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Law, Social Policy and the Constitution of Markets and Profit Making

Kenneth Veitch¹

Abstract

This article explores the relationship between law, society and economy in the context of the contemporary welfare state in the UK. Drawing on themes in Karl Polanyi's *The Great Transformation*, the article identifies the nature of the constitutive role of contemporary social policy and law in the creation and maintenance of markets and opportunities for the private sector in the field of welfare. By reference to recent legislative reforms and developments in health care and unemployment policy, the article focuses on the institutional mechanisms – especially forms of law and social relations – being put in place to foster a friendly environment for those seeking to profit from welfare. It is argued that what emerges from those developments and reforms is a reformulation of the function of the welfare state and related law: no longer are these predominantly driven by a logic of social protection via redistribution to those in need; rather, they increasingly form core components of the state's desire to create openings for the private sector within welfare. In Polanyi's terms, the result is that the institutions that once contributed to ensuring the embeddedness of the market economy in

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society now play an important role in processes of disembedding – a state of affairs that has potentially detrimental consequences for those seeking assistance from the welfare state.

Introduction

Social policy and related legislation present an opportunity to consider fundamental issues of law, economy and society and, importantly, the interplay between them. As such, they form fertile subjects for engaging with an economic sociology of law. In recent years, however, there has been a tendency in some academic literature to treat them as if they were distinct entities. The standard analysis and critique of neoliberalism, for instance, conceptualises the development of the so-called self-regulating market as demanding a corresponding diminution of the social or welfare state. The result is that the social and the economic appear in conflict with each other, with the economic sphere being viewed as unable to function properly where the social persists.² This article challenges this portrayal of neoliberalism by exploring the connections between law, economy, and society. Specifically, it identifies the constitutive role of contemporary law and social policy in creating and maintaining markets and opportunities for profit making within the welfare sector.³

In one sense, social policy has always been bound up with questions and problems of economy. The welfare state illustrates this vividly. Thus, through discharging its core function of protecting citizens against the economic and social risks of capitalism, welfare institutions

² See, for example, D. Harvey, *A Brief History of Neoliberalism* (2007).

³ The article is therefore in keeping with literature that stresses the centrality of the state and social relations to the development, maintenance, and success of markets and neoliberalism. See, for example, N. Fligstein, *The Architecture of Markets: An Economic Sociology of Twenty-First-Century Capitalist Societies* (2002), L. Wacquant, 'Three Steps to a Historical Anthropology of Actually Existing Neoliberalism' (2012) 20 *Social Anthropology* 66, and P. Bourdieu, *The Social Structures of the Economy* (2005).

indirectly assisted the capitalist mode of production. For instance, publicly funded health care and education benefited employers by ensuring a flow of healthy, knowledgeable and skilled workers. What can be witnessed today, however, is a more direct role for social policy and related legislation in supporting capital – something that has implications for assumptions surrounding the traditional functions of the welfare state. Via a focus on recent developments and reforms within health care and unemployment policy and law, the article develops an analysis of the types of institutional mechanisms that are being deployed to facilitate the implementation of this more direct role of social policy and law.

In order to frame the discussion and analysis, the article draws on some themes and concepts from a work that has to a degree inspired the development of economic sociology and the nascent economic sociology of law – namely, Karl Polanyi's *The Great Transformation*.⁴ Two specific features of Polanyi's work render it useful in the present context. The first is his idea of the embeddedness of the market economy in society and social relations; the second is the stress he places on state intervention as an indispensable element in the construction of markets. Those features of his work provide a conceptual framework through which to reflect on the important changes in the roles of current social policy and law. On the one hand, it allows for a focus on their constitutive functions in respect of markets and opportunities for profit making for the private sector within the field of welfare. Specifically, it directs us to consider the types of institutional mechanisms – including the forms of law and social relations – that have, and are being, created for the purpose of facilitating such objectives. On the other hand, it confronts us with key questions regarding the degree to which the welfare state

⁴ K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (2001) [1944].

continues to operate as a source of social protection for citizens against the consequences and risks flowing from capitalism. As we will see, in some circumstances today's social policy and law are being deployed in ways that create conditions for precisely the production of such consequences and risks.

The reciprocal relationship between social and economic policy

One of the many virtues of Karl Polanyi's *The Great Transformation* is its insight that a self-adjusting market (what he also calls the market economy) cannot exist for any length of time before it results in the destruction of natural and human life.⁵ This state of affairs would mean:

no less than the running of society as an adjunct to the market. Instead of economy being embedded in social relations, social relations are embedded in the economic system ... For once the economic system is organized in separate institutions, based on specific motives and conferring a special status, society must be shaped in such a manner as to allow that system to function according to its own laws.⁶

Famously, Polanyi goes on to illustrate this scenario by reference to the dangers arising from the fictitious commodification of land, labour and money that emerged at the end of the eighteenth century and tightened its grip during the nineteenth. Rather than land and labour 'form[ing] part of the social organization itself',⁷ as was the case in the mercantile system, these natural and human elements of society became subject to the price mechanism, the operation of which was to have devastating social consequences. Disembedded from social organisation and thrust under a system operating on the principles of gain and 'unconscious growth',⁸ the functions of land and labour shifted from the non-economic to the economic, and society had to take measures to protect itself. Moreover, Polanyi stresses that the self-regulating market

⁵ id.

⁶ id., p. 60.

⁷ id., p. 72.

⁸ id., p. 35.

was not some sort of free-floating entity that emerged out of thin air and operated without support of any kind. Rather, state intervention was crucial in establishing and enforcing the doctrine of laissez-faire and the operation of the self-regulating market. As Polanyi notes of the 1830s and 1840s, there emerges 'an enormous increase in the administrative functions of the state, which was now being endowed with a central bureaucracy able to fulfil the tasks set by the adherents of liberalism.'⁹

Against this backdrop, Polanyi's thesis is that the economic system must always be embedded in social relations if it is to function for the benefit of society. He notes the types of measures society was adopting to protect itself against the self-regulating market. Thus, for example, he charts the development from the 1870s of strong Trades Unions that negotiate wages and conditions of labour outside of the self-regulating market. Moreover, such measures had as their objective non-monetary interests such as 'professional status, safety and security, the form of a man's life, the breadth of his existence, the stability of his environment'.¹⁰ It was the need for social protection to address the 'social interests of different cross sections of the population [...] threatened by the market' that mattered.¹¹ According to Polanyi, such measures had restored the social embeddedness of market economy and thereby ensured the indivisibility of the economic, the political and the social. This, he said, reflected Robert Owen's insistence 'on the *social* approach'¹² within New Lanark in Scotland:

New Lanark had taught [Owen] that in a worker's life wages was only one among many factors such as natural and home surroundings, quality and prices of commodities, stability of employment, and security of tenure ... The education of children and adults, provision for entertainment, dance, and music, and the general

⁹ id., p. 145.

¹⁰ id., p. 161.

¹¹ id., p. 162.

¹² id., p. 178. Emphasis in original.

assumption of high moral and personal standards of old and young created the atmosphere in which a new status was attained by the industrial population as a whole.¹³

For present purposes, two aspects should be noted from Polanyi's book: the first is the importance placed on the social embeddedness of markets as the *conditio sine qua non* of the maintenance of society; the second, related to this and especially relevant here, is that for the social embeddedness thesis to be meaningful, the self-protective measures adopted by society from the 1870s onwards had to serve non-economic interests ('the form of a man's life, the breadth of his existence' etc.). That is, they had to ensure that markets and the economy were rooted in the organisation of society and reflected the non-economic interests and values associated with man's life.

Published in 1944, Polanyi's book appeared just before the establishment in the UK of the institutions of societal self-protection that have come to be known collectively as the welfare state. Before assessing whether and how some recent examples of social policy and law sit within Polanyi's embeddedness framework, it is necessary to get a sense of how the relationship between economic and social policy has played out over the course of the welfare state's history. We can usefully do so by referring to some of Bob Jessop's work on the capitalist state.

In *The Future of the Capitalist State*,¹⁴ Jessop develops an ideal typical analysis of what he identifies as the two dominant forms of capitalist state in the post-WWII era – the Keynesian Welfare National State (KWNS) and the Schumpeterian Competition State or Schumpeterian Workfare Postnational Regime (SWPR). Two points from his analysis are relevant for present

¹³ *id.*, p. 178.

¹⁴ B. Jessop, *The Future of the Capitalist State* (2002).

purposes. First, Jessop stresses what he calls “the regulation approach” to capitalism, which posits that stable capital accumulation is unlikely to result from the operation of market forces alone. Rather, it requires the intervention of the state and other ‘non-market mechanisms’. These ‘shap[e] the dynamic of accumulation as well as being shaped by that dynamic.’¹⁵ In other words, accumulation (economic) regimes and political regimes co-evolve. Moreover, ‘choices among economic and social policies are typically linked to prevailing accumulation strategies, state projects, hegemonic projects and more general philosophical and normative views of the good society.’¹⁶ Secondly, in this context Jessop explores the changing productive role of social policy in capital accumulation regimes since the War – something he argues is often overlooked in analyses that concentrate on the decommodifying and redistributive features of the welfare state. Let us now look briefly at this second aspect of his work in the context of the two features of social policy that will form the focus of the reflections in the remainder of the paper.

Jessop first discusses what he calls ‘the social reproduction of labour-power as a fictitious commodity’. In the era of the KWNS, the state, rather than families and/or liberal market forces, becomes the key player in this reproduction. Here, the socialisation of life risks occurs via a system of comprehensive and (near-)universal measures designed to redistribute wealth to those in need. Access to these measures was based mainly on ‘past, present or future participation in the labour market and/or on national citizenship.’¹⁷ In contrast, within the SWPR or Workfare State we have witnessed what Jessop describes as ‘the increasing

¹⁵ *id.*, p. 1.

¹⁶ *id.*, p. 44.

¹⁷ *id.*, p. 150.

subordination of social policy to economic policy'.¹⁸ This occurs primarily as a result of internationalisation and the need for national states to remain economically competitive, lest they risk capital flight. In those circumstances, the welfare state comes to be viewed as both an onerous cost of production and an obstacle to a flexible labour market – the latter deemed to be necessary in order to remain economically competitive. The welfare state was therefore redesigned in order to reduce costs and to help facilitate and enhance the establishment of flexible labour markets. One of the mechanisms through which this occurred was (and is) workfare – a social policy that makes the receipt of state unemployment benefit conditional upon signing, and complying with, a contract stipulating a variety of work-related activities to be undertaken with a view to returning the unemployed to the labour market. Those 'active' labour policies differ from the KWNS's 'passive' system of unemployment support, where the unemployed were effectively unconditionally entitled to receive state support. Today, the discourse is firmly one of obligation and Jessop notes that it reflects 'a general movement away from the social democratic tradition'.¹⁹ We will return to workfare later.

Jessop also highlights the shift away from 'collective consumption' in today's SWPR. Collective consumption – the publicly organised and financed provision of goods and services, such as education, health, and housing by a particular form of national state – has given way 'to more market- and/or third sector solutions to the socialization of consumption'.²⁰ Features indicative

¹⁸ On this theme, see J. Clarke, 'Subordinating the Social? Neo-liberalism and the Remaking of Welfare Capitalism' (2007) 21 *Cultural Studies* 974.

¹⁹ Jessop, *op cit.*, p. 155. Reference omitted.

²⁰ *id.*, p. 162.

of this trend include the following: 1) an increased role for the private and third sector²¹ in the provision of social services, which may involve, for instance, outright privatisation or such provision by those sectors combined with public payment, or the application of market discourse and practices within a publicly funded and provided service (such as the implementation of the internal market within the UK's National Health Service (NHS) in the 1990s); and, 2) greater reliance on public-private partnerships as a mode of governance within the welfare sector. In other words, the function of social policy is no longer simply to ensure the public financing of publicly delivered social services. The prising open of this monopoly to include the involvement of the private sector means that social policy is, at least in part, now specifically designed to facilitate opportunities for profit making.

Jessop's work on the reciprocal relationship between economic and social policy since the 1940s presents two key issues that might fruitfully be refracted through the prism of Polanyi's work, outlined earlier. First, there is a suggestion that social policy and the institution created for the purpose of society's self-protection against the detrimental social consequences produced by capitalism – the welfare state – have been redesigned in order, predominantly, to support the very source of those consequences – that is, capitalism. This is at odds with the impact of the forms of social protection that Polanyi charted from the 1870s onwards as these, he argued, ensured that the economic system became re-embedded in the social – that is, that those measures protected non-monetary interests, such as 'the form of a man's life' and 'the breadth of his existence'. In Polanyi's terminology, this contemporary shift in the predominant

²¹ According to the House of Commons Public Accounts Committee, the third sector includes 'voluntary and community organisations, charities and social enterprises, ranging from small local community groups to large, established, national and international organisations.' HC Public Accounts Committee, *Building the Capacity of the Third Sector* (2009), p. 1.

function of social policy and the welfare state from a source of social protection for citizens to a facilitator of markets and opportunities for profit making represents a disembedding of the economy from social relations, resulting in 'the running of society as an adjunct to the market'. Moreover, we encounter here a reversal of Polanyi's double movement thesis, in which forms of social protection are created in order to ameliorate the deleterious effects of markets; rather, the institutional forms of social protection today shed at least part of this protective function and are deployed, instead, towards ends the social consequences of which the welfare state traditionally offered protection against. The result is a disembedding of the economy via, *inter alia*, institutions formerly associated with ensuring its embeddedness.

If establishing markets and facilitating opportunities to obtain profit are core functions of social policy today, then a second issue arises. This involves identifying what kinds of mechanisms, including legal ones, are used for this purpose, and what forms of social relations are expressed through those mechanisms. Here, we are less concerned with Polanyi's concept of embeddedness and more with his observation, reiterated by Jessop, that state intervention is crucial in establishing and maintaining markets and possibilities for capital accumulation. In particular, it is the *political* formulation and deployment of a variety of institutions and institutional mechanisms, and through these, the construction and use of specific forms of social relation, that must be the focus of attention here. As Loïc Wacquant argues, what is required when trying to grasp the slippery phenomenon of neoliberalism is a shift from 'a 'thin' economic conception centred on the market to a 'thick' sociological conception centred on the

state that specifies the institutional machinery involved in the establishment of market dominance ...²²

By reference to two examples from recent social policy and law, the following section illustrates the relevance of those two themes in Polanyi's work for understanding the constitutive role of social policy and law in establishing and maintaining markets and opportunities for profit making within the welfare sector.

Constituting Markets and Profit Making Opportunities – Health Care and Workfare

(i) Solidarity and Reforming the National Health Service (NHS)

The first mechanism that is increasingly deployed for the purpose of establishing and maintaining markets and opportunities for profit accumulation is the monetary fund through which social services within the welfare state are traditionally paid for. The operating principle of this type of fund is solidarity. This denotes that citizens' resources are pooled for the purpose of spreading risk and that there is an element of redistribution within society. The management of social risks is therefore not merely the preserve of those who can afford to purchase private insurance; rather, it is undertaken by the state on behalf of non-owners of insurance. While this redistributive aspect of the fund has traditionally implemented an underlying concern for social justice and the protection against social risk of those lacking means, as Alain Supiot notes there is also an impersonal element to this 'welfare state' form of solidarity. For while founded on the redistributive ethos described, the system posits a formal set of social relations amongst

²² Wacquant, op cit., p. 71.

citizens, rather than one based on close local or customary social bonds. Citizens therefore make payments to bureaucratic institutions and then bring claims for access to social goods and services such as health care and pensions. This lends a technical quality to the system.²³

The argument advanced here is twofold. First, there is evidence in contemporary social policy that points to the use of this monetary fund and certain types of law to create and sustain markets and opportunities for profit making within the field of welfare. The result is a novel form of redistribution – that is, from the public to the private sector – which, as we shall see, has implications for our understanding of solidarity and the use to which the social relations characteristic of this principle are put. Secondly, the impact of these changes has the potential to result in a disembedding of the economy from society as the resources of the welfare state no longer necessarily operate to protect those in need from the consequences of capitalism.

Some recent developments in the NHS serve to illustrate those arguments. One is the prominent role of public-private partnerships (PPPs; formerly the Private Finance Initiative) as ways of funding new NHS hospital buildings. Here, private contractors raise the money to finance the construction of hospitals for the NHS and, via the PPP contract, own and manage the hospital. The NHS Primary Care Trust leases the hospital and staff, such as cleaners, from the contractors, paying what is known as a ‘unitary charge’ for these from their annual health care budget. Contracts last for periods ranging from 25-30 years, although once they are paid off, the NHS does not necessarily end up owning the premises. The PPP scheme has been the object of cogent critique.²⁴ As well as being a social cost in monetary terms – that is, a

²³ See A. Supiot, *Homo Juridicus: On the Anthropological Function of the Law* (2007), pp. 207-12.

²⁴ See, for instance, A.M. Pollock, *NHS plc: The Privatisation of Our Health Care* (2004).

mechanism by which to facilitate the accumulation of capital and profit via the redistribution of money from public funds²⁵ – it also has potential social costs in human terms, as the often onerous contractual obligations to pay for PPP financed buildings can jeopardise the existence of NHS hospitals, thereby endangering the treatment of patients.²⁶

Aspects of the recent reforms to the NHS in England confirm this trend. The Health and Social Care Act 2012 replaces Primary Care Trusts with clinical commissioning groups (CCGs) as the bodies responsible for commissioning (purchasing) most health care services within the NHS (a task that will involve responsibility for spending £80bn of NHS resources). By 2016, it will become possible for CCGs to outsource their commissioning work to non-public bodies – including private firms. A market will therefore effectively be created for such services and be funded from the NHS budget. The legislation also promotes the ‘any qualified provider’ approach to the provision of NHS health care services – meaning there will be increased scope for, *inter alia*, private health care providers to become involved in the provision of NHS health care. The scope for private sector involvement is also heightened by the promotion of ‘fair and effective’ competition and the application of competition law to the commissioning of NHS treatment for the first time. The sector specific regulator for health care – Monitor – is under a duty to promote provision of health care services which is ‘economic, efficient and effective’, and to exercise its functions in a manner that will prevent anti-competitive behaviour in health

²⁵ An analysis by *The Guardian* newspaper in 2012 found that the current 717 PFI contracts, while having a total capital value of £54.7bn, would have an ultimate cost of £301bn once paid off. See *The Guardian* (6 July 2012) pp. 1 & 18. As Hellowell and Pollock note, one of the reasons for this inflated cost is that ‘the cost of finance on PFI schemes is higher than is the case for publicly financed schemes ...’. M. Hellowell and A.M. Pollock, ‘The Private Financing of NHS Hospitals: Politics, Policy and Practice’ (2009) 29 *Economic Affairs* 13. There is also evidence of a so-called Secondary Market in PFI shareholdings in hospitals, schools, roads and prisons. See BBC Radio 4’s *File on 4* programme ‘PFI Profits’, broadcast on 19th June 2011.

²⁶ The recent placing of South London Healthcare Trust into administration owing to an unsustainable deficit created by the contractual obligation to pay PFI costs is a case in point. Also, see Hellowell and Pollock, *id.*

care provision that is against patient's interests.²⁷ It will also be able to tackle specific abuses and unjustifiable restrictions that demonstrably act against patients' interests by deploying its licensing powers and, where relevant, the Competition Act 1998. The effect will be to alter the current situation, in which the bulk of NHS services are commissioned from public bodies, by creating a level playing field in which private providers of health care can compete to deliver NHS healthcare services. CCGs will need, in effect, to ensure that a tendering process for the provision of NHS services is in place, if they are not to fall foul of competition law.

Those developments and reforms do not mean that redistribution in the original sense of that term, described above, no longer occurs within the NHS or that patients must now pay to access NHS services; access to treatment based on clinical need rather than the ability to pay continues to be advanced as a core principle of the NHS across the political spectrum.²⁸ Nor is it claimed that those recent policies disclose the first instance of any type of relationship between the NHS and capital. For instance, it could be argued that since its inception the NHS has maintained in good condition what Marx referred to as 'a disposable industrial reserve army'.²⁹ But the NHS was not originally designed to be a source of capital accumulation and profit making in itself – that is, as an institution the private sector became directly involved in running or helping to manage. The policies and legislation described above indicate that this has changed.

²⁷ Health and Social Care Act 2012, s.62. What the phrase 'against patients' interests' means is unclear.

²⁸ 'It is our privilege to be custodians of the NHS, its values and principles. We believe that the NHS is an integral part of a Big Society, reflecting the social solidarity of shared access to collective healthcare, and a shared responsibility to use resources effectively to deliver better health.' Department of Health, *Equity and Excellence: Liberating the NHS* (2010; Cm. 7881), at 7, para. 1.1.

²⁹ K. Marx, *Capital: A Critique of Political Economy, Volume 1* (1976), at p. 784, and generally pp. 781-802.

The shift entails a political reformulation of the ends to which public resources are directed. This manifests itself in the public fund being made to adopt another redistributive dimension – namely, to act as a direct source for the extraction of private wealth. It also has implications for the idea of the socialisation of risk that lies at the heart of the principle of solidarity, as its meaning is no longer confined to describing the community’s pooling of resources to the end of protecting its members against the risk of *social* misfortune (such as illness); rather, as, for example, PPPs demonstrate, it also incorporates the deployment of this common fund to protect those in the private sector from a variety of *economic* risks. As Pollock et al note of PFI (now PPP) contracts, they rarely transfer economic risks to the funding consortium, with the result that these usually fall on the public and its purse. For instance: ‘Where a Trust wishes to terminate a contract, either because of poor performance or insolvency of the private consortium, it still has to pay the consortium’s financing costs, even though the latter is in default.’³⁰ This social protection from economic risk might be thought to have a more general meaning too in that making available the welfare state’s public funds for the private sector opens up an invaluable source of income and potential market and profit making opportunities at times, such as the present, of sluggish economic growth at the macro level. Importantly, though, this shift in the function of the socialisation of risk has the concomitant effect of exposing the community and its members to a diminution in the level of social protection as money is diverted away from core services to the interests of capital – something that dilutes the original redistributive objective of the fund.

³⁰ A.M. Pollock et al, ‘Private Finance and “Value for Money” in NHS Hospitals: A Policy in Search of a Rationale?’ (2002) 324 *British Medical Journal* 1205, at 1208-09.

Legally, this novel function of the socialisation of risk might be conceptualised as a case of joint and several liability, not merely in the familiar sense of debtors being held jointly and severally liable only for their own debts, but in the sense of a group being ascribed such a liability for the debts or costs or harms of others outside of the group too. In the context of the foregoing examples, this means that, via the medium of contract, taxpayers become jointly and severally liable for repaying the significant costs of PPP building projects, including costs flowing from any default on the part of the private funding consortium. In turn, and perversely, citizens also become liable for the *social costs* they themselves suffer (lack of access to adequate health care, say) as these flow from the liability to pay the financial costs of PPPs from public resources. Andreas Wildt's description of the Roman Law concept from which the idea of solidarity originates – *obligatio in solidum* – assists in highlighting some of themes involved in this contemporary set of arrangements:

To be the cosignatory of a loan means that one is liable for the reversals of fortunes of another; that one's own economic well-being is no longer completely in one's own hands ... The bonds of fraternal recognition ... are not blood bonds in this Roman conception, nor are they affective. Neither genes nor love, but liability is the bonding force. We are bound together with those with whom, like it or not, our own fates and our own well-being are interwoven. That, and not a sum of money to be repaid, is the sense of the acknowledgement of debt.³¹

The developments described above demonstrate the state's extension of the type of solidarity associated with the operation of a welfare institution such as the NHS. For no longer is the community of taxpayers solely 'liable for the reversals of [social] fortunes' of others within the group – that is, those who become ill. Additionally, through the legal institution of contract, this community's liability is extended to embrace the costs and risks and harms of those operating in the private sector. And while sums of money do indeed need to be repaid (and paid) by the

³¹ A. Wildt, 'Solidarity: Its History and Contemporary Definition', in *Solidarity*, ed. K. Bayertz (1999), p. 6. Reference omitted.

community to this sector, the underlying source of this obligation is the political creation of a bond between the public and the private, the social and the economic. Through its contracts with the private sector, the state increasingly binds the social and economic ‘fates’ and ‘well-being’ of its citizens to the private sector, its agents, and market mechanisms such that they become interwoven, or inextricably linked, with these.

What this scenario reveals then is the indispensability of a key welfare institution and its large fund of public resources for the prospects of capital and profit accumulation within the NHS. It also demonstrates how the state moulds this welfare institution and its underlying mode of social relations (solidarity) to work towards those ends. Together with competition and contract law, these become crucial institutional mechanisms for realising the political desire to develop markets and increase the role of the private sector.

(ii) Workfare, Contract and Social Relations

We saw earlier that workfare serves capital by supporting the flexible labour markets that are deemed necessary to ensure countries’ economies are, and remain, competitive.³² But what does this social policy reveal about the type of institutional mechanism deployed by the state to produce this market-friendly outcome? And what form of social relations is expressed through this mechanism?

³² This justification can be seen in the current UK Government’s White Paper on welfare reform, where the existing welfare system is said not to ‘reflect the needs of a flexible labour market’. Department for Work and Pensions, *Universal Credit: Welfare that Works* (2010; Cm. 7957) 10. The new system of Universal Credit will, in contrast, ‘drive dynamic labour market effects’. *Id.*, p. 58.

The workfare contract – or ‘claimant commitment’, as it is now known after the implementation of the Welfare Reform Act 2012 (WRA 2012) – is the social policy mechanism used by the state to support flexible labour markets. The choice of contract is important as it presents a powerful image of the person and social relations that is intuitively attractive and worthy of support, especially in today’s consumer-driven society. This image is founded upon a liberal political rationality that conceives of the self as a rational, self-determining agent, who makes autonomous choices about whether to enter agreements based upon self-assessments of individual utility. As such, the workfare contract does not, in theory at least, compel welfare beneficiaries to sign up to it; rather it emphasises the importance of consent, negotiation and reciprocity in the construction of the agreement. In other words, it envisages formal equality between the contracting parties. This is important as it means that, by being deemed to have voluntarily chosen to enter into the contract, welfare recipients can be taken to have freely negotiated and accepted the responsibilities under the agreement. In other words, they can be assumed to have bound themselves to the obligations in the contract – which are that they work, seek work, or undertake training with a view to working in a flexible labour market. As a number of scholars have pointed out, the empirical reality of workfare and other ‘social control contracts’ does not reflect any practical implementation of the theoretical contract norms such as reciprocity and consent.³³ The truth is that, if the unemployed wish to obtain benefits, they have little option but to accept the conditions in the workfare contract. There is a vast inequality of bargaining power between welfare beneficiaries and welfare state administrators.

³³ See, for example, P. Vincent-Jones, *The New Public Contracting: Regulation, Responsiveness, Relationality* (2006), Ch. 9 and M. Freedland and D. King, ‘Contractual Governance and Illiberal Contracts: Some Problems of Contractualism as an Instrument of Behaviour Management by Agencies of Government’ (2003) 27 *Cambridge Journal of Economics* 465.

In one sense, however, this does not really matter, for the crucial point is that, whether or not those contractual norms are replicated in practice, they are treated as if they are. It is the ideological dimension of the workfare contract – that is, its ability to represent unemployment and the solutions to it as revolving around a formally equal set of social relations characterised by matters of individual choice and responsibility – that is important here. Possible structural causes of unemployment, such as flexible labour markets themselves, are obscured, allowing politicians to claim these markets as solutions to the problem, rather than as the problem itself.

Consistent with the ideological dimension of the workfare contract is the threat of the application of financial sanctions for either breaches of the contract or a failure to enter into it at all. This has been a core feature of workfare and has been continued and deepened in the WRA 2012.³⁴ Essentially, unemployment benefit is reduced in stages depending on the severity and number of contractual breaches, the classification of claimant, and the type of workfare programme. While the presence of those sanctions may confirm the critique that workfare contracts are not based on the norm of consent (for the inevitable reduction in or removal of one's unemployment benefit in the event of non-compliance effectively leaves the claimant with no practical alternative but to agree to the conditions), again it is the ideological aspect of contract – that you must suffer the consequences of breaches of your voluntarily assumed obligations – that is crucial in lending legitimacy to a policy designed to entrench flexible labour markets. Moreover, this punitive element of the workfare contract feeds into more populist notions surrounding those groups assumed to be heavily reliant on welfare benefits – that they

³⁴ For more detail on this, see ss. 26 and 27 of the WRA 2012 and the Act's preceding White Paper, Department for Work and Pensions, *op cit.*, Ch. 3.

are up to no good, lazy, cheating the system etc. The call for them to find a job and relieve the taxpayer of unnecessary costs also serves to further contemporary social policy's aim of securing the presence of flexible labour markets and, hence, a more competitive economy.

It could be argued that other mechanisms, such as the Mandatory Work Activity scheme, have been developed with the same objective of maintaining flexible labour markets in mind. Purportedly designed for jobseekers who would 'benefit from experiencing the habits and routines of working life',³⁵ viewed from another angle it is simply a mechanism for ensuring the flow of free labour for employers operating within flexible labour markets.³⁶ What all of these mechanisms demonstrate however, is the crucial constitutive role the state plays through its social policy in developing and maintaining flexible labour markets. In that sense they bear out Polanyi's observation that the state's intervention is crucial in establishing and maintaining a market economy.

Workfare also contains elements pointing to a Polanyian disembedding of the economy from society; in other words, the policy is not necessarily designed to protect society and its members from the deleterious human consequences of the operation of markets. On the one hand, this can be seen in the provision for the removal of benefits from those failing to discharge their contractual workfare obligations. On the other hand, by binding beneficiaries to flexible labour markets, jobseekers become subject to the economic and social insecurity associated with this type of market. I have described elsewhere empirical evidence suggesting that those entering the labour market through workfare programmes often find themselves in

³⁵ Department for Work and Pensions, *op cit.*, p. 29.

³⁶ The Mandatory Work Activity scheme involves an unpaid full-time work placement lasting a maximum of four weeks.

precarious forms of employment and, eventually, back on benefits – the so-called revolving door syndrome.³⁷ Consequently, workfare is very different to the types of protective measures Polanyi described as emerging from the 1870s. Importantly, it would not appear to serve the types of non-economic interest – ‘safety and security, the form of a man’s life, the breadth of his existence, the stability of his environment’ – Polanyi viewed as a condition of embeddedness. Indeed, quite the opposite would appear to be the case, as workfare jeopardises those interests and threatens to produce what Robert Castel has described as the individual’s ‘disaffiliation’:

that is, *rupture of the bond within society*. The final outcome, the end of this process, is that economic insecurity becomes destitution and fragility of relationships becomes isolation ... Poverty is revealed as the outcome of a series of breakdowns in belonging and failures to establish bonds, which finally throws the person concerned into a floating state, a sort of *social no-man’s land*.³⁸

Revealingly, the possibility of disaffiliation in the present context arises through the intervention of the welfare state and its objective of supporting flexible labour markets. It is a social cost *written into the state’s social policy* – a form of policy originally designed to ameliorate the worst social and economic consequences of capitalism. In Polanyi’s terms, not only is this an example of ‘the running of society as an adjunct to the market’; it also reveals that the institutions most traditionally associated with embeddedness have today themselves become important vehicles of disembeddedness.

The next, and final, section draws together the paper’s themes by reflecting upon what implications they might have for our understanding of the relationship between law and the welfare state today.

³⁷ K. Veitch, ‘Social Solidarity and the Power of Contract’ (2011) 38 *Journal of Law and Society* 189.

³⁸ R. Castel, ‘The Roads to Disaffiliation: Insecure Work and Vulnerable Relationships’ (2000) 24 *International Journal of Urban and Regional Research* 519, at 520. Emphases added.

Law and the Contemporary Welfare State

Historically, what were the effects of the emergence of the welfare state upon law? Having identified formal rational law as the form of law characteristic of Western modernity and the rise of the capitalist economy, Weber notes the challenges being made to the formal qualities of modern law. With the emergence of the ‘modern class problem’, there arose ‘[n]ew demands for a “social law” to be based upon such emotionally colored ethical postulates as “justice” or “human dignity”, and directed against the very dominance of a mere business morality’.³⁹ This results in what Weber calls the materialisation of formal law, as law’s formal and abstract system of general rules becomes, *inter alia*, more particularistic (designed to further specific economic or social purposes within commercial or labour law, for instance) and involved in the management of class conflict. This dilutes its formal, impartial and technical character as its function shifts from ensuring the equality of legal subjects before the law to the implementation of particular governmental social policies designed to redress the inequalities arising from capitalism. In other words, with the arrival of the welfare state the form and function of law alter from those characteristic of the liberal state.⁴⁰

How might the legislation considered in this paper fit within this historical trajectory from formal rational law to social law? The first point to note is that it displays elements of social law. Thus the Health and Social Care Act 2012, for example, depicts a welfare system that,

³⁹ M. Weber, *Economy and Society* (1978), p. 886.

⁴⁰ Weber’s identification of the materialisation of law has given rise to a sizeable literature on this topic, largely taken up via a focus on the phenomenon of juridification. See, for instance, J. Habermas, *The Theory of Communicative Action – Volume 2: Lifeworld and System* (1987), 356-73; G. Teubner, ‘Juridification: Concepts, Aspects, Limits, Solutions’ in *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law*, ed. G. Teubner (1987), 3-48; and, F. Ewald, ‘A Concept of Social Law’ in *Dilemmas of Law in the Welfare State*, ed. G. Teubner (1986), 40-75. Limitations of space do not allow for a discussion of this literature here.

despite cuts in expenditure, continues to operate on the principle of solidarity – in the sense of a social fund in which the community pools risks and there is an element of redistribution. For instance, in principle at least, access to NHS services continues to be based on clinical need, rather than the ability to pay.

But this Act and the Welfare Reform Act 2012 also contain evidence of elements of formal rational law and an image of social relations influenced by the liberal political rationality associated with this form of law. Thus, the possibility of applying competition law to ensure the absence of anti-competitive behaviour introduces a degree of formal equality into the NHS commissioning process, and the use of contract law as the legal mechanism upon which PPPs rest stresses the importance of the formal notion that agreements freely entered into between parties must be upheld. The fact that the outcomes of the implementation of these formal legal processes may not lead, in Weber's words, to "justice" or "human dignity", does not affect their legal validity. This differs from social law, which, François Ewald argues, operates on the basis of "solidarity contracts" – a notion of contract 'founded on ideas of fair distribution or equitable allocation of social burdens and profits'.⁴¹ Similarly, the workfare contract and claimant commitment, while not strictly legal entities, are founded on the same idea of social relations – characterising jobseekers as self-determining, self-interested actors who freely enter into contracts and accept obligations with a view to maximising their individual utility. Once again, while entering into the contract or commitment may result in injustice or human indignity (one might think, for instance, of the lack of pay for work undertaken through the Mandatory Work Activity scheme), founding these contracts and commitments upon both this idea of social

⁴¹ Ewald, id., p. 43.

relations and the formal properties of contract law means that those types of social consequences have no bearing on the legal validity of workfare mechanisms.

Those Acts therefore display elements of both social law and formal rational law. Importantly, the latter functions as a central institutional mechanism through which the welfare state establishes, supports and maintains markets today (flexible labour markets in the case of workfare and a market for the provision of services and infrastructure in the field of health care). Within the sphere of social policy, formal rational law and its associated liberal form of social relations are therefore constitutive of the development of markets and opportunities for capital accumulation and profit making. Those functions demonstrate one of Polanyi's key arguments, namely that state intervention is crucial to the establishment and continuation of free markets. Laissez-faire did not require the withdrawal of the state in order to flourish; instead, it demanded constant state policing and assistance. Law, of course, had, and has, an integral role to play in this. Contract and property law, for example, are essential not only in providing, via principles such as freedom of contract, for the protection of private property rights within an already existing market; they are foundational in *establishing* markets. As

Paddy Ireland notes:

[P]roperty and markets are legal, political and social constructs – the products as well as the objects of regulation; and thus, as a result, not only is the goal of “deregulation” absurd, the dynamics and rationalities of particular markets are themselves inevitably political and legal products which vary according to the legal rights-obligations-regulatory structures that constitute them.⁴²

This brings us to one of the central points to emerge from the analysis undertaken in this paper.

For the creation of markets and the carving out of opportunities for capital accumulation and

⁴² P. Ireland, 'Law and the Neoliberal Vision: Pension Privatisation, Investor Protection and the Ownership Society' (2011) 62 *Northern Ireland Legal Quarterly* 1, at 5.

profit making in the welfare arena are not the products of formal rational law alone. Rather, they are also 'political and social constructs'. In order to function effectively, formal rational law requires a propitious political and social environment. In the present case, this takes the form of a combination of a large communal resource, based on the principle of solidarity, from which funds can periodically be extracted by the private sector, and the institution of a liberal political rationality within social policy that views social relations as being based on an image of people as self-determining, self-interested actors who voluntarily create their responsibilities via consensual agreements. Given that, politically, it would be unfeasible simply to dismantle welfare institutions and move to a system of private insurance, the desire to use these institutions as sources of economic growth for the private sector requires the careful construction of a legal, political and social system geared towards this end (a 'state-crafting', to deploy Loïc Wacquant's phrase⁴³). While this includes implementing what for the post-WWII welfare state are new legal mechanisms and political rationalities (albeit they have a much older provenance), it also involves putting what might be called the existing system of public or social wealth at the service of markets, capital accumulation, and profit making. The result is that the solidarity fund takes on an additional redistributive function – redistributing wealth *away* from those for whom it was originally intended and *towards* those who operate the system – the capitalist economy – responsible for producing the need for a welfare state initially. While redistribution to the non-owners of capital still occurs through the welfare system today, there is greater potential for recent social policy, and the type of law it institutes

⁴³ Wacquant, op cit.

within the welfare system (formal rational law), to produce injustice and human indignity as a result of its concern to further Weber's 'business morality'.

This raises a final point, which is that the form of law increasingly to be found within social policy and legislation becomes complicit in the tendency of the welfare state to produce conditions of social suffering rather than the social protection one had come to expect of it. As social policy becomes concerned with issues of reducing costs by, *inter alia*, furthering the role of the private sector, and with sustaining flexible labour markets, so the form of law deployed to support those objectives begins to become constitutive of an erosion of social protection and the consequences, such as social dislocation and economic insecurity, identified earlier. Here, the law of the welfare state begins to exhibit what Alain Supiot has described in the context of labour law as 'the separation of things and persons'. There, he argues that today 'work figures as a thing divested of the person and available for purchase and sale, and the person features only in the case of 'needs' which are so compelling that they cannot be ignored by the collectivity.'⁴⁴ But as welfare policy itself is increasingly tailored towards private ends, it too becomes 'divested of the person', as the approach to unemployment benefit via workfare demonstrates. Unlike the protective legislation at the end of the nineteenth century that Polanyi discusses, the legislation described in this paper is not exclusively concerned with the protection of non-economic interests, despite the fact that one might consider welfare as indispensable to what Polanyi describes as 'the substance of society'. For welfare – 'the state of faring or doing well: freedom from calamity, etc.'⁴⁵ – is inextricably linked to providing the

⁴⁴ A. Supiot, 'The Dogmatic Foundations of the Market' (2000) 29 *Industrial Law Journal* 321, at 339.

⁴⁵ Chambers English Dictionary.

conditions for human beings not simply to exist, but to flourish (of 'doing well'). Health care, education, decent work, and shelter are all preconditions for the realisation of this flourishing. The rise of formal rational law within the welfare sector operates as part of an institutional framework responsible for the steady erosion of such an understanding of, and aspiration to, welfare, and its replacement with one in which Weber's 'business morality' begins to dominate.