Governance of the Young Unemployed – A Comparative Study of the United Kingdom, Germany and Norway

Aina A. Kane
Associate Professor, The Arctic University of Norway
aina.a.kane@uit.no

Julia Köhler-Olsen
Associate Professor, Oslo Metropolitan University
juliak@oslomet.no

Abstract

In this article, we focus on how the United Kingdom, Germany and Norway govern and balance young unemployed claimants' right to social benefits with conditions of compulsory activities, with the aim of their transition into employment. In the three countries mentioned, we have examined and compared the national legislation and regulations, as well as how case workers in job centres experience these tools in their work with activating the young unemployed.

Balancing the individuals' right of benefits with the job centre's right and duty to impose conditions and activities as well as to sanction non-compliance, is also a matter of balancing national legislation with international human rights instruments. We have therefore analysed the three countries' legislation and job centre conduct in light of the human right to non-discrimination and equality.

To find answers to our research questions, we have studied the legal framework and human rights instruments addressing social security, conditionality and non-discrimination, and interviewed caseworkers regarding their leeway for individual professional discretion.

We find that the human right of substantive equality is challenged in all three countries. Claimants' commitments can entail stigma, stereotyping and shame, legislation can fail to provide the leeway necessary for accommodating for differences between the individuals, and sanctioning can represent a system of paternalism rather than social citizenship.

Key words

unemployed – social security – conditionality – substantive equality – job centre – professional discretion

1. Introduction: Research Questions and Purpose

This article is based on our conception of compulsory conditions attached to the benefit of social assistance influencing the work of professionals. The compulsory work-related or work-promoting activities might be conceived either as a carrot or as a stick by the professionals administering social benefits. Furthermore, this article is grounded in the conception that compulsory work-related conditions change the character of the human right to social assistance as the last resort for economic support.

Carmel and Papadopoulos define governance as 'the attempt to "steer" the behaviour of individuals, groups or institutions towards particular social and politico-economic goals via a

set of institutions and processes that aim to maintain or change the status quo'.[1] Based on this definition of governance, this article aims to study legislation and regulations as well as the organisational arrangements and procedures for delivery of activation policies.[2] An overall goal of our research project is to explore how States attempt to 'steer' the behaviour of social assistance recipients with the aim of entering the work market.

In 2017, Norway replaced the discretionary access for authorities to impose requirements of work-related activities for young unemployed recipients of social assistance with a universal compulsory duty of activity laid onto the individual. This amendment was based on the belief that imposed activities, rather than committed activities, are necessary for the transition to work for younger persons.[3] The law's amendment is in line with the increasingly severe legal requirements by other European countries regarding eligibility for either social insurance based benefits or social assistance.[4] Yet, when it comes to compulsory activities, Norway's introduction of this type of behavioural condition appears rather late compared to other European countries such as France, the United Kingdom (UK), Germany and Sweden.[5] Although Norway was part of the first wave of introduction of activation requirements as an eligibility condition for social assistance, it did not have any *compulsory* activities for social assistance recipients until they were introduced in 2016. Moreira and Lødemel call the introduction of compulsory work-promoting activation programmes in various European countries between the period of 1998 and 2008 'the second wave of activation reforms', the first wave lasting from 1990 until1998 with great differences between European countries, yet with a shared commitment to invest in the human capital of participants.[6] Based on the later introduction of compulsory activities in Norway, we are interested in examining types of steering methods directed at unemployed young individuals in other, more experienced countries.

European studies show that transition into the labour market is particularly challenging for young people who have dropped out of the education system, those with impaired physical health and mental issues, with disabilities, young immigrants, young homeless persons, and young persons who have been under child protection orders.[7] With regard to the recent Norwegian law amendment, our research is therefore targeted at the young unemployed. Our research interest is based on the premise that targeting and individual methods must be in place for providing support to the young unemployed trying to enter the labour market.[8] Compulsory activation might allow for less flexible methods. From that perspective, conditionality may seem counterproductive for bridging the gap from unemployment to employment. Other countries in Europe have had rules on conditionality and compulsory activation for a longer

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[1] E. Carmel and T. Papadopoulos, 'The new governance of social security in Britain', in: J. Millar (ed), *Understanding social security: Issues for social policy and practice* (Bristol: Policy Press, 2003) 93-110.

[2] Inspired by the work of various contributors in a book edited by A. Moreira and I. Lødemel (eds), *Activation or Workfare? Governance and the Neo-Liberal Convergence* (Oxford: Oxford University Press, 2014).

[3] A.A. Kane and J. Köhler-Olsen, 'Aktivitetsplikt for sosialhjelpsmottakere – har lovgiveren funnet opp hjulet på nytt?', *Tidsskrift for erstatningsrett, forsikringsrett og velferdsrett* (4) (2015) 262-291; A.A. Kane, J. Köhler-Olsen and C. Reedtz, 'Aktivisering av unge sosialhjelpsmottakere –forutsetninger for overgang til arbeid', *Tidsskrift for velferdsforskning* (2) (2017) 117-113.

[4] S.C. Matteucci and S. Halliday (eds), *Social Rights in Europe in an Age of Austerity* (London: Routledge, 2018).

[5] For a similar comparison on the structure of unemployment protection see M. Adler and L.I. Terum, 'Austerity, conditionality & litigation', in: S.C. Matteucci and S. Halliday (eds), *Social Rights in Europe in an Age of Austerity* (London: Routledge, 2018) 147-169.

[6] A. Moreira and I. Lødemel, 'Introduction', in: A. Moreira and I. Lødemel (eds), *Activation or Workfare? Governance and the Neo-Liberal Convergence* (Oxford: Oxford University Press, 2014) 1-14.

[7] Eurofound, *Active inclusion of young people with disabilities or health problems,* (Luxembourg: Publications office of the European Union, 2013).

[8] Kane and Köhler-Olsen, 'Aktivitetsplikt for sosialhjelpsmottakere' (n 3); and Kane, Köhler-Olsen and Reedtz, 'Aktivisering av unge sosialhjelpsmottakere' (n 3).

period of time than Norway. Our first research question is therefore: *What type of legislation and regulations are in place for governing young unemployed in the UK, Germany and Norway?*

Working with the young unemployed means working with individuals representing a variety of characteristics, resources and challenges. This calls for professional discretion involving individual assessments and considerations in each case. The term *discretion* can have different meanings. Legislation can present criteria that have no clear boundaries, e.g. 'in need'. To interpret such wording and to apply it in given cases, a case worker must apply professional discretion with regard both to what the term 'in need' is meant to address and to whether the term covers the situation in a given case. For decisions based on legal criteria, authorities will often apply professional discretion in order to find the most adequate solution in each individual case. Thus, professional discretion represents a tool for making individually tailored decisions in line with the legal purposes. Case workers in all three countries must, based on their national legislation, apply discretion and make decisions regarding benefits and compulsory activities for the young unemployed. This leads us to our second research question*: How do case workers in the UK, Germany and Norway experience these tools for the governance of activation?*

Though belonging to different typologies of welfare regimes, all three countries are State Parties to international human rights conventions demanding the provision of social rights to all citizens. Governance steering must therefore be in line with the three countries' international human rights obligations. Our third research aim is therefore to examine whether behavioural conditions and sanctions are leading to equality understood as the fulfilment of the State's obligation to implement work-promoting policy in light of the right to non-discrimination. The third research question is: *What type of social benefit system for young unemployed is in line with human rights to non-discrimination and equality*?

2. Methodology

2.1 Legal method and legal sources

In order to answer to our research problems we will apply legal, qualitative and legal-sociological research methods.

Initially, we give an account of legal frameworks in the UK, Germany and Norway regarding the eligibility to basic income and work-promoting assistance for young unemployed persons. We also examine legal frameworks regulating how work-promoting activities can be offered, complied with and be compulsory in character, as well as the sanctioning of non-compliance. Legal sources include international human rights instruments, national legislation, preparatory works, international and national jurisprudence, department guidance and other regulations, as well as legal literature. Our presentation and interpretation of the legal sources is based on a common law legal-dogmatic method. If the plain meaning of the rule does not reveal itself easily from the text, we search for the legislators' meaning of the rule by reading preparatory work or department guidance. Furthermore, we might need to ask which void or problem the legislation was designed to address, trying to find the legislative purpose using the objective teleological method.[9]

Various international and regional human rights conventions include norms regarding the right to social benefits and the right to non-discrimination. The UK, Germany and Norway follow a dualistic system regarding international law; treaties and agreements ratified by the

[9] T. Lundmark and H. Waller, 'Using statutes and cases in common and civil law', *Transnational Legal Theory* 7(4) (2016) 429-469.

national parliament have no direct effect until and unless incorporated into domestic law.[10] The three countries have all incorporated the European Convention on Human Rights 1950 (ECHR) in their national legislation, and the Convention holds the status of ordinary national law.

Four global and one regional human rights sets of conventions are incorporated by the Norwegian Human Rights Act of 1999. Furthermore, Section 3 of this Act states that provisions of the conventions and protocols incorporated shall take precedence over any other legislative provisions that conflict with them. The incorporated conventions have, thus, a so-called semi-constitutional status in Norwegian law, whereas the ECHR is of ordinary status in British and German law.

Human rights law not incorporated into national law is of relevance in all three countries' legal systems. The impact on domestic law is visible in the interpretation of legislation, the consideration of public policy and the assessment of the legality of the exercise of administrative discretion. In all three countries' legal method and tradition, international law is not ranked higher than ordinary legislation.[11] However, a principle prevails that in case of doubt, a national law is to be constructed so as not to conflict with international law.[12]

Based on Article 31 of the UN Convention on the Law of Treaties of 1969, we will interpret international human rights treaties in good faith with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In addition to the Convention text, we will use subsequent practice in the interpretation of the treaty, such as the practice of supervisory bodies like various Supervisory Committees and the European Court of Human Rights (ECtHR).

The ECtHR has developed jurisprudence regarding the equality guarantee in Article 14 of the ECHR, redressing disadvantage due to stereotypes, prejudice, humiliation and violence, facilitating participation and accommodating difference, including through structural change in a more robust manner.[13] These multidimensional features must be redressed to achieve substantial equality.[14] We have chosen to copy and follow the Court's way of analysing the question of discrimination and whether the State's system is supporting equality. In this respect, we need to point out that we will not conclude firmly whether one or several countries are in breach of the ECHR right to non-discrimination read in conjunction with the right to social security. Yet, our analysis along the Court's line of analysis provides points of discussions on whether the British, German and Norwegian social systems provide equality of opportunity, equality of result and equality of dignity.[15]

While all three countries are members of the Council of Europe and States Parties to the ECHR, only the UK and Germany are members of the European Union (EU).[16] As Member States of the EU, national courts and authorities must apply to the Charter of Fundamental Rights of the European Union (the Charter, the EU Charter) when EU law is at stake. The Charter is considered to be part of Union primary law and must, like any norm of Union law,

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[10] R. Clayton and H. Tomlinson, *The Law of Human Rights* (Oxford: Oxford University Press, 2009).

[11] B.A. Boczek, *International Law: A Dictionary -. Dictionaries of International Law, No. 2* (Oxford: The Scarecrow Press, 2005) 13.

[12] A. Cassese, *International Law* (Oxford: Oxford University Press, 2005) 230.

[13] S. Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights', *Human Rights Law Review* 16 (2016) 273-301 at 273; S. Fredman, 'Substantive Equality Revisited', *International Journal of Constitutional Law* 15(3) (2016) 712-734 at 730.

[14] Fredman, 'Emerging from the Shadows (n 13) 274.

[15] *Ibid*.

[16] The UK has voted to leave the European Union and departs at 11 pm UK time on Friday 29 March, 2019. A. Hunt and B. Wheeler, BBC News UK. 'Brexit: All you need to know about the UK leaving the EU', 21 June 2018. 1 October 2018 <https://www.bbc.com/news/uk-politics-32810887>. Norway is a Member State of the European Economic Area (EEA) which does not fall under the ambit of the EU Charter of Fundamental Rights.

be respected when this body of law is applied by courts or authorities.[17] However, the rule of application in national law is somewhat restricted. Article 51 (1) of the Charter states that the Charter is addressed to the Member States 'only when they are implementing Union law'.

Despite this restriction on the direct application of the EU Charter in national law, the UK resisted the application of the Charter at the national level altogether, and instead obtained inclusion of the separate Protocol No. 30 relating to the application to the Charter in the UK.[18] This leads to two different systems in the UK and Germany regarding the application of the Charter. Firstly, we give account of the main rule of application regarding Germany, and secondly, we will present the scope of application according to Protocol No. 30.

German courts and authorities, as well other EU Member States, when confronted with problems of purely national law, are *not* obliged to apply the Charter. This can be read out of Charter Article 51 (2) stressing that the provisions of the Charter are not intended to extend the competences and powers of the Union. Allan Rosas, judge of the European Court of Justice, argues that in cases on purely national law, national courts and authorities should instead rely on the national constitutional Bill of Rights as well as the international human rights instruments which are binding on the Member States in question.[19] The term 'implementing Union Law' should, furthermore, be interpreted narrowly. This is in order to avoid that the European Court of Justice and national courts of Union Member States would become something close to human rights courts, due to the fact that it is becoming increasingly difficult to find areas where Union law is totally absent.[20]

The aim of Protocol No. 30, binding for the UK, is to ensure that the Charter should not be able to overturn national law. Also, Article 2 of the Protocol No. 30 states that the Charter applies to the UK only 'to the extent that the rights or principles that it contains are recognised in the law or practices of…the United Kingdom'. This prohibition of powers, it is argued, has little if any practical effect. David Anders Q.C. and Cian C. Murphy point out that this little practical effect is due to the fact that:

> … national and EU courts have long possessed the competence to measure national law within the scope of EU law against the yardstick of EU fundamental rights, freedoms and principles, and since those rights freedoms and principles are said only to be re-affirmed by the Charter it will no doubt be argued – with some force – that the Article 1(1) prohibition on the extension of powers has little if any practical effect.[21]

Notwithstanding that the UK and Germany belong to two different systems of application of the EU Charter, we argue that the answer to the question of direct application of the Charter's social rights and principles by national courts and authorities is very similar for both systems.

Article 52 (5) of the Charter states that those provisions of the Charter containing *principles,* may be implemented by Member States when they are implementing Union law. These principles shall be judicially cognisable only in the interpretation of such Union law acts and in the ruling of such Union law. Article 1 (2) of Protocol No. 30 states something quite similar. The Charter's solidarity rights and principles receive special treatment in Article 1(2) of the Protocol. These solidarity rights do not 'in particular and for the avoidance of doubt' create

[17] The Treaty on European Union (TEU), as amended by the Treaty of Lisbon, Article 6 (1) states that the Charter 'shall have the same legal values as the Treaties' by that endowing it with the status of Union primary law.
[18] Also Poland and the Czech Republic are Member States to Protocol No 30.
[19] A. Rosas, 'When is the EU Charter of Fundamental Rights applicable at national level?', *Jurisprudence* 19(4) (2012) 1269-1288 at 1269
[20] *Ibid* 1281.
[21] David Anders Q.C. and C.C. Murphy, 'The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe', *EUI Working Paper Law 2011/08* 1-30 at 11.

justiciable rights for the UK except insofar as is provided for in UK national laws.[22] Thus, with regard to social rights and principles as laid down in the Charter Title IV, these rights and principles can only be applied directly by German national courts when interpreting Union Law (Article 52 (5) of the Charter), and only be directly applied by UK national courts if such rights are provided for in UK national law (Protocol No. 30 Article 1 (2)). If social rights and principles of the Charter are not part of Union Law, German national courts cannot apply it, and likewise, UK courts cannot apply social rights and principles of the Charter if these rights are not found in national law.[23] Since very few social rights are part of Union law, German courts and authorities must only rarely apply the EU Charter's social rights and principles directly, just like the UK is not required to apply the EU Charter's social rights and principles directly, if not provided for in national law.

Certain social rights are part of EU secondary law, such as the right to non-discrimination based on gender (Gender Equality Directive No 2006/54/EC) and racial discrimination (Racial Equality Directive no 200/43/EC). We would argue that social rights and principles of the EU Charter Title IV related to gender – and racial-based discrimination are to be respected and observed when Germany is implementing these two directives in national law. With respect to the question of direct application in the UK, the relevant Charter rights and principles are probably directly applicable since the UK as a Member State of the Union is obliged to implement these two directives on non-discrimination. Thus, these two directives have informed the national law of the UK.

However, there is no EU secondary law regarding the right to social security. This leads to the fact that neither German nor British courts nor authorities must respect the fundamental social right laid down in the EU Charter with regard to social security and social assistance in Article 34. This leads to a weak protection of social rights by the lack of direct application of Article 34 of the EU Charter.

The weak protection of social rights is also visible in the reluctant application of worker's rights by the European Court of Justice (ECJ). The ECJ has in two cases shown clear reluctance to consider workers' rights to fall within the scope of Union law even though these are protected under the EU Charter on fundamental rights. The social rights of the workers were not considered to be directly applicable as required by Article 51 (1) of the Charter because the ECJ did not consider these workers' rights to be part of Union law, and by that fall under the ambit of Article 52 (5).[24]

In conclusion, the EU Charter on fundamental rights on social security must not be applied directly by either German or UK courts or authorities. Thus, we have decided not to include Article 34 of the EU Charter on social security and social assistance as a legal source in our research. Since it is not directly applicable to hold German and UK authorities legally accountable for their policies on social benefits, and since Norway is not a Member State of the EU, as well as for the sake of restricting the amount of legal sources in this particular research, we find it well-founded to exclude this source for legal interpretation of German and UK national law.

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[22] *Ibid* 11-12.

[23] *Ibid* 12.

[24] Case C-176/12, *Association de mediation sociale*, Judgment of 15 January 2014, concerning the right to information and consultation with the undertaking (The EU Charter Article 27). Case C-117/14, *Nisttahus Poclava*, Judgement of 5 February 2015 concerning the right to protection in the event of unjustified dismissal (The EU Charter Article 30). Pointing to the case C-176/12, Association de mediation sociale, some have argued for a broader interpretation of what should be considered to be Union law. See: M. Delfino, 'The Court and the Charter – A "Consistent" Interpretation of Fundamental Social Rights and Principles', *European Labour Law Journal* 6(1) (2015) 86-99. Also: L.J. Quesada, 'Social rights in the case-law of the Court of Justice of the European Union: the opening to the Turin Process', *Conference on Social rights in today's Europe: The role of domestic and European Courts,* Nicosia 24 February 2017.

2.2 Qualitative method

Our research aim is not only to scrutinise and compare three countries' legislation and regulations on social benefits and conditionality, but also to examine the organisational arrangements and procedures for delivery of activation policies. We have therefore also gathered information and insight from professionals working in institutions set up to 'steer' the behaviours of individuals. We have chosen to focus on the young unemployed, based on the fact that Norway's introduction of compulsory activities as a condition for social assistance targeted claimants under the age of 30. Also, we have previously pointed to European research showing that younger claimants are particularly at risk of exclusion from the labour market, due to lack of education and qualifications, and impaired physical and mental health. Additionally, young immigrants, disabled, homeless and youth who have been under child protection orders, have greater difficulties in finding work.[25]

Choosing the United Kingdom and Germany for comparison with Norway is based on our previous knowledge of the introduction of compulsory activities for social benefits recipients in these countries. To get an insight into how Job Centres in the UK, Germany and Norway carry out their work with the young unemployed, we have gathered information from two agencies in Germany and one agency in both Great Britain and Norway, in cities with a population of between 50,000 and 600,000. Notwithstanding the fact that the number of interviews is not representative for all job centres in the three countries, we think that our respondents' descriptions can show some patterns and insights with transfer value regarding how legislation is understood and applied in the governing of the young unemployed.

2.3 Data and selection method

We have gathered data from group interviews and individual interviews with caseworkers, and casework leaders, representing a variety of qualifications and work experiences, all working with young unemployed. Access to respondents was obtained through contacting the agencies' management, in the UK in a regional office (Jobcentre Plus) and in Norway in a local Labour and Welfare Administration office (NAV). In Germany, we interviewed in two job centres in two different cities, due to the organisation of the job centres being different within these two municipalities (see further below, Section 3.3).

After informing about our research project and asking for interviews with caseworkers working with young unemployed people in local Job Centres, we were given access to our respondents. In the British Job Centre, we interviewed a group of 10 caseworkers and then two individual caseworkers. In Norway we interviewed two caseworkers individually. The Job Centres in all three countries informed us that they recruit caseworkers across different qualifications and work experiences to work with the young unemployed, so our respondents represented different professional backgrounds.

Our research aim to gain insight into the organisational arrangements and procedures for policy delivery of activation policies towards young unemployed social benefits recipients, led us to the following topics for our interviews:

1) **Work-promoting activities for young unemployed persons**: a) availability, assessments and supervision, b) compulsory activities and exemptions, and c) sanctioning of non-commitment.

[25] Eurofound, *Active inclusion of young people with disabilities or health problems* (n 7).

2) **Leeway for caseworkers' professional discretion**: a) Their perception of leeway, 2) considerations made in individual cases, and 3) Factors influencing their leeway.

Based on a semi-structured interview guide, we invited our respondents to describe and exemplify how they carry out their work. Examples from questions were: 'What assessments are made of each person before work-promoting assistance/measures are considered'? 'How do you rate your access to exempt young unemployed from compulsory activities'? And 'How do you perceive your leeway for individual discretion in your work with this group'?

All interviews lasted about an hour and were carried out in the native language of each country. The interviews in Germany and Norway were tape recorded, whilst the interviews in the UK were recorded through a combination of stenography and written notes. We transcribed our interviews shortly afterwards, exchanged the transcripts of the interviews with each other, and deleted the tape recordings.

2.4 Method of analysis

We analyse our data through the legal framework for the three countries. Comparing legal framework and job centres' conduct in three European countries is in many ways challenging. The types of financial assistance available for the young unemployed are different in the countries, as are the criteria for eligibility. In this paper, we do not aim to present the full picture of youth unemployment in the UK, Germany and Norway. However, we aim to show examples of contexts for financial assistance and for activating the young unemployed. In addition, we aim to describe and compare the different criteria for entitlement, basic criteria (unemployment, no/low income) and specific work-related criteria (activities). We have interpreted the descriptions from our respondents' work with the young unemployed in order to show possible relevant examples of how they perform their work within the relevant legal framework. On this basis, we will discuss both how they are given and how they make use of professional leeway and discretion in individual cases. By applying a legal-sociological method,[26] our analysis aims to show how the legal framework is understood and applied in the day-to-day work of local Job Centres.

2.5 Terms

Comparing different legal systems, their implications and implementation in practice requires some hard choices as to which terms we should use to describe certain phenomena.

Public bodies in charge of social benefits and work-related aid targeted at unemployed persons are titled as Jobcentre Plus in the UK, Job Centre in Germany and NAV-office in Norway. In this article, we will use the common term 'job centre' for all three countries.

The staff responsible for following up the young unemployed receiving social benefits, implementing activation policies and sanctioning in case of non-compliance also have different titles in the three countries. While our respondents in the UK titled themselves 'work coaches', respondents in Germany used the term 'personal advisers' and respondents in Norway 'supervisors'. Since we experienced that all our job centre respondents described their work through the assessments and decision-making in individual cases, we have decided to use the term 'caseworkers'.

The caseworkers in the UK and Germany used the term 'customer' when referring to the individual applying for or receiving social benefits. In Norway the individual is called 'user'.

[26] T. Mathiesen, *Retten i samfunnet: en innføring i rettssosiologi* (Oslo: Pax, 2011).

In this article, we have chosen to use the term 'claimant' which in our opinion describes the situation when an individual makes a claim for a benefit.

Another term which will be used in this article is 'employable'. One understanding of the term relates to personal characteristics such as appropriate behaviour, appropriate clothing and body hygiene. In context of this research project we choose a broader understanding. The term 'employable' is used here to refer to those young unemployed who, according to eligibility terms in each country, are considered capable of working.

The term 'universal' is often used to describe social benefits that are provided for all citizens or inhabitants without any eligibility requirements. This term is used slightly differently in this research project. We use the term 'universal social benefit' when an eligibility requirement or criterion becomes so broad that the social benefit comprises a very large number of those in need of public assistance. In addition, we also use the term 'universal' in relation to activities being compulsory for almost all recipients falling under the respective social benefit scheme. When reasons for exemptions from compulsory activity are narrow and strict, the activation policy applies 'universally' for all the respective recipients.

In Section five, we discuss which type of social benefit system directed at the young unemployed is in line with the human rights to non-discrimination and equality. In this discussion we introduce a more specific concept of the right to non-discrimination and the right to equality. This concept is termed 'substantive equality'. To achieve the aim of substantive equality, four complementary and interrelated objectives must be pursued. Substantive equality is about addressing disadvantages, stigma, stereotyping, prejudice and violence, facilitating participation and accommodating differences, including through structural change.[27] For example, welfare benefits might address disadvantages, but be delivered in such a way as to stigmatise the claimants. In other words, the means employed in the UK, Norway and Germany in achieving substantive equality must respect claimants' differences, avoid stigma and stereotyping, facilitate participation, and accommodate differences.

3. Work-Promoting Activities and Social Benefits – Rights and Duties

3.1 Introduction

In this section, we will present our comparison of the social benefits system and its activation policies targeted at the young unemployed in the UK, Germany and Norway, answering the first research question regarding what type of legislation and regulations are in place in the UK and Germany compared to Norway. Firstly, we examine the countries' benefits system and eligibility criteria for receiving financial assistance and adequate work-promoting activities. Secondly, we introduce the agencies responsible for the governing of social benefits and activation policies, describing their organisation and mandate and highlighting similarities and differences. Thirdly, we compare the UK, Germany and Norway's legal framework for implementing compulsory work activities. Lastly, the reader is presented with the systems' handling of non-compliance with respect to compulsory work-activities.

3.2 Benefits – systems and basic criteria

The UK, Germany and Norway must ensure the individual's right to social security. This obligation is laid down in several international and regional human rights instruments such as Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),

[27] Fredman, 'Emerging from the Shadows' (n 13); and Fredman, 'Substantive Equality Revisited' (n 13).

Article 26 of the Convention on the Rights of the Child (CRC) for those under the age of 18, Article 20 of the International Labour Organization Convention C102 (ILO-C102) on Social Security (Minimum Standards), and Articles 12 and 13 of the European Social Charter (ESC).

In general, there is an understanding that social security consists of two benefits schemes: social insurance and social assistance. This type of understanding is prevalent in Article 12 ESC on social security schemes and Article 13 on social assistance as the last resort of means, being the only human rights instrument that obliges States to provide types of benefits systems. Social assistance is defined in Article 13 as the provision of adequate assistance to those without adequate resources and who are unable to secure such resources either by their own efforts or from other sources, in particular by benefits under a social security scheme. Furthermore, Article 14 requires State Parties to promote and provide services which, by using methods of social work, would contribute to the welfare and development of both individuals and groups in the communities and to their adjustment to the social environment. Neither the ILO-C102 nor the ICESCR mention social insurance and social assistance in particular. One explanation for the ILO-C102 and the ICESCR lacking the aforementioned two types of social security benefits schemes might be that it is to be considered a discretion for each State Party on how they organise their national security system for those in need.

Article 9 UN ICESCR and Article 26 UN CRC seem to have a broad understanding of what constitutes 'social security'. Both conventions state that: '[t]he states parties to the present covenant recognize the right of everyone to social security, including social insurance' including contributory as well as non-contributory social security schemes. The UN CESCR Committee states furthermore that the right to social security is 'of central importance in guaranteeing human dignity'.[28]

The ECHR is missing a legal norm that obliges State Parties to secure social services and benefits. Yet, if a social security scheme exists, a number of social benefits are considered protected as possessions under the ambit of Article 1 of Protocol No. 1 on the protection of property. The ECtHR pointed out that if a State does decide to create benefits, it must do so in a manner compatible with Article 14 ECHR on the right to non-discrimination.[29] In its Grand Chamber decision of 2005 on the admissibility of the case *Stec and others v. the UK*, the ECtHR discussed whether non-contributory social benefits fall under the ambit of Article 1 of Protocol No. 1, stated in paragraph 52: '.. [..] .. the Court considers that .. [..] .. a right to a non-contributory benefit falls within the scope of Article 1 of Protocol No. 1 ..[..] ..'.[30] In other words, the discussion of whether only contributory social benefits fall under the scope of Article 1 of Protocol No. 1 or if non-contributory benefits are also included in the scope of the particular human right, was put to rest. It is therefore undoubted that both contributory and non-contributory social benefits are protected under the ECHR and its Protocol No. 1. Having presented the three countries' human rights obligation to ensure and fulfil social security, we now present the national social security systems and benefits relevant for young unemployed recipients.

In the UK, The Welfare Reform Act 2012 (WRA)[31] regulates the criteria for Universal Credit (UC), a benefit form first introduced to some chosen sites in the UK in October 2014 with the aim to make it a universal benefit for unemployed persons throughout England, Scotland and Wales. Where implemented, UC replaces former benefits such as Jobseeker's Allowance (unemployment), income-related Employment and Support Allowance (health/disabilities), and

[28] UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 19 on the right to social security (art.9)', UN Doc. E/C.12/GC/19 (2008) para. 1.
[29] See further below Section five on the right to non-discrimination and substantive equality.
[30] *Stec and others* v. *the UK*, Decision of 6 July 2005, Applications Nos. 65731/01 and 65900/01.
[31] Welfare Reform Act (2012), the UK, chapter 5, part 1 Universal Credit.

other forms of income support.[32] UC is calculated by combining a standard allowance, housing costs, particular needs, and costs for children (Section 1 WRA), and has replaced such individual benefits. Basic criteria are listed in Section 4 (1) WRA; claimants must be over the age of 18 and under State pension age, must be in Great Britain and not receiving education. Also, the claimant must have 'accepted a claimant commitment' (Section 4 (1) (e)), that is, accepted conditions for receiving the benefits. The criteria 'must be in Great Britain' mainly means that the person must be a legal resident, and not a habitual resident, while '[n]ot receiving education' means not undertaking full time course of advanced education or full-time course or training for which the person can claim student loan or grant.[33]

Universal Credit, as well as a number of other benefits, is subject to a benefit cap, meaning that there is a limit on the total amount of benefit.[34] The benefit gap was introduced in 2013, and comes into effect regardless of family size, housing costs or other circumstances.[35] In 2015, the UK Supreme Court ruled in a case where the benefits cap was argued to be discriminatory and disproportionate by particularly affecting women and single mothers having to escape domestic violence. During the case proceedings, the benefit cap was also argued to breach children's basic human rights of sufficient means to meet their basic needs, and the State obligation to view all actions and decisions in light of the best interest of the child. Though the five judges dissented (3-2), the policy was not overturned by the Supreme Court.[36] In a similar recent case brought before the Court of Appeal by the Secretary of State for Work and Pension, the Court of Appeal handed down its judgment on 15 March 2018 by the majority of two to one that the benefit cap was not discriminatory against lone parent families with very young children under two years old.[37] In the High Court ruling it was held that the application of the revised benefit cap to lone parents with children under two amounts to unlawful discrimination and that 'real damage' is being caused to the claimants and families like theirs across the country. Upon considering the impact of the benefit cap, Mr Justice Collins concluded that 'real misery is being caused to no good purpose.'[38] The Court of Appeal has also taken the very unusual step for granting permission to appeal to the Supreme Court against its own judgment.

In Germany, employable persons lacking sufficient income, their partners and children under the age of 15 living in a joint household are eligible to receive unemployment benefits II (UBII), Sections 7-9 of the Second Book of the German Social Code 2005 (SGB II). The regular maximum duration of the insurance-based unemployment benefit (UBI) is 12 months. UBII is the benefit system for the long-term unemployed. The UBII main element is to secure one's livelihood by paying standard benefit in the form of direct cash payments as well as subsidies for accommodation and heating, Sections 19-22 SGB II. UBII also covers compulsory social insurance contributions, Section 26 SGB II. Eligible for UBII are persons aged between 15 and 64 who are physically and mentally capable of working for at least 15 hours per week. The German Federal Constitutional Court decided in 2010 in a significant case on the question of minimum subsistence level under UBII.[39] In 2009, The Federal Social Court and the Higher Social Court of Hessen submitted three cases to the Federal Constitutional Court, focusing on the problem that children under the age of 14 were entitled to only 60 percent of the basic

[32] GOV.UK, 'Universal Credit'. Retrieved 24 September 2018 <https://www.gov.uk/universal-credit>.
[33] Department for Work and Pensions (2013). 'The Universal Credit Regulations 2013', Regulations 9 and 12. Retrieved 24 September 2018 <http://www.legislation.gov.uk/ukdsi/2013/9780111531938/contents>
[34] GOV.UK, 'Benefit cap'. Retrieved 24 September 2018 <https://www.gov.uk/benefit-cap>.
[35] GOV.UK, 'National introduction of benefit cap begins'. Retrieved 24 September 2018. <https://www.gov.uk/government/news/national-introduction-of-benefit-cap-begins>.
[36] *R (on the application of SG and others (previously JS and others)) (Appelants)* v. *Secretary of State for Work and Pension (Respondent)* [2015] UKSC 16.
[37] *Court of Appeal DA and others* v. *Secretary of State for Work and Pension* [2018] EWCA Civ 504.
[38] *DA and others R (On the Application Of)* v. *Secretary of State for Work and Pensions* [2017] EWHC 1446.
[39] The German Federal Constitutional Court, Judgment of 9 February 2010, BverfG, BvL 1/09.

provisions, without any definition or ascertainment of children's needs, or any provisions for further groups. The Federal Constitutional Court argued that the UBII legislation, covering the standard benefits rates for adults and children, were not in compliance with constitutional law. The argument of the Court was based on Article 1 (1) of the German basic law on the State's obligation to protect human dignity read in conjunction with the principle of the social Welfare State laid down in Article 20 (1). The Court stated on grounds of these provisions a fundamental right to a guarantee of a dignified minimum existence. Though being considered a landmark decision, the court also pointed out that it is the legislator's discretionary power to decide on the level of minimum subsistence. Judicial review is limited to the issues of reasonableness and arbitrariness.

In Norway, a person can be entitled to unemployment benefits under the National Insurance Act 1997 (NIA) if s/he has had previous employment, and benefits are calculated from previous income. The young employable unemployed receiving contributory social benefits under the NIA are obliged to attend work-related activities. Non-compliance is sanctioned with 100 percent cut of benefits for a period of 12 weeks (NIA, Chapter 4). Unemployed claimants not entitled to unemployment benefit and unable to cover their cost of subsistence through work income or other means are entitled to social assistance under the Social Services Act 2009[40] (SSA), Section 18. Such assistance must be sufficient for the claimant's basic needs, yet restricted in order to maintain his/her motivation for seeking employment (Sections 4 and 18 SSA). This demonstrates how support for subsistence is reserved for applicants with no other means to cover their basic expenses: food, housing, electricity/heating, clothing, medicine and other items considered as basic and necessary for the applicant. Financial support under the SSA serves as the lower and last safety net, demonstrated through the wording of the criterion 'is unable to provide for' her/himself. According to Section 4, social services must be 'justifiable', meaning that not only must the job centre's assessments and conduct be proper and accountable, but also the measurement of benefits. The legal requirement of justifiability within all welfare services were introduced as a result of a decision from the Norwegian Supreme Court in 1990,[41] stating the individual right to social care of a minimum standard. Despite the requirements of justifiable and sufficient measurements of social assistance, the level of social assistance has not been adjusted to the same extent as other benefits. Pensions under the NIA have over the last ten years increased significantly more than social assistance under the SSA.[42]

While the UK, through the Universal Credit, has abandoned unemployment benefit based on previous income (income-based Jobseeker's Allowance and income-related Employment Support Allowance), Germany and Norway still offer unemployment benefits (UB I, respectively Unemployment Benefit NIA, Chapter 4) for a certain period of time based on previous income. All three countries still also have social benefits based on the idea that those not being able to work due to health problems, parenting, family care or age are eligible for social insurance-based benefits.

The first obvious difference between the social benefit system of the UK, Germany and Norway is that the young employable unemployed are defined up to the age of 30 in the Norwegian SSA, while the UK and Germany define young employable unemployed up to the age of 25. Within the UC regulations in the UK, no differences can be seen between those being under or over the age of 25 with regards to eligibility and sanctioning, though claimants under 25 receive a reduced payment rate.[43] The German UBII regulations differentiate between

[40] Social Services Act, Norway. 18 December 2009 no. 139.
[41] Rt. 1990 Section 874.
[42] A. Kjønstad, A. Syse and M. Kjelland. *Velferdsrett I* (Oslo: Gyldendal juridisk, 2017).
[43] GOV.UK, 'Universal Credit – What you'll get'. Retrieved 24 September 2018 <https://www.gov.uk/universal-credit/what-youll-get>.

claimants under and over the age of 25 when it comes to the type and length of sanctioning, whereas the Norwegian SSA differentiates between those under or over the age of 30 when it comes to compulsory activation compared to discretionary activation.

Another difference we find is between the UK and Germany on the one hand and Norway on the other, concerning which claimants are eligible for what type of benefit receipts. In the UK, all citizens outside the labour market and education system are covered by UC and the claimants must accept a claimant commitment fulfilling work-related requirements. UC thus pre-supposes that claimants are capable of working regardless of whether they have had previous employment or not. In Germany, all long-term unemployed citizens, whether previously employed or not, and considered capable of working at least 15 hours per week, are eligible for UBII. It is irrelevant whether the claimant could contribute to the social benefit system previously or not. Norway, on the other hand, has a two-fold system dividing the young employable unemployed into two groups: claimants covered by NIA-benefits and claimants covered by the SSA-benefits. Those young unemployed who have no previous connection to the labour market are covered by social assistance according the SSA. Members of both groups are classified as unemployed, have not necessarily been previously employed, lack sufficient income, are considered employable and have to commit to work-related and work-promoting activities. The Norwegian social welfare system differentiates between those eligible according to NIA, due to the need of additional medical treatment, and those falling under the ambit of SSA.

In summary, the German and UK systems are characterised by a uniform basic income support scheme on the lower level for those capable of work. The Norwegian system differentiates between the young employable unemployed, based on either former income or health issues eligible for NIA-benefits and those receiving social assistance under SSA-scheme, representing the final net of social security based on individual basic needs and costs.

Summarising table:

The UK	**Germany**	**Norway**
The Welfare Reform Act 2012 (WRA): Universal Credit (UC) - conditional	The Second Book of the German Social Code 2005 (SGB II): Unemployment benefits II - conditional	National Insurance Act 1997 (NIA): Unemployment benefits - conditional
	SGB XII: Social Assistance - non-conditional	Social Assistance Act 2009 (SAA): Social Assistance - conditional for claimants under 30.

3.3 Agencies – organization and mandate

In the UK, Germany and Norway, employment agencies are co-organised State- and local job centres, managing both unemployment benefits and social assistance, as well as work-related assistance to unemployed claimants. In the UK, the local Jobcentre Plus offices are administered by the Department of Work and Pensions (DWP), and their mandate is to provide an integrated service incorporating benefits and employment. The agencies are responsible for assessing claims for Universal Credit and for supervising claimants in their job searching process. In Germany, the national Federal Employment Agency (FEA) and the municipal Social Service were merged in 2005. The new agency represents a so-called consortium model and are

administered by Federal Ministry of Labour and Social Affairs. The consortium is the idea of a 'one-stop shop' for delivering employment services to UBII claimants by employees who previously worked at municipal social assistance offices as well as employees from local FEA offices. However, there was an option for municipalities to apply for a different solution, the so-called municipality models, where local offices have taken over the responsibility for administering UBII on their own.[44] Today, 108 out of 11.054 municipalities existing in Germany are so-called 'optional municipalities'. In Norway, the Work and Welfare Agency (NAV) represents a merging in 2006 of stately and local benefit and welfare agencies through NIA and SSA, administered by the Department of Work and Welfare.

Common to the three countries is the claimant interacting with just one office; Jobcentre Plus in the UK, Job Centre in Germany and NAV-office in Norway. The internal organisation of the agencies shows some differences. In the UK, the merger of benefit administration and job-placement services located within the same local office had already happened by the introduction of Jobseeker's Allowance in 1996.[45] This type of merger happened about a decade later in Germany, combining the administration of the local social assistance offices and local FEA offices; the latter have always been responsible for job-placement activities. Thus, German Job Centres consist of employees previously either working with short term unemployed receiving social insurance benefits or working with claimants receiving social assistance. The role of the German job centres is to co-ordinate integration efforts through the expertise of 'personal advisers' (Section 14 SGB II) in charge of providing overall guidance and job placement. However, the responsibility for payment of social benefits is still divided. While federal taxes cover the expenditure for benefits and services, municipalities continue to be responsible for accommodation and heating.[46] The merger of the State agencies of social insurance and employment services with local authority social assistance provisions and activation measures happened in Norway in 2005. Still, employees responsible for the administration of NIA and social insurance-based benefits and services are employed by the Norwegian State, while those employees responsible for the administration of SSA are employed by their municipality. Social assistance is an expenditure for municipalities financed from their available revenues from taxes, block grants, and other general transfers from the national government, while social insurance-based benefits are financed by national taxation.[47]

To summarise, in all three countries, benefits and casework is administered in locally run branches, under governmental agencies. However, in Germany some municipalities are granted administration of UB II independently.

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[44] J. Clasen and A. Goerne, 'Germany: Ambivalent Activation', in: A. Moreira and I. Lødemel (eds), *Activation or Workfare? Governance and the Neo-Liberal Convergence* (Oxford: Oxford University Press, 2014) 172-202 at 180.

[45] J. Griggs, A. Hammond and R. Walker, 'Activation for All – Welfare Reform in The United Kingdom, 1995-2009', in: A. Moreira and I. Lødemel (eds), *Activation or Workfare? Governance and the Neo-Liberal Convergence* (Oxford: Oxford University Press, 2014) 73-100. Job Seekers' Allowance merged social insurance and social assistance benefits for unemployed claimants.

[46] Clasen and Goerne, 'Germany' (n 44).

[47] E. Gubrium, I. Harsløf and I. Lødemel, 'Norwegian Activation Reform on a Wave of Wider Welfare State Change', in: A. Moreira and I. Lødemel (eds), *Activation or Workfare? Governance and the Neo-Liberal Convergence* (Oxford: Oxford University Press, 2014) 19-46.

Summarising table:

The UK	Germany	Norway
Jobcentre Plus	Jobcenter	NAV-office
Merger of benefit administration and job-placement services in 1996.	Merger of Social Services and Federal Employment Agency in 2005.	Merger of the State agencies of social insurance and employment services with local authority social assistance in 2005.
	108 municipalities without a merger. Municipalities are responsible for UBII.	
Department of Work and Pensions	Federal Ministry of Labour and Social Affairs	Ministry of Labour and Social Affairs

3.4 Compulsory work-related activities

Article 20 of the ILO-Convention C102 on Social Security (Minimum Standards), and Articles 12 and 13 of the ESC provide legal grounds for imposing activities on the benefit recipients. The term 'activities' can be either suitable employment or other forms of activities aiming to qualify for and lead to suitable employment. The wording implies that any duty imposed on the unemployed to receive social security is legitimate only if constituting or leading to 'suitable employment'.[48]

In the UK, eligibility for UC is conditional upon the claimants complying with different areas of work-related activities. Claimants must commit to participation in work-focused interviews and work preparation.[49] UC claimants must also commit to work searching and work availability.[50]

Claimants can be subject to only one or some requirements, or be exempt from requirements due to e.g. limited capability or heavy caring responsibilities (Sections 19-21). UCR Regulation 16 also states such exemptions when 'there are exceptional circumstances' which would make such commitment 'unreasonable'. The activities are to be stated in a 'Claimant's Commitment' document, making up a full week of activities. A claimant who finds part-time work will be obliged to actively search for work in the remaining hours to make up a full week.

In Germany, eligibility for UBII requires active job searching and commitment to participating in welfare-to-work programmes. The rights and duties of the claimant of UBII in the activation process are set out in so-called 'integration agreements' (SGB II, Section 15). The overall goal of the UBII is to 'demand and promote' ('Fordern und Fördern'), as is the first Article's title of the SGBII. The various measures of active labour market policy are laid down in the Third Book of the German Code of Social Law on employment promotion (SGB III). Which activities are required depends on the caseworker's professional discretion and leeway.[51] Welfare-to-work programmes and activities can comprise the instrument of 'work opportunities' or short training courses. Further training comprises a more substantial human capital investment and focuses on the adaption of occupation-specific skills to recent labour market developments. Other programmes can be wage subsidies, start-up grants and job placement services of private companies.[52] According to Section 10 (1) SGBII, a UB II recipient

[48] T. Eidsvaag, 'Arbeidslinjen og menneskerettighetene', *Retfærd* 39 (153:2) (2016) 45-57.
[49] Welfare Reform Act (2012) (n 31), Sections 15-16.
[50] *Ibid*, Sections 17-18.
[51] Clasen and Goerne, 'Germany' (n 44).
[52] M. Huber, M. Lechner, T. Walter and C. Wunsch, 'Do German Welfare-to-Work Programmes Reduce Welfare Dependency and Increase Employment? *German Economic Review* 12(2) (2010) 182-204.

can be exempt from work-related or work-promoting activities. The reason for exemption can be due to limited physical or mental capability, caring responsibilities for children under the age of three or caring for elderly family members. Other exceptional circumstances can also be considered by the caseworker.

In Norway, unemployment benefits under the system of NIA require that the claimant, regardless of age, is a legitimate job seeker, 'willing to take' 'any paid job', 'anywhere in Norway', 'full time or part time' and 'to participate in work-promoting measures'. Claimants must further register as active job seekers and report to NAV fortnightly, or more frequently if required by the job centre. Social assistance under the system of SSA also requires compulsory activities as a main rule, but merely for claimants under the age of 30.[53] In the law proposal, the Labour and Welfare Department states that individual assessments and considerations must be carried out regarding which activities will be adequate for strengthening the claimant's chances of obtaining work.[54] The Department further describes the activities to be both 'low threshold' for claimants with work as a long-term but vague goal, and work-related activities for claimants needing to maintain their work ability while searching for work.

Claimants can be exempt if 'weighty reasons' justify such an exemption.[55] The Labour and Welfare Department describes the term 'weighty reasons' as reasons due to the claimant's characteristics or situation, leading activities to be considered inappropriate or unrealistic at the time of decision. However, it is emphasised that the access for exemption is narrow.[56]

In summary, unemployed claimants in all three countries are required to participate in some kind of work-promoting activity. Grounds for exemption from compulsory activities are relatively similar in the three countries. However, while the British UC and German UBII regulations explicitly state adequate reasons for not imposing work-related activities, Section 20A of the Norwegian SSA only states that exemption must be due to 'weighty reasons'. In order to reach justified individual decisions for imposing – or exempting – compulsory conditions for social benefits, the claimant's work capability needs to be properly assessed.

Summarising table:

	The UK	**Germany**	**Norway - NIA**	**Norway – SSA**
Commitment	'Claimaint's commitment'	'Intergration Agreement'	Commitment to 'activity plan'	Commitment to 'activity plan'
Activities	-Work-focused interview, work preparation, work search, personal employability	-Work assessments, short qualifying courses, salary subsidies, loans and internships	-Legitimate job applicant, -medical treatment and work related activities to (re)enter work with health challenges	-Compulsory work-related activities for claimants under 30

[53] SSA, Section 20A.
[54] Norwegian Government Law proposal. Prop. 13 L (2016-2017) Changes in the Social Services Act, National Insurance Act and Others (compulsory activities for young recipients of social assistance), para. 2.4.2.
[55] *Supra* note 53.
[56] *Supra* note 54, para. 2.4.3.

Exemption	'Exceptional circumstances' making commitment 'unreasonable'	- Limited capability		'Weighty reasons'

3.5 Sanctioning of non-compliance

Whilst Norway has ratified the ILO-Convention C168 on Employment Promotion and Protection against Unemployment, Germany and the United Kingdom have not. ILO-Convention C168 Article 20 (f) states that reduction in social security payment can be made when the receiver without just cause has failed to attend placement, vocational guidance, training, retraining or redeployment in suitable work. Article 21 no. 1 furthermore states that benefits can be reduced or withdrawn if the receiver refuses to accept suitable employment. Yet, it is important to notice that Article 21 no. 2 lays down considerations necessary to be made by the Norwegian authorities when assessing whether an employment is suitable or not. Sanctioning a receiver of social security when activities or work are not considered to be 'suitable', could mean a violation of the individual's right to social security.

In the UK, UC claimants 'for no good reason' failing to comply with work-related requirements and conditions, can be sanctioned through a reduction in their benefits.[57] Sanctioning must follow set procedures, as described by the Department for Work and Pensions:[58] 1) Referral from the Job Centre, based on documentation and claimant information, to the 'the decision maker', i.e. Central office; 2) Information, including the claimant's reasons being weighed up; then 3) Decision-making. If sanctioning is decided, the claimant is given written notification. The claimant can ask the department for a reconsideration of the sanction. If a sanction is upheld, the claimant can appeal to an independent tribunal. Claimants subjected to reductions can claim 'hardship payments', i.e. a reduced amount of the UC.[59] Hardship payment requires individual assessments, showing that the claimant is unable to pay for immediate basic needs such as housing, heating and food. The claimant must also demonstrate reduced spending and attempts to secure alternative funding, as well as demonstrate that he complies with his commitments during the period of hardship payment. Hardship payment is to be reimbursed in rates. In Germany, if the caseworker detects non-compliance of the UBII recipient, the welfare agency is required to impose a sanction by benefit revocation (SGB II, Secstinos 31-32). Boockmann *et al.*, however, describe discretion at the agency level with regard to whether a sanction is actually imposed or not.[60] The sanction regime distinguishes between breach of a duty of conduct and breach of a duty of compulsory registration and participation. Breach of a duty of conduct relates to participation in any activities aiming to support (re)integration to the labour market. Breach of a duty of compulsory registration and participation relates to registering as jobseeker and participating by attending meetings at the job centre or medical appointments. Sanctions for breach of a duty of conduct related to attendance in work-related activities are harsher for claimants under the age of 25. First absence triggers the elimination of social assistance entirely for a period of three months (SGB II,

[57] Welfare Reform Act (2012) (n 31) Sections 26-27, Section 11(j).

[58] Department for Work and Pensions (2017). 'Universal Credit Sanctions Experimental Official Statistics'. Retrieved 24 September 2018 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/613873/universal-credit-sanctions-statistics-background-information-and-methodology.pdf>.

[59] Welfare Reform Act (2012) (n 31) Sections 28 and 56.

[60] B. Boockmann, S.L. Thomsen and T. Walter, 'Intensifying the use of benefits sanctions: an effective tool to increase employment?', *IZA Journal of Labour Policy* 3(21) (2014) 1-19.

Section 20).[61] Housing and heating is paid directly to the landlord during this period (SGB II, Section 31 (3)). The caseworker has the discretion to decrease this period to six weeks in special circumstances (SGB II, Section 31 (b) (1)). A second failure to comply within a year will result in a total cancellation of payments, including for housing and heating (SGB II, Section 31(a) (1). The personal adviser can revise this decision if the claimant is willing to follow up the requirements immediately. Sanctions regarding the duty of compulsory registration and participation are sanctioned less strictly. A breach is sanctioned by a reduction of 10 percent of UBII, regardless the age of the claimants. The German system allows caseworkers to provide additional support if the sanction is a reduction of more than 30 percent of UBII allowances (SGB II Section 31(a) (3) (1)). It can only be provided to those who have fallen under the minimum subsistence due to sanction cuts.[62] The additional support consists of benefits either in kind or of a pecuniary type, such as food stamps. The Social Court of Gotha initiated a preliminary ruling procedure before the Federal Constitutional Court in June 2015, suggesting that penalty deductions from UBII violated fundamental rights enshrined in the constitution. The Social Court based its questions to the Federal Constitutional Court on the constitutional right to human dignity (German Basic Law, Article 1 (1)), the right to physical integrity (German Basic Law, Article 2 (2)), and the freedom to choose an occupation (German Basic Law, Article 12).[63] However, instead of deciding on the compatibility of penalty deductions with these constitutional norms, the Federal Constitutional Court ruled the preliminary proceedings to be inadmissible on the grounds of procedural failures by the Social Court of Gotha, and thus avoided a substantial decision on penalty deductions.[64]

In Norway, claimants receiving unemployment benefit under the system of NIA and 'for no good reason' failing to report to NAV as required, or who are no longer considered a 'legitimate job seeker', lose their right to benefits (NIA, Sections 4-8 and 4-21). For social assistance under the system of SSA, sanctioning requires that NAV in writing has informed the claimant about the possibility of such a sanction and can be immediately effectuated by the agency (SSA, Section 20A). According to the legislative proposals,[65] NAV must take into account both the claimant's reasons for non-compliance and the possible consequences of a benefit reduction, and the reduction cannot bring benefits below what is reasonable for the claimants' immediate basic needs (SSA, Section 4). Non-compliance cannot be sanctioned by total elimination of social assistance since claimants unable to provide for themselves, are entitled a minimum base of living costs (SSA, Sections 18 (1) and 4). NAV can therefore reduce the benefit, but not lower than for minimum basic needs. Such minimum benefits are not generally subject to reimbursement to NAV.

In summary, legislation in all three countries empowers the authorities to sanction claimants by reducing or cancelling benefits for non-compliance with compulsory work-related activities. However, the procedures for sanctioning are different. In Germany and Norway, sanctioning can be decided and implemented by the Job Centre/NAV-office directly, whereas in the UK, the Jobcentre plus must refer the case to the Central Office for a decision to be made. This procedure also gives the claimant the right to contradict, as well as to have his/her case reconsidered and even appealed.

[61] Sanctions for those over the age of 25, SGBII Section 31ff: Penalty deductions of 30 percent, and then 60 percent and ultimately 100 percent. Sanctions by penalty deductions last for at least three months. No discretion is left to the caseworker.

[62] See also The German Federal Constitutional Court, Judgment of 9 February 2010, BverfG, 1 BvL 1/09 on a guarantee of a minimum subsistence level.

[63] The Social Court of Gotha, Preliminary Ruling Procedure of 4 June 2015, S 15 AS 5157/14.

[64] The German Federal Constitutional Court, Decision of 6 May 2016, BverfG, 1 BvL 7/15.

[65] Norwegian Government Law proposal: Prop. 39L (2014-2015). Changes in the Work Environment Act and the Social Services Act, 129.

The sanctioned claimant's right to minimum subsistence is similarly present in the three countries' legislation. One clear difference here is that in order to receive hardship payments in the UK, the claimant must prove that he has tried alternative funding. Hardship payments are to be reimbursed, which is not the case for minimum social assistance in Norway or UBII in Germany.

Summarising table:

	The UK	**Germany**	**Norway**
Sanctions	-Reduction or cancellation of benefits -Referral to «Central Office» for contradiction and decision. -Subject to appeal	-Reduction according to type of breach -Stronger sanctions if breach of work-related activities for under 25's -Milder sanctions if breach of attendance to Job Center or medical appointments	-Reduction or cancellation, depending on type of benefit. -SSA-reductions must consider claimant's basic needs. -Must be informed in advance about the possibility of sanctions
Emergency/ hardship payments	-Hardship payments available, -Claimant must demonstrate reduced spending and alternative funding. - Claimant must comply with commitments during hardship payments. -Payments subject to reimbursement	-Emergency payments - in kind or pecuniary type, e.g. food stamps	-Emergency payments – short-term but no specific conditions

3.6 The rule of law as framework for professional discretion

Caseworkers implement national and international legal norms on social benefits by applying professional discretion. The exercise of professional discretion involves making individual considerations in cases where the solution to a problem is not pre-described in regulations. The rule of law plays an important role in ensuring that professional discretion and leeway is tailored in a way to support and ensure that a decision is sound.

One part of the rule of law is the requirement of a legal basis for State interference in private life. Article 8 ECHR states that people's private lives are to be free from 'interference by a public authority', except when such interference is 'in accordance with the law' and 'necessary in a democratic society'. Thus, labour and welfare authorities must have statutory authority to make decisions regarding benefits and work-promoting activities for the unemployed. This entails that statutory norms on social benefits and work-promoting activities should be designed in a way so as not to leave too much to professional discretion. Otherwise, the predictability of authorities' decision-making is weakened, bearing the risk of less accountable decisions, as well as the risk that interfering in the individual's private life might not be in accordance with the law.

Article 14 of the ESC states that Contracting Parties 'undertake to promote or provide services, which by using methods of social work, would contribute to the welfare and development of both individuals and groups in the community…'. This means social security systems being established in line with social work methods. The International Federation of Social Workers has given this global definition of social work:

> Social work is a practice-based profession and an academic discipline that promotes social change and development, social cohesion, and the empowerment and liberation of people. Principles of social justice, human rights, collective responsibility and respect for diversities are central to social work. Underpinned by theories of social work, social sciences, humanities and indigenous knowledges, social work engages people and structures to address life challenges and enhance wellbeing.[66]

In addition, when applying professional discretion, it is paramount that public authorities follow procedural rules to avoid any misuse of authority and to ensure sound administrative practice. The procedural framework all three countries are obliged to implement is found in Article 6 ECHR. This human rights norm is intended to ensure the fulfilment of procedural rights within the justice and administrative system of State Parties. In its case law, the ECtHR has determined that social benefits fall under the scope of Article 6.[67] Thus, every social benefit claimant is entitled to a fair and public hearing within a reasonable time by authorities managing social benefits. The right to fair and public hearing within a reasonable time is interpreted as the obligation of States to have in place and to follow procedural norms in decision-making. To fulfil the legal obligation of imposing conditions for work related activities which are adequate for each individual claimant, it is vital that professional discretion is based on thoroughly assessed information, based on the situation as experienced by the claimant as well as other sources.

A well-established procedural rule important in relation to professional discretion is the explanation of 'how the decision-making authority reached its decision'.[68] The particular outcome of a decision on social benefits and work-related activities must be transparent and testable for the claimant.

The rule of law also requires that decisions made by authorities must aim at achieving substantive equality, meaning that every individual's case is to be treated individually and by that ensuring equal treatment before the law. This rule of law is expressed by Article 7 of The Universal Declaration of Human Rights (UDHR) stating that '[a]ll are equal before the law'. Thus, each person represents his/her own case: needs, resources, opinions and wishes. Applying statutory norms with summary and discretionary criteria allows and demands professionals making judgements based on considered reasoning, in individual cases.

Bearing in mind the human rights obligation regarding procedural norms and using methods of social work in public decision-making, in the following, caseworkers' leeway when using profession discretion in UK, Germany and Norway will be presented.

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[66] International Federation of Social Work (2014). 'Global Definition of Social Work'. Retrieved 24 September 2018 <https://www.ifsw.org/what-is-social-work/global-definition-of-social-work/>.

[67] *Deumeland vs. Germany*, Judgment of 29 May 1986, Series A No 99; *Feldbrugge vs. Netherlands*, Judgment of 29 May 1986, Series A No 100.

[68] The Equality and Human Rights Commission. 'Article 6: Right to a fair trial'. Retrieved on 24 September 2018 <https://www.equalityhumanrights.com/en/human-rights-act/Article-6-right-fair-trial>.

4. Activation and Sanctioning Systems – Inclusion and Exclusion

4.1 Introduction

Having presented and compared the legal frameworks of the UK, Germany and Norway, the aim of this section is to present and compare the findings from the interviews we conducted in The UK, Germany and Norway. We will answer the second research question on how caseworkers in the UK, Germany and Norway experience the legal framework for the governance of activation. The main aim is to investigate caseworkers' professional conduct and leeway for professional discretion in individual cases. We examine the scope of professional discretion with regard to the type of activation and sanction by non-compliance.

4.2 Caseworkers' leeway for professional discretion in individual cases

4.2.1 The caseworkers' main work goal and main areas of professional discretion

Asked about their main work goal, respondents from all three countries described a strong focus on getting claimants into the work force. The UK respondents spoke of employment as a sole objective, and all pointed out that commitment to active job seeking and taking any job, full-time/part-time or short-term, was paramount. Asked about when and how they used their professional discretion, they all linked this solely to matching jobs and people, though some respondents also stressed their use of discretion in tailoring claimants' commitments for each person. However, the majority of their examples of using professional discretion described their individual assessments on whether and how to sanction non-compliance with compulsory activities. According to the German respondents, their focus was not exclusively employment; they also highlighted working to support entrance to or the completion of education, as well as apprenticeships. They described their main areas of professional discretion to be linked to what type of activity was adequate for the individual claimant, depending on whether employment was a short-term or long-term goal. The Norwegian respondents also spoke of a strong focus on employment, but also demonstrated differentiation between employment as a short-term goal or a long-term goal for their claimants. They described the facilitation of work-promoting activities for the unemployed as their main mandate, although they expressed concern for persons who they considered to be 'far from labour market' due to social problems.

4.2.2 The characteristics of the claimants

Asked about what factors influenced their leeway for professional discretion, all caseworkers stressed how work-promoting activities and commitments must be tailored to suit individuals with different and complex problem areas.

The UK respondents were consistent in saying that although their claimants as a main rule were to comply with work-promoting activities, they had to focus on the ones that failed to comply. According to one respondent: 'often some of the claimant's "baggage" or needs do not appear during the first assessment, and sometimes the claimant will present to have more obstacles than he/she really does'. Many respondents used the term 'mismatch between commitment and performance', when describing situations where claimants failed to comply. Such situations were exemplified: 'some of our claimants have baggage, such as mental health issues, domestic violence, homelessness, drug abuse et cetera', and 'some need work experience of any kind, training, to gain self-confidence'.

One German respondent exemplified how commitments must serve concrete purposes for the claimant by describing a claimant needing financial support one month before commencing studies. Rather than starting a random activity, he could receive UBII unconditionally. However, if the claimant would profit from attending a qualifying course before commencing

studies, UBII would be conditioned on attendance of this course. The Norwegian respondents all spoke of the necessity of proper assessments, e.g. ‘so I might think a case looks easy; all this person needs is a job. But I might be unaware that there is more to him than we know, more than he wants to tell us. That will often lead to wrongful decisions, too little help and too much pressure on the person, leading to counter-productive results’.

For claimants regarded as being ‘far from’ employment due to mental issues and social problems, respondents stressed that they must take individual steps closely related to the claimant. On the other hand, as exemplified by a German respondent: ‘working with ordinary customers requires us to follow certain standards, also because there are much higher expectations towards this type of claimant. If the “ordinary” customer does not fulfil the standards, he or she will meet certain consequences’.

4.2.3 The characteristics of the caseworkers

Several UK respondents pointed out that ‘we are not social workers’ and the job centre ‘is not social services’. They illustrated their statement with examples like ‘the Job Centre’s work is to match jobs and people’ and ‘other agencies have other responsibilities, ours is to help people find sustainable work’. They consistently stressed that they all should work in the same ways. Two respondents described how they in their recruitment interviews at Jobcentre Plus had been asked ‘why do you think you can be a work coach?’, and several others pointed out that though they had different backgrounds, they had undergone ‘the same in-house training’. According to one respondent, ‘the diversity amongst us makes us able to meet each person in a diverse group of job seekers’. Another respondent described: ‘we were called work advisors before, now we are work coaches – and coaching is our main skill, along with labour market skills, community service knowledge and people skills’. Also, one stated, whilst other respondents nodded, that ‘we find that the legislation is “looser” than we aim to be. The law only requires steps of work search, but that is too little and too general’. One respondent added: ‘our guidance is much more intensified so that we can give them the tools they need to turn their own life around’. The UK respondents also emphasised how the labour market largely influences their professional discretion, e.g.: ‘jobs are outsourced, manual jobs are done by computers’, and ‘“John Doe” can no longer expect to find work at the local factory’.

One German respondent described how: ‘there are colleagues that are acting close to legal frameworks and norms, because these provide safety, and there are colleagues who want to find out how far they can stretch the scope of professional discretion’. This respondent described herself/himself as a ‘rubber band’, but underlined that: ‘in the end there are clear legal conditions framing what we can do, and which not even I can bend. For example, when a customer no longer can receive benefits under the scheme of UBII, then I lose competence and jurisdiction over his or her case. Something I find a pity.’ Another respondent pointed out that ‘legal regulations always lead to the question of how to apply these legal regulations’ and that ‘I can choose not to impose consequences on the young claimant, until we perhaps in the fifth week or so start sanctioning. I have that choice, so I need to have an idea from the start as to how I am to handle this case’.

One Norwegian respondent stated: ‘I experience endless room for professional leeway, due to my experience in this job. I know that if I can justify my decisions, nobody can criticize me’. He/she added that ‘for a supervisor with less experience and more insecurity, the room for such leeway will be tighter and you will end up forcing claimants unjustifiably because you do what others tell you’. The Norwegian respondents also stressed the importance of decisions based on discussions between staff, e.g: ‘we may have an idea in our office that some of us are “mild” and others “strict”, so perhaps our differences may be offset through discussions’. The respondents also demonstrated challenges:

> Sometimes, if colleagues say that "this claim is a definite *no*", and I start writing the decision, but something tells me that this is just wrong, to deny this claim. Then I turn the case and start all over again, using my knowledge of the case and the law, but this requires courage from me.

4.2.5 The organising of the job centre

The German and Norwegian respondents described how their leeway for professional discretion is influenced by how the municipality chooses to organise the job centre. One German respondent working at a job centre within an 'optional municipality' explained how those working in job centres co-organised with FEA are 'I'd say; less independent. They have rather a lot of influence from outside, and all in all everything follows what the FEA demands'. According to this respondent, the job centre has less leeway for developing projects tailored to local situations and challenges. However, he/she also pointed out that being a merged FEA and Job Centre, the caseworkers at job centres are 'more integrated and networked with the FEA. Working at one agency, I can much more easily pick up the phone and discuss a case and possible ways of work integration with a colleague from the FEA. That is not possible if you are not in the same agency'.

One Norwegian respondent described: 'our agency is organised on a principle of building blocks, where we only address the blocks that we think are necessary in each case. It is difficult to cut a block by suggesting more individual solutions', and 'we are constantly being reorganised, for example from working with only one group of claimants to having to work with all groups'. Another respondent stressed how 'it is quite frustrating to hand over a decision that I have thoroughly assessed, and then it is returned with criticism on small details'. The first respondent said that 'I do not think my leeway seems very wide considering that the claimants in my team are considered to be relatively close to getting work', but also added: 'for persons needing assessments regarding their health situation or housing help, we can consider postponing their compulsory activities'. Both respondents described how their ideal was to use their knowledge and their co-operation with their claimant, but their ideals were restricted by agency instructions and internal cultures like 'that is how we do it here', internal 'hear-say' from colleagues and 'we do not have the mandate to make the final decisions in the cases we have assessed'. They also described how 'internal instructions are restricting the claimant's entitlement' and 'my professional discretion', whereas one respondent pointed out that 'if granting a claim will bring the person closer to employment, my leeway is wider'. The other respondent explained how 'I have often discussed cases where colleagues state that the claim is a clear "no". Then I start assessing, and I get this gut feeling – based on the case information and the law – that it is not right to decline this claim'.

4.2.6 Discussion

To summarise, the caseworkers in all three countries described how they are influenced by 1) the characteristics of their claimants; 2) the characteristics of the caseworkers; 3) the organising of the agency; and 4) the legal framework.

To grant young unemployed persons a just and informed assessment and decision process as described in human rights instruments, it is important that sufficient attention is given to their individual characteristics, resources and needs, as required by the rule of law laid down in Article 6 ECHR, Article 14 ESC and the Article 7 UDHR. Although the UK respondents pointed out that the Job Centre is not the Social Services, respondents from all three countries have described that their young claimants show several and somewhat complex challenges to be dealt with before they can be employed. They have also brought forward how caseworkers' characteristics can influence how they perceive how wide or narrow their leeway for individual discretion is. Personal discretion can lead to a decision of a rather broad understanding of legal

regulations in order to reach the young person and to increase the chance of employment in the long run. Caseworkers have expressed that working in co-organised local and federal job centres restricts their professional leeway, through policy norms, through having to work with all claimant groups and by internal agency instructions. These findings show the importance of securing that caseworkers working with the young unemployed have sufficient knowledge/skills, time and professional leeway – within agencies with sufficient focus on this target group.

The UK *Work First* approach focuses on that unemployed people should take on any job as quickly as possible, 'reflecting the idea that the best way to succeed in the labour market is to join it'. [69] Researchers point out that although the approach focuses on work in light of social and economic benefits, it is 'less concerned with the initial job outcomes produced by employability policies'. Research is showing that this focus on 'any job' is not providing sustainable employment, and that people are moving in and out of precarious employment.[70]
The Norwegian *workfare policy* as a political management tool implies that the benefit systems are to be tailored in ways that stimulate the citizens to work rather than being supported by social benefits.[71] Research shows variable success of whether this approach aids more people into sustainable work. What is suggested by research is that adequate activation does lead to entering the work marked, but the question remains whether it leads to employment which is sustainable.[72] The Norwegian labour market is described as performing well in quantity, quality and inclusiveness dimension. The job quality is understood in terms of pay, security, working environment and the inclusiveness dimension points to income equality, gender equality and employment access for disadvantaged groups. However, men still earn 35 percent more than women in work, and 9 percent of the working-age population live on less than 50 percent of the median equalised household disposal income.[73] This rather positive description of the Norwegian labour market should suggest that those entering the work market find sustainable work. In part this might be correct, but research also presents evidence that this is not the outcome for some groups in society. In particular, the aim of integrating groups of immigrants and women into sustainable work is challenging.[74] It seems possible to suggest that finding adequate activities for the young unemployed increases the possibility of sustainable work. Researchers have also pointed out, however, that the system of compulsory activities for social benefit recipients bears the risk of the young unemployed being forced into activities that do not promote their transition into work, in order to avoid sanctioning.[75]

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[69] C.D. Lindsay, R.W. McQuaid and M. Dutton, 'New approaches to employability in the UK: combining Human Capital Development and Work First strategies?', *Journal of Social Policy* (2007) 539-560 at 541.
[70] The Conversation. 'Welcome to Britain: a land where jobs may be plentiful but are more and more precarious' (21 November 2017). Retrieved 24 September 2018 <https://theconversation.com/welcome-to-britain-a-land-where-jobs-may-be-plentiful-but-are-more-and-more-precarious-87423>.
[71] S. Stjernø and E. Øverbye, 'Arbeidsmotivasjon, arbeidslinje og velferdsstat', in: S. Stjernø and E. Øverbye (eds), *Arbeidslinja - Arbeidsmotivasjonen og velferdsstaten* (Oslo: Universitetsforlaget, 2012) 15-26.
[72] E.S. Dahl and I.A.E. Lima, 'Krav om å stå opp om morra'n – Virker det?', *Arbeid og Velferd* 3 (2016) 115-130; Ø. Hernæs, S. Markussen and K. Røed, 'Can welfare conditionality combat high school dropout?', *IZA Discussion paper* No 9644 (2016) 1-44.
[73] OECD, 'How does Norway Compare – Employment Outlook 2017' (2017). Retrieved 24 September 2018 <http://www.oecd-ilibrary.org/employment/oecd-employment-outlook-2017_empl_outlook-2017-en>.
[74] F. Bakken, 'Det kjønnsdelte arbeidsmarkedet i Norge', *Arbeid og Velferd* 4 (2009) 79-86; H. Aune, *Deltidsarbeid – vern mot diskriminering på strukturelt og individuelt grunnlag* (Oslo: Cappelen Damm, 2013); K. Thorshaug and M. Valenta, 'Et arbeidsmarked for alle? – Innvandreres innpass og stilling på det norske arbeidsmarkedet', *NTNU Samfunnsforskning Mangfold og inkludering* (2012) 1-46.
[75] A. Hagelund, E. Øverbye, A. Hatland and L.I. Terum, 'Sanctions – the night side of the Work Line approach', *Tidsskrift for velferdsforskning* 1(19) (2016) 24-43; *Supra* (n 3).

Germany's welfare-to-work programmes, introduced alongside UBII, have the primary objective of (re)integrating welfare claimants into the labour market as quickly as possible and to reduce welfare dependencies.[76] Research on the effectiveness of the German welfare-to-work programmes with regard to attaining sustainable work does not unambiguously conclude one way or the other. It depends on various factors. Bockmann, Thomsen and Walter point out that not all groups of claimants are supported alike. For example, women are much less supported in these programmes than men, which in turn leads to different outcomes for sustainable employment.[77] Huber, Lechner, Walter and Wunsch conclude that short training does have a significantly positive effect on self-sufficient employment, yet, it depends on the type of group receiving this type of training. One-Euro-Jobs, considered to be short training, is positive and shows weakly significant employment effects for men who are not lone parents and who are not migrants. These One-Euro-Jobs are temporary, part-time jobs. They take place in the public and non-profit sector, are in the public's interest and should not compete with regular jobs. Participants are not paid a wage but receive their welfare benefit plus one to two euros per hour worked.[78] Short, but also continuous training are effective for young participants and non-migrants, while short training also shows positive employment effects on the elderly and people with small children.[79]

Although there is a wide consensus that work and self-provision are major values for the individual and the society as a whole, it is important to recognise that some individuals face more challenges in their transition to work. For those individuals, it is imperative that the authorities fulfil their human rights obligations of supporting the unemployed into employment and of securing their basic needs for subsistence. For work to be a real value rather than only an ideal one, we emphasise the importance of sustainable work, which is described by Eurofound as 'achieving living and working conditions that support people in engaging and remaining in work throughout an extended working life'. Eurofound also stresses that '[t]he challenge is to match the needs and abilities of the individual with the quality of jobs on offer'.[80] With this background, it is imperative that the young unemployed are not being shuttled between jobs that have no or insufficient purpose towards sustainable employment, or else being sanctioned.

4.3 Sanctioning of con-compliance – motivation or punitive remedy?

As said in Section 3.5, only Norway is bound by international treaty Articles 20 (f) and 21 no. 1 and no. 2 ILO C168. These norms allow States to refuse, withdraw, suspend or reduce social benefits when non-compliance with conditions occurs, but the conditions must be 'suitable' for allowing such sanctioning. In the following, the use of sanctioning by caseworkers of the UK, Germany and Norway will be presented and compared to each other.

4.3.1 Types of compulsory commitments

Asked what activities the agencies would make compulsory for the young unemployed, our respondents had different descriptions and examples.

The UK respondents all emphasised job searching as the main compulsory commitment for their claimants. One respondent described how 'looking for work is a full time job', another

[76] Clasen and Goerne, 'Germany' (n 44) 185.

[77] B. Boockmann, S. Thomsen and T. Walter, ‚Aktivierung der erwerbsfähigen Hilfebedürftigen mit arbeitsmarktpolitischen Massnahmen – Wer wird gefördert?', *AStA Wirtschaft Sozialstaat Arch* 4 (2011) 269-292.

[78] K. Hohmeyer and J. Wolff, 'A fistful of euros: Is the German one-euro job workfare scheme effective for participants?', *International Journal of Social Welfare* 21(2) (2012) 174-185.

[79] Clasen and Goerne, 'Germany' (n 44) 184.

[80] Eurofound. 'Sustainable work' (2018). Retrieved 24 September 2018 <https://www.eurofound.europa.eu/topic/sustainable-work>.

how ‘we focus more on evidence, our customers must demonstrate their work search process’. The respondents described how commitments could also be of a more personal kind, in order to enable introduction to an employer at any time and at short notice. One respondent exemplified such commitments as; ‘I will dress smart, have clean hands and finger nails’ and ‘I will not smell of alcohol/weed when I attend the Job Centre’. The respondents further explained how claimants’ commitments are written as ‘I will’-sentences, e.g. ‘I will apply for all jobs that meet my qualifications’.

The German job centre staff described the ‘integration contract’ as the basis for co-operation between the caseworker and the claimant. One respondent underlined the importance of removing any pressure from this contract; otherwise, the claimant would be gone. Yet, the idea is that every claimant ‘is doing something’. Another respondent pointed out that ‘if I should tell you all kinds of activities, we would sit here the entire day’.

The Norwegian respondents listed the activities for the unemployed under 30 to be mandatory attendance at the NAV-office, in order to be assessed, supervised and assisted into short-term or long-term work. Asked about duration, they replied ‘until they get a job’, or ‘until placed in a different work-promoting measure’.[81] They also stressed that the range of other work-promoting activities to choose between was restricted, especially for persons who needed more customised activities because of special needs, and persons who had tried and failed at the skills required for such activities.

The UK and Norwegian respondents emphasised the importance of mandatory and active use of the agencies’ job-search websites. The UK respondents described the website *Universal Job Match*, for job seekers to present their CV, apply for jobs, record their work-related activities and communicate with their caseworker, e.g. ‘because everything on the site is recorded, and we can monitor and check the claimant’s activities and compare them to their Claimants’ Commitment’. The Norwegian respondents focused on how the NAV website could also give claimants ‘necessary information about rights and duties without appointments’ with the agency, as well as representing a platform for digital communication between the claimant and the caseworker. The German respondents did not mention the Job Centre’s job-search websites or any platform for digital communication, which might be due to respondents exemplifying their work mainly through cases where the young unemployed were rather ‘far from’ employability.

4.3.2 Challenges of claimants’ commitments

All respondents described that supporting and/or imposing activities on their young claimants represented some challenges.

One UK respondent described how ‘sometimes we see a mismatch between the claimant’s commitment and performance, and then we need to find out what is stopping him’. Another respondent, who described different kinds of ‘baggage’ in claimants, pointed out how ‘we need to help them move forward by bringing in help from other service providers, charities, and voluntary services. How can they step forward in their work progress, with their problems?’ Another UK respondent expressed concerns regarding how ‘sanctions might damage life skills and confidence’. One respondent emphasised how ‘making up each person’s claimant commitment takes openness and honesty, trust and confidence. Otherwise the person might just disappear off the rack’, while one added ‘others have so many obstacles that their claimant commitment must be very small steps. But still steps and still commitment’.

The German respondents pointed out that some of their claimants are relatively or very far away from the ordinary labour market, e.g.: ‘even though we work in a labour market-oriented way, not a social work oriented, someone like me is acting and working within a huge scope’.

[81] Relevant social benefits then could be health based. Either Work Assessment Allowance, see NIA Chapter 11, or a social benefit for those not being able to work ever, disability benefits, NIA Chapter 12.

One respondent stressed: ‘we have extremely many here with mental illnesses, and you can really see that they are becoming younger and younger’. They also described constant discussions regarding whether the policy of mandatory activities with sanctions is an effective method. One respondent expressed compulsion towards claimants with mental health problems as ‘a stillbirth’. Another respondent talked about how the young claimant ‘needs to be picked up where he or she is, and taken along in a manageable tempo, in the direction he or she wants the most’. He/she also stressed how: ‘we are working with young people with no banister’.

The Norwegian respondents described how the young persons’ challenges are mainly mental health issues, lack of self-confidence due to dropping out of school and previous lack of coping in their adolescence. According to one respondent, ‘when you have to make him try an activity and experience that it does not work for him because it is far too challenging and more assessments are needed, then we are restricted regarding which activities can be adequate for assessing the person better’. They also expressed concerns about the young claimants’ lives if they cannot cope with compulsory activities and therefore lose their benefits and contact with NAV. The need for targeted assessment in such cases is illustrated from both respondents, as explained by one: ‘you must have knowledge about consequences of ailments like mental health problems or drug abuse, also about what services this office can offer, the labour market and the requirements of working life’.

4.3.3 Situations and process for sanctioning non-compliance

UK caseworkers stated that they must consider sanctions for all claimants not demonstrating evidence of performance of compulsory activities. As exemplified by one: ‘this person here, he has presented a hand-written note over two pages, with very general activities, “asked around for work, checked my CV, and applied for seven jobs”. It is nowhere near the 35 hours of activities I had assessed him as capable of’. According to the German respondents, claimants not complying can be sanctioned for several months, e.g. ‘since they are not fulfilling the offers we make’. The Norwegian respondents described sanctioning as easier towards the claimants complying with daily attendance at their internal course, e.g. ‘So it is easy to detect when they are missing. They always get a chance with me, but repeated unreasoned absence will be sanctioned’.

Regarding the process of sanctioning, respondents in the different countries had different descriptions. In UK, one caseworker emphasised how ‘we must refer the case to the Central Office’. Asked whether the claimant is able to challenge a referral, one respondent states, ‘Yes, our referrals are very factual, we describe what contact has taken place, the claimant’s commitment, what he has done or not and his given reasons. The Central Office will inform him/her of our referral and ask his views, then assess the case and sanction or not’. In Germany, sanctions are imposed by the caseworker responsible for designing the ‘integration contract’. The respondents described how they are sometimes fascinated when claimants do not return and protest against loss of benefits, and assume that the young person is supported by family and friends, e.g.: ‘then, I always say: Eating spaghetti at grandma’s.’ The Norwegian NAV-office also has the mandate to make the decision and impose the sanction directly, e.g. ‘because we have informed them that that will be the consequence’. According to one respondent, ‘Once we stop their money, they come back here anyway. And if they don’t, we assume they do not need our assistance’.

Asked whether the person’s basic needs would be secured after sanctioning, the respondents described different regimes. The UK respondents stated that claimants applying for hardship payment ‘must first demonstrate that he has tried to find what he needs, free of charge’, and that ‘he must try to live somewhere for free, use food banks etc.’. In addition to this, ‘He will still have to demonstrate that he complies with his commitment, 35 hours a week’. According

to the Norwegian respondents, claimants 'must still be able to survive'. One respondent still describes how the caseworkers are challenged:

> The law says that if you can prove that you have no money, regardless why, then you are entitled "crisis assistance". But within this office there is an internal rule saying that we do not grant crisis assistance "just like that". However, if a claimant appeals our decision, we know that it will be overruled.

4.3.4 Discussion

In all three countries, the legal justification for imposing sanctions for non-compliance is the idea of activities promoting and passivity inhibiting transition to employment. Sanctioning can be somewhat mitigated by emergency benefits, to secure a minimum survival for the individual. However, the UK respondent who stated that 'sanctions might damage life skills and confidence' highlights the dilemma that the construction of compulsory demands and sanctioning indeed runs the risk of counter-productive decisions, bringing the claimant further away from work life. This dilemma has been highlighted in research, showing that sanctions can introduce new disincentives to work, as well as having a severe impact on the individual.[82]

A person being sanctioned for non-compliance through loss of benefits is still subject to the human rights of minimum subsistence.[83] In all three countries, national legislation secures a minimum of existence for its citizens, by providing emergency benefits. Thus, it is reasonable to ask how a comprehensive or full reduction of a benefit defined in statutory law as minimum would not amount to a violation of the fundamental right to minimum subsistence. In relation to Germany, one might also ask how benefits in kind or food stamps relate to the fundamental right to private life in the meaning of developing one's personality. Furthermore, relating to all three countries, how is the idea of a minimally dignified existence, including the ability to maintain interpersonal relationships and a minimum of participation in social, cultural and political life secured?[84] The idea of social citizenship is contradicted by hardship payment, benefit in kind and emergency payments and as Lembke states: '[p]enalty deductions negate the very idea of a fundamental right to (dignified socio-economic) minimum subsistence and the paradigmatic shift from paternalist welfare to social citizenship'.[85]

The respondents' descriptions and reflections have shown some areas which can both promote and inhibit young unemployed persons' (re-)entrance to work, as well as areas where the persons' human rights can be at risk. We will enhance five such areas:

1) While the Job Centre's websites represent a platform for information and efficient job search for the claimants, it also represents a form of surveillance. This calls for clear policies regarding boundaries between expedient and inexpedient surveillance. Using websites as a contact point between welfare agencies and individuals who can be considered vulnerable due to health related and/or social problems also represents challenges. It requires that all claimants have access to computers and the internet, and also knowledge of and skills in how to use such websites. An obvious question to be asked is therefore whether such websites serve the surveillance interest of the authorities rather than the legal security interest of the individual.

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[82] D. Wright, P. Dwyer, J. McNeill and A.B.R. Stewart, 'First wave findings: Universal Credit', *Economic and Social Research Council*, UK (2016). Retrieved 1 October 2018 <http://www.welfareconditionality.ac.uk/wp-content/uploads/2016/05/WelCond-findings-Universal-Credit-May16.pdf>.

[83] UN Convention on Economic, Social and Cultural Rights, 'General Comment No. 3 (1990) on the nature of state parties' obligations, Article 2 no. 1', UN Doc. E/1991/23, para. 10.

[84] U. Lembke, ;Germany', in: S.C. Matteucci and S. Halliday (eds), *Social Rights in Europe in an Age of Austerity* (London and New York: Taylor and Francis, 2017) 54-79 at 71.

[85] *Ibid.*

2) The wording 'I will' in UK claimants' commitments gives the impression that the claimant has made a choice, which can obscure the fact that commitments are laid down in laws and are therefore imposed on the person. The 'integration agreement' in Germany is voluntary, meaning the caseworker cannot force the claimant to enter this agreement. This might not be obvious for the claimant being simultaneously informed about sanction regime.

3) Our respondents stress how they are dealing with claimants with several types of problem, where mental health is a factor described by all. Commitments to show evidence of sufficiently active job searching illustrates the need of sufficient numbers of vacant and adequate jobs, a factor outside the claimants' control. The Norwegian respondents also express the lack of sufficient and adequate work-promoting activities. Still, the legal requirement to comply with activities is imposed on the individuals, with the possible risk of inhibiting their (re)-entrance to the labour market.

4) The German and Norwegian systems for sanctioning being imposed by NAV/Job Centre directly after claimant's failure can be seen as less suited to safeguarding the person's legal rights than the UK system of the job centre referring a sanctioning case to the Central Office. Here, the claimant can challenge the decision at both the referring job centre and the Central Office. On the other hand, the system of referral also bears the risk of the caseworkers distancing themselves from the claimant and the sanctioning decision, whilst the decision is made by staff who do not know the claimant. However, regardless of how the sanctioning process is performed, we still stress the importance of recognising that sanctions represent loss of basic income and therefore cause hardship to the individuals.

5) For a sanctioned person to be secured absolute basic needs for survival, UK respondents stated that they must prove that they have tried to find accommodation and food for free – meaning they have to ask for charity. Not only is this a stigmatising system for persons who have no other means of income, but the respondents state that they still have to comply with their 35 hour-a-week commitment. Norwegian respondents describe that the NAV-system restricts a sanctioned persons' legal rights to minimum assistance, through the agency's 'internal routines'. The question in relation to benefit in kind and pecuniary benefits like food stamps is whether it is in line with the fundamental right to private life understood as personal freedom and the possibility of experiencing social citizenship.

Another aspect to discuss is whether conditionality and sanctioning is the proper tool for promoting sustainable employment. Youth Unemployment Statistics for UK (2018) show – after excluding young people in full education – a decrease in the number of unemployed young people aged 16-24, and an increase in the number of young people not in work and not looking for work.[86] In a UK study on welfare sanctions and conditionality, the authors conclude that although such regimes seem to reduce benefit use, there is cause for concern regarding increasing numbers of persons being excluded from benefits also becoming excluded from both work and welfare.[87] In a survey performed by the Trussel Trust, a UK National anti-poverty charity in charge of more than 425 foodbanks, the authors express concern about the well-

[86] A. Powell, 'Youth Unemployment Statistics'. Briefing paper Number 5871 (12 June 2018). Retrieved 24 September 2018 <http://researchbriefings.files.parliament.uk/documents/SN05871/SN05871.pdf>.

[87] B. Watts, S. Fitzpatrick, G. Bramley and D. Watkins, Joseph Roundtree Foundation. 'Welfare sanctions and conditionality in the UK' (2014). Retrieved 24 September 2018 <https://www.jrf.org.uk/sites/default/files/jrf/migrated/files/Welfare-conditionality-UK-Summary.pdf>.

established relationship between sanctioning and increased foodbank use.[88] The report also shows that one third of respondents experienced difficulties meeting their claimant commitments, and one fifth were affected by sanctioning. Economy was reported as a key reason for claimants not meeting their conditions, due to them not being able to afford the expenses of bus fares to attend meetings or internet to fulfil the requirement of 35 hours a week activity on the Universal Jobmatch website.

Research studies from Germany address various consequences for those claimants subjected to sanctions.[89] A study based on 30 interviews with claimants states that sanctions often have a crippling effect on the claimants, and that only in rather few cases does claimant show adaptability.[90] Similarly, other studies talk about claimants, especially those under the age of 25, stopping any contact with the job centre.[91] Other consequences found in these and other studies are increased experience of social exclusion, increased debt, increased moving of housing, increased experience of shame linked to use of food stamps, increased hunger, and the experience of deterioration of physical and psychological health.[92]

In Norway, the new regime of universal compulsory activities for social assistance claimants only came into effect in January 2017. However, the social agencies had for decades had the discretional power to impose such activities, though this power had been variably effectuated.[93] In a study based on data for the period of 1994-2004, the effects of social agencies increasing their discretional power to impose conditions were evaluated.[94] The analysis shows that the number of social assistance recipients was reduced, and that the work-related activity conditions for young people had had a particular impact. Still, the author argues that the new universal regime might be less effective than the previous system of discretional power, based on the caseworkers' information of each person, to decide whether to impose conditions, and who to give such conditions. Finally, he suggests that the new regime of universal compulsory activities will have less effect than an increased use of discretional individual decisions. The need for professional discretion based on the individual's needs and resources to prevent claimants being excluded both from work and from welfare has also been discussed by other researchers.[95]

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[88] A. Jitendra, E. Thorogood and M. Hadfield-Spoor, The Trussel Trust: Stop UK Hunger. 'Left behind – Is Universal credit truly universal?' (2018). Retrieved 27 September 2018 <https://s3-eu-west-1.amazonaws.com/trusselltrust-documents/Trussell-Trust-Left-Behind-2018.pdf>.

[89] An overview of recent research can be found in the German language in this document: Deutscher Bundestag, Wissenschaftliche Dienste, 'Auswirkungen von Sanktionen im SGB II – Überblick über qualitative Studien in Deutschland', WD 6–3000–004/17, 1-11.

[90] A. Ames, 'Ursache und Auswirkungen von Sanktionen nach § 31 SGB II – Studie im Auftrag der Hans-Böckler Stiftung' (2010). Retrieved 27 September 2018 <http://www.aktive-arbeitslose.at/sites/aktive-arbeitslose.at/files/download/ames_anne_sanktionen.pdf>.

[91] H. Apel and D. Engels, 'Unabhängige wissenschaftliche Untersuchung zur Erforschung der Ursachen und Auswirkungen von Sanktionen nach §31 SGB II und nach dem SGB III in NRW' (2013). ISG Institut für Sozialforschung und Gesellschaftspolitik GmbH. Retrieved 27 September 2018 <https://www.isg-institut.de/download/ISG_Endbericht_2013_Sanktionen_NRW.pdf>; S. Götz, W. Ludwig-Mayerhofer and F. Schreyer, 'Sanktionen im SGB II. Under dem Existenzminimum' (2010). IAB Kurzbericht, Ausgabe 10/2010. Retrieved 27 September 2018 <http://doku.iab.de/kurzber/2010/kb1010.pdf>.

[92] Deutscher Bundestag, Wissenschaftliche Dienste, 'Auswirkungen von Sanktionen im SGB II' (n 90).

[93] E.S. Dahl and I.A.E. Lima, 'Krav om å stå opp om morra'n – Virker det?', *Arbeid og Velferd* 3 (2016) 115-130.

[94] Ø.M. Hernæs, 'Hvordan påvirker økt bruk av vilkår for sosialhjelp sysselsetting og lønnsfordeling?', *Søkelys på arbeidslivet* 1(2) (2018) 4-22.

[95] Kane and Köhler-Olsen, 'Aktivitetsplikt for sosialhjelpsmottakere' (n 3); Kane, Köhler-Olsen and Reedtz, 'Aktivisering av unge sosialhjelpsmottakere (n 3); Dahl and Lima, 'Krav om å stå opp om morra'n' (n 94); and Hernæs, 'Hvordan påvirker økt bruk av vilkår for sosialhjelp sysselsetting og lønnsfordeling?' (n 95). See also K. Frøyland, T. Maximova-Mentzoni and K. Fossestøl, 'Sosialt arbeid og oppfølging av utsatt ungdom I NAV'. AFI-rapport 2016:01, Oslo: Work Research Institute.

5. Three Systems in Light of the Right to Substantive Equality

5.1 Introduction

Admittedly, our research aim has evolved through the course of learning about and analysing similarities and differences between the social benefits systems of UK, Germany and Norway. We started by asking ourselves which type of organisation of social benefit systems serves and best attains the goals of entering the ordinary labour market. As legal researchers, we formed our question in the light of non-discrimination and equality law. Is it fruitful to include a large part of the unemployed within one social benefit scheme and activation policy, as to some extent UC in UK and UBII in Germany do, or is it fruitful to differentiate between various groups of unemployed, as in Norway, in order to bridge the gap from unemployment to employment? Our third research question regarding which type of social benefit system for the young unemployed leads to substantive equality in line with the human rights to non-discrimination and equality is discussed in the following sub-sections.

5.2 The right to substantive equality

The right to substantive equality contributes to the process of the inclusion of minorities in mainstream society. Non-discriminatory social benefits schemes ensure substantive equality when transforming historical and structural hindrances, redressing disadvantage and addressing power structures, providing non-stigmatising access to adequate social benefits for individuals and groups of individuals.[96]

Since all three countries are State Parties to the ECHR and the ECtHR has developed case law on the question of non-discrimination in relation to social benefits, it is reasonable to expect that the following analysis of the UK, Germany and Norway's social benefit systems targeted at young employable unemployed is based on the Convention and the Court's case law. The European judiciary, both national and European courts, are granting the legislator a wide margin of appreciation and discretion when it comes to policy choices in relation to general measures of economic or social strategy, such as welfare benefits.[97] The judiciary, thus, will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'.[98] However, we choose to discuss the three system's adequacy for achieving substantive equality for this specific group in society in light of the four dimensions of substantive equality as developed by Sandra Fredman.[99] As we discuss whether the conditionality and sanctioning of non-compliance is supporting the aim of substantive equality, we will point out, through examples of national and international court cases, the pitfalls if one or more of these dimensions are not adequately considered by the courts. We will also provide examples of a variety of legal practices supporting the argument that judges have been aware of these dimensions and have been ruling in line with them. In this respect, we point out that we will not conclude firmly whether one or several countries are in breach of the right to non-discrimination read in conjunction with the right to social security. Our aim is to analyse the three countries'

[96] See Section 2.6 on the term 'substantive equality'.
[97] Rt. 1990 Section 874 (n 41) para. 133. *DA and others R (On the Application Of)* v. *Secretary of State for Work and Pensions* (n 38); and The German Federal Constitutional Court (n 39).
[98] *DA and others R (On the Application Of)* v. *Secretary of State for Work and Pensions* (n 38) para. 139; and The German Federal Constitutional Court (n 39) para. 27.
[98] *DA and others R (On the Application Of)* v. *Secretary of State for Work and Pensions* (n 38).
[99] Fredman, 'Emerging from the Shadows' (n 13); and Fredman, 'Substantive Equality Revisited' (n 13).

social benefit system for the young employable unemployed in light of the claimants' right to substantive equality.

5.3 Redressing disadvantage - Redistributive dimension

5.3.1 A disadvantaged group of claimants

Young employable, yet unemployed, persons applying for UC, UBII and SSA are often among those living in poverty and social exclusion. There is much knowledge about the possible reasons for why young people are dropping out of education, either at the secondary or higher level, or do not learn any skills, let alone apply for jobs.[100] The main findings on possible reasons are: 1) poor school presentations early in a pupil's life; 2) the background of the pupil, such as ethnicity, class and gender; and 3) the identification and engagement of the pupil's home with educational system.[101] On a more individual level, Norwegian researchers point to: 1) lack of motivation for education and work; 2) neglect in their upbringing; 3) lack of friendship and poor social network; and 4) psychological health problems.[102] We presuppose that these individual factors are relevant reasons for the unemployment of young people also in the UK and Germany.

5.3.2. Universally applicable

The detrimental effects of belonging to a group of low social-economic status, belonging to an ethnic minority group, having a certain gender and being brought up in a neglecting home are not targeted directly by the legal norms of UC, UBII and SSA. However, as Sen has put it: '[w]hat people can achieve is influenced by economic opportunities, political liberties, social powers and the enabling conditions of good health, basic education, and the encouragement and cultivation of initiatives'.[103]

None of the legal norms are explicitly targeting any of the known disadvantages many of the young unemployed are struggling with. There is a lack of affirmative action that would advance substantive equality. The structure of UC, UBII and SSA is universally applicable to all young claimants. All young unemployed receiving benefits under these schemes must fulfil activities, with only very narrow exceptions. This approach, admittedly, provides equal opportunity for the young person to enter the labour market. However, it does not recognise how, due to social, economic, physical or psychological constraints, it may not be feasible for this person to achieve the goals.[104] A system that appears nearly universal may have disparate impact (often referred to as indirect discrimination).

That universal conditionality and sanctioning can have as a consequence that individuals or groups are treated alike which should have been treated differently because their status and situation is different, is acknowledged also in jurisprudence of the ECtHR. In the case *Thlimmenos v. Greece* in 2000, the Court stated that: '[t]he right not to be discriminated against

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[100] Eurofound, 'Active inclusion of young people with disabilities or health problems', (Luxembourg: Publications office of the European Union, 2013); T. Falch and O. H. Nyhus, 'Betydning av fullført videregående opplæring for sysselsetting og inaktivitet blant unge voksne', *Søkelys på arbeidslivet* 28(4) (2011) 284-301.

[101] S. Lillejord et al., 'Frafall i videregående opplæring: En systematisk kunnskapsoversikt', *Kunnskapssenter for utdanning*, KSU 1/2015. Ø.N. Wiborg and M.N. Hansen, "Change over time in the intergenerational transmission of social disadvantage", *European Sociological Review* 25(2) 379-394.

[102] K. Reichborn-Kjennerud, 'Unge sosialhjelpmottakere – unge og umotiverte?', in: T.A. Andreassen and K. Fossestøl (eds), *Nav ved et veiskille. Organisasjonsendring som velferdsreform* (Oslo: Gyldendal Akademisk, 2011); S. Brage and O. Thune, *Medisinske årsaker til uførhet i alderen 25-39 år* (Oslo: NAV, 2008); S. Brage and T. Bragstad, *Unge på arbeids- og helserelaterte ordninger* (Oslo: Arbeids- og velferdsdirektoratet, 2011).

[103] *Ibid* 730; A. Sen, *Development as freedom* (New York: Oxford University Press, 1999) 5.

[104] Fredman, 'Emerging from the Shadows'; and Fredman, 'Substantive Equality Revisited' (n 13).

in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.'[105]

5.3.3 Equal opportunity to choose your life path

Equality of opportunity emphasises that once opportunities are made available, each individual can choose her or his own life course. This understanding is visible within the British, German and Norwegian systems by using individual agreements as a means of implying that the claimant can choose her or his future path.[106] Yet, besides strict exemptions, little in the legal norms of UC, UBII or SSA shows consideration of the fact that the young person's previous life experiences might make her or him unable to meet the requirements attached to her or his chosen path.

The policy of benefit cap, introduced in the UK, is an example of the opportunity to enter the labour market with support from the UC system, motivated by having a higher income than benefits once you have entered the labour market. Yet, this social policy and its legal norms fail to see that lone parents with young children under the age of two years still will not find it easier to take on paid work.[107] As a consequence of the benefit cap for these lone parent-families, they have to live on low benefits and stay marginalised in poverty. The equal opportunity approach provides these parents with the choice to take up activities which lead them to enter the labour market, but does not address the constraints that are faced by lone parents with young children. The equal treatment of all UC claimants has a disparate impact on these lone parents and their children. The policy of benefit cap fails both to address the disadvantages due to lack of child care these lone parents are facing, and to support either an exception or adjustment for this group of claimants.

The majority of the UK Court of Appeal in the case of *DA and others v. the Secretary of State for Work and Pension* recognised the disparate impact on lone parents with young children. However, the Court then used the pattern of discriminatory law asking whether this disparate impact can be justified. Since only social policies which are 'manifestly without reasonable foundation' are considered to be discriminatory, and the Court of Appeal did not find evidence of that, the State won its appeal. Furthermore, the Court's majority accepted the State's argument that this group of lone parents can choose to work. It also agreed with the State that these lone parents with young children are not worse off getting a job than lone parents with older children, which then often have several children, too. The right to substantive equality does not support the idea of freedom of choice regardless of the circumstances; it takes the circumstances on board to redress the disadvantages. The right to substantive equality does not even require the comparison with another group which is also struggling and by that levelling down those that are better off, in this case lone parents with older children which are in child care or even school.[108] If the Court would have analysed this case by asking if the social policy of a benefit cap is readdressing the disadvantage of lone parents with young children, it might have come to a different conclusion in this case. This point of view could be seen by the reasoning of Judge Lady Hale in her minority opinion in the Supreme Court case *R (on the application of SG and others) v. Secretary of State* regarding the question of whether the benefit cap is discriminatory against lone female parents. Lady Hale held that: '…the major aim, of

[105] *Thlimmenos v. Greece*, Judgment of 6 April 2000, Application No. 34369/97.

[106] The British UC system calls these agreements 'Claimants commitments', the German UBII system calls them 'Integration agreement' and the Norwegian SA system requires the commitment to an 'Activity plan'. See also above Section 3.4.

[107] The German Federal Constitutional Court (n 39).

[108] Fredman, 'Emerging from the Shadows' (n 13) 282.

incentivising work and changing the benefits culture, has little force in the context of lone parents, whatever the age of their children.'[109] She acknowledged the circumstances and context of lone parents addressing the benefit cap's failure to redress their disadvantages, and on the contrary adding to their existing constraints.

It is crucial to recognise that the young unemployed make decisions in a way that one might find problematic. We often adapt our choices to our circumstances.[110] One can hear the argument that those not choosing to enter an agreement with the caseworker have this freedom of choice, and can choose not to apply for the benefit of UC, UBII or SSA. The freedom of choice is also often used to excuse the experience of being sanctioned for non-compliance: not fulfilling the obligations you agreed to is your own choice, and you have to live with the consequences of being sanctioned. These arguments do not take into account the power imbalance between the claimant and the system presented by the caseworker when agreements are entered.[111] Neither does the freedom of choice argument take into account the circumstances and context in which young claimants agree to specific activities.

In a different area of welfare policy, namely public education, but on the same questionable matter of choice, the *ECtHR in DH v. Czech Republic* carefully scrutinised the claims that the situation the applicants finds themselves in is a result of their own choice. In this case, the State argued that there was no breach of Article 14 ECHR, since the Roma parents had agreed to separate education. The Court's Grand Chamber, however, dismissed this argument by the State, assessing voice and agency in the light of power imbalance between the public authorities and the Roma parents.[112]

Redressing the disadvantages of the young claimants must thus recognise that providing a range of choices on types of activities, or having the choice not to apply for UC, UBII or SA, being provided with the possibility to enter an agreement or commitment, is not addressing the disadvantage attached to the circumstances the young person might actually find herself in. This is even more the case when choices and agreements are linked to sanctions. The threat of being sanctioned when not complying with the conditions agreed upon will in general increase the constraints for the young unemployed. This is even more so, once the young person is failing to comply and is sanctioned. The power structure underlying the system of sanctioning is excluding the young unemployed from participating in determining their actions.[113]

5.3.4 Leeway and discretion for caseworkers

The legal system of UC, UBII and SA provide leeway for professional discretion by the caseworker. Examples from our interviews with caseworkers in the UK, Germany and Norway have shown that some of their professional practice is aimed at redressing the disadvantages of the young unemployed. Some caseworkers call the claimant in the morning, making sure she gets up on time, and some also use social media to stay connected with the young unemployed using their form of communication. Other examples show a more streamlined approach focusing on entering the labour market as a sole aim of the caseworker's task.

Respondents in the UK expressed a more rigid conception of what are adequate and suitable activities for the young unemployed under the ambit of UC, where the paramount focus is employment and job-seeking. The German respondents described a variety of activities for entering the work market, including education or apprenticeship. Norwegian staff demonstrated

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[109] *DA and others R (On the Application Of)* v. *Secretary of State for Work and Pensions* (n 38) para. 229

[110] Fredman, 'Emerging from the Shadows' (n 13); and Fredman, 'Substantive Equality Revisited' (n 13).

[111] M. Kjørstad, 'Do your duty – demand your right: a theoretical discussion of the norm of reciprocity in social work', *European Journal of Social Work* 29(5) (2017) 630-639 at 637

[112] *D.H. and others v. Czech Republic*, Judgment of 13 November 2007, Application No. 57325/00, para. 203.

[113] I.M. Young, *Justice and the Politics of Difference* (Princeton University Press, 2011) 47.

differentiation between employment as a short-term goal or a long-term goal for their claimants putting weight on social problems some claimants might have.

It may seem that the UK system bears a higher risk of treating their claimants in a completely identical manner, not allowing necessary leeway to support the individual with targeted and suitable activities. Without sufficient data to conclude firmly this way, we can still point out that all three countries are obliged to support the individual with suitable activities and work. Though human rights provisions like Article 20 ILO-Convention C102 and Article 20 of the European Code on Social Security legitimate imposing sanctions on claimants not fulfilling their activity requirements or when refusing to take suitable work, sanctioning can indeed become illegitimate when activity and work is not 'suitable'. Also, EU policy requires that the UK and Germany are providing suitable activities and work. Principle 4 of the European Pillar of Social Rights states that individuals have the right to 'timely and tailor-made assistance to improve employment or self-employment prospects' (Principle 4, first paragraph).

There is no clear evidence that a universal system like the UK one, or a nearly universal system like the one in Germany, *per se* leads to non-differentiated treatment where differentiation is necessary. However, universal systems might lead to more conformity in types of activities and work offered. Adequacy, quality, accountable assessments, suitable activities and work might get lost on the way.

The wording in Section 20A of the Norwegian SSA stating young claimants' obligation to fulfil compulsory activities in order to receive social assistance is held in general and universal applicable terms. However, the legislator in the preparatory work leading to Section 20A SSA pointed out that caseworkers must use their discretionary power when evaluating the employability of the young unemployed and, based on that, consider what type of activity is adequate to propose for the young claimant.[114] Those being rather far away from the ordinary labour market need other types of activities than those being fairly near a possible employment. Despite the common aim of work, the legislator in the preparatory work acknowledged that requirements for the claimant must be adjusted to the claimant's situation. Unfortunately, this is not expressed in the wording of Section 20A SSA, which gives reason to ask whether caseworkers are expected to read legal preparatory papers given by the government.

Norwegian respondents describe the young employable unemployed under the SSA as having a high incidence of mental health issues, lack of self-confidence due to dropping out of school and previous lack of coping in their adolescence. When preparing the legal norm, the legislator seems to adjust to this fact by not placing overly strict requirements on this group in the preparatory papers. Yet, the wording of Section 20A SSA is strict in its requirements. The section does require that claimants attend the imposed work-promoting activities, unless weighty circumstances apply.

According to our respondents in all three countries, they apply individual and professional discretion regarding what type of activity was promoted for the young unemployed. The characteristics of their claimants, whether they were 'close to' or 'far from' entering ordinary work, influenced the choice of activity imposed. The individual is treated individually, in order to accommodate difference in all three countries. This implies that the accommodation of differences is possible in any type of social benefit scheme that allows for professional discretion with regard to finding adequate activities for the individual.

The discretionary power provided for in the three systems is the single factor that can ensure an approach to conditionality and sanctioning, and as such redress the disadvantages many young claimants are struggling with. However, the caseworkers are not in the position to change the power structures imposed on the claimant by the systems *per se*. The caseworkers might even find themselves embedded in power structures they cannot avoid. In addition, some of the

[114] Norwegian Government law proposal, Prop. 39 L (2014-2015). Changes in the Work Environment Act and the Social Services Act, para. 6.6.2.

constraints experienced by the young unemployed have their roots and causes in previous experiences which the caseworker cannot redress at the time the young unemployed is entering the system of either UC, UBII or SA. Caseworkers in job centres hold different qualifications and skills, which also represents a risk that both assessments and decisions in each claimant's case can be based on more or less arbitrary conditions.

5.4 Redressing stigma, stereotyping, and prejudice – Recognition dimension

5.4.1 Recognition wrongs

According to Fredman, this dimension of substantive equality speaks to our basic humanity. She states that: '[e]quality attaches to all individuals, not because of their merit, or their rationality, or their citizenship or membership of any particular group, but because of their humanity'.[115] The right to substantive equality aims to specify the wrong to be addressed as stigma, stereotyping and prejudice.

The second dimension of the right to substantive equality is referred to as the recognition dimension. Instead of talking about human dignity as an open-ended and rather vague conception, Fredman argues that the right to substantive equality must address 'recognition wrongs'.[116] 'Recognition wrongs' is a concept developed by Nancy Fraser expressing the inequality in the mutual respect and concern that people feel for one another in society.[117]

In a case regarding violence against women, the ECtHR drew attention to the recognition dimension, making visible the ways in which stigma, stereotypes and prejudice against women can lead the authorities to refuse to recognise the victims as worthy of State protection and to the passive or active condoning of perpetrators' actions.[118] Applying the recognition dimension, the ECtHR has in several cases also required structural change regarding same-sex civil partnership.[119] The Court has for example stressed 'the instrinsic value for the applicants' for which the recognition of civil partnerships would provide.[120] Fredman points out that the Court has recognised the ways in which stigma and prejudice have implications in relation to disadvantage and social and political exclusion.[121]

5.4.2 Stereotyping and prejudice of claimants

Previous research has shown that individuals receiving social benefits and the related fear of or experience of poverty, describe shame as a psychosocial dimension in their lives. Poverty related shame is imposed by the attitudes and behaviour of those not in poverty, framed by public discourse and influenced by the objectives and implementation of anti-poverty policy leading to stigma.[122] Gubrium and Lødemel state that the social assistance claimants they spoke

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[115] Fredman, 'Substantive Equality Revisited' (n 13) 730.
[116] Fredman, 'Emerging from the Shadows' (n 13) 282.
[117] N. Fraser and A. Honneth, *Redistribution or Recognition – A Political-Philosophical Exchange* (London: Verso, 2003)
[118] Fredman, 'Emerging from the Shadows' (n 13) 292: *Opuz v. Turkey*, Judgment of 9 June 2009, Application no. 33401/02.
[119] *P.B and J.S. v. Austria*, Judgement 22 July 2010, Application No. 18984/02, para 30; *Schalk and Kopf v. Austria*, Judgment of 24 June 2010, Application No. 30141/04; *Oliari v. Italy*, Judgment of 21 July 2015, Applications Nos. 18766/11 and 36030/11.
[120] *Valliantatos v. Greece*, Judgment of 7 November 2013, Applications Nos. 29381/09 and 32684/09, para. 73.
[121] Fredman, 'Emerging from the Shadows' (n 13) 295.
[122] R. Walker et al., 'Poverty in Global Perspective: Is Shame a Common Denominator?', *Journal of Social Policy* 42(2) (2013) 215-233. E.K Gubrium, et al., 'Investing in work: exclusionary inclusion in Austria, Belgium and Norway', *International Journal of Sociology and Social Policy* 37(1) (2017) 591-604.

with in Norway consider the fact that social assistance is the last resort option and that it is calculated carefully as a source of considerable shaming.[123]

We argue that unemployed persons receiving social assistance in Norway experience a greater burden based on stress, stigma and shame than those who fall under unemployment benefits within the NIA. Based on that premise, the following assumption can be made: rather universal benefit schemes, like the UC and UBII, comply with the recognition dimension by including a large number of unemployed persons under the same social benefit scheme and by that avoiding a hierarchy among claimants of various social benefits. The experience of 'we are all in the same boat' might counteract stigma, stereotyping and prejudice.

However, there are signs of persisting stigma and stereotyping prevailing in the way society interacts with claimants of UC and UBII. One example is the agreements which some UK respondents describe that claimants must sign. These rather personal commitments, stating for example 'I will dress smart' or 'I will have clean hands and finger nails' appear, in our point of view, as shaming UC claimants.[124] The social policy of a benefit cap in the UK also has an element of stereotyping and prejudice. The policy was explained by the British Government by stating that: '[w]ithin the cap, there is a very clear incentive for people to work, ..[..].. ensuring claimants know they are better off in work than on benefits.'[125] We find that this explanation implies that claimants of UC are not sufficiently willing or motivated to work. The majority of the Supreme Court in the case *R (on the application of SG and others) v. Secretary of State for Work and Pension* contributed to this prejudice against and stereotyping of unemployed by acknowledging this being a legitimate aim for the social policy of benefit cap.[126]

Similar implicit shaming is also visible in Section 20A of the Norwegian SSA. The legislator explained and defended the introduction of compulsory activities for the young unemployed under the age of 30 by pointing out a few job centres that had implemented a compulsory activity scheme and could show an increasing success rate of work integration.[127] The success of these job centres is explained by the municipalities' great effort in establishing and running adequate and suitable activities for young social assistance claimants.[128] It is therefore fair to ask why this legal norm on activity is not formulated as an obligation for the job centres to provide adequate, suitable activities and accountable assessments of claimants in their responsible area, rather than as an obligation for the claimant to fulfil an activity. The legal norm is formed as an obligation for the young claimant implies that she or he is unwilling to work and therefore must be forced to do so. This stereotyping could have been avoided by the legislator. Regarding all three countries' social benefit systems discussed here, they link labour market support and benefit eligibility tightly to job search conditionality, thereby stressing an obligation on the part of jobseekers rather than on public authorities supporting the individual in finding suitable work.

In the design of UC, UBII and Section 20A SSA there is a rather strong element of stereotyping and reinforcing prejudice against those unemployed claiming social benefit support. The UN

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[123] E.K. Gubrium and I. Lødemel, '"Not good enough": Social assistance and shaming in Norway', in: E.K. Gubrium, S. Pelissery and I. Lødemel (eds), *The Shame of It – Global Perspectives on Anti-Poverty Policies* (Bristol and Chicago: Policy Press, 2014) 85-110; E.K Gubrium, '"No one should be poor" – Social shaming in Norway', in: E. Chase and G. Bantebya-Kyomuhendo (eds), *Poverty and Shame: Global Experiences* (Oxford: Oxford University Press, 2015) 270-282.

[124] See above, Section 4.3.1.

[125] Website of the UK Government, Department for Work and Pension. (2013). Press release 'Benefit cap – final stage starts'. Retrieved 27 September 2018 <https://www.gov.uk/government/news/benefit-cap-final-stage-starts>.

[126] *DA and others R (On the Application Of)* v. *Secretary of State for Work and Pensions* (n 38) para. 65.

[127] Norwegian preparatory work: Innst. 208 L. (2014-2015) para. 4.14.

[128] Dahl and Lima, 'Krav om å stå opp om morra'n' (n 94).

Committee on Economic, Social and Cultural Rights has underlined that State Parties must pay full respect to the principle of human dignity to avoid any adverse effect on the form in which benefits are provided.[129] The Norwegian social assistance system under the SSA, with its universal individual duty of committing to imposed work-related activity, can raise and confirm stereotypes of the 'lazy young people on benefits', and can as such heighten already existing stigma and humiliation. In UK, the practice of requiring UC claimants to sign commitments written as 'I will'-sentences, e.g. 'I will apply for all jobs that meet my qualifications' or 'I will dress smart', 'have clean hands and finger nails', 'I will not smell of alcohol/weed when I attend the Job Centre', witness a paternalistic treatment of adults. Also, sanctioned claimants were required to demonstrate the use of food banks and other charities in order to be entitled hardship money. We consider this shaming and by that an action that violates the human dignity of the claimant. Germany's UB II claimants are urged to sign 'integration agreements', giving the impression of a choice with regard to activation policies. We agree with other authors that it is questionable that pressuring claimants to reach State-defined goals concerning employment are in line with the principle of human dignity meaning that human beings must not be treated as objects of the State.[130] We reformulate this, however, by stating that the design and implementation of the three countries' social benefit scheme do not fulfil the right to substantive equality, not acknowledging that these systems must address the recognition dimension. At the moment, recognition of shaming, stereotyping and existing prejudice is not only lacking at the governmental level, the legislator, in some implementation practices, but also at the judicial level, as some cases from the UK illustrate.

5.5 Participation dimension

5.5.1 The importance of community and social inclusion

The participation dimension addresses both the lack of political voice and the importance of community and social inclusion in the life of individuals. The lack of political voice must be compensated for by equality laws, both to compensate for this absence of political voice and to open up the channels for greater participation in the future. Related to this policy and political level, one can find this part of the participative dimension in Article 4 (3) of the UN Convention on the Protection of Rights of persons with Disabilities requiring State Parties to closely consult with and actively involve persons with disabilities' in the development and implementation of legislation and policies relating to disability.

The importance of community in the life of individuals is recognised by the right to substantive equality when addressing that individuals are essentially social. To be fully human includes the concept of social inclusion, meaning that there must be active measures to integrate individuals into society.[131] The aim is to counteract a rather universal, abstract understanding of the individual and by that, counteract formal equality. An example for an approach where individuals must be integrated in society and their community is visible in Article 12 of the UN CRC on the child's right to participation. This article requires State Parties to assure the child and children the right to express their own views freely. A prerequisite is that the child is capable of forming his or her views. The UN Committee on the Rights of the Child has stressed that to form a view or views requires the child to be informed about the matters affecting his or her life.[132] Thus, the participative dimension regarding social inclusion of the child entails to

[129] UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 19' (n 28) paras. 1 and 21.
[130] Lembke, 'Germany' (n 66).
[131] Fredman, 'Substantive Equality Revisited' (n 13) 732

receive adequate information in order to be able to develop an opinion or view in addition to facilitating free expression of these its opinion or view.

With regard to social security, the German Federal Constitutional Court has used the principle of human dignity to found a fundamental right to minimum subsistence.[133] The Court did underline that the content of the minimum subsistence is not understood as merely the sustenance of physical existence, but also the possibility of social relationships and participation in cultural and political life.[134] This understanding of the Court reflects an understanding of social rights as claims to inclusion into society's life.[135]

In relation to the young unemployed, we discuss if the three countries' social benefit systems are supporting social inclusion of young unemployed.

5.5.2 Active labour market policies and social inclusion

The human right to work as laid down in Article 23 of the Universal Declaration of Human Rights provides that 'everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection of unemployment'. The right to work includes the free choice of employment. In previous publications, active labour market policies with compulsory and coercive elements of activation are discussed in the light of the right to freely choose employment.[136] As Freedland, Craig, Jacqueson and Kountouris point out: 'that the principle [the freedom to work] is not a very powerfully protective one….the jobseeker…can be asked to accept any sort of job offer immediately available on the market, or face the loss or curtailment of social security entitlements.'[137]

The three countries' approach regarding compulsory activities and sanctioning non-compliance can be described as an offer, yet it has the character of an order. We have found few legitimate reason for refusing activities offered by the job centre. Thus, though we agree that society can ask for contributions, nearly universal compulsory activities and the threat of sanctions have the risk of being punitive and as such will favour social exclusion and isolation, rather than social inclusion and participation.[138]

We are also of the opinion that the coercive elements in the UC, UBII and Section 20A SSA decrease the element of participation by narrowing the freedom of the young unemployed to choose their professional and vocational path. Many young unemployed are without a realistic choice due to lack of education or previous career. Yet, the effect of decreased choice and participation might lead to a lack of full realisation of the young unemployed's personality.[139] This is even more the case if those activities offered to the young unemployed are not long-term vocational education and training programmes, but rather subsidised or job creation

[132] UN Committee on the Rights of the Child, 'General Comment No. 12 (2009) on the Right of the child to be heard', UN Doc. CRC/C/GC/12, para. 25

[133] Rt. 1990 Section 874 (n 41).

[134] *Ibid* para. 165.

[135] F. Ferraro, 'Fundamental rights in times of crises', in: S.C. Matteucci and S. Halliday (eds), *Social Rights in Europe in an Age of Austerity* (London: Routledge, 2018) 205.

[136] M. Freedland et al., *Public Employment Services and European Law* (Oxford: Oxford University Press, 2007); T. Eidsvaag, 'The activation line in social security and social assistance law: a human rights perspective', in: H.S. Aasen et al. (eds), *Juridification and Social Citizenship in the Welfare State* (Cheltenham: Edward Elgar Publishing Limited, 2014) 81-101. F. Ferraro, 'Fundamental rights in times of crises', in: S.C. Matteucci and S. Halliday (eds), *Social Rights in Europe in an Age of Austerity* (London: Routledge, 2018) 197-213.

[137] M. Freedland et al., *Public Employment Services and European Law* (Oxford: Oxford University Press, 2007) 225.

[138] *Ibid* 137; See also F. Oschmiansky, A. Mauer and K. S. Buschoff, "Arbeitsmarktreformen in Deutschland – Zwischen Pfadabhängigkeit und Paradigmenwechsel", WSI Mitteilungen (6) (2007) 291-297

[139] Fredman, 'Emerging from the Shadows' (n 13) 224.

schemes.[140] Training programmes in Germany, for example, consist of short-term courses often used in a highly standardised manner, and by that are undercutting the young unemployed's possibility of participation and choice regarding activities.[141] In our opinion, this increases rather than decreases the risk of social exclusion of young persons in the long run. The aim of social inclusion through entering the labour market based on long-term vocational education and training is threatened.

5.6 Transformative dimension

5.6.1 Accommodating differences

The ECtHR has in *Thlimmenos v. Greece* in 2000 recognised that the right to non-discrimination according to Article 14 ECHR is violated '…when States without an objective and reasonable justification fail to treat differently persons who's situations are significantly different.'[142] Individuals or groups must, in other words, be treated differently because their status and situation is different.

Similar to this understanding is the content of the transformative dimension of the right to substantive equality. This dimension recognises that equality is not necessarily about sameness and that different identities and characteristics should be respected. What should not be respected is the detriment which is attached to difference.[143] The transformative dimension has the aim to respect and accommodate difference, removing the detriment but not the difference itself. According to Fredman, this means that existing social structures must be changed to accommodate difference, rather than requiring member of out-groups to conform to the dominant norm.[144]

5.6.2 Changing social structures

There are, as we see it, no signs of UC, UBII and Section 20A SSA contributing to change of social structures related to the young unemployed. On the contrary, the universal approach to activation, the focus on short-term training and fast track to employment and the sanctioning of non-compliance is lacking the accommodation of differences between the various groups of unemployed and within the group of young unemployed.

As we have shown, whether a young unemployed person is met with an understanding for her or his individual identity and characteristics depends on the use of professional discretion by the caseworker. The caseworker and the claimant are, however, in all three countries still situated in a structure and system where the transition to employment is the sole aim. The claimant has to train for and adjust to the labour market and its requirements, rather than the labour market and society at large adjusting to the aspects of identity attached to the young unemployed. There are some differences as to how much leeway and professional discretion caseworkers have. With regard to our respondents, the Norwegian case workers seem to have the most leeway, whilst the UK caseworkers seem to have the least. The overall impression, however, is that the legal framework governing social policy implementation towards young unemployed, does not aim to bring about a structural change supporting the young unemployed to enter labour market.

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[140] W. Voges, H. Jacobs and H. Trickey, 'Uneven Development – Local Authorities and Welfare in Germany', in: I. Lødemel and H. Trickey (eds), *An Offer You Can't Refuse – Workfare in International Perspective* (London: Policy Press, 2001) 85, 89.

[141] F. Oschmiansky, A. Mauer and K.S. Buschoff, 'Arbeitsmarktreformen in Deutschland – Zwischen Pfadabhängigkeit und Paradigmenwechsel', *WSI Mitteilungen* 6 (2007) 291-297.

[142] *Supra* note 105.

[143] Fredman, 'Substantive Equality Revisited' (n 13) 733.

[144] *Ibid.*

5.7 Conclusions

Considering the question of which type of social benefit system for the young employable unemployed supports the right to substantive equality, we find challenges in all three countries discussed. Substantive equality entails redressing disadvantage, addressing stigma, stereotyping, prejudice and violence, as well as facilitating participation and accommodating differences, including through structural changes.[145] Firstly, some descriptions of how claimants are treated individually and in general by legal rules, such as personal commitments which must be entered, do in our opinion support the experience of stigma, stereotyping and shame. Secondly, when activation and work-promotion is the paramount aim of caseworkers, one can ask whether UB II and UC as well as Section 20a SSA provide enough leeway for accommodating for differences between the young unemployed. Thirdly, compulsory activation and the harsh penalising sanctioning system represents the counterpart to facilitating participation, and by that represents a paternalistic system rather than a system securing social citizenship.

6. Concluding Observations

The duty to provide for oneself, as described in the ESC, must be understood and applied within a social context. Compulsory activities as mandatory for receiving basic life support can be considered to be an aim (being active rather than passive) or a means (activities in order to obtain sustainable work and self-sufficiency). However, conditions for receiving basic social benefits for persons unable to provide for themselves combined with a sanctioning system, also comprises a perspective of claimants having to provide in order to receive. Commitments as conditions for social benefits can thus be regarded as so-called quasi-contracts, since it is formed between parties with different powers representing authorities on one side and unemployed persons on the other.

Respondents from the three countries are unequivocal in their view that the introduction of compulsory activities has made the NAV/Job Centres work more targeted, both in assessing the claimants and in obtaining jobs and placements in the ordinary labour market as well as relevant courses/workshops for job seekers. Considering how work-promoting activities can be seen as part of the claimants' rights, and the customising of targeted activities is a duty for NAV and Job Centres, it seems unjust that the individual is subject to the legal duty of commitments.

In light of our respondents' descriptions and our legal analysis, we have identified how securing the human rights of social benefits for individuals not complying or not coping with compulsory commitments, requires thorough legislation, securing agency systems and professional conduct. Imposed activities and sanctions, as well as restricted financial aid, puts pressure on individuals who, according to our respondents, experience complex health-related and social problems. The regimes also require financial resources with regards to, for example, the number of suitably qualified staff at Job Centres. This brings us to suggest considering the introduction of an unconditional universal basic income. According to Kildal[146] the concept of an unconditional universal basic income for all citizens means '[e]veryone is to be guaranteed a certain minimum of finance, regardless who they are and how they choose to live their lives'. The author describes how such basic income enables people to provide for themselves and also

[145] Fredman, 'Emerging from the Shadows' (n 13) 282.
[146] N. Kildal, 'En grunninntekt til alle?', in: N. Kildal, N. and K.T. Elvbakken (eds), *Velferdspolitiske utfordringer – Risiko, prioriteringer og rettferdighet* (Oslo: Abstrakt forlag, 2006) 84-109 at 84).

contribute to society, which they are unable to 'when they are effected by unemployment and profound poverty'. The author acknowledges basic income as a 'radical and controversial proposal', but argues that the concept can neutralise the effects a destabilised work market has on individuals and families.[147] This concept could represent a social security for all claimants, while NAV/Job Centres could focus on addressing and aiding the problems that cause claimants to not comply.

[147] *Ibid* 89-92.