

# An interdisciplinary research approach: A legal and discursive analysis of social rights policy in the UK

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## Introduction

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. It shows that the project's unique interdisciplinary approach to analysing empirical data offers a valuable contribution to the socio-legal research field. After setting out in brief the motivations behind the overall project, this briefing addresses the benefits of an interdisciplinary research approach for examining how the social rights frameworks across UK jurisdictions are taken up in practice. Part I explains the value of directing attention to discourse in analysis. Part II shares some examples to illustrate how certain mechanisms and (social) processes are made visible through a critical examination of discourse.

The research project asked why rights holders encounter barriers in accessing justice when violations of social rights occur, how access to justice can be improved and what further research is required to address this gap. The aim of the project was to gain a better understanding of practitioner's experiences in helping people access justice for violations of social rights. We measured standards of those issues against expectations of international law, and wanted to understand what remedies (effective solutions), if any, were available in those areas where domestic law falls short.

To address our research questions, we used an innovative case method approach embedded in legal cases in Scotland, England, Wales and Northern Ireland, which entailed semi-structured interviews with a variety of advocates, legal and non-legal, at each level of the support network (charity/ advice sector, lawyer, barrister). We refer to these advocates as 'practitioners'. The case studies engage with multiple social rights, and have facilitated as a gateway to understanding the intersectional barriers that rights holders face in their journey to access an effective remedy for social rights violations. We adopted a combined legal and discourse analytic approach, in order to better understand conceptions of justice and address gaps in the current legal framework.

The literature has long dispelled common and pervasive misconceptions that economic, social and cultural rights are of lesser status than civil and political rights.<sup>1</sup> In fact, the operation of economic, social and cultural rights as enforceable legal rights has been realised in practice in different constitutional and regional settings throughout the globe.<sup>2</sup> Nonetheless, the fact that social rights are not made explicit in laws and policies makes them invisible and manifests as challenges in securing social rights justice. This not only creates problems for practitioners in adjudicating social rights violations, but also robs rights holders of their own power<sup>3</sup> and, by extension, a legitimate voice. It is important therefore to examine which discourses

1 Cf. K Boyle *Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020) Ch 2; Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156

2 For a discussion on this see K Boyle, 'Models of Incorporation and Justiciability of Economic, Social and Cultural Rights' (2018) Scottish Human Rights Commission

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

within the broader social and legal context give power to mechanisms of invisibilisation, and which counter discourses could be produced to give social rights protection its proper place within a human rights framework. Thus, language or discourse, we argue, constitutes both the problem and potential solutions regarding increasing accountability for social rights in the devolved areas of the UK.

## Part I: The value of directing attention to discourse

Our approach to analysing the data is underpinned by our understanding that all meaning is created through discourse, and furthermore, that discourse and thought are mediated by power relations, which are socially and historically situated.<sup>4</sup> These tenets help us evaluate and better understand how certain groups in society are privileged over others, and more importantly how to address change in terms of the mechanisms that hinder access to justice and effective remedies, as well as empower individuals to disrupt unjust practices. This approach builds upon conceptions of rights as constructs of deliberative democracy<sup>5</sup> and deliberative dialogue theory.

A critical discourse lens illuminated how barriers to social justice are socially and discursively produced and, more importantly, how understanding these dynamics can inform practice and chart ways forward to create legitimacy for social rights in the UK. We direct attention to discourses, not only because they reflect representations, but because discourses can be seen as “practices that systematically form the objects of which they speak”.<sup>6</sup> This Foucauldian perspective recognises the ways in which knowledge circulates and functions, and it is through discourse that claims to knowledge and truth are produced. Our interdisciplinary approach, which is embedded in the intricate links between discourse and ideology, therefore helps to examine both the procedural and substantive claims on access to justice for social rights.

## Part II: A critical approach to discourse analysis

Discursive approaches are valuable for analysing how laws and policy governing social rights protections in the UK impact on rights holders, because it draws attention to the intertextual and interdiscursive links between discourses, as expressed in legal doctrine and articulated by practitioners in the field. Thus, “in order to account for and analyse the multiple layers of [...] policy and its concomitant impact, we need to theoretically, methodologically, and empirically engage with policy in terms of both structure and agency, and this is made possible by applying various forms of critical and discursive analysis to [...] policy situations”.<sup>7</sup>

A discourse analytic approach helps us to make visible discourses embedded in practice that are linked to structures of authority and executed through a variety of specific techniques, including discourses that marginalise, undermine, or are wielded in order to hinder social rights protection. Our analysis shows that the realisation of social rights is not only about operational processes of determining entitlement and eligibility, but are in fact processes of valuation and categorisation that sort people into pre-determined categories by means of various tools and mechanisms. These processes are not neutral but value-laden and, influenced by wider socio-political currents, often (re)produce differences and embed inequalities.

These practices and processes are situated at the intersection of different sectors and scales of social structure. It is a fragmented system that interlinks governments, institutions, legal frameworks and the third sector. This complexity and its management is constituted in manifold policies and procedures, difficult and lengthy application processes, frequent changes to rules and regulations, obscurity, poor visibility of available services and programs, complicated and lengthy complaints procedures and a lack of cognisance of the interrelationship of social rights and people’s needs. In the UK, there is an

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

5 For example, see the competing conceptions of rights formation under proceduralism or substantive deliberation in different constitutional settings; Seyla Benhabib, ‘Reason-Giving and Rights-Bearing: Constructing the Subject of Rights’ (2013) 20 *Constellations* (2013) 38

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

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

even greater level of fragmentation due to different constitutional arrangements and legal frameworks under devolution. The large-scale undertaking of providing public services is also dispersed, provided by nearly half a million civil servants across cities in England, Wales, Scotland and Northern Ireland. A multidisciplinary approach is particularly effective for examining the multi-faceted nature of social rights protection frameworks across the UK jurisdictions. Our analysis demonstrates how increased decentralisation, automation, privatisation and the outsourcing of government functions results in significant gaps in oversight and accountability.

The processing and sorting of information and people through various strategies of valuation creates hierarchies that are organised according to the perceived worthiness of individuals, further marginalising those who already struggle to access and participate in the 'system'. Differences in the use of language, or how and which discourses are mobilised, often quite systematically translates into inequalities between individuals.<sup>8</sup> Our data show that not all members of society have access to language or discourse in the same way<sup>9</sup>, resulting in significant impact on the realisation of social rights and the ability to access an effective remedy.

Our analysis shows how circulating discourses intersect in the realisation of social rights, mobilising ideological conceptions of human rights, as well as discourses of valuation and categorisation. The dominant UK Home Office 'hostile environment' policy is a powerful example of the ways in which ideology becomes practice through a variety of rules and regulations that marginalise a large group of people on account of their immigration status. Those categorised and framed as 'failed asylum seekers'<sup>10</sup> are essentially stripped of any legitimate voice to challenge social rights violations. 'The politics of framing',<sup>11</sup> is instrumental in the creation of boundaries, delimiting certain actions and interpretations, relating to matters of social belonging and justice.<sup>12</sup>

Another example of how certain discursive spaces are constrained and limit interpretations concerns current practices governing medical assessments for social security benefits, such as Personal Independent Payment (PIP). These practices prevent rights holders from challenging the content of medical assessment reports, even when significant errors have been made. As the medical assessments are not audio or video recorded, this means that rights holders cannot provide any legitimate evidence to challenge the 'truths' produced in a report. Those suffering from mental health challenges are especially disadvantaged in these processes.

## Conclusion

Concerted efforts must be directed to reclaiming the narrative for social rights: a) as justiciable (enforceable legal) rights in and of themselves and b) in ways that mobilise counter discourses that subvert the dominant valuation discourse along the axis of deserving and non-deserving. The only way to subvert negative valuation discourses centred on notions of (un)worthiness is to base social rights entitlements in a discourse of human rights rather than contrasting categories of worth.

It is essential, however, that rights claiming goes hand in hand with addressing the complex structures and processes that produce suffering and entrench existing power relations. Advocacy and raising legal consciousness is meaningless without efforts to address the structural inequalities that give rise to silencing certain voices. Our analysis illustrates how disempowering discourses are also closely linked to mechanisms that perpetuate discriminating practices. In turn, accountability for those practices depend, in part, on the legal framework and adequate legal mechanisms should be aligned to create and ensure accountability for social rights compliance.

8 Jan Blommaert, *Discourse: A Critical Introduction* (Cambridge University Press 2005) at 71

9 See for instance, Dell Hymes, 'Inequality in Language: Taking for Granted' (1992) 8(1) Working Papers in Educational Linguistics

10 See for example the first line of the judgment in *Ali v Serco* [2019] CSIH 54 in which Lady Dorrian begins her judgment with "The appellant is a failed asylum seeker". This statement as a matter of fact can also be understood as a manifestation of an exclusionary discourse that marginalises human beings, denying them access to basic rights on account of their immigration status. The research also demonstrates that the allocation of "failed" status can be in a constant state of flux, meaning it is by no means a permanent fixture.

11 Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (Columbia University Press 2009) at 22; also see Deborah Tannen, *Framing in Discourse* (Oxford University Press 1993)

12 For an example, see Diana Camps, 'Restraining English Instruction for Refugee Adults in the United States' in E M Feuerherm and V Ramanathan (eds), *Refugee Resettlement in the United States: Language, Policy, Pedagogy* (Multilingual Matters 2016)

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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