

Welfare-to-Work, Structural Injustice, and Human Rights

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Abstract: This article discusses welfare-to-work schemes, places schemes with strict conditionality in the theoretical framework of structural injustice, and argues that they may violate human rights law. Welfare-to-work schemes are schemes that impose obligations on individuals to seek and accept work on the basis that otherwise they will be sanctioned by losing access to social support. The schemes are often presented as the best route out of poverty. However, the system in the UK, characterised by strict conditionality, has ended up coercing those who are poor and disadvantaged into precarious work, and conditions of in-work poverty. Because schemes with strict conditionality force people to work in these conditions, structures of exploitation are created and sustained, becoming widespread and routine. The article further situates the problem in the theoretical framework of structural injustice, and argues that a framework of ‘state-mediated structural injustice’ is the best way of explaining the wrong. It finally claims that this injustice violates principles that are enshrined in human rights law, which the authorities have an obligation to examine and address.

Keywords: welfare conditionality, welfare-to-work, structural injustice, precarious work, human rights, exploitation, in-work poverty.

INTRODUCTION

Questions of social justice are sometimes analysed by focusing on individual responsibility.¹ This may be the individual responsibility of the poor for free-riding on the welfare support system instead of trying hard to obtain a job or a job that pays better than their current one, the individual responsibility of the unemployed for their predicament, or the individual responsibility of unscrupulous employers for exploiting workers. This focus is convenient for Governments. It suggests that they are not responsible for the domination or exploitation suffered by workers or others; instead, private actors are morally responsible and perhaps legally liable. The role of the state appears to be simply to take certain corrective steps to address the relevant wrongs.

In response to theories that focus heavily on individual responsibility, Iris Marion Young developed the concept of structural injustice.² She did so in order to assess the role, not of a single action, but of whole structures that place some groups in a position of disadvantage. She developed a type of responsibility that she called the ‘political responsibility’ of actors who act rationally and legitimately but who benefit from structural injustice. In this article, I consider welfare-to-work schemes by situating them in the theoretical framework of structural injustice. Welfare-to-work schemes are schemes that impose obligations on individuals to seek and accept work on the basis that otherwise they will be sanctioned by losing access to welfare support. The article shows that because these schemes deploy coercive conditionality they generate structures of exploitation which amount to what I call ‘state mediated structural injustice’.

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¹ For discussion of some of the debates, see I.M. Young, *Responsibility for Justice* (Oxford: OUP, 2013), chapter 1. For a critique of egalitarian theories that focus on individual responsibility, see J. Wolff, ‘Fairness, Respect, and the Egalitarian Ethos’ (1998) 27 *Philosophy and Public Affairs* 97.

² Young, as above n 1. For an early discussion of the main concepts, see I.M. Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990), chapter 2.

The first part of the article examines the development of these schemes in the United Kingdom, and explains that the system has become especially punitive. The second part of the article turns to empirical research, primarily in the field of social policy. It examines the effects of welfare conditionality, which connects welfare benefits to certain behaviour, on people's lives in the UK.³ My concern here stems from the growing realisation through this scholarship that welfare-to-work schemes with strict conditionality force individuals into exploitative work and in-work poverty. The concept of exploitation is, of course, contested.⁴ For the purposes of this article, exploitation occurs when someone takes advantage of a person's vulnerability by violating her or his labour rights in order to make profit. Here it is shown that instead of finding a route out of poverty through paid work, many are forced into in-work poverty. Welfare-to-work schemes thereby often turn the unemployed poor into working and exploited poor.

Against this background, the third part of the article examines the responsibility of the state, using Young's account of structural injustice as a starting point. Young developed her theory assuming that there is no specific unjust law or policy in place. Unlike Young, though, my aim is to attribute responsibility to the state for state-mediated structural injustice. This is responsibility for state actions that can be viewed as having a *prima facie* legitimate aim, but which create patterns that are very damaging for large numbers of people. My argument rests on the belief that we can identify agency in the context of the structure.⁵ This is an important task in the effort to hold accountable particular actors for wrongdoing, and not just those who benefit from structural injustice.⁶ To the extent that the state is responsible for the unjust structure, it has a duty to remedy the injustice.

The fourth part of the article assesses whether the authorities are complying with human rights law in these cases of state-mediated structural injustice. The problem here is not that activation policies or non-standard work arrangements can never be legitimate. The claim is that the state creates and sustains a system that can be viewed as legitimate in its aims of promoting employment and hence social inclusion, but is problematic when it becomes particularly punitive whilst also forcing the poor into exploitative employment relations that are lawful, making exploitation standard and routine.

Even though welfare-to-work schemes and non-standard work arrangements, taken separately, might not be necessarily unjust, the overall structure that forces people into workplace exploitation is unjust. The state is responsible because this injustice is state-mediated, and can be seen to violate human rights law, as the section explains by considering the prohibition of slavery, servitude, forced and compulsory labour, the right to private life, the prohibition of discrimination, and the prohibition of inhuman and degrading treatment under the European Convention on Human Rights (ECHR), as well as the right to work freely under the European Social Charter (ESC). Not all instances of structural injustice can be addressed by law reform: poverty and disadvantage are due to deep economic and social factors. However, to the extent that we can identify responsibility of state authorities for an unjust structure, we have to hold them accountable

³ For an introduction see B. Watts and S. Fitzpatrick, *Welfare Conditionality* (Abingdon-on-Thames: Routledge, 2018).

⁴ Literature on the topic of exploitation includes: A. Reeve (ed), *Modern Theories of Exploitation* (Thousand Oaks: Sage Publications 1987); R. Goodin, *Reasons for Welfare* (Princeton: Princeton University Press 1988); A. Wertheimer, *Exploitation* (Princeton: Princeton University Press 1999); R. Sample, *Exploitation: What It Is and Why It's Wrong* (Lanham: Rowman and Littlefield 2003); J. Wolff, 'Structures of Exploitation', in H. Collins, G. Lester and V. Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford: OUP 2018) 175; V. Mantouvalou, 'Legal Construction of Structures of Exploitation' in the same volume, 188.

⁵ See M. Powers and R. Faden, *Structural Injustice – Power, Advantage, and Human Rights* (Oxford: OUP 2019) 115. For other examples of scholarship that examines responsibility for structural injustice, see S. Parekh, 'Getting to the Root of Gender Inequality: Structural Injustice and Political Responsibility' (2011) 26 *Hypatia* 672; M. McKeown, 'Iris Marion Young's "Social Connection Model" of Responsibility: Clarifying the Meaning of Connection' (2018) 49 *Journal of Social Philosophy* 484.

⁶ Powers and Faden, as above n 5.

under human rights law, and they must address the injustice by adopting a conditional welfare system that does not push and trap those who are already disadvantaged into exploitative relations.

WELFARE-TO-WORK

It is typically said that work is the best route out of poverty.⁷ On this basis, through welfare-to-work schemes, welfare benefits for working age people are most of the time conditional upon making an effort to obtain work. These schemes should be understood as part of the so-called activation policies, which are policies that encourage active engagement with the labour market. A standard justification of activation policies is that they ‘improve economic self-reliance and societal integration via gainful employment instead of joblessness and benefit receipt’.⁸ This paternalistic argument that grounds activation policies in the best interests of the recipients is commonly deployed in politics.⁹

There are a variety of schemes, with activation policies in certain countries being limited to funding vocational training programmes in order to match supply and demand needs in the market,¹⁰ while others have a stricter conditionality approach. Welfare-to-work schemes make welfare benefits conditional upon looking for and undertaking work. These schemes are grounded on a promise that people will have either a job or social support that will enable them to cover their basic needs, but also a threat that if they do not make the required effort to get a job and if they do not accept job offers, they will be sanctioned. The sanctions that are imposed either involve reduction or withdrawal of benefits, or replacement of benefits with food stamps.

Even though work is an important good and people generally want to work, there are reasons of principle to question conditional systems of benefit. In 1998 Jonathan Wolff questioned whether they are compatible with equality, as they require the most disadvantaged in society to reveal information about their circumstances, while ‘the rich do not have to explain how they got rich’,¹¹ but also because of what he calls ‘shameful revelation’.¹² On this analysis, there are things that people do not want to reveal to anyone, including themselves. If someone is unemployed at a time of low unemployment, the failure to be employed is not perceived to be due to external circumstances, but due to lack of talent or aptitude for the jobs that are available. Welfare-to-work schemes in this case require that those who want welfare support prove to themselves and to state authorities that they have failed to get a job despite the fact that there are few employment opportunities. They have to reveal facts that may be degrading, embarrassing or humiliating, in a manner that makes it impossible to think of themselves as equals in society. ‘This removes any last shred of dignity from those already in a very unfortunate position.’¹³ Wolff was concerned that egalitarian theories of distributive justice focus on individual responsibility for people’s condition in order to assess what is the fair distribution of resources, and argued that an egalitarian ethos is not only about fairness in distribution of resources, but also about respect.¹⁴ Wolff’s argument is

⁷ See, for instance, the UK Government’s Response to the Work and Pensions Committee’s Nineteenth Report (2017-2019) at [6].

⁸ W. Eichhorst, R.O. Kaufmann, R. Konle-Seidl and H.-J. Reinhard, ‘Bringing the Jobless into Work? An Introduction to Activation Policies’ in W. Eichhorst, R.O. Kaufmann, R. Konle-Seidl (eds), *Bringing the Jobless into Work?* (Berlin: Springer, 2008).

⁹ Other arguments that are used to justify this policies include arguments of economic efficiency, sustainability and justice. See A. Molander and G. Torsvik, ‘Getting People into Work: What (if Anything) Can Justify Mandatory Activation of Welfare Recipients?’ (2015) 32 *Journal of Applied Philosophy* 373.

¹⁰ See generally, G. Bonoli, ‘The Political Economy of Active Labor-Market Policy’ (2010) 38 *Politics and Society* 435.

¹¹ As above n 1, 111.

¹² *ibid* 109.

¹³ *ibid* 114.

¹⁴ See also his more recent J. Wolff, ‘Fairness, Respect and the Egalitarian “Ethos” Revisited’ (2010) 14 *Journal of Ethics* 335.

an important normative argument involving the compatibility of these schemes with egalitarian values.¹⁵

In the UK welfare-to-work schemes and their underlying principles are not a new phenomenon, but have become especially punitive in recent years.¹⁶ They represent a shift away from social security as a way to prevent hardship to a way to get people into work,¹⁷ and have been endorsed both by Labour and Conservative governments. The way that they have evolved helps illustrate how over the last two decades there has been a turn towards a particularly strict conditionality system. In 1995 the Jobseekers Act was enacted, which involved the assessment of jobseekers' behaviour. Labour Governments (1997-2010) endorsed welfare-to-work as a key element of their policy that insisted that the unemployed should access paid work as quickly as possible, otherwise there would be stepped up sanctions, consisting in reduction of their welfare benefits. During this same period conditionality applied to more groups of welfare support claimants than before, including people with disabilities and single parents. In 2002, an agency called Jobcentre Plus was established, which was for all those who claimed benefits and were out of work. Personal advisers were introduced who would support claimants to find work, and a weekly plan (the 'jobseeker's agreement') was put in place for everyone. The advisers would regularly monitor compliance with the agreement and refer claimants who had not met the conditions to the Department for Work and Pensions. Other tasks of the advisers were to issue a 'jobseeker's direction' which gave specific guidance on how to look for a job, to receive training and improve their employability. Advisers also had the power to impose sanctions if the claimants did not meet the conditions imposed. One of the key aims of the regime was to support not only jobseekers, but also those with childcare responsibilities, the ill and disabled, to find work. The Welfare Reform Act 2007 introduced among other things a stricter test for disabled claimants, who were assigned personal advisers and would be sanctioned if they did not take part in the scheme. The Welfare Reform Act 2009 extended conditionality to other groups, such as single parents.

The Coalition Government (2010-2015) developed welfare conditionality further. This was accompanied by the rhetoric of 'alarm clock Britain', namely the idea that there are hard-working people who are concerned about their living standards and dislike those who live on welfare benefits.¹⁸ The Welfare Reform Act 2012 adopted a particularly punitive conditionality regime. The resulting Universal Credit system merged six separate in-work and out-of-work benefits into one means-tested payment, and was one of the key reforms introduced through the Act. The aim was to simplify the benefits system, and the underlying idea of the system is that it can constitute a 'nudge' that will make people turn to the paid labour market, instead of being passive recipients of benefits. The purpose was to influence individual behaviour, as the assumption is that individuals are to blame primarily for their unemployment, often presented as voluntary.¹⁹ Universal Credit claimants have to prepare a plan with their work coaches at their local Job Centre, called a 'Claimant Commitment'. This explains what has been agreed between the two with respect to what claimants need to do in order to get a job.

¹⁵ There are other criticisms of social welfare programmes that target the poor in terms of how effective they are in promoting equality. See, for instance, W. Korpi and J. Palme, 'The Paradox of Redistribution and Strategies of Equality: Welfare State Institutions, Inequality, and Poverty in the Western Countries' (1998) 63 *American Sociological Review* 661.

¹⁶ For a historical overview that traces the origins of welfare-to-work programmes in English Poor Laws of the 17th century, see A. Paz-Fuchs, *Welfare to Work* (Oxford: OUP, 2008) chapter 2. See also S. Deakin and F. Wilkinson, *The Law of the Labour Market* (Oxford: OUP, 2005) chapter 3. For detailed analysis of the evolution of social security and welfare conditionality in the 20th and 21st century, see M. Adler, *Cruel, Inhuman or Degrading Treatment? Benefit Sanctions in the UK* (London: Palgrave Macmillan, 2018) chapter 2. See also M. Freedland, P. Craig, C. Jacqueson and N. Countouris, *Public Employment Services and European Law* (Oxford: OUP, 2007) chapter 6.

¹⁷ Adler, as above n 15, chapter 3.

¹⁸ See P. Wintour, 'Nick Clegg to Speak Up for "Alarm Clock Britain"', *The Guardian*, 11 January 2011. See also A. Daguerra, 'The Unemployed and the Moral Case for Benefit Sanctions' (2015) 22 *Journal of Social Security Law* 130.

¹⁹ *ibid* 133. On behavioural change in this context, see the discussion in Watts and Fitzpatrick, above n 3, 82.

Universal Credit also introduced for the first time conditionality for those who are already employed but are on a low income. These claimants have to apply for additional work for otherwise they will face sanctions. In-work conditionality suggests that the rationale of the system was not only to get people into work, but also to get them to work harder. The Government's broader purpose was 'to ensure that any type of paid work is more financially rewarding than reliance on benefits'.²⁰ Low paid workers who do not meet a threshold of income face sanctions. The scheme was criticised from early on for creating a perverse incentive for people to work for less than 16 hours a week, in order to qualify for benefits.²¹ Low paid workers were therefore also presented as undeserving poor who can be sanctioned if they do not make the appropriate efforts to secure a higher income.²²

Non-compliance with Universal Credit requirements incurs the second harshest sanctions in the world:²³ the lowest for those who, for instance, do not attend a work interview, and the highest ones for those who do not apply for a job, and range from losing their benefit for 28 days the first time that this happens, to 182 days for the second time, and 1095 days for the third time.²⁴ The number of those who were sanctioned increased, from about 300,000 sanctions and disqualifications in 2001 to over 1,000,000 in 2013,²⁵ with empirical evidence suggesting that sanctions are imposed unfairly, when for instance someone misses an appointment because of a clashing funeral commitment about which the individual has informed the authorities.²⁶

Soon after the system was introduced, Dwyer and Wright described it as 'unprecedented in offloading the welfare responsibilities of the state and employers onto citizens who are in receipt of *in work* and *out of work* social security benefits. Unemployed and low paid citizens are now held to be solely responsible, not only for a lack of paid employment, but also partial engagement with the paid labour market and the levels of remuneration that they may receive'.²⁷ The system has also been likened to the penal system by Adler because the fines imposed at times exceed fines imposed by criminal courts, as he showed, arguing persuasively that they are deeply problematic for disciplining and managing the poor.²⁸

In addition to the above, it is important to appreciate that those who are employed under workfare schemes, whereby they have to undertake unpaid work with an employer in order to receive a benefit, are sometimes excluded from protective labour legislation. Writing on workfare in the UK and the Netherlands, Paz-Fuchs and Eleveld observed that the relevant schemes exclude, albeit not always explicitly, participants from various labour law protections.²⁹ They explained that recipients are not classified as workers entitled to the national minimum wage; it is unclear to what extent they are covered by Working Time Regulations 1998; they are not protected against unfair dismissal, which is a protection that only employees have; and it is unclear whether they are covered by equality law.

²⁰ P. Dwyer and S. Wright, 'Universal Credit, Ubiquitous Conditionality and Its Implications for Social Citizenship' (2014) 22 *Journal of Poverty and Social Justice* 27 at 30.

²¹ *ibid* 31.

²² *ibid*.

²³ The US has the harshest sanctions in the world. See H. Immervoll and C. Knotz, 'How Demanding Are Activation Requirements for Jobseekers?', OECD Social, Employment and Migration Working Papers No 215, 12 July 2018, 47.

²⁴ *ibid* 32.

²⁵ Adler, as above n 15, 46-47.

²⁶ Adler, as above n 15, 58.

²⁷ Dwyer and Wright, as above n 20, 33.

²⁸ M. Adler, 'A New Leviathan: Benefit Sanctions in the Twenty-first Century' (2016) 43 *Journal of Law and Society* 195. See also the discussion in his book, as above n 15.

²⁹ A. Paz-Fuchs and A. Eleveld, 'Workfare Revisited' (2016) 45 *Industrial Law Journal* 29.

FROM UNEMPLOYED POOR TO WORKING POOR: CLUSTERING DISADVANTAGE³⁰

Despite the fact that work is presented as the best way out of poverty, there is a significant amount of in-work poverty, which this section links to welfare-to-work schemes. The Welfare Conditionality project, a five-year research project by Peter Dwyer, led to studies that examine the effects of welfare conditionality on the material well-being but also on the physical and mental health of those who use it.³¹ Empirical research also suggests that there is stigma associated with the benefits system, which is a reason why some people prefer not to claim benefits during periods of unemployment.³²

The particular problem that this section highlights is that those under welfare-to-work schemes are often forced and trapped into exploitative work and in-work poverty.³³ There are two central questions to be considered in order to understand the phenomenon of in-work poverty: first, who is a worker, and second, how we define poverty. The Bureau of Labour Statistics, the European Union and the International Labour Organisation (ILO) take different approaches to in-work poverty, but these do not lead to fundamental differences in measurements. The definition of who is a worker is generally broad. When someone engages in paid work for at least one hour in a given period of usually one week, they are viewed as ‘at work’.³⁴ For the ILO someone is part of the working poor if he or she has been or is usually working for at least one hour in a week, and is in a household with a level of consumption that is lower than the threshold of poverty. According to the EU definition, people are part of the working poor if they are employed more than half of the reference year, and live in a household with a disposable income below the 60 percent median income threshold.³⁵ Despite certain differences in measuring in-work poverty, there are significant similarities. Crucially, both definitions adopt a broad conceptualisation of employment.³⁶ In-work poverty may be due to either low wages or low working hours.³⁷ This generally applies to people who are employed in non-standard arrangements, such as part-time and zero-hour contracts, which are defined as personal work relations for which ‘there are no fixed or guaranteed hours of remunerated work’.³⁸

Against this background, Seikel and Spannagel examined the links between activation policies and in-work poverty.³⁹ They explained that research on activation often ignores employment conditions, such as whether the new job is full-time or part-time work, and the levels of remuneration. On the basis of empirical evidence from 18 European countries, they stressed that an increase in employment does not necessarily mean less poverty: ‘simply making the jobless work is no guarantee for a reduction of in-work poverty’.⁴⁰ Activation policies, as they explained, force individuals to take up any job irrespective of how much it is paid, while cuts to benefits reduce the total income of the household. They argued that ‘activation can be seen as a driver of in-work poverty’ and found that ‘strict conditionality of welfare benefits and a high degree of commodification of labour seems to force unemployed persons to accept jobs regardless of the

³⁰ On the concept of clustering of disadvantage, see J. Wolff and A. De-Shalit, *Disadvantage* (Oxford: OUP, 2007).

³¹ See, for instance, P. Dwyer (ed), *Dealing with Welfare Conditionality* (Bristol: Policy Press, 2019). See also Watts and Fitzpatrick, as above n 3, 99.

³² K. Garthwaite, *Hunger Pains – Life Inside Foodbank Britain* (Bristol: Policy Press, 2016) 102.

³³ The concept ‘in-work poverty’ is not new. One of the first systematic studies of poverty was about the working poor. See B.S. Rowntree, *Poverty: A Study of Town Life* (London: Macmillan, 1901).

³⁴ *ibid* 14.

³⁵ *ibid*.

³⁶ *ibid* 22.

³⁷ *ibid* 15.

³⁸ M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations* (Oxford: OUP, 2012) 318.

³⁹ D. Seikel and D. Spannagel, ‘Activation and In-Work Poverty’, in H. Lohmann and I. Marx (eds) *Handbook on In-Work Poverty* (Cheltenham: Edward Elgar, 2018) 245.

⁴⁰ *ibid* 251.

pay levels'.⁴¹ They also highlighted that the stricter a welfare conditionality system is, the more likely it is that participants will become part of the working poor. Activation policies that focus on upskilling can have a positive effect on household income, while strict conditionality systems force people to accept jobs irrespective of pay, which means that some schemes often turn the unemployed poor into working poor.⁴²

The UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston, produced a Report following a visit to the UK in 2018, which focused on the problems of Universal Credit and in-work poverty.⁴³ He said that 'the philosophy underpinning the British welfare system has changed radically since 2010',⁴⁴ extensively discussed welfare conditionality and its punitive effects on the worst off, and also referred to in-work poverty. He emphasised that in the UK there are 14 million people in poverty, that 60% of those who are in poverty are in families where someone works, and 2.8 million people in poverty are in families where all adults work full time.⁴⁵ He also explained that even if both parents in a family work full time and earn the national minimum wage, they are still 11 per cent short of the income that is needed in order to raise one child.⁴⁶ A Joseph Rowntree Foundation Report of 2018 found that there were four million workers in poverty, a rise of half a million in comparison to five years before.⁴⁷ Since 2004-2005, the number of those in in-work poverty has been rising faster than the total number of people in employment.⁴⁸ Alston emphasised that the denial of benefits has pushed certain categories of claimants into unsuitable work,⁴⁹ and explained that people want to work, and take work that is badly paid and precarious in order to meet their basic needs.⁵⁰ Having spoken with Universal Credit claimants, he said that not only did they have to 'fill out pointless job applications for positions that did not match their qualifications', but also that they had to 'take inappropriate temporary work just to avoid debilitating sanctions'.⁵¹

To further corroborate the claim of Seikel and Spannagel, empirical research conducted in the UK on the effects of Universal Credit suggests that claimants are routinely forced to apply for and accept jobs that are precarious. It is crucial to underline here that claimants are expected to accept zero hour contracts, because these are viewed as valuable flexible arrangements.⁵² For those who accessed the Jobcentre, the experience of applying for many unsuitable and inappropriate jobs is reported to be 'soul destroying', in the words of a foodbank volunteer.⁵³ The duty to accept exploitative work accentuates the problem. Someone interviewed said:

⁴¹ *ibid* 257.

⁴² *ibid*.

⁴³ Report of the UN Special Rapporteur on Extreme Poverty and Human Rights, Visit to the UK and Northern Ireland, A/HRC/41/39/Add.1, 23 April 2019.

⁴⁴ *ibid* [95].

⁴⁵ *ibid* [28].

⁴⁶ *ibid* [35].

⁴⁷ Joseph Rowntree Foundation Report 'UK Poverty 2018'.

⁴⁸ *ibid*. In 2011-12 for the first time on record it was documented that from those who live in poverty, the majority are in in-work poverty. See T. MacInnes, H. Aldridge, S. Bushe et al, 'Monitoring Poverty and Social Exclusion', Joseph Rowntree Foundation, 2013.

⁴⁹ Alston makes this point in relation to people with disabilities, for instance, in [4] of his Report.

⁵⁰ *ibid* [8].

⁵¹ *ibid* [57].

⁵² See the response to a question asked by Chris Stevens MP <https://www.parliament.uk/business/publications/questions-answers-statements/written-question/Commons/2018-11-29/197460/>. See also the exchange in Parliament between Work and Pensions Secretary Amber Rudd MP and Chris Stevens MP in December 2018 <https://www.independent.co.uk/news/uk/politics/amber-rudd-zero-hour-contracts-benefit-sanctions-universal-credit-work-pensions-dwp-a8690626.html>

⁵³ Garthwaite, as above n 32, 104.

I used to work in hotels doing waiting on silver service. I've done all kinds of work, do you know what I mean, all kinds. Whatever job come up I'd take really. Mostly factory work. Just boring work really. No skills in it.

[...]

Any job I'd do. Any job. As long as I know it's a permanent job. Not one of these zero hour contract things, because I don't want to take a job and not afford where I'm living now and end up back on the streets.⁵⁴

According to findings of Kamerade and Scullion, some people first come into contact with non-standard work through Jobcentres, where they are 'encouraged, directed or coerced to apply for low-skilled, low paid and precarious jobs, such as temporary agency work and zero hours work'.⁵⁵ They used examples of someone who turned down a job with an agency because it did not cover travel expenses from Derbyshire to Manchester (about 50 miles distance), and was therefore sanctioned. Another man accepted a zero-hours contract, and was told that he would receive a text message if he were needed. Having not heard, he was offered the option to turn up at work at 7am but was again not offered any work. He eventually secured a few hours temporary work, but he still had to be on Universal Credit, attend appointments and apply for jobs. Further empirical research by Garthwaite suggested that most people working in non-standard work arrangements (agency, part-time or zero-hours), do not do so by choice, and would like to see zero-hour contracts banned.⁵⁶ This is because under many of these arrangements people cannot meet their basic needs, such as clothing, food or accommodation. Some of these jobs lead people into foodbanks.⁵⁷ This has further stigma attached to it, with those using them being embarrassed to admit it. An in-work Universal Credit claimant interviewed by the Welfare Conditionality project said:

It's a bit degrading... my adviser, she isn't too bad. She says to me most times, 'I'm quite happy with what you're doing, and obviously you want to work because you're working, and it's not as though you're not looking for jobs'. But like they're always checking up on you. They always want to know... 'If I wasn't happy with you, we can sanction you'. Every other meeting it's kind of there, a reminder that like keep on doing what you're doing, otherwise this will happen to you.⁵⁸

Further challenges are faced by in-work claimants whose first job is a zero-hours contract, and who are required to apply for more work. This is exemplified by an interviewee of the Welfare Conditionality project who said:

All the first employers want you to be available at the snap of a finger for the zero-hour contracts... So when you go for a second job, if you're in retail everybody's going to want you on a Saturday, aren't they? If you go, 'Oh no, I'm at such-and-such that day' they're going to go, 'No'.⁵⁹

A related issue that emerges from empirical studies and shows how the system in the UK leads to the proliferation of non-standard work involves those who use a combination of paid work and welfare benefits. Those who work for over 15 hours and earn above a set level of income lose any

⁵⁴ J. Flint, 'Social Class, Urban Marginality and Narratives of the Ethics of UK Welfare Sanctions', Welfare Conditionality Project Report, 14.

⁵⁵ D. Kamerade and L. Scullion, 'Welcome to Britain: A Land where Jobs May Be Plentiful but Are More and More Precarious', *The Conversation*, 21 November 2017.

⁵⁶ Garthwaite, as above n 32, 108.

⁵⁷ *ibid*, 109.

⁵⁸ Written Evidence from the Welfare Conditionality: Sanctions, Support and Behaviour Change Project, Submission to the Work and Pensions Select Committee Inquiry: Universal Credit 'In-Work Progression', January 2016.

⁵⁹ *ibid*.

welfare benefits. For instance, one interviewee said that she was offered a placement for three weeks and worked 16 hours at a care home with people with dementia but was paid for 15 hours so that she would not lose her benefits and become unable to afford her rent.⁶⁰ Scholars analysing the system early on had predicted that Universal Credit would create this perverse incentive.⁶¹ In this way, the scheme leads to the proliferation of non-standard work, with claimants not only being forced to accept it, but also being trapped in the arrangements. They are trapped both because these jobs become standard and routine, and because people have very limited opportunities and resources (material, such as funding to re-train, and non-material, such as time) to obtain better work.⁶²

It is important to appreciate that it is also highly questionable whether the system of sanctions is effective in its stated aims.⁶³ The National Audit Office observed that more data and evidence is required, but early analysis suggests that even though employment rates of those formerly under an unemployment benefit has increased, there is no increase in earnings. Sanctions force people to accept jobs that are badly paid, and this leads to reduction of their long-term income.⁶⁴

In response to criticisms of non-standard work arrangements,⁶⁵ the UK Government has regularly insisted that people are positive about part-time work or zero-hour contracts, because these give them flexibility. The ‘Taylor Review of Modern Working Practices’, for instance, said that flexibility is important for workers, and that they should not be deprived of the capacity to choose flexible working arrangements, such as zero-hour contracts.⁶⁶ Evidence on in-work poverty, though, and the fact that many in this condition are in precarious work calls this position into question. The Taylor Review argued that people should have a choice of working arrangements, and that their options should not be hindered. However, many who are employed in such contracts would rather have secure, stable, full-time work, with which they can meet their basic needs, but do not have this option. Some have been forced into these arrangements through the welfare system. As it emerges from empirical research, for many people atypical work is not necessarily freely chosen work. There are many who do not opt to work in zero-hour or agency arrangements because of the flexibility inherent in such arrangements, but because they will otherwise lose any welfare support and will be unable to meet their basic needs.⁶⁷ Yet even when they do this work, they may still be unable to meet their basic needs, and have to use foodbanks.⁶⁸

What emerges from this section is that welfare-to-work schemes with strict conditionality force people into exploitative jobs, the use of which becomes all the more widespread and routine. It leads to ‘clustering of disadvantage’, whereby people accumulate disadvantages such as poverty, workplace exploitation, ill-health, or homelessness.⁶⁹ It creates a system that is convenient for employers, but unsuitable to the main aim that activation policies are supposed to pursue, namely encouraging the unemployed to engage with the paid labour market as a route out of poverty. The

⁶⁰ Garthwaite, as above n 32, p 106.

⁶¹ Dwyer and Wright, as above n 20, 31.

⁶² For an illustration of how people are trapped in this situation, see J. McBride, A. Smith, M. Mbala, “‘You End Up with Nothing’: The Experience of Being a Statistic of ‘In-Work Poverty’ in the UK” (2018) 32 *Work, Employment and Society* 210.

⁶³ House of Commons, Committee of Public Accounts, ‘Benefit Sanctions’, Forty-second Report of 2016-17, 21 February 2017.

⁶⁴ National Audit Office, Report on ‘Benefit Sanctions’, HC 628, Session 2016-17, 30 November 2016 [3.10].

⁶⁵ See, for instance, A. Adams, M. Freedland and J. Prassl, ‘The “Zero-Hours Contract”: Regulating Casual Work or Legitimising Precarity?’, *Oxford Legal Studies Research Paper* 11/2015.

⁶⁶ See the ‘Good Work: Taylor Review of Modern Working Practices’, July 2017, p 14. For a critique of the Report, see K. Bales, A. Bogg and T. Novitz, “‘Voice’ and ‘Choice’ in Modern Working Practices: Problems with the Taylor Review” (2018) 47 *Industrial Law Journal* 46.

⁶⁷ M. Ball, C. Hampton, D. Kamerade and H. Richardson, ‘Agency Workers and Zero Hours – The Story of Hidden Exploitation’, University of Salford Research Report, July 2017, 6.

⁶⁸ Garthwaite, as above n 32, 109.

⁶⁹ Wolff and De-Shalit, as above n 30.

system instead stigmatises the poor and traps them in exploitative working conditions and in in-work poverty.

STRUCTURAL INJUSTICE

I have thus far explained that welfare-to-work programmes with strict conditionality force people into exploitative work through which they cannot meet their basic needs, while employers benefit from this situation. This section suggests that the situation should be understood as an instance of structural injustice, for this concept, as analysed in what follows, helps us identify where the injustice lies, who is responsible for it, and how it should be addressed.

The rhetoric of personal responsibility, which is typically deployed by the UK Government in discussions on welfare-to-work programmes, places the blame on the undeserving poor, as was explained earlier. On this line of thinking, when the poor are exploited, the employers are to blame if they break the law, and the responsibility of the state is to address the harm inflicted by private actors. Iris Marion Young questioned the analysis that only those who causally contribute to injustice should bear responsibility for remedying it, and turned to the role of social structures to take a broad view and identify society's major social positions, and their systematic relations.⁷⁰

For Young, structural injustice is different to injustice perpetuated by individuals and injustice perpetuated by the state or other powerful institutions.⁷¹ The concept was developed to describe situations where people find themselves suffering serious harm, such as exploitation and domination, but this is not through their own fault, and is not caused to them intentionally by one individual or institution. It occurs when individuals act according to normal rules and morally justifiable practices, but the preconditions and results of their actions are structural processes that produce unjust circumstances.⁷² Young said that structural injustice:

exists when social processes put large groups of persons under systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time that these processes enable others to dominate or to have a wide range of opportunities for developing and exercising capacities available to them. Structural injustice is a kind of moral wrong distinct from the wrongful action of an individual agent or the repressive policies of a state. Structural injustice occurs as a consequence of many individuals and institutions acting to pursue their particular goals and interests, for the most part within the limits of accepted rules and norms.⁷³

Young illustrates the problem of structural injustice with the story of Sandy, a single mother of two who decided to move out of her apartment that was part of a central-city apartment building which would be converted into condominiums. The building was anyway very old and she had a long commute to work as a sales clerk in a suburban mall. Sandy decided to look for an apartment closer to her work. She realised, though, that flat rentals close to her work were extremely expensive, while affordable apartments were really far away. She decided to spend some money that she had saved for rent in order to get a car. She applied for state support and was told that she had to wait for two years. She finally found a small apartment a forty-five-minute drive from her work. Her children would have to share a bedroom and she would have to sleep in the living room. There was no washer and dryer in the building, nor a playground, but Sandy had no other option but to take it as she would soon be evicted. However, she needed a deposit for three months' rent,

⁷⁰ Young as above n 1, 56. Karl Marx wrote on capitalism as an unjust structure, in K. Marx, *Capital* (London: International Publishers) 1973.

⁷¹ Young, as above n 1, 45.

⁷² *ibid* 47.

⁷³ *ibid* 52.

according to standard landlord policy, which she could not afford because she had paid for the car. She therefore faced the prospect of homelessness.

Sandy is faced with an injustice, according to Young, because no-one should be in a position of insecurity of housing, particularly in an affluent society. However, the blame for this injustice cannot be placed on a particular individual with whom she has interacted, for they have all acted according to the law, and have treated her with decency. In a case such as this, it is hard to assign causal responsibility, to know what can be done, and who has the power to do it. Young's aim was to show that everyone has political responsibility to address unjust structures, even those who are not directly responsible for causing a particular harm. People act according to their interests, and do not break the law, but on this analysis they still have forward-looking responsibility to address the injustice. Her insight is crucial for present purposes because it shifts attention away from individual responsibility for causing an injustice to broader social structures.

In the example of Sandy, the state cannot be blamed for the wrong that she suffered, because there is no concrete law or policy that directly harmed her. As Young explained, Sandy's situation was different to the victims of Mugabe who were evicted when he razed the shantytowns where they lived, or blacks and Jews who were forbidden from buying or renting property in the United States. In examples such as these, states cause injustice to groups through direct action with intention to harm, their laws or policies, but this was not what the case of Sandy exemplified. No concrete laws or policies can be identified as the major cause.⁷⁴ Young's conception of structural injustice aimed to capture a type of responsibility that should be distinguished from individual fault and specific unjust policies. It is not caused immediately and is not as focused as a single policy, for its sources are multiple and long-term, and are produced by normal rules and practices. It is the result of many policies and the acts of thousands of individuals who act lawfully.⁷⁵

Responsibility for State-mediated Structural Injustice

In the remainder of this section and the section that follows I use insights from Young's analysis of whole structures rather than a single blameworthy act but focus not on structures that are unintentional but on structures that are deliberately created, have a *prima facie* legitimate aim but generate unjust side-effects. I propose that we can identify agency in the context of the unjust structure⁷⁶ and focus on the culpability of the state.⁷⁷ What we observe in the example of welfare-to-work is that even though the harm of exploitation suffered by the workers caught in the unjust structure is not directly caused by the state, it is state-mediated. I call it state-mediated to emphasise the point that state acts with a *prima facie* legitimate aim have an unintended (albeit foreseeable) side-effect which is very damaging for large numbers of people.

The role of the state here is different to its role in Mugabe's atrocities. We are faced with legislation that has the stated aim of getting people out of poverty and into employment, and legislation that permits non-standard work arrangements which may be convenient for some workers. Even though these laws and policies are not necessarily illegitimate as such when looked at in isolation, together they create patterns that coerce large numbers of people into exploitation, from which it is very hard to escape. People are not coerced into exploitative jobs by physical force,

⁷⁴ *ibid* 47.

⁷⁵ *ibid* 47-48. For analysis and critique of aspects of Young's theory of responsibility, see J. Reiman, 'The Structure of Structural Injustice: Thoughts on Iris Marion Young's *Responsibility for Justice*', (2012) 38 *Social Theory and Practice* 738; and in relation to responsibility for global justice, see M. Nussbaum, 'Iris Young's Last Thought on Responsibility for Global Justice' in A. Ferguson and M. Nagel (eds), *Dancing with Iris – The Philosophy of Iris Marion Young* (Oxford: OUP, 2009) 133. See also McKeown, as above n 5. On responsibilities of the victims of structural injustice, see T. Jugov and L. Ypi, 'Structural Injustice, Epistemic Opacity, and the Responsibilities of the Oppressed' (2019) 50 *Journal of Social Philosophy* 7.

⁷⁶ See also literature above, n 5.

⁷⁷ Powers and Faden also discuss the responsibility of states for structural injustice, as above n 5, Chapter 6.

of course. They accept them against their will because of the threat of severe sanctions.⁷⁸ The laws and policies in question affect those who are already disadvantaged because of their social position by forcing them into exploitative situations for otherwise they will face economic sanctions and destitution.

The state does not directly exploit people; work coaches and other Jobcentre employees generally act lawfully and rationally, following the rules that aim to help people into work. Employers may not act unlawfully either if they comply with employment law. Yet the injustice is structural because the processes set up through welfare-to-work programmes and the regulation of non-standard work enable employers to exploit workers.

It is typically said that the law affects power relations.⁷⁹ As Collins put it, ‘the law respects a particular concept of private property which gives the owner of capital complete freedom to choose whether or not to put it to productive use. If the law did not respect this privilege, then the power of capital would be radically diminished.’⁸⁰ When it comes to the labour market, a system of private property places employers in a position of power, and workers in a position of dependency. While legal rules respect a particular system of property, they also place restrictions on how property is used. Against this background, a central purpose of labour and welfare law is to address the imbalance of power inherent in the employment relation. Yet what we observe in the example discussed in this piece is that through certain laws that are *prima facie* just the state creates an unjust structure from which people cannot escape, which the employers exploit and from which they benefit.

This state-mediated injustice grounds a different kind of responsibility than the one usually invoked for direct state action with intention to harm. It can form the basis for legal liability of the state not for direct state action with an illegitimate aim, but for creating an unjust structure through state action with a *prima facie* legitimate aim that has harmful effects for large numbers. It is important to examine the role of the law in the creation of this structure, for states nowadays all too often emphasise the role of individual perpetrators, such as unscrupulous employers,⁸¹ and the responsibility of the poor for their predicament,⁸² rather than the role of whole systems that routinely create and sustain structures that force workers into exploitation.

The state-mediated structural injustice that I discuss can be analysed as follows. It is constituted by legislation, namely a welfare-to-work scheme with strict conditionality, which targets those who are already in a position of disadvantage, together with the legal framework that permits non-standard work. It is sustained by an administrative system, the institution of Jobcentres and work coaches, who set up demanding and often unproductive tasks for claimants, and monitor them closely. And it ends up with forcing people into in-work poverty. The intrusive system constrains individual choices, with claimants having to take exploitative work in order to secure income to cover their basic needs, having in reality a choice to make between either out-of-work or in-work poverty. It is well-documented that zero-hours jobs, for instance, often pay wages that are below the minimum wage, are insecure in the sense that there is no guaranteed minimum monthly income, and that many who are employed under such contracts need more hours than

⁷⁸ On the concept of coercion, see, for instance, V. Held, ‘Coercion and Coercive Offers’ in J.R. Pennock and J.W. Chapman (eds), *Coercion* (Chicago: Aldine Atherton 1976) 49 at 50-51. On economic need and coercion see J. Waldron, ‘Homelessness and the Issue of Freedom’, in *Liberal Rights – Collected Papers 1981-1991* (Cambridge: Cambridge University Press 1993) 309 at 318 ff.

⁷⁹ See Powers and Faden, as above n 5, 98. For a recent account of how legal rules produce private wealth, see K. Pistor, *The Code of Capital: How the Law Creates Capital and Inequality* (Princeton: Princeton University Press 2019).

⁸⁰ H. Collins, ‘Against Abstentionism in Labour Law’ in J. Eekelaar and J. Bell (eds), *Oxford Essays in Jurisprudence* (Oxford: Clarendon Press 1987) 86.

⁸¹ See, for example, the UK Modern Slavery Act 2015, which criminalises severe labour exploitation, without challenging background structures that create vulnerability to such exploitation. See V. Mantouvalou, ‘The UK Modern Slavery Act 2015 Three Years On’ (2018) 81 *Modern Law Review* 1017.

⁸² As we see in the example of welfare conditionality schemes.

what they are offered.⁸³ As Adams, Freedland and Prassl have explained, through the imposition of an obligation to accept such work for fear of poverty, destitution and stigmatisation ‘we see the perfect instantiation of the self-intensifying normalisation and legitimisation of Zero-Hours contracting’.⁸⁴

People’s social position, namely conditions of poverty, is targeted through welfare legislation that forces them into exploitative arrangements. Laws with strict conditionality sanction individuals for not seeking work. Jobcentres turn the meeting of people’s basic needs into a bureaucratic exercise. In this way people are forced into exploitative work, while employers benefit from this situation.

The conception of state-mediated structural injustice that I develop here underlines state responsibility for a situation that might not otherwise be evident if we did not examine the overall structure. The foreseeability and evidence of suffering by those who are already disadvantaged support the position that the state has a duty to correct the injustice. It should also be added that welfare-to-work programmes that force people into exploitative jobs are not the only examples of state-mediated structural injustice. There are other examples too, which have to be exposed and addressed.⁸⁵ Identifying a series of laws and policies that are *prima facie* legitimate but that create unjust structures forms the first step, and the basis for a normative argument to ground moral and legal responsibility of state authorities themselves for creating and sustaining these structures.

STATE-MEDIATED STRUCTURAL INJUSTICE AND HUMAN RIGHTS

In his 1998 article, Wolff argued that conditional welfare benefits should only be used exceptionally, because they place the poor in a position that is incompatible with egalitarian ethos. In this section, I propose that welfare-to-work programmes with strict conditionality create structures of injustice by forcing people into precarious work and ground state responsibility for violations of human rights.⁸⁶ The idea behind welfare-to-work is that the more people are in employment, the better it is: work is said to be the best way out of poverty, as was stated earlier. Yet as we saw above, the UK system ends up forcing people in conditions of in-work poverty and workplace exploitation, from which it is very hard to escape as there are few alternative opportunities, while employers benefit from this situation. A structure that forces people into exploitative work does not fulfil the right to work. To the contrary: it may be incompatible with the right to work and other human rights.⁸⁷

This section suggests that when labour and welfare law rules create and sustain structures of injustice, human rights law may have a positive role to play in supporting change.⁸⁸

Human rights obligations

In assessing welfare-to-work schemes with strict conditionality, both the overall structure and parts of it may give rise to responsibility for violations of human rights law.

⁸³ See, for instance, Garthwaite, as above n 32, 109.

⁸⁴ Adams, Freedland and Prassl, as above n 65, 20.

⁸⁵ I discuss other examples, such as restrictive visa schemes and prison labour, in V. Mantouvalou, ‘Structural Injustice and Workers’ Rights’, forthcoming in (2020) *Current Legal Problems*.

⁸⁶ Powers and Faden examine structural injustice and moral (rather than legal) human rights, above n 5.

⁸⁷ See the discussion of the right to work and the duty to work in A. Paz-Fuchs, ‘The Right to Work and the Duty to Work’, in V. Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Oxford: Hart, 2015) 177. On working conditions and the right to work see V. Mantouvalou, ‘The Right to Non-Exploitative Work’, in the same volume, 39.

⁸⁸ For an example where the UK welfare system’s housing benefit was ruled to violate human rights law, see *JD and A v UK*, App No 32949/17 and 34614/17, judgment of 24 October 2019.

When examining alleged violations of human rights law, attention is typically paid to the role of the state when it causes harm by intentional action. The European Court of Human Rights (ECtHR or Court) says that the primary purpose of the ECHR is to protect individuals against arbitrary interference by authorities with the exercise of Convention rights.⁸⁹ In addition, the Court has established a doctrine of positive state obligations ‘to secure the effective enjoyment of these rights’.⁹⁰ In these instances, the state is not directly responsible for private wrongs, such as workplace exploitation. State responsibility arises when the authorities know of the actual or impending harm in the private sphere but take no action to prevent or address it. For instance, in *Barbulescu v Romania*,⁹¹ the Court said that ‘the State’s positive obligations under Article 8 of the Convention are not adequately fulfilled unless it secures respect for private life in the relations between individuals by setting up a legislative framework taking into consideration the various interests to be protected in a particular context’.⁹² This statement suggests that the ECtHR is conscious of the inequality of power that is a central feature of the employment relation.

When it comes to the regulation of the labour market, the ECtHR recognises the sensitive nature of socio-economic policy and grants the state wide discretion. In this way, it accepts that different ways of organising the economy are compatible with the Convention. However, it has ruled that in some circumstances state responsibility may arise in the context of the organisation of the labour market⁹³ and in matters of social policy.⁹⁴

My account of state-mediated injustice exposes a kind of responsibility that contains a combination of action with a *prima facie* legitimate aim and omission to act when the background conditions created by the legal framework create and sustain structures of injustice. The responsibility of the state arises as follows: the state passes laws that may seem legitimate at first, but have side-effects affecting large numbers of people that the authorities do not systematically examine and address. This situation may violate human rights, and the authorities have to be held accountable for creating and sustaining it.

Examining structural injustice, Serena Parekh suggested that its implications for the duties of the state are three: first, an obligation to know and understand structural injustice; second, an obligation to raise awareness and support for change; and third, an obligation to change the structures that place people in this position.⁹⁵ Such obligations can also be grounded on European human rights law. In the case of the UK scheme with strict conditionality that forces people into precarious work, both the overall structure and parts of it raise pressing questions about compliance with human rights law to which we now turn.

Prohibition of forced and compulsory labour

Courts and other human rights monitoring bodies have considered a line of cases and produced reports on the question whether welfare-to-work schemes violate individual rights: first, the prohibition of forced and compulsory labour, and second, the right to work. The prohibition of forced and compulsory labour is included in legal documents that are enforceable through individual petition and judicial oversight, such as the ECHR that prohibits slavery, servitude, forced and compulsory labour in article 4.⁹⁶ The provision contains some exceptions in its third paragraph, including ‘any work or service which forms part of civic obligations’.

⁸⁹ *Kroon and Others v the Netherlands*, App No 18535/91, judgment of 27 October 1994 [31].

⁹⁰ *Wilson and Palmer v UK*, App Nos 30668/96, 30671/96 and 30678/96, judgment of 2 July 2002 [41].

⁹¹ *Barbulescu v Romania*, App No 61496/08, Grand Chamber judgment of 5 September 2017.

⁹² *ibid* [115]. The protective legislation can be labour law, civil law or criminal law (at [116]).

⁹³ *Evaldsson v Sweden*, App No 75252/01, judgment of 13 February 2007 [63].

⁹⁴ See, for instance, above n 87.

⁹⁵ Parekh, as above n 5, 683.

⁹⁶ For a detailed overview of the case law, see E. Dermine, ‘Activation Policies for the Unemployed and the International Human Rights Case Law on the Prohibition of Forced Labour’, in E. Dermine and D. Dumont (eds), *Activation Policies for the Unemployed, the Right to Work and the Duty to Work* (Brussels: Peter Lang, 2014) 103.

In the relevant case law on welfare-to-work, the Court has not ruled that there has been a violation of the Convention thus far. The most recent case is *Schuitemaker v the Netherlands*.⁹⁷ In that case, the applicant was a philosopher by profession, and was asked to take ‘generally accepted’ work (rather than work that was ‘deemed suitable’ for her). If she did not comply with the condition, her benefits would be reduced. She claimed that this was contrary to article 4. The Court said that:

it must in general be accepted that where a State has introduced a system of social security, it is fully entitled to lay down conditions which have to be met for a person to be eligible for benefits pursuant to that system. In particular a condition to the effect that a person must make demonstrable efforts in order to obtain and take up generally accepted employment cannot be considered unreasonable in this respect. This is the more so given that Dutch legislation provides that recipients of benefits pursuant to the Work and Social Assistance Act are not required to seek and take up employment which is not generally socially accepted or in respect of which they have conscientious objections.

In this particular case, the condition was not viewed as compelling her to perform forced or compulsory labour. The earlier *Talmon v Netherlands*,⁹⁸ where the applicant claimed that the only work suitable for him was as an ‘independent scientist and social critic’, while he had serious conscientious objections against any other work, was also deemed inadmissible by the European Commission of Human Rights. None of the cases examined this far by the ECtHR and Commission reach the level required for article 4 to apply. However, the structure created by the UK Universal Credit system is harsher than these examples in that it both imposes very severe sanctions and forces people into exploitative work.

The UK Supreme Court examined welfare-to-work in a 2013 judicial review case, *Reilly*.⁹⁹ One of the questions for the Court was whether jobseeker’s allowance that made a benefit conditional on Ms Reilly working for Poundland, in a position that would not advance her employment prospects, was contrary to article 4. The argument presented was that the requirement that Ms Reilly work for Poundland as a condition for claiming her benefit constituted forced and compulsory labour in contravention of article 4(2). This was because the work at Poundland ‘was exacted... under menace of [a] penalty’.¹⁰⁰ The Supreme Court ruled:

The provision of a conditional benefit of that kind comes nowhere close to the type of exploitative conduct at which article 4 is aimed. Nor is it to the point that according to Ms Reilly the work which she did for Poundland was unlikely in fact to advance her employment prospects. Whether the imposition of a work requirement as a condition of a benefit amounts to exacting forced labour within the meaning of article 4 cannot depend on the degree of likelihood of the condition achieving its purpose.¹⁰¹

The Court held that *Reilly* did not meet the conditions for article 4 to apply. It recognised that the provision has exploitation at its heart,¹⁰² but said that to find a violation, work has to be not just compulsory and involuntary, but the duty and its performance must be ‘unjust’, ‘oppressive’, ‘an

⁹⁷ *Schuitemaker v the Netherlands*, App No 15906/08, admissibility decision of 4 May 2010.

⁹⁸ *Talmon v the Netherlands*, App No 30300/96, Commission Decision of 26 February 1997.

⁹⁹ *Reilly & Anor, R (on the application of) v Secretary of State for Work and Pensions* [2013] UKSC 68. There have already been successful instances of judicial review on the basis that the regulations that involve the calculation of Universal Credit Regulations 2013 (SI 2013/976) were wrongly interpreted. See *R (on the application of Johnson and others) v Secretary of State For Work and Pensions* [2019] EWHC 23 (admin).

¹⁰⁰ *Reilly* [80].

¹⁰¹ *ibid* [83].

¹⁰² *ibid* [81].

avoidable hardship’, ‘needlessly distressing’ or ‘somewhat harassing’.¹⁰³ Even if the Supreme Court was correct that Ms Reilly did not suffer a violation of her Convention rights, several examples of Universal Credit claimants who are in recent years forced into work that they do not want to take exactly because of its precarious nature, with the menace of sanctions that may leave them destitute, reach the level of exploitation required for a violation of article 4.¹⁰⁴ Obligations to accept precarious work under the menace of severe sanctions and destitution, as evidenced in empirical work discussed earlier in this piece, can in some instances be viewed as unjust, oppressive, distressing and harassing, to use the words of the UK Supreme Court.

The overall structure created through welfare-to-work with strict conditionality, which forces and traps large numbers of people in precarious work, normalises ‘all but the most extreme forms of abusive employment arrangements, leaving a rapidly increasing number of workers without recourse to employment protective norms’, as Adams, Freedland and Prassl put it.¹⁰⁵ This situation should make us reopen the question whether the UK scheme is compatible with article 4 of the ECHR.

Right to work

The UK welfare-to-work scheme may also give rise to issues under the right to work in article 1(2) of the ESC, which is the counterpart of the Convention in the area of economic and social rights.¹⁰⁶ The standards set in the context of the Charter are often used by the ECtHR to illuminate the interpretation of rights protected in the ECHR.¹⁰⁷ Article 1(2) provides that ‘[w]ith a view to ensuring the effective exercise of the right to work, the Parties undertake [to] protect effectively the right of the worker to earn his living in an occupation freely entered upon’. The European Committee of Social Rights (ECSR), which is the monitoring body of the ESC, has found in this context that contracting parties may violate the provision when they have schemes with excessive conditionality. As was said earlier, there are different types of activation policies and different kinds of welfare conditionality schemes, some of which are stricter than others.¹⁰⁸ According to the ECSR, welfare-to-work may be incompatible with article 1(2), when work is inconsistent with human dignity or more generally when it is exploitative.¹⁰⁹ In light of the analysis of the overall structure of injustice that this article presented, the UK system of strict conditionality forces people into exploitative work, which suggests that it is incompatible with the ESC.

Prohibition of inhuman or degrading treatment

In addition to the fact that the overall structure of welfare-to-work with strict conditionality that forces people into exploitative work may breach human rights, elements of the structure may also ground responsibility for human rights violations both as an aspect of the structure that I discuss here and independently of it. As an aspect of the structure, they ground state responsibility because

¹⁰³ *ibid* [89]. These terms were borrowed from *Van der Musselle v Belgium*, App No 8919/80, judgment of 23 November 1983 [37].

¹⁰⁴ See R. Mason, ‘Jobseekers Being Forced Into Zero-Hours Jobs’, *The Guardian*, 5 May 2014.

¹⁰⁵ Adams, Freedland and Prassl, as above n 65, 3.

¹⁰⁶ For an overview, see E. Dermine, ‘Activation Policies for the Unemployed and the International Human Rights Case Law on the Right to Freely Chosen Work’ in E. Dermine and D. Dumont (eds) *Activation Policies for the Unemployed, the Right to Work and the Duty to Work* (Brussels: Peter Lang, 2014) 139.

¹⁰⁷ V. Mantouvalou, ‘Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation’ (2012) 12 *Human Rights Law Review* 529; K.D. Ewing and J. Hendy, ‘The Dramatic Implications of *Demir and Baykara*’ (2010) 39 *Industrial Law Journal* 2.

¹⁰⁸ See an overview of European approaches in Freedland et al, as above n 16, chapter 6.

¹⁰⁹ See ECSR Conclusions 2012, Statement of Interpretation, Article 1(2). See further the discussion by S. Deakin, ‘Article 1 – The Right to Work’, in N. Bruun, K. Lorcher, I. Schoemann and S. Clauwaert (eds) *The European Social Charter and the Employment Relation* (Oxford: Hart, 2017) 147, at 159. See also Freedland et al, as above n 16, 227.

it was earlier explained that there is evidence that the harsher the sanctions are, the more likely it is that people will be forced into exploitative work. Independently of this, they ground state responsibility because of the links between sanctions and destitution. There is evidence that some Universal Credit claimants become destitute because of the scheme.¹¹⁰ This may be due to either the cruelty of sanctions, or because of the way that the Universal Credit payments are made.

In his study, Adler suggested that benefit sanctions in the UK can be so cruel as to violate article 3 of the ECHR, which prohibits inhuman and degrading treatment.¹¹¹ According to well-established case law of the Court, for article 3 to be breached, the conduct in question has to reach a ‘minimum level of severity’.¹¹² In order to assess this threshold, the Court takes into account factors such as the duration, physical and mental effects of the treatment, as well as the sex, age and health of the victim.¹¹³ The ECtHR has not had to examine the compliance of benefit sanctions with article 3 to date. However, it has examined the question whether destitution may in certain conditions violate it.¹¹⁴ In *MSS v Belgium and Greece*,¹¹⁵ for instance, the Grand Chamber of the Court ruled that leaving asylum seekers in conditions of destitution and homelessness constituted a violation of article 3, while the UK House of Lords reached a similar conclusion in *Limbuella, Tesema and Adam*.¹¹⁶ According to *Limbuella*, there has to be deliberate state action that denies the satisfaction of basic needs, such as shelter or food, and this has to be of such severity as to have seriously detrimental effects or cause serious suffering.¹¹⁷

Can the threshold of severity under article 3 be reached in instances of sanctions? The answer to this question has to be positive in some situations. This is because the effects of the imposition of sanctions sometimes lead to inability of claimants to meet their basic needs. Non-compliance with Universal Credit requirements incurs the second harshest sanctions in the world, as was said earlier. It has been established that people have to resort to foodbanks in order to satisfy their basic necessities. For instance someone using a foodbank said:

The only time I come [to the food bank] is if my benefits have been stopped or cut. I had a sanction once because I was overpaid child tax credit, so they stopped the payment completely. It’s not a nice way of living, literally living day by day... We’re lucky the food bank is here but there should be a system to catch us before we fall through the net.¹¹⁸

This reality can be viewed as deliberate state action, even if it is supposed to have a legitimate aim, because the state authorities know or ought to know of the effects of benefit sanctions on people’s

¹¹⁰ See Human Rights Watch, ‘Nothing Left in the Cupboards – Austerity, Welfare Cuts, and the Right to Food in the UK’, 20 May 2019. See also Joseph Rowntree Report, ‘Destitution in the UK 2018’, 52.

¹¹¹ Adler, as above n 16, chapter 1. See also M. Simpson, “‘Designed to Reduce People... to Complete Destitution’”: Human Dignity in the Active Welfare State’ (2015) *European Human Rights Law Review* 66 at 71.

¹¹² *Ireland v UK*, App No 5310/71, judgment of 18 January 1978 [162].

¹¹³ *ibid.*

¹¹⁴ The question of article 3 and destitution was examined early on in *Francine van Volssem v Belgium* (1991) 1 *Droit Social* 88. Discussed by L. Pettiti, ‘Pauvreté et Convention Européenne des Droits de l’Homme’ (1991) 1 *Droit Social* 84; see also Antonio Cassese, ‘Can the Notion of Inhuman or Degrading Treatment Be Applied to Socio-Economic Conditions?’ (1991) 2 *European Journal of International Law* 141, and C. O’Cinneide, ‘A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights’ (2008) *European Human Rights Law Review* 583.

¹¹⁵ *MSS v Belgium and Greece*, App No 30696/09, Grand Chamber Judgment of 21 January 2011.

¹¹⁶ *Regina v Secretary of State for the Home Department (Appellant), ex parte Adam (FC) (Respondent)*; *Regina v Secretary of State for the Home Department (Appellant), ex parte Limbuella (FC) (Respondent)*; *Regina v Secretary of State for the Home Department (Appellant), ex parte Tesema (FC) (Respondent) (Conjoined Appeals)* [2006] 1 AC 396.

¹¹⁷ *ibid* [7-8], per Lord Bingham.

¹¹⁸ Human Rights Watch, as above n 110.

lives.¹¹⁹ These include shock and confusion (because they thought that they had complied with the conditions), economic hardship, deep poverty, debt, eviction threats, homelessness, food bank use and ill health.¹²⁰ It is therefore possible to envisage individual cases where the deprivation is so extreme that it can ground responsibility of the state for violations of article 3.

Universal Credit claimants under zero-hour contracts face additional problems to other claimants. This is because the benefit is paid in arrears on the basis of earnings for the previous month, on the assumption that in the month that follows a claimant will have the same earnings. As this is not the case for many on zero-hour contracts, they regularly receive payments that are not correctly calculated, and do not cover their basic needs.¹²¹ It is not only the sanctions that may reach the level of severity of article 3, in other words, but also the effects of the design of payments.

Right to private life and prohibition of discrimination

Aspects of the unjust structure described here may also give rise to a violation of the right to private life guaranteed in article 8 of the ECHR,¹²² either alone or in conjunction with article 14 that prohibits discrimination in the enjoyment of Convention rights. The Court interprets article 8 broadly so as to cover activities that take place not only in one's home or other private space, but also in an individual's personal and social life: 'the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings',¹²³ as the Court puts it.

The digitalisation of the scheme entails very close monitoring of claimants' everyday life, which may violate article 8. Aspects of the system, such as the Claimant Commitment, have been described as an authoritarian approach towards the unemployed.¹²⁴ Social policy scholars have suggested that there is 'large-scale surveillance of detailed back-to-work plans, involving variable coercion, since claimants can be sanctioned for non-compliance with any item written in the document'.¹²⁵ Claimants have to show that they look for work 35 hours a week, and the main system to monitor this is an online electronic search engine for jobs. This electronic system has been characterised by Fletcher and Wright as a 'digital panopticon', and criticised for being 'laced with compulsion and intrusive surveillance'.¹²⁶ People's work coaches can see their daily online activity, such as the jobs for which they applied, and use the information in order to impose sanctions on them. The extensive monitoring of how they spend their life, the 'shameful revelations' of their daily life that they are forced to make (to use the words of Wolff), and the fact

¹¹⁹ The 'know or ought to know' formulation is regularly used by the ECtHR to establish positive obligations of state authorities for human rights violations. See, for instance, *Osman v UK*, App No 23452/94, judgment of 28 October 1998 [116].

¹²⁰ See Watts and Fitzpatrick, as above n 3; Fitzpatrick et al, 'Destitution in the UK', Joseph Rowntree Foundation, 2018; C. Fitzpatrick, G. McKeever and M. Simpson, 'Conditionality, Discretion and TH Marshall's "Right to Welfare"' (2019) 41 *Journal of Social Welfare and Family Law* 445; S. Wright and A.B.R. Stewart, 'First Wave Findings: Jobseekers', May 2016, available at <http://www.welfareconditionality.ac.uk/wp-content/uploads/2016/05/WelCond-findings-jobseekers-May16.pdf>; Adler, as above n 15, chapter 6.

¹²¹ See the submissions of the Welfare Conditionality Project to the UN Special Rapporteur on Extreme Poverty and Human Rights, https://www.ohchr.org/Documents/Issues/EPoverty/UnitedKingdom/2018/NGOS/Welfare_Conditionality_Sanctions_SupportandBehaviourChange.pdf. See also Alston Report, as above n 37 [52-54].

¹²² Article 8(1) of the ECHR reads as follows: 'Everyone has the right to respect for his private and family life, his home and his correspondence'.

¹²³ *Von Hannover v Germany* (No 2) [95]. Other examples that illustrate the broad coverage of article 8 include *Niemietz v Germany*, App No 13710/88, judgment of 16 December 1992; *Sidabras and Dziantas v Lithuania*, App Nos 55480/00 and 59330/00, judgment of 27 July 2004.

¹²⁴ D.R. Fletcher and S. Wright, 'A Hand Up or a Slap Down? Criminalising Benefit Claimants in Britain Via Strategies of Surveillance, Sanctions and Deterrence' (2018) 38 *Critical Social Policy* 323.

¹²⁵ *ibid* 330.

¹²⁶ *ibid* 332.

that the participants feel that they are always checked on bring their experience within the scope of the right to private life under article 8 of the ECHR.

When there is an interference with article 8, the Court applies a test of proportionality in order to assess whether the interference is justified or whether it violates the right to private life: it first assesses whether it has a legitimate aim, and then whether the means are proportionate to the aim pursued. It was earlier said that the aim of the scheme may be presented as legitimate, and the UK Government would argue that the surveillance is justified as a proportionate restriction of the right to private life. However, it should be viewed as only *prima facie* legitimate, for if we observe the overall structure created by the scheme, it will be obvious that ‘the balance between sanction and support has tipped firmly in favour of the former’,¹²⁷ putting in question whether the aim is really to support the poor or whether it is to sanction and manage them, as Adler argued. Even if the aim were viewed as legitimate, the extensive intrusion in question might be found to be disproportionate to the aim pursued.¹²⁸

As with article 3 discussed above, the state conduct in question can be examined not only as an aspect of the structure discussed in this piece, but also independently of exploitative working arrangements, as a free-standing violation. However, if the intrusive monitoring is examined as an aspect of the whole structure set up by the UK welfare-to-work system, whereby individuals know that they may face severe sanctions and destitution if they do not comply with work coaches’ directions, the intrusion is graver than if we only assessed it as a free-standing violation.

Article 8 may be violated alone, or in conjunction with article 14 that prohibits discrimination. This latter provision is not exhaustive in enumerating the prohibited grounds of discrimination.¹²⁹ In the case of welfare-to-work, the ground in question would be someone’s ‘social origin’. The Court has decided several cases that address the issue of poverty and social exclusion.¹³⁰ In *Wallona and Walla v Czech Republic*,¹³¹ for instance, the applicants and their children were separated following court orders, because they could not afford housing that would be spacious enough for the whole family. As the reason for the separation was the applicants’ material deprivation, and not their relationship with their children, the action of the authorities was viewed as disproportionate to the aim pursued.¹³² The Court ruled that article 8 was violated alone, and in light of that it did not consider whether there was a breach of article 14 too. Similarly, in *Garib v the Netherlands*,¹³³ which involved the right to choose one’s residence under article 2 of Protocol 4 of the ECHR, the majority of the Court did not take the opportunity to clarify the role of poverty as a ground of discrimination which was not invoked by the applicant. However, Judge Pinto de Albuquerque, joined by Judge Vehabovic, was critical of this aspect of the majority decision, and examined extensively poverty as a ground. He said that poverty ‘contains within it a highly destructive potential as it jeopardises the fulfilment of many fundamental freedoms’,¹³⁴ and explained that many international and national human rights documents prohibit discrimination

¹²⁷ *ibid* 330.

¹²⁸ For analysis of how the test of proportionality operates in qualified rights under the ECHR, see G. Letsas, ‘Rescuing Proportionality’ in R. Cruft, S.M. Liao and M. Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford: OUP 2015) 316 at 337-338.

¹²⁹ See generally S. Fredman, ‘Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights’ (2016) 16 *Human Rights Law Review* 273.

¹³⁰ See F. Tulkens, ‘The Contribution of the European Convention on Human Rights to the Poverty Issue in Times of Crisis’, 2015, available at [http://www.ejtn.eu/Documents/Administrative%20Law%20202015/5\)%20ECtHR%20for%20Judicial%20Trainers/ECHR,%20economic%20crisis%20and%20poverty%20\(paper\).pdf](http://www.ejtn.eu/Documents/Administrative%20Law%20202015/5)%20ECtHR%20for%20Judicial%20Trainers/ECHR,%20economic%20crisis%20and%20poverty%20(paper).pdf) See also the cases and literature earlier, under the discussion of possible violations of article 3 of the ECHR.

¹³¹ *Wallona and Walla v Czech Republic*, App No 23848/04, judgment of 26 October 2006.

¹³² See particularly [73-74].

¹³³ *Garib v the Netherlands*, App No 43494/09, Grand Chamber Judgment of 6 November 2017.

¹³⁴ *ibid* [25].

on the basis of ‘economic condition or status’ or ‘social origin’.¹³⁵ He also emphasised that the Inter-American Court of Human Rights has explicitly ruled that poverty is a factor of discrimination.¹³⁶ In light of the international and regional approaches to poverty in this context, the dissenting opinion suggested that the ECHR should also be interpreted as prohibiting discrimination on the grounds of poverty. Similarly, as Francoise Tulkens argued, the Court has interpreted article 14 in a manner that is particularly sensitive to structurally vulnerable groups,¹³⁷ so it is possible to envisage a situation where extensive intrusions with the right to private life of those who are poor constitute a disproportionate intrusion in their privacy.

It should be evident that by examining the compatibility of welfare-to-work schemes with strict conditionality with human rights, I do not suggest that activation policies or non-standard work arrangements always constitute violations of human rights. However, the whole structure as described in the preceding sections creates systemic oppression and exploitation of the poor, who are forced into exploitative working arrangements, which grounds responsibility for human rights violations.

CONCLUSION

Welfare-to-work schemes are supposed to support the poor to enter into paid work, because work is presented as the most effective route out of poverty. However, the system in the UK has ended up coercing those who are poor and disadvantaged into conditions of in-work poverty and exploitation through the menace and imposition of severe sanctions. Through schemes with strict conditionality structures of exploitation have been created and sustained, becoming widespread and routine. The disadvantaged are forced into exploitative conditions while employers benefit from this situation.

In this article I presented the problem and situated it in the theoretical framework of state-mediated structural injustice, which I suggested is the best way of explaining the wrong. On this analysis, I proposed that we can identify agency in the context of an unjust structure, and should attribute responsibility to the state for putting in place laws that have a *prima facie* legitimate aim but which create patterns whereby large numbers of people are exploited. I also claimed that this state-mediated structural injustice violates principles that are enshrined in human rights law, which the authorities have an obligation to examine and address.

It took scrutiny by parliamentary committees, such as the Work and Pensions Committee, and a Report of the UN Special Rapporteur on Extreme Poverty and Human Rights and Extreme Poverty, to raise awareness, start uncovering the injustice of the situation, and highlight the state’s responsibility for it. It will take decisive and concrete steps by the Government to assess the scheme’s impact and change the structure that places the worst off in a position of routine and systemic exploitation, in order to comply with its human rights obligations.¹³⁸ Legal reform will not root out poverty, which is a deeper structural problem, but will at least shake off aspects of a structure that systematically forces and traps the poor in workplace exploitation.

¹³⁵ Such as the International Covenant on Civil and Political Rights, article 26; American Convention on Human Rights, article 1.

¹³⁶ See *Gonzales Lluy v Ecuador*, Judgment of 1 September 2015.

¹³⁷ Tulkens, as above n 130, 14.

¹³⁸ For a theoretical account of requirements that need to be met for welfare-to-work schemes to be just, see S. White, *The Civic Minimum* (Oxford: OUP 2003).