The European Union and citizenship rights in the United Kingdom

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This paper asks what effects Europeanization has on the citizenship rights of the people of the United Kingdom's different jurisdictions. It uses T H Marshall's threefold division of social rights- into civil, political, and social rights- as its framework. It examines the consequences of the EU's development for political rights- Marshall's right to "participate in the exercise of political power"- and finds it wanting (Marshall 1950[1992]:8). The EU's much-discussed "democratic deficit" does exist; political power has shifted away from the bodies in which UK citizens have the most say. It then examines the development of civil rights. For all the important effects the EU has had on various rights (particularly for women), it has overwhelmingly focused on one right- the freedom of movement, whether for goods, services, capital or people. It concludes with a discussion of the scope that the development of the EU leaves for the development of distinctive social citizenship rights within parts of the UK, or for the UK as a whole.

Civil and Political Rights in the EU

Much of the existing literature on the EU and citizenship focuses on political and civil rights (for examples, Bellamy and Warleigh 2001; Costa 2004; Lehning and Weale 1997; Wiener 1998). There are two good reasons for this focus (Warleigh 2001:27). One is that core of the EU citizenship mapped out in Part II of treaty lies in the statement that citizenship of the union confers the rights and duties in the treaty (Art 17.2). In other words, it establishes, at least on paper, a closer relationship between the EU institutions as they already existed and the citizens of the EU states including the UK. Given that the EU has not developed many significant social rights, the rights that inhere in EU citizenship are mostly political and civil. The key rights associated with the EU are civil. Second, much of the drive for EU citizenship reflected persisting concerns about legitimacy problems and a "democratic deficit" that might be reduced by democratisation of the EU. That is what leads to the establishment of political rights.

This focus on the freedom of movement, which works out to the development of the internal market, determines the EU's consequences for social rights. The chapter examines the impact of the EU on social rights through three different lenses: the image of the EU as a paragon of negative integration and force for lower standards; the image of the EU as a defender and leveller-up of social rights; and a third, political, image of the EU as a set of concrete institutions that have their own well-developed cultures, methods, and relationships which amount to a regulatory urge. The third image of the EU- as a

regulatory state, driven by political spillover- fits best the policy areas involved with social rights. The effect of the EU on social rights in the UK, so far, is overwhelmingly the imposition of administrative transition costs, and to a lesser extent the imposition of regulations and market structures that might improve or undermine, but often mesh poorly with, the existing social rights of the UK.

Political rights

That second concern drives many of the political rights in the EU. Political rights in the EU are mostly efforts to democratise the EU itself by extending citizens' role in the exercise of political power. The development of the EU has shifted a substantial amount of political power to the EU institutions. If the right to participate in its exercise does not follow, then the EU diminishes political rights.

The most commonly suggested, and by most standards most successful, device for enhancing participation is the directly elected European Parliament. The EP has steadily grown in power and seriousness over the last thirty years. But it still has two problems as a vehicle for the exercise of political rights. One is formal, and is explained in any textbook. The EP is a reactive body, which can often amend, and sometimes veto, actions taken by the Commission and European Council. It cannot drive the agenda, introduce legislation, or, given the complexity of EU legislation, participate in any legislation in a way that most people understand. Warleigh concludes that its formal role means that it does not do what citizens expect of a Parliament; "Parliament is ultimately an institution through which skilful MEPs can wield substantial influence, but not a body in which citizens can experience making their voices heard" (Warleigh 2003:2, 89-90).

The other problem is structural. The EP does not have a demos- it enjoys little loyalty or public profile, and almost none of the affinity and national identity that member state and some regional legislatures enjoy (Bellamy and Castiglione 2004; Majone 1999). Electors typically appear to view it as a "second-order" election and use it to protest against incumbent member state governments rather than express views on the EU policies themselves (Hough and Jeffery 2003:242-245). Its electoral system, additionally, interferes with its representative qualities (Farrell and Scully 2007). The result is that in addition to its formal problems, the EP also suffers from a lack of public affinity and loyalty.

Given that voting for the European Parliament is not enough, there are other efforts to develop public participation in the exercise of EU political power through relationships with civil society (Michalowitz 2004; Smismans 2006 is a set of excellent examples). These start with the mundane. The European Commission attempts to work closely with interest groups in order to increase its legitimacy in the eyes of civil society, in an effort to build pro-European constituencies (thereby creating support for new EU initiatives), and in a simple effort to gather the information required to make coherent policy in a very complex Union (Greenwood 2003:5; Warleigh 2003:113). They include efforts to develop co-determination, asking representatives of labour and capital to formulate some legislation (Johnson 2005). They also include the possiblity of litigating, winning desired political outcomes in European courts (see Bellamy 2006). They extend to great heights of potentially useless political innovation, such as the Open Method of

Coordination (OMC)(Borras and Jacobsson 2004; Greer and Vanhercke 2008; Wincott 2003b). This is a form of peer-group policy coordination in which committees of member states discuss common problems, formulate indicators, collect data, develop action plans and monitor each others' progress.

The many writers who have spoken of a democratic deficit are right: the EU has probably reduced the political rights of citizens by shifting power away from the institutions in which they have established rights to participate. Insofar as it tries ("frantically") to make this good with multiple, differentiated forms of political participation, it improves its democratic credentials by some standards, but not by the stringent ones set by Marshall's demand for equality (Bartolini 2005:407). Better integrating groups through openness to lobbies, subsidies to lobbies, or the OMC has many virtues, and might be the only practical way the EU can open itself to its complex polity (Bellamy and Castiglione 2004), but influence through Euro-lobbies, as with any strategy that relies on interest groups, will still reflect, rather than counteract, inequalities of economic and other resources (Coen and Richardson forthcoming). Stefano Bartolini is right: European integration is as much an "elite consolidation" as it is a pioneer of new forms of engagement (Bartolini 2005; Cohen and Vauchez 2007; also Costa and Magnette 2007).

Civil Rights

The EU is in many ways a device for the expansion of a small number of civil rights (European human rights covenants, not- yet- incorporated into the EU, have more). Chief among them is the freedom of movement of goods, services, capital and people- the "four freedoms" discussed by its lawyers in a liberalizing appropriation of a term originally coined by Franklin Roosevelt of the US to justify the welfare state.

Development of the civil rights of freedom of movement is no simple task. It requires a great deal of legislation and policy change to remove discriminatory provisions in legislation. Allowing professionals to practice in other member states, for example, requires vetting the licensing and establishment procedures of each state in order to eliminate discrimination on the basis of nationality, eliminating payment and other policies that discriminate on grounds of nationality, harmonizing degrees and qualifications enough to operate the "mutual recognition" system that means professionals from different member states are interchangeable. Nickless calls this the "translation into Euro-speak"- the replacement of member states with the Union as the main reference point in policymaking (Nickless 2002). This process involves a degree of harmonization, to ensure interchangeability, and to prevent social dumping. Expanding the civil right to visit, work, do business and practice professions in other countries requires a great deal of legislation and policy change in the member states (Wincott 2003a:299). EU legislation and jurisprudence holds that it would be discriminatory to deny social rights to workers who move to another country; who would want to exercise their freedom to move it it meant loss of access to social rights? The result is that EU workers have, with qualifications, the right to enjoy the welfare states of whatever EU state they make their home.

A long series of laws and court decisions have detached access to markets and access to social rights (not the rights), and not much else, from member state citizenship and started to reattach it to European citizenship (Meehan 1993:146). But implementing this right, in the context of the EU regulatory state and its chosen policy tools, can mean paying transition costs as welfare states restructure in order to achieve compliance; it can mean ongoing inefficiency born of the need to alter functioning systems to comply with new regulation; and it can mean the accidental destruction of important foundations of a system.

In addition to this basic civil right the EU has developed other rights from references in the treaties. The most prominent example of this development of rights is in gender equality, and to a limited extent in other equality issues. It is important to note the boost given to the status of women in the UK by the EU institutions. This has been in large part driven by the European Court of Justice, which at one point struck such a heavy blow for gender equality (in a case about pensions and insurance) that member states hastily amended the treaty to avoid enormous bills for decades of discrimination (Stone Sweet 2004b).

The result of the development of these rights- belatedly called "citizenship of the union" is to create an alterative basis for claims of citizenship rights . The people of the UK can claim rights as citizens of the UK, or, in a very few cases, as citizens of the EU (Meehan 1993:146). This expands the range of citizenship, above all civil, rights; it also undoes existing balances between different rights.

The EU and social citizenship rights

"There are no EU social rights in a traditional national sense"
(Kolb 1999:177)

A social right is, for Marshall, "a invasion of contract by status, the subordination of market price to social justice, the replacement of the free bargain by the declaration of rights" (Marshall 1950[1992]:40). That makes a social right an island of equality in a capitalist society that otherwise produces, and depends on, inequality. What is the concrete impact of the EU on the parts of the welfare state that deliver given social rights? There are three broad images of social rights in the EU- the EU as destroyer of social rights, the EU as avatar of social rights, and the EU as a regulatory state with a logic orthogonal to social rights.

The EU as capitalisme sauvage

One image begins with the fact that the EU is basically a free trade zone, albeit one with extensive scope for upwards harmonization by legislation. This produces a basic argument that we should expect a race to the bottom. The argument is simple and well-rehearsed. Social rights cost money. That money has to come from taxes (or, if they are pursued through labour regulations, higher labour costs). This puts firms at a competitive disadvantage against their rivals in lower-cost places. Politicians, finding that the cost of

social rights is strangling their economies and tax bases, will eventually abrogate those social rights. EU structural funds, for all their public profile, are far too minimal to defend social rights. This can be presented positively; the tendentious Gillingham excitedly identifies negative integration as the basis of most of what he likes in EU history (Gillingham 2003).

There are two reasons that the EU has not, apparently, produced this expected race to the bottom. One is that the structure of the EU itself builds in harmonisation to prevent just that. A huge part of EU legislation is just such harmonisation, intended to keep states from dropping beneath certain regulatory floors. When there is no harmonisation and the factors of production are mobile, the internal market can trigger races to the bottom. Corporation tax looks like it might be a victim of the right, created by the ECJ, to incorporate many kinds of firms anywhere in the EU, and the decision of member states to avoid EU tax legislation that might stop the competition at the price of reducing their formal autonomy.

The other is that race to the bottom effects are nowhere near as pronounced as we might expect from the clarity and simplicity of the argument. Some of the world's most competitive economies are highly taxed Scandinavians. There is an enormous literature on the nature and extent of races to the bottom; the key point is that they are not simple and are not universal, in the EU or elsewhere (Goodhart 1998; Hansen 2006; Oates 1999; Rom 2006; Simeon 2006).

The EU as a social model

If the EU is not a free-trade zone that undermines social rights, could it instead be a positive force, producing quantitative convergence upward and qualitative convergence on something desirable? For some, the European Union is rather the institutional support that enables something called a European social model to survive in a global economy and produce convergence on a more, rather than less, generous set of social rights (for one prominent example: Giddens et al. 2006; For an analysis of the ideological project: Jepsen and Serrano Pascual 2006).

If we look at the direct efforts of the EU institutions to produce, or declare, convergence on high levels of social rights, the situation does not look good (Goetschy 2006). The Presidency of the Nice summit declared that the European social model, "characterised by... systems that offer a high level of social protection, by the importance of social dialogue and by services of general interest covering activities vital for social cohesion, is today based, beyond the diversity of the Member States' social systems, on a common core of values" (Adnett and Hardy 2005:2-3) As the Commission put it in the accompanying 2000 "Social Agenda", a document substantially reaffirmed in 2005, a quality social policy involves "a high level of social protection, good social services available to all the people in Europe, real opportunities for all, and the guarantee of fundamental and social rights." (COM(2000)379:13, 20-23). The problem comes about when we look at the actions suggested to achieve these goals. The actions are to establish a Social Protection Committee (an OMC committee), support its work, "contribute to the reflection on the future of social protection...by issuing a communication", present an annual report, "invite the social partners to develop and discuss their contribution to the

modernisation and improvement of social protection", and "develop close cooperation...to elaborate an agenda of social protection." In other words, talking, part of policymaking anywhere, *is* the EU policy.

The reason for this is fairly simple. The EU does not have significant social policy competencies. There has never been significant appetite among member states for an EU social policy competency; social policy, taxation, and nationality are issues that member states have jealously guarded. We can gauge this by looking at the social policy competencies allocated to the EU in the Treaties. That is quick and easy because there are next to none. Social policy is, after all, crucial in politics and morally freighted. 'Nobody should be surprised that there is so little "social Europe"' writes Schmitter; 'If anything, the absence of any substantial commitment by the members of the EU to harmonize, or even to coordinate, their social policies is overdetermined" (Schmitter 2000:43).

But it is never wise to restrict discussions of Europeanisation to the pronouncements and deeds of the European Union institutions alone. Perhaps the EU institutions' discussion of a European social model feeds into broader patterns of convergence. Here the concept of a European social model flies in the face of a consensus in the welfare state literature. Esping-Andersen divided welfare state regimes into three types; all three (liberal, conservative, and social democratic) can be found within the EU, and the liberal regime type includes, inconveniently, both two EU states and some states that nobody things have a European model- such as the US (Esping-Andersen 1990). Subsequent theorists often added southern european types, giving the EU four different kinds of welfare state regime (Ferrara 1996), or added new axes. Given the abundant research identifying, if not any particular set of subtypes, at least very different kinds of welfare states within Europe, it seems that any European model would have to be abstract if it were not to immediately disqualify at least a few EU members[1], and that the political, social, and economic costs of convergence on a single model with distinctively European characteristics would be enormous.

Enormous, but prohibitive? There is a flourishing new field of convergence studies that looks at the ways policies converge, one that is blurring with "Europeanisation" studies as the latter loses its focus on member state adaptation to EU policy (Holzinger and Knill 2005; Radaelli 2006). The problem is that the arguments for convergence rely on the power of ideas. Ideas are, at first glance, far too weak to produce convergent social models. Furthermore, ideas might not travel; policymakers, if they search out ideas, search them out in countries they think are relevant. There is not much evidence that Italian and British policymakers would even consider borrowing ideas from each other on anything more than the most superficial level. The more plausible source of convergence is imposition- rules with which policymakers must comply. The problem is that most of the EU's rules are designed to force compliance with the internal market, not a social model.

Nor is there aggregate evidence for a distinctive EU welfare model (Castles 2004:73-93). I have found no study of EU welfare states that suggests they are converging in terms of overall spending, program structure, or, beyond the most minimal definitions (shared with many other countries), their social rights. Interesting new

[1] Martin and Ross, in their excellent book, simply expel the UK from the "European Social Model" and are still unable to define said model by much more than a more expansive welfare state and stronger labour regulation than is found in the "Anglo-American" systems.

research on preferences regarding pensions finds that national identity is one of the most powerful variables in explaining the pension system preferences of respondents. People like the system of the country that they live in (Kiiver et al. 2005). So Francis Castles is right that "the upward harmonization thesis is largely an in-house product of EU institutions" (Castles 2004:75).

If there is not much convergence and it is impossible to make many substantive claims about what comprises a European social model specific to the EU, there still might be the possibility that the EU is a geoeconomic defense-a perfect way to create a benign environment for expansive social rights (reviewed in Wincott 2000). In theory, it does not work as well; it is "logically inconsistent" to claim that the EU defends a social model that does not exist (Kleinman 2002:58). In practice, the EU institutions are not even about defending expansive welfare states. Rather, they are regulatory institutions that enhance and deepen the single internal market, subjecting increasing areas of European society to competition from across the EU. That is difficult to present as a victory for an expasive welfare state and labour involvement. Many people in Europe value their expansive social citizenship, and the value they place on it is politically significant, but that does not mean that the EU defends or gives better definition to the already existing models we see across the continent.

The EU as a regulatory state

The EU, in short, has not unleashed downward competitive pressures sufficient to weaken social rights in the UK (or other member states). Nor has it directly or indirectly produced a social model that would strengthen or Europeanise social rights. What it has done is regulate an increasingly large part of European life, starting with areas distant from social rights but increasingly affecting the nature of the bureaucracies that make social rights concrete.

Expanding regulation of provision is at the heart of what the EU does. This breaks down into two issues: what explains the expansion of regulation, and what does the regulation mean?

Competency creep

Accounting for the expansion of EU competencies- which are overwhelmingly regulatory- is tantamount to accounting for the phenomenon of European integration. This sort of question looks dated to many European Union scholars; it has been years since a general consensus emerged that the EU poses many interesting problems, of which authority migration is among the least interesting, and that the relevant concepts are more to do with governance and policymaking than the process of integration itself. That reflects the fact that in many areas of politics European integration is a fact, not a process. But in social policy, Europe is still integrating. It is doing this primarily through the efforts of EU institutions themselves (the clearest explanations are still Leibfried and Pierson 1995; Pierson and Leibfried 1995).

The approach that focuses on this dynamic is known as neofunctionalism. Its key concept is spillover- the shift of EU competencies into adjacent areas. There are two

broad ways to think about spillover, the key concept of "neofunctionalists" . One is social. It argues that the process of integration creates its own momentum. Free movement of goods means that companies integrate production networks more closely and begin to chafe under inharmonious transport or communications systems. The example of telecommunications seems to show a case of this kind of broad-based spillover; once the UK had liberalised its telecommunications markets, firms that operated across Europe began to locate their telecommunications networks in the UK to save money. The resulting flight to UK operators began to convert continental incumbents to the virtues of liberalization- they found themselves unable to compete because of the regulatory mechanisms that had ceased to protect them (Bartle 2005). This broad, society-driven understanding of neofunctionalism is quite common and often appears to be what authors mean when they nod at it. But it is not the necessary emphasis of neofunctionalist theory; European society and policy areas need not integrate for European integration to happen.

Rather, it can happen through political activity, even when there is no demand in society. This is because this second understanding of spillover is quite narrow and precise: it is caused by the activities of supranational political institutions. The father of neofunctionalism, Ernst Haas, seemed to make this argument. Haas explained the pressure for European integration once supranational institutions have been created as a result of the activities of domestic interest groups. Some groups, failing to get their perferred policies at the domestic level, will push for transfer of powers to the supranational organization. The powers, as used, will then provoke demands for more or less power to be transferred to the supranational organization. Integration in a policy area starts with interest groups and an EU institution, but once there is a supranational policy it rapidly creates a supranational policy arena around it, with groups organizing on the new level (Haas 1958[2004]:xxxii-xxxiii). What it requires to produce spillover is somebody with motive to request an expansion of EU competencies and, crucially, an EU institution that is willing to press the expansion forward. There are two candidate organisations in the EU. One is the European Commission, and one is the other is the European Court of Justice (Majone 1998). The Commission is willing to strategically pump-prime, trying to draw interest groups and demands for EU action; it is rightly called a "purposive opportunist" for its combination of adaptability and determination to expand the EU- and its- role (Cram 1997). The Court has a well-documented habit of enunciating principles that expand the role of EU law, forcing legislators and the other EU institutions to respond by finding EU law (principally internal market law) where there is no EU legislation (Alter 2001; Burley and Mattli 1993; Mattli and Slaughter 1998; Stone Sweet 2004b). The Court "has positioned itself as the balancer of constitutional rights guaranteed under the EU's constitution against an asserted public interest expressed in member-state policy...potentially any national legal controversy can be transformed into EU litigation". The best weapons both have are the four freedoms- the commitment of the EU to expanding the freedom of movement of goods, services, capital and labor. EU institutions do almost nothing as well as this "market-making" (Stone Sweet 2004a; Warleigh 2003:94).

The key thing to remember is that spillover can be purely political, partly because political rights to participate in- or restrain- the exercise of EU power are so inadequate. There is comparatively limited social pressure for the incorporation of welfare

bureaucracies in the internal market. Rather, it can be driven by EU institutions and produce markets where there were none, in order to make systems compatible with the EU internal market. That is what is happening, and that is why neofunctional arguments explain the development of EU policy towards the welfare state (Greer 2006).

Regulation

The policies that have effects for social rights are the ones that eliminate barriers to the free movement of goods, services, people and capital within the EU and to a lesser extent harmonize regulations. In other words, the EU policies that affect social rights are regulatory ones justified by the internal market- regulations on people who deliver services, such as professionals, and regulations on how governments structure their welfare states.

This regulatory bent is the habitual, indeed necessary, *modus operandi* of the EU. Creating the single internal market means eliminating barriers to movement and trade within the EU. In other words, regulating the regulations- vetting member state policies for possible discriminatory effects- is the most important thing that the EU does and it is by far what they are most able to do (Wincott 2004:94). The focus on regulation as the basic form of the EU began with the work of Giandomenico Majone, who developed the concept of the "regulatory state" in Europe (Majone 1994). His basic argument is that states in Europe have shifted from direct control over activities to control through regulation. Rather than incur the costs of directly doing things, they regulate those who do. While this is a Europe-wide phenomenon, the EU is clearly the purest example of regulatory politics because it does so little, wields such substantial powers through its rules, and bears so few of the adminstrative, economic, or political costs of complying with EU law. Regulatory states do not pay as much of the cost of what they do, with negative consequences for both efficiency and democracy.

The development of regulatory policy based on the narrow treaty bases of the EU means that regulations are biased towards the development of the internal market rather than any other social goals. This is not to question the goal or obscure the effects of other kinds of EU regulation (such as environmental protection). It is to point out that adopting those principles radically reduces the importance of the tradeoffs elected politicians must make about social rights- tradeoffs between cost and quality, between timely access and universal access, between health budgets and education budgets, or between services for the elderly and services for the young. Those concerns, which are the heart not just of arguments about social citizenship but also the practical policymaking that concerns governments, are marginal in EU debate but the regulations that EU debate produces reshuffle the costs and benefits of different policies.

Some extend this to argue that the structure of the EU gives it a structural neoliberal tendency (Scharpf 1996; Smith 2005; Streeck 1996) Their argument is that the EU institutions and community method have a built-in tendency to produce deregulation through expansion of the internal market. The EU institutions are particularly good at removing member state laws and policies that inhibit the free movement of goods, services, capital and people. These barriers and policies, however, often turn out to have been props of some sort of social right. By contrast, positive integration- the development of policies that preserve or expand social rights at the EU level- requires use of the

elaborate, complex, and unpredictable EU legislative route and is hampered by the treaties' weak social policy competencies. The collective action problems faced by defenders of social rights, such as trades unions, are consequently almost insurmountable.

Supranational regulation and social rights in the UK

In social policy, therefore, the EU enters as exactly what we should expect: a supranational regulatory machine that subordinates most concerns to the promotion of the four freedoms that are its main constitutional principles. What does this do to social citizenship rights? It means that we should not look for the establishment of new EU social rights, because, as Scharpf and others point out, it is extremely difficult to legislate or implement new social rights in the EU (Scharpf 1999). Instead, the EU's regulatory bent, coupled to its institutional bent to market-making, means that existing systems engaged in satisfying social rights must restructure to comply with the developing internal market.

A health example

Health is surely close to any model of social citizenship. Universal health care touches people at any stage of their lives, is a hard-won victory even in the least egalitarian systems, and in the form of the NHS systems has a prominent place in society and politics. And it is a highly plausible component of any European model, given that it is one thing the United States emphatically lacks. So European member states have had no trouble declaring that they all seek to have sustainble, high-quality health care systems with access for all (Greer and Vanhercke 2008; Hunter 2007). But such declarations are based on weak treaty powers for the EU. As ever, internal market law matters, and it is pressing down from many sides.

The issue of patient mobility is a particularly clear case of what can happen to the government bodies that make social rights concrete when they interact with the EU (for an overall view, Mossialos et al. 2008). There have long been EU-wide arrangements for posted workers and tourists to receive care, but non-emergency care outside the member state of residence required pre-authorisation. The challenge to this regime, which left financial and clinical discretion with the member states, began with a pair of cases, *Kohll* and *Decker*[2]. Starting with them, the Court ruled that publicly financed systems could not discriminate against providers in other EU member states.This automatically causes administrative turbulence, but it was mostly restricted to reimbursement-based systems. It also dealt with small numbers; there are simply not that many cases of cross-border patient mobility.

[2] C-158/96, Judgment of the Court of 28 April 1998. Raymond Kohll v Union des caisses de maladie. ECR 1998 I-01931. 28 April 1998. And C-120/95 Nicolas Decker v Caisse de maladie des employés privés. ECR 1998 I-01831

The decision that applies it to the UK is the *Watts* decision[3]. This is the case of a woman from Bedfordshire who went to France for a hip replacement and then attempted to bill her local Primary Care Trust. The PCT declined to pay on the basis that it had given her an appointment for the hip replacement. Mrs. Watts decided to appeal to the EU basis of her citizenship, rather than her UK citizenship, and argued that the PCT's decision interfered with her rights as a European. There are two issues in the case: the extent to which the decisions on mobility apply to the NHS (i.e. the extent to which it is a business, rather than a public service); and the extent to which the NHS systems' core form of rationing, the waiting list, is compliant with EU law. The ECJ ruled that the NHS systems did indeed act in a market, and so should be able to price their services even if they did not choose to do it internally. It also ruled that waiting lists based on financial exigencies are illegitimate- waiting lists must be clinical, not financial, and adapted to the individual needs of the patient.

What this means is completely but threatening to the NHS systems for two reasons. The logic of the decision comes not from an explicit value judgement on the merits of waiting list as a form of health care rationing, but rather as a consequence of the logic of Europeans' freedom of movement[4]. Putting her on a waiting list for a hospital in Bedfordshire did not deliver quick care but it let the PCT try to avoid funding quicker care at a faster provider elsewhere in the EU. Its justification- limited funds- was thrown out (the ECJ has reliably said it could permit restrictions on the internal market in heath in order to preserve the financial stability of systems, but has equally reliably refused to accept anything under that provision). Instead, waiting must be clinical and based on patient needs. Waiting is, of course, a form of rationing rather than a clinically advisable or patient-friendly thing to do. The result is far more legal uncertainty- and a direct attack on the basic rationing mechanism that makes possible other, desirable, attributes of the NHS. By contrast, co-payments and insurance-based systems have not opted for this principle, and do not suffer as much. So the social right to equal health care as it exists in the UK is undermined by elimination of the principle of rationing that underpins it.

The second reason it is a threat is that patient mobility is part of a larger thread of decisions that are progressively narrowing the scope states have to argue that their public services are exempt from the internal market. The *Watts* decision obliges the NHS to price services in order to establish a basis on which providers located elsewhere in the EU can compete. The effects will to some extent be territorially differentiated; the English NHS is being restructured into a market (albeit a tightly managed creation of Whitehall that does not comply with EU internal market law). Scotland and Wales are doing nothing of the sort (Greer 2004). It is therefore possible that the UK government will have fewer problems of principle and possibly lower transition costs as it integrates

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[3] Case C-372/05 *Watts* 16 May 2006.

[4] This is one of many cases in which the ECJ turned member state value judgements into (automatically suspect) derogations from the internal market. It did it in *Grogan* with the Republic of Ireland's constitutional ban on abortion, and more recently in undermining the Swedish state alcohol monopoly. Eurohealth (2007). ECJ rules against Swedish alcohol restrictions. *Eurohealth*, 13, 37-38Phelan, D. R. (1992). Right to Life of the Unborn v. Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union. *Modern Law Review*, 55, 670-689.

its NHS into internal market law than Scotland and Wales. It is more likely, though, that the increasingly marketised English NHS is likely to fall badly afoul of EU competition law somedays. Either way, it is still dangerous. The efficiency and (by international standards) low administrative costs of the NHS has been based on its ability to plan in ways that are difficult in a market.

"What's amazing to lawyers is not that the Court did this. It's that it took so long for it to do it" remarked a Brussels health policy analyst in a September 2005 interview. Naturally, though, the other dynamic part of the EU, the Commission, has responded. There are many health-related activities in the Commission, as its purposeful opportunists in different DGs look for opportunities to pursue their purpose of competence expansion (or policy activities that presuppose and entail it) (Greer 2008). The Court led the competency expansion, but the Commission is eager to capture health for its various purposes- purposes as distinct as the enhancement of a European Social Model and the development of competition free from "state aid."

Social rights in an integrating Europe

The lessons from health are that the development of the EU institutions, which as neofunctionalists point out is difficult to stop, takes the form of regulations that constrain and change the environment for policy and for the delivery of social rights. By subordinating much provision to the internal market, the EU regulatory regime subordinates other goals and changes the terms of tradeoffs. It can produce transition costs as well as gains or losses in efficiency- and if an organisation charged with delivering the substantive content of a social right suffers a loss in efficiency due to the regulation, the regulation has undermined the social right.

A second lesson is that compliance with internal markets can require the creation of markets- the ECJ does not just eliminate discrimination in markets; it also relabels nonmarket activities as market activities in order to better regulate them in the name of the internal market. Political spillover can lead to regulatory demands to restructure the public sector in order to make it compatible with the internal market. Compatibility with the internal market trumps efficiency in the delivery of social rights, or even more fundamental commitments (Phelan 1992).

A third lesson is that the effects of EU regulation, like any other form of regulation, can be difficult to gauge- it is only with hindsight that we can necessarily identify whether they required large or small transition costs, efficiency gains or losses, or compromises of social rights. To a large extent, figuring out the consequences of EU law is guesswork even for those in the NHS and health departments who are most intimately involved. It would be difficult to predict the consequences of the development of the EU for other parts of the public sector that deliver the substantive content of social rights. This is because the devil is in the detail. It is also because while we can confidently predict that the EU will increasingly shape social rights through internal-market-biased regulation driven by political spillover, we cannot predict much about the concrete development of policies dealing with such detailed areas as harmonisation of qualifications, trade in services, the concept of a "service of general interest" or pension and tax jurisprudence.

The fourth lesson is that Europeanization changes priorities. The demand for compliance is essentially a demand that fitting with the new EU regulatory framework be a priority. Compliance becomes a new goal, and fulfilling it diverts resources and attention from other goals. Scarce resources, including time, thought, and effort as well as money, must go to compliance. The policy might be good or bad, and its effects might turn out to be good or bad, but it is a change, and that involves opportunity costs and compliance costs.

Conclusion: Ever closer union

Crudely, devolution is about shifting power downwards from London, to Belfast, Cardiff and Edinburgh; Europeanization necessarily shifts it upwards, from London to Brussels and other sites of European goverment. Devolution, as other chapters (most forcefully the chapter by Michael Keating) argue, creates an opportunity to create a Scottish, Welsh, or even Northern Irish social citizenship that is distinctive from that of England. But, as other chapters, particularly those by Alan Trench and Russell Mellett, point out, the ability of devolved or any government to develop distinctive policies depends on the regulatory and financial constraints that they must face (anybody can develop a distinctive discourse; making it stick is much easier if there are distinctive policies to match).

This creates the problem. Europeanization can overpower devolution. If all UK health systems, for example, must comply with EU law on professional mobility, patient waiting times, private health insurance, public procurement, state aids, and a variety of other internal market rules, their ability to set their own priorities or even maintain existing ones is limited. A distinctive social citizenship is hard to operate when it conflicts with EU regulation on government, and regions' ability to create positive policy that would enable it is even more limited than that of member states. In a Europe that is not of the regions, regional governments that would construct a distinctive social citizenship face a regulator that increasingly matters to their social policies but that they have a hard time affecting.

The effect of the EU is, above all, to throw tremendous force behind one particular civil right: the right to freedom of movement within the Union. The price is an institutional infrastructure that probably erodes political rights and a long series of increasingly important policy puzzles for those who must give substance to social rights. A Europeanised politics of social policy and social rights is clearly coming. It is not coming because the EU unleashed a race to the bottom. Nor is it coming because there is enough concrete EU policy that creates convergence on a qualitatively distinct and quantitatively improved level of social rights that might constitute a social model. Nor is it coming because there are obvious arguments that it is a good thing (on the contrary: Weale 2006). There are processes that work that produce upward and downward harmonization of social rights, but they are not encompassing or distinctive to the EU countries. It is certainly not coming because of any affective loyalty to the EU or demand for a social policy- no serious study has found that around the Union or adequate opportunities to exercise political rights on behalf of a social policy.

Rather, the tangible consequences of EU policy are the ones we would expect from reading any of the many empirical studies and theoretical essays on

Europeanisation: high transition costs and set of changes that are basically patternless from a policy or social rights perspective but are required to comply with the logic of expansion of the EU regulatory state. In the case of health, this presages either an assault on the basic egalitarianism of the NHS- the extent to which it is an "invasion of contract by status"- or a health budget that, no longer underpinned by its traditional rationing mechanisms, spirals out of control. In other cases, it is likely to be less serious, and simply force the bureaucracies that implement social rights to use their resources to pay transition costs. Some of these will be one-offs; others will be lasting.

This is a concrete, political process of spillover. Governments have made it clear at every step that they do not want an EU social policy, and few have done so more strenuously than the UK. Insofar as that is changing, and it is changing, that is because the ECJ has created so much instability that more EU law will be required to stabilize the situation, as the Commission argued in the case of health and the Services Directive.

The development of citizenship in the EU has made clear the aspect that Daniel Wincott's chapter noted in Marshall's work: civil, political, and social rights are "interacting elements" rather than stages. The right to go work where you like was won within England, according to Marshall, in eighteeenth century England (Marshall 1950[1992]:10); it has been developing within the EU since the creation of the common market. The right to participate in EU politics directly, as against through member state governments, emerged with direct election of the European Parliament. It should not be surprising that there is consequent pressure now to create social rights; insofar as the European Union is the community to which people belong (regardless of whether they feel that they belong), the European Union is where they would logically look to exercise their civil and political rights in pursuit of social ones. In its most flattering light, we could say that the EU's main effect has been to develop the civil right of movement at some cost to political and social rights. Perhaps that development will produce a broad regulatory and social reaction and EU-level social rights, just as Marshall (and Polanyi) suggest.

But the problem with applying such a sequence is that EU institutions and voting procedures do not work like that and it is difficult to see how they could be changed to do so. Increased attention to "civil society" is a poor substitute for the equal right to participate in the exercise of political power, but so long as member states and public indifference hobble the European Parliament, it is difficult to see how to restore equal political rights. In the areas of policy that actually deliver the basket of services that constitutes social rights, the EU is likely to continue to regulate- disrupt- those who deliver the services rather than create new rights. Member states, hobbled by their decision not to create direct EU competencies, find themselves in a catch-22: if they create a treaty base to legislate, they give up control to the EU, but if they do not, political spillover incorporates those areas into the internal market and they lose control anyway.

The most we can hope for is that the civil right to move is worth it, that innovation improves political rights, and that the process of imposing the four freedoms improves social rights. Given the poor connection between the EU's processes of political spillover and the issues at stake in policymaking for social rights, that would probably be happenstance.

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