Tax in reverse: Financial support and social security during COVID-19

MacLennan, S. & Graham, L.

Accepted manuscript PDF deposited in Coventry University's Repository

Original citation:
'Tax in reverse: Financial support and social security during COVID-19', in *Global Pandemic, Security and Human Rights: Comparative Explorations of COVID-19 and the Law*, ed. by Ben Stanford, Steve Foster, Carlos Espaliú Berdud, pub 2021 (ISBN 9781032010250)

Publisher: Routledge

Copyright © and Moral Rights are retained by the author(s) and/ or other copyright owners. A copy can be downloaded for personal non-commercial research or study, without prior permission or charge. This item cannot be reproduced or quoted extensively from without first obtaining permission in writing from the copyright holder(s). The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the copyright holders.

Chapter 7. Tax in reverse: Financial support and social security during COVID-19

Luke D Graham and Stuart MacLennan

Dr Luke D. Graham's Economic and Social Research Council-funded PhD, undertaken at Lancaster University, applied an Economic, Social, and Cultural Rights framework to Destitution in the UK. A monograph based on this thesis titled 'International Human Rights Law and Destitution: An Economic, Social and Cultural Rights Perspective' is under contract with the Routledge Research Series in Human Rights and is expected for publication in 2022. Broadly, his research focuses on Human Rights Law and, more specifically, Economic, Social, and Cultural Rights. Currently, he is exploring poverty and the right to clothing. https://orcid.org/0000-0003-0678-2106

Dr Stuart MacLennan is Associate Professor of Law at Coventry University and an Associate Member of the Centre for Financial and Corporate Integrity. Stuart completed his undergraduate degree (LL.B.(Hons)) and Diploma in Legal Practice (Dip.L.P.) at the University of Edinburgh, his Master's degree (LL.M.) at the Glasgow Graduate School of Law, and his Ph.D. at Trinity College, University of Dublin. Stuart has published extensively in the field of tax law and policy, including in the British Tax Review and Intertax. Stuart is also Managing Editor of the Irish Journal of European Law, Editor of the Coventry Law Journal, and Production Editor of the European Journal of Legal Education.

https://orcid.org/0000-0002-6439-6898

Abstract

This chapter examines the principles underpinning the UK Government's tax and benefit design in response to COVID-19. Since 2010, a central theme underpinning tax and benefit design has been the avoidance of fraud. For those seeking to receive benefits in the UK, this has resulted in a focus on benefits eligibility as opposed to immediacy of need. Consequently, throughout the last decade, this restrictive approach to the receipt of benefits has negatively impacted the enjoyment of the right to social security. COVID-19 has, however, challenged these underpinnings and the UK Government's COVID-19 financial support packages have paid less heed to the need to avoid fraud. Rather, the immediacy of need triumphed. Consequently, during COVID-19 the financial support policies which were made available

were less restrictive and more generous than existing social security provision. From the perspective of the right to social security, this shift must be praised. The pandemic, therefore, offers the potential to powerfully rebut the assumptions upon which a decade of social security austerity has been founded. In turn, the cruciality of social security in response to the pandemic may contribute to improved social security structures in the UK and the right to social security can serve as an important yardstick in informing our future social security structures.

Introduction

The COVID-19 pandemic necessitated an unprecedented shift in fiscal policy in the United Kingdom. As of 3 March 2021, the Office for Budget Responsibility (OBR) estimates that the total cost of the government's policy responses to the coronavirus at £331bn,[1] with further expenditure anticipated in future. Among the most significant categories of government expenditure as a consequence of the coronavirus is support for households – in excess of £100bn – amounting to approximately a third of direct coronavirus-related expenditure.[2]

In order to provide this extensive financial support to households at the time at which it was urgently needed it was necessary to design new payments, and new means of distributing them. The new payments – colloquially referred to as the furlough scheme – were not intended for those who might have ordinarily found themselves out of work and, therefore, engaged with the benefits system. Instead, these payments are intended to support households during the period in which they could not work because of COVID-19. It makes sense, therefore, that such payments should be dealt with by the tax system, rather than the benefits system.

Reverse taxation is not a new concept: the idea for a Negative Income Tax first gained traction in the United Kingdom through the 1950s and 1960s.[3] While various refundable tax credits have been available throughout the decades that followed, by far the most prominent example of using the tax system to distribute, rather than collect, money was Gordon's Brown's system of tax credits.[4] Fraud and error were a significant concern with respect to the tax credit system,[5] and significant lessons have been learnt from their roll out.

---

[1] This includes direct government expenditure and does not include the effect of government policy (such as lockdowns) on overall economic output. See Office for Budget Responsibility, 'The rising cost of the coronavirus policy response' (3 March 2021) <https://obr.uk/box/the-rising-cost-of-the-coronavirus-policy-response-2/> accessed 30 May 2021.
[2] *Ibid*
[3] Peter Sloman, 'Beveridge's rival: Juliet Rhys-Williams and the campaign for basic income, 1942–55' (2016) 30(2) Contemporary British History 203.
[4] Tax Credits Act 1999.
[5] House of Commons Treasury Committee, *The administration of tax credits* (HC 811-I).

Since the early 2010s there has been a notable shift in the principles underpinning tax and benefit design. Tax and social security laws, as well as administrative procedures, have increasingly been designed with the potential for fraud in mind – what this chapter calls 'the new approach'. Under this new approach, ensuring that the conditions required to be entitled to benefits are met takes priority over the immediacy of need. The government's response to COVID-19, however, largely abandoned this new approach, with expediency of payments being of paramount importance.

This chapter seeks to evaluate the government's system of financial support in the context of the principles underpinning the UK's benefits system, as well as the 'new approach' to tax and benefit design. This chapter commences by outlining the principles underpinning tax and benefit design in the United Kingdom. This chapter proceeds to outline the support made available to households during the coronavirus pandemic and the change in approach to tax and benefit design. This chapter concludes that the urgency of ensuring financial support during the pandemic represents a setback to the new approach to tax and benefits design in the United Kingdom.

Tax and benefit design

All tax laws have three basic elements:

1. A tax base – an object or event which incurs a charge to tax;
2. A charge to tax – a means of computing the amount of tax payable upon the base;
3. A taxpayer – a person who is legally obliged to pay the tax.

Tax laws also usually include provisions for collection and administration of taxes.[6] The same also applies in reverse, whether directly through the tax system, or indirectly through the benefits system. Every benefit has a factor that creates an entitlement to a benefit (for example, joblessness, a low income, or children), a means of computing the amount of benefit payable, and a person who is entitled to claim the benefit. Much like tax laws, social security laws also provide for the payment and monitoring of benefits.[7]

[6] In the United Kingdom these are principally contained in the Taxes Management Act 1970.
[7] Principally the Social Security Administration Act 1992.

Figure 1: the tax process

Tax lawyers, perhaps unsurprisingly, have long focused on the legislative design of taxes,[8] rather than the means of collection and enforcement. This is reflected in the fact that despite sweeping changes to the tax and benefits system in the latter half of the 20th century the process for administering both systems remained largely unchanged.

In the past decade, however, a shift in emphasis has been observed in the design of taxes and benefits – what this chapter calls the 'new approach'. In December 2009, the Government published a white paper 'Putting the Frontline First – Smarter Government'.[9] The white paper recommended the establishment of a Smarter Government Public Sector Fraud Taskforce, led by the National Fraud Authority, which reported in March 2010. The taskforce's report – 'A fresh approach to combating fraud in the public sector'[10] – made a number of recommendations that can be seen in design of tax and benefit systems today. Paramount among these recommendations was that consideration of fraud risks should be built in early, ideally at the policy development stage. The report also recommended placing a

> greater emphasis on the prevention of fraud, prior to providing a service or making a payment, compared to the resource they place against detection, investigation and prosecution after a fraud has occurred[11]

as well as greater use of real-time credit references when designing new systems.

Examples of the 'new approach' in the tax system can be seen in the roll-out of Making Tax Digital in the Finance (No.2) Act 2017.[12] Under Making Tax Digital, taxpayers are obliged to

[8] See, for example, John Prebble 'Why is tax law incomprehensible?' [1994] British Tax Review 380; John Avery Jones, 'Tax law: Rules or principles?' (1996) 17(3) Fiscal Studies 63; Judith Freedman, 'Improving (not perfecting) tax legislation: Rules and principles revisited' [2010] British Tax Review 717.
[9] HM Treasury, *Putting the Frontline First – Smarter Government* (Cm 7753).
[10] National Fraud Authority, 'A fresh approach to combating fraud in the public sector: The Report of the Smarter Government Public Sector Fraud Taskforce' (March 2010) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/249252/NFA_Smarter_Government_Report.pdf> accessed 30 May 2020.
[11] *Ibid*, p.8.
[12] See Schedule A1, Taxes Management Act 1970.

keep records in electronic form with 'digital links' between applications and services. While Making Tax Digital is confined to VAT at present, HMRC plans to launch the system for Income Tax in 2023.

This new approach to tax and benefit design can also be seen, in particular, in the design of the government's flagship social security reform: Universal Credit. Universal Credit seeks to eliminate the opportunities for fraud and error by utilising a 'real-time earnings system' using data from HMRC.[13]

Criticism of Universal Credit has been extensive, however, the preponderance of such criticism has been levelled not at the design of the benefit but of the system through which it is administered. The administration of Universal Credit adopts a highly restrictive and conditional approach; designed to ensure that claims are not overpaid through either error or fraud. Although welfare conditionality in the UK predates Universal Credit,[14] since 2010 there has been a ''punitive turn' in conditionality governing benefit receipt'.[15] Under this punitive turn, conditionality has been extended, personalised (according to individual circumstances and needs) and intensified. This has made it more difficult for individuals to access adequate levels of social security and it is this approach to conditionality which is embedded within the administration of Universal Credit.[16]

The right to social security

Whilst Universal Credit and other benefits can be examined through the domestic lens of tax and social security design, these financial support policies, and the expansion of the social security system which they represent, explicitly relate to the right to social security. As such, the UK Government's response in the realm of financial support and social security to the COVID-19 pandemic can also be examined through the lens of international human rights law. More specifically, this can be examined using the right to social security. For example, it has been recognised by the Social Security Advisory Committee that 'social security support will

[13] White Paper, p. 43.
[14] Edmiston highlights the concept of creeping conditionality as representative of the increases in conditionality between the 1970s up until 2010 see Daniel Edmiston, 'Welfare, Austerity and Social Citizenship in the UK' (2017) 16 Social Policy & Society 261, 262.
[15] Chris Grover, 'Violent Proletarianisation: Social Murder, the Reserve Army of Labour and Social Security "Austerity" in Britain' [2018] Critical Social Policy 1, 4–5.
[16] Edmiston (n 16) 262.

remain an important mainstay for many people, as the economic and social effects of the pandemic continue'.[17] By extension – and given the importance of the right to social security in 'guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their Covenant rights'[18] – these financial support policies also relate to the realisation of a range of other Economic, Social, and Cultural Rights (ESCRs). In particular, the right to social security is strongly intertwined with the realisation of the right to an adequate standard of living.[19]

The right to social security is contained in both Article 22 and Article 25 of the Universal Declaration of Human Rights.[20] It is under the International Covenant on Economic, Social, and Cultural Rights (ICESCR), however, that the United Kingdom (UK) voluntarily accepted obligations stemming from this right.[21] Under Article 9 of the ICESCR, the UK recognises 'the right of everyone to social security, including social insurance'.

Despite this, the United Nation's human rights regimes 'have mostly remained silent as to the actual definition of the right to social security and its specific content'.[22] This is because guidance regarding the implementation of this right has been described as the 'unique task'[23] of the International Labour Organisation and defining the right to social security has also fallen to this agency.[24] International Labour Organisation convention 102 prescribes nine types of social security[25] and is repeated in the reporting guidelines for States parties under Article 9 of

[17] Social Security Advisory Committee, 'A Review of the COVID-19 Temporary Measures: Occasional Paper 24' (*GOV.UK*, 18 November 2020) <https://www.gov.uk/government/publications/a-review-of-the-covid-19-temporary-measures/a-review-of-the-covid-19-temporary-measures-occasional-paper-24> accessed 19 February 2021.
[18] Committee on Economic and Social Rights CESCR, 'General Comment No. 19: The Right to Social Security (Art. 9) (2007) UN.Doc. E/C.12/GC/19' para 1.
[19] Asbjorn Eide, 'Adequate Standard of Living' in Daniel Moeckli et al. (ed), *International Human Rights Law* (Third Edition, OUP 2018) 201; CESCR, 'General Comment No. 19: The Right to Social Security (Art. 9) (2007) UN.Doc. E/C.12/GC/19' (n 2) para 22.
[20] United Nations General Assembly UDHR, 'Universal Declaration of Human Rights (Adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)'.
[21] International Covenant on Economic, Social and Cultural Rights (ICESCR) (Adopted on 16 December 1966, A/RES/2200).
[22] International Labour Organization ILO, 'Extending Social Security to All: A Guide through Challenges and Options' 12 <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_146616.pdf> accessed 4 February 2020.
[23] Lucie Lamarche, 'The Right to Social Security in the International Covenant on Economic, Social and Cultural Rights' in Audrey Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002) 87–114, 89.
[24] Vladimir Rys, *Reinventing Social Security Worldwide: Back to Essentials* (Policy Press 2010) 27.
[25] International Labour Organization ILO, 'Social Security (Minimum Standards): Convention No. 102'.

the ICESCR.[26] This reflects the importance of the International Labour Organisation standard-setting in informing understandings of the right to social security.[27] The central role of the International Labour Organisation is indicative of the right's underpinnings: the right to social security has been explicitly tied to the concept of work and such narrow underpinnings may limit social security to 'income-based and situation-based benefits for workers and their families.'[28]

Here a distinction can be drawn between contribution-based social security (social insurance) and non-contribution-based social security (social assistance).[29] Although some regard social assistance as separate from social security, because 'assistance is often discretionary and, therefore, neither a right nor a duty',[30] we use the term social security – and the right to social security – as an umbrella term encompassing both of these concepts. This is because the Committee on Economic, Social and Cultural Rights (CESCR) has explicitly specified 'that the right to social security includes the right to social assistance.'[31] It follows that both contributory and non-contributory social security payments are subject to obligations stemming from Article 9 of the ICECSR: the right to social security.

Principles underpinning the UK's social security system

Despite these human rights-based obligations, the right to social security does not inform the UK's social security structures. Rather, since the coalition government was elected in 2010, the UK's approach to social security has been one which has undermined the realisation of ESCRs. Wilson et al provide an overview of the reforms to social security announced since the coalition government took office in 2010. These include changes to tax credits; changes to housing benefit for private renters; changes to deductions taken from Housing Benefit and Council Tax Benefit; restricting contributory employment and support allowance to one year; replacing the disability living allowance; abolishing council tax benefit; introducing the

[26] Secretary General of the United Nations, 'Compilation of Guidelines on The Form and Content of Reports to Be Submitted by States Parties to The International Human Rights Treaties (2009) UN.Doc. HRI/GEN/2/Rev.6 Chapter 2 (Annex) (B)' para 27.
[27] Martin Scheinin, 'The Right to Social Security' in Asbjorn Eide et al (ed), *Economic, Social and Cultural Rights: A Textbook* (Second Revised Edition, Kluwer International Law 2001) 214–215.
[28] ibid. *Our emphasis*
[29] ibid 211.
[30] Eide (n 3) 202.
[31] Committee on Economic and Social Rights, 'General Comment No. 19: The Right to Social Security (Art. 9)' (23 Nov 2007) UN.Doc. E/C.12/GC/19 (n 18) para 4 (b).

‘bedroom tax’; introducing a household benefit cap; limiting the increase of benefits; and the introduction of universal credit.[32] The whole raft of benefit changes since 2010, especially the Welfare Reform Act 2012 and the Work Act 2016 which are highlighted by the CESCR, has resulted in concern ‘about the adverse impact of these changes and cuts on the enjoyment of the rights to social security and to an adequate standard of living.’[33] Labelled ‘welfare austerity’, this ‘fundamental restructuring’ of the UK’s social security system has altered the relationship between citizen and state to one of more constrained social security provision.[34]

Reduced levels of support provided by social security payments have been made palatable for the UK’s populace through a ‘public narrative’[35] which has allowed the emergence and establishment of a ‘new welfare commonsense.’[36] This commonsense holds the cause of the crisis to be ‘an overgenerous, bloated and ineffective welfare state rather than the reckless behaviour of financial institutions and the political elites that enabled them.’[37] Specifically, the welfare system was cited as ‘the principle cause of welfare dependency and public sector debt.’[38] This narrative holds welfare dependency to be inherently bad and is reliant upon the portrayal of the welfare recipient as a deceptive scrounger, and figure of social disgust, which in turn ‘enables the state to retreat from providing basic levels of welfare support with reliance on charity becoming the norm for many.’[39] This new commonsense has been used to blame the impoverished for their own condition. By portraying the welfare recipient as a deceptive scrounger, it is suggested that those in receipt of welfare can, if they so wish, improve their own condition through their own choices. Such rhetoric has been accepted by a majority of the voting British demos at the last four general elections.

---

[32] Tony Wilson and others, ‘The Local Impacts of Welfare Reform: An Assessment of Cumulative Impacts and Mitigations’ (Local Government Association 2013) 10 <http://www.learningandwork.org.uk.gridhosted.co.uk/wp-content/uploads/2017/01/The-local-impacts-of-welfare-reform-version-7.pdf> accessed 14 November 2020.

[33] Committee on Economic and Social Rights, ‘Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’ (14 July 2016) E/C.12/GBR/CO/6 para 40.

[34] Daniel Edmiston, ‘Welfare, Austerity and Social Citizenship in the UK’ (2017) 16 Social Policy & Society 261, 263.

[35] Kim Allen, ‘Whose Crisis Counts? Intersectionality, Austerity and the Politics of Survival’ (2018) 41 Ethnic and Racial Studies 2301, 2301.

[36] Kayleigh Garthwaite and Claire Bambra, ‘How the Other Half Live’: Lay Perspectives on Health Inequalities in an Age of Austerity’ (2017) 187 Social Science & Medicine 268, 274.

[37] Allen (n 19) 2301.

[38] Edmiston (n 18) 262.

[39] Garthwaite and Bambra (n 20) 274.

Based upon the misguided notion that 'people must be kept in poverty if they are workless to ensure that they are incentivised to take wage work when it is available' the question of how much is 'enough' has been a secondary consideration in the design of social security.[40] As such, the UK's social security system was designed to provide 'fairly low levels of income replacement' and this was justified based upon the assumption that 'given the UK's fast-moving jobs market, jobseekers would be able to find work quickly, and indeed would have a strong incentive to do so'.[41] This strong incentive stems from designing social security to provide less income than work.

This is even though work does not guarantee freedom from poverty in the UK.[42] Although entering work does reduce poverty rates, there is rising in-work poverty in the UK.[43] In-work poverty is indicative that for many people work alone cannot allow them to realise their ESCRs. This is because poverty may be regarded as

> as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the *enjoyment of an adequate standard of living* and other civil, cultural, economic, political and social rights.[44]

Logically, if those in work are unable to avoid poverty and out of work social security payments are designed to pay less than work, many of those in receipt of out of work social security face poverty and the non-realisation of their ESCRs. On account of this, the UK entered the COVID-19 crisis 'with a relatively weaker social security system than it entered the previous financial crisis, given significant real-term cuts in spending on working-age social security over the last

[40] Carol Walker, *Managing Poverty: The Limits of Social Assistance* (Routledge 1993) 56.
[41] Mike Brewer and Karl Handscomb, 'This Time Is Different – Universal Credit's First Recession' (Resolution Foundation 2020) 7 <https://www.resolutionfoundation.org/publications/this-time-is-different-universal-credits-first-recession/> accessed 19 February 2021.
[42] Phillip Alston, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Visit to the United Kingdom of Great Britain and Northern Ireland' (2019) UN.Doc.A/HRC/41/39/Add.1 paras 16–18.
[43] Lindsay Judge and Hannah Slaughter, 'Working Hard(Ship): An Exploration of Poverty, Work and Tenure' (Resolution Foundation 2021) 5 <https://www.resolutionfoundation.org/app/uploads/2020/02/Working-hardship-report.pdf> accessed 18 February 2021.
[44] Committee on Economic and Social Rights 'Substantive Issues Arising in The Implementation of The International Covenant on Economic, Social and Cultural Rights: Poverty and The International Covenant on Economic, Social and Cultural Rights' (4 May 2001) UN.Doc. E/C.12/2001/10 para 8. *Our emphasis*

decade'.[45] Destitution and poverty were increasing in the UK even before the COVID-19 crisis.[46] The pandemic will only serve to exacerbate this.

COVID-19 as a challenge to the underpinning of the UK's social security system

Whilst posing a challenge to public health the pandemic has, at the same time, challenged the economic health of both individuals and nations.[47] This is because the measures designed to combat the spread of the virus are akin to a 'direct economic shock' which can have cyclic 'knock-on consequences that can further exacerbate the situation'.[48] Consequently, the COVID-19 crisis has upended the assumptions and ideologies upon which the UK's social security system has been based and demonstrated the inadequacies of the pre-pandemic system.

The Government has long had at its disposal the potential to utilise emergency powers to manage a public health crisis. Indeed, the measures restricting social gatherings, travel, household mixing, and business opening were all principally enacted under the Public Health (Control of Disease) Act 1984 ('the 1984 Act').[49] The powers to make regulations under Part 2A of the 1984 Act principally concern the control of the spread of infection or contamination. The COVID-19 pandemic, therefore, necessitated the enactment of emergency legislation, most prominently the Coronavirus Act 2020 ('the 2020 Act').[50]

Among the broadest and most sweeping of the delegations under the 2020 Act is the grant of power under s76, which provides that 'Her Majesty's Revenue and Customs are to have such functions as the Treasury may direct in relation to coronavirus or coronavirus disease.' s86 of the 2020 Act includes an appropriation, effectively granting the government a blank cheque from Parliament.

---

[45] Rachelle Earwalker and Rebecca McDonald, 'Briefing: Strengthen Social Security for a Stronger Economy' (Joseph Rowntree Foundation 2020) 4 <https://www.jrf.org.uk/file/56686/download?token=fprqBaSE&filetype=briefing> accessed 19 February 2021.
[46] Suzanne Fitzpatrick et al., 'Destitution in the UK 2020' (Joseph Rowntree Foundation 2021) 2 <https://www.jrf.org.uk/file/57091/download?token=RUTqeIbh&filetype=full-report> accessed 19 February 2021.
[47] Ken Mayhew and Paul Anand, 'COVID-19 and the UK Labour Market' (2020) 36 Oxford Review of Economic Policy S215, S215.
[48] Earwalker and McDonald (n 29) 3–4.
[49] This includes, inter alia,
[50]

The fiscal consequences of the government's actions under the 2020 Act can hardly be overstated. The effect of policy decisions on the government's finances is estimated as being a net cost of £274.5bn in 2020-21, with a further estimated impact of £132.2bn in 2021-22.[51] The most prominent of the government's fiscal interventions is the Coronavirus Job Retention Scheme (CJRS), more commonly known as the furlough scheme. Additional support for households came in the form of extended benefit payments and the Self-Employment Income Support Scheme (SEISS). Further support for business came in a variety of forms, including grants, loans, and tax relief.

What follows is an explanation of the design of the various schemes.

Support for households

The Coronavirus Job Retention Scheme

The CJRS is provided for by a Treasury Direction of 15 April 2020 under ss 71 and 76 of the 2020 Act ('the Furlough Direction').[52]

Crucially, the Furlough Direction requires that the in applying for the CJRS an applicant accepts that

> (a) a payment made pursuant to such claim is made only for the purpose of CJRS […] and
>
> (b) the payment must be returned to HMRC immediately upon the person making the CJRS claim becoming unwilling or unable use the payment for the purpose of CJRS.[53]

Furthermore, no CJRS claim may be made 'if it is abusive or is otherwise contrary to the exceptional purpose of CJRS.'[54]

One anti-fraud safeguard built into the scheme is that the CJRS is only available to employers operating a Pay As You Earn (PAYE) scheme. This should, therefore, mean that the CJRS is only available to *bona fide* employers with respect to employees properly engaged in the PAYE system.[55]

---

[51] HM Treasury, Budget 2021 (March 2021) HC 1226
[52] Treasury Direction made on 15 April 2020 under Sections 71 and 76 of the Coronavirus Act 2020.
[53] Paragraph 2.4
[54] Paragraph 2.5
[55] Paragraph 5.

The system as originally conceived permitted claims to be made with respect to employees where

(a) the employee has been instructed by the employer to cease all work in relation to their employment,

(b) the period for which the employee has ceased (or will have ceased) all work for the employer is 21 calendar days or more, and

(c) the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease.[56]

Such arrangements present a number of opportunities for abuse, in particular where a claim is made with respect to an employee who has not, in fact, ceased working. Further opportunities for abuse exist where an employee has ceased working for reasons other than coronavirus[57] or where that employee had left the employment of the claimant but the claimant had not recorded their departure prior the Furlough Direction coming into force.

Payments made under the CJRS are notably generous. Under paragraph 7.1 of the Furlough Direction qualifying employees may be paid 80% of their normal monthly income up to a maximum monthly CJRS payment of £2,500.

Self-Employed Income Support Scheme

The SEISS seeks to achieve similar outcomes to the CJRS, however, the nature of self-employment presents even greater opportunities for abuse.

Unlike the CJRS, the SEISS is assessed on a three-monthly basis, albeit with the maximum payout for three months – £7,500 – being equivalent to the maximum payout over three months on the CJRS. The amount of the SEISS payment is the lower of £7,500 or 80% of three-months' average trading profits in the three preceding financial years.[58] The SEISS employs a somewhat different definition of profits than that typically used under the Income Tax Acts. The trading profits used under the SEISS are the total amount of trading income under Step 1 of s.23 Income Tax Act 2007 less any trading losses. While this might seem like a perfectly obvious definition of trading profits, it bypasses any allowances or reliefs that might be permitted under

[56] Paragraph 6.1.
[57] Such as where a business is no longer viable and that employee, but for coronavirus, would have been redundant.
[58] Fewer years may be used where the recipient did not trade during one or more of the three preceding years. See para. 6.2.

the Income Tax Acts, as well as aggregating unconnected losses which would otherwise be limited to connected trades under s34 Income Tax (Trading and Other Income) Act 2005 (ITOIA). Both the ITOIA and SEISS methods are, effectively, anti-abuse provisions for different contexts. In the computation of loss relief for income tax purposes a barrister, for example, should not be able to reduce their taxable income in respect of their professional practice through a loss-making side trade in baking cakes. Similarly, therefore, in the case of SEISS a taxpayer should not be able to artificially inflate their real trading profits by limiting their losses to unconnected trades.

Similar to the CJRS 'a claim may only be made in relation to a trade the business of which has been adversely affected by coronavirus or coronavirus disease.'[59] Paragraph 3.4 contains a similar anti-abuse provision to that contained in the Furlough Direction.

Business support

Support for business generally falls outwith the scope of this chapter. Such support from government has been considerable, and has largely been subject to similar design principles. The financial support schemes made available to businesses include…

Expand

Temporarily Enhancing Existing Social Security Structures

In addition to the CJRS and the SEISS, the Government also provided financial support to those in the benefits system. The Social Security (Coronavirus) (Further Measures) Regulations 2020 provides an uplift to Universal Credit payments of up to £20 per month. Unlike many recipients of CJRS or SEISS, those in receipt of Universal Credit are already engaged with the benefits system. Consequently, there was no need to design new payments or procedures.

Payments received under either the CJRS or SEISS affect the amount of Universal Credit to which a claimant will be entitled. The manner in which SEISS is payable, however, places self-employed recipients of Universal Credit at something of a disadvantage. As SEISS is payable in a single payment it can have the effect of reducing a recipient's Universal Credit payment to zero in the month in which the SEISS payment is received.

[59] 3.3 Self-Employment Direction

The Government has also been criticised for failing to match the Universal Credit uplift on so-called 'legacy benefits' – principally claimants of certain disability benefits who have not been migrated over to Universal Credit. The High Court has granted permission to challenge the decision of the Department of Work and Pensions not to uplift these 'legacy benefits'[60] and, although the outcome of that challenge remains to be seen, given that 'legacy benefits' are principally claimed by persons with disabilities it is likely that Article 14 of the European Convention on Human Rights (prohibition of discrimination) will be relied upon alongside other convention rights. Discrimination in the enjoyment of the right to social security is also prohibited under Article 2 of the ICESCR and the UK, as a state party to the ICESCR, has undertaken to guarantee that 'the rights enunciated in the present Covenant will be exercised without discrimination of any kind'. As such, the government's failure to uplift legacy benefits may be regarded as contrary to its obligations under international human rights law.

Evaluating COVID-19 financial support

Data from the Office of National Statistics show that since February 2020 - after which the first social distancing measures were implemented in the UK - 'the number of payroll employees has fallen by 828,000'. In the latter end of 2020 redundancies reached a record high and the number of those out of work – or on such low pay or hours that they required in-work social security payments – also increased.[61] In fact of those who were in work before the pandemic and have newly claimed Universal Credit, it has been estimated that '46 per cent were still actively working and earning in May while receiving UC, with another 12 per cent furloughed. This gives new context to the two million new claims to UC during this crisis: they are not all unemployed'.[62] Thus, as of January 2021, at the same time as the employment rate continues

60 Jamie Burton 'High Court to decide whether it was lawful of the Government not to give nearly 2million people on disability benefits the same £1040 a-year increase that it has given Universal Credit recipients' Doughty Street Chambers (19th April 2021) < https://www.doughtystreet.co.uk/news/high-court-decide-whether-it-was-lawful-government-not-give-nearly-2million-people-disability> last accessed 30th May 2021

61 Office for National Statistics, 'Labour Market Overview, UK - Office for National Statistics' <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/uklabourmarket/january2021> accessed 19 February 2021.
62 Brewer and Handscomb (n 25) 6.

to fall there has been a large increase in unemployment.[63] There is also massive 'under-employment'. The fast-moving job market is – for now – no-more and the COVID-19 crisis has exposed greater numbers of people to the UK's social security system.

On account of these changing circumstances, several changes were made to social security policy in response to the challenges of the pandemic.[64] Universal Credit has been observed to have responded remarkably well to the huge increase in the number of claims being made by 'rapidly adapting the claim process', 'suspending conditionality and the Minimum Income Floor (MIF)',[65] 'expediting payment', and 'providing a £20 per week uplift in the Standard Allowance'.[66] Despite these 'enhancements' to the social security system, 'a very large proportion of the UK population have experienced a fall in disposable income'[67] and research has highlighted that 'about 35 percent of all workers faced a substantive loss of income – i.e. "COVID-19-induced economic hard-ship" – between March and May of 2020'.[68] For example, a survey of new Universal Credit claimants has found that '34 per cent are having trouble keeping up with bill payments, 42 per cent have cut back on spending to prioritise housing costs, and over half have already dipped into their savings'.[69] Further studies demonstrate that around half of Universal Credit recipients 'had a severe financial strain' and 'one in six new claimants and one in five existing claimants had skipped a meal in the previous two weeks because they could not afford food'.[70] Stemming from the inadequate realisation of the right to social security, this has negative implications for the right to food.

---

[63] Office for National Statistics (n 33).

[64] Kate Summers and others, 'Claimants' Experiences of the Social Security System during the First Wave of COVID-19' (Distant Welfare 2021) 2 <https://www.distantwelfare.co.uk/winter-report> accessed 19 February 2021.

[65] The Minimum Income Floor (MIF) is a part of Universal Credit which applied to the self-employed. The MIF is 'an assumed level of earnings… based on what we would expect an employed person to receive in similar circumstances'. This is informed by the national minimum wage. If a self-employed individual's earnings are below the MIF, the MIF is used to determine Universal Credit eligibility. When a self-employed person earns below the MIF, this means that there is a difference between what a self-employed person earns and what they are regarded as earning in determining their Universal credit allowance. This leaves them financially worse off. See Department for Work and Pensions 'Guidance: Universal Credit for the self-employed' (18th June 2020) <https://www.gov.uk/government/publications/universal-credit-and-self-employment-quick-guide/universal-credit-and-self-employment-quick-guide#the-minimum-income-floor> accessed 22 February 2021.

[66] Social Security Advisory Committee (n 1).

[67] Mayhew and Anand (n 31) S217.

[68] Dirk Witteveen, 'Sociodemographic Inequality in Exposure to COVID-19-Induced Economic Hardship in the United Kingdom' (2020) 69 Research in Social Stratification and Mobility 4.

[69] Brewer and Handscomb (n 25) 8–9.

[70] Summers and others (n 36) 3.

Even the UK's (temporarily) enhanced social security system pales in comparison to the generosity of the CJRS. The furlough scheme was designed to keep employees attached to their employers so that they could readily resume their work once lockdown restrictions eased. The aim of this was to 'avoid large-scale redundancies and the subsequent problems of large numbers of unemployed people trying to find their way back into work'.[71] The furlough scheme has protected individuals from being made unemployed and this in turn has prevented a large drop in individual's incomes. Evidence shows that the median fall in disposable income across all employees moved to the furlough scheme is just 9% whereas that figure is 47 per cent if people instead lose their jobs and fall on to' Universal credit'. [72] Even despite this, the blanket provision of 80% of pre-COVID-19 income for those falling under this scheme has likely been inadequate for the lowest earners. This is because, for those who were already experiencing in-work poverty at the outset of the pandemic, 80% of their incomes may be insufficient to avert poverty and to realise their ESCRs.[73] This demonstrates that despite its successes, the furlough scheme has not been without its failures.

A temporary setback to the Conservative vision for the social security system?

Although these enhancements have been praised as preventing 'an unprecedented collapse in GDP from turning into a living standards disaster'[74] , it must also be recognised that these measures are designed to be a short-term response whereas the impact of COVID-19 upon the economy and employment figures may be long lasting. For example, plans to remove the £20 per week uplift to the standard Universal Credit allowance are projected to 'reduce the incomes of 6 million households by around £1,000 and mean the incomes of the poorest fifth of working-age households fall by over 4 per cent'.[75] Consequently, 61% of families on Universal Credit are projected to 'struggle to keep up or will fall behind on bills, around twice the

[71] Mayhew and Anand (n 31) S216.
[72] Brewer and Handscomb (n 25) 7–8.
[73] McDonald, R. 2020. ' Last minute extension of furlough undermines its effectiveness'. Joseph Rowntree Foundation. https://www.jrf.org.uk/blog/last-minute-extension-furlough-undermines-its-effectiveness (referenced 5 January 2021)
[74] Mike Brewer and others, 'The Living Standards Outlook 2021' (Resolution Foundation 2021) 4 <https://www.resolutionfoundation.org/app/uploads/2021/01/Living-standards-outlook-2021.pdf> accessed 19 February 2021.
[75] ibid 8.

proportion of families across the economy as a whole (31 per cent)'.[76] Affecting 16 million people, as a result of the removal of this uplift '700,000 more people are likely to be pulled into poverty'.[77] When combined with rising unemployment, a further 1.2 million people – including 400,000 children – are projected to fall into relative poverty:

> This would be the biggest year-on-year rise in poverty rates since the 1980s. Unlike then, though, when rising relative poverty was caused by typical incomes growing much faster than those at the bottom, the forecast rise in poverty in 2021-22 reflects a predicted sharp fall in the incomes of low-income households. As a result, and unlike in the 1980s, absolute poverty (defined as those in a household with less than 60 per cent of the 2010-11 median income) will also rise.[78]

As such, COVID-19 is projected to lead to 'catastrophic rises in destitution'[79] and 'typical incomes are set to fall, most significantly at the lower end of the income distribution, leading to increasing poverty'.[80]

The enhancements to Universal Credit and the ubiquitous and unconditional application of the furlough scheme contrast starkly with the UK's restrictive and conditional approach to social security over the preceding decade. To the pessimist, it would appear that these temporary measures have been designed to shield large numbers of people from an inadequate social security system to ensure the continued existence of that system once the pandemic allows a return to normality. The pre-pandemic normality was – however – of a social security system that was not fit for purpose.

Conclusion

This chapter has explored the intersection of tax and benefit design in the UK in the context of COVID-19. It highlights that, since 2010, the focus of tax and benefit design has been to prevent fraud. This has resulted in a punitive turn in the design of benefit conditionality and increased eligibility requirements. In turn, this has undermined the realisation of the right to

---

[76] Mike Brewer and Karl Handscomb, 'The Debts That Divide Us' (Resolution Foundation 2021) 1 <https://www.resolutionfoundation.org/app/uploads/2021/02/The-debts-that-divide-us.pdf> accessed 19 February 2021.
[77] Earwalker and McDonald (n 29) 11.
[78] Brewer and others (n 45) 6.
[79] Trussell Trust. 2020. Lockdown, Lifelines and the Long Haul Ahead: The Impact of Covid-19 on foodbanks in the Trussell Trust Network. https://www.trusselltrust.org/wp-content/uploads/sites/2/2020/09/the-impact-of-covid-19-on-food-banks-report.pdf. (referenced 21 September 2020).
[80] Brewer and others (n 45) 5.

social security and a whole range of associated human rights. Consequently, the UK's social security structures have not aligned with the state's obligations under the Article 9 of the ICESCR.

COVID-19, however, forced a change in approach. This chapter provides a comprehensive overview of the support provided to both households and individuals. From this overview, it is clear that, whereas once the prevention of fraud was prioritised, the immediacy of need has come to influence COVID-19 financial support packages in the UK. These temporary measures are decidedly more generous than the social security measures which existed before the pandemic. As such, these enhancements have improved the enjoyment of the right to social security in the UK. However, they were only ever intended to be temporary and do not, yet, represent an ideological shift in tax or benefit design.

As such, there is a clear role for policy going forwards 'and maintaining a higher (but far from high) basic level of benefits can provide the route to ensuring that household living standards – especially for those on low and middle incomes – share in the wider economic recovery'.[81] The post-COVID social security system will likely continue to require government 'interventions and flexibility'.[82] Therefore, the pandemic offers the potential to powerfully rebut the assumptions upon which a decade of social security austerity has been founded. In turn, the cruciality of social security in response to the pandemic may contribute to improved social security structures in the UK. It has been observed that COVID-19 policy – including social security policy – changes have grown in response to public pressure.[83] It may well be that public pressure can be harnessed to entrench the positive effects of these changes and to push for stronger changes. The right to social security has the potential to serve as an important yardstick in informing our future social security structures.

References

Allen, K. 'Whose Crisis Counts? Intersectionality, Austerity and the Politics of Survival' (2018) 41 Ethnic and Racial Studies 2301.

Alston, P. 'Report of the Special Rapporteur on Extreme Poverty and Human Rights: Visit to the United Kingdom of Great Britain and Northern Ireland' (2019) UN.Doc.A/HRC/41/39/Add.1

[81] Brewer and others (n 45) 9.
[82] Earwalker and McDonald (n 29) 4.
[83] Paul Cairney, 'The UK Government's COVID-19 Policy: Assessing Evidence-Informed Policy Analysis in Real Time' [2020] British Politics <https://doi.org/10.1057/s41293-020-00150-8> accessed 19 February 2021.

Brewer, M. and Handscomb, K. ‘This Time Is Different – Universal Credit’s First Recession’ (Resolution Foundation 2020) <https://www.resolutionfoundation.org/publications/this-time-is-different-universal-credits-first-recession/> accessed 19 February 2021.

-- The Debts That Divide Us’ (Resolution Foundation 2021) <https://www.resolutionfoundation.org/app/uploads/2021/02/The-debts-that-divide-us.pdf> accessed 19 February 2021.

Brewer, M. and others, ‘The Living Standards Outlook 2021’ (Resolution Foundation 2021) <https://www.resolutionfoundation.org/app/uploads/2021/01/Living-standards-outlook-2021.pdf> accessed 19 February 2021.

Burton, J. ’High Court to decide whether it was lawful of the Government not to give nearly 2 million people on disability benefits the same £1040 a-year increase that it has given Universal Credit recipients’ Doughty Street Chambers (19th April 2021) < https://www.doughtystreet.co.uk/news/high-court-decide-whether-it-was-lawful-government-not-give-nearly-2million-people-disability> last accessed 30th May 2021.

Cairney, P. ‘The UK Government’s COVID-19 Policy: Assessing Evidence-Informed Policy Analysis in Real Time’ [2020] British Politics <https://doi.org/10.1057/s41293-020-00150-8> accessed 19 February 2021.

Committee on Economic and Social Rights ‘Substantive Issues Arising in The Implementation of The International Covenant on Economic, Social and Cultural Rights: Poverty and The International Covenant on Economic, Social and Cultural Rights’ (4 May 2001) UN.Doc. E/C.12/2001/10 para 8.

-- ‘General Comment No. 19: The Right to Social Security (Art. 9)’ (2007) UN.Doc. E/C.12/GC/19.

Department for Work and Pensions ‘Guidance: Universal Credit for the self-employed’ (18th June 2020) <https://www.gov.uk/government/publications/universal-credit-and-self-employment-quick-guide/universal-credit-and-self-employment-quick-guide#the-minimum-income-floor> accessed 22 February 2021.

Earwalker, R. and McDonald, R. ‘Briefing: Strengthen Social Security for a Stronger Economy’ (Joseph Rowntree Foundation 2020) 4

<https://www.jrf.org.uk/file/56686/download?token=fprqBaSE&filetype=briefing> accessed 19 February 2021.

Edmiston, D. ‘Welfare, Austerity and Social Citizenship in the UK’ (2017) 16 Social Policy & Society 261.

Eide, A. ‘Adequate Standard of Living’ in Daniel Moeckli et al. (ed), *International Human Rights Law* (Third Edition, OUP 2018) 187-207.

Fitzpatrick, S. and others., ‘Destitution in the UK 2020’ (Joseph Rowntree Foundation 2021) <https://www.jrf.org.uk/file/57091/download?token=RUTqeIbh&filetype=full-report> accessed 19 February 2021.

Freedman, J. ‘Improving (not perfecting) tax legislation: Rules and principles revisited’ [2010] British Tax Review 717.

Garthwaite, K. and Bambra, C. ‘How the Other Half Live’: Lay Perspectives on Health Inequalities in an Age of Austerity’ (2017) 187 Social Science & Medicine 268.

Grover, C. ‘Violent Proletarianisation: Social Murder, the Reserve Army of Labour and Social Security “Austerity” in Britain’ [2018] Critical Social Policy 1.

HM Treasury, *Putting the Frontline First – Smarter Government* (Cm 7753).

-- Budget 2021 (March 2021) HC 1226.

House of Commons Treasury Committee, *The administration of tax credits* (HC 811-I).

International Labour Organization ILO, ‘Extending Social Security to All: A Guide through Challenges and Options’ 12 <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_146616.pdf> accessed 4 February 2020.

Jones, J.A. ‘Tax law: Rules or principles?’ (1996) 17(3) Fiscal Studies 63.

Judge, L. and Slaughter, H. ‘Working Hard(Ship): An Exploration of Poverty, Work and Tenure’ (Resolution Foundation 2021) <https://www.resolutionfoundation.org/app/uploads/2020/02/Working-hardship-report.pdf> accessed 18 February 2021.

Lamarche, L. 'The Right to Social Security in the International Covenant on Economic, Social and Cultural Rights' in Chapman, A. and Russell, S. (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*(Intersentia 2002) 87–114.

Mayhew, K. and Anand, P. 'COVID-19 and the UK Labour Market' (2020) 36 Oxford Review of Economic Policy S215, S215.

McDonald, R. ' 'Last minute extension of furlough undermines its effectiveness' (2020) Joseph Rowntree Foundation. https://www.jrf.org.uk/blog/last-minute-extension-furlough-undermines-its-effectiveness accessed 30 May 2021.

National Fraud Authority, 'A fresh approach to combating fraud in the public sector: The Report of the Smarter Government Public Sector Fraud Taskforce' (March 2010) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/249252/NFA_Smarter_Government_Report.pdf> accessed 30 May 2020.

Office for Budget Responsibility, 'The rising cost of the coronavirus policy response' (3 March 2021) <https://obr.uk/box/the-rising-cost-of-the-coronavirus-policy-response-2/> accessed 30 May 2021.

Office for National Statistics, 'Labour Market Overview, UK - Office for National Statistics' <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/uklabourmarket/january2021> accessed 19 February 2021.

Prebble, J. 'Why is tax law incomprehensible?' [1994] British Tax Review 380.

Scheinin, M. 'The Right to Social Security' in Eide, A. et al (ed), *Economic, Social and Cultural Rights: A Textbook* (Second Revised Edition, Kluwer International Law 2001) 211-221.

Sloman, P. 'Beveridge's rival: Juliet Rhys-Williams and the campaign for basic income, 1942–55' (2016) 30(2) Contemporary British History 203.

Rys, V. *Reinventing Social Security Worldwide: Back to Essentials* (Policy Press 2010).

Secretary General of the United Nations, 'Compilation of Guidelines on The Form and Content of Reports to Be Submitted by States Parties to The International Human Rights Treaties' (2009) UN.Doc. HRI/GEN/2/Rev.6 Chapter 2 (Annex) (B).

Social Security Advisory Committee, ‘A Review of the COVID-19 Temporary Measures: Occasional Paper 24’ (*GOV.UK*, 18 November 2020) <https://www.gov.uk/government/publications/a-review-of-the-covid-19-temporary-measures/a-review-of-the-covid-19-temporary-measures-occasional-paper-24> accessed 19 February 2021.

Summers, K. and others, ‘Claimants’ Experiences of the Social Security System during the First Wave of COVID-19’ (Distant Welfare 2021) <https://www.distantwelfare.co.uk/winter-report> accessed 19 February 2021.

Trussell Trust ‘Lockdown, Lifelines and the Long Haul Ahead: The Impact of Covid-19 on foodbanks in the Trussell Trust Network’ (2020) <https://www.trusselltrust.org/wp-content/uploads/sites/2/2020/09/the-impact-of-covid-19-on-food-banks-report.pdf> accessed 21 September 2020).

Walker, C. *Managing Poverty: The Limits of Social Assistance* (Routledge 1993).

Wilson, T. and others, ‘The Local Impacts of Welfare Reform: An Assessment of Cumulative Impacts and Mitigations’ (Local Government Association 2013) 10 <http://www.learningandwork.org.uk.gridhosted.co.uk/wp-content/uploads/2017/01/The-local-impacts-of-welfare-reform-version-7.pdf> accessed 14 November 2020.

Witteveen, D. ‘Sociodemographic Inequality in Exposure to COVID-19-Induced Economic Hardship in the United Kingdom’ (2020) 69 Research in Social Stratification and Mobility 4.