



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

EU Citizenship and the Edges of Europe

Citation for published version:

Shaw, J 2012 'EU Citizenship and the Edges of Europe' CITSEE Working Paper Series, no. 19, vol. 2012, CITSEE. <http://www.law.ed.ac.uk/file_download/series/372_eucitizenshipandtheedgesofeuropa.pdf>

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

Publisher Rights Statement:

© Shaw, J. (2012). EU Citizenship and the Edges of Europe. (CITSEE Working Paper Series; Vol. 2012, No. 19). CITSEE.

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.





CITSEE WORKING PAPER SERIES



EU citizenship and the edges of Europe

Jo Shaw

Working Paper 2012/19



European Research Council



University of Edinburgh, School of Law
The Europeanisation of Citizenship in the Successor States of the Former Yugoslavia
(CITSEE)

EU citizenship and the edges of Europe
Jo Shaw

The Europeanisation of Citizenship in the Successor States of the Former Yugoslavia
(CITSEE)
CITSEE Working Paper Series 2012/19
Edinburgh, Scotland, UK
ISSN 2046-4096

© 2012 Jo Shaw

This text may be downloaded only for personal research purposes.
Additional reproduction for other purposes, whether in hard copies or electronically,
requires the consent of the authors.

Requests should be addressed to citsee@ed.ac.uk

The view expressed in this publication cannot in any circumstances be regarded as
the official position of the European Union.

Published in the United Kingdom
The University of Edinburgh
School of Law
Old College, South Bridge
Edinburgh, EH8 2QL
Scotland, UK

www.law.ed.ac.uk/citsee/workingpapers

This work was supported by funding from the CITSEE project (The Europeanisation
of Citizenship in the Successor States of the Former Yugoslavia), based at the
University of Edinburgh, UK. CITSEE is funded by the European Research Council
under the European Union's Seventh Framework Programme, ERC Grant no. 230239,
and the support of the ERC is acknowledged with thanks.

For information about the Project please visit the project website at
<http://law.ed.ac.uk/citsee>

EU citizenship and the edges of Europe

Jo Shaw, University of Edinburgh¹

Abstract

This paper considers the prospects for EU citizenship in the current EU economic and political crisis. It contrasts the neglect of the concept of EU citizenship on the part of Member States, including their willingness to trample on many aspects of the free movement principle, with the interest in EU citizenship shown by substate political actors in Scotland, where an independence referendum is under consideration.

Keywords:

European Union, citizenship, free movement, crisis

I

The European Union is being pushed close to the edge. We live, it would seem, in times in crisis – in both economic and political terms. For perhaps the first time in its 50-year existence, the European integration process appears to many to be as much part of the problem as it is likely to be part of the solution. What are the implications of these crises and processes for EU citizenship? How is EU citizenship faring as the ‘edges’ of Europe (and its core) become ever more contested? How robust is EU citizenship? What resources does it provide for developing arguments to protect or develop citizens’ rights and democratic processes in a crisis context? Does the concept help us to better understand how the relationship between economic and political conjunctures plays out at the level of the EU, its institutions and its Member States? In this brief note, I will sketch some preliminary thoughts on these important questions.

Clearly a simple mantra of ‘more EU citizenship’, just like a simple mantra of ‘more Europe’, is not going to solve these problems alone. The crisis in the Eurozone appears to have exhausted the limits of solidarity between the EU Member States, even though political leaders continue to pay lip service to the benefits of and need for greater political union. None the less, unless we are to give up entirely on the

¹ Jo Shaw, Salvesen Chair of European Institutions, University of Edinburgh (jo.shaw@ed.ac.uk). This work was supported by funding from the CITSEE project (The Europeanisation of Citizenship in the Successor States of the Former Yugoslavia), based at the University of Edinburgh, UK. CITSEE is funded by the European Research Council under the European Union's Seventh Framework Programme, ERC Grant no. 230239, and the support of the ERC is acknowledged with thanks. I would also like to thank Igor Štiks for comments on this paper. A version of this paper will appear in Claudio Franzius/Franz C. Mayer/Jürgen Neyer (eds.), *Grenzen der europäischen Integration? Limits of European integration?*, Baden-Baden: Nomos 2012 (in press).

processes and promises of European integration in terms of its capacity to deliver important public goods, such as geopolitical stability and – hitherto – considerable prosperity, it is still important to look closely at the existing and possible future elements of the integration process, including the legal framework of EU citizenship to see how they interact with challenges such as the promotion of democracy in times of austerity and political crisis. Such elements might help to improve solidarity, democratic accountability and legitimacy at the EU level, without undermining the political processes at the national level that continue to be important in sustaining the consent of the population at large for budget cuts and austerity measures in the face of hostile world markets.

Although the crisis in the Eurozone dominates the headlines, the problems faced by the EU and its Member States which have effects in relation to citizenship and the limits of EU citizenship in particular are many and various (enlargement, Schengen, etc.). The prospects for future EU enlargement in south east Europe – beyond Croatia which is very close to expected accession in 2013 – have largely been kicked into the long grass, with consequent negative impacts upon the politics of the Western Balkan states where incentives for political elites to pursue further democratisation, the consolidation of reforms of judicial and state institutions, and the completion of painful and controversial transitions towards balanced, open and sustainable economies appear to have disappeared altogether. For Turkey – with a growth rate averaging above 5% for the last ten years – EU enlargement appears increasingly to be an irrelevance, leaving it largely impervious to the negativity regarding its prospects for membership, which continues to emanate from many Member State governments. It therefore seems increasingly unlikely that EU citizenship will see a territorial enlargement in the near future, although its effects already resonate in significant ways outside the EU's borders, e.g. in the interface with visa liberalisation, and through the 'halfway house' status enjoyed under the Association Agreement by Turkish citizens.

States such as Poland, which has a nominal obligation to join the Eurozone when the conditions are right, doubtless view the arrival of that date with fear and loathing, given the state of the weaker economies in that zone, and the better data being returned by those outside. Even in core areas of EU activity, such as the free movement of persons, the Schengen zone appears to be on the point of unravelling with greater recourse to the restoration of national frontier controls and less (European) parliamentary scrutiny proposed by ministers.

Both politically and economically, many of the EU Member States find themselves in increasing difficulties. Italy, Spain and Portugal all find themselves in significant financial difficulties because of the increasing impossibility, especially for the latter two states, of borrowing at a reasonable cost on the international financial markets. Ireland, like Greece and Portugal, has needed a Eurozone-led international bailout in order to avoid a sovereign default, and it has struggled to find its way out of recession. While its citizens and residents suffer desperately from five consecutive years of recession, in the political sphere, Greece has seen polarisation and

widespread demands for a new political order² as its continuing membership of the Eurozone and even of the EU itself has continued to be called into question. Meanwhile we have seen significant votes for parties of both the far right and the far left, including those whose democratic credentials are highly questionable, in its first inconclusive general election in 2012. The country is stuck in a paradox whereby the vast majority of voters wish to avoid exiting the euro, but equally are reluctant to vote for the parties that have led the moves towards the bailout and the attendant austerity measures. The far right neo-fascist Golden Dawn party, elected to parliament for the first time in 2012, has spearheaded attacks – both verbal and physical – on immigrant communities, scapegoating them for some of Greece's economic difficulties. Increasingly visible destitution in Greece raises the question of willingness of European states to address in a meaningful way the challenges of intra-continental solidarity.

This is not an isolated incident. In many Member States, the rise of far right political parties has led to an increase in hostility towards immigrants, putting broader efforts to promote integration and tolerance into reverse. In Hungary, political convulsions of a rather different ilk, which some say amount to a type of constitutional coup involving highly partisan amendments to the constitution and the republican structure of the state, have combined with budgetary problems related to its excessive deficit, to give rise to a toxic political mix. Hungary also has its own looming far right forces in the form of Jobbik, whose members have been responsible for serious attacks upon minority groups, especially the Roma. In France, the far right Front National candidate scored a significant success in the first round of the presidential elections in 2012. One of the effects of these electoral successes has been that mainstream parties of the left and the right have adopted anti-immigration political rhetoric as a means of staving off the electoral challenge of the far right, often with significant impacts upon immigrant communities who have seen a considerable decrease in their levels of security, for example, through ever more restrictive settlement or family migration policies.

Many commentators regard the steps taken to manage the financial crisis, involving the replacement of elected political leaders in a number of states with so-called 'technocrats' who meet the approval of the international financial community, as highly problematic from a democratic point of view, and as being one of the factors contributing to a polarisation of views at the national level. The banking and financial crises since 2008, and the contagion that has threatened the continued existence of the Eurozone, have resulted, in many people's eyes, in the undermining of democratic processes within states, and a reinforcement of a negative tendency for key decisions to be taken behind closed doors without any element of real

² For a cogent exposition of the arguments that Greece's political system is 'broken', see P. Eleftheriadis, 'Only a new political system can rescue Greece', FT.com, 27 May 2012, <http://www.ft.com/cms/s/0/a02f585a-a5bd-11e1-b77a-00144feabdc0.html#axzz1xnhIDzaN>.

accountability either to national parliaments or to electorates (whether through European or national level elections).

Moreover, suggestions from German politicians that one of the ways out of the crisis must be deepened political union beg as many questions as they answer, as such union would almost certainly involve the types of treaty changes that the Federal Constitutional Court is unlikely to find acceptable when they are tested against the enduring foundation stones of the German polity, which the majority of the members of that court judge to be enshrined within the Basic Law. From that point of view, it would seem that politicians find themselves between a rock and a hard place. In any event, it is not at all clear what sort of 'union' is envisaged in this context, and there is no evidence that it will be rooted in concepts of solidarity which recognise the diversity of political and economic systems in Europe, as opposed to being a 'protective' union which will reinforce the hegemony of what is seen as the 'German' approach to austerity.

In the UK, a different type of political crisis is coming to the fore, as the Scottish National Party government in Scotland moves closer to organising a referendum in Scotland on negotiating independence from the rest of the UK. In and of itself, this would be an exercise of democratic sovereignty by the Scottish referendum electorate, but it is also a move which might run counter to the views of the majority of UK citizens (who cannot vote in such a referendum) or even of those persons – UK citizens or otherwise – who were actually born in Scotland. Scottish independence is a significant political debate which could have implications for other Member States where minority 'nations' are watching carefully the successes and failures of the Scottish independence movement and the position taken *vis-à-vis* the question of Scotland's (and the rest of the UK's) membership of the EU after putative independence (both continued and as a new member). What are the implications of such a move for (EU) citizenship?

II

A small contribution to the much bigger enterprise of addressing democratic legitimacy in the EU and its Member States involves a close look at the pressures to which EU citizenship is being subjected under the current conditions of 'crisis'. Contributions along such lines by EU lawyers would probably start with the mantra that EU citizenship is 'destined to be the fundamental status of the nationals of the Member States', which was first raised in *Grzelczyk*,³ assuming this to be a building block onto which one can then graft a set of comments about the extent to which this aspiration has so far been achieved. This linear approach is not helpful. In times of austerity and times of crisis, it is just as likely that EU citizenship – which curtails Member States' sovereignty in fields such as immigration and welfare by enforcing

³ Case C-184/99 *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-La-Neuve* [2001] ECR-I 6193 at para. 31.

the free movement and equal treatment principles, and which now contains important political elements in the shape of the electoral rights instituted by the Treaty of Maastricht for EU citizens resident in other Member States – will be seen as threatening the majority of citizens of the Member States who are not actively using free movement rights (or do not perceive themselves as doing so) and instead as empowering a minority at the expense of the majority. EU citizenship is not widely seen as some sort of (potential) universal good, but as something for the minority. This sets up a potentially dangerous polarisation between ‘the statics’ and ‘the mobiles’. In that respect, EU citizenship could be seen as a possible and indeed perhaps likely victim of the crisis, rather than as a means for confronting the economic and political problems we face, whether by promoting labour mobility and solidarity across borders or by highlighting the importance of continued efforts to promote democratisation at every level of the multi-level euro-polity. We should therefore proceed cautiously and without preconceptions of its underlying value to evaluate what is happening to EU citizenship at the present time, and in that context we need to take careful account of the limits of EU citizenship, as much as the potentiality that it holds.

The limits of EU citizenship have been much discussed. Niamh Nic Shuibhne has provided a very useful conceptual scheme primarily from a legal perspective, distinguishing between the *normative*, the *inner* and the *outer* limits of EU citizenship.⁴ To this one might add a concept of *symbolic* limits – the fact that even those exercising rights associated with the European integration process (e.g. consumer rights enhanced as a result of a supranational harmonisation) typically do not see themselves as acting in the guise of EU citizens. The question of *normative* limits addresses the capacity of the EU to ‘carry’ a concept of citizenship given that it is not a state. But as it is an entity with certain state-like, or near-state, characteristics such as its legal system and constitutional structure, we should consequently regard it, in those terms, as being ‘citizenship-capable’, although that begs the question of what sort of citizenship EU citizenship should be. If the citizens of a polity are those with membership rights and obligations, living under conditions regulated by law, then EU citizenship – as a status that is complementary to (and legally derived from) the citizenship of the Member States – is indeed a form of citizenship, albeit one which is quite different in character to national citizenship. EU citizenship is thus *normatively* limited to precisely the extent that EU integration is also *normatively* limited, by reference to the terms of the present constitutional settlement.

Of course, we also know that because of the activism of the Court of Justice EU citizenship has in recent years become something of a ‘leader’ or driver of integration processes, e.g. in areas where case law has resulted in significant protections against deportation for the third country national family members of EU

⁴ N. Nic Shuibhne, ‘The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights?’, in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law*, Hart Publishing, Oxford, 167.

citizens. But without a dynamic of further integration, EU citizenship must normally 'match' rather than determine the scope and limits of political integration. Although the Court's activism has developed the concept of EU citizenship in some interesting ways since the late 1990s (such as the case of *Martínez Sala*, which first established the space within which the concept of citizenship could evolve independently of existing constraints of the free movement rights established by the Treaties and subsequent legislation⁵) in practice the Court cannot and should not usurp the role of the Member States as the 'masters of the Treaties' in this and other areas, for to do otherwise would be to risk its entire legitimacy. There are, therefore, normative boundaries to the concept of EU citizenship, although recent case law has meant that it is not entirely clear where these are located.

A similar caveat can be applied when thinking about the *outer* limits of EU citizenship. According to Nic Shuibhne's scheme, these are the limits that circumscribe the present content of EU citizenship, such as the rights which can be derived from the scheme and wording of the Treaties and secondary legislation. This includes, of course, any territorial limits to which the EU and EU citizenship are subject. On the subject of the outer limits, Nic Shuibhne's reaches the conclusion that

The outer limits might be transcended politically through an agreed revision of the normative parameters of EU citizenship. But in the absence of this, and working with what we have, the development of citizenship rights should not be thought of as a boundless exercise.

This comment could just as well apply to the *inner* limits, that is, to the manner in which EU citizenship is limited by a 'state space' into which it cannot intrude. Here, too, the Court's activism has had a significant impact with significant and often contested intrusions into immigration and welfare sovereignty as a result of the application of free movement rules and equal treatment principles. Inevitably the Court's activism runs into the problem of how it can reconcile the continued evolution (expansion?) of the domain of EU citizenship rights with the 'wholly internal rule' which seeks to preserve some (national) situations entirely outside the reach of EU law. This has significant repercussions where EU citizenship appears to give mobile citizens 'better' rights than static ones.⁶

A close look to see how far the Court of Justice has carried the concept of EU citizenship, from what might be thought of as its modest beginnings in the Treaty of Maastricht, could indeed bring many insights into these evolving limits and how these are playing out in times of 'crisis' where the very idea of integration is under pressure.⁷ Even at the same time as free movement rights are becoming increasingly

⁵ Case C-85/96 *Martínez Sala v Freistadt Berlin* [1998] ECR-I 2691.

⁶ C-127/08 *Metock et al v. Minister for Justice, Equality and Law Reform* [2008] ECR I-06241.

⁷ For a fuller discussion of the relevant case law by this author see J. Shaw, 'A view of the citizenship classics: *Martínez Sala* and subsequent cases on citizenship of the Union', in M. Maduro and L. Azoulay (eds.), *The Past and Future of EU Law; The Classics of EU Law Revisited on the 50th Anniversary of the Rome*

politicised (and less normalised) in many Member States, it might be suggested that the Court – accompanied by some of its most enthusiastic cheerleaders – has come close to making this process into an apparently ‘boundless exercise’ which could see significant threats to the continuing legitimacy of the very concept of EU citizenship if mobile EU citizens are somehow seen to be getting ‘benefits’ (e.g. access to certain family reunion rights) which are denied to those who remain static. According to Richard Bellamy, this could destabilise the social compact of longer-term commitment and loyalty that must lie at the heart of any stable successful polity.⁸ The Court of Justice could, therefore, be said to be heading into dangerous waters with its recent development of a new jurisdictional test for the applicability of EU law in the citizenship area which is based on whether a measure taken by a Member State could be said to deprive an EU citizen of the ‘substance’ of his or her rights. This is all the more so given that the Court has yet to define precisely what is meant by the substance of citizenship rights in its case law.⁹ Although some have tried to take this a step further, in order to mainstream fundamental rights concerns within and across the EU Member States, by arguing that a deprivation of fundamental rights is by definition a deprivation of the very substance of citizenship rights,¹⁰ it is not clear that such an argument could or should gain further traction. It would certainly involve also a fundamental review of the current restrictions on the scope of the Charter of Fundamental Rights in relation to EU competences. The political will for such a change seems weak at present, and not all would agree that it would be a desirable route for the EU to follow.

III

Away from the immediate confines of the case law of the Court of Justice, there is one interesting case where the limits of EU citizenship appear to be in the process of being tested out by political actors in ways that build on that case law and which take advantage of tensions within and across the multi-level Euro-polity and its Member States. Thus EU citizenship has been invoked by various political actors who are involved in the Scottish independence debate in ways that suggest that its

Treaty, Oxford: Hart Publishing, 2010, 356-362 and J. Shaw, ‘Citizenship: contrasting dynamics at the interface of integration and constitutionalism’, in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, 2nd Edition, OUP, 2011, 575-609.

⁸ R. Bellamy, ‘Evaluating Union citizenship: belonging, rights and participation within the EU’, (2008) 12 *Citizenship Studies* 597-611.

⁹ The apparent breadth of the original formulation put forward by the Grand Chamber of the Court of Justice in Case C-34/09, *Ruiz Zambrano*, judgment of 8 March 2011 at para 42 appears to have been significantly qualified by a case decided almost at the same time but by a smaller Chamber (C-434/09 *Shirley McCarthy v. Secretary of State for the Home Department*, judgment of 5 May 2011) and a subsequent Grand Chamber case (C-256/11 *Dereci and others v. Bundesministerium für Inneres*, judgment of 15 December 2011).

¹⁰ A. Von Bogdandy *et al*, ‘Reverse Solange – protecting the essence of Fundamental Rights against EU Member States,’ (2012) 49 *Common Market Law Review* 489–519.

limits could indeed be politically pliable. It has long been argued by Scottish National Party representatives that with Scotland already in the EU as part of the UK, once it becomes independent the essentials of this situation should simply continue. A good example of this approach is the statement of the spokesman for the Scottish First Minister Alex Salmond in response to the publication of a controversial publication by the group *Business for a New Europe* which suggested that a post-independence Scotland would have to apply *de novo* for membership of the EU,¹¹ with all the attendant difficulties of the candidature process. Refuting the threat of accession, the spokesman said:

Scotland is already part of the territory of the European Union and the people of Scotland are citizens of the EU – and, as distinguished legal, constitutional and European experts have confirmed, there is no provision for either of these circumstances to change upon independence, and the rest of the UK will be exactly (sic) the same position.¹²

This argument has been developed more fully by Aidan O’Neill QC. He has argued that the very fact that ‘Scottish citizens’ (i.e. those who would become citizens of an independent Scotland) have previously been EU citizens by virtue of their UK citizenship means that a putatively independent Scotland must be regarded as effectively already a Member State of the EU, because of the acquired rights of those citizens. The route to clarity might come, suggests O’Neill, via the Court of Justice (CJEU) if it is asked what is the status of post-independence Scottish citizens:

The question to ask is whether the CJEU would consider that the fact that Scotland became independent required that all (or any portion) of the previous UK citizenry thereby be deprived of their acquired rights as EU citizens? Given the CJEU’s high theology of the primacy of EU law, and of EU citizenship as being “the fundamental status of nationals of the Member States”, it is suggested that the most likely position that the Luxembourg court would take, if faced with the question of Scottish independence, would be ... [to] ... rule that Scotland and EWNI [England, Wales and Northern Ireland] should *each* succeed to the UK’s existing membership of the EU, but now as two States rather than as one.¹³

This does seem to suggest that legal reality can follow political reality in the event of independence rather smoothly when it comes to redefining the normative limits of EU citizenship after Scottish independence. This conclusion is a little hard to square with usual approaches to state succession under international law. But it is

¹¹ *In Depth: Scottish Independence and EU Accession*, March 2012, http://www.bnegroup.org/images/uploads/publications/files/In_Depth_-_Scottish_Independence_and_EU_Accession_-_BNE_March_2012_1.pdf.

¹² <http://news.stv.tv/politics/301178-post-referendum-currency-uncertainty/>.

¹³ See A. O’Neill, ‘A Quarrel in a Faraway Country?: Scotland, Independence and the EU’ <http://eutopialaw.com/2011/11/14/685/>, 14 November 2011.

interesting to see the concept of (EU) citizenship, combined in O'Neill's case with an argument based on the primacy of EU law, being mooted as a useful prism through which to view fundamental social and political choices such as the possible reconfiguration of an existing Member State into two independent states, both of which would like to be Member States. This means that discussions around the post-Scottish independence status of Scotland and the rest of the UK (or EWNI as it is now usually known in the debate) are not discussed solely by reference to either the Vienna Convention on the Law of Treaties and the international law of state succession or the internal EU questions about processes of Treaty change and enlargement.¹⁴

It is also interesting in that context to note the positive approach to the political rights attaching to EU citizenship taken by the current Scottish government, which has proposed that – as with the referendum on devolution organised by the UK government in 1997, and as with the Scottish Parliament elections themselves since 1999 (both of which were choices made by the Westminster Government on behalf of the UK as a whole) – the franchise for the referendum on independence should include the 60,000 EU citizens resident in Scotland.¹⁵ This might also suggest that this group would have the right to vote in what would become Scottish *national* elections after independence. It would be anomalous to give such a group the right to vote in the referendum on independence (thus allowing them to affect this fundamental political and constitutional choice) and then not to allow them a vote under the circumstances of ordinary politics, in the event that the separatist movement which they are invited to participate in were to be successful. However, such a conclusion might be affected by the related question of who would be entitled to be a citizen of 'new' Scotland.

But at the same time, even under the current political settlement, EU citizenship shows up the anomalies that can and do occur within states when there is internal diversity of social policy choices within asymmetrically organised polities, because of the application of the wholly internal rule set against the principle of non-discrimination on grounds of nationality which applies in cases which fall within the scope of EU law. This means that Scotland must from 2012 onwards give EU citizens the right to attend Scottish universities under the same conditions as Scottish domiciled students i.e. for free, if admitted. This extends also to EU citizens domiciled elsewhere in the UK (e.g. Irish citizens in Northern Ireland), even though Scotland can 'discriminate' against UK citizens domiciled elsewhere in the UK by not

¹⁴ See further the written evidence to the Scottish Affairs Select Committee of the UK Parliament by Aidan O'Neill QC on 'The Referendum on Separation for Scotland', <http://www.publications.parliament.uk/pa/cm201012/cmselect/cm Scotaf/writev/referendum/rs13.htm>. This point is picked up by other interveners in the debate: <http://www.publications.parliament.uk/pa/cm201213/cmselect/cm Scotaf/writev/ref/m01.htm>.

¹⁵ See <http://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-16895691>. For further details on the mechanics of the proposed referendum see <http://www.scotland.gov.uk/Publications/2010/02/22120157/7>.

giving them the benefit of Scotland's regime under which the costs of tuition for undergraduate students at Scottish universities are essentially borne by the taxpayer. This is because of the effects of EU free movement and equal treatment law as it stands, and because of the interaction between these rules and the wholly internal rule which allows Scotland to implement its asymmetric choices in relation to the allocation of public resources *within the UK and to UK citizens alone* solely by reference to UK law.

IV

Setting the Scottish independence debate aside, we can see that in many other areas the integrity and sustainability of EU citizenship are now coming under heavy pressure from political actors. EU citizenship is rarely seen to offer the basis for a solution to current problems by offering solidarity within a free market by allowing, for example, labour to circulate to where it is needed most. A good example is the apparent threat by the UK government to prevent 'immigration' from Greek citizens in the event of their state's exit from the Eurozone.¹⁶ As it happens, these alarmist reactions seem likely to be unfounded, as there is no suggestion that the UK would be a 'destination' for Greeks 'escaping' their austerity hit economy. In fact, there are already signs that those Greeks seeking to take advantage of their free movement rights under the Treaties, perhaps in order to seek work, are going to Germany, not the UK.¹⁷ But the very fact that UK politicians feel free to challenge the core of EU citizenship in this way suggests a lack of robust commitment to these principles on their part. There does not seem to be an effective legal basis for restricting the access of Greek citizens to the labour market if Greece does not actually leave the EU. The only possibility is to apply Article 347 of the Treaty on the Functioning of the European Union, but this could only apply in extreme circumstances and should not be applicable if Greece undergoes an orderly and managed exit from the Eurozone, but not the EU as a whole:¹⁸

¹⁶ See the report on the views of the Home Secretary (<http://www.telegraph.co.uk/news/uknews/immigration/9291493/Theresa-May-well-stop-migrants-if-euro-collapses.html>), subsequently refuted by the Deputy Prime Minister as 'apocalyptic' in character: (<http://www.telegraph.co.uk/news/9293763/No-British-drawbridge-to-stop-Greek-immigration-says-Nick-Clegg.html>).

¹⁷ See 'Nearly a million new immigrants in Germany', 20 May 2012, *Deutsche Welle*, <http://www.dw.de/dw/article/0,,15964384,00.html>.

¹⁸ Even in the event of Greece's departure from the EU, the arguments developed in relation to Scotland seem to suggest Greek citizens should enjoy some sort of 'acquired rights' protection. Indeed, any full 'Grexit', not just from the Eurozone, but also from the EU as a whole would be likely to be negotiated and involve transitional protections at least for Greek citizens already resident and working in other Member States. It is possible that UK officials had been thinking of such a scenario, or had perhaps been thinking that an exit from the Eurozone might involve some sort of temporary restoration of capital movement controls on the part of Greece, against which the other Member States might bargain some sort of temporary labour market controls. However, such measures would require treaty action to be legally binding.

Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

While these may be the 'exceptional circumstances' referred to by the UK Home Secretary in her interview, they would probably only apply to immediate population movements in a crisis situation, not to a longer term process of emigration by Greek citizens seeking employment opportunities elsewhere in the EU. Resisting that type of free movement would seem to require either removing Greece from the EU or alternatively the UK leaving the EU in order to escape the effects of free movement.

The general tenor of the public approach taken by the UK government to assuring the British public that they could be protected against an apocalyptic 'invasion' of work-seeking or indeed welfare-seeking Greek citizens would seem to build quite logically upon the way in which 'immigration' to the UK from post-2004 and post-2007 Member States has been constructed in political and popular discourse in the UK. While access to the UK labour market was permitted for the so-called A8 states of central and eastern Europe after 2004, in contradistinction to almost all the other Member States, in fact these practices of free movement, often circular in character and generally regarded by informed studies to have been a benefit to the UK economy,¹⁹ are regarded in political and popular rhetoric as an increasingly problematic form of immigration that has to be controlled.²⁰ One image that is portrayed is that of the benefit tourist, seeking to take advantage of the UK welfare state when in practice there is no evidence of such a threat at all and in any event states such as the UK have largely walled off their welfare states against such incursions or exploitation.

A mix of confusing messages come across regarding what is universally termed in the UK press 'Eastern European immigration', even though the vast majority of the states from such mobility emanates would not regard themselves either geographically or geo-politically as part of 'Eastern' Europe. On the one hand, citizens of new Member States are seen as undermining solidarity within the host state based on labour costs, by being willing to work for lower wages than domestic workers. On the other hand, they are readily excluded from the welfare bargain of those states, and thus are forced to be prepared to work in whatever jobs they can

¹⁹ J. Doyle, 'EU Migrants 'good for UK economy'', The Independent, 24 July 2009, <http://www.independent.co.uk/news/uk/home-news/eu-migrants-good-for-uk-economy-1759279.html>.

²⁰ See J. Shaw, N. Miller and M. Fletcher, *Getting to grips with EU citizenship: issues of friction between UK immigration law and EU free movement law*, Research Report, University of Edinburgh, forthcoming July 2012 (available from <http://www.law.ed.ac.uk/overlap>).

find. Failure to find work does not normally mean for such a group that the ordinary 'safety' net applicable to the unemployed or homeless persons will step in.

Thus the equality that is supposed to underlie the free movement rules seems to be increasingly under threat from all sides. The UK has mounted a pilot programme of removing to their home state destitute EU citizens from the new Member States; France and Italy are just two of the Member States which have mounted controversial and legally doubtful actions against EU citizens of Roma ethnicity,²¹ seeking their removal either because they do not qualify under the Treaty's free movement rules (which do not give an unqualified right of residence beyond three months to persons who are not economically active in the broadest sense (which includes students) or self-sufficient) or simply because they are somehow collectively associated with problems of crime and disorder. For those states it would seem that free movement is not for the poor or for those of certain ethnic backgrounds. Clearly reasons of crime and disorder – if applied collectively to whole groups – do not qualify as valid reasons for removal under the Citizens' Rights Directive.²² But unfortunately, as the Commission itself has admitted, there remain profound problems with national implementation of this measure. In a 2008 report²³ the Commission stated baldly that

The overall transposition of Directive 2004/38/EC is rather disappointing. Not one Member State has transposed the Directive effectively and correctly in its entirety. Not one Article of the Directive has been transposed effectively and correctly by all Member States.

Things have barely improved since then, for while the Commission's attempts to bring enforcement actions against Member States may have produced more 'paper' compliance, it is not clear that provisions of EU law remain any more accessible or useable – in a meaningful way – by socially excluded groups such as the Roma or homeless and destitute people than they ever were in the past. Thus application in practice of EU law remains a problem if implementation has been confined to the legislative level and has not penetrated in an effective way into administrative practices.

In similar terms, some of the long cherished freedoms of the single market seem to be under threat in the form of new plans from the Member States to make it easier to reinstate temporary Schengen frontier controls and in so doing increasingly to bypass the control functions of both the European Commission and the European

²¹ S. Carrera and A. Atger, *L'affaire des Roms : A Challenge to the EU's Area of Freedom, Security and Justice*, CEPS Paper, September 2010, <http://www.ceps.eu/book/1%E2%80%99affaire-des-roms-challenge-eu%E2%80%99s-area-freedom-security-and-justice>.

²² Directive 2004/38 of the European Parliament and the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L158/77.

²³ COM(2008)840, at p3.

Parliament.²⁴ While the primary intention of these measures may be that they are needed to restrict the movement of (certain) third country nationals, in practice the effects will be felt by all, regardless of citizenship status. This was, after all, the rationale for the removal of internal frontier controls in the first place.²⁵ A combination of a lack of commitment to free movement and threats to frontier free travel threatens a perfect storm of challenges to the core principles of the EU integration project.

V

2013 is the *European Year of Citizens*,²⁶ celebrating the legal, political and symbolic power of the concept of EU citizenship. This is part of a wider endeavour of the Barroso II Commission to make citizenship a political priority and to focus on the obstacles to the exercise of EU citizenship rights, including free movement rights, political rights and other ancillary rights attaching to EU citizens. Alongside these initiatives, the 2012 launch of the process allowing for European Citizens' Initiatives bringing together one million citizens' signatures has promised much, but seems likely to deliver little in view of the limitations of this type of measure as an instrument to strengthen democracy and participation. Overall, the harsh reality of the pressures under which the European integration project finds itself at the present time suggests that keeping in place the existing legal framework for citizenship rights is likely to be the limit of reasonable ambition for the foreseeable future. The symbolic capital associated with the term 'citizenship' is supposed to work in favour of the EU. That was one of the motivations of including this term in the Treaty of Maastricht, and indeed since 1993 it could be argued that these provisions of the Treaty, largely thanks to the Court of Justice's activism, have over-delivered, at least in rhetorical terms.

In practice, under the current conditions, where the edges of Europe seem to threaten in ever more immediate ways the very core of the integration project, the presence of a concept of citizenship at the supranational level is more likely to be seen as a provocation and a threat to the continued existence and relevance of the Member States, under whose protective umbrella (however leaky) citizens still want to take refuge in times of crisis. The voices calling for free movement to be given greater prominence and the mobility of young people in particular to be supported in

²⁴ Details of the approach taken by the Council of Ministers can be found in the Council Press Release No. 10760/12, detailing the meeting of the Justice and Home Affairs Ministers on 7 and 8 June 2012.

²⁵ For a brief evaluation of the approach of the Council of Ministers and what it might mean see the Migrants' Rights blog: <http://www.migrantsrights.org.uk/blog/2012/06/vote-reintroduction-schengen-area-border-checks-more-evidence-depth-crisis-eu>, June 12 2012. A more extended, but earlier, analysis of the Schengen Governance Package fills out the arguments more fully: S. Carrera, *An Assessment of the Commission's 2011 Schengen Governance Package: Preventing abuse by EU member states of freedom of movement?*, CEPS Paper, March 2012.

²⁶ Proposal for a Decision of the European Parliament and of the Council on the European Year of Citizens (2013), COM(2011) 489.

order to combat youth unemployment are very much minority voices.²⁷ At the present time, EU citizenship is simply not perceived as being relevant to the democratic and other challenges that almost all the Member States are facing, except in the case where subnational political movements seek to use it as part of their panoply of arguments for autonomy. The positivity surrounding the potential of EU citizenship in the context of polity renewal in Scotland seems an exception against a backdrop of widespread attempts to undermine EU citizenship on the part of Member States (and certainly a failure to highlight publicly what its benefits might be). While some idealists might still think that facing up to these challenges primarily involves the task of reasserting the basic principles of the EU and of its legal order – and this is indeed an attractive prospect when one is faced with some members of the UK Government asserting the need to confront the (so far imagined) ‘threat’ of a Greek invasion by undermining one of the main precepts of EU law – it fails to take sufficient account of the extent to which there is now a climate of adversarialism as well as a sense of irrelevance attaching itself to the whole issue of EU citizenship. In that sense, the threat to the continued effectiveness of EU citizenship could be a harbinger of a more general threat to the continued existence of the EU itself.

²⁷ T. Petersen, ‘Can Mobility offset Unemployment?’, Bertelsmann Stiftung, Spotlight Europe, #2012/04 June 2012.



ISSN 2046-4096

THE EUROPEANISATION OF CITIZENSHIP IN THE SUCCESSOR STATES OF THE FORMER YUGOSLAVIA (CITSEE)
SCHOOL OF LAW, THE UNIVERSITY OF EDINBURGH,
OLD COLLEGE, SOUTH BRIDGE
EDINBURGH, EH8 9YL, SCOTLAND, UK
WWW.LAW.ED.AC.UK/CITSEE