

## Structures of Injustice, the Law, and Exploitative Work

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Injustices at work are often structural, because of the systematic inequality of bargaining power between the employer and the workers.<sup>1</sup> The economic structure of the market has the effect that employees have weaker bargaining power than employers. The more unregulated the market is, the weaker the power of the employee. Most of the time, the harm of exploitation in these circumstances is caused directly by the employers, who are mostly private actors. They may be acting lawfully, but they take advantage of the vulnerability of workers, which is caused by the economic system.<sup>2</sup> Traditionally, the state tries to reduce this vulnerability of workers to exploitation by regulating working conditions and protecting workers' rights through law. Much academic scholarship has focused on general inequalities in bargaining power, failures to reform property and contract, and the need to reform individual and collective labour law. While unquestionably important, this focus has neglected how specific laws also concretely create vulnerability and are connected to structures of exploitation.

Building on the work of Iris Marion Young, this chapter examines what I call 'state-mediated structures of exploitation' at work—namely, legal rules that increase workers' vulnerability, which is systematically exploited by private actors. My focus is on cases where the state through laws takes identifiable special measures, which promote a *prima facie* legitimate aim but which, in practice, increase the vulnerability of workers to exploitation by private employers. The vulnerability created by these measures is systematic. We observe a pattern of exploitation that emerges as a result, a structure, and

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<sup>2</sup> On vulnerability and structural injustice, see Schiff, Chapter 7, this volume.

not just some occasional or isolated cases. These structures become all the more widespread, standard, and routine. My ultimate aim is to assess in what circumstances the state may have legal responsibility on the basis of human rights law to change the rules and destabilize the unjust structures in question (see also Parekh, Chapter 14, this volume).

## I Structural Injustice

In what follows I do not develop a theory of justice at work but focus on the role of legal rules in creating, exacerbating, and entrenching structures of injustice. When I refer to structures, I use the term to describe patterns in social relations (Giddens 1984: 16). The specific injustice that interests me is workplace exploitation, by which I mean the unfair taking advantage of someone's vulnerability. I take the seminal work of Iris Marion Young (2011) on 'structural injustice' as a starting point.<sup>3</sup>

Young developed her theory on structural injustice in response to the position that people are responsible for being in poverty because of their life choices. She thought that poverty should not be analysed without examining social structures too.<sup>4</sup> By turning to the role of social structures, she sought to take a broad view and consider society's major social positions, and their systematic relations (Young 2011: 56).

For Young (2011: 45), structural injustice is different from injustice perpetrated by individuals and injustice perpetuated by the state or other powerful institutions. She developed the concept to describe situations where people find themselves suffering serious injustice, 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 pre-conditions and results of their actions are structural processes that produce unjust circumstances (Young 2011: 47). Young (2011: 52) 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

<sup>3</sup> See also her earlier 'Political Responsibility and Structural Injustice', Lindley Lecture at the University of Kansas, 2003, <https://kuscholarworks.ku.edu/bitstream/handle/1808/12416/politicalresponsibilityandstructuralinjustice-2003.pdf?sequence=1>. For a presentation of the main themes and literature analysing Young's work, see McKeown (2021).

<sup>4</sup> See the discussion in Young (2011: ch. 1). See also Shelby (2016).

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.

In situations of structural injustice, there are deep power differentials between social groups, and there are no particular agents responsible for this injustice: the injustice seems to be self-perpetuating (Jugov and Ypi 2019: 7). A problem that follows is that assigning responsibility for injustice in this context is difficult, because it is not clear who, if anyone, is blameworthy (see Browne, Chapter 5, this volume).

In relation to the injustice of exploitation particularly, Young argued that it ‘consists in social processes that bring about a transfer of energies from one group to another to produce unequal distributions, and in the way to which social institutions enable a few to accumulate while they constrain many more’. She further explained that ‘the injustices of exploitation cannot be eliminated by redistribution of goods, for as long as institutionalized practices and structural relations remain unaltered, the process of transfer will re-create an unequal distribution of benefits’ (Young 1990: 53). She adopted a structural account of exploitation, in other words, that does not focus on opportunistic employers or other agents but examines systematic relations.<sup>5</sup>

## II The Story of Sandy

Young illustrates the problem of structural injustice with the story of Sandy, a single mother of two who faced the prospect of homelessness through no fault of her own but because of a number of circumstances that affect people in a market economy. 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 particular individuals with whom she interacted, for they all acted according to the law, and 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 focus was on individual responsibility, and her primary aim was to show that everyone has ‘political responsibility’ to address unjust structures, and particularly those who are not directly responsible

<sup>5</sup> For further discussion, see [Deveaux and Panitch \(2017: 1\)](#).

for causing a particular harm. People act according to their interests, and do not break the law. They do not have backward-looking responsibility for the injustice, as she explains. However, they still have forward-looking responsibility to address it, because they benefit from the injustice.

Young's insight is crucial, because it shifts attention away from individual responsibility in two ways: on the one hand, it shows that people in Sandy's position are not responsible for their predicament. On the other hand, it illustrates how those with whom Sandy interacted along the way complied with societal rules and practices so they are also not necessarily responsible for having caused direct harm to her. Instead, Young places attention on broader social structures, people's social positions, and their interactions.

If Sandy herself or other people with whom she interacted are not responsible for her situation, could it be said that the state is responsible? Young says that the state cannot be blamed for the wrong that Sandy suffered, because there is no concrete law or policy that directly harmed her in the situation that she describes. To support the point, Young refers to state action where there is responsibility for harm and explains that Sandy's story was different from that of the victims of Mugabe who were evicted when he razed the shanty towns where they lived, or black and Jewish people who were forbidden from buying or renting property in the United States (Young 2011: 47). In examples such as these, states cause injustice to groups through direct action with intention to harm, or with their laws or policies, but this was not what the situation of Sandy exemplified as an instance of structural injustice.

There is no question that some laws and policies cause direct harm to people, but in the case of Sandy no such laws are involved. Young (2011: 47) acknowledged that '[s]ome laws, such as municipal zoning laws, and some policies, such as private investment policies, contribute to the structural processes that cause Sandy's plight, but none can be singled out as the major cause'. On the one hand, then, she refers to laws that cause harm directly, while, on the other hand, she refers to laws that might have contributed to harm, but that are not the major cause.

Young (2011: 166–9) paid further attention to the role of the state in a different aspect of her analysis of structural injustice. She explained that it comes in the discussion as follows: when it is not evident who is responsible for an injustice but it is clear that someone needs to do something about this injustice, the state may have a responsibility to act. This grounds a positive obligation for state action in order to solve the problem of coordination in the sense that no other actor has the task of addressing the injustice.<sup>6</sup> In this

<sup>6</sup> She refers to Goodin (1995: 28).

case, the strength of focusing on the role of the state for this structural injustice is said to be in that it has the capacity to raise awareness and change social processes in the future (see Parekh, Chapter 14, this volume).

Young's conception of structural injustice aimed to capture a type of responsibility that should be distinguished from individual fault and specific unjust policies. Young viewed Sandy as embedded in a network of relations where no one could be viewed as primarily responsible for her situation. The harm that she suffered is not caused immediately and is not as focused as a single policy, for its sources are multiple and long term. It is the result of many policies and the acts of thousands of individuals who act lawfully (Young 2011: 47–8). The responsibility in which Young was interested was individual, forward-looking, and political (rather than legal).

However, probably because her focus was on forward-looking responsibility, Young did not pay sufficient attention to powerful actors that act in a way that appears to be legitimate but that may in reality create or exacerbate vulnerability that is linked to structures of exploitation. For this reason, McKeown developed three different types of structural injustice—pure, avoidable, and deliberate—and explained that the role of powerful agents should be in the centre of our analysis (see McKeown, Chapter 4, this volume). My interest is specifically in the role of the state as a powerful actor and its use of the law in a manner that may be creating, perpetuating, and reinforcing structures of injustice.<sup>7</sup> In the case of Sandy, we do not have sufficient information on the laws that affected her and put her in a position of homelessness and destitution, so it is hard to assess whether we can identify legal rules that may be to blame for her situation.

### III The Story of Marcell

I will now tell a different story. Marcell is a 26-year-old man with a 9-year-old son and estranged partner, who live in London.<sup>8</sup> He had to leave college, where he was studying health and social care, in order to find work to support his partner and child. He moved from London to Newcastle, where life was less costly, but he initially only managed to find work for fifteen hours per week as a cleaner for an employment agency. He stayed in a hostel for a few months. While in this employment, Marcell often experienced delays in

<sup>7</sup> This was also discussed by Powers and Faden (2019: ch. 6).

<sup>8</sup> This testimony is a summary from the piece McBride et al (2018: 210).

being paid because of payroll and electronic system errors. His pay in 2015 was £6.70 per hour,<sup>9</sup> and his monthly net pay £420.

Marcell wanted to become a security officer, but he had to pay £220 to apply to get the Security Industry Authority Licence, which is a legal requirement for anyone working in the security industry. He could not afford this, though, because he had to use his income to cover his basic needs and support his son. Marcell tried to find more work, but he could not, so very often he was in debt at the end of the month. He could afford to pay only for essentials such as electricity, water, rent, and child support. At some point he managed to survive on noodles for five months in order to make savings to buy a carpet. He said that it was worth the sacrifice, because he wanted to have the carpet for his son's visit. He also started using a food bank. Marcell said that he wanted to go to university, work for a charity, and have a better personal and social life.

In 2016 Marcell moved to a new job as a cleaner, through the same agency, working twenty-two hours a week, paid at £7.20 per hour, about £500 per month. He also found a second, voluntary post in a community centre doing charitable work for four hours a week. He still experienced problems with being paid on time, and his hours were occasionally reduced, because some of the cleaners left work early, which led the supermarket to reduce the hours and pay for everyone. He was keen to get a licence as a security officer, but he did not manage to get financial support to obtain the certificate, even though he completed the necessary training. In the end he decided to cut down on food in order to pay for this. His social life was very limited. He went out on a date at some point, but the woman whom he dated had to pay for everything and did not see him again. He also had few opportunities to see his son.

Marcell said that working more hours simply meant that he had to pay more rent. 'I was better off when I was doing 15 hours a week because I had help with housing benefit. So I have to pay for rent, water, broadband, transport, have some food, pay my child support and be able to save at least maybe £20 or £10 a week' (McBride et al. 2018: 216). However, he was usually left with nothing at the end of the month, because he also had to repay a loan for a mobile phone and laptop that he had got when he was 16. In the end he decided that he could not go to the university, but all he wanted was to move back to London, be close to his son, and find a better job. Marcell said that his dream was to work for a charity in countries where there is real poverty. 'But for now, I'm still on the same roundabout' (McBride et al. 2018: 217).

The story of Marcell may seem similar to Sandy's. He is in a situation of underemployment and in-work poverty, unable to meet his basic needs, such

<sup>9</sup> This was compliant with the national minimum wage, which was set at £6.70 in 2015.

as food, but also basic social contact. Here, as in the story of Sandy, there does not appear to be any direct state action that harms Marcell, and no individual—no employer, landlord, or anyone—is breaking the law. Marcell is trapped in this situation: he wants to work longer hours, get a better job, and be able to cover his basic needs, but he cannot afford it. Our reaction, as in the case of Sandy, is that no one in an affluent society should be trapped in this situation of in-work poverty, being unable to cover his basic needs. At first glance, we might say that, like Sandy, Marcell is a victim of structural injustice too.

#### **IV The Law on Agency Work and Welfare Conditionality**

Sandy's story is fictional and presented in general terms, so we cannot scrutinize the role of the state or private actors more closely. The story of Marcell is real. For this reason, we can attempt to take a closer look at the role of the law. Marcell is employed through an agency as a part-time worker. There is much evidence on exploitative working conditions of those who are employed through agencies (see, e.g., [Judge and Tomlinson 2016](#); [Judge 2018](#)). Originally the purpose and use of employment agencies was to mediate between workers and employers so as to cover specific temporary business needs. In recent years, the agency industry has grown enormously ([Theodore and Peck 2016](#): 26). In this kind of working arrangements, which are often called precarious, it is not always clear whether there is an employer or whether the worker is self-employed, who is the employer (the employment agency or the end user), and what duties it owes to those who work for it (as an employee or worker). All these issues have implications for the legal rights that workers have or from which they are excluded through law. Businesses, acting lawfully, often prefer to cover permanent needs through agencies so that they do not assume employer duties that they would have had, had they employed workers directly.

The UK legal framework on agency work creates structures of injustice by increasing workers' vulnerability to exploitation, as I will explain. In a manner similar to Young, the account of exploitation that I use here is structural, in the sense that the vulnerability is created by a structural process. Through this process some systematically benefit by accumulating power at the expense of others.<sup>10</sup> The concept of exploitation on which I focus, though, concerns vulnerability of workers that is created by identifiable legal

<sup>10</sup> This account of exploitation is encapsulated [Young \(1990: 48 ff.\)](#).



rules. My aim is to assess the legal rules that are responsible for structures of exploitation, as well as how these rules should change.

In relation to Marcell, we can consider several judicial decisions that have determined who is the employer that owes legal duties to agency workers, and how these decisions have increased workers' vulnerability by ruling that the end user is not an employer or by taking a restrictive approach to employment status (the question whether the person employed is a worker or an independent contractor) that serves as a gateway to labour rights. To give an example of the approach of courts to agency work, in a leading case where someone worked for an entity through an agency for three years and was replaced as soon as she was off work sick, the Court decided that the worker could not claim her rights against the end user. It explained that agency workers are in 'a legal no man's land being neither employed nor self-employed, vulnerable, but enjoying little or no protection', and that this creates social injustice.<sup>11</sup> Despite recognizing the injustice, the Court in this instance and in case law that followed was not willing to impose legal obligations on the entity for whom the claimant worked by implying a contract between the worker and the end user. It applied the general commercial contract rules in a manner that was not sensitive to the particularities of the employment context and set a precedent on this matter. Agency workers are also regularly excluded from protection of other labour rights and anti-discrimination legislation.<sup>12</sup>

The legal framework on agency work cannot be described as state action with intention to harm. The position of Marcell could have been viewed as an instance of pure structural injustice, to use the words of McKeown, whereby we cannot identify a perpetrator, and the injustice is a result of multiple agents who are not blameworthy (McKeown 2021: 4). However, if we examine the role of the law more closely, we may reach a different conclusion and accept that it has an important role to play. Rules on agency work may appear to be justified: both workers and employers may be said to value the flexibility of these working arrangements. Are they really justified, though, when we observe that these rules make workers vulnerable and are systematically exploited by employers? Or is it just an *appearance* of legitimacy?

Moreover, and to examine the role of the law a bit further, Marcell refers to his contact with the Jobcentre, a body for those who claim benefits and are out of work or underemployed. It is, therefore, possible that Marcell has been *required* to work for an agency through the UK welfare conditionality scheme, which makes welfare support conditional upon applying for and

<sup>11</sup> *James v. Greenwich Borough Council* [2008] EWCA Civ 35, para 60.

<sup>12</sup> See *Muschett v. HM Prison Service* [2010] EWCA Civ 25.



accepting work and imposes harsh sanctions on claimants who do not accept this work. If Marcell found his job through the Jobcentre, it may not be freely chosen: he may have been required to accept it under the UK Welfare Reform Act 2012, for otherwise he would lose access to welfare support and might face destitution as a result. It has been shown in empirical research that many 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’ (Kamerade and Scullion 2017).<sup>13</sup>

The Welfare Reform Act may not appear at first to be legislation that intends to harm people directly: it has a *prima facie* legitimate aim, which is to encourage the unemployed or underemployed to look for (more) work, as this is viewed as the best route out of poverty. The requirement to seek work as a condition for welfare support cannot be said to constitute state action with intention to harm. However, the way that the UK scheme is designed forces people to accept exploitative work, as otherwise they face very harsh sanctions (see Adler 2018, ch. 2), and it traps them in these arrangements, both because precarious jobs become increasingly common, and because people have very limited opportunities and resources to obtain better work, as the example of Marcell showed. In this way, legal rules, such as the Welfare Reform Act and the rules on agency work, play a major role in creating and sustaining structures of exploitation, which become all the more widespread, standard, and routine (see further Mantouvalou 2020a: 929).

The example of Marcell and the brief discussion of the legal framework aim to show this: when looking at certain injustices that can be described as self-perpetuating or structural, we can identify legal arrangements that have a major role to play in creating or sustaining them. The legal rules here may have an appearance of legitimacy, which is why they cannot be described as state action with intention to harm. The authorities can claim to have a legitimate aim: encouraging people to work and creating flexible working arrangements that some may value. However, these rules create workers’ vulnerability that is systematically exploited.

To be clear, my aim is not to question whether there is structural injustice in general or to criticize the use of Sandy’s story, which Young employed for a different purpose: to develop the concept of political responsibility. However, it is important to appreciate that, in certain cases where it appears that injustice is structural and that no agent is responsible for it, it may be

<sup>13</sup> There is a body of research that suggests that there is a link between strict welfare conditionality schemes and in-work poverty. See Seikel and Spannagel (2018: 245).

possible to identify concrete legal rules that increase workers' vulnerability to exploitation.<sup>14</sup> Having identified these rules, we can then consider responsibility for the creation of the unjust structures in question more closely,<sup>15</sup> and scrutinize further the role of the law and the state (Haslanger 2012: 318).

## V State-Mediated Structures of Injustice

I have argued that in certain instances of injustice that appear to be structural the state may be responsible for creating concrete rules that have an appearance of legitimacy but that allocate power in such a way that increases and entrenches workers' vulnerability to exploitation. This should be distinguished from responsibility for direct state action that causes harm, and from omission to act when there is harm in the private sphere, the state knows or ought to have known about it, but does nothing to address it.<sup>16</sup>

The responsibility in which I am interested is responsibility for vulnerability that is created, increased, and perpetuated through law that is linked to structures of exploitation: this is why I call it *state mediated*. It is responsibility for state action—the creation of vulnerability itself—but the structures of exploitation are beneficial for private employers. The state authorities know or ought to know of the vulnerability that they create, increase, and perpetuate, and the resulting structures of exploitation. Employers act according to the law, but workers are forced and trapped in these structures of injustice because of legal rules.

It is important to understand the examples that I discuss as state-mediated *structures* of injustice for several reasons. First, they involve rules that are connected to patterns in social relations. Because of identifiable legal rules, large numbers of people are placed in a position of vulnerability of which others take advantage systematically. The processes are set up through specific laws and policies that enable employers to exploit workers. A second reason why the concept of a structure is suitable is because it can refer to something that is erected, a construction. It is not one hurdle in people's life. The example of Marcell shows how people are trapped in these structures. In addition, the idea of the structure helps us appreciate how the system may become entrenched, with aspects of it continuing to exist even when the law changes. Here it is worth clarifying that it is not only the law that creates vulnerability.

<sup>14</sup> I have discussed further examples in Mantouvalou (2020b) and also in Mantouvalou (2023).

<sup>15</sup> On the structure/agency dichotomy, see Giddens (1984: 14). See also Sewell (1992)

<sup>16</sup> Young (2011: 167) also discusses responsibility for omission and the role of the state to coordinate agencies in order to address social problems.

The groups placed in this position of vulnerability through precarious work are often already in a position of disadvantage because of a variety of factors, such as race, poverty, or migration status (see [Haslanger \(2012: 311\)](#)). This is also what the term ‘clustering of disadvantage’ describes: people accumulate disadvantages such as poverty, workplace exploitation, ill-health, or homelessness ([Wolff and De-Shalit 2007](#)).

By referring to *concrete* vulnerability to exploitation that is created by the state, I want to distinguish it from the general way in which the law affects power relations. In general, as [Collins \(1987: 86\)](#) 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.’<sup>17</sup> 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, as I said earlier. This is what is typically meant when people refer to power imbalance in the employment relation. It is often in this general way that some talk about injustice that is structural: the employer has the right to direct and manage employees, who must follow the instructions. This is a structure of power at work that recognizes an ability of the employer to control the employee that is distinct from a free and equal relation ([Collins et al. 2018: 5](#)).

For many labour law scholars, the employment relationship is one of subordination, and the primary purpose of labour and social security law should be to reduce the vulnerability of workers through interventions ([Collins 1989: 468](#)).<sup>18</sup> However, what we observe in examples like that of Marcell is that at times there are identifiable special measures that do not normally harm directly but that create further vulnerability that is systematically exploited. The exploitation is not caused directly by the state: it is private employers who take advantage and benefit from it. It is also not an isolated instance of exploitation: the state conduct is linked to patterns that are all the more widespread, standard, and routine. It is important to place attention on the responsibility of the state in relation to these structures of injustice, because, if the law is responsible for creating vulnerability that is systematically exploited, a change in the law can also help remedy the injustice by removing the rules that create this vulnerability and protecting workers’ rights.<sup>19</sup> The state is a powerful agent. By holding it accountable

<sup>17</sup> [Pistor \(2019\)](#) recently examined how private law produces private wealth.

<sup>18</sup> See further the discussion in [Davidov \(2016: esp. chs 3 and 4\)](#).

<sup>19</sup> On structural injustice and change, see also Wolff, Chapter 1, this volume.

for misallocating power in these situations, we can demand that power be allocated more fairly.

By way of an objection to this account, it can be said that in at least some of the structures of injustice that I call state mediated, it is the state's intent to cause harm to some groups of people. This can be said, for instance, about welfare-support recipients who are sanctioned if they do not look for work (see [Adler 2018](#)). The sanctions are deliberately imposed. It can, therefore, be argued that the wrong in question should be placed in the same category of intentional harmful state conduct as Mugabe's atrocities. However, in the state-mediated structures of injustice that I discuss here I am not so much interested in the *intentions* of state authorities. Some of the structures of injustice may be intentionally created and others may be side-effects.

The key point is that the laws in question have an appearance of legitimacy: the authorities can put forward a *prima facie* legitimate justification—namely, a justification that cannot be described as unlawful or immoral. However, the identification of the patterns that are created as a result and the systematic exploitation suggest that the supposed legitimacy of the action should be questioned. The role of the state here is different from its role when the authorities cause direct harm to people. We are faced with laws and policies that are not necessarily illegitimate when looked at in isolation, but that together create patterns that place large numbers of people into exploitative labour relations, from which it is very hard to escape.

There is also the opposite objection to what I describe as state-mediated structures of injustice. The objection is that laws with legitimate aims can always be abused by unscrupulous employers (and others).<sup>20</sup> There will always be 'a few bad apples'—namely, individuals who identify weaknesses and gaps in the legal system. These individuals (employers very often in my examples) take advantage of the law in order to promote their own interests. The value of the rules in question should not be questioned for this reason and the state should not be held responsible for the injustice that is in reality directly caused by individual action in the private sphere.

A few things can be said in response. First, state authorities have demanding duties to treat everyone fairly. Law as an institution should be scrutinized closely, because the creation of vulnerability to exploitation, even if inadvertent, is contrary to the state's duties of justice. In addition, the standard of fairness required in these cases is not impossibly high. In order for this type of responsibility of the state to arise, it is important to show that the effect of the laws examined is systematic exploitation. We are not just dealing with

<sup>20</sup> I am grateful to my colleague Charles Mitchell for pressing me on this point.

cases where some devious employers identify gaps in the law and take advantage of them. We are considering clearly identifiable legal rules that increase workers' vulnerability, accompanied by widespread patterns of exploitation. It is also not the case that employers always exploit the workers in question. There will be virtuous employers who do not take advantage of the situation. Nonetheless, this does not mean that there is no state responsibility for the structures of injustice in these examples, and that we should be focusing only on the responsibility of the unscrupulous employers alone.

By saying that we can identify responsibility in the context of an unjust structure, I do not claim that individuals who directly exploit workers do not bear responsibility. As Haslanger (2012: 319) put it, 'our societies are unjustly structured, and immoral people with power can and do harm others. Moreover, individual and structural issues are interdependent insofar as individuals are responsive to their social context and social structures are created, maintained, and transformed by individuals.' There can be responsibility both for individual and for structural injustice. 'Structures cause injustice through *misallocation* of power; agents cause wrongful harm through the *abuse* of power (sometimes the abuse of misallocated power)' (Haslanger 2012: 320). I am focusing on the state because, by looking at the legal framework, we can propose structural reform that can be 'more sweeping and reliable' (Haslanger 2012: 319) than smaller changes. By identifying powerful agents that are responsible for unjust structures, and particularly by focusing on the role of the state as an especially powerful actor, we are better placed to propose structural reform.

Neither do I claim that those who benefit from the situation of state-mediated injustice do not have political responsibility of the type that Young developed. There is moral (and sometimes legal) responsibility for the exploitation both by the employer, as well as political responsibility of everyone who benefits from this situation. However, the state is also responsible for creating and sustaining the unjust structure. It is, therefore, crucial to examine the responsibility of the state for the additional reason that it has the power to change the unjust structures in question.

## VI Human Rights

When there is allocation of power through law in a way that creates concrete vulnerability to exploitation that is systematically exploited, the state should be held morally responsible. In what follows I ask this question: can we identify legal responsibility for this situation? I address this by looking at human

rights law, which is an area of law that focuses typically on state responsibility for violations of human rights.<sup>21</sup> My aim is to identify normative principles on state conduct that can also ground legal responsibility and a basis for reform. My primary focus here is on European human rights law, and particularly the European Convention on Human Rights (ECHR), an influential regional system that binds forty-six member states of the Council of Europe.

The European Court of Human Rights (ECtHR or Court) has developed a long case law on state duties and has examined both negative state obligations not to harm and positive obligations to protect individuals from human rights violations in the private sphere. The Court has held that, for a positive state obligation to arise, it has to be shown that the authorities ‘know or ought to have known’ of an alleged violation. This is an important insight for the cases of state-mediated injustice that I analyse, where the exploitation takes place in the private sphere. What is it that the authorities know or ought to have known for state responsibility to arise? This was examined by the ECtHR in *Osman v. UK*,<sup>22</sup> where it said that it had to establish if the authorities knew or ought to have known of a ‘real and immediate risk’ of a human rights violation, and ‘failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.’<sup>23</sup>

State responsibility is, therefore, engaged when the authorities know or ought to have known of a harm that may occur. The ‘know or ought to have known’ formulation typically involves violations of rights by private actors,<sup>24</sup> though it also sometimes arises in the case of natural disasters.<sup>25</sup> The Court has examined when positive obligations arise in several cases, including work-related ones.<sup>26</sup> The authorities cannot be held to account for treatment in the private sphere if they are unaware of it, and their lack of awareness is justified. Even though for state authorities the standard of responsibility should be more demanding than the standard for individuals, we cannot hold them accountable for violations of human rights with which they had no connection and no way of knowing about. What they must know is either that some wrong is being committed in the private sphere, or that there is an immediate risk for such wrong to be committed.

<sup>21</sup> Powers and Faden (2019: 19) focused on structural injustice and human rights as moral principles rather than legal rules.

<sup>22</sup> *Osman v. UK*, App No 87/1997/871/1083, Judgment of 28 October 1998.

<sup>23</sup> *Osman*, para. 116.

<sup>24</sup> For instance, see the reasoning of the Court in *DP and JC v. United Kingdom*, Judgment of 10 October 2002, [2002] ECHR, paras 111–12.

<sup>25</sup> *Özel and Others v. Turkey*, Judgment of 17 November 2015.

<sup>26</sup> *Chowdury and Others v. Greece*, App. No. 21884/15, Judgment of 30 March 2017; *Brincat and Others v. Malta*, 60908/11, 62110/11, 62129/11, Judgment of 24 July 2014.

When examining state responsibility in examples of structures of injustice that I discuss here, it is hard for the authorities to claim that they had no knowledge of the situation, because the state has played an active role by creating vulnerability to exploitation through law. Moreover, the resulting injustices are systematic and form patterns. An example where the Court found a violation of the Convention in such an instance was *Rantsev v. Russia*,<sup>27</sup> where one of the key issues was that the Cypriot law on ‘artiste’ visas created vulnerability to human trafficking. The Court ruled that the visa scheme violated human rights.

The responsibility for state-mediated structures of injustice that I outline draws on these insights. It differs from violations of positive obligations, because it is not only responsibility for omission to act; it is responsibility for the creation of vulnerability through action. The state is responsible, both because it creates vulnerability and because the authorities know or ought to know that exploitation occurs in the private sphere. The authorities may claim that they did not exploit or intend to create vulnerability to exploitation, as they had a legitimate aim when enacting the laws in question. However, malicious intention is not required: what is required is knowledge of the pattern of injustice. Let me now turn to some more concrete provisions of human rights law that may be breached when looking at the laws that affected Marcell’s life.

The ECHR does not contain a human right to be protected from exploitation. However, several provisions may be violated when people are forced into exploitative work through welfare conditionality. An obvious starting point is the prohibition of forced and compulsory labour that is prohibited under article 4 of the ECHR. The provision contains some exceptions in its third paragraph, including ‘any work or service which forms part of civic obligations.’ The Court has not thus far ruled that there has been a violation of the Convention in welfare conditionality case law. However, several examples of welfare benefit claimants who are 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, may reach the level required for a violation of the provision. Obligations to accept precarious work under the menace of severe sanctions and destitution, as evidenced in empirical work, can in some instances be viewed as unjust, oppressive, distressing, and harassing, which are the criteria set out by the ECtHR for a violation of article 4 to be established.<sup>28</sup>

<sup>27</sup> *Rantsev v. Cyprus and Russia*, App. No. 25965/04, Judgment of 7 January 2010.

<sup>28</sup> *Van der Musselle v. Belgium*, App. No. 8919/80, judgment of 23 November 1983, para. 37.



Moreover, there is evidence that some welfare benefit claimants become destitute because of the UK scheme.<sup>29</sup> In that respect, it has been 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 (Adler 2018: ch. 1; see also Simpson 2015: 66). 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.’<sup>30</sup> In order to assess this threshold, the Court takes into account factors such as the duration, and the physical and mental effects, of the treatment, as well as the sex, age, and health of the victim.<sup>31</sup> Does the UK welfare conditionality scheme meet this level of severity? 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 the inability of claimants to meet their basic needs. Non-compliance with requirements imposed on claimants at the Jobcentre incurs the second harshest sanctions in the world. It has been established that people have to resort to food banks in order to satisfy their basic necessities when benefits are cut. In cases where claimants become destitute, it can be said that the laws in question are incompatible with human rights law.

Turning to a national legal order, the German Constitutional Court examined whether welfare conditionality complies with the fundamental right to the guarantee of an existential minimum in accordance with human dignity (Art. 1(1) in conjunction with Art. 20(1) of the Basic Law).<sup>32</sup> The Court considered the effects of benefit sanctions extensively and highlighted that they can include ‘social withdrawal, isolation, homelessness, severe psychosomatic disorders and crime to access alternative sources of income’ (para. 65) because people cannot meet even the most basic needs such as paying for their rent and electricity. It ruled that, while the provisions appear legitimate on their face, they fail the strict proportionality test that was applied here (para. 136).

Finally, elements of the scheme may violate the right to private life (art. 8), together with the prohibition of discrimination (art. 14) on the ground of poverty. The Court interprets article 8 broadly so as to cover activities that take place not only in a person’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

<sup>29</sup> 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.

<sup>30</sup> *Ireland v. UK*, App. No. 5310/71, judgment of 18 January 1978 [162].

<sup>31</sup> *Ireland v. UK*.

<sup>32</sup> BVerfG 1 BvL 7/16 (05.11.2019).

outside interference, of the personality of each individual in his relations with other human beings,<sup>33</sup> as the Court puts it. In cases of welfare claimants, both their close monitoring by the Jobcentre and the imposition of duties to accept exploitative work may raise issues of the right to private life. The provision on the prohibition of discrimination, in turn, does not exhaust the grounds of discrimination. It is open ended, and the Court has decided several cases that address the issue of poverty and social exclusion ([Tulkens 2015](#)). It has interpreted article 14 in a manner that is particularly sensitive to structurally vulnerable groups ([Tulkens 2015:14](#)), 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 interference with their privacy under the ECHR.

## Conclusion

The main purpose of this chapter has been to assess the role of the state in certain instances of structural injustice. I also discussed state responsibility in human rights law to show that this body of rules may in certain circumstances be able to hold the authorities accountable for creating vulnerability to exploitation and structures of exploitation, and require legal change. Workplace exploitation and poverty are not the only structures of injustice associated with precarious work. The Marmot Review analysed the social determinants of health that are associated with health inequality, including lower life expectancy, and explained the role of precarious work arrangements in this context (see [Marmot et al. 2020](#)). Workers who are already in a disadvantaged position are employed in insecure and exploitative work through which they cannot meet their basic needs and that have damaging effects on many other aspects of their lives. Change in legal rules in a way that will protect job security can play a role in addressing these other effects too.

It is also crucial to add that not all instances of structural injustice can be addressed through human rights law or more generally through law reform. A variety of actors need to mobilize to achieve social change, while often the structures that I discuss reinforce other, broader social structures: 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

<sup>33</sup> *Von Hannover v. Germany* (No 2) [95]. Other examples that illustrate the broad coverage of art. 8 include *Niemietz v. Germany*, App. No. 13710/88, judgment of 16 December 1992; *Sidabras and Dziautas v. Lithuania*, App. Nos 55480/00 and 59330/00, judgment of 27 July 2004.

structure, it is important to analyse it, use the legal mechanisms that are available to challenge it, and press for legal change as a step towards broader structural reform.

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