

Do the bankruptcy laws of England & Wales adequately protect debtors' human rights who suffer mental illness?

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by

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ABSTRACT

Striking the correct balance of interest amongst creditors and debtors is an underlying objective of insolvency law and practice. However, in the last three decades, the attitudes towards debt, risk and rewards have shifted significantly in favour of a debtor. The financial crises of 2008 and the COVID-19 pandemic exposed the vulnerability of a debtor who requires adequate protection and certainty that their rights will be protected by all means. The available safety net for debtors in England & Wales through the regulatory and statutory framework protects debtors are insufficient. The parallels system of the international debt relief framework, which comprises international treaties and conventions to which the United Kingdom is party grants certain rights to the debtor to maintain dignity and respect. Debtors confront many challenges during the life cycle of their debt. Discrimination, mental stress, fear of losing a home, and the societal stigma of bankruptcy and exclusion are the prime issues a debtor faces daily. It is now evident that debt and bankruptcy create both physical and mental problems for a debtor. The Supreme Court decisions in Manchester CC v Pinnock and Hounslow CC v Powell examine the potential impact of Article 8 of the European Convention on Human Rights and Fundamental Freedoms on protecting the home in creditor repossession proceedings. However, under Article 8, occupiers may have an independent right to respect for their home, which should be recognised in the legal frameworks governing creditor's enforcement rights against the home. Common symptoms of mental health problems, such as low motivation, untrustworthy memory, limited concentration, and diminished planning and problem-solving abilities, can make it difficult for people to be engaged consumers and advocate for themselves, particularly when they are in debt.

Keywords: *Impact of Bankruptcy, Debt, Debtors Protection, Human Rights, Mental Illness, Mortgagor Rights, England & Wales.*

Table of Contents

Abstract	1
Table of Contents	2
Acknowledgements	7
Table of Abbreviations	8

CHAPTER 1: INTRODUCTION

Introduction	10
Debt and Debt-Related Difficulties	14
Debt- Related Challenges	18
Current State of the UK Personal Debt	19
Problem and Objectives Statement	20
Literature Review	26
Conceptual Framework: Concept, Definitions, and Indicators of Over-indebtedness	34
Arrears	36
Subjective Burden	36
Credit Commitments.....	36
Unsecured Repayment-to-income Ratio	37
Total Repayment-to-income Ratio.....	37
Identification of the Poor.....	37
The Human Rights Approach: Concept and Rationale.....	38
International Human Rights Framework and Debtors Rights.....	40
European commitments.....	41
National law	41
International commitments.....	42
Financial Losses	43
Adequacy: Concept and how it is Evaluated	43
Illustrating Framework- Measuring Discrimination	44
Research Question and Research Methodology	47
Limitations and Scope for Future Research	48
Contribution to the Body of Knowledge	48

CHAPTER 2: HISTORY OF DEBT

Introduction.....	50
Credits and Debts	52
The Debt Law’s Historical Background	54
The Evolution of Bankruptcy Law	56
Freedom from Debt-Related Imprisonment	60
Conclusion	63

CHAPTER 3: IMPACT OF DEBT

Introduction.....	65
Impact of COVID-19 on the Debt	67
Impact of COVID-19 on BAME	74
Impact of Bankruptcy on Debtors	79
Bankruptcy Costs to the Debtor	79
Impact on the Earnings of the Bankrupt	82
Bankruptcy Impact on Debtor Future Access to Credit	89
Impact on the Debtor Bank Account, Savings, Pension, and Insurance Policies	92
Bankruptcy Impact on Debtor Job and Business	94
Bankruptcy Impact on the Debtor’s Possessions	98
Bankruptcy Impact on Debtor Reputation & Privacy	99
Bankruptcy Impact on British Citizenship and Immigration Status of a Debtor	101
Impact of Bankruptcy on Debtor’s Mental Health & Emotion	103
Depression and Anxiety	103
Stress	104
Resentment	106
Denial or Denunciation	106
Anger and Frustration	107
Regret and Disappointment	107
Shame and Embarrassment	107
Fear	108
Debt, Gambling & Suicide.....	109
Impact of Bankruptcy & Repossession on the Debtor’s Family Home	111
Conclusion	118

CHAPTER 4: DEBTOR’S PROTECTION FRAMEWORK

Introduction.....	120
Credit Agreements and Debtors Protection	123
Consumer Credit Laws	125
Regulatory System of Debtor Protection and its Key Attributes.....	128
Responsible Lending Approach- Concept and Context	131
The Conception of the Mortgagor in Private Law & Development	134
FCA Regulatory System Protects Consumers in the Financial Crisis?	142
Conclusion	143

CHAPTER 5: DEBTOR RIGHTS AND PROTECTION FRAMEWORK

Introduction.....	146
Bankrupt and Creditors Beneficial Interest	151
The Debtor-Creditor Landscape & Law	159
Law of Property Act 1925 and Lenders Protection	164
The Power of Sale	166
The Consequences of the Sale	166
Regulating the Power of Sale	167
Foreclosure	168
Judicial Intervention in Balancing Creditor and Debtor Rights.....	169
Impact of Human Rights Law on Possession Claims	176
Creditors Regulatory Regime and Debtors Support	182
Conclusion	186

CHAPTER 6: INTERNATIONAL HUMAN RIGHTS LAW FRAMEWORK FOR DEBT RELIEF

Introduction.....	189
Global Over-Indebtedness & Reforms: A Historical Overview	190
Human Rights Debt Relief Framework	196
Relating Issues	202
Gender Discrimination	202
UN Convention on Torture and the ECHR (Article 3).....	203
Convention on the Rights of the Child	206

Rights of the Disabled Person and Convention on the Rights of Persons with Disabilities	209
The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR)	211
Conclusion	213

CHAPTER 7: DEBTOR MENTAL HEALTH & SOCIO-ECONOMIC PROBLEMS

Introduction	214
Social Consequences of Over-Indebtedness on Individuals	215
Indebtedness and its Relation to Financial Exclusion	221
Impact of Bankruptcy on Economy & Social Cost of Debt	227
Effects of Over-Indebtedness on Individual Health	233
Impact of Debt on the Mental Health of Individuals	239
Debt, Repossession and Morality	245
Ethical Issue for the Creditor	248
Mortgagee’s Duty to Act in Good Faith	250
Mortgagee’s Duty to Act with Reasonable Care and Skill	250
Mortgagee’s Duty to Obtain the Best Price Reasonably Obtainable	251
Conclusion	253

CHAPTER 8: FINDINGS OF STUDY & CONCLUSION

Findings of Study	255
Recommendation to the Debtor	258
Obtain Adequate Insurance	258
Establish A Savings Cushion	259
Adjust Spending	259
Manage Spending	259
Settling Debts	259
Consolidation of Debt	259
Debt Management Plan (DMP)	260
Sell off the Property	260
Debt Relief Order (DRO)	260
Individual Voluntary Arrangement (IVA)	261
Bankruptcy	261
Conclusion	262

Recommendation to Lenders and Policymakers..... 266

Bibliography

Table of Cases..... 268
International Human Rights Case Law..... 271
Table of Legislation 272
Secondary Instruments 273
International Instruments 274
Books 275
Journal Articles..... 277
Thesis 283
Other online Materials..... 283

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Table of Abbreviations

BAME	Black, Asian and Minority Ethnic
BBC	British Broadcasting Corporation
BRO	Bankruptcy Restriction Order
CAB	Citizen Advice Bureau
CCA	Consumer Credit Act
CCD	Consumer Credit Directive
CCJ	County Court Judgement
CCL	Consumer Credit Law
CDCJ	European Committee on Legal Cooperation
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CJRS	The Coronavirus Job Retention Scheme
CMA	Competition and Markets Authority
CML	Council of Mortgage Lenders
CRAs	Credit Reference Agencies
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DRO	Debt Relief Order
DTI	Debt-to-Income
ECHR	European Convention on Human Rights
ECSR	The European Committee of Social Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
ESIS	European Standardised Information Sheet
FCA	Financial Conduct Authority
FPC	Financial Policy Committee
GDP	Gross Domestic Product
HCST	High-Cost Short-Term
HEDG	Health, Econometrics and Data Group HEDG
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICO	Information Commission's Office
IMF	International Monetary Fund
IPA	Income Payments Agreements
IPO	Income Payment Order
IS	Insolvency Service
IVA	Individual Voluntary Arrangement
LTV	Loan-to-Value
MCD	Mortgage Credit Directive
MCOB	Mortgage Conduct of Business
MMHPI	Money and Mental Health Policy Institute
MMR	Mortgage Market Review
NHS	National Health Services
OECD	Organisation of Economic Co-operation and Development
OFT	Office of Fair Trading
ONS	Office of National Statistics
OR	Official Receiver
OUP	Oxford University Press

PRA Prudential Regulatory Authority
TIB Trustee in Bankruptcy
WHO World Health Organization

Chapter 1: Introduction

In light of the initiatives to combat social exclusion and poverty, as well as the financial and economic crisis that struck Europe and the United States in 2008, the European Commission's Directorate-General for Employment, Social Affairs, and Equal Opportunities has identified over-indebtedness as a major challenge.¹ Over-indebtedness is a significant problem that has resulted in households being unable to comply with their increasing financial obligations and basic needs.² The illiquidity of the households leads to poverty, social exclusion, and other related societal issues.³ As will be discussed further on in this study, an individual with over-indebtedness can face issues with their mental health. People suffering from debts often report mental health issues and are unable to meet their daily basic needs. Thus their health is adversely affected.

The financial and economic crises of 2008 and the recent COVID-19 pandemic have increased the financial issues and concerns for families in Europe, especially the UK. As a result, most debtors have been unable to meet unexpected expenses.⁴ The situation is exacerbated by the current financial and economic crises developing because of the COVID-19 pandemic.⁵ COVID-19's long-term impact on global financial systems, countries and individuals is difficult to predict. The pandemic, according to the World Health Organization (WHO), has resulted in a dramatic loss of human life worldwide and poses an unprecedented challenge to public health, the food system and the world's employment.⁶ Job losses, credit arrears, increases in eviction and mental health problems are the acute immediate effects individuals confront around the globe. The COVID-19 pandemic, according to Ian Stewart, chief economist at Deloitte, is a massive shock to the economic system and has an immediate

¹ Nicole Fondeville and others, 'Over-indebtedness' Research note 4/2010(2010) Social Situation Observatory, European Commission Employment, Social Affairs and Equal Opportunities Social Situation Observatory: (Living Conditions and Income Distribution 2010) 3.

² Rosa María Lastra, 'Northern Rock, UK Bank Insolvency and Cross-Border Bank Insolvency' (2008) 9(3) *Journal of Banking Regulation* <<https://www.semanticscholar.org/paper/Northern-Rock%2C-UK-bank-insolvency-and-cross-border-Lastra/62ad525e9a889d42968f6ff2f23f8dfb600e6b67>> accessed 27 July 2019.

³ David Batty, 'Social exclusion: the issue explained' (*The Guardian*, 15 January 2002) <<https://www.theguardian.com/society/2002/jan/15/social-exclusion1>> accessed 23 July 2021.

⁴ Michelle J White, 'Corporate and Personal Bankruptcy Law' (2011) 7(1) *Annual Review of Law and Social Science* <<https://econweb.ucsd.edu/~miwhite/annualreview-white-3.pdf>> accessed 27 May 2021.

⁵ Coronavirus disease 2019 (COVID-19) is an infectious disease caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).⁵ The disease was first identified in December 2019 in Wuhan, the capital of China's Hubei province, and has since spread globally, resulting in the ongoing 2019–21 coronavirus pandemic.

⁶ WHO Joint statement, 'Impact of COVID-19 on people's livelihoods, their health and our food systems' (*World Health Organization*, 13 October 2020) <<https://www.who.int/news/item/13-10-2020-impact-of-covid-19-on-people's-livelihoods-their-health-and-our-food-systems>> accessed 23 October 2021.

and pronounced effect on people's ability to work.⁷ Countries have now entered into an unprecedented territory, and an unprecedented response is being recorded globally. The financial impact of COVID-19 is massive and beyond calculation right now and outside of the scope of this thesis. However, individual suffering will be extensive. Some of the effects include the loss of jobs, mental and physical health deterioration, domestic violence, personal debt, financial difficulties, and bankruptcy. A global recession is a distinct possibility⁸, and the developed and developing countries are undergoing an unprecedented economic hit.

According to the World Bank, nearly two-thirds of emerging markets and developing economies, including three-quarters of unstable and conflict-affected low-income countries, will not fully recover per capita income lost in 2020 by 2022.⁹ As a result, around 100 million people are anticipated to return to extreme poverty by the end of the year. These negative consequences have hit the most vulnerable populations such as women, children, and unskilled and informal workers.¹⁰ “We know many people are suffering financial pressures as a result of the COVID-19 pandemic,” said Christopher Woolard, interim Chief Executive at the FCA. The measures we've announced are intended to provide people affected with short-term financial assistance during what could be an exceedingly difficult time. The changes will help consumers who have credit cards, loans, or overdrafts and are experiencing temporary financial difficulties as a result of the pandemic.”¹¹ The latest Bank of England surveys suggested that payment deferrals aided these households in coping with the uncertainties surrounding their future financial condition, which may have resulted in spending cuts, exacerbating the downturn.¹²

The Bank of England released the results of their most recent survey of British households. The survey showed that COVID-19 had a big effect on household income and

⁷ The Institute of Chartered Accountants in England and Wales, 'Deloitte's latest weekly insights webinar' (*The Institute of Chartered Accountants in England and Wales*, 24 March 2020) <<https://www.icaew.com/insights/viewpoints-on-the-news/2020/mar-2020/deloitte-partners-covid-19-economic-impact-is-severe>> accessed 12 July 2021.

⁸ Daniel Bachman, 'COVID-19 could affect the global economy in three main ways' (*Deloitte Touche Tohmatsu Limited*, 3 March 2020) <<https://www2.deloitte.com/us/en/insights/economy/covid-19/economic-impact-covid-19.html>> accessed 12 April 2021.

⁹ The World Bank, 'The Global Economy: on Track for Strong but Uneven Growth as COVID-19 Still Weighs' (*The World Bank*, 8 June 2021) <<https://www.worldbank.org/en/news/feature/2021/06/08/the-global-economy-on-track-for-strong-but-uneven-growth-as-covid-19-still-weighs>> accessed 17 November 2021.

¹⁰ *Ibid.*

¹¹ FCA press release, 'Temporary financial relief for customers impacted by coronavirus' (*Financial Conduct Authority*, 9 April 2020) <<https://www.fca.org.uk/news/press-releases/fca-confirms-temporary-financial-relief-customers-impacted-coronavirus>> accessed 12 April 2021.

¹² The World Bank, 'How have payment holidays supported mortgage borrowers during the Covid crisis?' (*Bank of England*, 09 August 2021) <<https://www.bankofengland.co.uk/bank-overground/2021/how-have-payment-holidays-supported-mortgage-borrowers-during-the-covid-crisis>> accessed 17 November 2021.

spending and that many households cut spending even though their income did not go down.¹³ Widespread payment holiday assistance was implemented in March 2020, but those schemes have now expired, with only those who applied before March 31, 2021, able to access them. ‘Tailored assistance’ is now the norm for others in need.¹⁴ These schemes somehow helped many borrowers (homeowners and tenants), but some of them encountered concerns and conditions that had never been seen before; many of them involved issues that were present before but have been exacerbated by the pandemic. For example, Financial Ombudsman Services investigated complaints from people who are unable to repay a loan.¹⁵ The pandemic has caused those who never experienced financial issues to do so, and those who were already struggling are finding things significantly more difficult. In theory, this is the best that banks can do right now, but some charitable foundations believe that payment holidays will worsen the debtor's situation because the debtor will have to pay additional interest on the amounts owed. Thus, a payment holiday can be a temporary measure to give relief but not a permanent solution.

In the current situation, the levels of individual debts are growing faster in the UK, which has led to a substantial negative impact on the debtors’ lives because having debts creates financial pressure on households. Debts are linked to financial exclusion and create issues like lower labour market, family breakdown, housing emergency, healthcare problems, mental health issues and bankruptcies. There is a consistent and robust link between the lower living standards of individuals and personal debts. For instance, higher debts lead to a reduced amount of spending on food and household essentials.¹⁶ The highly indebted individuals suffer from financial exclusion and struggle to get access to good credit products, pushing them into expensive borrowing like payday loan products. The debtors also face family breakdown, separation, or divorce, directly impacting their children’s lives. Thus, consumer over-indebtedness is a broader economic issue as well as a human-suffering issue.¹⁷

¹³ Bank of England, 'How has Covid-19 affected the finances of UK households?' (*Bank of England*, 25 August 2020) <<https://www.bankofengland.co.uk/bank-overground/2020/how-has-covid-19-affected-the-finances-of-uk-households>> accessed 27 April 2021.

¹⁴ Helen Saxon 'Coronavirus Finance & Bills Help' (*Money Saving Expert*, 20 April 2021) <<https://www.moneysavingexpert.com/news/2020/03/uk-coronavirus-help-and-your-rights/>> accessed 23 April 2021.

¹⁵ Financial Ombudsman Services, 'Insight summary: complaints resulting from Covid-19 and the impact on consumers and SMEs' (*Financial Ombudsman Services*, 27 January 2021) < <https://www.financial-ombudsman.org.uk/data-insight/insight/covid-19-impact-consumers-smes>> accessed 17 November 2021.

¹⁶ Bernadette Rainey and others, *The European Convention on Human Rights* (6th edn, OUP 2014) 212.

¹⁷ Chrystin D Ondersma, 'A Human Rights Framework for Debt Relief' (2014) Rutgers School of Law-Newark Research Paper No. 139 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2390788> accessed 10 June 2021.

Individuals who are deeply in debt and unable to meet their contractual obligations frequently experience shame, marginalisation, exclusion and a lack of basic necessities. Indebtedness hinders securing new jobs as the unemployed feel the pressure of debts which affects them emotionally. Debt affects people's employment status, as they often remain unemployed, which further adds pressure on the state welfare system. Shelter¹⁸ reports that non-payment of a priority debt¹⁹ can lead to bankruptcy, repossession of the family home, homelessness, and may lead to imprisonment as well as affecting physical and mental health. A money claim or county court judgement (CCJ), according to the credit rating agency Experian, can have a negative impact on the debtor's ability to obtain credit for up to six years. This means that debtors may be unable to obtain loans, credit cards, or even mobile phone contracts.²⁰ On the other hand, creditors have legitimate concerns about losses caused by non-paying debtors, and the economy suffers as a result of too many people devoting their disposable income to servicing debts.²¹

The financial crises of 2008 and COVID-19 put many households behind their contractual debt payments, including the mortgage and rent. However, the government's timely intervention to rescue the households saved many debtors from repossessions and evictions. According to the UK Finance (previously known as Council of Mortgage Lenders) data and available evidence, the number of repossessions and evictions was halted due to emergency legislation and direct regulation. However, many charities in the UK estimated that the possessions and eviction are ticking time bombs that will explode soon. The possession and eviction claims have peaked since the courts lifted the restrictions, and the bailiffs can evict again. The fear of losing the family home further pushes debtors into mental stress. Individual bankruptcies are on the rise due to job losses and the current economic uncertainty. Businesses are also struggling to bounce back to pre-COVID-19 levels. Thus, there is an overall gloomy

¹⁸ Shelter Cymru, 'Priority and non-priority debts' (*Shelter Cymru*, 3 December 2020) <<https://sheltercymru.org.uk/get-advice/money-advice/loans-debt-and-bankruptcy/priority-and-non-priority-debts/>> accessed 23 April 2021.

¹⁹ Some debts are referred to as priority debts because failure to pay them has serious consequences. Priority debts should always be addressed before non-priority debts. Priority debts include mortgage payments and loans secured by your home; rent; gas and electricity debts; council tax; and certain court-ordered payments. Child support and maintenance payments, as well as TV licence payments, are considered priority debts. If you do not pay a priority debt, you will face serious consequences. You could, for example, lose your home due to mortgage or rent arrears, face action by enforcement agents (previously known as 'bailiffs,' have your gas or electricity supply cut off, or be forced to accept an expensive pre-payment metre instead of losing belongings on hire purchase such as a car, furniture, or other goods. If you do not pay your council tax or magistrates court fines, you may be sentenced to prison.

²⁰ Experian Credit Agency, 'County court judgements and your credit file' (*Experian*, April 2021) <<https://www.experian.co.uk/consumer/guides/ccjs.html>> accessed 23 April 2021.

²¹ Chrystin D Ondersma, 'A Human Rights Framework for Debt Relief' (2014) 36 *University of Pennsylvania Journal of International Law* 269, 297.

environment. The abuse or denial of human rights of a debtor and the available safety net is in question.

Debts and Debt-Related Difficulties

Debt is the money owed by one person (known as debtor or borrower) to another person or stakeholder (creditor or lender). In broader terms, the debtor can be a country, local government, company, and an individual. The lender or creditor can be an individual, bank, payday loan provider, credit card company, local government, and state. Debt can be further characterised as contractual terms related to lending money and the timing of the repayments²² of the original amount along with interest associated with that loan. Significant evidence has been established between the socio-economic status and the mental health of a debtor. Poverty is a determinant and a consequence of mental health problems. There is sufficient nexus between the low-income level,²³ higher rate of unemployment and being on a benefit,²⁴ poor housing, and mental health problems. The University of York's Health, Econometrics and Data Group (HEDG) research indicates that before the pandemic, psychological distress was more strongly associated with chronic health conditions, employment status, and housing conditions than other factors such as age and gender.²⁵ It is said that debt leads to worse mental health issues since the debtor often suffers from stress, especially when the debtor is an individual. A financially stressed person might struggle to deal with financial obligations and get into over-indebtedness quite gradually.

Over-indebtedness could lead to more profound depression and anxiety. Different studies have confirmed that the person with debt problems faces further and exacerbated mental health problems like depression, fear, stress and other issues compared to those without debts.²⁶ Debts²⁷ can also lead to suicides, psychotic disorders, problem drinking, drug dependence, and

²² The act of repaying money borrowed from a lender is known as repayment.

²³ David Gordon and others, 'Poverty and Social Exclusion in Britain' (*Joseph Rowntree Foundation*, 2000) <<https://www.jrf.org.uk/sites/default/files/jrf/migrated/files/185935128x.pdf>> accessed 11 May 2021.

²³ H Meltzer and others, 'The Prevalence of Psychiatric Morbidity among Adults Living in Institutions' (2003) 15 *International Review of Psychiatry* 129,129.

²⁴ *Ibid.*

²⁵ Apostolos Davillas and Andrew M Jones, 'The first wave of the COVID-19 pandemic and its impact on socioeconomic inequality in psychological distress in the UK' (*IZA An Institute of Labour Economics*, 4 June 2021 <https://www.iza.org/publications/dp/14057/the-first-wave-of-the-covid-19-pandemic-and-its-impact-on-socioeconomic-inequality-in-psychological-distress-in-the-uk>) accessed 17 November 2021.

²⁶ Sam Thompson, 'Understanding the relationship between debt problems and psychological distress' (PhD thesis in Clinical Psychology, University of East London 2015).

²⁷ The Cambridge Dictionary defined debt as the amount of money that is owed by a person, company, country, etc. and that they usually have to pay interest on.

neurotic disorders.²⁸ In addition, over-indebtedness at times leads to heavy smoking. Further over-indebtedness²⁹ also causes numerous societal issues as many debtors cannot contribute positively to the economy and rely on the welfare system after losing a job, repossession, and bankruptcy. Henceforth, to change a situation and save individuals from over-indebtedness, bankruptcy laws provide respite to the debtor.

The UK's legislature has played an essential role in introducing the concept of bankruptcy law to help individual debtors after considering these issues. Insolvency proceedings in the UK have split the law applicable to individuals or partners (Bankruptcy) and the companies (Insolvency).³⁰ Such laws balance several objectives: it protects the creditors' rights while simultaneously safeguarding the interests of the debtors. Bankruptcy law is governed by the Insolvency Act 1986³¹ and by the Insolvency Rules 1986³² in the UK primarily. However, the legal term bankruptcy is only applicable to individuals and no other legal entities. An individual can present their petition to the adjudicator regarding their bankruptcy to not pay the debts.³³ Creditors can also ask the court to issue a bankruptcy order against the individual debtor. Since the 1980s, many stakeholders have been interested in the development of bankruptcy laws.³⁴

It is critical to understand that two quite different regulatory systems are in place in the UK, based on which mortgage concept is implemented. The first financial services regulatory system, overseen and governed by the Financial Conduct Authority³⁵, arose from public law and is based on a consumer-oriented view of the mortgagor. The second is property law, which is a private law enforced by the judiciary and is based on the concept of the mortgagor as a

²⁸ *Ibid.*

²⁹ There is a need to define and measure over-indebtedness in a practical way. In the EU, there is no standard definition of over-indebtedness and, as a result, no set of standardised and harmonised statistics on it (European Commission, 2008). In the United Kingdom, for example, the emphasis has been placed on falling behind on regular bill payments, with over-indebtedness defined as a situation "where households or individuals are in arrears on a structural basis, or at a significant risk of getting into arrears in a structural basis" (Research note 4/2010 Over-indebtedness New evidence from the EU-SILC special module).

³⁰ Lambert Ariane Mogiliansky and others, 'Are Russian commercial courts biased? Evidence from a bankruptcy law transplant' (2007) 35 *Journal of Comparative Economics* 254, 255.

³¹ The Insolvency Act 1986 (Amendment) Order 2015 No. 922.

³² Insolvency Rules 1986, SI 1986/1925.

³³ Insolvency Act 1986, s 264 (1) (2).

³⁴ Following the Cork Review Committee Report on Insolvency Law and Practice 1982, the Insolvency Act 1986 was enacted. The report discovered that there was no comprehensive statement of insolvency law in England and Wales. Instead, there was a patchwork of materials dealing with the subject, such as the Bankruptcy Act of 1914, the Deeds of Arrangement Act of 1914, the Companies Act of 1948, and parts of the County Courts Act of 1959. They were all supplemented by common law and equity principles. The Act created a more adaptable system of voluntary arrangements. (All Answers Ltd, 'Insolvency Act 1986' (*Law Teacher* April 2021) <<https://www.lawteacher.net/acts/insolvency-act-1986.php?vref=1>> accessed 23 April 2021).

³⁵ The FCA's statutory objectives were set up under the Financial Services and Markets Act 2000 and amended by the Financial Services Act 2012.

landowner.³⁶ However, besides the regulatory systems of the UK, this study has also focused on the International and Regional Conventions on Human Rights³⁷ to examine human rights so that it can be measured as to whether the existing law adequately protects debtors' human rights. Therefore, a detailed discussion has been conducted on this subject in the subsequent sections of the thesis based on the available primary and secondary resources.

Striking the right balance between debtors' and creditors' interests is a fundamental objective of bankruptcy law and practice. The balance between the rights of the creditors and debtors is delicate, determined by legislation and judicial interpretation, and influenced by the current socio-economic climate. Undoubtedly, attitudes toward debt, risk, and reward have shifted significantly over the last thirty years, tipping the scales in favour of the debtor. The reasons for this are numerous and varied. A booming economy will ensure that individuals and businesses are appropriately rewarded for their entrepreneurial efforts, allowing the most efficient and competitive businesses to succeed and thrive. The failure of certain businesses or individuals is an unavoidable result of an economic situation whereby only the fittest can survive. Smaller and start-up businesses are frequently the ones most vulnerable to market downturns, even if such downturns are only temporary and do not represent a long-term structural change. Fear of failure and bankruptcy should not be allowed to stifle economic activity, and a balance between reward and sanction must be struck. Responsible entrepreneurial risk-taking is essential to a growing and dynamic economy.

It is the creditor's responsibility to conduct their checks and balances and to seek appropriate incentives for the risk of providing credit. It is not the role of the law to regulate, control, and potentially stifle economic activity. However, in the United Kingdom, the market is regulated to ensure that a future balance is struck between creditors receiving fair and reasonable treatment and being free and open to negotiate the terms and rewards for providing credit. Thus, the imposition of harsh, oppressive, and unfair credit terms may discourage entrepreneurial activity due to the fear of sanction, personal liability, and ultimately bankruptcy.³⁸ Hence, balance is provided by a plethora of regulatory and legislative provisions, the majority of which arise from the Bankruptcy & Insolvency laws and through the FCA regulatory regime. Therefore, bankruptcy laws regulate economic activities by controlling the

³⁶ *Ibid.*

³⁷ International Covenant on Civil and Political Rights (ICCPR), New York, 16 December 1966 United Nations, 999 U.N.T.S. 171; 6 I.L.M. (1967) 368; International Covenant on Economic, Social and Cultural Rights (ICESCR), New York, 16 December 1966, 993 U.N.T.S. 3; 6 I.L.M. (1967) 360; Convention on the Rights of the Child (CRC), New York, 20 November 1989 United Nations, *Treaty Series*, vol. 1577, p. 3; the European Convention on Human Rights ETS No. 005 213 U.N.T.S. 222.

³⁸ Vernon Dennis, *Insolvency Law Handbook* (4th edn, The Law Society 2021) 400.

affairs of bankrupt debtors and their creditors. The experiences of creditors themselves help to provide fair and equitable treatment and balance debtors' interests and rights to obtain financial rehabilitation against the right of creditors to receive a return on the debt. Bankruptcy laws are thus primarily intended to address economic activities. However, bankruptcy laws impose restrictions (for director disqualification and bankruptcy restrictions, - chapter 3 has a detailed discussion), and such restrictions are generally imposed to protect the public interest.

The COVID-19 pandemic has had a significant economic shock, but its long-term consequences and impact are unknown. However, unlike the financial crises of 2008, the government has been swift to legislate and intervene decisively in the functioning of the free market, particularly the relationship between debtor and creditor. It has done so ostensibly to avoid economic disaster and an unprecedented level of insolvencies. At the same time, the government has provided unprecedented levels of financial assistance, such as loans (coronavirus business interruption loan (CIBL) and (Bounce Back Loan), tax relief, cash grants, and a furlough scheme. The coronavirus job support scheme (March 2020 to September 2021) was introduced in the UK with the previously unknown term “furlough and state support to prevent the employment market from collapsing.”³⁹ The UK government provided support and helped businesses sustain and control job losses. Furthermore, the Chancellor announced on 4 October 2021 some extensions to the government’s ‘Jobs Plan’ schemes, in addition to many schemes, to assist individuals, including the long-term unemployed and those made redundant following the end of furlough and the extended incentives for employers.⁴⁰ Those measures will help keep the jobs and employment levels up, indirectly affecting the individual financial position and reducing the debt burden.

On the legislative front, the Corporate Insolvency and Governance Act (CIGA) 2020 contained a mix of temporary emergency measures, with the objective of helping companies and similar entities to continue trading during the COVID-19 pandemic. In addition, CIGA aims to provide permanent new processes for introducing flexibility into the corporate⁴¹ insolvency regime. Due to the limitation Governance Act (CIGA) 2020, it is not discussed further here as this research only focuses on individual rights. In addition to that, FCA (which regulates all regulated credit activities) jumped into recusing the debtors in the COVID-19 pandemic by implementing and collaborating with the lenders to provide payment holidays to

³⁹ *Ibid.*

⁴⁰ BDO UK, ‘COVID-19: government support for individuals and businesses’ (*BFO UK*, 18 October 2021) <<https://www.bdo.co.uk/en-gb/insights/tax/corporate-tax/covid-19-government-support-for-individuals-and-businesses>> accessed 31 October 2021.

⁴¹ This is not covered in this research.

struggling debtors. Furthermore, the newly introduced Debt Respite Scheme⁴² provides anyone with a debt crisis access to a standard ‘breathing space’, so for up to 60 days, they are legally protected from creditor action. In addition, most enforcement actions and contact from creditors are halted, and most interest and charges on their debts are frozen.⁴³ Only individuals getting mental health crisis care are eligible for a mental health crisis breathing space, which comes with additional safeguards. It lasts for the period of mental health crisis therapy and an additional 30 days (no matter how long the crisis treatment lasts). However, the government and regulators’ actions are insufficient to address the growing problem of over-indebtedness, repossession, and the crises that come with it.⁴⁴

Debt-Related Challenges

Debt is a significant component of all economies. Almost every citizen owes something to someone else. These debts can take many forms,⁴⁵ including a loan for the purchase of a home (mortgage), credit cards, overdrafts, car finance, hire purchases, student loans, and taxes. Consumer debt is a key economic tool in the United Kingdom. According to the Money Charity, the UK population owed £1,745.7 billion in debt at the end of August 2021.⁴⁶ The average household total debt, including mortgages, was £62,813.⁴⁷ The facts are even more shocking: per adult, this was £33,006, or approximately 108.9% of average earnings⁴⁸, indicating that over-indebtedness is increasing while the means to pay the debt are not. The total household debt is expected to rise from £2,006 billion in 2020 to £2,354 billion in 2025⁴⁹, according to the Office for Budget Responsibility's March 2021 forecast. Between April 2021 and June 2021, the number of mortgage possession claims was 27.5, implying that possession orders were issued at a rate of 3.0 per day in England and Wales.

⁴² Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020

⁴³ GOV UK, ‘Guidance: Debt Respite Scheme (Breathing Space) guidance for creditors’ (*GOV UK*, 7 September 2021) <<https://www.gov.uk/government/publications/debt-respite-scheme-breathing-space-guidance/debt-respite-scheme-breathing-space-guidance-for-creditors>> accessed 17 November 2021.

⁴⁴ National Debt Line, ‘Breathing space’ (*National Debtline*, 2021) <<https://www.nationaldebtline.org/fact-sheet-library/breathing-space-ew/>> accessed 17 November 2021.

⁴⁵ Lawyers & Jurists, ‘The Debtor-Creditor Landscape’ (*Lawyers & Jurists*, 2021) <<https://www.lawyersjurists.com/article/the-debtor-creditor-landscape-2/>> accessed 31 October 2021.

⁴⁶ The Money Charity, ‘The Money Statistics October 2021’ (*The Money Charity*, Oct 2021) <<https://themoneycharity.org.uk/money-statistics/>> accessed 31 October 2021.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ The office for budget responsibility’s, ‘Overview of the October 2021 Economic and fiscal outlook’ (*The office for budget responsibility’s UK*, 27 October 2021) <<https://obr.uk/overview-of-the-october-2021-economic-and-fiscal-outlook/>> accessed 31 October 2021.

Furthermore, the daily occurrence of 77 landlord possession claims and 49.5 landlord possession orders can be used to estimate the magnitude of the debt problem. In the year to September 2021, the Citizens Advice Bureau in England and Wales dealt with 1,906 debt issues every day. According to the Money Charity data, 306 people were declared insolvent or bankrupt in England or Wales from July to September 2021, a 32.9% increase from 21,188 during the same period in 2020. According to UK Finance, total mortgage arrears have remained close to historically low levels due to the mitigating effects of payment deferrals and other targeted forbearance. However, early indications suggest that arrears are moving in two directions: those in pre-pandemic financial difficulty have continued to accumulate arrears despite payment deferrals, and those in post-pandemic financial difficulty have continued to accumulate arrears despite payment deferrals. As a result, home repossessions may be more than tenfold by 2022, according to UK Finance. During the COVID-19 crisis, millions of borrowers struggled to make mortgage payments, with many opting to stop altogether. As a result, lenders seized 2,900 homes last year, but the trade group predicts that the figure will rise to 22,300 by 2022.⁵⁰ The growing repossession fears put courts to the test of whether they can use their discretionary powers under the Administration of Justices Act 1970 & 1973 to balance creditor rights and give the debtor a chance to correct the default if a lender seeks possession.

Current State of the UK Personal Debt

According to the Office for National Statistics,⁵¹ total household debt in the United Kingdom was £1.28 trillion from April 2016 to March 2018, with financial debt accounting for £119 billion (9%) and property (mortgages and equity release) debt accounting for £1.16 trillion (91%). From April 2014 to March 2016, total household debt climbed by £12 billion (11%), with the majority of the rise accounted for by increasing hire purchase debt (up £6 billion) and student loans from the Student Loans Company (up £7 billion). In the most recent period, increases in total household property debt and total household financial debt were driven by a combination of an increase in the number of families with debt and rising debt levels. The most important finding was that from April 2016 to March 2018, 4% of households had debt repayment concerns. While looking at debt levels is essential for seeing how debt is distributed and changes over time, it is also useful to assess how much debt is a burden or an

⁵⁰ UK Finance, 'Arrears And Possessions' (*UK Finance*, August 2021) <<https://www.ukfinance.org.uk/data-and-research/data/mortgages/arrears-and-possession>> accessed 3 November 2021.

⁵¹ Carla Kidd, 'Household debt: Wealth in Great Britain' (*Office for National Statistics*, 5 December 2019) <<https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/incomeandwealth/datasets/householddebtwealthingreatbritain>> accessed 17 November 2021.

issue for households. One metric is the extent to which households consider their debt to be a burden. From April 2016 to March 2018, 7% of all households with property debt felt their debt to be a "major burden," while 30% found it to be "somewhat of a burden." Only the property loan burden of households that are behind on their mortgage payments is measured in the Wealth and Assets Survey. The percentages would almost probably be higher if these households were included. Some families may view debt as more than simply a financial hardship. Their debt could be a source of concern that has a detrimental impact on the family's finances. Debt can affect a family's standard of life, stability, and financial inclusion. Because the amount of debt that is deemed a concern varies from household to household, it is difficult to determine. A household is considered to be in debt if it is experiencing only liquidity issues, only solvency issues, or both liquidity and solvency issues.

Problem and Objectives Statement

The financial crises of 2008 and COVID-19 functioned as a catalyst in increasing the existing debt problem in the UK. COVID-19 impacted overall every individual in some way, but its impact is more severe on the Black, Asian and Minority Ethnic (BAME) community. Research indicated that only two (7%) of the 29 papers included ethnicity data (both were case series without outcomes specific to ethnicity).⁵² According to previous research⁵³, none of the ten top COVID-19 case-notifying countries supplied ethnicity data. The UK mortality reporting, for example, does not need ethnicity information. However, when other characteristics (such as age, deprivation, and geography) were taken into account, the Public Health survey found that those of Chinese, Indian, Pakistani, Other Asian, Caribbean, and Other Black ethnicity had a 10–50% higher risk of death than those of White ethnicity.⁵⁴ Given the high number of deaths among BAME healthcare workers, this exclusion becomes obvious. In addition, according to recent UK data from intensive care units, BAME patients account for more than a third of all patients. According to the United Nations, COVID-19 does not discriminate in and of itself, but rather exposes existing inequalities in society.⁵⁵ It is now a

⁵² Manish Pareek and others, 'Ethnicity and COVID-19: an urgent public health research priority' (*The Lancet*, 21 April 2020) < [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30922-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30922-3/fulltext)> accessed 17 November 2021.

⁵³ *Ibid.*

⁵⁴ Clare Lally, '2020 Impact of COVID-19 on different ethnic minority groups' (*UK Parliament*, 19 October 2020) <<https://post.parliament.uk/impact-of-covid-19-on-different-ethnic-minority-groups/>> accessed 17 November 2021.

⁵⁵ António Guterres, 'We are all in this Together: Human Rights and COVID-19 Response and Recovery' (*United Nations*, 23 April 2020) < <https://www.un.org/en/un-coronavirus-communications-team/we-are-all-together-human-rights-and-covid-19-response-and> > accessed 17 November 2021.

fact that financial difficulties and non-payment of contractual debts, particularly if secured on the family home, resulting in possession, which eventually leads to bankruptcy.

Individual failure in the United Kingdom has increased dramatically in recent years as a result of bankruptcies. Bankruptcy has a significant impact on the individuals concerned, especially their physical and mental health, the physical and mental health of their families, and the environment. Bankruptcy has an impact on the bankrupt's future credit access, earnings, reputation, privacy, family home, savings, pension, and even immigration status. According to the UK Visas and Immigration, a good character⁵⁶ requirement guide for nationality means that an application will usually not be denied solely because the applicant is in debt, especially if loan repayments were made on time and reasonable efforts were made to pay off accrued obligations. However, if a person deliberately and recklessly accumulates debts with no indication of a serious intention to pay them off, the application will usually be denied.⁵⁷

Furthermore, it is critical to consider the damage that bankruptcy could cause a debtor in obtaining credit in the future, and also the associated cost implications, as well as the need to exhaust all available options prior to filing for bankruptcy. According to the government's published guidance, the bankruptcy order can remain on the debtor's credit file for six years after the bankruptcy order.⁵⁸ In addition, bankruptcy has a negative impact on the mental health and emotions of the bankrupt, which leads to a slew of other societal issues, such as pressure on the National Health Service and reliance on the social welfare system. This study intends to investigate the impact of bankruptcy on individuals and consider relevant factors that affect their daily lives.

In the wake of the financial crises, the European Commission examined the issue of over-indebtedness, and the Consumer Credit Directive (2008/48/EC) was implemented across the EU, which was incorporated into the Consumer Credit Act 1974.⁵⁹ The goal of the Consumer Credit Laws is to protect consumers and to help improve consumer confidence and understanding of credit products, as well as to assist individuals in making the right decision when it comes to taking out unsecured⁶⁰ credit. Furthermore, Consumer Credit Laws seek to prevent over-indebtedness, provide debtors with a safety net, and ensure that lenders'

⁵⁶ Borders, Citizenship and Immigration Act 2009, s 47.

⁵⁷ Gov UK, 'Nationality Good Character Requirement' (*UK Visas and Immigration*, 30 September 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770960/good-character-guidance.pdf> accessed 17 November 2021.

⁵⁸ The Insolvency Service, 'Guide to Bankruptcy' (*The Insolvency Service*, 30 September 2021) <<https://www.gov.uk/government/publications/guide-to-bankruptcy/guide-to-bankruptcy>> accessed 17 November 2021.

⁵⁹ The provisions came into effect fully on 1 February 2011.

⁶⁰ An unsecured line of credit is not guaranteed by any asset and lenders usually charge a higher rate of interest.

irresponsible lending practices are limited in consumer credit markets. Later in 2014, the Mortgage Credit Directive (2014/17/EU)⁶¹ was implemented, along with an enhanced measure to encourage lenders to lend responsibly and a slew of other consumer-friendly provisions. The purpose of this research is to determine whether the FCA regulatory system will protect consumers from unavoidable financial crises. This research investigates the available mechanisms for consumer protection through the regulatory system of financial services supervised and governed by the FCA and Property law. Moreover, this study will determine whether the regulatory regime protects secured borrowers during financial crises.

Upon bankruptcy, the bankrupt estate is vested to trustees,⁶² who will realise the bankrupt's interest in the property for the benefit of creditors and certain⁶³ creditors' rights to continue post-bankruptcy. However, an unsecured creditor is at a significant disadvantage because they do not have a lien on the bankruptcy assets. Therefore, there is nothing much they can do to recover their loss except charge a higher interest rate during the loan term while the debtor can afford it. In cases where the bankrupts own a home, the trustees seek to realise the value of the bankrupt's equity. The ability to realise the bankrupt's interest in the debtor's family home remains an essential feature of bankruptcy law and provides a good illustration of the balancing act performed by the court between the interest of the bankrupt (and their family) and creditors. This research aims to analyse and highlight the practical issue faced by the trustee and the bankrupt where the family home is owned under sole and joint ownership.

In repossession claims, the Administration of Justice Act 1970⁶⁴ is primarily relied upon by a mortgagor. Therefore, the courts are inclined to give the mortgagor a fair chance to save the family home. The Human Rights Act of 1998⁶⁵ requires, so far as it is possible to do so, that primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. The central question addressed in this study is whether section 36 of the Administration of Justice Act 1970⁶⁶ is still "fit for purpose," and if not, what new legislative provision should be included to allow the court to strike a balance between creditor and debtor rights. In conjunction with the Administration of Justice Act 1970, the Law of Property Act 1925 is examined to investigate the inherent powers of possession granted to the lender, where the court appoints a trustee to seize the debtors' assets and pay the

⁶¹ The Mortgage Credit (Amendment) (EU Exit) Regulations 2019.

⁶² Insolvency Act 1986, s 306.

⁶³ Who has the charge on the property or assets of the bankrupt.

⁶⁴ Administration of Justice Act 1970, s 36.

⁶⁵ Human Rights Act 1998, s 3.

⁶⁶ Administration of Justice Act 1970, s 36.

money to the creditors so that they do not incur a loss.⁶⁷ Taking into account existing laws and relevant case studies, this study investigates whether English⁶⁸ bankruptcy law is adequate to protect debtors' rights and how significant an impact of possession claims is on the debtor and their family is as well as potentially infringing on their human rights.

Over-indebtedness was prominently highlighted during the 2008 financial crisis, and it later gained widespread attention during the COVID-19 period. The Bank of England's second quarterly report⁶⁹ for 2021 demonstrated that the COVID-19 and the measures to address it had a significant impact on household incomes and spending, with some particularly hard hit.⁷⁰ The Report also concluded that the share of households struggling with their finances has increased, particularly among those with unsecured loans, who tend to have lower incomes and are less likely to be in employment, and this group is expected to be one of the most vulnerable in the next phase of this crisis.⁷¹ Although the Report emphasises the impact of COVID-19 on household income, savings, and debt, it fails to address the core issue of how deeply it has affected the individual. The recovery from the COVID-19 crisis is dependent on the pandemic's evolution and the resulting pace of economic recovery, both of which remain uncertain.⁷²

The international human rights framework for debt relief and consumer protection is examined from the debtor's perspective in this study, as are the debtor's protections. Also discussed is how the international human rights framework influenced the debtor and the debt. The European Convention on Human Rights, the Charter of Fundamental Rights, and the Human Rights Act of 1998 are all examined, and relevant case law is discussed. Given the uncertainty surrounding an individual debtor's fate, it is critical to examine debt crises through the lens of human rights in order to assess the available safety net of protection provided by the international debt relief framework. This study investigates the available protection under the international debt relief framework as well as the debtor's safety net. Subsequently, the study investigates whether the statutory and regulatory systems protect consumers during a financial or economic crisis. Besides this, this study puts how do the two systems (Private and

⁶⁷ Julian Franks and Oren Sussman, 'Financial Distress and Bank Restructuring of Small to Medium Size UK Companies' (2005) 9 *Review of Finance* 65,65.

⁶⁸ Common law legal system of England and Wales.

⁶⁹ Jeremy Franklin, and others, 'Household debt and Covid' (*Bank of England*, 25 June 2021) <<https://www.bankofengland.co.uk/quarterly-bulletin/2021/2021-q2/household-debt-and-covid>> accessed 7 October 2021.

⁷⁰ Julian Franks and Oren Sussman, 'Financial Distress and Bank Restructuring of Small to Medium Size UK Companies' (2005) 9 *Review of Finance* 65,65.

⁷¹ *Ibid.*

⁷² *Ibid.*

Public law) protect the debtor, and does the international debt relief framework protect the debtor who faces difficulties and mental health issues as a result of debt.

Mortgages secured on residential property are significant because a person's home provides security, and losing it results in a lifetime's financial loss. The recession that followed the 2008 financial crisis, according to the British Medical Journal, resulted in increased unemployment, homelessness, and poverty, all of which are critical health determinants. Dr. Clare Chambers-Jones looked into a variety of factors that keep people in poverty, such as educational barriers, limited access to electricity, water, and food, low wages, unemployment, gender inequality, a lack of infrastructure, and political discourse.⁷³ Dr. Chambers-Jones went on to investigate how, as a result of the COVID-19 pandemic, approximately four million people have fallen behind on rent, council tax, or phone bills, affecting both the household and the individual who is unable to make their contractual debt payments. The non-payment of debt ultimately leads to eviction or possession. With the advent of the financial crisis and COVID-19, increased unemployment means individuals have limited income through the welfare system and their affordability to pay off the debt can be adversely affected. Once an individual gets into arrears, they face difficulties and hardship to pay off the debt. As a result, they also face mental health issues such as depression, and stress.

Bankruptcy is a lifetime event for many bankrupts that puts them behind on many fronts, they never recover from its impact quickly and their family suffers with them too. The relationship between a creditor and a debtor is contractual, which means that both parties can enforce their contractual rights. If the debtor defaults or becomes bankrupt, the available remedy for the creditor depends on the nature of the credit to the debtor. The lending can be either secured or unsecured. This research has highlighted many financial and mental health-related issues resulting from debt. A significant question arises about why a debtor takes on a debt. Debt itself is not bad and helps individuals and businesses to thrive. Although the aim and objective of why a debtor takes debt are outside the scope of this study, it is briefly explored in this research, particularly concerning home purchase. Because losing a home is a severe financial loss for individuals and their families and causes mental health issues.

This study approaches the subject of debt and over-indebtedness from a human rights perspective: creditors are increasingly exploiting those who are unable to repay their debts with accumulative interest. In some cases, the activities of lenders or creditors result in serious

⁷³ Clare Chambers-jones, 'Consumer Debt, Financial Difficulties & Poverty during COVID-19' (*Open University School of Business*, 2021) <<https://business.school.open.ac.uk/news/consumer-debt-financial-difficulties-poverty-during-covid-19>> accessed 7 October 2021.

human rights violations for debtors, such as the loss of homes, properties, and even livelihoods. In addition, the bankruptcy law of the United Kingdom, as well as the jurisprudence of the European Court of Human Rights, were examined in this study to investigate the human rights provisions for debtors. According to the provisions of the convention, every individual has the right to a fair trial, security, justice, and liberty, and servitude and torture are prohibited.⁷⁴ Furthermore, according to human rights principles, creditors and debtors have equal rights to have their civil and human rights determined by an impartial, competent, and independent tribunal.⁷⁵ These principles include contractual obligations and property rights as well.

The negative impact of over-indebtedness is on the households or debtors and society that suffers from financial losses. The costs to the society include the increased social welfare expense, higher medical costs, loss in income tax receipts and costs of rehousing the debtor.⁷⁶ Once a household falls into the debt trap, it affects the life and health of the debtor from all possible angles and has a disastrous impact on relationships. Debt may lead to marital disputes due to a lack of financial resources where spouses argue as they cannot meet the household expenses. Debt collection agencies use many inhumane tactics on debtors, putting enormous strain on their physical and psychological health. As a result, debtors experience sleepless nights and suffer from stress or anger issues. The stress due to debts can also lead to depression or frustration.⁷⁷ The debtor must take some serious steps so that the issues of financial distress can be prevented, and the severe consequences can be reduced. The available support to the debtor through many governmental and charities are readily available in all accessible formats.

The aftershocks of the COVID-19 crisis will stay for a while; the debtor in debt pre-COVID-19 may still be in debt afterwards and the available support and protections are inadequate under the human rights framework. The availability of a safety net of protection is addressed in this research. Furthermore, this research responds to the consumer over-indebtedness since an individual with debts may lead to mental health and social problems for which they need assistance to establish their rights. The ECHR provides a catalogue of human rights. Violations of these rights are pronounced by the European Court of Human Rights

⁷⁴ Equality and Human Rights Commission, 'The Human Rights Act' (*Equality Human Rights*, 30 Nov 2018) <<https://www.equalityhumanrights.com/en/human-rights-act/article-5-right-liberty-and-security>> accessed 23 April 2021.

⁷⁵ Chrystin D Ondersma, 'A Human Rights Framework for Debt Relief' (2014) Rutgers School of Law-Newark Research Paper No. 139 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2390788> accessed 10 June 2021.

⁷⁶ Downs Carolyn & Ryan Woolrych 'Gambling and debt: The hidden impacts on family and work life' (2010) American Psychological Association <<https://psycnet.apa.org/record/2010-17592-005>> accessed 10 June 2021.

⁷⁷ Luisa Anderloni & Daniela Vandone, 'Risk of Over-Indebtedness and Behavioural Factors (2011) Palgrave Macmillan Studies in Banking and Financial Institutions <https://link.springer.com/chapter/10.1057/9780230303829_5> accessed 10 June 2021.

(ECtHR).⁷⁸ The European Convention on Human Rights prohibits, among other things, discrimination and protects privacy rights to due process. These rights are potential of great relevance to individuals who become bankrupt and undergo mental health issues like stress, frustration, or tension due to over-indebtedness.⁷⁹ The Human Rights Act of 1998 incorporated the rights enshrined in the European Convention on Human Rights into domestic law. Since the incorporation⁸⁰ of the ECHR, individuals can rely upon convention rights within⁸¹ the UK courts. This study discusses the available solutions, recommendations for the debtor and measures they can take before exercising bankruptcy as a last resort and how the available support from the government and charities can help them.

Literature Review

It is argued that the English legal system's bankruptcy laws are insufficient to protect debtors' rights, particularly for individuals suffering from mental health issues because of financial losses (such as eviction, repossession, and bankruptcy). The 2008 financial crisis and the COVID-19 pandemic made debtors vulnerable, necessitating adequate protection and assurance that their rights will be protected. Unfortunately, due to the regulatory and statutory framework that protects debtors, the available safety net for debtors in English jurisdiction is insufficient. To answer the research question, it is critical to examine the existing bankruptcy laws in the English legal system to determine the adequacy of bankruptcy laws and available mechanisms for debtor protection and support during financial crises, as well as to ensure that the UK meets the minimum requirements under the international human rights framework. To assess how many different ways bankruptcy can affect an individual and to link the effects of severe financial losses on the individual's mental health (stress, depression, anxiety, suicidal thoughts etc.) a review of the literature is required.

Further, the review focuses on the Human Rights Act of 1998 and its effect on the Law of Property Act 1925 and the Insolvency Act of 1986, as well as linking debtor protection with International Human Rights instruments and determining the available protection system for individual rights within the international human rights framework. In addition, the primary

⁷⁸ Javaid Rehman, *International Human Rights Law* (2nd edn, Longman Pub Group 2010) 184.

⁷⁹ Good Therapy, 'Money and Financial Issues' (*Good Therapy*, 24 March 2020) <<https://www.goodtherapy.org/learn-about-therapy/issues/money-and-financial-issues>> accessed 23 April 2021.

⁸⁰ Prior to the incorporation of the Convention, individuals in the United Kingdom could only complain of unlawful interference with their Convention rights by filing a petition with the European Commission of Human Rights in Strasbourg, which only referred the case to the European Court of Human Rights for a full hearing if it determined that the complainant had exhausted all local remedies and met a number of other admissibility criteria.

⁸¹ Instead of having to wait to take cases to the European Court of Human Rights.

objective is to recognise the connection between severe financial losses and mental health, as well as how it affects a debtor's life during the eviction, repossession, or the sale of a family home. In the modern era, balancing the interests of creditors and debtors is a fundamental objective of the law. Due to the fact that consumer protection (Individual Human Rights) and commercial interest (Lender/Investor Rights) are two crucial areas that must be addressed, this analysis is restricted to individual debtor rights only.

According to studies⁸² conducted in the 1990s, the consequent downgrading of the mortgagor from a citizen to a consumer had left them open to the exercise of arbitrary and unaccountable decision-making by mortgagees.⁸³ Although the structural adjustments required to move housing provisions to the free market would be made, it was not realised at the time that the status of the mortgagor in English land law would largely remain unchanged. Land law's perception of the mortgagor has evolved over the centuries, but the mortgagor has rarely been viewed as a consumer. It is interesting to note, for instance, that Black and Scott mention land transactions 'only incidentally' because they do not fit with the traditional consumer protection emphasis on goods and services.⁸⁴ This cannot be merely explained by the fact that the transaction involves real estate⁸⁵, as second mortgage agreements (also known as '2nd Charge Mortgages') fall squarely within the protective borders of consumer credit regulation.⁸⁶ Rather, it stems from the historical evolution of the modern mortgage device and its crystallisation at the pinnacle of the freedom of contract principle.⁸⁷

The idea of a consumer carries with it a sense of the need to guard against market excesses, which does not easily meld with the idea of a property owner or with the general political philosophy of a property-owning democracy with its connotations of independence and freedom from the state.⁸⁸ This study is sceptical of claims about the commodification⁸⁹ of housing when it calls for greater protection for mortgagors' human rights in relation to the first legal mortgage.⁹⁰ The goal of encouraging property law to equate certain aspects of the land

⁸² Whitehouse, L., The homeowner: citizen or consumer? in S. Bright & J. Dewar (Eds.), *Land law: themes and perspectives* (Oxford University Press 1998) 186,188.

⁸³ Whitehouse, L, The impact of consumerism on the homeowner in D. Cowan (ed.), *Housing: participation and exclusion* (Aldershot: Ashgate 1998) 132,136.

⁸⁴ Colin Scott and Julia Black, *Cranston's Consumers, and the Law (Law in Context)* (3rd edn, Butterworths 2000) 8.

⁸⁵ Brown S, 'The Consumer Credit Act 2006 Real Additional Mortgagor Protection?' (2007) (July/Aug) *The Conveyancer and Property Lawyer* 316,318.

⁸⁶ Niel S, 'Responsible lending and borrowing where to low-cost home ownership' (2010) 30 *Legal Studies* 612.

⁸⁷ Stewart A. and Black J., *Rethinking Housing Law* (Sweet & Maxwell 1996) 49-50.

⁸⁸ Stewart A., 'Rethinking housing law: a contribution to the debate on tenure' (1994) 9 *Housing Studies*, 263,279.

⁸⁹ Forrest, R., & Williams, P., 'Commodification and housing: emerging issues and contradictions' (1984) 16 *Environment and Planning* 1163,1165.

⁹⁰ O'Mahony L Fox, *Conceptualising Home: Theories, Laws, and Policies* (Hart Publishing 2006) 272.

purchase with other consumer products, on the other hand, is simply to reverse the somewhat ironic situation that exists within the current legal framework, which means that mortgagors receive less protection than a consumer purchasing non-essential goods.⁹¹ As a result, the argument goes, mortgagors deserve at least as much human rights protection as would normally be associated with consumer status.

In academic research, the consumer protection strategy with regard to the first mortgagor has not been made frequently or strongly enough.⁹² As Smith points out, while some inertia on these issues is to be expected among politicians and policymakers, it is becoming increasingly difficult to justify in the research community.⁹³ The time has come to acknowledge that viewing the mortgagor as a self-sufficient individual capable of competing on an equal footing with institutional mortgagees is no more appropriate for land law than viewing smoking as a healthy habit. Mortgagors will continue to receive less protection than buyers of non-essential goods, a situation that is wholly unjustifiable given the shift to a mass home ownership market, unless and until land law recognises that both the use and user of mortgage finance have changed. To fill the gap in the literature, the Law of Property Act of 1925 has been examined, along with its numerous pertinent provisions and case law, which gives rise to the lender's inherent right of possession should a debtor default on the secured loan payments.

The public law regime, as opposed to the private law approach, clearly sees the mortgagee as a consumer. This is demonstrated by the government's fundamental programme to overhaul the oversight of financial services, which includes adding first and second mortgages to the Financial Conduct Authority's purview (FCA). While the FCA and other statutory provisions protect consumer interests, evidence suggests that there is still more work to be done (for example, the Unfair Terms in Consumer Contract Regulations 1999, the Financial Services and Markets Act 2000, and the Consumer Protection from Unfair Trading Regulations 2008). Mortgagors, in particular, continue to lack sufficient⁹⁴ information to make informed decisions, are unable to negotiate⁹⁵ the terms of their agreement, and are subject to

⁹¹ Whitehouse L, 'The First Legal Mortgagor: A Consumer Without Adequate Protection?' (2015) 38 *Journal of Consumer Policy* 161,162.

⁹² Stewart A. and Black J., *Rethinking Housing Law* (Sweet & Maxwell 1996) 268.

⁹³ Smith S.J, 'Banking on housing? Speculating on the role and relevance of housing wealth in Britain' (*Droduracuk*, 20 July 2006) <https://dro.dur.ac.uk/71/1/Smith_speculating.pdf?DDD14> accessed 23 June 2022.

⁹⁴ Whitehouse L, 'A Longitudinal Analysis of the Mortgage Repossession Process 1995-2010: Stability, Regulation and Reform' (2010) 6 *Modern Studies in Property Law* 1.

⁹⁵ Whitehouse, L, The impact of consumerism on the homeowner in D. Cowan (ed.), *Housing: participation and exclusion* (Aldershot: Ashgate 1998) 129,132.

onerous terms and conditions that place them at a significant disadvantage.⁹⁶ These factors, which suggest market and information failures, justify the inclusion of the first legal mortgage in the realm of consumer protection and a cultural shift in the way the private law regime views the mortgagor.⁹⁷

Despite the fact that the modern acquisition mortgage has many characteristics of a consumer good, with individuals purchasing credit for private use in a market governed more by competition and self-regulation than by law, the private law system has rarely viewed the purchase of land as falling within the scope of consumer protection.⁹⁸ According to Brown, residential mortgages have never been deemed appropriate for regulation under consumer credit legislation. The exclusion of the first legal mortgage, however, cannot be explained solely on the basis that the transaction involves land, as second mortgage agreements appear to fall squarely within the protections of consumer law.⁹⁹ Unlike second mortgages, however, the first legal mortgage involves the acquisition of land.¹⁰⁰ Smith and Swann, for example, note that dealing with the subject of house and land purchase, which is subject to a different type of regulation, is not possible when defining the consumer.¹⁰¹ That distinct type of regulation is perhaps best described as land law, a subset of property law that has been imbued with its own distinct characteristics and principles over the centuries. The fact that land purchase has its own set of legal rules and principles stems, in part, from its history and complexity.

In an ideal world, it would be preferable to make the case for the reinstatement of the mortgagor's status as a citizen when advocating for a hypothesis on how land law views the mortgagor. This research instead makes the case for the mortgage to be viewed through the lens of a human rights perspective, with a grudging acceptance of the seemingly irreversible privatisation of housing or, hopefully, as an expedient and effective remedy to the ills of the mortgage market. However, this research is cautious of claims relating to the commodification of housing in advocating for greater protection for mortgagors with regard to the first legal mortgage. The obvious problem with advocating for a more consumerist approach is that if buying a home is seen as being equivalent to buying other goods, then why should mortgagors

⁹⁶ Stewart A. and Black J., *Rethinking Housing Law* (Sweet & Maxwell 1996) 49.

⁹⁷ Whitehouse L, 'The First Legal Mortgagor: A Consumer Without Adequate Protection?' (2015) 38 *Journal of Consumer Policy* 161,162.

⁹⁸ Colin Scott and Julia Black, *Cranston's Consumers, and the Law (Law in Context)* (3rd edn, Butterworths 2000) 8.

⁹⁹ Brown S, 'The Consumer Credit Act 2006 Real Additional Mortgagor Protection?' (2007) (July/Aug) *The Conveyancer and Property Lawyer* 316,325.

¹⁰⁰ O'Mahony L Fox, *Conceptualising Home: Theories, Laws, and Policies* (Hart Publishing 2006) 18.

¹⁰¹ Smith, P., & Swann, 'Protecting the consumer: an economic and legal analysis' (Oxford: Martin Robertson 1979) 18.

be given more protection against the loss of their home? However, the goal of comparing some aspects of buying a home to buying other consumer goods is simply to reverse the situation that currently exists under the current private law regulatory framework, wherein borrowers who buy land are afforded less protection than those who use a second mortgage to buy, say, a car. Therefore, the claim is that mortgage holders should be protected at least to the same extent as a consumer would be.

However, unlike other consumer transactions, Lisa White identifies reasons why mortgages require special consideration and tailored regulation.¹⁰² As Nield points out, unlike other financial products, the mortgage (like other credit) is not always seen as the product being bought and sold, but as a means to an end.¹⁰³ The purchased home then comes into focus. This implies that mortgage holders are less likely to understand the terms and implications of their mortgage contracts. Evidence from Citizens Advice supports this claim, showing that a sizable portion of consumers lack a basic understanding of even the most basic elements of a mortgage or secured loan agreement. As a result, there appears to be a case for greater protection of the mortgagor during the early stages of the mortgage relationship. The Mortgage Credit Directive has recognised this¹⁰⁴, which requires Member States (enforced by The Mortgage Credit (Amendment) (EU Exit) Regulations 2019)¹⁰⁵ to promote measures aimed at educating mortgage product consumers. A second reason why the purchase of a residential property merits special treatment relates to its qualities as a home and not as a commodity. Fox, Bright, and others have conducted research attempting to define the elusive qualities that make a house a home. The home possesses a distinct set of characteristics, including privacy, security, identity, and order. Because of these characteristics, home ownership should not be compared to car ownership. As suggested by Nield, secured lending places the borrower's home in jeopardy, necessitating the strictest protections against predatory lending and enforcement practices. These characteristics also justify the need to reform the private law regulation of the mortgage relationship in order to imbue it with the essential elements of a consumer protection strategy within the context of human rights.

According to Haley, the history of judicial intervention has been characterised by an uneasy interaction between the non-interventionist attitude of the common law (which upheld

¹⁰² Whitehouse L, 'The First Legal Mortgagor: A Consumer Without Adequate Protection?' (2015) 38 *Journal of Consumer Policy* 161,174.

¹⁰³ Nield S and Hopkins N, 'Human rights and mortgage repossession: beyond property law using Article 8' (2013) 33 *Legal Studies* 431,433.

¹⁰⁴ The Mortgage Credit Directive Order 2015, SI 2015/910.

¹⁰⁵ The Mortgage Credit (Amendment) (EU Exit) Regulations 2019.

the lender's contract and estate rights) and the more protective and lenient treatment of the mortgagor in equity (which, in appropriate cases, sought to restrict the exercise of those rights).¹⁰⁶ The Courts of Equity's overprotective approach to the mortgagor was gradually eroded during the nineteenth century by a belief in the principle of contract freedom.¹⁰⁷ Stewart claims that because the Courts of Equity refused to provide protective supervision, the flexible and interventionist approach to the mortgagor's position came to an end, never to be regained.¹⁰⁸ Atiyah explains this change in judicial attitudes by noting that, during the nineteenth century, paternalistic ideas waned and the laissez-faire philosophy took root. The majority of educated people, including the judges, interpreted laissez-faire to mean that the law should interfere as little as possible with people's lives.¹⁰⁹

There is an apparent conflict between this new view of the mortgage as a commercial transaction negotiated on the terms that should be between two knowledgeable and equal parties.¹¹⁰ The development of the building society movement in the nineteenth century and its willingness to increase access to mortgage financing, coupled with an unprecedented increase in house building and the simplification of land transfer by the Law of Property Act 1925, meant that the nature and role of the mortgage in society changed.¹¹¹ According to Haley, it became less common for private individuals to make advances secured by investment properties (like farms and development estates). Instead, institutional lenders gave out the majority of mortgages using borrowers' homes as collateral.¹¹² Governments were able to pursue higher rates of owner-occupation and eventually develop a market for mass home ownership thanks to this change in the mortgage's nature. Although there is only a small amount of recognition of these changes in land law, there is one. It could even be argued that this is one instance of land law that takes a consumer protectionist stance. That concession is the Administration of Justice Act of 1970¹¹³, which has been described as a substantial interference with the contractual right that the parties freely negotiated. The district judge has the discretion under this provision to suspend an order for possession on specified payment terms if it appears to the court that if the power is exercised, the borrower will be able to pay any sums due under

¹⁰⁶ Haley, M., 'Mortgage default: possession, relief and judicial discretion' (1997) 17 *Legal Studies* 481,483.

¹⁰⁷ Whitehouse L., 'The First Legal Mortgagor: A Consumer Without Adequate Protection?' (2015) 38 *Journal of Consumer Policy* 161,166.

¹⁰⁸ Stewart A. and Black J., *Rethinking Housing Law* (Sweet & Maxwell 1996) 49.

¹⁰⁹ Atiyah, P. S., 'Atiyah's Introduction to the Law of Contract (Oxford: Clarendon Law Series 1995) 8.

¹¹⁰ Stewart A. and Black J., *Rethinking Housing Law* (Sweet & Maxwell 1996) 50.

¹¹¹ Craig, P., 'The house that Jerry built? Building societies, the state, and the politics of owner-occupation (1986) 1 *Housing Studies* 87,96.

¹¹² Haley, M., 'Mortgage default: possession, relief and judicial discretion' (1997) 17 *Legal Studies* 481,485.

¹¹³ Administration of Justice Act 1970, s 36.

the mortgage within a reasonable period (the term any sums due applies only to the arrears outstanding at the time in addition to normal contractual payments, Administration of Justice Act 1973)¹¹⁴. Despite its apparent protective intent, section 36 supports the argument made in this research about the mortgagor's role in land law.

According to the Court of Appeal decision in *Cheltenham and Gloucester Building Society v Norgan*¹¹⁵, district judges should consider the remaining term of the mortgage when determining the period over which a mortgagor should be expected to clear their arrears. However, research¹¹⁶ indicates that the typical suspension period remains between one and five years. The reason given by district judges for this limitation on their discretion is that they want to ensure that mortgagees are not subjected to years of increasing financial debt.¹¹⁷ This is due in part to the fact that a mortgagor is responsible for the costs of any legal proceedings and additional fees incurred while they remain in arrears. Therefore, district judges believe that a period shorter than the remaining term of the mortgage is in the borrower's best interest. In addition, section 36 is only available to mortgagors who possess the financial resources necessary to satisfy the section's affordability test. The law does not address any other factors, including the presence of children, disability, illness, or relationship breakdown.

In order to address the aforementioned issues, the Law of Property Act of 1925, along with its numerous pertinent provisions and case law, gives rise to the lender's inherent right of possession should the debtor default on the secured loan payments, has been examined and analysed. This research established that the Law of Property Act of 1925 primarily protects lenders due to the nature of its numerous provisions, which grant the lender the right of possession. As a result of the contractual nature of the secured loan agreement between the borrower and the lender, the available protection mechanism for a debtor is insufficient or barely enforceable. Consequently, the Acts¹¹⁸ cannot provide adequate protection to debtors who suffer significant financial loss, such as the loss of a family home. In addition, the FCA's regulatory provisions, MCOBs¹¹⁹, FSMA 2000¹²⁰ and Consumer Credit Act 1974¹²¹ have been researched and discussed, leading to the conclusion that the FCA's regulatory system's

¹¹⁴ Administration of Justice Act 1973, s 8.

¹¹⁵ *Cheltenham and Gloucester Building Society v Norgan* [1996] 1 All ER 449.

¹¹⁶ Whitehouse, L., 'A longitudinal analysis of the mortgage repossession process 1995–2010: stability, regulation and reform' in S. Bright (Ed.), *Modern studies in property law* (Oxford: Hart Publishing 2011) 151,174.

¹¹⁷ Whitehouse, L., 'The malleability of the law of mortgage' in C. Twigg-Flesner & G. Villalta-Puig (Eds.), *The boundaries of commercial and trade law* (Munich: Sellier 2011) 51,74.

¹¹⁸ Insolvency Act 1986, Law of Property Act 1925.

¹¹⁹ FCA, 'FCA Handbook' (FCA, 2021) <<https://www.handbook.fca.org.uk/>> accessed 25 November 2021.

¹²⁰ Financial Services and Markets Act 2000.

¹²¹ Consumer Credit Act 1974 (as amended in 2006).

protection provisions only highlight the problems a debtor can face, while its enforcement mechanism only penalised the lenders but failed to redress the individual debtor's violated rights. Consequently, the aforementioned regulatory regimes cannot provide adequate protection for an individual debtor and provide insufficient protection.

The Administration of Justice Act 1970¹²² and the Administration of Justice Act 1973¹²³ were analysed to determine the court's discretionary powers when a borrower was threatened with the loss of his or her home. When the debtor fails to make contractual payments and is facing a financial crisis, the court has limited discretion to prevent a repossession claim. In the current economic climate, where the economy is still recovering from the impact of the COVID-19 pandemic, it is imperative that the 1970s Acts be revisited. The courts can then be empowered to protect the borrower's interests in accordance with the circumstances, particularly when the borrower's family and children are at risk of losing the family home. New legislative provisions should be required to give the court the authority to strike a balance between the rights of creditors and debtors. Financial losses such as eviction, repossession, and bankruptcy raise grave concerns, especially for individuals with mental health issues. The court's discretionary powers to provide the necessary protection are limited.

Articles and cases pertaining to the Human Rights Act 1998,¹²⁴ the European Convention on Human Rights¹²⁵, and International Human Rights Instruments are examined. A vast majority of the Conventions emphasise the right to life, the right to an adequate standard of living, the right to adequate food, the right to adequate housing, the right to the family home, the rights of children, and the prohibition against torture (in respect of debt collection measures). This research has examined pertinent UN Conventions that emphasise the aforementioned debtor rights. Under the provisions of the Convention, every person has the right to a fair trial, security, justice, and liberty, and slavery and torture are prohibited. Additionally, creditors and debtors have equal protection of their civil and human rights as determined by an impartial, competent, and independent tribunal. Currently, debtors in the United Kingdom are permitted to pursue their claim if a public entity violates their Convention rights. The claim against the private lender, however, can only be pursued under private law. Even though the international debt framework provides adequate rights, the debtor's protection

¹²² Administration of Justice Act 1970, s 36.

¹²³ Administration of Justice Act 1973, s 8.

¹²⁴ Human Rights Act 1998.

¹²⁵ European Convention on Human Rights ETS No. 005 213 UNTS 222.

is inadequate due to the limited recourse available against the private lender and the contractual nature of the relationship.

Conceptual Framework: Concept, Definitions, and Indicators of Over-indebtedness

Most households benefit greatly from credit because it allows them to smooth out short-term income fluctuations and borrow to finance long-term projects such as home purchases. However, some households are struggling with debt.¹²⁶ There was already some concern about rising debt levels due to high inflation and borrowing costs, and the situation of vulnerable households has been exacerbated by the additional pressures resulting from COVID-19 over the next two years. According to life-cycle theory¹²⁷, households use credit markets because they want to live in a stable way over time. Since people's incomes tend to go up at the beginning of their lives and go down after they retire, debt is a way for families to spread out their costs over their lives. Young families expect their incomes to go up in the future, so they spend more than they earn and build up debts that they will pay off when they are older. In the context presented, there are numerous reasons why a household may incur more debt than it can repay.

Financial imprudence¹²⁸ or poor financial decisions resulting from a lack of understanding of the true cost of repaying the loan is the first driver of over-indebtedness. This factor may be related to both the issue of lender terms and conditions transparency and borrowers' financial literacy and ability to manage their finances correctly.¹²⁹ Imprudence may also stem from psychological preconceptions and mental illness, which influence consumers' borrowing decisions and predictions, such as the overconfidence bias, or the tendency to underestimate the likelihood of experiencing an adverse event.¹³⁰ According to Bucks and

¹²⁶ The Economist, 'Higher inflation is raising the cost of servicing Britain's government debt' (<https://www.economist.com/>, March-2022) <<https://www.economist.com/britain/2022/03/12/higher-inflation-is-raising-the-cost-of-servicing-britains-government-debt>> accessed 21 June 2022.

¹²⁷ The life-cycle hypothesis (LCH) is an economic theory that describes people's spending and saving habits over their lifetime. According to the theory, individuals try to smooth their consumption over their lifetime by borrowing when their income is low and saving when their income is high.

¹²⁸ Richard Disney, Sarah Bridges and John Gathergood, 'Research Paper CPE Research Report-Drivers of over-indebtedness: report to the Department for Business, Enterprise, and Regulatory Reform' (*University of Essex*, 2008) <<https://www.iser.essex.ac.uk/research/publications/513423>> accessed 21 June 2022.

¹²⁹ Department for business and innovation & skills, 'Over-indebtedness in Britain: Second follow-up report' (<https://assets.publishing.service.gov.uk/>, 2010) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/36990/10-830-over-indebtedness-second-report.pdf> accessed 21 June 2022.

¹³⁰ Jason J Kilborn, 'Behavioral Economics, Over-indebtedness & Comparative Consumer Bankruptcy: Searching for Causes and Evaluating Solutions' (2010) 22 SSRN Electronic Journal 13,15.

Pence, borrowers with adjustable-rate mortgages are likely to underestimate or be unaware of how much their interest rates could change.¹³¹

Over-indebtedness can also occur when unexpected events change the initial conditions under which the creditor-debtor contract was formed (of course, the effects of adverse events can be mitigated by insurance). When the events are reasonably predictable, a lack of insurance can be viewed as imprudence).¹³² Unexpected reductions in household income (for e.g., unemployment), unanticipated expenses (e.g. costly medical care), or an increase in the cost of debt (e.g. a rise in interest rates where the mortgagor is on standard variable rate (SVR)) are all events that can lead to over-indebtedness. Unexpected changes in family structure may also have an impact on debt repayment ability (e.g. divorce or the birth or death of a family member). It's also worth noting the situation in which the need for a loan is determined by the level of over-indebtedness, creating a vicious cycle that can be disruptive for families and dangerous for financial intermediaries.¹³³ What exactly do we mean by 'over-indebtedness' and how can we quantify it? There is no agreement in the literature on how to define or measure over-indebtedness.¹³⁴ The European Commission examined and compared over-indebtedness definitions and measures in EU countries, highlighting the various points of view that emerge from different socioeconomic and legislative environments.¹³⁵ According to the European Commission studies¹³⁶ to develop a common definition across the EU have identified a set of criteria to be applied. (1) The household should be the unit of measurement because individual incomes are typically combined within the same household. (2) Indicators should cover all aspects of household financial commitments, such as borrowing for housing, consumer credit, paying utility bills, meeting rent and mortgage payments, and so on. (3) Over-indebtedness implies an inability to meet recurring expenditures and should therefore be viewed as a

¹³¹ Brian Bucks and Karen Pence, 'Do borrowers know their mortgage terms?' (2008) 64(2) *Journal of Urban Economics* 218, 219.

¹³² Matthias Keese, 'Triggers and Determinants of Severe Household Indebtedness in Germany' (2009) SOEP paper No 239 (1) Triggers and Determinants of Severe Household Indebtedness in Germany 5,7.

¹³³ According to Oliver Valins (When Debt Becomes a Problem: A Literature Study 2004,) factors such as gambling, alcoholism, and drug addiction can also be considered causes of over-indebtedness, despite the fact that they are rarely discussed in the mainstream debt literature.

¹³⁴ Berthoud R and Kempson E (1992), *Credit and debt: the PSI report*. Policy Studies Institute. Bridges, S. And Disney, R. (2004), "Use of credit and arrears on debt among low-income families in the United Kingdom", *Fiscal Studies*, 25: 1-25. Kempson E., McKay, S. and Willitts, M (2004) 'Characteristics of families in debt and the nature of indebtedness', Department of Work and Pensions Research Report 211, Leeds: Corporate Document Services.

¹³⁵ European Commission, 'Financial Services Provision and Prevention of Financial Exclusion report. Directorate-General for Employment, Social Affairs and Equal Opportunities, Brussels (*European Commission*, March 2008) <<https://www.bristol.ac.uk/media-library/sites/geography/migrated/documents/pfrc0806.pdf>> accessed 24 November 2021.

¹³⁶ European Commission (2010), *Over-indebtedness: New evidence from the EU-SILC special module*, Research note 4/2010.

structural rather than a temporary condition. (4) The problem cannot be solved simply by borrowing more. (5) In order to meet its obligations, a household must either significantly reduce its expenses or find ways to increase its income.

Over-indebtedness research¹³⁷ has converged on a common set of indicators, despite the fact that there is no universal agreement on which indicator best captures true over-indebtedness. In general, the indicators show four aspects of being over-indebtedness; using credit a lot, being in arrears, seeing debt as a burden, and paying back a lot of debt compared to income. Typically, the final dimension consists of separate indicators for unsecured and total debt repayments. As each of these indicators focuses on a different aspect of excessive debt, they each provide potentially useful information. Nonetheless, none of these is 'ideal' in the sense of being superior to others. For example, Disney et al. (2008) argue that such indicators are likely to capture debt problems in various types of households and at various stages of life. The definitions of the commonly used indicators (and separate versions at the individual and household levels) are as follows:

Arrears: This identifies borrowers who have fallen behind on an unsecured credit commitment (a credit or store card, mail order catalogue, hire purchase agreement or personal loan). Arrears are defined as any missed (minimum) payments on credit or store cards in the last 12 months, as well as two or more consecutive (current) missed payments on mail orders, hire purchases, and loans.¹³⁸ The household arrears indicator identifies households in which any members are behind on an unsecured credit commitment, the household is 2 or more months behind on mortgage repayments, or the household is 2 or more consecutive payments behind on any household bills.

Subjective Burden: This identifies borrowers who report that any of their unsecured debt is a 'heavy burden' (rather than a "moderate burden" or no problem), as well as households who report any debt (including mortgages) is a 'heavy burden'.

Credit Commitments: This is a count of the number of unsecured credit commitments held by individuals, as well as the total number of credit commitments held by all household members (including mortgages and bill arrears). The traditional credit commitment over-

¹³⁷ BERR (2008), "Over-Indebtedness in Britain: A Follow-Up Report", BBIS (2010), "Over-Indebtedness in Britain: Second Follow-Up Report", Disney, R., Bridges, S. and Gathergood, J. (2008), "Drivers of Over-Indebtedness", a report to BERR.

¹³⁸ Department for business and innovation & skills, 'Over-indebtedness in Britain: Second follow-up report (<https://assets.publishing.service.gov.uk/>, 2010) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/36990/10-830-over-indebtedness-second-report.pdf> accessed 21 June 2022.

indebtedness indicator identifies households with four or more commitments.¹³⁹ However, given the recent expansion of credit products, it has been suggested that this threshold may no longer be relevant. As a result, rather than using a predefined (and somewhat arbitrary) threshold, most analyses rely on the number of commitments directly.

Unsecured Repayment-to-income Ratio: This determines whether total household repayments of unsecured debt exceed 25% of gross household income.

Total Repayment-to-income Ratio: This determines whether total household debt repayments are greater than 50% of gross household income.

According to these criteria, a household is over-indebted when its existing and expected resources are insufficient to meet its financial commitments without lowering its standard of living, which may imply lowering it below what is considered the minimum acceptable in the country in question, which may have both social and policy implications. Given the difficulties associated with most indicators of over-indebtedness, asking people directly whether or not they are facing debt repayment difficulties is arguably the most powerful method. The disadvantage of subjective indicators is that they inevitably rely on individuals' interpretations of terms such as 'heavy burden', which is likely to differ both within countries and, more importantly, between countries.

Identification of the Poor

Poverty can be defined as the denial of a person's rights to a variety of basic capabilities, such as the ability to be adequately nourished, to live in good health, and to participate in decision-making processes as well as in the social and cultural life of the community.¹⁴⁰ In the language of rights, a person living in poverty lacks several human rights, such as the right to food, health, political participation, and so on. If a person's lack of control over economic resources contributes to their non-realization of their rights, such rights have constitutive relevance for poverty. Some human rights are such that achieving them will aid in the realisation of other human rights with constitutive relevance to poverty. For example, if the right to work is realised, it will contribute to the realisation of the right to food. Such rights have an instrumental relevance to poverty. Of course, the same human right can have both

¹³⁹ BERR (2008), "Over-Indebtedness in Britain: A Follow-Up Report", BBIS (2010), "Over-Indebtedness in Britain: Second Follow-Up Report".

¹⁴⁰ Office of the United Nations high commissioner for human rights, 'Principles and Guidelines for A Human Rights Approach to Poverty Reduction Strategies HR/PUB/06/12' (<https://www.ohchr.org/>, 2006) <<https://www.ohchr.org/sites/default/files/Documents/Publications/PovertyStrategiesen.pdf>> accessed 21 June 2022.

constitutive and instrumental significance. As poverty is defined as the denial of a person's right to a set of basic capabilities, capability failure is thus a defining attribute of poverty.¹⁴¹

Since poverty denotes an extreme form of deprivation, only basic capability deficiencies should be counted as poverty, and they should be ranked in order of importance. Due to the fact that different societies may have different priorities, the list of basic capabilities may vary from society to society. However, empirical evidence suggests that there is a common set of capabilities that can be considered basic in most societies. This set includes the capabilities to be adequately nourished, to avoid preventable diseases and premature mortality, to be adequately sheltered, to have basic education, to ensure personal security, to have equitable access to justice, to live in dignity, to earn a living, and to participate in the life of a community.¹⁴² After identifying the fundamental capabilities, the next step is to identify the population groups that are unable to attain these fundamental capabilities.

The Human Rights Approach: Concept and Rationale

The human rights approach emphasises the multidimensional nature of poverty, defining it as a variety of interrelated and mutually reinforcing deprivations, and highlighting the stigma, discrimination, insecurity, and social exclusion associated with poverty.¹⁴³ The deprivation and humiliation of poverty stem from a variety of factors, including the lack of an adequate standard of living, including food, clothing, and housing, and the marginalisation and social exclusion of the poor debtor. All of these forms of deprivation will be countered by the commitment to uphold human rights. The fundamental idea underlying the adoption of a human rights approach to diminish over-indebtedness is that poverty reduction policies and institutions (national and international) should be explicitly based on the norms and values set out in international human rights law. Norms and values shape policies and institutions, whether explicitly or implicitly. The human rights approach provides a clear normative framework of international human rights. International human rights, underpinned by universally recognised moral values and reinforced by legal obligations, provide a compelling normative framework for the formulation of national and international policies, including poverty reduction

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ Office of the United Nations High Commissioner for Human Rights, 'Principles And Guidelines For A Human Rights Approach To Poverty Reduction Strategies HR/PUB/06/12' (<https://www.ohchr.org/>, 2006) <<https://www.ohchr.org/sites/default/files/Documents/Publications/PovertyStrategiesen.pdf>> accessed 21 June 2022.

strategies.¹⁴⁴ The potential to empower the poor is one of the reasons why the human rights framework is compelling in the context of poverty reduction. Effective poverty reduction is now widely recognised as impossible without the poor's empowerment. Empowerment¹⁴⁵ is at the heart of the human rights approach to poverty reduction.¹⁴⁶ The introduction of the concept of rights is the most fundamental means by which empowerment occurs. Once this concept is introduced into the context of policymaking, the rationale for reducing poverty is no longer based solely on the fact that people in poverty have needs, but also on the fact that they have rights, which impose legal obligations on others. Thus, the human rights perspective lends legitimacy to the call for poverty alleviation to be the primary goal of policymaking. The human rights perspective emphasises the fact that poverty is a manifestation of the non-fulfilment of human rights, making poverty reduction strategies not only desirable but also mandatory for states that have ratified international human rights instruments.

The most prominent features of the human rights normative framework can, in some way, contribute to the empowerment of the poor. These characteristics consist of the principles of universality, non-discrimination, and equality, the principle of participatory decision-making, the concept of accountability, and the recognition of the interdependence of rights. In international human rights law, the twin principles of equality and non-discrimination are among the most fundamental. Recognizing these principles helps to bring attention to the fact that discriminatory practices, both overt and covert, are at the root of much poverty. This recognition necessitates a shift in poverty-reduction strategies away from a narrow focus on economic issues and toward a broader strategy that addresses the socio-cultural and political-legal institutions that sustain discriminatory structures. Thus, the human rights approach to poverty reduction requires that laws and institutions that promote discrimination against specific individuals and groups be struck down and that more resources be directed toward activities that have the greatest potential to benefit the poor. However, a human rights approach recognises that some human rights may have to be realised over time because of resource limitations. Any approach to policymaking requires making trade-offs between alternative goals in the light of social priorities and resource constraints. The human rights approach, on

¹⁴⁴ Office of the United Nations High Commissioner for Human Rights, 'Human Rights and Poverty Reduction: A Conceptual Framework' (<https://www.ohchr.org/>, 2003) <<https://www.ohchr.org/en/publications/policy-and-methodological-publications/human-rights-and-poverty-reduction-conceptual>> accessed 21 June 2022.

¹⁴⁵ The term 'empowerment' is used here to refer to the process of enhancing the capacity of poor individuals or groups to make decisions and transform those decisions into desired actions and outcomes, as well as to participate in, negotiate with, influence, control, and hold accountable the institutions that impact their lives.

¹⁴⁶ Deepa Narayan, 'Empowerment and Poverty Reduction: A Sourcebook' (<https://openknowledge.worldbank.org/>, 2002) <<https://openknowledge.worldbank.org/handle/10986/15239>> accessed 21 June 2022.

the other hand, places restrictions on the act of prioritisation in order to safeguard the poor from unintended consequences of trade-offs. In particular, it warns against any trade-off that causes a human right to regress from its current level of realisation and prohibits the non-achievement of particular minimum levels of realisation.

Poverty reduction through the human rights lens emphasises the responsibility of those who make decisions about the rights of people. Duty implies responsibility, and responsibility demands accountability. So, any poverty reduction strategy must incorporate institutions and legal/administrative mechanisms to ensure accountability. Even though duty-bearers are responsible for deciding which accountability mechanisms are best suited to their particular situation, all mechanisms must be accessible, transparent, and effective.

By recognising the interdependence of rights, the international human rights framework broadens the scope of poverty reduction strategies. Although poverty appears to be primarily concerned with economic, social, and cultural rights, the human rights framework emphasises that the enjoyment of these rights is crucially dependent on the enjoyment of civil and political rights. Thus, the human rights approach dispels the myth that civil and political rights and freedoms are luxuries relevant only to relatively prosperous societies and that economic, social, and cultural rights are merely aspirations rather than binding obligations. As a result, it requires that civil and political rights, as well as economic, social, and cultural rights, be integrated into poverty-reduction strategies.¹⁴⁷ To summarise, the human rights approach has the potential to advance the objective of reducing poverty in numerous ways.

International Human Rights Framework and Debtors Rights

The term ‘human rights framework’ refers to all legal and other human rights commitments made by the United Kingdom. Treaties agreed under the auspices of international bodies, primarily the United Nations, such as the International Covenant on Civil and Political Rights and the United Nations Convention on the Rights of Persons with Disabilities; treaties agreed at a regional, European level, such as the European Convention on Human Rights (ECHR), which was agreed upon under the auspices of the Council of Europe; and national human rights laws.¹⁴⁸ Various international, regional, and national organisations have also

¹⁴⁷ Office of the United Nations high commissioner for human rights, 'Principles and Guidelines for A Human Rights Approach to Poverty Reduction Strategies HR/PUB/06/12' (<https://www.ohchr.org/>, 2006) <<https://www.ohchr.org/sites/default/files/Documents/Publications/PovertyStrategiesen.pdf>> accessed 21 June 2022.

¹⁴⁸ Equality and Human Rights Commission, 'Human Rights in Action' (<https://www.equalityhumanrights.com/>, 2014) <https://www.equalityhumanrights.com/sites/default/files/human_rights_in_action_rio_case_studies_1.pdf> accessed 21 June 2022.

issued a number of declarations, codes of conduct, and guidelines regarding human rights. Some of these offer states interpretation guidance for treaties. Despite the fact that they are typically not directly enforceable, these are pertinent to how these human rights commitments are interpreted and can guide the creation of new laws. The most crucial components of the human rights framework are considered for the purposes of this research and discussed throughout this study. The framework and key debtor rights are discussed briefly below, and their implications can be seen throughout this research.

European commitments

The European Convention on Human Rights (ECHR), which was agreed upon by the Council of Europe member states, has been in force since 1953 and contains a number of rights, primarily civil and political, which are set out in a series of Articles. The rights (Convention rights) apply to everyone who lives within the jurisdiction of the states that have signed on to it. Individuals who believe their rights under the Convention have been violated bring cases to the European Court of Human Rights in Strasbourg for adjudication after exhausting all domestic remedies.

Under the direction of the European Union, the Charter of Fundamental Rights was adopted. When the Treaty of Lisbon went into effect in 2009, it became legally binding throughout the EU and covered civil, political, economic, social, and cultural rights. All EU members, including the UK, are bound by it, but only when applying EU law. After Brexit, the Charter will no longer be applicable in the United Kingdom.¹⁴⁹ According to the UK government, repealing the Charter will not result in less protection for human rights, including the rights of children and young people.

National law

The Human Rights Act 1998 (HRA) gives most Convention rights direct legal effect in the United Kingdom. It accomplishes this by requiring public officials to act in accordance with these rights (unless they are required to do otherwise by primary legislation). The key articles applicable to debtor rights are discussed and applied in this study to establish the safety net and adequacy of the laws. Some national laws, such as the Equality Act of 2010, are pertinent to defending certain aspects of human rights. For instance, the Police and Criminal Evidence Act of 1984 protects against unfairness in criminal proceedings, the right to a fair trial being another Convention Right, and the Mental Health Act of 1983 protects against the arbitrary deprivation of the right to liberty (a Convention Right). The devolution statutes

¹⁴⁹ European Union (Withdrawal Agreement) Act 2020.

pertaining to Scotland, Wales, and Northern Ireland include the Convention rights in the HRA. However, in this study, English Law is the only focus. These statutes also make provisions for the enforcement of Convention rights through their own legal frameworks.

International commitments

The United Kingdom has ratified numerous international human rights treaties, with many covering economic, social, and cultural rights in addition to civil and political rights. In contrast to the European Convention on Human Rights, these treaties have not been incorporated into UK's domestic law, but they can have an impact in other ways, such as serving as a useful tool for interpreting domestic law in the courts. They can also serve as a set of guiding principles for the formulation of public policy.¹⁵⁰

The following international agreements have the greatest bearing on the international framework; The United Nations Convention on the Elimination of All Forms of Racial Discrimination, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, The United Nations Convention on the Rights of the Child, the United Nations Convention on the Rights of Persons with Disabilities, International Covenant on Civil and Political Rights (it protects a variety of civil and political rights for individuals, such as the right to life, freedom of expression, and religion, among others), International Covenant on Economic, Social, and Cultural Rights (it commits states to work toward granting a variety of economic, social, and cultural rights for individuals, such as labour rights, the right to health, the right to education, and the right to an adequate standard of living). Case law has confirmed that, in addition to ensuring that human rights are not violated, public authorities have an obligation to take proactive steps to protect human rights. These are referred to as positive obligations. Positive obligations are especially relevant to the right to life, the right not to be subjected to torture or inhuman or degrading treatment or punishment, and the right to privacy and family life, as well as the right to a home and correspondence. In this context, the right to private life is quite broad and includes physical and mental integrity protection.¹⁵¹ The purpose of debtors' rights is to establish significant connections between poverty, excessive debt, and particularly human rights as well as the

¹⁵⁰ Equality and Human Rights Commission, 'Human Rights in Action' (<https://www.equalityhumanrights.com>, 2014) <https://www.equalityhumanrights.com/sites/default/files/human_rights_in_action_rio_case_studies_1.pdf> accessed 21 June 2022.

¹⁵¹ *Ibid.*

practical significance of incorporating such rights within more general strategies to protect debtors.

Financial Losses

There is no universal definition of financial loss; it can mean anything and everything to any individual. Although, for the purposes of this study, only possession of a family home and bankruptcy are considered serious losses. The repossession of a family home is the most traumatic loss, as discussed in detail in chapter 3 of this study. To recover their debts, lenders can take action against the borrower, but the actions can have a negative impact on the debtor's life. Chapter 3 discusses the consequences of bankruptcy, which affects debtors from all walks of life. In general, a debtor has no control over bankruptcy or repossession of a family home. Lenders typically use these provisions as a last resort if a debtor fails to honour his contractual obligations. Although a debtor can voluntarily use a damage control measure and take legal steps to reduce financial losses and pay off his debt as he sees fit.

Adequacy: Concept and how it is Evaluated

Identifying indicators for use in human rights assessments requires consideration of multiple factors such as; What do we need to examine? How do we select potential indicators of what we want to evaluate? What do we need to examine? How do we select potential indicators of what we want to evaluate? How many indicators are needed to evaluate a human rights implementation? The way these issues are addressed, and the assumptions made determine the method used to conceptualise the indicators. Indicators can be either quantitative or qualitative in nature. The former is narrowly defined as 'statistics', whereas the latter encompasses any information articulated as a narrative or in a 'categorical' form.¹⁵² As with the categories of objective and subjective indicators in the literature on statistics and development indicators, human rights indicators can also be divided into fact-based and judgment-based categories. This distinction is not always based on whether or not the indicators were defined using trustworthy or repeatable methods of data collection. Instead, it is best viewed in terms of the informational value of the relevant indicators.

“Human rights can never be fully measured in statistics; the qualitative aspects are too essential. The conclusion, however, is not that the human rights community should avoid using quantitative facts, but rather learn how to use them. The challenge is to develop a know-how on how to plan such fact-finding, to assemble the data, to organize them meaningfully and to

¹⁵² United Nations Human Rights Commission, 'Human Rights Indicators: A Guide to Measurement and Implementation' (<https://www.ohchr.org/>, 2012) <https://www.ohchr.org/sites/default/files/Documents/Issues/HRIIndicators/Summary_en.pdf> accessed 22 June 2022.

present and disseminate them properly in order that high standards of relevance and reliability be met.”¹⁵³

The main goal is to assess the extent to which rights holders are using their rights; in other words, to record a few outcomes that might be connected to the level of human rights realisation. Additionally, it is to evaluate the duty bearer's progress in upholding its human rights obligations. The objective is not to compile an exhaustive list of indicators for every human rights standard or every provision of every treaty. Given the complexity of treaty provisions, the breadth of human rights standards, and the range of possible applications, it may actually be nearly impossible to do that. The application of a few carefully chosen quantitative indicators could complement the assessment of human rights, which will always have a strong qualitative component. Furthermore, it would seem logical to begin by identifying and developing indicators for a specific human right and the cross-cutting norms that apply to it because standards on specific rights and cross-cutting human rights norms serve as the foundation of all human rights treaties. Once these indicators have been identified, it is simple to combine them in accordance with the various treaty provisions in order to monitor the treaty's implementation.¹⁵⁴

Illustrating Framework- Measuring Discrimination

It is hard to evaluate and measure the adequacy of given rights due to many variables explained herein. Discrimination is difficult to quantify. Different treatments or results are sometimes the result of complicated processes involving multiple, cumulative acts of discrimination or are just the result of other factors rather than clearly defined acts of discrimination. Additionally, victims frequently lack the ability to recognise the discrimination to which they are subjected. Acts of discrimination are frequently disregarded because of the high levels of tolerance for discrimination that certain social and cultural practices foster among some population groups. Additionally, they frequently lack access to or are unaware of available legal remedies. As a result, the number of discrimination-related court convictions is a poor indicator of the prevalence of discrimination in a nation. Given the limitations of using event-based data to monitor discrimination, statistical techniques and direct surveys are critical for determining the prevalence of discriminatory practices in a country.

¹⁵³ Council of Europe Commissioner for Human Rights, Thomas Hammarberg (2006 -2012) in his address at the Montreux Conference on “Statistics, Development and Human Rights”, September 2000.

¹⁵⁴ United Nations Human Rights Commission, 'Human Rights Indicators: A Guide to Measurement and Implementation' (<https://www.ohchr.org/>, 2012) <https://www.ohchr.org/sites/default/files/Documents/Issues/HRIIndicators/Summary_en.pdf> accessed 22 June 2022.

There are some useful statistical tools in this context which can help to quantify the adequacy of rights. Disaggregated socioeconomic statistics (e.g., life expectancy, age-specific sex ratios, and unemployment rates by ethnic origin) measure disparities and differential outcomes that are frequently the result of multiple and accumulative discrimination. Multiple regression-based economic models can be used to estimate the proportion of differences in outcomes that can be attributed to discrimination as opposed to observable factors. Surveys of the general population that examine experiences, perceptions, and attitudes toward discrimination (e.g., the proportion of ethnic minorities reporting victimisation and discrimination by public and private employees that is motivated by race). Situation or discrimination -testing surveys to measure discrimination directly in specific situations, like those involving access to employment, housing, health care, private educational institutions, or other public services. Any of these methods might be useful to periodically assess the level of discrimination in a nation, particularly in areas where it appears that diverse racial, ethnic, religious, and linguistic communities are vying for limited resources and employment opportunities. The strengthening of legal and administrative corrective measures in such situations could be facilitated by concrete evidence supporting discriminatory practises in various social spaces of human engagement, including the political space. The form and manifestation of discrimination, the circumstances under which discrimination occurs, the consequences for the individual, and the availability and access to redress and compliance mechanisms must all be considered when selecting the attributes and indicators of this right.

The definition of discrimination is a good place to start. In general, the term ‘discrimination’ as used in various international human rights instruments, is understood to imply any distinction, exclusion, restriction, preference, or other differential treatment that is directly¹⁵⁵ or indirectly¹⁵⁶ based on the prohibited grounds of discrimination and has the intention or effect of nullifying or impairing the recognition, enjoyment, or exercise of all civil, cultural, economic, political, and social rights by all persons on an equal footing. It is therefore critical to adequately capture the elements highlighted in this definition when identifying attributes and selecting indicators of non-discrimination and equality in order to measure the adequacy. Furthermore, in terms of the circumstances that normally lead to discrimination,

¹⁵⁵ Whenever an individual is treated less favourably than another because of their ethnicity or national origin, this is referred to as "direct discrimination" because there is no reasonable and objective justification for the difference in treatment.

¹⁵⁶ When a priori impartial laws, procedures, policies, or programmes treat particular population groups less favourably without a valid justification, this is known as indirect discrimination (e.g., a minimum height criterion for joining the police force that excludes more individuals from one population group than from another).

attributes that reflect an individual's access to a decent standard of living, health and education, and employment opportunities could be developed. Equal access to public services, including access to justice, and pertinent services offered by private actors is essential for eradicating historical inequalities and discrimination that may have subjected some population segments, such as women, ethnic groups, minorities, migrants, and persons with disabilities, to violence, whether physical, sexual, or psychological. Targeting specific population groups is an extreme form of discrimination and all of these factors contribute to the injustice of historical inequalities and discrimination.

Furthermore, because enforcing the right in and of itself is not always sufficient to ensure true equality, the right to non-discrimination and equality recognises the need for temporary special measures, also known as affirmative action or positive discrimination.¹⁵⁷ To accelerate *de facto* equality, temporary special measures may be required. In the case of women's employment, for example, a number of government agencies have adopted administrative guidelines on the recruitment, promotion, and placement of women, with the goal of improving gender distribution at all levels, particularly at the higher tiers. As a result of the above illustration, four characteristics have been identified in order to measure just the right of non-discrimination: “equality before the law and personal protection,” “direct or indirect discrimination by public and private actors nullifying or impairing access to education and health services,” “direct or indirect discrimination by public and private actors nullifying or impairing equality of livelihood opportunities,” and “special measures, including participation in decision-making.”¹⁵⁸ For each of the identified attributes, the cluster of structural-process-outcome indicators is used to reflect both the *de jure* and *de facto* aspects of the realisation of the right.

To summarise, there is no single, definitive definition of adequacy, nor are there measurement tools to assess and quantify the effectiveness of rights. The adequacy of rights varies from person to person in a given situation. For example, under the right to a reasonable standard of living, a trustee in bankruptcy only allows the debtor to keep and use £20 surplus money after meeting all necessary needs while Official Receiver have Income Payment Order, which some debtors may believe is sufficient for their needs. While some consider it a violation

¹⁵⁷ Article 4 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women, which is referenced in its Committee's general recommendation No. 25 (2004), contains the phrase “temporary special measures.”

¹⁵⁸ United Nations Human Rights Commission, 'Human Rights Indicators: A Guide to Measurement and Implementation' (<https://www.ohchr.org/>, 2012) <https://www.ohchr.org/sites/default/files/Documents/Issues/HRIIndicators/Summary_en.pdf> accessed 22 June 2022.

of fundamental human rights to leave a debtor in poverty by allowing only £20 per month to budget for unforeseen financial commitments.

Research Question and Research Methodology

The fundamental hypothesis of this study is that bankruptcy laws in the English Legal System are inadequate to protect debtors' rights, particularly for individuals who suffer from mental health issues due to financial losses such as eviction, repossession, and bankruptcy. Therefore, this study examines the English Laws, European Convention on Human Rights¹⁵⁹, and International Human Rights instruments¹⁶⁰ obligatory to the UK to substantiate the inadequacy of the law. Furthermore, in examining the subject from the debtor's perspective through the lens of domestic and international human rights framework, the study engages with fundamental human rights, including the right to life, right to an adequate standard of living, right to adequate food, right to adequate housing, right to the family home and the rights of children and prohibition from inhuman and degrading treatment (in respect to debt collection measure).

The primary research methodology used is doctrinal, with a textual analysis known as library-based research.¹⁶¹ The body of literature on debt and its implications in general, as well as associated financial damages, is consistent and comprehensive. The analysis of these available materials answers several questions raised in this research by relying on existing legal instruments and scholarly contributions on the subject, and empirical research is not considered at any stage of the study. To address the main topic, the research employs an interdisciplinary approach. Law, social policy, sociology, politics, and economics are all investigated. Although the inability to pay off the debt, which results in severe financial losses, appears to be the primary contributing factor to the debtor's mental health, it is also driven by a lack of safety net within the available protection in legislation. As a result, to address the debtor protection phenomenon in the English Legal System, it is necessary to efficiently evaluate the all-determining factor. An examination of the traditional element, for example, is critical to this study because the mental health of the debtor in general, and over-indebtedness in particular, is supported by cultural or traditional perceptions. Furthermore, while over-indebtedness is a

¹⁵⁹ European Convention on Human Rights ETS No. 005 213 U.N.T.S. 222.

¹⁶⁰ International Covenant on Civil and Political Rights (ICCPR), New York, 16 December 1966 United Nations, 999 U.N.T.S. 171; 6 I.L.M. (1967) 368; International Covenant on Economic, Social and Cultural Rights (ICESCR), New York, 16 December 1966, 993 U.N.T.S. 3; 6 I.L.M. (1967) 360; Convention on the Rights of the Child (CRC), New York, 20 November 1989 United Nations, *Treaty Series*, vol. 1577, p. 3.

¹⁶¹ Ashish Kumar Singhal and Ikramuddin Malik, 'Doctrinal and socio-legal methods of research: merits and demerits' (2012) 2 Educational Research Journal 252, 252.

universal phenomenon, this study employs comparative analysis to assess the compatibility of UK laws with its international obligations.

Secondary sources such as books, journal articles, and previous research are extracted and reviewed using Brunel, the Institute of Advanced Legal Studies, Lincoln Inn, and the British Library, as well as relevant human rights instruments, national statutes, and cases. The only research methodology used is doctrinal (textual analysis). It must be acknowledged that the quality of available treaties, statutes, cases, data, reports, and published research on the issues is sufficient to rely solely on textual analysis in the current research context.

Limitations and Scope for Future Research

The study is limited to analysing the impact of severe financial losses and bankruptcy on individuals' mental health, which could have been exacerbated by stress, depression, or sleeplessness issues due to over-indebtedness. The study does not apply the bankruptcy theories in this research which were missing and can be added in future studies. The bankruptcy law of other countries is also not focused upon, which leaves a scope of prospective studies on the bankruptcy laws of other countries to show their effectiveness in protecting a debtor from over-indebtedness. There is a lack of comparison of bankruptcy law and the legal proceedings between the UK and other countries to show its effectiveness. The study can further examine bankruptcy law and its effectiveness in supporting creditors and debtors to solve their issues of debt while striking a balance between them. Another significant limitation is that the study is limited to debtors' rights. However, a brief analysis of the Law of Property Act 1925 and Administration of Justice Act 1970 & 1973 is drawn on where the court strikes a balance between the creditor and debtor rights. Limited evidence has been provided on the creditors' rights under this law to get their repayments and avoid financial losses from the debtors. Henceforth, considering the study's limitations, the prospective researcher can perform further research to gather and analyse the vast amount of information in order to obtain accurate results. Comprehensive analysis can be developed based on UK bankruptcy law while covering the limitations highlighted here.

Contribution to the Body of Knowledge

The study has highlighted the impact of bankruptcy on individuals and the deficiencies in the effectiveness of bankruptcy law in the English Legal System. It covers the bankruptcy laws and the treatment of bankrupts and provides information regarding the difficulties debtors face when they become bankrupt or encounter significant financial losses that impact their

mental health. This research also concludes that the FCA regulatory regime, Consumer Credit Laws & Mortgage Credit Directive¹⁶², cannot fully protect secured borrowers in future financial crises even with all their implementations and enforcement. In addition, this research has established the available mechanism for consumer protection through the regulatory system of financial services and Property law is inadequate to safeguard the debtor's rights. This study has also found that the Administration of Justice Act 1970 & 1973 is not “fit for purpose,” hence new legislative provisions are required to empower the court to strike a balance between the creditor and debtor rights. Besides these, the relevant evidence has demonstrated how financial loss through debts affects the mental health of the debtors and their economic conditions, especially when trustees seize their assets if they are unable to repay the debts under the Insolvency Act 1986.¹⁶³ This research has also established that the bankruptcy law in England & Wales is inadequate when it comes to protecting debtors’ rights and is unable to protect the borrower from evictions and repossession claims, and infringes on their human rights. In addition, this research looks at consumer debts and establishes that over-indebtedness can lead to debtors’ negative mental health issues as well as social problems. This study identifies that the debtor’s human rights are only ensured by the international human rights framework if they are adequately safeguarded. Socioeconomic issues faced by the debtor are explored to build an accurate picture of the debtor’s life. This research has reviewed the available literature on the relationship between debt, poverty and mental health and acknowledges that debt impacts the debtor and their families severely and causes issues such as depression, stress, anxiety, psychotic disorders, problem drinking, drug dependence, and can also lead to suicidal thoughts and ultimately suicides. Finally, this study has presented solutions, recommendations for the debtor and other stakeholders, and proposes measures that can be taken before exercising the bankruptcy option as well as avoiding debt-related problems.

¹⁶² The Mortgage Credit (Amendment) (EU Exit) Regulations 2019.

¹⁶³ Insolvency Act 1986, s 287(1), (2) (b).

Chapter 2: History of Debt

This chapter will briefly examine and discuss the origin of money, credit, and debt, the historical background of debt, bankruptcy laws, and the evolution of bankruptcy in the United Kingdom context. The historical need for bankruptcy laws and freedom from imprisonment for debt will be explored and highlighted. The institution of bankruptcy will be investigated in a British context, and the need for debtor protection will be examined and explored within the international human rights framework. The philosophy of bankruptcy and its historic objective will be discussed from a debtor's perspective. This chapter will further discuss and build the ground for protecting debtor rights in modern economic society and related problems such as mental health issues and social and cultural perceptions.

Introduction

The term 'debt' has been used throughout human history; certain types of 'debt' and 'debtors' have always existed. Debt has been a source of contention for the last 5,000 years, accounting for a significant portion of modern human history - at least the history of states and empires.¹ In his book about the great classicist Moses Finley, David Graeber quotes him as saying that in the ancient world, all revolutionary movements had a single programme: "Cancel the debts and redistribute the land."² It is critical to understand the ancient history of debt and debtor in order to comprehend how debtor protection needs to be evolved over time. Debt is likely the oldest form of trade, with cash and barter transactions emerging later.³ Mesopotamian tablets have been discovered that record credits and debits, temple rations, and money owed for temple land rent, with the value of each precisely specified in grain and silver. A history of debt is, by definition, a history of money, and the simplest way to understand the role that debt has played in human society is to simply follow the forms that money has taken, the ways that money has been used over the centuries, and the inevitable debates about what all of this means. Nonetheless, this is unmistakable. There are two fundamental approaches to the concept and origin of money that are incompatible due to their exceptional nature: one sees money as a commodity (money as a commodity), and the other as a social relations project (money debt).⁴ When commercial trades became more sophisticated due to civilisational progress, trading

¹ David Graeber, *Debt the First 5,000 Years* (1st edn, Melville House, Brooklyn, New York 2011) 8.

² *Ibid.*

³ *Ibid.*, 32.

⁴ Simon Kuznets, 'German Monetary Theory' 1905-1933' (1935) 178 *The ANNALS of the American Academy of Political and Social Science* 206, 206.

became more uncomfortable and uneconomical in a barter system. It was thought to be difficult to transport specific quantities of heavy products to the locations where exchanges used to take place. It was also difficult to measure and separate them to achieve a quantity comparable to the products being exchanged. As a result, finding someone who demanded the item that one possessed was challenging while also disposing of anything one wanted in exchange.

Furthermore, knowing the equivalent prices among all the goods exchanged was nearly impossible due to the numerous combinations, and these relative prices varied constantly.⁵ The phenomenon of money was invented to solve all these problems in a completely decentralised and unplanned way:⁶ one particular commodity that would operate as a general equivalent among all other products. The first possessions used as money were grain, iron, tobacco salt, shells, cattle, and nails. Then, gradually and through a natural evolutionary process driven by market forces, demand, and needs, precious metals like silver and gold were used for trading. Money is merely a neutral tool used to facilitate commercial exchanges.⁷ Money, in this view, is profoundly defined by its function as a medium of exchange. Because of the significant market potential and smooth nature of this commodity, governments expended enormous effort to control and regulate its use to the point of becoming monopolists in its manufacture. In order to accomplish this, they forged pieces of this metal (gold, silver) into a specific shape and stamped their power symbol on them, pursuing and sanctioning any other type of forging. As a result, they ensured that their currencies were the only ones permitted in economic transactions, effectively monopolising money creation through unfair competition.⁸

Finally, a new mechanism known as 'credit' has recently begun to be used to reduce the amount of metal used and avoid continuous transportation. There was nothing more than a promise to pay money, which was expressed in the form of bills and cheques and even electronic notes if the conditions were met. Consequently, credit had to be created for money to avoid the use of cumbersome materials.⁹ It is easy to conceive of credit as a modern phenomenon based on a culture of mortgages, credit cards, and personal loans, but credit has been given since the dawn of humanity. It's easy to see the concept of 'I will pay you

⁵ Geoffrey Ingham, 'The nature of money' (2004) 5 Economic sociologies: the European electronic newsletter <<https://econpapers.repec.org/article/zbweconso/155831.htm>> accessed 17 November 2021.

⁶ Eduardo Garzón Espinosa, 'The origin of money from the money-debt approach' (2019) 6 Iberian Journal of the History of Economic Thought 37, 38.

⁷ A Mitchell Innes, 'What Is Money?' (Edward Elgar Publishing 2004) <<https://www.elgaronline.com/view/9781843765134.00007.xml>> accessed 17 November 2021.

⁸L. Randall Wray, 'Alternative Approaches to Money' (2010) 11 Theoretical Inquiries in Law 29, 31.

⁹ Eduardo Garzón Espinosa, 'The origin of money from the money-debt approach' (2019) 6 Iberian Journal of the History of Economic Thought 37, 38.

tomorrow!’ emerging almost as soon as barter and commerce did, and it is possible that credit existed in some form before formal monetary systems were introduced.¹⁰ It has even been proposed that a grasp of debt and obligation was one of the factors that allowed early civilisations to thrive. People began assisting one another in hunting, lending one other equipment and food, and caring for one another when they became ill, among other things. These tasks were completed with the expectation that they would produce an obligation that would be fulfilled later.¹¹ This meant that people were better equipped to overcome temporary difficulties, resulting in higher survival rates and a larger population. It’s also possible that the requirement for a standardised way to communicate debt played a role in the formation of currency. As it was sometimes known, the concept of interest-bearing loans dates back to the same time. Loans would be made in the form of grain or cattle that had a proclivity to multiply and grow over time, and the lender would naturally anticipate a portion of the growth when the loan was repaid.¹²

Credits and Debts

Humans invented the concept of money as a way to quantify their financial commitments and responsibilities.¹³ Money is not a commodity; rather, it is “merely a non-tangible abstract unit in which obligations are created and discharged.”¹⁴ There are always two parties involved in these obligations or commitments, one of whom is a creditor, and the other is a debtor, because “[Credit] is simply the correlative of debt.”¹⁵ What A owes B is A's debt to B as well as B's credit on A. A is the debtor of B, and B is the creditor of A. The terms ‘credit’ and ‘debt’ express a legal relationship between two parties, and they express the same legal relationship from two different perspectives.¹⁶ In this social association, one party provides value while the other receives it. The creditor is the party who provides value because providing value confers the right to receive the equivalent in the future. The party who receives value is the debtor because receiving value imposes an obligation to provide the equivalent at

¹⁰Steven Finlay, 'The History of Credit' (*Springer Link* 2009) <https://link.springer.com/chapter/10.1057/9780230232792_3> accessed 17 November 2021.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Geoffrey Ingham, 'The nature of money' (2004) 5 *Economic Sociology: European Electronic Newsletter*, Max Planck Institute for the Study of Societies 18, 25.

¹⁴ Eduardo Garzón Espinosa, 'The origin of money from the money-debt approach' (2019) 6 *Iberian Journal of the History of Economic Thought* 37,41.

¹⁵ *Ibid.*

¹⁶ L. Randall Wray, What is Money? in Alfred Mitchell Innes (ed), *Credit and State Theory of Money* (Edward Elgar Publishing Limited 2004) 14, 25.

some point in the future.¹⁷ As a result, credit serves as money rather than any other commodity.¹⁸ David Graeber emphasises that transactions in the recorded early days of human civilisation occurred primarily through recognition of credits and debts, and rarely through barter: “Obviously, and this is what anthropologists observe when neighbours engage in something like an exchange, if you wanted your neighbour's cow, you would say “wow, nice cow,” and he would say “you like it? Take it!” and as a result, you now owe him one. Quite frequently, individuals engage in no exchange at all.”¹⁹ Because of its exceptional nature, credit and debt appreciation is a far more useful and efficient tool for conducting transactions than barter or the use of commodity money.²⁰ Geoffrey Gardiner explained the term credit in the barter system as below:

“Let us assume that the huntsman needs a supply of arrows, but until he can hunt, he has nothing to give in exchange. So, he promises Fletcher ten haunches of venison in exchange for a supply of arrows. Thus, in modern terminology, he is asking for ‘trade credit’.”²¹

Credit is the most efficient means of exchanging goods and the most valuable type of property. After all, credit has no weight, takes up no physical space, can be easily transferred to another person, is more easily protected against any physical threat such as destruction or theft, and is immortal.²² The first known records of debt go back to 3500 BC.²³ Debt has maintained its hegemonic position with cash and barter, usually limited to situations involving strangers or those deemed uncreditworthy. In any era, indebtedness aggravates the major fault lines of inequality within society: in terms of class, race, sexual orientation, and over generations. Nevertheless, more than this, debt is often used to justify those inequalities morally. Thus, creditworthiness lends moral authority and is deeply implicated not only in how money is used but in its very organisation as a social institution.²⁴

¹⁷L. Randall Wray, *The Primacy of Trade Debts in the Development of Money*, in Geoffrey. W Gardiner (ed), *Credit and State Theory of Money* (Edward Elgar Publishing Limited 2004) 128, 149.

¹⁸ Eduardo Garzón Espinosa, 'The origin of money from the money-debt approach' (2019) 6 *Iberian Journal of the History of Economic Thought* 37, 41.

¹⁹ *Ibid.*

²⁰ *Ibid.*, 41.

²¹L. Randall Wray, *The Primacy of Trade Debts in the Development of Money*, in Geoffrey. W Gardiner (ed), *Credit and State Theory of Money* (Edward Elgar Publishing Limited 2004) 128, 130.

²² L. Randall Wray, 'Alternative Approaches to Money' (2010)11 *Theoretical Inquiries in Law* 29, 40.

²³ Eduardo Garzón Espinosa, 'The origin of money from the money-debt approach' (2019) 6 *Iberian Journal of the History of Economic Thought* 37,41.

²⁴ Elayne Oliphant, 'Debts' (2019) 87 *Journal of the American Academy of Religion* 642, 643.

The Debt Law's Historical Background

A lender could execute against the debtor's liquid assets in the twelfth and thirteenth centuries, according to a historical review.²⁵ In the thirteenth century, a trader could be detained for an outstanding debt,²⁶ and, in the last hundreds of years, so could a non-trader. In a later development, it was discovered that a task could be used to counteract detention to the benefit of creditors.²⁷ The land had been a focal point in the primitive framework, which meant that only individual property and benefits or leases of real estate could be executed. A trader's account could be attached to his real estate as early as the thirteenth century, and executions could be conducted against that property.²⁸ The Law Merchant initially managed Individual bankruptcy²⁹, which was comprised of European business traditions and practises, given Italian commercial law, which was itself based on Roman law, and under which no one but dealers could go bankrupt. The Law Merchant was absorbed into English Common Law beginning in the fourteenth century.

Sir Frederick Pollock says:

“The Law Merchant, as it existed through the Middle Ages, was undoubtedly a body of cosmopolitan custom, vesting its claim to allegiance not on any express reception by the municipal authority, but its intrinsic reasonableness evidenced by the general consent and usage of the persons concerned. It was recognised and constantly described as being part of the Law of Nature.”³⁰

And Sir John Davies says:

“The Law Merchant, as it is a part of the law of nature and nations, is universal and the same in all countries in the world.”³¹

The English Bankruptcy Act³² was sanctioned in 1542. The Act provided for the seizure and sale of the borrower's property, including individual and real property, in the event of any

²⁵ Lienne Steyn, ‘Treatment of a Debtor's Home in Insolvency: Comparative Perspectives and Potential Developments in South Africa’ (2013) 22 International Insolvency Review <https://www.researchgate.net/publication/259538621_Treatment_of_a_Debtor's_Home_in_Insolvency_Comparative_Perspectives_and_Potential_Developments_in_South_Africa> accessed 10 June 2021.

²⁶ *Ibid*, 452.

²⁷ *Ibid*.

²⁸ *Ibid*.

²⁹ The Law Merchant was a body of law developed by medieval courts in various European countries.

³⁰ Louis Edward Levinthal, ‘The Early History of English Bankruptcy’ (1919) 67 University of Pennsylvania Law Review 1, 4.

³¹ *Ibid*.

³² Statute of Bankrupts Act 1542, 34 & 35 Henry VIII c 4 (1542-3).

wronged party, as well as the distribution of the returns to the lenders in proportion to the various debts. Reactions to the situation were that an indebted trader could not have any significant bearing on being declared bankrupt, and bankrupts were treated as if they were criminals, with no distinction made between legitimate account holders who had ended up wiped out through setbacks and exploitative or neglectful debtors. There was no procurement for discharge³³ until, in 1732, crucial wearing attire of the bankrupt and his better half and youngsters, his instruments, family unit products and furniture were exempted.³⁴ The English Common Law kept on applying to ‘non-merchant’ borrowers, whose treatment turned out to be progressively brutal and insensitive, with committal to indebted person’s jail a typical event, even where the indebted person had no advantages with which to fulfil his debts.³⁵

Reforms included the establishment of a court for the relief of insolvent debtors in 1813, followed by the passage of various progressive bankruptcy acts. A Bankruptcy Act,³⁶ applicable to all indebted individuals, including ‘non-traders,’ was enacted in 1861.³⁷ The Bankruptcy Act of 1883³⁸ accommodated a bankruptcy request to vest the bankrupt’s property in the official collector of the court and from that point, once designated, in a trustee. The property included the indebted person's land and ‘hereditaments,’ and it included not only the bankrupt's property at the time of the bankruptcy petition but also that which he obtained during liquidation. Any restitution for an individual wrong committed against the bankrupt, as well as trust property held by the bankrupt, were all excluded after obtaining profit. According to the Bankruptcy Act of 1914, the trustee could renounce any property privilege that would be difficult for the bankrupt estate. The trustee³⁹ could claim overabundance wage, which the bankrupt would not require for his and his family's survival. Real estate acquired after the bankruptcy petition was filed did not vest in the trustee unless he intervened to guarantee it.

Under the chairmanship of Sir Kenneth Cork, a review committee on Insolvency Law and Practice⁴⁰ was formed in January 1977 to complete a thorough audit of indebtedness law

³³ Lienne Steyn, ‘Treatment of a Debtor's Home in Insolvency: Comparative Perspectives and Potential Developments in South Africa’ (2013) 22 International Insolvency Review <https://www.researchgate.net/publication/259538621_Treatment_of_a_Debtor's_Home_in_Insolvency_Comparative_Perspectives_and_Potential_Developments_in_South_Africa> accessed 10 June 2021.

³⁴ *Ibid.*

³⁵ *Ibid.*, 453.

³⁶ Bankruptcy Act 1861.

³⁷ Except for married women who were not traders.

³⁸ Bankruptcy Act 1883, s 56.

³⁹ Bankruptcy Act 1914, s 48.

⁴⁰ Hereafter referred to as the ‘Cork Committee.’

and practice and to consider necessary and appealing reforms.⁴¹ After considering absolved property and family assets, the ‘Cork Committee’ suggested in its report,⁴² commonly referred to as the; ‘Cork Report’, that more significant emphasis should be placed on a bankrupt’s surplus salary amid bankruptcy being connected to the instalment of his debts.⁴³ It specifically requested clarity regarding the position of the family home⁴⁴ and stated that a court should be required to consider the welfare of the bankrupt family.⁴⁵

The Evolution of Bankruptcy Law

It is imperative to understand the history of available protection to the debtor to ascertain the adequacy of the laws available in the past and their evolution to the present day. During the 19th century, two different reforms have shaped the features related to European Insolvency and Bankruptcy laws. The first one took place in the initial stage of the century when many countries, except Britain, adopted the 1807 ‘Commercial Code of France’ due to the Napoleonic Wars. The other wave related to reforms started in the 1880s by introducing the processes that were alternatives to liquidation and bankruptcy. It is believed that during the second phase, the European legislation moved in the same direction to mitigate the original austerity of the bankruptcy law. Before the waves of reforms in the 19th century, the bankruptcy laws of Europe shared similar aspects that are derived from the common roots of Italian medieval commercial norms and Roman law.⁴⁶

At first, the bankruptcy law was regulated under the judiciary’s responsibilities, which was not evidenced in earlier cases. However, in all the circumstances, the opening of the process against the debtor by the courts⁴⁷ led to the deferral of the rights of the individual creditors to indict the debtors. This rule is known as the automatic stay, which aimed to avoid the debtors’ run assumed to suffer from liquidity issues. At the same time, to protect the creditors, the debtors were dispossessed of their assets. The main aim of the process was to

⁴¹ Lienne Steyn, ‘Treatment of a Debtor’s Home in Insolvency: Comparative Perspectives and Potential Developments in South Africa’ (2013) 22 *International Insolvency Review* <https://www.researchgate.net/publication/259538621_Treatment_of_a_Debtor's_Home_in_Insolvency_Comparative_Perspectives_and_Potential_Developments_in_South_Africa> accessed 10 June 2021.

⁴² Report of the Review Committee: Insolvency Law and Practice (1982) Cmnd 8558, which, as mentioned above, is referred to, in this thesis, as ‘the Cork Report’.

⁴³ Cork Report para 591.

⁴⁴ Cork Report para 241.

⁴⁵ Cork Report para 1120.

⁴⁶ Oliver Hart, ‘Different Approaches to Bankruptcy’ (*National Bureau of Economic Research*, 2000) Working Paper 7921 <<http://www.nber.org/papers/w7921>> 19 November 2021.

⁴⁷ An official bankruptcy court did not exist until 1831 (I.P.H Duffy, *Bankruptcy and Insolvency in London During the Industrial Revolution* (1st edn, Garland Publishers 1985) 45). Cases were generally dealt with at the Lord Chancellor in Chancery Lane.

supply public evidence that helped the creditors meet the more transparent assessment based on the debtors' financial situation compared to the ones they could reach depending on private information. The public processes resulted in the lists of the bankrupted debtors presented publicly by the tribunals and afterwards published. Though there were similarities in the processes and legislation, structural differences still existed. For instance, the bankruptcy law in France was related to traders, while, in England, it is related to debtors.

After the 1870s, some critical changes were noticed with the introduction of the softer pre-bankruptcy processes. These are said to be the results of the moral attitude toward bankruptcy and transformations in the economy.⁴⁸ Besides that, bankruptcy was also considered a result of bad luck, not always of fraud or incompetence. Moreover, the advent of big corporations also attracted the attention of legislators to the fact that a firm's values can be much higher compared to the price of individual assets, primarily when it is sold in illiquid markets. Therefore, the new policy differed from bankruptcy, which stated that they could be opened only at the initiative of the debtors and can avoid the insolvency of the firms. Many authors further noted that the history of credit is as old as that of humanity. When an individual borrows money or applies for any credits, the person enters into an oral or written agreement. However, if there are no repayments, the debtor breaches the contract, which affects every economy. In traditional forms, the debtors had to undergo punishments like bondage or imprisonment. In Europe, there were no known bankruptcy laws. It took a while for Europe to introduce bankruptcy laws in the prosperous medieval commercial towns of Italy. The debtors dealt with harsh terms, and bankruptcy was considered equivalent to robberies from lenders. Later in the 19th century, the debtors were allowed with limited time in custody to repay their financial debts.⁴⁹

In England, the law of bankruptcy had already undergone significant changes by the early eighteenth century. It had lost much of its old moral content since the early years of the century.⁵⁰ Even among colleagues, there was a growing recognition that bankruptcies were not always the result of dishonest, fraudulent, or criminal behaviour on the part of the bankrupt.⁵¹ Bruce Mann made interesting observations on the century's far from complete changes,

⁴⁸ Julian Franks and Oren Sussman, 'Financial distress and bank restructuring of small to medium size UK companies' (*Ideas*, 2005) <<https://ideas.repec.org/a/oup/revfin/v9y2005i1p65-96.html>> accessed 20 May 2021.

⁴⁹ *Ibid.*

⁵⁰ Karl Gratzner and Dieter Stiefel, 'History of Insolvency and Bankruptcy from an International Perspective' (*Digitala Vetenskapliga Arkivet*, 2008) <https://www.diva.portal.org/smash/get/diva2:15847/FULLTEXT01.pdf%253e,%2520%255b>> accessed 20 July 2021.

⁵¹ *Ibid.*

observing a redefinition of insolvency ‘from sin to risk, from moral failure to economic failure’.⁵² Although Mann's statement implies the evolution of American bankruptcy law, it can also be applied to English bankruptcy law. For the first time, the bankruptcy laws of the early eighteenth century provided methods for a fresh start by granting the debtor a ‘certificate of conformity.’ It discharged the debtors of all liabilities incurred before the bankruptcy. The possibility of a fresh start was determined by many factors, including the reasons for the bankruptcy, the debtor's general conduct or reputation within the local mercantile community, the debtor's relationship with the creditor, the latter's willingness to grant a certificate of conformity, and, last but not least, the debtor's kinship network and its ability to support him.⁵³

Several studies⁵⁴ have examined the historical evolution of bankruptcy laws and procedures in England in detail: thus, research confines analysis to an outlined reconstruction, highlighting the most significant issues and developments. Modern English bankruptcy law has its origins in strict and creditor-friendly mediaeval laws, but it lost its vindictive character in the eighteenth century. The economic turmoil caused by the rapid development of trade and economic activity, in general, demonstrated that the comparison of bankruptcy to fraud lacked empirical support.⁵⁵ In response to this shifting attitude, the revolutionary instrument⁵⁶ of debt discharge was introduced in the early eighteenth century, and the reformatory effort gained momentum in the nineteenth century. The introduction of deeds of arrangement, different treatment for small debts, abolition of the strict insolvency law for non-traders, and imprisonment for debts are examples of how English legislators moved toward making bankruptcy easier for debtors.⁵⁷ Creditors gradually lost power over debtors and public bodies until, in the 1880s, the board of trade took sole control of bankruptcy laws and procedures.⁵⁸ It should be noted that changes were influenced not only by formal rule changes but also by

⁵² BH Mann, *Republic of Debtors: Bankruptcy in the Age of the American Independence* (Harvard University Press, 2002) 5.

⁵³ *Ibid.*

⁵⁴ I.P.H Duffy, *Bankruptcy and Insolvency in London During the Industrial Revolution* (Garland Publishers 1985) 58.

⁵⁵ *Ibid.*, 60.

⁵⁶ Certificates of Conformity and Discharge. The Ledger books provide: Names of the commissioners, Name of the bankrupt, Occupation, Location, Date, Names of the creditors who sign off (at least four-fifths).

⁵⁷ Karl Gratzner and Dieter Stiefel, ‘History of Insolvency and Bankruptcy from an International Perspective’ (*Digitala Vetenskapliga Arkivet*, 2008) <<https://www.diva-portal.org/smash/get/diva2:15847/FULLTEXT01.pdf%253e,%2520%255baccessed%20July%202021>>

⁵⁸ V.M Lester, *Victorian Insolvency. Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth Century England*, (Oxford: Clarendon 1995) 67.

judicial interpretation.⁵⁹ For example, the courts' acknowledgement of the 'floating charge'⁶⁰ is a fundamental factor of corporate insolvency introduced in 1890. The English bankruptcy system gradually emerged. Significant changes in bankruptcy law occurred in 1914⁶¹, but after that date, the legislation only saw marginal changes during the 1930s depression and comprehensive reforms in the 1980s. The cultural and traditional perception of bankruptcy changed but remained negative throughout the nineteenth and early twentieth centuries. The idea that someone could be imprisoned for debts became increasingly difficult for the public to accept, and this shift in attitude resulted in significant reforms of the institution, if not its abolition.⁶² The prison sentences and corporal punishments slowly disappeared,⁶³ although the debtors were subjected to the social stigma.

Despite this advancement, bankrupts were still viewed suspiciously, and the widespread belief that, in the majority of cases, criminal behaviour was to blame for the inability to repay debts persisted. The main aim of such a bankruptcy system is to maintain equality among creditors if there is a loss in debtors' bankruptcy. Current law distinguishes⁶⁴ between insolvency and bankruptcy. If there were no bankruptcy laws, the creditors would have had competition in seizing debtors' assets. However, the bankruptcy system and the bankruptcy law created a different situation. Both the creditors and debtors could file the bankruptcy and receive some equal opportunities. There are some possible situations where agreements can be made to ensure that viable personal business can exist during a time of crisis as well. Henceforth the regulatory system has affected the regularity of bankruptcies. The debtors and creditors have contradictory objectives and motives. However, there is an acceptable compromise between the two parties. Thus, either the creditor or the debtor is the most favoured person through the law of bankruptcy. The bankruptcy law is a part of personal insolvency that has received significant attention in the last few years. Thus, a detailed description has been provided on the same in the next section of the study.

⁵⁹ P. Johnson, Creditors, Debtors, and the Law in Victorian and Edwardian England. in Steinmetz, W. (ed.) *Private Law and Social Inequality in the Industrial Age* (Oxford University Press 2000) 73.

⁶⁰ A contractual device on the basis of which the most senior creditor in practice monopolized the procedure at their advantage.

⁶¹ Largely concerning the conditions for debt discharge.

⁶² Margot Finn, *The Character of Credit. Personal Debt in English Culture, 1740–1914* (Cambridge University Press, 2003) 67.

⁶³ In England, imprisonment for debt was abolished in 1869. While imprisonment for debt was abolished in Italy in 1876.

⁶⁴ In short, according to David Kirk, *insolvency practitioner (The Gazette)*, bankruptcy only applies to an individual, not a partnership entity or limited company. In contrast, insolvency is a broad term that encompasses all types of financial failure. Bankruptcy is only one type of personal insolvency; others include individual voluntary arrangements, debt relief orders, and debt management plans.

Freedom from Debt-Related Imprisonment

A debtor's prison is a jail sentence for an individual who is unable to pay his debt. Looking back at the twelfth and thirteenth centuries, a lender could enforce a court order against portable resources.⁶⁵ A trader could be imprisoned for an outstanding debt,⁶⁶ in the thirteenth century, and a non-trader could in the last hundreds of years.⁶⁷ Debtors have been imprisoned for non-payment of debts since the 14th century. Insolvent debtors who owed less than £100 and were not traders could face indefinite imprisonment until the debt was repaid to creditors.⁶⁸ Bankruptcy could be used to avoid prison, but only if the individual was a merchant or trader. Even so, the costs were prohibitive: £10, which was equivalent to 10 to 20% of the typical worker's annual income in the mid-1800s.⁶⁹ Most commonly hoped that the debtor's family or friends would repay the debt and save the debtor from imprisonment. Debtors' social standing was important because the prison's warden would charge for the accommodation; prisons were state-owned and regulated but operated for private profit.⁷⁰

Affluent debtors were given access to a bar and shopped with the option of going out during the day to earn money to repay creditors. Of course, the concept of debtors' prison was flawed from the start. Debtors who were imprisoned and had no family or friends were unable to earn enough to repay their debts, which continued to accumulate. Most were left with no choice but to beg for alms⁷¹ from passing strangers. Debtors' prisons were common in Western Europe until the mid-nineteenth century to deal with unpaid debt.⁷² Destitute debtors who were unable to pay were imprisoned in these facilities until they worked off their debt through labour or received outside funds from family and friends to pay the balance. The bankrupts were thought to be inextricably linked to his creditors. Under the Insolvent Debtors (England) Act 1813, debtors could request release after 14 days in jail by swearing an oath that their assets

⁶⁵ Lienne Steyn, 'Treatment of a Debtor's Home in Insolvency: Comparative Perspectives and Potential Developments in South Africa' (2013) 22 *International Insolvency Review* <https://www.researchgate.net/publication/259538621_Treatment_of_a_Debtor's_Home_in_Insolvency_Comparative_Perspectives_and_Potential_Developments_in_South_Africa> accessed 10 June 2021.

⁶⁶ *Ibid.*

⁶⁷ Wikiwand, 'Debtors' Prison' (*Wikiwand*, 2021) <https://www.wikiwand.com/en/Debtors%27_prison#/References> accessed 11 May 2021.

⁶⁸ Andy Wood, 'In debt and incarcerated: the tyranny of debtors' prisons-Extortion, brutal treatment and appalling conditions were experienced by imprisoned debtors' (*The Gazette*, 2014) <<https://www.thegazette.co.uk/all-notices/content/100938>> accessed 12 April 2020.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² The Tampa Bay Times, 'Debtors' Prison' (*The Tampa Bay Times*, 2009) <<http://www.tampabay.com/opinion/editorials/article991963.ece>> accessed 12 April 2020.

did not exceed £20, but if any of their creditors objected, they had to stay in prison. However, attitudes were changing, and the Bankrupts (England) Act 1825⁷³ allowed people to begin bankruptcy proceedings in agreement with creditors. Their labour earnings were used to cover the costs of their incarceration as well as their accumulated debt. Throughout the history of bankruptcy law, increasing access and compassion for debtors have made prison terms illegal in the majority of the world.

Debtors' prison has been used by critics since the late twentieth century to refer to criminal justice systems in which a court can sentence someone to prison for wilfully failing to pay criminal fees, usually on the order of a judge.⁷⁴ Since the nineteenth century, the English legal system has made significant changes to the institution of debt imprisonment. In most continental systems, it has been completely or nearly completely abolished; in England and many states in the United States, it is still practised, but only in the case of a debtor of means who evades payment of the debt, and the period of imprisonment is limited and prescribed.⁷⁵

Prison for failure to pay a private debt was used in the United Kingdom in the nineteenth century, but it was abolished by statute in 1869. Although most parts of the world abolished debt imprisonment in the nineteenth century, it was instituted under the International Law framework in 1968. International Human Rights Law, Article 1⁷⁶ of Protocol No. 4 of the European Convention on Human Rights⁷⁷ prohibits imprisonment for not paying a contractual obligation. However, the scope of Article 1 is limited in its application by the words 'merely on the grounds of inability to fulfil an obligation.' Deprivation of liberty is not prohibited if other factors are present, such as when the debtor acts fraudulently or negligently, or for some other reason refuses to honour an obligation with which he can comply.⁷⁸ The explanatory report⁷⁹ on Protocol 4, Article 1,⁸⁰ delineates the provisions and limitations of the framework.

⁷³ 6 Geo. IV, c. 16.

⁷⁴ Just Answer, 'What is Contempt of Court and other Contempt of Court Questions Answered' (*Just Answer*, 2020) <<https://www.justanswer.com/topics-contempt-of-court/>> accessed 12 April 2020.

⁷⁵ Lienne Steyn, 'Treatment of a Debtor's Home in Insolvency: Comparative Perspectives and Potential Developments in South Africa' (2013) 22 *International Insolvency Review* <https://www.researchgate.net/publication/259538621_Treatment_of_a_Debtor's_Home_in_Insolvency_Comparative_Perspectives_and_Potential_Developments_in_South_Africa> accessed 10 June 2021.

⁷⁶ No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

⁷⁷ European Convention on Human Rights ETS No. 005 213 UNTS 222.

⁷⁸ David Harris and others, *Law of the European Convention on Human Rights* (4th edn, OUP 2018) 736.

⁷⁹ Council of Europe, Explanatory Report – ETS 46 – Human Rights (Protocol No. 4) para 6 Strasbourg, 16.IX.1963 (*Council of Europe*, 1963) <<https://rm.coe.int/16800c92c0>> accessed 24 April 2021.

⁸⁰ "The article could not, therefore, be construed as prohibiting deprivation of liberty as a penalty for a proved criminal offence or as a necessary preventive measure before trial for such an offence, even if criminal law recognised as an offence an act or omission which was at the same time a failure to fulfil a contractual obligation.

The phrase ‘deprived of his liberty’ is intended to cover any period of loss of liberty, whether by detention or arrest.⁸¹ The provision in this protocol is extended by the Convention to failure to fulfil contractual obligations of any kind, not just money debts. It could refer to non-delivery, non-performance, or non-forbearance.⁸² The Convention right provides a security to the debtor that he will not be subjected to imprisonment if he fails to pay his contractual debts. In modern days in England & Wales, if an individual gets into the council tax arrears, the council will likely promptly pursue the debt via the court to get all the money at once. The debtor will have to pay the court costs and possibly bailiff fees and original debt, adding hundreds of pounds to the bill. In extreme cases, the debtor could go to prison, but usually only if he deliberately does not pay the council tax⁸³ and not for non-payment of the debt but will be for the offence of failing to follow the court’s order concerning the debts.

According to experts, the purpose of the Article was to prohibit any deprivation of liberty solely because the individual lacked the material means to fulfil his contractual obligations, as this is incompatible with the concept of human liberty and dignity.⁸⁴ In the case of *Göktan v. France*,⁸⁵ the Court determined that imprisonment in default of payment of the customs fine was a penalty, not a means of enforcing the fine, both under Article 7 of the Convention and Article 4 of Protocol 7. The definition of a ‘penalty’ cannot differ between Convention provisions. Furthermore, Article 1 of the fourth Protocol did not apply when a person was detained at the request of a creditor for refusing to make an affidavit regarding his property. Turkey and the United Kingdom have signed but never ratified Protocol No 4. The Convention rights, associated with debtor safety, are discussed in the proceeding chapter in detail. A similar level of protection is granted under the Convention right offered in the

For a law which makes a breach of contract into a criminal offence punishable by imprisonment always provides for one or more elements of criminality other than a simple inability to perform the contractual obligation.

For example, the law of a Contracting Party would thus not be in conflict with this article if it permitted the deprivation of liberty of an individual who: – knowing that he is unable to pay, orders food and drink in a cafe or restaurant and leaves without paying for them.

– through negligence, fails to supply goods to the army when he is under contract to do so.

– is preparing to leave the country to avoid meeting his commitments.”

⁸¹ Council of Europe, Explanatory Report – ETS 46 – Human Rights (Protocol No. 4) para 2 Strasbourg, 16.IX.1963 (*Council of Europe*, 1963) <<https://rm.coe.int/16800c92c0>> accessed 24 April 2021.

⁸² *Ibid*, para 3.

⁸³ Sara Williams, 'Which debts can you go to prison for not paying?' (*Debt Camel*, February 2017) <<https://debtcamel.co.uk/prison-for-debt/>> accessed 23 April 2021.

⁸⁴ Council of Europe, Explanatory Report – ETS 46 – Human Rights (Protocol No. 4) para 5 Strasbourg, 16.IX.1963 (*Council of Europe*, 1963) <<https://rm.coe.int/16800c92c0>> accessed 24 April 2021.

⁸⁵ *X v FRG* No5025/71, 14 YB 692 (1971).

International Bill of Rights⁸⁶ by Article 11⁸⁷ of the International Covenant on Civil and Political Rights (ICCPR). The prohibition in the International Covenant on Civil and Political Rights does not apply to statutory obligations. The word ‘inability’ implies that the person is unable to fulfil the obligation rather than simply unwilling to do so. The word ‘merely’ implies that the prohibition does not apply to people who have committed another crime in addition to the contractual breach. The prohibition on imprisonment for breach of contract is an absolute right. Absolute rights cannot be limited or qualified under any circumstance. Under article 4 of the International Covenant on Civil and Political Rights,⁸⁸ states may take actions derogating from certain of their obligations under the Covenant ‘in time of public emergency which threatens the nation's life and the existence of which is officially proclaimed’. The prohibition on imprisonment for failure to perform a contract, on the other hand, is expressly excluded from the obligations from which derogation is permitted. In the following chapters, a detailed available legal framework for debtor safety and security under International Law is reviewed.

Conclusion

In conclusion, the sale of credit has existed for an exceedingly long time in trade history, and so have the debts. Credit is the most efficient way to sell any commodity, even in modern society nowadays. There is a frequent term used by the seller of consumer goods that buy now and pay later, which is a kind of temptation to overburden themselves with unnecessary debt. Such practice should be condemned, and strict affordability criteria are implemented to protect the debtor. In any case of social and economic policy, bankruptcy law should prioritise debtor rehabilitation over asset distribution among creditors. The importance of distributing bankrupt assets fairly among creditors should be a secondary consideration. If there were no bankruptcy laws, the creditors would have had competition in seizing debtors' assets. Nevertheless, the bankruptcy system and the bankruptcy law created a different situation. Both the creditors and debtors can file the bankruptcy and receive some equal opportunities. The bankruptcy concept should be founded on a process in which an honest debtor can give up his assets for distribution and be released from debt so that he or she can begin a new life. Prison for failure to pay a private debt was used in the United Kingdom in the nineteenth century, but it was abolished by

⁸⁶ International Bill of Human Rights is made up of: Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1966), International Covenant on Economic, Social and Cultural Rights (1966), Optional Protocol to the International Covenant on Civil and Political Rights, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

⁸⁷ “No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.”

⁸⁸ International Covenant on Civil and Political Rights (ICCPR), New York, 16 December 1966 United Nations, 999 UNTS 171; 6 ILM (1967) 368.

statute in 1869. With some exceptions, a debtor is protected from imprisonment under international human rights law because of his inability to fulfil his contractual obligations. Fortunately, debtor treatment has evolved to be more equitable.

Debtors who deliberately defraud creditors of large sums are still subject to custodial sentences, but only in the most extreme cases.⁸⁹ The protection of the debtor and the chance of a fresh start⁹⁰ in case of a debtor's bankruptcy⁹¹ should be the priority of any economic society. Debt affects debtors socially, economically, and physically. The subsequent chapters have explored why less attention has been given to the Act's reform of personal insolvency law as society experiencing a record level of personal indebtedness due to financial crises caused by Covid-19. The next chapter of this study highlighted the impact of bankruptcy on a debtor.

⁸⁹ Andy Wood, 'In debt and incarcerated: the tyranny of debtors' prisons-Extortion, brutal treatment and appalling conditions were experienced by imprisoned debtors' (*The Gazette*, 2014) <<https://www.thegazette.co.uk/all-notices/content/100938>> accessed 12 April 2021.

⁹⁰ Adrain Walters, 'Personal Insolvency Law after the Enterprise Act: An Appraisal' [2005] 5 *Journal of Corporate Law Studies* 65, 66.

⁹¹ Enterprise Act 2002, s 279.

Chapter 3: Impact of Debt

Introduction

This chapter critically examines debtor rights and the impact of bankruptcy on the debtor's income, future credit accessibility, employment, business, personal possessions, savings, pension, and privacy. The impact of bankruptcy and repossession on the debtor's family home is analysed, and the available statutory and regulatory protection and potential deficiencies are explored. The chapter goes on to explore and examine the contemporary issues that arise as a result of a debtor's family home repossession. The impact of bankruptcy and repossession on the debtor's psychological health has been discussed to raise critical human rights issues. Research on the relationships between housing and health indicates that mortgage repossession's social, social-psychological, and health-related consequences are dramatic and overwhelmingly negative.¹ Other research has identified various reasons for which a debtor faces financial hardships that lead to insurmountable debts.² There is a sense of empathy for the debtor's situation, which may be due to the socioeconomic climate. By leaving a legacy of unpaid debt, these cases demonstrate that bankruptcy can lead to scandalous and shocking outcomes that degrade the reputations of those involved.³ According to research, debt and job loss are also contributing factors to bankruptcy.⁴

Debtors in the United Kingdom have equal rights regardless of their financial or social status. Existing English law prohibits debt collectors from using unfair, abusive, or deceptive debt collection tactics and prohibits debt collectors from discriminating against debtors. The following is a brief description of the core debtors' rights that will be examined and discussed throughout this research, as well as analyses of the consequences if a debtor fails to meet their contractual obligations.

- The right to fair treatment: Debtors have the right not to be harassed or bullied when contacted by a creditor or debt collector. Debt collector behaviour is subject to stringent regulations.

¹ Janet Ford and others, *Home ownership in a risk society: A Social Analysis of Mortgage Arrears and Possessions* (The Policy Press 2001) 113.

² Scotland Debt Solutions, 'What is Sequestration (Scottish Bankruptcy)?' (*Scotland Debt Solutions*, 25 February 2020) <<https://www.scotlanddebt.co.uk/sequestration>> accessed 15 June 2021.

³ Fiona Tolmie, *Corporate and Personal Insolvency Law* (2nd edn, London: Routledge-Cavendish 2003) 27.

⁴ Bankruptcy Canada, 'Causes of Bankruptcy in Canada' (*Bankruptcy Canada*, 2020) <<https://bankruptcy-canada.com/bankruptcy/causes-of-bankruptcy/>> accessed 15 June 2021.

- The right not to face discrimination: Discrimination occurs when debtors are treated unfairly because of a characteristic about them, such as their gender, race, age, or physical or mental disability.
- The right to privacy: Debtors are entitled to privacy. The creditor may collect, store, use, or disclose information about the debtor, but only if they follow the rules outlined in the GDPR and the Data Protection Act of 2018. Many other rights are granted to consumers under the DPA 2018, including the right to be informed, the right of access, the right to rectification, the right to erasure/to be forgotten, the right to restrict processing, the right to data portability, the right to object, and the right to object to automated decision making and profiling.
- The right to contest the debt: The debtor has the right to challenge the debt if they do not believe it is their debt or believe the amount is incorrect. Personal information may be inaccurately recorded by credit reporting agencies, which can adversely affect a person's credit rating and ability to secure loans unless a correction is made.
- Protection against unfair terms: Under the Unfair Contract Terms Act of 1977 and the Consumer Rights Act of 2015, the debtor has statutory and regulatory protection against unfair contract terms to some extent.
- The right to assistance: Many debtors who face unforeseen financial and health issues require assistance from their creditors as well as tailored assistance to deal with the specific situation they are in.
- Right to a fair trial: The debtor has the right to defend himself against the claim brought by his creditors, either in person or through legal assistance of his preference. However, if he lacks the means to pay for legal assistance, he may be given it free of charge when the interests of justice so demand.
- Right to the family home and peaceful enjoyment of property: Every natural or legal person has the right to peaceful enjoyment of his or her possessions. No one's possessions may be taken from him except in the public interest and under the conditions prescribed by law and the general principles of international law. The right to respect one's home does not entitle you to a house. It is your right to enjoy your current home in peace. This means that public authorities should not prevent you from entering or living in your home unless there is a compelling reason to do so, and they should not enter without your permission.

- A prohibition from inhuman & degrading treatment: Every debtor has the right not to be tortured by creditors or their agents who use illegal collection methods. Case law and research have shown that debt collectors and their agents frequently use illegal methods to collect debts, which can result in severe psychological harm.
- The right to a reasonable standard of living: Everyone has the right to a standard of living adequate for his or her health and well-being, including food, clothing, housing, medical care, and necessary social services, as well as the right to security in the event of unemployment, sickness, disability.

In addition to the above, creditors and regulators have several additional responsibilities and ethics codes to protect the rights of debtors. As a result of their inability to defend themselves, mental health debtors' rights necessitate a higher level of protection. When a person declares bankruptcy, it has ramifications on every aspect of their life, and the protections that are in place fall short in many ways. The following section of this study discusses the impact of bankruptcy on the debtor, as well as the violations of their rights.

Impact of COVID-19 on the Debt

The impact of COVID-19 has had devastating consequences on global economies with severe financial consequences, including the rise of collective national and individual debt. Internationally, due to the lockdown, there has been a dramatic decline in economic activities. According to the International Monetary Fund (IMF), the 2020 outlook has shifted from expected global growth of more than 3% to a sharp contraction of 3%, significantly worse than the output loss seen during the 2008–09 global financial crisis.⁵ The monetary researchers are uncertain regarding the recovery period of these crises on the global economy. The IMF raised serious concerns regarding the stability of the global financial system. IMF feared that several cracks have started emerging in the global financial market due to the tightening of financial conditions at unprecedented speed.⁶ Food inflation and energy prices are rising at an unprecedented rate. The COVID-19 pandemic has led to harmful health conditions within the UK, weakening economic and financial stability challenges. The ultimate priority for the UK government has been to save precious lives. To save lives, the government implemented a

⁵ International Monetary Fund, 'Global Financial Stability Report' (*International Monetary Fund*, April 2020) <<https://www.imf.org/en/Publications/GFSR/Issues/2020/04/14/global-financial-stability-report-april-2020>> accessed 18 November 2021.

⁶ *Ibid.*

lockdown⁷ to limit the spread of COVID-19.⁸ A recent report released by McKinsey & Company highlights that the UK lockdown helped to restrain the public-health crisis; however, it is taking its toll on the economy.⁹

According to the Office of National Statistics (ONS), 23% of businesses temporarily closed or paused trading in the weeks from April 6 to April 19, 2020, with approximately 60% of businesses that continued to trade reporting a drop in revenues.¹⁰ The study stressed that approximately 24% of the UK workforce (7.6 million jobs) are at risk because of COVID-19 related lockdowns.¹¹ In McKinsey's midpoint scenario, it is feared that in 2020 the UK's Gross Domestic Product (GDP) is expected to fall by 9%, resulting in a significant decrease in employment.¹² The study further reveals that increased unemployment creates considerable anxiety among those vulnerable to job losses during the crisis. According to the research, economic activity will resume once the lockdown restrictions are lifted, though the speed and patterns are uncertain and vary by sector.¹³ The recovery will depend on the economy's future and support from the government to individuals and businesses.

According to the ONS, the percentage of currently trading businesses has fallen slightly from 93% in late October 2021 to 91% in early November 2021; this is the first time the figure has fallen since January 2021. The transportation and storage industry is primarily to blame. In addition, over a quarter (28%) of businesses currently in operation reported a decrease in turnover compared to typical expectations for this time of year; this is an increase from 24% in late September 2021 and the highest percentage since early August 2021.¹⁴ The ONS data further highlight the vulnerability of businesses that have not permanently ceased trading; reporting 6% no or low confidence in their ability to survive the next three months, compared

⁷ First lockdown in March 2020, Second lockdown in December 2020.

⁸ Phoebe Dunn and others, 'A timeline of national policy and health system responses to COVID-19 in England' (*The Health Foundation*, 10 June 2020) <<https://www.health.org.uk/news-and-comment/charts-and-infographics/covid-19-policy-tracker>> accessed 18 November 2021.

⁹ Tera Allas, Marc Canal, and Vivian Hunt, 'COVID-19 in the United Kingdom: Assessing jobs at risk and the impact on people and places' (*McKinsey & Company*, 11 May 2020) <<https://www.mckinsey.com/industries/public-sector/our-insights/covid-19-in-the-united-kingdom-assessing-jobs-at-risk-and-the-impact-on-people-and-places>> accessed 18 November 2021.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Office for National Statistics, 'Coronavirus (COVID-19) roundup' (*Office for National Statistics*, 18 November 2021) <<https://www.ons.gov.uk/businessindustryandtrade/business/businessservices/bulletins/businessinsightsandimpactontheeconomy/18november2021>> 18 November 2021.

¹⁵ Office for National Statistics, 'Coronavirus (COVID-19) roundup' (*Office for National Statistics*, 18 November 2021) <<https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/conditionsanddiseases/articles/coronaviruscovid19roundup/latest#economy>> 18 November 2021.

to 4% reported in early October 2021. The figure was the highest (13%) for businesses in the other service activities industry. To the economy, the ONS reported that GDP increased by 0.8% in May 2021 as coronavirus restrictions eased, with GDP now 3.1% lower than before the pandemic in February 2020. The current source of concern is a lack of food supply, with approximately one in every six (17%) adults reporting that they were unable to purchase essential food items in the previous two weeks due to a lack of availability (16% in the last period - 6 to 17 October).¹⁵ Research carried out by Standard Life Foundation indicated that around 28% of the UK households are affected due to the sudden consequences of the pandemic and are experiencing financial difficulties.¹⁶

A recent survey conducted by YouGov estimated that 3.1 million UK households were in severe financial difficulty, and a further 4.8 million households were struggling; hence anxiety about money was widespread.¹⁷ It is further extracted that the households will experience further financial difficulties in the coming months. According to the research, 3.4 million UK households (12%) expect it to become even more difficult to pay bills and credit commitments over the next three months, and it is estimated that up to 1.7 million (6%) more households could fall into severe financial difficulty during that period, with a similar number struggling to make ends meet.¹⁸ The latest UK household survey revealed shocking data about the financial difficulties faced by households due to COVID-19 that almost all (87%) said that they struggled to pay for food and other daily necessities.

Further in the survey, all the participants said that it was a struggle to pay bills and meet other commitments; indeed, more than eight in ten (83%) said it was a constant struggle, and two-thirds (66%) of them admitted to currently owing money in missed payments on household bills or credit commitments.¹⁹ The preliminary findings of the data indicate that they have an impact on their jobs as a result of the economic environment's uncertainty.²⁰ It is most likely that people with low income are the most vulnerable to job losses during the crisis. Economic activity will resume once lockdown restrictions are lifted, although the rate and pattern of restoration are uncertain and vary by sector.²¹ The recovery will depend on the economy's

¹⁶ Elaine Kempson & Christian Poppe, 'Coronavirus Financial Impact Tracker' (*Standard Life Foundation*, April 2020) <https://www.standardlifefoundation.org.uk/__data/assets/pdf_file/0030/57486/COVID-19-Financial-Impact-Tracker-April-2020-FINAL.pdf> accessed 19 June 2020.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ It should be noted that this included people who had been granted a payment holiday.

²⁰ *Ibid.*

²¹ *Ibid.*

future and support from the government to individuals and businesses. The ONS data indicates that in the summer of 2021 (21 July to 15 August in Great Britain), one in every six adults experienced some form of depression, compared to one in every ten before the pandemic (July 2019 to March 2020). According to the data, younger adults, women, disabled adults, unemployed adults, those who could not afford an unexpected £850 expense, and adults living in England's most deprived areas were more likely to suffer from depression.²² Thus, the initial findings of the data indicate that the impact and effects of the COVID-19 crisis on households and the economies are more severe than the financial crises of 2007-2008.²³ Nevertheless, the COVID-19 crises continue to disrupt economic activity.

According to the ONS, the UK Gross Domestic Product (GDP) fell by 10.4% in June 2020.²⁴ To the most recent data, the GDP is expected to have grown by 0.6% in September 2021, but it remains 0.6% below its pre-coronavirus (COVID-19) pandemic level (February 2020).²⁵ The UK government has introduced several measures to facilitate the general public, such as increasing working tax credit,²⁶ introducing the Coronavirus Job Retention scheme for businesses to furlough employees,²⁷ and lumpsum grants for the self-employed.²⁸ The Coronavirus Job Retention Scheme (CJRS) ended on 30 September 2021. The ONS survey in late October 2021 of 16% of businesses reported that 3% of their workforce was made permanently redundant while 16% returned to work on reduced hours.²⁹ The result was an increase in the unemployment rate from 4% to 5.2%. By July, the unemployment rate had

²² Office for National Statistics, 'Coronavirus (COVID-19) latest insights: Well-being' (*Office for National Statistics*, 10 November 2021) <<https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/conditionsanddiseases/articles/coronaviruscovid19latestinsights/wellbeing>> 18 November 2021.

²³ *Ibid.*

²⁴ Office for National Statistics, 'Estimates of employment, unemployment, economic inactivity and other employment-related statistics for the UK' (*Office for National Statistics*, 16 June 2020) <<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/uklabourmarket/june2020#unemployment>> accessed 21 June 2020.

²⁵ Ellis Best, 'GDP monthly estimate, UK: September 2021' (*Office for National Statistics*, 11 November 2021) <<https://www.ons.gov.uk/economy/grossdomesticproductgdp/bulletins/gdpmonthlyestimateuk/september2021#main-points>> accessed 18 November 2021.

²⁶ *Ibid.*

²⁷ Gov UK, 'Coronavirus Job Retention Scheme up and running' (*Gov UK*, 20 April 2020) <<https://www.gov.uk/government/news/coronavirus-job-retention-scheme-up-and-running>> accessed 14 June 2020.

²⁸ Gov UK, 'Chancellor extends Self-Employment Support Scheme and confirms furlough next steps' (*Gov UK*, 29 May 2020) <<https://www.gov.uk/government/news/chancellor-extends-self-employment-support-scheme-and-confirms-furlough-next-steps>> accessed 14 June 2020.

²⁹ Office for National Statistics, 'Coronavirus (COVID-19) latest insights: Work' (*Office for National Statistics*, 11 November 2021) <<https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/conditionsanddiseases/articles/coronaviruscovid19latestinsights/work#employment-and-furlough>> accessed 18 November 2021.

dropped to 4.6%, and the number of unemployed had fallen by 1.6 million. These figures do not include people who are on furlough.³⁰ The average forecast from economists is for the unemployment rate to reach 5.2% by the end of 2021.³¹ The UN Conference on Trade and Development (UNCTAD) forecasted global GDP growth of 5.3% in 2021 and 3.6% in 2022 in its September 2021 evaluation of the global economy. However, global GDP would still be 3.7% lower in 2022 than it was expected to be before the pandemic began, resulting in a ‘cumulative income loss of about \$13 trillion in 2020-22’. Despite the spread of the new Delta variant, the vaccine rollout in the UK in 2021 appears to have reduced some of that uncertainty. However, as we approach the winter of 2021/2022, there is considerable uncertainty about the path of the pandemic and its economic consequences.

In addition, the legislature introduced the Coronavirus Act 2020, which is predominantly? protecting vulnerable individuals and families and ensuring the accountability of powers under the act.³² Schedule 29 of the Act³³ protects individuals and families from eviction on non-payment of rent. The Courts in England & Wales have postponed all eviction proceedings to protect the vulnerable during these crises.³⁴ The Financial Conduct Authority (FCA) paves the way for the financial sector to play its part to help destitute households. The financial regulator approved and directed that payment holidays for up to six months on mortgages, loan payments, hire purchases, credit card payments and other forms of credit without affecting credit ratings.³⁵ Tailored support from the lenders is available if a debtor finds it challenging to pay loan payments because of coronavirus. This support is unconditional if the debtor is struggling for the first time or has already had a payment holiday that’s coming to an end.³⁶ Helen Saxon of Money Saving Expert reported that more than 1.6 million mortgage customers have applied for the payment holiday since the start of the COVID-19 crisis. It was

³⁰ Daniel Harari and Matthew Keep, ‘Coronavirus: Economic impact’ (*Commons Library Research Briefing*, 24 September 2021) <<https://researchbriefings.files.parliament.uk/documents/CBP-8866/CBP-8866.pdf>> accessed 18 November 2021.

³¹ Gov UK, ‘Forecasts for the UK economy: September 2021’ (*GOV UK*, 15 September 2021) <<https://www.gov.uk/government/statistics/forecasts-for-the-uk-economy-september-2021>> accessed 18 November 2021.

³² Department of Health & Social Care, ‘Impact assessment Coronavirus bill: summary of impacts’ (*GOV UK*, 23 March 2020) <<https://www.gov.uk/government/publications/coronavirus-bill-summary-of-impacts/coronavirus-bill-summary-of-impacts>> accessed 15 June 2020.

³³ Coronavirus Act 2020, s 81.

³⁴ Peter Apps, ‘Courts suspend all possession hearings – putting a pause on evictions’ (*Inside Housing*, 27 March 2020) <<https://www.insidehousing.co.uk/news/news/courts-suspend-all-possession-hearings--putting-a-pause-on-evictions-65849>> accessed 15 June 2020.

³⁵ Financial Conduct Authority, ‘Mortgages and coronavirus’ (*FCA*, 20 March 2020) <<https://www.fca.org.uk/consumers/mortgages-coronavirus-consumers>> accessed 19 November 2021.

also pointed out that for the majority of the debtors, the payments will increase by less than £50 once they start repaying again.³⁷ However, the reporter also feared that the payments would double, triple, or even quadruple for some debtors due to interest costs added to their balance and factored in future monthly repayments.³⁸ For illustrative purposes, a repayment mortgage of £100,000 over 25 years term with an interest rate of 4.34% will attract a monthly increase of £9.05 based on three month payment holiday.³⁹

The debt charity StepChange added that by the end of May 2020, more than 4.6 million UK households would be facing debts of £6 billion due to COVID-19.⁴⁰ The chief executive of StepChange raised concerns by stating, “We were already dealing with a debt crisis, but COVID-19 has so far added another four million people and counting to the number who are going to need help finding their way back to financial health.”⁴¹ The research director at the Resolution Foundation proposed policy-makers and noted, “As policymakers prepare their plan to support Britain's recovery, they must prioritise strengthening the family finances of low- to middle-income households.”⁴²

According to the House of Commons report on the impact of COVID-19 on household debt and savings, low-wage workers are more likely than the average to have lost their jobs or been placed on furlough, so their income has decreased on average. According to the Resolution Foundation, low-income households have been disproportionately affected by labour market shocks: 47% of those in the bottom fifth of income experienced an adverse employment change between March 2020 and June 2021, compared to 20% in the top fifth. In addition, the decrease in household income will impact their ability to pay utility bills, loans, rent, and mortgage payments.⁴³ According to Money Advice Trust research, more than 7 million people in the United Kingdom (14%) are concerned about paying their council tax bills

³⁷ Money Saving Expert, 'Beware mortgage payment holiday calculation errors – make sure you aren't being overcharged' (*Money Saving Expert*, 28 April 2020) <<https://www.moneysavingexpert.com/news/2020/04/beware-mortgage-payment-calculation-errors---ensure-you-aren-t-b/>> accessed 15 June 2020.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Step Change, 'Coronavirus and personal debt: a financial recovery strategy for households' (*Step Change*, June 2020) <<https://www.stepchange.org/Portals/0/assets/pdf/coronavirus-policy-briefing-stepchange.pdf>> accessed 15 June 2020.

⁴¹ *Ibid.*

⁴² Caoimhe Toman, 'UK households face £6bn tsunami of debts due to Covid-19' (*Share Cast*, 9 June 2020) <<https://www.sharecast.com/news/news-and-announcements--/uk-households-face-pound6bn-tsunami-of-debts-due-to-covid-19--7534980.html>> accessed 15 June 2020.

⁴³ House of Commons Library, 'Coronavirus: impact on household debt and savings' (*Commons Library Research Briefing*, 6 July 2021) <<https://researchbriefings.files.parliament.uk/documents/CBP-9060/CBP-9060.pdf>> accessed 18 November 2021.

in the coming year. It is concerned that, between 2009 and 2019, the proportion of National Debt Line callers with council tax arrears almost doubled, from 15% to 29%.⁴⁴ According to government figures, over £4.4 billion in council tax arrears was owed to local authorities in England as of March 2021. A total of £157 million is owed in Wales. The current collection rules and system of council tax support in England evidently do not work well for low-income individuals.⁴⁵ The household debt problem is an alarming situation in the UK and raises serious concerns because the COVID-19 crises are impacting even more aggressively on existing debtors, further pushing them into the clutches of adversity, poverty and in some cases, destitution.⁴⁶ Therefore, it is unsurprising to note one legal scholar making the point that “COVID-19 represents a major stress test for societies, states, and international order. Unfortunately, when it comes to the human rights dimension, many countries are failing this test. Neoliberal economic, austerity and hostile environment policies have left social protection threadbare. They have undermined public services, social security, and workers’ rights, and exposed more people ever to their harmful consequences.”⁴⁷

Dominic Cummings, the prime minister’s former chief special adviser, testified to parliamentary committees about the government’s response to the pandemic for seven hours. According to the BBC news reality check team, the criticism advanced by Dominic Cummings on the government’s failure to implement safeguarding measures concerning care home testing, early lockdown⁴⁸ and closing the UK borders holds grounds that the government delayed taking prompt action as necessary to safeguard lives.⁴⁹ An inquiry⁵⁰ into the pandemic suggested it was understandable that the government “did not consider it practical or effective simply to

⁴⁴ Money Advice Trust, ‘Council Tax After Covid: Reforming Council Tax Support and collection in the wake of the pandemic’ (*Money Advice Trust*, July 2021) <https://moneyadvicetrust.org/media/documents/Council_tax_after_covid_report.pdf> accessed 19 November 2021.

⁴⁵ *Ibid.*

⁴⁶ Richard Partington, ‘UK households face £6bn debts because of Covid-19, says charity’ (*The Guardian*, 9 June 2020) <<https://www.theguardian.com/money/2020/jun/09/uk-households-face-6bn-debts-because-of-covid-19-says-charity>> accessed 17 June 2020.

⁴⁷ Lutz Oette, ‘How is Covid-19 impacting Human Rights?’ (*SOAS Blog*, 30 March 2020) <<https://www.soas.ac.uk/blogs/study/covid-19-human-rights/>> accessed 14 June 2020.

⁴⁸ The debate over whether to close UK borders dates back to the beginning of the pandemic. Between January and March 2020, the United Kingdom implemented some measures in an attempt to protect itself from the new virus. Quarantine was imposed on 273 people travelling from Wuhan, China, the site of the first outbreak. Others from “high-risk countries,” such as China, Iran, and Northern Italy, were voluntarily asked to isolate themselves for 14 days.

⁴⁹ BBC, ‘Dominic Cummings: Five claims fact-checked’ (*BBC News*, 27 May 2021) <<https://www.bbc.co.uk/news/57254305>> 19 November 2021.

⁵⁰ Parliament UK, ‘Conclusions and recommendations’ (*Publications Parliament*, 5 August 2020) <https://publications.parliament.uk/pa/cm5801/cmselect/cmhaff/563/56307.htm#_idTextAnchor106> accessed 19 November 2021.

restrict flights” at that time, partly because there were so many British residents trying to get home. Yvette Cooper, chair of the committee of MPs behind the inquiry, said, “The government’s failure to have proper quarantine measures in place in March 2020 as the infection was spreading fast was a grave error and meant Covid spread faster and reached more people”.⁵¹ In addition, Mr Dominic Cummings criticism of the government policy that after April 2020, there was ‘no proper border policy’ shows a lack of responsibility until February 2021, and only then did the government introduce quarantine hotels and travel restrictions for people arriving in the UK from high-risk countries.⁵² Given the severe flaws and government failure to take prompt action that has cost many valuable lives, a public enquiry over government delay must be initiated. Furthermore, numerous researchers have criticised the decision to implement a late lockdown in the UK due to COVID-19, which imposed a paralytic effect on public life that resulted in severe financial hardships issues for many.⁵³ It has been further emphasised that the human rights law framework imposes a positive obligation on the States to protect individual work, housing, education and livelihood.⁵⁴ Moral reformers believe that it is the ultimate obligation of the State to protect individuals from financial hardships and health disasters.⁵⁵ In the United Kingdom, these are often the people who have borne the brunt of austerity policies, rising inequality, and marginalisation.⁵⁶

Impact of COVID-19 on BAME

The NHS England admitted that there is evidence of disproportionate mortality and morbidity, particularly among Black, Asian, and Minority Ethnic (BAME) people who have contracted COVID-19, including NHS staff.⁵⁷ The Health Services Journal⁵⁸ also found a significant disparity in COVID-19 deaths among BAME people versus White health and care

⁵¹ *Ibid.*

⁵² More than 40 countries are on the government's red list, which has the most stringent travel restrictions. One example is India, where a new coronavirus mutation discovered in the country has spread to the United Kingdom. International travel has been linked to this. It has been designated as a "variant of concern," with over 3,400 cases discovered in the United Kingdom. Despite this, and despite the discovery in the UK of other variants discovered elsewhere, the government has never outright prohibited international travel, as some countries have.

⁵³ The Guardian, ‘Revealed: the inside story of the UK’s Covid-19 crisis’ (*The Guardian*, 29 April 2020) <<https://www.theguardian.com/world/2020/apr/29/revealed-the-inside-story-of-uk-covid-19-coronavirus-crisis>> accessed 17 June 2020.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ NHS England, 'Addressing the impact of COVID-19 on BAME staff in the NHS' (*NHS England* 2020) <<https://www.england.nhs.uk/coronavirus/workforce/addressingimpact-of-covid-19-on-bame-staff-in-the-nhs/>> accessed 21 June 2021.

⁵⁸ Health Services Journal, 'Exclusive: deaths of NHS staff from COVID-19 analysed' (*Health Services Journal*, 22 April 2020) <<https://www.hsj.co.uk/exclusive-deaths-of-nhs-staff-from-covid-19-analysed/7027471.article>> accessed 21 June 2021.

workers in the Kingdom.⁵⁹ The Royal College of Psychiatrists has observed that the disproportionate death rate is also reflected in the general population in the UK.⁶⁰ Even after controlling for age, self-reported health and disability, and other socio-demographic factors, Black, Bangladeshi and Pakistani people were nearly twice as likely as White people to die from COVID-19, according to data from the Office for National Statistics.⁶¹ According to British Medical Association, the current evidence⁶² for COVID-19 shows that those from a BAME background and males have been disproportionately impacted, with age and specific underlying conditions also associated with more severe illness.⁶³

The King's Fund charity expressed concern that the shocking data has understandably caused widespread fear, anxiety, and grief among BAME employees and their communities and called for immediate action to protect them from the higher COVID-19 risk.⁶⁴ The NHS confederation of BME Leadership emphasises that there are strong indications that the crisis is exacerbating existing inequalities and inequities experienced by BAME healthcare staff, which requires further investigation.⁶⁵ The issue of debt faced by Black, Asian, and Minority Ethnic women in the UK is having a greater financial and psychological impact than their White counterparts, according to polling, as reported in the Guardian news.⁶⁶ Overall, BAME women were more likely to believe that the outbreak would cause them to incur more debt, that they would struggle to make ends meet in the next three months, and that they would be concerned

⁵⁹ It is evidenced that around 2/3rds of healthcare staff who have died are from a BAME background whereas they make up around 20% of the overall workforce in NHS.

⁶⁰ Royal College of Psychiatrists, 'Impact of COVID-19 on Black, Asian, and Minority Ethnic (BAME) staff in mental healthcare settings | assessment and management of risk' (*Royal College of Psychiatrists*, 13 May 2020) <https://www.rpsych.ac.uk/docs/default-source/about-us/covid-19/impact-of-covid19-on-bame-staff-in-mental-healthcare-settings_assessment-and-management-of-risk_13052020v2.pdf?sfvrsn=1068965_2> accessed 21 June 2020.

⁶¹ Chris White and Vahé Nafilyan, 'Coronavirus (COVID-19) related deaths by ethnic group, England, and Wales: 2 March 2020 to 10 April 2020' (*Office for National Statistics*, 7 May 2020) <<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/articles/coronavirusrelateddeathsbyethnicgroupenglandandwales/2march2020to10april2020>> accessed 21 June 2021.

⁶² 21% of all staff are BAME – 63% of healthcare workers who died were BAME.

20% of nursing staff are BAME – 64% of nurses who died were BAME.

44% of medical staff are BAME – 95% of doctors who died were BAME.

⁶³ British Medical Association, 'COVID-19: the risk to BAME doctors' (*BMA*, 24 August 2021) <<https://www.bma.org.uk/advice-and-support/covid-19/your-health/covid-19-the-risk-to-bame-doctors>> accessed 19 November 2021.

⁶⁴ The Kings Fund, 'Ethnic minority deaths and Covid-19: what are we to do?' (*The Kings Fund*, 30 April 2020) <<https://www.kingsfund.org.uk/blog/2020/04/ethnic-minority-deaths-covid-19>> accessed 21 June 2020.

⁶⁵ NHS Confederation BME Leadership Network, 'The impact of COVID-19 on BME communities and health and care staff' (*NHS Confederation BME Leadership Network*, April 2020) <https://www.nhsconfed.org/media/Confederation/Files/Publications/Documents/BRIEFING_Impact-of-COVID-19-BME_communities-and-staff_FNL.pdf> accessed 21 June 2020.

⁶⁶ Haroon Siddique, 'BAME women suffer harder financial hit' (*The Guardian*, 8 June 2020) <<https://www.theguardian.com/world/2020/jun/08/coronavirus-uk-bame-women-suffer-harder-financial-hit>> accessed 14 August 2021.

about how they would pay their rent or mortgage.⁶⁷ The shocking disproportionate death rate, widespread fear, anxiety, and grief amongst BAME, inequalities and inequities experienced by BAME compelled the government to order an inquiry to understand why such a high number of people from BAME backgrounds are dying from the virus.⁶⁸ Subsequently, Public Health England published a research report on the review of disparities in the risk and outcomes of COVID-19 among BAME. According to a review conducted by Public Health England, there is evidence that COVID-19 does not affect all population groups equally.⁶⁹

According to the review, the risk of contracting the infection, experiencing more severe symptoms, and death is associated with older age, ethnicity, male sex, and geographic area.⁷⁰ According to the findings, Black ethnic groups had the highest age-standardised COVID-19 diagnosis rates per 100,000 population (486 in females and 649 in males), while White ethnic groups had the lowest (220 in females and 224 in males).⁷¹ According to Public Health England's disturbing research, death rates from COVID-19 were higher for Black and Asian ethnic groups than for White ethnic groups, and people of Chinese, Indian, Pakistani, other Asian, Caribbean, and other Black ethnicity origin had a 10 to 50% higher risk of death when compared to White British.⁷² Survival⁷³ rates among confirmed COVID-19 cases were examined, and those of Bangladeshi descent had about twice the mortality rate of those of White British ancestry.⁷⁴

It is speculated in the report that financial vulnerabilities due to COVID-19 may be felt differently across the different ethnic groups in England.⁷⁵ For example, the study found that men in Pakistani and Bangladeshi households were more likely to work in a "shutdown sector" (restaurant work, taxi driving) and have a partner who is not currently in the labour market; this could lead to high levels of financial insecurity in this group.⁷⁶ The study recommends that

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ Public Health England, 'COVID-19: understanding the impact on BAME communities' (*Assets Publishing Service Gov UK, 16 June 2020*) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892376/COVID_stakeholder_engagement_synthesis_beyond_the_data.pdf> accessed 19 June 2021.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ After accounting for the effect of sex, age, deprivation, and region.

⁷⁴ Public Health England, 'COVID-19: understanding the impact on BAME communities' (*Assets Publishing Service Gov UK, 16 June 2020*) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892376/COVID_stakeholder_engagement_synthesis_beyond_the_data.pdf> accessed 19 June 2021.

⁷⁵ *Ibid.*, 22.

⁷⁶ *Ibid.*

local and national policy initiatives be sensitive to BAME communities to ensure that existing health and economic inequalities are not exacerbated as a result of the pandemic's extraordinary measures.⁷⁷ It is very relevant to mention that the COVID-19 impact on BAME is very severe in terms of financial vulnerabilities compared to other populations in the UK. According to FCA's findings, 43% of BAME individuals were concerned about meeting bill commitments in the next three months, compared to a still concerning but significantly lower 17% of White individuals. Of course, some of these findings may have been influenced by recent events, but there is no reason to believe that the significant differences in optimism between BAME and White people have vanished.⁷⁸

The findings highlighted that BAME individuals had suffered a significantly worse drop in earnings than their White counterparts, even when age, employment sector, and other factors were considered. In addition, emotional concerns about financial security appear to be disproportionately higher among BAME people. It can be assumed that the disparities in the impact on the labour market and the disparities in financial concerns will continue to be felt in the future. As a result, some of the disparities between BAME and non-BAME groups may widen in the next few months.⁷⁹

According to the study, participants' concerns about social factors such as housing, accommodation, and living conditions that may have increased the risk of COVID-19 exposure were constantly raised.⁸⁰ BAME communities were more likely to live in densely populated urban areas where the virus spreads quickly, and they were more likely to be critical workers, particularly in London.⁸¹ Consequently, there is an increased risk of transmission within households where minority ethnic groups are more likely to live in overcrowded accommodations. The Public Health England research quoted: "Multiple generations living in one household mean elderly and vulnerable individuals may struggle, or be unable, to physically distance themselves safely. However, older people might have more support for essential activities."⁸² In addition to raising concerns about living standards, stakeholders

⁷⁷ *Ibid.*

⁷⁸ Philippe Bracke and others, 'Covid-19 and UK's BAME communities – an economic perspective' (FCA, 26 January 2021) <<https://www.fca.org.uk/insight/covid-19-and-uk-bame-communities-economic-perspective>> accessed 19 November 2021.

⁷⁹ *Ibid.*

⁸⁰ Public Health England, 'COVID-19: understanding the impact on BAME communities' (*Assets Publishing Service Gov UK*, 16 June 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892376/COVID_stakeholder_engagement_synthesis_beyond_the_data.pdf> accessed 19 June 2021.

⁸¹ *Ibid.*

⁸² *Ibid.*

expressed their worries about low income and poverty, which increases the risk of acquiring COVID-19 and having more severe diseases. According to the findings of the study, members of the BAME community who were more economically deprived were more likely to work in occupations that exposed them to greater risk or were less able to take protective measures, such as isolation at home.⁸³ The research evidenced that income inequality and poverty were significant concerns for BAME that reduced their capacity to tolerate the economic challenges.⁸⁴ A few stakeholders expressed concern that more needed to be done to protect BAME's economic stability. The Public Health England research mentioned:

“A lot of people think this is just an ethnicity issue, but it's not: it's everybody's business.”⁸⁵

The BAME communities raised their concern in the research about the inequalities and stressed that it is a legal and moral obligation of the State to protect those most at risk. The long-term effects of COVID-19 are expected to have a significant impact on BAME communities, particularly those living in high deprivation areas.⁸⁶ The known inequalities indicate that Convention rights are being violated, and the State has a legal and moral obligation to protect the lives of vulnerable BAME groups, who face roughly twice the risk of death as people of White British ethnicity. Furthermore, under the European Social Charter, it is the responsibility of each member state to protect against poverty and social exclusion. The Public Health England research mentioned severe concerns in terms of financial and social difficulties likely ahead for BAME aftermath⁸⁷ of COVID-19. The BBC report highlighted the potential social impact on BAME communities “The unequal impact of COVID-19 on BAME communities may be explained by several factors ranging from social and economic inequalities, racism, discrimination and stigma, occupational risk, inequalities in the prevalence of conditions that increase the severity of disease including obesity, diabetes, hypertension and

⁸³ *Ibid.*

⁸⁴ Omar Khan, 'Economic inequality and racial inequalities in the UK: Current evidence and the possible effects of systemic economic change' (*Friends Provident Foundation Organisation*, 2019) <<https://www.friendsprovidentfoundation.org/wpcontent/uploads/2019/01/Runnymede-report.pdf>> accessed 21 June 2020.

⁸⁵ Public Health England, 'COVID-19: understanding the impact on BAME communities' (*Assets Publishing Service Gov UK*, 16 June 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892376/COVID_stakeholder_engagement_synthesis_beyond_the_data.pdf> accessed 19 June 2021.

⁸⁶ *Ibid.*

⁸⁷ “We already had people who had existing problems, but we know that because of the post-COVID economic issues that there are going to be disproportionate effects on those people who are from lower socio-economic backgrounds and there is a predominance of people from Black and Asian and minority ethnic groups in those lower socio-economic status backgrounds. So, this is like a triple whammy, adding the traumatic effects of COVID itself and then the economic effects.”

asthma.”⁸⁸ The following section of this study discusses and investigates how BAME communities deal with mental health issues, as well as the financial consequences of social and economic inequalities while in debt.

Impact of Bankruptcy on Debtors

UK personal debt is rising at an alarming rate. Personal debt is cited as one of the greatest challenges to the UK economy and society by academics.⁸⁹ Personal debt is mainly reflected in household debts to the income ratios, which presents how the debts can be covered from the current disposable incomes. Unfortunately, household debts in the UK are rising, signifying that the debtors cannot pay back the debts.⁹⁰ Over-indebtedness of individual people suffering from bankruptcy has various causes, and its impacts are very severe; the COVID-19 crisis will inevitably exacerbate this. As bankruptcy could significantly impact a debtor’s life, it is critical to examine the issue related to bankruptcy in detail. Even if a debtor has failed to meet his contractual obligations, he has human rights that must be protected. This section highlights the main points and examines the impact of bankruptcy on debtor human rights from various angles.

Bankruptcy Costs to the Debtor

Individual debtors must apply for a bankruptcy order online to the adjudicator and pay a fee of £680.⁹¹ The individual who is already struggling with debts might feel it extremely difficult to raise the fees. To ease the burden on the debtor who is already struggling financially, the Scottish Government introduced Coronavirus Scotland No. 2 Bill, which provided relief to debtors who are receiving social security or on a low income.⁹² However, the application fees for bankruptcy are excessive and can undermine the basic approach to providing a debtor with a fresh start. According to the theory of discharge in consumer bankruptcy, the goal of bankruptcy as providing a ‘fresh start’ for specific debtors is inadequate.⁹³ It can be argued that

⁸⁸ James Tapper, 'Minorities more at risk from Covid-19 because of racism, says report' (*The Guardian*, 13 June 2020) <<https://www.theguardian.com/inequality/2020/jun/13/leaked-report-says-racism-and-inequality-increase-covid-19-risk-for-minorities>> accessed 30 August 2021.

⁸⁹ Johnna Montgomerie, 'Tackling Britain’s private debt crisis' (*Progressive Economics Group*, November 2017) <<https://peg.primeeconomics.org/policybriefs/britains-private-debt-crisis#>> accessed 26 April 2021.

⁹⁰ Andrew Keay and Peter Walton, *Insolvency Law: Corporate and Personal* (Pearson 2003) 312.

⁹¹ Step Change Debt Charity, 'Bankruptcy costs and fees in the UK' (*Step Change Debt Charity*, May 2020) <<https://www.stepchange.org/debt-info/bankruptcy-costs-and-fees.aspx>> accessed 21 June 2020.

⁹² Citizens Advice Scotland, 'New exemptions from bankruptcy fees to be introduced' (*Citizens Advice Scotland*, 26 May 2020) <<https://www.cas.org.uk/news/new-exemptions-bankruptcy-fees-be-introduced>> accessed 13 June 2020.

⁹³ Margaret Howard, 'A Theory of Discharge in Consumer Bankruptcy' (1987) 48 *Ohio State Law Journal* 1047, 1048.

bankruptcy is designed to rehabilitate the debtor and not punish by introducing high costs to become bankrupt.

Various charities in the UK can help and give a debtor a grant towards their bankruptcy fees. The criteria of the grant are mostly unknown and therefore hard to fulfil by an ordinary debtor. There are no statistics available to gauge the number of debtors who seek help through charities. According to the Citizen Advice Bureau (CAB), it is often hard to get the necessary fees, and delays in filing for bankruptcy can prolong the stress and suffering.⁹⁴ Subsequently, a struggling debtor needs to approach charities and organisations such as Turn2Us, Trade Union Congress, Royal British Legion, EDF Energy Trust, Severn Trent Trust Fund, and British Gas Energy Trust, to seek financial help to clear the debt or get assistance in fees. The Citizen, Advice Bureau charity warns that:

“Bankruptcy can have serious consequences; it might not be the only option, and it might not be the best one. Other debt solutions such as a Debt Relief Order (DRO) or an Individual Voluntary Arrangement (IVA) can be explored. Bankruptcy might help debtors become free of debts, but it is not the right option for everyone. It is important to know that bankruptcy will affect daily life.”⁹⁵

For debtors who have assets (property, excess income), the Insolvency Service (IS) will appoint a trustee overseas to the bankruptcy estate. The official receiver acts as a trustee, investigates the debtor's financial affairs, and reports to the court.⁹⁶ The bankrupt estate will bear the costs of the trustee in bankruptcy (TIB), and those fees can be thousands of pounds. In this scenario, the debtor's estate ends up paying huge costs of bankruptcy in terms of fees, adding significant strain to the mental and physical well-being of the individuals involved. As per the rules,⁹⁷ TIB is entitled to remuneration for his work in that role. In the case of *Hunt v Yearwood-Grazette*,⁹⁸ the High Court considered the appropriate remuneration for a TIB where the bankrupt disputed the fees charged. The High Court dismissed the appeal of TIB and

⁹⁴ Citizen Advice Bureau, 'Possible assistance with Bankruptcy costs/fees' (*Citizen Advice Bureau*, 2020) <<https://forums.moneysavingexpert.com/discussion/1167839/possible-assistance-with-bankruptcy-costs-fees>> accessed 21 June 2020.

⁹⁵ Citizen Advice, 'Bankruptcy-overview' (*Citizen Advice*, June 2020) <<https://www.citizensadvice.org.uk/debt-and-money/debt-solutions/bankruptcy-2/bankruptcy-explained/bankruptcy-overview/>> accessed 21 June 2020.

⁹⁶ Royston Miles Goode, 'Principles of Corporate Insolvency Law' (*Google Books*, 2011) <<https://books.google.co.uk/books?id=mtK4kQlhEowC>> accessed 11 May 2020.

⁹⁷ Insolvency Rules 1986, rule 6.138(1).

⁹⁸ *Hunt v Yearwood-Grazette* [2009] EWHC 2112 (Ch).

maintained the County Court’s decision to refuse the TIB for an order of possession and sale to recover their fees.

In *Brook v Reed*⁹⁹, the Court of Appeal held that whether the remuneration and expenses of a TIB were proportionate required an assessment of all the case circumstances. Most commonly, the debtor lender (creditors) pursue bankruptcy for non-payment of contractual debt. The creditors or other parties must file a bankruptcy petition at the court. The minimum total debt should be equal to or exceeds (£5000) at the bankruptcy level.¹⁰⁰ The statutory minimum amount was increased from £750 in 2015; the underlying aim, as said by Jo Swinson, the Business Minister, was that the government wanted to ensure this form of insolvency, which can have profound implications, was “reserved; for those with sizeable debts.”¹⁰¹ Debt advisors and critics acknowledged the government’s decision to increase the minimum level of debt that can force people into bankruptcy.¹⁰² As a consequence of the government decision, about 3,600 people per year with low debt levels and no ability to pay off those debts will be granted a Debt Relief Order (DRO) rather than being forced to become bankrupt as a last resort route.¹⁰³

The bankruptcy costs can put a debtor further into debt if he fails to secure a grant or borrows from family and friends and is an obstruction to access justice. *R. v. Lord Chancellor, ex p. Lightfoot*¹⁰⁴ is instructive in this regard.¹⁰⁵ In the *R. v. Lord Chancellor Ex p. Witham* court held that: “Access to justice is a fundamental requirement of the rule of law. Its imperative rests upon the need for objective and independent adjudication of disputes between man and man and between man and state. This was the sense in which the phrase was used in *R. v Lord*

⁹⁹ *Brook v Reed* [2011] EWCA Civ 331.

¹⁰⁰ Insolvency Act 1986, s 267(4).

¹⁰¹ The Guardian, 'Government raises bankruptcy threshold to £5,000' (*The Guardian*, 15 Jan 2015) <<https://www.theguardian.com/money/2015/jan/15/bankruptcy-threshold-raised-5000pounds#:~:text=Ministers%20are%20hiking%20the%20amount,for%20%E2%80%9Cunreasonably%20small%20debts%E2%80%9D.>> accessed 13 June 2020.

¹⁰² Paloma Kubiak, 'Bankruptcy threshold to be raised from £750 to £5,000' (*Money Savings Expert*, 15 January 2015) <<https://www.moneysavingexpert.com/news/2015/01/Bankruptcy-threshold-to-be-raised-from-750-to-5,000/>> accessed 21 June 2020.

¹⁰³ *Ibid.*

¹⁰⁴ *R. v. Lord Chancellor, ex p. Lightfoot* [1999] 4 All E.R. 583.

¹⁰⁵ The bankruptcy costs can put a debtor further into debt if he fails to score a grant and borrows from family and friends and is an obstruction to access justice. *R. v. Lord Chancellor, ex p. Lightfoot* is instructive in this regard. In *R. v. Lord Chancellor, ex p. Lightfoot* an appellant accumulated debt of £60,000 and petitioned for bankruptcy but could not afford to pay the deposit fees of £250 requiring under Insolvency Fees Order 1986 Art. 8(1) and Art. 9(b) for the fees of the Official Receiver. The appellant contends in reliance on *R. v Lord Chancellor Ex p. Witham* that mandatory deposit undermines her constitutional right of access to the court. The counsel for the appellant submitted that it was immaterial as is the distinction between the court fees which constituted the obstacle in *R. v Lord Chancellor Ex p. Witham* and the official receiver's fees which constitute the obstacle here.

Chancellor Ex p. Witham, as was the expression 'access to the Queen's courts'; no distinction was intended, as I hope the context of those expressions' use makes clear. The subordinate order complained of in *R. v Lord Chancellor Ex p. Witham* offended against this imperative. It constituted a general prohibition of indigent litigants from the door of the court, whatever their dispute. But it by no means follows that every case where access to court procedures is envisaged by statute gives rise to a constitutional right.” (page 773 (b)–(d)).¹⁰⁶

As was acknowledged by the court in *Gustafson v Sweden*¹⁰⁷ 623 at 634: “The court recalls that the applicability of Article 6(1) under its “civil head” requires the existence of a “dispute” over a “right” which can be said, at least on arguable grounds, to be recognised under domestic law. That dispute must be genuine and serious; it may relate not only to the existence of a right but also to its scope and the manner of its exercise. Furthermore, the outcome of the proceedings must be directly decisive for the right in question.” Subsequently, the court dismissed the appeal and maintained that while free access to the courts was fundamental in a democratic state, that was not in question. *R. v Lord Chancellor Ex p. Witham* was distinguished, as in this instance, the deposit was not a prerequisite for court access but a contribution toward the cost of services.

It can be argued from a creditor’s point of view that the increased threshold of bankruptcy amount will have a severe impact on the methods available to recover the debts under the new criteria.¹⁰⁸ Debts below the bankruptcy threshold are pursued through the small claims court. County court proceedings will be more time-consuming and, in theory, more expensive. It will cause creditors to rethink how they recover debts and move towards more informal debt settlement methods.¹⁰⁹ The high bankruptcy costs are unjust and violate the debtor's right to a fair trial and the right to seek assistance if he lacks resources or is unable to find the necessary assistance.

Impact on the Earnings of the Bankrupt

Once the bankruptcy petition is filed, no further payments are required towards the creditors; it may leave an extra income after bankruptcy to the debtor.¹¹⁰ A debtor must be honest and declare all their income to the TIB. According to the philosophy, an honest debtor

¹⁰⁶ *R. v, Lord Chancellor Ex p. Witham* [1998] Q.B. 575.

¹⁰⁷ *Gustafson v Sweden* [1997] 25 EHRR.

¹⁰⁸ Michael Mccord, 'Bankruptcy limit increases from £750 to £5,000' (*Tughans*, Jan 2015) <<https://www.tughans.com/news-insights/bankruptcy-limit-increases-750-5000/>> accessed 14 June 2021.

¹⁰⁹ *Ibid.*

¹¹⁰ The Gazette, 'What will happen to my debts during bankruptcy?' (*The Gazette*, June 2020) <<https://www.thegazette.co.uk/insolvency/content/100626>> accessed 22 June 2020.

who is overburdened with debt and makes his assets available to his creditors is entitled to a discharge from them. The goal of bankruptcy is to reward only the honest debtor with a fresh start.¹¹¹ Fiona Gaskell, an insolvency specialist, warns that it is vital that the bankrupt makes full disclosure¹¹² to the Official Receiver (OR) or TIB, as failure to do so may result in the bankrupt being viewed as uncooperative.

Under the Insolvency Act 1986¹¹³, a bankrupt commits an offence if they fail to disclose all the information required by TIB or the Official Receiver. In the case of *Hicken v Ellison*,¹¹⁴ the debtor failed to disclose their income and failed to provide the relevant documentation to the Official Receiver, and the Official Receiver initiated the contempt of court proceeding and successfully obtained the contempt of court order against the debtor. According to the Walsall Magistrates' Court, a bankrupt was sentenced to 12 months in prison, suspended for two years, after pleading guilty to fraudulent removal of the property, perjury, and material omission.¹¹⁵ The critics claim that the process has been widely used by dishonest debtors who have hidden their assets, preferred certain creditors, and had their debts discharged.¹¹⁶ Section 291 of the Insolvency Act 1986¹¹⁷ places statutory duties on the bankrupt concerning TIB or Official Receiver to affect the bankruptcy process's credibility and give the creditor a fair asset distributive advantage. According to a bankruptcy practitioner, "Bankruptcy is not inherently bad or good, but it is an important protection for honest consumers who find themselves in big trouble in debt."¹¹⁸ Bankruptcy practitioners and debt advisors agree that a bankruptcy enables an honest debtor to write off most debts.¹¹⁹ A bankrupt debtor can keep household items, tools

¹¹¹ Margaret Howard, 'A Theory of Discharge in Consumer Bankruptcy' (1987) 48 Ohio State Law Journal 1047, 1050.

¹¹² It is critical that the bankrupt be completely truthful and honest about his income and assets, and that he cooperate with the official receiver. The TIB has statutory authority to investigate the debtor's history to determine whether the bankruptcy was caused intentionally.

¹¹³ Insolvency Act 1986, s 353.

¹¹⁴ *Hicken v Ellison* [2016] EWHC 2791 (Ch) (08 November 2016).

¹¹⁵ *The Insolvency Service*, 'Press release, 'Prison sentence, community service and costs awarded against bankrupt who hid interest in property' (*The Insolvency Service*, 4 August 2014) <<https://www.gov.uk/government/news/prison-sentence-community-service-and-costs-awarded-against-bankrupt-who-hid-interest-in-property>> accessed 13 April 2020.

¹¹⁶ G Stanley Joslin, 'Bankruptcy: Anglo-American Contrasts' (1966) 29 *Bankruptcy: Anglo-American Contrasts*, 149, 152.

¹¹⁷ Insolvency Act 1986, s 291.

¹¹⁸ Jeffrey Jenkins, 'Is Filing Bankruptcy Bad? Can It Be Good' (*National Bankruptcy Forum*, 2 April 2020) <<https://www.natlbankruptcy.com/is-filing-bankruptcy-bad-can-it-be-good/>> accessed 22 June 2021.

¹¹⁹ Rocket Lawyer, 'Advantages and disadvantages of declaring bankruptcy' (*Rocket Lawyer*, 2020) <https://www.rocketlawyer.com/gb/en/quick_guides/advantages-and-disadvantages-of-declaring-bankruptcy> accessed 22 June 2020.

for the trade, vehicle, and family house (subject to TIB or Official Receiver failing to sell within three years of the bankruptcy order).¹²⁰

Fiona Gaskell in the Gazette dispelled the misconception that encompasses bankruptcy and that a bankrupt loses everything.¹²¹ The Insolvency Act 1986¹²² covers everything that belongs to the bankruptcy estate and provides exceptions that exclude the bankruptcy estate. One of the bankruptcy aims is that the creditor should receive at least part of what the debtor owes if possible.¹²³ The TIB will consider the change in debtor circumstances and determine whether an Income Payment Agreement (IPA) or Income Payments Order (IPO) needs to be modified. For example, depending on debtor circumstances, the IPA or IPO may be suspended, payments may be increased, or the debtor is asked to pay a portion of the lump sum. If the trustee refuses to change the amount, a debtor may petition the court to change it.¹²⁴

In the case of *Raithatha v Williamson*¹²⁵ court held that the bankrupt's right to receive income from his pension could be the subject of an IPO, even though he had not elected to draw his pension. The court concluded that a bankrupt has "entitlement to a payment under a pension scheme not merely where the scheme is in payment of benefit but also where, under the rules of the scheme, he would be entitled to payment merely by asking for payment." Contrary to *Raithatha v Williamson*¹²⁶, the High Court dismissed an application from TIB for access to the bankrupt's pension, which was not yet in payment in the case of *Horton v Henry*.¹²⁷ In the case of *Hinton (trustee in bankruptcy of Wotherspoon) v Wotherspoon*,¹²⁸ the court granted a TIB an IPO under the Insolvency Act 1986¹²⁹ for the bankrupt's surplus income to be used to meet the claims of the creditors. Debt charity StepChange raised its concerns about the surplus¹³⁰ income which a bankrupt debtor pays toward creditors.¹³¹ The IPA can last for a

¹²⁰ *Ibid.*

¹²¹ Fiona Gaskell, 'Bankruptcy myths dispelled' (*The Gazette*, 2020) <<https://www.thegazette.co.uk/insolvency/content/100308>> accessed 22 June 2020.

¹²² Insolvency Act 1986, s 283.

¹²³ Citizen's advice, 'Asked to make an income payments agreement' (*Citizens Advice Bureau*, 2020) <<https://www.citizensadvice.org.uk/debt-and-money/debt-solutions/bankruptcy-2/asked-to-make-an-income-payments-agreement/>> accessed 13 April 2020.

¹²⁴ *Ibid.*

¹²⁵ *Raithatha v Williamson* [2012] EWHC 909 (Ch).

¹²⁶ *Ibid.*

¹²⁷ *Horton v Henry* [2014] EWHC 4209 (Ch).

¹²⁸ *Hinton (trustee in bankruptcy of Wotherspoon) v Wotherspoon* [2016] EWHC 621 (Ch).

¹²⁹ Insolvency Act 1986, s 310.

¹³⁰ any disposable income over £20 will be subject to IPA or IPO in favour of creditors.

¹³¹ Step Change Debt Charity, 'After bankruptcy' (*Step Change Debt Charity* 2020) <<https://www.stepchange.org/debt-info/bankruptcy-income-payment-agreement.aspx>> accessed 22 June 2020.

maximum period of three years. The court will not make an IPO if it leaves the debtor without enough money to meet daily needs.¹³²

Charities raise an increasing concern that if a debtor has over £20 disposable income left, then the debtor should pay extra amounts towards his creditors, which is a fair condition, but in practice, it will be hard to differentiate between the essential and non-essential expenditures for a debtor.¹³³ The Official Receiver will not set IPA, where a debtor's income is solely made of benefits or pension. The IPO may potentially impact the debtor's right to standards of living and affect their ability to meet his family's daily needs due to the required contribution.¹³⁴ Like all other individuals, debtors have everyday needs, which cannot be fully satisfied with the limited monthly budget of £20. According to Insolvency Direct, the Official Receiver seeks to recover the total amount of any surplus available to the bankrupt.¹³⁵ It is vital to emphasize that the Official Receiver will consider each debtor's scenario on its own merits. The Official Receiver will grant £10 per person per month to cover the sundries emergencies,¹³⁶ which is insufficient in the current economic environment. It constitutes a violation of fundamental human rights to leave a debtor in a state of destitution¹³⁷ by leaving just £20 per month to budget for unforeseen economic commitments. The Joseph Rowntree Foundation raised shocking facts that over 1.5 million people were destitute in the UK in 2017, including 365,000 children.¹³⁸ Prior to the coronavirus, an unacceptable 14.5 million people in the UK were impoverished, accounting for more than one in every five people, according to the research.

¹³²Gov UK, 'Guide to Bankruptcy' (*The Insolvency Service*, 10 March 2020) <<https://www.gov.uk/government/publications/guide-to-bankruptcy/guide-to-bankruptcy>> accessed 13 April 2020.

¹³³ Citizen's advice, 'Asked to make an income payments agreement' (*Citizens Advice Bureau*, 2020) <<https://www.citizensadvice.org.uk/debt-and-money/debt-solutions/bankruptcy-2/asked-to-make-an-income-payments-agreement/>> accessed 13 April 2020.

¹³⁴ *Ibid.*

¹³⁵ Insolvency Direct, 'Income Payments Agreements (ISCIS)' (*Insolvency Direct*, December 2010) <<https://www.insolvencydirect.bis.gov.uk/casehelpmanual/I/IPA%20%28ISCIS%29.htm>> accessed 22 June 2020.

¹³⁶ *Ibid.*

¹³⁷ According to the Joseph Rowntree Foundation, Destitution means going without the bare essentials we all need. That is a home, food, heating, lighting, clothing, shoes, and basic toiletries. We define destitution as when people have lacked two or more of these essentials over the past month because they could not afford them, or if their income is extremely low – less than £70 a week for a single adult. This definition is also based on what the general public agree destitution to be.

¹³⁸ Joseph Rowntree Foundation, 'Over 15 million people were destitute in the UK in 2017' (*Joseph Rowntree Foundation*, 7 June 2018) <<https://www.jrf.org.uk/press/over-one-and-a-half-million-people-were-destitute-uk-2017>> accessed 22 June 2020.

Child poverty and in-work poverty increased over several years, and certain groups were disproportionately likely to be pulled into poverty. Many groups already struggling to stay afloat have also endured the most of COVID-19's economic and health consequences. There are 230,000 poor children in Scotland, with 90,000 of them living in single-parent households.¹³⁹ The UN report of the Special Rapporteur on extreme poverty and human rights in the UK raised serious concerns about the available social safety net due to drastic cuts to local authorities' budget.¹⁴⁰ The obligation to protect generally entails creating and maintaining an atmosphere or framework by an effective interplay of law, regulations, and measures so that individuals and groups can realise their rights and freedoms freely.¹⁴¹

The Special Rapporteur reported a shocking increase in food banks and significant increases in homelessness and rough sleeping.¹⁴² The report reveals that the level of poverty in the UK is striking, with people stating that they must choose between eating and heating their homes, children arriving at school with empty stomachs, with schools collecting food and sending it home because teachers know their students will go hungry otherwise.¹⁴³ "The Social Metrics Commission found in 2018 that almost a third of children in the United Kingdom were in poverty. After years of progress, child poverty has been rising since 2011–2012, almost entirely in working families. The Equality and Human Rights Commission forecasts that 1.5 million more children will fall into poverty between 2010 and 2021–2022, bringing the child poverty rate to a shocking 41%. One in 10 girls in the United Kingdom has been unable to afford menstrual products, and many have missed school because of their period."¹⁴⁴

"Changes to benefits, and sanctions against parents, have unintended consequences on children and are driving the increase in child poverty. The Child Poverty Action Group found that child benefits will have lost 23% of their real value between 2010 and 2020, due to sub-inflationary uprating and the current freeze. And low-paid jobs and stagnant wages have a direct effect on

¹³⁹ Jack Evans, 'Freeing low-income single parents from in-work poverty's grip' (*Joseph Rowntree Foundation*, 17 June 2021) <<https://www.jrf.org.uk/report/freeing-low-income-single-parents-work-povertys-grip>> accessed 19 November 2021.

¹⁴⁰ United Nations Human Rights Council, 'Visit to the United Kingdom of Great Britain and Northern Ireland Report of the Special Rapporteur on extreme poverty and human rights' (*United Nations Human Rights Council*, 23 April 2019) <<https://undocs.org/A/HRC/41/39/Add.1>> accessed 22 June 2020.

¹⁴¹ Manisuli Ssenyonjo, *Economic, social, and cultural rights in international law* (1st edn Hart Publishing 2009) 111.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*, 16.

children, with families where two adults earn the minimum wage still falling 11% short of the adequate income needed to raise a child.”¹⁴⁵

Equality Human Rights Commission UK's latest report echoes similar concerns.

“Poverty is one of the main barriers to the full enjoyment of children’s rights. Living in poverty can have a negative impact on children’s health, well-being, education, and development. Children living in poverty are more likely to experience food and housing insecurity, live in overcrowded conditions and be at a greater risk of bullying and violence. In 2018/9, there were 4.2 million children in the UK living in relative poverty, with 3.7 million children living in absolute poverty. Children living in families where someone is disabled, children living in lone-parent households, and children from certain ethnic minorities are disproportionately likely to be living in poverty.”¹⁴⁶

People living with such appalling conditions and leaving a debtor with barely a £20 surplus requires a considerable review of the IPA rules. Furthermore, bankruptcy can economically impact the debtor even after being declared bankrupt. The UN committee on Economic, Social and Cultural Rights published a list of issues in Oct 2015,¹⁴⁷ which requires the UK government’s attention and response to provide the minimum level of protection of the ESCR. The Report raised issues that fall under particularly Article 11 of the ICESCR¹⁴⁸, such as: “Information required on how the State party ensures that all individuals, in particular members of disadvantaged and marginalized groups, have access to adequate and affordable food. Please also provide information on measures adopted to address food insecurity and to reduce the reliance on emergency food aid from food banks”

“Concrete information on how current housing policies and welfare reform are contributing to addressing the housing deficit in the State party. Please provide statistical information on the supply of social and affordable housing, especially for the most disadvantaged and marginalized individuals and groups, including middle- and low-income individuals and

¹⁴⁵ *Ibid.*

¹⁴⁶ Equality Human Right Commission, ‘Children’s rights in Great Britain’ (*Equality Human Right Commission UK*, 20 November 2020) <https://www.equalityhumanrights.com/sites/default/files/childrens_rights_in_great_britain_0.pdf> accessed 19 November 2021.

¹⁴⁷ UN CESCR (2015), ‘List of issues in relation to the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland’, E/C.12/GBR/Q/6(*UN Human Rights Treaty Bodies*, 2015) <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGBR%2fQ%2f6&Lang=en> accessed 19 November 2021.

¹⁴⁸ International Covenant on Economic, Social and Cultural Rights (ICESCR), New York, 16 December 1966, 993 UNTS 3; 6 ILM (1967) 360.

households, young people, and persons with disabilities. Please also provide information on how the security of tenure is guaranteed, particularly in the private rental sector, and on the measures adopted to protect tenants from forced eviction.”

“Updated data on the extent of homelessness in the State party, disaggregated by sex, region, and ethnic group. Please also explain to what extent the measures adopted by the State party have contributed to reducing homelessness and indicate the number of reception facilities, including emergency shelters, hostels, and social rehabilitation centres, that are available in the State party. Please provide information on the measures adopted.”¹⁴⁹

Policy adjustments in times of economic crisis are permitted by the UN CESCR guidelines¹⁵⁰, provided that they are temporary, necessary, proportionate, non-discriminatory, and do not undermine a minimum core level of ESCR¹⁵¹ protection. States may be required to take regressive measures in these situations. However, they leave the debtor with barely adequate money to fulfil his family, and the children's obligation raises serious human rights issues. Therefore, the bankruptcy law should offer the debtor a fresh start does not punish them for their bankruptcy. The International Covenant on Economic, Social and Cultural Rights (ICESCR) confers the right to a standard of living, adequate food, housing, and clothing and imposes on the State to protect and fulfil the obligation. The living standards of bankrupts may be affected if the IPA cap on earnings is reduced and disposable income above £20 is required to be paid. By failing to provide the debtor and his family with adequate income for their health and well-being, including food, clothing, housing, and medical care, as well as necessary social services, Article 11 of the ICESCR may be violated. Physical and mental health are prerequisites for many other human rights. For example, better health leads to increased economic growth, which in turn allows for more resources to be invested in all human rights.¹⁵²

¹⁴⁹ *Ibid.*

¹⁵⁰ UN CESCR (2015), ‘List of issues in relation to the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland’, E/C.12/GBR/Q/6(*UN Human Rights Treaty Bodies*, 2015) <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGBR%2fQ%2f6&Lang=en> accessed 19 November 2021.

While these guidelines are not binding on the UK, they are an authoritative interpretation by UN CESCR of the obligations that States Parties have under ICESCR in times of economic crisis. As such, they provide an extremely useful reference point against which to assess the UK’s implementation of ICESCR since its last review.

¹⁵¹ Equality and Human Rights Commission, ‘Socio-economic rights in the UK - Equality and Human Rights’ (*Equality and Human Rights Commission UK*, April 2016) <https://www.equalityhumanrights.com/sites/default/files/icescr_submission_-_april_2016.pdf> accessed 14 June 2020.

¹⁵² Manisuli Ssenyonjo, *Economic, social, and cultural rights in international law* (Hart Publishing 2009) 315.

Under ICESCR¹⁵³ “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in the circumstances beyond his control.”

There is an academic debate surrounding the exact nature of the right to food in international law, and some scholars increasingly assert that the ‘absolute’ nature of the right to be free from hunger has lifted the right to the status of customary international law.¹⁵⁴ A debtor is required to contribute his income exceeding £20 towards the creditor for another three years, which will not help him and worsen his living condition. The ‘reasonable’ does not mean basic, and what represents ‘reasonable domestic needs will vary on the individual debtor’s circumstance. No formula can fit all according to each debtor’s living circumstances and needs. The living standard can easily be compromised as the debtor has to report changes in income or expenditure to the Official Receiver, which in itself is an issue that requires further attention. While a debtor is facing the stigma of bankruptcy and work-related restrictions, resources are limited, and the probability that the debtors will suffer and live below poverty is apparent. There is also a growing recognition that health is a human rights issue as well as a fundamental component of long-term development, poverty reduction, and economic prosperity.¹⁵⁵ Leaving a debtor £20 of extra income to meet non-essential needs is an indirect violation of the debtor’s human rights and amounts to degrading treatment, as well as a violation of their right to a sufficient standard of living and food.

Bankruptcy Impact on Debtor Future Access to Credit

According to Credit Angle, the negative information on the debtor's credit file stays for a considerable period that varies and depends on the negative information.¹⁵⁶ The Information Commissioner’s Office (ICO), which regulates data privacy regulation in the UK, made it mandatory for Credit Reference Agencies (CRAs) that harmful¹⁵⁷ data must be removed from

¹⁵³ International Covenant on Economic, Social and Cultural Rights (ICESCR), New York, 16 December 1966, 993 UNTS 3; 6 ILM (1967) 360, Article 11.

¹⁵⁴ Javaid Rehman, *International Human Rights Law* (2nd edn, Pearson 2010) 157.

¹⁵⁵ Manisuli Ssenyonjo, *Economic, social, and cultural rights in international law* (Hart Publishing 2009) 314.

¹⁵⁶ Credit Angel, 'How Long Does Bad Information Stay on Your Credit Report?' (*Credit Angel*, 2020) <<https://www.creditangel.co.uk/help/how-long-does-information-stay-on-your-credit-report>> accessed 22 June 2020.

¹⁵⁷ Negative information that lasts and remains on an individual credit report: Bankruptcy - 6 or 15 years, Late Payments - 6 years, County Court Judgements - 6 years, Debt Relief Orders - 6 years, Defaulted Debts - 6 years, Individual Voluntary Arrangements - 6 years.

an individual's credit file after six years except for certain types of bankruptcy orders.¹⁵⁸ It is an advantage to the struggling debtor that the bankruptcy order writes off all their debts but adversely affects the debtor's creditworthiness. Investopedia declared that bankruptcy could impact debtors' credit scores more severely than any other single financial event.¹⁵⁹ On becoming bankrupt, a debtor's credit rating is adversely affected, meaning that any credit application is at high risk of being declined.

In the process of credit risk control, the credit provider collects various information and asks questions¹⁶⁰ as a part of the application from an applicant. According to the research, subprime lenders tend to be more flexible when assessing a debtor's application, although they often charge higher-than-average interest rates.¹⁶¹ It is vital to consider the damage that bankruptcy could cause to a debtor in obtaining credit in the future and associated cost implications, and the need to exercise all the available options before bankruptcy. The government's published guidance highlights the fact that the bankruptcy order can stay on the debtor's credit file for six years after the bankruptcy order,¹⁶² which means that the bankruptcy will leave a lasting stain on the debtor's credibility and his access to easy credit terms will be impaired. Consequently, bankruptcy affects the ability of individuals to obtain mainstream credit and thus pushes the debtor to get credit at a higher interest rate. The Insolvency Act 1986¹⁶³ made it compulsory for the bankrupts to disclose to the lender that they are undischarged bankrupts if they are getting credit of £500, as per Section 360,¹⁶⁴ obtaining credit, engaging in business.

¹⁵⁸ Information Commissioner's Office (ICO), 'Credit explained' (*Information Commissioner's Office*, September 2019) <<https://ico.org.uk/media/your-data-matters/documents/1282/credit-explained-dp-guidance.pdf>> accessed 22 June 2020.

¹⁵⁹ Investopedia, 'How Bankruptcy Affects Your Ability to Secure Credit' (*Investopedia*, 2 May 2020) <<https://www.investopedia.com/ask/answers/110614/how-will-bankruptcy-affect-my-ability-get-credit-future.asp>> accessed 22 June 2020.

¹⁶⁰ Following are the most common question asked by credit and insurance provider as part of the application;
Have you had any Defaults registered in the last 6 years?
Have you had any CCJ's registered in the last 6 years?
Have you missed any payments on commitments in the last 5 years?
Have you had a property repossessed?
Have you ever been bankrupt?
Have you ever entered into an IVA?
Have you ever entered into a DMP?

¹⁶¹ Ian Aikman, 'Bad credit mortgages' (*Which UK*, March 2020) <<https://www.which.co.uk/money/mortgages-and-property/mortgages/getting-a-mortgage-with-poor-credit/bad-credit-mortgages-ay2m91n0u9mu>> accessed 23 June 2020.

¹⁶² *The Insolvency Service*, 'Guidance, 'Guide to Bankruptcy' (*The Insolvency Service*, 10 March 2020) <<https://www.gov.uk/government/publications/guide-to-bankruptcy/guide-to-bankruptcy>> accessed 13 April 2020.

¹⁶³ Insolvency Act 1986, s 360 (1)(a).

¹⁶⁴ *Ibid.*

(1) *The bankrupt is guilty of an offence if—*

(a) *either alone or jointly with any other person, he obtains credit to the extent of the prescribed amount or more without giving the person from whom he obtains the relevant information about his status.*

According to Insolvency Act 1986, obtaining credit includes taking possession of goods under the hire-purchase agreement, as per Section 360.¹⁶⁵ In practice, the creditors will not lend to a bankrupt for the first two years due to the high risk of debtor vulnerability and the potential risk to the lender that this loan will become one of the bad debts of the business. The Equality Act 2010¹⁶⁶ made it illegal for creditors and service providers such as banks, credit card companies, utility companies, or debt collection agencies to discriminate. The high credit costs associated with a bankrupt applicant compared to a non-bankrupt applicant may be classified as discrimination within human rights law. It is reported that the American Express credit card company paid over \$95 million to consumers in Puerto Rico, the U.S. Virgin Islands and other U.S territories for discriminating against the consumer in those areas.¹⁶⁷ Bankruptcy becomes attractive to some lenders who offer credit at an incredibly high rate of 1300.5% APR.¹⁶⁸ This extortionate interest rate may further cause financial difficulties, and even after bankruptcy, the debtor still lives in the red.

Loan sharks frequently work from home, charge exorbitant interest rates, and do not provide much documentation to confirm their arrangements with debtors. A loan shark typically has many customers and lends money as a business, but their lending is illegal. As a result, loan sharks frequently resort to illicit means to collect the money they have lent, such as threatening with violence or seizing credit cards or valuables. In extreme cases, non-payers have been forced into prostitution and drug dealing.¹⁶⁹ In addition, Guardian News reported that criminals have been using social media sites to local community groups to find, threaten and control people in debt.¹⁷⁰ According to Stop Loan Sharks,¹⁷¹ people in the United Kingdom do not talk about money enough. Despite the COVID-19 crisis affecting individuals' finances,

¹⁶⁵ Insolvency Act 1986, s 360 (2) (a).

¹⁶⁶ The Equality Act 2010, s 14.

¹⁶⁷ Max Fay, 'Debt and Discrimination' (*Debt Organisation*, 2020) <<https://www.debt.org/advice/discrimination/>> accessed 23 June 2020.

¹⁶⁸ Swift money, 'Bad Credit Payday Loan' (*Loan for bad credit*, 2020) <<https://swiftmoney.com/payday-loans-for-bad-credit.php>> accessed 13 April 2020.

¹⁶⁹ Citizens Advice, 'Loan sharks' (*Citizens Advice*, 2021) <<https://www.citizensadvice.org.uk/debt-and-money/borrowing-money/types-of-borrowing/loans/loan-sharks/>> accessed 19 November 2021.

¹⁷⁰ James Tapper, 'Loan sharks target new victims via WhatsApp and Facebook' (*The Guardian*, 9 May 2021) <<https://www.theguardian.com/money/2021/may/09/loan-sharks-target-new-victims-via-whatsapp-and-facebook>> accessed 19 November 2021.

¹⁷¹ Stop Loan Sharks investigates and prosecutes illegal money lenders and provides support for borrowers in the UK.

9 out of 10 UK adults (47 million) find it difficult to talk about money or discuss it at all. Money is frequently regarded as taboo, and discussions about money can leave people feeling embarrassed and conflicted.¹⁷² However, openly discussing money can significantly improve physical, mental, and financial wellbeing.¹⁷³ Unfortunately, the unregulated loan sharks are still lending where the debtor's circumstances prohibit them from finding a regulated lender, which may be far less expensive. The failure to provide credit assistance and to protect the debtor is a violation of the debtor's right to assistance.

The FCA implemented an initial cost cap of 0.8 % interest per day and a total cost cap of 100% of the principal for HCST¹⁷⁴ loans on January 2, 2015. Before this date, lenders typically charged 0.97% per day (29% per month), with a maximum of 150% of the principal. High cost loans and methods of collection leave significant adverse effects which directly affect the debtor's mental health and violate human rights. For example, in *Kerrigan & 11 Ors v Elevate Credit International Limited (t/a Sunny) (in administration)*,¹⁷⁵ the court dismissed the negligence claim for personal injury (aggravation of depression) under the Financial Services and Markets Act 2000. However, the claimant was awarded damages due to the tarnishing of their credit ratings by the lender. There were 3 million borrowers of high-cost credit loans prior to COVID-19, excluding overdrafts, according to the FCA. However, the number of people who are underserved by the current system is far greater. According to Financial Times, 11 million people in vulnerable financial circumstances exclude from the mainstream provision, which is 3 million more than before the pandemic.¹⁷⁶

Impact on the Debtor Bank Account, Savings, Pension, and Insurance Policies

Bankruptcy harshly impacts the debtor's day-to-day finances; therefore, a debtor needs to consider the impact on the bank account, savings and pension before exercising the option of bankruptcy.¹⁷⁷ A debtor's bank account will be frozen immediately after the bankruptcy

¹⁷² Stop Loan Sharks, 'It's Talk Money Week 20Let's Start A Conversation About Money And Loan Sharks' (*Stop Loan Sharks*, 11 November 2021) <<https://www.stoploansharks.co.uk/its-talk-money-week-2021-lets-start-a-conversation-about-money-and-loan-sharks/>> 19 November 2021.

¹⁷³ *Ibid.*

¹⁷⁴ High-cost short-term.

¹⁷⁵ *Kerrigan & 11 ors v Elevate Credit International Limited (t/a Sunny) (in administration)* [2020] EWHC 2169 (Comm).

¹⁷⁶ Helen Thomas, 'Crackdown on high-cost credit leaves gap that must be filled' (*Financial Times*, 25 May 2021) <<https://www.ft.com/content/72b3e83a-4e6e-479d-b5df-e5c572e7d477>> accessed 19 November 2021.

¹⁷⁷ Step Change Charity, 'How bankruptcy affects me' (*Step Change Charity*, 2020) <<https://www.stepchange.org/debt-info/bank-accounts-after-bankruptcy.aspx>> accessed 25 June 2020.

order, which means no payments can be made in or out of the account.¹⁷⁸ A bankrupt should hand out his chequebook and bank cards to the Official Receiver as soon as possible.¹⁷⁹ It can affect the regular direct debit for essential utilities such as; mortgage or rent payments, gas, electricity, water rates, council tax, school meals payment for children, and road tax.¹⁸⁰ In a research briefing paper to the House of Commons, the legal position is made clear that it is not illegal for a bankrupt to open a bank account.¹⁸¹ So, even if the debtor is bankrupt, they have the right to have a bank account.

In a recent complaint,¹⁸² the Financial Ombudsman Service upheld that either side can end their business relationship by giving notice according to the account terms. Likewise, in a similar case,¹⁸³ Financial Ombudsman Services held that the lender caused unnecessary delays and hassle to the account holder and awarded £250 compensation to the account holder. The Official Receiver will find out what is in the account from the bank. If they decide that the debtor needs the money for necessary living expenses, they will tell the bank to release it.¹⁸⁴ Changes were brought into the Insolvency Act¹⁸⁵ in October 2015, which means there is no barrier for a debtor to open a basic bank account even if they are undischarged. If the debtor has a joint account, the Official Receiver will decide how much money in the account is to be released to the other account holder. This uncertainty can harm the joint account owner's credit history if they have to pay the priority bills if the debtor used the overdraft facility available in the account prior to the bankruptcy petition. Similarly, if the debtor has any savings accounts, they will become part of his bankruptcy estate and access to them will be restricted; additionally, the balance will be used to make payments to creditors. As a result, the bankrupt will have no emergency funds or access to funding resources.

Treatment and impact on the debtor's pension due to bankruptcy is a complex area and beyond the scope of this study. Generally, if a debtor has an approved pension and is eligible

¹⁷⁸ *Ibid.*

¹⁷⁹ Insolvency Service, 'Bankruptcy & Bank Accounts' (*Insolvency Service UK*, 2020) <<http://insolvency-service.co.uk/>> accessed 25 June 2020.

¹⁸⁰ Fiona Gaskell, 'Bankruptcy and bank accounts' (*The Gazette*, 2020) <<https://www.thegazette.co.uk/insolvency/content/100026>> accessed 25 June 2020.

¹⁸¹ Lorraine Conway, 'Can an undischarged bankrupt open a bank account?' (*Commons Library Parliament*, 16 December 2019) <<https://commonslibrary.parliament.uk/research-briefings/sn06109/>> accessed 25 June 2020.

¹⁸² Financial Ombudsman Service, 'DRN-1627750' (*Financial Ombudsman Service*, 6 May 2020) <<https://www.financial-ombudsman.org.uk/files/277669/DRN-1627750.pdf>> accessed 25 June 2020.

¹⁸³ *Ibid.*

¹⁸⁴ Citizen's Advice Bureau, 'Asked to make an income payments agreement' (*Citizen's Advice Bureau*, 2020) <<https://www.citizensadvice.org.uk/debt-and-money/debt-solutions/bankruptcy-2/asked-to-make-an-income-payments-agreement/>> accessed 13 April 2020.

¹⁸⁵ The Insolvency Act 1986 (Amendment) Order 2015, SI 2015 No. 922.

for a lump sum or regular income, that income can be used towards IPA or IPO to pay off debt. However, since changes in the insolvency law from April 2015, TIB will assess and explore the value of pension funds to pay off the creditors.¹⁸⁶ In addition, the rules concerning pensions, endowment policies and other related benefits have been changed since May 2000. Now, if the debtor has any beneficial interest, on bankruptcy that will be transferred to TIB. The statutory discharge period can be extended for bankruptcy if the debtor fails to adhere the section 279(4)¹⁸⁷ and does not cooperate with the TIB. The court may make subsequent orders suspending discharge. However, the court should not use the suspension of the discharge as a punishment for the debtor's lack of compliance or as an incentive to promote future compliance.¹⁸⁸ There is a misconception that being discharged from bankruptcy means the end of the bankruptcy. This is not the case if the debtor has assets like a family home or business. The impact of the bankruptcy on the debtor's home is discussed later in this section of the study.

Bankruptcy Impact on Debtor's Job and Business

Citizens Advice Bureau highlights that bankruptcy brings severe consequences to the debtor's job, business, and working life.¹⁸⁹ The statutory restriction schedule published by the government (England & Wales) imposes exclusions on the types of jobs a bankrupt can do.¹⁹⁰ According to the schedule, the bankrupt cannot hold an office in a particular sector¹⁹¹ if subject to Bankruptcy Restriction Order (BRO) in England & Wales. The Insolvency Service guidance stipulates that the same schedule applies whether a person is subject to an interim BRO or a bankruptcy undertaking under Insolvency Act 1986.¹⁹² As bankruptcy has a profoundly serious impact on a bankrupt's employment, debtors need to explore all available debt management

¹⁸⁶ Guidance, 'Guide to Bankruptcy' (*The Insolvency Service*, 10 March 2020) <<https://www.gov.uk/government/publications/guide-to-bankruptcy/guide-to-bankruptcy>> accessed 13 April 2020.

¹⁸⁷ Insolvency Act 1986, s 279 (4).

¹⁸⁸ *Shierson and another v Rastogi (a bankrupt)* [2007] EWHC 1266 (Ch).

¹⁸⁹ Citizen's Advice Bureau, 'Job and work – the impact of bankruptcy' (*Citizen's Advice Bureau*, 2020) <<https://www.citizensadvice.org.uk/debt-and-money/debt-solutions/bankruptcy-2/is-bankruptcy-right-for-you/job-and-work-impact-of-bankruptcy/>> accessed 27 June 2020.

¹⁹⁰ Government Guidance for Business and Industry UK, 'Bankruptcy: Additional effects of a bankruptcy restrictions order or undertaking' (*Assets Publishing Service UK*, 13 May 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806099/schedule_of_bankruptcy_restrictions_BRO_BRU.pdf> accessed 27 June 2020.

¹⁹¹ The public office, local government, education sector, children service, health & medical sector, financial service sector, Legal services sector, nuclear industry, Police & crime prevention agencies, transportation, courts & tribunals, utilities and public contracts and other miscellaneous sectors.

¹⁹² Insolvency Act 1986, Schedule 4A, Para 8 (Sch. 4A inserted (1.4.2004) by 2002 c. 40, ss. 257(2), 279, Sch. 20 (with s. 249(6)); S.I. 2003/2093, art. 2(2), Sch. 2 (subject to arts. 3-8 (as amended by S.I. 2003/2332, art. 2)).

tools.¹⁹³ Therefore, bankruptcy indirectly affects and indeed violates human rights by taking away the means of livelihood from the debtor. As the bankrupt can be excluded from professions like solicitors, accountants, and other professionals mentioned below, the debtor may be left unemployed, which means that the debtor has limited sources of income and insufficient resources on which to live, another severe breach of fundamental human rights. Research indicates that debt crises are caused by unemployment, and an unemployed person finds it challenging to find a proper job because of the debt.¹⁹⁴

Under the Insolvency Act 1986,¹⁹⁵ a bankrupt may commit a criminal offence by breaching a specific restriction. The list of occupations and roles which are excluded from bankruptcy is not exhaustive.¹⁹⁶ There follows examples of occupations which a bankrupt cannot take up:

- Practice as a solicitor without the permission of the Solicitors Regulation Authority¹⁹⁷
- Function as the account manager of individual savings accounts (ISAs)¹⁹⁸
- Function as a trustee of a pension trust¹⁹⁹
- In any registration office of births, deaths, or marriages²⁰⁰
- Function as a plan manager of a personal equity plan²⁰¹
- A person subject to bankruptcy restrictions may not be a member of the Children and Family Court Advisory and Support Service²⁰²
- A member of the creditor's committee in an Investment Bank Special Administration may not be represented by a person who is subject to bankruptcy restrictions²⁰³

¹⁹³Citizen's Advice Bureau, 'Job and work – the impact of bankruptcy' (*Citizen's Advice Bureau*, 2020) <<https://www.citizensadvice.org.uk/debt-and-money/debt-solutions/bankruptcy-2/is-bankruptcy-right-for-you/job-and-work-impact-of-bankruptcy/>> accessed 27 June 2020.

¹⁹⁴ Julian Franks and Oren Sussman, 'Financial Distress and Bank Restructuring of Small to Medium Size UK Companies' (2005) 9(1) *Review of Finance* <<https://academic.oup.com/rof/article-abstract/9/1/65/1574115?redirectedFrom=fulltext>> accessed November 19, 2021.

¹⁹⁵ Insolvency Act 1986, s 350, s 353, s 354, s 355, s 356, s 357, s 358, s 359, s 360, s 361, s 362.

¹⁹⁶ Government Guidance for Business and Industry, 'Bankruptcy: Additional effects of a bankruptcy restrictions order or undertaking' (*Assets Publishing Service UK*, 13 May 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806099/schedule_of_bankruptcy_restrictions_BRO_BRU.pdf> accessed 27 June 2020.

¹⁹⁷ Solicitors Act 1974, s 15 (1).

¹⁹⁸ The Individual Savings Account Regulations 1998, SI 1998/1870, reg 20 (ba) (c).

¹⁹⁹ Pensions Act 1995, s 1 (b) (c) (e) (f).

²⁰⁰ The Registration of Births, Deaths and Marriages Regulations 1968, SI 1968/2049, reg 5 (i).

²⁰¹ The Personal Equity Plans Regulations 1989, SI 1989/469, reg 15(b).

²⁰² The Children and Family Court Advisory and Support Service (Membership, Committee and Procedure) Regulations 2005, SI 2005/433, reg 6 (d).

²⁰³ The Investment Bank Special Administration (England and Wales) Rules 2011, SI 2011/1301, r 5 (d) (f).

- A person who is subject to bankruptcy restrictions is judged an unfit person to conduct any of the regulated activities under the Health and Social Care Act 2008²⁰⁴
- A person subject to bankruptcy restrictions is not permitted to serve on a tribunal established by the Secretary of State under Schedule 3 of the Industry Act 1975²⁰⁵

Under the Equality Act 2010²⁰⁶, discrimination against protected characteristics²⁰⁷ is prohibited. According to research, women are more likely than men to pay higher rates of interest on their credit balances. Further, the Equality Act 2010²⁰⁸ requires that an employer provide opportunities for promotion or any other benefit, facility, or service to the employees. Restricting a bankrupt's employment in certain sectors may raise serious concerns and violate the basic human right of work. Under section 15(1)(b) of the Equality Act 2010,²⁰⁹ an element of proportionality needs to be implied.

In *Akerman-Livingstone v Aster Communities Limited*,²¹⁰ the Supreme Court made it clear that a distinction between Equality Rights and Convention Rights was required when determining what was proportionate or not. Lord Neuberger²¹¹ agreed that there would be instances where a 'discrimination defence' under the Equality Act could be summarily dealt with. On the other hand, Lady Hale emphasised that the four-stage test must be followed when considering the question of proportionality in relation to the objective justification defence: "The first and most obvious difference between article 8 and the Equality Act is that section 35 of the Equality Act applies to both private and public sector landlords, whereas only public authorities are obliged by section 6(1) of the Human Rights Act 1998 to act compatibly with the Convention rights. (It has been assumed for the purpose of this case that social landlords providing accommodation to enable local authorities to fulfil their duties towards the homeless are public authorities.) Thus no landlord, public or private can adopt a discriminatory policy towards eviction, for example, by evicting a Black person where they would not evict a White. Thus also no landlord, public or private, can evict a disabled tenant "because of something

²⁰⁴ Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, SI 2014/2936, Sch 4 reg 2, reg 3.

²⁰⁵ Industry Act 1975, Sch 3, paragraph 6(1)(c), as amended by Tribunals Courts and Enforcement Act 2007 (Consequential Amendments) Order 2012 Sch 2 para 9.

²⁰⁶ The Equality Act 2010, s 14.

²⁰⁷ Age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation.

²⁰⁸ The Equality Act 2010, s 39 (1) (b).

²⁰⁹ The Equality Act 2010, s 15(1) (b).

²¹⁰ *Akerman-Livingstone v Aster Communities Limited* [2015] UKSC 15.

²¹¹ *Ibid* [59].

arising in consequence of [his] disability” unless the landlord can show that this is a proportionate means of achieving a legitimate aim.”

“This extra right is consistent with the obligations which the United Kingdom has now undertaken under the United Nations Convention on the Rights of Persons with Disabilities. This defines discrimination on the basis of disability to include the “denial of reasonable accommodation” (article 2). States parties are required, not only to prohibit all discrimination on the basis of disability, but also “In order to promote equality and eliminate discrimination, [to] take all appropriate steps to ensure that reasonable accommodation is provided” (article 5(2) and (3)). By ‘reasonable accommodation’ is meant adjustment to meet the particular needs of a disabled person.”²¹²

In *Khan v Trident Safeguards Ltd*,²¹³ the Court of Appeal determined that all money claims (except unfair dismissal claims) vest in the trustee in bankruptcy. Vesting potential windfall into TIB hands and assignment of the claim leaves the bankrupt financially empty-handed and raises human rights implications such as depriving the bankrupt of social security and unfair treatments compared to non-bankrupt. In *Shlosberg v Avonwick Holdings Limited and others*,²¹⁴ the High Court considered the nature, devolution, and availability of legal professional privilege in the context of a bankrupt's application to assert it against solicitors acting for his trustees in bankruptcy and multiple parties in ongoing litigation against him. The Court of Appeal dismissed the appeal against this decision,²¹⁵ concluding that legal professional privilege in a bankrupt's documents was neither property vested in a trustee in bankruptcy nor something that could be waived.²¹⁶

Bankruptcy and debt problems can cause severe consequences for the debtor post-bankruptcy in the employment field. Employment restrictions push the bankrupt debtor into marginalisation and create an environment of discrimination against fellow professionals. This unequal treatment of the bankrupt limits the available opportunities to the debtor, especially if the debtor is a professional accountant, barrister, or solicitor. It is feared that if that professional is declared bankrupt, their whole career will be ruined as a bankrupt cannot resume his position for a considerable time. The professional will effectively be barred from carrying out their roles as an accountant, barrister, or solicitor. This situation will force the bankrupt into performing

²¹² *Ibid* [24, 26].

²¹³ *Khan v Trident Safeguards Ltd* [2004] EWCA Civ 624.

²¹⁴ *Shlosberg v Avonwick Holdings Limited and others* [2016] EWHC 1001 (Ch).

²¹⁵ *Avonwick Holdings Limited and others v Shlosberg* [2016] EWCA Civ 1138.

²¹⁶ Insolvency Act 1986 s 311(1).

roles that they have not been prepared to take on, often leaving them earning far less and therefore in a difficult position.

Further, the debtor may never enjoy the same standard of living they had before been bankrupt. Although Article 8 of the European Convention on Human Rights²¹⁷ does not provide for general employment protection, the concept of private life includes an individual's right to form and develop relationships with others, including professional and business relationships. In the case of *Volkov v Ukraine*,²¹⁸ the dismissal of a judge for 'breach of oath' engaged Article 8 because it affected a wide range of his relationships with other people, including those of a professional nature, and had an impact on his and his family's material well-being as well as his reputation. The aforementioned situation highlights human rights concerns that must be addressed as soon as possible. Moreover, the discussion also raises many concerns which require legislative attention to draw the line between an 'honest' circumstantial bankrupt (who had no control over the factors that led them to bankruptcy) and the 'deceitful' opportunist bankrupt. The discriminatory treatment of a bankrupt needs to be addressed statutorily to support and protect some professionals who fall prey to debt crises and become insolvent.

Bankruptcy Impact on the Debtor's Possessions

Going bankrupt may mean that the debtors will lose some of their belongings, or TIB can sell particular possessions of the debtors for the proceeds to be distributed among the creditors. Therefore, a debtor needs to consider the impact of the bankruptcy if they possess certain items which may have sentimental value to them along with the high monetary value. Once a bankruptcy order is made, all the debtor's belongings become the property of TIB, except those which are protected or exempt. When ownership of the goods passes to the TIB, this is called vested. A bankrupt must not do anything to sell, give away or hide these belongings. Most of the household items will not be sold as those are protected or exempted from sale. The debtor can keep the items defined in section 283²¹⁹ if the TIB thinks these cannot be replaced with a suitable and cheaper version.

A bankrupt may lose or cannot keep the items (antiques, jewellery, caravans, leisure equipment: such as game consoles and cameras) if these are not required for the debtor's job,

²¹⁷ European Convention on Human Rights ETS No. 005 213 UNTS 222.

²¹⁸ *Volkov v Ukraine* (21722/11) [2013] IRLR 480 (ECtHR).

²¹⁹ Insolvency Act 1986, s 283.

business, or vocation or to satisfy the basic home needs.²²⁰ The TIB can sell them. The TIB can also claim any belongings that come into the debtor's possession before being discharged from bankruptcy.²²¹ In jointly owned possessions, a bankrupt's share can be sold to the joint owner, or TIB may apply for a court order if the joint owner does not agree to sell the item. Goods bought under a hire purchase agreement can be kept by the debtor, but there is usually a clause in the agreement to void the agreement should a purchaser become bankrupt, and the goods are then returned to the business. The primary concern should be the debtor and their rehabilitation, with distribution to creditors being a consideration that is subordinate to and permitted only in accordance with this primary concern. However, the distribution to creditors is the primary concern in England.²²²

Bankruptcy Impact on Debtor Reputation and Privacy

The bankrupt cannot keep his bankruptcy private. If disclosing the debtor's address could put him or his family in danger, he can request a PARV order (Persons at Risk of Violence) instead.²²³ But being bankrupt is potentially going to breach the privacy rights of the debtor, so the debtor needs to understand that being bankrupt can impact his reputation as it may become public knowledge. The publicity of bankruptcy might particularly affect certain ethnic minorities as it is still considered taboo in many communities. In ethnic communities like Pakistan, India, and Bangladesh, the reputation of an individual is considered the most valuable asset. For many South Asians suffering in silence from mental health problems and debt, a culture of shame is all too familiar, and discussing psychological health is also considered taboo within the community. South Asians are generally close-knit communities, and news about being hit by financial crises quickly spread. Many individuals do not talk about the issue and isolate themselves for fear of shame and embarrassment. It is common practice in the South Asian culture that close family and friends are judgemental about bankruptcy, leaving individuals marginalised. Even small changes in circumstances are noticed by the wider community. Failure of a business or the loss of a job will not go unnoticed. It is difficult to conceal bankruptcy within the aforementioned communities and the bankrupt is shunned and

²²⁰ Citizen's Advice Bureau, 'Asked to make an income payments agreement' (*Citizens Advice Bureau*, 2020) <<https://www.citizensadvice.org.uk/debt-and-money/debt-solutions/bankruptcy-2/asked-to-make-an-income-payments-agreement/>> accessed 13 April 2020.

²²¹ *Ibid.*

²²² G Stanley Joslin, 'Bankruptcy: Anglo-American Contrasts' (1966) 29 *Bankruptcy: Anglo-American Contrasts* 149,151.

²²³ Guidance, 'Guide to Bankruptcy' (*The Insolvency Service*, 10 March 2020) <<https://www.gov.uk/government/publications/guide-to-bankruptcy/guide-to-bankruptcy>> accessed 13 April 2020.

stigmatised.²²⁴ According to this study, 'bankrupt debtor' status falls into Goffman's third category of stigma: a blemish of individual character based on conduct that fellow community members may discover.²²⁵ Consequently, bankrupt debtors possess an undesirable trait and live with the status of 'discreditable' by peers and by society.²²⁶

In this instance, bankruptcy and privacy laws may appear to be separate, but they overlap much more than one might anticipate. Evaluating individual rights and interests to achieve social good is at the heart of both fields. Once a bankruptcy order is made, the TIB informs various organisations and third parties that the debtor has been made bankrupt. Primary creditors include banks or building societies, the landlord (renting or pursuing a business from rent premises), energy, water and telephone suppliers, local authorities, and professional bodies. Although all major organisations will be informed about the debtor's bankruptcy, it will still be advertised in the London Gazette.²²⁷ Details of a debtor's bankruptcy are rarely published in a local or national newspaper, so friends, family, and neighbours are unlikely to learn about the debtor's bankruptcy in this manner. The only exception is if there has been a high level of public concern or complaint about the debtor's financial conduct.²²⁸ The details of the bankruptcy will then be made public in the Insolvency Register. The Insolvency Service maintains a publicly accessible list of people who have been declared insolvent. As a result, while bankruptcy provides a debtor with a fresh start, it may also leave more severe stains on a reputation, resulting in serious human rights violations. Suicidal thoughts can be exacerbated by financial failures because the debtor may feel like a failure as a father, son, or partner who is unable to provide for the family's needs or provide an adequate standard of living. The collection and use of the debtor's financial data can interfere with his private life, which requires justification as held in *Hilton v UK*.²²⁹ Furthermore, respect for private life also includes the protection of reputation as held in *Fayed v UK*.²³⁰

²²⁴ Deborah Thorne and Leon Anderson, 'Managing the Stigma of Personal Bankruptcy' (2012) 39 *Sociological Focus* 77, 83.

²²⁵ Sousa D Michael, 'Bankruptcy Stigma: A Socio-Legal Study' (*Digital Commons*, 2014) <<https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1618&context=etd>> accessed 28 June 2021.

²²⁶ *Ibid.*

²²⁷ <https://www.thegazette.co.uk>.

²²⁸ Citizen's advice will your bankruptcy be public knowledge' (*Citizens Advice Bureau*, 2020) <<https://www.citizensadvice.org.uk/debt-and-money/debt-solutions/bankruptcy-2/asked-to-make-an-income-payments-agreement/>> accessed 13 April 2020.

²²⁹ *Hilton v UK*, Application no. 12015/86, 57 DR 108.

²³⁰ *Fayed v UK* [1994] ECHR 27.

The Secretary of State had appointed inspectors to investigate and report on a firm takeover. The inspectors made findings in their report that were critical of and detrimental to the applicants, who claimed that they had been

Bankruptcy Impact on British Citizenship and Immigration Status of a Debtor

Unfortunately, bankruptcy affects the immigration status of a debtor. An unsatisfied debt judgment can cause a debtor's potential rejection of his application for immigration status. Further, bankruptcy also limits the ability of a debtor to sponsor anyone into the UK. It can be highly stressful if the debtor wants to sponsor a dependent (wife or children). Changes in the British Nationality Act 1981,²³¹ introducing good character requirements, can potentially impede debtor human rights.

“The good character requirement previously only existed for naturalisation as a British citizen. It was subsequently introduced by section 58 of the Immigration, Asylum and Nationality Act 2006 as a requirement for specific routes to registration as a British citizen. Section 47 of the Borders, Citizenship, and Immigration Act 2009 inserted section 41A into the British Nationality Act 1981 (‘the BNA 1981’) on 13 January 2010, extending the good character requirement to other registration routes, including to a person registering as a British Overseas Territories Citizen, British Overseas Citizen or British Subject”.²³²

A person will not be considered to be of good character if there is evidence to suggest if, for example, their financial affairs have been in disarray - such as if they have failed to pay taxes for which they were responsible, or accumulated significant debt.²³³ If a debtor is not a British citizen as yet and considering an application for nationality, they need to think about the consequences of bankruptcy as their application is likely to be turned down if there is information to suggest, on the balance of probabilities, that bankruptcy or fraud has taken

denied proper access to the courts to contest the determination made against them under the civil limb of article 6(1). It was held that Inspectors from the Department of Trade and Industry are investigators, not judges. The lack of a legal recourse for their report was not a violation of the Convention. Article 6(1) is based on the concept that "civil claims must be capable of being referred to a court for judgement." "Under domestic law, tracing the dividing line between procedural and substantive limitations of a given privilege is not always easy. Whether the limitation is presented in terms of the right, or the remedy is sometimes only a matter of legislative strategy.' 'Neither in form nor in content, the Inspectors did not make a decision. 'They explicitly stated in their report that their conclusions would not be conclusive. They did not make a legal conclusion as to criminal or civil liability in relation to the Fayed brothers, particularly in relation to the latter's civil right to honour and reputation... the purpose of the Inspectors' procedures was not to settle any disagreement (contestation). In short, the Inspectors' investigation cannot be claimed to have "decided" the applicants' civil right to a good reputation, as defined by Article 6(1), or that its outcome was directly decisive for that right.' The application was rejected.

²³¹ Borders, Citizenship and Immigration Act 2009, s 47 & British Nationality Act 1981, s 41A.

²³² Gov UK, ‘Nationality Good Character Requirement’ (*UK Visas and Immigration*, 30 September 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770960/good-character-guidance.pdf> accessed 17 November 2021.

²³³ *Ibid*, 36.

place.²³⁴ UK Visas and Immigration²³⁵ (UKVI) carry out checks when deciding the citizenship applicant is a good-character applicant. Good character²³⁶ includes an individual's financial background.

The decision-maker will check whether an individual has paid income tax or national insurance contributions and whether that individual has ever been declared bankrupt. An application from an undischarged bankrupt is likely to be denied. However, under good character suitability, the applicant's financial soundness is rigorously considered. If a person advises that they have been declared bankrupt or have been a director involved in the management of a company that has gone into liquidation (wholly or partially), further investigations must be conducted.²³⁷ If a debtor was declared bankrupt and discharged previously, his application may be successful, but this is dependent on several factors. However, if the person was declared bankrupt or their company went bankrupt through no fault of their own, the application will almost always be approved. For example, they could have been the victim of poor business decisions made by others, or an economic downturn could have severely harmed their company.²³⁸

In practice, if an application for naturalization is refused on the grounds of financial soundness, then the only remedy available is a Judicial Review. In the COVID-19 crisis, everyone was affected financially in some way. As a result, the UK government introduced temporary relief measures²³⁹ for migrants and visitors who could not return to renew their visas due to COVID-19 restrictions. However, these measures provided relief in terms of visa policies only. No financial relief, like waiving, or a reduction, in application fees was given. Moreover, the rapid changes in the economy are having a severe effect on migrant debtors. Under these conditions, it is highly appropriate for the policymakers to relax the rules to accommodate the affected debtor when they apply for British citizenship.

²³⁴ *Ibid.*, 37.

²³⁵ Gov UK, 'Nationality Good Character Requirement' (*UK Visas and Immigration*, 30 September 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770960/good-character-guidance.pdf> accessed 17 November 2021.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ UK Gov, 'Guidance: Coronavirus (COVID-19): advice for UK visa applicants and temporary UK residents' (*GOV UK*, 24 March 2020) <<https://www.gov.uk/guidance/coronavirus-covid-19-advice-for-uk-visa-applicants-and-temporary-uk-residents>> accessed 20 November 2021.

Impact of Bankruptcy on Debtor's Mental Health & Emotions

There is an established statistical relationship between the problem of debt and the poor psychological health of a debtor.²⁴⁰ Debts are frequently cited by psychiatrists as a source of severe anxiety and psychological distress.²⁴¹ Debt has been linked to depression, anxiety, and even self-harm in small-scale studies based on individual debtors in the medical literature.²⁴² Debt can cause significant emotional and mental health issues for a debtor, and the stakes are extremely high during bankruptcy or repossession of a family home. Debt is money owed by a debtor to a creditor (lender), whereas debt is more than money to some debtors. Nearly half (46%) of people who are in debt also have a mental health problem, so debt affects a debtor in a variety of ways. There is no standard debt forbearance. While one debtor may suffer from depression because of a £1000 credit card debt, another may not have considered this as debt until he saw the debit balance is £5000. The following are the most common psychological and emotional issues associated with debt, regardless of the type or amount.

Depression and Anxiety: There is a link between being in debt and experiencing depression and anxiety symptoms.²⁴³ Many mental health issues, including depression and severe anxiety, are twice as common among those who have difficulty paying their debts and loans.²⁴⁴ Anxiety can be brought on by a variety of things, such as worrying constantly about money, feeling overwhelmed and seeing no way out, and feeling hopeless.²⁴⁵ Men and women who engage in high-risk credit behaviour are more likely to report depression symptoms than those who do not, according to the Royal College of Psychiatrists.²⁴⁶ Adults in the United Kingdom with mental illnesses are three times more likely to report debt than those without

²⁴⁰John Gathergood, 'Debt and Depression: Causal Links and Social Norm Effects' (2012) 122 *The Economic Journal* 1094,1094.

²⁴¹ Mind UK, 'Still-in-the-Red.Pdf' (*Mind UK*, 2020) <<https://www.mind.org.uk/media/273468/still-in-the-red.pdf>> accessed 12 May 2020.

²⁴²Richard Reading and Shirley Reynolds, 'Debt, social disadvantage and maternal depression' (2001) 53 *Social Science & Medicine* 441, 441.

²⁴³ John Gathergood, 'Debt and Depression: Causal Links and Social Norm Effects' (2012) 122 *The Economic Journal* 1094,1094.

²⁴⁴ *Ibid.*

²⁴⁵ Kristen Kuchar, 'The Emotional Effects of Debt' (*The Simple Dollar*, 28 Oct 2019) <<https://www.thesimpledollar.com/credit/manage-debt/the-emotional-effects-of-debt/>> accessed 15 April 2020.

²⁴⁶ Fitch et al, 'The Debt and Mental Health Evidence Form A Tool Pdf' (*Cambridge*, 2010) <https://www.cambridge.org/core/services/aop-cambridgecore/content/view/AB0D9DEABE8F700D2CE6F91BEA531EE5/S1758320900004625a.pdf/debt_and_mental_health_evidence_form.pdf> accessed 12 May 2020.

mental illnesses.²⁴⁷ Policy initiatives such as the UK government's tackling over-indebtedness strategy and the charity Mind's 'in the Red' campaign²⁴⁸ have identified mental illnesses resulting from debt.²⁴⁹ The financial services sector published voluntary guidelines for managing and collecting debts from individuals with mental health problems.²⁵⁰ Many lenders have now restricted previously easy access to credit to promote financial health and fairness in pricing to the debtor. There are around 14 million²⁵¹ people who use an unarranged overdraft facility (a facility that is not agreed upon in advance with the lender, and some lender charges 80% per year). Once a debtor enters into the unwanted territory of debt, depression and stress are often unavoidable consequences.

Stress: Debt and stress often go hand in hand.²⁵² Naturally, a debtor's mind is full of worries about how they will deal with the debt and whether they will ever get out of it. If a debtor has significant debt, that can also increase stress levels at work, resulting in less productivity, and the debtor can lose his job, which would be even more catastrophic to the debtor's financial position. In comparison, it can be imagined that facing bankruptcy or repossession of a family home, the debtor will be extremely stressed. A debtor's stress level will increase while having no money to spend on necessities for his family. Debt-related stress affects more than just the debtor's work and day-to-day activities. That stress can also detract from the benefits of events that would otherwise have a positive impact. Buying a pair of new shoes and upgrading to a new phone are the little things that promote a debtor's level of happiness which are replaced by stress because of debt. The debtors are under pressure to resolve the issues of over-indebtedness and repay the creditors.²⁵³ An analysis by the Centre for Mental Health Research shows that an additional half a million people will be affected by mental health issues in the coming year if the economic downturn caused by COVID-19 is like

²⁴⁷ Gov UK, 'The social and economic circumstances of adults with mental disorders' (*Office for National Statistics*, 11 March 2013) <<https://data.gov.uk/dataset/a3ba9bc3-5896-47f1-99f7-19af6a007cec/the-social-and-economic-circumstances-of-adults-with-mental-disorders>> accessed 20 November 2021.

²⁴⁸ Mind UK, 'Still-in-the-Red.Pdf' (*Mind UK*, 2020) <<https://www.mind.org.uk/media/273468/still-in-the-red.pdf>> accessed 12 May 2020.

²⁴⁹ DTI, 'Department of Trade and Industry Departmental Report 2006, CM6826' (*Assets Publishing Service UK*, 2006) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/272285/6826.pdf> accessed 20 November 2021.

²⁵⁰ Money Advice Liaison Group, 'Good Practice Awareness Guidelines' (*MALG*, 2015) <<https://malg.org.uk/wp-content/uploads/2017/03/MALG-Debt-and-Mental-Health-Guidelines-2015.pdf>> accessed 20 November 2021.

²⁵¹ FCA Press releases, 'New overdraft rules mean 7 out of 10 people will be better off or see no change' (*FCA*, 22 Jan 2020) <<https://www.fca.org.uk/news/press-releases/new-overdraft-rules-mean>> accessed 15 April 2020.

²⁵² Kristen Kuchar, 'The Emotional Effects of Debt' (*The Simple Dollar*, 28 Oct 2019) <<https://www.thesimpledollar.com/credit/manage-debt/the-emotional-effects-of-debt/>> accessed 15 April 2020.

²⁵³ Michelle J White, 'Corporate and Personal Bankruptcy Law' (2011) 7 *Annual Review of Law and Social Science* 139, 141.

the one that occurred in 2008.²⁵⁴ This study raises concerns that the long-term impact of COVID-19 on the economy is damaging mental health, and its effects would become more significant and last longer.²⁵⁵

The WHO Europe region is also concerned about the safety and well-being of specific vulnerable groups, including health care and other frontline workers, informal or self-employed workers, migrants and refugees, women and children who have been abused or neglected, and people with pre-existing mental or physical health conditions or disabilities.²⁵⁶ The effects of COVID-19 are not limited to mental health; it also severely impacts people's financial health. The Royal College of Psychiatrists worries that some people might have thoughts of hurting themselves, in an effort to control their emotions, or wanting a release of their feelings and as a result, they might even have thoughts of wanting to end their life.²⁵⁷ According to UNICEF UK, lockdowns are putting many children in danger right in their own homes.²⁵⁸

“The stress of illness, confinement in the home and financial strain are likely to exacerbate volatile family situations leading to an increase in incidences of domestic violence, abuse, or neglect. Stress for parents during this time might also contribute to an increased risk of substance misuse or worsening mental health symptoms.”²⁵⁹

The research at UNICEF UK feared that COVID-19 had turned children's lives upside down, and while the situation will be manageable for some children with the proper support and resources, the effects of the pandemic will cast a long shadow over their lives for others.²⁶⁰ Children's loss of education, increased risk of abuse in their homes, food insecurity during the lockdown and access to healthcare are vital areas where COVID-19 has severely affected children's rights. The University of Oxford reveals in its latest research that parents and carers have reported that their children's behaviour has got worse during COVID-19, with increasing

²⁵⁴ Dr Graham Durcan & others, 'Covid-19 and the nation's mental health Forecasting needs and risks in the UK (*Centre for Mental Health*, 15 May 2020). <https://www.centreformentalhealth.org.uk/sites/default/files/202005/CentreforMentalHealth_COVID_MH_Forecasting_May20.pdf> accessed 2 July 2020.

²⁵⁵ *Ibid.*

²⁵⁶ WHO Europe Region, 'Vulnerable populations during COVID-19 response' (*WHO*, May 2020) <https://www.euro.who.int/__data/assets/pdf_file/0003/446340/Factsheet-May-2020-Vulnerable-populations-during-COVID-19-response-eng.pdf> accessed 20 November 2021.

²⁵⁷ Royal College of Psychiatrists, 'COVID-19: Self-harm and suicide' (*Royal College of Psychiatrists*, 2020) <<https://www.rcpsych.ac.uk/mental-health/treatments-and-wellbeing/covid-19-self-harm-and-suicide>> accessed 2 July 2020.

²⁵⁸ UNICEF UK, 'Children in Lockdown: What Coronavirus Means for UK Children' (*UNICEF UK*, 2020) <<https://www.unicef.org.uk/wp-content/uploads/2020/04/Unicef-UK-Children-In-Lockdown-Coronavirus-Impacts-Snapshot.pdf>> accessed 20 November 2021.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

incidences of behaviours like temper tantrums, arguments and children not doing what they are asked to do.²⁶¹ Furthermore, parents reported increased emotional difficulties in their children, such as sadness, worry, clinginess and physical symptoms associated with worry, according to the research.²⁶² In an open letter to education secretary Gavin Williamson, prominent psychologists warned that the delay in getting children and adolescents back to schools is a 'national disaster' that puts children's mental health at risk.²⁶³

Resentment: Debt is difficult for the debtor, especially when it interferes with marriage, partnership, or family life. Following debt or bankruptcy, one spouse or partner may resent the other. It is fairly common for a debtor to blame the partner for entering the relationship with more debt, losing a job, not earning enough money, not saving, or engaging in spending habits that may lead to debt. The Royal College of Psychiatrists concluded that large amounts of debt have a negative impact on a household's psychological well-being. 'Arguments over money are by far the leading predictor of divorce,' according to Sonya Britt, assistant professor of family studies and human services and program director of Personal Financial Planning (PFP).²⁶⁴

"It is not children, sex, in-laws or anything else. It is money for both men and women."²⁶⁵

A debtor may also be resentful of his or her employer for not adequately compensating him or her for work performed or for failing to raise his or her salary. Furthermore, a debtor may resent family and friends who are financially dependent on him or her or otherwise, negatively impacting the debtor's financial health. In reality, many debtors choose to resent themselves and the decisions they made that put them in debt or put them in a tight financial situation, whether the debt was caused by excessive spending, a poor career choice, or something else.

Denial or Denunciation: Some debtors regard debt as a burden, while others completely disregard it. Despite repeated reminders, overdue notices, and phone calls, a debtor

²⁶¹ The University of Oxford, 'Children show an increase in mental health difficulties over COVID-19 lockdown' (*University of Oxford News*, 16 JUN 2020) <<https://www.ox.ac.uk/news/2020-06-16-children-show-increase-mental-health-difficulties-over-covid-19-lockdown>> accessed 20 November 2021.

²⁶² *Ibid.*

²⁶³ Philippa Roxby, 'Coronavirus: Child psychologists highlight mental health risks of lockdown' (*BBC News*, 14 June 2020) <<https://www.bbc.co.uk/news/health-53037702>> accessed 2 July 2020.

²⁶⁴ Sonya Britt, 'Study reveals early financial arguments are a predictor of divorce' (*Phys Org*, 12 July 2013) <<https://phys.org/news/2013-07-reveals-early-financial-arguments-predictor.html>> accessed 15 April 2020.

²⁶⁵ *Ibid.*

is often in denial about his or her debt. Denial can be demonstrated by failing to open bills and bank statements that arrive in the mail, stuffing bills and late notices in a drawer and forgetting about them, failing to answer the phone when the debtor suspects it is a creditor, or simply refusing to deal with the debt.²⁶⁶ Unfortunately, this leads to an even more significant problem: instead of talking to the creditor and exploring options to repay the debt, the debtor starts ignoring them. While this tactic works for a short time, this leads to debt piling up as creditors will charge missed payment fees, and higher interest rates, all ultimately leading to bankruptcy. In addition, denial can lead a debtor into deeper debt as it can facilitate further spending.

Anger and Frustration: It can be extremely difficult for a debtor to come to terms with the fact that they are in debt. When the debtor is unable to control or manage the debt, it can be frustrating and aggravating. Debt can also serve as a painful reminder of the unfortunate events that led to its accumulation in the first place.

Regret and Disappointment: With smartphone technologies, central banks and credit card companies now provide apps that instantly tell a debtor account's status. It is even quicker for a debtor to log in and see how many debts he piled up, and without a doubt, that will lead to regret. A debtor may regret the unwanted purchases or poor financial choices they have made. Even after realising this, a debtor will continue to struggle financially, entangling even more creditors and sinking further into their pit of insolvency. When this happens, it is too late to do anything about it.²⁶⁷

Shame and Embarrassment: In our society, money and material possessions are frequently associated with success. Being in debt, a debtor feels embarrassed or ashamed. For example, a debtor might feel embarrassed that he or she is not making enough money, losing his or her family home, or being declared bankrupt. It is also considered an embarrassment in society that the debtor fails to manage their money or maintain their lifestyle. In certain ethnic minorities, debt (county court judgment, bankruptcy, and repossession) is often taboo. Most debtors do not want their family and friends to know that they are in the red and struggling. For example, according to a creditcard.com survey, 85% of respondents were hesitant to discuss their credit card debt. This attitude can lead to more debt.²⁶⁸ Many charities (Mind,

²⁶⁶ Kristen Kuchar, 'The Emotional Effects of Debt' (*The Simple Dollar*, 28 Oct 2019) <<https://www.thesimpledollar.com/credit/manage-debt/the-emotional-effects-of-debt/>> accessed 15 April 2020.

²⁶⁷ G Stanley Joslin, 'Bankruptcy: Anglo-American Contrasts' (1966) 29 *Bankruptcy: Anglo-American Contrasts* 149,153.

²⁶⁸ *Ibid.*

StepChange, Citizen Advice) in the UK run free confidential advice services that can help with isolation and embarrassment if a debtor contacts them.

Fear: A debtor may grow to fear the repercussions that accompany debt. For example, if a debtor struggles to pay his or her rent arrears or mortgage payments, the fear of eviction or repossession and losing the family home always looms in the debtor's mind. Similarly, missed payments or outstanding utility bills cause fear of disconnection from the services. Fear of any unexcepted expense (car breakdown, boiler breakdown) and fear of losing a job will destroy a debtor financially. The fear of what comes next, of always being in the red, and of a relationship breaking up because of debt are all possible effects of being in debt. The research on debt and marital behaviour found that young adults with high debt levels were less likely to get married.²⁶⁹

In conclusion, high debts lead to poor mental health conditions and mental health issues like depression, stress, and other issues. Psychological or emotional stress is often the result of over-indebtedness. People with debts suffer from severe anxiety, suicidal thoughts, depression, and anger. They come under stress and depression and are full of anxiety till the time they can pay it back. Therefore, the debtors face high risks of mental disorders. There are not only household debts, educational loans, credit cards and other loan debts that can lead to over-indebtedness. As a consequence of over-indebtedness, the debtors face a decrease in self-control and lose their confidence in facing the issues and resolving them rather than losing their assets to the creditors. Moreover, debts lead to stress, for which a person can have serious mental health issues. Going forward, it is vital to recheck the problems of over-indebtedness and resolve them so that the mental pressure on the debtors can be reduced.

In this context, the law of bankruptcy is an essential solution to the issue of over-indebtedness where the debtors are provided with extended- payment options to repay the debts. In addition, the debtors are provided with possible solutions like the human rights framework where they have access to education, health care and other daily needs to reduce their mental health issues. Once a debt is paid off, that can bring relief, freedom, and accomplishment to debtors. The only way to attain this achievement is by making bankruptcy laws more lenient, accessible, and in line with debtors' human rights.

²⁶⁹ Fenaba R Addo and others, 'The Changing Nature of the Association Between Student Loan Debt and Marital Behavior in Young Adulthood' (2019) 40 *Journal of Family and Economic Issues* 86, 86.

Debt, Gambling & Suicide

There is an established interrelationship between debt and gambling. Research supports the fact that gambling is a substantial contributing factor to unmanageable indebtedness.²⁷⁰ Various studies also indicate that indebtedness is a risk factor that can trigger a stressed person to contemplate suicide.²⁷¹ The debt charity StepChange warns that gambling problems often worsen debt problems as borrowing more money to pay for a gambling addiction increases a debtor's debt.²⁷² The increased debt triggers additional gambling habits in the debtor. Gambling-related debt not only affects the debtor but also affects and impacts the debtor's families and communities.²⁷³ The money used to gamble could have been used to pay for priority needs and bills. The BBC reported that using online gambling and the use of credit cards causes the debt problem to spike.²⁷⁴ The UK's gambling industry regulator imposed a comprehensive ban on using credit cards online to protect consumers on 14th April 2020.²⁷⁵ Neil McArthur, Gambling Commission chief executive, noted: "This credit card ban will further protect consumers from financial harm, and today, nobody in Great Britain can use a credit card to gamble. It is a ban which ultimately reduces the risks of harm to consumers from gambling with money they do not have."²⁷⁶

The Gambling Commissioner further stated,

"The ban also comes at a vital time as we see an increase in the use of some online products, such as online slots and virtual sports, and our online search analysis shows an increase in UK consumer interest in gambling products since the lockdown began. This highlights just how important it is for gambling operators to keep people safe, and the credit card ban will help that."²⁷⁷ The Data released by the Gambling Commissioner reveals that since the ban on using a credit card for online gambling, the number of participants has decreased, although the

²⁷⁰ Paul S. F Yip & others, 'Financial Debt and Suicide in Hong Kong SAR' (2007) 37 *Journal of Applied Social Psychology* 2788, 2789.

²⁷¹ *Ibid.*

²⁷² Step Change Debt Charity, 'Gambling and betting debts Help to manage your money' (*Step Change Debt Charity*, 2020) <<https://www.stepchange.org/debt-info/gambling-debt.aspx>> accessed 2 July 2020.

²⁷³ Carolyn Downs and Ryan Woolrych, 'Gambling and debt: the hidden impacts on family and work-life' (2010) 13 *Community, Work & Family* 311, 312.

²⁷⁴ BBC News UK, 'Credit card gambling: 'It'll take me 10 years to pay off my debt' (*BBC News UK*, 14 January 2020) <<https://www.bbc.co.uk/news/newsbeat-51108036>> accessed 2 July 2020.

²⁷⁵ Gambling Commission UK, 'Protecting the safety of consumers is at the heart of today's credit card gambling ban' (*Gambling Commission UK*, 14 April 2020) <<https://www.gamblingcommission.gov.uk/news-action-and-statistics/News/protecting-the-safety-of-consumers-is-at-the-heart-of-todays-credit-card-gambling-ban>> accessed 2 July 2020.

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

players are spending more time and money during the lockdown.²⁷⁸ According to BBC data, betting organisations' advertisements appeared in 95% of commercial breaks during live UK football matches.²⁷⁹ With this barrage of betting promotions, it is unsurprising that gambling is an ongoing problem that requires strict legislative and regulatory control. Research indicates that being in debt alone is enough to affect someone's mental health, and gambling can lead to anxiety, low self-esteem, depression and even insomnia.²⁸⁰ Past studies show a strong relationship between debt and suicide, and those who died by suicide were eight times more likely to be in debt.²⁸¹ The Debt Support Trust reported alarming statistics that suicide is considered by almost 50% of people struggling with debt in the UK.²⁸² The increased burden of debt on the debtor sometimes leaves them with the perception that suicide is the only option.²⁸³ According to the charity, debtors who are struggling with debt face marital breakdown, job loss, and family problems, and a large percentage of people who are struggling to make ends meet consider suicide.²⁸⁴ Money and Mental Health Policy Institute (MMHPI) presented the government with a petition to change the 'out-of-date' legislation that encourages companies to use threatening language when collecting debts.²⁸⁵ Adult Psychiatric Morbidity Survey, which is commissioned by the NHS and funded by the government, reveals alarming statistics in 2017:

“Over 420,000 people in problem debt considered taking their own life in England. More than 100,000 people in debt attempt suicide each year. People in problem debt are three times more likely to have considered suicide than people not in problem debt.”²⁸⁶ According to MMHPI's research, many people in distress who are unable to see a solution to their situation are at a

²⁷⁸Gambling Commission UK, 'Protecting the safety of consumers is at the heart of today's credit card gambling ban' (*Gambling Commission UK*, 14 April 2020) <<https://www.gamblingcommission.gov.uk/news-action-and-statistics/News/protecting-the-safety-of-consumers-is-at-the-heart-of-todays-credit-card-gambling-ban>> accessed 2 July 2020.

²⁷⁹Creditfix, 'Gambling Debt Help & Advice' (*Creditfix*, 2020) <<https://www.creditfix.co.uk/help-with-debt/types-of-debt/gambling-debt/>> accessed 2 July 2020.

²⁸⁰ *Ibid.*

²⁸¹ Thomas Richardson and others, 'The Relationship Between Personal Unsecured Debt and Mental and Physical Health: A Systematic Review and Meta-Analysis' (2013) 33 *Clin Psychol Rev* 1148, 1149.

²⁸²Debt Support Trust, 'Debt and Suicide' (*Debt Support Trust*, 2020) <<https://www.debtsupporttrust.org.uk/debt-advice/debt-and-suicide/>> accessed 20 November 2021.

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

²⁸⁵ Callum Mason, 'Martin: '100,000 attempt debt suicide each year – stop the debt threats' (*Money Saving Expert*, 4-December 2018) <<https://www.moneysavingexpert.com/news/2018/11/more-than-100-000-people-in-problem-debt-attempt-suicide-each-ye/>> accessed 20 November 2021.

²⁸⁶ *Ibid.*

higher risk of becoming suicidal.²⁸⁷ To address the issues, save lives, and protect vulnerable debtors, regulatory and legislative support is urgently needed.

Impact of Bankruptcy & Repossession on the Debtor's Family Home

The beneficial interest of the bankrupt debtor in their family home as the principal residence is the most valuable asset in the bankruptcy estate. In recent years, the family or matrimonial home has become the main asset of consumer debtors and a sole trader and partnership.²⁸⁸ Sir Edward Coke (pronounced Cook) said in the Institutes of the Laws of England, 1628: “For a man's house is his castle, et domus sua cuique est tutissimum refugium [and each man's home is his safest refuge].” What was meant by “castle” was defined in 1763 by British prime minister George Grenville, who had a good list of names to choose from: William Pitt, the first Earl of Chatham, also known as Pitt, the Elder: “The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - the rain may enter - but the King of England cannot enter.”

Bankruptcy adversely affects the debtor and leaves a significant impact on the debtor's economic and mental health.²⁸⁹ The family home can be any freehold or leasehold, registered or unregistered, and solely or jointly owned. It is imperative to highlight that the TIB interest in the bankrupt family home is subject to any charge on the property in favour of a spouse arising under the Family Law Act 1996²⁹⁰ and Insolvency Act 1986.²⁹¹ TIB interest in the family home of the debtor remains for three years; during that period, the vested interest needs to realise if TIB makes an unsuccessful application in respect of their interest in the bankrupt's family home, on the dismissal of the application, the property is re-vest in the bankrupt estate in favour of TIB unless the court orders otherwise under section 283(4) Insolvency Act 1986.²⁹² A mortgagee's right of possession arises as soon as the mortgage deed is executed unless the parties expressly or imply agreement otherwise²⁹³ According to *National*

²⁸⁷ *Ibid.*

²⁸⁸ Sally Wheeler, 'Protection for the matrimonial home' (1989) 11 *The Journal of Social Welfare Law* 101,102.

²⁸⁹ David Himmelstein and others, 'Illness and Injury as Contributors to Bankruptcy' (2005) 24 *Health Affairs* 63, 64.

²⁹⁰ Family Law Act 1996, s 30, s 31, s 33 (5).

²⁹¹ Insolvency Act 1986, s 336 (2).

²⁹² Insolvency Act 1986, s 283 (4).

²⁹³ *Four-maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317 & *Western Bank Ltd. V Schindler* [1977] Ch 1.

Westminster Bank Plc v Skelton,²⁹⁴ a mortgagee with a legal charge²⁹⁵ has the right to seek possession of the mortgaged property at any time after the mortgage is executed.

TIB can apply for the residential home possession or sale order under section 335A(2) of the Insolvency Act 1986.²⁹⁶ However, the court must have specific regard for the needs and financial resources of the bankrupt's spouse and the needs of any children in determining what order to make under Trusts of Land and the Appointment of Trustees Act 1996²⁹⁷ applications.²⁹⁸ Apart from the bankrupt's needs, it must also consider the bankrupt's creditors' interests, the bankrupt's spouse's conduct insofar as it contributed to the bankruptcy, and all other circumstances of the case.²⁹⁹ This study has raised concerns that to establish form and procedure, the law of mortgage, either implicitly or explicitly, relies heavily upon the exercise of discretion by various parties within the mortgage relationship as a means of adding substance to it.³⁰⁰ It further raises the concerns from a human rights perspective that TIB is given such immense powers and the safety and welfare of children and spouses are at risk if the debtor's property is held jointly. It has been expressed that the mortgagee holds an inherent right to ownership 'when the ink is dry.'³⁰¹ However, it may be that at one time the mortgagor has defaulted, but the mortgagee will practice their right to sell the property and apply the returns to fulfil the debt outstanding. The mortgagee will customarily look for a court order for the possession of the property so it can be sold with vacant possession.³⁰²

However, a court order is not generally necessary. A mortgage deed includes a provision that allows the mortgagee to sell the property once the payment is due; a lender may

²⁹⁴ *National Westminster Bank Plc v Skelton* [1993] 1 WLR 72.

²⁹⁵ This means that unless the mortgagor fails to comply with the terms of the mortgage, the mortgagee will not be able to exercise his or her right to possession of the property. An indebted person's property (Home) may be sold by a lender under modern English law if certain conditions are met with regard to the mortgaged property. This is known as "repossession." The Financial Conduct Authority (FCA) regulates all mortgage lenders (FCA). How lenders interact with their customers is governed by FCA rules and regulations. This set of rules is known as the Mortgage Conduct of Business (MCOB) regulations. You should be treated fairly by your lender. If you have suggestions on how to deal with payment issues and arrears, they must take them into consideration. If your lender wants to take your house back, it should only do so if all other options have been exhausted.

²⁹⁶ Insolvency Act 1986, s 335A (2).

²⁹⁷ Trusts of Land and the Appointment of Trustees Act 1996, s 14.

²⁹⁸ Insolvency Act 1986, s.335A (2).

²⁹⁹ Mark Pawlowski and James P Brown, 'Applications for sale of the family home after one year of bankruptcy: a creditor's prerogative' (2015) 3 Nottingham Insolvency and Business Law 517, 520.

³⁰⁰ Lisa Whitehouse, 'A Longitudinal Analysis of the Mortgage Repossession Process 1995-2010: Stability, Regulation and Reform' (2010) 6 Modern Studies in Property Law 1,9.

³⁰¹ *Four Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317.

³⁰² When it comes to claims for an order for possession and sale, a mortgagee's claims in English law are called "claims," respectively. This is known as a "foreclosure claim" in other legal systems. English law uses the term "foreclosure" to refer to a termination of the right of the mortgagor to redeem the mortgage, and not just an order for possession and sale. Foreclosure is only possible with a court order.

exercise his contractual rights without a court order. Even without such a provision, the mortgagee has an implied, statutory power conferred by the Law of Property Act 1925³⁰³ to sell the property.³⁰⁴ The powers of a mortgagee have outlined in the Law of Property Act of 1925 as well as the terms of the mortgage deed. It is usual for the parties to include additional provisions³⁰⁵ provided that the terms: are not unjust or unconscionable in any way,³⁰⁶ do not unreasonably limit the mortgagor's right to redeem his or her property,³⁰⁷ do not interfere with the mortgagor's business,³⁰⁸ do not constitute an extortionate credit bargain within the meaning of the Consumer Credit Act 1974³⁰⁹ or extortionate credit under the Insolvency Act 1986.³¹⁰

However, a mortgagee may not practice this power until a mortgagor has been in default of an instalment for no less than three months in the wake of getting a notification to pay.³¹¹ A mortgagee may likewise apply, under section 91(2) of the Law of Property Act 1925,³¹² for a judicial order for the sale of the property, the outcome of which the court may direct the sale of the mortgaged property. "On such terms that it supposes fit."³¹³ As per the terms of the Charging Orders Act 1979,³¹⁴ an unsecured judgment creditor may, at the court's discretion, obtain a charging order which has the effect of securing the debt by creating a charge, *ex post facto*, against the debtor's property. A charge forced by a charging order has the same impact as an equitable charge made by the debtor.³¹⁵ As for the family home, the court will attempt to "strike a harmony between the ordinary desire of the bank and the hardship to the companion or accomplice and youngsters if a request is made".³¹⁶ Where the mortgaged property constitutes the indebted person's home, customarily, the claims of secured creditors prioritise whatever other creditor or relatives, advancements mirror measures of acknowledgement for the need to consider the premiums of 'innocent' family members.³¹⁷

³⁰³ Law of Property Act 1925, s 101.

³⁰⁴ The mortgagee may convey the property sold to a purchaser.

³⁰⁵ over and above the statutory rights in the mortgage.

³⁰⁶ *Multiservice Book Binding Ltd v Marden* [1979] Ch 84.

³⁰⁷ *Bradley v Carritt* [1903] UKHL 1.

³⁰⁸ *Alec Lobb (Garages) Ltd and others v Total Oil Great Britain Ltd* [1984] EWCA Civ 2.

³⁰⁹ Consumer Credit Act 1974, s 137-140.

³¹⁰ Insolvency Act 1986, s 343.

³¹¹ Law of Property Act 1925, s 103.

³¹² Law of Property Act 1925, s 91(2).

³¹³ Edward Cousins and Ian Clarke, *Cousins: Law of Mortgages* (4th edn, Sweet & Maxwell 2017) 530.

³¹⁴ Charging Orders Act 1979, s 1(1) (5).

³¹⁵ Charging Orders Act 1979, s 3(4). Thus, the creditor acquires the status of a secured creditor who may, upon the debtor's default, ask for an order for the sale of the property. However, a charging order is void against a purchaser for value of the land unless it is registered.

³¹⁶ Lienne Steyn, 'Statutory Regulation of Forced Sale of the Home in South Africa, (DDL thesis in Law, University of Pretoria 2012).

³¹⁷ *Ibid.*

Where the account holder owned the home, in some instances, courts permit the wife a privilege of occupation of the ‘wedding home’ to prevail over the privilege of the husband’s trustee in bankruptcy to sell the property, in light of the ‘forsook wife’s equity.’³¹⁸ The position turned out to be statutorily managed with the institution of the Matrimonial Homes Act 1983.³¹⁹ The impact was to give the ‘non-entitled’ life partner statutory privileges of occupation, which could likewise be ensured against outsiders by registration.³²⁰ However, these occupation rights were explicitly made void against the trustee in bankruptcy of the ‘entitled spouse’ or his creditors³²¹, which implied that a man’s house was in danger of being sold in case of bankruptcy. In many cases, courts tended to support the lenders’ interest over the bankrupt’s companion and children unless there are exceptional circumstances.³²² A case regularly referred to as a representation of ‘home interests’ prevailing over commercial interests³²³ is *Williams and Glyn’s Bank Ltd v Boland*.³²⁴ In this case, inaction by the mortgagee, upon the mortgagor’s default, for repossession of his home, both the Court of Appeal and the House of Lords found that the mortgagor’s wife’s equitable interest under an implied trust, of which the mortgagee had been ignorant, prevailed over the last’s case against the husband. Lord Denning stated that “we should have regard to and limit the application of the paragraph in the light of the doctrine of notice. But this would run counter to the whole purpose of the Act. The purpose, in each system, is the same, namely, to safeguard the rights of persons in occupation, but the method used differs.”³²⁵

However, as Fox related, Lord Wilberforce, in a different judgment, recognized that the court’s choice flagged the requirement for “a take-off from a nice routine of getting rid of request as to occupation past that of the seller, and substitution of a more watchful request stretching out to spouses and different individuals from the family, or even of persons outside it.”³²⁶ The judicial interpretation of the Human Rights Act 1998³²⁷ and its very integration into

³¹⁸ *Bendall v McWhirter* [1952] 2 QB 466 (CA) was one such case. However, the House of Lords overruled the decision, in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175.

³¹⁹ Matrimonial Homes Act 1983, s 1.

³²⁰ Gareth Miller, *The Family, Creditors, and Insolvency* (OUP 2004) 80.

³²¹ Matrimonial Homes Act 1967, s 2(7).

³²² *Jones v Challenger* [1961] 1 QB 176; *Re Solomon* [1967] CH 573; *Re Turner* [1975] 1 All ER 5, [1974] 1 WLR 1556; *Re Densham* [1975] 3 All ER 726, [1975] 1 WLR 1519; *Re Bailey* [1977] 2 All ER 26, [1977] 1 WLR 278; *Re Lowrie* [1981] 3 All ER 353; *Re Citro Domenico*, *Re Citro Carmine* [1990] 3 WLR 880. Cf *Re Holliday* [1981] 1 Ch 405 (CA), where the sale of the home was postponed for five years.

³²³ Lorna Fox O’Mahony, *Conceptualising Home: Theories, Laws, and Policies* (Hart Publishing 2006) 53.

³²⁴ *Williams & Glyn’s Bank Ltd v Boland* [1981] AC 487.

³²⁵ *Ibid* [504].

³²⁶ *Ibid*, 54.

³²⁷ Human Rights Act 1998, s 3.

society's current issues are exemplary as is the development of case law to protect the individual and their families from protecting their rights. This ongoing development of case law can fill the gap left by the legislature to protect the debtor's rights. Fox likewise highlights a passage from the judgment of Lord Scarman who "additionally proposed that: '[t]he troubles are, I accept, exaggerated: but bankers, and solicitors, exist to give the service which general social needs. As they have effectively done in the past, they can modify their practice if it is socially required'."³²⁸ In an ensuing verbal confrontation, in the House of Lords, it was expressed that the 'integrity' of the family home is of great social significance and that there was a need to 'secure and protect the values which society maintains in the institution of marriage and the family.'³²⁹ Although resulting cases³³⁰ did not mirror the same measure of legal activism, Fox makes an intriguing remark that despite concerns in regards to the standard of request after *Williams & Glyn's Bank Ltd v Boland*³³¹, within a couple of years, the necessity that all occupiers be ascertained and inquiries made into their circumstances had come to be viewed as necessary.³³² Fox also adds that, "[i]n request to abstain from losing the need to the equitable interests of occupiers, it is currently standard conveyancing practice for banks to request every grown-up occupier (over 17), to ask that they unveil any interests claimed in the land, and to look for their assent or go along with them as joint parties on the transaction." She additionally states that, "in 1987, the Law Commission inferred that conveyancers have learnt to live with it."³³³

The 'Cork Committee' communicated concerns that "[e]viction from the family home ... might be a fiasco to the debtor himself ... as well as to the individuals who are living there as his dependants."³³⁴ It observed that the family home was regularly the most critical resource in the bankrupt's bequest. It additionally considered the deficiency of residential accommodation as well as how expensive housing was.³³⁵ Accordingly, it prescribed that the bankrupt indebted person's interest for the family home should vest in the trustee and that the bankruptcy court should be required to determine any dispute in connection to it.³³⁶ It further

³²⁸ *Ibid.*, 55.

³²⁹ Lorna Fox O'Mahony, *Conceptualising Home: Theories, Laws, and Policies* (Hart Publishing 2006) 326.

³³⁰ *Bank of Bharoda v Dhillon* [1998] 1 FLR 524; *Mortgage Corp Ltd v Shaire* [1998] 1 FLR 973.

³³¹ *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487.

³³² Lorna Fox O'Mahony, *Conceptualising Home: Theories, Laws, and Policies* (Hart Publishing 2006) 55.

³³³ *Ibid.* With reference to Law Commission Third Report on Land Registration Law Com No 158 1987.

³³⁴ The Cork Report para 1116.

³³⁵ The Cork Report para 1115.

³³⁶ The Cork Report para 1126-1128.

suggested that the court ought to have extraordinary power, considering the welfare of any children and any vulnerable or elderly adults in the family, to defer a trustee's privilege of possession and right of sale of the family home.³³⁷ Prof. Mark Pawlowski and barrister James Brown highlighted that an Article 8 argument was raised and failed in *Foyle v Turner*.³³⁸

In this case, HH Judge Norris QC recognised that Article 8 rights protection required a balance between the needs of the individual and the community's needs. Any interference with individual rights must be proportionate to the legitimate goal pursued. However, in his opinion, the checks and balances required under the Insolvency Act 1986³³⁹ before an order for sale could be made, such as considering the needs and resources of a non-bankrupt spouse and whether exceptional circumstances dictated that the needs of creditors should not be put first³⁴⁰, were similar to those required under the European Convention³⁴¹ on Human Rights.³⁴² As a result, there was no need to consider Article 8 rights separately.

In the case of *Barca v Mears*,³⁴³ the deputy judge indicated that a possible shift in emphasis in the interpretation of the Insolvency Act 1986³⁴⁴ might be necessary to achieve compatibility with a bankrupt's rights under the European Convention on Human Rights. According to practitioner commentary and analyses, the provisions of the Insolvency Act 1986 should be interpreted as acknowledging that creditors' interests would outweigh all other interests in the majority of cases. However, it was left open for a court to determine that, based on a proper examination of the facts of a particular case, it was one of the exceptional cases in which that proposition was not valid.³⁴⁵ In the words of deputy judge Nicholas Strauss, QC: “. . .it may be incompatible with Convention rights to follow the approach taken by the majority in *Re Citro*, in drawing a distinction between what is exceptional, in the sense of being unusual,

³³⁷ The “family home” was defined as a dwelling in which there is, or are, living: the debtor and his wife; the debtor or his wife with (in either case) a dependent child or children; the debtor's wife; or the debtor, and a dependent parent of the debtor or of his wife who has been living there as part of the family based on a long-term arrangement. See the *Cork Report* para 1120, 1124.

³³⁸ *Foyle v Turner* [2007] BPIR 43. See also, *Donohoe v Ingram (Trustee in Bankruptcy of Iain Charles Kirkup)* [2006] EWHC 282 Ch, where the issue of Article 8 rights was largely side-stepped by a finding that, even on a wider interpretation of exceptional circumstances, the trial judge's conclusion that there were no exceptional circumstances was correct as cited in Mark Pawlowski and James P Brown, 'Applications for sale of the family home after one year of bankruptcy: a creditor's prerogative' (2015) 3 Nottingham Insolvency and Business Law 517, 520.

³³⁹ Insolvency Act 1986, s 335A (2).

³⁴⁰ *Ibid.*

³⁴¹ European Convention on Human Rights ETS No. 005 213 UNTS 222.

³⁴² *Kay v Lambeth London Borough Council* [2006] 2 AC 465.

³⁴³ *Barca v Mears* [2004] EWHC 2170 (Ch).

³⁴⁴ Insolvency Act 1986, s 335A.

³⁴⁵ Mark Pawlowski and James P Brown, 'Applications for sale of the family home after one year of bankruptcy: a creditor's prerogative' (2015) 3 Nottingham Insolvency and Business Law 517, 520.

and what Nourse L.J. refers to as the ‘usual melancholy’ consequences of a bankruptcy. This approach leads to the conclusion that, however disastrous the consequences may be to family life if they are of the usual *kind*, then they cannot be relied on under s.335A; they will qualify as ‘exceptional’ only if they are of an unusual kind, for example where a terminal illness is involved. . . It seems to me that a shift in emphasis in the interpretation of the statute may be necessary to achieve compatibility with the Convention. There is nothing in the wording of s.335A . . . to require an interpretation which excludes from the ambit of ‘exceptional circumstances’ cases in which the consequences of the bankruptcy are of the usual kind, but exceptionally severe.”³⁴⁶

Notwithstanding these cautious remarks, the trend of case law has been not to require the operation of a different exercise from that adopted in *Re Citro*³⁴⁷ or the strict wording of the Insolvency Act 1986.³⁴⁸ Thus, for example, in *Ford v Alexander*³⁴⁹, Peter Smith J. expressly held that the requirements in s.335A(2) of the Insolvency Act 1986 and the change of emphasis in s.355A(3)³⁵⁰ did not infringe Article 8. In his view, they already provided an appropriate balance between the rights of creditors and the respect of privacy and the debtor's home, in his Lordship's words:

“That balance serves the legitimate aim of protecting the rights and freedoms of others. I am, therefore, of the opinion that the requirements of s.335A satisfy the test of being necessary for a democratic society and thus proportionate (see, *McCann v UK* (App no 19009/04) and *Connors v UK* (App no 66746/01)). This was the conclusion in the pre-Pinnock bankruptcy cases, and I see no basis for coming to a different conclusion.”

Therefore, the assumption is that the requirements set out in s.355A of the Insolvency Act 1986³⁵¹ do not infringe Article 8 of the Convention. As concluded by the researchers and case law, the courts continue to apply the same test as applied in the pre-1986 decisions on bankruptcy, so that exceptional circumstances must, in the words of Nourse LJ in *Re Citro*,³⁵² fall outside the ‘normal melancholy consequences of debt and improvidence’.³⁵³

³⁴⁶ *Barca v Mears* [2004] EWHC 2170 (Ch) [40, 41].

³⁴⁷ *Re Citro* [1991] Ch 142.

³⁴⁸ Insolvency Act 1986, s 335A (3).

³⁴⁹ *Ford v Anor Alexander* [2012] EWHC 266 (Ch).

³⁵⁰ Insolvency Act 1986, s 335A (3).

³⁵¹ *Ibid.*

³⁵² *Re Citro* [1991] Ch 142, at 157.

³⁵³ *Harrington v Bennett* [2000] BPIR 630; *Dean v Stout (The Trustee in Bankruptcy of Mushtaq Hussain Dean)* [2004] EWHC 3315 (Ch); *Everitt v Budhram* [2009] EWHC 1219 (Ch) and *Fred Perry (Holdings) Ltd v Genis* [2015] 1 P & CR DG5.

Conclusion

Finally, as stated in the introduction to this chapter, bankruptcy affects the debtor socially, economically, and mentally, as well as negatively impacting the debtor's fundamental human rights. The bankrupt may enjoy a fresh start by getting rid of his debts, but he must pay a heavy price for the upcoming life ahead. The sacrifice can be by sacrificing his career and doing less engaging jobs due to restrictions on employment or giving up his business. Bankruptcy leaves a significant mark on the debtor's life in every area. Access to future credit can be expensive when compared to a non-bankrupt individual. In almost all sorts of credit and employment applications, a bankrupt person must declare that he was once bankrupt. That declaration leaves a kind of stigma on the debtor. Bankruptcy being advertised may bring debtors' reputations into question in the eyes of family and friends and leave a mark of failure forever. If a bankrupt is a migrant wanting to acquire British citizenship, his application will be refused until he becomes discharged from bankruptcy. Even after the discharge period, the application for British citizenship might get refused.

However, many debts are written off after a debtor becomes bankrupt except for court fines, maintenance orders and student loan debt. The most considerable debt is the student loan which affects young professionals in many ways. According to Prof. Claire Callender, "The number of students relying on student loans to pay for their higher education is constantly rising, as is the amount they borrow. Yet, we know little about the long-term consequences of this for society and individuals. What we do know from current research is concerning. Student loan debt seems to have a harmful effect on many aspects of graduates' lives once they leave higher education."³⁵⁴ According to the academic literature, having student loan debt is associated with a negative relationship with homeownership, including owning lower-value properties. Student loan debt is also likely to postpone homeownership. It is abundantly clear that declaring bankruptcy solves only one side of the problem while creating far too many others in return. A critical aspect raised in this chapter is the treatment of the debtor home in bankruptcy and repossession. Many human rights issues are raised which require the attention of policymakers and legislature. The practical issues which arise during the mortgagee's possession and exercising the power of sale under the Property Act 1925³⁵⁵ are the mortgagee's

³⁵⁴ Jane Dalton, 'Student Loan Debt Harms Mental Health, Careers and Home Ownership for Many Years, Study Says' (*Independent News*, 11 June 2018) <<https://www.independent.co.uk/news/education/education-news/student-loan-debt-harms-mental-health-careers-home-ownership-years-a8392326.html>> accessed 20 November 2021.

³⁵⁵ Law of Property Act 1925, s 103.

duties to dispose of mortgagor property with good faith, care, and reasonable skill to obtain the best price. On careful examination, it can be assumed that it is the mortgagor who suffers during the repossession.

The economic impact of bankruptcy on the state is not wide enough, although the impact on specific sectors, including health and welfare, is clear. Bankruptcy impacts the mental and emotional health of debtors in a far greater way than is generally expected. Psychological or emotional stress results from over-indebtedness, and the debtor can suffer from severe anxiety, suicidal thoughts, depression, and anger. These effects also elevate human rights issues under domestic and international law. The right to work, the right to an adequate standard of living, the right to human dignity, the right to be free from incarceration for inability to pay the debt, the right to be free from discrimination, the right to due process and the right to own property are some of them.

The Human Rights approach must be used to ease the pressure off the debtor. It is recommended to use the Human Rights approach to consumer credit as the current approaches have inadequacies. First, under the current approach, regulations are scrutinised based on concerns about economic efficiency. Many of the issues associated with consumer credit, particularly those stemming from consumer confusion or desperation, are not adequately addressed by the levelling of the playing field focus. Second, consumer protection has not insisted on at least a minimal level of debtor protection, and the goal of protecting debtors' basic needs has been deemed less important than wealth maximisation.³⁵⁶ Protection of debtors should be the priority of the laws as a bankrupt gives up almost everything in his estate. The next chapter of this study focuses on the regulatory framework encompassing consumer safety and debtor rights, including many contemporary challenges.

³⁵⁶ Chrystin D Ondersma, 'A Human Rights Approach to Consumer Credit (2015) 90 Tulane Law Review, 373,373.

Chapter 4: Debtor's Protection in English Law

Introduction

This section of the research aims to examine and investigate the statutory and regulatory debtors' human rights framework and available safety nets for them, with a focus on regulated consumer contracts and, in particular, regulated mortgage contracts (1st legal charge). Mortgages tied to residential homes are significant because a person's home ensures their security, and losing it is a financial loss that lasts a lifetime. According to the British Medical Journal, the recession that followed the 2008 financial crisis resulted in increased unemployment, homelessness, and poverty, all of which are critical health determinants.¹ Using a wide range of factors that keep people in poverty, Dr Clare Chambers-Jones found that low wages, unemployment, gender inequality, lack of infrastructure and political discourse all contribute to a cycle of poverty.² Dr Chambers-Jones went on to discover that the COVID-19 pandemic has caused approximately four million people to fall behind on their rent, council tax, or phone bills,³ all of which have an impact on their households. These people are unable to meet the terms of their loan agreements. When debts go unpaid, the final options are bankruptcy or eviction.

The critical concern for debtors and lenders during the court proceedings is how to handle arrears cases concerning individuals with mental health issues.⁴ Residential mortgage lending necessitates extra care and consideration because of the sensitive nature of the subject matter.⁵ At the start of the COVID-19 pandemic, the UK government enacted emergency legislation⁶ to protect social and private tenants by delaying all evictions for six months. This short-term statutory protection expired on 20 September 2020 and was replaced with another.⁷

¹ The Week, 'Link between recession and mental health problems explained' (*The Week News*, 7 September 2016) <<https://www.theweek.co.uk/76318/link-between-recession-and-mental-health-problems-explained>> accessed 20 November 2021.

² Clare Chambers-Jones, 'Consumer Debt, Financial Difficulties & Poverty during COVID-19' (*Open University School of Business*, 2021) <<https://business.school.open.ac.uk/news/consumer-debt-financial-difficulties-poverty-during-covid-19>> accessed 7 October 2021.

³ *Ibid.*

⁴ Susan Bright, 'Personal circumstances often not disclosed in repossession cases' (*University of Oxford*, May 2014) <<https://www.ox.ac.uk/news/2014-05-07-personalcircumstances-often-not-disclosed-repossession-cases>> accessed 2 May 2021.

⁵ Lisa Whitehouse, 'The First Legal Mortgagor: A Consumer Without Adequate Protection?' (2015) 38 *Journal of Consumer Policy* 161,161.

⁶ The Coronavirus Act 2020.

⁷ Because of the coronavirus (COVID-19), your landlord must have given you a longer notice period if you received notice between March 26, 2020, and September 30, 2021. If you were given notice between March 26

Although legislation ensured that bailiffs do not serve eviction notices or carry out evictions and mortgage repossessions,⁸ the FCA guidance⁹ limits the use of deferral mortgage payments only in exceptional circumstances arising out of COVID-19. The limitation on the use of mortgage or other contractual payments deferral pushes many debtors towards losing their homes. This section aims to assess the current protection and sufficiency of a debtor's human rights if he or she is about to lose his or her property. The important legislation,¹⁰ such as England and Wales's Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) Regulations 2020,¹¹ is being scrutinised to ensure consumer protection in the regulated market. This study investigates whether the legal and regulatory framework adequately protects consumers in times of financial distress and provides an adequate safety net.

Aside from that, this section explores whether the current legal and regulatory framework protects consumers from unavoidable financial crises. It is critical to understand that two hugely different regulatory systems are in place in the UK, based on which the mortgage concept is implemented. The first regulatory system of financial services supervised and governed by the FCA was founded on the concept of the mortgagor as a consumer and was based on public law. The other is property law, which is a private law regulation implemented by the judiciary and supported by a view of the mortgagor as a landowner.¹² An examination is made of whether debtors' human rights are adequately protected by statutory and regulatory systems during a financial or economic crisis. What is more, how do the two legal systems, 'private and public' protect borrowers' rights who run into financial difficulties or have mental health problems as a result of debt? Understanding the English regulatory framework is essential before diving into specific issues. From broad oversight and self-regulation to greater

and August 28, 2020, your landlord must have given you three months to vacate the property. If you were given notice between the 29th of August 2020 and the 31st of May 2021, your landlord must have given you 6 months to vacate the property. If you were given notice between the 1st of June 2021 and the 30th of September 2021, your landlord must have given you four months to leave. (Private renting for tenants: evictions-<https://www.gov.uk/private-renting-evictions>).

⁸ Gov UK 'Guidance for landlords and tenants' (*GOV UK*, 7 April 2021) <<https://www.gov.uk/government/publications/covid-19-and-renting-guidance-for-landlords-tenants-and-local-authorities/coronavirus-covid-19-guidance-for-landlords-and-tenants>> accessed 2 May 2021.

⁹ FCA Finalised guidance, 'Mortgages and Coronavirus: Tailored Support Guidance' (*FCA*, November 2020) <<https://www.fca.org.uk/publication/finalised-guidance/mortgages-coronavirus-tailored-support-guidance.pdf>> accessed 2 May 2021.

¹⁰ The Consumer Credit Act 2015, Consumer Credit Directive (2008/48/EC) (CCD) and Mortgage Credit Directive (2014/17/EU) (MCD).

¹¹ The Debt Respite Scheme (Breathing Space) does not come into force until 4 May 2021.

¹² Lisa Whitehouse, 'The First Legal Mortgagor: A Consumer Without Adequate Protection?' (2015) 38 *Journal of Consumer Policy* 161,161.

control of risks, the legislature's attitude toward financial markets has evolved since the financial crisis of 2008.¹³ However, the financial crisis prompted the government to conduct a comprehensive review of all aspects of the financial regulatory structure, including consumer credit. Following its review, the British government concluded that the separation of the Office of Fair Trading¹⁴ (OFT) and the Financial Conduct Authority (FCA) in consumer credit caused a fundamental weakness in financial services regulation. As a result, the government decided to bring consumer credit under the FCA's regulatory regime alongside other retail financial services.¹⁵ It was as a result of this that on 1st April 2014, consumer credit was taken over by the FCA. Firms engaged in consumer credit activities¹⁶ are now regulated by the Financial Conduct Authority rather than the OFT, which was abolished. The government's overarching goal is to replace the statutory basis of consumer credit regulation under the Consumer Credit Act 2015¹⁷ with a rules-based approach, which would result in a simpler, more flexible, and responsive regime, as well as provide some safety nets to protect debtor rights.

In the UK, the regulatory framework for consumer credit activities combines the Financial Services and Markets Act 2000¹⁸ and its secondary legislation¹⁹ and retained provisions in the Consumer Credit Act 1974.²⁰ Consumer credit and its excessive use have been identified as critical elements that contribute to family financial vulnerability and cause problems for debtors. It means that unexpected circumstances can put these families in danger of becoming over-indebted. To create a safe market, the EU regulated the consumer credit market in 2008 through the Consumer Credit Directive (DIR 2008/48/EC).²¹ The Directive is fully implemented²² into the UK law. It aims to protect debtors' human rights by preventing

¹³ Elvira Mendez Pinedo, 'Will the Directive 2014/17/EU on mortgage credit protect consumers in the next economic and/or financial crisis?' (June 2018) 8 *Juridical Tribune* 564,566.

¹⁴ The OFT was closed down on 31 March 2014 and its responsibilities were transferred to a number of different bodies, including the Competition and Markets Authority (CMA) and the Financial Conduct Authority (FCA).

¹⁵ Commercial Banks (Banking), Investment Banks (Wealth management), Insurance Companies (Insurance), Brokerage Firms (Advisory), Planning Firms (Wealth management, Advisory), CPA Firms (Wealth management, Advisory).

¹⁶ Entering into a regulated credit agreement as a lender, credit broking, debt adjusting, debt counselling, debt collecting, debt administration, providing credit information services and providing credit references.

¹⁷ Consumer Credit Act 2015.

¹⁸ Financial Services and Markets Act 2000.

¹⁹ Financial Services and Markets Act 2000 (Commencement of Mortgage Regulation) (Amendment) Order 2002, SI 2002/1777.

²⁰ Consumer Credit Act 1974 (as amended in 2006).

²¹ Caritas Europa, 'The EU Must Prevent Over-Indebtedness' (*Caritas Europa*, 15 July 2019) <<https://www.caritas.eu/the-review-of-the-consumer-credit-directive/>> accessed 29 April 2020.

²² The Consumer Credit (EU Directive) Regulations 2010, SI 2010/1010.

The Consumer Credit (Total Charge for Credit) Regulations 2010, SI 2010/1011.

The Consumer Credit (Disclosure of Information) Regulations 2010, SI 2010/1013.

over-indebtedness, providing a safety net for debtors, and ensuring that lenders' irresponsible lending practises are limited in consumer credit markets.

Credit Agreements and Debtors Protection

According to HM Land Registry data, house prices in the UK have gradually increased over the last two decades, causing consumers to borrow more money and spend a larger portion of their household income on repaying their residential property loans.²³ Debtor protection is essential since the amount of money being lent is often significant, affecting most debtors' private means.²⁴ Debtor human rights protection in the mortgage lending sector is a fundamental and exciting issue that requires attention because of its importance to the financial services sector. A lack of knowledge or experience with financial services puts many debtors at risk, making this a critical topic.²⁵ Over-indebtedness among consumers is a risk associated with the increasing use of loans, which could limit their access to an adequate standard of living or healthcare.²⁶ Furthermore, consumers may be vulnerable as a result of significant changes in their income (unemployment) or unexpectedly high necessary costs, such as a medical emergency. Debtors in this vulnerable position may be willing to enter into unfair agreements; in other words, desperation may force individuals to enter into excessively onerous agreements.²⁷ It is possible for consumers to have difficulty understanding the terms and conditions of a mortgage lending agreement because it is a long-term financial commitment with numerous features and clauses.²⁸ This difficulty may be caused by misleading practices, hidden terms, or debtors not being aware of problematic issues.²⁹ To make matters worse, the borrower may be unable to make informed decisions due to a lack of understanding of the mortgage agreement's problematic terms or the absence of adequate financial information or

The Consumer Credit (Agreements) Regulations 2010, SI 2010/1014.

The Consumer Credit (Amendment) Regulations 2010, SI 2010/1969.

The Consumer Credit (Advertisements) Regulations 2010, SI 2010/1970.

²³ HM Land Registry, 'House Price Statistics' (*HM Land Registry*, 13 December 2020) <<https://landregistry.data.gov.uk/app/ukhpi/browse?from=2000-01&location=http%3A%2F%2Flandregistry.data.gov.uk%2Fid%2Fregion%2FUnited-kingdom&to=2020-11-01&lang=en>> accessed 13 December 2020.

²⁴ Natalie Staff, 'Consumer Protection in Mortgage Lending' (2016) 3 *European Journal of Comparative Law and Governance* 385,385.

²⁵ P. Rott, 'Chapter 33: The Low-Income Consumer in European Private Law, in *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Mickitz*, Purnhagen Kai & Rott Peter (eds), (2014) 3 *Studies in European Economic Law and Regulation* 675, 676.

²⁶ Chrystin D Ondersma, 'A Human Rights Framework for Debt Relief' (2014) 36 *University of Pennsylvania Journal of International Law* 269, 297.

²⁷ Chrystin D Ondersma, 'A Human Rights Approach to Consumer Credit (2015) 90 *Tulane Law Review*, 373,379.

²⁸ Hans Wolfgang Micklitz and others, *Understanding EU Consumer Law* (Intersentia Publishers 2009) 180.

²⁹ Natalie Staff, 'Consumer Protection in Mortgage Lending' (2016) 3 *European Journal of Comparative Law and Governance* 385,387.

assistance.³⁰ Another potential reason debtors might misunderstand the contract is that their consideration is more directed towards the purchased property than the offer letter or mortgage agreement. Therefore, consumers might ignore the fact that the mortgage agreement is the product that they are about to purchase.³¹

Lenders and mortgage brokers may take advantage of a borrower's lack of knowledge in order to make a quick sale. Many debtors do not understand many of the key terms of their mortgage contracts, how the various jargon works in law, and the consequences if they do not meet the loan repayment terms. Furthermore, the complexity of mortgage products is increasing all the time. A wide range of products and service providers are available in the financial market, but many consumers lack the necessary financial knowledge to make the most of them. Mortgage advice is sought by many consumers because of the complexity of credit products, the consequences of their product choice, and the increasing difficulty in obtaining mortgage loans. Nonetheless, there is a general lack of trust in the mortgage advice provided, resulting in low consumer confidence. As a result, the multifaceted nature of mortgage lending necessitates a high level of consumer protection. Debtors' rights to information in order to make informed decisions and protection against unfair terms may be violated by lenders and brokers in order to further their own interests.

To address the issue and harmonise the EU mortgage market, the Mortgage Credit Directive (MCD) was introduced in February 2014 and implemented in the UK on March 21, 2016. The following section of this chapter briefly examines the key provisions of the Consumer Credit Act 1974³² and Financial Services and Markets Act 2000³³ (FSMA), with a focus on the implementation of the Directives to assess available debtor protection in the UK. However, for the time being, the focus will be on the Financial Services and Markets Act 2000. It addresses a wide range of legal issues, including marketing rules, anticompetitive practices, responsible lending regimes, and consumer protection.

³⁰Chrystin D Ondersma, 'A Human Rights Approach to Consumer Credit (2015) 90 *Tulane Law Review*, 373, 386.

³¹ Lisa Whitehouse, 'The First Legal Mortgagor: A Consumer Without Adequate Protection?' (2015) 38 *Journal of Consumer Policy* 161,174.

³² Consumer Credit Act 1974 (as amended in 2006).

³³ Financial Services and Markets Act 2000.

Consumer Credit Laws

The European Council adopted the Consumer Credit Directive (2008/48/EC) in May 2008 to establish a coordinated set of rules within the credit market core areas among EU member states; in the UK, Consumer Credit Directive was implemented through the Consumer Credit Act 1974.³⁴ Aiming to improve consumer confidence and understanding of credit products and to help people make informed decisions about taking out unsecured³⁵ loans, the legislation was passed to ensure a high level of consumer protection across Europe. For example, a personal loan or credit card that does not require the borrower to put a lien on their assets if they fall behind on payments is considered unsecured credit. Unsecured debt causes significant mental health and social crises and its impact on the debtors is discussed in the last section of this study. The most common asset used for security in secured loan cases is a borrower's home, which the lender may repossess if the borrower fails to make contractual payments on time. Secured lending products are not covered by the Consumer Credit Act 1974. Since February 2011, providers offering any type of unsecured credit have been required to follow the new rules.

In some cases, some of the changes were implemented before the financial crisis. The research focuses on the fundamental changes that were made to the UK consumer regulatory framework. Among the most significant changes brought about by the Consumer Credit Act 1974 were the following:

- Lenders must adequately explain the terms of the credit they are offering.
- In order for lenders to provide or increase credit, they must verify the borrower's ability to repay.
- Requirements pertaining to databases used to check credit.
- Consumers have a 14-day cooling-off period during which they can cancel their credit agreement.

The CCA 1974 has led providers to assess the debtors' creditworthiness better and introduced fundamental rights to credit consumers for fair dealing. The FCA took over the regulation of consumer credit from the OFT in April 2014 and have had all the interest and implementation powers since then under FSMA 2000³⁶ and Financial Services Act 2012.³⁷

³⁴ Consumer Credit Act 1974 (as amended in 2006).

³⁵ An unsecured line of credit is not guaranteed by any asset and lenders usually charge higher rate of interest.

³⁶ Financial Services and Markets Act 2000.

³⁷ Financial Services Act 2012.

Consumer credit laws do not provide comprehensive protection to the debtor alone; it only regulates the assumption of how the lender should lend and provide certain rights to the debtor. The legal framework around unsecured lending is not tough enough to protect the debtor and requires a safety net against default. The unsecured lender typically uses aggressive debt collection methods, which mostly puts debtors into mental health crises. The collection of non-credit (Council tax, Parking fines) related debts by rapacious firms can sometimes cross the line and treat the debtor mercilessly. In the BBC's report, some bailiffs have been known to be abrasive, and it has been reported that people have been marched to ATMs to pay their debts.³⁸ In 2014, the government enacted reforms to protect citizens from unfair practices, with a focus on how bailiffs collect the debt. The CEO of Citizens Advice criticises and admits that government agencies and local governments are the worst in class when it comes to debt collection, despite the fact that they should be setting the standard.³⁹

A debtor reported to BBC how they felt after being chased for debt by bailiffs, "I want to die. They have made me feel so ill and scared. I cannot go outside the house, and I keep my windows closed even when it is hot."⁴⁰

Over-indebtedness frequently begins with financial stress and an unexpected expense, such as an accident or job loss. A small amount of additional debt can quickly spiral out of control for people living on a tight budget. Loans intended to be temporary solutions (e.g., payday loans) run the risk of becoming a permanent problem.⁴¹ Finally, preventing indebtedness entails improving people's basic financial management skills, particularly among the low-skilled and unemployed. More can and should be done to encourage financial education among young people and to ensure that services are in place to assist vulnerable households in making better budget choices. The Debtor needs to borrow, whether to invest in their future or overcome a difficult life period. However, borrowing must not become a trap out of which they cannot escape.⁴² Lenders must focus more on the debtor's right to information and adequate assistance to ensure the debtor's understanding of the commitments made, and it is the lender's responsibility to ensure that the information is provided in a way that the debtor understands. The consumer credit laws are effective, but their effectiveness is being challenged

³⁸ Hannah Richardson, 'Government bodies 'worst for aggressive debt collection' (*BBC*, 26 July 2018) <<https://www.bbc.co.uk/news/education-44953430>> accessed 7 October 2021.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Caritas 'Credit Should Not Be a Trap: How to Prevent Over-Indebtedness' (*Caritas*, 15 July 2019) <<https://www.caritas.eu/how-to-prevent-over-indebtedness/>> accessed 29 April 2020.

⁴² *Ibid.*

and not monitored to ensure that the safety net is fully available to the debtors and provide the necessary protection of their human rights as intended by the legislature. Hence the protection afforded by the consumer credit laws is inadequate and cannot protect consumers from being thoroughly abused by the providers.

In order to understand the current state of mortgage regulation in the UK, one must first understand the genesis of the regulations that govern it. Mortgages have been around for centuries, but it wasn't until the 1840s that building societies⁴³ made them a standard offering.⁴⁴ As homeownership soared in the twentieth century, they became commonplace items on the market. It's always been the case that building societies and banks are heavily regulated. Mortgages, as a product, were not regulated⁴⁵ by law until 2004, however. Regulation of mortgages for homeowners was established by the Financial Services and Markets Act of 2000 and was implemented at that time by the former Financial Services Authority (now known as the Financial Conduct Authority).⁴⁶ Between 1997 and 2004, the Council of Mortgage Lenders (CML) mortgage codes were a voluntary regulation system. The Independent Mortgage Code Compliance Board oversaw its implementation, which applied to both lenders and intermediaries. Currently, mortgage regulation is divided into two parts. The first is known as Mortgage Conduct Business Rules (MCOB), and it is administered by the Financial Conduct Authority (FCA). As a result of the Mortgage Market Review⁴⁷ (MMR) in 2014, these were significantly revised. The second set of regulations is predominantly for credit providers, known as Prudential Regulation, overseen by Prudential Regulation Authority⁴⁸ (PRA). The PRA is responsible for determining the minimum amount of capital that banks and other financial institutions should have on hand in order to protect themselves from credit risk and to help stabilise the overall financial system. The Prudential Regulatory Authority (PRA) and

⁴³ Friendly Societies Act 1793.

⁴⁴ CML 'The Evolution of Mortgage Regulation - Council of Mortgage Lenders' (CML, 2020) <<https://www.cml.org.uk/policy/policy-updates/all/the-evolution-of-mortgage-regulation/>> accessed 29 April 2020.

⁴⁵ Lender-borrower relationships in the UK are governed by the Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB). In October 2003, the Financial Services Authority (FSA) issued them. After October 31, 2004, these regulations apply to all Regulated Mortgage Contracts. The Financial Conduct Authority was renamed the Financial Services Authority in April 2013.

⁴⁶ Financial Services and Markets Act 2000.

⁴⁷ The Mortgage Market Review (or MMR) was a detailed investigation of the mortgage market done by the British government following the global financial crisis of 2008. It was first suggested in 2009 and became law in 2014. The adjustments made as a result of its findings, which indicated that there were too many instances of high-risk lending before the 2008 financial crisis, are related to its findings. Many people were unable to make their mortgage payments; as a result, exacerbating the subsequent turmoil. As a result, the mortgage industry has become more competitive. There will be no more self-certified mortgages (often known as "liar loans"), fewer interest-only mortgages, and required guidance on all mortgage products.

⁴⁸ Financial Services and Markets Act 2000, s 2A.

the Financial Conduct Authority regulate individual lenders⁴⁹ (FCA) in addition to additional macro-prudential regulation in the form of recommendations and directions from the Financial Policy Committee⁵⁰ (FPC). On March 25, 2015, Parliament passed legislation granting the FPC direction over housing tools, specifically limits on residential mortgage lending based on loan-to-value (LTV) and debt-to-income (DTI) ratios. The measures came into effect on April 6, 2015. Furthermore, all home-owner mortgages, including second charge mortgages, are now regulated mortgage contracts in terms of conduct. The most recent significant regulatory development is the incorporation and implementation of the Mortgage Credit Directive (2014/17/EU) into UK domestic law in order to ensure mortgage consumer protection is on par with other EU member states.

This section's primary goal is to determine if the regulatory provisions will protect consumers from unavoidable financial crises. Primarily, it is critical to understand that the concept of a mortgagor is based on two quite different regulatory systems in the United Kingdom. The first system of financial services regulation overseen and governed by the FCA is based on a consumer-oriented view of the mortgagor and is derived from public law. The other is a view of the mortgagor as a landowner⁵¹ supported by property law, land law, and private law regulations imposed by the courts. According to this argument, mortgagors aren't treated fairly and consistently because of the existence of these two regimes. Financial Conduct Authority has only a limited level of checks in cases where the debtor is vulnerable and their rights are being infringed by the provider, and thus the debtor needs more protection. The new reforms are likely to protect only a portion of the current system, leaving borrowers completely dependent on the Financial Conduct Authority.

Regulatory System of Debtor Protection and its Key Attributes

Under the consumer protection regulatory system, financial services are supervised and governed by the FCA, which is based on public law and is based on a conception of the mortgagor as a consumer. The section of the study below highlights briefly how the UK regulatory framework protects consumer human rights when considering obtaining a regulated mortgage if they suffer from mental health issues or face an uncertain financial crisis. Important regulatory provisions have been implemented to require credit providers and intermediaries to

⁴⁹ Financial Services and Markets Act 2000, s 1A.

⁵⁰ The Financial Policy Committee (FPC) was established in 2013 as part of a new regulatory structure enacted after the financial crisis to ensure financial stability headed by the Bank of England.

⁵¹ Lisa Whitehouse, 'The First Legal Mortgagor: A Consumer Without Adequate Protection?' (2015) 38 Journal of Consumer Policy 161,161.

take preventive measures to avoid ‘irresponsible lending’ and borrowing behaviours. One of the main goals of the regulatory provisions is to avoid a situation similar to what occurred in the United States in 2007-2008 when subprime mortgage lending caused global financial crises. The regulatory provisions introduced by the Mortgage Credit Directive and later implemented by the FCA established standard rules across the EU and the UK that consumers must be better informed and compare and choose between competitors' products on the mortgage offer prior to a binding contract. These safeguards are intended to better protect mortgage consumers from unfair and misleading practices. The FCA's secured lending regulatory regime applies to all consumer loans made to purchase a property (typically a home, but not always), including loans guaranteed by a mortgage or another comparable security, guarantee, or lien.⁵²

Considering that the economics of consumer protection regulation is essentially contained in the economics of information,⁵³ it is not surprising that consumer human rights are first and foremost provided through the duty of information. European Standardised Information Sheets (ESIS) must be provided to consumers by direct and indirect mortgage providers as well as mortgage intermediaries (Mortgage Brokers). This means that the customer is now aware of the most important aspects and dangers associated with the mortgage contract. Consumers should be aware of all available mortgage products, their various characteristics, and the financial commitments they will make. As a result, lenders must provide consumers with standard information (ESIS), allowing them to shop around for the best product for them and better understand their future financial commitments, including their benefits and drawbacks. Most lenders do not require debtors to seek independent legal advice, which is something that can be changed under FCA regulations in order to improve the protection of debtor rights. This will also provide the debtor with an opportunity to reconsider the commitments they are making in the legal context if they so choose. When fixed interest rates are in effect, the total cost of mortgage credit must be made clear before the loan can be taken out. The cost of a variable-rate mortgage must be recalculated and disclosed at the agreed-upon time if the debtor prefers this option (i.e. once a year). Debtors should be warned of possible interest rate changes or other changes to the credit in long-term contracts and the ESIS includes worst-case scenarios regarding variable interest rates and the depreciation of the domestic

⁵² Elvira Mendez Pinedo, ‘Will the Directive 2014/17/EU on mortgage credit protect consumers in the next economic and/or financial crisis?’ (June 2018) 8 *Juridical Tribune* 564,565.

⁵³ Pauline M. Ippolito and David T. Scheffman, *Federal Trade Commission Bureau of Economics, Consumer Protection Conference* (Federal Trade Commission, 26 April 1984) <<https://www.ftc.gov/sites/default/files/documents/reports/empirical-approaches-consumer-protection-economics/198404consumereconomics.pdf>> accessed 20 November 2021.

currency in cases of foreign currency loans. All charges are included in the overall cost of credit.⁵⁴

Lenders and credit intermediaries should pay more attention to and elicit more information from debtors about issues such as changes in their health, ongoing problems such as physical disability, including visual and hearing impairment, and life events such as the death of a family member or a friend, or a loss of income. Reliance issues such as low and erratic income, excessive debt, and a lack of a support structure can be investigated in order to determine the debtor's required support. Before making a final loan offer, any concerns about their mental capacity, language abilities, or learning disabilities should be investigated. Lenders can play an important role in limiting debtor exposure to debt-related problems and safeguarding them against defaults by exercising a little extra due diligence.

The FCA's secured lending regulatory provisions aim to prevent over-indebtedness in tandem with a better supply of objective information. First, before legally binding the private credit agreement, consumers are given a guaranteed period of reflection (a right of withdrawal).⁵⁵ Consumers now have the legal right to repay their loans early, which reduces the total remaining cost of the mortgage. Credit providers may be entitled to fair compensation in such cases for any costs directly and exclusively related to issues of early repayment. Before the introduction of MCD⁵⁶, the norm in the credit provider market was to charge higher penalties should a consumer wish to settle their debt early. This has now been abolished. According to the FCA's MCOB⁵⁷ rules, lenders and credit intermediaries (individuals or businesses who provide information and assistance to consumers looking for a mortgage loan) must first act honestly and transparently in the best interests of the consumer.⁵⁸ Second, they must ensure that their employees have up-to-date knowledge and training on mortgage or loan products and that customers are provided with all necessary information prior to signing any binding contract.⁵⁹ Finally, a new approach to protecting consumers is referred to as

⁵⁴ Elvira Mendez Pinedo, 'Will the Directive 2014/17/EU on mortgage credit protect consumers in the next economic and/or financial crisis?' (June 2018) 8 Juridical Tribune 564,565.

⁵⁵ *Ibid.*

⁵⁶ The Mortgage Credit Directive Order 2015, SI 2015/910 & Mortgage Credit Directive (Amendment) Order, SI 2015/1557.

⁵⁷ Conduct of advising and selling, Disclosure of information, Terms of offer documents are all covered by the MCOB regulations. The obligation to treat customers fairly, Keeping records is a legal obligation. Planned repayments of equity, Repossessions, and arrears formula for calculating the compound annual growth rate Calculation of the total credit charge, Charges.

⁵⁸ Elvira Mendez Pinedo, 'Will the Directive 2014/17/EU on mortgage credit protect consumers in the next economic and/or financial crisis?' (June 2018) 8 Juridical Tribune 564,565.

⁵⁹ *Ibid.*

‘responsible lending’ which is accomplished by enforcing new comprehensive standards to assess mortgage applicants' creditworthiness in order to ensure the consumer's affordability and that mortgagors can meet their repayment obligations introduced under MCOB.⁶⁰ According to the FCA report⁶¹ published on 25 March 2019. The FCA identified three key themes. The report is structured along with these themes, which relate to:

- Rights and protections for consumers
- Information requirements
- Sanctions (including unenforceability)

Instead of requiring banks and credit institutions to provide advice, warnings, or denials of credit as per the Consumer Credit Act 1974,⁶² the MCOB seeks to create a market where responsible credit (lending/borrowing) is the rule rather than the exception.⁶³ Therefore, the debtor can be better protected if heavy sanctions are imposed on the credit intermediary who fails to adhere to CCA 1974⁶⁴ provisions and breach MCOB⁶⁵ rules. A better monitoring mechanism is required for the protection of the debtor's human rights. As previously mentioned, the regulator's primary goal is to protect the human rights of consumers, but the available enforcement system is ineffective, and the affected debtor has no recourse against the lender. Taking private legal action against the lender provides relief for the debtor, but the costs involved are a hindrance for the struggling debtor.

Responsible Lending Approach- Concept and Context

Regulators have adopted the phrase ‘Responsible Lending Approach’ as a trademark for reforms in consumer credit regulation following the financial crisis and rising levels of debt in society. Financial sector regulation is now widely accepted as being responsible for protecting consumers from excessive debt (World Bank 2013).⁶⁶ Consumers' rights must be protected, particularly in the mortgage credit market, where over-indebtedness can have serious

⁶⁰ FCA, ‘FCA Handbook’ (FCA, 2021) <<https://www.handbook.fca.org.uk/>> accessed 20 November 2021.

⁶¹ FCA report, 'Review of retained provisions of the Consumer Credit Act: Final report' (*Financial Conduct Authority*, March 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/788713/5857_CCA_FINAL_Report_WEB.PDF> accessed 19 April 2020.

⁶² Consumer Credit Act 1974 (as amended in 2006).

⁶³ Elvira Mendez Pinedo, ‘Will the Directive 2014/17/EU on mortgage credit protect consumers in the next economic and/or financial crisis?’ (June 2018) 8 *Juridical Tribune* 564,572.

⁶⁴ Consumer Credit Act 1974 (as amended in 2006).

⁶⁵ FCA, ‘FCA Handbook’ (FCA, 2021) <<https://www.handbook.fca.org.uk/>> accessed 20 November 2021.

⁶⁶ The World Bank, ‘Responsible Lending’ (*The World Bank*, October 2013) <<https://documents1.worldbank.org/curated/en/596151468336064796/pdf/832840WP0GFDR00Box0382083B00PUBLIC0.pdf>> accessed 20 November 2021.

consequences for consumers, such as repossession, loss of family home, mental health issues, and the stability of the financial system. The concept of ‘responsible lending’ is a policy concept. Though it is used to refer to a wide range of procedures or regulatory tools, the term itself serves no purpose other than to paint a broad picture of the desired outcome that the legislator or regulator seeks to achieve.⁶⁷ The policy, which focuses primarily on encouraging responsible behaviour among market participants, is part of a larger context of financial sector management and reforms. The legislator in this area is inclined to strike a balance between several financial sector policy objectives: financial inclusion, financial sector stability, financial service provider integrity, and financial consumer protection.⁶⁸ As a result of the financial crisis, the Financial Conduct Authority (FCA) has implemented a regulatory framework aimed at creating an internal mortgage credit market that is open to all market participants (inclusion).⁶⁹ The FCA also seeks to promote the stability of the mortgage market, responsible behaviour by lenders, and high levels of consumer protection.⁷⁰

A broad definition of the policy, consistent with the Mortgage Credit Directive's approach could look like this: “The policy aimed at ensuring responsible behaviour of participants in the financial market including both lenders and borrowers particularly focused on preventing over-indebtedness of borrowers, which is given shape through various regulatory mechanisms, and which may also be pursued through other legal means, such as remedies in private law, or non-legal means such as education.”⁷¹ Preventing over-indebtedness among borrowers may be defined as the goal of policy, but policymakers are free to tailor their responsible lending policies to the specific context in which they work. The Financial Policy Committee (FPC) has issued a recommendation on income ratios in order to reduce excessive household debt. According to the recommendation,⁷² 15% of mortgages granted by lenders who lend more than £100 million each year should not exceed an income ratio of 4.5. The lender must always act honestly, fairly, and professionally in the best interests of the consumer

⁶⁷ Mak, 'What Is Responsible Lending the EU Consumer Mortg.Pdf' (*Springer*, 2015) <<https://link-springer-com.ezproxy.brunel.ac.uk/content/pdf/10.1007/s10603-015-9301-9.pdf>> accessed 2 May 2021.

⁶⁸ FCA, ‘FCA Handbook-MCOB 11’ (FCA, 2021) <<https://www.handbook.fca.org.uk/>> accessed 20 November 2021.

⁶⁹ ‘Interactive Single Rulebook: Mortgage Credit Directive’ <<https://eba.europa.eu/regulation-and-policy/single-rulebook/interactive-single-rulebook/5802>> accessed 2 May 2020. Mortgage Credit Directive, recital 2.

⁷⁰ Ibid- Mortgage Credit Directive, recitals 3–6.

⁷¹ Compare World Bank report [2013], in particular para. 23 and para. 32. The report does not discuss private law liability. That this is a possibility, as well as sanctions in criminal law, is however confirmed in the EU Mortgage Credit Directive, recital 83.

⁷²FCA, ‘FCA Handbook’ (FCA, 2021) <<https://www.handbook.fca.org.uk/>> accessed 20 November 2021.

and never avoid its duties or liabilities to the consumer.⁷³ When communicating with a consumer, whether orally or in writing, the lender must take reasonable steps to ensure that the communication is transparent, fair, and not misleading.⁷⁴ The lender must take into account the consumer's knowledge when doing this.⁷⁵ When determining a customer's creditworthiness,⁷⁶ a lender must follow a formal policy that specifies the factors it will consider. Unfortunately, many lenders⁷⁷ have now begun to engage in pre-financial-crisis practices, offering certain mortgage clients five and a half to seven times their income. The majority of lenders will approve the loan based on the most recent month's bank statements and payslips.

The FCA rules book MCOB 11⁷⁸ detailed the rules for a credit provider that the policy must contain, including how the lender is to assess income and expenditure, how future interest rates are to be taken into account, and the calculations used to determine loan affordability. Under the MCOB 11, it is mandated that lenders perform an affordability⁷⁹ and creditworthiness assessment⁸⁰ on consumers before agreeing to lend them money. Income, assets, expenses, and current and future debt are all taken into account when determining whether a loan is affordable. The responsible lending approach aims to restrict irresponsible and aggressive lending to protect consumers. In practice, more prime and sub-prime lenders are now carrying out consumer affordability checks rather than using income multiple of incomes to assess consumer affordability for a mortgage. With this new regime, regulators and lenders are working together to limit unnecessary debt piling. More scrutiny of the consumer income is required in order to establish the correct amount of loan affordability. The self-employed consumers required special attention due to the vulnerability and volatility in their income, especially after the COVID-19 situation because of the disruption to the income they suffered. Along with the regulator and lenders are to ensure affordability and protection. It is also the responsibility of consumers to avoid unnecessary debt and only commit to what is affordable to them.

⁷³ FCA, 'Mortgages and Home Finance: Conduct of Business Sourcebook' (*FCA Handbook*- Release 50, May 2020) <<https://www.handbook.fca.org.uk/handbook/MCOB.pdf>> accessed 25 May 2020
MCOB 2: Conduct of business, section 2.5(A-6): The customer's best interests.

⁷⁴ *Ibid.*, MCOB2, section 2(2) (6R)-section 2(2) (8G).

⁷⁵ *Ibid.*

⁷⁶ FCA, 'MCOB 11 Responsible lending, and responsible financing of home purchase plans' (FCA, 2021) <<https://www.handbook.fca.org.uk/handbook/MCOB/11/?view=chapter>> accessed 20 November 2021.

⁷⁷ Nationwide, Habito etc.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.* Section 11 (6) (2R) (2).

⁸⁰ *Ibid.* Section 11(6) (2R). This is the main rule, exceptions provided in Section 11(6) (3R), Section 11(6) (57R) and Section 11(7R) refers to interest roll-up mortgages, forbearance situations, additional borrowing that is required to protect the creditor's security or where a contract variation fee is added to the mortgage.

The consumer market is back to the normal pre-COVID-19 state now, and the government and lenders are doing their best to boost the economy. The government has fuelled the housing market by reducing the stamp duty rates⁸¹ and lenders by introducing the helping hand scheme⁸², which allows consumers to borrow up to five and half times their income. Further to this, the government also launched a mortgage guarantee-backed scheme to help young buyers with highly leveraged loans. Under the scheme, the government guarantees 95% of mortgages to encourage lenders to offer low-deposit deals, which they had withdrawn from the market in response to the coronavirus crisis.⁸³ However, the regulator needs to ensure that the concept of responsible lending must be upheld to provide a better safety net to the borrower by not lending more than they can afford.

The Conception of the Mortgagor in Private Law & Development

This research look at land law and private law regulation as implemented by the judiciary, with a focus on the mortgagor as a landowner. The mortgagee's role in land law has evolved over time, but the mortgagor has rarely been viewed as a consumer.⁸⁴ Consumer protection has rarely been applied to land purchases despite the fact that current mortgages bear many of the characteristics of consumer goods, with individuals purchasing credit for private use in a market that is more regulated and competitive by competition and self-regulation than by law.⁸⁵ There has never been a consensus that residential property mortgages should be regulated under consumer credit laws, as Sarah Brown points out.⁸⁶ The exclusion of the first legal mortgage, on the other hand, cannot be explained solely on the basis that the transaction involves land because second mortgage agreements appear to fall squarely within the protective confines of consumer law.⁸⁷ The first legal mortgage, however, differs from the second mortgage in that it involves the purchase of land.

⁸¹ Reduced rates of Stamp Duty Land Tax (SDLT) will apply for residential properties purchased from 8 July 2020 until 30 June 2021 and from 1 July 2021 to 30 September 2021 inclusive.

⁸² Lauren Smith, 'Nationwide Increases the Amount it Will Lend First-Time Buyers' (*Money Expert*, April 2021) <<https://www.moneyexpert.com/news/nationwide-increases-the-amount-it-will-lend-first-time-buyers/>> accessed 7 October 2021.

⁸³ *Ibid.*

⁸⁴ Lisa Whitehouse, 'The First Legal Mortgagor: A Consumer Without Adequate Protection?' (2015) 38 *Journal of Consumer Policy* 161,162.

⁸⁵ Colin Scott and Julia Black, *Cranston's Consumers, and the Law (Law in Context)* (3rd edn, London: Butterworths 2000) 8.

⁸⁶ Sarah Brown, 'The Consumer Credit Act 2006 Real Additional Mortgagor Protection?' (2007) (July/Aug), *The Conveyancer and Property Lawyer* 316, 325.

⁸⁷ Lisa Whitehouse, 'The First Legal Mortgagor: a Consumer Without Adequate Protection?' (2015) 38 *Journal of Consumer Policy* 161,165.

Consequently, it is impossible to deal with house and land purchases, subject to different regulations.⁸⁸ That distinct type of regulation is perhaps best described as land law, a branch of property law that has been infused with its distinctive characteristics and principles over the centuries.⁸⁹ Because of its history and complexity, the system of legal rules and principles that govern the purchase of land has been established. Land law has become increasingly abstracted since the thirteenth century as the tenurial system was gradually phased out and replaced by a hierarchy of interests and estates.⁹⁰ Following on from the preceding section, this section will look at how this particular set of legal rules views the borrower and, perhaps more importantly, how this impacts the legal protections provided to each. What's interesting about land law's concept of a mortgagor is that it has changed dramatically over time, leading us to conclude that land law is not averse to further change. For most of the sixteenth century, land law was torn between treating borrowers as rational, self-reliant actors who could make well-informed decisions and as helpless, credit-dependent victims. This friction was characterised between the sixteenth and late nineteenth centuries by the conflicting views adopted by the courts of common law and equity. Simpson notes that the tendency of common law courts to adopt a formal interpretation of agreements, combined with the introduction of the 'classical common-law mortgage' in the early sixteenth century,^{91,92} resulted in a situation in which:

"The common law courts construed mortgage transactions strictly and unsympathetically. If the mortgage provided that the mortgagor was to lose his land through defaulting in payment upon a fixed day, then that was that; it mattered nothing that he defaulted by a single day, or that the property was worth infinitely more than the debt."⁹³

The mortgagor was assumed to be a landowner, and the mortgage was a commercial transaction negotiated by parties with similar bargaining power.⁹⁴ The courts of equity, on the other hand, began intervening in the contractual relationship between the mortgagor and the mortgagee in the mid-sixteenth century to protect the mortgagor's interests, including the

⁸⁸ Peter Smith and Dennis Swann, *Protecting the Consumer An Economic and Legal Analysis* (Oxford: Martin Robertson 1979) 18.

⁸⁹ Lisa Whitehouse, 'The First Legal Mortgagor: a Consumer Without Adequate Protection?' (2015) 38 *Journal of Consumer Policy* 161,165.

⁹⁰ Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2008) 640.

⁹¹ Alfred William Brian Simpson, *A History of the Land Law* (OUP 1964) 225.

⁹² Frederic William Maitland, *Equity: A Course of Lectures* (2nd edn, Cambridge University Press 1936) 206.

⁹³ Alfred William Brian Simpson, *A History of the Land Law* (OUP 1964) 226-227.

⁹⁴ Ann Stewart, *Rethinking Housing Law* (Modern Legal Studies) (Sweet & Maxwell 1996) 267.

creation of the mortgagor's 'equity of redemption.'⁹⁵ The justification for the courts of equity interfering in this manner was based on the belief that mortgagors were vulnerable to the demands of the mortgagee.⁹⁶ Prior to the late nineteenth century, merchants used the legal mechanism of the mortgage to obtain financial support, and the poor used it to obtain funds that could be used to alleviate their financial difficulties. Mortgagors would use their previously acquired land as security for the loan.⁹⁷ It was this aspect of need concerning mortgagors that led Lord Henley LC to note that "necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them".⁹⁸ As a result, the courts of equity were tasked with protecting mortgagors who were entangled in a contract in which the mortgagee had a significant advantage in terms of power.⁹⁹ As Haley mentions:

"The history of judicial intervention has been marked by the uneasy interaction between the laissez-faire attitude of the common law (which upheld the lender's contract and estate rights) and the more protective and tender treatment of the mortgagor in equity (which, in appropriate cases, sought to restrict the exercise of those rights)."¹⁰⁰

A belief in 'freedom of contract' during the nineteenth century gradually eroded the courts of equity's overprotective approach to the mortgagor. There was no longer any "flexible and interventionist approach to the mortgagor's position," according to Stewart's argument.¹⁰¹ As a result, the courts of equity were unable to provide the protective oversight they had previously provided. Atiyah explains this transformation in judicial attitudes, "during the nineteenth century, paternalistic ideas faded, as the philosophy of laissez-faire took root. Most educated people, including the judges, took laissez-faire to mean that the law should interfere with people as little as possible."¹⁰² This new concept of the mortgage form as "a commercial transaction negotiated between knowledgeable and equal parties on the terms which should be enforced"¹⁰³ appears at odds with the changing use made of mortgage finance during this time. The growth of the building society movement and its willingness to increase access to mortgage

⁹⁵ Alfred William Brian Simpson, *A History of the Land Law* (OUP 1964) 228.

⁹⁶ Lisa Whitehouse, 'The First Legal Mortgagor: a Consumer Without Adequate Protection?' (2015) 38 *Journal of Consumer Policy* 161,166.

⁹⁷ Michael Haley, 'Mortgage default: possession, relief and judicial discretion' (1997) 17 *Legal Studies* 483, 485

⁹⁸ *Vernon v Bethell* (1762) 2 Eden 110 at 113.

⁹⁹ P.B Fairest, *Mortgages* (2nd edn, Sweet & Maxwell 1980) 7.

¹⁰⁰ Michael Haley, 'Mortgage default: possession, relief and judicial discretion' (1997) 17 *Legal Studies* 483, 485.

¹⁰¹ Ann Stewart, *Rethinking Housing Law* (Modern Legal Studies) (Sweet & Maxwell 1996) 49.

¹⁰² P.S Atiyah, *Atiyah's Introduction to the Law of Contract* (6th edn, Clarendon Law Series 2006) 8.

¹⁰³ Ann Stewart, *Rethinking Housing Law* (Modern Legal Studies) (Sweet & Maxwell 1996) 50.

finance¹⁰⁴ during the nineteenth century, combined with an unprecedented increase in house building and the simplification of land transfer by the Law of Property Act 1925¹⁰⁵, changed the nature and role of the mortgage in society.¹⁰⁶ Private loans secured by investment property became less common; institutional lenders granted the majority of mortgages on the security of the mortgagor's home.¹⁰⁷

This change, like the mortgage, enabled post-war governments to pursue higher levels of owner-occupation and, eventually, to create a mass homeownership market.¹⁰⁸ While the perception of these variations remains insufficient within land law, there exists one concession to them. It might even be argued to represent one example of where land law adopts a consumer protectionist approach.¹⁰⁹ In the Administration of Justice Act 1970¹¹⁰, that concession is described as undertaking “substantial interference with the contractual right which the parties have freely negotiated.”¹¹¹

According to the Administration of Justice Act 1970:

“(1) Where the mortgagee under a mortgage of land which consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, the court may exercise any of the powers conferred on it by subsection (2) below if it appears to the court that in the event of its exercising power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.

(2) The court—

(a) may adjourn the proceedings, or

(b) on giving judgment, or making an order, for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order, may—

(i) stay or suspend execution of the judgment or order, or

(ii) postpone the date for delivery of possession,

for such period or periods as the court thinks reasonable.

¹⁰⁴ Pete Craig, 'The house that Jerry built? Building Societies, the state, and the politics of owner-occupation' (1986) 1 Housing Studies 87, 94.

¹⁰⁵ Law of Property Act 1925.

¹⁰⁶ Michael Ball, *Housing Policy, and Economic Power: The Political Economy of Owner Occupation* (Routledge 1983) 29-30.

¹⁰⁷ Michael Haley, 'Mortgage default: possession, relief and judicial discretion' (1997) 17 Legal Studies 483, 485.

¹⁰⁸ Lisa Whitehouse, 'The First Legal Mortgagor: a Consumer Without Adequate Protection?' (2015) 38 Journal of Consumer Policy 161,166.

¹⁰⁹ *Ibid.*

¹¹⁰ Administration of Justice Act 1970, s 36.

¹¹¹ *Cheltenham and Gloucester Building Society v Norgan* [1996] 1 All ER 449, at 458C.

(3) Any such adjournment, stay, suspension or postponement as is referred to in subsection (2) above may be made subject to such conditions with regard to payment by the mortgagor of any sum secured by the mortgage or the remedying of any default as the court thinks fit.

*(4) The court may from time to time vary or revoke any condition imposed by virtue of this section.*¹¹²

Further, the Administration of Justice Act 1973 provides that:

“(1) Where by a mortgage of land which consists of or includes a dwelling-house, or by any agreement between the mortgagee under such a mortgage and the mortgagor, the mortgagor is entitled or is to be permitted to pay the principal sum secured by instalments or otherwise to defer payment of it in whole or in part, but provision is also made for earlier payment in the event of any default by the mortgagor or of a demand by the mortgagee or otherwise, then for purposes of section 36 of the Administration of Justice Act 1970 (under which a court has the power to delay giving a mortgagee possession of the mortgaged property so as to allow the mortgagor a reasonable time to pay any sums due under the mortgage) a court may treat as due under the mortgage on account of the principal sum secured and of interest on it only such amounts as the mortgagor would have expected to be required to pay if there had been no such provision for earlier payment.

(2) A court shall not exercise by virtue of subsection (1) above the powers conferred by section 36 of the Administration of Justice Act 1970 unless it appears to the court not only that the mortgagor is likely to be able within a reasonable period to pay any amounts regarded (in accordance with subsection (1) above) as due on account of the principal sum secured, together with the interest on those amounts, but also that he is likely to be able by the end of that period to pay any further amounts that he would have expected to be required to pay by then on account of that sum and of interest on it if there had been no such provision as is referred to in subsection (1) above for earlier payment.

(3) Where subsection (1) above would apply to an action in which a mortgagee only claimed possession of the mortgaged property, and the mortgagee brings an action for foreclosure (with or without also claiming possession of the property), then section 36 of the Administration of Justice Act 1970 together with subsections (1) and (2) above shall apply as they would apply if it were an action in which the mortgagee only claimed possession of the mortgaged property, except that—

(a) section 36(2)(b) shall apply only in relation to any claim for a possession; and

(b) section 36(5) shall not apply.

*(4) For purposes of this section the expressions “dwelling-house”, “mortgage”, “mortgagee”, and “mortgagor” shall be construed in the same way as for the purposes of Part IV of the Administration of Justice Act 1970.*¹¹³

The district judge has the discretion under this provision to suspend an order for possession on specified payment terms if “it appears to the court that in the event of its exercising power, the borrower is likely to be able within a reasonable period to pay any sums due under the mortgage” (the term ‘any sums due’ applies only to arrears outstanding at the

¹¹² Administration of Justice Act 1970, s 36.

¹¹³ Administration of Justice Act 1973, s (8).

time in addition to regular contractual payments as per the Administration of Justice Act 1973). Regardless of its apparent protective meaning, the Administration of Justice Act of 1973¹¹⁴ supports the argument in this section of the study regarding the mortgagor's conception in land law. According to the Court of Appeal decision in *Cheltenham and Gloucester Building Society v Norgan*¹¹⁵, district judges should consider the remaining term of the mortgage when determining the reasonable period over which a mortgagor should be expected to clear their arrears. In deciding what constitutes a 'reasonable period' for section 36 of the Administration of Justice Act 1970, Waite LJ remarked:

"It does seem to me that the logic and spirit of the legislation requirements, that the court should take as its starting point the full term of the mortgage and pose at the outset the question: would it be possible for the mortgagor to maintain payment off of the arrears by instalments over the period?"¹¹⁶

Research¹¹⁷ suggests, however, that the typical suspension period remains between one and five years. District judges' rationale for this constraint on their judgement is that they are concerned about ensuring that mortgagors are not subjected to years of ever-increasing financial debt. It is partly due to a mortgagor's liability for the costs of any legal proceedings and additional charges incurred while they are in arrears.¹¹⁸ A period shorter than the remaining term of the mortgage, therefore, is considered favourable by district judges. This theory gives consumers breathing room and time to sort out their finances. As a result, only mortgagors who meet the affordability test established by section 36 of the Administration of Justice Act 1970 are eligible to apply. The legislation does not take into account any other factors, such as the presence of children, disability, ill health, or relationship breakdown.¹¹⁹ The Pre-Action Protocol for Possession Claims based on mortgage arrears in respect of the residential property (the Protocol)¹²⁰ seeks to ensure that the parties 'act fairly and reasonably' with one another when resolving any matter pertaining to the mortgage, adding an additional layer of consumer

¹¹⁴ *Ibid.*

¹¹⁵ *Cheltenham and Gloucester Building Society v Norgan* [1996] 1 All ER 449, at 458C.

¹¹⁶ *Ibid.*, 458.

¹¹⁷ Lisa Whitehouse, 'The First Legal Mortgagor: a Consumer Without Adequate Protection?' (2015) 38 *Journal of Consumer Policy* 161, 167.

¹¹⁸ *Ibid.*

¹¹⁹ Susan Bright and Lisa Whitehouse, 'Information, Advice & Representation in Housing Possession Cases' (2014) *SSRN Electronic Journal* <<http://www.ssrn.com/abstract=2430096>> accessed 12 May 2021.

¹²⁰ Ministry of Justice 'Pre-Action Protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property, Civil Procedure Rules' (*MOJ*, 2020) <http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_mha> accessed 3 May 2020.

human rights protection to the process (para. 3.1a).¹²¹ According to the protocol, a borrower must be given time to come up with an acceptable proposal to repay the arrears, as well as options like extending the mortgage or capitalising arrears (para. 7.1). The protocol advises the borrower to get in touch with a local housing department or an independent debt advisor. According to the debtor's right to fair treatment and a trial, this is the appropriate course of action. The following are the key clauses that a lender should consider before bringing a possession claim against a borrower who has fallen behind on their payments:

“5.3 The lender must advise the borrower to make early contact with the housing department of the borrower's Local Authority and, should, where relevant, refer the borrower to appropriate sources of independent debt advice.

5.4 The parties, or their representatives, must take all reasonable steps to discuss with each other the reasons for the arrears, the borrower's financial circumstances and proposals for repayment of the arrears (see paragraph 7.1). For example, parties should consider whether the reasons for the arrears are temporary or long-term and whether the borrower may be able to pay the arrears in a reasonable time.

5.5 The lender must consider a reasonable request from the borrower to change the date of regular payment (within the same payment period) or the method by which payment is made. The lender must either agree to such a request or, where it refuses such a request, it must, within a reasonable period of time, give the borrower a written explanation of its reasons for the refusal.

5.6 The lender must respond promptly to any proposal for payment made by the borrower. If the lender does not agree to such a proposal, it should give reasons in writing to the borrower within ten business days of the proposal.

5.7 If the lender submits a proposal for payment, the borrower must be given a reasonable period of time in which to consider such proposals. The lender must set out the proposal in sufficient detail to enable the borrower to understand the implications of the proposal.

5.8 If the borrower fails to comply with an agreement, the lender should warn the borrower, by giving the borrower 15 business days' notice in writing, of its intention to start a possession claim unless the borrower remedies the breach in the agreement”¹²²

All regulated mortgages are subject to the Protocol's terms and conditions. When a mortgagee decides to go after possession in a county court, the court should make sure that the Protocol is being followed. Non-compliance with the rules is not punishable, but the judge can adjourn the hearing to give the mortgagee a chance to make good on the mistake.¹²³ Regardless of its obvious protective features, section 36 of the Administration of Justice Act of 1970 and the possession process generally support the notion of the mortgagor as a broadly equal player in the mortgage relationship. It is heavily influenced by the mortgagee's contractual rights and

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*, 26.

financial interests, ensuring that payments are made, and costs are covered. Concerns about the mortgagor's potential consumer vulnerability or the social implications of repossession are not addressed.¹²⁴ This leaves debtors vulnerable and in the dark, as they are on the verge of losing their family home and require protection through the human rights framework.

Despite significant changes in housing provision, mortgage usage, and consumer access to mortgage credit, modern land law and its conception of the residential mortgage (regulated) as a rational contracting party to a commercial transaction has remained largely unchanged since 1979.¹²⁵ One possible explanation is that a more balanced approach to the interests of both parties to a regulated mortgage is required because (to summarise) the modern mortgagor is no longer needy and the modern mortgagee is no longer greedy.¹²⁶ Another is that, in order for consumers to continue to have access to homeownership, it is necessary to maintain a steady flow of mortgage credit by protecting the mortgagee's interests.¹²⁷ An account of the different regimes that regulate first and second charge mortgages, a distinction that is well-rehearsed but still exposes the mortgagor's differing perceptions, depending on the nature of the agreement, provides evidence in support of the argument that the first legal charge is obvious as less vulnerable than other consumers.¹²⁸

It is assumed here that under this limb of the debtor's protection regime, courts have minimal powers under the statute to protect the debtor should they fall into the debt trap and fail to keep up their contractual loan payments. Lenders have the upper hand in terms of secured lending charges on the borrower's home, and under the contract and property law, they have the rights or possessions. In the current environment, some lenders are accommodating, recognising the debtor's problems and providing all available resources to support them in keeping their home. Some lenders have dedicated support teams to help borrowers. Under The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020¹²⁹, debtors now have some additional protection should

¹²⁴ *Ibid.*

¹²⁵ Lisa Whitehouse, 'The Mortgage Arrears Pre-Action Protocol: An Opportunity Lost' (2009) 72 *The Modern Law Review* 793, 794.

¹²⁶ Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2008) 720-721.

¹²⁷ Lorna Fox O'Mahony, *Conceptualising Home: Theories, Laws, and Policies* (Publishing 2006) 88.

¹²⁸ Citizen-Advice, 'Pdf-Set-up-to-Fail-Evidence-Report' (*Citizen-Advice*, 2020) <https://www.citizensadvice.org.uk/Global/Migrated_Documents/corporate/pdf-set-up-to-fail-evidence-report.pdf> accessed 3 May 2020.

¹²⁹ Standard breathing space and mental health crisis breathing space are two distinct types of breathing space. Anyone struggling with debt can take advantage of the standard breathing space. For a period of up to 60 days, they are shielded from creditor action. The protections include a suspension of most enforcement action and

they suffer a mental health issue. However, the statutory framework of debtor protection does not fully protect the debtor from the lender's possession and ill-treatment. More strict and enforceable laws and regulations are required to protect the debtor's rights, particularly post-COVID-19, as the aftermath of the pandemic are not fully gauged yet.

FCA Regulatory System Protects Consumers in the Financial Crises?

It is the goal of FCA regulation to safeguard customers while simultaneously developing an organised mortgage credit market. There are still several unanswered questions that will determine whether this is possible in reality. What lessons can be drawn from the financial crisis and recent COVID-19 pandemic by all countries, not just the UK? After a financial crisis, countries and international organisations are not always able to learn from their mistakes and implement better policies to protect consumers and debtors. Recent research based on OECD data has demonstrated how differences in the severity of crises can result in opposite outcomes in elite perceptions of financial stability, explaining differences in policy and market outcomes at the national level.¹³⁰ According to the evidence, countries that were affected by the financial crisis in the early 1990s were more likely than other countries to have smaller mortgage markets than the rest of the world.¹³¹ In countries with co-ordinating economic and policy institutions,¹³² this effect was significant. The same is true for the European Union and the United Kingdom. The financial sector's shaky supervision did not prevent the crisis, or the losses suffered by investors, creditors, and consumers. The crisis demonstrated how the UK and EU, or EEA credit legislation were ill-equipped to protect consumers and prevent credit choices from leading to over-indebtedness and financial difficulty.¹³³ One could argue that consumer and mortgage credit law provides ambiguous protection against over-indebtedness, financial hardship, and mortgage payment difficulties during economic downturns. This is true for a variety of reasons.

In the first place, responding to the question of how and when credit is safe is extremely difficult. A policy of *ex-ante* information and responsible credit cannot be compared to a high

contact from creditors, as well as a freeze on most interest and charges on their debts. Only those who are receiving mental health crisis treatment are eligible for a breathing space designed specifically for them, and it comes with additional safeguards to keep them safe. A minimum of 30 additional days are added to the length of the person's current crisis treatment (no matter how long the crisis treatment lasts).

¹³⁰ *Ibid.*

¹³¹ Ismail Emre Bayram, 'Once bitten, twice shy: financial crises, policy learning and mortgage markets in advanced capitalist economies' (PhD thesis in Political and Social Sciences, European University Institute Research 2014).

¹³² *Ibid.*

¹³³ *Ibid.*

level of consumer protection because information and regulation cannot protect against all risks of life and personal changes.¹³⁴ Second, economic conditions and interest rates will fluctuate inevitably over the course of the loan's life. Customers and business owners have no control over these fundamental factors. The real question is whether the UK rules will be able to operate and protect consumers in the context of the capitalist economic cycles of expansion and contraction. The reason for this is that both elasticity and discipline are essential for the establishment and maintenance of a global money and credit market balance.¹³⁵ Academics referred to cycles of our “Western capitalist economies as boom and bust.”¹³⁶ As a result, there is a pressing need to address the global financial system's problems and flaws. Despite the government's financial packages, the economy will continue to deteriorate despite the failure to learn from the past. This G20/OECD Task Force to implement into practice international standards of financial consumer protection is unfortunately not mentioned by the EU and the UK in their self-referential approach to the G20 high-level principles on Financial Consumer Protection.¹³⁷

However, while consumer protection regulations may provide some protection in times of financial crisis, the impact on the individual consumer will be long-lasting and significant. The financial watchdog is only able to impose sanctions against the institution and does not have the authority to compensate the individual who has been harmed as a result of its actions (poor mortgage advice, lenders failing to responsibly lend or recklessly lending at a higher rate).

Conclusion

It is argued that the FCA regulatory system and MCOB rules represent some additional UK legislation in the field of consumer protection, and while this is undeniably an improvement, it falls short of resolving all issues and significantly protecting consumers. When it comes to the current state of the economy, it's unclear if the FCA regulatory system's ex-ante information and responsible lending principles and framework will serve as a safety net. Many other important issues which have been discussed in this chapter were neglected. Due to the

¹³⁴ Elvira Mendez Pinedo, ‘Will the Directive 2014/17/EU on mortgage credit protect consumers in the next economic and/or financial crisis?’ (June 2018) 8 *Juridical Tribune* 564,572.

¹³⁵ Coursera ‘Economics of Money and Banking’ (*Coursera*, 2020) <<https://www.coursera.org/learn/money-banking>> accessed 3 May 2020.

¹³⁶ *Ibid.*

¹³⁷ OECD, ‘G20-OECD Task Force on Financial Consumer Protection - (OECD,2014) <<https://www.oecd.org/daf/fin/financial-education/g20-oecd-task-force-financial-consumer-protection.htm>> accessed 3 May 2020.

increasingly complex nature of financial markets and the difficulty in predicting significant economic and financial risks *ex-ante*, the global financial crisis of 2008 emphasised the need for stronger measures to protect financial consumers going forward. The exclusion of first legal mortgages from the majority of the provisions of the Consumer Credit Act 1974¹³⁸ has been a matter of concern for the government (Department for Business, Innovation and Skills)¹³⁹, consumer organizations¹⁴⁰, and scholars for many years. This concern derives from the view that the Consumer Credit Act 1974 regime was much more protective than the protection offered to first legal mortgagors. The assumption must be that these mortgages are adequately regulated under the FSMA 2000¹⁴¹ and that the FCA will ensure that mortgagors are treated “fairly”, but this removes the ability of mortgagors to bring an action on their behalf, leaving them dependent instead on a regulator that still has to prove itself.¹⁴² The difficulty regulators face in monitoring compliance within the mortgage market “is that the regulator is always at a distance and is only likely to pick up problems after they have occurred”.¹⁴³

Given the FSA’s (Financial Services Authority) failure to regulate mortgages effectively in recent years, significant improvements will have to be made by the FCA in enforcement procedures.¹⁴⁴ The failure of previous requirements to substantially impact the arrears management practices of mortgagees is of particular concern given the fear that current levels of possessions have been subdued due to a stagnant housing market and low-interest rates.¹⁴⁵ The recent fall in the number of possession claims was primarily due to current housing market conditions and “memories of the last recession and the fallout from the US sub-prime crisis”.¹⁴⁶ The problem, therefore, is “What will happen to mortgage arrears and possessions as market conditions change? Government policy ambitions and lenders' forbearance strategies have been largely synchronised since the summer of 2008. Once these key dimensions diverge,

¹³⁸ Consumer Credit Act 1974 (as amended in 2006).

¹³⁹ Bridget Prentice, 'Mortgages Power of Sale and Residential Property-Consultation Paper CP55/09' (*Ministry of Justice*, 2009) <<http://data.parliament.uk/DepositedPapers/Files/DEP2010-0009/DEP2010-0009.pdf>> accessed 25 May 2020.

¹⁴⁰ Lisa Whitehouse, 'The Mortgage Arrears Pre-Action Protocol: An Opportunity Lost' (2009) 72 *The Modern Law Review* 793, 794.

¹⁴¹ Financial Services and Markets Act 2000.

¹⁴² Lisa Whitehouse, 'The First Legal Mortgagor: a Consumer Without Adequate Protection?' (2015) 38 *Journal of Consumer Policy* 167,167.

¹⁴³ *Ibid.*

¹⁴⁴ Treasury Committee, 'Mortgage arrears and access to mortgage finance' (*House of Commons*, August 2009) <<https://publications.parliament.uk/pa/cm200809/cmselect/cmtreasy/766/766.pdf>> accessed 25 May 2020.

¹⁴⁵ Lisa Whitehouse, 'The First Legal Mortgagor: a Consumer Without Adequate Protection?' (2015) 38 *Journal of Consumer Policy* 167,167.

¹⁴⁶ Shelter England, 'Uncharted Territory Managing Mortgage Arrears' (*Shelter England*, 2009) <https://england.shelter.org.uk/_data/assets/pdf_file/0017/203705/Uncharted_Territory.pdf> accessed 12 May 2021.

will the current regulatory practice be sufficient to sustain the current practice in limiting possessions? There is a distinct possibility that, depending on housing market improvement, possessions have merely been postponed rather than avoided.”¹⁴⁷

The concern expressed in this section concludes that if the private law regime does not harmonise its approach with that of the public law regime by treating the mortgagor as a consumer, then reforms like those proposed by the FCA regulatory system will be ineffective in responding to this ‘ticking time bomb’¹⁴⁸ in mortgage possessions. It is argued that “labels are important and identifying occupiers as consumers imply a host of rights and obligations that suggest activity and choice on the part of the occupier (which might not be possible or appropriate)”.¹⁴⁹ Crown suggests that labels are essential, but that consumer classification denotes choice, rationality, and sovereignty.¹⁵⁰ It also signifies a fear to protect the individual household against excessive power, oppressive terms, and unfair treatment. In order to change the legal conception of the mortgagor to one of the consumers, principally in respect of the possession process, will address many of the obstacles that are currently preventing mortgagors from receiving fair and consistent treatment. This section of studies explored both regulatory and private law regimes to establish that the available safety net for safeguarding the debtor's human rights is insufficient and requires more efforts and assurances from the regulators and government in the post-COVID-19 pandemic's vulnerability. The subsequent chapter of this study has discussed the parallel debt relief framework for protecting and safeguarding debtors' human rights as an additional safety net.

¹⁴⁷ Lisa Whitehouse, ‘The First Legal Mortgagor: a Consumer Without Adequate Protection?’ (2015) 38 *Journal of Consumer Policy* 167,167.

¹⁴⁸ *Ibid.*

¹⁴⁹ David Cowan, *Housing Law, and Policy* (Law in Context) (Cambridge University Press 2011) 20.

¹⁵⁰ *Ibid.*

Chapter 5: Debtor Rights and Protection Framework

Introduction

This study only addresses the laws and regulations that apply in England and Wales, and its scope is limited to debtor human rights. However, while the section has briefly discussed the protection a creditor expects from a debtor who borrows for non-essential needs and is over-indebted, the main goal of this section is to investigate the debtor rights and protection framework. In offering a loan to the debtors, creditors aim to profit through the increased return of money and added interest. The criticality of the creditors claiming a debtor's assets is that those specific laws are enforced to protect the creditors. Nevertheless, risks are associated when a creditor lends money, and more stringent regulations and legal measures are to be required to reduce the risk. The interests of the debtors can be protected if there is increased oversight, increased due diligence, and increased legal protection. This will result in a reduced probability of risk. Hence, both parties can benefit; the creditors will benefit from high profits, and the debtors will pay less interest, thus gaining more financial benefits.¹ On the other hand, creditors may encounter debtor misbehaviour when debtors conceal their assets in order to obtain a loan prior to borrowing and then disregard their agreement after borrowing the amount from the creditor. Therefore the debtor-creditor relationship is contractual and requires both parties to be transparent.

In another situation, the debtors may be involved in less profitable projects with a high failure risk.² As per their agreement with the creditor, they transfer the risk to the creditor or, on the other hand, dilute their assets.³ Consider the following scenario: a debtor borrows money from a creditor by guaranteeing that the assets they own are theirs and have complete control over these assets, but another party actually owns the assets. When a debtor applies for unsecured credit, creditors are unable to conduct the necessary due diligence or make a prudent lending decision. An accurate picture of the debtor's existing financial circumstances is essential to calculate the risk for the lender, and an appropriate asset is required for secured lending. Therefore, to protect creditors, standard legal protections must be enforced where the concerned parties are unable to negotiate well for themselves. In most circumstances, once the

¹ Royston Miles Goode, *Principles of Corporate Insolvency Law* (4th edn, Sweet & Maxwell 2011) 46.

² Richard Lehman, 'Research News' (*The BMJ News*, 2 JUNE 2012) <https://www.bmj.com/bmj/section-pdf/187549?path=/bmj/344/7859/Research_News.full.pdf> accessed 31 October 2021.

³ Lucian Arye Bebchukt and Jesse M Fried, 'The Uneasy Case for the Priority of Secured Claims in Bankruptcy-Secured Claims in Bankruptcy' (1996) 105 *The Yale Law Journal* 857,858.

debtor defaults or enters into arrears, the cost of debt collection and fees associated with them are exceedingly high; the extra burden on the debtor leads them into further debt. Appropriate legal protection can minimise the costs involved by including already defined terms or clear negotiation terms in cases where existing terms are inadequate. For this study, the scope was limited to a secured loan, so the legal documentation, contract and deeds for the charge necessitated due diligence. Furthermore, the precise terms of the lending contract will be highly beneficial in cases where those involved in the transactions have insufficient knowledge to negotiate well, or when the creditors are prevented from obtaining valuable terms which provide profits due to some shared problems.⁴ Nonetheless, if the legal practices are productive in theory but highly rigid in reality, then instead of reducing costs, the legal measures can instead increase the costs of transactions. Another perspective is that the legal measures can either under protect or overprotect the welfare of the creditors. In this regard, bankruptcy law is a strict legal measure that ensures the protection of both creditors and debtors.

Creditors' security is just as important as debtors' security, especially when the creditors are family, friends, or individuals who pool their money to help the debtors. Creditor protection is also important because some people may have invested in small credit unions or building societies to profit, but if the debtors do not pay their contractual debt, creditors may lose their savings or investments and become debtors themselves. As a result, both the debtor and the creditor are essential pillars of the economic transaction, and their rights must be protected. In addition to the standard underwriting process, this section of the study briefly highlights methods or measures that protect both debtors and creditors from loss and help mutual economic gains. However, this study is restricted to the impacts on individuals, particularly on debtors' human rights and to individual capacity rather than corporate capacities.

Individuals rely on their job or business as a source of income to run their homes during an economic cycle. As a result, if an employee loses their job, it will have a direct impact on them. Therefore, workplace or business protection is as important as debtor rights. Unemployment means that the individuals' sources of income will dwindle over time, and they will eventually fall victim to the debt cycle, with all of its associated problems. Thus, the debtor's place of work and business require indirect protection and safeguarding to keep the individual's income safe and to keep them out of debt. According to IMF staff research,

⁴ John Armour, 'Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law' (2000) 63 *The Modern Law Review* 355, 357.

essential jobs have been less affected by the COVID-19 pandemic and the global financial crisis.⁵ On the other hand, while jobs in the social sector have been severely impacted by the current pandemic, they have been less impacted by the global financial crisis.⁶ Moreover, during both crises, low-income workers have suffered more than top-income earners.⁷

According to research, employment is the best way out of poverty, but debts have overshadowed people's lives both when they were in work and when they were unemployed. Thus research has focused on the concept of 'recurrent' poverty.⁸ The 'recurrently poor' have fluctuations in income over time which swing them above and below the official poverty line.⁹ According to Tomlinson and Walker, 'recurrent poverty' affects roughly 5-7% of the population as a whole, representing roughly a fifth of all poverty experiences.¹⁰ Debt, poverty and unemployment are linked; hence it is crucial to establish an available mechanism in law for the lender to have business protection where employees will be directly affected by business closures. Business closures can result from uneconomical circumstances, debts, or other unknown reasons. As a result, it is critical for the business or company to understand their available bankruptcy law protections in order to protect individual rights and interests.

Bankruptcy law is concerned with the prevention, administration, and regulation of a person or company in financial distress. The essence of bankruptcy law is that individuals find themselves in a situation where they are unable to meet their payment obligations, and the legal consequences vary from country to country around the world. The UK economy is entering a period of debt following the COVID-19 pandemic. Even two decades after the financial crisis, debt levels have not decreased, owing to accumulated debt in the financial and household sectors. The level of debt has risen globally from \$57 trillion in 2007 to \$199 trillion in 2015.¹¹ Over-indebtedness has a negative impact on the economy because the opportunity for financial

⁵ Ippei Shibata, 'Unemployment in Today's Recession Compared to the Global Financial Crisis' (*IMF Blog*, 23 July 2020) <<https://blogs.imf.org/2020/07/23/unemployment-in-todays-recession-compared-to-the-global-financial-crisis/>> accessed 20 November 2021.

⁶ *Ibid.*

⁷ John Armour, 'Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law' (2000) 63 *The Modern Law Review* 355, 357.

⁸ Tracy Shildrick and others, 'The low-pay, no-pay cycle Understanding recurrent poverty' (*JRF Organisation*, November 2010) <<https://www.jrf.org.uk/sites/default/files/jrf/migrated/files/unemployment-pay-poverty-full.pdf>> accessed 26 October 2021.

⁹ *Ibid.*

¹⁰ Mark Tomlinson and Robert Walker, 'Recurrent poverty: the impact of family and labour market changes' (*JRF Organisation*, Feb 2010) <<https://www.jrf.org.uk/report/recurrent-poverty-impact-family-and-labour-market-changes>> accessed 26 October 2021.

¹¹ Richard Dobbs and others, 'Debt and (not much) deleveraging' (*McKinsey & Company*, February 2015) <<https://www.mckinsey.com/featured-insights/employment-and-growth/debt-and-not-much-deleveraging>> accessed 25 October 2021.

investment decreases, as does the use of different lines for raising different levels of credit. Both conditions have a negative impact on economic recovery. High debt levels have become an unavoidable feature of all economies, and the trend has become a natural occurrence. Previous research indicated that the most appropriate way to handle an insolvent debtor is to discharge their debt liabilities or principal amount, and the interest payment could be made on a periodical basis.¹² However, the strategies to repay their debt liabilities have evolved, and debtors never intending to repay their debts were a common social concern.¹³ Some debtors adopted violent means to get away from their creditors or became rebels.¹⁴ According to Maria Gerhardt¹⁵, insolvency legislation in the United Kingdom is consumer-oriented. Several tools and methods are developed to protect debtors as well as their share of the property.

Insolvency in Europe does not match the common law of the United States, though the United Kingdom came the closest to matching the insolvency procedures and approach of the United States.¹⁶ Providing future opportunities for rescue and growth has long been a tenet of UK bankruptcy law.¹⁷ Incorporating the rescue culture is done by reorganising and restructuring healthy businesses, which can recover by predicting the financial tides.¹⁸ Extending financial facilities is the foundation for continuing business operations and encouraging corporate rescue plans.

Governments, on the other hand, are struggling to determine the appropriate level of rescue financing required to save the creditors. These rescue plans may be ultimately futile in their aim of persuading external lenders to extend financial support to bankruptcy or insolvency as the repayment is not guaranteed by the insolvent.¹⁹ Many jurisdictions have overcome the obstacles discussed on the national level. During the repayment of interest liabilities, the insolvency legislation prioritises new lenders and provides incentives to encourage external

¹² Peter Schuster, 'The Age of Debt? Private Debt in Late Medieval Society' (*Bielefeld University*, 2008) <<https://pub.uni-bielefeld.de/record/2033689>> accessed 25 October 2021.

¹³ *Ibid.*

¹⁴ David Graeber, *Debt the First 5,000 Years* (Brooklyn, New York 2011) 231.

¹⁵ Maria Gerhardt, 'Consumer Bankruptcy Regimes and Credit Default in the US and Europe A comparative study' (*CEPS Working Document No. 318/July 2009*) <<http://aei.pitt.edu/11336/1/1887.pdf>> accessed 25 October 2021.

¹⁶ *Ibid.*

¹⁷ Hansard Report, 'Insolvency Law and Practice: Cork Report' (*Hansard*, 18 April 1983) <<https://api.parliament.uk/historic-hansard/lords/1983/apr/18/insolvency-law-and-practice-cork-report>> accessed 25 October 2021.

¹⁸ Royston Miles Goode, *Principles of Corporate Insolvency Law* (4th edn, Sweet & Maxwell 2011) 46.

¹⁹ Akpareva Aruoriwo, 'Financing Corporate Rescues, Where Does the UK Stand?' (*School of Advanced Study, University of London*, 2014) <<https://sas-space.sas.ac.uk/5609/1/2080-3020-1-SM.pdf>> accessed 25 October 2021.

financing before bankruptcy.²⁰ Scholars have argued that such incentives help create an economically rescued environment, and fresh funds provide many opportunities for bankrupts.²¹ These norms and methodologies are becoming the basic model or approach adopted in insolvency and bankruptcy guidelines.²² To include all these reforms in the UK Insolvency Law, the Enterprise Act 2002²³ was introduced and amended by the Insolvency Act 1986. The new reform policy introduced an improved administration regime, and administrators were given the responsibility to extend security and borrow funds on behalf of the company.²⁴ They are also responsible for prioritising the payment of creditors, both secured and unsecured.²⁵ Nevertheless, America and Canada's incentives are more motivating and encouraging, and the UK lacks those factors.

Bankruptcy imposes several legal restrictions on the undischarged bankrupt (detailed impact on an individual can be found in Chapter 3). These restrictions can cause several mental health issues in both the undischarged bankrupt and company officials. As an example, the UK government's publications draw attention to indebtedness as a significant cause of a mental disorder.²⁶ Similar results were reported by the British Bankers Association (BBA), demonstrating that organisational indebtedness creates acute pressure for debtors who are suffering from mental health problems.²⁷ A number of initiatives and campaigns were launched by the UK government, as well as many mental health tools.²⁸ The present thesis discussed the relationship between mental health and indebtedness in the UK. The first section focuses on the plight of bankrupts and the violations of their human rights. Then, the impact of the above on the mental health of bankrupts is analysed. The initiatives and considerations given by government agencies are critical because they represent the benefits and reforms extended to debtors in England and Wales. Credit is the most common requirement for starting and launching a new business. However, there are significant risks involved in seizing a new

²⁰ Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, s.11.2 and American Bankruptcy code, 11 USC s.364.

²¹ Akpareva Aruoriwo, 'Financing Corporate Rescues, Where Does the UK Stand?' (*School of Advanced Study, University of London*, 2014) <<https://sas-space.sas.ac.uk/5609/1/2080-3020-1-SM.pdf>> accessed 25 October 2021.

²² *Ibid.*

²³ Enterprise Act 2002, s 248.

²⁴ Insolvency Act 1986, SCHEDULE 1.

²⁵ Insolvency Act 1986, SCHEDULE B1.

²⁶ John Beddington, 'The mental wealth of nations' (*National Library of Medicine*, 2008) <<https://pubmed.ncbi.nlm.nih.gov/18948946/>> accessed 26 October 2021.

²⁷ The Lending Code, British Bankers' Association, Building Societies Association, The UK Cards Association, London.

²⁸ Rachel Jenkins and Chris Fitch, 'Recession, debt and mental health: Challenges and solutions' (2009) 5 *Mental Health in Family Medicine* 85, 86.

opportunity for success and the main one is failure. If the new venture fails to repay its debts, this results in the formation of an insolvent entity. Parties involved can take several actions to protect themselves from this situation occurring but most of the time, the actions are unethical and violate fundamental human rights.²⁹

In order to address these issues, the government has enacted legislative reforms. The current study has highlighted the past and present impact of reforms on human rights violations. The reforms and policies of England and Wales bankruptcy laws are discussed in brief from the perspective of creditors. The section has provided detailed information about the changes made to England and Wales law following reports and suggestions from authorities, committees, and the Law Commission. The debtors' restrictions are examined to gather evidence of business rescue under England and Wales insolvency law. As part of this research, scholars and experts assess the legal tools that have evolved over time, and their potential effects on society are considered. The new debtor-oriented culture is assessed after evaluating the insolvency law and rescue tools introduced by government agencies in England and Wales. According to this chapter's findings, small businesses and sole proprietors benefit from bankruptcy laws' methods and tools.

Bankrupt and Creditor's Beneficial Interest

This section investigated the possible inadequacy of bankruptcy laws in situations where the bankrupt faces numerous challenges and their human rights are violated or not adequately protected. The bankrupt estate consists of the bankrupt's property at the time the bankruptcy was filed.³⁰ As a result, the bankruptcy estate will pass to trustees,³¹ who will realise the bankrupt's interest in the property for the benefit of creditors and certain³² creditors' post-bankruptcy rights. As a matter of fact, an unsecured creditor is significantly disadvantaged.

In cases where the bankrupts own a home, the trustees seek to realise the value of the bankrupt's equity. Therefore, if the property is held jointly by the bankrupt's spouse, the trustee allows the spouse to buy out the bankrupt's equitable interest. Although if the trustee fails to realise the bankruptcy estate under the statute³³ within three years, then the bankrupt interest is re-vested in the principal residence. Despite this, the ability to realise the bankrupt's interest in

²⁹ J. Boettcher and others, 'Ethical Issues that arise in Bankruptcy' (2014) 119 *Business and Society Review* 473, 475.

³⁰ Insolvency Act 1986, s 283(1).

³¹ Insolvency Act 1986, s 306.

³² Who has the charge on the property or assets of the bankrupt.

³³ Insolvency Act 1986, s 283A.

the debtor's family home remains an essential feature of bankruptcy law and provides a good illustration of the balancing act performed by the court between the interest of the bankrupt (and their family) and creditors. The trustee and the bankrupt face a practical issue when the family home is owned solely or jointly, and this short analysis aims to highlight that issue. A debtor's home is often the only asset that can be sold and distributed to creditors³⁴ when they declared bankrupt. It's, for this reason, the TIB is likely to seek an order for possession and sale of the home, usually by applying under the Trusts of Land Act 1996³⁵ or Family Law Act 1996³⁶ (depending on how it is owned and occupied, for example with children or with others having home rights).³⁷

Under the Land Registration Act 1925³⁸, if the bankrupt solely owns the family home, then the trustee in bankruptcy is entitled to be registered as the sole proprietor. Importantly, where the bankrupt is the sole owner, they may hold the property for someone in trust. Therefore, it raises a serious issue, especially where the debtor borrowed money to purchase a family home from friends and family or keep the property in trust for them. In that case, the court observes the terms of an adequately constituted trust in the absence of fraud. The bankrupt's beneficial entitlement is determined according to terms of the trust under *Goodman v. Gallant*.³⁹ The appointment of trustees in bankruptcy is for the benefit of the secured creditors. Therefore trustees are required to undertake a careful review of the factual situation while assessing whether the property is held on trust⁴⁰ (constructive or resulting). Under this situation, they must apply the same critical analysis of ownership that arises during a marital breakdown in cases where the cohabittees are in dispute. In determining the beneficial interest, the court looks for an express agreement, arrangement, or a common understanding of how the property is shared. For example, in the case of *Grant v. Edwards*⁴¹ the court found that where a party substantially contributes towards the household expenditure, that party has a beneficial interest under a constructive trust.

³⁴ Simon Hill, 'Trustee in Bankruptcy selling a Home' (33 *Bedford Row*, August 2008) <<https://www.33bedfordrow.co.uk/insights/articles/trustee-in-bankruptcy-selling-a-home>> accessed 30 October 2021.

³⁵ Trusts of Land and the Appointment of Trustees Act 1996, s 14.

³⁶ Family Law Act 1996, s 33 (5).

³⁷ Simon Hill, 'Trustee in Bankruptcy selling a Home' (33 *Bedford Row*, August 2008) <<https://www.33bedfordrow.co.uk/insights/articles/trustee-in-bankruptcy-selling-a-home>> accessed 30 October 2021.

³⁸ Land Registration Act 1925, s 42(1).

³⁹ *Goodman v. Gallant* [1986] 1 All ER 311.

⁴⁰ *Pettitt v. Pettitt* [1970] AC 777 and *Gissing v. Gissing* [1971] AC 886.

⁴¹ *Grant v. Edwards* [1986] Ch 638.

Similarly, beneficial interest under a constructive trust exists where physical assistance was provided in improving the property.⁴² In the absence of an express agreement, the court must be persuaded that some subsisting property right exists for the party not holding the legal title. For example, in the case of *Lloyds Bank v. Rosset*,⁴³ direct payment for the purchase of property or mortgage payments constituted the contractive trust. Thus, the trustees need to safeguard the interest of creditors, and all dealings and conduct of the bankrupts should be considered while they own the property solely in their names.

The TIB faces another practical issue where two or more proprietors have a legal interest in the title. TIB register the interest via restriction in the HM Land Registry to protect the creditor's beneficial interest. The joint owner shares legal ownership as joint legal tenants, and despite the bankruptcy of one of the co-owners, there is no change to the ownership of the legal estate. In the absence of an express declaration of trust, the rebuttable presumption is that the co-owners hold the beneficial interest as tenants in common in equal shares,⁴⁴ as decided in the case of *Stack v Dowden*.⁴⁵ TIB can apply to the court for the sale of a family home.⁴⁶ The court considers a variety of factors when deciding whether or not TIB should be applied. Unless the circumstances are 'exceptional' the court must assume that the interests of creditors outweigh all other considerations when an application is made 12 months after the property has vested in TIB.⁴⁷

Trustees typically provide a 'breathing space' to the bankrupt (and thus to any family they may have) for a year to allow them to make alternative living arrangements. This mandatory statutory assumption has broader implications: the 12-month 'line in the sand' guides courts in balancing competing interests, even when the assumption is not strictly applicable.⁴⁸ In balancing the interest of the bankrupt's family home and rights to creditors, save in exceptional circumstances, the interest of creditors prevails after one year.⁴⁹ The 'one-year provisions' only apply to a family home. Exceptional circumstances are, predictably,

⁴² *Eves v. Eves* [1975] 1 WLR 1338.

⁴³ *Lloyds Bank v. Rosset* [1990] 1 All ER 1111.

⁴⁴ The Legal Stop, 'declaration of Trust - Tenants in Common (Fixed Shares)' (*The Legal Stop, 2021*) <<https://www.thelegalstop.co.uk/Business/Declaration-of-Trust--Tenants-in-Common--Fixed-Shares-.html>> accessed 31 October 2021.

⁴⁵ *Stack v Dowden* [2007] 2 All ER 929.

⁴⁶ Insolvency Act 1986, s 335A (2).

⁴⁷ Simon Hill, 'Trustee in Bankruptcy selling a Home' (33 *Bedford Row*, August 2008) <<https://www.33bedfordrow.co.uk/insights/articles/trustee-in-bankruptcy-selling-a-home>> accessed 30 October 2021.

⁴⁸ *Martin-Sklan v White* [2007] BPIR 76.

⁴⁹ Insolvency Act 1986, s 335A (3).

undefined, and each case is unique based on its facts. For example, the illness of the bankrupt's wife or other dependant family members can prevent an order from being made to sell the property. In *Cloughton v Charalambous*⁵⁰ Justice Jonathan Parker summed up the court's position on exceptional circumstances:

“What is required of the court in applying s.335A(3) is, in effect, a value judgment. The court must look at all the circumstances and conclude whether or not they are exceptional.”

Given the need for a value judgement because of the lack of a clear definition of 'exceptional', it is perhaps unsurprising that the court's approach to this delicate area of law has shifted slightly over time. Lord Justice Nourse made it clear in *Re Citro*⁵¹ that the circumstance would have to be outside of the usual 'melancholy consequences of debt and improvidence' to be considered exceptional, which rules out any general hardship suffered by the bankrupt's children or spouse if a family home is taken away. Similarly, it has been established that any disruption to a child's education caused by the loss of the home does not constitute an exceptional consequence of bankruptcy.⁵²

However, as time went on, the courts began to recognise certain types of adversity as exceptional. In the case of *Re Reval*⁵³, for example, the bankrupt's wife had paranoid schizophrenia, which was deemed exceptional because moving to a smaller property away from her friends and family could have caused a relapse in her condition, and an order in favour of the bankrupt was made. Similarly, in *Re Bremner*⁵⁴, the exceptional circumstance was that the bankrupt was being cared for solely by his wife after being diagnosed with terminal cancer and had a life expectancy of only six months. As a result, the judge ordered that the property be put up for sale three months after the bankrupt's death. Nonetheless, the judge determined that there was sufficient equity in the property to pay all creditors in full. Furthermore, in *Re Mott*⁵⁵, the court postponed the sale order until the death of the bankrupt's mother, who had lived in the property for the previous 40 years and was in poor health. Because the Insolvency Act of 1986⁵⁶ expressly excludes the bankrupt's needs from consideration, the bankrupt's health is not directly

⁵⁰ *Cloughton v Charalambous* [1998] BPIR 558 (The bankrupt's wife had renal failure and chronic osteoarthritis, which meant her mobility was severely limited, and the house in question had been modified to meet her needs. For this reason, the court postponed the sale of the bankrupt family home for an indefinite period).

⁵¹ *Re Citro ((Domenico) (a bankrupt)* [1991] (Ch) 142.

⁵² *Salmon's Trustee v Salmon* [1989] SLT (Sh Ct) 49.

⁵³ *Re Reval* ([1998] B.P.I.R. 384.

⁵⁴ *Re Bremner* ([1999] B.P.I.R. 185.

⁵⁵ *Re Mott* [1987] CLY 212.

⁵⁶ Insolvency Act 1986, s 123.

relevant to the application. However, it is critical because the exclusion of bankrupt individuals is a direct violation of their fundamental human rights.

In addition, the court can still issue a sale order even if an exceptional circumstance exists; the only question is for how long the order will be in effect. Even though the bankrupt's daughter had dyspraxia and was suffering from global developmental delay, Justice Lawrence Collins made this point clear in *Dean v Stout*⁵⁷ and reinforced it in *Grant v Baker*⁵⁸, where it was decided on appeal that the sale of the bankrupt's home should only be postponed for 12 months (rather than indefinitely). It is clear from the case law that, while a finding of exceptionality can delay a possession and sale order, it will not do so indefinitely.

Under this strict interpretation of section 335A⁵⁹, the European Convention on Human Rights⁶⁰ and the Human Rights Act of 1998 are applicable. Article 8 (the right to respect for private and family life and the home) has been raised as a defence to possession proceedings several times but did not succeed.⁶¹ The courts have consistently found that section 335A⁶² strikes a 'necessary balance' between 'creditors' rights and debtors' rights' to privacy and their home and that the section's requirements "satisfy the test of being necessary for a democratic society and are thus proportionate."⁶³ As a result, Article 8 defences have frequently resulted in significant delays and costs for the estate of the bankrupt, while never helping the bankrupt to obtain the desired delay in the sale. While exceptionality findings have increased, the court's threshold for postponing a possession and sale order remains extremely high, so that only severe or terminal illnesses, often in conjunction with specific interior adaptations to the home, are recognised as sufficiently exceptional circumstances.⁶⁴ Importantly, possession proceedings will not be dismissed even if such circumstances are determined to be exceptional. Rather, they will be postponed for a limited period.⁶⁵

⁵⁷ *Dean v Stout* ([2005] EWHC 3315 (Ch)).

⁵⁸ *Grant v Baker* ([2016] EWHC 1782 (Ch)).

⁵⁹ Insolvency Act 1986, s 335A.

⁶⁰ European Convention on Human Rights ETS No. 005 213 UNTS 222.

⁶¹ David Pomeroy, 'The trials of being exceptional in bankruptcy', (*The Gazette*, 2021) <<https://www.thegazette.co.uk/all-notices/content/100828>> accessed 21 November 2021.

⁶² Insolvency Act 1986, s 335A.

⁶³ *Ford & Ford v John Alexander (Trustee in Bankruptcy)* [2012] EWHC 266 (Ch) (Smith J).

⁶⁴ David Pomeroy, 'The trials of being exceptional in bankruptcy', (*The Gazette*, 2021) <<https://www.thegazette.co.uk/all-notices/content/100828>> accessed 21 November 2021.

⁶⁵ *Ibid.*

The safety and emotional well-being of the bankrupt's children were critical factors in the case of *Martin-Sklan v White*.⁶⁶ Thus, the eviction was likely to have a negative impact on the children's well-being, educational attainment, and self-esteem. In *Barca v Mears*⁶⁷, the disruption to a child's educational special needs was unsuccessfully argued to be exceptional. As determined in the case of *Re Karia*⁶⁸, a reduced ability to assist with homework while maintaining contact was insufficient. Most of the time, there is no detailed consideration of the creditors' specific circumstances. Instead, it is almost clear that what the creditors want is to be paid as soon as possible. Thus, creditors are given 'conventional weight' without much approval or specific evidence regarding their specific interests or concerns. However, those resisting applications can challenge this, persuading the court that they should be given less weight.⁶⁹

The likelihood that deferring payment of debts will not cause any significant hardship to creditors is an important consideration for the court. Therefore, it is highly likely that there will be no prejudice; so this will very probably be exceptional⁷⁰ (depending on militating factors). So, suppose there is a sufficient surplus or cushion of equity between the property's value and the totality of trustees' expenses/costs, bankruptcy debts (with statutory interest thereon by the proposed sale date. This case will almost certainly be exceptional.⁷¹ Whether or not there is enough bankruptcy, the estate surplus will be affected by any likely depreciation or appreciation in the value of the home. Bankruptcy can be considered house price inflation or deflation if the bankrupt allows the home to fall into disrepair in order to reduce its value. Creditors' favourable statutory interest rates will be considered during the postponement period compared to standard deposit account rates. Even where all the realised costs of the bankruptcy

⁶⁶*Martin-Sklan v White* [2007] BPIR 76.

Facts in this case- The bankrupt and his chronically alcoholic partner had two daughters, ages ten and fourteen. Their mother would occasionally leave the house without notice for several days to indulge in a period of alcoholism, leaving the children concerned about her whereabouts and safety. Domestic incidents may occur when the children return, possibly inebriated, leading to them seeking refuge with neighbours or other family members. The girls' safety and well-being were safeguarded by a delicate combination of their father, their home, and a long-established support network of close neighbours, relatives, and their schools. Living close to neighbours who understood the family's problems without explanation and who could provide refuge to two young girls alone at any time of day or night was 'priceless' and 'almost impossible to replicate.' Substitute lodging fared poorly in comparison. When the needs of the children were weighed against the interests of three large, cash-rich creditors who benefited from a reasonable rate of statutory interest and a comfortable cushion of equity protecting them, possession and sale were postponed for seven years, until the youngest child was 17 years old.

⁶⁷*Barca v Mears* [2005] BPIR 15.

⁶⁸*Re Karia* [2006] BPIR 1226.

⁶⁹*Holtham v. Kelmanson* [2006] EWHC 2588 (Ch).

⁷⁰*Donohoe v Ingram* [2006] BPIR 417 on *Re Holliday (a bankrupt)* [1981] Ch 405.

⁷¹ Simon Hill, 'Trustee in Bankruptcy selling a Home' (33 *Bedford Row*, August 2008) <<https://www.33bedfordrow.co.uk/insights/articles/trustee-in-bankruptcy-selling-a-home>> accessed 30 October 2021.

swallow up money, a sale will still be in the creditors' interests.⁷² Creditors will seek to have the bankrupt's bankruptcy expenses discharged as much as possible from the bankrupt's assets. They are the tragic consequences of debt and improvidence, which have been experienced by every civilised society. Exceptional circumstances can arise on both the bankrupt's and creditors' sides, however, and it is important to recognise this. In particular, non-payment of debt to the creditor by the debtor can cause the creditor's entire business to fail, and many people can lose their jobs. A home valuation will almost certainly be required to balance these factors properly.

Furthermore, expert testimony will almost always be required to back up any alleged medical, educational, or welfare consequences of the sale. Human rights have called into question the strictness of the mandatory assumption. However, after initial 'tentative' obiter comments that the 'narrow approach' of *Re Citro*⁷³ was inconsistent with Article 8 in *Barca v Mears*⁷⁴, it has been stated in *Foyle v Turner*⁷⁵ that the Human Rights Act of 1998 does not necessitate any changes to the Insolvency Act 1986⁷⁶ approach aside from appealing, dissatisfied litigants can request a review or variation of the order under the Act.⁷⁷ For example, if a sale is postponed, an application to vary it may be made; however, exceptional circumstances, such as new or newly revealed facts, must exist to justify overturning the original order held in *Papanicola v Humphreys*.⁷⁸ Even in the absence of exceptional circumstances, there is room for some postponement. For example, a three-month postponement was granted to allow arrangements to be made in *Donohoe*⁷⁹ based on 'common humanity.'

Any significant delay in a sale is dependent on the fact that trustees typically wait 12 months after vesting before applying. Several recent cases have shed light on the courts' approach to distinguishing between 'normal and exceptional' in bankruptcy cases. The courts will be pondering this question more frequently as the economy deteriorates. It is imperative to uncover the implications and effects of severe financial losses a debtor undergoes during insolvency and the methods of debt collection employed by the creditors. Financial losses cause

⁷² *Harrington v Bennett* [2000] BPIR 630.

⁷³ *Re Citro* ((Domenico) (a bankrupt) [1991] (Ch) 142.

⁷⁴ *Barca v Mears* [2005] BPIR 15.

⁷⁵ *Foyle v Turner* [2007] BPIR 43.

⁷⁶ Insolvency Act 1986.

⁷⁷ Insolvency Act 1986, s 375.

⁷⁸ *Papanicola v Humphreys* [2005] 2 All ER 418.

⁷⁹ *Donohoe v Ingram* [2006] BPIR 417.

serious mental health problems to the debtor, and repossession of a family home is a severe loss. Therefore, it is essential to explore the adequacy, enforcement, and collection procedure in the English Legal System for a debtor, especially for the debtor's home. The Insolvency Act 1986 presented new procurements, a significant number of which depended on the Cork Committee's proposals with respect to home assets⁸⁰, including changes to the trustee's powers in connection to the indebted person's home.

The Insolvency Act of 2000⁸¹ and the Enterprise Act of 2002 both introduced provisions⁸² affecting how a bankruptcy trustee manages a bankrupt's residence in transit.⁸³ Insolvency law and debtor-creditor law were affected by the Human Rights Act 1998⁸⁴, which was passed in 2000. Public authorities, including courts and tribunals, are obligated by the Human Rights Act 1998 to act in accordance with the European Convention on Human Rights.⁸⁵

Human Rights Act 1998, section 3 states that:

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

Accordingly, a court must interpret a statute passed by parliament to uphold Convention rights, where this is possible. Article 8(1)⁸⁶ of the European Convention on Human Rights also

⁸⁰ Ian Fletcher, *The Law of Insolvency* (5th edn, Sweet & Maxwell 2017) 21.

⁸¹ Insolvency Act 2000.

⁸² *Ibid*, 23-24.

⁸³ *Ibid*, 26.

⁸⁴ Human Rights Act 1998, s 6(1).

⁸⁵ European Convention on Human Rights ETS No. 005 213 UNTS 222.

⁸⁶ "Article 8 provides: (1) Everyone has the right to respect for his private and family life, his home, and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others."

applies, in particular, to the protection of a debtor’s home, in this context.⁸⁷ The methodology of the English courts has been that Article 8 does not influence the mortgagee’s entitlement to ownership after the mortgagor has fallen into unfulfilled obligations. In *Harrow London Borough Council v Qazi*⁸⁸, Lord Scott expressed, regarding the choice in *Wood v the United Kingdom*⁸⁹, that “the [European] Commission’s decision ... [made] it clear ... that a mortgagor cannot conjure Article 8 to decrease the authoritative and exclusive privileges of the mortgagee under the mortgage”. Therefore, article 8 is essentially not applicable.⁹⁰ The lion’s share, in *Harrow London Borough Council v Qazi*⁹¹, received the perspective “that courts were not required to direct an adjusting exercise in individual cases, as domestic law itself struck the right harmony between the interests of individual and the interests of the community.”⁹² On the other hand, in a minority judgment, Lord Bingham of Cornwall pronounced that “a couple of things are more integral to the pleasure in human life than having someplace to live.”⁹³ It has been stated that the choice of the European Court of Human Rights, in *Connors v the United Kingdom*⁹⁴, “conveys the most grounded suggestion that *Qazi*⁹⁵ was wrongly decided.”⁹⁶ Cases that later appear to recommend this may without a doubt be the position.⁹⁷ It is submitted that this is the present issue that requires enlightenment in English law to provide the debtors with adequate protection and relief from associated mental health suffering.

The Debtor-Creditor Landscape & Law

Debt is a significant part of every economy. Nearly every citizen owes some debt to someone else. These debts come in all shapes and sizes,⁹⁸ such as a loan for home purchases (mortgage), credit cards, overdrafts, car finance, hire purchases, student loans, and taxes.

⁸⁷ Lienne Steyn, ‘Treatment of A Debtor's Home In Foreign Jurisdictions’ (DDL thesis in Law, University of Pretoria 2012).

⁸⁸ *Harrow London Borough Council v Qazi* [2003] UKHL 42, [2004] 1 AC 983.

⁸⁹ *Wood v UK* (1997) 24 EHRR CD 69, a decision concerning possession proceedings brought by a local authority against a tenant.

⁹⁰ *Harrow London Borough Council v Qazi* [2003] UKHL 42, [2004] 1 AC 983 par 135. On the impact of this decision, Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, Oxford University Press 2008) 89

⁹¹ *Harrow London Borough Council v Qazi* [2003] UKHL 42, [2004] 1 AC 983.

⁹² Lienne Steyn, ‘Treatment of A Debtor's Home In Foreign Jurisdictions’ (DDL thesis in Law, University of Pretoria 2012).

⁹³ Remarks by Gray and Gray *Elements of Land Law* 89, with reference to *Harrow London Borough Council v Qazi* [2004] 1 AC 983 [8].

⁹⁴ *Connors v United Kingdom* (2005) 40 EHRR 9.

⁹⁵ *Harrow London Borough Council v Qazi* [2003] UKHL 42, [2004] 1 AC 983.

⁹⁶ Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, Oxford University Press 2008) 128.

⁹⁷ *McCann v UK* (2008) 47 EHRR 40 and *Kay v United Kingdom* [2010] ECHR 1322, 37341/06.

⁹⁸ Lawyers & Jurists, ‘The Debtor-Creditor Landscape’ (*Lawyers & Jurists*, 2021) <<https://www.lawyersjurists.com/article/the-debtor-creditor-landscape-2/>> accessed 31 October 2021.

Consumer debt is a primary device of the UK economy. According to the Money Charity, at the end of August 2021, The UK population owed £1,745.7 Billion in debt.⁹⁹ The average household total debt, including mortgages, was £62,813.¹⁰⁰ This equates to a shocking £33,006 per adult, around 108.9% of average earnings.¹⁰¹ This indicates that over-indebtedness is increasing as the means to pay the debt is not available. The total household debt is expected to rise from £2,006 billion in 2020 to £2,354 billion in 2025, according to the Office for Budget Responsibility's March 2021 forecast.¹⁰² The level of mortgage possession claims between April 2021 and June 2021 is 27.5, which means possession orders were made every day at the rate of 3.0 in England & Wales. Furthermore, the magnitude of the debt problem can be estimated by the fact that every day, 77 landlord possession claims, and 49.5 landlord possession orders were issued.¹⁰³ Every day in the year to September 2021, the Citizens Advice Bureau in England and Wales dealt with 1,906 debt issues, according to the Citizens Advice Bureau. The money charity data further reveals that 306 people were declared insolvent or bankrupt in England or Wales from July to September 2021, and an increase of 32.9% from 21,188 for the same period in 2020.¹⁰⁴

The economy runs well when debts get paid on time. However, when they are not paid on time, litigation may result on the creditor's end, and mental health-related issues arise on the debtor's end as they cannot pay back the contractual debt, and debtor-creditor law is engaged. This section has discussed an overview of the legal relationship between debtors and creditors. Mainly, it is about what goes on when a debtor-creditor relationship is established by the parties and then broken by one. For the most part, the section is about unsecured debt obligations, which causes the problem of debt and over-indebtedness, while secured lending is discussed in the latter part.

A debtor's obligation can arise from a variety of circumstances, including loans, credit card debt, unpaid utility bills, taxes, and rent arrears, to name a few. Debt agreements can be written or oral, expressed or implied under contract laws. Unsecured debts, such as credit card debts, utility bills, personal taxes, and unsecured loans, can begin as unsecured and become

⁹⁹ The Money Charity, 'The Money Statistics October 2021' (*The Money Charity*, Oct 2021) <<https://themoneycharity.org.uk/money-statistics/>> accessed 31 October 2021.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² The office for budget responsibility's, 'Overview of the October 2021 Economic and fiscal outlook' (*The office for budget responsibility*, 27 October 2021) <<https://obr.uk/overview-of-the-october-2021-economic-and-fiscal-outlook/>> accessed 31 October 2021.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

secured through legal actions¹⁰⁵, such as when a debtor fails to pay and contract enforcement in court. The county court judgement can be attached as a lien or property possessed to satisfy the judgment debt. The debtor-creditor relationship consists of both rights and duties.¹⁰⁶ The term ‘rights’ refers to the right to repay a loan or the right of a landlord to enter a property if rent is not paid. ‘Duties’ refer to the debtor's required actions, such as the obligation to repay loans. However, statutes¹⁰⁷ have expanded those roles. For example, a creditor has the right to collect on debt under contractual law and is responsible for reporting accurate information to credit agencies under Data Protection Act 2020.¹⁰⁸

Similarly, while a debtor is required to repay a contractual debt, he or she has the right not to be harassed by phone calls in connection with collection efforts for that debt. In the United Kingdom, numerous laws govern the rights and obligations of debtors and creditors. Although these laws predate the invention of money and trade, modern laws are primarily concerned with consumer protection. Debtor-Creditor law is private, though criminal laws may involve cases involving certain kinds of fraud, touched in this section briefly where a debtor fraudulently obtains credit. Being unable to pay a debt is not a criminal offence, although owing money to the government in unpaid taxes and fines can trigger contempt charges that can land a person in jail, as discussed in the later part of this chapter. In contrast to tort and contract law, most debtor-creditor law is statutory. The FCA and PRA govern the unfair collection practices and regulations around the debt collection practices in the UK.

Before consumer and debtor protection provisions were created in the debt collection methods, it was difficult for a debtor to respond against bad creditor behaviour like persistent phone calls, home visits, and the like. However, debtors have responded to this behaviour through the years by reporting to the media, complaints to the ombudsman for invasion of privacy, and intentional infliction of emotional distress. The Data Protection Act 2018 and GDPR¹⁰⁹ emphasises individual privacy rights. Invasion of privacy can take several forms, including public disclosure of private information (in the case of bankruptcy), wrongful intrusion (bailiffs' home visits), misappropriation of a person's name or likeness and casting a

¹⁰⁵Lawyers & Jurists, ‘The Debtor-Creditor Landscape’ (*Lawyers & Jurists, 2021*) <<https://www.lawyersjurists.com/article/the-debtor-creditor-landscape-2/>> accessed 31 October 2021.

¹⁰⁶ *Ibid.*

¹⁰⁷ Fraud Act 2006, Contract Law, Law of Property Act 1925, Consumer Credit Act, 1974 & 2006, Companies Act 2006, Money Laundering Regulations 2017, Data Protection Act 2018, Mental Capacity Act 2005.

¹⁰⁸ Data Protection Act 2018.

¹⁰⁹ The General Data Protection Regulation (EU) 2016/679.

person in a false light (incorrect data about an individual). In addition, invasion of privacy is sometimes alleged when the creditor has contacted the debtor's employment and informed the employer of the debt. A creditor may contact a debtor's employer for legitimate reasons, such as obtaining salary confirmation for lending purposes, based on the information provided by the debtor. In an invasion of privacy cases, where the creditor contacted the debtor's neighbours, published the debt in a local newspaper, or posted a notice of the debt at the debtor's place of employment, courts have found for the debtor. The non-repayment of unsecured debt does not cause as many issues for the debtor, as debtor assets are not used as security. But a debtor defaulting on contractual debt results in adverse credit history, leading to a higher interest rate on future credit. The subsequent section deals with the laws that bind a debtor and creditor in secured lending transactions and protect a lender against an insolvent debtor.

The main issue arises in the secured lending relationship between a debtor and creditors, where the creditor has a charge or lien on the debtor's assets. The creditor is free to seek repayments of its debt by any legal means. The mortgage contract is an agreement between the borrower and the lender. The general principles of contract law require that a contract must be enforceable¹¹⁰ between parties. For a contract to be enforceable, both the borrower and lender must agree to the mortgage terms before signatures are placed on applications and deeds. Most of the time the borrower does not fully understand the meaning of having his property 'charged' by the lender. Neither their conveyancer explains the consequences in full due to the common assumption that buyers are aware. The cost of arrears, consequences of defaults and changing of interest rate from fixed to variable upon final repayment demand letter are the concerns that need to be highlighted to the debtor at the outset of the agreement. Most of the terms and conditions in the mortgage contract should not be enforceable, according to the argument, because the borrower is not fully informed about the mortgage's legal implications on the lender's behalf by their representatives.¹¹¹ Borrowers are often concerned and excited about the

¹¹⁰ Parties must intend to bind each other legally, as held in the landmark case *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256. The party to whom the offer is being made must accept the offer. The general rule is that the offeror must receive the acceptance before it is effective. It was held in the landmark case *Entores v Miles Far East* [1955] 2 QB 327. The acceptance must be communicated to the offeree. The terms of the acceptance must exactly match the terms of the offer. The agreement must be certain. The agreement must be specific. That means that when the contract is assessed objectively, it must be possible to determine just what the parties have agreed to. That was held in the cases of *Scammell & Nephew v. Ouston* [1941] 110 and *Sudbrook Trading Estate v. Eggleton* [1983]110. There must be a consideration. That means the contract must contain mutual promises, or obligations, between the parties agreeing. So, for example, the lender has agreed to offer the borrower £110,000 on the condition that the borrower will pay back £120,000. Also, to ensure the contract is valid and enforceable, the following must be observed. First, the capacity of the parties means the parties are of the age to create a legally binding contract and are sane to enter into such agreements.

¹¹¹ Mortgage broker, intermediary, solicitors acting for lender.

family home they are purchasing rather than focusing on the mortgage contract and their obligations and the associated costs or consequences for non-repayment. Contract law¹¹² requires that parties be of sound mind. For borrowers who enter into lending contracts when they have the mental capacity to enter the agreement, what protection do they have in law if they become incapacitated during the contract term? There is no single definition in social science and psychology as psychiatrists have different theories on what is regarded as ‘sanity’, ‘sound mind’ and competency. According to Mental Health UK, the meaning of “mental capacity is about whether a person can make a particular decision by himself.” The UK government enacted the Mental Capacity Act 2005¹¹³ to promote and protect decision-making within a legal framework. It accomplishes this in two ways: it empowers people to make decisions for themselves whenever possible, and it protects people who lack capacity by providing a flexible framework that places individuals at the centre of decision-making.¹¹⁴ The Mental Capacity Act of 2005 clarifies that everyone is presumed to be ‘sane’ and capable of making decisions unless proven otherwise. There has been a great deal of case law involving elderly people with mental illnesses who live in rented housing and cannot make decisions.

The common law and equity law decision in *Hart v. O'Connor*¹¹⁵ are that a contract with someone who lacks the capacity to enter such a contract is voidable (not void) by the person lacking capacity if the other party was aware of their lack of capacity.¹¹⁶ It is not possible to void a contract based on the person's lack of capacity, but only if the other party was aware of it (fraud, misrepresentation).¹¹⁷ In contrast with *Wychavon District Council v EM (HB)*,¹¹⁸ where at the bottom of the tenancy agreement, there was written, “[the Claimant] is profoundly disabled and cannot communicate at all.” The landlord knew of the disability. *Imperial Loan Co Ltd v Stone*¹¹⁹ still represents the actual position under common law. In other words, an agreement based on mental disability is void if it can be demonstrated that the disability was obvious to the other party at the time of the contract. Under these circumstances, the contract

¹¹² Contract law in the United Kingdom is governed by the Sale and Supply of Goods Act 1994, which protects both the seller and the buyer.

¹¹³ Mental Capacity Act 2005, s 1(2).

¹¹⁴ Social Care Wales, 'The Mental Capacity Act and Deprivation of Liberty Safeguards (DoLS)' (*Social Care Wales*, 03 October 2019) <<https://socialcare.wales/service-improvement/the-mental-capacity-act-and-deprivation-of-liberty-safeguards-dols>> accessed 31 October 2021.

¹¹⁵ *Hart v. O'Connor* [1985] AC 1000.

¹¹⁶ Lucy Series, 'Mental Capacity Act and Tenancy: An open question' (*Lucy Series*, 7 October 2011) <<https://thesmallplaces.wordpress.com/2011/10/07/mental-capacity-act-and-tenancy-an-open-question/>> accessed 31 October 2021.

¹¹⁷ *Ibid.*

¹¹⁸ *Wychavon District Council v EM (HB)* [2011] UKUT 144 (AAC).

¹¹⁹ *Imperial Loan Co Ltd v Stone* [1892] 1 QB 599.

cannot be annulled unless the other party is aware of the incapacity. The justification for this seems to be the existence of the equitable jurisdiction to set aside ‘an improvident bargain made with a poor and ignorant person’.¹²⁰ The Mental Capacity Act 2005 affords protection to people who entered into legal agreements when suffering from some mental incapacity. In land law, these cases usually involve landlord-tenant issues. However, there are no cases relating to this act that protects a borrower who later develops severe depression due to the mortgage debt and can no longer continue the payments. The test of competency to contract is whether a person’s mental powers have been affected in such a way that the ability to understand the nature of the act in which he engaged, its scope and effect, or its nature and consequence, has been destroyed. Thus, if a person understands the nature, extent, and scope of the business he is about to conduct and possesses the mental strength required to conduct ordinary business, he is considered a person of sound mind and memory in law.

Furthermore, a party who has not been adjudicated mentally incompetent in a court of law is presumed to be competent. The competence presumption, on the other hand, is rebuttable. If the presumption of competency is overturned, the contract entered into by the mentally incompetent person is null and void. Formal adjudication of competency and the appointment of a guardian, on the other hand, deprives the individual of any contractual capacity, rendering any contract entered into by the mentally incompetent person null and void. This paragraph refers to the mental ability of a party to agree. In the case of a borrower who is already suffering from severe depression or mental illness as a result of existing debts or other reasons, one can argue that he is not a ‘sane’ or ‘sound mind’ person to enter into such agreements, particularly a mortgage agreement, which is profoundly serious. Thus the mortgage contract should be void or voidable. The lender needs to ensure that to protect their interests; they exercise their due diligence to check the capacity of the parties, and their understanding when entering into the contracts.

Law of Property Act 1925 and Lenders Protection

The relationship between a creditor and a debtor is contractual, which means both parties can enforce their rights under the contract law. On a debtor becomes bankrupt, the available remedy for the creditor depends on the nature of credit to the debtor. The lending can be either secured or unsecured. This study uncovered a slew of financial and mental health issues caused by debt. A significant question arises regarding why a debtor accepts a debt. Debt

¹²⁰ *Cresswell v Potter* [1978] 1 WLR 255.

is not inherently bad, and it can help individuals and businesses thrive. Although the purpose and goal of why a debtor takes on debt are beyond the scope of this study, it is briefly discussed here, particularly in relation to residential home purchases. This is because losing a home is a significant financial loss for individuals and their families and a source of mental health issues. The primary function of a mortgage, as previously stated, is to provide security for money lent. If the mortgagor defaults, the mortgagee's ultimate goal is to recover payment of the principal debt, plus interest and related costs.¹²¹ The study found that losing a family home and facing bankruptcy is the most substantial loss for a debtor, with significant consequences for the debtor's mental health. This section looks at how lenders can use the law to enforce their legal rights to recover a secured loan or mortgage and how the law protects debtors from contractual obligations.

A mortgage is a type of security in which one party (mortgagor) transfers title to his property (either at law or in equity) to secure the repayment of a loan or other payment obligation to another party (mortgagee).¹²² A mortgage may either be a legal¹²³ mortgage or an equitable¹²⁴ mortgage. If the secured loan is not satisfied under the agreement that creates the mortgage between the parties, the mortgagee has several remedies against the mortgagor. The remedies are available to mortgagees with the benefit of either legal or equitable routes. Mortgagees have five¹²⁵ primary rights under the mortgage. Unless the parties expressly or implicitly agree otherwise¹²⁶, a mortgagee's right to go into possession arises when the mortgage deed is executed.¹²⁷ The terms of a mortgage deed will generally be such that the mortgagee's right to possession will not be exercisable (in other words, the mortgagee usually is not entitled to take possession) unless there has been a default under the terms of the mortgage.¹²⁸ The powers of a mortgagee have been outlined in the Law of Property Act of 1925 as well as the terms of the mortgage deed. It is customary for the parties to include additional

¹²¹ The person giving the security (the mortgagor or chargor) is referred to as the borrower (although the person giving the security need not be the person borrowing the money or Principally responsible for the debt). The person taking the security (the mortgagee or chargee) is referred to as the lender.

¹²² Law of Property Act 1925, s.205(i)(xvi).

¹²³ To be a legal mortgage, the charge must be created by deed, expressed to be by way of legal mortgage and registered at the Land Registry (Law of Property Act 1925, s 87).

¹²⁴ If the charge is not made by deed or is not registered at the Land Registry, it is likely an equitable mortgage.

¹²⁵ Sue the mortgagor under the covenant to repay the loan, enter into possession of the property, sell the property, appoint a receiver over the property and Foreclose.

¹²⁶ *Western Bank Ltd v Schindler* [1977] Ch 1.

¹²⁷ *Four-maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317.

¹²⁸ Practical practice Note: a mortgagee's power of sale arises (in the absence of any contrary terms in the mortgage deed) when the mortgage is made, and the mortgage money becomes due. A mortgagee's power of sale is not conditional on the mortgagee going into possession. On the contrary, most mortgagees who exercise their power of sale do not go into possession and do not obtain a possession order.

provisions¹²⁹ if the mortgage terms are not unfair or unconscionable.¹³⁰ The provisions do not unfairly limit the mortgagor's right to redemption¹³¹ or limit the mortgagor's trade.¹³² Under the Consumer Credit Act of 1974, the terms do not constitute an extortionate credit bargain, nor do they constitute excessive credit under the Insolvency Act of 1986.¹³³

The Power of Sale: According to the Law of Property Act of 1925¹³⁴, a mortgagee exercising its statutory power of sale has the authority to transfer the property by deed. The property will be transferred free from all estates, interests, and rights over which the mortgagee has priority¹³⁵ but is subject to all estates, interests, and rights that prioritise the mortgage. Thus, the mortgage deed will give the mortgagee the express power to sell and convey the property in practice protected alone by the single statute of the Law of Property Act 1925. Once the legal date of redemption passes, the mortgagee has a personal action on the contract to repay the sum owed. For example, if the mortgagor fails to repay a due loan instalment. In that case, the mortgagee can have the personal debt judgment satisfied in the usual way, including enforcement against the mortgagor's property, or making the mortgagor bankrupt as held in the *Alliance & Leicester Plc v Slayford*.¹³⁶ It flows naturally from the mortgage as a contract, wherein each party has promised to fulfil certain obligations. Practically, the mortgagee will not do this until instalments are significantly in arrears¹³⁷; however, an action always remains a possibility. As a result, it is critical to explain to the mortgagor when taking out a secured loan that a mortgage will contain an express power of sale, but if it does not, a power of sale will be implied into every mortgage made by deed under LPA 1925¹³⁸, unless a contrary intention appears.

The Consequences of the Sale: The sale proceeds are utilised to pay the mortgage debt and associated liabilities according to the priority¹³⁹ specified in the Law of Property Act

¹²⁹ Over and above the statutory rights in the mortgage.

¹³⁰ *Multiservice Book Binding Ltd v Marden* [1979] Ch 84.

¹³¹ *Bradley v Carritt* [1903] UKHL 1.

¹³² *Alec Lobb (Garages) Ltd and others v Total Oil Great Britain Ltd* [1984] EWCA Civ 2.

¹³³ Insolvency Act 1986, s 343.

¹³⁴ Law of Property Act 1925, s104(1).

¹³⁵ *McKean v Maloney* [1988] 1 Qd R 628.

¹³⁶ *Alliance & Leicester Plc v Slayford* [2001] 33 HLR.

¹³⁷ It will arise as soon as the legal (contractual) date for redemption has passed or, in the case of instalment mortgages, usually when one instalment is in arrears, as held in *Twentieth-Century Banking Corporation Ltd v Wilkinson* [1977] Ch 99.

¹³⁸ Law of Property Act 1925, s 101(1)(i).

¹³⁹ First in payment of the costs and charges incurred by the sale; second, in satisfaction of the principal debt, interest and costs, intending to discharge the mortgage; and third, if there is any surplus, to the person entitled under the mortgage, usually being the mortgagor, as in the Court of Appeal case *Halifax Building Society v Thomas* [1996] Ch 217.

1925.¹⁴⁰ A successful sale by a priority mortgagee extinguishes the mortgagor's redemption equity and transfers the land to the purchaser free of the mortgagor's claim. For example, if a property worth £100,000 is subject to the first mortgage of £85,000, a second mortgage of £5,000, and a third mortgage of £7,000, the first mortgagee's sale at £100,000 would allow payment of all three mortgages plus a portion of the balance to the mortgagor. Similarly, if the second mortgagee exercised their power of sale, a purchaser would most likely pay only £15,000 (£100,000 - the value - minus £85,000 - the first mortgagee) for the land subject to the first mortgage.

Regulating the Power of Sale: The mortgaged property (family home) possession and sale is a calamitous and highly stressful event for the mortgagor. Therefore, the additional statutory and common law obligation is placed on the lender concerning the conduct of the sale. (1) If the mortgagee sells the property before the power of sale becomes exercisable, the purchaser receives only the mortgagee's interest, and the mortgagor is unaffected. It is as if the mortgagee has only transferred the mortgagee's rights to the buyer. (2) If a mortgagee sells after the power has arisen, but before it is exercisable, the purchaser takes the land free of the mortgage, except that the mortgagor may be able to set aside the sale if the purchaser had notice of the mortgagee's fault.¹⁴¹ (3) Most importantly, in practice, when the power of sale has both arisen and become exercisable, the mortgagor must rely¹⁴² on equity to protect his interest. While selling the property the mortgagee is under a duty of care to the mortgagor to obtain the best reasonably obtainable price as held in *Standard Chartered Bank v Walker*.¹⁴³

The primary duty is to get the best price reasonably¹⁴⁴ obtainable, so a sale by open public auction, even when prices are low, satisfies this duty as held under *Cuckmere Brick Co Ltd v Mutual Finance Ltd*.¹⁴⁵ If the mortgagee does not pursue this option, several offers are made on the property. The court considers the mortgagee's steps to sell the property and then considers whether, in accepting the offer to contract at a price, given that this was within an acceptable range for the property in which the initial offer was perfectly acceptable, including the failure to fulfil the last-minute reduction, which caused the duty as per *Michael v Miller*.¹⁴⁶

¹⁴⁰ Law of Property Act 1925, s 105.

¹⁴¹ Law Property Act 1925, s 104.

¹⁴² Intervention is premised once again on the fundamental point that a mortgage is a security for a debt and that a mortgagee is entitled to his remedies in such a way that ensures fair payment of the debt and nothing more.

¹⁴³ *Standard Chartered Bank v Walker* [1982] 1 WLR 1410, CA (Eng).

¹⁴⁴ *Dean v Barclays Bank plc* [2007] EWHC 1390 (Ch).

¹⁴⁵ *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] 2 All ER 633.

¹⁴⁶ *Michael v Miller* [2004] EWCA Civ 282.

However, the mortgagee is not required to take the steps that an owner would take when selling the property, so there is no obligation for the mortgagee to pursue planning applications or leases that would increase the property's value.¹⁴⁷ This situation leaves the mortgagor in a vulnerable position as in daily life; it is hard to get the right price for the house sale with the fear of repossession. A well-known common law practice is that the mortgagee may not sell the property to his agent or employee.¹⁴⁸ However, if a mortgagee sells to a company in which they have an interest, or is even associated with, the mortgagee bears the burden of establishing that the sale was at the best price reasonably obtainable, and if he is unable to discharge this duty, he is liable for damages, as determined in the case of *Mortgage Express v Mardner*.¹⁴⁹ The mortgagee may apply under LPA 1925¹⁵⁰ for authority to sell to himself, in which case the propriety of the transaction will be assessed by the court, also known as judicial sales. The prohibition on a mortgagee selling to himself applies even if the mortgagee is the only party interested in purchasing the property.¹⁵¹ In a recent high court case¹⁵², it is held that receivers appointed by a mortgagee under the LPA 1925 had neither placed themselves in a position of conflict nor acted in bad faith when, pursuant to their power of sale, they had sold the land in question to a company connected with the mortgagee.

Foreclosure: Although it is rarely used in the UK, this is potentially the most potent remedy in the mortgagee's arsenal. Foreclosure extinguishes the mortgagor's right to redemption and results in the transfer of the mortgaged property to the mortgagee, free of the mortgagor's rights.¹⁵³ If the need arises, the mortgagee will file a foreclosure action in court unless the mortgagor repays the mortgage within a certain time frame. If repayment is not made, the mortgagee will be given a foreclosure nisi,¹⁵⁴ which in effect, gives the mortgagor a further period to raise the money to pay off the loan. If the mortgagor fails to pay, a foreclosure order will be made 'absolute', and the mortgagor's interest in that property will be extinguished. It is usually the end of the matter, although, in exceptional circumstances, the court may open a foreclosure absolute and allow the mortgagor to redeem later.¹⁵⁵

¹⁴⁷ *Parker-Tweedale v. Dunbar Bank plc* (No. 2) [1991] Ch 26.

¹⁴⁸ *Williams v Wellingborough Council* [1975].

¹⁴⁹ *Mortgage Express v Mardner* [2004] All ER (D) 299.

¹⁵⁰ Law Property Act 1925, s 91.

¹⁵¹ *Alpstream AG v PK Airfinance Sarl* [2013] EWHC 2370 (Comm).

¹⁵² *Devon Commercial Property Ltd v Barnett* [2019] EWHC 700 (Ch).

¹⁵³ Law Property Act 1925, s 88.

¹⁵⁴ The first Court appearance in a foreclosure is the Order Nisi, which is considered a final order. The redemption amount is the amount of the principal, interest, and expenses that the borrower will need to pay the lender to pay out the mortgage and stop the foreclosure.

¹⁵⁵ Lawyers & Jurists, 'The Debtor-Creditor Landscape' (*Lawyers & Jurists* 2021) <<https://www.lawyersnjurists.com/article/the-debtor-creditor-landscape-2/>> accessed 31 October 2021.

Nevertheless, a mortgagee or creditor has a carefully balanced decision on whether to seek to enforce its debt¹⁵⁶ under the statute or immediately commence an insolvency procedure. The action depends on the creditor's or mortgagor's attitude to the debt and the current financial position.

Judicial Intervention in Balancing Creditor and Debtor Rights

This segment examines the most frequently relied upon section 36 of the Administration Act of 1970.¹⁵⁷ The overarching question addressed in this section is whether section 36¹⁵⁸ is still 'fit' for purpose. If not, what new legislative provision should be enacted in its place to allow the court to strike a balance between creditor and debtor rights? Section 36 of the Administration Act of 1970 states that if a mortgagee seeks possession of the property, usually intending to sell and realise the mortgagee's property, the mortgagor's property will be forfeited. Under the act, the court has the authority to suspend the possession order or adjourn the proceedings to give the mortgagor enough time to pay off arrears or agree to the new mortgage terms. The mortgagee was only entitled to possession of the property under the Law of Property Act 1925¹⁵⁹ unless the mortgage contract expressly stated otherwise.

The mortgagee, on the other hand, has the right to possession immediately and without demonstrating any default on the part of the mortgagor. In *Four-Maids Ltd v Dudley Marshall (Properties) Ltd*,¹⁶⁰ Harman J expressed that the mortgagee may go into possession "before the ink is dry on the mortgage".¹⁶¹ Lara McMurtry describes this inherent right to possession as "a relic of sixteenth-century jurisprudence", and instead of doing so as a prelude to exercising the power of sale, mortgagees were typically inclined to act because they were subject to duties to account for rents and profits¹⁶² from the land and potential waste liability.¹⁶³ According to most residential mortgages, the mortgagee may only take ownership of the property if the mortgagor defaults. Section 36¹⁶⁴ may then come into play to provide the mortgagor time to correct the

¹⁵⁶ by, for example, warrant of execution, charging order, attachments of earnings.

¹⁵⁷ Administration of Justice Act 1970, s 36.

¹⁵⁸ *Ibid.*

¹⁵⁹ Law Property Act 1925, s 100.

¹⁶⁰ *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] 1 Ch 317, at 320.

¹⁶¹ That was underlined by the same Judge in *Alliance Permanent Building Society v Belrum Investment Ltd* [1957] 1 All ER 635, at 636.

¹⁶² *Western Bank Ltd v Schindler* [1977] 1 Ch 1, at 20-26.

¹⁶³ David Capper, 'Giving the Borrower Time: an Evaluation of the Fitness for the purpose of Section 36 of the Administration of Justice Act 1970' (*Queen's University Belfast - Research Portal*, 2017) <https://pureadmin.qub.ac.uk/ws/portalfiles/portal/140551393/Section_36_of_the_Administration_of_Justice_Act_1970_2_00000002_.pdf> accessed 31 October 2021.

¹⁶⁴ Administration of Justice Act 1970, s 36.

default and, therefore, prevent the mortgagee from taking possession. As security, the mortgagee must sell the property, and any attempt to do so must demonstrate default by the mortgagor.¹⁶⁵ Because new buyers are unlikely to pay a fair price for an occupied property, a selling mortgagee will almost always prioritise vacant property. Section 36¹⁶⁶ only allows the court to temporarily suspend a possession order or postpone possession proceedings; it does not, in essence, preclude the sale of a mortgaged property. The rational desire to obtain possession, on the other hand, would generally ensure that the court could give the mortgagor more time to stop the sale of their family home and fix the default. The main point of section 36¹⁶⁷ is that the borrower can be given a reasonable amount of time to correct the default. For example, the failure to pay any instalment on time under the *Halifax Building Society v Clark*¹⁶⁸ mortgage created an immediate obligation to pay the entire outstanding mortgage balance. Due to the mortgagor's inability to make timely payments, Sir John Pennycuick VC issued a possession order because the default could not be remedied within a reasonable amount of time.

Section 8¹⁶⁹ has had the following significant ramifications. First, it addressed the issue raised in *Halifax Building Society v Clark*¹⁷⁰ above by stating in section 8(1)¹⁷¹ that only arrears, not the entire mortgage debt, had to be paid within a reasonable time. That was significant relief to the mortgagor, and it may be easy to pay while paying the whole mortgage

¹⁶⁵ Law of Property Act 1925 s 103.

¹⁶⁶ Administration of Justice Act 1970, s 36.

¹⁶⁷ *Ibid.*

Additional powers of court in action by mortgagee for possession of dwelling-house.

(1) Where the mortgagee under a mortgage of land which consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, the court may exercise any of the powers conferred on it by subsection (2) below if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.

(2) The court—

(a) may adjourn the proceedings, or

(b) on giving judgment, or making an order, for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order, may—

(i) stay or suspend execution of the judgment or order, or

(ii) postpone the date for delivery of possession,

for such period or periods as the court thinks reasonable.

(3) Any such adjournment, stay, suspension or postponement as is referred to in subsection (2) above may be made subject to such conditions with regard to payment by the mortgagor of any sum secured by the mortgage or the remedying of any default as the court thinks fit.

(4) The court may from time to time vary or revoke any condition imposed by virtue of this section.

(5) F43.

(6) In the application of this section to Northern Ireland, “the court” means a judge of the High Court in Northern Ireland, and in subsection (1) the words from “not being” to “made” shall be omitted.

¹⁶⁸ *Halifax Building Society v Clark* [1973] 1 Ch 307.

¹⁶⁹ Administration of Justice Act 1973, s 8.

¹⁷⁰ *Halifax Building Society v Clark* [1973] 1 Ch 307.

¹⁷¹ Administration of Justice Act 1973, s 8 (1).

is a substantial problem, particularly after missing mortgage payments, the chances of getting good remortgage deals diminishes. Second, it must be clear that the mortgagor can continue to make regular mortgage payments once the arrears have been cleared.¹⁷² A third way to interpret this provision is to treat it as permitting the borrower to defer the payment of capital in accordance with subsection (1) above, even if the mortgage is in traditional form and requires repayment within a short time, such as six months.¹⁷³ Fourth, section 8(3)¹⁷⁴ prohibits the mortgagee from foreclosing on the mortgage in order to avoid using the court's suspension or adjournment powers.¹⁷⁵ Finally, it brings endowment¹⁷⁶ mortgages under section 36¹⁷⁷ protection. One day before section 8's implementation, the Court of Appeal decided in *Western Bank Ltd v Schindler*¹⁷⁸ that the Court of Appeal had difficulty applying section 36¹⁷⁹ to an endowment mortgage because the endowment was a separate contract from the mortgage. There had been no failure to pay the latter, which had been overdue for quite some time. *Bank of Scotland v Grimes*¹⁸⁰, on the other hand, recognises that the obligation to pay off the mortgage at the end of the mortgage period is a 'deferred payment' under the Administration of Justice Act 1973.¹⁸¹

The legal right of a mortgagee to sell a mortgaged property without first obtaining a court order has already been established.¹⁸² Is it necessary for the mortgagee to obtain a court order for possession before exercising the power of sale? Surprisingly, even after the Administration of Justice Act 1970¹⁸³ was amended, this is still not the case. Despite section 36, the Court of Appeal upheld the mortgagee's right to take possession of the mortgaged property without a court order in *Ropaigealach v Barclays Bank Plc*.¹⁸⁴ Two judges who decided the case recognised the inconsistency but thought it was a matter for the legislature to

¹⁷² *Bank of Scotland v Grimes* [1985] 2 All ER 254, at 259: "Therefore the relief which is given by the 1973 Act is that if the court is satisfied that the householder is in a position to bring the books up to date, that is to pay all the sums that he should have paid up to the present time, including capital and interest, some relief can be given, providing, of course, it looks likely that he will be able to put his house in order and continue to pay in the future."

¹⁷³ *Centrax Trustees Ltd v Ross* [1979] 2 All ER 952.

¹⁷⁴ Administration of Justice Act 1973, s 8 (3).

¹⁷⁵ *Habib Bank Ltd v Taylor* [1982] 3 All ER 561 [564].

¹⁷⁶ An endowment mortgage is a type of interest-only mortgage. It is a mixture of an investment and an insurance policy. You pay the interest on the lump sum you have borrowed rather than repaying the sum itself. The endowment product also includes life insurance which will repay the loan in the event of your death.

¹⁷⁷ Administration of Justice Act 1970, s 36.

¹⁷⁸ *Western Bank Ltd v Schindler* [1977] 1 Ch 1.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Bank of Scotland v Grimes* [1985] 2 All ER 254, at 259.

¹⁸¹ Administration of Justice Act 1973, s 8 (1).

¹⁸² Law of Property Act 1925 s 103.

¹⁸³ Administration of Justice Act 1970, s 36.

¹⁸⁴ *Ropaigealach v Barclays Bank Plc* [1999] 4 All ER 235.

address.¹⁸⁵ The court has the authority to suspend or otherwise adjourn proceedings in order to give time for a borrower to get back on track if a mortgagee seeks possession of land, including a residential home, in accordance with the 1970 Administrative Justice Act.¹⁸⁶ The mortgagee is not required to seek possession, but that is implied. A vacant property would be preferred by the mortgagee if they wanted to sell the property¹⁸⁷; if the mortgagee used or threatened violence to gain entry to the occupied property, there is a risk that they are committing a criminal Offence.¹⁸⁸ That provides some relief to the mortgagor from being harassed by the lender from their debt collection measures. Because the property in *Ropaigealach*¹⁸⁹ was vacant, neither of these factors influenced the lender's decision to take possession. *Ropaigealach*¹⁹⁰ confirms what *Smith*¹⁹¹, *Clarke*¹⁹², and *Dixon*¹⁹³ all suggested, that if the mortgagee does not need a court order, taking possession is a right rather than a remedy, though all three agreed that it should be a remedy.

Second, it was an argument for a new statutory¹⁹⁴ provision to replace section 36, which would make possession a remedy that the mortgagee could seek if it could demonstrate either a default by the mortgagor that could not be remedied within a reasonable time or a threat to the mortgagee's security that could only be averted through possession.¹⁹⁵ Alison Clarke acknowledged that substituting a remedy for the mortgagee's right would necessitate some consideration of how the mortgagee's rights to the mortgaged property would be affected, which would have to be reflected in the amending legislation.¹⁹⁶ Concerns that less reputable lenders might not seek court orders for possession and instead try to 'persuade' the mortgagor to leave prompted Dixon to favour possession as a remedy.¹⁹⁷ *Ropaigealach*¹⁹⁸ was decided

¹⁸⁵ *Ibid*, at 252 (Clarke LJ), 256 (Henry LJ).

¹⁸⁶ Administration of Justice Act 1970, s 36.

¹⁸⁷ Law of Property Act 1925, s103.

¹⁸⁸ Criminal Law Act 1977, s 6, Protection from Eviction Act 1977, s 1.

¹⁸⁹ *Ropaigealach v Barclays Bank Plc* [1999] 4 All ER 235.

¹⁹⁰ *Ibid*.

¹⁹¹ R.J. Smith, 'The Mortgagee's Right to Possession-the Modern Law' (1979) Conv. 266, at 267.

¹⁹² Alison Clarke, 'Further Implications of Section 36 of the Administration of Justice Act 1970' (1983) 293 Conv. 293, 294.

¹⁹³ Martin Dixon, 'Sorry, We've Sold Your Home: Mortgagees and Their Possessory Rights' (1999) 58 CLJ 281,283.

¹⁹⁴ Administration of Justice Act 1973, s 8.

¹⁹⁵ It's been argued that in today's world, a threat to the mortgagee's security could arise without the mortgagor's involvement in any significant way.

¹⁹⁶ Alison Clarke, 'Further Implications of Section 36 of the Administration of Justice Act 1970' (1983) 293 Conv. 293, 305.

¹⁹⁷ Martin Dixon, 'Sorry, We've Sold Your Home: Mortgagees and Their Possessory Rights' (1999) 58 CLJ 281,283.

¹⁹⁸ *Ropaigealach v Barclays Bank Plc* [1999] 4 All ER 235.

prior to the 1998 Human Rights Act. In *Horsham Properties Group Ltd v Clark*¹⁹⁹, Briggs J re-examined the issue following the Human Rights Act 1998. Following the default of the mortgagors, the mortgagees appointed receivers over the mortgaged property under the authority of the Law of Property Act 1925²⁰⁰ and a clause in the mortgage conditions themselves. The receivers sold the property in accordance with the LPA 1925²⁰¹ and another provision in the mortgage terms. The purchaser transferred the property to the claimants, who filed a possession action against the mortgagors, claiming that they were trespassers because the receivers' sale had exceeded all of their rights to the property. The mortgagors contended that the mortgagee's ability to sell the property without obtaining a court order for possession infringed on their right to peaceful enjoyment of their possessions, which is guaranteed by article 1 of the First Protocol to the European Convention on Human Rights.²⁰² By holding that no property rights (or 'possession') were taken away from the mortgagors, Briggs J avoided the question of whether the Convention had a horizontal effect and held that article 1 of the First Protocol was not violated, he effectively ruled that the Convention had no horizontal effect. In other words, they had rights to the property as long as they followed the mortgage terms, but those rights were terminated when they defaulted. Due to the statutory power of sale, the mortgagors were not deprived of anything because they carried out their private agreement. A statutory provision revokes the rights of the mortgage holder without a court order, which could be argued to be in the public interest under article 1.

"... it reflects the bargain habitually drawn between mortgagors and mortgagees for nearly 200 years, in which the ability of a mortgagee to sell the property offered as a security without having to go to court has been identified as a central and essential aspect of the security necessary to be provided if substantial property based secured lending is to be available at affordable rates of interest."²⁰³

The truthfulness of this claim may be called into question in light of subsequent European human rights jurisprudence, as will be revealed in the following section. Article 8²⁰⁴

¹⁹⁹ *Horsham Properties Group Ltd v Clark* [2008] EWHC 2327 (Ch), [2009] 1 WLR 1255.

²⁰⁰ Law Property Act 1925, s 101(1)(iii).

²⁰¹ Law Property Act 1925, s 101(1)(i).

²⁰² European Convention on Human Rights ETS No. 005 213 UNTS 222.

²⁰³ *Horsham Properties Group Ltd v Clark* [2009] 1 WLR 1255 at 1266.

²⁰⁴ "1. Everyone has the right to respect for his private and family life, his home, and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

of the European Convention on Human Rights (ECHR), incorporated into domestic law by the Human Rights Act 1998, provides the right to a family home. According to a number of landlord repossession cases²⁰⁵ involving social housing, tenants have the right to challenge the landlord's regaining possession, even if they have no legal claim to the property under domestic law.²⁰⁶ The right to bring a claim against the proportionality of repossession in front of an impartial and independent tribunal implies the right to do so. Mortgagee repossession cases are still unclear as to whether Article 8 has a significant impact. Article 8.2 states that a public authority may not interfere with Article 8 rights except on specified grounds. For the Human Rights Act 1998,²⁰⁷ the court is a public authority; however, in the context of Article 8, a public authority may be limited to bodies such as the housing authorities that brought the possession proceedings in the decisions referred to above.

In *Manchester City Council v Pinnock*²⁰⁸ Lord Neuberger MR gave the judgment expressly stated that “nothing in this judgment is intended to bear on cases where the person seeking the order for possession is a private landowner.” In *Malik v Fassenfelt*,²⁰⁹ Sir Alan Ward argued that Article 8 had a horizontal effect and thus could be pleaded against a private landowner, but this issue was not on appeal in that case, and Lord Toulson and Lloyd LJ (the other members of the Court of Appeal) did not share Sir Alan’s views. The Supreme Court ruled in *McDonald v McDonald*²¹⁰ that Article 8 could not be invoked against a private landlord seeking possession of an assured shorthold tenancy under the Housing Act 1988.²¹¹ The potential fuller effect of Article 8 on mortgagee repossession cases will be discussed further below. However, in the context of the mortgagee’s need for a court order, the mortgagor’s rights appear to rest more securely on Article 6.1 of the ECHR, where it is provided that “[i]n

²⁰⁵ *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104; *Hounslow London Borough Council v Powell* [2011] UKSC 8, [2011] 2 AC 186; *Corby Borough Council v Scott* [2012] EWCA Civ 276, [2012] HLR 23; *Buckland v United Kingdom* (2013) 56 EHRR 16; *Thurrock Borough Council v West* [2012] EWCA Civ 1435, [2013] HLR 5; *Fareham Borough Council v Miller* [2013] EWCA Civ 159, [2013] HLR 22; *Southend-on-Sea Borough Council v Armour* [2014] EWCA Civ 231, [2014] HLR 23; *Circle 33 Housing Trust v Lawal* [2014] EWCA Civ 1514, [2015] HLR 9; *Sims v Dacorum Borough Council* [2014] UKSC 63, [2014] 3 WLR 1600; *R(N) v Lewisham London Borough Council* [2014] UKSC 62, [2014] 3 WLR 1548; *Aster Communities Ltd v Akerman-Livingstone* [2015] UKSC 15, [2015] 2 WLR 721.

Rachael Walsh, ‘Stability and Predictability in English Property Law – the Impact of Article 8 of the European Convention on Human Rights Reassessed’ (2015) 131 *LQR* 535.

²⁰⁶ David Capper, ‘Giving the Borrower Time: an Evaluation of the Fitness for the purpose of Section 36 of the Administration of Justice Act 1970’ (*Queen’s University Belfast - Research Portal*, 2017) <https://pureadmin.qub.ac.uk/ws/portalfiles/portal/140551393/Section_36_of_the_Administration_of_Justice_Act_1970_2_00000002_.pdf> accessed 31 October 2021.

²⁰⁷ Human Rights Act 1998, s 6 (3)(a).

²⁰⁸ *Manchester City Council v Pinnock* [2010] UKSC 45.

²⁰⁹ *Malik v Fassenfelt* [2013] EWCA Civ 798.

²¹⁰ *McDonald v McDonald* [2016] UKSC 28.

²¹¹ Housing Act 1988, s 21.

the determination of his civil rights and obligations . . . , everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”²¹²

The Human Rights Act 1998 and the European Convention on Human Rights are constantly evolving, and the law is clear. The current position in social housing landlord cases differs significantly from that taken by the House of Lords in *Harrow London Borough Council v Qazi*,²¹³ which occurred less than a decade before *Pinnock*.²¹⁴ However, all developments have concerned the extent of the courts’ powers when a landowner seeks possession, not whether the landowner must seek a court order. It is unconscionable in the current situation for a lender to take possession of the mortgaged property and evict the borrower with no other hindrance than a potential criminal liability. In the context of section 36²¹⁵, this would imply that the borrower would always have the option of asking the court to suspend the order for possession or otherwise adjourn proceedings to allow the borrower to get back on track within a reasonable time.

Legislative reform should be undertaken to clarify the law and enshrine in law this restriction on the exercise of the lender's security. In addition, the said legislation should require a lender to obtain a court order for possession before selling a mortgaged property. Without a possession order, the lender should not be able to take possession or sell the property. The Ministry of Justice consultation paper includes a statement from the Council of Mortgage Lenders²¹⁶ that this is industry practice,²¹⁷ as well as a letter from the Financial Conduct Authority to all lending institutions in the UK stating that exercising the power of sale without first obtaining a court order would be considered an unfair practise.²¹⁸ It is unsatisfactory that evicting someone from their home is even theoretically possible without an independent tribunal determining whether all necessary legal conditions for doing so have been met. Because there is no reason to doubt the Ministry of Justice’s²¹⁹ assertion that obtaining a court order for possession is standard industry practice, lenders would face no significant burdens if

²¹² Ian Loveland, 'Peaceable entry to mortgaged premises: considering the doctrine's compatibility with the HRA 1998' (2014) 5 *Conveyancer and Property Lawyer* 381, 383.

²¹³ *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983.

²¹⁴ *Manchester City Council v Pinnock* [2010] UKSC 45.

²¹⁵ Administration of Justice Act 1970, s 36.

²¹⁶ UK Finance is the new name for CML.

²¹⁷ Ministry of Justice, 'Mortgages Power of Sale and Residential Property-Consultation Paper CP55/09' (*Ministry of Justice*, 29 December 2009) <<http://data.parliament.uk/DepositedPapers/Files/DEP2010-0009/DEP2010-0009.pdf>> accessed 31 October 2021.

²¹⁸ *Ibid*, para 67.

²¹⁹ *Ibid*, para 74.

this became a legal requirement. Dr Lisa Whitehouse pointed out that the law should be changed rather than relying on regulatory action because regulation is consistently distant.²²⁰ Because of the uncertainties surrounding abandoned or unoccupied property, the Ministry was correct in recommending that a court order be obtained for these properties.²²¹ However, the borrower's agreement to allow the lender to take possession and sell should render a court order unnecessary.²²² Although the current market conditions and associated problems were most likely not in the legislature's mind when section 36²²³ was enacted, it may still be capable of addressing the majority of the challenges they pose. The court has discretion under section 36, and these broader contexts may be legitimate factors to consider in determining a reasonable period for paying off arrears. That is a piece of social legislation designed to assist borrowers in becoming homeowners. A reasonable period to get back on track towards achieving this goal may legitimately be treated as a more extended period than a reasonable period to profit from property speculation.

Impact of Human Rights Law on Possession Claims

The preceding section demonstrated that the better understanding of the relationship between the mortgagee's right to take possession of the mortgaged property and the Human Rights Act 1998 is that the mortgagee must obtain a court order before evicting the mortgagor from his or her home; however, this is not the default position. In the event that a lender is seeking a court order granting them possession of the property, borrowers who can show that they are paying their mortgage on time and clearing their arrears will be spared eviction if the court grants their request to suspend the possession order. Requiring the mortgagee to obtain a possession order would provide the mortgagor with valuable protection. To use section 36²²⁴ discretion, the court must first verify that all legal requirements for enforcing the mortgage have been met. However, the real issue at hand is one that goes much deeper.

Does Article 8 of the European Convention on Human Rights allow a court to rule that eviction would be disproportionate, even though the legal requirements mentioned above were met and there was no reasonable basis to conclude that the mortgagor could pay off arrears and

²²⁰ Lisa Whitehouse, 'The Mortgage Arrears Pre-Action Protocol: An Opportunity Lost' (2009) 72 *The Modern Law Review* 793,804.

²²¹Ministry of Justice, 'Mortgages Power of Sale and Residential Property-Consultation Paper CP55/09' (*Ministry of Justice*, 29 December 2009) <<http://data.parliament.uk/DepositedPapers/Files/DEP2010-0009/DEP2010-0009.pdf>> accessed 31 October 2021.

²²² *Ibid.*

²²³ Administration of Justice Act 1970, s 36.

²²⁴ *Ibid.*

get back on track within a reasonable period of time? Some have questioned whether Article 8 applied outside of the context of social housing. The requirement to obtain a court order for repossession based on Article 6 and the question of the applicability of Article 8 was postponed until now.²²⁵ The horizontal effect of the ECHR is at stake at this point. Is it only applicable between a public authority and a private person or body (vertical effect), or can it also be applied between two private persons or bodies?²²⁶ If Article 8 has a horizontal impact, the proportionality of eviction may be an issue that must be considered, and the other issues are raised above. Accordingly, the following discussion focuses primarily on whether Article 8 has a horizontal effect in Section 36. Still, some brief consideration will be given to how Article 8 might work in this context if applicable.

In *Barclay's Bank Plc v Alcorn*,²²⁷ the Court of Appeal held this about the compatibility of section 36 with Article 8:

“It is plainly necessary, in the context of the wider economic well-being of a country, that homeowners should be able to borrow – and banks and lending institutions should be willing to lend – on the basis that loans will be repaid. If loans are not to be repaid – and security is not to be enforced for that purpose – then the domestic mortgage market is likely to be seriously affected; and, with it, the economic well-being of the country. There is, therefore, a balance to be struck. Section 36 and its amending section strikes that balance. I can see nothing in the common law, as mitigated by section 36 of the 1970 Act and section 8 of the 1973 Act, which is inconsistent with the convention rights to which I have referred.”²²⁸

That could mean that if section 36²²⁹ must be Article 8 compliant, it is. Alternatively, it could mean that, apart from Article 8, section 36 is an ECHR complaint in general. In any case, as James Hurford pointed out, its pre-dates *Pinnock*²³⁰ and the other authorities mentioned

²²⁵ *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104; *Hounslow London Borough Council v Powell* [2011] UKSC 8, [2011] 2 AC 186; *Corby Borough Council v Scott* [2012] EWCA Civ 276, [2012] HLR 23; *Buckland v United Kingdom* (2013) 56 EHRR 16; *Thurrock Borough Council v West* [2012] EWCA Civ 1435, [2013] HLR 5; *Fareham Borough Council v Miller* [2013] EWCA Civ 159, [2013] HLR 22; *Southend-on-Sea Borough Council v Armour* [2014] EWCA Civ 231, [2014] HLR 23; *Circle 33 Housing Trust v Lawal* [2014] EWCA Civ 1514, [2015] HLR 9; *Sims v Dacorum Borough Council* [2014] UKSC 63, [2014] 3 WLR 1600; *R(N) v Lewisham London Borough Council* [2014] UKSC 62, [2014] 3 WLR 1548; *Aster Communities Ltd v Akerman-Livingstone* [2015] UKSC 15, [2015] 2 WLR 721.

Rachael Walsh, ‘Stability and Predictability in English Property Law – the Impact of Article 8 of the European Convention on Human Rights Reassessed’ (2015) 131 LQR 535.

²²⁶ James Hurford ‘Does article 8 broaden the court’s powers under section 36 of the Administration of Justice Act 1970?’ (2014) 17 Journal of Housing Law 9, 10.

²²⁷ *Barclay's Bank Plc v Alcorn* [2002] EWCA Civ 817.

²²⁸ *Ibid.*

²²⁹ Administration of Justice Act 1970, s 36.

²³⁰ *Manchester City Council v Pinnock* [2010] UKSC 45.

above.²³¹ To get a clear conclusion on this question, the research begins with section 3²³² of the Human Rights Act of 1998 and then moves on to recent English case law on the subject of Article 8's potential horizontal effect between private persons or bodies. To begin, two points should be made to this provision.

First, section 36 of the Administration of Justice Act of 1970 is primary legislation, and second, the Convention's duty to read primary legislation applies without exception. Second, the most critical Convention right in the context of section 36 is Article 8, as stated above.²³³ Respect for a person's home is included in this. Article 8.2 states that a public authority may not interfere with an individual's right to respect for his or her home except for the reasons specified in Article 8.2. In essence, this means that if either the mortgagee or the court is a public authority for Article 8.2, the proportionality of eviction is in question. Consider the House of Lords' decision in *Ghaidan v Godin Mendoza*²³⁴ as an example of what reading and implementing legislation in accordance with the Convention entails.²³⁵

There are two critical points to be made about this decision. First, the majority of speeches made it clear that reading and implementing legislation in accordance with the Convention, to the greatest extent possible, required a search for the general purpose of the legislation and was not dependent on the need to find an ambiguity in the legislation. Second, insofar as this case concerned the defendant's Article 8 rights, it was overlooked that it was a private individual (the freeholder) rather than a public authority attempting to interfere with the

²³¹ James Hurford 'Does article 8 broaden the court's powers under section 36 of the Administration of Justice Act 1970?' (2014) 17 *Journal of Housing Law* 9, 11.

²³² Section 3 of the Human Rights Act provides that "[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

²³³ In two decisions by Master Ellison, *Swift Advances Plc v Heaney* [2013] NI Master 18 and *GE Secured Loans Ltd v Morgan* [2013] NI Master 19, possession was refused to second mortgagees because, *inter alia*, the Master did not think it proper to grant possession under Schedule 7 to the Land Registration Act (NI) 1970. The charged properties were in deep negative equity, with a substantial deficiency on the first charge in each case. Possession followed by the sale would probably have damaged the security of the first charges.

²³⁴ *Ghaidan v Godin Mendoza* [2004] UKHL 30.

²³⁵ For nearly 30 years, the defendant maintained a stable homosexual relationship with the protected tenant of a flat subject to the Rent Act 1977. The defendant was not permitted to succeed to the tenancy of the flat as the protected tenant's spouse after his death under Schedule 1 paragraph 2 of the 1977 Act but became entitled to an assured tenancy of the flat (which did not provide the same security of tenure) as a member of the original tenant's family under Schedule 1 paragraph 3 of the same Schedule. The defendant persuaded a majority of the House of Lords (Lord Millett dissented) to read and apply paragraph 2 in accordance with his Article 8 right to respect for his home and his Article 14 right to be free from discrimination in possession proceedings brought by the freehold owner. The majority argued that the term "spouse" in paragraph 2 included someone who had lived with the tenant for a long time in a stable heterosexual relationship. They then broadened the definition of "spouse" to include anyone who had lived with the tenant for an extended period of time in a similarly stable same-sex relationship. (This went beyond the House's previous decision in *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27, which predated the Human Rights Act 1998 and only allowed the same-sex partner to succeed to the assured tenancy under paragraph 3 as a member of the protected tenant's family.)

defendant's right to respect his home. Moving on to the recent case law on horizontal effect following *Pinnock*,²³⁶ the first significant case was *Malik v Fassenfelt*.²³⁷ In this case, a private landowner sought to reclaim his land from a group of people who were illegally occupying it.

The only question at hand was whether the eviction was disproportionate, assuming that the defendants were entitled to raise this defence. The Court of Appeal agreed unanimously in *Malik v Fassenfelt*²³⁸ that eviction would not be disproportionate, and thus the claimant was granted possession of his land. Next, Sir Alan Ward examined the case law on social landlords repossessing property and concluded that the same principles should apply to private landowners, mainly because the court is a public authority and thus must do what other public authorities are required to do.²³⁹ The other members of the court, Lord Toulson and Lloyd LJ, expressly declined to decide whether Article 8 was available as a defence, although the tenor of their judgments indicated that it was not. According to Lord Toulson, the ECHR imposes obligations on states rather than individuals. He acknowledged that the Strasbourg court has sometimes held that states should protect a person's private life from interference by another private person. However, he described these as exceptional and unusual cases in which the applicants were victims of particularly objectionable conduct that seriously impaired their ability to live everyday life.²⁴⁰ He also contended that the state's interference with a private landowner's right in this manner might violate Article 1 of Protocol 1 of ECHR.²⁴¹

The horizontal effect of Article 8 was directly at issue in *McDonald v McDonald*.²⁴² The respondents purchased a home with the help of mortgage financing provided by a mortgage lender. In violation of several mortgage terms, they granted an assured shorthold tenancy of

²³⁶ *Manchester City Council v Pinnock* [2010] UKSC 45.

²³⁷ *Malik v Fassenfelt* 140 [2013] EWCA Civ 798.

²³⁸ *Ibid.*

²³⁹ *Ibid* at [26].

²⁴⁰ *Ibid* at [44], citing *X & Y v Netherlands* (1985) 8 EHRR 235, *MC v Bulgaria* (2003) 15 BHRC 627, and *Von Hannover v Germany* (2005) 40 EHRR 1.

²⁴¹ *Ibid* at [45].

²⁴² *McDonald v McDonald* [2016] UKSC 28.

Brief Fact: Ms McDonald suffers from mental health issues, specifically emotionally unstable personality disorder. As a result, her parents decided to purchase a home for her to live in with the help of a loan secured by the property. Ms McDonald's parents later ran into financial difficulties, so Law of Property Act 1925 receivers were appointed and served a valid section 21 notice under Housing Act 1988 on Ms McDonald. HHJ Corrie held at first instance that the possession claim was procedurally correct and that unless Ms McDonald was entitled to rely on a proportionality defence under article 8, he was bound to make a possession order. The judge then concluded that Ms McDonald was not entitled to raise an article 8 defence in this case, and thus a possession order would be issued. However, he considered what he would have done if he had been wrong about that and responded by saying he would have dismissed the possession claim if Ms McDonald had been able to raise an article 8 defence. An appeal to the Court of Appeal was denied, and this subsequent appeal to the Supreme Court was also rejected.

the property to their mentally ill daughter. When the fixed term of this tenancy expired, it was transformed into an assured shorthold periodic tenancy. When the respondents could not make mortgage payments, the lenders appointed receivers over the property under the Law of Property Act 1925.²⁴³ The receivers, formally acting as the respondents' agents, served the tenant to quit under the Housing Act 1988²⁴⁴ and initiated possession proceedings. Section 21(4)²⁴⁵ required the court to issue a possession order following the service of a valid notice to quit. The Supreme Court was strongly influenced by the statutory context in which the claim for possession of the property arose in ruling that the court was not a public authority within the meaning of Article 8.

Decades of rent control and increased security of tenure rights for tenants appeared to have rendered the private rented sector in the United Kingdom dormant. As a result, there was little incentive to become a landlord and provide private rented housing as an alternative to owner-occupation. Section 21(4) of the Housing Act 1988 was part of a package of legislative measures enacted in the 1980s and after to revitalise the private rented sector. If the court were considered a public authority for Article 8 and had to consider the proportionality of granting a possession order, the purposes of this legislation could be undermined. In that context, the Supreme Court viewed the court as “merely the forum for determining the civil right in dispute between the parties”²⁴⁶, rather than a public authority obligated to consider the tenant's Article 8 rights.²⁴⁷ Applying this reasoning to section 36 of the Administration of Justice Act 1970, the conclusion reached was that Article 8 would not apply in that context as well, although this says nothing about the previous argument that Article 6 of the ECHR requires occupiers to be given the right to have the question of eviction from their home decided by a court.

On the surface, this appears to be a clear and final decision, but consider the fact that everything appeared to be quite similar before the dialogue between the House of Lords and the Strasbourg court resulted in the Supreme Court performing a volte-face in cases where public sector landlords sought possession of the property. The seam of Strasbourg authority that suggests the court is a public authority for Article 8 purposes was one troubling feature of *McDonald's*²⁴⁸ Supreme Court and Court of Appeal judgments. These decisions, *Zehentner v*

²⁴³ Law Property Act 1925, s 109.

²⁴⁴ Housing Act 1988 s 21(4).

²⁴⁵ *Ibid.*

²⁴⁶ *Harrow London Borough Council v Qazi* [2004] 1 AC 983, at para 108 (Lord Millett).

²⁴⁷ The Supreme Court seems to have been concerned not to open the ‘floodgates’ and open up the entire body of land law to Convention review.

²⁴⁸ *McDonald v McDonald* [2016] UKSC 28.

*Austria*²⁴⁹, *Zrilic v Croatia*²⁵⁰, *Brezec v Croatia*²⁵¹, and *Lemo v Croatia*²⁵², were not followed by the English courts in *McDonald*²⁵³ for a variety of reasons, none of which were entirely convincing. First, it was pointed out that none of these decisions was made by the Grand Chamber, which cannot be considered sufficient reason to dismiss them. Second, it was pointed out that neither Austria nor Croatia had taken the point that Article 8 was arguably inapplicable, but this could be because the point was terrible. Third, it was argued that *Zehentner* and *Zrilic* were not concerned with contractual rights subject to statutory limitations. However, if *Zehentner* is examined, it is not easy to see why he should be treated differently than *McDonald*. Fourth, the applicant was evicted from her apartment following a judicial sale of the property to enforce a money judgement for plumbing work performed on the property. The enforcement proceedings were the final stage of a private law action to recover payment for services rendered; they were not public bankruptcy proceedings brought on behalf of the applicant's general creditors. Fifth, in *Zrilic*, the domestic court exercised its own partition and sale powers, favouring a party who also had Article 8 rights. That would have limited the scope of the applicant's Article 8 rights but not rendered them inapplicable. Ultimately, a residential tenant successfully invoked Article 8 against a private sector landlord in *Brezec* and *Lemo*! However, these last two cases may be distinguishable because the landlord was a state-owned company when the tenancies in question were granted. The tenant would have had a strong case that their Article 8 rights could not be revoked by subsequent privatisation of the property. It is understood that a referral has been made to Strasbourg, implying that the Supreme Court's decision, as in the public sector landlord cases, may not be the final word on the subject.²⁵⁴

Professors Sarah Nield and Nicholas Hopkins have questioned the compatibility of the Administration of Justice Act 1970²⁵⁵ with Articles 8 and Article 1 of Protocol 1 to the ECHR.²⁵⁶ Their research deftly exposes some of section 36's undeniable limitations. For example, it considers only the parties' financial interests in mortgage transactions and has a minimal understanding of home and all it entails for homeowners. Moreover, unlike other legislative provisions struggling to deal with land repossession, such as the Trusts of Land and

²⁴⁹ *Zehentner v Austria* (2009) 52 EHRR 22.

²⁵⁰ *Zrilic v Croatia* (Application no. 46726/11) 3 October 2013.

²⁵¹ *Brezec v Croatia* [2014] HLR 3.

²⁵² *Lemo v Croatia* (Application no 3925/10) 10 July 2014.

²⁵³ *McDonald v McDonald* [2016] UKSC 28.

²⁵⁴ Emma Lees, 'Horizontal Effect and Article 8: *McDonald v McDonald*' [2014] 131 Law Quarterly Review 34, 35.

²⁵⁵ Administration of Justice Act 1970, s 36.

²⁵⁶ Sarah Nield and Nicholas Hopkins, 'Human rights and mortgage repossession: beyond property law using Article 8' (2013) 33 Legal Studies 431, 434.

Appointment of Trustees Act 1996²⁵⁷ (enforcement action by the trustee of a trust for sale of land) and the Insolvency Act 1986²⁵⁸ (power of sale of the trustee in bankruptcy), this provision does not allow for the interests of third parties (particularly children) to be considered. Thus, section 36²⁵⁹ in its current form may well deserve the critical verdict of ‘no longer fit for purpose’ in terms of social policy.²⁶⁰ However, despite its undeniable merits, this study fails to make a compelling case for why Article 8 applies in the context of mortgage repossessions.

In terms of this research's overarching questions about section 36's fitness for purpose, it should be noted that it appears somewhat unsatisfactory that Article 8 must be considered in public law repossession proceedings but not in private law repossession proceedings. In ruling against the applicability of Article 8 in private law, the Supreme Court was aware that private landlords and mortgagees have property rights under Article 1 of the First Protocol that would be diminished if the proportionality of evicting an occupier were considered. However, when the nature of the parties' respective rights and the seriousness of the consequences of losing them are weighed against each other, is not there a strong case changing section 36 so that the court considers the proportionality of evicting the mortgagor from their home? In most cases, the mortgagee's property rights are primarily economic. The court would only refuse a possession order in exceptional circumstances, as discussed in the previous section of this study. The mortgagor risks losing their home, with the not-insignificant risk of becoming homeless in an era when public-sector housing is not as plentiful as it once was. Accordingly, section 36²⁶¹ should be reformed in the same way that section 15²⁶² and section 335A²⁶³ was, to allow for the interests of third parties (such as children) in their home to be taken into account.

Creditors Regulatory Regime and Debtors Support

Principles, codes, and rules are FCA's three types of regulatory instruments through the Financial Services and Markets Act (FSMA) 2000.²⁶⁴ Failure to comply with the principles or codes may result in regulatory sanctions, but it does not give the borrower the right to bring

²⁵⁷ Trusts of Land and the Appointment of Trustees Act 1996, s 15.

²⁵⁸ Insolvency Act 1986, s 335A.

²⁵⁹ Administration of Justice Act 1970, s 36.

²⁶⁰ Sarah Nield and Nicholas Hopkins, 'Human rights and mortgage repossession: beyond property law using Article 8' (2013) 33 *Legal Studies* 431, 453.

²⁶¹ Administration of Justice Act 1970, s 36.

²⁶² Trusts of Land and the Appointment of Trustees Act 1996, s 15.

²⁶³ Insolvency Act 1986, s 335A.

²⁶⁴ Financial Services and Markets Act 2000.

legal action. Furthermore, it does not affect the validity of the mortgage contract, if, for example, the lender violates any rules. In that case, the validity and effectiveness of the mortgage contract are unaffected, but the borrower has the right to sue for breach of statutory duty. However, if the lender engaged in regulated activity without authorisation, the contract would be prima facie unenforceable. The Mortgage and Home Finance: Conduct of Business Sourcebook contains the relevant rules in the United Kingdom (MCOB). When entering into a regulated mortgage contract, lenders are required by MCOB chapter 11²⁶⁵ to assess the borrower's ability to repay, and the lender must demonstrate affordability as a precondition to entering into the contract. In addition, MCOB Chapter 13²⁶⁶ requires lenders to treat arrears borrowers fairly and according to a written policy consistent with the chapter.

Repossession is to be used only as a last resort after all reasonable attempts to resolve the situation have failed.²⁶⁷ However, there is little empirical evidence to show that MCOB Chapter 13 has made a difference in mortgage repossession. To the extent that lenders have shown more extraordinary patience, this may be due to economic factors such as low-interest rates and negative equity. During COVID-19, the support from all the lenders and government was admirable and truly helped to some extent, many households by allowing them to take payments holidays.²⁶⁸ The Mortgage Pre-Action Protocol for Possession Claims²⁶⁹ (MPAP), introduced by the Civil Justice Council in 2009, regulates the mortgage repossession process that requires discussion. It only applies to first and second-charge mortgages secured on residential property, not to buy-to-let mortgages. The Protocol describes the behaviour that the court will generally expect the parties to exhibit prior to the commencement of a possession claim. It does not affect the parties' rights and obligations. Paragraph 2.3²⁷⁰ emphasises the importance of resolving disputes outside of court while acknowledging that in some cases, an

²⁶⁵ FCA, 'MCOB 11A1 MCD mortgage credit intermediary: submission of information to MCD mortgage lender' (*FCA*, 2016) <<https://www.handbook.fca.org.uk/handbook/MCOB/11A/?view=chapter>> accessed 25 October 2021.

²⁶⁶ FCA, 'MCOB Application' (*FCA*, 2016) <<https://www.handbook.fca.org.uk/handbook/MCOB/13/?view=chapter>> accessed 25 October 2021.

²⁶⁷ A&L Goodbody, 'The Land and Conveyancing Law Reform Act 2009' (*Lexology*, 23 July 2009) <<https://www.lexology.com/library/detail.aspx?g=b91f8d28-df4c-4178-be39-cc68e4cdc680>> accessed 2 November 2021.

²⁶⁸ Alex Ellerton, 'Lenders: managing compliance during Covid-19' (*Grant Thornton*, 26 Aug 2021) <<https://www.grantthornton.co.uk/insights/lenders-managing-compliance-during-covid-19/>> accessed 2 Nov 2021.

²⁶⁹ Civil Procedure Rules, 'Pre-Action Protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property' (*Ministry of Justice*, April 2011) <https://www.justice.gov.uk/courts/procedure-rules/civil/pdf/protocols/prot_mha.pdf> accessed 31 Oct 2021.

²⁷⁰ *Ibid.*

order for possession may be in the best interests of both parties. The Protocol's aims are stated in paragraph 3²⁷¹ as follows: that the parties act fairly and reasonably towards each other in resolving any matter concerning mortgage arrears; and to encourage more contact between them in order to seek agreement, and where agreement cannot be reached, to allow efficient use of the court's time and resources. The parties, or their representatives, must discuss the reasons for the arrears (for example, whether they are temporary or long-term), the borrower's financial circumstances and repayment proposals, and whether the borrower will be able to pay the arrears within a reasonable time.²⁷² The lender must promptly respond to any payment proposal made by the borrower and, if not agreeable to the proposal, provide reasons in writing within ten business days²⁷³ if a borrower fails to comply with an agreement. In that case, the lender must give the borrower 15 business days' written notice of its intention to file a possession claim unless the borrower remedies the breach.²⁷⁴ A lender must not consider filing a possession claim if the borrower has applied for financial assistance from several listed sources, or has affordability or financial difficulty and needs time to seek independent debt advice, or has a reasonable expectation of improving their financial situation soon (for example a new job or income from a lodger).²⁷⁵ Starting a possession claim is described as a last resort, used only when all other reasonable attempts to resolve the situation have failed. Several options are listed, including extending the mortgage term, changing the type of mortgage, deferring interest payments, and capitalising arrears.

When a borrower files a genuine complaint with the Financial Services Ombudsman about a potential possession claim, the lender must consider whether to postpone the start of the claim and if the lender does not intend to wait for the Ombudsman's decision, it must notify the borrower with reasons.²⁷⁶ If the Protocol is not followed, judges may adjourn proceedings and deny lenders their costs. According to recent research, the Protocol is being applied inconsistently in England and Wales, with some judges strictly enforcing it and others ignoring it. However, the same study highlighted the enormous difference for a borrower if he or she attends the repossession hearing. Put simply, if the borrower is not present, the judge can do little or nothing for him or her, but he or she can do a surprising amount if they are.²⁷⁷ In

²⁷¹ *Ibid.*

²⁷² *Ibid.*, para 5.4.

²⁷³ *Ibid.*, para 5.6.

²⁷⁴ *Ibid.*, para 5.8.

²⁷⁵ *Ibid.*, para 6.1.

²⁷⁶ *Ibid.*, para 8.

²⁷⁷ Lisa Whitehouse, 'Losing a home: does the current housing possession process provide effective access to justice?' (2014) 164 *New law journal* 16, 17.

essence, the available protocols help borrowers get a chance to save their family home and, on the other hand, help the lender rethink the economic decision they were going to take if possession is granted. The loss to both parties is consequential.

Loss of reputation is the primary source of potential impairment for the mortgagee due to the possession process. Reputational risk is defined as “the possibility that negative publicity about an institution’s business practises, whether true or not, will result in a decrease in customer base, costly litigation, or revenue reductions.”²⁷⁸ Therefore, it is assumed that a mortgagee who fails to treat their customers fairly²⁷⁹ or who undertakes an excessive number of possessions may face negative publicity or a decrease in the customer base.²⁸⁰ However, there have been cases where otherwise reputable lenders have received negative publicity due to their handling of mortgage defaults. Yorkshire Building Society, for example, was fined £4.1 million by the FCA in 2014 for failing to deal with customers in default in an appropriate and timely manner²⁸¹, and this was widely publicised.²⁸²

For some mortgagors, the potential harm caused by the possession process may manifest itself in the form of economic loss, as in the case of the possession of investment properties. For others, losing their home may harm their health, creditworthiness, and social standing, as discussed in chapter 7 of this research. According to Lisa Whitehouse, losing a home ‘represents a significant disruption to the ontological security of homeowners and their families as the home affords it as a site of refuge and control.’²⁸³ That may help explain why some mortgagors’ physical and mental health suffer due to the possession process. According to the Royal College of Psychiatrists, mortgage debt can have a “negative impact on personal identity, invoking uncertainty and impacting on a sense of self; heightened levels of uncertainty; and feelings of stigma, shame, and biographical disruption.”²⁸⁴ These consequences may also affect the mortgagor’s family. Nettleton’s interview with children who

²⁷⁸ Board of Governors of the Federal Reserve System, Commercial Bank Examination Manual [April 2016] 4, 7.

²⁷⁹ Also, breach of MCOB rules and codes.

²⁸⁰ Lisa Whitehouse, 'Mortgage possession at a crossroads: which way should we turn?' (2019) 83 *Conveyancer and Property Lawyer* 227, 234.

²⁸¹ FCA, 'FCA fines Yorkshire Building Society £4,135,600 for failings in dealing with customers in mortgage arrears' (29 October 2014) Press Releases.

²⁸² Sean Farrell, 'Yorkshire Building Society fined £4m for unfair treatment of borrowers' (*Guardian News*, 29 Oct 2014) <<https://www.theguardian.com/business/2014/oct/29/yorkshire-building-society-fine-4m>> accessed 2 Nov 2021.

²⁸³ Lisa Whitehouse, 'Mortgage possession at a crossroads: which way should we turn?' (2019) 83 *Conveyancer and property lawyer* 227, 241.

²⁸⁴ Royal College of Psychiatrists London, 'No health without Royal College of Psychiatrists Position statement PS4/2010 public mental health the case for action' (*Royal College of Psychiatrists London*, October 2010) <https://www.rcpsych.ac.uk/pdf/PS04_2010.pdf> accessed 31 October 2021.

have been evicted highlighted several issues of concern for them, such as uncertainty, worry, and a lack of control.²⁸⁵ The causes underlying the threat of possession also show a lack of control. Essentially, a mortgagor may lose their home due to a *Social Force Majeure* rather than fecklessness.

Moreover, current circumstances, such as a combination of labour market flexibility,²⁸⁶ job insecurity, a reduction in social welfare provision, and reduced access to legal advice, have created what Forrest refers to as a ‘landscape of precariousness’ in which individuals, regardless of age or status, are capable of falling into debt.²⁸⁷ In this environment, it only takes one or two ‘affordability shocks’ to have a significant impact on a mortgagor’s ability to meet their mortgage payments, and COVID-19 is quite shocking. Therefore, courts exercise their discretion in the possession cases to provide much relief to borrowers and equally help the lenders recover the money lent by taking fair decisions and relying on the available regulatory and statutory powers.

Conclusion

Recent housing market developments and COVID-19 pandemic crises make it an excellent time to revisit the discretion granted to courts in mortgagee repossession cases to adjourn proceedings to allow the borrower time to either remedy their default under the mortgage contract or arrange for a sale of the property at a price sufficient to pay off the mortgage debt. This conclusion returns to the overarching question posed in the introduction, namely, whether section 36²⁸⁸ is ‘still fit for purpose’ and, if not, what a new legislative provision should include providing borrowers with the protection against repossession that they deserve. That overarching question was divided into three sub-questions, the answers to which are discussed below.

In response to the first question, whether the lender needs a court order to enforce its security and reclaim possession of the property as a right, it was demonstrated that the lender does need to demonstrate the borrower’s failure to pay the mortgage. That allows the lender to

²⁸⁵ S. Nettleton, ‘Losing a Home through Mortgage Repossession: The Views of Children’ (2001) 15 *Children and Society* 82, 92.

²⁸⁶ Yvonne McCarthy, ‘Dis-entangling the mortgage arrears crisis: The role of the labour market, income volatility and housing equity’ (*Central Bank of Ireland*, February 2014) <<https://www.centralbank.ie/docs/default-source/publications/research-technical-papers/research-technical-paper-02rt14.pdf?sfvrsn=8>> accessed 31 October 2021.

²⁸⁷ Lisa Whitehouse, ‘Mortgage possession at a crossroads: which way should we turn?’ (2019) 83 *Conveyancer and property lawyer* 227, 242.

²⁸⁸ Administration of Justice Act 1970, s 36.

sell the property, but the property is likely to sell for a much lower price without vacant possession. That means that lenders will usually seek an order for possession so that borrowers can ask the court to exercise the section 36 powers in their favour. It provides a safety net mechanism for the debtor and a chance to rectify the fault. However, in the current environment, it cannot be considered acceptable that a lender could even, in theory, sell the borrower's home without the borrower having an opportunity to ask the court to intervene and give the borrower a chance to rectify the situation. Whether or not Article 6 of the ECHR applies in mortgagee repossession proceedings, it establishes a standard that domestic law should follow. A court should thus decide the borrower's rights to their home. A new legislative provision should specify this and clarify that it only applies to genuine residential mortgages.

In response to the second question, the position should be that the 'reasonable period' within which the borrower must demonstrate an ability to clear arrears and get back on track to pay off the mortgage must be at least the mortgage's remaining term. Under the FCA Regulation provisions, an extension of the mortgage period should not be ruled out if it jeopardises the lender's security. In any given case, there should be no presumption that the 'remaining term' is the 'reasonable period.' The maximum periods within which rescheduling should operate are 'remaining term' and possibly an extension. Still, the time in any particular case should be set in relation to the facts of that case, taking into account the legitimate interests of both parties. In making rescheduling decisions, it is permissible to consider any risks to the lender's security, but not where the risk is due to negative equity or irresponsible lending. In those cases, the only relevant consideration is whether the borrower has a viable plan to get back on track with mortgage payments. Thus, a new statutory provision defining the court's discretion in these terms would be beneficial. It would serve as a foundation for the regulatory requirements likely to govern most mortgage default cases.

New legislation is needed to ensure that when a court is asked to decide whether a lender should be granted a possession order, the borrower's Article 8 rights are considered. Although the lender has demonstrated that all legal requirements for recovering possession have been met, the court should rule that a possession order is disproportionate in the circumstances. That is the position in public law, and despite the lender's private property rights, it would be preferable if it were also the position in private law.²⁸⁹ New legislative

²⁸⁹ David Capper, 'Giving the Borrower Time: an Evaluation of the Fitness for the purpose of Section 36 of the Administration of Justice Act 1970' (*Queen's University Belfast - Research Portal*, 2017) <https://pureadmin.qub.ac.uk/ws/portalfiles/portal/140551393/Section_36_of_the_Administration_of_Justice_Act_1970_2_00000002_.pdf> accessed 31 Oct 2021.

provisions should be enacted to ensure that the borrower's Article 8 rights are respected. The opportunity should also be taken to ensure that the borrower's Article 8 rights are respected along with third-party rights (such as children's) in their home being taken into account. That is the case with the Trusts of Land and Appointment of Trustees Act 1996²⁹⁰ and the Insolvency Act of 1986.²⁹¹ The third question is about the difficult decision of selling the property, either because there is, unfortunately, no other option, or the borrower does not wish to continue struggling. Borrowers may be permitted under current law to sell the property themselves if it appears that a higher price is likely to be obtained. However, the court must be cautious of homeowners who waste time on the sale because they want to stay in their homes. MCOB and MPAP also support this approach. Section 36, which grants the authority to postpone a sale for a more extended period than anticipated in *Birmingham Citizens Permanent Building Society v Caunt*²⁹², is social legislation designed to enable ordinary people to become homeowners where this is reasonably possible.

Nevertheless, unfortunately, contracts that last a couple of decades or more are not always going to go as planned. That is the context in which to consider those unfortunate cases in which the borrower's joint venture becomes a homeowner and the lender profiting from assisting the borrower to do so ends. There is no other option but to cut losses and move on. Even if statutory reform is not required in this case, it is necessary for others. It presents an excellent opportunity for statutory clarification of the law in the manner discussed above. The world of a home purchase is quite different today from 1970 when section 36²⁹³ was enacted. People borrowed (and were only allowed to borrow) what they could afford to repay for the essential purpose of purchasing a home back then. House prices rose much more slowly than in recent years, and housing market crashes were a relatively unknown phenomenon. There was a much larger supply of social housing for people who had become homeless due to mortgage difficulties. People have recently entered (and been permitted to enter) highly geared loans for various reasons, which have been discussed throughout this research. The housing market has experienced a significant 'boom and bust cycle', and negative equity has emerged, particularly in the 2008 Financial crisis and that caused issues for both lenders and borrowers.

²⁹⁰ Trusts of Land and the Appointment of Trustees Act 1996, s 15.

²⁹¹ Insolvency Act 1986, s 335A.

²⁹² *Birmingham Citizens Permanent Building Society v Caunt* [1962] 1 Ch 883.

²⁹³ Administration of Justice Act 1970, s 36.

Chapter 6: International Human Rights Law Framework for Debt Relief

Introduction

This section examines the international debt relief framework and how it applies to individual debtors. It also explains how it differs from the current framework established under the Human Rights Act and the European Convention on Human Rights, which provides the debtor with an additional safety net. As discussed in the preceding chapter, the regulatory and private law systems only provide limited relief. Over-indebtedness was prominently highlighted during the 2008 financial crisis and later gained widespread attention during the COVID-19 period. In the Bank of England's second quarterly report for 2021, it was clear that COVID-19 and the steps taken to fix it have had a big impact on household incomes and spending, with some people particularly hard hit by them.¹ The report also concluded that the proportion of households struggling with their finances has increased, particularly among those with unsecured loans who tend to have lower incomes and are less likely to be employed, and that this group is likely to be among the most vulnerable in the next phase of the crisis.² Although the report emphasises the impact of COVID-19 on household income, savings, and debt, it fails to address the central issue of how deeply it has impacted individuals.

The pandemic's development and the pace of economic recovery are both unknown.³ This means that the COVID-19 crisis's recovery will depend on both of these things. Given the uncertainty surrounding an individual debtor's fate, it is critical to view debt crises through the lens of human rights in order to assess the available safety net of protection available through the international debt relief framework. Since economies have become increasingly reliant on customer credit-driven growth, countries must decide whether and how to address the issue of over-indebtedness. Prof. Chrystin Ondersma has found that over-indebtedness is seen as a bigger financial problem and a human suffering crisis.⁴ Furthermore, it has been stated that debtors who are burdened with large amounts of debt face humiliation, marginalisation, exclusion, and an inability to meet their basic needs. Furthermore, the methods used to collect debt exacerbate this suffering. However, the aforementioned issues only dealt with debt, and how this impacted the debtor's mental health was not fully addressed. Historically, many

¹ Jeremy Franklin and others, 'Household debt and Covid' (*Bank of England*, 25 June 2021) <<https://www.bankofengland.co.uk/quarterly-bulletin/2021/2021-q2/household-debt-and-covid>> accessed 7 October 2021.

² *Ibid.*

³ *Ibid.*

⁴ Chrystin D Ondersma, 'A Human Rights Approach to Consumer Credit' (2015) 90 *Tulane Law Review*, 373,383.

countries have not considered or integrated responses to bankruptcy and arrears into human rights frameworks. However, in recent years, European policymakers have demonstrated an interest in incorporating human rights frameworks into their approach to consumer over-indebtedness reduction. Certain factors have heightened interest in consumer over-indebtedness, resulting in a significant increase in the total number of debtors seeking relief through formal bankruptcy procedures and other less formal measures.⁵ Individuals who are in debt experience shame, extreme guilt, exclusion, marginalisation, and a failure to meet their basic needs on a daily basis. Furthermore, the process of collecting debt from individuals appears to be vexing. As discussed in the previous section of this study, the debt collection procedure and the use of bailiffs had a negative impact on the debtor's mental health. Several incidents in which harsh punishments are meted out to those who fail to pay their debts can be found in various forms. It is said that if there are too many debtors and creditors, the entire economy suffers.⁶ Despite the fact that there have been several global financial crises, reforms to bankruptcy regimes or resolving consumer over-indebtedness, have not yet flourished.⁷

Global Over-Indebtedness & Reforms: A Historical Overview

In the following section, this study will discuss how other countries have addressed the issue of over-indebtedness and why UK and EU debtors are better protected than debtors in other developed countries. In the United States and other countries, the issues of over-indebtedness are never taken into consideration. European countries have shown an interest in incorporating human rights principles into over-indebtedness. So far, two scholars have noted that insolvency systems primarily focus on business solvency.⁸ Initially, their findings did not include a human rights analysis of consumer over-indebtedness. However, policymakers in the EU recognised the need for a human rights debt framework. Concerns about human rights have not been factored into consumer over-indebtedness in its current form. The United Kingdom and the European Union are the only parts of the world that have expressed and implemented over-indebtedness human rights policies. It is believed that a bankruptcy⁹ regime is necessary to satisfy human rights concerns. Furthermore, the response to the concept of over-

⁵ *Ibid.*

⁶ The New York Times, 'Poor Land in Jail as Companies Add Huge Fees for Probation (*The New York Times*, 2 July 2012) < <https://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html>> accessed 22 November 2021.

⁷ *Ibid.*

⁸ Jan C. V Apeldoorn, 'Human Rights in Insolvency Proceedings' (2012) 12 *Law and Business Finance* 21,23.

⁹ Although the insolvency regime is not a core part of this study, to evaluate the debt relief framework it is discussed and looked upon how the other countries adopted reforms to protect the debtor who is subject to bankruptcy. The laws and impact of bankruptcy are discussed in the subsequent chapter in detail.

indebtedness is dependent on the nature of the indebtedness experience itself. The experiences are classified according to social norms and government policies. Individuals carry social stigma and shame in terms of social norms. While indebtedness is acceptable to some extent for others, declaring bankruptcy or insolvency can be stigmatising or shame-inducing. Consumer protection laws, welfare policies, and regulatory frameworks, particularly in the United Kingdom, protect people from creditors.

Debtors are protected from creditors during the collection process by consumer protection laws. In the United Kingdom, consumer credit is a regulated activity overseen by the Financial Conduct Authority (FCA), as discussed in detail in the preceding section. In dealing with consumer over-indebtedness, the human rights framework is a useful tool for establishing protections for both debtors and creditors. It is a well-known fact that countries have the right to choose and protect the fundamental human rights of people who are deeply in debt. Some countries have social safety nets in place to ensure that people's basic needs for food and shelter are met. While in some countries, new debt collection methods that protect debtors' rights to dignity, privacy, just remuneration, and freedom from discrimination are in place.

It is noted that there is a rapid increase in consumer over-indebtedness across countries.¹⁰ The Council of Europe defines over-indebtedness as “situations where the debt burden of an individual or a family continuously and manifestly exceeds its payment capacity, resulting in systematic difficulties, and sometimes failure, in paying the creditors.”¹¹ While the World Bank came up with another definition of over-indebtedness, describing it as “the debtor’s ongoing inability to service current obligations on all outstanding obligations as they become due.”¹² Tyler Durden reported that over the last three decades, household debt has risen exponentially in many developed and developing countries.¹³ Consumers in developed countries are now divided into two groups. The professional and middle classes have maintained their employment and income despite COVID-19, though some of their spendings

¹⁰ Therese Wilson, *International Responses to Issues of Credit and Over indebtedness In the Wake of Crisis* (Routledge 2013) 21.

¹¹ Council of Europe, ‘Recommendation CM/Rec (2007) 8 of the Committee of Ministers to member states on legal solutions to debt problems’ (*Council of Europe*, 20 June 2007) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d5b81> accessed 22 November 2021.

¹² The World Bank, ‘Responsible Lending: Overview of Regulatory Tools’ (*The World Bank*, October 2013) <<https://documents1.worldbank.org/curated/en/596151468336064796/pdf/832840WP0GFDR00Box0382083B00PUBLIC0.pdf>> accessed 22 November 2021.

¹³ Tyler Durden, ‘The Global Debt Problem’ (*Zero Hedge*, 11 April 2021) <<https://www.zerohedge.com/markets/global-debt-problem>> accessed 22 November 2021.

have been restricted by lockdowns. This class has been purchasing residential property, having saved up enough money for the necessary deposits and having ready access to mortgage financing. And then there are the low-wage earners, particularly in the hospitality and tourism industries, who have lost their jobs and have little or no savings.¹⁴ Due to the COVID-19 pandemic, the current debt situation is not measured fully, and the full-scale impact is still under review. Every country has reported severe problems that individuals have faced due to government measures such as lockdowns and other economic factors like job losses and lack of financial support. It is feared that rising mortgage rates will lead to an increase in defaults in the UK. However, the recent rise in house prices will almost certainly reverse, possibly to the point where even 80% of loan-to-value mortgages become uncovered, resulting in a crisis for lenders.

The Organisation for Economic Cooperation and Development (OECD) states that household debt in Norway (246.96% of net disposable income (\$106,283), Denmark (256.7% of net disposable income (\$105,221)), and the Netherlands (235.7% of net disposable income (\$90,178)) had the highest household debt loads.¹⁵ In contrast, the household debt in the UK (145% of net disposable income (\$56,945)) is low compared to many other European countries, but still very high compared to many Eastern European countries. In previous studies, unemployment, illness, divorce, and other sources of temporary or unexpected loss of income were found to be common causes of debt accumulation.¹⁶ Many countries around the world were affected by the financial crisis of 2008 and its debt problems. Many countries that don't have consumer bankruptcy laws have started or are thinking about starting debt relief programmes for people who can't pay their debts.¹⁷ All the neighbouring countries, like Latvia, Slovenia, Poland, Sweden, and the Netherlands, have initiated and discharged new bankruptcy laws. It's important to note that Sweden changed its bankruptcy laws a lot in order to get people out of debt quickly and make repayment plans that last more than five years exceedingly rare.¹⁸ The Netherlands, on the other hand, reformed its debt settlement procedures and allowed debt discharge after one year rather than three, which is consistent with current UK procedures. They also gave courts the authority to compel creditors to accept debtors proposed out-of-court

¹⁴ *Ibid.*

¹⁵ Economic Co-operation and Development, 'Household Debt' (OECD, 24 March 2021) <<https://data.oecd.org/hha/household-debt.htm>> accessed 22 November 2021.

¹⁶ Chrystin D Ondersma, 'A Human Rights Framework for Debt Relief' (2014) 36 University of Pennsylvania Journal of International Law 269, 279.

¹⁷ *Ibid.*

¹⁸ Patricia A. McCoy 'Barriers to Foreclosure Prevention During the Financial Crisis' (2013) 55 Arizona law review 723, 728.

settlements. Similarly, when Greece implemented personal discharge for consumers, the UK implemented debt relief orders.¹⁹ According to the London Economics Report, Ireland and Germany have changed their bankruptcy laws to allow discharge after three years of plan repayment.²⁰

The Council of Europe's primary goal is to achieve greater unity among its members, and one method of achieving that goal is to maintain further implementation of human rights and fundamental freedoms. The European Convention on Human Rights (ECHR) has been at the forefront of human rights law, particularly in the realms of civil and political rights. The global link that emerged in its relationship to other contracts is becoming an increasingly important component of the court's function. The version of the ECHR associated with non-compliance rights, similar to the right to life and the prescription of torment, has been followed by other global decision-making institutions. The ECHR and its Protocols are primarily concerned with civil and political rights.

The European Court of Human Rights is in charge of making sure that human rights are protected by law.²¹ The European Convention on Human Rights is influenced by both regional and global sources. It is considered to be at the cutting edge of human rights law. The Convention is widely regarded as one of the most significant developments in legal history as well as the Council of Europe's pinnacle achievement. The emergence of the authority of the European Court of Human Rights has been described as one of the most remarkable phenomena in the history of international law, if not all law. In 2005, the Council of Europe's European Ministers of Justice, who are in charge of implementing the European Convention on Human Rights, convened a conference to discuss legal solutions to over-indebtedness that are consistent with human rights principles.²² The Committee emphasised the importance of addressing excessive debt in light of the Committee's human rights obligations under resolution 1.²³ The European Committee on Legal Cooperation (CDCJ) developed legislative and administrative measures, as well as practical solutions, to address the issue of excessive debt.

¹⁹ *Ibid.*

²⁰ Chrystin D Ondersma, 'A Human Rights Framework for Debt Relief' (2014) 36 *University of Pennsylvania Journal of International Law* 269, 280.

²¹ Niaz A. Shah, 'The Right to a Fair Trial and the Military Justice System in Pakistan' (2016) 7 *J Int'l Human Legal Stud* 330, 335.

²² Council of Europe, '26th Conference of European Ministers of Justice, (*Council of Europe*, 7-8 April 2005) <<https://www.coe.int/en/web/human-rights-rule-of-law/mju26-2005-helsinki>> accessed 22 November 2021.

Over-indebtedness frequently causes social and health problems and social exclusion of families, which may jeopardise the basic needs of children, according to the report. Debt recovery was also supported by the same committee, which emphasised the importance of ensuring that debtors' rights and human dignity are respected at all stages of debt collection and debt enforcement procedures, while not violating creditors' rights. Debtor rehabilitation was also recommended by the CDCJ, which stated that repayment plans should be 'reasonable'. As a response, the Council of Europe prepared a document outlining specific areas for government action in response to the report. The areas are described as "establishing policies for debt management and responses to over-indebtedness, ensuring the quality of all services related to over-indebtedness and the impartiality of providers, encouraging lender participation, and establishing accessible information about consumer rights" and "financial management awareness".²⁴

In addition, the Council of Europe responded with specific solutions for over-indebtedness prevention, alleviation of over-indebtedness effects, and rehabilitation of the over-indebted. Furthermore, the Council emphasised the importance of respecting the debtor's human dignity during the debt collection process, as well as encouraging financial and social inclusion of over-indebted individuals, and fair debt collection methods. Moreover, the Convention requires that the Convention's values of tolerance, social peace, and non-discrimination be promoted and adhered to.²⁵

Similarly, the World Bank's Report²⁶ on the Treatment of Natural Persons' Insolvency acknowledged that insolvency regimes may have human rights implications. However, the report provides no specific guidance on the human rights standards or obligations involved in dealing with over-indebtedness. Over-indebtedness has been identified as a human rights concern in Europe and the United Kingdom in the last decade. Even before the 2008 financial crisis, the Council of Europe's Committee of Ministers, which is in charge of implementing the European Convention on Human Rights (ECHR), issued a report discussing the human rights implications of consumer over-indebtedness and proposing ways to harmonise responses to

of Europe, '26th Conference of European Ministers of Justice, (Council of Europe, 7-8 April 2005) <<https://www.coe.int/en/web/human-rights-rule-of-law/mju26-2005-helsinki>> accessed 22 November 2021
<https://www.coe.int/en/web/human-rights-rule-of-law/mju26-2005-helsinki/ages/result_details.aspx?ObjectId=09000016805d5b81> accessed 22 November 2021.

²⁵ Niaz A. Shah, 'Charlie Hebdo: Testing the Limits of Freedom of Expression' (2017) 14 *Muslim World J Hum Rts* 83, 109.

²⁶ World Bank, 'Insolvency and Creditor/Debtor Regimes Task Force, Report on the Treatment of the Insolvency of Natural Persons' (*World Bank*, 2014) <<https://openknowledge.worldbank.org/handle/10986/17606>> accessed 22 November 2021.

over-indebtedness.²⁷ It is found that over-indebtedness may lead to mental health problems.²⁸ In addition, social problems arise out of these financial matters, which will lead to the exclusion of individuals from society. Despite this, the reports and recommendations emphasised the importance of treating excessive debt as a human dignity issue. Furthermore, the reports acknowledged that debtors' ability to meet basic needs can be hampered by excessive debt. Human rights concerns have grown in popularity outside of Europe, and discussions about solutions and implementation for consumer over-indebtedness are taking place. As a result, concerns about over-indebtedness and adequate debtor protection are growing in the UK, particularly among those with mental health problems.

The United Kingdom, as a whole, has been subjected to a consumer bankruptcy explosion. The policy formulation for these occurrences has two different components. The primary effort by the government to engage in strategies is to prevent debtors from becoming over-indebted. These policies call attention to conscientious lending, debt information and guidance and financial education. The second is a sequence of a restructuring intended to revise bankruptcy laws by bringing the law into line more strongly with the demands of over-indebted debtors who could no longer deal with their responsibilities and duties. It has long been acknowledged that the policies of the two areas should be restructured to keep pace with the fast growth of consumer credit and debt, as emphasized by Skene and Walters.²⁹ Skene and Walters, in their research, recorded that household debt in the United Kingdom tops the world and represents around 140%³⁰ of aggregate household income.³¹ The study noted that several factors increased the consumer's concern about over-indebtedness. The total insolvency rate increased in all regions of England and Wales in 2018.³² In fact, the total insolvency rate increased for the third successive year to 25.0 per 10,000 adults, a rate increase of 3.6 per 10,000. Individual voluntary arrangements (IVAs) continued to account for most individual

²⁷ Council of Europe, 'Recommendation CM/Rec (2007) 8 of the Committee of Ministers to member states on legal solutions to debt problems' (*Council of Europe*, 20 June 2007) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d5b81> accessed 22 November 2021.

²⁸ *Ibid.*

²⁹ Donna M. Skene and Adrian Walters, 'Consumer Bankruptcy Law Reform in Great Britain' (2006) 80 *American Bankruptcy Law Journal* 477,483.

³⁰ This has increased in 2021 to 145%.

³¹ Donna M. Skene and Adrian Walters, 'Consumer Bankruptcy Law Reform in Great Britain' (2006) 80 *American Bankruptcy Law Journal* 477,483.

³² The Insolvency Services, 'Gender, England, and Wales, 2018' (*The Insolvency Services*, July 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/817344/Commentary_-_Individual_Insolvencies_by_Location_Age_and_Gender_-_2018.pdf> accessed 28 March 2020.

insolvencies, and all types of insolvency increased their rate per 10,000 adults. Further analysis of the gender data reveals that males had a higher rate of insolvency per 10,000 adults than females, but the gender gap narrowed noticeably from 2009 onwards, and by 2014, females had higher insolvency rates than males. This shift coincided with a decrease in bankruptcies (where males have a higher rate of insolvency), the introduction and growth of debt relief orders (where women have a higher rate of insolvency), and the narrowing and subsequent reversal of the gender gap for individual voluntary arrangements.³³ Thus, the existing data clearly shows a hike in insolvencies and a lack of protection for individuals.

The government's attempt to pursue strategies to prevent consumers from becoming over-indebted is explained in the consumer bankruptcy law reform in the United Kingdom policy. Lending, debt counselling, and financial education were all prioritised in the strategy. The second set of reforms aims to modernise bankruptcy laws by better aligning them with the needs of over-indebted consumers who are unable to meet contractual obligations. The goal of these reforms is to create integrated legal frameworks for debt management and relief that provide a menu of options tailored to the needs of debtors regardless of their financial circumstances while balancing the interests of debtors and creditors as much as possible. The purpose of bankruptcy laws is to provide debtors with protection and a method for distributing a debtor's assets among all creditors in an equitable manner.

Human Rights Debt Relief Framework

In many countries, the explosion of private household debt is the direct result of two parallel phenomena: the State's failure to adhere to its human rights obligations, particularly in the area of economic, social, and cultural rights, and the increasing 'financialisation' or commoditisation of social services. Financialisation, on the other hand, can act as the polar opposite of such a framework, as it is based on the idea that it is the individual's responsibility to ensure an adequate standard of living and access to essential goods and services. Many human rights issues can be solved by increasing the availability of credit for everyone, which is known as 'financial inclusion'. This includes the ability to start a business to earn a living, obtain adequate health care, or get a job. Financialisation draws attention to the importance of financial markets and the concept of self-management in improving one's own living conditions, while simultaneously obscuring the obligations of governments to take appropriate steps to gradually realise economic, social, and cultural rights in a democratic society. The

³³ *Ibid.*

Universal Declaration of Human Rights' flagship provision is “All human beings are equal in dignity and rights.”³⁴ Human Rights are said to be the fundamental rights that everyone has and enjoys. It is the freedom given to people to react to acts of injustice committed against them. As part of the ‘human rights framework’, the United Kingdom has ratified several treaties and has taken on international obligations. These are the international treaties that give humans legal authority. The concept of human rights has evolved since World War II. It has gained international recognition. The Universal Declaration of Human Rights was adopted by the United Nations to conserve, preserve, and protect future generations from human rights violations for the first time.

The idea of ‘access to credit as a human right’ comes from the idea that if we want everyone to have access to food, shelter, and health, we need to make sure everyone has access to the tools that can help them get those things. Article 25(1) of the Universal Declaration of Human Rights³⁵ starts with the idea that people have the right to food, shelter, and health. This could be said to mean that access to credit is so important in reducing poverty that access to credit should be a right in itself. The human rights framework is fundamentally predicated on the premise that States (and, to a lesser extent, private actors) have obligations to respect, protect, and fulfil human rights while ensuring equality and combating discrimination.

Debt is not in and of itself a human rights issue, let alone a violation. What causes concern is when indebtedness is either caused by or results from human rights violations, affecting those who are marginalised or vulnerable, in particular. The Universal Declaration of Human Rights enshrines rights that are especially relevant for an examination of over-indebtedness and abusive lending and collection practices, including the rights to life, liberty, and security, freedom of movement, social security, just remuneration, an adequate standard of living, including food, housing, education, clothing, and medical care and necessary social services, and the right to security. In this context, the rights to information, as well as political and public participation, are especially significant.

All of the aforementioned rights are enshrined in several international treaties, most notably the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights. Several instruments have also been negotiated and ratified in relation to specific population groups, ensuring a clear understanding

³⁴ *Ibid.*

³⁵ Universal Declaration of Human Rights, 10 Dec 1948, 217 A (III).

of one of the pillars of human rights: non-discrimination. International human rights law is founded on the principles of equality and non-discrimination. Understanding the financial implications of household debt on the enjoyment of rights such as health, education, housing, and access to water and electricity inevitably leads to a detailed assessment of what the enjoyment of various human rights necessitates. Individuals or households caught in debt and economic vulnerability spiral must contend with formidable economic forces or actors, high levels of inequality, low levels of accountability, increasing financialisation of services, and limited access to mechanisms of justice or redress.

The ‘Guiding Principles’ on business and human rights apply to the impact of business activities on human rights, which includes banking and financial private lenders, as well as other private lending actors. According to the Guiding Principles, states have a duty to protect against human rights violations committed by third parties, including businesses, within their territory and/or jurisdiction. Corporations, in turn, must not violate human rights, while states must take steps to prevent, investigate, punish, and redress violations through legislation, regulations, policies, and adjudication. Furthermore, states have an obligation to ensure that people whose rights have been violated by business activities on their territory have access to effective redressal mechanisms.

The ‘International Human Rights Debt Relief Framework’ includes agreements of international organizations, principally the United Nations, such as the International Covenant on Civil and Political Rights (ICCPR),³⁶ the United Nations Convention on the Rights of Persons with Disabilities (UN-CRPD),³⁷ treaties agreed at a regional, national, and European level covering European Convention on Human Rights (ECHR).³⁸ European Convention on Human Rights is the main focus of this research. It was adopted under the auspices of the Council of Europe, and national legislation on human rights was enacted: in the United Kingdom, this is primarily the Human Rights Act 1998 (which incorporates the ECHR into domestic law), although numerous other national statutes play a critical role in upholding human rights.³⁹ In addition to these laws, international, regional, and national bodies have issued human rights guidelines, declarations, ethics, and codes of conduct. Finally, human rights courts provide guidance on how treaties should be interpreted; while these are not always related, they are relevant to the interpretation of human rights commitments and help to shape

³⁶ New York, 16 December 1966 United Nations, 999 U.N.T.S. 171; 6 I.L.M. (1967) 368.

³⁷ Convention on the Rights of Persons with Disabilities, New York, 13 December 2006 UN *Doc. A/61/611*.

³⁸ ETS No. 005 213 U.N.T.S. 222, entered into force on Sept. 3, 1953.

³⁹ Human Rights Act 1998.

new case law. The European commitments include the European Convention on Human Rights⁴⁰ and the European Union Charter of Fundamental Rights.⁴¹ Various treaties are included in the international commitments. The European Convention on Human Rights was agreed upon by member states of the Council of Europe in terms of European Commitments. The Convention has been in effect since 1953 and contains a series of Articles that express a variety of civil and political rights. The rights apply to everyone who is subject to the jurisdiction of the states that have signed the treaty. After taking all possible steps to resolve their claim at the national level, the European Court of Human Rights in Strasbourg examines cases brought forward by individuals whose Convention rights may have been violated. The European Court of Human Rights also administers to oversee the implementation of the Convention by the forty-seven member states of the Council of Europe. As a result, individuals can file complaints about human rights violations with the Court after exhausting all other avenues of appeal in the member state in question.

Through the Human Rights Act of 1998, Convention rights are incorporated into UK national law to help individuals. Several Convention rights provide individuals with a way out of difficult situations. Articles of the Convention that are most commonly cited and interpreted concerning the protection of debtors include:

- The right to life is emphasised in Article 2 of the Convention; this article is related to the research. Over-indebtedness, as previously discussed, causes severe mental disorders and stress, which leads to suicidal thoughts and suicide.⁴² The effect of over-indebtedness on mental health was addressed in the study's later section.
- Article 3 addresses the right to be free of torture and inhuman or degrading treatment or punishment. Over-indebtedness is a form of torture for the debtor; additionally, debt collectors treat debtors inhumanely and degradingly, and their methods, as described earlier, are not debtor-friendly, causing mental suffering to the debtor.
- Article 4 of the Convention says every individual should be free from slavery and forced labour. At the same time, it was discussed previously that the over-indebtedness

⁴⁰ ETS No. 005 213 U.N.T.S. 222, entered into force on Sept. 3, 1953.

⁴¹ European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02

⁴² *Renolde v. France* (Application no. 5608/05) 16 October 2008.

During pre-trial detention, a prisoner with mental health issues committed suicide. The state was said to have violated his article 2 right.

Fact: The court recognised the vulnerability of those in custody, particularly those who were mentally ill, and reaffirmed the duty of state authorities to protect such people. 'However, such an obligation must be interpreted in a way that does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct, and the operational choices that must be made in terms of priorities and resources,' the court stated.

or inability of the debtor to pay the actual loan is a kind of modern slavery, where the insolvency procedures are not favourable. In current economic and financial crises, once a debtor falls into the vicious circle of poverty and debts, they are compelled to do voluntary forced labour. Thus, the mortgage prisoner's⁴³ homeowner is self-propelled toward forced work to meet their financial obligation as they do not have any choice. The concept of what is in the normal course of business is one of the criteria used to limit the concept of compulsory labour. Work or labour that is normal in and of itself may be rendered abnormal if the selection of the groups or individuals obligated to perform it is governed by discriminatory factors. In cases where the Court⁴⁴ has determined that there was no forced or compulsory labour for the purposes of Article 4, this does not mean that the facts in question are entirely outside the scope of Article 4 and, thus, of Article 14.

- In repossession and eviction cases, Article 6 focuses on the right to a fair trial or hearing. It is a matter of principle that everyone is entitled to a fair hearing by a tribunal in the determination of 'civil rights and obligations' as defined in Strasbourg Court case law. Furthermore, in Article 6.1, guarantees are added regarding the Court's organisation and composition, as well as the conduct of the proceedings. In sum, the right to a fair hearing comprises the whole (*Golder v. the United Kingdom*⁴⁵). However, neither the letter nor the spirit of Article 6 precludes a person from voluntarily waiving the guarantees of a fair hearing, either expressly or implicitly, under certain conditions (*Dilipak and Karakaya v. Turkey*⁴⁶, *Schmidt v Latvia*⁴⁷). Moreover, in a democratic society, as defined by the Convention, the right to a fair administration of justice is so

⁴³ Mortgage prisoners are homeowners who are current on their mortgage payments but cannot switch to a better deal because they do not meet the strict affordability rules enacted following the 2008 financial crisis. This is despite the fact that switching would often result in lower mortgage payments, leaving them trapped with their current mortgage and paying more money than they need to.

⁴⁴ *Van Der Musselle v. Belgium* (Application no. 8919/80) 23 November 1983.

Fact: The Court rejected a claim that there had been a violation of article 4 when a pupil Avocat was required by Order of Advocates regulations to assist those in need of legal aid and represent clients without payment if so, directed by the Order. A violation could occur "if the service imposed a burden so excessive or disproportionate to the benefits attached to the future exercise of that profession that the service could not be treated as having been voluntarily accepted beforehand." The Court emphasised the importance of services falling within the scope of an Avocat's normal activities, that a compensatory factor could be found in the benefits associated with the profession, and that the services contributed to the applicant's professional training opportunity to broaden his experience.

⁴⁵ *Golder v. The United Kingdom* (Application no. 4451/70) 21 February 1975.

⁴⁶ *Dilipak and Karakaya v. Turkey* (Applications nos. 7942/05 and 24838/05) 4 March 2014.

⁴⁷ *Schmidt v Latvia* (Application no. 22493/05) 27 April 2017.

crucial that a restrictive interpretation of Article 6.1 would be contrary to the provision's aim and purpose (*Guðmundur Andri Ástráðsson v. Iceland*⁴⁸).

- Article 8 (Right to respect for private and family life, home, and correspondence) is a crucial article that will be discussed in depth later in this chapter.
- The right to freedom of expression and to receive and impart information (Article 10) is fundamental, and FCA regulatory system reflects these rights and implementation in the regulated sector.
- Many debtors can benefit from the right not to be discriminated against (Article 14). The majority of lending is risk-based in the lending world. As a result, the lender charges the borrower a preferential interest rate based on their credit history, which may constitute indirect discrimination. Under ECHR, in the case of *Carson and Others v. the United Kingdom*⁴⁹, only differences in treatment based on an identifiable characteristic, or 'status', can amount to discrimination within the meaning of Article 14. The Court also confirmed that discrimination based on disability, medical conditions, or genetic features was covered by Article 14 of the Convention and Article 1 of Protocol No. 12 (*Glor v. Switzerland*⁵⁰, *G.N. and Others v. Italy*⁵¹, *Kiyutin v. Russia*⁵²). Can the issue of a discriminatory rate be brought to court when the lender is not a government agency and individuals enter into commercial agreements with their consent? In *Guberina v. Croatia*⁵³, the applicant sought a tax exemption for the purchase of a new home that was specially designed to meet the needs of his severely disabled child. The authorities did not take his son's special needs into account. They determined that he did not meet the requirements for tax exemption because he already had a suitable place to live. The court emphasised that by ratifying the UN-CRPD, Croatia was obligated to respect such principles as reasonable accommodation, accessibility, and non-discrimination against persons with disabilities and that there had been a violation of Article 1 of Protocol No. 1 in conjunction with Article 14 of the Convention by ignoring the specific needs of the applicant's family related to his child's disability. For the first time, the Court acknowledged that the applicant's discriminatory

⁴⁸ *Guðmundur Andri Ástráðsson v. Iceland* (Application no. 26374/18) 1 December 2020.

⁴⁹ *Christine Goodwin v. the United Kingdom* (Application no. 28957/95) 4 November 2008.

⁵⁰ *Glor v. Switzerland* (Application no. 13444/04) 6 November 2009.

⁵¹ *G.N. and Others v. Italy* (Application no. 43134/05) 1 December 2009.

⁵² *Konstantin Markin v. Russia* (Application no. 30078/06) 22 March 2012.

⁵³ *Guberina v. Croatia* (Application no. 23682/13) 22 March 2016.

treatment based on his child's disability constituted disability-based discrimination under Article 14.

Apart from these, other national laws, such as the Equality Act 2010, are relevant to protect various aspects of human rights, while others are drafted in such a way as to protect human rights. When compared to the Convention alone, the international debt relief framework provides a more robust system of protection to the individual debtor and protects the rights identified above. In terms of international commitments, the United Kingdom has ratified a number of international human rights treaties⁵⁴ dealing with a variety of human rights issues. These treaties, unlike the European Convention on Human Rights, are not expressly incorporated into UK law, but they can have an impact in other ways, such as providing a useful tool for interpreting domestic legislation in the courts.

Relating Issues

Gender Discrimination: Discrimination based on race, ethnicity and colour is a highly distressing issue, and the first crucial international treaty is the International Convention on the Elimination of all Forms of Racial Discrimination. It is said that people should not be able to be superior because of their race because it is scientifically false, morally wrong, socially unjust, and dangerous. There should be no discrimination anywhere in the world.⁵⁵ Individual discrimination based on race, colour, or ethnic origin has been shown to impede friendly and peaceful relations between nations, capable of disrupting peace and security among peoples, as well as the harmony of people living side by side even within the same state. Unfortunately, manifestations of gender discrimination continue to exist in various parts of the world in various forms. Gender discrimination is defined as any unequal treatment, including privilege and priority, which is given to one person over another because of their gender. Its purpose or effect is to nullify or impair the equal recognition, enjoyment, or exercise of human rights and fundamental freedoms in political, economic, social, cultural, or any other field of public life. It will be the primary focus of the treatise. The debtor is subject to discrimination in the modern lending criteria based on the suitability of certain financial products due to credit rating, gender or other risk factors. The lender has justified this discrimination by referring them to high credit

⁵⁴ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)).

⁵⁵ International Convention on the Elimination of All Forms of Racial Discrimination, Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19.

risk due to the history or inability of the debtor to pay off the contractual debt on time. Better rates of interest are available to prime debtors than sub-prime debtors due to their credit rating. The lender justifies that this sort of discrimination is due to commercial interest, but in the end, the debtor is further pushed into debt. The majority of decision-making on a credit application is assessed by the automated decision-making algorithm, which means it is essential to provide those debtors with protection under the law rather than being pushed into further debts by discriminating against them by charging a higher interest rate.

Discrimination against women remains a highly distressing and disturbing concern of modern human rights law, and the most relevant treaty in this regard is the Convention on the Elimination of All Forms of Discrimination against Women (1979)⁵⁶, which is regarded as the most significant and important international instrument for the promotion and protection of the rights of women. This Convention monitors the status of women while also promoting women's rights. The provisions have highlighted areas where women are denied equality with men. These efforts for women's advancement have resulted in a number of declarations and conventions dealing with women's discrimination in all forms. Also, the Convention takes an important place in bringing the female half of humanity into the focus of human rights concerns.⁵⁷ In the UK, discrimination against women in terms of debt is still present and requires immediate attention. Recently, a credit referencing agency highlighted that women pay more credit than their male counterparts in the media.⁵⁸ Martyn James, a money expert at Revolver, told the Sun news that the gender credit gap 'definitely' exists.⁵⁹ Women are the target of this "gender credit gap", and they face paying £17,000⁶⁰ more in interest for financial products like mortgages, credit cards and unsecured loans over their lifetime.⁶¹ Lenders and the regulator need to work together to factor out the differences and ensure that women do not lose out simply because they are women.

UN Torture Convention (CAT), and the ECHR (Article 3): Torture, Cruel, Degrading Treatment or Punishment is a major concern within international human rights. The

⁵⁶ International Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979 United Nations, *Treaty Series*, vol. 1249, p. 13.

⁵⁷ *Ibid.*

⁵⁸ Rebecca Speare-cole, 'Why women pay Thousands of pounds more to borrow money than men due to the gender credit gap' (*The Sun News*, 16 Apr 2021) <<https://www.thesun.co.uk/money/14660334/women-pay-more-borrow-money-gender-credit-gap/>> accessed 7 October 2021.

⁵⁹ *Ibid.*

⁶⁰ The research found that the cost of lifetime borrowing for women was £152,403 due to their lower credit scores. This compares to £135,490 for men - a difference of £16,913.

⁶¹ *Ibid.*

primary convention in this regard is the Convention against Torture and Other Cruel, Degrading Treatment or Punishment.⁶² The term ‘torture’ is defined as follows:

“Article 1(1): For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

Degrading treatment, on the other hand, refers to treatment that is both humiliating and inhumane. A variety of factors influence whether or not treatment reaches a degrading level. The duration of the treatment, its physical or mental effects, and the victim's gender, age, vulnerability, and health are all factors to consider. This concept is founded on the principle of dignity, which acknowledges that all people have inherent worth. Although degrading and inhuman treatment is common in debt collection practices, it is difficult to prove that debtors were tortured as a result of the remarkably high threshold imposed by the Convention and law. Lenders may use a variety of methods or channels to enforce debt repayment. Aside from judicial enforcement – if the debt is legally contracted – debt collection services, ranging from ‘official agencies’ to non-financial institutions, are commonly used. Abuse has been observed in this context all over the world. Debtors have been subjected to daily phone calls or various forms of harassment and shameful practices by collectors, according to cases.⁶³

Over-indebtedness has the potential to deprive indebted individuals not only of their economic, social, and cultural rights but also of their civil and political rights through the criminal justice system. Individuals with low incomes may accumulate debt as a result of local government fines and fees, such as traffic and parking tickets. These amounts can quickly escalate when they enter the court system and face additional costs. For vulnerable individuals, the accumulation of fines and fees, which may also be the result of various forms of discrimination, can exacerbate consequences and occasionally result in amounts that they are ultimately unable to pay. Chapter 2 of this study has examined in detail how the debtor who failed to pay has been treated in the past in detail, where they suffered inhuman and degrading treatment. The case law arising from Article 3 of the European Convention on Human Rights

⁶² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 United Nations, Treaty Series, vol. 1465, p. 85.

⁶³ *Harrison v Link Financial Ltd* [2011] EWHC B3 (Mercantile) [53].

is discussed in the following section because it is most directly relevant to the UK, and its importance has grown since the incorporation of the ECHR into UK domestic law through the Human Rights Act 1998.

The following ECHR analysis is conducted to analyse and obtain the threshold of what can fall under the definition of inhuman and degrading treatment that some debtors face on a daily basis, in order to assess the required safety net level for those debtors. According to Article 3 of the ECHR, “No one shall be subjected to torture or inhuman or degrading treatment or punishment”. In theory, treatment must be severe enough for a challenge under this provision to succeed. The Strasbourg authorities set a high standard for treatment that falls under the purview of Art.3; it must exceed “a certain roughness of treatment”.⁶⁴ In deportation and asylum cases, Article 3 is frequently cited. Following the decision in *D v the United Kingdom*⁶⁵ that an HIV patient could not be returned to a state of origin where medical treatment was inadequate, it is rarely used to determine the debtor's condition when they are subjected to humiliating, inhumane and degrading treatment during debt collection procedures, which is sometimes left unreported. Article 3 has been expanded to include poverty and social decay in non-Convention countries. In *R (Adam, Limbuela and Tesema) v Home Secretary*⁶⁶ the House of Lords applied this extended right to overrule legislation denying social support to asylum seekers who fail to submit their claims as soon as “reasonably practicable”.

The rejection of social support was deemed to be torture, and inhuman treatment demonstrates how far the Convention has progressed as a social and economic rights instrument, where claims to social services, accommodation, and a high standard of medical care can be made out under the prohibition drafted into the Convention. How far the Convention's reach as a social and economic rights instrument has progressed, and where claims to social services, housing, and a high standard of medical care can be made under the prohibition. It is determined that the court applies “reasonably practicable” and “certain roughness of treatment” along with other established principles to judge the contravention deemed to amount to torture and inhuman treatment. These can apply to the debtor’s condition when they are subjected to humiliating, inhumane and degrading treatment. Inhumane debt collection methods are used that cause severe mental health injury to the debtor and are left unreported. Judge Nicholas Chambers QC, who sat in Queen’s Bench Division in Wales, has

⁶⁴ *The Greek Case* (1969) Application Nos 00003321-3/67, 11 YbK of the ECHR 501.

⁶⁵ *D v The United Kingdom* (1997) 24 EHRR 423.

⁶⁶ *R (Adam, Limbuela and Tesema) v Home Secretary* [2005] UKHL 66.

stated that the lender calls to the debtor are some forms of torture, as reported in the local newspaper,⁶⁷ where the debtor reported that the lender's debt collection methods were inhuman and full of mental torture. The judge said:

“In my view, the Claimant rightly complains that, mainly by MBNA but also by the Defendant, he was hounded by telephone calls seeking payment of what was said to be due. The calls were a form of torture oppressively frequent in amount and often without attribution to an identification number. I am unimpressed by suggestions that all that the Claimant had to do was to seek a meeting when the position was that those who called him would not listen to what he had to say of his difficulties.”⁶⁸

Judge Chambers further said that an inability to comply with an agreement was “no excuse for the conduct of which it must be supposed the sole purpose must have been to make the claimant's life so difficult that he would come to heel”.

However, since COVID-19, many lenders have changed their behaviour toward debt collection procedures due to the pressure from watchdogs and human rights groups. Further, introducing the Debt Respite Scheme Regulations 2020⁶⁹ relieved debtors under debt pressure and can legally take a short break under this scheme. This regulation's underlying aim is to help the debtor safeguard them from the stress of the inability to pay the contractual debt, which COVID-19 may have caused or due to any other mental health. However, relief is short-term but aims to help the debtors. Therefore, the courts should discourage some lenders' inhuman and aggressive debt collection techniques and provide reassurance and safeguards to deserving debtor who is subjected to mental stress to protect their rights.

Convention on the Rights of the Child: The rights of children are significant rights at international, regional, and domestic levels. The most significant convention at the international level is the Convention on the Rights of the Child (1989).⁷⁰ As a result, children's human rights have become part of the larger human rights discussion. The Convention guarantees children fundamental rights, including the right to be protected from harmful acts

⁶⁷ Online Wales, 'Debt collectors' calls 'were a form of torture', says judge' (*Online Wales*, March 2011) <<https://www.walesonline.co.uk/news/wales-news/debt-collectors-calls-were-form-1843986>> accessed 11 October 2021.

⁶⁸ *Harrison v Link Financial Ltd* [2011] EWHC B3 (Mercantile) [53].

⁶⁹ Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020.

⁷⁰ Convention on the Rights of the Child, New York, 20 November 1989 United Nations, Treaty Series, vol. 1577, p. 3.

or practices of commercial or sexual exploitation, physical or mental abuse, and military service.⁷¹ Article 3⁷² of the Convention stated,

“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.”

Given the importance of Article 3, state parties are required to recognise that this principle is a primary consideration in all of their activities involving children and that it is enshrined in the constitutional framework or relevant national legislation.⁷³ Furthermore, the significance of the provisions is underlined by the fact that these provisions cannot be the subject of any reservation.⁷⁴ Additionally, it should be ensured that respect is accorded to each child within their jurisdiction without regard for the child's race, colour, sex, language, religion, political or other opinions, national, ethnic, or social origin, property, disability, birth, or other status.⁷⁵ The Supreme Court ruled in *R (SG & Ors) v Secretary of State for Work and Pensions*⁷⁶ that the government's ‘benefit cap’ violates the United Kingdom's legal obligations on children's rights. The benefit cap is a fixed limit on the total amount of state benefits that a family can receive, regardless of family size or circumstances. The Deputy President of the Supreme Court, Lady Hale, states in the judgment that:

“The prejudicial effect of the cap is obvious and stark. It breaks the link between benefit and need. Claimants affected by the cap will, by definition, not receive the sums of money which the State deems necessary for them adequately to house, feed, clothe and warm themselves and their children.” (paragraph 179) “It cannot possibly be in the best interests of the children

⁷¹ Javaid Rehman, *International Human Rights Law* (2nd edn, Longman Pub Group 2010) 559.

⁷² Convention on the Rights of the Child, New York, 20 November 1989 United Nations, Treaty Series, vol. 1577, p. 3.

⁷³ Javaid Rehman, *International Human Rights Law* (2nd edn, Longman Pub Group 2010) 564.

⁷⁴ Goodwin-Gill and McAdam, *The refugee in International Law* (OUP, 2007) 323.

⁷⁵ See Convention on the Rights of the Child, Adopted and opened for signature, ratification, and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.

⁷⁶ *R (SG & Ors) v Secretary of State for Work and Pensions* [2015] UKSC 16.

affected by the cap to deprive them of the means to provide them with adequate food, clothing, warmth and housing, the basic necessities of life.” (paragraph 225)

Lord Kerr states:

“It cannot be in the best interests of the children affected by the cap to deprive them of the means of having adequate food, clothing, warmth and housing. Depriving children of (and therefore their mothers of the capacity to ensure that they have) these basic necessities of life are simply antithetical to the notion that first consideration has been given to their best interests.” (paragraph 268)

Lord Carnwath states:

“The Secretary of State has failed to show how the regulations are compatible with his obligation to treat the best interests of children as a primary consideration.” (paragraph 128)

The impact of debt is so severe on the individual that their family and the whole household is affected. Hannah Slater of Generation Rent highlighted the shocking statistics that over a quarter of families with children in England rent privately and do not have tenure security.⁷⁷ Additionally, the English Housing Survey emphasises that one in every eight families with children who moved last year did so because their landlord gave them notice. There were 118,000 families who were forced to relocate due to a lack of absolute security of tenure. Many of these families will have been evicted under Section 21's ‘no fault’ eviction policy.⁷⁸

Moving is a significant source of stress for the family, but the primary victims are the children. When the head of the house (parents or carers) is stressed and anxious, their children are automatically affected. Parental stress impairs children's ability to reach their full potential due to financial concerns, and housing security is critical for their optimal development. This insecurity puts many questions⁷⁹ which require responses and solutions. The Supreme Court ruled unanimously that Article 8 of the European Convention on Human Rights (ECHR)

⁷⁷ Chloë Darlington, 'End unfair evictions so children in private renting families can benefit from secure homes' (*Children England*, 16 August 2018) <<https://www.childrenengland.org.uk/blog/end-unfair-evictions-for-children>> accessed 11 October 2021.

⁷⁸ *Ibid.*

⁷⁹ How can a child feel safe and secure when their family has been forced to move home without being given a reason, or even while their parents are worried about this threat? How can a child develop a sense of belonging and build healthy friendships if they're shunted by landlords from one neighbourhood to another? How much harder is it for a child to learn, achieve and find purpose when their education is disrupted?

requires that the best interests of the child be taken into account and given paramount weight when assessing proportionality.⁸⁰ According to Maslow's⁸¹ hierarchy of needs, an individual's basic physical needs for shelter, safety, and security must be met in order for them to experience psychological well-being through the development of relationships and a sense of belonging, ultimately enabling them to become fulfilled and purposeful individuals.⁸² The financially struggling debtor is unable to fulfil his family needs and mostly relies on the state supports for himself and his children, as under the convention UK government has committed to providing the children with an adequate house, food and clothes, but there is still a section in the society who are ignored. The UK government has made a public commitment to ensure its policies comply with the Convention: "All UK government policies and practices must comply with the UNCRC".⁸³ However, the implementation is not evidenced fully as yet, and the situation posts the COVID-19 crisis is still uncertain due to the vast scale of its impact on children.

Rights of the Disabled Person and Convention on the Rights of Persons with Disabilities: Another significant aspect of international human rights law is the rights of persons with disabilities. In this context, the most important international treaty is the Convention on the Rights of Persons with Disabilities (CRPD).⁸⁴ The Convention's preamble notes that "Disability is an evolving concept and results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others". Persons with disabilities, on the whole, continue to face barriers to their participation as equal members of society and human rights violations in all parts of the world. As a result, people with disabilities receive less respect from the general public. As a result, this convention works to improve the living conditions of disabled people in all countries, particularly in developing countries. It is also emphasised that people with disabilities should be actively involved in policy and programme decision-making processes. Furthermore, the convention is concerned about the difficult circumstances faced by people with disabilities who encounter multiple or aggravated forms of discrimination based

⁸⁰ *ZH (Tanzania) v SSHD* [2011] UKSC 4.

⁸¹ Abraham Harold Maslow was an American psychologist who was best known for creating Maslow's hierarchy of needs, a theory of psychological health predicated on fulfilling innate human needs in priority, culminating in self-actualization.

⁸² Chloë Darlington, 'End unfair evictions so children in private renting families can benefit from secure homes' (*Children England*, 16 August 2018) <<https://www.childrenengland.org.uk/blog/end-unfair-evictions-for-children>> accessed 11 October 2021.

⁸³ GOV UK, 'Policy paper 2010 to 2015 government policy: equality Updated 8 May 2015' (*GOV UK*, 8 May 2015) <<https://www.gov.uk/government/publications/2010-to-2015-government-policy-equality/2010-to-2015-government-policy-equality>> accessed 11 October 2021.

⁸⁴ Convention on the Rights of Persons with Disabilities, New York, 13 December 2006 UN Doc. A/61/611.

on race, colour, sex, language, religion, political or other opinions, national, ethnic, indigenous, or social origin, property, birth, age, or another status.⁸⁵ The Convention on the Rights of Persons with Disabilities (CRPD) is not directly enforceable in the UK courts,⁸⁶ although the UK adopted the treaty in 2006 with ratification in 2009. By following CRPD, the UK agrees to protect and promote⁸⁷ the human rights of disabled people, including ensuring disabled people are protected from all forms of exploitation, violence, and abuse.⁸⁸ There are ways⁸⁹ in which the Convention can have practical relevance in the debtor's life where the lender can have some reasonable adjustment to aid the debtor.

Similarly⁹⁰, if the debt has been assigned to a debt collection agency, they must consider the debtor's disability and fully cooperate in accordance with the Equality Act 2010. Many high-street lenders have established separate debtor support units, primarily for debtors who are disabled or require emotional support to repay their debt. Lender support is an ever-increasing necessity post-COVID-19, as the number of debtors falling into arrears rises due to job losses and country economics. To summarise, the rights guaranteed by the Convention can be argued in court for specific interpretations of the law. The Convention on the Rights of the Child (CRPD) can be used to interpret and apply UK legislation that is ambiguous or uncertain, such as the Equality Act 2010 (for example, a disability, a reasonable adjustment) and the Human Rights Act 1998. In more detail, the UK courts have held that where a UK statute predates an international treaty (the Equality Act 2010 predates the CRPD), words in the statute are to be interpreted as intended to carry out the treaty obligation and not to be inconsistent with it. As a result, if there is ambiguity or uncertainty in the UK statutory provision, the CRPD can be invoked. Furthermore, the UK courts ruled that using treaty provisions that lay out broad and fundamental principles as determinative tools for interpreting a concrete measure, such as

⁸⁵ *Ibid.*

⁸⁶ *Britliff v. Birmingham City Council (Disability Discrimination) (Rev 1)* [2019] UKEAT 0291_18_1608).

⁸⁷ Eliminating disability discrimination and abling disabled people to live independently in the community ensuring an inclusive education system.

⁸⁸ Equality and Human Rights Commission, 'UN Convention on the Rights of Persons with Disabilities (CRPD)' (*Equality and Human Rights Commission*, August 2017) <<https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/un-convention-rights-persons-disabilities>> accessed 28 March 2021.

⁸⁹ For example, suppose you've fallen behind on your credit card payments and have received a warning letter from your bank. You've asked a friend to call on your behalf because you're deaf. They claim you must first answer several security questions, which you are unable to do. So that your friend can communicate on your behalf, the bank should make reasonable adjustments.

⁹⁰ Example- Your electricity debt has been passed to a debt collection agency. You're deaf and your partner usually phones your electricity provider for you. The debt collection agency has now started phoning you to chase the debt, but they refuse to speak to your partner. The debt collection agency should make reasonable adjustments so you can communicate with them. For example, they could contact your creditor to verify your partner's authority or ask you to send them a letter of authorisation.

a specific provision of a UK statute, requires extreme caution; aspirational provisions cannot qualify the clear language of primary legislation.⁹¹

The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR): The International Covenant on Economic, Social, and Cultural Rights recognises everyone's right to an adequate standard of living for themselves and their families, including food and shelter, as well as to the continuous improvement of living conditions (art.11.1). This article should be read in conjunction with Covenant article 2.2, which provides for the exercise of all Covenant rights without regard for any form of discrimination. Along with other crucial human rights concerns that could have ramifications for a variety of rights, including the right to life, liberty, and security, several of the debt collection issues raise critical questions about access to justice, as well as the procedures and mechanisms by which both public and private actors can claim debts. Article 26 of the International Covenant on Civil and Political Rights is unambiguous in its guarantee of equality before the law, without regard for discrimination, and equal protection under the law. The 1968 United Nations International Conference on Human Rights stated that the Declaration⁹² “constitutes an obligation for the members of the international community.”⁹³

In setting forth economic rights, the Declaration affirms the right to “just and favourable remuneration” that ensures “for [each person] and [his or her] family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection” for each individual and his or her family.⁹⁴ Moreover, it affirms the right to rest and leisure and the right to “a standard of living adequate for the health and well-being of [each person and his or her] family, including food, clothing, housing and medical care . . .”⁹⁵ That said, many (if not most) of the rights supported in the Declaration are not accompanied by any remedy in the event of a violation, and some do not consider ‘human dignity’⁹⁶ to be a human right although human dignity and equality are the core of the Declaration. However, that does not mean that policymakers will not want their responses to over-indebtedness to reflect the human rights

⁹¹ *R (on the application of) v Oxfordshire County Council & Ors* [2017] EWCA Civ 1308.

⁹² Universal Declaration of Human Rights, 10 Dec 1948, 217 A (III).

⁹³ Proclamation of Teheran, Final Act of the International Conference on Human Rights, U.N. Doc. A/Conf.32/41 (May 13, 1968).

⁹⁴ Universal Declaration of Human Rights, art 23.

⁹⁵ *Ibid*, art 24.

⁹⁶ Chrystin D Ondersma, ‘A Human Rights Framework for Debt Relief’ (2014) 36 *University of Pennsylvania Journal of International Law* 269, 298.

concerns raised in the Declaration. Indeed, in its short Recommendation, the Council of Europe focused primarily on the need for responses to over-indebtedness to respect human dignity.⁹⁷

The International Covenant on Civil and Political Rights⁹⁸, adopted by the U.N. General Assembly in 1966, obligates its parties to protect individuals' civil and political rights, including rights to life,⁹⁹ freedom of religion,¹⁰⁰ freedom of expression¹⁰¹, and freedom of assembly.¹⁰² It also includes freedom from discrimination¹⁰³ and freedom from involuntary servitude or forced labour.¹⁰⁴ The International Covenant on Civil and Political Rights (ICCPR) has 167 parties, including the UK. The International Covenant on Economic, Social, and Cultural Rights, also adopted by the U.N. General Assembly in 1996, commits its parties to endeavour to provide their residents with positive economic, social, and cultural rights, including education, health, and an adequate standard of living, which includes food, clothing, and housing.¹⁰⁵ The International Covenant on Economic, Social and Cultural Rights (ICESCR) has 160 parties.¹⁰⁶

The ICESCR, in contrast to the ICCPR, does not guarantee the rights it declares but instead promises to achieve “progressive realization” of these rights,¹⁰⁷ which at the very least includes the obligation not to impede the realization of these rights. The UN is in charge of resolving violations of the ICCPR and ICESCR. The United Nations Human Rights Committee has the authority to oversee all parties to the ICCPR. The First Optional Protocol, on the other hand, makes it impossible to settle human rights violations under the ICCPR. The Committee on Economic, Social, and Cultural Rights recognises that an immediate guarantee of all of the rights enshrined in the ICESCR may be impossible; however, parties must take steps toward realising the rights and provide “minimum essential levels of each of the rights.” Individual complaints may be considered by the Committee on Economic, Social, and Cultural Rights

⁹⁷ Council of Europe, ‘26th Conference of European Ministers of Justice, (*Council of Europe*, 7-8 April 2005) <<https://www.coe.int/en/web/human-rights-rule-of-law/mju26-2005-helsinki>> accessed 22 November 2021.

⁹⁸ International Covenant on Civil and Political Rights (ICCPR), New York, 16 December 1966 United Nations, 999 UNTS 171; 6 ILM (1967) 368.

⁹⁹ *Ibid*, art 6.

¹⁰⁰ *Ibid*, art 18.

¹⁰¹ *Ibid*, art 19.

¹⁰² *Ibid*, art 21.

¹⁰³ *Ibid*, art 26.

¹⁰⁴ *Ibid*, art 8.

¹⁰⁵ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid*, art. 2.1 (parties are obliged to “take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”)

under the Optional Protocol to the ICESCR, but only from countries that have ratified the ICESCR.¹⁰⁸

Conclusion

Developed and developing nations have different views, exposed in decision-making and decrees of the Human Rights Council, the Committee on Human Rights, on whether foreign debt must be considered a human rights issue. The developed regions contradict the effect of foreign debt on the attainment of human rights by the UN human rights organizations, debating that these organizations are not the "right" ones to deal with the debt issue. Excessive debt obligations harm the achievement of human rights in debtor countries in two critical interconnected ways: by diverting resources away from essential social services and employing policy conditionality related to global debt relief measures, which weakens country ownership of regional development strategies.¹⁰⁹ Many UN human rights associations have reliably acknowledged that high debt obligations limit the capability of many States to satisfy their human rights responsibilities. It might be asserted that States' responsibility to ensure the satisfaction of fundamental human rights might take precedence over their debt service burdens, specifically when such payments additionally restrict the capability of States to satisfy their human rights responsibilities, as pointed out by Lumina.¹¹⁰ Property rights have been acknowledged as 'the most recurrently declared and determinedly equipped right in global history. Human rights measures have followed a top-down model broadly: drafted during an era at the supranational level exposing global objectives, governments have recognized them through contributions to international accords. Asset and creditor-rights laws, on the contrary, have emerged in a bottom-up manner: composed, codified, executed, and then transformed all through the centuries, they indicate practical social needs and marketplace realities. Whether dealing with political, financial, or other rights, human rights regulations remain far from respected in most world regions. Empirical research put forward that states that approved human rights accords do not develop their human rights functioning, or else that the accords have been related to deprived human rights practices.

¹⁰⁸ Optional Protocol to the International Covenant on Civil and Political Rights, *supra* note 87. The International Labour Organization also forms part of the United Nations and addressed concerns pertaining to workers' rights

¹⁰⁹ Chrystin D Ondersma, 'A Human Rights Framework for Debt Relief' (2014) 36 *University of Pennsylvania Journal of International Law* 269, 298.

¹¹⁰ *Ibid.*

Chapter 7: Debtor Mental Health & Debtor's Socio-Economic Problems

Introduction

Discussing the debt and debtor's Socio-Economic problems is the concluding section of the research before the conclusion. This part aims to determine and highlight the social issues which a debtor faces due to debt. Part II of this study discusses the detailed impact of bankruptcy on a debtor from a legal and human rights perspective. At the same time, this section emphasises the social aspects, including mental health issues linked to debt. During the COVID-19 pandemic, the issue of debt gained hype in the media and got attention from human rights groups, the government and lenders to look at support to deal with the short-term debt crises created by the loss of jobs. Helen Saxon, a senior money analyst, emphasised that the coronavirus pandemic has fundamentally changed the way we live, so while the primary concern has always been health, many debtors have struggled and are still struggling with financial wellbeing too.¹ Helen Saxon further pointed out that many people were worried about paying their bills or living post-COVID-19.²

FCA, the watchdog of the financial sector, has issued guidance to lenders to help customers struggling to make repayments. Furthermore, the government implemented the new Debt Respite Scheme³, which allows an Approved Mental Health Professional (AMHP) to certify that a person is receiving mental health treatment in order to begin a mental health crisis 'breathing space' break, as discussed in detail in the following section. The causes of falling behind contractual debt are beyond to scope of this study, although the reported causes are briefly examined.

Debtors' mental health and behaviours are examined in this section, as well as the effects of over-indebtedness. Over-indebtedness from household debts or personal debts has a negative impact on the economy and individual health, limiting economic emergence and consumer spending. Due to a lack of economic activities and opportunities, people who become unemployed face poverty and lack proper food or shelter or other basic needs directly associated with affordability. It affects individual health while leading to depression, anxiety,

¹ Helen Saxon 'Coronavirus Finance & Bills Help' (*Money Saving Expert*, 1 August 2021) <<https://www.moneysavingexpert.com/news/2020/03/uk-coronavirus-help-and-your-rights/>> accessed 12 October 2021.

² *Ibid.*

³ Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020.

and other similar issues.⁴ Over-indebted persons face mental health illnesses due to the burden of debts they are unable to repay. Other challenges that impede the debtor's mental health and human rights are discussed in the subsequent sections.

Social Consequences of Over-Indebtedness on Individuals

According to the House of Commons fact sheet on the recent household debt, the situation was alarming as per the data; the household debt peaked in Q2 2008 at 151.5% of household disposable income. In contrast, in Q2 2021, it was 130.5% when most of the COVID-19 restrictions were removed.⁵ Similarly, the individual insolvencies in England and Wales have seen the most significant increase since the current series began in 2010 between Q3 2020 and Q4 2020,⁶ right at the peak of the COVID-19 crisis. How much this situation will worsen is hard to predict; however, from the available records, it can be determined that the debtor is ultimately suffering indirectly due to many social factors. The increased number of insolvencies indicates that the economic environment is not friendly to the debtors. Carrying an unmanageable debt imposes an economic burden on the bankrupt people and their families.⁷ Debtors also confront other issues like the low standard of living due to over-indebtedness. According to Iris Elliott of the Mental Health Foundation, poverty increases the risk of mental health problems and can be both a cause and a result of mental illness.⁸

A high level of debt leads to reduced expenditure on food and household essentials and leaves very minimal disposable income. A debtor with a high level of debt is financially excluded and struggles to access credit products, further pushing them into expensive borrowing activities; for most, this is a continuous cycle. The level of over-indebtedness also increases at the same time. Debts also harm personal relationships that contribute to a family breakdown that often involves children. Therefore, it can be said that debts or bankruptcy make an impact on family relations too. Due to indebtedness, people find it challenging to find work, and most of the time is spent finding a quick solution for repayment. Most debtors become

⁴ Simon Hall, 'Financial Accelerator Effects in UK Business Cycles - Bank of England Working Paper No 150' (2002) SSRN Electronic Journal) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=296824> accessed 16 Oct 2021.

⁵ House of Commons Library, 'Household debt' (*House of Commons Library*, 07 Oct 2021) <<https://researchbriefings.files.parliament.uk/documents/SN02885/SN02885.pdf>> accessed 12 October 2021.

⁶ *Ibid.*

⁷ J. Gathergood, 'Debt and depression: causal links and social norm effects' (2012) 122 *The Economic Journal* 1094,1114.

⁸ Iris Elliott, 'Poverty and mental health' (Mental Health Organisation, August 2016) <<https://www.mentalhealth.org.uk/sites/default/files/Poverty%20and%20Mental%20Health.pdf>> accessed 13 October 2021.

unemployed, and the few linked with work cannot engage in financial institutions.⁹ Apart from work, over-indebtedness leads to health issues like physical and mental health problems. People suffer from depression, anxiety and fear due to over-indebtedness. They may also suffer from sleeplessness. The creditors try to recover the debts by employing a debt collecting agency or by seeking legal assistance. Hence, the personal welfare of the people is affected by reduced standards of living, exclusion, social stigma or deteriorating health conditions.¹⁰ Most of the debtors are unemployed or receive low wages. There are various social consequences of over-indebtedness on individuals.

Over-indebtedness and levels of indebtedness in the UK have raised concerns about the potential impact on society.¹¹ Debt problems cause mental health problems, and there is a direct link between employment problems and over-indebtedness.¹² It raises difficulties for the bankrupt person to find a suitable job. Over-indebtedness means that people may fall below the line of poverty, which significantly impacts individual lives, their families, or society.¹³ There are priority¹⁴ debts that make a severe impact on the debtor and their families if not repaid. Debt impacts a debtor in both the mental and physical. Indebtedness leads to stress and intense pressure. According to Gathergood, the debtor suffers from anxiety, depression, and stress for which proper treatment is needed.¹⁵

The psychiatrist reported that debtors might also face health issues like strokes, hypertension, diabetes, and heart diseases due to debts, common among vulnerable and poor people.¹⁶ According to the Mental Health and Money Advice, it is estimated that 50% of people who are in debt also have a mental health problem, and one in every five people who have a mental health problem also has money problems in the United Kingdom. During the COVID-

⁹ Elaine Kempson, 'Over-indebtedness in Britain A report to the Department of Trade and Industry' (*Research Gate*, 2002) <https://www.researchgate.net/publication/247089321_Over-Indebtedness_in_Britain> accessed 30 October 2021.

¹⁰ Iris Elliott, 'Poverty and mental health' (*Mental Health Organisation*, August 2016) <<https://www.mentalhealth.org.uk/sites/default/files/Poverty%20and%20Mental%20Health.pdf>> accessed 13 October 2021.

¹¹ J. Schicks, 'Microfinance Over-Indebtedness: Understanding its drivers and challenging the common myths' (2010) Centre Emile Bernheim Working Paper No. 10, 47.

¹² European Central Bank, 'Working Paper Series: Unemployment risk and over-indebtedness' (*European Central Bank*, May 2016) <<https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1908.en.pdf>> accessed 13 October 2021.

¹³ Iris Elliott, 'Poverty and mental health' (*Mental Health Organisation*, August 2016) <<https://www.mentalhealth.org.uk/sites/default/files/Poverty%20and%20Mental%20Health.pdf>> accessed 13 October 2021.

¹⁴ Those that carry the most serious consequences if you don't pay them.

¹⁵ J. Gathergood, 'Self-control, financial literacy, and consumer over-indebtedness' (2012) 33 *Journal of economic psychology* 590, 592.

¹⁶ Ajai R Singh and Shakuntala A Singh, 'Diseases of Poverty and Lifestyle, Well-Being and Human Development' (2008) 1 *Mens Sana Monogr* 187, 188.

19 crisis from March 2020- until 30 September 2021, the UK government ran many financial schemes to reduce the effect of the pandemic on individuals and businesses. Such measures include payment holidays from contractual loans, deferment of utility bills, additional support in the Universal Credit scheme by adding £20 extra per week to eligible families and the Coronavirus Job Retention Scheme, also known as ‘furlough’ payments. Such support aims to reduce the burden on the households who suffered the most and provide some financial relief. The full impact of such support is not measured yet, although the Mental health and Money Advice charity reported that around 5.9 million people were claiming Universal Credit as of July 2021 and out of these, around an estimated 1.3 million people claiming Universal Credit had poor mental health.¹⁷ It is also shocking that around 1.6 million people were claiming furlough at the end of July.¹⁸ The government has announced welfare cuts and price rises in October 2021, and various charities have criticised these cuts¹⁹, claiming that they will affect the fragile debtor and their household adversely post COVID-19.²⁰ The Mental health and Money Advice charity feared that with an estimated 1.3 million people claiming Universal Credit with poor mental health, this £20-per-week cut is expected to significantly impact some people's lives.²¹ The debtors who never have experienced financial hardship could find themselves worrying about money and become victims of mental illness.

The Rethink mental illness charity anticipated that after such a long time working from home as a result of the COVID-19 pandemic, some debtors might find that the return to work or increased hours affects their mental health. Increases in living costs, cuts in social welfare benefits, and increased energy costs are expected to impact debtors’ worries about money as well as their mental health.²² Fuel poverty is considered a payment of 10% of the net income on fuel costs, including lighting, cooking, and water heating.²³ Fuel poverty affects the standard of living of the householders while, on the other hand, fuel poverty makes a severe impact on

¹⁷ Mental Health and Money Advice, 'Managing your mental health and money after government cuts' (*Mental Health and Money Advice*, 21 September 2021) <<https://www.mentalhealthandmoneyadvice.org/en/top-tips/managing-your-mental-health-and-money-after-government-cuts/>> accessed 13 October 2021.

¹⁸ *Ibid.*

¹⁹ Universal Credit will decrease by £20 per week: Energy prices are expected to rise by 12% to a maximum of £1,277 per year per household for gas and electricity (for standard variable energy tariffs): The Coronavirus Job Retention Scheme, known as furlough, will stop on 30th September 2021: Some National Insurance contributions (NI) will increase by 1.25 percentage points from 6th April 2022.

²⁰ *Ibid.*

²¹ Mental Health and Money Advice, 'Managing your mental health and money after government cuts' (*Mental Health and Money Advice*, 21 September 2021) <<https://www.mentalhealthandmoneyadvice.org/en/top-tips/managing-your-mental-health-and-money-after-government-cuts/>> accessed 13 October 2021.

²² *Ibid.*

²³ S. Collard, 'Toward financial inclusion in the UK: Progress and challenges' (2007) 27 *Public Money and Management* 13, 16.

the health of people by reducing disposable income. Most of the people in the UK live either in rented accommodations or local authority housing. As a rule of thumb, no more than 33% of the disposable income should be spent towards rent or mortgage. According to the government social housing records from 2016 to 2018, 17% of households (3.9 million) in England lived in social housing (renting their home from a local authority or housing association).²⁴ The number of households occupied by private renters is 4.44 million.²⁵ It is appalling and astonishing to note that according to government data, Black African (44%), Mixed White and Black African (41%), and Black Caribbean (40%) households were most likely to rent social housing out of all ethnic groups.²⁶

This study has already discussed how the COVID-19 pandemic affected the BAME group in part II, though data on rent/mortgage arrears by the BAME group is not available. Due to the COVID-19 pandemic and other economic and personal causes, the debtor faced issues of rent or mortgage arrears. Although unexpectedly, mortgage arrears are reduced due to the timely government intervention and the lender's commitment to support the debtors during the COVID-19 pandemic. It is expected that this support will continue on a tailored basis. According to UK Finance, the total mortgage arrears remain close to historically low levels due to the mitigating effects of payment deferrals and other tailored forbearance schemes.²⁷ The most recent arrears figures acknowledge that government-led COVID-19 related support has helped debtors stay out of arrears, but those in pre-pandemic financial difficulty have continued to accumulate arrears, despite the use of payment deferrals.²⁸

Eric Leenders, managing director of Personal Finance at UK Finance, expressed his concern that the scheme has now come to an end and the majority of customers who used it have now returned to making regular payments.²⁹ According to the available data, home possession cases dropped, and only 90 were reported in England & Wales in the second quarter

²⁴ Gov UK, 'Renting social housing' (*GOV UK*, 4 March 2021) <<https://www.ethnicity-facts-figures.service.gov.uk/housing/social-housing/renting-from-a-local-authority-or-housing-association-social-housing/latest#full-page-history>> accessed 13 October 2021.

²⁵ Horst Stipp, 'Number of households occupied by private renters in England from 2000 to 2020' (*Statista*, 5 Feb 2021) <<https://www.statista.com/statistics/286444/england-number-of-private-rented-households/>> accessed 13 October 2021.

²⁶ Gov UK, 'Renting social housing' (*GOV UK*, 4 March 2021) <<https://www.ethnicity-facts-figures.service.gov.uk/housing/social-housing/renting-from-a-local-authority-or-housing-association-social-housing/latest#full-page-history>> accessed 13 October 2021.

²⁷ UK Finance Limited, 'Arrears and possessions' (*UK Finance*, 12 August 2021) <<https://www.ukfinance.org.uk/data-and-research/data/mortgages/arrears-and-possessions>> accessed 13 October 2021.

²⁸ *Ibid.*

²⁹ *Ibid.*

of 2021, predominantly due to the restrictions on eviction placed by the government until May 2021.³⁰ However, the number of possessions is expected to increase slowly as the backlog of cases from 2020 unwinds. It is a known factor that rent arrears lead to eviction, resulting in a considerable burden on the debtor's resources to provide emergency accommodation to his or her family. Likewise, defaulting on the contractual mortgage payments leads to home repossession, which causes mental health and related social issues for the debtors. Debt charities, lenders, and landlords have all warned that half a million renters could lose their homes without financial assistance.³¹ Due to COVID-19, an estimated 450,000 families are behind on their rent, and many charities have warned of renters losing their homes in the coming months and an increase in homelessness if more assistance is not provided.³² At the start of COVID-19, the UK government introduced the 'Everyone In' scheme, which critics suggest that probably been the single most significant homelessness policy shift in the UK for several years.³³ In 2019, around 120,000 households became homeless in England, including nearly 50,000 children.³⁴

The right to an adequate living standard is recognised in the ICESCR, and Art.31 of the European Social Charter also promotes the same right to prevent and reduce homelessness. The response of the UK government to COVID-19 undoubtedly caused a paradigm shift in the homelessness system.³⁵ It has shown that where the political will exists, it is possible to eliminate the homelessness issue. The prime advocate of homelessness rights, Shelter, has called on the government to provide ongoing, dedicated funding to local authorities to ensure its commitment to end rough sleeping can be met, along with more rough sleeping support and a "new generation" of colonial homes.³⁶ The BBC has reported that the local authorities do not have enough funding to keep 'Everyone In' operational unless the government pledges new funding.³⁷ Homelessness is directly associated with the debtor's financial position, which can be avoided with the proper and timely support from the state concerning organisations to ensure that under the human rights framework, and for the humankind protection given to the

³⁰ *Ibid.*

³¹ Simon Read, 'Rent debt crisis 'could lead to homelessness' (*BBC News*, 18 February 2021) <<https://www.bbc.co.uk/news/business-56103280>> accessed 13 October 2021.

³² *Ibid.*

³³ Margery Infield, 'Has Covid-19 really ended homelessness?' (*Think NPC*, 10 August 2020) <<https://www.thinknpc.org/blog/has-covid-19-really-ended-homelessness/>> accessed 13 October 2021.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Jonathan Blake, 'Covid homeless scheme not leading to permanent accommodation, warns charity (*BBC News*, 27 August 2021) <<https://www.bbc.co.uk/news/uk-politics-58334379>> accessed 13 October 2021.

³⁷ *Ibid.*

vulnerable debtor, to protect their human rights. According to the Money Advice Service, 8.3 million people in the United Kingdom are over-indebted, and 22% of UK adults have less than £100³⁸ in savings, making them extremely vulnerable to a financial shock such as job loss or large, unexpected bills.³⁹ Many local communities seek food and shelter since they have either lost their jobs or have faced difficulties meeting the payments of their rent or mortgages. The country has an increasing number of poor people now.⁴⁰

Since 2014, the ratio of unsecured debt to household income has been rising. According to Martin Lewis, it is generally prudent to have three to six months' worth of expenses set aside in savings in case of an emergency, and this is true for loans, mortgages, and other fixed repayment borrowings.⁴¹ The cost of borrowing increased while the interest on savings was at a record low, which is also a factor that people do not want to save and spend most of their disposable income on non-essential items. The UK government-funded Coronavirus Job Retention Scheme (CJRS) ended on 30 September 2021, and the impact of this on-the-job market is not quantified yet. There is now uncertainty over the almost one million people still thought to be on the scheme at the end of September, according to Office for National Statistics (ONS) estimates.⁴² With limited income during and after, the COVID-19 debtor has not been cushioned against another wave of crises, and potential crises can ruin the debtor financially and mentally. The loss of a job or source of income has a significant impact on the debtor's mental health due to worries about meeting contractual debt needs and ensuring that the family has enough to eat.

Article 11 of the International Covenant on Economic, Social and Cultural Rights does not dictate or obligate the state to protect jobs losses though provided protection and rights to social security. With the 'dualist' legal system in place in the UK, international treaties like the ICESCR do not have any effect on domestic law unless they are explicitly incorporated.⁴³ The state nevertheless has a positive obligation to ensure the protection of the debtor only in a

³⁸ Select Committee on Financial Exclusion, Tackling financial exclusion: A country that works for everyone? (Report of Session 2016–17, HL Paper 132), para 38.

³⁹ National Audit Office, 'Tackling problem debt' (*National Audit Office*, 6 September 2018) <<https://www.nao.org.uk/report/tackling-problem-debt/>> accessed 13 October 2021.

⁴⁰ Isabelle Guérin, *Microfinance, Debt and Over-Indebtedness Juggling with Money* (1st edn, Routledge 2018) 27.

⁴¹ Martin Lewis, 'Repay debts or save?' (*Money Saving Expert*, 20 July 2021) <<https://www.moneysavingexpert.com/savings/pay-off-debts/>> accessed 13 October 2021.

⁴² Sky News, 'COVID-19: Warning of redundancies as £70bn furlough scheme ends' (*Sky News*, 30 September 2021) <<https://news.sky.com/story/covid-19-warning-of-redundancies-as-70bn-furlough-scheme-ends-12421708>> accessed 13 October 2021.

⁴³ Joint Committee on human rights, 'The International Covenant on Economic, Social and Cultural Rights—Twenty-first Report of Session 2003–04' (*Parliament Publications UK*, 2 November 2004) <<https://publications.parliament.uk/pa/jt200304/jtselect/jtrights/183/183.pdf>> accessed 13 October 2021.

matter which is subject to public law or in the regulatory framework. Getting unemployed or being dismissed due to an employee's fault or the employer's economic situation is not protected. Over-indebtedness significantly impacts the employment of people with arrears, increasing the country's unemployment rate. Rent arrears or defaulting on contractual debt payments while employed create mental stress on low paid workers because they do not have enough disposable income to pay off their debt. Ultimately increased mental stress and debt worries create a lack of focus in their work, and there are chances of loss of employment if employers find that debtor is not working according to the employment contract.

The negative impact of over-indebtedness is on the households or debtors, and it is the society that suffers from financial losses. The costs to the society include the increased social welfare expense, higher medical costs, loss in income tax receipts and the costs of rehousing the debtor.⁴⁴ When a household falls into the debt trap, it affects the life and health of the debtor from all possible angles and has a disastrous impact on relations. Debt may lead to marital disputes due to a lack of resources where spouses argue and cannot meet the household expenses. Debt collection agencies deploy many torturous systems on debtors to recover debts, which causes enormous pressure on debtors' physical and psychological health. As a result, debtors experience sleepless nights and suffer from stress or short- tempers. The stress due to debts can also lead to depression or frustration.⁴⁵ The debtor must take some serious steps so that the issues of financial distress can be prevented, and the severe consequences can be reduced. The available support to the debtor through many governmental and charities are readily available in all accessible formats. The aftershocks of -the COVID-19 crisis will stay for a while; the debtor in debt pre-COVID-19 may still be in debt; however, the level of available support and protection under the Human rights framework is much more.

Indebtedness and its Relation to Financial Exclusion

Over-indebtedness and financial exclusion are the two major issues that the European Commission has decided to address in the last decade at a European level.⁴⁶ At an individual country level, the interests in these two subjects have become a common topic in France, Germany, Italy, and Belgium. The UK is an exception since it initially analysed the over-

⁴⁴ Carolyn Downs and Ryan Woolrych, 'Gambling and debt: the hidden impacts on family and work life' (2010) 13 Community, Work & Family 311,328.

⁴⁵ Luisa Anderloni and Daniela Vandone, 'Risk of over-indebtedness and behavioural factors' (2011) Springer Link < https://link.springer.com/chapter/10.1057/9780230303829_5 > accessed 24 November 2021.

⁴⁶ Giovanni D'Alessio and Stefano Iezzi, 'Household over-indebtedness: definition and measurement with Italian data' (2013) SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243578> accessed 24 November 2021.

indebtedness in the eighties and financial exclusion in the nineties.⁴⁷ Though there are early studies based on the relation between financial exclusion and indebtedness, still, there are arguments that continue about whether financial exclusion and over-indebtedness interact with each other. Over-indebtedness is the incapability of a person to meet financial commitments, while financial exclusion is the process through which the lack of financial access contributes to social exclusion and poverty for individual bankrupt people.⁴⁸ The European Commission report⁴⁹ has defined financial exclusion as: “A process whereby people encounter difficulties accessing and using financial services and products in the mainstream market that are appropriate to their needs and enable them to lead a normal social life in the society they belong.”⁵⁰ In this section of the study, the relationship between the over-indebtedness and difficulties accessing financial products a debtor faces due to financial exclusion is discussed in relation to the debtors' human rights.

Over-indebtedness and financial exclusion are a growing concern at the European and national levels due to their consequences at the collective and individual levels. According to a study of the relationship between banking exclusion and poverty, a large proportion of households at risk of poverty did not have a bank current account (36%).⁵¹ Over-indebtedness and financial exclusion are nothing new. A decade of rapid growth in personal debt and consumer credit, capped by the financial crisis of 2008, first brought these issues to public attention, but now COVID-19 has brought them to the forefront once again. Rapidly rising house prices, low-interest rates⁵², and an expanding credit market all contributed to a dramatic increase in credit usage. Financial exclusion can contribute to household marginalisation because it prevents them from fully participating in practices that have become standard in society in the past, even though old practices can be replaced in the age of the digital world. Despite the rise of digital trends, it is widely acknowledged that access to cash is critical for

⁴⁷ Resolution Foundation, 'In Brief: Financial Exclusion' (*Resolution Foundation*, 2014) <<https://www.resolutionfoundation.org/app/uploads/2014/08/Financial-exclusion.pdf>> accessed 13 October 2021.

⁴⁸ Gianni Betti and others, 'Consumer over-indebtedness in the EU: measurement and characteristics' (2007) 34 *Journal of Economic Studies* 136, 144.

⁴⁹ European Commission, 'Financial Services Provision and Prevention of Financial Exclusion report. Directorate-General for Employment, Social Affairs and Equal Opportunities, Brussels (*European Commission*, March 2008) <<https://www.bristol.ac.uk/media-library/sites/geography/migrated/documents/pfrc0806.pdf>> accessed 24 November 2021.

⁵⁰ Helen Russell, Bertrand Maître, Nora Donnelly, 'Financial Exclusion and Over-indebtedness in Irish Households' (*Trinity College Dublin*, 2011) <http://www.tara.tcd.ie/bitstream/handle/2262/73527/2011-03_07_FinancialExclusionPublication_rpt.pdf?sequence=1&isAllowed=y> accessed 14 October 2021.

⁵¹ *Ibid.*

⁵² Record low interest in the Bank of England history since March 2009.

millions of people in the United Kingdom. According to the Financial Inclusion Commission, ‘5.4 million adults still rely on cash to a great or very great extent in their day-to-day lives.’⁵³ Professor Rowlingson, Professor of Social Policy at the Centre of Household Assets and Savings Management, University of Birmingham, raised the alarm that “seven million people say they would struggle without cash”.⁵⁴ The UK government in the 2020 budget announced that it would “bring forward legislation to protect access to cash and ensure that the UK’s cash infrastructure is sustainable in the long-term.”⁵⁵ The COVID-19 pandemic highlighted digital exclusion across the country, as internet access and digital skills have become increasingly important for gaining access to a wide range of services, including financial ones, during times of lockdown.⁵⁶ According to recent figures from the Office of National Statistics, 6.3% of adults in the UK have never used the internet.⁵⁷

A recent study by Lloyds banking group revealed that an estimated 9 million (16%) are unable to use the internet and their device by themselves.⁵⁸ According to the Financial Inclusion Commission, poor people still pay more for essential goods and services compared to those on higher incomes⁵⁹ and “it is estimated that 99% of low-income households pay at least one poverty premium”.⁶⁰ Professor Rowlingson affirmed in the parliamentary committee that £2 per cash withdrawal is unfair, and the machine’s location for cash withdrawals is within the top 10% of deprivation areas in England.⁶¹ The data⁶² as per the Financial Inclusion

⁵³ House of Lords Liaison Committee, 'Tackling Financial Exclusion: A country that works for everyone? Follow-up report-10th Report of Session 2019–21' (*Parliament Publications UK*, 24 April 2021) <<https://publications.parliament.uk/pa/ld5801/ldselect/ldliaison/267/267.pdf>> accessed 14 October 2021.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Carl Baker and others, 'COVID-19 and the digital divide' (*UK Parliament Post*, 17 December 2020) <<https://post.parliament.uk/covid-19-and-the-digital-divide/>> accessed 14 October 2021.

⁵⁷ House of Lords Liaison committee, 'Tackling Financial Exclusion: A country that works for everyone? Follow-up report-10th Report of Session 2019–21' (*Parliament Publications UK*, 24 April 2021) <<https://publications.parliament.uk/pa/ld5801/ldselect/ldliaison/267/267.pdf>> accessed 14 October 2021.

⁵⁸ Lloyds Banking Group, 'The UK’s largest study of transactional, behavioural and attitudinal research including the Essential Digital Skills measure' (*Lloyds Banking Group*, Dec 2020) <https://www.lloydsbank.com/assets/media/pdfs/banking_with_us/whats-happening/lb-consumer-digital-index-2020-report.pdf> accessed 14 October 2021.

⁵⁹ Financial Inclusion Commission, ‘The Facts’ (*Financial Inclusion Commission*, 2021) <<https://financialinclusioncommission.org.uk/>> accessed 18 October 2021.

⁶⁰ Parliament Committees, 'Written evidence from the Financial Inclusion Commission – FEF0003' (*Parliament Committees*, 11 March 2021) <<https://committees.parliament.uk/writtenevidence/25341/html/>> accessed 14 October 2021.

⁶¹ Parliament Committees, 'Written evidence from Professor Karen Rowlingson – FEF0001' (*Parliament Committees*, 11 March 2021) <<https://committees.parliament.uk/writtenevidence/25341/html/>> accessed 15 October 2021.

⁶² 28% of adults or 14 million people have experienced a direct negative effect on their income due to the coronavirus pandemic (as of May 2020: 12.5 million UK adults have little or no confidence in their ability to manage money: 22% of all adults in the UK have less than £100 in savings: 1 in 5 adults would not be able to

Commission website revealed that some debtors paying the £2 charges are unaffordable where 22% of all adults in the UK have less than £100 in savings. This level of charges exposes the seriousness of the issues of indebtedness and financial exclusion in the UK.

The Parliamentary Committee's report observed that "people who are living with mental health problems are particularly likely to be victims of financial exclusion" and are "more likely to be out of work or living unstable lives which were beyond their control, meaning that they face multiple hardships due to lack of access to services, including financial services."⁶³ The situation after COVID-19 has deteriorated further; job losses and economic shutdowns in specific sectors left debtors struggling. The Money Advice Trust advised the government that a 'no-interest loan scheme' specifically for people who have fallen into debt on essential bills, such as their rent or council tax due to the impact of COVID-19, is much needed to provide basic security.⁶⁴ Such a programme would "enable people to apply for a loan to pay off these arrears, and then repay the loan (without interest) over an affordable period." The Money Advice Trust believes that this could reduce the risk of homelessness whilst "ensuring landlords are not financially disadvantaged."⁶⁵

In the UK, it is seen that the risks of financial exclusion and arrears on credit commitments are common among debtors belonging to low-income areas. Living on a low income is more difficult, more expensive, and more unstable because of financial exclusion.⁶⁶ Financial exclusion has multiple components⁶⁷, and any of its manifestations can have several headline causes. The majority of the European and the UK population are suffering from poverty and are building up arrears, and they do not have access to the necessary financial products or services such as credit, savings, payment services and insurance. Access to financial services is required for citizens to be socially and economically integrated into society. It is also significant for economic growth, employment, social inclusion, and poverty

cover more than one month of living expenses if they lost their source of income: 1 million people in the UK do not have a bank account: 16% are borrowing to pay for essentials because they have run out of money.

⁶³ Select Committee on Financial Exclusion, 'Tackling financial exclusion: A country that works for everyone?' (Report of Session 2016–17, HL Paper 132) 167.

⁶⁴ House of Lords Liaison committee, 'Tackling Financial Exclusion: A country that works for everyone? Follow-up report-10th Report of Session 2019–21' (*Parliament Publications UK*, 24 April 2021) <<https://publications.parliament.uk/pa/ld5801/ldselect/ldliaison/267/267.pdf>> accessed 14 October 2021.

⁶⁵ *Ibid.*

⁶⁶ Simon Blake, Esther de Jong, 'Short changed: Financial exclusion a guide for donors and funders' (*Think NPC*, July 2008) <<https://www.thinknpc.org/wp-content/uploads/2018/07/Short-changed.pdf>> accessed 14 October 2021.

⁶⁷ Not being financially capable: Not having and using a bank account: Not using mainstream, affordable credit, and using expensive subprime credit: Not building up savings: Not having insurance: Being over-indebted.

reduction.⁶⁸ Treatment and prevention of financial exclusion and over-indebtedness is a significant step in to fight against poverty, and social exclusion as per National Action Plans on Inclusion within the UK.

In the UK, the main reasons for becoming over-indebted are job loss, low wages, sickness and separation or divorce.⁶⁹ Recent COVID-19 has had an unprecedented impact on the UK economy. Over-indebtedness has been defined in the following way: “People are over-indebted if their net resources (income and realisable assets) render them persistently unable to meet essential living expenses and debt repayments as they fall due.”⁷⁰ In the eyes of the Law Reform Commission ‘Indebtedness can be said to refer to a commitment to repay money that a debtor has borrowed and used. According to the researchers, indebtedness should be distinguished from over-indebtedness, which refers to the use of credit, a central and increasingly widely used element of modern financial systems.’⁷¹ In this regard, indebtedness can be viewed as a necessary and healthy by-product of credit provision, which benefits both society and individuals. Credit and lending activities are the blood of a country's economy. Indebtedness is not bad if a debtor has the means to service their contractual debt, while over-indebtedness leads to many problems, as identified in the previous section. Debt becomes most problematic when it leads to over-indebtedness, that is, when it exceeds household resources, resulting in an inability to meet all payment obligations and cover living expenses for extended periods.⁷² There is a clear relationship between financial exclusion and over-indebtedness. Due to financial exclusion, the debtor does not have access to cheap credit due to many reasons.⁷³

As a result, the debtor is unable to pay off the expensive debt or restructure it with an inexpensive option and becomes over-indebted. As a result, even if the debtor is in financial difficulty due to a loss of income or increased expenditure, his or her standard of living rises above that of those who do not have access to financial services. Difficulties in obtaining credit

⁶⁸ Sushil Wadhvani and Martin Wall, ‘The effects of profit-sharing on employment, wages, stock returns and productivity: Evidence from UK micro-data’ (1990) 100 *The Economic Journal* 1, 16.

⁶⁹ E. Thomas Garman and others, ‘The negative impact of employee poor personal financial behaviors on employers’ (1996) 7 *Journal of financial counseling and planning* 110,157.

⁷⁰ Helen Russell and others, 'Financial Exclusion and Over-indebtedness in Irish Households' (*Department of Community, Equality and Gaeltacht Affairs-Ireland*, 2011) <<http://www.tara.tcd.ie/bitstream/handle/2262/73527/2011-03>

07_FinancialExclusionPublication_rpt.pdf?sequence=1&isAllowed=y> accessed 16 October 2021.

⁷¹ *Ibid.*

⁷² Mário B Ferreira, and others , 'On the Relation Between Over-Indebtedness and Well-Being: An Analysis of the Mechanisms Influencing Health, Sleep, Life Satisfaction, and Emotional Well-Being' (*US National Library of Medicine National Institutes of Health*, 29 Apr 2021) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8116657/>> accessed 15 October 2021.

⁷³ Credit problems in the past, Defaults, CCJ etc.

prevent people from participating in society and from finding work. It is also said that there is a close relationship between high-cost credits and low income. People belonging to low-income households are more rejected for credit compared to those belonging to high-income groups. Financial exclusion and indebtedness make the lifestyle of low-income individuals more complex compared to high-income. Lack of access to bank accounts in the UK may not lead to over-indebtedness, but it can be a contributing factor. Studies point to a lack of access to credit also leads to over-indebtedness in European countries, especially the, UK and is a significant step towards self-bankruptcy.

It is feared that the pandemic and its consequences will accentuate many factors discussed above, increasing the risk of debt problems.⁷⁴ Managing outstanding debt is an important step to take as this helps the debtor to fulfil their needs and helps to achieve the desired⁷⁵ goals. Sometimes debts are taken on unwisely, or loans are offered inappropriately: to take an extreme example, the great recession that began in 2007 was triggered by the inappropriate marketing of sub-prime mortgage loans in the United States.⁷⁶ Debtors with no access to suitable credits could not cope with their difficulties and avoid over-indebtedness. Studies suggest that a common situation in Europe and the UK that results in over-indebtedness is unexpected life changes.⁷⁷ These might include separation, divorce, sickness, and job loss. The over-indebted individual does not have the resources or adequate insurance, which can provide some cushion should the person lose his or her job or face unforeseen circumstances beyond his or her control. These exceptional circumstances create family issues which have been said above including separations. These make the life of debtors more complex, and debtors further drag themselves into self-isolation and marginalisation. In addition, the borrowers might take wrong decisions due to low- levels of financial knowledge or the mistrust of the lenders. Sometimes, the borrower cannot inform the lender about their current mental situation or hides important factors when getting loans to repay the previous ones. Due to their very commercial nature, most lenders protect themselves by charging the fees when the repayments are missed to cover the credit costs as per their pre-disclosed terms. Lack of

⁷⁴ Stephen E. G. Lea, 'Debt and Over-indebtedness: Psychological Evidence and its Policy Implications' (*Social Issues and Policy Review*, 26 November 2020) <<https://spssi.onlinelibrary.wiley.com/doi/10.1111/sipr.12074>> accessed 15 October 2021.

⁷⁵ House buying, car lease etc.

⁷⁶ Stephen E. G. Lea, 'Debt and Over-indebtedness: Psychological Evidence and its Policy Implications' (*Social Issues and Policy Review*, 26 November 2020) <<https://spssi.onlinelibrary.wiley.com/doi/10.1111/sipr.12074>> accessed 15 October 2021.

⁷⁷ S. H. Lee and others, 'How do bankruptcy laws affect entrepreneurship development around the world?' (2011) 26 *Journal of Business Venturing* 505,520.

financial capabilities⁷⁸ leads the debtor to accept inappropriate terms & conditions and therefore fall into the trap of over-indebtedness.

As argued by Martin Lewis in the Parliamentary committee, the issue of over-indebtedness and financial exclusion requires a far more senior, influential, and invested government in financial inclusion.⁷⁹ Alarm raised by Professor Rowlingson that financial exclusion has “increased even more [due] to the COVID-19 pandemic” and as a result, “leadership needs to ... step up”⁸⁰ According to Professor Rowlingson “, a unified strategy for tackling financial inclusion, with clear objectives and a delivery plan, would help join up the various strands of work that are all essential as we emerge from the pandemic and seek to level up so that no one is excluded or left behind.”⁸¹ The issue of over-indebtedness is highlighted now more than ever and requires attention post-COVID-19 due to the many individuals and families affected who have lost their jobs and cannot manage their contractual payments. The government has committed efforts to tackle the issue of financial inclusion but requires more resources and financial commitments, which are lacking due to the present economic situation and the public borrowing level already pledged to support the public in COVID-19.

Impact of Bankruptcy on Economy & Social Cost of Debt

A liberal consumer bankruptcy laws framework provides partial insurance against the financial risks faced by households, but it may also raise the cost of credit. The workforce is affected differently during bankruptcy when compared to other types of restructuring. The debtors not only lose their household goods, but they also lose the opportunity to seek employment further in other companies. They cannot be a company director or get engaged in any management without the tribunal’s permission during the period of bankruptcy,⁸² as discussed in detail in Chapter 3 of this research. The trade association and professionals have certain conditions for individuals to maintain membership during the bankruptcy period. Some restrictions might come while holding the statutory positions at this time. The consumers need

⁷⁸ J. Gathergood, 'Debt and depression: causal links and social norm effects' (2012) 122 *The Economic Journal*, 1094,1114.

⁷⁹ House of Lords Liaison committee, 'Tackling Financial Exclusion: A country that works for everyone? Follow-up report-10th Report of Session 2019–21' (*Parliament Publications UK*, 24 April 2021) <<https://publications.parliament.uk/pa/ld5801/ldselect/ldliaison/267/267.pdf>> accessed 14 October 2021.

⁸⁰ Parliament Committees, 'Written evidence from Professor Karen Rowlingson – FEF0001' (*Parliament Committees*, 11 March 2021) <<https://committees.parliament.uk/writtenevidence/25341/html/>> accessed 14 October 2021.

⁸¹ *Ibid.*

⁸² Julian Franks and Oren Sussman, 'Financial Distress and Bank Restructuring of Small to Medium Size UK Companies' (2005) 9 *Review of Finance* 65, 71.

to contact the suitable ultimate body of the profession and trade to see whether there are any more restrictions during or after the period of insolvency. However, in some instances, the individual can continue in their current employment during bankruptcy.⁸³ Following the Companies Act 1963, it is an offence for bankrupt persons to act in different capacities to the firm without seeking the tribunal's consent. The following capacities include the auditor, director, receiver, liquidator, and manager of a company.

Under the Human Rights framework,⁸⁴ no one should be subject to discrimination, although the treatment of a bankrupt is no less than discrimination if left unaddressed at all levels. Bankruptcy is not a debtor's choice but the ultimate failure of all the stakeholders who failed to provide the required protection. The marginalisation and exclusion of the bankrupt from the core position may be justifiable in some instances, but the majority of debtors use bankruptcy as a last resort. The debtor is subjected to humiliation and faces daily crises while being chased for debt. Regulatory systems and privacy laws may allow such action, but this is not acceptable under the Human Rights framework. The debtor loses their home, which is ultimately everything for most of them, their pride and consequently becomes a victim of institutional and organisational discrimination. During the bankruptcy and possession of the family home, the children of the debtors are more at risk of losing accommodation and facing homelessness. The protection and safety of the children are paramount in such cases.

The United Nations Convention on the Rights of the Child has not been incorporated into UK law, and it does not have direct adjudicative power in UK courts. That is, an individual cannot go to a UK court to complain about a violation of any of the Convention's rights, despite the fact that the UN Committee's conclusions and recommendations, while not legally binding, do provide an authoritative interpretation of the individual treaty obligations, which are legally binding on the UK.⁸⁵ Although the principles of the UNCRC are not directly incorporated into domestic law, they guide domestic law and practice and are frequently referred to by courts when interpreting human rights and other legislative obligations. Since November 2008, when the United Kingdom removed a reservation allowing it not to apply the Convention to decisions involving children and young people subject to immigration control, the government has accepted that all children, regardless of immigration status, must have access to all of the rights

⁸³ Michael Bridge and Robert Stevens, *Cross-border Security, and Insolvency* (OUP 2001) 223-224.

⁸⁴ Human Rights Act 1998, ECHR, Charter of fundamental Rights, European Social Charter, ICESCR, etc.

⁸⁵ Joint Committee on Human Rights- House of Lords & House of Commons, 'The UK's compliance with the UN Convention on the Rights of the Child Eighth Report of Session 2014-15' (*Parliament Publications UK*, 24 March 2015) <<https://publications.parliament.uk/pa/jt201415/jtselect/jtrights/144/144.pdf>> accessed 18 October 2021.

and protections outlined in Article 2 of the Convention without discrimination.⁸⁶ The UNCRC has a degree of more direct legal effect in the UK's legal system through the Human Rights Act 1998, in addition to its status as an international treaty that is legally binding on the UK.⁸⁷ In the context of its interpretation of the European Convention on Human Rights, the European Court of Human Rights has begun to take note of the Convention.⁸⁸ United Nations Convention on Children Rights, Art.27 ensures that the state must help families who cannot afford to provide a good standard of living to children. In bankruptcy, the most valuable asset of a debtor is their home which is taken away from their family.

The Universal Periodic Review⁸⁹ highlighted that the UK government has only supported 28% of the recommendations relating to children's rights, compared to 42% of all the recommendations it received in May 2017. Chances for Children charity revealed that debtors on low incomes also face a 'poverty premium' by paying more for essential goods and services and that 44% of families in crisis often do not have essential items such as beds or clothing for their children.⁹⁰ This distressing situation of existing poverty requires additional ringfencing to guard the children's rights where debtors risk losing the family home. According to the Ministry for Housing Communities and local government, over 128,340 children are in temporary accommodation, as reported in the last quarter of 2019.⁹¹ The rising number of homeless children can be mainly attributed to cuts to welfare, housing benefits, and family home possessions. The Homelessness Reduction Act 2017 has some positive changes, but the lack of funding to implement it raises many concerns for the local authorities when it comes to meeting their new duties.⁹² UN Convention on the Rights of the Child (CRC) sets out under the following articles⁹³ the provision for the safety and wellbeing of the children in their best

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Neulinger and Shuruk v Switzerland* (App. No. 41615/07, 6 July 2010) at para. 135 ('The Court notes that there is currently a broad consensus including in international law in support of the idea that in all decisions concerning children, their best interests must be paramount.').

⁸⁹ Ministry of Justice, 'United Nations Universal Periodic Review' (*Friends, Families and Travellers*, August 2017) <<https://www.gypsy-traveller.org/wp-content/uploads/2017/10/annex-uk-response-to-the-recommendations.pdf>> accessed 14 June 2021.

⁹⁰ Chances For Children, 'The Real Face of Child Poverty in the UK in 2017' (*Buttle UK*, 2017) <<http://s3-eu-west-1.amazonaws.com/files.buttlet.org.uk/Chances4Children-Report-WEB.pdf>> accessed 14 June 2021.

⁹¹ Ministry for Housing Communities and local government, 'Live tables on homelessness' (*GOV UK*, 21 May 2020) < <https://www.gov.uk/government/statistical-data-sets/live-tables-on-homelessness> > accessed 14 June 2021.

⁹² Giana Rosa and Maria Stephens, 'State of Children's Rights in England 2018' (*Children's Rights Alliance for England*, March 2019) <<http://www.crae.org.uk/publications-resources/state-of-childrens-rights-2018/>> accessed 24 November 2021.

⁹³ "Under Article 18:

interest and places responsibility on the state to safeguard the children's interests. The impact of COVID-19 on children and their mental health is quite noticeable due to school closures and parents losing their jobs. Children with a parent in psychological distress were more likely to have a potential mental health problem.⁹⁴

Homelessness resulting from the end of an assured shorthold tenancy has been the most common cause since 2012. Assured shorthold tenancies came to an end in 2010-11, displacing 6,630 applicants (15%) from their last stable residence. There were 18,270 (31%) in 2016-17, an increase of 176%.⁹⁵ Section 21 of the Housing Act 1988, which allows landlords to evict tenants without reason, is believed to be the root cause of 94% of cases of homelessness resulting from the end of a private tenancy.⁹⁶ With bankruptcy and debt problems on the rise and the high number of evictions based on the non-payment of rent, it will raise severe crises and concerns for the safety of debtors' children should their family home be repossessed.

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities, and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.”

“Under Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.”

“Under Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral, and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.”

⁹⁴ The Lancet Psychiatry, 'Child mental health in England before and during the COVID' (*The Lancet*, 11 January 2021) <[https://www.thelancet.com/journals/lanpsy/article/PIIS2215-0366\(20\)30570-8/fulltext](https://www.thelancet.com/journals/lanpsy/article/PIIS2215-0366(20)30570-8/fulltext)> accessed 15 October 2021.

⁹⁵ Deborah Garvie, 'Briefing: Homelessness Reduction Act 2017' (*Shelter England*, April 2018) <https://england.shelter.org.uk/_data/assets/pdf_file/0007/1494871/Homelessness_HRA17_Implementation_Briefing_FINAL.pdf> accessed 14 June 2021.

⁹⁶ Dan Wilson Crow, 'No-fault evictions drive up homelessness' (*Generation Renting Organization*, 18 Aug 2018) <https://www.generationrent.org/no_fault_evictions_drive_up_homelessness> accessed 14 June 2021.

Children's rights are the fundamental needs that children have in order to thrive, such as the right to a decent standard of living, an education, to play, to be healthy, and to be cared for. They should serve as a safety net, ensuring that children always receive the minimum treatment standards regardless of the changing economic climate.⁹⁷ The emergency measures the government has taken under Coronavirus Act 2020 to prevent repossession and eviction is returned⁹⁸ to pre COVID-19 level, which means the temporary protection afforded under the statute is no longer in place. The European Committee of Social Rights (ECSR) maintains that children residing irregularly in a country must be provided with adequate shelter and that living conditions in shelters must be in accordance with human dignity.⁹⁹

The ECHR does not recognise a right to housing, but if a state decides to provide housing, it must do so in a non-discriminatory manner.¹⁰⁰ In *Bah v. the United Kingdom*¹⁰¹, the ECtHR held that it was legitimate to put criteria for allocating limited resources such as social housing, provided that such criteria were not arbitrary or discriminatory. As in the examination of *Connors v. the United Kingdom*¹⁰², the court found that evictions of Roma families from caravan sites are a breach of their convention right. In *Wallová and Walla v. the Czech Republic*¹⁰³ and *Havelka and Others v. the Czech Republic*,¹⁰⁴ the ECtHR has tacitly dealt with the issue of the quality of housing, stating that inadequate housing does not justify placing children into public care.

A particular impact of over-indebtedness in a society is that the National Health Service (NHS) can be overloaded with patients who require mental illness treatment, care, and support due to debt. The NHS website has brief information and tools for a mood self-assessment¹⁰⁵ to reduce the GP's burden. During COVID-19, the NHS performed well and cared for patients with all available support, but the other patients who required urgent treatment were ignored

⁹⁷ Giana Rosa and Maria Stephens, 'State of Children's Rights in England 2018' (*Children's Rights Alliance for England*, March 2019) <<http://www.crae.org.uk/publications-resources/state-of-childrens-rights-2018/>> accessed 24 November 2021.

⁹⁸ *Ibid.*

⁹⁹ Council of Europe (children's rights division), 'Handbook on European law relating to the rights of the child' (*Council of Europe*, 2015) <https://www.echr.coe.int/Documents/Handbook_rights_child_ENG.PDF> accessed 14 June 2021.

¹⁰⁰ *Ibid.*, 155.

¹⁰¹ *Bah v. the United Kingdom* (App no. 56328/07) 27 September 2011.

¹⁰² *Connors v. the United Kingdom* (App no. 66746/01) 27 May 2004.

¹⁰³ *Wallová and Walla v. the Czech Republic* (App no. 23848/04) 26 October 2006 [73-74].

¹⁰⁴ *Havelka and Others v. the Czech Republic* (App no. 23499/06) 26 October 2006 ([57-59]).

¹⁰⁵ NHS, 'Mood Self-Assessment' (*NHS UK*, 11 November 2019) <<https://www.nhs.uk/conditions/stress-anxiety-depression/mood-self-assessment/>> accessed 28 April 2020.

due to the enormous demand for health services. In addition, NHS has an exceptionally long waiting list for consultation in certain areas, which means help for the debtor who has a mental illness cannot be provided in an efficient timely manner. Therefore debtors are putting extra pressure on a system that is already fragile.

The state welfare system will be under immense pressure as more people resort to state funding, unemployment allowance or universal credit. The local councils may face significant social housing crises due to tenant eviction or repossessions of homes post COVID-19. According to the Ministry of Housing, Communities & Local Governments, from 1st April 2019, more than 1,157,285 tenants are on the social housing waiting list, of which 243,551 is in London.¹⁰⁶ With bankruptcy and repossession on the rise, the number will likely increase in the coming months and years. As established above, extra childcare or fostering may be needed because debt causes more family issues such as separation and divorces. Homelessness is a significant consequence of debt which generates more social issues within society. According to empirical evidence, the sophistication of the bankruptcy law, as well as the efficiency of insolvency proceedings, are positively related to the investment share of GDP.¹⁰⁷ In an ideal world, the bankruptcy process would benefit the economy, providing a way for debtors to discharge their debts theoretically encouraging borrowing and spending. For consumers, this means using credit cards or mortgages to buy goods and make large purchases like houses or cars. This entails businesses taking on more risk by investing in R&D and expanding. There would be little incentive to incur debt or engage in risky behaviour if debts could not be forgiven.

On the contrary, the bankruptcy process provides creditors with a fair means of collecting debts and repossessing collateral property to the greatest extent possible. It has been established that debt damage family life (strained relationships, threatened family separation and divorce), causes mental health issues (stress, anxiety, suicidal thoughts etc.) and adversely affects the work-life of an individual (hurts productivity, employment prospects and leads to marginalisation). This 'social cost' is on top of the British economy's £162 billion outstanding consumer credit. The additional burden on welfare should an individual become incapacitated financially, moving and eviction costs, extra support from the NHS, and social care, affects state services. In addition, the creditors can suffer business closures due to accumulated bad

¹⁰⁶ London Gov, 'Households on Local Authority Waiting List, (*Borough - London Datastore*, 2019) <<https://data.london.gov.uk/dataset/households-local-authority-waiting-list-borough>> accessed 28 April 2020.

¹⁰⁷ Marianna Succurro, 'Bankruptcy systems and economic performance across countries: some empirical evidence' (2012) 33 *European Journal of Law and Economics* 101,110.

debts, which can cause a significant increase in the cost of consumer borrowing and cause a more negative economic impact. There has been an increase in demand for care and support services, as well as a strain on the welfare safety net, as a result of the £8.3 billion in problem debt that has accumulated over the last few decades. The current £8.3 billion challenge to policymakers is likely to grow in the future as the modern labour market becomes more unstable and families are less able to withstand economic shocks.¹⁰⁸ Although it is challenging to measure the accurate cost of social debt because it affects people in so many ways if we break down the social cost of debt in Monterey value as per Money Advice Service 2013, it is easy to calculate the burden¹⁰⁹ of debt on the country's resources.

Effects of Over-Indebtedness on Individual Health

For the past two decades, household debts in the UK have been rising while making the over-indebtedness of families and individuals a widespread phenomenon. Households with unsecured debt are more likely to have experienced a drop in income because hits to income have been more concentrated among those with lower incomes or less secure jobs in the COVID-19 pandemic.¹¹⁰ The credit crunch along with successive economic recessions has affected the households that face debt-related financial distress.¹¹¹ The COVID-19 pandemic has had an unprecedented impact on the UK economy, and household debt may yet play a more prominent role in the Covid crisis. This, according to the Bank of England, will depend on how

¹⁰⁸ Step Change Debt Charity commissioned online survey from YouGov. Total sample size: 4,442 GB adults. Fieldwork undertaken 17th - 20th December 2013. Figures obtained by extrapolating the percent from the above sample to the full GB adult population of 48,788,100 given by Office for National Statistics 2012 population estimates.

¹⁰⁹ **Housing Problems:** People falling behind on their rent or mortgage payments and risking losing their home or being forced to move or facing eviction. This cost an additional £2.8 billion to the government. **Mental Health Problem:** Debt pressures can exacerbate mental health conditions, such as stress, anxiety, and insomnia. This can lead to an extra cost of £960 million. **Physical Health Problems:** Debt stress can lead to physical health problems and generate extra pressure on the National Health Service (NHS) which cost an additional £19 million. **Employment Cost:** Stress, anxiety and other factors can undermine employment productivity further prolong unemployment can lead to an individual losing their jobs. This causes an extra £2.3 billion to the economy. **Older People's Care:** Deteriorating health can lead to older people needing extra and earlier care as they do not have enough savings or provision for long term care. This requires additional funding of £658 million. **Relationship Problems:** Debt stress can lead to pressure on relationships and breakups. This costs an extra £790 million in the shape of legal aid to the government. **Children Care:** Mental health problems and relationship problems can lead to children already in precarious families being taken into care. This requires an extra £229m.

¹¹⁰ Bank of England, 'Household debt and Covid' (*Bank of England*, 25 June 2021) <<https://www.bankofengland.co.uk/quarterly-bulletin/2021/2021-q2/household-debt-and-covid>> accessed 17 October 2021.

¹¹¹ Maite Blázquez Cuesta Santiago Budría, 'The effects of over-indebtedness on individual health' (*Institute for the Study of Labor*, March 2015) <<https://ftp.iza.org/dp8912.pdf>> accessed 17 October 2021.

the pandemic evolves and the pace of economic recovery, both of which remain uncertain.¹¹² How governments, households, businesses, and financial markets react to these changes will also be determined.¹¹³ Apart from the political issues of the household's ability to sustain the debt burdens, the financial fragility of the household impacts the health of the people as well.

Debts impose a psychological loss on the debtors and have impacted their physical and mental health. Mental health and money are linked directly. The Mental Health Foundation charity found that mental health problems can make it harder to earn and manage money, and debt can trigger or worsen conditions such as anxiety, stress and depression.¹¹⁴ The Institute for Fiscal Studies discovered that in the United Kingdom, younger people are more likely than older people to live in a debt-ridden household, with 60–70% of those aged 20–30 living in a debt-ridden household, compared to only 39% of those aged 60–64 and 11% of those aged 80–84.¹¹⁵ The frequency of debt increases with income; according to the Institute for Fiscal Studies, 7% in the lowest income decile live in households with debts greater than 10,000 euros, and this figure rises to 18% among those in the highest income decile, where above-average incomes hold more of a higher percentage of unsecured debt.¹¹⁶ Some findings that correlate age to debt found that credit card debt peaks among individuals aged 40–49.¹¹⁷

Research indicates that among individuals aged 18–30, the amount of debt increases with age.¹¹⁸ Some research¹¹⁹ indicated that debt might have severe consequences and may enhance criminal behaviour; so insight into the prevalence and determinants of debt and its association with a crime is essential.¹²⁰ The findings revealed that debt is prevalent among young people; on average, 49% reported having at least some debt, and 22% had financial

¹¹² Bank of England, 'Household debt and Covid' (*Bank of England*, 25 June 2021) <<https://www.bankofengland.co.uk/quarterly-bulletin/2021/2021-q2/household-debt-and-covid>> accessed 24 November 2021.

¹¹³ *Ibid.*

¹¹⁴ Mental Health Foundation, 'Debt and mental health' (*Mental Health Foundation*, 10 August 2021) <<https://www.mentalhealth.org.uk/a-to-z/d/debt-and-mental-health>> accessed 24 November 2021.

¹¹⁵ Andrew Hood, Robert Joyce, David Sturrock, 'Problem debt and low-income households' (*The Institute for Fiscal Studies*, January 2018) <<https://ifs.org.uk/uploads/publications/comms/R138%20-%20Problem%20debt.pdf>> accessed 17 October 2021.

¹¹⁶ *Ibid.*

¹¹⁷ Patricia Drentea, 'Age, Debt and Anxiety' (2000) 41 *American Sociological Association* 437,438.

¹¹⁸ Machteld Hoeve and others, 'A Systematic Review of Financial Debt in Adolescents and Young Adults: Prevalence, Correlates and Associations with Crime' (*PLOS*, 19 August 2014) <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0104909>> accessed 17 October 2021.

¹¹⁹ Robert K Merton, 'Social Structure and Anomie' (2004) 1 *American Sociological Review* 672,673.

¹²⁰ *Ibid.*

problems.¹²¹ According to research, the strongest associations with debt are low self-esteem, a pro-debt attitude (of young people and their parents), a lack of perceived control over financial management, poor social functioning, financial stress, and an external locus of control.¹²² The alarming association between debt and crime required further investigation and due to the limitation of this study, it cannot be further explored. The debtors have faced anxiety, increased cardiovascular risks, stress, suicidal ideation, depression, and self-harm.

In terms of depression, research has shown that debt is not the only predictor of depression.¹²³ Debt was discovered to be significantly associated with an increase in mild, moderate and severe depression among older adults in Japan. This is attributed to the obligation to repay debt resulting in psychological pain or a lower quality of living conditions.¹²⁴ Self-reported debt and depression are linked, but Sarah Bridges and Richard Disney found that there are important person-specific effects.¹²⁵ They also found a link between subjective measures of financial well-being and psychological well-being; individuals respond differently to objective financial situations.¹²⁶ Over-indebtedness is associated with depression; specifically, the length of over-indebtedness predicts depressive symptoms.¹²⁷ Debt was found to be a significant risk factor for anxiety in studies published in the *European Journal of Public Health*.¹²⁸ More Union Cross members in low-income households were found to be more anxious than the average Northern Irish household, with 11.5% reporting anxiety or depression and 23.5% seeking treatment for these conditions, according to the research.¹²⁹ In the United States, qualitative research conducted with 14 focus groups of low- to middle-income people facing repossession and foreclosure intervention professionals reported changes in mental health as a result of stress and anxiety caused by financial hardship, efforts to manage the

¹²¹ Machteld Hoeve and others, 'A Systematic Review of Financial Debt in Adolescents and Young Adults: Prevalence, Correlates and Associations with Crime' (*PLOS*, 19 August 2014) <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0104909>> accessed 17 October 2021.

¹²² *Ibid.*

¹²³ Amit Noh and others, 'Relationship Between Debt and Depression, Anxiety, Stress, or Suicide Ideation in Asia: A Systematic Review' (2020) 11 *Frontiers in Psychology* 1336, 1344.

¹²⁴ Tatsuhiko Kaji and others, 'Relationship between late-life depression and life stressors: large-scale cross-sectional study of a representative sample of the Japanese general population' (2010) 64 *Psychiatry and Clinical Neurosciences* 426,428.

¹²⁵ Sarah Bridges and Richard Disney, 'Debt and depression' (2010) 29 *Journal of Health Economics* 388,390.

¹²⁶ *Ibid.*

¹²⁷ Daniel A Hojman and others, 'Debt trajectories and mental health' (2016) 167 *Social Science & Medicine* 54,55.

¹²⁸ Margareta Dackehag and others, 'Debt and mental health: new insights about the relationship and the importance of the measure of mental health' (2019) 29 *European Journal of Public Health* 488,490.

¹²⁹ Debbie Keatley And others, 'The toxic relationship between debt and mental and physical health in low-income households in Northern Ireland in 2014' (2014) 24 *European Journal of Public Health* 107,113.

financial problem, and loss of ontological support.¹³⁰ Thus, most research and studies establish a link between debt and anxiety which adversely affects the debtors and their ability to further deal with the debt issue.

There is also a link between stress and debt, as debt causes extreme stress in debtors. Several studies on the effect of debt on stress have been conducted in the past. Jill Norvilitis discovered that debt (in the form of credit card and store debt) predicted overall stress in people over the age of 18 and college students.¹³¹ Using the general health questionnaire to assess the psychological cost of credit research, it was discovered that households with outstanding credit, either at the household or individual level, report significantly lower psychological well-being, and the presence of household debt reduces the likelihood of scoring full marks on the general health questionnaire 12 by 6%.¹³² As discussed in previous chapters, losing a home is a huge loss for a debtor, so it has an impact. According to the findings, those in the foreclosure or default group experienced significantly more psychological distress than others.¹³³

A study of 100 suicide case files from a coroner's office in the United Kingdom found that, while not a statistically significant pattern, debt was mentioned as a relevant factor for suicide behaviour in 11% of men by inquest witnesses.¹³⁴ The rates of suicide have been rising continuously in the EU since 2008; since then, the relation between socioeconomic status and health has received significant attention in literary studies.¹³⁵ A study of suicide by gassing in Hong Kong from 2005 to 2013 found that those who used helium to commit suicide were more likely to be in debt, and debt was associated with charcoal suicide.¹³⁶ Between debt and suicide, hopelessness serves as a partial mediator.¹³⁷ Suicide attempts are more closely linked to

¹³⁰ Kimberly Libman and others, 'Housing and Health: A Social-Ecological Perspective on the US Foreclosure Crisis' (2012) 29 *Housing, Theory and Society* 1,5.

¹³¹ Jill M Norvilitis and others, 'Journal of Applied Social Psychology Journal of Applied Social Psychology Personality Factors, Money Attitudes, Financial Knowledge, and Credit-Card Debt in College Students' (2006) 36 *Journal of Applied Social Psychology* 1395,1398.

¹³² Brown S and others, 'Debt and distress: Evaluating the Psychological cost of credit' (2005) 26 *Journal of Economic Psychology* 442-652.

¹³³ Carolyn Cannuscio and others, 'Housing strain, mortgage foreclosure, and health' (2012) 60 *Science Direct* 134,136.

¹³⁴ Jonathan Scourfield and others, 'Sociological autopsy: An integrated approach to the study of suicide in men' (2012) 74 *Social Science & Medicine* 466,469.

¹³⁵ Sumit Agarwal and others, 'Impact of State Exemption Laws on Small Business Bankruptcy Decision' (2005) 71 *Southern Economic Journal* 620,622.

¹³⁶ Shu-Sen Chang and others, 'Suicide by gassing in Hong Kong 2005–2013: Emerging trends and characteristics of suicide by helium inhalation' (2016) 192 *Journal of Affective* 162,163.

¹³⁷ Amit Noh and others, 'Relationship Between Debt and Depression, Anxiety, Stress, or Suicide Ideation in Asia: A Systematic Review' (2020) 11 *Frontiers in Psychology* 1336, 1344.

bankruptcy within two years than to pre-injury bankruptcy, but the weaker link between pre-injury bankruptcy and suicide is still significant, according to research on the subject.¹³⁸

According to research, a higher debt/income ratio is significantly associated with worsening health and self-reported health issues. Part of the relationship between debt, debt stress, and health can be explained by health behaviours and risk.¹³⁹ In Katarina Arandjelovic's research, people living in households with debt for the past 12 months had 22.6% greater odds of reporting poor health than those who did not, while evidence of the effect of debt collection costs is stronger than that of social stigma.¹⁴⁰ After considering the critical determinants of health like age, gender, occupation and educational level, a strong correlation has been found between income and health. Income is a flow and cannot capture the long-term financial condition, which is a more critical determinant of health than income. The changes noticed in the health and illness of individuals develop over time, and it is important to consider the long-term conditions that develop in them and their households whenever it is practically possible. It has been noticed that wealth is a more meaningful and predictive indicator of the material well-being of the people than income since it reflects the lifetime accumulation of the financial status. Over-indebtedness affects individual health conditions for many reasons.¹⁴¹ The debt issues are linked to lowered self-esteem, an increasingly cynical outlook on life and reduced mental health due to severe anxiety, hostility, and depression. It can also be said that debt is linked to the declining physical health of an individual. To the extent that the high payment burdens might tighten the financial condition of the families, the debtors save on the medical care utilisation along with health protection like healthy food, which is expensive compared to unhealthy food. It has also been noticed that financial hardship leads to irrational behaviour of the debtors and is also associated with the notion of unhealthy behaviours like excessive drinking, increased calorie intake and smoking.

There is also a link between suicide and financial stress, as stated earlier.¹⁴² Besides that, financial issues also result in suicide attempts for the debtors and lead to negative

¹³⁸ Judi Kidger and others, 'The Association between Bankruptcy and Hospital-Presenting Attempted Suicide: A Record Linkage Study' (2011) 41 *Suicide and Life-Threatening Behavior* 676,678.

¹³⁹ Patricia Drentea and Paul Lavrakas, 'Over the limit: the association among health, race and debt' (2000) 50 *Social Science & Medicine* 517,519.

¹⁴⁰ Katarina Arandjelovic and others, 'Mental health system development in Asia: Does Australia have a role?' (2016) 50 *Australian & New Zealand Journal of Psychiatry* 834,837.

¹⁴¹ John Armour and Simon Deakin, 'Insolvency and employment protection: the mixed effects of the Acquired Rights Directive' (2002) 22 *International Review of Law and Economics* 443, 452.

¹⁴² John Armour and others, 'The costs and benefits of secured creditor control in bankruptcy: Evidence from the UK' (2006) 8 *Review of Law & Economics* 101, 122.

psychological situations like depression. Despite many earlier studies which documented the link between health issues and debt, the impact of debts on the health of debtors is still a matter of concern. The significant concern is reverse causality. Few attempts have been made in the literature that traced the connection between health, and debts. Debts are said to have substantial psychological costs. As per the analysis of previous studies, the average effects of debts on people's health are similar for the two different debt measures like home loans and consumer credits.¹⁴³ Other studies have suggested that in the aftermath of the global economic crisis, many households in Europe were left with arrears, and it became challenging for them to manage it. Similarly, the situation post COVID-19 is considered more significant than that of the 2008 financial crisis for the debtors and requires urgent attention and a safety net for their mental health and human rights protection.

Indebtedness impairs the well-being of those people who are affected by debt. The impact of unpaid household debts is an important subject- matter. Debtors take debt as a solution to afford many necessities of their life, including purchasing a home, cars and food. The use of credit for luxury goods is being incorporated into society as a need. The credit is given on the ability of the debtors to pay them back on time. However, if the households' financial problems accumulate due to severe illness, unemployment, and the collapse of property values and rising interest, they may not control or manage the debts, and the remaining financial challenges become severe.¹⁴⁴ Over-Indebtedness leads to a cut back on the standards of living of the households. Unpaid consumer debts come with different social consequences. Debtors do not lose access to their credit if there are no issues with loan repayments. The debtor who is the homeowner and is in arrears becomes the subject of the different debt-collection actions, including foreclosure and bankruptcy. The legal results of unmanageable arrears differ in different nations.¹⁴⁵

The debtors face pressure from the creditors to pay back the loans, affecting their mental health. The risks and ill health-related behaviours have explained the parts of the relations between financial strains, health, and debts. In terms of self-reported health, it is seen that the strength of the relation between health and debt-to-income decreased and became non-

¹⁴³ C. Bruneau and others, 'Macroeconomic fluctuations and corporate financial fragility' (2012) .8 *Journal of Financial Stability* 219, 221.

¹⁴⁴ Andreas Charitou and others, 'Predicting corporate failure: empirical evidence for the UK' (2004) 13 *European Accounting Review* 465, 468.

¹⁴⁵ Angela Christidis and Alan Gregory, 'Some New Models for Financial Distress Prediction in the UK' (2010) Centre for Finance and Investment Discussion Paper No 10.

significant, while the effect of financial stress or debts on health remained significant. However, physical impairments shows that the relationship strengths between physical impairment and the debt-to-income ratio have decreased. Most people have suffered a financial crisis due to unemployment and bankruptcy, which has also affected their health. It has also resulted in increased health-seeking behaviours and significant psychological stress.¹⁴⁶ The increase in debts in different countries has a different impact, but it has influenced the households and their health in the UK.¹⁴⁷ Debt plays a vital role in affecting the health of individuals.¹⁴⁸ High debts are sources of anxiety and lead to poor mental or physical health and psychological distress, worsening financial welfare.

The stress resulting from over-indebtedness leads to enhanced unhealthy behaviour like poor dietary habits, alcohol consumption, and smoking. Debts also reduce the availability of the future resources of healthcare investment and leads to a vicious circle where more debts are the causes and consequences of poor health. Damaging financial blows result in harm to health and reduced financial resources. Other than that, the lack of proper education, unemployment, low income or lower class is the primary aspect that affects an individual's health conditions. Debt affects the family or friendly relations and results in health issues.¹⁴⁹ Due to socioeconomic hardships or material deprivation, the physical health of an individual is affected. As described earlier, debt also leads to anxiety, psychological stress, and poor physical and mental health conditions. A detailed discussion has been done on the impact of debts on the mental health conditions of individuals under bankruptcy in the subsequent section of this thesis.

Impact of Debt on the Mental Health of Individuals

It is critical to understand the full effects of debt on mental health in order to determine the safety net for the debtor's protection. When it comes to mental health and finances, there is often a strong connection. Financial difficulties and mental health issues can exacerbate each other, resulting in a vicious cycle that is difficult to break. More than 1.5 million people in the United Kingdom are grappling with debt and mental health issues at the same time, according

¹⁴⁶ Sergei A. Davydenko and Julian R. Franks, 'Do Bankruptcy Codes Matter? A Study of Defaults in France, Germany, and the U.K.' (2008) 63 *The Journal of Finance* 565,578.

¹⁴⁷ *Ibid.*

¹⁴⁸ Julian Franks and Oren Sussman, 'Financial Distress and Bank Restructuring of Small to Medium Size UK Companies' (2005) 9 *Review of Finance* 65, 71.

¹⁴⁹ Alan Gregory and other, 'UK IPOs: long run returns, behavioural timing, and pseudo timing' (2010) 37 *Journal of Business Finance & Accounting* 612, 615.

to government statistics.¹⁵⁰ Half of those who are struggling with debt also have a mental health issue (46%).¹⁵¹ People who have had mental health issues have said that their financial situation has exacerbated their mental health issues by 86% in a survey of 5,500 people.¹⁵² One-fifth of people with mental health issues are in debt, according to a new study. Three and a half times as many people with mental health issues are in debt as those without mental health issues (5%).¹⁵³ According to the Money and Mental Health survey, 72% of respondents stated that their mental health issues had a negative impact on their financial situation.¹⁵⁴ Financial problems are a common source of stress, and the stigma associated with debt can make it difficult for people to seek help and isolate themselves. As a result, people's mental health may suffer, particularly if they are forced to cut back on necessities such as heating and eating, or if creditors are aggressive or insensitive when collecting debts.¹⁵⁵

Furthermore, financial hardship significantly reduces recovery rates for common mental health conditions. Individuals with depression and problem debt, for example, are 4.2 times more likely to still be depressed 18 months later than people without financial difficulties.¹⁵⁶ In addition, people who are in serious debt are three times more likely to have considered suicide in the previous year. Suicide is a complex phenomenon caused by a combination of social factors, life events, and other circumstances. However, as previously stated, there is a strong link between unmanageable debt and suicide. Over 100,000 people in England attempt suicide each year because they are in debt.¹⁵⁷

Individuals with mental health issues are less likely to be in high-paying jobs and more likely to be in low-paying jobs due to their mental health and required commitment to the job. For example, compared to 74% of the general population and 65% of people with other health conditions, only 43% of people with mental health problems are employed. Furthermore, people with mental illnesses are overrepresented in high-turnover, low-paying, part-time, or

¹⁵⁰ Money and Mental Health Institute, 'Money and Mental Health: The Facts' (*Money and Mental Health Institute* 2019) <<https://www.moneyandmentalhealth.org/wp-content/uploads/2019/03/debt-mental-health-facts-2019.pdf>> accessed 18 October 2021.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ Petros Skapinakis and others, 'Socio-economic position and common mental disorders. Longitudinal study in the general population in the UK' (2006) 189 *British Journal of Psychiatry* 109, 113.

¹⁵⁷ Money and Mental Health Institute, 'Money and Mental Health: The Facts' (*Money and Mental Health Institute*, 2019) <<https://www.moneyandmentalhealth.org/wp-content/uploads/2019/03/debt-mental-health-facts-2019.pdf>> accessed 18 October 2021.

temporary jobs.¹⁵⁸ When some debtors are unable to work due to mental health issues, they will rely on benefits. Half of all out-of-work adults in the age range of 16 to 64 suffer from a mental illness like depression or generalised anxiety disorder, which affects one-third of all Housing Benefit claimants. Two-thirds of those claiming Employment and Support Allowance (ESA), a benefit for those unable to work because of illness or disability, fall into this category (66%).¹⁵⁹ Mental health issues can influence how our minds work, how we behave, and how we feel. Common symptoms of mental health issues, such as increased impulsivity and memory problems, can make it difficult to stay on top of financial management or negotiate a good deal in complex markets, increasing the likelihood of financial difficulty.¹⁶⁰ People with mental health issues may find it difficult to access essential services and providers, such as banks and energy providers.

People may have a hard time comprehending bills and remembering account information, which can lead to financial difficulties and stress. Almost four out of ten people (37%) who have had mental health problems show significant anxiety when dealing with essential services, including symptoms such as a racing heart or difficulty breathing.¹⁶¹ Debtor communication with critical service providers can be a challenge when trying to get the desired response from those providers. Using a common communication channel like the phone, face-to-face contact, or opening a letter is difficult for three-quarters of people who have had mental health problems (75%). Most people find phone calls to be the most difficult. Speaking on the phone is difficult or painful for 54% of people with mental health issues. In the absence of alternatives, people may be unable to seek assistance and resolve their account issues.¹⁶² Companies, on the other hand, may have difficulty identifying customers who have mental health problems. Many people are reluctant to tell health care providers about their mental health issues because of the stigma they face.

¹⁵⁸ NHS England, 'The Five Year Forward View for Mental Health' (*NHS England*, 2016) <<https://www.england.nhs.uk/wp-content/uploads/2016/02/Mental-Health-Taskforce-FYFV-final.pdf>> accessed 24 November 2021.

¹⁵⁹ NHS Digital, Adult Psychiatric Morbidity Survey: Survey of Mental Health and Wellbeing, England, 2014' (*NHS Digital*, 29 September 2016) <<https://digital.nhs.uk/data-and-information/publications/statistical/adult-psychiatric-morbidity-survey/adult-psychiatric-morbidity-survey-survey-of-mental-health-and-wellbeing-england-2014>> accessed 24 November 2021.

¹⁶⁰ Merlyn Holkar, 'Seeing through the fog: how mental health problems affect financial capability' (*Money and Mental Health*, 24 January 2017) <<https://www.moneyandmentalhealth.org/publications/fincap/>> accessed 24 November 2021.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

Furthermore, one-third (36%) of people suffering from a common mental disorder such as depression or anxiety have never received a diagnosis and may be unaware that they are suffering from a clinical mental health problem.¹⁶³ Since the last decade, due to the financial crisis, the debts of households in the UK have been rising rapidly compared to other countries. The impact of COVID-19 is not fully taken into account, but the effect of the pandemic is at an unprecedented level. Unsecured debts are growing faster than household incomes and secured debts. According to the Mental Health Institute, 5% of adults in the UK have unsecured debts as per their financial assets and savings, indicating their unmanageable debts.¹⁶⁴ The relationship between mental health and unmanageable debts of the debtor, can be seen in the fact that around 24% of people in the UK have mental health issues due to excessive debts.¹⁶⁵ It is said that the onset of mortgage indebtedness or unmanageable debts as per the financial assets of individuals is linked with the deterioration of the mental health conditions of the individuals.

The individuals who have failed to repay the mortgages and the arrears and have lost their houses or basic needs suffer from physical and mental health impairments. Those people also experience poor health conditions compared to those who do not have any debts. Due to adverse mental conditions, symptoms of depression and anxiety disorders are visible.¹⁶⁶ Mental health and psychological conditions are affected by over-indebtedness or a high level of debt that debtors feel they are unable to repay. Research indicates that worry exacerbates debt issues, and high-interest debt repayments influence the health-seeking behaviour of individual people in the UK.¹⁶⁷ It has been further noted that the financial concerns due to over-indebtedness are a crucial linear predictor of the physical and mental illness of the debtors.¹⁶⁸ An increased financial constraint is linked with worse health conditions. Financial stress is higher in families with more children than those families with a lesser number of children. Due to the large size of the family, it becomes challenging for the parents to feed them and provide

¹⁶³ NHS Digital, 'Adult Psychiatric Morbidity Survey: Survey of Mental Health and Wellbeing, England, 2014' (*NHS Digital*, 29 September 2016) <<https://digital.nhs.uk/data-and-information/publications/statistical/adult-psychiatric-morbidity-survey/adult-psychiatric-morbidity-survey-survey-of-mental-health-and-wellbeing-england-2014>> accessed 24 November 2021.

¹⁶⁴ Money and Mental Health Institute, 'Money and Mental Health: The Facts' (*Money and Mental Health Institute*, 2019) <<https://www.moneyandmentalhealth.org/wp-content/uploads/2019/03/debt-mental-health-facts-2019.pdf>> accessed 18 October 2021.

¹⁶⁵ *Ibid.*

¹⁶⁶ H Richard, G Jackson, Anthony Wood, 'The performance of insolvency prediction and credit risk models in the UK: A comparative study' (2013) 45 *The British Accounting Review* 183, 187.

¹⁶⁷ Elina Turunen and Heikki Hiilamo, 'Health effects of indebtedness: a systematic review' (2014) 489 *BMC Public Health* 17,21.

¹⁶⁸ *Ibid.*

them with basic needs and hence, they start borrowing from other people.¹⁶⁹ Gradually, this results in over-indebtedness, which indirectly affects the mental conditions of the debtors. Thus, financial stress is less among families with high disposable income and equity in their properties, which can be used as collateral to get cheap loans.

For a female head of the family, a long-time instability of the housing payments results in psychological issues.¹⁷⁰ These make a more considerable impact on their mental health and financial hardships.¹⁷¹ On the other hand, housing payment issues and arrears had high psychological costs for the male heads of the family and resulted in negative financial concerns. It is noted that the experience of mortgage indebtedness for males is linked with the increased rates of psychological consultations.

Financial strains affect mental health less if the individual has strong self-esteem and believes in their competence and ability to pay off the debts.¹⁷² However, it is seen that financial stress and problems of indebtedness are associated strongly with depression and its symptoms like anger and anxiety.¹⁷³ Mortgage defaulting and delinquency lead to depressive symptoms and food insecurity.¹⁷⁴ The ratio of the debts to the assets of individuals and their present employment status is a robust predictor of depression.¹⁷⁵ Indebtedness status or having debts on credit cards, mortgages or car loans are associated with mental health conditions. Low retirement wealth and higher consumer debts are essential predictors of depressive symptoms for both males and females.¹⁷⁶ They have a lower net worth, higher medical expenses, less education, poorer perceived health, and in addition, being widowed increases the depressive symptoms among the debtors.¹⁷⁷ The key drivers of depression are job loss, financial difficulties and worsened mental health conditions.¹⁷⁸ Highly indebted individuals tend to

¹⁶⁹ Matthias Keese and Hendrik Schmitz, 'Broke, Ill, and Obese: Is There an Effect of Household Debt on Health?' (2014) 60 *Review of Income and Wealth* 525, 531.

¹⁷⁰ R. M. Lastra, 'Northern Rock, UK bank insolvency and cross-border bank insolvency' (2008) 9 *Journal of Banking Regulation* 165, 171.

¹⁷¹ *Ibid.*

¹⁷² Ben Fell and Miles Hewstone, 'Psychological perspectives on poverty- A review of psychological research into the causes and consequences of poverty (*JRF Organization*, 4 June 2015) <<https://www.jrf.org.uk/report/psychological-perspectives-poverty>> accessed 18 October 2021.

¹⁷³ Lawrence Robinson and Melinda Smith, 'Stress management - Coping with Financial Stress' (*Help Guide* April 2021) <<https://www.helpguide.org/articles/stress/coping-with-financial-stress.htm#>> accessed 18 October 2021.

¹⁷⁴ Elina Turunen and Heikki Hiilamo, 'Health effects of indebtedness: a systematic review, (2014) 14 *BMC public health* 489, 511.

¹⁷⁵ Lin and Jenifer Piesse, 'Identification of corporate distress in UK industrials: a conditional probability analysis approach' (2004) 14 *Applied Financial Economics* 73, 75.

¹⁷⁶ Elina Turunen and Heikki Hiilamo, 'Health effects of indebtedness: a systematic review' (2014) 489 *BMC Public Health* 17,21.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

suicidal behaviours to escape the debts. In the wake of bankruptcy, financial stress increases the suicidal ideation among the debtors since their mental conditions are affected. Economic variables like average income, unemployment, economic growth, and bankruptcy impact the rates of suicidal incidents in the UK.¹⁷⁹

The debtors tend to commit suicide to get rid of debts, which negatively affects by their mental disorders because of financial strains.¹⁸⁰ The more debts an individual has, the higher the risk of mental disorders, stress, or anxiety.¹⁸¹ Economic stress influences the mental disorders of individuals.¹⁸² It has been seen that people with excessive debts suffer from illness and mental health disorders like bipolar disorders, anxiety and depression. Thus, debts can be considered significant predictors when trying to understand whether the person is suffering from debts or not.¹⁸³ The financial-economic crisis in the UK has significant influences on the well-being and health of individuals¹⁸⁴, and the situation post-COVID-19 is predicted to be worse than the 2008 crisis. As discussed earlier, economic instabilities cause psychological stress and are linked with the onset of mental health illness. Unexpected changes in the lifestyle of individuals like unemployment, are linked with anxiety disorders, suicide, and depression. The effects are further exacerbated by the experiences of shame at losing their jobs by individuals and facing financial hardships. Further emphasis has been given to such factors related to financial distress, which impact the mental health conditions of individuals. Research suggests that unemployment also leads to depression and suicidal thinking.¹⁸⁵ The number of households in the UK facing high debts has increased because of the COVID-19 pandemic. Over-indebtedness and debts are affecting those on low incomes and victims of job losses during the pandemic. Studies on bankruptcy suggest that bankruptcy leads to an economic crisis for individuals and increases the rate of poverty in the country.¹⁸⁶ Poverty is the socio-economic risk factor in mental health issues, and disorders like depression or anger or suicidal

¹⁷⁹ Jia Liu, 'Macroeconomic determinants of corporate failures: evidence from the UK' (2006) 36 *Applied Economics* 939, 941.

¹⁸⁰ *Ibid.*

¹⁸¹ Daniel A Hojman and other, 'Debt trajectories and mental health' (2016) 167 *Social Science & Medicine* 54, 56.

¹⁸² S. Rohlin and A. Ross, 'Does bankruptcy law affect business turnover? Evidence from new and existing business' (2015) 54 *Economic Inquiry* 361, 369.

¹⁸³ G. Chodorow-Reich, 'The employment effects of credit market disruptions: Firm-level evidence from the 2008–9 financial crisis; (2013) 129 *The Quarterly Journal of Economics* 1, 8.

¹⁸⁴ Kristian Wahlbeck and David Mcdaid, 'Actions to alleviate the mental health impact of the economic crisis' (2012) 11 *World Psychiatry* 139, 141.

¹⁸⁵ *Ibid.*

¹⁸⁶ Wei Fan and Michelle J White, 'Personal bankruptcy and the level of entrepreneurial activity' (2003) 46 *The Journal of Law and Economics* 543, 549.

ideation are linked to financial difficulties. As a result, the financial crisis increases the social exclusion of vulnerable groups, including the people living under the poverty line.

Job losses or lack of proper financial resources leads to changes in the lifestyle of people. Financial strain is linked to heavy drinking habits in debtors and causes mental health issues. Research indicates that an economic slump or job loss due to bankruptcy leads to higher alcohol use and depression, and anxiety.¹⁸⁷ In addition, financial stress causes feelings of anger, confusion, and insecurity that affect the children's attitudes toward their families. Consequently, it has been seen that loss of jobs or bankruptcy, not only affects the health conditions or behaviour of the debtors, but also affects their mental health conditions. In addition, their family lives are affected as well. Therefore, economic depression due to stagnation or unemployment hurts individuals generally.¹⁸⁸ In the above context, the case of *Mann v Goldstein*¹⁸⁹ is considered here to exhibit the conditions of bankruptcy or insolvency, which affect the individual and their mental health.

Debt, Repossession and Morality

Chapter 2 of this study made an in-depth evaluation of the history of bankruptcy law. Bankruptcy has been said to be active since earlier times. Bankruptcies have been rising since the debts were outpacing the debtor's annual income. Bankruptcy is more or less the same as the consequences of the inability to pay back the debts to creditors. Debtors believe that the whole bankruptcy system is degrading and requires overhauling in line with modern human rights. Bankruptcy in the modern age is stigmatic and getting a label of a bankrupt is scary for the family and the debtor.¹⁹⁰ In addition, the results of the bankruptcy revealed disruption in family life, some unavoidable intrusion into the privacy of the home, and the family home itself is in danger of being taken away from the bankrupt. The stigma of being labelled 'bankrupt' is often associated with guilt and blame. Doubt and distrust will ensue if a debtor fails to meet his financial obligations. The phrase 'gone bankrupt' had different meanings for different

¹⁸⁷ Stefan Angel, 'The Effect of Over-Indebtedness on Health: Comparative Analyses for Europe' (2016) 69 *Kyklos* 208, 211.

¹⁸⁸ Daniel Hojman and other, 'Over indebtedness and depression: Sad debt or sad debtors?' (*University of Chile, Department of Economics*, 2013) <<https://ideas.repec.org/p/udc/wpaper/wp385.html>> accessed 24 November 2021.

¹⁸⁹ *Mann v Goldstein* [1968] 1 WLR 1091.

¹⁹⁰ Linn White, 'Bankruptcy, Morality & Student Loans: A Decade Of Error in Undue Hardship Analysis' (*Ohio Northern University Law Review*, 2019) <https://digitalcommons.onu.edu/cgi/viewcontent.cgi?article=1021&context=onu_law_review> accessed 24 November 2021.

people. Several descriptions include; filing for bankruptcy, debt problems, inability to pay back the debt, and low repayment.¹⁹¹

In the UK, courts have the jurisdiction for issuing bankruptcy orders. Once the court declares an order of bankruptcy, the debtor's assets will be recovered and placed under the control of the receiver. Usually, the bank or building holds the security that will first take hold of the possessions. In England, a bankrupt usually will be discharged within 12 months of the order being issued. People, not corporations, were the focus of English bankruptcy law in the early modern period. It is recognized that during the early modern period, the failure to repay debts had a profoundly severe moral dimension. Failure to repay the debts was considered a crime against the creditors. The focus of the bankruptcy statute in the UK is on the protection of the creditors' assets. It leaves the bankrupt with barely anything, and when the debts were not fully repaid through the sale of assets, future earnings could be garnered until the debts owed were fully repaid (if the disposable income of a debtor is over £20). There is no morality in the field of business or banking as they rely highly on profit. Usually, when we take debts, no lender neither asks about marital faithfulness or thefts. The only moral component initiated will be in the mind of debtors as they fail to keep their promises.

Bankruptcy and morality are, in a way indirectly proportional to each other. Bankruptcy is a path to resurrection found in religious and non-religious texts. It is usually believed that if sins can be forgiven, then debt can also be forgiven. Debt forgiveness is nothing more than breaking tablets, tearing contracts, or destroying records. In comparison, all efforts achieved the same goal: to liberate people and provide them with a legal second chance.¹⁹² Taking loans or debts is not a moral transaction but a legal contract. While giving the loans, the creditors inject morality only when they collect the debt back from the bankrupt. Bankruptcy is never considered a moral failure as it has nothing to do with morality, says Miranda Marquit in an article.¹⁹³

Many parameters can be used to determine the morality of bankruptcy procedures. Below are the analyses for the possession of the family home explored. The assessment of the human rights compatibility of the creditor is mainly the enforcement of the sale of a home

¹⁹¹ Michael D Sousa, 'The Persistence of Bankruptcy Stigma' (*Social Science Research Network*, 2017) <<https://papers.ssrn.com/abstract=3048422>> accessed 12 May 2020.

¹⁹² Miranda Marquit, 'Is Bankruptcy Sinful and Bad or Right and Moral? An Examination' (*Miranda Marquit*, 2012) <<https://mirandamarquit.com/is-bankruptcy-sinful-and-bad-or-right-and-moral-an-examination/>> accessed 22 May 2021.

¹⁹³ *Ibid.*

against the law in the most common scenario. Besides this, there are other situations wherein creditors seek the recovery of their debt through various deals.¹⁹⁴ Whereas, under the Charging Orders Act 1979¹⁹⁵, an unsecured creditor may secure their debt by obtaining a charging order against the debtor's proprietary interest in the home, which a court-sanctioned sale may ultimately enforce. Alternatively, there are alternative scenarios that are referred to for the comparison of appropriate statutory regimes. "A legal charge in the majority of cases will wish to obtain possession to sell the home most advantageously by offering vacant possession. Their right to take possession stems from the Law of Property Act 1925¹⁹⁶, which confers upon a legal charge the rights of a mortgagee by sub-demise, including the inherent right to possession. Whether a legal charge is selling under an express or implied power,¹⁹⁷ they are not required to obtain a court order sanctioning sale, although equitable duties of care demand good faith and reasonable steps to be taken to obtain a fair market price".¹⁹⁸ Repossession is an Interference with respect for the Family Home "Under Art 8(1) and must be justified by the qualifications found in Art 8 (2) – namely, that the interference is, in accordance with the law and necessary in a democratic society in the interests of . . . the economic well-being of the country . . . or for the protection of the rights and freedoms of others."

The Supreme Court has begun to align the legal rules governing repossession with Strasbourg jurisprudence in the cases of *Manchester CC v Pinnock*¹⁹⁹ and *Hounslow LBC v Powell*²⁰⁰. These decisions finally recognise that repossession is a severe interference with the right to the home, which must be justified against the yardstick of proportionality in both the law governing repossession and its impact on the individual victim, where procedural safeguards play an important role. As a result of these decisions, the emphasis on constructing repossession of the home has shifted from a positive assertion of property rights to a prima facie violation of human rights that requires vindication. The Supreme Court decisions in

¹⁹⁴ *First National Securities Ltd v Hegerty* [1985] QB 850; *Ahmed v Kendrick* [1987] 56 P&CR 120; *Bank of Ireland Home Mortgages Ltd v Bell* [2001] 2 All ER (Comm) 920; *Edwards v Lloyds TSB Bank Plc* [2004] EWHC 1745 (fraud); *First National Bank Plc v Achampong* [2003] EWCA Civ 487; *Zandfarid v BCCI* [1996] 1 WLR 1420 (undue influence).

Where "A secured creditor may find their debt only secured against one parent's interest in the jointly owned home – for instance, where the charge against the other parent's interest has been set aside as a result of fraud or undue influence".

¹⁹⁵ Charging Orders Act 1979, s 1(1) (5).

¹⁹⁶ Law of Property Act 1925, s 87 (1).

¹⁹⁷ Law of Property Act 1925, s 101(1)(i), confers an implied power of sale upon a legal chargee which will overreach the chargor's interest, ss 88(1) and 89(1).

¹⁹⁸ *Cuckmere Brick Co v Mutual Finance Ltd* [1971] Ch 949; *Silven Properties Ltd v Royal Bank of Scotland Plc* [2004] 4 All ER 484.

¹⁹⁹ *Manchester CC v Pinnock* [2010] UKSC 45.

²⁰⁰ *Hounslow LBC v Powell* [2011] UKSC 8.

Manchester CC v Pinnock and *Hounslow LBC v Powell* examines the potential impact of Article 8 of the European Convention on Human Rights and Fundamental Freedoms on protecting the home in creditor repossession proceedings. However, according to Article 8, occupiers may have an independent right to respect in respect of their home, which should be recognised in the legal frameworks governing creditor enforcement rights against the home. According to Nield and Hopkins, the most common creditor enforcement route, mortgage repossession proceedings, falls short in this regard.²⁰¹

Ethical Issues for the Creditors

A critical aspect raised in this chapter is the treatment of the debtor home in bankruptcy and repossession. Many contemporary issues are raised that require policymakers' and legislature's attention to protect debtors' rights and interests. The practical issues which arise during the mortgagee's possession and exercising the power of sale under the Property Act 1925 are the mortgagee's duties to dispose of mortgagor property with good faith, care, and reasonable skill to obtain the best price to reduce the burden of debt and to ensure the full discharge of debts. On careful examination, it can be assumed that the mortgagor suffers during the repossession and requires protection. The economic impact of bankruptcy on the state is not wide enough, although specific sectors, including health and welfare, are impacted. The emotional and mental impact of bankruptcy is far more than expected on the debtor's health. Psychological or emotional stress results from over-indebtedness, and debtors suffer from severe anxiety, suicidal thoughts, depression, and anger. These effects also elevate the human rights issue under local and international law. The right to work, the right to an adequate standard of living, the right to human dignity, the right to be free from incarceration for inability to pay the debt, the right to be free from discrimination, the right to due process and the right to own property are some of them, which are discussed throughout this research along with their implications. The Human Rights approach must be used to ease the pressure from the debtor. It is recommended to use the human rights approach to consumer credit as the current approaches have inadequacies. First, under the current approach, regulations are scrutinised based on concerns about economic efficiency. Many of the issues associated with consumer credit, particularly those stemming from consumer confusion or desperation, are not adequately addressed by the levelling of the playing field focus. Second, consumer protection has not insisted on at least a minimal level of debtor protection, and the goal of protecting debtors'

²⁰¹ Sarah Nield and Nicholas Hopkins, 'Human Rights and Mortgage Repossession: beyond Property Law Using Article 8' (2013) 33 *Legal Studies* 431,437.

basic needs has been deemed less important than wealth maximisation.²⁰² Protection of debtors should be the priority of the laws as a bankrupt gives up almost everything in his or her estate.

A brief analysis of some ethical issues which arises on the creditor's part is explored, and possible human rights and private law breaches are discussed. Some contemporary issues arising due to bankruptcy and repossession are addressed by the regulatory and statutory framework, although they lack enforcement. It is imperative to discuss the practical issue arising from bankruptcy and during the repossession of a family home, under section 104(1).²⁰³ The mortgagee²⁰⁴ has a statutory power of sale, which is in addition to the mortgage deed itself, which contains an express right for the mortgagee to sell the property. The mortgagee is given the power of sale for its benefit, so its interest comes before the mortgagor.²⁰⁵ A mortgagee owes no duty of care to the mortgagor and that leaves the debtor in a vulnerable situation. In broad terms, a mortgagee can decide when to exercise his power of sale and can do so even if the terms of sale are disadvantageous to the mortgagor. However, a mortgagee must comply with the following duties when exercising its power of sale under the case law.

- To act in good faith²⁰⁶
- Acting with due care and skilfully²⁰⁷
- To take reasonable steps to ensure the best possible sale price.²⁰⁸
- To act reasonably towards the mortgagor²⁰⁹

So long as the mortgagee abides by the above duties, a court will not interfere in the sale simply because the mortgagor objects. However, the court will regard any interested parties' objection to property sale proceeds as second charge lenders. The mortgagee does not need to recover the outstanding debt (including interest & fees) as the sole reason for selling the property. A mortgagee can sell the property to recover part of the outstanding debt and protect the mortgagee's security. A mortgagee is only entitled (in equity) to secure payment of the sum due under the mortgage, nothing further (unless this is expressly allowed under the

²⁰² Chrystin D Ondersma, 'A Human Rights Approach to Consumer Credit (2015) 90 Tulane Law Review, 373,383.

²⁰³ Law of Property Act 1925, s 104 (1). "A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as he is by this Act authorised to sell or convey or may be the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage."

²⁰⁴ the lender in a mortgage, typically a bank, building society, or savings and loan association.

²⁰⁵ the borrower in a mortgage, typically a homeowner.

²⁰⁶ *Downsview Nominees Ltd and another v First City Corp Ltd and another* [1992] UKPC 34.

²⁰⁷ *Standard Chartered Bank Ltd v Walker* [1982] 1 WLR 1410.

²⁰⁸ *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] EWCA Civ 9.

²⁰⁹ *Palk v Mortgage Services Funding plc* [1993] Ch 330.

mortgage). Therefore, the mortgagee must account to the mortgagor for any rent and profit received and for the rent and profit he would have received but for its wilful default and neglect (known as accounting on a wilful default basis). A mortgagee must, therefore, take reasonable care to maximise its return for the property. In reality, it is tough for a debtor to pursue and make sure that the lender is acting under the above duties to protect his or her interest as the lender can sell the property for lower than the market price to quickly recover the debt from the sale. This vague situation puts the debtor under further mental distress and isolation. Another example is where the debtor secured extra loans from friends and family to modernize his home. They are not the secured creditors and their interest in the property is not mentioned in the charges register. In the case of repossession, the debtor's relationship with friends and family members shatters when they cannot reclaim the money lent to the debtor. This situation arises various human rights issues where the debtor is not protected under the statute due to gaps in the regulatory and statutory laws for the protection of the debtor.

Mortgagee's Duty to Act in Good Faith: The mortgagee (lender who is exercising its power of sale) owes the mortgagor (and others with interest in the property such as subsequent mortgagees or purchasers who take the subject in the mortgage) a general equitable duty to act in good faith and use his powers for a proper purpose.²¹⁰ Where the interests of the mortgagee and the mortgagor conflict, the mortgagee must not act knowingly, recklessly or in a way that unfairly prejudices the mortgagor. The courts will generally not set aside a sale transaction unless there is evidence of fraud. Even if the property is sold under market value, the sale transaction is unlikely to be set aside.²¹¹

Mortgagee's Duty to Act with Reasonable Care and Skill: The question of how reasonably the mortgagee exercised its duty of reasonable care and skill remains with the mortgagee. The mortgagee does not have to keep the mortgagor (the debtor), or any other parties interested in the sale proceeds up to date with the progress. For breach of the mortgagee's duties, the burden of proof lies with the mortgagor unless the mortgagee sells to a linked company or person, in which case the burden of proof is reversed. Commonly, a mortgagee will not be in breach of its duty of care to the mortgagor if it acts with reasonable care and skill. Where this involves assessing the property's market value, an acceptable margin of error will be allowed (which will depend on the facts in each case). Often the court will use a valuation "bracket" to assess this margin. Generally, the court will look at how the property

²¹⁰ *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] EWCA Civ 9.

²¹¹ *Adams v Scott* [1859] 7 WR 213.

has been marketed, for how long and how many genuine offers were received before the mortgagee accepted the offer that is being challenged. It is right to assume that where the lender is a small mortgage company who marketed and sold the property but in practice, it will be tough for a debtor to watch and audit the actions of the mortgagee where the mortgagee bestowed this power to an estate agency. It is entirely up to the estate agent to organise the conduct of sale where they can facilitate their friends or contacts without the mortgagee's knowledge. This malign intention and practice can put the debtors under stress, and with a resource to near nothing, it will be impossible for the debtor to bring any action in law against the mortgagee.

Mortgagee's Duty to Obtain the Best Price Reasonably Obtainable: If a mortgagee exercises its power of sale, it owes the mortgagor's (debtor's) duty to take reasonable care to obtain the best price reasonably available at the time.²¹² It was usually the property's market value at the date of sale, not the market value when the decision to sell was made.²¹³ There is no legal obligation on the mortgagee to market the property for a specific length of time or with any prescribed property estate agent. However, if the mortgagee agreed to an offer that is below the valuation report, the mortgagee needs to be sure that it has advertised the property widely and for a reasonable length of time. This hypothetical conflicting issue was addressed in the case of *Close Brothers Ltd v AIS (Marine) Ltd and another*, where the court considered how a mortgagee could comply with its duty to take reasonable care to obtain the best price when selling the property if there is a limited market or depressed market situation for the asset concerned. The mortgagor has six years under the Limitation Act 1980 to bring any claim against the mortgagee should he or she believe that the said duty is breached.

It will be reasonable to say that purchasing their own house, for an individual, is a lifetime decision and achievement, while in the UK, the number of households living in the private rented sector is increased from 2.8 million to 4.5 million in 2017.²¹⁴ In recent years there has been an increase in property ownership due to historically low-interest rates and high employment rates. The rate of residential repossession has also increased. According to the Ministry of Justice, mortgage possession claims have increased by 11% compared to the same quarter last year, continuing the initial increase seen from Oct-Dec 2018. It follows a three-

²¹² *Dean v Barclays Bank plc* [2007] EWHC 1390 (Ch).

²¹³ *Silven Properties v Royal Bank of Scotland* [2003] EWCA Civ 1409.

²¹⁴ Gov UK, 'UK Private Rented Sector - Office for National Statistics' (GOV UK, 2020) <<https://www.ons.gov.uk/economy/inflationandpriceindices/articles/ukprivaterentedsector/2018>> accessed 28 April 2020.

and-a-half-year period of stability (since January-March 2015).²¹⁵ The number of mortgage possession rates indicates that many homeowners struggle with their debt and cannot protect their family homes. There is nothing wrong, and it is lawful for a mortgagee to get possession of a debtor's home if he or she fails to maintain the repayments of their contractual debt. However, significant issues arise, as described above, once the mortgagee is in possession of the home, as it is entirely for the mortgagee to control the disposal of the property. The mortgagee exercises his power of sale under the LPA 1925²¹⁶. The LPA 1925, however, does not impose the statutory duty to act in good faith, to act with reasonable care, skills, and the duty to obtain the best prices for the mortgagor. These duties are only established through case law. For breach of the mortgagee's duties, the burden of proof lies with the mortgagor unless the mortgagee sells to a linked company or person, in which case the burden of proof is reversed.

This practice creates a practical issue that how a mortgagor whose home has been repossessed and does not have the financial resources or recourse to legal aid to file and investigate a claim against the mortgagee for breach of his duties. The mortgagee was only obliged to sell the property to recover their monies and costs. This purpose of the lender further puts the mortgagor into a financial crisis because the mortgagor does not have control over the sale of their property. Generally, a mortgagor puts a 5%-20% deposit towards a house purchase, plus solicitors' costs, broker fees and government taxes. The mortgagor is unlikely to recover their original deposit and costs should the mortgagee fail to exercise his duties on repossession. There is an additional risk of the mortgagor suffering further losses if the property is caught in a negative equity crisis. The unavailability of statutory protection to a debtor in the event of repossession and the mortgagee exercising his right of sale is alarming, especially in the current economic circumstances where the uncertainty is growing, and depression in the economy is high post COVID-19.

In conclusion, it can be argued that although the mortgagee exercises due diligence and reasonable care and skill to realise the actual value of the mortgagor property. But the current legal framework for selling the property is not favourable toward the mortgagor. There is a chance that external factors, such as the appointment of an estate agent, and marketing methods

²¹⁵ Ministry Of Justice 'Mortgage and Landlord Possession Statistics in England and Wales, October to December 2019 (Provisional)' (*Ministry Of Justice*, 13 February 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/865192/Mortgage_and_Landlord_Possession_Statistics_Oct_to_Dec_2019_.pdf> accessed 24 November 2021.

²¹⁶ Law of Property Act 1925, s 104.

may adversely impact the possibility of obtaining the property's market value, which is a direct loss to the destitute mortgagor (Debtor). The Supreme Court decisions in *Manchester CC v Pinnock*²¹⁷ and *Hounslow CC v Powell*²¹⁸ shows the possible impact of Article 8 of the European Convention on Human Rights and Fundamental Freedoms upon protecting the home in creditor repossession proceedings may not have the protection in property law. However, under Article 8, occupiers may have an independent right to respect for their home, which should be recognised in the legal frameworks governing creditor's enforcement rights against the home.²¹⁹

Conclusion

Despite recent progress, financial exclusion remains a significant issue. Donors can help millions of financially excluded people solve personal financial crises and make the most of their money by supporting charities in this field. Over-indebtedness and problem debt is the final issue to be addressed. It is not solely a component of financial exclusion: many financially included people struggle with borrowing. However, financial exclusion and the struggle to make ends meet on a low income with insufficient financial products are common. These estimates suggest that the Covid-19 crisis is likely to have significantly exacerbated the pre-existing trend toward higher levels of problem debt in the UK. It highlights the need for urgent consideration of the measures that could be taken by the government, private and social sectors, to support those struggling with problem debt and limit the broader costs this has for society. Money Advice Trust found that a quarter of people suffering financial difficulty due to Covid-19 reported a negative impact on their mental health.²²⁰

As discussed in this chapter, bankruptcy affects the debtor socially, economically, and mentally and negatively impacts the debtor's fundamental human rights. The bankrupt may enjoy a fresh start by getting rid of their debts, but they must pay a heavy price in the upcoming life ahead. The sacrifice can include losing their career and doing lower-paid jobs due to restrictions on employment for a bankrupt or giving up their business. Bankruptcy leaves a significant mark on the debtor's life in every area. Access to future credit can be expensive when compared to a non-bankrupt individual. A bankrupt need to declare in almost all credit

²¹⁷ *Manchester CC v Pinnock* [2010] UKSC 45.

²¹⁸ *Hounslow LBC v Powell* [2011] UKSC 8.

²¹⁹ Sarah Nield and Nicholas Hopkins, 'Human Rights and Mortgage Repossession: beyond Property Law Using Article 8' (2013) 33 *Legal Studies* 431,437.

²²⁰ Harriet Meyer, 'Debt and mental health: Covid has increased the pressure, but help is available' (*Guardian News*/7 Aug 2021) <<https://www.theguardian.com/money/2021/aug/07/debt-and-mental-health-covid-has-increased-the-pressure-but-help-is-available>> accessed 15 October 2021.

and employment applications that they were once bankrupt. This is a violation of privacy rights under GDPR because it grants the employer an exclusive insight into the debtor's private information, and during pre-checks for employment, the debtor can be subject to discrimination. That declaration leaves a stigma on the debtor. Bankruptcy being advertised may also bring debtors' reputations into question in the eyes of family and friends and leave a mark of failure forever. However, many debts are written off after a debtor becomes bankrupt, except for court fines, maintenance orders and student loan debt. It is noticeably clear that being bankrupt only solves one part of the debtor's problem as they may lose too much socially, along with impacts on mental and physical health. The Supreme Court decisions in *Manchester CC v Pinnock*²²¹ and *Hounslow CC v Powell*²²² examines the potential impact of Article 8 of the European Convention on Human Rights and Fundamental Freedoms on protecting the home in creditor repossession proceedings. However, under Article 8, occupiers may have an independent right to respect for their home, which should be recognised in the legal frameworks governing creditor's enforcement rights against the home.²²³

²²¹ *Manchester CC v Pinnock* [2010] UKSC 45.

²²² *Hounslow LBC v Powell* [2011] UKSC 8.

²²³ Sarah Nield and Nicholas Hopkins, 'Human Rights and Mortgage Repossession: beyond Property Law Using Article 8' (2013) 33 *Legal Studies* 431,437.

Chapter 8: Findings of Study & Conclusion

Findings of Study

The fundamental hypothesis of this study is that bankruptcy laws in the UK are an inadequate protection for debtors' rights, particularly for individuals who suffer from mental health issues due to financial losses such as eviction, repossession, and bankruptcy. Therefore, this study has examined the UK laws, European Convention on Human Rights, and International Human Rights instruments¹ which are binding upon the UK to substantiate the inadequacy of the law. In addition, this research has thoroughly examined the existing bankruptcy laws in the context of individual debtors.

First, the Insolvency Act 1986 and many of its provisions are reviewed and discussed throughout the study, along with case law. But the Insolvency Act 1986 cannot deal with many practical issues concerning the appointment and powers of trustees in bankruptcy, mainly when the debtor is the homeowner, as identified and addressed in Chapters 3, 4 and 5. Further, it is observed how bankruptcy impacts the individual's mental health and restricts the means of earning by imposing restrictions on being employed in certain professions.

Second, the Law of Property Act 1925 has been analysed along with its many relevant provisions and case law, which gives rise to the lender's inherent right of possession should a debtor default on the secured loan payments. Chapter 5 of this research established that the Law of Property Act 1925 primarily protects the lenders due to the very nature of its many provisions, which gives power to the lender to possession. This is because the available protection mechanisms for a debtor are too weak or barely enforceable due to the contractual nature of the secured loan agreement between the borrower and the lender. Therefore, the Acts² cannot provide adequate protection to debtors who suffer serious financial loss, such as losing a family home.

Third, the FCA's regulatory provisions, MCOBs³, FSMA 2000⁴ and Consumer Credit Act 1974⁵ have been researched and discussed in chapter 4 and 5, which concludes that the FCA's regulatory system's protection provisions only highlight the problems a debtor can face,

¹ Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Rights of the Child (CRC), the European Convention on Human Rights.

² Insolvency Act 1986, Law of Property Act 1925.

³ FCA, 'FCA Handbook' (FCA, 2021) < <https://www.handbook.fca.org.uk/> accessed 25 November 2021.

⁴ Financial Services and Markets Act 2000.

⁵ Consumer Credit Act 1974 (as amended in 2006).

while its enforcement mechanism only penalised the lenders but failed to redress the individual debtor's rights that are breached. Therefore, the aforementioned regulatory regimes cannot provide sufficient protection to an individual debtor.

Fourth, the Administration of Justice Act 1970⁶ and Administration of Justice Act 1973⁷ have been examined to gauge the court's discretionary powers where the borrower was facing possession of his family home. As discussed in chapter 5, the court has only limited discretion to avert a repossession claim; when the debtor fails to pay the contractual payments and facing a financial crisis. In the present economic situation where the economy is still recovering from the COVID-19 pandemic, it is clear that the 1970's Acts require a revisit. Then, the courts can be empowered to safeguard the borrower's interests as per the situation, especially where the borrower's family and children are at risk of losing the family home. New legislative provisions are required to empower the court to strike a balance between the creditor and debtor rights. Financial losses such as eviction, repossession, and bankruptcy, particularly for individuals who suffer from mental health issues, raise serious concerns. The court's discretionary powers are limited when it comes to the provision of adequate protection.

Fifth, the Human Rights Act 1998,⁸ the European Convention on Human Rights⁹ and International Human Rights instruments are examined with relevant articles and case law. Almost all the Conventions emphasise the right to life, right to an adequate standard of living, right to adequate food, right to adequate housing, right to the family home, the rights of children, and prohibition from torture (in respect to debt collection measures). This research has examined relevant UN Conventions which highlight the rights mentioned above for the debtors. Under the Convention provisions, every individual has the right to a fair trial, security, justice, and liberty and prohibits servitude and torture. Furthermore, the creditors and debtors have equal rights to protect their civil and human rights determined by the impartial, competent and independent tribunal. At present, the debtors in the UK have the liberty to pursue their claim if the public body infringes their rights under the Conventions. However, the claim against the private lender is only pursuable under private law. As a result, the debtor's protection is insufficient due to the limited recourse available against the private lender and its

⁶ Administration of Justice Act 1970, s 36.

⁷ Administration of Justice Act 1973, s 8.

⁸ Human Rights Act 1998.

⁹ European Convention on Human Rights ETS No. 005 213 UNTS 222.

contractual nature, despite the fact that the international debt framework provides adequate rights.

Finally, this research shows that there is a link between problem debt, over-indebtedness, and poverty and many mental health issues when the debt becomes unmanageable and resources to meet the contractual obligation are insufficient. Then the debtors have no choice except to face significant financial losses such as eviction, repossession, and bankruptcy. Therefore the bankruptcy laws in the UK are inadequate to protect debtors' rights, particularly for individuals who suffer from mental health issues.

Bankruptcy law has a vital role as a social insurance mechanism against the risks inherent in the debt-dependent economic structure of financialised capitalism. Bankruptcy literature, macroeconomic policy, inequality studies, and political science show what the law can offer to demonstrate how broad debt relief ideas can be implemented through concrete legal rules. Its findings extend globally beyond its focus on England and Wales. While the acceptance of the need to tackle problems of excessive debt is now widespread, international institutions do not necessarily see the potential of bankruptcy as a policy solution. The World Bank report on personal insolvency is rare in capturing these policy challenges and the bankruptcy law's role in addressing them. Bankruptcy law guarantees open access to effectively designed rapid debt relief procedures that would better serve public policy. Bankruptcy law is also well equipped to incorporate carefully designed safeguards against moral hazards and overcome persistent objections against proposed debt relief policies. Certain international policy documents seem only to see household debt in terms of Non-Performing Loans (NPLs) on bank balance sheets. These documents, in turn, tend to discuss bankruptcy under an implicit assumption that it is a debt collection tool for maximising returns to investors.

Bankruptcy law must offer open access for debtors in all cases where externalities would otherwise arise. An 'insolvency' condition is a practical criterion for access, operating as a screen to ensure the benefits of debt relief are available to debtors only where their exclusion would lead to social costs. However, that creditor consent or financial costs should not act as barriers to access. Debtors can be required to sacrifice excess assets and income, but with the precise aim of safeguarding against moral problems, rather than pursuing an objective of maximising returns to creditors. Significant social costs arising from the exemption of 'priority debts or debts linked to creditors' property rights, the most glaring of which is the lack of protection provided to a debtor's home under a law that claims to offer debtors a 'fresh start.

Despite these shortcomings, empirical evidence suggests that debtors entering bankruptcy nonetheless seem to benefit from better outcomes than the severe hardships suffered by similarly placed debtors denied access to bankruptcy. Bankruptcy procedures offer valuable assistance to specific debtors, particularly those earning reasonable incomes and having access to human and social capital. However, studies from the UK seem to converge around a finding that bankruptcy offers less assistance to debtors suffering from unemployment, ill health, or persistently low incomes.

Recommendation to the Debtor

Mental health problems are well established, and despite that, several bodies in the UK have provided clear guidelines on how to deal with people who wish to borrow large sums or become vulnerable later during their mortgage term. However, these rules do not assist a borrower who has a mortgage and is obligated to make the mortgage payments. In addition, unforeseen emergencies cause many bankruptcies that adversely affect mental health, with defaults, arrears on rent and mortgages further pushed down. The most common catalysts to debts are medical expenses (if not covered by NHS), divorce, overspending on unnecessary purchases, job losses, and increase in rent or mortgage payments; however, international factors like the financial crises of 2008 and the recent COVID-19 pandemic aggravate the situation. Based on this research, a debtor can take a few simple things to avoid problems and minimise the impact.

Obtain Adequate Insurance: Besides legally required insurance, such as car and homeowners' insurance, the ASU (Accident, Sickness and Unemployment Cover) is essential to meet the unforeseen circumstances that arise from sudden unemployment and health problems. For example, the majority of bankruptcies in the US are due in part to medical expenses. Likewise, mortgage Payment Protection or Income protection policies are popular choices to safeguard against unseen financial crises in the UK. Borrowers can take insurance to protect them from missing mortgage payments due to health problems or loss of employment. For example, the Mortgage Payment Protection Insurance (MPPI) is useful for someone who suddenly loses work or suffers from mental health issues. However, there are drawbacks to this type of insurance. MPPI policies typically cover mortgage payments for up to two years and pay up to £2,000 per month, or around 65% of the policyholder's monthly income (whichever is lower), providing protection when they need it the most. However, this means that the insurance is only applicable as temporary cover.

Moreover, companies will not offer an MPPI to a borrower if they have any pre-existing medical illnesses. The application for an MPPI would be refused. Although the borrower must complete a series of medical questions in the application form, the borrower must disclose any medical conditions. Also, if the MPPI insurance is granted, the borrower would have to disclose any medical issues during the policy tenure. Once a claim is made, the borrowers' subsequent insurance premiums can increase. It is another expense for the borrower to keep the policy for a more extended period. For someone who is trying to minimise his expenses, these are increased by taking additional insurance. Typical insurance can cost from £20 - £50 per month. The cover will depend on the borrower's age, the amount to cover, and other vital factors the provider will consider.

Establish A Savings Cushion: According to the study, approximately 1.6 million UK households do not have access to £100 in savings; thus, having three to six months' worth of living expenses in a readily accessible savings account could mean the difference between a minor financial setback and a major financial problem.

Adjust Spending: Is it possible for the debtor to make changes that will allow them to repay the debt by separately adjusting the priority and problem debt? This would be a difficult path to take, but it would result in long-term change.

Manage Spending: A debtor should aim to keep their monthly debt payments to no more than 25% of their take-home pay. If they are drowning in debt, bankruptcy may be their only option. Other options must be considered, however, because the impact of bankruptcy is significant, as discussed in detail in Chapter 3. The various options are discussed later.

Settling Debts: The debtor can try to settle their debts in 'Partial Settlement' for less than the total balance. While paying more minors than they owe may sound appealing, there are several factors that consumers should consider before attempting to settle a debt. First, the 'Partial Settlement' will be marked on the debtor's credit report instead of the 'Satisfaction' of the debt, which means that their credit history will negatively affect and impair their future ability to obtain credit.

Consolidation of Debt: Debt consolidation is used as an alternative to bankruptcy. The first hurdle in this scenario will be qualifying for the debt consolidation loan. Debtors who meet certain criteria may be able to obtain a 'good' interest rate. They must, however, consider how long it will take to repay the new debt. Instead of just looking at the monthly payment,

they must understand the actual cost of credit and calculate what they will pay over the loan term before committing to the new debt. Make sure to account for any closing costs (ERCs). The often-overlooked disadvantage of this option is that if the consumer's existing debt is unsecured and the new loan is secured on property, their home may be repossessed if they fail to pay the debt.

Debt Management Plan (DMP): To establish a debt repayment programme, the debtor should consider seeking free debt advice from the Citizen Advice Bureau (CAB) or similar organisations. The terms of debtor accounts are renegotiated under a DMP if it is agreed to include unsecured debt or debts on the programme and make one monthly deposit that is distributed to creditors until the debt is repaid. In addition, most lenders will freeze the interest charges, fees, and penalties, and the debtor is limited to the credit.

Sell off the Property: A borrower who can no longer keep up with their mortgage repayments and has exhausted all his rights to prevent the lender from seeking a possession order will have no choice but to sell the property. Before the lender starts acting for possession through the courts, it would be wise for the borrower to consider selling the property. They could either approach interested family members, consider marketing with the local agent, or consider quick selling through the auction. It would be wise for the borrower to sell the home rather than allowing the lender to repossess it so that the borrower can at least make some profit by selling the house rather than a loss which usually occurs when the lender sells the property. The borrower can then perhaps buy a smaller more affordable home. If the borrower has lost their home and cannot afford to buy a new one, they can contact their local council for accommodation if they qualify. The application for council accommodation is not so straightforward because the council has to be satisfied that the person is 'homeless'. If the borrower has become 'homeless', the council will usually offer accommodation. Various charity organizations can help borrowers in such circumstances as 'Shelter' or 'Gingerbread'. In all cases, the borrower needs to prove that he did not become 'intentionally' homeless.

Debt Relief Order (DRO): Debt relief is available to people with low incomes, few assets, and who are less than £30,000 in debt. Creditors are not paid, and debts are discharged 12 months after the DRO is granted. DROs were introduced in April of 2009. The DRO's 12-month period is known as the 'moratorium'. During this period, the debtor does not make any payments toward the debts listed in the DRO, and creditors are not permitted to pursue the debtor. The benefit of DRO is that once the 12 months are over, the debts included in the DRO

are written off if the debtor's situation has not improved. However, a DRO will stay in the debtor credit report for six years, and future access to credit is impaired.

Individual Voluntary Arrangement (IVA): An IVA is a voluntary method of repaying creditors for some or all of what is owed to them. The agreement is binding on all creditors once it has been approved by 75% or more of them. Licensed insolvency practitioners supervise IVAs. The benefit of IVA is that once the 60 months (or another agreed period) are over, the debts included in the IVA are written off if the debtor keeps his promise to pay the agreed instalment. However, an IVA will stay in the debtor credit report for up to six years, and future access to credit is impaired. If the debtor is a homeowner, they should consider taking free debt advice from the Citizen Advice Bureau (CAB) or similar organisations to establish if IVA is a suitable option.

Bankruptcy: Anyone who is unable to pay their debts can use this last resort of debt relief. Owned assets will be vested in a bankruptcy trustee, selling, and distributing the proceeds to creditors. Debt discharge usually occurs 12 months after the bankruptcy order is granted. Bankruptcies are the result of either a debtor petition, in which the individual is unable to pay their debts and applies online to become bankrupt or a creditor petition, in which a creditor can apply to the court to make an individual bankrupt if they owe £5,000 or more (£750 before October 2015). Bankruptcy is disadvantageous for the debtors who own property as they will lose their homes if they apply for a bankruptcy order. Secondly, the home would be repossessed, leaving the borrower homeless or needing to think about renting.

It should be noted that in some cases, the lender can still chase a borrower many years later down the line if there was a shortfall because when the lender sells the home at an auction, although they must seek the 'best price', they tend to sell the home for a lot less than its market value. It means the sale proceeds may not cover the costs of an outstanding mortgage. If the borrower were to buy another property and had substantial equity, the lender can chase for the outstanding mortgage arrears, administration costs and legal fees. However, according to the Council of Mortgage Lenders (CML) directive, which came into force on 11 February 2000, the lender would need to seek repossession within six years from the date of the sale of the property to repay any mortgage shortfall.

Conclusion

A large downside to bankruptcy is the social stigma attached to it because the bankruptcy order is made public. When the debtor declares his or herself bankrupt, their financial affairs are put in the hands of the Official Receiver, or a Trustee in Bankruptcy and the debtor's Bankruptcy will be advertised in his local newspaper (to enable any potential creditors to make a claim against the debtor). In addition, bankrupts have certain restrictions placed on them with serious implications. The detailed impact of bankruptcy is already discussed in chapter 3 of this research.

This research establishes that the general bankruptcy laws and available mechanisms for the protection and support of a debtor during financial crises are insufficient. Furthermore, the impact of bankruptcy and repossession of the family home severely affects the debtor's mental health and causes many mental illnesses such as stress, depression, anxiety, and suicidal thoughts. The existing regulatory and statutory debt framework cannot protect the debtor's interests and well-being as they appear biased towards creditors and protect their commercial interests. Research demonstrates that each financial crisis impacts the debtor and pushes them further into debt, as evidenced by the financial crises of 2008 and the COVID-19 pandemic. An increase in defaults, repossessions, and bankruptcies arise during financial crises because of job losses, decreased disposable incomes and a lack of economic activity.

The impact of bankruptcy can be so significant on the debtor that it affects them in every aspect of their lives, such as the debtor's earnings, employability, possessions, pension, health, and future access to credit. The limitations imposed on bankrupts are leading causes of their adverse financial situations after bankruptcy is declared because they are sometimes unable to do the job roles they want or are trained in, cannot have a standard bank account, and therefore face financial exclusion. In addition, because of their financial positions, bankrupts appear to be treated unfairly or barred from accessing certain rights available to individuals who are not bankrupt. Therefore, the statutory restrictions on bankrupts need to be revisited by the legislators to accommodate modern needs (such as allowing them to carry on certain professions, availability of fresh start-up loans, etc.). Bankruptcy is no substitute for a robust welfare state and an economy that offers a broader share of prosperity through more equitable income, wealth, and security distributions. However, there is every reason for bankruptcy to offer better outcomes for those debtors who turn to it for assistance. Moreover, bankruptcy law should recognise the policy benefits it can provide within the constrained economic order it

operates. Therefore, the broader availability of an extensive debt relief framework might be one solution we need to address the excesses of a debt-dependent economy, even if it alone cannot change the nature of this regime.

The study concludes that the existing regulatory framework for the debtor's protection is insufficient to protect the debtor because of a lack of enforcement mechanisms. For example, the Financial Conduct Authority and the Prudential Regulation Authority only have enforcement powers against authorised firms and creditors. But there is no redress available to the consumer directly except through the financial ombudsman services or other judicial remedies. But enquiries and complaints often take months for outcomes to be concluded and during this, the harm done to the debtor cannot be reversed.

The FCA's regulatory provisions brought some transparency and additional rights to the consumer concerning unfair and misleading practices. Contrary to the Consumer Credit Act 1974, which did not impose any duties on banks or credit institutions regarding advice, warnings, or denial of credit, the FCA's regulatory provisions aim to build a market where responsible credit is the norm. However, how far the FCA objectives have been achieved is not measurable entirely as it is predominantly applied to regulated activities. Additionally, the regulations only apply to the consumers who are getting advice or product from regulated activities while consumers accessing unregulated advice or products do not attract similar protections or rights. Therefore, the regulatory system only offers the consumer partial protection.

The statutory mechanism of debtor protection is primarily found in the Property Act 1925, Law of Property Act 2002, Insolvency Act 1986, Consumer Credit Act 1974, and Administration of Justice Act 1970 & 1973. Section 36 of the Administration Act 1970 is most frequently relied upon by borrowers' arrears with their mortgages. It is crucial to recognise that a mortgagee does not need a court order to secure the debtor's default possession. The Mortgagee's ability to possess arises as of right under the interest they have or are deemed to have in the land because under the property act, they have a charge. Numerous efforts can be seen in recent years where legislation introduced various measures to ease the debt burden on the debtor. Debt Relief Orders (DROs) came into force on 6 April 2009, introduced under the Tribunals, Courts, and Enforcement Act 2007 (TCEA 2007), allowing debtors who have a debt of £30,000 or less with disposable income less than £75 and assets worth less than £2000, a fresh start, getting their debts wiped out within 12 months. DROs give a debtor a new start but

leaves a negative mark on their credit history that affects their future access to credit. Despite this disadvantage, a DRO still offers partial protection to the debtor.

The most eagerly awaited Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 came into effect on 4 May 2021. The Debt Respite Scheme or Breathing Space aims to help relieve some of the pressure of dealing with creditors, so the debtor can focus on getting debt advice and setting up their debt solutions without worrying about being chased for payment or incurring extra charges. The Debt Respite Scheme provides individuals in the UK experiencing debt problems legal protections against their creditors, primarily affecting most personal debts and particularly unsecured debts (although arrears from secured debts such as mortgage loans are also affected). It is the only public law that provides short-term protection to the debtors against the creditors. The regulation came into effect recently, hence, its effectiveness is little known.

However, the limitation on certain debts makes the Debt Respite Scheme a little challenging for a debtor to gain total protection. However, it is an excellent addition to helping debtors who have a mental illness to get a month to sort out their finances. The statutory regime of protection requires further provisions in the law, where the debtor's protection overrides the commercial interest of creditors. The debt relief framework¹⁰ under the international human rights law ensures the protection of the debtor though there is a lack of an enforcement element. Rights such as no deprivation of liberty to fulfil the contractual obligation, limiting the rights of a person due to their inability to pay the debt, the right to have adequate standards of living, right to adequate food, rights to the family home and protection of privacy, right to have access to housing and a right to a fair trial are all a commitment under the international law. Most of these rights are enshrined in the domestic law and remedies available through judicial intervention in the UK. However, it is vital to understand that destitute debtors may not have the means to take action and exercise their rights to claim the protection available to them under the human rights law. Taking action against the local authorities or other public bodies is not easy and is expensive, while access to legal aid is only limited to severe problems.

This study aimed to provide a starting point for policymakers in the UK who want to shape responses to over-indebtedness while keeping human rights principles in mind. For

¹⁰ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)).

example, social safety nets may not be required by human rights law to provide prompt debt discharge for each debtor in order to meet adequate food and housing obligations. However, privacy safeguards and prohibitions on discrimination in creditor practices may alleviate, at least partially, human rights concerns about debt collection practices. Furthermore, the UK insolvency regime has made numerous changes in recent years to address human rights obligations that provide debt relief to debtors, most notably the Debt Relief Order, which is easily accessible and provides an adequate remedy. However, as discussed in this study, certain debt limitations cannot be considered under DRO. Although this study did not take a prescriptive stance on the need to incorporate human rights principles in responses to debtors' rights and bankruptcy law, it demonstrated that current responses to over-indebtedness do not fully satisfy human rights principles in many cases. To comply with international human rights obligations and human rights principles, the United Kingdom would need, among other things, better protections against abusive debt collection practices, greater protection of debtors' adequate living standards, and debt relief that is equally available to all.

The study determines that the effects of debt on individual life and health are so significant that it should be avoided wherever possible, and alternatives should be explored. Furthermore, its impact is on the entire household, including children. As established in this research, a debtor is often subject to inhuman treatments, faces mental torture, suffers what can be compared to physical abuse from the methods adopted by debt collectors and this causes even more problems for the debtor. Moreover, debtors face marginalisation and the loss of their self-esteem, which in many cases leads them further away from a solution. Thus, debt becomes more of a public health issue rather than a financial one. As briefly outlined in the above section, severe financial losses cannot be avoided but mitigated by taking prudent steps. Payday loans and loans that attract high-interest rates should be avoided in all circumstances. They have led to problem debt and eventually non-payments, leading to bankruptcy which (as discussed above) directly affects mental health. Available welfare support and free advice on debts can best be sought at an early stage of the problem, but this is only possible through effective communication with creditors. Many charities in the UK support and provide free advice and help people manage debts and help people to restructure debts (DMP) if needed.

Recommendation to Lenders and Policymakers

- Establish a mechanism for monitoring lenders' practices to ensure that debtors' human rights are fully respected by imposing an interest rate cap on individual/household debt, enacting legislation to prevent and punish predatory and abusive lending practices and considering establishing an agency in charge of monitoring their operations.
- Regulate and monitor all formal and informal lending activities, ensuring that contractual terms, especially interest rates and other non-interest charges, are transparent and fair. This is to ensure borrowers' human rights are not infringed upon by technologies that are used to support or enable banking and financial services, nor by those that are used to collect debts.
- Ensure that bankruptcy laws are in place to protect debtors and are consistent with human rights standards. Facilitate and/or grant debt relief to individual debtors in the absence of an adequate tool to protect their human rights.
- Regulate and enforce monitoring of advertising of credit, ensuring that both conditions and risks are unambiguously detailed and explained to potential applicants; especially to those bankrupts who are looking for a fresh start and have an impaired credit rating.
- Ensure that legislation prohibits the collection of debts where evidence exists of misrepresentation, fraud, mis-selling, coercion, unfair terms, harassment, or other abusive practices by lenders or debt collection agencies.
- For business transparency, ensure that financial regulators, borrowers, and their organisations have access to relevant and timely information on the profit rates of lenders, an essential factor for assessing the legitimacy of interest rates and non-interest items charged to borrowers.
- Ensure that individual debtors have access to financial legal advice and that they receive free legal representation in court.
- Consider implementing a comprehensive data protection framework to ensure that borrowers can exercise their right to privacy both online and offline. Debtors should be informed by digital lending companies about the data collected and how it will be used. Also ensure that debtors' private information is kept private and is not shared for any reason other than the lending transaction, including within the company and with sister companies.
- Ensure compliance in accordance with businesses' responsibility to respect human rights, and closely monitor lending and collection operations to prevent, identify, and

address abusive practices. Under no circumstances should debt collectors engage in abusive collection practices, such as harassing debtors. Also, ensure that they are selling borrowers appropriate loan products in accordance with their human rights and due diligence obligations.

- In the context of their mandates, national human rights institutions should pay particular attention to the impact of private debt, including over-indebtedness and abusive practices, on the enjoyment of human rights. These institutions should also conduct additional research on the impact of debt on human rights.
- Amendments are required in the Administration of Justice Act 1970¹¹ and the Administration of Justice Act 1973¹² so that courts can stay a repossession claim when the debtor fails to pay the contractual payments and facing a financial crisis. New statutory provisions should be required to empower the court to strike a balance between the creditor and debtor rights.
- Amendments in the Insolvency Act 1986 are required particularly in order to review the appointment and powers of trustees in bankruptcy, mainly when the debtor is the homeowner.
- Amendments in the Law of Property Act 1925 are required as currently, it protects the lenders due to the very nature of its many provisions, which gives the lender power to repossess. Specifically, the available protection mechanism for a debtor is too weak or barely enforceable due to the contractual nature of the secured loan agreement between the borrower and the lender. Court discretionary powers are statutorily required in order to protect the borrower.
- Amendment and enforcement in the FCA's regulatory provisions, MCOBs¹³, FSMA 2000¹⁴ and Consumer Credit Act 1974¹⁵ is required which should provide redress to the individual debtor whose rights are breached in terms of statutory financial compensation.

¹¹ Administration of Justice Act 1970, s 36.

¹² Administration of Justice Act 1973, s 8.

¹³ FCA, 'FCA Handbook' (*FCA*, 2021) <<https://www.handbook.fca.org.uk/>> accessed 25 November 2021.

¹⁴ Financial Services and Markets Act 2000.

¹⁵ Consumer Credit Act 1974 (as amended in 2006).

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