

Reconfiguring rights in austerity Britain: boundaries, behaviours and contestable margins

Abstract

This paper addresses policy change in Britain since 2010 across the three fields of domestic welfare, migration and asylum, and analyses the association between welfare, conditionality and control through the lens of civic stratification. Drawing on the work of Richard Munch and Mary Douglas, it moves beyond existing literature in this area to show that the more complex the classification in play, and the more severe its boundary implications, the more likely the emergence of contestable margins. Informed by Munch's 'battlefield' approach, it provides a discussion of contestable margins in each of the three policy fields and outlines the nature and source of challenges that emerge within the 'institutional battlefield'. A concluding section reflects on what is revealed by viewing welfare, migration and asylum within the same conceptual frame, identifying an emergent welfare paradigm that displays recurrent problems across all three fields.

Key words: welfare, migration, asylum, civic stratification, conditionality, contestation

Introduction

Prior to the 2010 General Election, David Cameron (2009) (then leader of the Conservative party) announced a coming 'age of austerity', whose central plank was an ambitious programme of welfare reform, framed as a moral mission of change and underpinned by a contestable notion of 'fairness' for the hardworking taxpayer (Cameron, 2012). Within this configuration, dependency was to give way to responsibility, enforced by frozen benefit rates and a heightened system of conditionality and sanctions (DWP, 2010), set to extend beyond provision for the workless to encompass support for the low paid within an integrated system of Universal Credit (UC) (DWP, 2010a)¹. This reform of the welfare system also featured in political rhetoric as both the reason and means to control migration, with domestic welfare and migration presented as 'two sides of the same coin', and subject to an attack on the 'something for nothing culture' for all groups (Cameron, 2013). Welfare provision is particularly amenable to boundaries of inclusion and exclusion, engaging as it does questions of

resource, desert and belonging, and the design and delivery of the whole system increasingly rests upon techniques of conditionality and control that extend across the three fields of domestic welfare, migration and asylum. It therefore invites an approach that examines such policies together by means of a unified frame of analysis.

Scholars recognise scope for a link between domestic welfare and the management of migration (Bommes and Geddes, 2000; Duevell and Jordan, 2002; Sainsbury, 2012), but have not so far produced a fully integrated analysis of this kind. An earlier article in this journal (Morris, 2007) argues that such a linkage can profitably engage Lockwood's (1996) concept of civic stratification – a system of inequality rooted in the differential granting or denial of rights by the state. Welfare provision has a central role in Lockwood's model as both constructing unequal treatment through the formal distinctions in play, and legitimising unequal treatment through related judgements of desert, and Morris (2007) extends the concept to address not only domestic welfare, but also migration and asylum. More recently, Shutes (JSP, 2016) offered a further refinement – though not explicitly engaging civic stratification, she shows how *categories* of inclusion and exclusion, *circumstances* of eligibility, and requirements of *conduct* differentially affect entitlement for various groups of both citizens and migrants.

The present paper goes further, to show that the more complex the classificatory system, and the more severe its boundary implications, the greater its potential to generate contestable margins. This argument contributes to existing literature by directing attention to the boundary drawing at play in the stratified system of entitlement, its underpinning rationale, and the formal contestation this has provoked. However, before outlining the sections to follow and embarking on analysis we should look to two additional theorists, whose work can complement and amplify a civic stratification approach.

Battlefields of change

Changes apparent in austerity Britain offer a distinctive instance of what Munch (2012) terms the 'liberal competition state', a model of inclusion based on the 'cult of the individual' and entailing a

shift 'from collective national welfare to individualised trans-national and national inclusion' (p1). Within this model, Munch points to the extension of opportunity beyond the nation, and a potential break-down of 'insider/outsider morality', noting that such trans-national economic integration is closely associated with the rise of global society under the auspices of human rights, and related requirements of responsible statehood. However, Munch also recognises that formalised rights of freedom and equality are prioritised over substantive social rights, such that the opening of society and economy to the outside generates fiercer competition for scarce goods on the inside (Munch, 2012:4). To capture the unfolding welfare dynamic, he identifies four 'battlefields' that combine in the production of change - the economic, symbolic (rhetorical), solidaristic, and institutional; battlefields that interact in a process fraught with contestation that can lead to varied outcomes and hence requires empirical investigation.

An important feature of Munch's model is that political rhetoric can shape the way problems are perceived and tackled, and thus becomes manifest in the nature and shape of institutional change. This argument echoes the concerns of Mary Douglas (1986), who some thirty years ago addressed the question of how institutions think, identifying institutionalised systems of classification as central to this function. So institutions think, or better stated carry meaning, through the distinctions that underpin their administrative procedures, shaping the contours of society and potentially also popular conceptions of social divisions in the process. One instance of this complex can be found in the central role assumed by welfare systems in the management of global economic change, both through enhanced 'activation' of citizens and selective entry and entitlement for migrants (Duevell and Jordan, 2002; Shutes, 2016).

Recognition of the control dimension of social rights is by no means new (see Dwyer, 2014; Bommers and Geddes, 2000; Sainsbury, 2012, Shutes, 2016), but Munch's framework draws attention to the way political rhetoric is translated into the details of policy and practice, and thus contributes to our understanding of the nature and process of welfare state change. Douglas sees such translation as raising epistemological issues concerning both the generation of a social system of knowledge, and

the hold that institutions have on processes of classification and recognition. Each of these insights has implications for the understanding and analysis of a system of civic stratification, respectively pointing to its supporting political rhetoric, and its role in shaping differential positions of entitlement and desert through a related process of boundary drawing.

According to Douglas, social judgements come ready prepared by our own institutions and require detailed scrutiny of the categories or labels they produce to stabilise the flux of social life. In this process, she argues, institutions create the very distinctions (or boundaries) to which they apply, based on some naturalising principle that can ‘confer the spark of legitimacy’ (p48). In Munch’s model this is achieved when rhetoric establishes a coherent and closed system across several fields, and hence what he terms a distinctive ‘paradigm’, but will also require a degree of ‘fit’ within a broader institutional matrix that stretches beyond the national level. In a period of radical change such compatibility is by no means guaranteed, and attention must therefore turn *both* to how far publicly circulated moral meanings offer a basis for generating and justifying the social classifications shaping civic stratification, and *also* to the contestations they generate within their institutional setting; hence the ‘institutional battlefield’ of Munch’s model.

The focus of this paper is therefore Munch’s fourth ‘battlefield’ of change, the institutional, as manifest in Britain’s reconfigured system of social rights, and the formal contestation it has provoked. The ‘institutional’ context here refers both to welfare provision itself² – as it extends across the fields of domestic entitlement, migration and asylum, and to official avenues of formal contestation, variously including parliamentary review, policy consultation, and judicial scrutiny. The present paper is divided into three main sections that respectively consider key developments in the fields of domestic welfare, migration and asylum. Applying the theoretical framework set out above to each measure, it identifies: the emergent pattern of stratified rights; its justificatory rationale; the boundaries at issue; and the contentious nature of the distinctions in play. It outlines the nature and source of challenges that emerge within the ‘institutional battlefield’ and provides a summary discussion of contestable margins for each of the three policy fields. A concluding section looks

across the issues raised, to reflect on what is revealed by viewing welfare, migration and asylum within the same conceptual frame. In each field we find a justificatory rhetoric of ‘fairness’, an attack on welfare dependency, and related assumptions of abuse, all deployed in an elaborate exercise of boundary drawing geared to the erosion of social rights, and the construction of an emergent welfare paradigm that displays recurrent problems across all three fields.

Reconfiguring domestic welfare – boundaries and behaviours

From 2010 to 2016 a rhetoric of ‘fairness’ for the hard-working taxpayer has reconfigured conceptions of solidarity and refashioned the function and design of the welfare system. The underpinning rationale is captured by the statement: ‘if you refuse to work we will not let you live off the hard work of others’ (Cameron, 2010), and the claim that a robust set of sanctions will end the ‘something for nothing culture’ (Duncan-Smith, 2013). In Douglas’s terms, the supporting epistemology sees dependency as a behavioural choice rooted in a cultural predisposition, and amenable to individualised, disciplinary correction (Adler, 2016). The boundaries generated are part of an intensified system of civic stratification built around the compulsion to work, imposed by heightened degrees of conditionality, and enforced by cuts and financial sanctions. Informed by Munch’s approach, we see a connecting chain that runs from rhetoric through solidarity to policy and programme design, to shape a stratified structure of desert that casts its net ever wider, generating boundary problems and contestable margins that then feature in the institutional battlefield.

Out of work and in-work conditionality,

In Lockwood’s (1996:539) model welfare dependency constructs a group ‘lacking in civic virtue’, which itself is stratified by differing degrees of desert, but the enhanced scope and severity of conditions and sanctions together amount to a further elaboration. The highest level of conditionality by conduct targets the unemployed claiming Job-seekers Allowance (JSA), requiring proof of work-seeking before registration, and enforced by a ‘claimant commitment’ that intensifies job-search requirements. Fearful claimants already commit to conditions they know they cannot fulfil, but

requirements are set to rise under UC to 35 hours job-search a week (Work and Pensions Committee, 2015:26). The boundaries at issue are manifest through financial sanctions for failure to comply, and the intensified regime introduced by the 2012 Welfare Reform Act operates at three levels of severity, depending on type and frequency of offence³, with sanctions lasting from a minimum of four weeks to a maximum of three years (against a prior range of one to 26 weeks). A further sub-stratum has to date operated *via* the Work Programme, described by Webster (2016) as a sanctions generating machine.⁴

The boundary drawing entailed within this stratified system has been exposed to formal scrutiny, and the most troubling finding (Oakley, 2014) for a scheme seeking behavioural change has been the high proportion of sanctioned claimants with mental health problems, a learning disability, or lacking any clear understanding of why a sanction was applied. Within the institutional battlefield, official reviews (National Audit Office, 2016; Public Accounts Committee, 2017; Work and Pensions Committee, 2015; Joint Committee on Human Rights, 2011) variously note a lack of evidence to show that sanctions work, the need for a clearer distinction between active abuse and significant effort, and the scope for as many as eight different categories among those affected - highlighting the problematic nature of the boundaries at issue. They also express concern about inconsistent and poor quality decision making, and the impact of sanctions on debt, rent arrears, homelessness, and destitution. Reviews criticise the paucity of formal monitoring of outcomes (Work and Pensions Committee, 2015:22), highlight the inadequacy of official data (NAO, 2016), and cite evidence that some are driven out of the system without work (Loopstra et al, 2015), such that the justifying rationale begins to crumble.

Nevertheless, a new stratum of civic stratification is to be established under UC as sanctions are trialled for extension *via* the construal of low wage supplements as a form of 'entrenched dependency' (DWP, 2010), pulling low-paid workers into conditionality. The boundaries of desert are thus redrawn and in Douglas's terms, this epistemological shift reveals an ambiguity in the early promise to make work pay (DWP, 2010; 2010a), as supplements to the wage are eroded.⁵ The threshold for freedom

from conditionality and intensive work search requirements is set at 35 hours per week at the national minimum wage,⁶ and the underlying rationale implies abuse in addressing a ‘perverse incentive’ for claimants to restrict their hours and pay.⁷

Together with frozen rates, cuts to in-work benefit *via* a reduced income threshold, an increased withdrawal rate against earnings, and reductions in the disregarded ‘work allowance’ mean an average yearly loss of £960 for families with children, and £2380 for single parents.⁸ These cuts met opposition in the House of Lords, where they were described as ‘morally indefensible’⁹, and a caution from the Work and Pensions Committee (2015) that they contradict the objective of making work pay. Effectively shrinking the category of desert, they were averted for Tax Credits (TCs) but with minor adjustment remain in place for UC, and though restoring the cuts would in theory increase incentives to work, conditionality and sanctions are now set to perform this function. Hence, the shifting meaning of ‘make work pay’ comes to rest on individual accountability and heightened conditionality enforceable by sanctions, rather than social responsibility or employer obligation. Against this rationale, the Work and Pensions Committee (2016) cites evidence that the problem is structural not motivational, while several organisations find a disproportionate effect on the disabled, and on families with children.¹⁰

Distinctions of desert also extend to family size, such that assumptions of behavioural choice and a rhetoric of ‘fairness’ underpin the restriction of Child Tax Credits (CTCs) to two children per family. Paid both to low-paid and workless families, CTC is now limited to ensure that recipients ‘face the same financial choices about having children as those supporting themselves solely through work’ (Summer Budget 2015 HC 264 105-16, paras 1.145). The limit has been criticised (Kennedy et al, 2017) as punishing children for the situation of a parent, and complex exemptions have been necessary for non-consensual births, multiple births, and children adopted from care. The restriction on exemptions for kinship care has been ruled unlawful, but a broader challenge to the overall policy was dismissed (*SC and Ors v SSWP* [2018] EWHC 864 (Admin)).

In sum, domestic welfare operates through conditionality aimed at incentivising work, and rests on behavioural and motivational assumptions, while deploying cuts, conditions and sanctions as a disciplinary device that extends the scope of civic stratification. This has generated boundary problems concerning the attribution of personal responsibility, the erosion of guaranteed minimums, a disproportionate impact on the vulnerable, and negative effects for children. Despite related concern raised by institutional scrutiny, the UC system operates a more far-reaching conditionality and sanctions regime (Webster, 2017), redrawing the boundaries of desert while supplying compliant labour for a 'flexible' labour market (Dean, 2012).

Capability and Caring

Stratified conditions of entitlement have also focused on the Employment Support Allowance (ESA) for the long-term sick and disabled, based on a pre-existing distinction between the Support Group, which is free from conditions, and the Work Related Activity Group (WRAG) with limited capability for work. Placed at a lower level of conditionality than the unemployed, the latter are not compelled to seek employment but are subject to work readiness requirements with sanctions for non-compliance, though the classification rests on a controversial Work Capability Assessment (WCA).¹¹ In 2012 sanctions for the WRAG were increased from 50 to 100 per cent of the basic allowance from inception¹² (Kennedy et al, 2016), and in 2017 a £30 supplement was removed from WRAG claimants. Intensifying the impact of a sanction, this reduction claims to address 'the financial incentive that could otherwise discourage claimants from taking steps back to work', described by one MP as an 'ill-founded fantasy' (Murphy and Keen, 2016).

Problematic boundaries and institutional contestation are again in evidence. The WRAG cut was resisted in the House of Lords (Murphy and Keen, 2016) on the grounds that there is no evidence of a disincentive to work effect, that it would impede efforts to find work, and also have perverse health effects. The rebellion was averted by attaching a 'financial privilege' to the bill, but the crude boundary on which the cut is based has been questioned (Murphy and Keen, 2016; Griffiths and Patterson, 2014), with the WCA discredited for poor decision making, a high success rate on appeal¹³,

and rising costs¹⁴. The classifying process has itself been challenged, and the Court of Appeal (MM and DM v SSHD [2013] EWCA Civ 1565) found under the 2010 Equality Act that assessments have unlawfully discriminated against people with mental health problems, while the Upper Tribunal (CJ and SG v SSWP [2017] UKUT 0324) ruled that a one-month time limit on the right to appeal was unlawful, particularly affecting claimants with mental health or learning disabilities.

Single parents are a further group traditionally subject to lighter conditionality, but exposed to a shifting boundary that can now require work-seeking when the youngest child is aged 3 (reduced from 5 in 2016), thus shrinking the category of carer (Dwyer, 2014). This shrinkage limits the scope for challenge to the ‘benefit cap’ – itself a stratifying device introduced in 2013 to set a limit on the total benefit a household can receive¹⁵, again claiming to restore ‘fairness’ to the taxpayer¹⁶ and justified as improving work incentives¹⁷. There are exemptions for claimants in receipt of TCs (or 16 hours work under UC), or disability related benefits, but not for the WRAG, and though intended to incentivise employment, the cap encompasses single parents who are not required to work. The carer/worker distinction also proved problematic for the non-exemption of households with full time carers, now the subject of a successful challenge.

The boundaries at issue for single parents were challenged in a Supreme Court intervention (SG and Ors v SSWP [2015] UKSC 16) by Child Poverty Action Group (CPAG): the comparator for claims to ‘fairness’ is the income of families on an average wage, discounting benefits that are included in the cap (Child Benefit (CB), CTC, and Housing Benefit (HB)); the cap detracts from payments made to parents on behalf of the child; and in the name of a work incentive is applied to single parents not required to seek employment. The challenge failed because it turned on discrimination against these parents, though judges expressed concern about non-compliance with the Convention on the Rights of the Child (CRC). However, a later case (DA and Ors v SSWP [2017] EWHC 1446) - after a lowering of the cap broke the link with average earnings - succeeded on discrimination regarding the right to family and private life under the European Convention on Human Rights (ECHR), thus drawing children into its ambit. Since the claimants were single parents with a child under two the judge

remarked (para 43, 30) that these were not the sort of households the cap was meant to cover, and nor were they single parents by choice. The rationale of the policy is further undermined by the fact that only 16 per cent of those affected must be actively seeking work.¹⁸ An earlier challenge to the cap (Hurley, Jarett and Palmer v SSWP [2015] EWHC 3382) succeeded with a claim of discrimination against disabled people under the ECHR¹⁹ through the failure to exempt households with full-time carers in receipt of Carers Allowance. The judge found the term ‘workless’ as applied to such households to be offensive (para 28).

Thus, while the disabled and single parents occupy a position of lower conditionality within the system of civic stratification, this protection has been eroded by enhanced conditions of conduct for the WRAG and by the lowered age of youngest child for work-seeking requirements. Underpinned by sanctions for both groups, this has meant an attendant shift in conceptions of desert, while the boundaries in play have generated scope for challenge in relation to the treatment of mental ill-health and the carer/worker divide. Evidence of improved employment outcomes remains weak (Work and Pensions Committee, 2015; Kennedy et al, 2016a)

Contestable margins

Drawing on Munch, Lockwood and Douglas, we see that within the institutional battlefield the principles of stratified conditionality are pre-set by the epistemological assumptions underpinning welfare policy, and challenge has been at the margins of boundary drawing within this constraint – inconsistent and unreliable decision-making, the ambiguity of ‘make work pay’, and questionable distinctions between fit/unfit, carer/worker, and adult/child. Institutional scrutiny has addressed these aspects of ideological over-reach, ostensibly based on enforcement to work but placing inappropriate pressure on those with mental ill-health, while also drawing the unfit, carers, and children into their ambit. Though most contestation has been procedural in form, as with official reviews of the sanctions regime, more far reaching challenge occurs when internationally grounded guarantees can be engaged. Discrimination in relation to mental health or the well-being of children are key examples, where the Equality Act and/or the ECHR have had most purchase. A questioning of the construal of

dependency in relation to ‘make work pay’ stands as an exception in addressing justificatory principles, but has had only limited purchase, while the more general problems of declining living standards, the collapse of minimum guarantees, punitive destitution, and the compulsion to take insecure work in a ‘flexible’ labour market go largely uncorrected. The denigrating implications of policy for the moral standing of claimants on occasion come to light, but without a broader epistemological battle about the meaning and content of a moral vision for welfare, the edifice remains largely intact.

Civic stratification and migration – thresholds, limits and exclusions

The logic documented above extends to the management of migration, and the trans-national extension of opportunity that features in Munch’s model is tightly delimited in the British case. Again, we see stratified rights deployed as a means of social control, a supporting rationale citing behaviours and abuse, and shrinking boundaries of entitlement justified by ‘fairness’ to the taxpayer (Cameron, 2013, 2014). Outside of permanent settlement, conditions of category for non-EEA migrants (outlined in Shutes, 2016) have long specified ‘no access to public funds’, normally precluding access for five years (Kennedy, 2015). However, migrant stratification starts before this, through distinctions of both category and circumstance (see Shutes, 2016) intended to forestall recourse to benefits in a filtering system on entry, in which familiar key principles apply.

Thresholds of inclusion and exclusion

In April 2011 annual limits were imposed on certain visa categories, and new maximum lengths of stay introduced for some workers. Other changes include closure of the low skilled visa category, and entry for job search by highly skilled migrants, but a faster route to permanency for individuals of high net worth (Gower, 2015). Skilled worker visas were restricted to graduate level at a salary threshold of £20,800, and a minimum salary of £35,000 was introduced for permanent settlement,²⁰ creating some boundary problems regarding shortage occupations,²¹ many nurses and teachers earning below this threshold.

Income thresholds are a form of conditionality by circumstance, limiting access for those who might become a charge on the state, and the 2012 immigration rules made this explicit in relation to a minimum income requirement (MIR) of £18,600 for non-EEA partner visas (with additions for children). The MIR reflects the amount required for maintenance ‘without becoming a burden on the taxpayer,’ and recognition of resources in addition to the applicants’ income was initially very narrow. Part of a broader objective to ‘bring a sense of fairness back to the immigration system’ (*MM v SSHD* [2013] EWHC 1900), the MIR echoes the rationale of welfare reform, and the probationary period excluding partners from public funds was extended in 2012 from two years to five. Despite this extension, the MIR set was one that 40-45 per cent of UK workers would fail (Gower, 2014:11), though the Migration Advisory Committee (MAC), in recommending possible thresholds, stated they were based on solely economic considerations and not ‘wider legal, social or moral issues’ (Gower, 2014:4). Nonetheless, the Minister responsible stated: ‘family life must not be established in the UK at the taxpayer’s expense and family migrants must be able to integrate.’²²

Following Douglas, we find an underpinning epistemology that sees contribution and integration in financial terms, and stratifies access to the national territory and the right to family life²³ by income, despite recognition of a disproportionate impact on members of low paid minorities, and on women (*MM and Ors v SSHD* [2013] para 113-4). These boundaries have been contested within the institutional battlefield, but government justification in terms of policy objectives was upheld by three judgments (from the High Court, Court of Appeal, and Supreme Court), none of which ruled that the MIR could be struck down, though the High Court noted a disproportionate impact on British citizens and refugees (*MM and Ors v SSHD* [2013] paras 13, 16). While all three courts recognised the possibility of recourse under ‘exceptional circumstances’, the UKSC (*MM and Ors* [2017] UKSC 10 para 24) notes that this must amount to more than the accommodation of behavioural choice. The court did, however, see a case for considering the prospective earnings of an incoming spouse and verifiable third-party support (paras 95-8), while more crucially, the rules were deemed unlawful in failing to address the best interests of the child (para 92). This contravened S55 of the 2009 Borders Citizenship and Immigration Act, which ends a reservation on the CRC, and the rules have therefore

been revised²⁴. They now allow consideration of other sources of income under a ten-year route to settlement when ‘exceptional circumstances’ are in play, raising further boundary questions. A concession outside the rules is available to prevent a conclusive breach of human rights, but is reportedly very rare indeed.

The MIR thus stratifies access to family life for British citizens and settled non-EEA migrants on the basis of income, and justified by ‘fairness’. It raises boundary problems in relation to the consideration of additional resources, acknowledged discriminatory effects on minorities and women, and putative distinctions between citizens and refugees, and voluntary migrants. The contested rule eventually met a barrier in relation to domestic and international guarantees on the best interests of children, and as with the benefit cap, the government and courts again had to grapple with an aspect of civic stratification whereby a child may suffer due to the circumstances of the parent.

Migrants and welfare rights

Migrant access to benefits has been more directly stratified through a pledge to address ‘the magnetic pull of Britain’s benefits system’ on migration,²⁵ for which MAC (2014) argue there is little evidence. Since non-EEA migrants do not have access to benefits until achieving permanent residence, attention turned to EEA migrants, and here we find stratified entitlement based on behavioural assumptions of abuse, designed to make Britain ‘a less attractive place for EU migrants who want to come here and try to live off the state’.²⁶ Free Movement regulations under EU law grant 3 months automatic residence, and equal treatment for *workers* with respect to Social Security (Directive 2004/38/EC), though Brexit will mean longer term changes. Meanwhile, Britain has stretched to the maximum permitted constraints on EEA workers benefit rights.

Stratifying measures from 2014 onwards (Kennedy, 2015) include a strengthening of the Habitual Residence Test to require 3 months residence for eligibility for JSA, and a variety of further constraints. A six-month time limit on JSA claims by new jobseekers was later reduced to 3 months, and they have been excluded from eligibility for HB, CB, and CTCs. EEA workers who become

unemployed are limited to six months JSA, and thereafter may lose worker status, which could also rebound on their path to permanent residence. A minimum earnings threshold now guides assessments of worker status, affecting potential access to other benefits and especially likely to penalise single parents (O'Brien, 2015). In March 2015 regulations were passed by Parliament to exclude EEA jobseekers from Universal Credit.

The boundaries at issue are undermined by official sources that show EEA nationals do not disproportionately claim benefits (Keen and Turner, 2016), while the Social Security Advisory Committee notes the absence of evidence showing benefits as a reason for migration (Kennedy, 2015a:26). Furthermore, the effect of migrant presence on jobs and wages is calculated to be extremely slight (Devlin et al, 2014). Nevertheless, British conditionality goes beyond that established under EU case law, (Case C-292/89 [1997] ECR I-00745) which requires evidence of continuing job-search and a genuine chance of being engaged, in contrast to DWP guidance of 'compelling evidence of a genuine prospect' of work²⁷. In contesting this requirement, CPAG²⁸ have compiled arguments against the lawfulness of the test, and the Upper Tribunal (MB and Ors v SSWP [2016] UKUT, 372 AAC para 57) has cautioned that 'compelling evidence may...all too easily result in raising the bar above the level...found to be required' for a real prospect within a reasonable period. So here we see institutional challenge at the margins without a full assault on the whittling away of jobseeker rights.

The restrictions represent a step back from the 'opening up of society to the outside' (Munch, 2012), drawing boundaries that constrain any emergent post-national regime under EU law, and effecting a creeping withdrawal from minimum guarantees. We see stratifying moves towards a conception of social security as an individualised rather than mutual form of insurance, and an increasingly restrictive definition of worker status. The boundary drawing entailed amounts to an extreme instance of conditionality, bordering on exclusion, and eroding generalised reciprocity while taking labour.

A further extension of civic stratification arises from an ECJ judgment (Zambrano v ONEm C-34/09) that created a right to work and reside for a non-EEA parent (a Zambrano carer), as required to give meaning to the status of minor age citizens of a member state in their state of nationality. This ruling

triggered the possibility of a benefit claim, but in November 2012 Zambrano carers were recognised in UK domestic law with the purpose of excluding them from income-based benefits. This boundary of exclusion was challenged but upheld in *Sanneh and Ors v SSWP* [2015] EWCA Civ 49 and *HC v SSWP* [2017] UKSC 73 by virtue of support available under S17 of the 1989 Children Act, provided at minimal levels by local authorities (LA's), and described as a skeletal right for a group constructed as tolerated aliens (O'Brien, 2016). The DWP impact assessment²⁹ cites a familiar rationale – fairness to the taxpayer, a reduced incentive to come and live off the state, and the allocation of public funds to those having the greatest connection with the UK. It is also argued the restriction will ensure that non-EEA migrants wishing to have children must first secure sufficient funds (Sanneh, para 96), while further justification (para 97) states that the message is directed not just at Zambrano carers but a wider audience, and thus has a broader rhetorical function.

The ruling not only affects the responsible parent (who may themselves be a taxpayer), but permits a lesser stratum of entitlement for some British children, who are held below mainstream subsistence levels. This boundary discriminates against Zambrano children in relation to other UK nationals, and though formally contested has been deemed justifiable in policy terms.

Contestable Margins

In sum, we again see stratified rights, boundary problems and formal contestation, but a holding back from challenge to underpinning assumptions. In the MIR case, the institutional battle is played out in the arena of the courts, but with only marginal success, and outside of limiting factors the UKSC endorses a cost-benefit approach to family life. It allows a limited conception of welfare that draws stratified lines of exclusion against overseas partners of both British citizens and non-EEA residents, justified by conceptions of fairness and responsibility. The UKSC judgment raises few questions as to whose interests immigration policy should serve, and contrasts with the family unification rights of those exercising free movement under EU law, to which the MIR does not apply. The restrictions on EEA benefit claims represent a further elaboration of conditionality that runs *against* the spirit of EU law, and represent an excessive form of individualisation that could bode ill for future domestic

welfare provision, while also undermining equal treatment guarantees - soon to be disbanded under Brexit. The Zambrano ruling echoes issues familiar from challenges to the benefit cap, though children are not placed at the centre of the case as benefits are paid on their behalf to their carers. In this respect, the boundary in play does not accord children themselves equal treatment, and again punishes a child for the circumstances of their parent(s). While each of these examples prompted recourse to international standards in the scrutiny of state actions, as highlighted in Munch's model, institutional challenge has had only marginal success, repeatedly meeting the force of national constraint over access to public funds and sovereign control.

Stratifying asylum – desert, deterrence and destitution

Asylum seekers are a group seemingly outside of conditionality, exercising an absolute right to seek asylum and not required (or permitted) to work before at best a 12 month wait. However, they are more than ever subject to stratified boundaries, resource constraint, and contested exclusions aimed at behavioural change, as Britain meets the refugee crisis in Europe with a strategy of isolationism, resettlement as opposed to spontaneous arrival (May, 2015), and safe return reviews for recognised refugees³⁰.

Good and bad asylum seekers

Public reaction to the death of Alan Kurdi³¹ prompted an expansion of the Syrian Vulnerable Persons Resettlement scheme and an additional commitment to resettle 3000 children and families from the region, initially under Humanitarian Protection but from March 2017 with full recognition on arrival. A reluctant amendment to the 2016 Immigration Act also committed the government to take an unspecified number of unaccompanied minors from within Europe - currently limited to 480,³² and dogged by fears of a 'pull factor' (McGuinness, 2017:16). A small number of minors were also resettled under accelerated Dublin principles, but the scheme has now closed.³³

A stratified distinction has emerged between those selected for resettlement and those claiming asylum on arrival 'after abusing the system' (May, 2015), whereby the latter 'false' claims are argued

to deprive those in genuine need. The supporting rationale rests on a discourse of abuse, and boundaries of desert are drawn between the vulnerable targets of resettlement (amenable to control), and ‘the wealthiest, luckiest and strongest’ who make spontaneous (uncontrolled) claims.³⁴ A distinction of worth is thus established by mode of arrival, and here is an epistemology that in Douglas’s terms creates its own reality. Visa regimes and carrier sanctions make arrival by legal means all but impossible, rendering most asylum seekers ‘abusers’, in a distinction undermined by poor decision making and success on appeal (All Party Parliamentary Group (APPG), 2017:8). Boundary drawing by mode of arrival filters through to a stratified reception system, subject to critical comment from the APPG who report that resettled refugees are better supported in accessing mainstream benefits and the labour market, while ‘spontaneous’ arrivals suffer a deficit.

Asylum support system

Stratified standards of maintenance have provoked a further boundary issue, manifest in judicial deliberation over levels of support for asylum seekers (Refugee Action v SSHD [2014] EWHC 1033). In 1999 the asylum support rate was set at 70% of Income Support (IS), and increased in line with this until 2008 when the link was broken (para 17). As of 2011, the rate was frozen at 51 per cent of IS for single adults but 81 per cent for children, and in 2014 was subject to legal challenge by Refugee Action, presenting evidence that 40 per cent could not afford enough food and 88 per cent had no money for clothes. The Home Office (HO) defended the need to demonstrate ‘fairness’ to the taxpayer (para 26), and claimed erroneously that rates had risen 11.5 per cent over the preceding five years. Identifying this error, the judge ruled there had been a failure to gather sufficient information for a rational judgement. However, the HO recalculation justified the existing rate, defended by the view that an increase could encourage spurious asylum claims, clogging up the system and impeding support for those with a genuine fear of persecution.³⁵

The previous year a Parliamentary enquiry³⁶ addressed the same boundary issues, expressing concern that rates were too low and should not fall below 70 per cent of IS, while the Refugee Action judgment stated that a reduction from what was regarded as a minimum requires careful investigation

(para 149). The enquiry also noted the lack of evidence that a higher rate would attract greater numbers and found the assumption that deteriorating conditions would make people leave to be dangerously flawed. It noted that current levels of support for children did not meet their essential living needs, and indeed higher rates had earlier been endorsed by the HO as protecting the best interests of the child (*Refugee Action v SSHD*, para 27). However, adjustments in 2015 further reduced support by standardising weekly rates at £36.95 per person, thus removing preferential rates for children and single parents³⁷. A follow-up challenge (*Ghulam and Ors v SSHD* [2016] EWHC 2639) failed, with no permission to appeal.

As with the benefit cap there were boundary concerns about eroding children's entitlement on the basis of parental status, and a possible breach of child welfare guarantees under S55 of 2009 Act. However, the judge (paras 241-2) held that what was required was merely the provision of a minimum dignified standard of living, and that a difference between asylum support and IS rates was justified by the legitimate purpose of discouraging economic migration and protecting limited resources against spending in excess of obligations.

Failed asylum seekers and undocumented migrants

Measures in the 2016 Immigration Act designed to further stratify support for failed asylum seekers also reveal behavioural assumptions concerning their motivations, a rationale of deterrence, and contested boundary drawing. In the pre-existing system, S94(5) of the 1999 Asylum and Immigration Act allowed failed asylum seekers with children to continue in receipt of support. This is now to be curtailed, while provision for childless failed asylum seekers and other categories of migrant under S4 of the 1999 Act has been repealed. The justification is that failed asylum seekers are illegal migrants and should no longer receive preferential treatment, which 'sends entirely the wrong message' and 'undermines public confidence' (Home Office, 2015:3). A government factsheet on the measures³⁸ states that 'people who do not need our help and who refuse to return home are here illegally', while those who can and should leave cannot expect to be supported by the taxpayer in making themselves 'intentionally destitute' by refusal to depart. There is particular emphasis (Home Office, 2015) that

S55 of the 2009 Act and local authority (LA) obligations do not require support where a family decides to remain unlawfully, so destitution emerges as the lowest rung on the civic stratification ladder.

However, the scope of S95 support for asylum seekers is to be expanded where there are further submissions on protection grounds or a Judicial Review (JR) outstanding (Gower et al, 2015, S6), and a new S95A will support failed asylum seekers who are destitute and can show a genuine obstacle to leaving. This requirement is difficult to meet, and the onus of proof has shifted from the HO to the claimant, with no right of appeal (Home Office, 2015). Charges that the outcome could be destitution and the creation of a new client group for local authority (LA) support (Harvey and Harper, 2017) led to a late amendment diverting recourse to S17 through a scheme governed by HO regulations under 10A schedule 3 of the 2002 Nationality Immigration and Asylum Act. Incorporating conditionality by conduct, this applies to families not eligible for S95A but who are co-operating with departure, or have an ongoing non-asylum application or appeal, or where necessary for the welfare of a child. It also encompasses migrant families excluded from mainstream support (eg. Zambrano carers), while 10B caters for ‘adult’ migrant care leavers with an outstanding non-asylum application or appeal, or appeal rights exhausted but judged to require support. Other care leavers without status are also denied the LA route to care leaving provision, which is intended for those ‘with a long-term future in the UK’ (Home Office, 2016).

These stratifying measures attempt to draw a clearer line between asylum seekers and failed asylum seekers, while blurring the boundary between the latter and those unlawfully present, and seeking to delimit the scope for their support. HO consultation on these measures has been the principle site of institutional contestation, and one response queried whether it would be acceptable to the HO for refused asylum families to be left destitute and visibly homeless on the streets³⁹, arguing that central and local government cannot simply be absolved of their duty of care to vulnerable children. LA’s remain obliged under S17 to assess any child in their area who may be in need, and in recognition of this LA support has been allowed while eligibility for HO support is determined. In fact, the final

version of the legislation leaves LA human rights duties intact as a residual safeguard (Harvey and Harper, 2017:383)

The consultation process generated further criticism, with the Children's Commissioner⁴⁰ arguing the changes rely on behavioural assumptions that the government's own Impact Assessment recognises are hard to evidence, putting children at risk in spurious expectation of change from their parents. This is held to conflict with both the CRC and S55 of 2009 Act, while several organisations note that the HO pilot of a similar measure failed to show that cutting support would increase departures⁴¹. The lack of appeal is contentious, since refusals involve boundary judgements not just about destitution but fitness to travel, taking reasonable steps to leave, and barriers to leaving – viewed as 'straightforward matters of fact' by the HO⁴².

Restrictions on care leaving raise a boundary problem over stratified support for minors, and when state responsibility should come to an end, provoking argument that it undermines protections in the Children Act for children leaving care and could contravene the CRC. This is seen as inconsistent with the aim that care leavers should enter life with same life chances as others⁴³. The HO position, however, is that care leaver support is not an appropriate vehicle for maintenance pending the departure of 'adult migrants' with no lawful basis to remain (Home Office, 2016). An amendment at third reading made an exception to cover victims of trafficking⁴⁴, but the overall outcome is a stratified system of care leaving aimed at correcting perceptions that Britain provides generous long-term support for all who arrive as children (Home Office, 2016).

Contestable margins

Asylum policy is characterised by a system of isolationism and exclusion that distinguishes between resettled and spontaneous arrivals, who then experience a two-tier system of reception. For the latter group, a stratified and shrinking system of support reveals a behavioural orientation with the stated aims of discouraging arrivals, promoting a culture of compliance, encouraging voluntary return, and correcting perceptions that are assumed to attract minor age asylum seekers to Britain. In line with

Munch's comments on responsible statehood, formal contestation has drawn upon a range of international instruments (eg. the CRC, the ECHR, the Charter of Fundamental Rights) as well as domestic law giving expression to international standards⁴⁵, but to little practical effect. In fact, beyond recognition of an objective minimum standard, legal judgments stress that it is not for the courts to determine the level of asylum support (Ghulam, paras 36-7; Refugee Action, para 3).

Boundary problems have turned on the appropriate relationship between minimum standards endorsed in domestic welfare and those required to ensure dignified standards for asylum seekers. A similar exercise has weighed the degree of support required for unaccompanied minors who enter adulthood with appeal rights exhausted against domestic guarantees for minors leaving care. While institutional contestation has produced some modification at the margins, unsubstantiated assumptions of abuse pervade all measures and immigration control has assumed priority over relief from destitution and the protection of children.

Conclusion - The emergent welfare paradigm

The conditional and disciplinary drive pervading welfare provision in austerity Britain is not of course new but since the change of government in 2010 has been sufficiently extended to amount to what Munch would term an emergent paradigm. He applies this notion when a consistent vocabulary of ideas, concepts and remedies spills over from one policy area to another, reconfiguring core principles of welfare and inclusion in the process. In the British case, an attack on the 'something for nothing culture', driven by a unifying rhetoric of 'fairness', and set against assumptions of abuse, extends from domestic welfare to migration and asylum, to fashion a contraction of social rights across all three fields. Analysis of the related policy measures has here adopted a civic stratification approach, paying particular attention to the boundary drawing entailed in this increasingly restrictive dynamic, and informed by Munch's attention to justificatory rhetoric, and Douglas's reflections on how institutions think. The argument is further advanced by Munch's battlefield approach, which focuses on the likelihood of struggle around attempts to reconfigure basic tenets of welfare policy. Bringing together these theoretical insights, this article has traced the stratifying devices in play for each field,

the justificatory rhetoric supporting their deployment, its underpinning assumptions, and the boundary problems and contestable margins that emerge within the ‘institutional battlefield’.

Viewing domestic entitlement, migration and asylum within the same frame, we can highlight the strategies and rationale apparent across all three fields. Each of the measures discussed deploys civic stratification to structure entitlement by shrinking categories of desert and increased conditionality, justified by notions of dependency as a behavioural choice, and carrying associated charges of abuse - variously amenable to discipline, deterrence, or exclusion. In the terms of Munch’s model (Munch, 2012:6), we find a welfare approach based on individual achievement and responsibility, and a rhetorical shift in solidarity that prioritises protection of the hardworking taxpayer while eroding minimum guarantees. But beyond this picture, as Munch’s model foresees, key changes have been subject to institutional contestation *via* parliamentary review, policy consultation, and judicial scrutiny, drawing on conceptions of responsible statehood and international human rights. Each of the measures discussed rests on problematic boundary drawing that has in most cases led to formal questioning and challenge within the institutional battlefield, but despite some notable successes this has yielded only marginal adjustment.

However, a focus on the institutional battlefield has also meant that in viewing the three fields together, we are able to identify not only common strategies and rhetoric, but recurrent boundary problems and points of challenge. Against almost every measure there are charges of inadequate evidence, inconsistent and/or poor decision making, the creation of destitution in the name of control, discriminatory effects on vulnerable groups, and/or negative impacts on children. Charges of discrimination, and a failure to prioritise the welfare of children have had the most purchase in contesting problematic boundary drawing and challenging its impact at the margins, in part because related protections are underpinned by international guarantees. Given these protections and other institutional sources of contestation, the supporting rationale is never quite securely established. However, much of the institutional battle has been fought on procedural issues that amend aspects of design and implementation, but leave the broader rationale and objectives largely intact. Indeed, a

number of legal judgments exercise restraint in ruling on more fundamental challenges to government policy, and rational aims linked to legitimate objectives provide an official last line of defence. A more fundamental assault on the problems documented here must therefore move beyond the confines of the institutional battlefield and look to the rhetorical battlefield in which the justificatory rationale is generated and sustained.

Notes

¹ Combining six working age benefits (DWP, 2010)

² Here meaning means-tested working age benefits

³ <https://www.gov.uk/government/publications/jobseekers-allowance-overview-of-sanctions-rules>

⁴ Now the Youth Obligation Scheme and the Work and Health Programme.

⁵ <http://www.cpag.org.uk/sites/default/files/Broken%20promises%20FINAL%20for%20website.pdf>

⁶ Restricted availability is permitted for lone parents, carers and ill health.

⁷ <https://publications.parliament.uk/pa/cm201617/cmselect/cmworpen/585/585.pdf>

⁸ <http://www.cpag.org.uk/sites/default/files/Broken%20promises%20FINAL%20for%20website.pdf>

⁹ <https://www.theguardian.com/politics/blog/live/2015/oct/26/tax-credit-cuts-debate-hancock-tells-peers-not-to-trigger-constitutional-crisis-politics-live?page=with:block-562e55a7e4b05ff99d1a1568>

¹⁰ <https://www.jrf.org.uk/report/keeping-more-what-you-earn>

<http://www.cpag.org.uk/sites/default/files/Broken%20promises%20FINAL%20for%20website.pdf>

¹¹ Revised under the Coalition but subject to controversy

¹² <http://www.cpag.org.uk/content/esa-and-sanctions-%E2%80%93-more-hard-times-ahead>

¹³ 54% of fit for work appeals were upheld July to September, 2014

<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7182>

¹⁴ <https://www.nao.org.uk/wp-content/uploads/2016/01/Contracted-out-health-and-disability-assessments.pdf>

¹⁵ £26,000 in 2012, lowered in 2016 to £23,000 for London and £20,00 elsewhere

¹⁶ <https://www.gov.uk/government/news/benefit-cap-thousands-move-into-work-or-off-housing-benefit>

¹⁷ A contested claim. See: <https://www.theguardian.com/politics/2013/may/09/ian-duncan-smith-benefits-cap-statistics>

¹⁸ <https://z2k.org/2017/05/88000-households-hit-by-lower-benefit-cap/>

¹⁹ Engaging article 1 protocol 1, and article 8

²⁰ With exceptions for PhD level jobs, and shortage occupations

²¹ <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7264>

²² <https://www.freemovement.org.uk/outcome-of-mm-minimum-income-case-in-court-of-appeal/>

²³ Article 8 of the ECHR

²⁴ <https://www.freemovement.org.uk/home-office-makes-changes-appendix-fm-minimum-income-rule-following-mm-case/>

²⁵ <http://www.telegraph.co.uk/news/uknews/immigration/10995875/David-Cameron-Were-building-an-immigration-system-that-puts-Britain-first.html>

²⁶ <http://www.telegraph.co.uk/news/uknews/immigration/10524285/We-will-block-benefits-to-new-EU-migrants-says-Cameron.html>

²⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/626639/v2am37.pdf

²⁸ http://www.cpag.org.uk/sites/default/files/CPAG-Kapow-GPOW-APR2015_0.pdf

²⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220217/eia-zambrano-right-to-reside-and-work.pdf

³⁰ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/597990/Refugee-Leave-v4.pdf

³¹ <https://www.theguardian.com/world/2015/sep/02/shocking-image-of-drowned-syrian-boy-shows-tragic-plight-of-refugees>

³² <https://www.pressreader.com/uk/the-guardian/20171024/281827169011133>

³³ <https://www.theguardian.com/world/2017/feb/08/dubs-scheme-lone-child-refugees-uk-closed-down>

³⁴ For 2012-16 the latter outnumbered the former by 5:1 (APPG, 2017)

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- ³⁵ <http://www.independent.co.uk/news/uk/politics/refugee-crisis-tim-farron-accuses-government-of-cutting-financial-support-for-asylum-seekers-a6706612.html>
- ³⁶ https://www.childrenssociety.org.uk/sites/default/files/tcs/asylum_support_inquiry_report_final.pdf
- ³⁷ http://www.legislation.gov.uk/uksi/2015/1501/pdfs/uksiem_20151501_en.pdf
- ³⁸ [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537248/Immigration Act - Part 5 - Support for Certain Categories of migrants.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537248/Immigration_Act_-_Part_5_-_Support_for_Certain_Categories_of_migrants.pdf)
- ³⁹ <http://www.nrpfnetwork.org.uk/Documents/Reforming-asylum-support-consultation-response.pdf>
- ⁴⁰ <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/06/UK-Childrens-Commissioners-Response.pdf>
- ⁴¹ https://www.childrenssociety.org.uk/sites/default/files/RCC_Schedule%203WelfareofUnaccompaniedYoungPeople_HoCCS_Nov15_FINAL.pdf
- ⁴² Recently in error over returns to Afghanistan
- ⁴³ <https://www.childrenssociety.org.uk/what-we-do/resources-and-publications/immigration-bill-commons-committee-stage-refugee-childrens>
- ⁴⁴ <http://www.nrpfnetwork.org.uk/News/Pages/local-authority-support-update.aspx>
- ⁴⁵ S55 of 2009, and the PSED

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