

Brexit and the Free Movement of Workers: A Plea for National Legal Self-Assertiveness

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The author welcomes comments and suggestions.

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Abstract

National judges and Member State governments have an obligation to be assertive about national interests threatened by EU policies, even to the extent of challenging existing doctrines of law, proposing new interpretations, and insisting on the proper division of judicial functions, for they have particular knowledge and understanding of the consequence of EU law. An unquestioning obedience to the Court of Justice and to established doctrine is not loyalty, but subversion of an essential legal dialogue, and a failure to play an active and constructive role in building a legal system which serves the goals and wellbeing of Europeans. The Brexit debate is a case study in this: despite claiming publicly that mass migration was threatening essential and legitimate public interests, the UK did not attempt to use the available doctrines or derogations to defend these, behaving as if legal orthodoxy was fixed in stone, and the only options were leave or accept. It would have been more loyal, more European, more helpful to Europe, to impose unilateral restrictions and defend them vigorously with evidence and good arguments.

Introduction

In the period before the Brexit referendum the British government, and its opponents, both claimed that so many citizens of other Member States were using their free movement rights to come and work in the United Kingdom that essential public interests were threatened.¹ The employment market was being distorted and wages at the bottom end of it kept low; public finances were being threatened by the costs of social assistance provided to migrant workers with low-paid jobs; and social harmony was threatened by the rapid changes in the population in certain, mostly poor, areas, where Eastern European businesses, languages, and workers were displacing native ones.

It may well be doubted whether these claims were true to any significant extent, and even where problems did arise it seems likely that they could have been solved by purely national measures,

¹ See the letter from David Cameron to Donald Tusk of 10th November 2015, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf

such as raising the minimum wage or providing support to the many neglected non-metropolitan areas of the UK.

Nevertheless, the UK has absorbed a strikingly large number of migrant Union citizen workers, and the other Member States of the Union and the European Commission decided that it was reasonable to acknowledge its concerns, at least to some extent. Hence they promised that if it remained in the Union it would be permitted to restrict the social assistance provided to migrant workers for the first years of their residence.² Conditions of necessity were attached to this, but the Commission took the unusual step of issuing a statement that given the degree of migration to the UK these conditions should be seen as met.³ Immediately after a decision to remain the EU would begin the process of adopting legislation for an 'emergency brake'.

The question in this article is whether such an emergency brake was legally necessary. Could the UK not simply have taken unilateral measures, in so far as necessary to protect its legitimate public interests? Can it really be the case that EU law can genuinely threaten the public interest and yet not permit Member States to respond to that threat without new EU legislation? If so, that would seem to be a structural defect in the system of EU law, for surely the purpose of Treaty derogations is precisely to permit such response, and where such derogations are absorbed into a system of secondary legislation the purpose is to protect the interests at stake Union-wide, not to prevent them being protected at all.

The conclusion of the article is that the United Kingdom could have taken unilateral measures akin to the emergency brake, or others of different form but necessary to protect the public interest. The view of free movement of workers as an absolute value to which all other concerns must be sacrificed is legally unconvincing.

The relevance of this is not just historical. The kinds of restrictive measures that Member States may take, and the relationship between Treaty derogations and secondary legislation, continue to be important questions. However, there is also a broader question about the place of national interests in the system of EU law. This article argues that for a Member State to complain about EU law without seeking to reinterpret it is to fail to take responsibility. The United Kingdom's failure as a Member of the Union was not in wishing to limit free movement, but in failing to actually do so, or at least to seriously try. They treated Union law as if it did not also belong to them. Soon they may be right.

Equally applicable restrictions on in-work benefits

The easiest path for the United Kingdom to have taken would have been to have limited in-work benefits for a certain number of years for workers newly entering the UK job market – precisely as proposed in the emergency brake.⁴ This would have addressed its concerns about public finances. If the government's claim that in-work benefits attracted migrants was true, then such a measure might also have reduced the numbers of incomers, certainly to low-paid jobs, and so also provided a

² Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union, EUCO 4/16, 2nd February 2016, Section D.

³ Draft declaration of the European Commission on the Safeguard Mechanism referred to in paragraph 2(b) of Section D of the Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union, EUCO 9/16, 2nd February 2016.

⁴ Note 2 above.

response to its other concerns.⁵ A measure of this type could be constructed to be applicable irrespective of nationality to all those coming to live in the UK – so also to returning expats – and as such it would fall within the extensive jurisprudence on ‘real links’ and integration requirements.⁶

For it is now well-established that equally applicable rules which make certain benefits only available to those with a sufficient link with the country or labour market in question are permitted by EU law, provided the restrictions are necessary, proportionate and appropriate to the nature of the benefit.⁷ These somewhat vague conditions are much discussed in the scholarship, but in-work benefits often contribute to basic living costs for those on low wages, and this is the kind of public assistance that is normally extended to the more embedded members of a community, and for which some form of ‘integration’ requirement would seem *prima facie* justified. Given that an overly brief waiting period for benefits may not be effective, but that after five years all lawful residents are entitled to social assistance under the citizenship directive,⁸ a period of between 2 and 4 years would appear arguable.

It is certainly true that integration requirements in the case law have rarely concerned workers, instead being applied to benefits granted to work-seekers, students, or other non-economically active migrants. However, their application to workers is not excluded in principle: the specific rights of workers to equality in social assistance, or social advantages, entitles them to be subjected to the same rules as nationals.⁹ However, where such rules impose equally applicable conditions, to do with integration or participation in society, these will only be treated as violations of non-discrimination if they are not sufficiently justified or are disproportionate.¹⁰ Limiting benefits for workers is thus all about justification – and yet precisely the special status of workers in EU law can make that justification difficult.

Hence where workers are concerned, the Court admits the theoretical possibility of applying integration requirements, but rejects them in practice, finding in a number of cases that those in work are ‘in principle’ integrated enough through their employment.¹¹ However, this is better understood as a strong presumption than as a rule: otherwise the theoretical possibility would be meaningless. That a worker is integrated enough to receive benefits is therefore a context-dependent finding of mixed fact and law, and the cases so far have involved radically different contexts from those under discussion here – usually study finance for workers’ children.¹² A central plank of the Court’s reasoning was that the workers in question had contributed to the benefits in question through their taxes. By contrast, a central part of the United Kingdom’s case is precisely that certain workers are a net drain on public resources. It would be open to the UK to argue that for a worker’s children to receive study finance is not the same as for the worker himself to receive

⁵ See Cameron letter, note 1 above. But c.f. *The impact of in-work benefit restrictions on EU migrants to the UK*, Migration Watch Briefing Paper 375, 23rd February 2016.

⁶ C. O’Brien ‘Real links, ‘Abstract rights and false alarms; the relationship between the ECJ’s ‘real link’ case law and national solidarity’ (2008) 33 E.L.R. 643; E. Spaventa ‘Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects’ (2008) 45(1) C.M.L.Rev 13.

⁷ *Gottwald* (C-103/08) [2009] ECR I-9117; *Commission v Austria* (C-75/11) ECLI:EU:C:2012:605; *Thiele Meneses* (C-220/12) ECLI:EU:C:2013:683

⁸ Art. 7 and art. 24 Directive 2004/38

⁹ See Article 24 Directive 2004/38; Article 7 Regulation 492/2011.

¹⁰ *O’Flynn* (C-237/94) [1996] ECR I-2617

¹¹ *Caves Krier* (C-379/11) ECLI:EU:C:2012:798; *Giersch* (C-20/12) ECLI:EU:C:2013:411; *Commission v Netherlands* (C-542/09) ECLI:EU:C:2012:346 at paras 60-64. See also *Martens* (C-359/13) ECLI:EU:C:2015:118

¹² Although see also *Hendrix* (C-287/05) [2008] ECR I-9329

social assistance with basic living costs because he is not self-sufficient, and the latter justifies demanding a higher degree of integration than the former.

An additional challenge is the Court's rule that integration requirements for workers cannot be justified by purely budgetary requirements, because this would lead to non-discrimination rights varying according to location and time, and with the state of local public finances.¹³ One response to this is to make an argument that is more than budgetary: to make a normative claim that certain kinds of benefits are legitimately earned by a period of work, just as unemployment benefits in many Member States are linked to the length of employment. It could be argued that social assistance changes a worker from a net contributor into a net recipient of public finances, implying thereby a different kind of membership of society.

A second response is to distinguish between merely saving money, which was at stake in the student finance cases and was rejected by the Court as a justification, and taking exceptional measures in a situation of extreme overload, because otherwise the ability of the state to guarantee essential services or protect essential interests would be imperilled. The legitimacy of such measures is acknowledged in *Bressol*, concerning a very high influx of foreign students into Belgium.¹⁴

The challenge for the UK would be necessity: showing that there really is a sufficient threat to its social security system. Before the Brexit debate began one might have been very sceptical that this could be established. Yet the point is now, arguably, moot, for after the Commission's statement the UK's evidential position appears to have changed dramatically. Official recognition from the Commission and all Member States that an influx justifies benefit restrictions is not legally decisive, but it must be persuasive. Hence, ironically, the decision to create an emergency brake may have made it unnecessary, at least in a formal legal sense.

Distinctly applicable restrictions on migrant workers

An alternative path for the UK would be to adopt measures that were not equally applicable, for example restricting benefit access for the first four years for foreign workers, but not for those with UK citizenship.¹⁵ Although nationality distinctions are generally undesirable, there are some legitimate reasons to prefer this approach. For if public assistance is purely linked to de facto residence, then this creates a real risk that individuals who have newly migrated can fall through the gaps of European welfare.

For if a recent migrant finds themselves in need of support in their new state, but is not entitled to it because of the newness of their residence, then the justification for this is that they can always go home. If, however, their home state treats returning migrants also as foreigners,¹⁶ then a person in this situation is without any supportive community of which they can call themselves a member. The restless cosmopolitan has no home, and no right to public assistance anywhere. It is hard to imagine that this reflects the philosophy either of free movement or of welfare states. Hence, if a 'certain degree of integration'¹⁷ may be required of migrants before they receive public support, then there

¹³ *Giersch* (C-20/12); *Commission v Netherlands* (C-542/09)

¹⁴ *Bressol* (C-73/08) [2010] ECR I-2735. See also *Kohll* (C-158/96) [1998] ECR I-1931; *Campus Oil* (72/83) [1984] ECR 2727. See also *Verkooijen* (C-35/98) [2000] ECR I-4071; *Commission v Portugal* (C-171/08) [2010] ECR I-6817; J. Snell 'Economic Aims as Justifications for Restrictions on Free Movement' in A. Schrauwen *The Rule of Reason: Rethinking Another Classic of Community Law* (Groningen, Europa Law Publishing, 2005) 37

¹⁵ Probably the intention in the proposed emergency brake: see Draft Decision of the Heads of State, section D2(b), note 2 above.

¹⁶ See G. Davies 'Any Place I Hang my Hat? Or: Residence is the New Nationality' (2005) 11:1 E.L.J. 43.

¹⁷ *Bidar* (C-209/03) [2005] ECR I-2119 at para 57

is much to be said for the view that a migrant returning to their state of nationality should be treated as integrated.

This was the essence of the Court's judgment in *Förster*, not that they spelled it out in quite such detail.¹⁸ However, a Dutch rule that excluded non-working foreigners, and only foreigners, from study finance for the first five years of their residence was not found to be discriminatory. The underlying condition for the study finance, the Court found, was a sufficient degree of integration, which was reasonable. One way of showing this was employment, another was residence for five years or longer, while yet another was possessing Dutch nationality. As a matter of social fact, as well of welfare policy, this approach seems defensible.

In principle, such an approach could be extrapolated to other benefits, and, in the right factual context, to workers. However, as well as the challenge of justification discussed above, the distinctly applicable approach runs into a degree of tension with secondary legislation, notably the Citizenship Directive, and Regulation 492/11 on the rights of workers.¹⁹

The scope of public policy

Firstly, it should be noted that Article 45 on the free movement of workers provides that the right to accept offers of employment, to move freely, and to stay in a host Member State for the purposes of work, may all be subjected to limitations justified on grounds of public policy, public security or public health. This would be the Treaty framework for any distinctly applicable restrictive measures. They would have to be formed in a way that amounted to restrictions on one of the rights above, and they would have to be justified by public policy.

Framing the emergency brake in terms of restrictions on accepting employment, or staying in the UK – in order to fall within the public policy derogation's scope – would not seem to be a problem. If the United Kingdom were to insist that residence for the purposes of work was only permitted if the income was above a certain level, or if the individual was capable of supporting themselves without recourse to social assistance, that would be a restriction on the right to stay as formulated in Article 45, to which the public policy derogation applies.

The more difficult question is whether the interests at stake fall within public policy. Traditionally, public policy has been used to address the situation of dangerous individuals, and targeted individual exclusions, and this is the understanding which seems to have been adopted in the secondary legislation, as will be discussed below. Yet there seems no reason to see it as inherently limited to such situations. In *Bouchereau* the Court gave its classical definition, finding that reliance on a public policy derogation presupposes "the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society".²⁰ The reference to an infringement of the law in this quotation is not intended, it is suggested, to show that this is an essential part of a public policy derogation, but rather to show that it is *not enough*.²¹

¹⁸ *Förster* (C-158/07) [2008] ECR I-8507

¹⁹ Directive 2004/38 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; Regulation 492/2011 on freedom of movement for workers within the Union [2011] OJ L141/1

²⁰ *Bouchereau* (30/77) [1977] ECR 1999 para 35

²¹ See *van Duyn* (41/74) [1974] ECR 1337

The essential condition for a public policy derogation is the sufficiently serious threat to a fundamental interest of society, a phrase adopted into the Citizenship Directive.²²

The relevance of public policy is therefore determined by what is threatened, not by who is creating the threat: there is no reason to think it can only be applicable to specific individuals. Indeed, cases such as *Bressol*, the cases on cross-border healthcare,²³ and recent cases on social assistance such as *Brey*,²⁴ all show the Court recognising that many threats are created by the number of individuals taking a certain action, where if just one of them were to do so there would be no policy threat at all.²⁵ Those cases were not about public policy as such, but they were about justifications for restrictions, including public health, one of the Treaty derogations, and it is hard to see what would make the logic of public policy different.

Thus in *Bond van Adverteerders* the Court accepted that public policy could in principle be relied on to impose generalized restraints on certain television advertising, applying to the whole field, not just a specific company, and in *Josemans*, more recently, it appeared to accept that public policy could justify generalized restraints on foreign tourists visiting Dutch coffee shops – because the numbers doing so were such that they created a public nuisance.²⁶ Admittedly those last two cases were about the free movement of services, but there is no reason in law or policy to think that identically formulated derogations mean something different in the context of different freedoms. It is, as the cases above show, the interests at stake that give them their meaning, not the legal classification of the type of movement or the of the actors involved in the case.²⁷ It may be concluded that that Treaty derogations should be, and can be, applied to group-created threats, if the necessary evidential basis is there.

The UK's public policy claim could be formulated in different ways. It might argue that the scale of worker migration creates a threat to the stability and viability of the housing or benefit system, perhaps in certain areas, or to the ability to provide adequate housing and social services to those on low incomes. It might also extend this argument to include the potential for social unrest and political instability which very high levels of migration could create. These would all seem to be public policy issues,²⁸ and in the case of political instability the referendum result might be taken as corroborative evidence. Indeed, had the government said that the influx of workers was such that they could not guarantee that it would be possible for the UK to remain in the EU, that would seem to be a concern that EU law could hardly fail to take seriously, and one that has turned out to be true. Perhaps the UK could even have restricted free movement of workers as a matter of European interest.

Thus if a case were to proceed purely on the basis of Article 45 the legal frame would be clear, and the issues would be evidential ones. However, it would not proceed in this way: the secondary legislation would be central, for that provides more detail both on the rights of workers, and on the permissible limitation of those rights by Member States. The particular issue here is that the

²² Article 27, Directive 2004/38

²³ *Kohll*, note 14 above; *Müller-Fauré* (C-385/99) [2003] ECR I-4509; *Watts* (C-372/04) [2006] ECR I-4325

²⁴ *Brey* (C-140/12) ECLI:EU:C:2013:565; *Alimanovic* (C-67/14) ECLI:EU:C:2015:597

²⁵ See here also *Van Duyn*, note 21 above.

²⁶ *Bond van Adverteerders* (352/85) [1988] ECR 2085; *Josemans* (C-137/09) [2010] ECR I-13019

²⁷ See e.g. *Bosman* (C-415/93) [1995] ECR I-4921; *Commission v France* (C-265/95) [1997] ECR I-6959

²⁸ See *Commission v France* (C-265/95) [1997] ECR I-6959 at para 56.

secondary legislation appears to include narrower public policy derogations than does Article 45, raising the issue of the relationship between primary and secondary law in such a situation.²⁹

Public policy in the secondary legislation on free movement of persons

The relevant provision of the Citizenship Directive is Article 27, which regulates the use of public policy to restrict movement and residence. It emphasises the need for proportionality and for serious threats to a fundamental interest of society, but the major problem is its requirement that measures 'shall be based exclusively on the personal conduct of the individual concerned'.³⁰ It goes on to say that considerations of 'general prevention' shall not be accepted.³¹

Article 27 is quite clearly oriented towards dangerous individuals, and measures targeting them because of characteristics which distinguish them from other migrants.³² This is at odds with a national measure which restricts migrants as a group, or even large groups of migrants, because of their impact as a whole.³³ If a migrant worker is refused housing benefit, even if the UK housing benefit system is on the verge of collapse, could this be said to be because of their personal conduct?

The fit is certainly uncomfortable. Treating an individual in a certain way purely because there are many like him or her would seem to be more like 'general prevention' than 'personal conduct'. Yet the rationale of Article 27 is essentially one of fairness. It aims to avoid the situation where a person is judged by their membership of a group, rather than by their behaviour, as in *Bonsignore*, where foreigners with guns were treated as more dangerous than natives.³⁴ If an Englishman commits a murder in France, this does not justify a clampdown on the English in France generally.

Yet if an individual migrant worker is unable to support themselves without benefits, and the impact of migrant workers as a whole on the benefit system is unsustainable, then a refusal of benefits or a denial of a right of residence is in fact linked to the particular characteristics of that person. This is not to say that they are morally equivalent to the criminals to whom Article 27 is generally applied, but such a use of the public policy derogation would not be an example of prejudice or arbitrary exclusion, as would have been the case in *Bonsignore*. The Citizenship Directive therefore can, and should, be read to allow derogations of the emergency brake kind.

The alternative is that the Citizenship Directive contains a narrower concept of public policy than the Treaty itself. This would raise legal issues which are returned to below.

However, the greater problem for such an action is Regulation 492/11, and the emergency brake was intended to take the form of an amendment to this regulation.³⁵ Implicitly, the Commission regarded the regulation as preventing the kind of restrictive actions under discussion here.

Certainly, the terms of the regulation support this view. They are clear and absolute, and provide that migrant workers shall enjoy equality in social and tax advantages, equal access to housing

²⁹ See G. Davies 'Legislative control of the European Court of Justice' (2014) 51 C.M.L.R. 1579; P. Syrpis (2015) 52 'The relationship between primary and secondary law in the EU'. C.M.L.R. 461

³⁰ Art. 27, Citizenship Directive note 19 above

³¹ Art. 27, Citizenship Directive note 19 above

³² *Bonsignore* (67/74) [1975] ECR 297;

³³ Although see *van Duyn* (41/74) [1974] ECR 1337

³⁴ *Bonsignore*, note 32 above.

³⁵ Commission declaration, note 3 above.

benefits, and that national laws restricting access to employment shall be disapplied.³⁶ It would take great linguistic talent to find space for a distinctly applicable emergency brake within these rules.

Therefore, if Regulation 492/11 does not contain the public policy derogations, one must ask whether it is contained within them: is the scope of the entire regulation constrained by the scope of Article 45? There are several reasons to think this must be the case.

Firstly, Article 45 does not apply to employment in the public service. This is explicitly provided in its last paragraph.³⁷ Yet Regulation 492/11 does not mention this limitation, either in its text or its preamble, and is generally worded. On its face, it applies to all employment, and would appear, in direct contradiction to Article 45, to guarantee a right of access to public service employment, on equal terms, to migrant workers.³⁸

This is not what in fact happens, and the Regulation is not understood to have this effect. The public service exclusion has not been removed from the Treaty by the adoption of the regulation. It is therefore the case that implicitly, when speaking of workers and employment, the regulation is referring to workers and employment only to the extent that they are included within Article 45. It is simply not applicable to situations falling within the public service exemption, and for this reason not mentioned by the Court in that context.³⁹

An analogy can of course be made to the public policy derogation. There is brief mention in the regulation preamble of the fact that the right to move and work in other Member States is subject to the derogations mentioned in the Treaty,⁴⁰ but while many aspects of this right to move and work are addressed in the regulation body, the derogations are not. How can this be reconciled? The most obvious reading is that, as with the public service exemption, the application of the entire regulation is subject to the Treaty derogations. The apparent absoluteness of the regulation wording is misleading: the Treaty still exists and applies.⁴¹

Thus insofar as the regulation addresses matters to which Article 45(3) applies, such as access to work and to public assistance – which is arguably part of the right to stay in Article 45(3) – it is subject to the Treaty derogations. This was the view expressed by the Court in *Ugliola*: considering Article 7(2) of Regulation 1612/68, it noted that “apart from the cases expressly referred to in paragraph (3), article [45] of the Treaty does not allow Member States to make any exceptions to the equality of treatment and protection required by the Treaty for all workers”.⁴²

This is not to say that secondary legislation can never affect Treaty derogations. In various fields there is a complex case law on the degree to which Member States retain a right to impose restrictions on movement after legislation has been adopted, and often that right is reduced, even in

³⁶ Arts. 3, 7, 9, Regulation 492/11

³⁷ Art. 45(4)

³⁸ Article 8 of the regulation contains a reference to exclusion from public office and management of public law bodies, which is however not intended to implement Article 45(4). It is concerned with other offices and functions exercised by those already employed in a host state: *Commission v Belgium* (149/79) [1982] ECR 1845 paragraph 15.

³⁹ Except in *Commission v Belgium* (149/79) note 38 above.

⁴⁰ Preamble to Regulation 492/11, paragraph 2.

⁴¹ See also *Vanbraekel* (C-368/98) [2001] ECR I-5363; *Surinder Singh* (C-370/90) [1992] ECR I-4265; K.E. Sorensen, 'Reconciling secondary legislation with Treaty rights of free movement', (2011) 36 E.L.Rev. 339 at 354.

⁴² *Ugliola* (15/69) [1969] ECR 363 para 6.

specific situations removed.⁴³ However, this is because the interest in question has been addressed within the legislation, not because it has been removed from the Treaty.⁴⁴

Hence where legislation embodies a certain Union-wide level of protection of a certain matter, typically a health or animal welfare risk, the Member States are taken to have agreed that this is a sufficient level of protection, and they are generally prevented from imposing stricter requirements later.⁴⁵ There is no denial of the derogation here, but an agreement on its meaning, which must subsequently be respected.

A useful example is found in *Rina Services*, where the Court forcefully, if not entirely coherently, expressed the view that Member States could not justify a derogation from Article 14 of the Services Directive by reference to Treaty derogations.⁴⁶ However, by contrast with Regulation 492/2011, which simply ignores the Treaty derogations, the Services Directive pays them considerable attention. They apply to many of its provisions, and the directive can legitimately be seen as expressing a considered interpretation of the primary law – freedoms plus derogations – as a whole. Importantly, where provisions of the directive, such as Article 14, do not allow for derogation this does not threaten the protection of essential interests because these articles concern highly specific forms of measures, and there are always other kinds of measures which could be taken instead: if a state cannot use the measures in Article 14 to protect public policy, it can still use more general measures, such as complete exclusion, if the threat is real. The Services Directive can be seen as regulating the kinds of measures appropriate to protecting essential interests, but not depriving states of the capacity to protect.

By contrast, Regulation 492/2011 cannot be seen as implementing the Treaty derogations. It simply ignores them. It reads as an implementation of Article 45 as if the derogations did not exist. If taken at face value, the regulation would deprive Article 45(3) of any useful effect.⁴⁷ The right to accept employment, for example, specifically subject to derogation in Article 45, is expressed in essentially the same terms in the regulation, but with the derogation removed. By contrast with the Services Directive, a right to protect certain essential interests found in primary law is apparently removed by secondary regulation.

If this was the proper reading of Regulation 492/2011, the regulation would be invalid, firstly because it directly contradicts primary Treaty provisions,⁴⁸ and secondly for lack of a legal base. For the regulation, like the Citizenship Directive in part, is adopted using Article 46, which aims to implement Article 45. If Article 45 is limited, then surely so must be the legislative competence to

⁴³ *Tedeschi* (5/77) [1977] ECR 144; *Denkavit* (C-39/90) [1991] ECR I-3069; *Compassion in World Farming* (C-1/96) [1998] ECR I-1251; M. Dougan 'Minimum harmonization and the internal market' (2000) 37 C.M.L.R. 853 at 865; F. De Cecco 'Room to move. Minimum harmonization and fundamental rights' (2006) 43 C.M.L.R. 9.

⁴⁴ *Compassion in World Farming*, note 43 above, para 47; *Commission v Poland* (C-639/11) ECLI:EU:C:2014:173

⁴⁵ *Compassion in World Farming*, note 43 above; *Commission v Poland* (C-639/11) note 44 above.

⁴⁶ *Rina Services* (C-593/13) ECLI:EU:C:2015:399. See also *Commission v Hungary* (C-179/14)

ECLI:EU:C:2016:108. The statement in *Rina* could be read as a more general proposition than is argued here. It would not be the first time that the Court has maintained a general principle despite deviating from it whenever good policy requires: *Commission v Belgium* (C-2/90) [1992] ECR I-4431; *Dusseldorp* (C-203/96) [1998] ECR I-4075; *Kohll* (C-158/96) note 14 above, where the Court deviates from the rule expressed in e.g. *Commission v Ireland* (113/80) [1981] ECR 1625; *Gebhard* (Case C-55/94) [1995] ECR I-4165. See for discussion the Advocate General in *Danner* (C-136/00) [2002] ECR I-8147 at para 35

⁴⁷ C.f. *Rina Services*, note 46 above, 36-9

⁴⁸ *Test-Achats* (C-236/09) [2011] ECR I-773

implement it.⁴⁹ To legislate beyond that limitation is to exceed the powers conferred, with the consequent nullity of the regulation.

In such a situation, it is more plausible to assume that the Treaty derogations constrain the regulation, and this is what is assumed in comparable situations: in cases where EU agricultural measures created health or policy risks, the Court found that if legislation does not address an essential public interest recognised in the Treaty, the legislation as a whole may be subjected to national measures necessary to protect that interest.⁵⁰ In as far as Regulation 492/2011 falls within Article 45(3) it therefore applies subject to limitations justified by public policy, public security, or public health. The Treaty continues to exist and to be applicable even after legislation, as the Court has reiterated in many free movement cases, and it cannot be overruled or contradicted by the legislature.⁵¹

A slight variation on this argument is relevant to the Citizenship Directive. Here the derogations are addressed, but seem perhaps to have been given a narrower meaning than the Treaty itself supports. What then is the status of the Treaty derogations? Once again, they continue to exist.⁵² Where secondary legislation purports to embody a complete implementation of a Treaty provision – derogation or substantive right – then primary law becomes largely redundant, except as a guide to interpretation.⁵³ However, if an implementation of a Treaty provision covers certain aspects of it, but there are clearly situations falling within the Treaty provision that are not addressed in the secondary law, then the Treaty remains applicable.⁵⁴ Secondary law cannot amend the nature and scope of the competences attributed to the Union, whether by extending them, or by removing limitations to them.

This is implicitly acknowledged in Article 114 of the Treaty, which in its fourth paragraph provides that “If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State *deems it necessary* to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.” This does not bestow the power to apply Treaty derogations to legislation, but *recognizes* it. That is not to say that Member States can interpret and apply derogations unilaterally, as trump cards: they remain concepts of EU law, negotiated between Member States and the Court, and in this case the Commission.⁵⁵ The point is rather this: the derogations still exist, even post-harmonisation. Legislating does not make them go away.

The public policy derogation in Article 45 is therefore available to Member States in as much as the specific public policy concern in issue has not been addressed by secondary legislation, even if this limits the application of the secondary legislation.⁵⁶ It may be worth noting here that secondary

Comment [JS1]: How does this square with cases such as C-319/97 Kostas, where the Court gives the Commission authorization a constitutive effect. I.e. a Member State is not allowed to apply its measure until the Commission gives its permission.

⁴⁹ *Germany v Parliament and Council (Tobacco Advertising)* (C-376/98) [2000] ECR I-8419

⁵⁰ *Compassion in World Farming* (C-1/96) note 43 above; *Commission v Poland* (C-165/08) [2009] ECR I-6843, paras. 50-62; *Scotch Whisky Association* (C-333/14) ECLI:EU:C:2015:845 para 25-27; *Hammarsten* (C-462/01) ECLI:EU:C:2003:33 para 29.

⁵¹ See G. Davies ‘Legislative Control of the European Court of Justice’ (2014) 51 C.M.L.R. 1579.

⁵² *Commission v Poland* (C-165/08) [2009] ECR I-6843 paras. 50-62

⁵³ *Baumbast* (C-413/99) [2002] ECR I-7091

⁵⁴ *Ruiz Zambrano* (C-34/09) [2011] ECR I-1177; *Surinder Singh* note 41 above; *Commission v Poland* (C-165/08), note 50 above, paras. 50-62

⁵⁵ See *Kostas* (C-319/97) [1999] ECR I-3143

⁵⁶ *Commission v Poland* (C-165/08), note 50 above, paras. 50-62; *Scotch Whisky Association* (C-333/14) ECLI:EU:C:2015:845 para 25-27; *Hammarsten* (C-462/01) ECLI:EU:C:2003:33 para 29.

legislation will never be able to completely replace these Treaty clauses. For while many of the issues surrounding free movement are predictable, and can be addressed, just as the Citizenship Directive clearly addresses the situation of the criminal migrant, it is the nature of public policy and public security, encompassing as they do all situations which might endanger essential state or public interests, that the list of possible threats to them is open-ended and to some extent unpredictable. Any attempt to refine or specify the general terms narrows them and creates the risk that a threat will arise not fitting the refined formulation. In that case, it must be so that the general Treaty derogations are applicable to fill the gap. The structure and system of the Treaty make clear that in inserting such derogations the Member States reserved the capacity to deal with public policy, security, or health threats, and the hierarchy of norms prevents this from being legislatively removed. Precisely for this reason it is plausible to interpret secondary legislation to be as far as possible in harmony with the Treaty terms, as suggested above concerning the Citizenship Directive. None of this is to say that the Member States retain complete autonomy over the scope and meaning of these exemptions – that is the subject of the next section - but merely that the exemptions are as much a part of the primary law as the rights from which they derogate.

Strategies in court

It is one thing to make a substantive legal argument, but another to get the Court of Justice to agree with it. However, it would be misleading to think that states are entirely at the mercy of the Court, or that its word on the law is the only one that counts. The European legal construction is a joint creation of the Court and national legal actors – lawyers and courts – and each has influence over the other, partly through the quality of their arguments, but also through their place within the legal system and their specific competences. National courts have specific powers within a legal process concerning EU law, which it is their responsibility to exercise as independent courts, not merely as servants of the Court of Justice.⁵⁷

In many states it is the constitution, policed by national courts, which sets ultimate limits to the application of EU law in that state.⁵⁸ While EU law doctrine may support the idea that EU law takes precedence over constitutions, most states disagree and in practice national judges will generally prefer the constitution, in the unlikely event of a conflict.

Twenty years ago this situation was commonly regarded by EU lawyers as evidence that national courts had not properly learnt their EU law: they were just ‘wrong’. More recently, the disagreement over ultimate supremacy is commonly seen in terms of pluralism, and the idea that national and European courts have different functions and different legal contexts which explain their different perspectives, and that the only appropriate response to this situation is for them to constructively engage with each other in a spirit of mutual respect.⁵⁹ The introduction of the national identity clause in the Lisbon Treaty, entrenching respect for, inter alia, national constitutional structures into EU law itself, could be seen as an official rubber stamping of this point of view.⁶⁰

⁵⁷ See P. Kirchhof ‘The balance of powers between National and European institutions’ (1999) 5 E.L.J. 225

⁵⁸ This is the position in most states. See Chalmers, Davies, Monti *EU Law*, 3rd edn. (CUP, 2014) at 222; A von Bogdandy and S Schill ‘Overcoming absolute primacy; respect for national identity under the Lisbon Treaty’ (2011) 48 C.M.L.R. 1417

⁵⁹ See N. Walker ‘The idea of constitutional pluralism’ (2002) 65 M.L.R. 317. A range of views may be found in M. Avbelj and J. Komarek (eds.) *Constitutional Pluralism in the European Union and Beyond* (Hart, 2012)

⁶⁰ Art. 4(2) TEU; See von Bogdandy and Schill, note 58 above; A. Voßkuhle ‘Multilevel Cooperation of the European Constitutional Courts, Der Europäische Verfassungsgerichtsverbund’ (2010) 6 European Constitutional Law Review 175, at 196

Certainly, constitutional supremacy is far from necessarily a negative thing for EU law. It has had little direct impact, but it gives national courts a way to voice legitimate concerns about democracy, rights, and other good and important things, which the Court of Justice typically does its best to take seriously.⁶¹ Given that national and European courts have different skills and views, a vigorous dialogue such as the BVerfG and ECJ have enjoyed over the years may be seen as constructively contributing to better EU law.⁶²

A constraining national legal voice can even be seen as a corollary of the nature of EU law itself. The Union is one of conferred and limited powers,⁶³ which would seem to imply that there must necessarily be an institution capable of rebutting or containing it if it exceeds those powers.⁶⁴ If there were no direct effect, Member States would be able to do this by refusing to implement EU law. However, if EU law and judgments are to take direct effect in national legal systems, and if the ECJ is to be the undisputed and unlimited interpreter of these documents, this amounts to a formally un-limited transfer of powers, clearly contrary to the Treaty.⁶⁵ Unconditional obedience to a directly effective EU law as stated by the Court of Justice is hardly compatible with conferral, and so contrary to the Treaties themselves. National constitutional courts who emphasise their capacity to have the last word are protecting not just the rights of their population, but the character of EU law. EU law contains an internal contradiction between the essentially conflicting ideas of conferral and of the interpretative autonomy of the Court, which can only be resolved, or at least mediated, by national judicial intervention.

UK courts, along with those of a few other states who lack 'hard' constitutions, have been excluded from such dialogues.⁶⁶ The European Communities Act provides that EU law, as understood by the ECJ, shall be accepted and enforced.⁶⁷ That is impressively law-abiding, but not necessarily the best approach, either from the UK perspective or that of the EU. It excludes a specific UK view on basic rights and interests from the legal dialogue. It would be legally very simple for the UK to amend the ECA to introduce a clause that EU law takes effect in the UK subject to certain basic rights and safeguards, to be policed by the Supreme Court, and while some might see this as disloyal or even illegal under EU law, it would be doing no more than bringing the UK position into line with that of most states. Had it been done earlier, it would have improved the ability of the Supreme Court to explain the UK's legal and principled concerns regarding the impact and application of EU law, as does the BVerfG for Germany. Does the scale of migration to the UK truly threaten its identity, social fabric, or core social institutions? Indicating the point at which EU law would cross UK red lines might have given the Court of Justice more opportunity to reflect on how these concerns could be acknowledged within EU law, as it has done in its dialogues with the BVerfG.

More mundanely, the preliminary reference procedure allocates specific roles to the national court and the Court of Justice.⁶⁸ Whether a public policy exemption exists in a certain field may be a question of interpretation of EU law, on which the Court's view that it has the last word is persuasive – albeit that the Treaty does not say this in so many words.⁶⁹ However, the degree of threat

⁶¹ Von Bogdandy and Schill, note 58 above, at 1424

⁶² Kirchhof, note 57 above.

⁶³ Art. 5 TEU.

⁶⁴ *Lisbon* judgment of the BvG, 2 BvE, 2/08, 30 June 2009, para 233 et seq.

⁶⁵ *Lisbon*, note 64 above; *Honeywell* judgment of the BvG, 2 BvR 2661/06, 6 July 2010.

⁶⁶ See Craig and de Burca *EU Law* 5th edn. (OUP, 2015) 290-91

⁶⁷ Arts. 2, 3, European Communities Act 1972

⁶⁸ Art. 267 TFEU; *Costa v ENEL* (6/64) [1964] ECR 585

⁶⁹ *ERT* (C-260/89) [1991] ECR I-2925; *Milch-Fett* (29/68) [1969] ECR 165; K. Lenaerts, I. Maselis and K. Gutmann *EU Procedural Law* (OUP, 2015) 244-6; Von Bogdandy and Schill, note 58 above, at 1448-9

represented by a given set of facts, and the consequences and practicality of different kinds of responsive measures, are matters for the national court,⁷⁰ and while the Court of Justice has often been magnificently ambiguous and inconsistent in its approach to the line between these functions,⁷¹ there is space for national judges to be assertive and claim ownership.⁷² It is quite arguable that restricting the free movement of workers in the UK would be a purely national matter, as the essential questions are evidential. The question would be whether the UK government could produce a case that would persuade its own Supreme Court. Certainly it is true that an unwelcome decision could be challenged by the Commission in an enforcement action, but a well-argued and supported judicial decision will carry weight before the Court of Justice.

Conclusion

It is not unusual to hear a claim that EU law imposes some unreasonable or harmful demand on a state. Yet EU law is full of open norms, and even where secondary legislation is precise it is contained and constrained by these norms.⁷³ Such open law has the arguable merit that it can be read to achieve whatever is perceived to be desirable: the law can be whatever it should be.

There may of course be debates about what is desirable, but until a matter has been fully fought through national and European courts it makes no sense for a Member State to claim that they are trapped. If they have a persuasive case that a legitimate interest is threatened then there are usually substantive and procedural tools available to them to meet the threat.

It is important that they try, for this is how EU law is formed and improved. The Court of Justice, as it regularly admits, does not have the knowledge of the national context that is available to national judges, and so the success of the European legal system as a whole relies on these national judges playing their role assertively and actively. It is for Member States, through their courts, to claim and even create the legal space that good policy requires.⁷⁴

The corollary is that for a Member State to passively accept and unquestioningly obey EU law and judgments, even when they genuinely perceive them to be harmful, is not admirable at all, but an abdication of their responsibility as EU Members to shape the system of which they are co-owner. The enormous fuss made in the United Kingdom about free movement of workers, when there were many avenues that could have been explored to mitigate the effects of this policy and safeguard national interests claimed to be threatened by it, shows a relationship of passivity with the EU, and a self-image as legal victims. The EU, by contrast, is a club which demands active participation of its Members. Its law is full of commitments to the general good and safeguards of vital interests, precisely so that it can be steered and developed and kept within bounds. If it seems to be causing harm the choice is not, as the Brexit debate seemed to suggest, between grumbling obedience or running away. There is a more constructive and responsive third way, which the UK tragically ignored: *do something about it!*

⁷⁰ *Costa v ENEL*, note 68 above; *Michaniki* (C-213/07) [2008] ECR I-9999 at 51

⁷¹ T. Tridimas 'Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction' (2011) 91 *ICON* 739; S. Pager, 'Strictness vs. discretion: The European Court of Justice's variable vision of gender equality' (2003) 51 *American Journal of Comparative Law* 553

⁷² G. Davies 'Activism Relocated: The Self-Restraint of the European Court of Justice in its National Context' (2012) 19 *JEPP* 76

⁷³ Davies 'Legislative control' note 29 above.

⁷⁴ See Kirchof, note 57 above; N. Walker 'The place of European Law' in G. De Burca and J. Weiler (eds.) *The Worlds of European Constitutionalism* (CUP, 2012) 57.

