Welfare-to-Work, Zero-Hours Contracts and Human Rights

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In response to concerns that non-standard work arrangements are precarious, it is often suggested that they are valuable for workers and employers because it is important for all to have the option of flexibility at work. In this article, I look at the relationship between welfare conditionality and zero-hours contracts, which constitute particularly precarious working arrangements. When we examine these together with schemes of strict conditionality, we observe that many people do not choose non-standard work because of the flexibility that it offers, but are required to accept the jobs in question for otherwise the authorities will withdraw welfare support, and welfare claimants may be faced with destitution. Welfare conditionality schemes that are particularly punitive can turn in this way the unemployed poor into working and exploited poor. This piece further argues that schemes with strict conditionality that force and trap people into these arrangements raise issues under human rights law. In these situations we are faced with what I have described elsewhere as 'state-mediated structures of exploitation'.[1] The state is responsible for creating vulnerability to exploitation from which private employers benefit, and has duties under human rights law to change the laws in question in order to destabilise the unjust structures.

To develop my argument, I first look at the meaning of the concept 'zero-hours contracts'. I then turn to welfare conditionality schemes in the second section to explain how schemes with strict conditionality, and particularly the UK Universal Credit, force people into precarious work by threatening them with serious sanctions. The combination of rules on strict conditionality and zero-hours work leads to the construction of structures of exploitation, as the third section explains by reference to empirical research that has explored the effects of the schemes on people's lives. In the fourth part, I argue that welfare conditionality schemes that force and trap people into zero-hours and other precarious work may violate several provisions of human rights law, such as the prohibition of forced and compulsory labour, the right to work, the prohibition of inhuman and degrading treatment, the right to private life, and the prohibition of discrimination. Different components of the schemes raise these issues, including the punitive harsh sanctions, the effect of the design of the payments and the constant monitoring of the unemployed poor.

1. Zero-hours contracts

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[1] V. Mantouvalou, 'Structures of Injustice and Exploitative Work', forthcoming in M. McKeown and J. Browne (eds) *Structural Injustice*; V. Mantouvalou, 'Structural Injustice and the Human Rights of Workers', (2020) 73 *Current Legal Problems* 59; and for fuller discussion in a variety of contexts, see V. Mantouvalou, *Structures of Injustice, Workers' Rights and Human Rights*, forthcoming by OUP, 2022.

There is no generally accepted definition of the term zero-hours contracts.[2] In this piece, I use it to refer to arrangements that constitute personal work relations for which workers do not have fixed or guaranteed hours of work.[3] This is also why these arrangements are called insecure. Other terms used to describe them include on-demand, intermittent or casual work.

Casual arrangements of this type exist in many legal orders, including New Zealand, Ireland, Germany, Belgium, the Netherlands, Italy and the United Kingdom.[4] An overview of casual work in a small number of EU member states shows that some countries permit zero-hours work without restrictions, while others set requirements, for instance, on minimum hours in certain types of casual arrangements.[5] By way of an example, in the Netherlands, there is provision for 'preliminary contracts' where if the worker accepts the work offered by the employer, the parties sign a contract for a fixed period of time, while there are also zero-hours contracts with no requirement of minimum hours (on the Dutch case, see the contribution of Anja Eleveld in this special issue). In Belgium, employment law organises certain forms of contracts as zero-hours contracts with no minimum hours guaranteed (on the Belgian case, see the contribution of Elise Dermine and Amaury Mechelynck). These are called 'flexi-jobs', which can only be used in specific sectors.

In the UK there are no similar limitations on the employer's power in casual work arrangements, while the worker can also refuse work. As the detail of working arrangements that can be viewed as zero-hours varies, this leads to different types of classification of the employment relationship by courts, with varying degrees of legal protection of workers (on the UK case, see the contribution of Joe Atkinson in this special issue).[6] In this context, legal rules that contain exclusions from protective laws of categories of workers, together with court decisions that examine worker status create vulnerability to exploitation. People on zero-hours work are often not classified as employees because it is said that there is no mutuality of obligations between the employer to provide work and the worker to perform it of the kind that we find in a standard employment relation.[7] Employees have an extensive set of statutory protections, including job security.[8] Those on zero-hours contracts are excluded from these protections when not viewed as employees. If they are categorised as 'workers',[9] which is an intermediate category, they enjoy certain labour rights, such as the right to a minimum wage and working time, but forego rights, such as protection from unfair dismissal.

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[2] A. Adams, M. Freedland, and J. Prassl, 'The "Zero-Hours Contract": Regulating Casual Work, or Legitimating Precarity?' (2015) Oxford Legal Studies Research Paper No. 11/2015 < https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2507693

[3] M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations,* OUP, 2012, p 318.

[4] For a description of the arrangements in different European legal orders, see the introduction of this special issue. V. de Stefano, 'Casual Work beyond Casual Work in the EU: The Underground Casualisation of the European Workforce - and What to Do about It' (2016) 7 *European Labour Law Journal* 421.

[5] See the contributions in this special issue. See also Eurofound, 'Casual work: Characteristics and implications', New forms of employment series, Publications Office of the European Union, Luxembourg, 2019, p 8.

[6] See also Adams, Freedland and Prassl, above n 2, p 10.

[7] See the case *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612 (CA) 632F–G. On mutuality of obligations, see also *Cotswolds Developments Construction Ltd v Williams* [2006] IRLR 181 (EAT) [55]. For analysis, see N. Countouris, 'Uses and Misuses of "Mutuality of Obligations" and the Autonomy of Labour Law', in A. Bogg, C. Costello, ACL Davies and J. Prassl (eds.), *The Autonomy of Labour Law*, Hart Publishing, 2015. See also ACL Davies, 'The Contract for Intermittent Employment' (2007) 36 *Industrial Law Journal* 102.

[8] Employment Rights Act 1996, s 94(1).

[9] Employment Rights Act 1996, s 230(3).

The self-employed have almost no employment rights. Rules developed by courts on employment status, in other words, together with the legislation that excludes workers or self-employed from protection create vulnerability of workers in zero-hours arrangements. They have fewer rights than other workers, and employers can take advantage of this situation.

In 2021 there were 876,800 workers in zero-hours contracts according to research of the Trades Union Congress in the UK.[10] Others estimate that the numbers are higher, while it is beyond dispute that they have risen significantly over the years and particularly between 2010-2020.[11] Working arrangements of this kind are prevalent in sectors that are seasonal or the demand for which varies during the year, like hospitality and care.[12] Certain categories of workers are overrepresented in zero-hours contractual arrangements, including women, people with disabilities, non-white people and migrants.[13] This kind of working arrangements may be useful for employers and workers, and suitable for some *ad hoc* work. However, often employers use them to cover permanent business needs without bearing the burdens of protective employment rules. The flexibility that is valued by some is linked to insecurity for many, and particularly for those who are already in a position of disadvantage for other reasons, such as their race or gender.

The effects of the insecurity that is due to zero-hours working arrangements have been explored in empirical research. Workers' income fluctuates, and hence they cannot plan their private life, have a family, pay their rent and cover other basic needs.[14] There is further evidence that workers under these arrangements are frightened to make a complaint about their working conditions because they fear that they will not be offered more work.[15] The implications of being on zero-hours contracts have been described as follows by workers affected:

> It is not just about insecurity. It is also about no guarantee on hours, giving absolute control to the employer […] There is no process; there is no access to justice. Even though on paper you may be regarded as an employee and able to access, if indeed you can afford it, the employment tribunal system, the reality is, for most zero-hour workers and short-hour workers, you are simply denied work if you raise a grievance or raise a concern with your employer.[16]

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[10] This estimate excludes the self-employed and those in other precarious work, such as agency work and seasonal work. See TUC, 'Insecure Work', July 2021, p 5, available at https://www.tuc.org.uk/sites/default/files/2021-07/insecurework2.pdf

[11] On the challenges in measuring prevalence of these arrangements, see A. Adams and J. Prassl, 'Zero Hours Work in the United Kingdom', ILO, 2018, pp 7-11. On the rising numbers, see Labour Force Survey, Office for National Statistics, 2019, 157.

[12] Eurofound, 'New Forms of Employment', Publications Office of the European Union, Luxembourg, 2015, p 61.

[13] Adams and Prassl, as above n 13, p 7.

[14] M. Ball, C. Hampton, D. Kamerade and H. Richardson, 'Agency Workers and Zero Hours – The Story of Hidden Exploitation', University of Salford Research Report, July 2017, p 17.

[15] ibid.

[16] Assistant General Secretary at Unite the Union, quoted in House of Commons, Business, Innovation and Skills Committee, 'Employment Practices at Sports Direct', Third Report of Session 2016-17, p 7.

In a report of the Resolution Foundation, a zero-hours contract worker explained the experience of insecurity and the challenge in making life plans through the following incident:

> I went for a flat and got turned down because I'm really on a zero hours contract and have no guaranteed hours. But I don't want to house share any more – and I threw away £300 I hadn't got on all the references and everything. I didn't even know [I was on a ZHC] until the searches came back![17]

It has been documented that there are workers on zero-hours contracts who cannot cover their basic needs through their income, and may have to use foodbanks.[18] This is not a unique phenomenon in the UK. Analysis of the arrangements in EU member states explained that the effects of the unpredictability of work and income makes workers feel 'desperate and exploited'.[19]

This short discussion on zero-hours contracts shows that those working under these arrangements may face grave challenges. Most importantly for my argument, people often do not choose these arrangements for the flexibility that they offer but are forced into them through welfare conditionality schemes to which I now to turn.

2. **Welfare-to-work and zero-hours work**

Welfare-to-work schemes are schemes whereby welfare benefits for working age people are conditional upon making an effort to obtain work. These schemes should be understood as part of the so-called activation policies, which are policies that encourage active engagement with the labour market. A standard justification of activation policies is that they 'improve economic self-reliance and societal integration via gainful employment instead of joblessness and benefit receipt'.[20]

There are a variety of schemes, with activation policies in certain countries being limited to funding vocational training programmes in order to match supply and demand needs in the market,[21] while others have a stricter conditionality approach. These schemes are grounded on a promise that people will have either a job or social support that will enable them to cover their basic needs, but also a threat that if they do not make the required effort to get a job and if they do not accept job offers, they will be sanctioned. The sanctions that are imposed either involve reduction or withdrawal of benefits, or replacement of benefits with food stamps. Even though welfare-to-work schemes and their underlying principles are not a new phenomenon, they have become especially punitive in recent years. Legal scholarship this far has primarily focused on welfare schemes that make benefits conditional upon doing unpaid

[17] L. Judge, 'The Good, the Bad and the Ugly – The Experience of Agency Workers and the Policy Response', Resolution Foundation Report, 2018, p 41.
[18] Ball, Hampton, Kamerade and Richardson, above n 16, p 30.
[19] Eurofound, as above n 14, p 66.
[20] W. Eichhorst, R.O. Kaufmann, R. Konle-Seidl and H.-J. Reinhard, 'Bringing the Jobless into Work? An Introduction to Activation Policies' in W. Eichhorst, R.O. Kaufmann, R. Konle-Seidl (eds), *Bringing the Jobless into Work?*, Springer, 2008.
[21] See generally, G. Bonoli, 'The Political Economy of Active Labor-Market Policy' (2010) 38 *Politics and Society* 435.

work.[22] Here I focus on schemes that push the unemployed (and at times the underemployed) in paid but very precarious working arrangements.

The UK Welfare Reform Act 2012 adopted a particularly punitive conditionality regime, which illustrates the harshness of the rules. The resulting Universal Credit system merged six separate in-work and out-of-work benefits into one means-tested payment, and was one of the key reforms introduced through the Act. Universal Credit claimants have to prepare a plan with their work coaches at their local Jobcentre, called a 'Claimant Commitment'. This explains what has been agreed between the two with respect to what claimants need to do in order to get a job.

Universal Credit also introduced for the first time conditionality for those who are already employed but are on a low income, which is something that affects those in zero-hours contracts particularly. These claimants have to apply for additional work for otherwise they will face sanctions. In-work conditionality suggests that the rationale of the system was not only to get people into work, but also to get them to work harder. The UK Government's broader purpose was 'to ensure that any type of paid work is more financially rewarding than reliance on benefits'.[23] Low paid workers who do not meet a threshold of income face sanctions. They were therefore presented as undeserving poor who can be sanctioned if they do not make the appropriate efforts to secure a higher income through more work.[24]

Non-compliance with Universal Credit requirements incurs the second harshest sanctions in the world:[25] the lowest for those who, for instance, do not attend a work interview, and the highest ones for those who do not apply for a job, and range from losing their benefit for 28 days the first time that this happens, to 182 days for the second time, and 1095 days for the third time.[26] The number of those who were sanctioned increased, from about 300,000 sanctions and disqualifications in 2001 to over 1,000,000 in 2013,[27] with empirical evidence suggesting that sanctions are imposed unfairly, when for instance someone misses an appointment because of a clashing funeral commitment about which the individual has informed the authorities.[28]

Soon after the system was introduced, Dwyer and Wright described it as 'unprecedented in offloading the welfare responsibilities of the state and employers onto citizens who are in receipt of *in work* and *out of work* social security benefits. Unemployed and low paid citizens

[22] For an overview of European approaches, see A. Eleveld, T. Kampen and J. Arts (eds), *Welfare to Work in Contemporary European Welfare States*, Policy Press, 2020. 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.

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

[24] ibid.

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

[26] ibid, p 32.

[27] M. Adler, *Cruel, Inhuman or Degrading Treatment? Benefit Sanctions in the UK*, Palgrave Macmillan, 2018, pp 46-47.

[28] ibid, p 58.

are now held to be solely responsible, not only for a lack of paid employment, but also partial engagement with the paid labour market and the levels of remuneration that they may receive'.[29] The system has also been likened to the penal system by Adler because the fines imposed at times exceed fines imposed by criminal courts, as he showed, arguing persuasively that they are deeply problematic for disciplining and managing the poor.[30]

3. **Structures of exploitation**

My concern in what follows is that systems of strict conditionality, such as the UK Universal Credit scheme, combined with zero-hours contractual arrangements, force people into exploitative work. There is evidence that there are links between activation policies and in-work poverty.[31] It has been shown that schemes of strict conditionality can be seen as 'a driver of in-work poverty' and 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'.[32]

Empirical research conducted in the UK on the effects of Universal Credit suggests that claimants are routinely forced to apply for and accept jobs that are precarious. It is crucial to underline here that claimants are expected to accept zero-hours contracts, because these are viewed as valuable flexible arrangements.[33] For those who access the Jobcentre, the experience of applying for many unsuitable and inappropriate jobs is reported to be 'soul destroying', in the words of a foodbank volunteer.[34] The duty to accept exploitative work accentuates the problem. Someone interviewed said:

> I used to work in hotels doing waiting on silver service. I've done all kinds of work, do you know what I mean, all kinds. Whatever job come up I'd take really. Mostly factory work. Just boring work really. No skills in it.
> […]
> Any job I'd do. Any job. As long as I know it's a permanent job. Not one of these zero hour contract things, because I don't want to take a job and not afford where I'm living now and end up back on the streets.[35]

According to findings of Kamerade and Scullion, some people first come into contact with non-standard work through Jobcentres, where they are 'encouraged, directed or coerced to

[29] Dwyer and Wright, as above n 25, p 33.
[30] M. Adler, 'A New Leviathan: Benefit Sanctions in the Twenty-first Century' (2016) 43 *Journal of Law and Society* 195.
[31] 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, p 245.
[32] ibid, p 257.
[33] See the response to a question asked by Chris Stevens MP https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-11-29/197460/ See also the exchange in Parliament between Work and Pensions Secretary Amber Rudd MP and Chris Stevens MP in December 2018 https://www.independent.co.uk/news/uk/politics/amber-rudd-zero-hour-contracts-benefit-sanctions-universal-credit-work-pensions-dwp-a8690626.html
[34] K. Garthwaite, *Hunger Pains – Life Inside Foodbank Britain*, Policy Press, 2016, p 104.
[35] J. Flint, 'Social Class, Urban Marginality and Narratives of the Ethics of UK Welfare Sanctions', Welfare Conditionality Project Report, 14.

apply for low-skilled, low paid and precarious jobs, such as temporary agency work and zero hours work'.[36] They used examples of someone who turned down a job with an agency because it did not cover travel expenses from Derbyshire to Manchester (about 50 miles distance), and was therefore sanctioned. Another man accepted a zero-hours contract, and was told that he would receive a text message if he were needed. Having not heard, he was offered the option to turn up at work at 7am but was again not offered any work. He eventually secured a few hours temporary work, but he still had to be on Universal Credit, attend appointments and apply for jobs. Further empirical research by Garthwaite suggested that most people working in non-standard work arrangements (agency, part-time or zero-hours), do not do so by choice, and would like to see zero-hours contracts banned.[37]

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

> All the first employers want you to be available at the snap of a finger for the zero-hour contracts... So when you go for a second job, if you're in retail everybody's going to want you on a Saturday, aren't they? If you go, 'Oh no, I'm at such-and-such that day' they're going to go, 'No.'[38]

A related issue that emerges from empirical studies and shows how the system in the UK leads to the proliferation of non-standard work involves those who use a combination of paid work and welfare benefits. Those who work for over 15 hours and earn above a set level of income lose any welfare benefits. For instance, one interviewee said that she was offered a placement for three weeks and worked 16 hours at a care home with people with dementia but was paid for 15 hours so that she would not lose her benefits and become unable to afford her rent.[39] Scholars analysing the system early on had predicted that Universal Credit would create this perverse incentive.[40] In this way, the scheme leads to the proliferation of non-standard work, with claimants not only being forced to accept it, but also being trapped in the arrangements. They are trapped both because these jobs become standard and routine, and because people have very limited opportunities and resources (material, such as funding to re-train, and non-material, such as time) to obtain better work.[41]

In response to criticisms of non-standard work arrangements, the UK Government has regularly insisted that people are positive about part-time or zero-hours contracts, because these give them flexibility. The 'Taylor Review of Modern Working Practices', for instance, said that flexibility is important for workers, and that they should not be deprived of the

[36] 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.
[37] Garthwaite, as above n 36, 108.
[38] ibid.
[39] ibid, p 106.
[40] Dwyer and Wright, as above n 25, p 31.
[41] For an illustration of how people are trapped in precarious work and in work poverty, see J. McBride, A. Smith, M. Mbala, '"You End Up with Nothing": The Experience of Being a Statistic of "In-Work Poverty" in the UK' (2018) 32 *Work, Employment and Society* 210.

capacity to choose flexible working arrangements, such as zero-hours contracts.[42] Evidence on in-work poverty, though, and the fact that many in this condition are in precarious work calls this position into question. The Taylor Review argued that people should have a choice of working arrangements, and that their options should not be hindered. However, empirical research finds that many who are employed in such contracts would rather have secure, stable, full-time work, with which they can meet their basic needs, but do not have this option. This research calls into question the suggestions that zero-hours work is freely chosen work, and makes it important to assess the implications in human rights law. There are many who do not opt for it because of the flexibility inherent in it, but because they will otherwise lose any welfare support and will be unable to meet their basic needs.[43] This is how the unemployed poor become working and exploited poor.

4. **Human Rights**

The severity of the issues that arise from the UK system were highlighted by the UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston, following a visit to the UK in 2018 that focused on the problems of Universal Credit and in-work poverty.[44] The role of the Special Rapporteur is to examine and report on the rights of those living in extreme poverty. Alston reviewed extensive evidence on the scheme and said that 'the philosophy underpinning the British welfare system has changed radically since 2010'.[45] He emphasised that in the UK there are 14 million people in poverty, that 60% of those who are in poverty are in families where someone works, and 2.8 million people in poverty are in families where all adults work full time.[46] The Special Rapporteur also explained that even if both parents in a family work full time and earn the national minimum wage, they are still 11 per cent short of the income that is needed in order to raise one child.[47]

The Special Rapporteur noted that the denial of benefits has pushed certain categories of claimants into unsuitable work,[48] and explained that people want to work, and take work that is badly paid and precarious in order to meet their basic needs.[49] Having spoken with Universal Credit claimants, he said that not only did they have to 'fill out pointless job applications for positions that did not match their qualifications', but also that they had to 'take inappropriate temporary work just to avoid debilitating sanctions'.[50] Alston's report attracted significant

[42] See the 'Good Work: Taylor Review of Modern Working Practices', July 2017, p 14. For a critique of the Report, see K. Bales, A. Bogg and T. Novitz, '"Voice" and "Choice" in Modern Working Practices: Problems with the Taylor Review' (2018) 47 *Industrial Law Journal* 46.
[43] Ball, Hampton, Kamerade and Richardson, as above n 16, p 6.
[44] Report of the UN Special Rapporteur on Extreme Poverty and Human Rights, Visit to the UK and Northern Ireland, A/HRC/41/39/Add.1, 23 April 2019.
[45] ibid [95].
[46] ibid [28].
[47] ibid [35].
[48] Alston makes this point in relation to people with disabilities, for instance, in [4] of his Report.
[49] ibid [8].
[50] ibid [57].

media attention and scrutiny of the scheme, and exemplified the crucial role of human rights institutions outside the standard individual or collective complaints processes.[51]

In the remainder of this article, I examine the responsibility of the state under human rights law for this situation. What we observe is that the legal rules in question make groups of workers vulnerable to exploitation by private employers, creating state-mediated structures of exploitation.[52] I call them *structures* of exploitation because they are not isolated instances but constitute patterns. I describe them as *state-mediated* because the state action in question, namely the legal rules in place, is a major cause of these structures of exploitation as they create vulnerability. Human rights law can help identify the responsibility of the state and place an obligation on the authorities to change the legal rules at stake.

Prohibition of forced and compulsory labour

I begin by looking at the prohibition of forced and compulsory labour, which is included in article 4 of the European Convention on Human Rights (ECHR).[53] The provision contains some exceptions in its third paragraph, including 'any work or service which forms part of civic obligations'.

In the relevant case law on welfare-to-work, the European Court of Human Rights (ECtHR or Court) has not ruled that there has been a violation of the Convention thus far. The most recent case is *Schuitemaker v the Netherlands*,[54] where the applicant, a philosopher by profession, was asked to take 'generally accepted' work (rather than work that was 'deemed suitable' for her). If she did not comply with the condition, her benefits would be reduced. She claimed that this was contrary to article 4. The Court said that:

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

In this particular case, the condition was not viewed as compelling her to perform forced or compulsory labour. The earlier *Talmon v Netherlands*,[55] where the applicant claimed that the only work suitable for him was as an 'independent scientist and social critic', while he had

[51] For a discussion of the visit and its effects, see P. Alston, B. Khawaja and R. Riddell, 'Much Ado About Poverty: The Role of a UN Special Rapporteur' (2019) 27 *Journal of Poverty and Social Justice* 423.
[52] Mantouvalou, as above n 1.
[53] For a detailed overview of the case law, see E. Dermine, 'Activation Policies for the Unemployed and the International Human Rights Case Law on the Prohibition of Forced Labour', in E. Dermine and D. Dumont (eds), *Activation Policies for the Unemployed, the Right to Work and the Duty to Work*, Peter Lang, 2014, p 103.
[54] *Schuitemaker v the Netherlands*, App No 15906/08, admissibility decision of 4 May 2010.
[55] *Talmon v the Netherlands*, App No 30300/96, Commission Decision of 26 February 1997.

serious conscientious objections against any other work, was also deemed inadmissible by the European Commission of Human Rights. None of the cases examined this far by the ECtHR and Commission reached the level required for article 4 to apply. However, the structure created by the UK Universal Credit system is harsher than these examples in that it both imposes very severe sanctions and forces people into work which is very insecure and through which they cannot meet their basic needs.

The Human Rights Committee (HRC), monitoring compliance with the International Covenant on Civil and Political Rights (ICCPR), has also examined related complaints. Article 8 of the ICCPR contains a prohibition of slavery, servitude, forced and compulsory labour, which is similar to article 4 of the ECHR. In *Faure v Australia*[56] the claimant argued that the requirement to work under the Australian Work for Dole programme constituted forced labour under the ICCPR. The Committee turned down this part of her claim. However, it considered the exemption of normal civic obligations from the prohibition of forced labour and said:

> to so qualify as a normal civil obligation, the labour in question must, at a minimum, not be an exceptional measure; it must not possess a punitive purpose or effect; and it must be provided for by law in order to serve a legitimate purpose under the Covenant. In the light of these considerations, the Committee is of the view that the material before it, including the absence of a degrading or dehumanizing aspect of the specific labour performed, does not show that the labour in question comes within the scope of the proscriptions set out in article 8.

The HRC accepted that people may have a duty to work as part of their normal civic obligations. When looking at Universal Credit, though, it is highly questionable whether working on zero-hours contracts for a private employer, in conditions such as the ones described earlier in this piece, can be viewed as constituting a normal civic obligation. It can therefore violate the prohibition of forced labour under the ICCPR.

The UK Supreme Court examined welfare-to-work and human rights in a 2013 judicial review case, *Reilly*.[57] One of the questions for the Court was whether jobseeker's allowance that made a benefit conditional on Ms Reilly working for Poundland, in a position that would not advance her employment prospects, was contrary to article 4. The argument presented was that the requirement that Ms Reilly work for Poundland as a condition for claiming her benefit constituted forced and compulsory labour in contravention of article 4(2). This was because the work at Poundland 'was exacted… under menace of [a] penalty'.[58] The Supreme Court ruled:

> The provision of a conditional benefit of that kind comes nowhere close to the type of exploitative conduct at which article 4 is aimed. Nor is it to the point that

[56] *Faure v Australia*, Comm. 1036/2001, U.N. Doc. A/61/40, Vol. II, at 97 (HRC 2005).

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

[58] *Reilly* [80].

> according to Ms Reilly the work which she did for Poundland was unlikely in fact to advance her employment prospects. Whether the imposition of a work requirement as a condition of a benefit amounts to exacting forced labour within the meaning of article 4 cannot depend on the degree of likelihood of the condition achieving its purpose.[59]

The Court held that *Reilly* did not meet the conditions for article 4 to apply. It recognised that the provision has exploitation at its heart,[60] 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'.[61]

The threshold set by the UK Supreme Court, the HRC and the ECtHR, is high, as Dermine has also observed in relation to regional and international human rights standards.[62] Even if the Supreme Court was correct that Ms Reilly did not suffer a violation of her Convention rights, the treatment of several Universal Credit claimants who are in recent years forced into work that they do not want to take exactly because of its precarious nature, with the menace of sanctions that may leave them destitute, reaches the level of exploitation required for a violation of article 4.[63]

Obligations to accept precarious work under the menace of severe sanctions and destitution, as evidenced in empirical work discussed earlier in this piece, can in some instances be viewed as unjust, oppressive, distressing and harassing, in the words of the UK Supreme Court. This would also be in line with ILO materials on the issue. The ILO Global Survey on the Eradication of Forced Labour, for instance, explained that the requirement to work could be contrary to forced labour if work is used as a penalty and there are no safeguards that will guarantee that the work is compatible with the 1930 Forced Labour Convention (No 29) and the 1952 Social Security Convention (No 102), particularly with respect to its suitability.[64] The approach of the ILO is often taken into account by other bodies that monitor compliance with workers' human rights, and can also help elucidate the meaning of forced labour here.[65]

The structures created through welfare-to-work with strict conditionality, which force and trap large numbers of people in zero-hours work for private employers, normalises 'all but the most extreme forms of abusive employment arrangements, leaving a rapidly increasing number of workers without recourse to employment protective norms', as Adams, Freedland and Prassl put it.[66] This situation should make us reopen the question whether welfare

[59] ibid [83].
[60] ibid [81].
[61] ibid [89]. These terms were borrowed from *Van der Mussele* v *Belgium*, App No 8919/80, judgment of 23 November 1983 [37].
[62] E. Dermine, 'Limitation of Welfare to Work: The Prohibition of Forced Labour and the Right to Freely Chosen Work', in Eleveld, Kampen and Arts (eds), *Welfare to Work in Contemporary European Welfare States*, Policy Press, 2020, 67.
[63] See R. Mason, 'Jobseekers Being Forced Into Zero-Hours Jobs', *The Guardian*, 5 May 2014.
[64] International Labour Conference, Global Survey on the Eradication of Forced Labour, 2007, para 205.
[65] On this see V. Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2012) 12 *Human Rights Law Review* 529; K.D. Ewing and J. Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 2.
[66] Adams, Freedland and Prassl, above n 2, p 3.

conditionality schemes that are particularly punitive while requiring people to accept zero-hours work, such as the UK scheme, are compatible with the prohibition of forced and compulsory labour.

Right to work

Aspects of welfare-to-work schemes may also violate elements of the right to work in international human rights law.[67] The UN International Covenant on Economic, Social and Cultural Rights (ICESCR), for example, incorporates the right, which 'includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts', and requires that the authorities 'take appropriate steps to safeguard this right'.[68] In the process of specifying the content of the right to work, the Committee on Economic, Social and Cultural Rights (CESCR), which monitors compliance with the ICESCR, issued General Comment 18 that provided an authoritative interpretation of the Covenant.

On the basis of article 6 and General Comment 18, the right to work guarantees both a right not to be forced to work and a right to decent work. The negative, immediate duties imposed by the right to work suggest that the authorities cannot compel people to work. Individuals should be able to control their labour, in other words, and this can also be viewed as an instantiation of their right to lead their life autonomously.[69] General Comment 18 refers to the quality of work explaining that work has to be decent in order to be compatible with the right to work. As was explained earlier, though, zero-hours work can be exploitative or abusive. Forcing people into this kind of work under the threat of serious sanctions and destitution can therefore be viewed as a violation of the right to work.

The UK welfare-to-work scheme may also give rise to issues under the right to work in article 1(2) of the European Social Charter (ESC), which is the counterpart of the Convention in the area of economic and social rights. The standards set in the context of the Charter are often used by the ECtHR to illuminate the interpretation of rights protected in the ECHR.[70] Article 1(2) provides that '[w]ith a view to ensuring the effective exercise of the right to work, the Parties undertake [to] protect effectively the right of the worker to earn his living in an occupation freely entered upon'.
The European Committee of Social Rights (ECSR), which is the monitoring body of the ESC, has found in this context that contracting parties may violate the provision when they have schemes with excessive conditionality. As was said earlier, there are different types of activation policies and different kinds of welfare conditionality schemes, some of which are stricter than others.[71] According to the ECSR, welfare-to-work may be incompatible with

[67] For a detailed overview of the principles, 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, p 139.
[68] Article 6 ICESCR.
[69] R. Lippke, 'Prison Labor: Its Control, Facilitation, and Terms' (1998) 17 *Law and Philosophy* 533.
[70] As above n 67.
[71] For an overview, see the volume above, n 24.

article 1(2), when work is inconsistent with human dignity or more generally when it is exploitative.[72]

The Committee has explained that activation policies violate the right to freely chosen work if they require claimants to accept work that is not suitable. Criteria on the meaning of 'suitable employment' are found in a Guide drafted in 2010 by the Committee of Experts on Social Security, in charge of the promotion of the European Social Security Code. Do zero-hours contracts constitute suitable employment? The answer to this question will often be negative because the concept of suitable employment is defined by reference to a decent wage.[73] For this reason, the UK system of strict conditionality that forces people into zero-hours work may be viewed as incompatible with the ESC.

Prohibition of inhuman or degrading treatment

In addition, the imposition of very harsh sanctions to welfare claimants that do not comply with welfare conditionality requirements by not accepting zero-hours work may be contrary to the prohibition of inhuman and degrading treatment under article 3 of the ECHR. There is evidence that some Universal Credit claimants become destitute because of the scheme.[74] This may be due to either the cruelty of sanctions, or because of the way that the Universal Credit payments are made. Michael Adler put forward the argument that sanctions may lead to a violation of article 3 of the Convention in his study on welfare conditionality in the UK.[75]

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'.[76] In order to assess this threshold, the Court takes into account factors such as the duration, physical and mental effects of the treatment, as well as the sex, age and health of the victim.[77] The ECtHR has not had to examine the compatibility of benefit sanctions with article 3 to date. However, it has examined the question whether destitution may in certain conditions violate it.[78] In *MSS v Belgium and Greece*,[79] for instance, the Grand Chamber of the Court ruled that leaving asylum seekers in conditions of destitution and homelessness constituted a violation of article 3,

[72] 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, p 147, at 159.

[73] On this 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, p 139 at 166 ff.

[74] 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', p 52.

[75] Adler, above n 29, chapter 1. See also M. Simpson, '"Designed to Reduce People… to Complete Destitution": Human Dignity in the Active Welfare State' (2015) *European Human Rights Law Review* 66 at 71.

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

[77] ibid.

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

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

while the UK House of Lords reached a similar conclusion in *Limbuela, Tesema and Adam*.[80] According to *Limbuela*, there has to be deliberate state action that denies the satisfaction of basic needs, such as shelter or food, and this has to be of such severity as to have seriously detrimental effects or cause serious suffering.[81]

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

> The only time I come [to the food bank] is if my benefits have been stopped or cut. I had a sanction once because I was overpaid child tax credit, so they stopped the payment completely. It's not a nice way of living, literally living day by day… We're lucky the food bank is here but there should be a system to catch us before we fall through the net.[82]

This reality can be viewed as deliberate state action, even if it is supposed to have a legitimate aim, because the state authorities know or ought to know of the effects of benefit sanctions on people's lives.[83] These include shock and confusion (because they thought that they had complied with the conditions), economic hardship, deep poverty, debt, eviction threats, homelessness, food bank use and ill health.[84] It is therefore possible to envisage individual cases where the deprivation is so extreme that it can ground responsibility of the state for violations of article 3.

Universal Credit claimants under zero-hours contracts in the UK face additional problems to other claimants. This is because the benefit is paid in arrears on the basis of earnings for the previous month, on the assumption that in the month that follows a claimant will have the same earnings. As this is not the case for many on zero-hours contracts, they regularly receive payments that are not correctly calculated, and do not cover their basic needs.[85] It is not only

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[80] *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)* [2006] 1 AC 396.

[81] ibid [7-8], per Lord Bingham.

[82] Human Rights Watch, above n 76.

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

[84] B. Watts and S. Fitzpatrick, *Welfare Conditionality* (Abingdon-on-Thames: Routledge, 2018); Fitzpatrick et al, 'Destitution in the UK', Joseph Rowntree Foundation, 2018; C. Fitzpatrick, G. McKeever and M. Simpson, 'Conditionality, Discretion and TH Marshall's "Right to Welfare"' (2019) 41 *Journal of Social Welfare and Family Law* 445; S. Wright and A.B.R. Stewart, 'First Wave Findings: Jobseekers', May 2016, available at http://www.welfareconditionality.ac.uk/wp-content/uploads/2016/05/WelCond-findings-jobseekers-May16.pdf; Adler, as above n 29, chapter 6.

[85] See the submissions of the Welfare Conditionality Project to the UN Special Rapporteur on Extreme Poverty and Human Rights, 6

the sanctions that may reach the level of severity of article 3, in other words, but also the effects of the design of payments.

The right to a subsistence minimum and the right to social assistance

International human rights law also provides for a right to social assistance, which guarantees public support for those who cannot meet their basic needs.[86] In this context, the ECSR has maintained that '[t]he establishment of a link between social assistance and a willingness to seek employment or to receive vocational training is in keeping with the Charter, in so far as such conditions are reasonable and consistent with the aim pursued, that is to say to find a lasting solution to the individual's difficulties'.[87] It has said, though, that [r]educing or suspending social assistance benefits can only be in conformity with the Charter if it does not deprive the person concerned of his/her means of subsistence.[88] In relation to the UK scheme, the Committee has raised questions about its compatibility with the right to social assistance, particularly with respect to severe sanctions that can be imposed on claimants.[89]

A good example of how the questions that arise should be addressed when harsh sanctions are in place was provided by a national court. 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).[90] Even though the Court accepted that welfare benefits can be conditional and available to those who are in true need, it also explained that any sanctions imposed have such an effect on human dignity that they should be subject to a strict test of proportionality (meaning that they should be suitable, necessary and reasonable).

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',[91] because people cannot meet even the most basic needs such as paying for their rent and electricity. In addition to the existential minimum compatible with human dignity, the Court explained that it pays attention to other rights that are affected, such as protection of family, occupational freedom or health, which are all included in the Basic Law.[92] It ruled that while the provisions on welfare conditionality appear legitimate on their face, they fail the strict proportionality test that was applied here.[93] It accepted that the authorities have a margin of appreciation on these matters, but that in this

https://www.ohchr.org/Documents/Issues/EPoverty/UnitedKingdom/2018/NGOS/Welfare_Conditionality_Sanctions_SupportandBehaviourChange.pdf.

[86] For a detailed overview, see A. Eleveld, 'The Sanctions Mitigation Paradox in Welfare to Work Benefit Schemes' (2018) 39 *Comparative Labour Law & Policy Journal* 449. For discussion of the provisions, see V. Gantchev, 'Welfare Sanctions and the Right to a Subsistence Minimum: A Troubled Marriage' (2020) 22 *European Journal of Social Security* 257 at 265 ff.

[87] ECSR Conclusions, decision of 6 December 2017, Norway, 2013/def/NOR/13/1/EN.

[88] ibid.

[89] ECSR, Conclusions XXI-2 (2017) United Kingdom. See M. Simpson, 'Assessing the Compliance of the United Kingdom's Social Security System with its Obligations under the European Social Charter' (2018) 18 *Human Rights Law Review* 745 at 759.

[90] BVerfG 1 BvL 7/16 (05.11.2019).

[91] ibid, para 65.

[92] ibid, para 135.

[93] ibid, para 136.

case they had not engaged in an assessment of the effects of the sanctions on people. It therefore found that they failed to satisfy the test of proportionality in the cases of withdrawal of 60% and 100% of the benefits from sanctioned individuals. In addition, the Court was concerned that the rigidity of the scheme did not permit discretion on whether sanctions will be imposed even if it is counterproductive for the social inclusion of the claimant. The UK Universal Credit scheme, taken together with zero-hours contractual arrangements, may fall short of these standards in instances of harsh sanctions and their effects.

The right to private life

Aspects of the system may also give rise to violations of the right to private life under article 8 of the ECHR. The Court interprets article 8 broadly so as to cover activities that take place not only in one's home or other private space, but also in an individual's personal and social life: 'the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings',[94] as the Court puts it.

The digitalisation of the UK scheme entails very close monitoring of claimants' everyday life, which may violate article 8. Aspects of the system, such as the Claimant Commitment, have been described as an authoritarian approach towards the unemployed.[95] Social policy scholars have suggested that there is 'large-scale surveillance of detailed back-to-work plans, involving variable coercion, since claimants can be sanctioned for non-compliance with any item written in the document'.[96] Claimants have to show that they look for work 35 hours a week, and the main system to monitor this is an online electronic search engine for jobs. This electronic system has been characterised by Fletcher and Wright as a 'digital panopticon', and criticised for being 'laced with compulsion and intrusive surveillance'.[97] People's work coaches can see their daily online activity, such as the jobs for which they applied, and use the information in order to impose sanctions on them. The extensive monitoring of how they spend their life 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.

When there is an interference with article 8, the Court applies a test of proportionality in order to assess whether the interference is justified or whether it violates the right to private life: it first assesses whether it has a legitimate aim, and then whether the means are proportionate to the aim pursued. The aim of the scheme may be presented as legitimate for it seeks to help people get into work, and the UK Government would argue that the surveillance is justified as a proportionate restriction of the right to private life. However, it should be viewed as only *prima facie* legitimate, for if we observe the overall structure created by the scheme, it will be obvious that 'the balance between sanction and support has

[94] *Von Hannover v Germany* (No 2), para 95. Other examples that illustrate the broad coverage of article 8 include *Niemietz v Germany*, App No 13710/88, judgment of 16 December 1992; *Sidabras and Dziautas v Lithuania*, App Nos 55480/00 and 59330/00, judgment of 27 July 2004.
[95] D.R. Fletcher and S. Wright, 'A Hand Up or a Slap Down? Criminalising Benefit Claimants in Britain Via Strategies of Surveillance, Sanctions and Deterrence' (2018) 38 *Critical Social Policy* 323.
[96] ibid 330.
[97] ibid 332.

tipped firmly in favour of the former',[98] putting in question whether the aim is really to support the poor or whether it is to sanction and manage them, as Adler argued. Even if the aim were viewed as legitimate, the extensive intrusion in private life should be found to be disproportionate to the aim pursued.[99]

Other aspects of the scheme may also violate article 8. This can be the case both in relation to the sanctions and the quality of the work that claimants are required to undertake. The case *Lacatus v Switzerland*[100] supports the point that the ECtHR is open to accepting that punishing the poor is incompatible with the right to private life. The case did not involve welfare conditionality. It examined the criminalisation of begging. It was brought by an applicant who came from a background of poverty, did not work or receive social support, and had to beg in order to meet her basic needs. The Court ruled that the imposition of a penalty on her and her detention for five days because she did not pay the fine struck in the heart of human dignity and violated her right to private life under article 8 because it was through begging that she could secure income to meet her basic needs. The ruling signals that punishing (through criminal law in this instance) certain activities that are linked to poverty is not compatible with the Convention. This has obvious implications for schemes where people who are in economic need are forced and trapped into exploitative work, in a manner that manages and punishes them,[101] instead of promoting their social inclusion.

Poverty and discrimination

Is the treatment of welfare claimants in the instances that I discuss compatible with principles of equality and non-discrimination that we find in human rights law? Article 14 of the ECHR prohibits discrimination but this is not a general, free-standing equality provision.[102] It prohibits discrimination in the enjoyment of the rights of the Convention, which means that it needs to be invoked together with another ECHR provision. The article is not exhaustive in enumerating the prohibited grounds of discrimination but is open-ended.[103] In this context, Judge Tulkens has argued that the ECtHR has interpreted it in a manner that is particularly sensitive to structurally vulnerable groups.[104]

The examples that I have identified may ground racial discrimination,[105] which has been described by the Court as 'a particularly invidious kind of discrimination and, in view of its

[98] ibid 330.

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

[100] *Lacatus v Switzerland*, App No 14065/15, Judgment of 19 January 2021.

[101] Adler has compared benefit sanctions to criminal sanctions, above n 32.

[102] Protocol 12 of the ECHR contains a free-standing equality provision but it has not been ratified widely.

[103] 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.

[104] 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) p 14.

[105] Aspects of the welfare benefits system in the UK has also been said to constitute discrimination on the basis of gender. See the discussion in M. Campbell, 'The Austerity of Lone Motherhood: Discrimination Law and Benefit Reform', (2021) OJLS.

perilous consequences, [one which] requires from the authorities special vigilance and a vigorous reaction'.[106] It can be seen that many of the laws at stake have a disproportionate adverse effect on minority, racial and ethnic groups, if compared to white people in a similar position.[107] This is not direct discrimination, in other words, but indirect discrimination, whereby the law disadvantages protected groups indirectly. In this regard, the ECtHR has ruled that 'a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group'.[108]

In assessing whether indirect discrimination constitutes a violation of the Convention, there is scope for justification through a test of proportionality, which tends to be often less strict than the scrutiny of direct discrimination. However, instances of indirect discrimination, such as the ones that I examine here, may be as morally troubling as instances of direct discrimination.[109] As Moreau argued, indirect discrimination may instantiate negligence on the part of the moral agent - the state authorities in our case - to take seriously into account the interests of disadvantaged groups when designing the rules in question.[110] For this reason, the test of proportionality should assess closely whether the state examined the effects of the rules on the most disadvantaged groups when designing them.[111]

For instance, looking at Universal Credit in the UK, there is evidence that black and Asian people are disproportionately represented in households that are found in poverty and unemployment, and are therefore in need of welfare support.[112] To the extent then that these groups have been forced in this work through strict conditionality and harsh sanctions, an argument can be made that the policy is indirectly discriminatory. In cases of destitution or labour exploitation of workers under these schemes, it can be argued that there is a violation of article 14 together with articles 4 (prohibition of forced and compulsory labour) or 3 (prohibition of inhuman and degrading treatment) of the ECHR. It is important to note here that articles 3 or 4 do not have to be breached when invoked in conjunction with article 14. The action in question simply has to 'fall within their ambit'.[113] The ground of discrimination would be race, and the test of proportionality in the context of article 14 has to assess closely the effects of the policies on the racial groups that are affected most and consider whether the authorities considered these effects when designing the rules.

[106] *DH and Others v the Czech Republic*, App No 57325/00 (ECtHR Grand Chamber, 13 November 2007) para 176.

[107] On indirect discrimination under the Convention, see *DH*, as above.

[108] *DH*, para 175.

[109] S. Moreau, 'The Moral Seriousness of Indirect Discrimination', in H. Collins and T. Khaitan (eds), *Foundations of Indirect Discrimination Law*, Hart, 2018, p 123 at 143.

[110] ibid, 144.

[111] For an example of a successful case of indirect discrimination on the basis of race for people in precarious work, see the employment tribunal Royal Parks decision 2202211/2020, 2204440/2020 & 2205570/2020.

[112] UNITE, 'Universal Credit: Not Fit for Purpose' (September 2019) <https://unitetheunion.org/media/2631/8869_universal-credit-report_a4_finaldigital.pdf>.

[113] See, for instance, *Thlimmenos v Greece* App no 34369/97 (GC, 6 April 2000).

Moreover, it can be said that human rights law may be developing the view that poverty is a prohibited ground of discrimination.[114] On this basis, welfare conditionality schemes that treat poor people with disrespect may be viewed as discriminatory. Poverty is not generally explicitly mentioned in human rights law as a prohibited ground of discrimination and the ECtHR has not yet examined the question directly in its majority rulings, but in many legal orders issues of poverty fit into concepts such as 'social origin' or 'social status' that are prohibited grounds of discrimination.

State conduct that disadvantages people because they are poor has been ruled to violate human rights law, while some judges have examined the issue of discrimination on the basis of poverty specifically in their dissents. In *Wallova 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 their children, the action of the authorities was viewed as disproportionate to the aim pursued.[116] The Court ruled that article 8 (right to private life) was violated alone, and in light of that it did not need to consider whether there was a breach of article 14. *Garib v the Netherlands*[117] involved the right to choose one's residence under article 2 of Protocol 4 of the ECHR on freedom of movement. The majority of the Court did not examine 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 ruling, and discussed extensively poverty as a ground of discrimination. He said that poverty 'contains within it a highly destructive potential as it jeopardises the fulfillment 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 highlighted 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.

It can therefore be said that welfare-to-work schemes that force people into zero-hours and other precarious work may violate the prohibition of discrimination both on the basis of race and on the basis of poverty.

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[114] For examples from several jurisdictions, see O. de Schutter, 'A Human Rights-Based Approach to Measuring Poverty', in M.F. Davis, M. Kjaerum and A. Lyons (eds), *Research Handbook on Human Rights and Poverty*, Edward Elgar 2021, p 2 at 5 ff; S. Ganty, 'Poverty as Misrecognition – What Role for Antidiscrimination Law in Europe' (2021) 21 *Human Rights Law Review* 962; S. Atrey, 'The Intersectional Case of Poverty in Discrimination Law', (2018) 18 *Human Rights Law Review* 411; S. Fredman, 'Redistribution and Recognition: Reconciling Inequalities', (2007) 23 *South African Journal on Human Rights* 214; Tulkens, above n 16.

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

[116] ibid, particularly [73]–[74].

[117] *Garib v the Netherlands*, App No 43494/09, Grand Chamber judgment of 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 Lluy et al v Ecuador* Inter-American Court of Human Rights Series C No 102/13 (1 September 2015).

Conclusion

Welfare-to-work schemes are supposed to support the poor to enter into paid work, because work is presented as the most effective route out of poverty. However, schemes with strict conditionality such as the system in the UK has ended up coercing those who are poor and disadvantaged into zero-hours working arrangements and other precarious work through the menace and imposition of severe sanctions and under the threat of destitution. Through schemes with strict conditionality structures of exploitation have been created and sustained, becoming widespread and routine. People who are poor and disadvantaged are forced into work that they do not want to accept, while private employers benefit from this situation. Forcing people into precarious work, and particularly zero-hours contracts, can be viewed as incompatible with several provisions of human rights law.

In this piece, I examined this legal and social problem and explored some of its main human rights implications. I should clarify here that by assessing the compatibility with human rights of welfare-to-work schemes with strict conditionality, taken together with zero-hours work, I do not suggest that activation policies or non-standard work arrangements always lead to violations of human rights. However, the whole structure as described in the preceding sections that contains harsh sanctions if people do not accept this insecure work creates systemic oppression and exploitation of the poor, and may ground state responsibility for human rights violations.