with the financial and housing insecurity that push individuals into destitution.

3. Access to social security

The government should be placed under a positive duty to ensure that individuals are receiving the social security benefits they are entitled to.

A positive duty would require governments to address the barriers within the social security system that inhibit legal entitlements being awarded; identify the extent of benefit underpayments; the reasons for this; and actions that will be implemented to improve uptake. Overall, experiences of the social security system point to a general need for citizens to better understand their social rights, alongside a specific need for expert assistance in navigating a complex and bureaucratic system to realise those rights. Applying the 'polluter pays' principle, a case can be made that the government department with responsibility for social security should part-fund the consequential advice provision to assist individuals to navigate the social security system. This should include a government-led nationwide campaign designed to build awareness of the new eligibility criteria, processes and conditions attached to claiming Universal Credit, as well as legal capability. The government should also consider how to guarantee a minimum income floor beneath which benefit payments will not be cut, either by sanctioning in proportion to that income floor or making automatic provision for hardship payments unless it can be established that an individual will not be affected disproportionately by the reduction in their income.

Emerging recommendations on debt and housing

In relation to debt, the main recommendation emerging is to provide time for debtors to negotiate realistic repayment plans with debt providers, funding advice to support this and including means of managing the costs both of a debt relief order and bankruptcy.

For housing, a review of the operation of housing-related benefits should be undertaken to determine the appropriateness of aspects of policy including the social sector size criteria ('bedroom tax'), payment of the benefit to the tenant rather than the landlord and the level of the local housing allowance. This report also endorses JRF's recommendation (2018) that there are comprehensive housing advice services covering all tenures.

Further research

The problem of destitution is an emerging area of research that merits further development. There are a number of critical areas that could be progressed, based on the research from this report and from the existing research by Fitzpatrick et al, looking particularly at the further fusion of the social policy research on destitution and empirical legal research on access to justice. Four distinct proposals are suggested to move this agenda forward:

1. A legal needs survey capable of exploring the extent to which legal needs might manifest as triggers for destitution.
2. Further analysis of the original data set created by Fitzpatrick et al for the 2015 interim report on destitution to inform the drafting of primary and/or secondary legislation to implement a duty to prevent destitution, drawing on the existing public consensus that has been established.
3. A qualitative study of why individuals vulnerable to destitution do not claim social security benefits to which they may be entitled, and a parallel study to understand why claimants do not dispute decisions when their claim is refused.
4. Qualitative research with decision-makers, advisers and welfare-to-work providers to determine what factors are taken into account when deciding whether to increase a claimant's conditional requirements and the triggers that lead to the referral or imposition of a sanction.

That a report on destitution needs to be written is itself a warning that current social support structures are not working. There is much that can be done to assist individuals facing destitution and this report highlights the many justiciable issues that arise from the circumstances of destitution, and the various intervention points where individuals could be assisted to escape destitution. Critically, however, current human rights protections do not go far enough: statutory protection is needed, and this report provides ample empirical evidence for this assertion. A failure to act at the point of destitution will inevitably lead to the UK breaching its domestic human rights obligations; the distance between current levels of destitution and inhuman or degrading treatment under Article 3 ECHR is little more than a continuing deterioration of destitute circumstances. The fact that destitution has been recognised by public consensus as being unacceptable underlines what should be a logical position: that the state should be obliged to provide the conditions under which people can satisfy their essential needs.

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