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Luke D. Graham

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Charity and statutory powers to alleviate destitution

Luke D. Graham *

1. Introduction

Most social and economic rights, as contained in the international human rights treaties, are not directly justiciable in the United Kingdom. Despite this, individuals may be able to enforce legal entitlements to the substance of some of those rights via domestic courts. In relation to those social and economic rights which relate to destitution, such enforcement is possible because the Westminster Parliament has legislated to imbue public authorities with a range of statutory powers which, when arising, require them to make provision to alleviate destitution.[1] When these powers arise they form the basis for domestic statutory – as opposed to international human – rights to the substance of a range of social and economic rights.[2] These powers may thus satisfy the international obligations flowing from some social and economic rights.

However, it is common in the practice of public authorities, and now well-accepted in the case law stemming from the judicial review of this practice, to hold that individuals who can access necessities such as shelter via charity are not destitute.[3] Accordingly, the statutory powers to alleviate destitution do not arise. In this way, the availability of charity serves

*Senior Lecturer in Public Law and Human Rights, University of Manchester, UK. Email: luke.graham@manchester.ac.uk

1 As will be examined in section 3, this statutory regime applies to only some categories of persons

2 This is because destitution may be defined as the non-realisation of a range of social and economic rights. See Luke D Graham, *International Human Rights Law and Destitution: An Economic, Social and Cultural Rights Perspective* (Routledge 2022). See also the text accompanying (n 36) – (n 41).

3 The term 'charity' is used narrowly, in this contribution, as shorthand to represent the provision by non-public bodies of the goods and/or services to which Parliament has conferred statutory rights. As will become clear, the case law illustrates that it is not simply registered charities who provide charity so defined.

a gatekeeping function which limits legal entitlements and prevents statutory powers from arising. This is despite the fact that reliance on charity to meet basic needs has been central to historical understandings of destitution. Thus, there is a mismatch between how destitution is understood ordinarily and how it is understood in the context of these statutory regimes. Resultingly, legal entitlements to alleviate destitution are not available to all of those who may be eligible for support under these statutory regimes and experience destitution in practice. This contribution examines the consequences of this through focusing on the relationship between charity and statutory powers to alleviate destitution. It illustrates how charity displaces statutory entitlements and further that the legislative framework underpinning, and the standard of review of, these powers allow public authorities to elide obligations which would otherwise arise if not for charity.

This interaction between statutory powers to alleviate destitution and charity speaks to the very definition of destitution and the current practice of public authorities represents a more restrictive definition which limits statutory entitlement. Recent calls to introduce broader destitution-specific legislation to expand legal protection against destitution to all,[4] identify that before establishing such a duty it is '*necessary to establish a definitive definition of destitution*, identify a duty bearer and decide on the nature of the duty'.[5] Consequently, this contribution clarifies the interaction between charity and existing statutory powers to alleviate destitution to inform attempts towards definitively establishing the parameters of, and thus facilitating the introduction of, any broader destitution specific legislation.

Whilst this contribution is focused primarily on the judicial review of statutory duties in domestic law, examining these duties alongside the international obligations flowing from social and economic rights serves a triple purpose. First, even though international human rights law is not generally binding in domestic law,[6] it 'may be a valuable resource for the courts in interpreting binding law. That is, it is a form of soft law which is of persuasive value in interpreting the law'.[7] Secondly, and relatedly, this allows the normative value of international human rights law to be brought to bear in support of the proposition that charity should not prevent statutory powers to alleviate destitution from arising.[8] Or in other words, not only can human rights law influence the interpretation of statutory duties but, also, such interpretations would support a less restrictive definition of destitution which disregards the availability of charity when determining whether entitlements arise. Thirdly, the normative value of human rights law can also be turned towards advocating for legislative reform to address the restrictive practice of public authorities under the existing statutory destitution frameworks.

4 Mark Simpson, Gráinne McKeever and Ciara Fitzpatrick, 'Legal Protection Against Destitution in the UK: The Case for a Right to a Subsistence Minimum' (2023) 86 *The Modern Law Review* 465.

5 *Ibid*, 491. *Emphasis added.*

6 This of course refers to the international human rights treaties. The European Convention on Human Rights is given domestic effect under the Human rights Act 1998.

7 Tom Obokata and Rory O'Connell, 'Ambition, Achievement and Potential: The UK and the Universal Declaration of Human Rights at Sixty' (2010) 14 *The International Journal of Human Rights* 394, 397.

8 See the text accompanying (n 36) – (n 59).

Section 2 introduces – and outlines the United Kingdom's charitable tradition in responding to – destitution. It identifies that charity has a long history of displacing statutory entitlement to destitution relief, before it is then argued that reliance on charity to attain the substance of social and economic rights in this context is incompatible with human rights-based obligations. Section 3 proceeds to outline how the statutory framework embeds a role for charity which serves to prevent statutory powers arising. Following this, section 4 examines the judicial review of public authority determinations of destitution. As this contribution will demonstrate, both the statutory framework and the standard of review of the exercise of executive power mean that in practice statutory powers will not arise when charity is available. The situation is cyclic. Statutory duties do not arise because charity is available. There is a need for charity because statutory duties do not arise. Thus, within the current legal framework charity contributes to its own need. Section 5 turns its gaze towards breaking this cycle. Whilst advocating for legislative reform, this contribution also advocates for charity to take an active and extra-legal role in unpicking its own seemingly embedded part in displacing statutory entitlements. One such extra-legal approach is for charity to undertake a strategic withdrawal from providing support to those who would Otherwise have Recourse to Public Funds (ORPF).

2. Charity and the non-realisation of social and economic rights

Charity has long formed a part of British tradition.[9] It has also long been central to poverty – and thus destitution – alleviation in the United Kingdom. Craig outlines the great deal of 'legislative activity' concerning poverty throughout the latter half of the sixteenth century in the build-up to the Poor Relief Act 1601.[10] This Act 'laid the foundation for subsequent legislation'.[11] It 'reshaped' the Elizabethan Poor Laws,[12] and set the 'basic legal structure for poor relief in eighteenth-century England and Wales'.[13] For some 300 years these Poor Laws (as amended) defined the state's response to impoverishment and indirectly the enjoyment of what we today consider to be social and economic rights. Charity was a key feature of this system. Indeed, before.

> the modern welfare state, no body of legislation was of greater importance to the average Englishman than the laws for the maintenance and relief of the poor. For the bulk of the population they represented a constant and often considerable burden in local taxes; for the poor they were, *apart from private charity*, the sole source of relief.[14]

9 Kathy Evans, 'Big Society in the UK: A Policy Review' (2011) 25 *Children & Society* 164, 164–5.

10 Paul Craig, *English Administrative Law from 1550: Continuity and Change* (Oxford University Press 2024) 47.

11 *Ibid*.

12 *Ibid*, 115.

13 Sarah Lloyd, *Charity and Poverty in England, c. 1680–1820* (Manchester University Press 2009) 19.

14 Nicholas c. Edsall, *The Anti-Poor Law Movement* (Manchester University Press 1971) 1. *Emphasis added.*

Here, charity formed part of what Innes labelled the 'mixed economy of welfare'.[15] Hindle identifies '"legal charity" or formal welfare provided by the parish' as part of this mixed economy.[16] Informal, non-legal (that is to which there is no legal entitlement), private charity co-existed alongside the official legal framework. This close connection between poor relief and charity persisted throughout the seventeenth century.[17] So too, it remained an important source of assistance in the eighteenth century, particularly for vulnerable groups.[18] The reforms of 1834 did not meaningfully respond to this interrelationship meaning that, '*at the official level*, early Victorian poor relief and charity tended to be separate spheres'.[19] The Poor Law Amendment Act did little to redress this.[20] Whilst 'the strategy adopted in 1834 envisaged a tripartite coalition of workhouse, charity and self-help'[21] problems arose from the lack of co-ordination between the legal framework and charity. Conflation of charity with poor relief hindered the effectiveness of the system and 'contributed to the relentless rise in poor law expenditure'.[22] These sentiments were expressed by Florence Nightingale who, in an 1866 article,

> quoted 'with approval an unidentified French 'administrateur': "we cannot understand your English laws - you have a Poor Law - you pay rates [to relieve poverty]..And then you subscribe to private charities *to take your paupers out of the power of the Poor Law*. If you do have one, why do you do the other? Would it not be cheaper to see that the two work in the same direction".[23]

Not only does this illustrate sentiments related to cost efficiency but, also, it indicates that charity was limiting access to the legal framework of support by removing individuals from the Poor Law.[24] At the same time charity 'undermined and compromised' the legal framework of poor relief.[25] Because this lack of co-ordination between the legal regime and charity undermined policy objectives, Poor Law reformers sought to

15 See Joanna Innes, 'The "Mixed Economy of Welfare" in Early Modern England: Assessments of the Options from Hale to Malthus (c. 1683-1803)', *Charity, Self-Interest And Welfare In Britain* (Routledge 1996) 139–80.

16 Steve Hindle, '"Not by Bread Only"? Common Right, Parish Relief and Endowed Charity in a Forest Economy c. 1600-1800' in Steven King and Alannah Tomkins (eds), *The Poor in England 1700-1850: An Economy of Makeshifts* (Manchester University Press 2003) 41.

17 EM Leonard, *The Early History of English Poor Relief* (Second, Frank Cass & Co Ltd 1965) 205.

18 Sarah Lloyd, '"Agents in Their Own Concerns"? Charity and the Economy of Makeshifts in Eighteenth-Century Britain' in Steven King and Alannah Tomkins (eds), *The Poor in England 1700-1850: An Economy of Makeshifts* (Manchester University Press 2003) 120.

19 Anthony Brundage, *The English Poor Laws 1700–1930* (Palgrave 2002) 113. *Emphasis added.*

20 Poor Law Amendment Act 1834.

21 David Vincent, *Poor Citizens: The State and the Poor in Twentieth-Century Britain* (Longman 1991) 26.

22 David Englander, *Poverty and Poor Law Reform in 19th Century Britain, 1834–1914* (Addison Wesley Longman Limited 1998) 21.

23 Cited in Brundage (n 19) 114. *Emphasis added.*

24 As will be examined in the following sections, charity continues to serve a gatekeeping function which limits access to entitlements under the statutory regime.

25 PF Aschrott, *The English Poor Law System Past and Present* (Second, Knight & Co 1902) 89–90.

address the 'problem of charitable giving'.[26] They did so by seeking 'to co-ordinate the work of both sectors'.[27] In 1869, the President of the Poor Law Board issued the *Goschen Minute* which 'called for close cooperation with organised charity'.[28] Consequently, the *Society for Organising Charitable Relief and Repressing Mendicity*, which 'sought to prevent duplication, waste and inefficiency in the distribution of charitable resources', was formed.[29]

As this brief overview of the Poor Law regime illustrates, before the introduction of the modern welfare state, charity was a significant 'part of the welfare patchwork'.[30] This overview indicates also that charity has a long history of inhibiting the exercise of statutory frameworks designed to alleviate poverty. In the 1960s, the view prevalent amongst historians of the Poor Laws was that 'the welfare state aside from poor relief meant 'charity' and that charity was a sham which did little to alleviate poverty'.[31] Such perceptions go some way to explaining why the post WW2 settlement and the welfare state envisioned a reduced role for charity and an increased role for the state.[32] The National Assistance Act 1948 terminated, and replaced, the Poor Law.[33] It established a National Assistance Board with a duty to 'to assist persons in Great Britain who are without resources to meet their requirements, or whose resources (including benefits receivable under the National Insurance Acts, 1946) must be supplemented in order to meet their requirements'.[34] This represented the state undertaking responsibility for the alleviation of destitution and has been identified as 'historical precedent for a form of statutory protection against destitution in the UK'.[35]

This mid twentieth century shift away from charitable responses to poverty in the United Kingdom overlapped with the development of international human rights law. Both this domestic regime and international human rights law focused on legal entitlements to poverty alleviation as opposed to centring a role for charity. For human rights, this is because poverty represents 'a denial of many established and substantive rights'.[36]

26 Brundage (n 19) 112.
27 Englander (n 22) 21.
28 Brundage (n 19) 114; 'it is of essential importance that an attempt should be made to bring the authorities administering the poor laws, and those who administer charitable funds, to as clear an understanding as possible' as quoted in Aschrott (n 25) 90.
29 Englander (n 22) 21–22. It must be noted that historians doubt the effectiveness of this body in achieving its objectives.
30 Stephen King, *Poverty and Welfare in England 1700–1850* (Manchester University Press 2000) 217.
31 Steven King and Alannah Tomkins, 'Introduction' in Steven King and Alannah Tomkins (eds), *The Poor in England 1700-1850: An Economy of Makeshifts* (Manchester University Press 2003) 3.
32 Writing in 1920, the Prime Minister whose government introduced the National Assistance Act 1948, Clement Atlee, opposed reliance on charity to address poverty. See Clement Atlee *The Social Worker* (G. Bell & Sons 1920).
33 National Assistance Act 1948, s.1.
34 *Ibid*, s.4.
35 Simpson, McKeever and Fitzpatrick (n 4) 489.
36 Amanda Cahill-Ripley and Luke D Graham, 'Using Community-Based Truth Commissions to Address Poverty and Related Economic, Social and Cultural Rights Violations: The UK Poverty Truth Commissions as Transformative Justice' [2022] *Journal of Human Rights Practice* 225, 227.

In light of this, the terms 'poverty' and 'extreme poverty' carry a distinct meaning in international human rights law.[37] International human rights law does not, however, formally distinguish destitution from poverty or extreme poverty. Whilst the experience of destitution may in limited circumstances constitute a violation of civil and political rights,[38] destitution is best understood as the non-realisation of social and economic rights. A social and economic rights-based understanding of destitution has been proposed which distils the 'substantive needs highlighted by existing [non-human-rights-based] definitions of destitution' to define destitution more narrowly than the human rights-based understanding of both poverty and extreme poverty.[39] This understands destitution as the *inadequate* realisation of the right to an adequate standard of living.[40] At the same time, because the adequate realisation of the right to social security would ensure the adequate realisation of the right to an adequate standard of living, destitution also represents the inadequate realisation of the right to social security.[41] An assessment of the adequacy of the realisation of these rights considers *how* individuals access the substance of rights. Historically, the term destitution has been used to convey a specific meaning. One to which reliance on 'public and private charities' to meet basic needs is central.[42] This view has been echoed in large scale participatory approaches to defining destitution where 'a majority of the public took the view that people who were only able to meet their essential living needs with help from charities, for example, should be considered destitute'.[43] Consequently, this human rights-based understanding of destitution distinguishes destitution from poverty and extreme poverty in part by also centralising a reliance on charity to meet essential needs. It follows that charity is incapable of meeting the United Kingdom's international obligations stemming from the social and economic rights which, if adequately realised would, prevent destitution.

37 For a detailed overview of how these terms have been understood in international human rights law see Luke D Graham, 'The Right to the Continuous Improvement of Living Conditions as a Response to Poverty' in Jessie Hohmann and Beth Goldblatt (eds), *The Right to the Continuous Improvement of Living Conditions: Responding to Complex Global Challenges* (Hart Publishing 2021) 65–85, 67–74.

38 Articles 2, 3 and 8 have been identified by O'Cinneide as the principal gateways to challenging destitution via the ECHR. See Colm O'Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights' (2008) 5 *E.H.R.L.R* 583; See also *R v Secretary of State for the Home Department ex parte Adams, Tesema and Limbuela* [2005] UKHL 66; *MSS v Belgium and Greece* [2011] Grand Chamber of the European Court of Human Rights Application no. 30696/09; For an overview of how vulnerability has been used to limit Article 3 based claims against destitution see Luke D Graham, 'The Gatekeeping Function of Vulnerability in Public Law and Human Rights' [2024] *Public Law* 228.

39 Graham, *International Human Rights Law and Destitution: An Economic, Social and Cultural Rights Perspective* (n 2) 50.

40 Graham, 'The Right to the Continuous Improvement of Living Conditions as a Response to Poverty' (n 37) 52–71. *Emphasis added.*

41 Graham, *International Human Rights Law and Destitution: An Economic, Social and Cultural Rights Perspective* (n 2) 71–74.

42 Partha Gangopadhyay, Sriram Shankar and Mustafa A Rahman, 'Working Poverty, Social Exclusion and Destitution: An Empirical Study' (2014) 37 *Economic Modelling* 241, 241.

43 Suzanne Fitzpatrick and others., 'Destitution in the UK 2016' (Joseph Rowntree Foundation 2016) 2.

That is not to suggest, however, that human rights-based obligations can never be met through provision by non-state actors (such as charities). Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights obliges states to 'take steps' to 'the *maximum of its available resources*' towards 'achieving progressively the full realization of the rights recognized in the present Covenant *by all appropriate means*'.[44] The Committee on Economic, Social and Cultural Rights has construed the term 'resources' broadly.[45] This goes beyond financial resources alone and can include provision by non-state actors. In a monograph focused on the role of social institutions in the implementation of human rights-based obligations, Fraser explains that there is a legitimate role for non-state actors and that states are 'obliged to facilitate' the participation of non-state actors in the realisation of human rights.[46] This does not, however, 'displace or relieve the state of any of its obligations'.[47] Rather, the state must facilitate and regulate the actions of non-state actors towards realising human rights whilst also 'filling any gaps'.[48] Fraser's work, however, focused on 'locally embedded and *culturally legitimate* social institutions'.[49]

In the context of the United Kingdom, a reliance on charity to meet essential needs does not *adequately* realise the right to an adequate standard of living. The adequacy of the realisation of social and economic rights is widely assessed by reference to availability, affordability, accessibility, acceptability, and quality (4AQ). In the context of destitution in the United Kingdom, charity indicates failings under each element of the 4AQ framework.[50] Of relevance to the theme of *cultural legitimacy*, there is much stigma and shame associated with the receipt of charity to meet essential needs.[51] Such shame and stigma is so great that 'many people will exhaust all options, such as relying on informal networks, before turning to charity'.[52] This speaks to the *acceptability* of charitable provision and is one indicator that a reliance on charity to meet essential needs in the United Kingdom is not *culturally legitimate*.

Beyond unacceptability, charity lacks sufficient capacity to respond to destitution in the United Kingdom. This speaks to the issue of *availability*. Formal charity, like

44 Article 2 (1) International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted on 16 December 1966, A/RES/2200). *Emphasis added.*

45 See Committee on Economic and Social Rights CESCR, 'General Comment No.3: The Nature of States Parties' Obligations' (United Nations 1990) U.N. Doc. E/1991/23 3.

46 Julie Fraser, *Social Institutions and International Human Rights Law Implementation: Every Organ of Society* (Cambridge University Press 2020) 158–9.

47 *Ibid,* 159.

48 *Ibid.*

49 *Ibid,* 12. *Emphasis added.*

50 For a detailed overview see Graham, *International Human Rights Law and Destitution: An Economic, Social and Cultural Rights Perspective* (n 2) 26–31.

51 See Chapter 7 of Kayleigh Garthwaite, *Hunger Pains: Life Inside Foodbank Britain* (Policy Press 2016) 135–48.

52 Kathryn Machray and Kate Haddow, '"Lads Are Daft Though, Aren't They?" Exploring Men's Narratives of Mitigating Food Insecurity and Navigating Food Aid' 388 <https://bristoluniversitypressdigital.com/view/journals/jpsj/32/3/article-p382.xml> accessed 23 January 2025.

informal charity such as familial support, is reliant upon donations from others. When considered in the context of economic crises this is paradoxical. In such crises – like the cost-of-living crisis – the depth and scale of poverty intensifies.[53] In the absence of adequate state sources of support, this intensification of poverty increases demand for, whilst at the same time reducing the supply of, charitable support. As an example, it has recently been reported that many charities are 'struggling to balance the books in the face of rising costs and demand, and declining donations and contract income'.[54] Charity is therefore a non-resilient approach to destitution alleviation, one which increases societal vulnerability towards – and within – economic crises. The precariousness of charitable provision is further illustrated by the case of *R (on the application of OK and others)*.[55] Here, the Red Cross had been exceptionally funding hostel accommodation for the claimants, a family with children. The hostel, not the Red Cross, ceased to accommodate the children 'because of the fact that a person with mental illness' was to be accommodated at the hostel.[56] Following the claimant's exclusion from the hostel, the Red Cross refused to fund alternative accommodation for the claimants meaning that the claimants had nowhere else to go.[57] The claimant's had no right to charitable support. They could not use legal avenues to require the Red Cross to continue to support their accommodation needs. Nor could, nor should, a charity be compelled to do so.

This is illustrative of the precariousness of charitable provision which in turn flows from the fact that charity 'involves neither a right of the individual nor a duty imposed on the state'.[58] Whereas rights are 'legally guaranteed entitlements',[59] there is no legally guaranteed entitlement to charity. The recognition of this fact is not new. The lack of legal entitlement to charity, in contrast to legal entitlement stemming from statute, featured in discussions surrounding the Poor Laws with beneficiaries of charity not exercising a 'much-debated right to assistance'.[60] Based on such sentiments, some argue that there would be no need for charity if the state were fulfilling its obligations.[61] Under such an account, charity represents a 'deflection, by the state, of its responsibilities

53 Luke D Graham, 'Poverty: The Cost-Of-Living-Perma-Crisis and the UDHR' [2024] *E.H.R.L.R* 30, 33.

54 Patrick Butler, 'Counselling Charity Relate Goes into Administration' *The Guardian* (2 December 2024) <https://www.theguardian.com/society/2024/dec/02/counselling-charity-relate-goes-into-administration> accessed 4 December 2024.

55 *R (on the application of OK and others) v Barking and Dagenham* [2017] EWHC 2092 (Admin) [6].

56 *Ibid.*

57 *Ibid.*

58 Asbjorn Eide, 'Adequate Standard of Living' in Daniel Moeckli and others (ed), *International Human Rights Law* (OUP, 3rd edn, 2018) 186–207, 202.

59 Alice Donald and Elizabeth Mottershaw, 'Poverty, Inequality and Human Rights: Do Human Rights Make a Difference?' (Joseph Rowntree Foundation 2009) 13.

60 Lloyd (n 13) 31–32.

61 Therese Boje Mortensen, 'NGOs as Child Rights Implementers in India: How NGO Workers Negotiate Human Rights Responsibility in "partnership" with a Neoliberal and Restrictive State' (Lund University 2023) 3 <https://lucris.lub.lu.se/ws/portalfiles/portal/163951266/Therese_Boje_Mortensen_avhandling_utan_signatur_.pdf>.

regarding the realisation of' social and economic rights.[62] A reliance on charity to attain the basic needs associated with destitution is indicative, also, of a 'failed state'.[63] Consequently, charity 'is not an adequate substitute for a Government fulfilling its [international human rights law] obligations'.[64] Instead, this represents a failure by governments in their obligations to respect, protect and fulfil social and economic rights.[65]

Charity, not only represents but also, contributes to this failure in obligations.[66] This is because charity has come to dominate responses to poverty and the associated non-realisation of social and economic rights.[67] Charity may, in the short term, alleviate the ongoing non-realisation of social and economic rights. However, it does little to address the structural conditions from which stems the need for such charitable provision. In this way, charity perpetuates both the existence of structures of social and economic rights non-realisation and the failings of the state.[68] In doing so, charity perpetuates, also, its own need. This fosters dependency on charity in place of state support. As will be demonstrated below, the legislative framework which governs the exercise of destitution alleviation and the policy underpinning it has fostered this dependency. Within the limited legal framework which provides destitution alleviation, this may be understood as the state shifting responsibility for destitution alleviation onto charity.

As the preceding analysis outlines, throughout the latter half of the twentieth century international human rights law has generally come to perceive charity as an inadequate approach to the realisation of social and economic rights. This aligned with domestic policy shifts which occurred in the middle of the century. However, domestic policy has now diverged from this human rights-based understanding, and charity has been regarded as an appropriate response to poverty in domestic law. Towards the latter stages of the twentieth century, political parties in the United Kingdom developed 'a fresh role' 'for the citizen' 'acting privately or preferably through organised charities, giving help *which the state can no longer afford to pay for*'.[69] This culminated in the United Kingdom's austerity project which perhaps

62 Graham, *International Human Rights Law and Destitution: An Economic, Social and Cultural Rights Perspective* (n 2) 30; See also, specifically in relation to foodbanks in Australia, Sue Booth, 'Food Banks in Australia: Discouraging the Right to Food' in Graham Riches and Tiina Silvasti (eds), *First World Hunger revisited: Food charity or the Right to Food?* (Palgrave Macmillan 2014) 15–28, 15–16.

63 Lindsay Findlay-King and others, 'Localism and the Big Society: The Asset Transfer of Leisure Centres and Libraries – Fighting Closures or Empowering Communities?' (2018) 37 *Leisure Studies* 158, 159.

64 Philip Alston, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Visit to the United Kingdom of Great Britain and Northern Ireland' (2019) UN.Doc.A/HRC/41/39/Add.1 [1].

65 Olivier De Schutter, 'Foreword' in Graham Riches and Tiina Silvasti (eds), *First World Hunger revisited: Food charity or the Right to Food?* (Palgrave Macmillan 2014) ix–xi, x.

66 Georgia Middleton et al., 'The Experiences and Perceptions of Food Banks amongst Users in High-Income Countries: An International Scoping Review' (2018) 120 *Appetite* 698, 699.

67 Booth (n 62) 16.

68 Graham, *International Human Rights Law and Destitution: An Economic, Social and Cultural Rights Perspective* (n 2) 31.

69 Vincent (n 21) 207. *Emphasis added.*

most clearly formalised the role of charity.[70] Austerity comprised of 'deregulation, privatisation, free trade and investment, and the *withdrawal of the state from many areas of social provision*'.[71] To fill the gaps left by the withdrawal of the state from social provision, the 2010–2015 coalition government's austerity policies were underpinned by the idea of the big society,[72] which in turn was based extensively on charity.[73] Premised on an understanding 'that the state is bad and almost anything else – the free market, charities, volunteers – is better',[74] these policies resulted in charity assuming 'a growing share of services previously delivered through statutory agencies'.[75] This shift in responsibility shifted, also, the 'relationship between public sector and 'third sector' of voluntary, community and neighbourhood organizations'.[76] Whilst it is clear that the big society ceased overtly to feature in government policy following the 2010–2015 coalition government,[77] an increased reliance on charity endures.[78] Foodbanks are the most visible representation of this. Whilst many foodbanks operate outside of the remit of the Trussell Trust,[79] between 2009 and 2017 the number of Trussell Trust foodbanks increased from 30 to over 1,300[80] and the number of Trussell Trust foodbanks remains roughly the same today at over 1,300.[81] Not only does this example illustrate that, for many, charity is a source of food but this also shows that the 'big society' continues to exist in practice.

Coalition government policy therefore embedded a role for charity and engineered a shift away from state responsibility for responding to destitution towards individual

70 Graham, *International Human Rights Law and Destitution: An Economic, Social and Cultural Rights Perspective* (n 2) 92–95.

71 Margot E Salomon, 'Of Austerity, Human Rights and International Institutions' (2015) 21 *European Law Journal* 521, 541. *Emphasis added.*

72 Armine Ishkanian, 'Neoliberalism and Violence: The Big Society and the Changing Politics of Domestic Violence in England' (2014) 34 *Critical Social Policy* 333, 334; Tony Manzi, 'The Big Society and the Conjunction of Crises: Justifying Welfare Reform and Undermining Social Housing' (2015) 32 *Housing, Theory and Society* 9, 9.

73 Manzi (n 72) 9; Martin Smith and Rhonda Jones, 'From Big Society to Small State: Conservatism and the Privatisation of Government' (2015) 10 *British Politics* 226, 244.

74 Ben Kisby, 'The Big Society: Power to the People?' (2010) 81 *The Political Quarterly* 484, 485.

75 Linda Milbourne and Mike Cushman, 'From the Third Sector to the Big Society: How Changing UK Government Policies Have Eroded Third Sector Trust' (2013) 24 *Voluntas* 485, 487; see also Evans (n 9) 50; Findlay-King and others (n 63) 158.

76 John Fenwick and Jane Gibbon, 'The Rise and Fall of the Big Society in the UK' (2017) 37 *Public Money & Management* 126, 126.

77 Fenwick and Gibbon (n 76) 126.

78 Graham, *International Human Rights Law and Destitution: An Economic, Social and Cultural Rights Perspective* (n 2) 93.

79 Alston (n 64) [22].

80 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' (The Trussell Trust 2017) 2 <https://trusselltrust.org/wp-content/uploads/sites/2/2017/06/OU_Report_final_01_08_online.pdf> accessed 31 July 2023; This 'foodbank explosion' has been linked to austerity, see Garthwaite (n 51) 2; see also Nicola Livingstone, 'The Hunger Games: Food Poverty and Politics in the UK' (2015) 39 Capital & Class 188, 189.

81 'What We Do' (*The Trussell Trust*) <https://www.trusselltrust.org/what-we-do/> accessed 15 May 2024.

and voluntary responses to destitution. This has been justified by blaming individuals for their own destitution rather than attributing responsibility to broader structural issues such as 'the reckless behaviour of financial institutions and the political elites that enabled them.'[82] Attributing responsibility for destitution to individuals has enabled 'the state to retreat from providing basic levels of welfare support *with reliance on charity becoming the norm for many*'.[83] Such sentiments are premised upon the assumption that individuals are able to 'improve their own condition through their own choices'.[84] This is in turn premised upon an acceptance of individualistic and free market ideology which promotes a reliance on the market, as opposed to legal entitlement, 'to resolve problems of human welfare'.[85] Rather than legal entitlements, such understandings recast social and economic rights as merely the 'opportunity to secure goods in the marketplace'.[86] Thus, the law underpinning social welfare policy and provision in the United Kingdom has come to centre individualism and charity as opposed to legal entitlements. This has undermined the realisation of social and economic rights. Whilst it follows from this that a change in legislative direction can prioritise legal entitlement over charity, currently it is in this context of centralising charity in social welfare provision that the place of charity has also become central to the determination of whether statutory powers to alleviate destitution arise.

3. Statutory powers to alleviate destitution

Public authority powers to alleviate destitution predominantly arise under two statutory frameworks. These are the Children Act 1989 and 'the Immigration and Asylum Act 1999 and related secondary legislation'.[87] These powers apply only to certain groups and are not the basis for a general legal entitlement to destitution alleviation. Even for those who are eligible to be considered for protection under these statutory regimes, powers to alleviate destitution do not arise when charity is available. Thus, these statutory regimes are more restrictive than a regime based on traditional understandings of destitution which would see powers arise for those who meet essential needs through charity.

82 Kim Allen, 'Whose Crisis Counts? Intersectionality, Austerity and the Politics of Survival' (2018) 41 E*thnic and Racial Studies* 2301, 2301.

83 Kayleigh Garthwaite and Claire Bambra, 'How the Other Half Live': Lay Perspectives on Health Inequalities in an Age of Austerity' (2017) 187 *Social Science & Medicine* 268, 274. *Emphasis added.*

84 Luke D Graham and Stuart MacLennan, 'Tax in Reverse: Financial Support and Social Security during COVID-19' in Ben Stanford and others (eds), *Global Crisis and COVID-19: Rights, Security and Law* (Routledge 2021) 121.

85 Masstricht Guidelines, 'Masstricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22–26 1997' [2].

86 Joe Wills, 'The World Turned Upside Down? Neo-Liberalism, Socioeconomic Rights, and Hegemony' (2014) 27 *Leiden Journal of International Law* 11, 30.

87 Simpson, McKeever and Fitzpatrick (n 4) 467.

Section 17 of the Children Act 1989 concerns the 'Provision of services for children in need, their families and others'.[88] The statutory framework does not limit this duty to make such provision to those who are destitute. Rather, 'a child shall be taken to be in need if'[89] – focusing only on those criteria which pertain to destitution – 'he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part'[90] or 'his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services'.[91] Under Section 17 of the Children Act, local authorities 'shall facilitate the provision by others (including in particular voluntary organisations) of services' it has a duty to provide.[92] It is through this notion of any other support that it has been held to be 'reasonable for a local authority to assess the alternative support available to a family that could prevent destitution e.g. through earnings or the support available from family and friends'.[93] Thus, the text of the primary legislation explicitly allows for provision by familial, of informal, charity. It must be noted, however, that this does not *require* that local authorities limit access to these entitlements in this way. It is merely reasonable for them to do so. Thus, it might be possible for the practice of local authorities to change to no longer assess the availability of charity when determining destitution under the provisions of the Children Act. This would represent a shift from a restrictive understanding of destitution towards an understanding which better aligns to the ordinary meaning of the word. Such a shift would also better align with international social and economic rights obligations. Consequently, a public authority could adopt a broader understanding of destitution in the exercise of these powers.

The role of charity is not so explicitly contained within the relevant sections of the Immigration and Asylum Act. Section 95 (1) of the Immigration and Asylum Act 1999 empowers the Secretary of State to 'provide, or arrange for the provision of, support for' asylum-seekers or their dependents 'who appear to the Secretary of State to be destitute or to be *likely to become destitute within such period as may be prescribed*'.[94] There is no explicit reference to charity in the text of the section 95 of the Immigration and Asylum Act. However, section 95 (3) defines destitution as:

'95 (3) For the purposes of this section, a person is destitute if

(a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or

88 Children Act 1989 s. 17.

89 *Ibid*, s. 17 (10).

90 *Ibid*, s. 17 (10) (a).

91 *Ibid*, s. 17 (10) (b).

92 *Ibid*, s. 17 (5) (a).

93 Jonathon Price, 'Children and Families: Destitution, Safeguarding and Services' (Welsh Refugee Council 2015) 7.

94 Immigration and Asylum Act 1999 95 (1). *Emphasis added* as this is relevant to section 5 below.

(b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs.'[95]

The focus is adequate accommodation or the means of obtaining it and meeting essential living needs. Section 96 concerns 'Ways in which support may be provided', again charity is not mentioned, and the onus is on the Secretary of State to provide. The same is true for section 97 'supplemental'. Section 99 concerns 'Provision of support by local authorities'. Section 99 (5) makes clear that.

'The powers conferred on an authority by this section include power to—

(a) provide services outside their area;
(b) provide services jointly with one or more other bodies;
(c) form a company for the purpose of providing services;
(d) tender for contracts (whether alone or with any other person)'

Common across these sections is that the statute is silent as to whether the power should arise when charity is available. However, sections 94, 95, 97, 114, 166 and 167 of, and Schedule 8, to the Immigration and Asylum Act 1999 confer powers to the Secretary of State to make regulations. It is under this secondary legislation that charity has come to limit powers from arising under the Immigration and Asylum Act 1999. Regulation 6 of the Asylum Support Regulations 2000 outlines the 'Income and assets to be taken into account' in 'Determining whether persons are destitute'.[96] Under regulation 6 (4) the Secretary of State 'must take into account'

(a) 'any other income which the principal, or any dependant of his, has or might reasonably be expected to have in that period;
(b) *any other support which is available to the principal or any dependant of his, or might reasonably be expected to be so available in that period*; and
(c) any assets mentioned in paragraph (5) (whether held in the United Kingdom or elsewhere) which are available to the principal or any dependant of his otherwise than by way of asylum support or support under section 98, or might reasonably be expected to be so available in that period.'[97]

These relevant considerations guide the lawful exercise of the powers arising under section 95 of the Immigration and Asylum Act.

If we accept the lawfulness of the regulations themselves, charity prevents powers to alleviate destitution arising under the Immigration and Asylum Act 1999 and the Asylum Support Regulations 2000. This is true also when claims are brought under

95 *Ibid*, s. 95 (3).
96 Asylum Support Regulations 2000 (SI 2000/704) regulation 6.
97 *Ibid* regulation 6 (4).

Article 3 ECHR.[98] The Courts have made clear in *R (Q)*, and restated in *Limbuela*, that the decision maker is required 'to decline to provide support unless and until it was clear that charitable support had not been provided and the individual was incapable of fending for himself'.[99] As such, other means of support must not be available for the power to alleviate destitution to arise.[100] Thus, under the statutory definition, provided individuals are able to meet the needs required to avoid destitution they are not regarded as destitute even if those needs are only met through 'other means of support (such as charities or families)'.[101] As such, in contrast to the Children Act regime under which there is no requirement to consider the availability of charity, under the Immigration and Asylum Act regime there is a duty contained in secondary legislation which requires decision makers to consider whether charity (as a form of any other support) is available before powers to alleviate destitution can arise. If such charity is available, the statutory power cannot arise.

4. Judicial review of the exercise of statutory powers to alleviate destitution

Whereas section 17 of the Children Act 1989 requires public authorities to facilitate charity, charity is not explicitly included in the Immigration and Asylum Act 1999. Consequently, this evaluation of the statutory framework hints at a possible tension between the Immigration and Asylum Act 1999 (primary legislation) and the Asylum Support Regulations 2000 (secondary legislation). That is to suggest that there may be a gap between what Parliament intended by inclusion of the word 'destitution' and the regulations. This is because the regulations depart from the ordinary meaning of the word destitution. Irrespective of this tension, at present powers may only arise under the statutory regime in response to a narrower conception of destitution. This is because, under the Children Act decision makers may lawfully consider whether charity is available and under the Immigration and Asylum Act and associated Regulations decision makers are required to consider whether charity is available. Therefore, in practice statutory powers only arise if charity is not available. This means that the availability of charity becomes central to the determination of whether powers, duties, and rights arise. It is to the judicial review of such 'destitution determinations' that this contribution now turns.

In practice, a common aspect of the statutory frameworks laid down in the Children Act 1989 and the Immigration and Asylum Act 1999 is that individuals 'must exhaust

98 Mark Simpson, '"Designed to Reduce People … to Complete Destitution": Human Dignity in the Active Welfare State' (2015) 1 *E.H.R.L.R* 66, 76–77. *Emphasis added.*

99 *R (Q) v Secretary of State for the Home Department* [63] see also; *ex parte Adams, Tesema and Limbuela* (n 38) [61].

100 James A Sweeney, 'The Human Rights of Failed Asylum Seekers in the United Kingdom' [2008] *Public Law* 277, 291.

101 *Ibid.*

any savings and look to friends or relatives who might be able to provide cheap or free accommodation, other members of the household who are entitled to work or claim benefits, ex-partners with possible liability for child maintenance and charitable organisations before turning to the state'.[102] The legal framework therefore places individuals seeking to assert these statutory rights under a *de jure* duty to seek charity. If they do not do so the statutory powers – and correlative rights – will not arise.

However, merely having sought – but failed – to secure charity does not suffice automatically to trigger the statutory powers. Rather it remains with the decision maker to determine whether the power arises on the facts. This determination is subject to the ordinary principles of judicial review. In the context of the Children Act 1989 this has seen the courts adopt an approach which is deferential to decision makers. The Supreme Court has made clear that

> The question whether a child is "in need" requires a number of different value judgments. … Questions like this are sometimes decided by the courts in the course of care or other proceedings under the Act. Courts are quite used to deciding them upon the evidence for the purpose of deciding what order, if any, to make. But where the issue is not, what order should the court make, but what service should the local authority provide, *it is entirely reasonable to assume that Parliament intended such evaluative questions to be determined by the public authority, subject to the control of the courts on the ordinary principles of judicial review. Within the limits of fair process and "Wednesbury reasonableness" there are no clear cut right or wrong answers.*[103]

In practice, this means that it is very difficult to challenge the merits of decision makers' decisions concerning whether or not statutory powers to alleviate destitution arise.[104]

At the same time, decision makers need not accept that charity is not available. It has been held to be 'perfectly proper' for administrative decision makers to investigate possible support networks.[105] The guidance set out in *R (O)* at paragraphs 12–22 has come to be accepted as applicable in such cases.[106]

> If the evidence is that a family has been in this country, without recourse to public funds and without destitution for a number of years, reliant on either work or the goodwill and kindness of friends and family, *then the local authority is entitled and indeed rationally ought to enquire why and to what extent those other sources of support have suddenly dried up*. In order to make those enquiries, the local authority needs information. If the applicant for assistance does not *provide adequate contact details for family and*

102 Gráinne McKeever and others, 'Destitution and Paths to Justice' (Joseph Rowntree Foundation 2018) 20.

103 *R (on the application of A) (FC) (Appellant) v London Borough of Croydon (Respondents) and one other action* [2009] UKSC [2009] UKSC 8 [26]. *Emphasis added.*

104 There are also barriers to accessing judicial review which must be overcome before then facing difficulties in succeeding and 'The costs risk associated with the "loser pays" rule, alongside high court fees and a shrinking legal aid budget, may render judicial review inaccessible for most' see Sam Guy, 'Access to Justice on the Market: An Empirical Case Study on the Dynamics of Crowdfunding Judicial Reviews' [2021] Public Law 678, 678.

105 *R (on the application of BC) v Birmingham City Council* [2016] EWHC 3156 (Admin) 60].

106 *R (on the application of OK and others) v. Barking and Dagenham* (n 55) [15].

> *friends who have provided assistance in the past*, or cannot *provide a satisfactory explanation as to why the sources of support which existed in the past have ceased to exist*, the local authority may reasonably conclude that it is not satisfied that the family is homeless or destitute, so that no power to provide arises.[107]

In this case, the court has held that it was 'a reasonable inference to draw that' the mother (PO) 'did not require accommodation because it was assessed that PO had access to a more extensive network of support available to her than she was prepared to disclose in the assessment and that people in that network could continue to accommodate her'.[108] This means that it is lawful for administrative decision 'to draw inferences of "non-destitution" from the combination of (a) evidence that sources of support have existed in the past and (b) lack of satisfactory or convincing explanation as to why they will cease to exist in future'.[109] This implies that individuals seeking to assert these statutory rights must provide adequate contact details for family and friends who have provided assistance in the past. *R (MN)* illustrates that it is rational to seek this information to allow the decision maker to contact previous sources of charity to 'check whether any of these sources of assistance were still potentially available *and, if not, why not*'.[110]

The decision maker is therefore not limited to determining whether charity is still available. It is not a purely objective, or binary, assessment of whether charity is or is not actually available. Rather, the decision maker may lawfully enquire *why* charity is no longer available. Thus, not only must those seeking to assert statutory rights persuade the decision maker that charity is no longer available, but the claimant must also provide a 'satisfactory explanation as to why the sources of support which existed in the past have ceased to exist'.[111] So too must the previous source of charity. Whether to accept such explanation remains an evaluative judgement to be made by the decision maker who can lawfully refuse to accept that 'other sources of support' will no longer provide charity. Decision makers have often refused to accept that charity is not available in situations in which charity has previously been available but has since been – or is set to be – withdrawn. This is irrespective of whether charity is in fact available. As illustrated in *R (on the application of O) v. Lewisham LBC*, 'The decision letter concludes: "'I am at present *not satisfied* that you lack the financial or social support that means you are currently destitute or *that your extensive network of support could no longer continue to support you*"'.[112] In this case,

> The mother has two sisters. They both, apparently, occupy three bedroomed houses … , inevitably, when asked, they say that she and the children could not stay with them, even

107 *R (O) v London Borough of Lambeth* [2016] EWHC 937 (Admin) [19]. *Emphasis added.*
108 *Ibid* [48].
109 *Ibid* [20]; quoted in *R (S and J) v Haringey LBC* [2016] EWHC 2692 (Admin) [42].
110 *R(MN) v London Borough of Hackney* [2013] EWHC 1205 (Admin) [37]. *Emphasis added.*
111 *R (O) v London Borough of Lambeth* (n 111) [19]. *Emphasis added.*
112 *R (on the application of O) v Lewisham LBC* [2016] EWHC 3184 (Admin) [14]. *Emphasis added.*

> on a temporary basis. *But Lewisham do not accept that*, which is why they refer in their decision letters to “social support”.[113]

The procedural nature of the judicial review of the determination of these statutory powers is plainly evident in this case. It was later held that ‘It cannot be said that the approach of the decision-maker in relation to that point was irrational. The decision letter, and indeed the evaluation which underpins it, shows the evaluation which was done’.[114] As such, to avoid a finding of irrationality public bodies must consider whether past sources of support are still available. The implications of this are stark. The decision maker may lawfully determine that powers and duties conferred by Parliament do not arise if the claimant has family members with accommodation. Whilst this does not legally require family members to provide charity, they may feel compelled to do so, irrespective of their wishes and desires. If they do provide charity, then they undermine the claimant’s argument that charity is not available to them, thereby preventing statutory powers from arising. This creates dependency on charity. Such charity cannot, however, be relied upon. Nor does it satisfy the obligations of states or the correlative rights of individuals flowing from social and economic rights.[115] At the same time, if they do not provide charity, the claimant will be destitute – even under the more restrictive statutory definition – in practice but not regarded as destitute by the decision maker. Consequently, individuals are limited from enforcing statutory rights when a decision maker believes that charity is available.

This is especially concerning when it is recognised that decision makers need not identify what charity is available to claimants to reach such a finding. Decision makers can lawfully infer that charity is available. In *R (on the application of O) v. Lewisham LBC*, the decision maker was able to point to specific and tangible sources of support. However, this is not required to ensure the lawfulness of destitution determinations. In fact, there may be no need for the decision maker to ‘identify a particular friend or family member who would provide support’.[116] When there is evidence that charity has been available in the past, and in the absence of satisfactory evidence to the contrary, ‘it cannot be said to be irrational’ for the decision maker to draw inferences to support the conclusion ‘that friends or family would provide support without identifying a particular friend or family member who would provide support.’[117] This evidences the extent of judicial deference on this issue. The focus of the court’s enquiry is procedural rather than grounded on whether charity is in fact available.

This highlights how the court’s supervision of the exercise of these powers is insufficient to ensure that individuals are able to enforce their legal entitlements.

113 *Ibid* [27]. *Emphasis added.*
114 *R (on the application of O) v Lewisham LBC* [2017] EWHC 815 (Admin) [20].
115 See the text accompanying (n 36) – (n 59).
116 *R (S and J) v Haringey LBC* (n 114) [63] (vi).
117 *ibid.*

This is because, in light of this judicial deference, the issue of whether or not charity is available remains an evaluative judgement to be made by the decision maker. The evaluative decision in *R (O)* to not accept that charity was no longer available was no doubt influenced by the fact that 'satisfactory explanations had not been given in respect of why previous income had stopped and there were inconsistencies in the claimants' account'.[118] This lack of satisfactory explanations and inconsistencies were used to distinguish the case of *R (on the application of OK and others) v. Barking and Dagenham* from *R (O).* In *R (OK)* the 'inordinate efforts' of the claimants to explain why charity was no longer available, and that therefore statutory powers should arise,[119] contributed to what the judge described as a 'rare case' in which the decision maker 'cross[ed] the threshold of irrationality'.[120] This shows that the evaluative judgements made by decision makers as to the availability of charity when determining whether statutory powers to alleviate destitution arise are not completely beyond the purview of judicial intervention. Yet, it suggests also that a great deal of evidence is required to influence such a finding, and the claimants went to extraordinary lengths to satisfy the decision maker that they could no longer avail themselves of charity. The suggested rarity of such a finding reiterates the concern that in practice not all of those who are entitled to support under the statutory regimes are able to access their legal entitlements. It suggests also that judicial review is a limited response to this issue.

5. Satisfying decision makers that they should exercise powers

Currently, under these statutory frameworks, powers to alleviate destitution cannot arise when charity is available. This is at odds with the state's international human

118 *R (on the application of OK and others) v. Barking and Dagenham* (n 56) [35].

119 'the claimants and their solicitors have gone to inordinate lengths to provide information to the defendant to explain why past sources of support have stopped and why their family and social network can no longer assist them with accommodation and basic needs. The statement of facts and grounds runs to 52 pages. Apart from the first and second claimants' detailed witness statements, there are no less than 14 statements from the claimants' family members, members of the church, the children's school, the Red Cross and Hackney Migrant Centre, attesting to the claimants' accommodation position, the number of moves since January 2017 and the lack of access to accommodation save for a night or two, why no ongoing accommodation is available and, in the case of the school and indeed Moorfields Hospital, raising real concerns about the children's welfare (in the case of the school because of the impact of the accommodation position and instability resulting from that)'see ibid.

120 'I fully appreciate that irrationality is a high threshold and I give all due respect to the primacy of the local authority as decision maker … to exercise a significant degree of scepticism when considering evidence that is put before it. However, in my judgment, this is one of those rare cases where the conclusion arrived at by the defendant that the third to fifth claimants are not in need in the face of all the unchallenged material available to the defendant regarding the reasons why past support has ceased, and in light of the claimants' circumstances involving 14 moves of accommodation over the last eight weeks, is one that does cross the threshold of irrationality.' see ibid [38].

rights-based obligations to adequately realise social and economic rights.[121] Powers will not arise unless individuals (i) have sought charity (ii) provide details of previous sources of charity, including contact details, and (iii) satisfy decision makers that charity is not available, has ceased, or is to cease. This places burdens on those seeking to assert statutory rights. The first burden, seeking charity, is most straightforward and requires that those seeking to assert statutory rights first seek other sources of support.[122] The second burden requires that the claimant provide details of previous charity. It is detrimental to the claimants' credibility not to do so.[123] If individuals do not divulge such information, the inference that charity is available is more likely to remain. Both burdens may be understood as incentivising certain behaviours. This second burden of course influences the decision maker's evaluative judgement as to whether charity is available. It therefore aids in dispelling the third burden. Other factors can also contribute towards overcoming the third burden and satisfying the decision maker that charity is not available and there is a need for the claimant to provide credible and convincing evidence. Even then, it may be that decision makers remain lawfully unsatisfied that the power should arise irrespective of the reality of non-availability of charity. This means that individuals who experience destitution in practice – specifically destitution as understood under the more restrictive definition adopted by decision makers – may be unable to access support to which they are legally entitled. At the same time, individuals may be unable to enforce these entitlements through the courts.

It is concerning that in such circumstances both the executive and the courts fail to give effect to the will of Parliament. Judicial review of the exercise of these powers grants a great deal of deference to the decision maker's evaluative judgement as to whether the claimant can avail themselves of charity, and thus whether statutory powers arise. Therefore, judicial review is ill-placed to address this issue. It is for Parliament to intervene to ensure that individuals can access support to which they are legally, and statutorily, entitled. Firstly, there is a need to reflect meaningfully on judicial deference as to the determination of whether charity is in fact available. Secondly, this first issue would also be addressed by legislative intervention to better align these statutory regimes with social and economic rights obligations. Here, the normative value of human rights law can be turned towards advocating for legislative intervention to fix the broken relationship between charity and statutory powers to alleviate destitution. Such reform is needed if these statutory regimes are to meet social and economic rights obligations.

Parliament could make clear that decision makers should understand charity as central to the experience of destitution. If they did so, those who would otherwise be eligible for support under the statutory regimes should be considered destitute

121 See the text accompanying (n 37) – (n 60).

122 See (n 107) and accompanying text.

123 It is conceivable that there may be instances in which individuals may face detriment if they do divulge previous sources of support. This issue warrants deeper exploration than can be provided in the scope of this contribution.

irrespective of charity. With respect to the Immigration and Asylum Act regime this could in fact be achieved through secondary legislation – specifically through amendment of Regulation 6 (4) b of the Asylum Support Regulations 2000.[124] Concerning the Children Act, there is a need to amend primary legislation and especially s. 17 (5) (a). Both regimes could be amended to make explicit that the availability of charity should not be a relevant consideration in the determination of whether an individual is destitute. This would make it unlawful for decision makers to consider the availability of charity when determining whether the statutory powers arise. This would constitute legislative reform of the way in which destitution has been defined under these regimes and would represent a broader understanding of destitution. One which is both better matched to the ordinary meaning of the word and which better aligns to the United Kingdom's international social and economic rights obligations.

Beyond these existing statutory regimes, such considerations are also pertinent to the proposed introduction of a general statutory duty to alleviate destitution.[125] Notably, the preceding analysis identifies the need to explicitly clarify the interaction between charity and the definition of destitution in any proposed framework. There is also a need to consider the limited intensity of judicial review in the design of any new destitution entitlements and duties. This is because under the existing framework individuals who are in fact destitute according to the restrictive statutory definition may be excluded from accessing legal entitlement because a decision maker is not persuaded of this fact. This undermines the utility of existing statutory protections against destitution. It will do the same for any new such protections designed in the same way.

Beyond legislative intervention, charity also has a role to play in unpicking its part in displacing legal entitlements. Major destitution alleviation charities have, in recent years, engaged in campaigns focused on 'rights not charity'. Such campaigns perceive the ultimate goal of such charities as 'their own extinction'.[126] The analysis in this contribution can be used to support the 'rights not charity' campaign as it relates to destitution. It identifies that legislative reform is required to achieve the aims of this campaign. The current legal framework embeds a role for charity because under these statutory regimes charity displaces statutory provision. This creates dependency on charity. In this way the law entrenches the need for charity. But at the same time, within this legal framework charity creates its own, growing need. Therefore, in relation to the alleviation of destitution, without legislative reform the 'rights not charity' campaign is doomed to fail. The 'rights not charity' campaign can leverage such analysis towards advocating for legislative reform to better align statutory protections against destitution with social and economic rights obligations. Beyond advocating for legislative reform, charity need not be a passive actor which merely awaits a legislative 'fix'.

124 For the text of this regulation see the text accompanying (n 102).
125 See the text accompanying (n 5) – (n 6).
126 Mortensen (n 61) 3.

This is even more important given that legislative reform is unlikely to be forthcoming due to the individualistic and market focused approach to social welfare in the United Kingdom.[127] Alone, the reform of these statutory powers to alleviate destitution would not represent a shift from the market driven social welfare orthodoxy which has settled since the austerity coalition years. Thus, 'rights not charity' must also advocate for broader structural changes to social welfare.

Beyond advocating for legislative and structural change, charity can take an active role towards unpicking its own role in displacing statutory entitlements within the existing legal framework concerning powers to alleviate destitution. This contribution proposes that registered charities can better focus – and prioritise – capacity towards those for whom statutory powers would not otherwise arise. This can be achieved through refusing support to those who would Otherwise have Recourse to Public Funds (ORPF). Given the limits of legal remedies in addressing the interaction between charity and statutory powers to alleviate destitution, extra-legal approaches – such as ORPF – appear to be the only options available to address the problem of charity displacing legal entitlement. Non-ideal, yet pragmatic, an ORPF approach would see charity work to support individuals in accessing legal entitlements within the limited confines of a legal framework which has sought to embed and foreground voluntarism and individualism.

In relation to formal, rather than informal and familial charity, registered providers of charity may wish to give notice that they will cease to provide support to those to whom statutory duties would otherwise arise from a set date in the future. Such an approach (an ORPF-based approach) would impact both those already in receipt of charity and, also, those who in the future may seek to avail themselves of charity. For the first group, ORPF would see a withdrawal of existing support. Charities cannot be compelled to provide support, and the case law evidences that statutory powers will arise when charity is withdrawn.[128] In light of the above discussion it would be reasonable to be concerned that such a withdrawal would result in 'protection gap' between the withdrawal of charity and statutory powers arising. However, the legal test for statutory powers arising under the Immigration and Asylum Act is not that the individual is experiencing destitution understood in the narrow statutory sense but rather that they may *imminently experience such destitution*. Section 95 (1) of the Immigration and Asylum Act 1999 empowers the Secretary of State to 'provide, or arrange for the provision of, support for' asylum-seekers or their dependents 'who appear to the Secretary of State to be destitute or to be *likely to become destitute within such period as may be prescribed*'.[129] The withdrawal of charity from those to whom statutory duties would, if not for charity, be owed appears to satisfy this requirement of imminency. This should safeguard against a support gap between the withdrawal of

127 See the text accompanying (n 87) – (n 89).
128 See the discussion of *R (OK)* at (n 55) – (n 57).
129 Immigration and Asylum Act 95 (1). *Emphasis added.*

charity and statutory powers arising. For the second group, those individuals who may face destitution in the future, registered providers of charity may wish to adopt a policy of not providing charity when this would bar powers arising. Perhaps from the same date as the deadline for those already in receipt of charity. Or, perhaps, such organisations would commit to only providing individuals with assistance for a set period of time, long enough for arrangements to be made under the statutory duties.

An obvious objection to this is that charities are limited by legislation. Notably, through the idea of 'charitable purpose'.[130] It could be suggested that a charity with the purpose of 'the prevention or relief of poverty' is not lawfully able to withhold support in this way. What must be recognised, however, is that charity law does not dictate to charities how they must alleviate poverty or for which classes of person they may do so. Rather, provided that charities do not operate contrary to the Equality Act 2010 and subject to s. 193 of that Act, charity trustees are able to restrict the provision of benefits fairly freely without judicial intervention.[131] Charities retain a broad discretion in this regard.[132] An ORPF-based approach to the allocation of a charity's resources would still see a charity fulfil its charitable purpose. Arguably, an ORPF-based approach would maximise the charity's prevention and relief of poverty. This is because charities have limited resources. As far back as 1996, in *Ex Parte B and Joint Council for the Welfare of Immigrants* Lord Justice Brown recognised that whilst 'voluntary organisations do what they can to help. The need … far exceeds their capacity'.[133] This has little changed and has become more acute. An ORPF-based approach would see these resources directed to those who are excluded from support from the state. This would also ensure that charities do not displace entitlement to statutory rights.

A second obvious objection is that an ORPF-based approach would create an administrative burden for charities, one which they may not have the capacity to deal with. This is because charities would have to determine whether or not individuals would be eligible for support under the statutory regime. This objection is unpersuasive given the limited classes of persons who are eligible for support under the statutory regime. Thus, the administrative burden for determining whether an individual falls under the support of the statutory regime is a low one. It consists of two questions. First, is the individual seeking support, or an individual in the family unit seeking

130 Charities Act 2011, s3(1)(a) lists the prevention or relief of poverty as a valid charitable purpose. On charitable purposes see *Special Commissioners of Income Tax v Pemsel* | [1891] UKHL 1.

131 Equality Act 2010 s. 193.

132 See, *Lehtimäki and others (Respondents) v Cooper (Appellant)* [2020] UKSC 33. This legal question in this case was whether the court had jurisdiction to direct members of a charitable company on how to exercise their powers absent a breach of fiduciary duty. This case illustrates that in fiduciary law, the courts will not issue such direction provided that the trustees act in good faith and in the best interests of the charity. Note, however, that trustees may be limited a charity's constitution. In such cases to introduce a ORPF policy would require the amendment of those charitable constitutions.

133 *R v Secretary of State for Social Security Ex Parte B and Joint Council for the Welfare of Immigrants* [1996] EWCA Civ 1293.

support, under the age of eighteen? Second, and/or, is the individual seeking support an asylum seeker, or the dependent of an asylum seeker? If the answer to either of these questions is “yes”, then the individual is entitled to support under the statutory regime provided that charity is not made available to them.

6. Conclusion

Charity has come to dominate responses to poverty and the associated non-realisation of social and economic rights. In relation to the statutory powers to alleviate destitution which arise under the Children Act 1989 and the Immigration and Asylum Act 1999, this preponderance of charity limits – and displaces – legal entitlements to state resources. The primary and secondary legislation governing these statutory powers entrenches a gatekeeping function for charity. The judicial review of the exercise of these powers similarly serves this function. Irrespective of whether charity is actually available, individuals face a high bar in succeeding in challenging a determination by decision makers that powers do not arise because charity may be available.

Individuals who wish to persuade decision makers that powers should arise under these statutory frameworks are required to seek charity, to be forthcoming in providing details of previous charity, and to satisfy decision makers that charity is not available, has ceased, or is to cease. Failing this, irrespective of whether charity is actually available, decision makers may lawfully determine that the powers do not arise. For some individuals, this means that they are unable to access support to which they are legally entitled and they are unable to redress this through judicial review. This legal framework therefore encourages a reliance on charity to avoid (this legal framework’s narrow conception of) destitution. This reliance on charity to meet basic needs is, however, central to the experience of destitution. Therefore, the legal framework governing these powers to alleviate destitution in fact causes, and entrenches, destitution. This is incompatible with the government’s international obligations flowing from social and economic rights. This is because the obligations flowing from these rights require the provision of state assistance. Here, the normative value of human rights may be used in support of the case for reform of this legal framework. These considerations should also shape the design of any new statutory powers to alleviate destitution.

Whilst the legal framework bears the primary responsibility for this failing, it must be recognised that charity also bears some of the responsibility for the continued existence of this framework. Charity may, in the short term, alleviate the ongoing non-realisation of social and economic rights. However, it does little to address the structural conditions from which stems the need for such charity. This contribution has sought to illustrate this by reference to the interaction between charity and statutory powers which would otherwise arise in the United Kingdom if not for the existence of such charity. In this context, charity displaces legal entitlement to state support. In doing so, charity perpetuates, also, its own need. To achieve the ambitions of campaigns centred on 'rights not charity' there is a need to face these uncomfortable truths. Failing reform of the legislative framework to better align the powers to alleviate destitution with social and economic rights-based obligations, formal charities may themselves wish to consider extra-legal actions to redress their part in this displacement of legal entitlements. An approach focused on denying charity to those who would Otherwise have Recourse to Public Funds (ORPF) is a step towards untangling the relationship between statutory powers to alleviate destitution and charity. This may represent an important first step towards alleviating destitution more generally via campaigns grounded on 'rights not charity'. Such an approach would also allow charities to direct their limited resources towards those who have no other sources of support. In turn, maximising the sum total of support available to alleviate destitution.

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ORCID

Luke D. Graham http://orcid.org/0000-0003-0678-2106