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Equality for whom?

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Equality is invariably presented as an inclusive principle. The Universal Declaration of Human Rights speaks of ‘the equal and inalienable rights of all members of the human family’. The European Union, mindful that its diversity agenda now extended beyond race and gender to other categories of difference, designated 2007 the ‘Year of Equal Opportunities for All’; and the British Conservative party raised no eyebrows in 2010 with a pre-election commitment to equality of opportunity for ‘every single individual in this country’.1

In that assertion of inclusivity, it is invariably overlooked that there is one section of society for whom equality of opportunity is not the intention of any government, a group for whom the law itself sets out the terms of their inequality: immigrants.2 The global experience of immigrants, in differing forms and to differing degrees, is that their conditions of entry to a state variously include restrictions on entitlements to access the labour market, public services, welfare support, family reunion and participation in elections.

These restrictions are not perceived by governments as discrimination but rather as the legitimate exercise of immigration control. For migrants, as the American scholar Linda Bosniak (2006) has neatly phrased it, ‘the border effectively follows them inside’, and the contradiction this creates with the equality principle raises the question that this article addresses: when is it legitimate for a government to restrict the rights of migrants as part of its sovereign right to control its territorial borders, and when should that capacity be curtailed by a competing principle: equality for all those living within the territory, regardless of immigration status? (ibid.: 2–4, 14). If it is legitimate to restrict some of the rights of immigrants in some circumstances, what are those circumstances, and when can it be said that those restrictions go too far and constitute illegitimate discrimination?

As Bosniak has observed, while it is common in the literature to come across ‘laundry lists of the vectors of subordination’, such as race, gender, class, sexual orientation and disability, the literature invariably fails to mention immigration status: it focuses on inequality among those who are entitled to equality while ignoring the more problematic category of those who by law are denied the full enjoyment of social, political and civil rights (Bosniak 2006: 4). Few argue that immigrants should enjoy full access to all rights on the same basis as citizens from the day they arrive: to vote, for instance, or to receive contributory benefits. Yet there are rights, such as freedom from torture and to a fair trial, where equal treatment with citizens is, in a liberal
democracy, taken for granted (Carens 2005: 32). On what basis is this distinction made? If not equality for all, equality for whom, in what circumstances and on what grounds?3

Equality: on what grounds?

Scholars who have explored this question have not all seen the equality principle as the default position from which departures need to be justified. Rather, they have asked ‘on what grounds should immigrants acquire equal rights with citizens?’ and suggested various grounds on which steps toward that entitlement might be justified. As in policy discourse, some have argued that the strength of an individual’s affiliation to the country should be the basis on which, over time, they acquire equal rights. The greater the individual’s ties to the society, the more enmeshed their social relations and identification with it, the stronger their claim to be treated as an equal member by their neighbours and the state. Joseph Carens (2005), while arguing that any departure from equal rights requires justification, has taken that view. Arguing that tourists may legitimately be denied certain rights because they are not members of society but visitors, and hence subject to the state’s authority only on a temporary basis, he continues:

But what about immigrants who have a right of ongoing residence? They are in a very different category. Living in a society on an ongoing basis makes one a member of that society. The longer one stays, the stronger one’s connections and social attachments. For the same reason, the longer one stays the stronger one’s claim to be treated as a full member. At some point a threshold is reached, after which one simply is a member of society, tout court, and one should be granted all the legal rights that other full members enjoy.

(italic: 33)

We see this emphasis on social ties reflected in discourse on access to scarce local resources: that long term residents in a locality, for instance, should have priority in the queue for public housing. A related view, in academic theory and policy discourse, is that rights should reflect the contribution an individual has made (Cox and Hosein 2012: 9).

As criteria for determining rights, however, affiliation and contribution have flaws. The individual may be motivated to participate in society and to contribute but be excluded, facing discrimination or other barriers (such as a husband who does not allow his wife to attend language classes) beyond their control. Denial of equal rights on that basis would thus be reinforcing their exclusion rather than supporting their efforts to overcome it. Affiliation, moreover, prioritises length of residence or belonging over the individual’s needs, or their capacity to contribute in future should equality of opportunity be enjoyed. Moreover, even if affiliation or contribution were legitimate grounds on which to justify calibrating the path to equality, it is by no means clear how they should be measured or the differing value of indicators of attachment and contribution assessed.

‘The affiliation view’, Cox and Hosein (2012) argue, ‘has it that your interactions with individual members of society change what the state owes you. But it’s more plausible to think that what the state owes you should depend on your interactions with the state itself’ (italic: 13). Struggling to find a justification for the common sense view that immigrants should enjoy fewer rights, they advocate an approach based on social contract theory. People give up a level of their autonomy, they argue, and accept a degree of state control over their lives, for which in return it provides some protection and access to resources. While that relationship applies in equal measure among citizens, hence equal rights, immigrants do not have the same relationship. If they are in the country for a short period, like tourists, the state has little impact on their lives so the state

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owes little back in return. Whereas the state’s impact on refugees, for instance, is great because they will make their future lives in the country, and have no alternative country to which they can return, the impact on temporary skilled workers will be limited. Restrictions in autonomy come in degrees, they argue, and the converse is that access to rights should too: ‘So what matters crucially in the autonomy view is the amount of time someone is in a country for and, perhaps, their ability to pursue their life elsewhere’ (ibid.: 17).

Baubock (1994), in his rejection of the related argument that migrants knowingly enter into a social contract that grants fewer rights when they gain admission to a country, rightly pointed out that refugees are not the only migrants who may effectively have no choice in their country of residence (ibid.: 203). It is also difficult to say that the significance of restricted rights on the life of, say, a temporary worker who is desperate to save for her family’s future, is more or less than the impact on a professional person migrating permanently for family reunion (who may nevertheless, in the event, not remain long term). Nor does this approach, like the affiliation criterion, take into account differing levels of need, or provide a clear means through which the impact of the state on the migrant’s autonomy could be measured.

**Equality principle in liberal democracy**

Baubock (1994) argued that states should put migrants on a trajectory toward equal rights because of the importance of the equality principle in the legitimacy of the liberal democratic state, not least in relation to the entitlement to vote. Denying the right to vote to those affected by its decisions undermines the legitimacy of the state. Tomas Hammar (1990) had earlier argued the case for voting rights for long term residents (‘denizens’) on the same grounds. While Baubock acknowledged it would be possible to develop a range of indicators which could be deemed grounds for inclusion in the franchise, such as birth in the country or payment of taxes, nothing other than residence could satisfy the democratic principle that all those who are subject to the jurisdiction of the state should be able to participate in elections. Extending his case beyond voting rights, he argued that there ought to be a general presumption in favour of equal treatment and rights for immigrants resident within the territory unless inequality is expressly provided for by legislation. In most European states he judged the opposite presumption to apply (Baubock 1994: 222).

The vast majority of states have signed up to international and regional human rights instruments in which the equality principle features large. Soysal (1994) foresaw this new legal framework leading to a universal concept of citizenship based on universal personhood rather than national belonging. Rights and privileges once reserved for citizens were, through the international human rights instruments, being codified and expanded as personal rights, undermining the national order of citizenship (ibid.: 1). Hollifield (2004) and others have indeed since noted that the extension of the international human rights legal framework and liberal ethic it reflects have to an extent constrained Western states’ capacity to limit future migration; according migrants rights to settlement and family reunion, for instance, which they do not enjoy elsewhere.

Soysal’s prediction nevertheless proved over-optimistic in the protection it would provide. International human rights norms have not prevented the imposition of restrictions on immigrants’ entitlements. This is in part because the restrictions can fall below the high threshold required to bring those safeguards into play. Thus, as Benhabib (2004) has argued, ‘a series of internal contradictions between universal human rights and territorial sovereignty are built into the logic of the most comprehensive international law documents in the world’ (ibid.: 11).
In Europe, at least, that assessment is unduly pessimistic as the European Convention on Human Rights (ECHR), binding on Council of Europe member states, does provide some protection from discrimination on grounds of nationality, immigration and residence status, and that protection is increasingly coming into play (De Schutter 2009: 78). Not only are governments being called to account for some of the restrictions they impose on immigrants, but also the test which the Convention sets down for determining whether its rights have been infringed provides the intellectual yardstick that is needed to answer our question: when is it legitimate to restrict rights and when should the equality principle prevail? In so doing, it also sets a new research agenda to address the paucity of evidence and analysis needed to apply the test.

**Discrimination on grounds of nationality and immigration status**

It is well known that Article 14 of the ECHR provides protection from discrimination ‘on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’. That protection is only invoked where it relates to one of the rights contained in the Convention, but that includes any right which a state has voluntarily decided to provide which falls within the scope of any Articles of the Convention.4

Not every difference in treatment amounts to discrimination. It has to be established that other people in a similar situation enjoy preferential treatment, and that the difference in treatment has no objective and reasonable justification. That means that for less favourable treatment to be non-discriminatory, it must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim that it is intended to achieve.5

A series of decisions of the European Court of Human Rights in Strasbourg has established that differential treatment on the basis of nationality status may violate Article 14. In considering, first, whether non-nationals are deemed to be in a comparable position to citizens of the country, the Court takes into account the factual bonds that an individual has to the state, such as payment of taxes and length of residence. It then looks to see if the treatment has objective and reasonable justification. The denial of unemployment benefit to a tax-paying Turkish national in Austria on the basis of his nationality was, for instance, found to be discrimination in the enjoyment of his right to property. Significantly, the Court emphasised that ‘weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention’.6

The Court requires weighty reasons when it considers the grounds for discrimination to be suspect. Discrimination on grounds of birth out of wedlock and sexual orientation, for instance, are treated in the same way (De Schutter 2011: 16–19). In the context of nationality the Court has thus made clear in a series of cases that the need to ‘balance . . . the state’s welfare income and expenditure’, to ‘protect . . . the country’s economic system’ and to ‘curtail . . . the use of resource-hungry public services’ (Pobjoy and Spencer 2012: 167) do not in themselves justify a state’s less favourable treatment of immigrants than of its own citizens.

Significantly, the Court has also found restricting rights on the grounds of a person’s immigration and residence status to be discriminatory. In 2005 it found that the absence of a stable residence permit was not sufficient reason to deny access to child benefits in Germany7 (De Schutter 2011: 15), while in 2012 immigration status was found to be insufficient grounds for denying the right to family reunion to one category of migrant with temporary residence (a refugee whose marriage post-dated his arrival) when allowing other temporary residents (workers and students) to be joined by their spouses. As the only difference between these
categories of migrants was the timing of their marriage, the Court considered them to be in an analogous position. The UK government argued that the less favourable treatment was justified because it needed to provide an incentive to workers and students to come to the country. The Court accepted that this was a legitimate aim but did not consider the difference in the treatment of refugees to be justified and proportional on those grounds.8

**Implications for restrictions on immigrant rights**

This means that European governments can indeed cite immigration control as a legitimate aim for restrictions on the rights of immigrants after they have entered the country. However, that government must also show that there is a reasonable and objective justification for the particular restriction in question: that there is evidence demonstrating that the restriction is necessary in order to achieve that aim; and that it is proportional, not a proverbial sledgehammer to crack a nut.

This test surely provides us with much more than arguments for lawyers to debate in court. Intellectually, it provides us with an operational yardstick which we can use to consider, on the basis of evidence, when it is legitimate for rights to be restricted and when the equality principle should prevail. In making that judgement, significantly, it is not just the migrant’s relationship with neighbours or the state which has to be considered, as in alternative approaches, nor indeed their needs or the impact of exclusion. Rather, a broad range of economic and social considerations may come into play in weighing up the necessity and proportionality of the restriction. In considering whether undocumented children should have access to education in the United States, for instance, the courts considered not only the impact on the child, but also the potential fiscal burden on the state, whether denying access would help to deter future undocumented migrants and the social costs if the individuals concerned were, as a result, unable to read and write (Bosniak 2006: 65).

European governments have hitherto not felt any great need to spell out any justification for restrictions on the rights of migrants and the evidence on which they are based. A recent study had considerable difficulty tracking down any rationale for many restrictions in place on migrants in the UK, except where, retrospectively, they had been challenged through the parliamentary process or in court (Pobjoy and Spencer 2012, Spencer and Pobjoy 2011). In legislation enacted in 2010 to strengthen protection from discrimination, the Equality Act, sweeping exemptions were allowed for restrictions on migrants’ rights without any requirement that they be objectively justified or proportional.9 The government’s use of the argument that the risk of ‘health tourism’ was sufficient justification for exclusion of many immigrants from AIDS treatment was an example of a justification later found by parliamentarians to lack a sufficient evidence base. In the face of overwhelming public health evidence on the benefits of inclusive access to AIDS treatment, that decision was reversed in 2012.

Recent court judgements challenging restrictions on immigrants’ rights are likely to lead to a stronger ‘culture of justification’ (Steyn 2000: 552) in which governments feel the need to spell out the rationale for restrictions, and the evidence on which they are based, to forestall legal challenge. Yet they may find this a challenging task because of the paucity of research evidence on the restrictions currently in place. Where is the evidence on the socio-economic and personal impact of denial of family reunion, of exclusion from recourse to public funds or restrictions on access to sections of the labour market? Do we know sufficient to be able to say authoritatively whether those restrictions are proportional to the policy aim to which they are directed? With many variables at play, those questions will never be easy to answer. Nevertheless, they provide a rich ground for new research and analysis that would enable us to argue where a line might be
drawn between ‘invidious discrimination and appropriate differentiation’ (Fredman 2001: 9, 30). Armed with evidence addressing that question, we could attempt to answer with more justification than in the past: Equality for whom, when and why.

Notes
2 I use immigrant and migrant interchangeably to refer to those who are foreign born and have not subsequently acquired the nationality or permanent residence of their country of current residence.
3 In this analysis I draw significantly on the work I have done with Jason Pobjoy at the Faculty of Law, University of Cambridge, published in Spencer and Pobjoy (2011) and Pobjoy and Spencer (2012) and acknowledge with gratitude his contribution.
4 Hode and Abvi v. UK (Appl. No. 22341/09), judgement of 6 November 2012 at [42]. If a government decides, for instance, to confer a right on certain categories of immigrant to be joined by spouses it must not discriminate between comparable categories of migrant when allocating that right.
5 Weller v. Hungary (Appl. No. 44399/05), judgement of 31 March 2009 at [27].
6 Gaygusuz v. Austria (Appl. No. 17371/90), judgement of 16 September 1996 at [42].
8 Hode and Abvi v. The United Kingdom (Appl. No. 22341/09), judgement of 6 November 2012. Bah v. The United Kingdom (Appl. No. 56328/07, 2011) also found less favourable treatment on grounds of immigration status to be discriminatory.
9 Equality Act 2010, Schedule 3 Point 4 Para 17, which allows discrimination on grounds of nationality, ethnic or national origins in relation to public services; and Schedule 23, allowing discrimination (through legal provision or ministerial decision) on the grounds of place and length of residency, for instance in access to the labour market for different categories of labour migrant and international student.

References