Unity in Adversity

EU Citizenship, Social Justice and the Cautionary Tale of the UK

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Introduction

WHERE DO WE go from here? The European Union's long-running identity crisis has become ever more shrill in recent years and has reached something of a peak with the UK's vote to leave. Prior to the referendum on UK membership, efforts to keep the British people on side included an unedifying scramble on the part of the European Council, the Commission and the Court of Justice to roll back progress on a social Europe and relinquish interests in social justice.

But it did not work out. The UK voted to leave anyway, and now it is essential to take stock and learn from the UK's cautionary tale. This book argues that Union citizenship has staunchly remained a market economy form of citizenship, deeply stratified according to socio-economic class, and inadequate to deliver principles of social justice. It is not just the 'economically inactive' who are ill-served, but workers in low-paid, low-status and low-security jobs, and those whose work histories are punctuated by, for example, periods of child care or adult care.

I. AN EXCLUSIONARY MARKET CITIZENSHIP

This study argues that market citizenship endorses a system of law-as-lists, rather than law-as-justice, in which EU nationals must conform to anachronistic and patriarchal economic categories on a list. It entrenches existing power dynamics and reinforces enduring exclusionary market structures. Those who do not sufficiently serve that market on its own terms (children, lone parents, carers, disabled people and poorly paid and exploited workers, for example), fall through the gaps.

The EU's own species of welfare law is an offshoot of the single market: it is relatively indifferent to social justice principles. Both social security coordination and the concept of equal treatment on the grounds of nationality are conceived of as means to reduce obstacles to economic movement. Even in the heyday of the European Court of Justice's citizenship case law, it did not mean a great deal on the ground for EU nationals seeking to assert equal treatment rights within host state's welfare regimes. Since the case of *Brey*,[1] the ECJ has beaten a hasty and inelegant retreat, affirming the primacy of the list of economic categories in

[1] Case C-140/12 *Pensionsversicherungsanstalt v Peter Brey* EU:C:2013:565.

Directive 2004/38,[2] and absolving Member States from having to engage in questions of social justice when dealing with EU nationals.

Women, children and disabled people face disproportionate disadvantages in this market citizenship regime. But the Union's conceptions of equal treatment on the grounds of sex and disability similarly stem from the market, and a desire to increase EU citizens' market activity (while children's rights barely register on the market radar). The principles of activation flow through the free movement framework, fuelling the commodification of EU national workers, and their alienation from the fruits of their labours. This commodification process is not a neutral, 'rational' one, but reflects entrenched, discriminatory power imbalances.

An EU market citizenship that is indifferent to social justice permits Member States, and in particular the UK, to take activation to its logical conclusion with each others' nationals, and to find that once someone ceases to fit onto the economic list, they cease to be entitled to social protection. The UK has in recent years rolled out an activation-plus regime for EU nationals, introducing reforms that more quickly and more comprehensively disentitle those who fall between the gaps in the list provided by Directive 2004/38.

II. A PROGRAMME OF DECLARATORY DISCRIMINATION

The UK government introduced a highly publicised raft of reforms throughout 2014 specifically targeting EU nationals. The then Prime Minister, David Cameron, penned articles in the national press, announcing that free movement needed to be 'less free'[3] and that we had to do something about the 'magnetic pull' of the UK welfare system.[4] This book argues that these reforms, along with the publicity, government documents and decision-maker guidance that accompanied them, form a programme of declaratory discrimination on the grounds of nationality.

Employers' discriminatory declarations can themselves be acts of discrimination.[5] The state ought to be held to at least as high standards of equal treatment, since its actions are capable of conditioning access to the labour market wholesale, not just to particular jobs. The pejorative and stigmatising language adopted when announcing its measures, along with stated intentions to reduce free movement, are discriminatory and are capable of forming declaratory obstacles to movement. The ECJ has prohibited discriminatory positive advertising

[2] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

[3] D Cameron, 'Free Movement within Europe Needs to be Less Free', *The Financial Times* 26 November 2013.

[4] D Cameron, 'We're Building an Immigration System that Puts Britain First', *The Telegraph*, 28 July 2014.

[5] Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* EU:C:2008:397.

of national produce;[6] it does not seem much of a stretch to suggest that discriminatory *negative* advertising with regard to other states' nationals could be equally obstructive. The stated intentions to prevent people from exercising free movement rights could dissuade people from moving. Indeed, the government's *Before You Go* campaign warns of the 'dangers' of moving to the UK without an imminent job or adequate resources, explicitly aiming to dissuade EU nationals from moving in order to seek work.[7]

These declaratory obstacles found expression not just in official statements and publicity, but in the ensuing laws and non-legal guidance which emphasised the legal differentiation between own nationals and EU nationals, and codified a rejection of social justice principles for the latter. The lists have proliferated: lists of conditions, lists of circumstances in which a right to reside is lost, and lists of exclusions applied to EU national jobseekers.[8] Law-as-justice has receded further as UK courts have all but extinguished requirements to apply EU law proportionately, and so condoned a disregard of factors like social integration, past economic activity, absence of links with other states, vulnerability, need, and so on. Together, the UK and the ECJ have kicked over the dying embers of Union social citizenship.

III. EU LAW IN ACTION AND ADMINISTRATIVE OBSTACLES TO SOCIAL JUSTICE

In order to appreciate the exclusions created by market citizenship, it is necessary to test EU law, and EU citizenship, in action. This study draws upon the findings of the *EU Rights Project*, a legal action research project funded by the Economic and Social Research Council (ESRC), in which I conducted an advice-led ethnography. This involved working directly with EU nationals, supporting them through first-tier advice and advocacy, and offering second-tier support (such as drafting) to advisers. I conducted a parallel ethnography, drawing up case studies accompanied with field notes and documentary excerpts. I supplemented the case studies with expert interviews, and preparatory and reflective focus groups with advisers.

It was only by attempting to use EU law that I could properly analyse its limits in practice. It is a novel and radical approach to studying EU law, which traditionally has tended to be dominated by doctrinalism or studies of implementation,

[6] Case 249/81 *Commission of the European Communities v Ireland* EU:C:1982:402.

[7] Department for Work and Pensions (DWP), *Response to the Report by the Social Security Advisory Committee—The Housing Benefit (Habitual Residence) Amendment Regulations 2014*, SI 2014/539 (November 2014), 4. Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/376103/PRINT-HB-Habitual-Residence-Amendment-Regs-2014-SSAC-report.pdf.

[8] See DWP, *Decision-Maker Guidance Part 3—Habitual Residence and Right to Reside: IS/JSA/SPC/ESA (June 2015)* 073031 and 073080. The new jobseeker exclusions can be found in a list of legislation: The Jobseeker's Allowance (Habitual Residence) Amendment Regulations 2013 SI 2013/3196; The Housing Benefit (Habitual Residence) Amendment Regulations SI 2014/539; The Immigration (European Economic Area) (Amendment) (No 2) Regulations 2013/3032; and The Immigration (European Economic Area) (Amendment) (No 3) Regulations 2014 SI 2014/2761.

and as a method it committed me to being an active part of the field of study. The relevant law is so complex and opaque, and existing advice and support so scarce, that working with EU nationals was the only realistic way to get inside the claims and appeals processes, otherwise those processes would in many cases never have happened. The case studies highlight the problematic and discriminatory effects of the UK's legal reforms and, in particular, the interaction of legal and *administrative* obstacles to justice for EU nationals in the UK.

These case studies demonstrate that equal treatment on the grounds of nationality is an illusion. Clients faced severe welfare rights cliff-edges, and UK and EU law tolerated the enforced destitution of EU national children. The class contingent nature of market citizenship meant that many of the exclusions targeting the economically inactive actually affected EU national *workers* because of their fluid work statuses, or because of the detrimental effects of living under the threat of exclusion, or because of the heightened administrative burdens imposed on all EU nationals. Equal treatment 'just' for the economically inactive proved to be equal treatment for no one.

An exclusionary and punitive legal environment contributed to a default of administrative complexity, obstruction and suspicion. The administrative obstacles spoke to a minimalist approach to societal responsibility to give effect to equal treatment rights, and a low commitment to cross-border social justice. Particular administrative obstacles—such as poor decision-maker understanding, problematic decision-maker guidance, and a 'refuse-first, ask questions later' approach—all seemed to be exacerbated by the ongoing legal reforms.

IV. OUTLINE OF THE BOOK

The premise of this book is that welfare, social justice and citizenship are inextricably interlinked. Chapter two explores this relationship in the context of EU welfare law, highlighting its mechanistic origins and purpose, and arguing that equal treatment on the grounds of nationality has been constructed as subsidiary to the higher objectives of the market. It also sets out the need to test EU citizenship through legal action research and explains the methods (and methodological background) of the *EU Rights Project* and its analytical framework.

EU citizenship was always extremely limited in terms of the social protections it offered EU migrants. Chapter three explores these limitations and, in particular, highlights the thorny issue of tolerated direct discrimination on the grounds of nationality in domestic welfare regimes. I suggest a narrative in which recent case law continues, and strengthens, the trajectory of market citizenship by dismantling the social trappings of earlier citizenship case law. A key lever for EU citizenship-based rights in those earlier cases was the concept of proportionality: that is, that equal treatment on the grounds of nationality was a primary law right attaching to EU nationals in their capacity as citizens, which could be subject to conditions and limitations, but those conditions and limitations must in their turn be subject

to a proportionality review. But proportionality is crumbling, and the conditions and limitations are becoming constitutive of the rights in themselves, displacing primary law. Chapter four explores some of the key consequences of the demise of proportionality and highlights those groups—children and lone parent families—placed at a greater disadvantage. It makes the case for giving children's rights substantially more weight (or even just any weight) in EU free movement law.

The ideological presumptions bound up with market citizenship are explored in chapter five with a focus on the concepts of responsibility and fairness as defined in the activation agenda. Activation denies societal responsibility for disadvantage and poverty, promoting individualism and an associated political agenda. It infuses concepts of equal treatment on the grounds of sex and disability, so that discrimination is only relevant insofar as it interferes with the functioning of the existing market systems. As such it provides its own justification for the discriminatory exclusions market citizenship creates along lines of sex and disability. Notions of economic virtue endow that agenda with a moral claim, giving it more of a rhetorical pull and masking its political origins and effects. EU and UK law interact to make EU migrants an apotheosis of activation.

Chapter six analyses the activation-plus regime imposed on EU nationals in the UK and presents the case that the series of reforms amounts to a programme of declaratory discrimination and creates declaratory obstacles to movement. I look at the rules that have made the cliff-edge steeper, so that those who are classified as jobseekers are quickly disentitled from social protections, and also the rules that make the cliff-top narrower. A narrowing definition of the migrant worker makes it more likely that low-paid and part-time workers are shunted over the welfare cliff-edge. Various restrictions overlap and interact, so that many EU nationals at various points fall through the gaps in the list of Directive 2004/38. In particular, I look at the ways in which the lawful residence clock is re-set, so that long-term residents, with substantial work histories, can be denied permanent residence and, as a result, be later found to have no right to reside. One group of EU migrants especially disadvantaged by the law-as-lists approach is that of victims of domestic abuse.

While chapter six considered equal treatment claims, chapter seven looks at the problems attending attempts to invoke the social security regulation legislation. This draws primarily upon case studies to highlight the shortcomings of the coordinating instruments, which require claimants to access and use complicated—and, in many cases, unclear—points of law. The principles of exportation and aggregation do not work smoothly. Member State resistance of competence belies a rather minimalist approach to social solidarity and market citizenship's law-as-lists approach enables them to limit their responsibilities. The states themselves have little incentive to be good coordinators or to avoid claimants being caught between two systems and protected by neither.

Failures of coordination are only one type of administrative obstacle. Chapter eight explores some of the myriad administrative hurdles encountered during the *EU Rights Project*. These include 'getting it wrong' through, for

example, poor decision-making and poor information-gathering. The chapter then explores procedural deficiencies that reveal a lack of will to 'get it right' (such as normalising delay, and refusing first and asking questions later). Some of the more frustrating obstacles were those that stopped us putting things right: obstacles to our communication with the relevant decision-makers, obstacles to decision-makers communicating amongst themselves, and bureaucratic hurdles placed in the way of communication. These obstacles were amplified because the claimants were EU nationals. All had direct consequences for social justice, and reflected a considerably dehumanised process, congruent with a market citizenship and law-as-lists framework.

Having argued that market citizenship is inadequate for the realisation of social justice, chapter nine then indeed does argue that European social justice is possible. In accepting market norms and values, we not only neglect questions of social justice in individual cases, but we neglect questions about the kind of society we want 'social Europe' to promote. We need to challenge the language of responsibility-centric, competition-based fairness, and to resurrect concepts of need, social responsibility and egalitarianism. Chapter nine suggests we resuscitate the idea of fairness as a rights-giving principle of administrative justice, and that we can make decision-making fairer if we resurrect, and reinforce, the requirement of a proportionality review of restrictions on EU nationals' rights. But simply saying 'proportionality' is not enough: we need to establish which principles are to have weight, and here I suggest that we explicitly adopt some European principles of social justice—starting with protecting child welfare and the promotion of gender equality.

V. SOME NOTES ON TERMINOLOGY AND TEXT

Throughout, both EU and EEA are used, depending on the context and the literature/law in question. The emphasis in this book is upon the reach and effects of Union citizenship, and so 'EU nationals' are the focus.

In my case studies I have, naturally, changed the names of clients. However, I wanted to make sure that the cases were as anonymous as possible. I have therefore worked out a simple scheme for switching each EU Member State for another, so the nationalities and states referred to are, where possible, changed from those in the original cases. The exception is John who, by the nature of the case as a UK national returning to the UK, could not easily be switched. Where dates are given I have altered these as well, while making sure that the duration of periods of time in question are the same, and that events are still documented as happening in the relevant legal period (for example, before the end of transition measures, or before the 2014 reforms, and so on).

The fieldwork all took place before the introduction of the Immigration (European Economic Area) Regulations 2016. These largely replicate the regulations which were in force at the time of the advice work: the Immigration (European

Economic Area) Regulations 2006. While tidying up that instrument's multiple amendments, they have introduced some more stringent or punitive provisions. Much of the work completed here was based on the 2006 Regulations, and I have given references to the 2016 Regulations where there are relevant differences.

VI. THE UK AS A CAUTIONARY TALE

The cacophony of negative messages coming from UK authorities, and to some extent from EU institutions, has created a toxic politics of free movement which could not help but percolate into administrative culture. This book argues that the administration of welfare cannot be disaggregated from the government's own messages and guidance to decision-makers. Nor can the government's programme of scapegoating EU nationals be dissociated from the UK public's vote to leave the EU in the EU membership referendum.

That referendum result should not be a basis for retreating from the project of social Europe, or for abandoning the attempt to establish European social justice principles, on the grounds of popular prejudice towards, and distaste for, each other's nationals. Nor is it grounds for promoting more commodification and alienation and rendering free movement even more of a prerogative for the privileged. Rather, it repeats a lesson from history: that we do not make populations more tolerant by adopting discriminatory laws and by using the law as a tool of stigma.

Substantial legal reforms have accentuated administrative obstacles and contributed to the construction of EU national benefit claims as 'problems', feeding into messages about how decision-makers should (or more accurately, should not) use their discretion. This has significant ramifications for EU nationals during the course of the UK's exit from the EU, which will involve a more dramatic legal upheaval, and for other states going through periods of reform and welfare retrenchment. The EU needs to think about whether and how it wishes to guard the efficacy of EU law, and whether its citizens merit social protection, should the risks of administrative friction become more acute in times of legal transition.

Our apparent desensitisation to market citizenship means that it has become even more influential. If unquestioned, it shapes our ideas of fairness, personhood and fundamental rights and lays claim to our construction of morality itself. If we accept this, we not only neglect questions of social justice in individual cases, but we neglect questions about the kind of society we want Europe to be.