

# CRISIS IN, AND SUSTAINABILITY OF, THE BRITISH WELFARE STATE

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## 1. DEFINITION OF THE TERM “WELFARE STATE”

The welfare state is a government created policy in which the state plays an important role in protecting and promoting the social and economic wellbeing of the citizen. The main principles of the welfare state include the equitable distribution of wealth,<sup>1</sup> equality of opportunity and public conscience<sup>2</sup>.

## 2. A HISTORICAL NOTE

It was during the Liberal government's<sup>3</sup> welfare reforms of the period 1906 to 1914 that the modern welfare state came about. During that period much welfare legislation was enacted<sup>4</sup> providing welfare benefits to various classes of citizens.

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<sup>1</sup> This expression means the wealth of citizens or a group of citizens in society, namely the citizen's or group of citizens in society taking into account (a) the citizens' net worth and (b) the ownership of all assets. Wealth is not to be confused with income. The distribution of income is totally different from that of the distribution of wealth. Francis Bacon in “*Of Seditions and Troubles*” said “Above all things good policy is to be used so that the treasures and monies in a state be not gathered into a few hands... Money is like fertilisers, not good except it be spread.”

<sup>2</sup> Namely, the public responsibility of those who are unable to avail themselves to the minimum provisions to enjoy a good life.

<sup>3</sup> Under the then Prime Minister H.H. Asquith.

<sup>4</sup> See the Old Age Pensions Act, 1908, the Labour Exchanges Act, 1909 and the Development Act, 1909 which introduced government intervention in economic development, the introduction of free meals also in 1909, the National Insurance Act, 1911

The British welfare state experienced a boost in 1945. It was in 1941 that the British government under the premiership of Sir Winston Churchill commissioned a report on how to rebuild the country, - through the provision of unemployment and sickness insurance in the United Kingdom, - when the Second World War ended. William Beveridge<sup>5</sup> was the candidate chosen to chair this Commission as he had previously written a book in 1910<sup>6</sup> treating unemployment and how to combat it. In 1942 the Beveridge Report<sup>7</sup> was published advocating, *inter alia*, a national insurance system in which every citizen of working age would contribute to on a weekly basis. These contributions would provide social benefits to pensioners, the unemployed, the widowed, and the sick.

The Report also made recommendations on other important social shortcomings, which it called “the five giants,”<sup>8</sup> such as a national health service to treat the sick, the reform of the existing education system to encourage scholarship, a social security system to tackle poverty by providing citizens with adequate income, the abolition of slums to be replaced by a new house building programme and government policies for the creation of full employment.

The initial provisions of the Beveridge Report, having been well received,<sup>9</sup> came into operation in 1944 when the Ministry of National Insurance was set up. It was the influence of the Beveridge proposals which brought the Labour Party into power immediately after the war in 1945. Clement Attlee campaigned on the Beverage Report which he aimed to have in place by 1948, but which he never achieved since

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which set up a national insurance contribution system for both health and unemployment benefits. See too Derek Fraser “*The Evolution of the Welfare State - A History of Social Policy since the Industrial Revolution*” (1984).

<sup>5</sup> Mr Beveridge was subsequently knighted and elevated to a peerage.

<sup>6</sup> The book was entitled “*Unemployment: A Problem of Industry*” by W.H. Beveridge (1910) Longmans, Green & Co. suggesting that the removal of “red tape” (i.e. excessive regulation and bureaucracy) which tied down employers would be the only way to defeat unemployment and thus job cuts.

<sup>7</sup> As it is commonly known entitled “Report of the Inter-Departmental Committee on Social Insurance and Allied Services”

<sup>8</sup> Namely, “Want, Disease, Ignorance, Squalor and Idleness.”

<sup>9</sup> The Report was adopted by all three political parties of the time, namely the Conservative, the Liberal and the Labour Parties.

public funds had dried up as a result of the war effort.<sup>10</sup> Nevertheless he implemented numerous social reforms<sup>11</sup> which formed the key planks of the modern Welfare State.<sup>12</sup>

In fact the Labour Party in the 1945 general election pledged to drop Beveridge's "Five Giants"<sup>13</sup> and replacing those by providing for citizens "from cradle to the grave."

### 3. THE CURRENT CRISIS IN, AND SUSTAINABILITY OF, THE WELFARE STATE

#### 3.1. General Issues

There is little doubt that the United Kingdom welfare state is currently experiencing an unprecedented attack<sup>14</sup> culminating into, not only a serious crisis<sup>15</sup>

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<sup>10</sup> Thus social security benefits could not be paid out to those in poverty.

<sup>11</sup> For example, the National Insurance (Industrial Injuries) Act 1946, the National Assistance Act, 1948 which went further than the Beveridge recommendations on poverty but which, because of a flawed national insurance system on contributions, excluded women, and the National Health Service Act, 1946 which created the English and Welsh National Health Service which provided free health care to citizens and which came into being in 1948.

<sup>12</sup> For example, the National Insurance Act, 1946, the National Assistance Act, 1948 which though limited, - in that women and others were excluded from its provisions because the benefits were based on national insurance contributions, - nevertheless did play a role in alleviating poverty. The National Health Service Act, 1946 created the National Health Service in England and Wales in 1948. It was established by Aneurin Bevan who was appointed Minister of Health. In addition there was also a free national education system in operation and parents would receive Universal Child Benefit thus encouraging them to have children, at the time when the birth rate was low after the Second World War, by enabling parents to feed and support their children.

<sup>13</sup> See footnote 8 above.

<sup>14</sup> By way of spending cuts on social benefits and services which have serious effects on those claiming state welfare benefits and sectors of the population as a whole and particularly the low paid, women and children. Furthermore, there has been a tendency since the British coalition government came into power, to *restructure* the welfare state causing a *fragmentation* of public services and their *privatisation* from the public to the private sectors.

<sup>15</sup> It will be recalled that the United Kingdom experienced a serious crisis in the 1970s as a result of the oil price (caused by a sharp reduction of oil production by OPEC and the

but also, and as importantly, whether the welfare state can in itself be sustained in its current form. The two issues, namely “*crisis*” and “*sustainability*” form an “interactive bundle” to be examined below. Such examination will of necessity be modest as parameters of space do not allow for a detailed and more informed discussion to take place in such a vast and complicated field treating *inter alia*, labour, state pensions and social security laws and policies. The reader who wishes to carry out a more detailed and scholarly analysis on welfare, pensions and labour laws and related issues respectively will be referred in footnotes to authoritative, informed and scholarly sources.<sup>16</sup>

First to be discussed will be the changes made to social security laws. There will then follow in the second instance the changes made to pensions, to be followed in the third instance by labour law changes. Thereafter concluding thoughts will feature. The dénouement in each of those three fields of the welfare state will demonstrate the crisis element which has developed therein.

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exchange rate mechanism) and consequent food price increases with a rise in the unemployment figures, *inter alia*, caused by this situation. See Jo Carby-Hall “*Informe Inglés*” in “*Crisis del Estado de Bienestar y Derecho Social*” (Professor Antonio Marzal (Ed)). (1997) J.M. Bosch. pp. 41 – 47.

<sup>16</sup> For a more detailed evaluation see Jo Carby-Hall “*Main Measures Taken in the Fields of Social Security, Pensions and Labour Law in the Fight against the Economic Crisis: The British Position*” in José Luis Gil y Gil (Ed.) Scheduled for publication in Brazil and Portugal in 2015. Juruá. (45pp.). This article is based on the research carried out by this author in that book chapter. See too Peter F. Taylor-Gooby “*Crisis in the Welfare State*” Social Policy Association Annual Conference 8-10 July, 2013; Kerry-Anne Mendoza “*Austerity – The Demolition of the Welfare State and the Rise of the Zombie Economy*” (2015); Mark Blythe “*Austerity – The History of a Dangerous Idea.*” (2013) OUP; Christopher Pierson and Francis Castles “*The Welfare State Reader*” (2013) Polity Press in association with Blackwell Publishers Ltd.; James Bartholomew “*The Welfare State We’re In*” (2004) Politico’s Publishing Ltd.; Nicholas Barr “*Economics of the Welfare State*” (2012) and Francis Castles “*The Future of the Welfare State – Crisis Myths and Crisis Realities*” (2004) OUP.

### **3.2. Social Security Reforms**

The Welfare Reform Act 2012<sup>17</sup> has made the most fundamental change to the British social welfare system since its inception some seventy years ago. The welfare benefits system is being currently overhauled by the government, *inter alia*, to save some £18 billion annually from the welfare bill. The then General Secretary of the TUC responded to the Welfare Reform Bill<sup>18</sup> in those terms. He said “This is the wrong bill for the economic crisis we are in. With thousands of people losing their jobs every week, now is not the time to introduce even tougher conditions for claimants. We are...disappointed that the Government appears to be persisting with plans that amount to a ‘work for your benefit’ scheme. Paid work is scarce enough. Forcing claimants to work for their dole too could make this even worse.”

#### *3.2.1. Universal Credit*

The 2012 Act introduced the *Universal Credit* which is a single streamlined payment which replaces the existing working age benefits.<sup>19</sup> It is made to one person in a household and is aimed at people who are seeking work or who are on low income. This benefit, according to the government’s policy, (a) tackles the administrative complexity of the previous benefits system; (b) simplifies that previous benefits system and (c) reforms the previous welfare system for the purpose of improving people’s incentives to take up work.<sup>20</sup> There are about 12.5 million claimants receiving welfare benefits which will be replaced by the Universal Credit. Because of the large number of claims, this new benefit is being introduced in stages.<sup>21</sup>

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<sup>17</sup> Ch. 5 received the Royal Assent on 8<sup>th</sup> March, 2012.

<sup>18</sup> Published on 14<sup>th</sup> January, 2009.

<sup>19</sup> These consist of the following benefits, namely Income Support, Working Tax Credits, Child Tax Credits, Housing Benefit, Income- Related Employment and Support Allowance and Income-based Job Seekers’ Allowance. There is indeed complexity in each of these!

<sup>20</sup> Source: The November 2010 White Paper entitled “Universal Credit: Welfare that works.”

<sup>21</sup> The latest updates as at 24<sup>th</sup> February 2015 covers thirteen areas in England, Scotland and Wales. At the time of writing, Northern Ireland has not yet passed any legislation. The Welfare Reform Bill, 2013 No 13/11-15 is ongoing at the Northern Ireland Assembly, Stormont, and is at the Further Consideration stage as at 24<sup>th</sup> February, 2015. This Bill makes provision for Universal Credit and Personal Independent Payment. See Christine

The Universal Credit proposes to make claimants and their families become more independent and aims at improving work incentives, providing a smooth transition into and out of work,<sup>22</sup> reducing in-work poverty, simplifying the system<sup>23</sup> and reducing fraud and error.

There has been some concern on the Universal Credit system raised by, *inter alia*,<sup>24</sup> the Joseph Rowntree Foundation which has expressed concerns about its administration and its potential outcomes, as to whether or not the IT system would be able to cope with the new processing system and what stand-by arrangements should be made should the system crash. That Foundation was concerned that while the Universal Credit would give claimants the incentive to take up a job of fewer than 16 hours a week, it would discourage claimants to search for full-time jobs. It also suggested that an Ombudsman be created to deal with claimants' complaints.

### 3.2.2. *Child Benefit Cuts*

The 2012 legislation has made important changes to *child benefit*.<sup>25</sup> The effect of this provision is to reduce the child benefit entitlement of some 1.2 million families. Child Benefit is a tax-free payment made by the government to assist parents with the cost of bringing up their children. This benefit had hitherto been available to every

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Beatty's and Steve Fothergill's research paper entitled "*The Impact of Welfare Reform on Northern Ireland*" (October, 2013). Centre for Regional Economic and Social Research. – Sheffield Hallam University.

<sup>22</sup> While at the same time supporting a dynamic labour market.

<sup>23</sup> Simplifying it by making it by making easier for people to understand and cheaper and easier for staff to administer.

<sup>24</sup> Because concerns were also expressed by the House and Commons Works and Pensions Committee, regarding claimants not having bank accounts or on line facilities and by some seventy organisations who are or will be involved in implementing the biggest overhaul of the benefits system since the creation of the welfare state. They include organisations representing councils, charities, business groups, housing organisations, trade unions, and even government departments. For more information on those concerns the reader is invited to consult the BBC News Politics, 9<sup>th</sup> September, 2012. <http://www.bbc.co.uk/politics-19534570> (Retrieved 30<sup>th</sup> December 2012).

<sup>25</sup> Welfare Reform Act, 2012 s. 107.

family with children.<sup>26</sup> The cuts made by the 2012 legislation came into effect on 7<sup>th</sup> January, 2013. Thus child benefit for the first child is £20.30 a week. Subsequent children receive £13.40 a week each. Child benefit is paid until the child reaches the age of 16 if he/she does not enter university or other higher education institution. If he/she does enter into a university or higher education institution the benefit is paid until the child is 18 years of age (or in some cases 20 years of age)

The Chancellor's 2012 budget has however introduced a plan to steadily withdraw child benefit where one parent earns more than £50,000 a year with no child benefit being paid by the government on incomes of over £60,000 or more a year.<sup>27</sup>

This reform which has been criticised by many<sup>28</sup> saves the government £1.5 billion. This appears to be highly unfair in spite of the government's opinion that the scheme is "fundamentally fair."<sup>29</sup>

### *3.2.3. Personal Independent Payment*

The Disability Living Allowance (DLA)<sup>30</sup> which preceded the Personal Independence Payment (PIP) had been operative since 1992. During that time it had not seen any fundamental review or reform. According to the government there has been "confusion about the purpose of the benefit" it was "complex to claim" and there was "no systematic way of checking that awards remained correct." A change was therefore necessary to reflect today's understanding of disability. This change was

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<sup>26</sup> Her Majesty's Revenue and Customs (HMRC) which ran the scheme had hitherto paid out child benefit to some 7.9 million families with some 13.7 million children. (Source: BBC News Business, 7<sup>th</sup> January, 2013).

<sup>27</sup> The reader will find examples on how this system works and discusses nice problems which may arise in Jo Carby-Hall "*Main Measures taken in the Fields of Social Security*" *op.cit* at pp. 7 and 8.

<sup>28</sup> As, for example, the Labour Shadow Chancellor, NGOs and campaigners.

<sup>29</sup> Source: Public Sector Executive, 7<sup>th</sup> January, 2013.

<sup>30</sup> For an evaluation of the disability laws see Jo Carby-Hall "Disability Discrimination" based on a three year research programme centred at the University of Bari, Italy, and edited by Professor Carla Spinelli to be published in a special issue of "Derecho Social y Empresa" (Professor Pilar Contreras (Ed)) in 2015.

made by the Welfare Reform Act, 2012.<sup>31</sup> It should be pointed out at the outset that PIP is not a taxable benefit, that it applies only to eligible working age disabled persons of between 16 years of age and 64 years and that it is available to disabled persons at work as well as to those out of work.

PIP is based on the assessment of each individual disabled person's needs.<sup>32</sup> Assessments are carried out by trained personnel who examine the disabled person's ability to carry out a range of key activities necessary to everyday life.<sup>33</sup> The assessment contains two phases. The first phase consists of information gathering. The sources of information are based initially on what the disabled person has to say, followed by information gathered from health care personnel, medical practitioners and other professional who works with, or supports the disabled person.<sup>34</sup> The second phase consists of a face-to-face consultation with a trained *independent* assessor who is a health professional. The assessor will provide advice to a benefit decision maker at the Department of Work and Pensions (government). The benefit decision maker examines carefully all the information which has been gathered and makes the final decision on whether or not the claimant is entitled to PIP, at what rate and for how long the award is to last. The claimant's claim to receive PIP will only be successful if both those phases prove positive.

The Disability Living Allowance ended for the disabled working age persons as soon as the PIP provisions came into force<sup>35</sup> and who had an "indefinite life period

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<sup>31</sup> See in particular the Social Security (Personal Independence Payment) Regulations, 2013 which give details of the main rules of PIP, of the assessment criteria and of the rates at which payments are made. See too Personal Independence Payment (Transitional Provisions) Regulations, 2013 which set out how existing DLA claimants had moved to PIP and Disability Living Allowance, Attendance Allowance and Carer's Allowance (Amendment) Regulations, 2013 which provide for changes to align those benefits with PIP.

<sup>32</sup> This will help the government (Department of Work and Pensions) to decide the claimant's benefit entitlement.

<sup>33</sup> Basically the health professional will examine the claimant's personal circumstances so as to ascertain how his/her condition or disability affects the claimant.

<sup>34</sup> Medical personnel who support the claimant may include general practitioners, consultants or nurses who have knowledge of the claimant's history. However non-medical evidence from a social worker or a family member of the claimant would be just as important for the assessment process.

<sup>35</sup> i.e. 8th April, 2013

award”<sup>36</sup> under the DLA scheme. This means that most, though not all, of the PIP claimants will normally need to have a face-to-face consultation with a health professional and go through both stages of the procedure described immediately above. However, persons who suffer from severe health conditions and disabilities may not be subject to such consultation, etc... Furthermore terminally ill claimants are exempted from the procedure.

To be noted however is the fact that the DLA is still applicable to children under the age of 16 and to senior citizens over the age of 65. It is submitted that PIP will eventually become applicable to disabled children and to senior citizens, but the government states that “There are no current plans to replace [the] Disability Living Allowance for children under 16 and people aged 65 and over...”<sup>37</sup> The reason for this phasing is to ensure that the processes are working smoothly and effectively.

#### *3.2.4. Contribution-Based Employment and Support Allowance- The Welfare Reform Act 2012 changes*

This is a most complicated issue to treat. Space does not allow for a full explanation suffice to say that there exist two kinds of employment and support allowances applicable to people incapable of work. . The first is *contributory-based ESA*, the second is *income related ESA*.

For the ESA claimant to be entitled to *contributory-based ESA*, the claimant needs to have paid a specified number of national insurance contributions.<sup>38</sup> Until April 2012 contributions would have been paid *ad infinitum* if a person was deemed

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<sup>36</sup> The expressions “indefinite life period award” and “life award” which featured under the DLA scheme can be misleading. The “indefinite life period award” meant, until the DWP felt it necessary to review a case. It was never a life time award under the DLA. Under that scheme “life awards” were issued to disabled persons of working age and that meant for life. This however is no longer the case under the PIP provisions. Thus all awards are now for an indefinite period, namely for an unspecified/unknown period of time and therefore subject to *periodic review*. Such periodic reviews can take place yearly, every two or three years or more, depending on the opinion/administrative capacity of the DWP.

<sup>37</sup> Source: See footnote 31 above. The government wishes to act with caution and examine how the new benefits system works for claimants of eligible age prior to making decisions for children and senior citizens.

<sup>38</sup> Other than any occupational or personal pension the ESA claimant might have received which could reduce the amount of contribution-based ESA entitlement. Any other income, such as savings, would not be taken into account.

incapable of work. From that date onwards however the government has made an important change which limits the time when people can receive contribution-based ESA to 365 days if the claimant is in the work-related activity group.<sup>39</sup> Those claimants who after 365 days are unable to support themselves, have recourse to a number of safety nets. They may qualify for income related ESA<sup>40</sup> or other benefits such as Universal Credit or PIP.

Where not enough national insurance contributions have been paid by a claimant to qualify for contribution-based ESA, a person may be able to claim instead income-based ESA. This allowance is means-tested, thus any savings and/or income received by the person concerned or by his/her partner will be taken into account and deducted from the allowance. Should the savings/income be high, the person will not be able to claim this allowance<sup>41</sup>.

#### 4. STATE PENSIONS REFORMS

A flat-rate state pension is to be introduced by the government by 2017<sup>42</sup> at the earliest. The government plans to overhaul the state pension<sup>43</sup> which will be a single tier<sup>44</sup> pension of £144 a week<sup>45</sup> in current money introduced for new pensioners

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<sup>39</sup> This concept introduced by the Employment and Support Allowance (Work-Related Activity) Regulations, 2011 which required recipients of the ESA to undertake, as from 1<sup>st</sup> June, 2011 work-related activity. The aim of this “activity” is to assist the claimant to obtain work, remain in work or to be more likely to obtain and remain in work.

<sup>40</sup> The government estimates that some 60% of those affected by the 365 days contribution-based ESA time limit will be able to claim income-related ESA.

<sup>41</sup> There are other important changes made by the 2012 legislation one of which is in respect of the ESA youth provisions which can but only be mentioned here due to shortage of space.

<sup>42</sup> The new flat rate pensions proposals were included in the May 2013 Pensions Bill and reached the statute book in 2014. See Pensions Act 2014 c. 19 consisting of 57 sections and 20 Schedules.

<sup>43</sup> See the government White Paper on the subject dated 14th January, 2013.

<sup>44</sup> The reason why the term “single-tier “ is used is because the current top-up state pension includes the state earnings-related scheme (Serps) and its successor the state second pension (S2P) which will be repealed in due course.

<sup>45</sup> The reader should note that the contents of the White Paper are not “cast in stone.” Although the White Paper may give the impression that its contents constitute the final

which qualify from 2017 onwards. It is readily apparent that the proposed single-tier pension of £144 a week will be less attractive to a person who qualifies under each of the current schemes. There is much authoritative literature from independent sources which indicate that pensions will be worse off in the long run.<sup>46</sup> There are also scholarly writings which examine the winners and losers when the new state pension scheme comes into operation.<sup>47</sup>

The pensionable age by 2018 will be 65 for both genders, by 2020 the age will be 66 for both sexes, and will increase to 67 by 2026-28. There will, it is suggested, be further age increases thereafter.

The current law on state pensions is such as to discourage employees from saving. There are numerous reasons<sup>48</sup> for this phenomenon. The government has introduced as from October, 2012 the automatic enrolment into workplace pension schemes<sup>49</sup> under which employees subject to automatic enrolment have<sup>50</sup> to opt-in, rather than choose to opt-out.

The head of Pensions research<sup>51</sup> said “The message is... very simple; if you want more than £7,500 a year to live on in retirement, you need to start saving. With millions of employees set to join their company pension in the months ahead, today’s announcement delivers the foundation for a solution to the pension crisis.”<sup>52</sup>

The measures taken by the government in the fields of social security and state pensions make for dismal reading! The reader will not be surprised to know that equally drastic measures are being taken in the field of labour law reforms to which we shall turn our attention.

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reforms on the state pension, this is not necessarily the case. It is suggested that changes will be made when problems arise whilst running the new pensions scheme.

<sup>46</sup> For a study of these the reader is referred to Jo Carby-Hall “*Main Measures taken in the field...*” *op.cit.* at p. 21

<sup>47</sup> *Ibid. op. cit.* at pp. 22 – 24.

<sup>48</sup> See The Guardian 13th January, 2013,

<sup>49</sup> Namely, occupational pensions whether they be *final salary pension schemes* or *defined benefit pension schemes* where the employee can, at will, either opt-in or opt-out.

<sup>50</sup> They are therefore *encouraged* in a *positive* manner to opt-in.

<sup>51</sup> At Hargreaves and Lansdown (investment advisers).

<sup>52</sup> Source: The Guardian 14th January, 2013.

## 5. LABOUR LAW REFORMS

A number of hard fought for labour law rights<sup>53</sup> have been systematically eroded by the British government under the pretext of the economic crisis or for ideological reasons. A brief discussion is proposed on the erosion of each of those rights.

### 5.1. Working Time

The British Working Time Regulations<sup>54</sup> which give effect to the Working Time Directive<sup>55</sup> grants a variety of rights<sup>56</sup> to workers. The British government has negotiated an *opt-out* with the European Union which means that the worker may agree with the employer to opt-out either for a specific period or for indefinitely from the 48 hour average working week.<sup>57</sup> The opt-out in its most basic form becomes effective where the employee enters voluntarily and freely into an individually legally binding agreement with the employer.

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<sup>53</sup> Some of which emanate from European social laws such as Directives, Regulations or European social partners' agreements.

<sup>54</sup> 1998 (S.I. 1998 No. 1833).

<sup>55</sup> 2003/88/EC of the European Parliament and of the Council. 4<sup>th</sup> November 2003. O.J. L299, 2003-11-18.

<sup>56</sup> Which include the 48 hour maximum average week, rest periods, health assessments, annual paid holidays, a day off a week, and so on. See Jo Carby-Hall "*Working Time: The British Experience*" in "*Regnare Gubernare Administrare* (Professors Stanisław Grodziski and Andrzej Dziadzio (Eds)) Volume 1 of 2 volumes. (2012) Krakowskie Towarzystwo Edukacyjne sp. Zo.o. at pp. 367 – 395 for a fuller explanation.

<sup>57</sup> The opt-out concept is analysed in Jo Carby-Hall "Jo Carby-Hall "*Opt-Outs and Variations in Working Time -British Style*" in "*Le Travail Humain au Carrefour du Droit et de la Sociologie.*" (Professors Christian Mestre, Corinne Sachs-Durand and Michel Storck (Eds)) (2014) Presses Universitaires de Strasbourg at pp. 53 – 71.

There are many reasons for opposing the opt-out concept. One of these is that vulnerable workers may be *coerced* or *forced* by the employer in choosing to work longer hours which could be detrimental<sup>58</sup> to employees' health.<sup>59</sup>

It is well known that the British full-time male workforce has the longest working hour culture when compared to workers in other European countries.<sup>60</sup> The UK is the only European Union country to optimise significantly the opt-out clause. The tendency in other European countries is to use opt-outs in moderation. The British government has every intention of fighting hard to preserve the opt-out *status quo* and thus use it as a tool to maintain flexibility, respond quickly to market demand changes and to improve worker motivation through overtime. Economic and political reality thus prevail at the expense of ideology!

The TUC General Secretary Frances O'Grady summed up the situation admirably when she said "The Government should abandon its obsession with the Working Time Directive which guarantees millions of people a paid holiday and stops dangerous practices being done by exhausted people. Forcing people to work long hours is not the answer." She goes on to say that more investment in training, jobs, infrastructure and a better work-life balance<sup>61</sup> would raise productivity.

## **5.2. The Introduction of Employment Tribunal Fees**

Employment Tribunals are considered to be "do it yourself"<sup>62</sup> bodies. These tribunals have jurisdiction in a great number of employment matters.<sup>63</sup> At one time

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<sup>58</sup> It is well known that overwork can cause diabetes, heart problems, depression, stress and related illnesses. Furthermore overwork can lead to poor work performance and absenteeism which hamper the creation of economic success.

<sup>59</sup> The TUC General Secretary once said "People do want protection against excess working hours that damage their health and relationships even when poor pay forces them to notch up maximum overtime to provide a decent living standard."

<sup>60</sup> Source: Professor Frances Green, University of London, using the Eurostat Labour Force Survey data concluded that "Britons seem more harder-working, yet perhaps less happy and more inefficient" resulting from the long hour culture. (18th January, 2013.)

<sup>61</sup> See the discussion on the work-life balance in Jo Carby-Hall "*The Work-Life Balance Concept*." ADAPT Labour Studies Book Series. E-Publication (Italy) (2015).

<sup>62</sup> This expression was coined by the first Industrial Tribunals (as they were then called) President, Sir Dairmaid Conroy, a distinguished lawyer. He insisted on numerous occasions

claimants did not have to pay a fee to bring proceedings before an Employment Tribunal. Since summer 2013, this is no longer the case because the government wants to reduce the current costs of running the Employment Tribunal system.<sup>64</sup> Claimants have to pay a fee to make a claim and an additional fee if they wish to proceed to a full hearing. Such fees are prohibitive.

The effect of this policy is clear. Employees are deterred from bringing claims in Employment Tribunals. Such a policy encourages the unscrupulous employer to take full advantage to exploit employees and especially migrant workers.<sup>65</sup>

### 5.3. A Double Cap on Unfair Dismissal Compensation

One of the remedies for unfair dismissal is compensation.<sup>66</sup> The award of compensation consists of two elements, the *basic award* and the *compensatory award*.<sup>67</sup>

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when he met this author that that Industrial Tribunals were informal bodies where solicitors and barristers were not encouraged to appear, where claimants could represent themselves or be represented by a friend or trade unions, where judicial language and argument were to be discouraged, where the podium where the legally qualified chairman and representatives of employers and workers sat, was not to be raised too high, and so on. This has changed since those days and Employment Tribunal hearings are much more formal now. They are chaired by a judge and the two lay representatives. Legal practitioners represent their clients and much legal argument takes place.

<sup>63</sup> Employment Tribunal have jurisdiction in sixty eight different employment matters some of which include unfair dismissal. Redundancy, contractual matters, discrimination, trade union rights, working time, etc...

<sup>64</sup> Which amount to £84 million a year.

<sup>65</sup> The exploitation of employees is discussed in Jo Carby-Hall "*Economic Migrants: European Perspectives – Exploitation*." This book is scheduled for publication in 2015. (Professor José-Luis Gil y Gil (Ed)) Juruá, Brezil/ Portugal (26pp). For a more complete study on exploitation at European level see J.R.Carby-Hall "*The Treatment of Polish and Other A8 and A2 Economic Migrants in the European Union Member States*" (in two volumes) commissioned by the Commissioner for Civil Rights Protection of the Republic of Poland, (2008) Publisher: Bureau of the Commissioner. See also the Polish edition of this book published in two volumes (2008). See too Jo Carby-Hall "The Continuing Exploitation of Economic Migrants and Other Vulnerable Workers" in "*Essays on Human Rights: A Celebration of the Life of Dr. Janusz Kochanowski*." (Jo Carby-Hall (Ed)) (2014) Ius et Lex, Warsaw at pp. 94 – 134.

This latter award has been capped with effect from 1<sup>st</sup> February, 2013 to £74,200. An additional cap came into effect in summer 2013 which limits the amount of the compensatory award which an unfairly dismissed employee may receive to one year's salary. There is little doubt that this double cap favours the employer and penalises the employee!

#### **5.4. Increase of Qualifying Period for Unfair Dismissal Claims**

Prior to 2012 a dismissed employee had to be in continuous employment for one year. Since 6th April, 2012 the qualifying period was doubled to two years. This means that the employee employed continuously for less than two years is unable to bring an action for unfair dismissal. *Res ipsa loquitur* that the employee is disadvantaged!

#### **5.5. Redundancy Consultation Reduction and Exclusion from Consultation of Fixed-Term employees**

Under the previous law where 21 or more employees were to be made redundant, employers had to consult trade unions/employee representatives for a minimum period of 30 days. Where 100 or more employees were to be made redundant the consultation period was 90 days.<sup>68</sup> As from April, 2013 the consultation period has

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<sup>66</sup> The other two remedies are re-instatement or re-engagement. For details on these see Jo Carby-Hall "Aspects of Unfair Dismissal" *Managerial Law*, MCB University Press. Vol. 33 No.4 (1991) at pp. 31 – 34.

<sup>67</sup> For a detailed discussion of those two elements see J.R.Carby-Hall "*Aspects of Unfair Dismissal Law*" *Managerial Law*. MCB University Press. Vol. 33 Nos. 1, 2 and 3 (1991) at pp. 35 -48 and for a more philosophical approach see J.R.Carby-Hall "A Study of Three Termination Aspects of Modern Employment" in "*Studies in Labour Law*" J.R.Carby-Hall (Ed) MCB Books (1976) at pp. 202 – 280.

<sup>68</sup> Trade Union and Labour Relations (Consolidation) Act, 1992 s. 188. For an analysis see Jo Carby-Hall "*Redundancy in the United Kingdom*" in "*I Licenziamenti per Riduzione di Personale in Europa*" (Professors Bruno Veneziani and Umberto Carabelli (Eds)) (2001)

been reduced from 90 to 45 days and employees on fixed term contracts no longer have a right to claim a redundancy payment.

This is another example of the government's commitment to review labour laws in favour of the employer and support businesses at the expense of the employee, so as to improve growth.

## 5.6. The Back to Work Scheme

The government scheme forces people to work without pay!<sup>69</sup> The Court of Appeal found that the government breached the Job Seeker's Allowance (Employment Skills and Enterprise) Regulations 2011/917 under which most of the government's back to work schemes<sup>70</sup> were created. The Court of Appeal found the Regulations did not comply with the provisions of the Job Seeker's Act 1995 which gave the Department of Work and Pensions the power to introduce them. The breaches found were twofold. First, that the 2011 Regulations were *incompatible* with some of the 1995 Act's provisions and second, that serious *irregularities* were found in the manner in which the back to work schemes operated.

## 6. CONCLUDING THOUGHTS

The brief discussion which has taken place indicates that there are crises upon crises! There exist crises in the welfare state, in the pension field and within the labour laws themselves. Workers are clearly disadvantaged at the expense of more financial gain being made by employers. Many of these crises have been caused by a variety of *events* and for a variety of *reasons*, some of which include the current *economic crisis* and the consequent austerity measures imposed by the British government, the *complexities* of the welfare, pensions and labour laws and indeed the current government's *ideology*.

One has to ask oneself if there is another way to be found in the fight against recession and austerity, - other than the elimination, suppression and reduction of

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European SOCRATES PROGRAMME. Cacucci Editore (Italy) at pp. 387 – 537 and particularly at pp. 494 – 500.

<sup>69</sup> Source: The Court of Appeal transcript in *The Queen on an application of Caitlin Reilly and Jamieson Wilson v Secretary of State for Work and Pensions* [2013] EWCA Civ. 66 (Case No. B3/2012/2138/2141) and BBC News Business 12<sup>th</sup> February, 2013.

<sup>70</sup> There were five such controversial work experience schemes.

rights at work, the decreasing pensions and the dramatic cuts in social security benefits examined above, all of which make for depressing reading and spell serious crises in the welfare state.

Two economists, namely Oliver Blanchard and Daniel Leigh of the International Monetary Fund (IMF) stated that “Forecasters significantly underestimated the increase in unemployment and the decline in domestic demand associated with fiscal consolidation.”<sup>71</sup> The IMF also advocates fewer budget cuts in countries facing recession as well as a decrease in austerity measures.<sup>72</sup> In other words more spending and borrowing is needed to abate the crisis in the welfare state. The Chancellor of the Exchequer, Mr George Osborne holds a different view. His belief is that “The alternative to more spending and yet more borrowing is now frankly ludicrous and places those who advocate it on the outward fringes of the international debate.”<sup>73</sup> Unfortunately for Mr Osborne “the international debate” on this topic is contrary to his beliefs! Four Nobel prize winners in economics<sup>74</sup> and other distinguished economists<sup>75</sup> express different views on austerity measures. On 20th January, 2012 the Heads of the leading economic world bodies<sup>76</sup> called for economic policies which would foster growth and warned of the danger of austerity. Since 2010 the United Kingdom has followed a programme of severe austerity and is “now enduring a

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<sup>71</sup> Source: Euroserver 7th January 2013 Valentina Pop “*IMF economists admit to ‘errors’ on austerity policy.*” <http://euroserver.com/economic/118644> (Retrieved 21st February, 2013). The view expressed by Blanchard and Leigh are personal ones and not based on IMF thinking, except that the IMF has been critical of the austerity measures, particularly those taken with regard to Greece.

<sup>72</sup> The focus of the IMF statements is on Greece but that focus also applies to other countries, such as the United Kingdom, where austerity measures are in operation.

<sup>73</sup> Source: Article entitled “Britain is leading the way out of this crisis.” The Daily Telegraph 7th August, 2011

<sup>74</sup> Namely Paul Krugman, Amartya Sen, Joseph Stiglitz and Christopher Pissarides.

<sup>75</sup> *Inter alia*, Alan Blinder, Nouriel Roubini, Robert Shiller and Robert Reich. Source: United Kingdom Austerity Programme <http://en.wikipedia.org/wiki/United> (Retrieved 21st February, 2013)

<sup>76</sup> Namely Christine Lagarde of the IMF, Robert Zoellick of the World Bank, Pascal Lamy of the World Trade Organisation, Angela Gurría of the OECD, Donald Kaberuka of the AfDB, Haruhiko Koroda of the ADB, Luis Alberto Moreno of the IADB, Josette Sheeran of the WFP and Juan Somavia of the ILO. Source: Larry Elliott “IMF warns of threats to global economies posed by austerity drives.” The Guardian 20th January, 2012.

prolonged period of near stagnation”<sup>77</sup> Whereas in May 2010 when the present government came to power tax increases and severe public spending cuts were planned to take place over a period of five years to reduce the budget deficit inherited by the labour government, the period of austerity, by reason of stagnation,”<sup>78</sup> has been prolonged to seven years. According to the Confederation of British Industry (CBI)<sup>79</sup> “the only way to resolve unemployment in the short term is to pull out all the stops to get the economy moving and business growing.”

Economist are now saying clearly that austerity economics<sup>80</sup> are discredited and that it is time for a Keynesian inspired alternative<sup>81</sup> to the austerity programme currently operating in the UK. Keynesian economics have been vindicated time and time again.<sup>82</sup> Austerity measures have been described by Nobel prize-winner in economics Joseph Stiglitz as “economic suicide” and the rating agency Standard and Poor has admitted that “austerity alone is self-defeating.”<sup>83</sup>

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<sup>77</sup> See Chris Giles and Andrew Bounds “*Brutal for Britain*” Financial Times 15th January, 2012.

<sup>78</sup> In 2011 to 2014 growth has averaged at around 1%

<sup>79</sup> Mr. Neil Bentley, Deputy Director General of the Confederation of British Industry.

<sup>80</sup> Which invariably include cuts in the welfare state as for example, cuts in state sector jobs, pension cuts, minimum wage cuts, privatisations, (which in some cases have proved a disaster), the liberalisation of labour laws resulting in the loss of rights at work and the diminution of social security laws, spending cuts, etc...

<sup>81</sup> See the interesting and convincing argumentation in Symmetry Breaks “Austerity economics is now completely discredited. It is time for a Keynesian alternative” 18<sup>th</sup> June 2012 based on Keynes’ Theories on the economy.” (Source: <http://symmetrybreaks.wordpress.com/2012/06/18/austerity-economics-is-now-compl> (Retrieved 21st February, 2013).)

<sup>82</sup> For example the great depression of the 1930s, the stock market crash in 1987, and the Keynesian resurgence in 2008 in response to the global economic crisis. See too Nobel prize-winner in economics Paul Krugman’s “*Peddling Prosperity: Economic Sense and Nonsense in the Age of Diminished Expectations.*” (1994) W,N, Norton & Company, New York.

<sup>83</sup> Source: <http://symmetrybreaks.wordpress.com/2012/06/18/austerity-economics-is-now-compl> (Retrieved 21st February, 2013)

The Report of the influential and prestigious Brussels based Friends of Europe<sup>84</sup> think tank urges Jean-Claude Juncker's Commission to take cognisance of the fact that social policy in the EU "needs to be put on a par with microeconomic objectives," that "human investment must be given equal priority with investments in infrastructure, innovation and all other areas seen as crucial to Europe's global competitiveness" and that the social dialogue be "effective, efficient and representative."<sup>85</sup>

The UK needs a Keynesian fiscal stimulus by borrowing and investing<sup>86</sup> which would boost and stimulate the economy, reduce unemployment and increase state revenue through more people paying taxes. The British government needs to spend more on training and thus invest in people. The Keynesian concept appears to make good economic sense in remedying the high toll on the poorest and most vulnerable in society and defusing the current economic crisis and thus boosting the current crisis which exists in the British welfare state.

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<sup>84</sup> Source: Euroobserver Benjamin Fox "*Juncker urged to Revive 'Social Europe' model.*" 24th February, 2015.

<sup>85</sup> In many European Union countries the social dialogue has not been developed fully. In Poland, for example, it is only recently that the Pomeranian Employers' Association is running a social dialogue pilot scheme.

<sup>86</sup> By building its infrastructure, namely spending on its antiquated rail network, constructing affordable housing, spending on airports and many such infrastructure issues which would stimulate and boost the economy, reduce unemployment and increase state revenue through more people paying taxes, rather than by reducing state benefits, affecting pensions and reducing or removing rights at work all of which spell crises in the welfare state.