

Structural Injustice and the Human Rights of Workers

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Abstract: An increasing number of jobs are precarious, making workers vulnerable to various forms of ill-treatment and exploitation. The UK Government's main approach has been to criminalise the actions of unscrupulous employers who seek to exploit these. This approach, however, has been ineffective, partly because it ignores the broader socio-economic structures that place workers in conditions of vulnerability. This article develops an alternative solution, seeking to identify structures that force and trap workers in conditions of exploitation. It focuses specifically on what I call 'state-mediated structural injustice', where legislative schemes that promote otherwise legitimate aims create vulnerabilities that force and trap workers in conditions of exploitation. I use examples such as restrictive visa regimes, welfare conditionality programmes, and zero-hour contracts to illustrate the unjust structures. I finally assess whether these legal structures are compatible with human rights, such as the right to private life, the prohibition of slavery, servitude, forced and compulsory labour, and the right to fair and just working conditions, and make proposals for legal reform.

Keywords: structural injustice, modern slavery, forced labour, domestic work, Universal Credit, prison labour, immigration detention, human rights.

1. *Introduction*

In recent years, the UK Government has paid much attention to 'modern slavery', seeking to play a world-leading role in addressing the wrong. The term may appear somewhat obscure but the concept and the rhetoric surrounding it invokes extreme forms of labour exploitation, which the authorities seek to uncover and address. In this context, the Government has deployed a

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fierce rhetoric that focuses on individual responsibility of unscrupulous employers. Writing in 2016, Theresa May said:

These crimes must be stopped and the victims of modern slavery must go free. This is the great human rights issue of our time, and as Prime Minister I am determined that we will make it a national and international mission to rid our world of this barbaric evil.¹

In order to tackle this ‘barbaric evil’, the UK Government in 2015 enacted the UK Modern Slavery Act (MSA 2015), a piece of criminal legislation that codified and consolidated existing legislation² and increased penalties for the most serious offenders. Through this Act the aim was to send a clear and decisive message that labour exploitation will not be tolerated.

In January 2018 a frightened 18 year old man from Vietnam went to a police station in London and reported that he had spent 5 years being trafficked in and out of cannabis houses by criminal gangs across the capital.³ He explained how he travelled from Vietnam, through Europe, and was then put in the back of a lorry to come to the UK and work in cannabis cultivation. The police contacted the Home Office, and the man was detained and sent to an immigration centre, Brook House, where people are placed in detention before deportation. Some detainees in immigration detention centres are asylum seekers. As a general rule, asylum seekers do not have a right to work in the UK, and have to survive on just over £5 a day, which means that they cannot meet their basic needs.⁴

However, asylum seekers and other detainees in immigration detention centres are allowed to work while in detention.⁵ According to a Report on the conditions in Brook House, there were 116 paid work roles in the centre: ‘[t]hese included wing orderlies, barbers, kitchen orderlies and posts in the laundry, the garden, the chaplaincy and the food serveries’.⁶ Despite performing this work, those detained could not earn qualifications, certificates of other forms of

¹ T May, ‘My Government Will Lead the Way in Defeating Modern Slavery’ *The Telegraph* (London, 31 July 2016) <<https://www.telegraph.co.uk/news/2016/07/30/we-will-lead-the-way-in-defeating-modern-slavery/>> accessed 4 August 2020.

² Sexual Offences Act 2003 ss. 57-59; Asylum and Immigration (Treatment of Claimants) Act 2004 s 4, as amended by ss 109 and 110 of the Protection of Freedoms Act 2012, and s 71 of the Coroners and Justice Act 2009.

³ A Kelly and A Gentleman, ‘Lorry Deaths: Police Face Trust Problem Over Appeal to Vietnamese Migrants’ *The Guardian* (London, 31 October 2019) <<https://www.theguardian.com/world/2019/oct/31/modern-slavery-cannot-be-tackled-if-victims-treated-as-criminals>> accessed 4 August 2020.

⁴ See the discussion in M Gower, ‘Should Asylum Seekers Have Unrestricted Rights to Work in the UK?’ (House of Commons Library, Briefing Paper 1908, 2019).

⁵ See ‘Working for a Pound an Hour: An Immigration Detainee’s Perspective’ (*Futures of Work Blog*, 20 September 2019) <<https://futuresofwork.co.uk/2019/09/30/working-for-a-pound-an-hour-an-immigration-detainees-perspective/>> accessed 4 August 2020.

⁶ K Lampard and E Marsden, ‘Independent Investigation into Concerns about Brook House Immigration Removal Centre: A report for the divisional chief executive of G4S Care and Justice and the main board of G4S plc’ (November 2018) para 9.45 <<https://www.verita.net/wp-content/uploads/2018/12/G4S-version-report.pdf>> accessed 4 August 2020.

recognition for it.⁷ There are detainees who while in detention work seven days a week, cleaning the floor, showers and rooms. One detainee wrote that he had morning, afternoon and evening shifts, as well as shifts in between.⁸ There was so much work for him to do that he ended up cleaning all day, seven days a week. He took pride in his work and received positive feedback from staff but was only paid £1 an hour, and a maximum of £30 a week. People in immigration detention centres are detained in order to be deported. If they are victims of trafficking, there is a real risk of re-trafficking, namely a risk to be trafficked again soon after they have exited the situation.⁹ In this way, their ordeal starts all over again.

The above example seeks to show that there are people who are trafficked and exploited, who contact the authorities and are then placed in immigration detention; they work while in detention in cleaning and maintenance of the facilities, and are exploited again by being seriously underpaid. Then they are deported, and possibly re-trafficked in order to be exploited once more.

There are many criticisms of the MSA 2015, which will not be developed further in this piece.¹⁰ What I want to highlight here is that the political rhetoric surrounding the MSA 2015 gives the appearance of tackling exploitation but the Act does not actually address exploitation, as this article shows. Alongside the fierce statements on the individual perpetrators of modern slavery and human trafficking, the Government has shown limited interest in addressing the structures, and particularly the legal structures, that make people vulnerable and force them into conditions of workplace exploitation. The concept of exploitation is, of course, contested.¹¹ For the purposes of this article, exploitation occurs when someone takes advantage of a person's vulnerability by violating their labour rights in order to make profit. By referring to structures, the point that I want to underline is that we should move our focus away from individual responsibility of employers or traffickers of the kind that we find in the MSA 2015. We should turn our attention instead to patterns whereby legislation creates structures of injustice. These structures of injustice are the subject of this piece.

The next part of the article discusses a series of examples: first, domestic workers and migrant workers under restrictive visas, second, prison workers and immigration detainees, and, third, workers under welfare conditionality programmes, such as Universal Credit. These examples are an illustrative selection and are not exhaustive. Even though they may not seem connected at first, what they have in common is that upon closer inspection, we can identify a

⁷ *ibid.*

⁸ 'Working for a Pound' (n 5.)

⁹ See eg A Jobe, 'The Causes and Consequences of Re-Trafficking' (2010) International Organization for Migration. On problems in the UK anti-trafficking system, which sometimes puts people at risk of re-trafficking, see Labour Exploitation Advisory Group, 'Detaining Victims: Human Trafficking and the UK Immigration System' (2019) 49.

¹⁰ See V Mantouvalou, 'The UK Modern Slavery Act Three Years On' (2018) 81 MLR 1017.

¹¹ Literature on the topic of exploitation includes: A Reeve (ed), *Modern Theories of Exploitation* (Sage Publications 1987); R Goodin, *Reasons for Welfare* (Princeton University Press 1988); A Wertheimer, *Exploitation* (Princeton University Press 1999); R Sample, *Exploitation: What It Is and Why It's Wrong* (Rowman and Littlefield 2003); J Wolff, 'Structures of Exploitation' in H Collins, G Lester and V Mantouvalou (eds), *Philosophical Foundations of Labour Law* (OUP 2018) 175; V Mantouvalou, 'Legal Construction of Structures of Exploitation' in the same volume, 188.

pattern. The pattern consists in laws with a *prima facie* legitimate aim that create or sustain structures of injustice. Through these laws workers are forced and trapped in unjust, precarious and insecure arrangements, which are not isolated instances of ill-treatment but instead become widespread, standard and routine.

In the third part, the article situates the problem in the theoretical framework of structural injustice, which was first developed by Iris Marion Young.¹² Young's analysis of structural injustice aimed at assessing 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 focus on what I call 'state-mediated structural injustice'. 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.¹³ This is an important task in the effort to hold accountable particular actors for wrongdoing, and not just those who benefit from structural injustice.¹⁴ To the extent that the state is responsible for the unjust structure, it has a duty to address the injustice.

The fourth part of this article considers how human rights address these examples of state-mediated structural injustice. It suggests that human rights law is particularly well-suited to capture this type of responsibility, because from its inception it involved the role of the state. The article examines rights that are classified as both civil and political, and economic and social, such as the prohibition of forced labour, the right to private life, and the right to fair and just working conditions. 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 for human rights violations, we have to hold the actors accountable and change the unjust laws.

2. *Patterns of Legislation*

What are the patterns of legislation that place workers in a position of vulnerability to exploitation?

¹² IM Young, *Responsibility for Justice* (OUP 2013). For an early discussion of the main concepts, see IM Young, *Justice and the Politics of Difference* (Princeton University Press 1990) ch 2.

¹³ See M Powers and R Faden, *Structural Injustice – Power, Advantage, and Human Rights* (OUP 2019) 115. For other examples of scholarship that examine 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; C Lu, *Justice and Reconciliation in World Politics* (CUP 2017).

¹⁴ Powers and Faden, *ibid.*

A. *Domestic Workers*

Domestic workers are workers undertaking various household tasks, like cleaning, cooking, looking after children and the elderly. Some domestic workers live in the employers' household, so their living and working conditions are hidden from the public eye. Live-in domestic workers are mostly migrants, which means that they face challenges, such as language barriers, lack of friends, family or other networks of support in the country, lack of knowledge of existing networks of support and of their legal rights. As they work in private households, they have few opportunities to develop social relations.

The problem that this section highlights is that domestic workers are excluded from much labour protective legislation in many legal orders.¹⁵ In the UK, for example, domestic work is excluded from health and safety provisions, including health and safety inspections, because workers are employed in private homes.¹⁶ They are also excluded from the majority of working time protections, for instance, on maximum weekly working time, length of night work and night work by young workers.¹⁷ Domestic workers are vulnerable because their work is invisible as they work in private homes. In addition, housework, being traditionally women's work, is generally undervalued.¹⁸ However, their exclusion from protective legislation makes us think about a different pattern, one that is created by law. The law places these workers in a position of even greater vulnerability, while employers benefit from this situation.

The reasons why we have these exclusions from protective laws may appear legitimate at first. Domestic work is viewed as different from other kinds of work.¹⁹ This is said to justify why it has traditionally been subject to special rules. In relation to the specific exclusions mentioned above, as these workers are employed in private homes and people's homes are their property, inspections may appear too intrusive with employers' property and privacy rights. When they are 'live in' domestic workers, the employer offers to them accommodation and food, which is supposed to justify exclusions from other labour rights. The aim of the laws in question, in other words, is not to exploit these workers. They simply treat them differently because of the particularities of the sector.

Importantly and in addition to the above, since 2012 there is a visa scheme in the UK, which effectively ties migrant domestic workers to the employer with whom they entered the

¹⁵ V Mantouvalou, 'Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labour' (2012) 34 *Comparative Labor Law and Policy Journal* 133.

¹⁶ See s 51 of the Health and Safety at Work Act 1974.

¹⁷ For discussion and analysis, see G Mundlak, 'Recommodifying Time: Working Hours of "Live-in" Domestic Workers' in J Conaghan and K Rittich (eds), *Labour Law, Work, and Family* (OUP 2005).

¹⁸ LJB Hayes, *Stories of Care: A Labour of Love: Gender and Class at Work* (Palgrave Macmillan 2017) 52.

¹⁹ For an exploration of this idea from a historical perspective, see E Albin, 'From "Domestic Servant" to "Domestic Worker"', in J Fudge, S McCrystal, K Sankaran (eds) *Challenging the Legal Boundaries of Work Regulation* (Hart 2012) 231.

country. This occurred against the background of the so-called Points-Based-System. Under this system, the policy is to not grant visas to low-skilled migrants, so that domestic workers who are typically viewed as low-skilled workers did not fit.²⁰ The Overseas Domestic Worker visa does not permit domestic workers to change employer, contrary to the regime that existed before. Under the 2012 regime, when migrant domestic workers arrived lawfully in the country accompanying an employer, their visa status tied them to this employer.²¹ Their residency status was lawful only for as long as the employer with whom they entered employed them, to a maximum of six months. The six-month period was not renewable. Some changes were brought in through the Immigration Act 2016, but these have had a very limited effect on the situation of dependency.²²

The main problem of the visa is that workers who escape exploitative and abusive employers become undocumented, unless they are recognised as victims of human trafficking.²³ Their undocumented status makes them vulnerable to have limited judicial protection of their rights.²⁴ Being an undocumented migrant worker is even a criminal offence now as the Immigration Act 2016 includes measures that target migrant workers by criminalising illegal working.²⁵ In addition, if they stay in the UK while undocumented, there is evidence that they are exploited even further by new employers who know of their legal status and underpay them.²⁶ If they go to the authorities to report that they are victims of trafficking, on the other hand, they may end up in immigration detention in order to be deported. The visa was criticised for trapping migrant domestic workers in ongoing cycles of exploitation.²⁷ It also became a central political issue during the passing of the MSA 2015. However, despite significant pressure

²⁰ B Anderson, *Us and Them* (OUP 2013) 175.

²¹ See Immigration Rules, rr 159A-159H <<http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part5/>> accessed 4 August 2020.

²² See the discussion in Mantouvalou (n 10) 1032-1033.

²³ According to rr 159I-159K of the Immigration Rules (n 21) domestic workers recognised as victims of human trafficking with a conclusive grounds decision under the National Referral Mechanism have a right to apply for leave to remain for a period of up to 2 years.

²⁴ See A Bogg, '*Okedina v Chikale* and Contract Illegality: New Dawn or False Dawn?' (2020) 49 *Industrial Law Journal* 258.

²⁵ Immigration Act 2016, s 34. See ACL Davies, 'The Immigration Act 2016' (2016) 45 *Industrial Law Journal* 431; K Bales, 'Immigration Raids, Employment Collusion, and the Immigration Act 2016' (2017) 46 *Industrial Law Journal* 279.

²⁶ V Mantouvalou, "'Am I Free Now?'" *Overseas Domestic Workers in Slavery*' (2015) 42 *Journal of Law and Society* 329.

²⁷ *ibid.* For further examples of how domestic workers are trapped in cycles of exploitation and destitution, see A Sharp and N Sedacca, 'Dignity Not Destitution – The Impact of Differential Rights of Work for Migrant Domestic Workers Referred to the National Referral Mechanism' (Kalayaan 2019) <http://www.kalayaan.org.uk/wp-content/uploads/2019/10/Kalayaan_report_October2019.pdf> accessed 4 August 2020.

by the House of Lords, civil society and others, the Government resisted calls to make fundamental changes and return to the pre-2012 regime.²⁸

To sum up, the exclusion or different treatment of domestic workers from labour legislation, the visa that ties these workers to the employers, and finally the legal effects of being undocumented make us identify a pattern, which is created by law and places these workers in disadvantage.

B. *Prison Labour and Work in Immigration Detention*

The second example involves prison workers and people working while in immigration detention. Sometimes prisoners may work (not as part of their sentence). Work in fair conditions can be beneficial for prisoners.²⁹ However, there is evidence that refusal to undertake work while in prison could lead to punishment, including limited access to TV, reduced visits from friends and family and less gym time.³⁰ Importantly for the argument advanced here, the law excludes working prisoners from protective rules. In the UK, prisoners are not entitled to the minimum wage, which is £8.21 per hour for those over 25 years old. In light of this, those working either for the state or for private employers while in prison receive about £10 per week.³¹ There is a *prima facie* legitimate aim for this, which is twofold: first, work is supposed to be good for prisoners' rehabilitation; second, it contributes to the reduction of public spending for the running of prison facilities. However, the exclusion leads to a pattern of exploitation, which has been highlighted by the Howard League for Penal Reform that recommended that prisoners should not be paid below the national minimum wage.³²

There is a similar pattern in relation to detainees who work in private-run immigration detention centres. Immigration detainees are either asylum-seekers awaiting the outcome of their application or migrants awaiting deportation.³³ In terms of their work, English law says that paid work 'opportunities' may be provided in detention centres.³⁴ However, the law also excludes

²⁸ See particularly the Report of J Ewins, 'Overseas Domestic Workers Visa: Independent Review' (December 2015) <<https://www.gov.uk/government/publications/overseas-domestic-workers-visa-independent-review>> accessed 4 August 2020.

²⁹ R Lippke, 'Prison Labour: Its Control, Facilitation, and Terms' (1998) 17 *Law and Philosophy* 533; Howard League for Penal Reform, 'Business Behind Bars: Making Real Work in Prison Work' (2011) <https://howardleague.org/wp-content/uploads/2016/05/Business_behind_bars.pdf> accessed 4 August 2020.

³⁰ J Pandeli, M Marinetto and J Jenkins, 'Captive in Cycles of Invisibility? Prisoners' Work for the Private Sector' (2019) 33 *Work, Employment and Society* 596, 603-604.

³¹ Howard League (n 29) 35.

³² *ibid.*

³³ On immigration detention generally, see C Costello, 'Immigration Detention: The Grounds Beneath Our Feet' (2015) 68 *CLP* 143; See also Corporate Watch, 'Immigration Prisons: Brutal, Unlawful and Profitable – Yarl's Wood: A Case Study' (Corporate Watch 2011) <<https://corporatwatch.org/wp-content/uploads/2017/09/yarlswood2.pdf>> accessed 4 August 2020. On exploitation of labour in immigration detention, see A Riese, '[insert title]' (LLM dissertation, UCL 2015); T Lay, 'Are £1 an Hour Jobs Legal?' (*Corporate Watch*, 22 April 2015) <<https://corporatwatch.org/are-1-an-hour-jobs-legal/>> accessed 4 August 2020.

³⁴ Rule 17 of the Detention Centre Rules 2001, SI 2001/238.

immigration detainees from minimum wage legislation, while also providing that they should be paid at a flat rate. Section 59 of the Immigration, Asylum and Nationality Act 2006 excludes immigration detainees from minimum wage legislation. Detention Services Order 01/2013, in turn, provides that detainees should be paid at a flat rate of £1.00 per hour for ‘routine work’ (cleaning, for instance), and £1.25 per hour for ‘specified projects’ (painting, for instance).³⁵ Private companies running these detention centres exploit detainees by getting them to perform essential work for the maintenance of the centres, and pay them £1 per hour for this work.³⁶

C. *Welfare Conditionality and Precarious Work*

The third example that illustrates my argument involves welfare conditionality and precarious work. Welfare conditionality schemes are schemes that make welfare benefits conditional upon behavioural change.³⁷ My focus is on a particular and widely used aspect of conditionality that makes welfare benefits conditional upon work-related requirements, also known as welfare-to-work schemes. These 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.

In the UK in recent years the Welfare Reform Act 2012 adopted a particularly punitive conditionality regime.³⁸ The resulting Universal Credit system merged six separate in-work and out-of-work benefits into one means-tested payment. 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. All Universal Credit claimants have to complete a Claimant Commitment where they explain what action they take in order to get back to work, as well as the sanctions for non-compliance. They have a work coach who monitors closely what they do. If they do not meet the instructions of the work coach by missing an appointment with them, for instance, which sometimes may happen just accidentally, claimants face sanctions.

³⁵ Detention Services Order 01/2013: Paid work (reissued 2019, Home Office) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257748/paid-work.pdf> accessed 4 August 2020.

³⁶ See further K Bales and L Mayblin, ‘Unfree Labour in Immigration Detention: Exploitation and Coercion of a Captive Immigrant Workforce’ (2018) 47 *Economy and Society* 47; Jesuit Refugee Centre Report, ‘Detained and Dehumanised – The Impact of Immigration Detention’ (JRS June 2020) <<https://www.jrsuk.net/detentionreport17-18>> accessed 2020.

³⁷ For an introduction see B Watts and S Fitzpatrick, *Welfare Conditionality* (Routledge 2018).

³⁸ 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* (OUP 2008) chapter 2. See also S Deakin and F Wilkinson, *The Law of the Labour Market* (OUP 2005) ch 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* (Palgrave Macmillan 2018) ch 2. See also M Freedland, P Craig, C Jacqueson and N Countouris, *Public Employment Services and European Law* (OUP 2007) ch 6.

Non-compliance with Universal Credit requirements incurs the second harshest sanctions in the world:³⁹ the lowest for those who, for instance, do not attend a work interview, and the highest for those who do not apply for a job. Sanctions range from losing their benefit for 28 days the first time that this happens, to 182 days the second time, and 1095 days the third time.⁴⁰ The number of people sanctioned increased, from about 300,000 sanctions and disqualifications in 2001 to over 1,000,000 in 2013.⁴¹ There is much empirical evidence that shows that sanctions are imposed unfairly.⁴² 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.⁴³

The pattern that I want to highlight involves the relationship between the social security arrangements and the labour market in this context. What should be a social safety net in reality forces and traps people into exploitative work and in in-work poverty.⁴⁴ In the context of Universal Credit, which is an especially punitive scheme, Jobcentres require claimants to apply for and accept non-standard, precarious work, even if they really do not want this kind of insecure work.⁴⁵ It is crucial to underline here that claimants are expected to accept zero hour contracts, because these are viewed as valuable flexible arrangements.⁴⁶ If claimants do not apply for and accept these jobs, they lose social support and may face destitution.

It is typically said that work is the best route out of poverty.⁴⁷ However, it is important to appreciate that there are links between welfare-to-work and in-work poverty. There is empirical evidence from European countries, that welfare schemes with strict conditionality do not necessarily help people escape poverty. Seikel and Spannagel explained that activation policies force individuals to take up any job irrespective of how much it is paid, while cuts to benefits

³⁹ The US has the harshest sanctions in the world. See H Immervoll and C Knotz, 'How Demanding Are Activation Requirements for Jobseekers?' (2018) OECD Social, Employment and Migration Working Papers No 215, 47.

⁴⁰ *ibid* 32.

⁴¹ Adler (n 38) 46-47.

⁴² Adler (n 38) 58.

⁴³ See eg P Dwyer (ed), *Dealing with Welfare Conditionality* (Policy Press 2019). See also Watts and Fitzpatrick (n 38) 99.

⁴⁴ On different definitions of in-work poverty, see H Lohmann, 'The Concept and Measurement of In-work Poverty' in H Lohmann and I Marx (eds), *Handbook on In-Work Poverty* (Edward Elgar 2018) 7.

⁴⁵ For an illustration of how people are trapped in this situation, see J McBride, A Smith and 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.

⁴⁶ See the response to a question asked by Chris Stephens MP, HC 29 November 2018, 197460 <<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-11-29/197460/>> accessed 4 August 2020. See also the exchange in Parliament between Work and Pensions Secretary Amber Rudd MP and Chris Stephens 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>. On zero hour contracts, see A Adams, M Freedland and J Prassl, 'The "Zero-Hours Contract": Regulating Casual Work or Legitimizing Precarity?' (2015) Oxford Legal Studies Research Paper 11/2015.

⁴⁷ See eg Work and Pensions Committee, *Benefit Sanctions: Government's Response to the Committee's Nineteenth Report of 2017-2019* (HC 2017-19, 1949) [6].

reduce the total income of the household.⁴⁸ 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 pay levels’.⁴⁹ 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.⁵⁰

This problem was also highlighted by Philip Alston, UN Special Rapporteur on Human Rights and Extreme Poverty, who visited the UK in 2018.⁵¹ In a highly critical report, Alston explained that people under Universal Credit are forced to ‘take inappropriate temporary work just to avoid debilitating sanctions’.⁵² This is also supported by empirical research conducted in the UK by social policy scholars, who have shown that Universal Credit claimants are often forced to accept work that does not meet their basic needs, for otherwise they will lose all access to social support.⁵³

The examples of domestic work, work in prison and immigration detention, and precarious work by people under Universal Credit, are not exhaustive of the problem that this piece addresses. However, these examples are sufficient for present purposes, for they reveal a pattern of legislation that appears legitimate at first, but that creates patterns of injustice.

3. *Structural Injustice*

This section turns to the theoretical framework of structural injustice because the concept, as developed here, explains best the wrong and helps understand who is responsible for it. Earlier I explained that the UK Government typically uses a rhetoric of individual responsibility for workplace exploitation. This approach, which is particularly evident in the MSA 2015, places all emphasis on individual employers who are unscrupulous and take advantage of workers. It also blames workers, for being undocumented or for not being willing to work hard enough. When workers are exploited, the employers are to blame if they break the law. In this line of thinking,

⁴⁸ D Seikel and D Spannagel, ‘Activation and In-Work Poverty’ in H Lohmann and I Marx (eds), *Handbook on In-Work Poverty* (Edward Elgar 2018) 245.

⁴⁹ *ibid* 257.

⁵⁰ *ibid*.

⁵¹ Report of the UNHRC, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights: Visit to the UK and Northern Ireland’ (23 April 2019) A/HRC/41/39/Add.1.

⁵² *ibid* [57].

⁵³ 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) <<https://theconversation.com/welcome-to-britain-a-land-where-jobs-may-be-plentiful-but-are-more-and-more-precarious-87423>> accessed 4 August 2020; K Garthwaite, *Hunger Pains – Life Inside Foodbank Britain* (Policy Press 2016) 108.

the responsibility of the state only arises following that, and is limited to responsibility to address the wrong that unscrupulous employers have committed. Other times the question of employers' (or states') responsibility does not even arise for what can be described as workplace exploitation in precarious arrangements. This is because it is said that workers choose non-standard work, for the reason that these give them flexibility that is desirable.⁵⁴

It may be true that some workers benefit from non-standard work arrangements, such as part-time work. However, in many examples, it is the social conditions and the law that make them accept precarious work. The example of welfare-to-work with strict sanctions illustrates the point best. Individuals do not necessarily choose precarious jobs: they have to accept them in the context of welfare conditionality, because otherwise they will face severe economic hardship and destitution. In examples such as these, we are faced with structures of injustice and the law has a role to play in creating and sustaining these structures.

In order to analyse structural injustice, I use the work of the leading social and political theorist, Iris Marion Young, as a starting point.⁵⁵ Young developed her theory in response to libertarian and some liberal egalitarian analyses of social justice that focus on individual responsibility.⁵⁶ She questioned the argument 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.⁵⁷ For Young, structural injustice is different to injustice perpetuated by individuals and injustice perpetuated by the state or other powerful institutions.⁵⁸ Young analysed social processes that place groups in a position of disadvantage, and who cannot for this reason develop their capacities, while others benefit from this situation.

Young's analysis of structural injustice is grounded on a contrast between agency and structure. Structural injustice in her account suggests that there is no agential responsibility. When it comes to the role of the state, Young contrasts responsibility for structural injustice with responsibility for direct state action with intention to harm. She explains that:

Structural injustice is a kind of moral wrong distinct from the wrongful action of an individual agent or the repressive policies of a state. [It] occurs as a consequence of

⁵⁴ See, for instance, the Matthew Taylor, Greg Marsh, Diane Nicol and Paul Broadbent, 'Good Work: Taylor Review of Modern Working Practices' (Department of Business Energy & Industrial Strategy, July 2017) <<https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices>> accessed 4 August 2020, 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.

⁵⁵ This section draws on V Mantouvalou, 'Welfare-to-Work, Structural Injustice and Human Rights' (2020) MLR (forthcoming).

⁵⁶ For discussion of some of the debates, see Young, *Responsibility for Justice* (n 12) ch 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.

⁵⁷ Young (n 12) 56. Karl Marx wrote on capitalism as an unjust structure, in K Marx, *Capital* (first published 1867, International Publishers 1973).

⁵⁸ Young (n 12) 45.

many individuals and institutions acting to pursue their particular goals and interests, for the most part within the limits of accepted rules and norms.⁵⁹

In contrast to the modern slavery agenda to which I referred in the introduction, in the account of Young, the emphasis is not on individual evil employers. Structural injustice as understood by Young is due to many policies and individual acts, which are lawful, but that place large groups of people in conditions of exploitation and domination.⁶⁰ People act according to their interests, and do not break the law, but on her 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 employers for causing an injustice to broader social structures. At the same time, Young differentiates the responsibility that she discusses from the responsibility of states that cause injustice to groups through direct action with intention to harm, such as the responsibility of Mugabe for the atrocities that his regime committed.

My analysis differs from Young's theory, though, as it rests on the belief that in the examples discussed in this article we can identify agency in the context of the unjust structure.⁶¹ In this context, I examine the culpability of the state,⁶² which was not Young's focus. The responsibility that I discuss is not direct state action with intention to harm, though – at least not *prima facie*. It is different to the oppressive policies of Mugabe.

The structures of exploitation that I discuss are 'state-mediated'. The concept of state-mediated structural injustice describes structures that the state creates or reinforces through legislation with a *prima facie* legitimate aim, which has sometimes unintended (but certainly foreseeable) consequences that are very damaging for large numbers of people. On this analysis, the state is responsible and should be held accountable for the injustice.

The role of the state here is different to its role when the authorities cause deliberate harm to people. We are faced with laws and policies that are not necessarily illegitimate as such when looked at in isolation, but together they create patterns that coerce large numbers of people into exploitation, from which it is very hard to escape. The injustice is structural because the processes set up through these laws and policies enable employers to exploit workers.

⁵⁹ *ibid* 52.

⁶⁰ *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* (OUP 2009) 133. See also McKeown (n 13). 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.

⁶¹ See also literature above, n 13.

⁶² Powers and Faden also discuss the responsibility of states for structural injustice (n 13) ch 6.

It is typically said that the law affects power relations.⁶³ 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.’⁶⁴ 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 examples discussed in this piece is that through certain laws that are *prima facie* just the state creates unjust structures from which people cannot escape, which the employers exploit and from which they benefit.

Let us return to the examples discussed earlier. In the case of domestic work, the injustice does not occur through direct state action with intention to harm. State authorities do not directly exploit domestic workers. When excluding them from health and safety provisions, they put forward a *prima facie* legitimate aim, which consists in the protection of employers’ privacy or property. Inspectors would have to visit private homes, and this is viewed as problematic. When excluding these workers from other labour legislation, it is because the nature of this job is different to other jobs, and hence it requires special regulation.⁶⁵ By enacting the overseas domestic worker visa and criminalizing undocumented migrants, the state’s aim is to control immigration, which is viewed as a *prima facie* legitimate state function.⁶⁶ The doctrine of illegality in contract law (which bars workers from claiming some labour rights on the basis of an illegal contract) is supposed to preserve the integrity of the legal system.⁶⁷ These are all legitimate aims, at least *prima facie*. However, all these laws create structures of injustice for they place domestic workers in a position of vulnerability and trap them in conditions of exploitation. Other migrant workers in temporary labour migration schemes are in a similar position.⁶⁸

In prison work and work in immigration detention, the law may also have a *prima facie* legitimate aim, which consists in the rehabilitation of prisoners through work, on the one hand, and the reduction of public spending for the running of prisons and detention facilities, on the other. However, it creates structures of injustice, whereby prisoners and immigration detainees may have to work for either the state or private actors, while being excluded from labour

⁶³ *ibid* 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 University Press 2019).

⁶⁴ H Collins, ‘Against Abstentionism in Labour Law’ in J Eekelaar and J Bell (eds), *Oxford Essays in Jurisprudence* (Clarendon Press 1987) 86.

⁶⁵ See Albin (n 19).

⁶⁶ I am saying *prima facie* here because this is of course a complicated question. See, for instance, A Abizadeh, ‘Democratic Theory and Border Coercion – No Right to Unilaterally Control Your Own Borders’ (2008) 36 *Political Theory* 37; Anderson (n 20). See also B Anderson, ‘Migration, Immigration Controls and the Fashioning of Precarious Workers’ (2010) 24 *Work, Employment and Society* 300.

⁶⁷ A Bogg and S Green, *Illegality after Patel v Mirza* (Hart 2017).

⁶⁸ See further FLEX, ‘The Risks of Exploitation in Temporary Migration Programmes: A FLEX Response to the 2018 Immigration White Paper’ (FLEX 2019).

protective rules. They are paid below the minimum wage in order to perform monotonous tasks, very often jobs that most people do not want to do, while the state and private employers take advantage of this situation and exploit them.

Finally, when it comes to welfare-to-work schemes with strict conditionality, such as Universal Credit, we have legislation that has the *prima facie* legitimate aim of getting people out of poverty and into employment, and legislation that permits non-standard work arrangements that may allow flexibility to some workers. Both of these are legitimate aims, at least *prima facie*. But instead of supporting people to get out of poverty, schemes with strict conditionality that impose very serious sanctions to claimants force them into precarious work, in-work poverty and workplace exploitation.

What should be clear from the above discussion is that when we pay close attention to these situations, we identify patterns. These are not patterns of deliberate state action with intention to harm: the authorities attempt to justify them by pointing to aims of the laws that appear to be legitimate. However, they are at least as concerning because state action with a legitimate aim creates or reinforces structures of exploitation. These laws, then, are unjust. The state is responsible for creating and maintaining these structures of injustice. It also has a duty to address them.

4. *Human Rights*

Can the duty to address state-mediated structural injustice be grounded on human rights law? To provide an answer to the question this section focuses on the European Convention on Human Rights (ECHR) that has been incorporated in UK law through the Human Rights Act 1998, and also refers to findings of the European Committee of Social Rights (ECSR) and the International Labour Organisation (ILO), as the standards developed by these institutions are often used to shed light on the interpretation of the Convention.⁶⁹

In the patterns of injustice identified in this piece, it is private employers who exploit workers, not the state authorities themselves. However, the structures that make this systematic exploitation possible are state-mediated. The ECHR traditionally imposed negative obligations on states not to violate human rights. Over the years, the case law of the European Court of Human Rights (ECtHR) also developed positive obligations in certain circumstances to protect human rights in the private sphere, including the employment relationship.⁷⁰

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.

⁶⁹ 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 Ewing and J Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 Industrial Law Journal 2.

⁷⁰ See, for example, *Barbulescu v Romania*, App No 61496/08 (ECtHR Grand Chamber, 5 September 2017).

However, it has ruled that in some circumstances state responsibility may arise in the context of the organisation of the labour market⁷¹ and in matters of social policy.⁷²

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 which affect large numbers of people in ways that the authorities do not systematically examine and address. This situation may violate human rights, and the authorities have to be held accountable for any violations. Which are the human rights that are implicated in the above examples?

A. Prohibition of Slavery, Servitude, Forced and Compulsory Labour and the Right to Work

An obvious starting point is the prohibition of slavery, servitude, forced and compulsory labour under article 4 of the ECHR. The provision is implicated in the patterns identified in the examples of the overseas domestic workers, whose visa effectively ties them to their employer, the exploitation of prisoners and immigration detainees who are seriously underpaid, and the treatment of Universal Credit claimants who have to look for and accept precarious work under the menace of severe sanctions.

The ECtHR has examined several cases under article 4 in recent years, has developed the main concepts of the provision, and applied them in instances of severe labour exploitation. The first case where the Court found a violation of article 4 was the landmark *Siliadin v France*,⁷³ which involved a migrant domestic worker. The Court explained that her situation could not be classified as slavery because there was no legal right of ownership over her in French law, but that it constituted ‘servitude’, which also fell within the scope of article 4 of the ECHR that prohibits slavery, servitude, forced and compulsory labour. The Court defined ‘servitude’ as ‘an obligation to provide one’s services that is imposed by the use of coercion, and is to be linked with the concept of “slavery”’.⁷⁴ Factors that contributed to this classification included the living and working conditions of the applicant, her fear that was nurtured by her employers, the fact that her passport had been confiscated and that she was not allowed to leave the household. On forced and compulsory labour, the Court has noted that the wording of article 4 of the Convention has striking similarities to the ILO Convention No 29, and interpreted ‘forced and compulsory labour’ to encompass ‘all work or service which is exacted from any person and under the menace of any penalty and for which the said person has not offered himself

⁷¹ *Evaldsson v Sweden*, App No 75252/01 (ECtHR, 13 February 2007) [63].

⁷² 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 (ECtHR, 24 October 2019).

⁷³ *Siliadin v France*, App No 73316/01 (ECtHR, 26 July 2005).

⁷⁴ *ibid* para 124.

voluntarily'.⁷⁵ There are two key elements in this definition, in other words: first, the fear of a penalty; and second, the contrary will of the person.

The treatment of domestic workers under restrictive visas, prison workers, and possibly immigration detainees, and finally Universal Credit claimants may meet the criteria of forced labour.⁷⁶ In relation to the visa, the ECtHR ruled that a very restrictive visa regime, the artiste visa regime in Cyprus, led to a violation of the Convention.⁷⁷ This was because it formed strong ties between the worker and the employer creating the opportunity to exercise great control over the worker, and did not afford 'practical and effective protection against trafficking and exploitation'.⁷⁸ It can be said that the Cypriot visa regime that was found to violate the Convention in *Rantsev* was more restrictive than the overseas domestic worker visa. However, the *Rantsev* principles can be extended to cover this visa too. Indeed domestic workers may be viewed as more vulnerable than those under the artiste visa, for reasons such as their invisibility and isolation. Applying the *Rantsev* principles to the UK visa, it can be said that a system that effectively ties the workers to the employer creates a unique power of control and is linked to systematic exploitation. The authorities know of this situation but do not take steps to address it. These conditions do not afford 'practical and effective'⁷⁹ protection, and may therefore violate the prohibition under article 4.

Second, the legal structures that affect prison workers and workers in immigration detention may also be viewed as forced labour contrary to the Convention and the Charter. Article 4(3) explicitly permits work that is done in the ordinary course of detention. However, the Court has recognised that prisoners are in a vulnerable position.⁸⁰ On prison work, it was earlier said that there is evidence that refusal to do it could lead to punishment.⁸¹ This suggests that the work is very often not work freely chosen. On this, it is worth noting that the Committee of Experts of the ILO said in a report that 'where private enterprises are permitted to pay prisoners wages that are less than the minimum wage, their relationship cannot be considered comparable to a free employment relationship'.⁸² In immigration detention, people agree to engage in this work because otherwise they will have nothing to do for months in detention. The element of coercion is stronger in prison labour, but it is possible that immigration detainees feel that they have an obligation to work too because there is no other

⁷⁵ *Van der Musselle v Belgium*, App No 8919/80 (ECtHR, 23 November 1983) para 32.

⁷⁶ Costello has argued that the institution of immigration detention violates human rights law. See Costello (n 33).

⁷⁷ *Rantsev v Cyprus and Russia*, App No 25965/04 (ECtHR, 7 January 2010).

⁷⁸ *ibid* para 293.

⁷⁹ On the principle that rights have to be practical and effective, see *Airey v Ireland*, App No 6289/73 (ECtHR, 9 October 1979).

⁸⁰ See, for example, *Algür v Turkey*, App No 32574/96 (ECtHR, 22 October 2002) para 44; *Mikadze v Russia*, App No 52697/99 (ECtHR, 7 June 2007) para 109; *Renolde v France*, App No 5608/05 (ECtHR, 16 October 2008) para 93; and *Aliiev v Georgia*, App No 522/04 (ECtHR, 13 January 2009) para 97.

⁸¹ Pandeli, Marinetto and Jenkins (n 30) 603-604.

⁸² ILO Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference (ILO 1990) 90.

alternative while in detention, while they may also need the income.

The Strasbourg Court examined prison labour in *Stummer v Austria*,⁸³ which involved exclusion from affiliation to the state pension system for those who work while in prison. In that case the majority of the Grand Chamber did not find that there is forced labour, but Judge Françoise Tulkens disagreed. In a powerful dissent she explained that article 4 has to be interpreted according to present day conditions, and that ‘work without adequate social cover can no longer be regarded as normal work’.⁸⁴ For this reason, prison work in the conditions for which Stummer complained violates the prohibition, in the view of Tulkens.

The provision that prohibits forced labour under the European Social Charter (ESC) does not prohibit prison work but where prisoners work for private firms, the Charter requires their consent. Moreover, the ECSR says that their ‘pay and terms and conditions of employment must be as “similar as possible” to those applying to regular, waged employment’.⁸⁵ It cannot be said that a weekly remuneration of £10-15 or £30 for working every day for long hours is as similar as possible to regular waged work.

Third, the treatment of Universal Credit claimants who are in recent years forced into non-standard work under the menace of sanctions may also reach the level of exploitation required for a violation of article 4. There are several examples, emerging from empirical research, press coverage in the UK, and the analysis of the UN Special Rapporteur on Human Rights and Extreme Poverty, Philip Alston. These illustrate that people are forced into precarious work under the menace of serious sanctions (namely the withdrawal of welfare benefits) that may leave them destitute. The UK Supreme Court examined conditional welfare benefits in a 2013 judicial review case, *Reilly*.⁸⁶ The Court recognised that the provision has exploitation at its heart,⁸⁷ 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 avoidable hardship’, ‘needlessly distressing’ or ‘somewhat harassing’.⁸⁸ 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 precarious work, including zero-hour contracts, reach the level of exploitation required for a violation of article 4.⁸⁹ Support for this view can also be found

⁸³ *Stummer v Austria* App No 37452/02 (ECtHR, 7 July 2011).

⁸⁴ *ibid* (Partly Dissenting Opinion Judge Tulkens) para 8.

⁸⁵ Conclusions XVI-1 Germany.

⁸⁶ *Reilly & Anor, R (on the application of) v Secretary of State for Work and Pensions* [2013] UKSC 68, [2014] AC 453. 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 (Johnson and others) v Secretary of State For Work and Pensions* [2019] EWHC 23 (admin).

⁸⁷ *ibid* [81].

⁸⁸ *ibid* [89]. These terms were borrowed from *Van der Musselle v Belgium*, App No 8919/80 (ECtHR, 23 November 1983) [37].

⁸⁹ See R Mason, ‘Jobseekers Being Forced Into Zero-Hours Jobs’ *The Guardian* (London, 5 May 2014) <<https://www.theguardian.com/uk-news/2014/may/05/jobseekers-zero-hours-contracts>> accessed 4 August 2020.

in the conclusions of the ECSR.⁹⁰ According to the Committee, welfare-to-work may be incompatible with article 1(2) of the Charter, when work is inconsistent with human dignity or more generally when it is exploitative.⁹¹

B. *Prohibition of Inhuman and Degrading Treatment*

This section turns to the prohibition of inhuman and degrading treatment under article 3 of the ECHR. In some of the examples presented earlier, people may find themselves in destitution as an effect of the state-mediated structural injustice. For instance, there is evidence that some Universal Credit claimants become destitute because of the scheme.⁹² This may be due to either the cruelty of sanctions, or because of the way that the Universal Credit payments are made. Indeed, in his recent study, Adler suggested that benefit sanctions in the UK can be so cruel as to violate article 3 of the ECHR.⁹³

For article 3 to be breached, the conduct in question has to reach a ‘minimum level of severity’.⁹⁴ The ECtHR has not examined welfare conditionality under article 3 yet. However, it has examined the question whether destitution may in certain conditions violate article 3 of the Convention.⁹⁵ For example, the Grand Chamber of the Court ruled that in some extreme situations, leaving asylum seekers in conditions of destitution and homelessness could give rise to state responsibility under article 3.⁹⁶ The UK House of Lords reached a similar conclusion in the *Limbuela* case.⁹⁷ Can the threshold of severity under article 3 be reached in instances of sanctions in the context of welfare conditionality? The answer to this question has to be positive because the effects of the imposition of sanctions sometimes lead to inability of claimants to meet their basic needs, and having to use foodbanks, as well as the possibility of homelessness. It

⁹⁰ 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* (Peter Lang 2014) 139.

⁹¹ 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* (Hart 2017) 147, 159. See also Freedland and others (n 38) 227.

⁹² See Human Rights Watch, ‘Nothing Left in the Cupboards – Austerity, Welfare Cuts, and the Right to Food in the UK’ (HRW, 20 May 2019) <https://www.hrw.org/sites/default/files/report_pdf/uk0519_web3.pdf> accessed 4 August 2020. See also S Fitzpatrick, G Bramley, F Sosenko and J Blenkinsopp, ‘Destitution in the UK 2018’ (Joseph Rowntree Foundation, February 2018) <<https://www.jrf.org.uk/report/destitution-uk-2018>> accessed 4 August 2020 52.

⁹³ Adler (n 38) ch 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, 71.

⁹⁴ *Ireland v UK*, App No 5310/71 (ECtHR, 18 January 1978) [162].

⁹⁵ The question of art 3 and destitution was examined early on in *Francine van Volssem v Belgium* (1991) 1 *Droit Social* 88. See also A Cassese, ‘Can the Notion of Inhuman or Degrading Treatment Be Applied to Socio-Economic Conditions?’ (1991) 2 *EJIL* 141, and Colm O’Cinneide, ‘A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights’ [2008] *European Human Rights Law Review* 583.

⁹⁶ *MSS v Belgium and Greece*, App No 30696/09 (ECtHR Grand Chamber, 21 January 2011).

⁹⁷ *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 Limbuela (FC) (Respondent)*; *Regina v Secretary of State for the Home Department (Appellant), ex parte Tesema (FC) (Respondent) (Conjoined Appeals)* [2005] UKHL 66, [2006] 1 AC 396.

is possible that the Government would suggest that the effects of the system are mitigated by the provision of emergency support that is supposed to relieve those who are found in most serious need. However, there is evidence that this support is inadequate.⁹⁸

The authorities are aware of the seriousness of the effects of the sanctions on people's lives, which have been documented: shock, confusion and economic hardship. They are also aware of the evidence that there are links between sanctions and deep poverty, debt, eviction threats, homelessness, food bank use and ill health.⁹⁹ It is therefore possible to envisage individual cases where socio-economic deprivation of welfare claimants may ground responsibility of the state for violations of article 3.¹⁰⁰

C. Right to Private Life

Article 8 of the Convention protects the right to private and family life, home and correspondence. The second paragraph of the provision permits restrictions of the right if there is a legitimate aim and in a manner that is proportionate to the aim pursued. In some of the examples discussed in this piece, we can see that aspects of the unjust structure may violate the right to private and family life.

It was said earlier that domestic work is excluded from health and safety provisions and inspections in the UK.¹⁰¹ The aim pursued by this restriction appears to be legitimate at first. Employers have a right to private life in their home. If the authorities visited these households to inspect working conditions, the protection of the employers' private life would be restricted. However, it is important to appreciate that human rights law has highlighted in recent years that when wrongs, such as domestic violence, are committed in the privacy of someone's home, states have a duty to intervene and protect the victims.¹⁰² The protection of privacy in someone's home is not absolute.

In addition, domestic workers (and not just their employers) have a right to private life. Several aspects of the working and living conditions of live-in domestic workers may interfere with their own right to private life. The fact that they may not have their own room, they have very limited or no time off, very limited access to telephone often or other ways to communicate with their loved ones, no passports because the employers confiscate them which limits their freedom of movement, no opportunities to have a personal life whatsoever – the cumulative

⁹⁸ Fitzpatrick and others (n 92).

⁹⁹ See Watts and Fitzpatrick (n 37); Fitzpatrick and others (n 92); S Wright and ABR Stewart, 'First Wave Findings: Jobseekers' (ESRC, May 2016) <<http://www.welfareconditionality.ac.uk/wp-content/uploads/2016/05/WelCond-findings-jobseekers-May16.pdf>> accessed 4 August 2020; Adler (n 38) ch 6.

¹⁰⁰ The 'know or ought to know' formulation is regularly used by the ECtHR to establish obligations of state authorities for human rights violations. See eg *Osman v UK*, App no 23452/94 (ECtHR, 28 October 2018) [116].

¹⁰¹ In other legal orders, labour inspections in private homes are permitted, either unconditionally or under certain conditions. See ILO, *Labour Inspection and Other Compliance Mechanisms in the Domestic Work Sector: Introductory Guide* (2nd edn, ILO 2016) 17.

¹⁰² See *Bevacqua and S v Bulgaria*, App No 71127/01 (ECtHR, 12 June 2008); and *Opuz v Turkey*, App No 33401/02 (ECtHR, 9 June 2009).

effect of these restrictions constitutes an interference with their right to private life, which also has to be taken into account when assessing state obligations to protect them from exploitation and abuse in the context of article 8.¹⁰³

Is it justified not to have health and safety inspections to examine their living and working conditions? The answer has to be negative. This is because when we have identified a structure of injustice, such as the one in relation to domestic workers, the test of proportionality has to fail. The interest of the employer to have privacy should be outweighed by the interest of workers to be visible so that they are protected from workplace exploitation. The exclusion of domestic workers from health and safety provisions and other related legislation may also violate article 3 of the ESC that protects the right to health and safety at work. The ECSR examined it in 2015 and said that English law is not in conformity with the Charter.¹⁰⁴

Issues of private life also emerge when examining closely the system of Universal Credit. The digitalisation of the scheme entails very close monitoring of the everyday life of the claimants in order to assess their efforts to find work. Social policy scholars have suggested that there is ‘large-scale surveillance of detailed back-to-work plans’.¹⁰⁵ 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. 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 as a ‘digital panopticon’, and criticised for being ‘laced with compulsion and intrusive surveillance’.¹⁰⁶

The monitoring should not be assessed in isolation, but as an aspect of the whole structure set up by Universal Credit, whereby people know that they may face destitution if they do not comply with work coaches’ directions. The extensive monitoring of how they spend their life, and the fact 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.

Is the interference with the right to private life legitimate? This will depend on the implementation of the test of proportionality. The aim of the scheme may be presented as legitimate because it promotes the economic well-being of the country. 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, because 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’,¹⁰⁷ putting in question whether the aim is really

¹⁰³ For thorough analysis, see N Sedacca, ‘Migrant Domestic Workers and the Right to Private and Family Life’ (2019) 32 *Netherlands Quarterly of Human Rights* 288.

¹⁰⁴ European Committee of Social Rights, Conclusions XXI-2 - United Kingdom - Article 3-1.

¹⁰⁵ DR 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, 330.

¹⁰⁶ *ibid* 332.

¹⁰⁷ *ibid* 330.

to support the poor or whether it is to sanction and manage them, as Adler argued.¹⁰⁸ Even if the aim were viewed as legitimate, then, the extensive intrusion with people's everyday life should be found to be disproportionate to the aim pursued.¹⁰⁹

D. *Prohibition of Discrimination*

Finally, the above provisions may be violated alone or in certain circumstances together with article 14 that prohibits discrimination.¹¹⁰ The grounds of discrimination are open-ended in article 14.¹¹¹ The examples of structural injustice that I have identified may ground race discrimination because they have a disproportionate adverse effect on various minority, racial and ethnic groups.¹¹² For instance, looking at Universal Credit, black and Asian people are disproportionately represented in households that are found in poverty and unemployment, and are therefore in need of support.¹¹³ It could therefore be argued that there is a violation of article 14 together with article 4, 8 or 3 of the Convention, which were discussed earlier.

In addition, it can be argued that human rights law may be developing the view that poverty is itself a prohibited ground for discrimination.¹¹⁴ In *Wallona and Walla v Czech Republic*,¹¹⁵ 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

¹⁰⁸ Adler (n 38). Along similar lines, Hayes used the term 'institutionalised humiliation' in her study on the treatment of care workers by state authorities: Hayes (n 18) 4.

¹⁰⁹ For analysis of how the test of proportionality operates in qualified rights under the ECHR, see G Letsas, 'Rescuing Proportionality' in R Cruft, SM Liao and M Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 316, 337-338.

¹¹⁰ Article 14, ECHR, says that '[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

¹¹¹ 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. A recent Court of Appeal case examined the claim of detainees of immigration detention that their pay for work in detention violated their human rights, including the prohibition of discrimination. For discussion and critique of the judgment, see V Mantouvalou, 'Labour Exploitation in Immigration Detention' (*UK Labour Law Blog*, 1 June 2020) <<https://uklabourlawblog.com/2020/06/01/labour-exploitation-in-immigration-detention-by-virginia-mantouvalou/>> accessed 4 August 2020.

¹¹² See, for instance, *DH and Others v the Czech Republic*, App No 57325/00 (ECtHR Grand Chamber, 13 November 2007).

¹¹³ UNITE, 'Universal Credit: Not Fit for Purpose' (September 2019) <https://unitetheunion.org/media/2631/8869_universal-credit-report_a4_finaldigital.pdf> accessed 4 August 2020.

¹¹⁴ See F Tulkens, 'The Contribution of the European Convention on Human Rights to the Poverty Issue in Times of Crisis' (European Court of Human Rights – European Judicial Training Network Seminar, Strasbourg, 8 July 2015) <[http://www.ejtn.eu/Documents/Administrative%20Law%202015/5\)%20ECtHR%20for%20Judicial%20Trainers/ECHR,%20economic%20crisis%20and%20poverty%20\(paper\).pdf](http://www.ejtn.eu/Documents/Administrative%20Law%202015/5)%20ECtHR%20for%20Judicial%20Trainers/ECHR,%20economic%20crisis%20and%20poverty%20(paper).pdf)> accessed 4 August 2020. See also the cases and literature earlier, under the discussion of possible violations of article 3 of the ECHR.

¹¹⁵ *Wallona and Walla v Czech Republic*, App No 23848/04 (ECtHR, 26 October 2006).

their children, the action of the authorities was viewed as disproportionate to the aim pursued.¹¹⁶ 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*,¹¹⁷ 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',¹¹⁸ and explained that many international and national human rights documents prohibit discrimination on the basis of 'economic condition or status' or 'social origin'.¹¹⁹ He also emphasised that the Inter-American Court of Human Rights has explicitly ruled that poverty is a factor of discrimination.¹²⁰ 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 Judge Tulkens argued, the Court has interpreted article 14 in a manner that is particularly sensitive to structurally vulnerable groups,¹²¹ so it is possible to envisage a situation where extensive intrusions with, say, the right to private life of those who are poor constitute a discriminatory intrusion in their privacy.

To conclude this section, it should be said that this has not been an exhaustive discussion of human rights violations caused by the structures of injustice that are the focus of this piece. However, I attempted to explain that the unjust structures that I presented both raise human rights issues, and ground the responsibility of the state. This is because even though it is private employers who exploit workers in most of the examples, the state is responsible for the injustice because of the legislation that it has enacted – legislation with a *prima facie* legitimate aim that creates structures of injustice. Had the legislative framework been better, employers would not have had the power to exploit these categories of workers, taking systematic advantage of their position of vulnerability.

5. Conclusion

¹¹⁶ *ibid*, particularly [73]–[74].

¹¹⁷ *Garib v the Netherlands*, App No 43494/09 (ECtHR Grand Chamber, 6 November 2017).

¹¹⁸ *ibid* [25].

¹¹⁹ Such as the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 26; American Convention on Human Rights (22 January 1969, entered into force 18 July 1978) OAS Treaty Series No 36; 1144 UNTS 123, art 1.

¹²⁰ See *Gonzales Llay et al v Ecuador* Inter-American Court of Human Rights Series C No 102/13 (1 September 2015).

¹²¹ Tulkens (n 114) 14.

In this article, my aim has been to make three arguments. First, that structures of exploitation are built and people find themselves increasingly forced and trapped in bad jobs, while the employers benefit from this situation. Second, and crucially, that the state plays a significant role in creating or reinforcing these structures of injustice. It enacts rules with a *prima facie* legitimate aim, such as an aim to help people get back into work or an aim to control immigration, but with consequences that are very damaging for large numbers of people. Third, that the state violates human rights through creating or reinforcing these structures of injustice.

Since the state creates or reinforces these structures of injustice, it also has the power to rectify them. Not all instances of structural injustice can be addressed by law reform of course: 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 under human rights law and demand that they take the necessary steps to amend the laws that place workers in conditions of vulnerability.

This injustice will be rectified not through modern slavery laws that criminalise employers who engage in serious exploitation and abuse, to return to the introduction of this piece. It will be rectified by changing the laws that create structures of injustice: such as by protecting the health and safety of domestic workers, giving migrant workers an unconditional right to change employer, as well as safe immigration routes, using activation policies that are humane and focus on training and education, rather than harsh sanctions, paying detainees and prisoners fairly for their work and protecting them from labour exploitation.