



## USING THE LAW FOR SOCIAL CHANGE: A LANDSCAPE REVIEW

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The Baring Foundation is grateful to Lisa Vanhala and Jacqui Kinghan (University College London) for authoring this review.

Lisa and Jacqui are acting with New Philanthropy Capital as the Learning Partners to the Foundation's Strengthening the Voluntary Sector (STVS) programme.

The STVS programme was launched in 2015 and is a collaboration with the Legal Education Foundation and the Esmée Fairbairn Foundation. It aims to support civil society organisations to embrace the law and human rights based approaches as effective tools for achieving change for individuals and communities. It also aims to build sustainable collaborations that leverage existing legal expertise within the sector to ensure the use of these approaches is as effective as possible.

The Learning Partner will support the Foundation with a programme of research over the next three years.

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# 1 : Executive Summary

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The Strengthening the Voluntary Sector (STVS) programme supports effective use of the law and human rights based approaches by the voluntary sector in the United Kingdom. The programme intends to play a role in developing our conceptual understanding of the barriers, strengths and risks of using the law and has begun to build the evidence base to address empirical questions such as how, when and under what conditions use of the law and human rights-based approaches are effective, efficient and legitimate tools to tackle discrimination and disadvantage.

This review of the research landscape is the first publication produced by the Programme's Learning Partners and is intended to help guide the development of its programme of research over the next three years. However, we hope that it also provides useful information for the wider voluntary sector, legal and academic communities.

The objectives of this review are:

1. to succinctly outline existing knowledge on use of the law and human rights-based approaches by the voluntary sector in the UK;
2. to identify specific gaps in our knowledge and understanding with a view to establishing a forward-looking research agenda.

The research suggests that voluntary sector organisations considering use of the law and human rights-based approaches today face a unique socio-political context with specific challenges and opportunities. Four phenomena are playing a key role in shaping the landscape:

1. the impacts of **austerity politics**, both in terms of accessing justice and in terms of the scale and breadth of disadvantage and discrimination;
2. the shifting legal landscape caused by uncertainty over **Brexit**;
3. shrinking **space for civil society**;
4. a growth in the **hostility to human rights** talk.

The research finds that there are a number of factors voluntary sector organisations should consider in terms of using the law and human rights-based approaches. It also demonstrates that there is a better understanding of some of these factors than others. Key lines of enquiry include:

1. **Types of law:** Existing research shows that UK voluntary sector organisations tend to rely on human rights and equality law. There is much less research on use of the other types of law (such as labour law, administrative law, community care law) and other forms of law (such as collective/class actions, soft law, international treaties and other international legal mechanisms) by comparison.
2. **Structural factors:** Different ways of using the law, and participating in litigation efforts specifically, come with their own advantages, disadvantages and costs in terms

of ability to access the court, cost risks, and ability to share expertise with the court. Recent research highlights the need to better understand regional variation in the ability to access justice, obtain social welfare legal advice, effectively deploy human rights language and to pursue public law remedies.

3. **Resources:** Drastic cuts to legal aid in England and Wales have restricted the types of legal advice and representation provided and have also constrained voluntary sector organisations in terms of using legal aid funding to create a framework to facilitate other types of legal activity. New research on crowdfunding has noted that this is a potentially useful way of resourcing legal tactics, but this is not a totally straightforward process and has inherent risks both for voluntary sector organisations and for access to justice more broadly.
4. **Voluntary Sector Organisation characteristics and relationships:** Specific organisational characteristics and relationships that voluntary sector organisations have with others (including those in government and with other voluntary sector organisations) can shape the likelihood of successfully using the law or human rights-based approaches. For example, existing research on the UK experience in the field of disability rights and children's rights has shown that cooperative relationships among voluntary sector organisations can enhance the efficacy, legitimacy and effectiveness of using the law. It has also shown that competitive behaviour among voluntary sector organisations can undermine victories. A better understanding of the nuances of collaboration and partnership building in the UK will help identify both the possibilities and limitations of this approach across the sector.
5. **Interaction between using the law and other social change tactics:** Almost all research on the use of the law points out that it will not be effective if used in isolation. Yet to our knowledge there is relatively little systematic research identifying the conditions under which groups across issues areas will be successful in using the law for social change. A broader evidence base that identifies and measures outcomes and outlines which tools have been used, and to what effect, has the potential to meaningfully guide decision-making and resource allocation.

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## 2 : Introduction

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The Baring Foundation's Strengthening the Voluntary Sector (STVS) programme supports effective use of the law and human rights based approaches by the voluntary sector in the United Kingdom. In collaboration with the Esmée Fairbairn Foundation and the Legal Education Foundation the programme has awarded 36 grants to voluntary sector organisations to-date to tackle the discrimination and disadvantage faced by vulnerable people and to foster the space in which voluntary organisations operate through use of the law and human rights based approaches. The programme intends to play a role in developing our conceptual understanding of the barriers, strengths and risks of using the law and has begun to build the evidence-base to address empirical questions such as how, when and under what conditions use of the law and human rights-based approaches are effective, efficient and legitimate tools to tackle discrimination and disadvantage.<sup>1</sup> The objectives of this landscape review are:

1. to succinctly outline existing knowledge on use of the law and human rights-based approaches by the voluntary sector in the UK;
2. to identify specific gaps in our knowledge and understanding with a view to establishing a forward-looking research agenda.

### CONTEXT

It is worth noting that the current legal and political environment raises a number of challenges in terms of using the law and human rights-based approaches. Four political trends in particular are important for voluntary sector organisations and their funders to consider.

#### Socio-political context

Austerity politics mean that the STVS programme's grantees and other voluntary sector organisations are under ever-mounting pressure to help a growing number of people facing disadvantage and discrimination. Reductions in legal aid spending in particular have adversely impacted children, migrants and refugees and people with additional vulnerabilities.<sup>2</sup> Charities that may previously have been focused solely on supporting individuals are increasingly realising the systemic nature of problems and are looking

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<sup>1</sup> Crowther, N. (2015) *Better use of the law and human rights by the voluntary sector*. London: Baring Foundation; Vanhala, L. (2016) *Framework for better use of the law by voluntary sector organisations*. London: Baring Foundation; Vanhala, L. (2016) *Successful use of strategic litigation on issues related to discrimination and disadvantage: key cases from the UK*. London: Baring Foundation.

<sup>2</sup> Amnesty International (2016) *Cuts That Hurt: The Impact of Legal Aid Cuts In England on Access to Justice*. London: Amnesty International.

for new solutions.<sup>3</sup> A wide body of research has also shown how spending cuts have affected many parts of the administrative justice system, the services provided by legal professionals and the ability of vulnerable individuals to access justice.<sup>4</sup>

## Brexit

The repatriation of policy and regulation from the EU is a challenge and there is a risk of retrogressing in terms of human rights and equality protections. There has been uncertainty around provisions of the EU (Withdrawal) Bill and concern especially at the proposed exclusion of the Charter of Fundamental Rights and Freedoms from retained EU law.<sup>5</sup> However, the Brexit process could also provide opportunities to the voluntary sector. There is some embryonic research on the potential impact of Brexit on the voluntary sector's use of law and human rights but it is too soon to draw any firm conclusions.<sup>6</sup>

## Shrinking space for civil society

A decades-long process of restructuring the state-voluntary sector organisation relationship into one of partnership has created a bifurcation in civil society where activism and campaigning are increasingly separated from service provision. Ishkanian notes that “despite a long history of civil society campaigning in England, its probity is being questioned” on a number of levels.<sup>7</sup> The Lobbying Act, the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012, the restrictions on third party interventions and judicial review in the Criminal Justice and Courts Act 2015 and anti-advocacy clauses in government contracts have all contributed to a chilling effect on the use of the law by voluntary sector organisations.<sup>8</sup>

## Hostility to human rights talk

A decade-long public conversation about the possible abolition of the Human Rights Act and a vocal minority of politicians and media outlets who are antagonistic to human rights talk and have questioned the legitimacy of strategic use of the law have contributed to a

<sup>3</sup> Vanhala, L. and J. Kinghan (2018) *Literature Review on the Use and Impact of Litigation to Effect Systemic Change*. London: the Public Law Project and Lankelly Chase Foundation.

<sup>4</sup> Byrom, N. (2013) *The State of the Sector: The impact of cuts to legal aid on practitioners and their clients* (Warwick: Centre for Human Rights Practice). Thomas, R. and J. Tomlinson (2017) “Mapping current issues in administrative justice: austerity and the ‘more bureaucratic rationality’ approach.” *Journal of Social Welfare and Family Law* 39(3): 380-399. See also Warwick University's repository of reports on the impact of public spending cuts across the UK at: <https://warwick.ac.uk/fac/soc/law/research/centres/chrp/spendingcuts/resources/reports-uk/>

<sup>5</sup> Liberty & Amnesty International (2018), Joint Briefing for Second Reading: *Leaving without losing: protecting human rights in the EU (Withdrawal) Bill* at: <https://www.amnesty.org.uk/files/Liberty-AIUK-brief-2ndreading-Brexit.pdf>. See also Scottish Council for Voluntary Organisations (SCVO), ‘Scottish Declaration on Human Rights’ at: <https://humanrightsdeclaration.scot/the-declaration>

<sup>6</sup> See e.g. Hilson, C. (2018) “The Impact of Brexit on the Environment: Exploring the Dynamics of a Complex Relationship” *Transnational Environmental Law* 7(1): 89-113.

<sup>7</sup> Ishkanian, A. (2018) “From Consensus to Dissensus: The Politics of Anti-austerity Activism in London and its Relationship to Voluntary Organizations.” *Journal of Civil Society* 14(1): 5.

<sup>8</sup> Crowther, N. (2015) *Better use of the law and human rights by the voluntary sector*. London: Baring Foundation. See also Low-Beer, R and Tomlinson, J. (2018) *Financial barriers to accessing judicial review*. London: The Public Law Project (2018), Moriarty, M and Sibley C. (2015) “Counting the True Costs of Section 87 of the Criminal Justice and Courts Act 2015”. *Judicial Review* 20(3): 147.

hostile environment for use of the law and human rights-based approaches.<sup>9</sup> This is further complicated by confusion around the charitable purpose of human rights.<sup>10</sup> The Charity Commission’s guidance on giving grants to non-charities includes a note referring to the need to carefully scrutinise the decision to fund human rights-related work.<sup>11</sup> Research has tended to attribute this hostility to: a scepticism of all things “European”; the ambivalence of the UK’s constitutional order towards the judicial vindication of human rights; and broader sociological factors such as macro-level shifts in penal and social policy.<sup>12</sup> The devolved administrations across the UK also have distinct political environments and cultures to consider in this context.<sup>13</sup>

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**9** Alston, P. (2017) “The Populist Challenge to Human Rights.” *Journal of Human Rights Practice*. 9(1): 1–15; Greene, A. (2017) “The Human Rights Act in a Culture of Control.” In Smyth, C. and R. Lang (eds), *The Future of Human Rights in the UK*. Newcastle upon Tyne: Cambridge Scholars Press, pp. 4-26; Maiman, R.J. (2008) “‘They all have different policies, so of course they have to give different news’: Images of Human Rights Lawyers in The British Press.” In: Sarat A and Scheingold S (eds), *The Cultural Lives of Cause Lawyers*. Cambridge: Cambridge University Press.

**10** For leading cases on political purpose see *McGovern v AG* [1981] 3 All ER 493 and *The Human Dignity Trust v Charity Commission* CA 2013/0013. *HDT* illustrates how the Charity Commission may view human rights related purposes as political. The appeal tribunal found however that where activities are engaged in promoting human rights and upholding, rather than changing, the law they fall outside of those envisaged political by *McGovern*.

**11** The Charity Commission (2016) *Guidance – Grant funding an organisation that isn’t a charity*. Available at: <https://www.gov.uk/guidance/draft-guidance-grant-funding-an-organisation-that-isnt-a-charity>

**12** Greene, A. (2017) “The Human Rights Act in a Culture of Control.” In Smyth, C. & R. Lang (eds), *The Future of Human Rights in the UK*. Newcastle upon Tyne: Cambridge Scholars Press, pp. 4-26; Struthers, A. (2017) “Teaching British Values in Our Schools: But Why not Human Rights Values?” *Social & Legal Studies* 26(1): 89-110.

**13** Donald, A. and E. Mottershaw (2009) *Poverty, inequality and human rights: Do human rights make a difference?* York: Joseph Rowntree Foundation.

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## 3 : Approach

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This paper surveys and analyses existing literature and other sources to document where we currently stand in terms of our knowledge of use of the law and human rights-based approaches by the voluntary sector in the UK and in order to scan the horizon for issues that have been neglected or underappreciated by existing research. A variety of academic and practitioner sources were consulted. This included:

- Surveying peer-review journals where research on human rights-based approaches, use of law, strategic litigation, legal mobilization and civil society organisations tends to be published: *Social & Legal Studies*, *Journal of Law & Society*, *Law & Policy*, *Journal of Law & Courts*, *Law & Society Review*, *Human Rights Quarterly*, *Journal of Human Rights*, *Journal of Human Rights Practice*, *Journal of Civil Society*, *Nonprofit and Voluntary Sector Quarterly* and *Critical Social Policy*.
- Identifying recent academic monographs on use of the law, human rights-based approaches and the voluntary sector in the UK.
- Finding relevant policy and practitioner documents published by organisations such as the Public Law Project, Justice, the British Institute for Human Rights, Third Sector, the National Audit Office.
- Attending the Baring Foundation's Roundtable on Strengthening the Use of International Human Rights Treaties by the Voluntary Sector on February 22nd 2018 and hearing from experts on the use of international law mechanisms in the UK.

We sought to find research that could address the following research questions that lie at the heart of the Baring Foundation's STVS programme's theory of change.

- Types of law: What types of law do voluntary sector organisations (not) mobilise or rely on when implementing a rights-based approach?
- Structural factors: What structural and procedural opportunities and constraints do voluntary organisations face within the legal system? What kinds of campaigning and legal work are being undertaken to address these issues? How are digital innovations changing the use of the law by the voluntary sector?
- Resources: What are the different ways of resourcing use of the law and human rights-based approaches? What are the benefits and risks associated with some of the newer options for financing litigation, for example crowdfunding?
- Voluntary Sector Organisation characteristics: What characteristics of voluntary organisations render them more or less likely to use the law or adopt a human rights-based perspective? Does this relate to their mission, governance structure, staffing and/or models of service-delivery? What are the internal, cultural barriers to using human rights-based approaches and mobilising the law? What factors influence the likelihood of success?
- Voluntary Sector Organisation relationships: Do relationships with other voluntary sector organisations enhance or undermine the willingness and/or capacity to mobilise

the law? Does collaboration between legal and non-legal voluntary sector organisations enhance the legitimacy, efficacy and effectiveness of using the law or human rights-based approaches?

- Other relationships: Do relationships with other actors (central government, local government and corporate sector) enhance or undermine the willingness and /or capacity to mobilise the law? What are the characteristics of successful collaboration? What areas of law best facilitate effective voluntary sector and non-voluntary sector collaborations?
- Backlash: Where are the main sources of counter-mobilisation to the use of the law and human rights in the UK? What forms does backlash take? Is it effective in dampening use of the law and human rights-based approaches?

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## 4 : Review of existing research

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This section presents the findings of the review of existing literature and policy documentation. It structures the summary of existing research according to the different sets of questions outlined above.

### 1. LEGAL STOCK

This refers to the types of “legal hooks” used by voluntary sector organisations when they do use the law whether in training and capacity building, campaigning or litigation.

#### The Human Rights Act 1998 (HRA)

In 2000, the HRA, which incorporates the European Convention on Human Rights and Fundamental Freedoms (ECHR) into domestic law, came into force. The Act ‘brought rights home’ by facilitating access to the courts in order to challenge decisions made by public bodies and hold the state to account.<sup>14</sup> By placing more concrete legal duties on public authorities relevant to the voluntary sector it has opened up the way in which organisations can potentially use the law to promote and protect the rights of vulnerable groups.<sup>15</sup> Aside from litigation, a number of case studies have also shown how broader human rights-based approaches can be put into action in areas including health, social care, welfare entitlements and protection from violence.<sup>16</sup>

#### Equality legislation

The Equality Act 2010 brought protection from nine different forms of discrimination together under one act.<sup>17</sup> Several case studies have also focused on EU equality legislation with UK case studies showing how UK mobilisation shaped EU equality legislation and in turn how supranational law has shaped domestic interpretation and practices.<sup>18</sup>

#### Other legislation

Legal mobilisation based on other types of law has been studied less in the UK context though there is evidence of activity drawing on a range of other statutes, policies and

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<sup>14</sup> Leigh, I. and R Masterman (2008) *Making Rights Real: The Human Rights Act in its First Decade*. Oxford: Hart Publishing.

<sup>15</sup> Crowther, N. (2015) *Better use of the law and human rights by the voluntary sector*. London: Baring Foundation; Donald, A. and E. Mottershaw (2014) *Identifying Human Rights Stories: A Scoping Study*. London: Thomas Paine Initiative.

<sup>16</sup> British Institute of Human Rights (2007) *The Human Rights Act - Changing Lives*. London: British Institute of Human Rights; Scottish Human Rights Commission (2016) *Human Rights in health and social care – putting it into practice: case studies from Scotland*. Edinburgh: Scottish Human Rights Commission.

<sup>17</sup> Age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex, sexual orientation.

<sup>18</sup> Alter, K. and J. Vargas (2000) “Explaining variation in the use of European litigation strategies.” *Comparative Political Studies* 33(4): 452-82; Vanhala, L. (2018) “Shaping the Structure of Legal Opportunities: Environmental NGOs Bringing International Environmental Procedural Rights Back Home.” *Law & Policy* 40(1): 110-127.

common law: for example groups have mobilised the law based on community right-to-buy schemes, local planning regulations and labour law. Straw suggests ways in which reconfiguring human rights arguments under the common law might help ‘future proof’ against repeal of the HRA.<sup>19</sup> There has also been a recent flurry of activity related to access to justice around the *Unison* case, a landmark 2017 decision concerning the common law and the constitutional right of access to the courts.<sup>20</sup> In the criminal justice sphere, some research addresses how organisations collaborate on Innocence Projects and the potential role such projects have in criminal justice reform.<sup>21</sup> There is also interesting activity by voluntary sector organisations in the field of community care law using, for example, the Care Act 2014, the Children Act 1989 and the Children and Families Act 2014.<sup>22</sup> However, to our knowledge there has been comparatively limited analysis of use of the law by voluntary sector organisations in the UK based on private law such as tort, property and contract law.<sup>23</sup>

## Soft law

This refers to quasi-legal instruments which may not have legally binding force, or whose binding force is weaker than traditional “hard” law mechanisms. It can also refer to other new modes of governance. Recent research coming out of the US on community campaign organisations and research on soft law in the EU has focused on the possibilities of using these non-binding norms as a peg for legal mobilisation and/or an outcome of use of the law for social change.<sup>24</sup> There is relatively little research on the use of soft law principles in the UK context, with the exception of an embryonic body of research on how NGOs have deployed the UN Guiding Principles on Business and Human Rights.

## International law

This refers to international treaties to which the UK is party but that have not been incorporated into domestic law. In her research on the impact of international law, Beth Simmons shows that domestic political actors are able to appeal to the authority of the treaty to pressure the government to improve its rights practices. This pressure can be applied through both formal channels, such as legal challenges to state behaviour, and informal channels, such as mobilised social movements.<sup>25</sup> Research has documented the many different ways in which voluntary sector organisations have deployed international rights norms in their campaigning, capacity-building, training work and in their litigation efforts.<sup>26</sup> There has also been research on how UK voluntary sector organisations have participated in treaty negotiations, human rights monitoring mechanisms such

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<sup>19</sup> Straw, A (2015). “Future Proofing: Running Human Rights Arguments under the Common Law.” *Judicial Review* 20(4): 193.

<sup>20</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51.

<sup>21</sup> Roberts, S. and L. Weathered (2008) “Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission.” *Oxford Journal of Legal Studies* 29: 43-70.

<sup>22</sup> See for example Clements, L. (2017) *Accessing Public Services Toolkit: A Problem Solving Approach*. Cerebra.

<sup>23</sup> See the following for examples from the U.S. and comparative research: Lempert, R. (1976) “Mobilizing private law: an introductory essay.” *Law & Society Review* 11: 173-189; Howells, G. (2011) *The Tobacco Challenge: Legal Policy and Consumer Protection*. London: Routledge; Barnes, J. and T.F. Burke (2015) *How policy shapes politics: Rights, courts, litigation and the struggle over injury compensation*. New York: Oxford University Press.

<sup>24</sup> Jacquot, S. and T Vitale (2014) “Law as Weapon of the Weak? A Comparative Analysis of Legal Mobilization by Roma and Women’s Groups at the European Level.” *Journal of European Public Policy* 2014, 21(4): 587-604.

<sup>25</sup> Simmons, B. (2009) *Mobilizing for Human Rights: International Law in Domestic Politics*. Cambridge: Cambridge University Press.

<sup>26</sup> See e.g. Children’s Rights Alliance for England (2017) *Barriers and solutions to using children’s rights approaches in policy*. London: CRAE.

as the Universal Periodic Review, and treaty compliance processes.<sup>27</sup> Research has also highlighted the influence of US, Canadian and European judicial interpretation of international legal norms on the UK experience, though research on this has largely been confined to women's international rights norms and disability rights.<sup>28</sup>

## 2. SHIFTING STRUCTURAL OPPORTUNITIES AND CONSTRAINTS IN THE LEGAL SYSTEM

The procedures that regulate access to the courts for voluntary sector organisations structure the opportunities and constraints that voluntary organisations face. These variables are important for those organisations that use litigation or other court-based strategies as part of their broader campaign for social justice. Academic research has identified the following factors as important for analysing levels of access to justice for voluntary sector organisations.

### Standing

This refers to the regulations that limit or allow access to courts. There is a strong foundation of legal and socio-legal research on standing rules in the UK, with research also documenting recent changes on standing in the Scottish courts.<sup>29</sup>

### Cost rules

The rules on who bears the costs in litigation also matter in shaping the use of legal action by voluntary sector organisations. In normal circumstances, under English law the losing party pays the winning party's fees. This means that the risks and potential costs of litigating in the United Kingdom are generally much greater than in other jurisdictions. There has been growing concern among both practitioners and scholars of the access to justice issues raised by the impact of recent policy changes.<sup>30</sup> Joe Tomlinson points out that there is "an urgent need for a thorough and wide-ranging analysis of the "economy" of the modern judicial review system".<sup>31</sup>

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**27** Bernaz, N. and I. Pietropaoli (2017) "The Role of Non-Governmental Organizations in the Business and Human Rights Treaty Negotiations." *Journal of Human Rights Practice* 9(2): 287–311; Hodson, L. (2011) *NGOs and the Struggle for Human Rights in Europe*. Oxford: Hart Publishing; Moss, L. (2010) "Opportunities for Nongovernmental Organization Advocacy in the Universal Periodic Review Process at the UN Human Rights Council." *Journal of Human Rights Practice* 2(1): 122–150; Niemetz, M. (2014) "Empowering Civil Society: How to Increase the Input of NGOs into Security Council Deliberation." *Journal of Human Rights Practice* 6(1): 69–88.

**28** Millns, S. and C. Skeet (2013) "Gender equality and legal mobilization in the United Kingdom: using rights for lobbying, litigation, defense and attack." *Canadian Journal of Law and Society* 28(2): 169–188.

**29** Vanhala, L. (2012). "Legal opportunity structures and the paradox of legal mobilization by the environmental movement in the UK." *Law & Society Review*, 46(3): 523–556; Vanhala, L. (2018) "Shaping the Structure of Legal Opportunities: Environmental NGOs Bringing International Environmental Procedural Rights Back Home." *Law & Policy* 40(1): 110–127.

**30** Hickman, T. February 9 2017. "Public Law's Disgrace." UK Constitutional Law Blog.

**31** Tomlinson, J (2018) "Crowdfunding and Public Interest Judicial Review: A Risky New Resource for Law Reform". Available at SSRN: <https://ssrn.com/abstract=3106355> or <http://dx.doi.org/10.2139/ssrn.3106355>; Low-Beer, R. and J. Tomlinson (Forthcoming) *The Political Economy of Judicial Review: What we know and what need to know about how money affects access to judicial review*. London: The Public Law Project.

## Third-party interventions

Third party interventions are one way in which a person or organisation not otherwise involved in a legal case can submit specialist information or expertise to the court. The Public Law Project note in their report, *Third Party Interventions: A Practical Guide*, that voluntary sector organisations' specialist knowledge about how particular decisions impact upon disadvantaged groups can assist the court in important ways.<sup>32</sup> Academic and policy research on the use of third-party interventions has documented the barriers and showcased successful case studies of strategic interventions.<sup>33</sup>

## Class/collective actions

While still relatively uncommon in the UK the adoption of the Consumer Rights Act 2015 has implications for the likelihood of class action litigation.<sup>34</sup> There is a lively research community of legal scholars tracking these developments in the EU and the UK.

## Geographic factors

Research has questioned whether the wider needs of regional communities in public law matters are being met through the decentralisation of the Administrative Court's jurisdiction.<sup>35</sup> There has also been wide concern for the social welfare legal advice deserts in large areas of England and Wales.<sup>36</sup> The reception to human rights across devolved parts of the UK is salient here too with Anna Poole QC recently commenting that while there are exceptions, "the majority of human rights challenges in cases that proceed to judgment [in Scottish courts] are rejected".<sup>37</sup> Research also points to the constrained political context of both legal mobilisation and legislative reform in Northern Ireland especially in relation to equality and related welfare issues.<sup>38</sup>

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<sup>32</sup> The Public Law Project (2008) *Third Party Interventions: A Practical Guide*. London: Public Law Project; The Public Law Project (2014) *Guide to Strategic Litigation*. London: Public Law Project.

<sup>33</sup> Harlow, C., and Rawlings, R. (1992) *Pressure through law*. London: Routledge; Smith, R. (2003) "Experience in England and Wales: Test case strategies, public interest litigation, the Human Rights Act and legal NGOs". Available at: [https://www1.essex.ac.uk/armedcon/story\\_id/000696.pdf](https://www1.essex.ac.uk/armedcon/story_id/000696.pdf); Justice and Freshfields Bruckhaus Deringer (2016) *To Assist the Court: Third Party Interventions in the Public Interest*. London: Justice and FBD. Available at <https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/06/To-Assist-the-Court-Web.pdf>; The Public Law Project (2008) *Third Party Interventions: A Practical Guide*. London: Public Law Project; Samuels, H. (2005) "Feminist Activism, Third Party Interventions and the Courts." *Feminist Legal Studies* 13: 15-42; Vanhala, L. (2018) *Case Study of Just for Kids Law's Strategic Intervention in the UK Supreme Court: R (Tigere) v Secretary of State for Business, Innovation and Skills*. London: Just for Kids Law.

<sup>34</sup> Hensler, D., C. Hodges and I. Tzankova, eds. (2016), *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation*. Cheltenham: Edward Elgar.

<sup>35</sup> Nason, S. and M. Sunkin (2013) "The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Specialisation of Services in Public Law." *The Modern Law Review* 76(2): 223-253; Nason, S. November 16 2016. "Justice outside London? A Update on 'Regional' Judicial Review." UK Constitutional Law Blog.

<sup>36</sup> The Law Society of England and Wales (2016) *Parliamentary Brief: Legal aid deserts in England and Wales*. London: The Law Society.

<sup>37</sup> Poole, A. (2016) "Human Rights in Great Britain." *Judicial Review* 21(3): 162 -173.

<sup>38</sup> Harvey, C. (2012) "Contextualised Equality and The Politics of Legal Mobilisation: Affirmative Action in Northern Ireland." *Social and Legal Studies* 21: 23-50; Tomlinson, M. (2016). "Risking peace in the 'war against the poor'? Social exclusion and the legacies of the Northern Ireland conflict." *Critical Social Policy* 36(1): 104-123.

### 3. RESOURCING USE OF THE LAW

Use of the law in the UK is expensive by almost any measure. The Public Law Project has been among those organisations, practitioners and scholars leading the charge on documenting and analysing the implications of recent changes in the costs regime for access to justice and public interest litigation.<sup>39</sup>

#### Legal aid

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) dramatically altered the depth and breadth of legal aid provision in England and Wales. Family law cases no longer receive legal aid, unless there is evidence of domestic violence, and most housing, debt, social welfare, prison law and immigration cases (subject to some limited exceptions) are also no longer in scope for funding.<sup>40</sup> The Bach Commission recently proposed codifying a new “right to justice” as well as urgent changes to legal aid eligibility rules and to the operation of the legal aid system.<sup>41</sup> For voluntary sector legal organisations in England and Wales the possibility of using legal aid funding to create a framework to facilitate other types of legal activity has therefore been restricted as has the types of legal advice and representation provided.<sup>42</sup> A stakeholder group of voluntary organisations recently outlined an urgent need for re-evaluation of cuts to the Justice Select Committee, especially to enable ‘problem clusters’ to be resolved.<sup>43</sup> Comparatively, while cuts have been proposed legal aid levels in Northern Ireland have largely remained the same and in Scotland there has been much less of a reduction in spending but nonetheless concerns about future provision remain.<sup>44</sup>

#### Crowdfunding

A growing phenomenon is the corraling of third party funding for litigation from the public, often using an online platform.<sup>45</sup> In a recent paper Joe Tomlinson argues that in certain cases crowdfunding can solve the resource dilemma. However, he is also careful to note the multiple risks inherent in the use of crowdfunding. Some of these are particularly relevant to voluntary sector organisations: uncertainty about the other side’s costs; reputational risks; questions of how to frame and campaign around the issues in a legal case; the narrow or broad-based nature of participation; the potential risks of donors having to be identified to the courts and/or being liable for further costs; and the risk that government may take effective crowdfunding as an indicator that public funds (such as legal aid) are not necessary.<sup>46</sup>

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<sup>39</sup> The Public Law Project (2007) *How to fund a judicial review claim when public funding is not available*. London: The Public Law Project.

<sup>40</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1.

<sup>41</sup> Fabian Society (2017) *The Right to Justice: Final Report of the Bach Commission*. London: Fabian Society, p.6.

<sup>42</sup> The Law Commission (2014) *Tackling the Advice Deficit*. London: The Legal Action Group; The Law Commission (2015) *Getting it Right in Social Welfare Law: The Low Commission’s follow-up report*. London: The Legal Action Group.

<sup>43</sup> Law Centres (2017) *Post Implementation Review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, Memorandum to the Justice Select Committee. Available at: [www.lawcentres.org.uk/asset/download/619](http://www.lawcentres.org.uk/asset/download/619)

<sup>44</sup> Northern Ireland Audit Office (2016) *Managing Legal Aid*. Belfast: Northern Ireland Audit Office; Law Society of Scotland (2015) *Legal Assistance in Scotland: Fit for the Twenty First Century*. Edinburgh: Law Society of Scotland.

<sup>45</sup> Tomlinson, J (2018) “Crowdfunding and Public Interest Judicial Review: A Risky New Resource for Law Reform”. Available at SSRN: <https://ssrn.com/abstract=3106355> or <http://dx.doi.org/10.2139/ssrn.3106355>.

<sup>46</sup> Tomlinson, J (2018) “Crowdfunding and Public Interest Judicial Review: A Risky New Resource for Law Reform”. Available at SSRN: <https://ssrn.com/abstract=3106355> or <http://dx.doi.org/10.2139/ssrn.3106355>.

## 4. VOLUNTARY SECTOR ORGANISATION CHARACTERISTICS

The Baring Foundation Working Paper 2 on a *Framework for Better Use of the Law* includes a conceptual discussion of how to categorise voluntary sector organisations based on their relationship with law and their use of legal approaches. Similar techniques are available for analysing organisations in terms of their engagement with human rights-based approaches.<sup>47</sup> These look at both what organisations do and how they do it and analyse a voluntary sector organisation's mission, governance structure, staffing, service delivery approaches and the way in which they work with other voluntary sector organisations. There has been some research in the UK on these various facets but further research could help explore some of the internal and organisational cultural barriers to use of the law and human rights-based approaches.<sup>48</sup>

## 5. VOLUNTARY SECTOR ORGANISATION RELATIONSHIPS

Academic research on use of the law is divided on how relationships might influence the propensity to assert the law. This concerns both relationships with government and relationships across the voluntary sector.

### Public sector

Some scholars have hypothesized that having relationships with government partners is likely to have a chilling effect on a group's use of the law because groups "don't want to bite the hand that feeds them". Other scholars have suggested that knowing and deploying the law within these relationships can encourage the other side to take an organisation more seriously and give them a seat at the table. Further research is needed to understand the nuances of these dynamics in the UK. Variation in the experience of voluntary sector organisations may be explained by a number of factors such as: the nature of the government department being dealt with; the level of government one is engaging with; the quality of individual relationships with those in the bureaucracy and particular local or regional legal cultures.

### Other Voluntary Sector Organisations:

Existing research on the UK experience in the field of disability rights and children's rights has shown that cooperative relationships can enhance the efficacy, legitimacy and effectiveness of using the law. It has also shown that competitive behaviour among voluntary sector organisations can undermine victories.<sup>49</sup> However, these findings are not necessarily relevant in other policy areas. Further research could explore the best models for delivering support to non-legal organisations that are interested in using the law.

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<sup>47</sup> Vanhala, L. (2011). *Making Rights a Reality? Disability Rights Activists and Legal Mobilization*. New York: Cambridge University Press; Victorian Equal Opportunity and Human Rights Commission (2008), *Implementing the Human Rights Based Approach in Community Organisations*.

<sup>48</sup> Vanhala, L. (2018) "Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organisations in the United Kingdom, France, Finland and Italy." *Comparative Political Studies* 51(3): 380-412.

<sup>49</sup> Vanhala, L. (2011). *Making Rights a Reality? Disability Rights Activists and Legal Mobilization*. New York: Cambridge University Press; Vanhala, L. (2018) *Case Study of Just for Kids Law's Strategic Intervention in the UK Supreme Court: R (Tigere) v Secretary of State for Business, Innovation and Skills*. London: Just for Kids Law.

## The interaction between different social change tactics

As Susan Millns and Charlotte Skeet note in their study of legal mobilization on gender equality a distinctive feature in the UK is the need for mixed strategies that do not focus exclusively on either parliamentary or court-based activity. This is in part because of the nature of parliamentary sovereignty. Even since the adoption of the Human Rights Act, the courts cannot strike down problematic legislation in the same way as other Supreme or Constitutional Courts in Europe and elsewhere. The notion that use of the law on its own is not effective has been asserted in countless other studies yet there has been little work that moves beyond a small number of case studies of single legal cases or campaigns.<sup>50</sup>

## Counter-mobilisation and backlash

In the US there have been innovative developments in research on the politics of counter-mobilisation and backlash.<sup>51</sup> This has documented how conservative or reactionary groups have appropriated legal mobilisation tactics pioneered by liberal or progressive groups.<sup>52</sup> There has also been an increase in strategic lawsuits against public participation (SLAPP): this refers to legal cases (e.g. libel suits, super-injunctions) taken by corporations to silence voluntary sector organisations. Chris Hilson (2016) notes that while SLAPPs are typically regarded as a threat, there are some notable cases in the UK where the environmental movement has been able to convert what may appear as a legal threat into a positive legal or media opportunity. In short, there are some indications that counter-mobilisation may increase in the future and could represent a serious threat to the successful use of the law and human rights-based approaches by voluntary sector organisations.<sup>53</sup>

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<sup>50</sup> Budlender, S., G. Marcus SC, and N. Ferreira (2014) *Public interest litigation and social change in South Africa: Strategies, tactics and lessons*. Johannesburg: The Atlantic Philanthropies; Bouwen, P. and M. McCown (2007) "Lobbying versus litigation: political and legal strategies of interest representation in the European Union." *Journal of European Public Policy*, 14(3): 422-433; Donald, A. and E. Mottershaw (2009) "Evaluating the Impact of Human Rights Litigation on Policy and Practice: A Case Study of the UK" *Journal of Human Rights Practice* 1(3): 339-361; Barber, C. (2012) "Tackling the evaluation challenge in human rights: assessing the impact of strategic litigation organisations." *International Journal of Human Rights* 16(3): 411-435; Hertogh, M and S. Halliday (2004) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives*. Cambridge: Cambridge University Press.

<sup>51</sup> McCann, M. (2008) "Litigation and legal mobilization." In K.E. Whittington, R.D. Kelemen and G.A. Caldeira (eds). *The Oxford Handbook of Law and Politics*. Oxford: Oxford University Press, 522-540.

<sup>52</sup> Goldberg-Hiller, J. (2002) *The Limits to Union: Same-Sex Marriage and the Politics of Civil Rights*. Ann Arbor: University of Michigan Press; Haltom, W. and M. McCann (2004) *Distorting the Law: Politics, Media, and the Litigation Crisis*. Chicago: University of Chicago Press; Keck, T. (2009) "Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights" *Law & Society Review* 43(1): 151-186.

<sup>53</sup> Donson, F. (2010). "Libel Cases and Public Debate – Some Reflections on whether Europe Should be Concerned about SLAPPs." *Review Of European Community & International Environmental Law* 19(1): 83-94; Hilson, C. (2016) "Environmental SLAPPs in the UK: threat or opportunity?" *Environmental Politics* 25(2): 248-267.

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## 5 : Conclusions

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This landscape review has outlined the state of research on the use of the law and human rights-based approaches by voluntary sector organisations. Research on structural and procedural issues in accessing justice and funding use of the law has received a good deal of academic and practitioner focus reflecting the profound shifts over the last decade in policy in this area. As such, we do not view these as immediate research priorities. There have also been a number of studies documenting use of the law – particularly equality and human rights law – by voluntary sector organisations (though these tend to draw lessons from one or a small number of case studies explored in depth rather than looking across a wide range of cases or campaigns).

The knowledge gaps identified by this survey include:

### **Types of law being engaged with by the voluntary sector**

There is a relative lack of understanding of: the extent of use and value of using other types of law – such as family law, labour law, housing law, planning law, tort law, local authority regulations – in the UK; the mobilisation of soft law mechanisms; the extent and impact of use of various international legal norms and international legal mechanisms. If we had a comprehensive overview of the ways in which other types of law are being used, and the overlap with human rights and more traditional common law approaches, there is potential to open up new pathways to impact for voluntary sector organisations.

### **Comparative research on UK-wide use of law**

It seems clear that tactics are used with success in some parts of the UK and not others. Contextual socio-political issues and geographic factors create both possibilities and barriers to the use of law. Further comparative research across England, Wales, Scotland and Northern Ireland would assist in learning lessons from successes that might be replicated elsewhere in the UK as well as identifying barriers and sharing experiences of overcoming them.

### **Voluntary sector organisation characteristics and relationships**

A number of factors inherent to organisations and to relationships between voluntary sector organisations can shape their propensity to take a human rights approach or to use the law in their work. A particularly promising finding is that collaboration between voluntary sector organisations can enhance legitimacy, efficacy and effectiveness of using the law but this research has generally been based on single case studies limiting the generalisability of these findings.

### **Relationships with government**

We have limited analysis of how voluntary sector organisations work with other actors such as central and local government to achieve change through the use of the law. A

better understanding of the nuances of collaboration and partnership building in the UK will help identify both the possibilities and limitations of this approach across the sector.

### **Interaction between using the law and other social change tactics**

Almost all research on use of the law points out that it will not be effective if used in isolation. Yet to our knowledge there is relatively little systematic research identifying the conditions under which groups across issues areas will be successful in using the law for social change. There is also relatively little research showing how to evaluate the impact of use of the law. A broader evidence base that identifies and measures outcomes and outlines which tools have been used, and to what effect, has the potential to meaningfully guide decision-making and resource allocation.

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