

Effective remedies & structural orders for social rights violations

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Access to Justice For Social Rights
Addressing The Accountability Gap

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This briefing document has been prepared for the Nuffield Foundation project on ‘Access to Justice For Social Rights: Addressing The Accountability Gap’, led by Dr. Katie Boyle. After setting out in brief the motivations behind the overall project, this writeup addresses the following using a comparative law lens: a) the meaning of an effective remedy for social rights violations (Part I), b) the conditions for the grant and success of structural remedies for social rights violations (Part II), c) possible models for structural remedies (Part III), d) design principles for such structural remedies (Part IV). The experience of social rights litigation and the strategies used by litigants in courts around the world for social rights violations can help inform approaches in the UK.

Part I: Effective Remedies for Social Rights Violations

Violations of social rights directly impact on the ability of human beings being able to lead a decent life with dignity. Social rights form part of the international human rights framework, including the right to housing, the right to food and fuel and the right to social security. State parties who have signed up to the international framework are under an obligation to protect these rights in the domestic context, this includes the UK.¹ As part of its international obligations the UK is required to provide access to an effective remedy if there is a failure to meet these obligations.² This includes facilitating access to a legal remedy in court if necessary, implying the existence of both a substantive and procedural duty toward rights-bearers on the part of state parties. Remedies may also include administrative, judicial, and legislative actions. The three potential functions of a remedy are:

- a) its capacity to place the right-holder in the same place prior to the social right violation (**restitution**);
- b) ensure ongoing compliance with a social right (**equilibration**);
- c) engage with the feature of the legal system that caused the rights violation (**non-repetition**).

¹ The UK ratified the International Covenant on Economic, Social and Cultural Rights in 1976.

² CESCR General comment 9, 3 December 1998, E/C.12/1998/24; The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, [1998] 20 Human Rights Quarterly, 691, para.23.

Remedies should also be appropriate, sufficient, and accessible, to meet these aims.³ Domestic remedies for social rights violations usually take three broad forms: individual (they help address a violation for one person), programmatic (they address a systemic issue that impacts lots of people), and hybrid (they achieve a mixture of both individual and systemic relief). A singular focus on any one of these could produce problems: courts that focus solely on individual cases may jeopardise relief for a broader class of petitioners, while leaving intact a systemic feature of a legal system that may require attention, thereby being unable to ensure non-repetition of the rights violation. Likewise, delivering only systemic relief may leave individual petitioners without access to a remedy. The world over, hybrid remedies that combine individual and systemic relief have been the most 'effective' kind, while also being capable of engaging with structural constitutional principles like the separation of powers and parliamentary sovereignty that seek to constrain judicial power in jurisdictions like the United Kingdom.

Hybrid remedies of the kind referred to above may also take the form of collective litigation in situations involving multiple complainants and multiple duty bearers. Such 'dialogic' forms of judicial remedies are especially suited to claims involving social rights. Resolving violations of social rights may often require an institutional expertise that courts do not have. In such cases courts may consider the meaning and content of rights but defer back to the decision maker in relation to the remedy. The court can also play an important role in mitigating inter-institutional confrontation where more there may be more than one department responsible (this can include between executive departments at the national level or indeed disputes about obligations between the national and devolved level). Dialogic forms of judicial remedies can be innovative in nature in an exploration of how best to address systemic issues. In such kinds of remedies, courts can act as an intermediary between different rights holders and duty bearers to find an effective remedy that requires multiple duty bearers to respond as part of a structural interdict (a hybrid remedy that can offer individual and systemic relief potentially involving multiple applicants and multiple defendants).

Part II: When are structural remedies for social rights violations granted

Structural remedies that can address the problems associated with a focus on individual remedies have been used in jurisdictions across the world to ensure rights-compliant outcomes for litigants and broader systemic reform. Since structural remedies are relatively unknown in the UK, it may be helpful to examine the factors that have influenced their grant in other jurisdictions. These include the following:

- a) the presence of a textual basis for a structural or collective remedy, including the broad standing and jurisdictional rules for litigants and courts;
- b) legislative or executive inattentiveness, incompetence, or inertia may motivate courts to intervene and grant a structural remedy;
- c) when courts are unsure about the remedy which is necessary to address a systemic problem, it is likelier to issue a structural order wherein it invites parties to engage in dialogue to devise the remedy;
- d) where a large class of petitioners may be affected by a government act or omission, courts often grant structural orders to provide relief, which, if not granted, would result in irreparable harm;
- e) the past conduct of the government influences the grant of a structural remedy and courts will be likelier to grant such a remedy if it anticipates non-compliance.

Part III: Structural Remedial Models

Structural remedies in social rights cases take a variety of forms in litigation across jurisdictions. Two of these may be adapted in the context of cases brought before courts in the UK:

- a) **The Declaration & Retention of Jurisdiction Model:** in remedies of this nature, courts make a declaratory finding, while also retaining jurisdiction until the individual litigant or a

3 Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-national and National Law* 3 (Cambridge University Press, 2021).

- b) litigant group obtains the necessary relief. Retention of jurisdiction may also occur where there is a systemic issue that requires legislative or executive intervention, without which there is a likelihood of repetition of the violation.
 - c) **The Collaborative Model:** In remedies of this kind, courts innovate with models of problem solving that may take the form of expert committees, amici, and oversight boards which may design or monitor the remedy granted including the participation of those impacted as key stakeholders in the design of the remedy.
 - d) **Suspended Declarations of Invalidity:** A remedy of this nature comprises a declaration of constitutional incompatibility or invalidity on a government act or omission. Thereafter, such a declaration is suspended for a definite period, pending government action to correct the error that led to the situation.
- **Participation** - The participation of stakeholders is important when courts are deciding between individual and structural remedies. It is crucial that courts listen to petitioners and try to incorporate their wishes to the extent possible. However, it is important to remember that concerns persist around power disparities between parties, possible splintering of petitioner groups, and the need to delineate a strong normative baseline in structural remedies.
 - **Deliberation** - The principle of deliberation can play an important role in choosing between individual and structural remedies, read with the principle of participation. It can occur horizontally across institutions and vertically between the local and supranational level. Deliberation between petitioners and respondents may help the court pick between kinds of remedies and calibrate the tension in the grant of remedy between individual and systemic justice.
 - **Counter-majoritarian** – Courts can play an important role in exercising a voice for marginalized groups in matters where there is a danger of elite majoritarian decision making at the executive level that fails to account for the impact on those groups who may be marginalized by and within that system.
 - **Flexibility** – Courts require to exercise flexibility in their approach to social rights violations and remedial relief. Often times, particularly in the UK context, courts have been reluctant to exercise jurisdiction in matters of economic and social policy.⁴ This can have serious consequences for the right to an effective remedy for a violation of social rights. Courts should exercise flexibility in (1) ensuring they do not abdicate their role as an important institutional accountability mechanism; (2) engage in deliberation around the meaning and content of rights and whether a violation has occurred, even if ultimately the remedy is deferential in nature; (3) exercise flexibility between more interventionist and deferential remedial relief depending on the circumstances, including those conditions listed above (in Part 2).

Part IV: Design Principles for a Structural Remedy for Social Rights Violations

The following principles should guide the design of structural remedies:

- **Accessibility** – In order for remedies to be effective, they must be capable of being accessed by individuals and groups of claimants. Access and standing rules play an important role in ensuring that remedies are accessible to not just the individual claimant.
- **Fairness** – Principles of procedural and substantive fairness should be incorporated when deciding between remedies that affect individuals and groups. In most cases, the choice will not be binary, and petitioners will be left best off when combining both kinds of remedies. Courts may set certain normative baselines that can serve as a substantive guide to structuring deliberations which are guided by norms of procedural fairness. These procedural norms include the need for ensuring party autonomy and participatory parity, while the substantive norms are guided by the constitutional provisions on housing and human dignity.

⁴ *R (Pantellerisco and others) v SSWP* [2021] EWCA Civ 1454 para.58 referring to Lord Reed in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2021] 3 WLR 428 para.146 who cites Lord Bridge in *R v Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521.

Further Reading

- Jeff King, *Judging Social Rights* (Cambridge University Press, 2012).
- Katie Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020).
- Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-national and National Law* (Cambridge University Press, 2021).
- Kent Roach and Geoff Budlender, *Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate*, Just and Equitable 122 South African Law Journal 325 (2005).
- *Doucet-Boudreau v. Nova Scotia*, 2003 SCC 62 (Supreme Court of Canada).

The Access to Justice for Social Rights: Addressing the Accountability Gap project explores the barriers faced by rights holders in accessing justice for violations of social rights across the UK. The project seeks to better understand the existing gaps between social rights in international human rights law, and the practice, policy and legal frameworks across the UK at the domestic level. It aims to propose substantive legal solutions – embedding good practice early on in decision making as well as proposing new legal structures and developing our understanding of effective remedies (proposing substantive change to the conception of ‘justice’ as well as the means of accessing it).

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