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Social Citizenship in Asymmetric Constitutions

The reconfiguration of membership across state and sub-state polities of the European Union

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PhD
The University of Edinburgh
2013

Abstract

This study examines the extent to which the transfer of legislative competence to polities above and below the state problematizes a national model of membership. The study first examines fragmentation of competences determinative of social membership across the polities of two 'asymmetric constitutions' (constitutional structures in which both the whole and the parts are distinct territorially-bounded political communities, and in which legislative competence is allocated unevenly across the constituent polities). Two case studies then explore how those polities exercise those competences so as to define the boundaries of equal social membership, and how these boundaries interact across the constitutional structure. The study highlights three observations in support of its conclusion that constitutional asymmetry presents a challenge to a national model of membership: constituent polities of the asymmetries under examination allocate social rights primarily by reference to residence, thus lending (qualified) support to transnational and a-national theories of membership; differentiated social rights enjoyed by a particular sub-set of nationals are incompatible with the presumed equality of nationals under a national model of membership, resulting in the perception of inequity and discrimination; and the interdependence of membership competences across the constitutional asymmetry means that it is no longer possible for a polity to exclusively determine the boundaries of social membership.

Acknowledgments

This research has been funded by the Arts and Humanities Research Council under a Collaborative Doctoral Award. I would like to express my sincere thanks to both the AHRC and to the Federal Trust, with whom I was associated under the Award, for their generous support of my doctoral studies.

During my studies at Edinburgh University I have had the privilege of working within an incredibly vibrant research community, and my work has benefitted greatly from the discussions that I have had with insightful and committed colleagues and friends. Particular thanks are owed to Richard Jones, Lynne Copson, Elisenda Casanas Adam, Dejan Stjepanovic and Gezim Krasniqi.

The research process would have been much more arduous without the friendships that have grown along the way. I would like to thank Thomas Horsley and Sandra Keegan for their invaluable support: I consider myself very fortunate to have gone through this process with you. Lianne Robertson has provided a great deal of encouragement, I am incredibly proud to have seen her become a mother to her beautiful son Zac during the course of this research. Nina Westoby has continuously shown generosity and kindness and I wish her the very best of luck at the start of her own PhD.

I owe particular thanks to my supervisors, Cormac Mac Amhlaigh and Jo Shaw, who have always been on hand to provide advice and guidance. Jo Shaw has been a generous mentor throughout my postgraduate studies, and I am incredibly grateful to both her and Alf Thomas for the support that they have offered me.

Finally, I would like to thank my family for their encouragement and patience. Thanks are owed to Lyn Wright for her letters, certificates and chanting. Nam Myoho Renge Kyo. Marijke Lansbergen has been a thoughtful and caring friend, and I am particularly appreciative of her help in the period leading up to submission. Joy and Rien Lansbergen have provided unfailing support, and I am immeasurably grateful for the sacrifices they have made along the way. The love and friendship of my partner, Andy Mills, has carried me throughout the highs and lows of my research. Thank you.

Contents

Introduction

Citizenship in its modern form is intricately bound together with the nation-state: from the eighteenth century self-conscious 'membership organisations' united by a common culture and language have asserted a democratic right of self-governance, vesting the sovereign power of the state in a unified body of peoples. The solidarity and loyalty fostered by a shared national identity has facilitated the realisation of citizenship as a principle of equality, secured through the grant of civic, political and social rights which form the substantive benefit of membership. The traditional 'national' model of membership based on the coincidence between the nation and the state is one in which rights are granted by the state to nationals on the basis of a shared national identity.

The homogeneous identity upon which national citizenship is predicated has been subject to contestation: it faces challenges 'from above' by way of globalisation and the movement of people across state borders, and 'from below' by self-conscious national minorities. Membership organisations no longer map neatly onto the territorial boundaries of the state, thus problematizing the national model of membership and raising questions of how a liberal democratic state should meet its obligations towards resident non-nationals and minority cultures.

Much of modern citizenship theory is devoted to reconfiguring the boundaries of equal membership in terms of a revised balance between rights, status and identity, so as better to meet the demands of social justice in the face of these challenges. The vast majority of these reconfigurations have responded to the fragmentation of national identity, whilst presuming that the state remains the dominant organisational framework within which the benefits of membership are delivered. A shifting constitutional landscape rebuts this presumption, with legislative competence transferred to polities above and below the state.

Whilst a substantial degree of literature has examined the formation of these constitutional structures by reason of claims to self-determination of national minorities, few have considered how citizenship operates across those revised structures, once those claims have been realised. Little scholarly attention has been devoted to the criteria according to which non-state polities define the boundaries of equal social membership, and the manner in which these boundaries interact across a

constitutional structure to contest established notions of equality of nationals. The objective of the following study is to investigate these questions, and in doing so to consider how the transfer of legislative competence to polities above and below the level of the state further problematizes a national model of membership.

Chapter one of the study presents a brief 'state of the art' of citizenship theory, expanding on the points raised above in order to introduce the premise on which the study is based, and to justify the objective of the research through identification of an under-represented area of scholarship. The chapter explains in further depth the approach adopted in the study, and gives further information on the selection of the case studies.

Chapter two of the study maps the re-location of competences determinative of social membership across the constituent polities of the UK and Spain as two 'asymmetric constitutions' (constitutional structures in which both the whole and the parts are distinct territorially-bounded political communities, and in which legislative competence is allocated unevenly across the constituent polities), and contextualises the relationship between transfer of legislative competence and the recognition or development of alternative identity groupings. The chapter identifies three forms of 'membership competence' – the competence to provide social goods and services[1] (sub-state and state), to allocate social goods and services (sub-state, state and EU), and to secure access to social goods and services (state and EU). It notes that with the transfer of membership competences to non-state polities, the conundrum of how to allocate the benefits of membership in order to meet the demands of social justice is replicated across polities at multiple levels. The study also notes that membership competences are fragmented across the constitutional structure, with the result that no single polity has exclusive control over the bounds of social citizenship.

Two case studies then examine the distribution of selected social rights across the constituent polities of the UK and Spain, each of which focusses upon a different dimension of the constitutional asymmetry. Chapter three examines the interaction between EU and State competences to define the boundaries of equal social membership, through the lens of minimum income allowances. The case study first examines the provision of minimum income allowances (non-contributory and non-

[1] The terms 'social good' and 'social service' are used to refer to a broad range of goods and services provided by a polity that secure the 'social element' of citizenship (see further at n.123, below).

discretionary social benefits that form a ‘safety net’ of social protection) by the state, and the extent to which their receipt is conditioned under national law by criteria pertaining to nationality and residence. It then turns to consider the basis upon which those allowances are allocated under EU law to persons falling within the scope of social security co-ordination. The focus of the chapter is on the reactive exercise of state competences so as to condition the minimum income allowances that an individual receives by virtue of their rights of residence and equality under EU law. It observes that both the UK and Spain have asserted control over the rights of residence enjoyed by EU Citizens and their family members, and examines the way in which the UK has excluded certain EU Citizens and their family members from receipt of those benefits. These measures have proved contentious, and their compatibility with the right on non-discrimination enjoyed by EU Citizens is questionable.

The case study in chapter four addresses the interaction between sub-state and state competence to define the boundaries of equal social membership, through the lens of differential fee imposition for public services (liability for higher education tuition fees and charges levied on prescriptions). The chapter first presents an overview of divergences in social policy enacted across sub-state polities, and examines the basis on which the benefit of those policies are extended or withdrawn across the group of persons with social membership of the state. The study then uses the example of access to higher education in the UK to consider how the construction of privileged sub-state social membership groups below the level of the state are overlaid by EU law rights of equal treatment, thus granting privileged access to migrant EU citizens over certain UK nationals. The chapter then considers the extent to which these differences have been considered as ‘anomalous’ and ‘discriminatory’, noting attempts that have been made to challenge to the legality of such differentiation.

The conclusion of the study highlights three observations drawn from the case studies which suggest that constitutional asymmetry presents a challenge to a national model of membership. First, examination of the criteria conditioning receipt of social rights illustrate that constituent polities of the constitutional asymmetries under examination allocate social rights on the basis of residence, thus lending

qualified support to post-national and a-national theories of citizenship in respect of social rights. Secondly, differentiated rights enjoyed by a particular sub-set of nationals are incompatible with the presumed equality of nationals under a national model of membership, and result in the perception of inequity and discrimination. Conversely, extension of rights to EU Citizens suggests that participation in a singular national identity is no longer determinative of the receipt of rights. Finally, the interdependence of membership competences across the constitutional asymmetry means that it is no longer possible for a polity to determine the boundaries of social membership on the basis of national interests, nor to exclude from the benefit of social membership those that do not participate within a shared national identity.

The study aims to probe the complexities of membership definition in asymmetric constitutions, offering an insight into tensions and idiosyncrasies that characterise this hitherto under-developed field of scholarship, as a conceptual grounding for further theoretical and empirical study. In doing so it employs a context-led methodology associated with 'constitutional ethnography', which '*looks to the logics of particular context as a way of illuminating complex relationships among political, legal, historical, social economic and cultural elements'*.[2] In the early stages of developing this research agenda I benefitted greatly from participation in a number of workshops and policy forms hosted by both the Federal Trust and by the James Madison Trust, which provided invaluable insight into the prevailing policy discourses surrounding both devolution and European integration.[3] This partnership both encouraged me to engage more closely with the political (rather than the purely doctrinal) study of federalism, and also guided my interest in membership groups, which I perceived to be the unarticulated dimension of policy divergence. Collaboration with the Federal Trust has also enabled me to explore some of the topics raised within the following study in greater depth through 'policy

[2] Kim Lane Scheppele, *Constitutional Ethnography* (2004) 38 Law and Society Review, see further at n.109

[3] The Federal Trust is a research institute studying the interactions between regional, national, European and global levels of government, with which I am 'partnered' under a Collaborative Doctoral Award granted by the UK Arts and Humanities Research Council. The James Madison Trust is a charitable trust established to support and promote federal studies, which is a principal benefactor of the Federal Trust and which has a substantially overlapping membership body.

briefs',[4] and the process of writing for a non-academic forum has proved a highly instructive – if at times challenging – experience of the requirement to adapt my analytical perspective and writing style.

[4] Anja Lansbergen, (2009) *Testing the Limits of European Citizenship* Federal Trust Policy Brief <http://www.fedtrust.co.uk/filepool/Testing_Limits_of_Citz.pdf> ; Anja Lansbergen, (2012) *Recent CJEU Decisions on European Citizenship: A case study on judicial activism* Federal Trust Policy Brief No 32 <http://www.fedtrust.co.uk/filepool/Policy%20Brief%2032%20-%20%20Recent%20CJEU%20Decisions.pdf> accessed 10 May 2012

1. Citizenship and Constitutional Asymmetry

1.1. Citizenship and equality of membership

'*citizenship, even in its early forms, was a principle of equality*' - T.H. Marshall[5]

A logical place for a study of citizenship to commence may be with an examination of the various manifestations of citizenship throughout history. It might examine its early roots in the city states of ancient Greece and its transformation in the Roman Empire. It might chart its marginalisation in the Anglo-Saxon, Gothic and Vandal kingdoms of medieval Europe, and its expression in the Guilds of medieval cities.[6] Space precludes such an analysis within this study, but even such a cursory outline serves useful in identifying the nature of the illusive subject under discussion. Whilst its complexities may be hard to capture within a succinct definition, a historical snapshot shows us that citizenship is about the limits of human association: limits that operate across territory, across power, and across people. The location of those limits shift across time and space, but their significance is eternal.[7]

A common starting point for a definition of citizenship is one of membership in a community.[8] The enduring question central to citizenship theory then pertains to the nature of the relationship between the individual and the collective: what does

[5] T. H. Marshall, *Citizenship and social class: and other essays* (Cambridge University Press 1950), page 33

[6] For discussion on the history of citizenship see Derek Heater, *A Brief History of Citizenship* (Edinburgh University Press 2004); J.G.A. Pocock, 'The Ideal of Citizenship Since Classical Times' in Gershon Shafir (ed), *The Citizenship Debates: A Reader* (University of Minnesota Press 1998); Max Weber, 'Citizenship in Ancient and Medieval Cities' in Gershon Shafir (ed), *The Citizenship Debates: A Reader* (OUP 1998); and Geoffrey de Ste. Croix, 'The Athenian Citizenship Laws' in David Harvey and Robert Parker (eds), *Athenian democratic origins: and other essays* (Oxford University Press 2004).

[7] A historical examination of citizenship has prompted some theorists to conclude that '*citizenship entails a relatively stable core meaning surrounded by a periphery of historically contingent meanings*' (Kloek, J. and Tilmans, K (eds.) (2002) *Burger* Amsterdam University Press, referenced in Dora Kostakopoulou, *The Future Governance of Citizenship* (Cambridge University Press 2008), page 44). Kostakopoulou rejects this presumption, arguing that '*citizenship's evolving meanings and content have been, and will continue to be, shaped by different historical exigencies, institutional contexts and structural developments. But it would also be incorrect to believe that citizenship, including the existing nationality model of citizenship, in inhospitable to alternative readings and thus non-malleable*' (Kostakopoulou (2008), page 44).

[8] Linda Bosnaik identifies the '*chronic uncertainty of the meaning associated with the concept of citizenship*', but notes that '[m]*ost analysts concur in defining citizenship as membership of a political community, or of a 'common society''* (Linda Bosnaik, *Citizenship Denationalized* (2000) 7 Indiana Journal of Global Legal Studies 447, page 454).

membership entail?[9] Two defining characteristics of a liberal model of citizenship, which set apart the citizen from the serf or the subject, are those of freedom of the individual and equality of membership.[10] Equality as a characteristic of citizenship permeates all modern citizenship scholarship, reoccurring themes of which are elaborated within the egalitarian theory of right-based citizenship by the sociologist T.H. Marshall.

TH Marshall's seminal paper 'Citizenship and Social Class' was delivered in the form of a commemorative lecture in 1949, in the context of a post-War Britain that was witnessing the birth of the modern Welfare State. Marshall's paper was built around a classification of three 'elements' of citizenship: civil, political and social. Civil rights, he explained, were those '*necessary for individual freedom – liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice*'. The 'political element' of citizenship is '*the right to participate in the exercise of political power*', and the 'social element' is '*the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society*'.[11]

Marshall argued that the development of civil and political rights in the eighteenth and nineteenth centuries served to secure the democratic and universal status of freedom,[12] but that those rights were not '*as egalitarian in practice as they*

[9] Will Kymlicka and Wayne Norman note that '*the scope of a 'theory of citizenship' is potentially limitless – almost every problem in political philosophy involves relations among citizens or between citizens and the state*' (Will Kymlicka and Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory* (1994) 104 Ethics 352, page 353).

[10] Rainer Bauböck identifies three answers to the question 'what does it mean to be a citizen?': '*First, it means the opposite of being a subject, i.e. a relation towards the state and its authorities in which people enjoy basic rights. Second, it means also that people exercise control over governments directly or indirectly by participating in political deliberation…Third, it means that people are equals as members of an inclusive polity*' (Rainer Bauböck, Transnational citizenship: membership and rights in international migration (Edward Elgar 1994), page vii). Kostakopoulou notes that '*liberal citizenship is essentially a status bestowed on those who are presumed to be full and equal members of the community*' (Kostakopoulou (2008), page 22).

[11] Marshall (1950), pages 10-11. Marshall broadly characterises 'civic rights' as secured during the 18th century, political rights during the 19th century, and social rights during the 20th century. The descriptive merit and context-specific evolution of citizenship that Marshall presents have been subject to criticism.

[12] Ibid, page 18. Marshall suggested that civil rights were realised in the eighteenth century through the establishment of the rule of law and the defence in the courts of individual liberty against Parliament. They were further developed through the principle of '*individual economic freedom*',

professed to be in principle',[13] as class prejudice and inequalities of wealth prevented the realisation of the equality that they offered.[14] The crux of Marshall's argument lay in his assertion that the twentieth century marked a '*big advance in social rights, and this involved significant changes in the egalitarian principle as expressed in citizenship*'.[15] During this period, he argued, social rights were incorporated into the status of citizenship, granting '*an absolute right to a certain standard of civilisation which is conditional only on the discharge of general duties of citizenship*'.[16]

Social rights, Marshall suggested, did not necessarily achieve economic equality. The facilitation of economic equality was not however the central objective of social rights – what was important was not the equalisation of income, but the equalisation of status:

> *'What matters is that there is a general enrichment of the concrete substance of civilised life, a general reduction of risk and insecurity, an equalisation between the more and the less fortunate at all levels…Equalisation is not so much between classes as between individuals within a population which is now treated for this purpose as though it were one class. Equality of status is more important than equality of income'*.[17]

And this, indeed, was Marshall's central thesis: the equality demanded by citizenship and promised by civic and democratic rights is realised through the removal of barriers to social justice. When social justice is guaranteed through social

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championed by the courts through application of the Common Law and cemented in the abolition legislative restrictions upon the ability of an individual to choose his occupation. Political citizenship followed throughout the nineteenth century, though its universality was not completely realised until 1918.

[13] Ibid, page 35

[14] '*In the latter part of the nineteenth century*', Marshall argued, '*a growing interest in equality as a principle of social justice and an appreciation of the fact that the formal recognition of an equal capacity for rights was not enough*'. Such interest was generated by advances in social integration, marked by the '*diminishing gap between skilled and unskilled labour*', by the compression of the scale of disposable incomes through direct taxation, and through the increased availability of material good through mass manufacture (ibid, page 46).

[15] Marshall located the original source of social rights in England in membership of local communities and functional associations, which were later replaced by a system of wage regulation and the Elizabethan Poor Law. By the beginning of the 20th Century, Marshall argued, social rights had become divorced from the status of citizenship. The claims of those in need of assistance were treated '*not as an integral part of the rights of the citizen, but as an alternative to them – as claims which could be met only if the claimants ceased to be citizens in any true sense of the word*'. By accepting social assistance, an individual '*forfeited in practice the civil right of personal liberty*', and surrendered any political rights that he might have (ibid, page 24).

[16] Ibid, page 43

[17] Ibid, page 56

rights that allow all to share in a universal guarantee of security, and to participate in a '*common culture and common experience*' independently of wealth or social class, the persistence of economic divergences does not run contrary to the basic human equality required of citizenship.[18]

Marshall's work has had a pervasive influence on the field of modern citizenship scholarship. This influence is identifiable not only in the many studies of 'social citizenship' that it has engendered, but also in the uptake by scholars of Marshall's basic classification: citizenship is an egalitarian principle that requires equality of membership, and that equality is ultimately secured through the conferral of civic, political and social rights.[19] Citizenship rights assume a central placing in citizenship theory as the substantive benefit of membership,[20] with many scholars including them within a multifaceted definition of citizenship: Linda Bosniak, for example, explores citizenship in terms of 'legal status', 'rights', 'political activity' and 'collective identity',[21] whilst Bloemraad et al explain that '[c]itizenship encompasses legal status, rights, participation, and belonging'.[22] Joppke works within a framework that distinguishes between citizenship as 'status, rights and identity', whilst Cohen favours a tripartite division of status, political participation and identity.[23] Antje Wiener and Richard Bellamy conceive of citizenship in terms of rights, (access to) participation and belonging,[24] whilst Engin F Isin proposes a

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[18] Similarly, Bauböck identifies as an aspect of citizenship that '[t]*here may be large inequalities and wide cleavages in society but each citizen is counted as one and only one and all citizens are counted together*' (Bauböck (1994), page vii).

[19] It is not my intention to claim that Marshall's work is the origin of a rights-based theory of liberal citizenship, nor that all scholars who recognise the centrality of rights in a theory of citizenship would necessarily agree with Marshall's analysis. The foregoing examination of Marshall's thesis on social citizenship is intended by way of insight into the basic equality demanded of citizenship, and the realisation of that equality both through democratic participation and social rights.

[20] Bauböck draws a distinction between 'nominal' citizenship in the form of a legal status devoid of any particular content, and 'substantial' citizenship, which is '*the particular nature of the relation itself*' (ibid, page 23).

[21] Bosnaik (2000), page 455

[22] Irene Bloemraad, Anna Korteweg and Gökçe Yurdakul, *Citizenship and Immigration: Multiculturalism, Assimilation, and Challenges to the Nation-State* (2008) 34 Annual Review of Sociology 153, page 153

[23] Christian Joppke, *Transformation of Citizenship: Status, Rights, Identity* (2007) 11 Citizenship Studies 37; Jean L Cohen, *Changing Paradigms of Citizenship and the Exclusiveness of the Demos* (1999) 14 International Sociology 245

[24] Antje Wiener, *Making Sense of the New Geography of Citizenship: Fragmented Citizenship in the European Union* (1997) 26 Theory and Society 529, page 534. Richard Bellamy identifies three 'lineages' of citizenship: '*rights, belonging and participation*' (Richard Bellamy, Dario Castiglione

distinct conception of citizenship that focuses upon a delineation between citizenship 'practices' and rights and obligations.[25]

These classifications of citizenship illustrate clearly that rights (and the equality of membership that they secure) are commonly identified as an intrinsic element of citizenship. They also identify two other aspects of citizenship – status and identity – that provide insight into a related issue with which citizenship theory must grapple: to whom do the right of equal membership, and the substantive benefits associated with it, attach?

1.2. The nation-state as the orthodox frame of equal membership

The orthodox context in which the equality of modern citizenship is understood is that of the nation-state.[26] Christian Joppke explains that the 'nation-state' is a '*dual concept*' encompassing both sovereignty in the form of a '*monopolization of legitimate violence*', and '*a collective identity*' with '*a democratic pretension to rule*'.[27] The first aspect – that of State sovereignty – arose in the wake of the 'Thirty Years War' out of the Peace of Westphalia, a treaty widely recognised as heralding the foundation of the modern political state system.[28] State sovereignty facilitates

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and Emilio Santoro, *Lineages of European Citizenship: Rights, Belonging and Participation in Eleven Nation-States* (Palgrave Macmillan 2004)).

[25] He thus argues that '[c]*itizenship can be defined as both a set of practices (cultural, symbolic, and economic) and a bundle of rights and obligations (legal, political, and social) that define a membership in a polity*' (Engin F. Isin, *Citizenship, class and the global city* (1999) 3 Citizenship Studies 267, page 267).

[26] Bosnaik notes that '*the assertion that citizenship is necessarily a national enterprise finds much support in conventional understanding, both popular and scholarly*', and that '*there can be little question that the nation-state is the predominant community of political membership in the contemporary world*' (Bosnaik (2000), pages 448-449).

[27] Christian Joppke, 'Immigration Challenges the Nation-State' in Christian Joppke (ed), *Challenge to the Nation-State, Immigration in Western Europe and the United States* (OUP 1998), page 8. Joppke notes that '[t]*he two concepts have different origins, stateness being rooted in the geopolitical transformation of Europe after the Peace of Westphalia and receiving its apotheosis under absolutism, nationness being rooted in the cultural transformation brought about by Protestantism, the rise of vernaculars, and the Enlightenment*' (ibid,, page 8).

[28] Charles Tilly notes that '[p]*erhaps the Treaty of Westphalia (1648), at the close of the Thirty Years War, first made it clear that all of Europe was to be divided into distinct and sovereign states whose boundaries were defined by international agreement*' (Charles Tilly, Formation of the National States in Western Europe (Princeton University Press 1975), page 45). See also John H. Herz, *Rise and Demise of The Territorial State* (1957) 9 World Politics 473, page 477; Paul Hirst and Grahame Thompson, *Globalisation and the future of the nation state* (1995) 24 Economy and Society 408, page 410; Walter C. Opello Jr and Stephen J. Rosow, *The Nation-State and Global Order: A Historical Introduction to Contemporary Politics* (2nd edn, Lynne Rienner Publishers 2004), page 12. Characteristics of Statehood are set out in Article 1 of the 'Montevideo Convention', which

citizenship as a legal status, whereby individuals are assigned into (traditionally mutually exclusive)[29] groups of state memberships.[30]

The second aspect – that of nationhood – followed in the 18th Century with the rise of nationalism[31] as an ideal, shaped largely by a resurgence of political philosophy in the Enlightenment that recognised the right of self-determination attaching to a self-aware[32] nation of peoples, bound together by a shared cultural identity.[33] The primacy afforded to individual freedom by liberal political theory

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establishes that '*The State as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) the capacity to enter into relations with other states*' (Convention on the Rights and Duties of States 1933, League of Nations Treaty Series, No. 3802, Vol. 165, page 19).

[29] As a result of the link between nation and state, dual nationality was long considered to be a contradiction of the singular loyalty owed by the individual to the State responsible for his protection; a position that is reflected in the statement within the preamble to The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws '*that it is in the general interest of the international community to secure that all its members should recognise that every person should have a nationality and should have one nationality only*' (Hague Convention on Certain Questions Relating to the Conflict of Nationality Law 1930, League of Nations Treaty Series, No. 4137, Vol. 179, page 89). Feldblum argues that '*Multiple nationality has traditionally been discouraged and banned by states. Nevertheless, the incidence of dual nationality in western Europe has continued to rise…The emergent fluidity of memberships—local, national, and transnational—has meant that citizenries are less defined by one state border or identity. Dual nationality breaks with the logic and practice of national state citizenship*' (Miriam Feldblum, 'Reconfiguring Citizenship in Western Europe' in Christian Joppke (ed), *Challenge to the Nation-State, Immigration in Western Europe and the United States* (OUP 1998), page 236).

[30] Bauböck notes that '*legal scholars describe citizenship as a relation between a state and its members in which persons are assigned a legal status*' (Bauböck (1994), page 23).

[31] '*A nationalist argument is a political doctrine built upon three basic assertions: a) There exists a nation with an explicit and peculiar character b) The interests and values of this nation take priority over all other interests and values c) The nation must be as independent as possible. This usually requires at least the attainment of political sovereignty*' (John Breuilly, *Nationalism and the State* (Manchester University Press 1982), page 3).

[32] Keating explains that '*Nations are to be distinguished from ethnicities or mere cultural groups on one hand or regions on the other partly by their self-consciousness of being a nation, partly by objective characteristics*' (M Keating, *Plurinational Democracy in a Post-Sovereign Order* (2002) 53 Northern Ireland Legal Quarterly 351, page 357). Similarly, David Miller notes that '*national communities are constituted by belief: nations exist when their members recognize one another as compatriots, and believe that they share characteristics of the relevant kind*' (David Miller, *On Nationality* (OUP 1997), page 22).

[33] Hastings argues that a common ethnicity, which he defines as those people '*with a shared cultural identity and spoken language*', constitutes '*the major distinguishing element in all pre-national societies'* (Adrian Hastings, *The Construction of Nationhood: Ethnicity, Religion and Nationalism* (CUP 1997), page 3). See also Anthony Smith, who identifies the '*ethnic basis of national identity*', and identifies an ethnic group as '*a type of cultural collectivity, one that emphasises the role of myths of descent and historical memories, and is recognised by one or more cultural differences like religion, customs, language or institutions*'(Anthony D Smith, *National Identity* (Penguin Books 1991), page 20). See also Anthony D Smith, *The Ethnic Origins of Nations* (Blackwell 1986). The role of ethnicity in determining national identity is contested by 'civic nationalists'; see further below at n.52.

played a crucial role in the resurrection of modern citizenship,[34] and the fingerprint of John Locke's 'natural rights' philosophy is evidenced in both the Bill of Rights 1689 and the US Constitution of 1788.[35] The birth of the nation-state redefined the populace *'from subjects of monarchs to citizens of states'*, and secured *'an emerging overlap between the state and the nation as the principal definer of citizenship*'.[36] As Rogers Brubaker notes in his seminal work on citizenship and nationhood:

> *'The development of the modern institution of national citizenship is intimately bound up with the development of the modern nation-state. The French Revolution marked a crucial moment in both…As a bourgeois revolution, it created a general membership status based on equality based on equality before the law. As a democratic revolution it revived the classical conception of active political citizenship but transformed it from a special into what was, in principle if not yet in practice, a general status. As a national revolution, it sharpened boundaries – and antagonisms – between the members of different nation-states. And as a state-strengthening revolution, it 'immediatized' and codified state membership. National citizenship as we know it bears the stamp of all these developments'.*[37]

The development of the nation-state prompted a resurgence of citizenship in the form of a national endeavour, operating not only across state territory but encompassing a unified nation of peoples. In Brubaker's terms, the state as a 'territorial organization' was united with citizenship as a nationally-bounded 'membership organization'.[38] The development of citizenship within the context of the nation-state thus links together the multiple aspects of citizenship, engendering a

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[34] Kostakopoulou notes that the ideas behind the Enlightenment literature on the social contract and political reform '*'caught on' and galvanised the democratic revolutionary thought of the late eighteenth century*' (Kostakopoulou (2008), pages 23-24).

[35] Donald Doernberg argues that '*the Constitution, as well as the Declaration of Independence, is traceable to Locke's natural rights philosophy'* (Donald L. Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action* (1985) 73 California Law Review 52, page 67).

[36] Yasemin Nuhoğlu Soysal, *Limits of citizenship: migrants and postnational membership in Europe* (University of Chicago Press 1994), page 16. Jürgen Habermas has also noted that '*the complex and long-running processes of the "invention of the nation"…played the role of a catalyst in the transformation of the early modern state into a democratic republic. Popular national self-consciousness provided the cultural background against which "subjects" could become politically active "citizens*"' (Jürgen Habermas, *The European Nation-State: On the Past and Future of Sovereignty and Citizenship* (1998) 10 Public Culture 397, 402).

[37] Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press 1992), page 49

[38] Ibid, pages xi, 21-23, 63, 71-72

'national' model of membership in which rights (and the equality of membership that they secure) attach to the formal status of nationality as an expression of shared national identity.

1.3. Contestation of the nation

The culturally-homogeneous population upon which a national model of membership is predicated has been subject to contestation. Globalisation and increased (and adapted) migratory flows have resulted in the de-coupling of aspects of citizenship that grew concomitantly in the nation-state, such that national membership organisations no longer coincide with the territorial organisation of state frameworks. As JL Cohen explains:

> *'Three distinct components of the citizenship principle have been identified in the literature: a political principle of democracy, a juridical status of legal personhood and a form of membership and political identity. The modern paradigm of citizenship was based on the assumption that these components would neatly map onto one another on the terrain of the democratic welfare state. Globalization, new forms of transnational migration, the partial disaggregation of state sovereignty and the development of human rights regimes have rendered this model anachronistic'*.[39]

The increasing heterogeneity of state populations problematizes the national model of membership, creating a fissure between the equality and freedom of the individual demanded of liberal citizenship, and the exclusion and marginalisation of those individuals who do not possess formal citizenship, or who do not participate in the common national identity.[40] Much of modern citizenship scholarship can be understood in terms of an endeavour to reconfigure the boundaries of equal membership in order to better meet the demands of liberal citizenship, and is

[39] Cohen (1999), page 245

[40] This contestation lies at the heart of Bauböck's theory of transnational citizenship, in which he argues that the answers that liberal democratic theory gives to the question 'what does it mean to be a citizen?' challenge the answers given to the question 'what does it mean to be a citizen of a certain state'? Bauböck thus uses the term 'transnational citizenship' to denote '*a clash between normative principles of liberal democracy and current forms of exclusion from citizenship at the level of nation-states'* (Bauböck (1994), pages viii and 20). See also Kostakopolou, who argues towards a revised institutional design of citizenship on the basis that '*citizenship as national membership has exclusionary effects which undermine the normative ideals of democratic participation and equality'* (Kostakopoulou (2008), page 100).

expressed in a variety of models of membership that draw a differing balance in the relationship between rights, status and identity.

Civic Nationalism (rights are allocated on the basis of status, as indicative of a common national identity grounded other than in ethnicity)

Not all scholars who have observed the implicit tension between national membership and culturally heterogeneous societies have reached the conclusion that national citizenship is necessarily problematic from a liberal perspective. David Miller in his work 'On Nationality' has attempted to reconcile national membership with the demands of liberal citizenship. In doing so, he rejects the assumption that '*that a nation must be understood as an ethnically homogeneous community*',[41] arguing that national identity is demarcated by a community '*constituted by shared belief and mutual commitment*', and '*marked off from other communities by its distinct public culture'*.[42]

Miller then defends the importance of this national identity on the grounds that nations are '*ethical communities*' that give rise to particular and distinct obligations between members. The loyalty fostered by these mutual relations, Miller argues, is necessary to sustain the re-distributive functions of the state.[43] Political co-operation alone, in the absence of such particular loyalties, relies on rational self-interest and is thus incapable of supporting more than minimal state functions. Miller thus argues that '*the ethics of nationality is plausible, resting as it does on well established facts about human identity and human motivation'*.[44]

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[41] Miller (1997), page 21

[42] These are two of five constitutive elements by which Miller characterises national identity: '*These five elements together—a community (1) constituted by shared belief and mutual commitment, (2) extended in history, (3) active in character, (4) connected to a particular territory, and (5) marked off from other communities by its distinct public culture—serve to distinguish nationality from other collective sources of personal identity*' (ibid, page 27).

[43] Miller argues that '*there are strong ethical reasons for making the bounds of nationality and the bounds of the state coincide. Where this obtains, obligations of nationality are strengthened by being given expression in a formal scheme of political co-operation; and the scheme of co-operation can be based on loose rather than strict reciprocity, meaning that redistributive elements can be built in which go beyond what the rational self-interest of each participant would dictate*' (Miller (1997), page 73).

[44] Ibid, page 80

Three primary consequences flow from Miller's defence of nationality. First, he argues that it is ethically legitimate to limit the positive obligations imposed upon the state in respect of non-nationals:

> *'if we take nationality seriously, then we must also accept that positive obligations to protect basic rights (e.g. to relieve hunger) fall in the first place on co-nationals, so that outsiders would have strong obligations in this respect only where it was strictly impossible for the rights to be protected within the national community. If bad policies or vested interests in nation A mean that some of its citizens go needy, then, if nation C decides that its own welfare requirements mean that it cannot afford to give much (or anything) to the needy in A, it has not directly violated their rights; at most, it has permitted them to be violated, and in the circumstances this may be justifiable'*.[45]

Secondly, Miller embraces the right of self-government of national-minorities, arguing that '*where a nation is politically autonomous, it is able to implement a scheme of social justice; it can protect and foster its common culture; and its members are to a greater or lesser extent able collectively to determine its common destiny*'.[46] Thirdly, Miller rejects the grant of group differentiated rights for ethnic minorities which, he argues, both 'overlooks the need and desire on the part of ethnic minorities to belong as full members to the national community', and 'makes unrealistic demands upon members of the majority group.'[47] Miller thus presents the argument that 'states may legitimately take steps to ensure that the members of different ethnic groups are inducted into national traditions and ways of thinking'.[48]

Central to Miller's attempt to reconcile nationalism and liberalism is his distinction between national identity and ethnicity. This approach aligns Miller with

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[45] Ibid, page 79

[46] Ibid, page 98. Miller further argues that '*national self-determination does not entail state sovereignty, and is consistent with recognizing international obligations, including duties of justice. It licences secession only in cases where the claims of the would-be secessionists cannot be met by institutions of partial self-determination (e.g. devolved government)*' (ibid, page 81).

[47] Ibid, page 139. On the latter point, Miller elaborates: '*In the absence of a shared identity, [the majority group] are being asked to extend equal respect and treatment to groups with whom they have nothing in common beyond the fact of cohabitation in the same political society.*'

[48] Ibid, page 142. For this purpose he considers the French example to be instructive: '*Since the Revolution at least, French ideas of nationality and citizenship have been open and inclusive: anyone might become a French national who resided on French soil and displayed attachment to French values. But along with this in the nineteenth century went a deliberate policy of 'making Frenchmen' out of the various communities living on French soil. The two main instruments were compulsory education in public schools and military service*' (ibid, page 143).

other theorists who make such distinctions as between a '*Kulturnation'* and '*Staatsnation'* (Friedrich Meinecke),[49] between '*Eastern'* and '*Western'* nationalism (Hans Kohn),[50] or between '*ethnic'* and '*bureaucratic'* nationalism (Anthony Smith).[51] Michael Keating explains these distinctions as gravitating around a fundamental difference in approach: whereas ethnic nationalism '*sees membership of the national community as a given, or ascriptive*', 'civic nationalism' '*sees individuals constituting themselves as a collective*'.[52] Civic nationalism mitigates the problems encountered by an ethnic national model of membership by making the boundaries of the national collective sufficiently permeable so as to admit persons by naturalisation, thereby enabling theorists such as Miller to defend the virtues of national identity from a liberal perspective.[53]

Postnational citizenship (rights extend beyond status, marginalising national identity in favour of universal principles of personhood that attach to systems of global governance)

Whereas Miller defends the importance of national identity and argues that closed (but permeable) national memberships are compatible with liberal citizenship, a diametrically-opposed model of membership identifies the waning significance that national identity plays in the allocation of membership benefits in globalised societies. Yasemin Nuhoğlu Soysal's theory of 'postnational' citizenship argues that membership is legitimated by the international community on the basis of universal rights rather than by the nation-state on the basis of national belonging, evidence for which she draws from the inclusion of resident aliens within society as social,

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[49] Friedrich Meinecke, *Weltbürgertum und Nationalstaat: Studien zur Genesis des deutschen Nationalstaates* (R. Oldenbourg 1922)
[50] Hans Kohn, *The idea of nationalism: a study in its origins and background* (Macmillan Co 1945)
[51] Anthony D Smith, *Nationalism in the Twentieth Century* (Martin Robertson and Co. 1979), page 169; see also the distinction made by Hans Kohn between 'Eastern' and 'Western' nationalism (*supra*, n.50).
[52] M Keating, *Nations Against the State: The New Politics of nationalism in Quebec, Catalonia and Scotland* (Palgrave 2001), page 4. Brubaker criticises the 'Manichean myth' of the civic/ethnic categorisation of nationalism, arguing that the dichotomy is 'over-burdened' and intended to fulfil both analytical and normative functions (Rogers Brubaker, 'The Manichean Myth: Re-thinking the distinction between 'civic' and 'ethnic' naitonalism' in Hanspeter Kreisl and others (eds), *Nation and National Identity: the European Experience in Perspective* (Rüegger 1999)).
[53] See also a liberal theory of nationalism advanced by Yael Tamir (Yael Tamir, *Liberal Nationalism* (Princeton University Press 1993)).

political and economic actors.[54] Soysal identifies two developments in global governance as responsible for this shift: '*the emergence of transnational political structures'*, and '*the emergence of universalistic rules and conceptions regarding the rights of the individual, which are formalized and legitimated by a multitude of international codes and laws*'.[55] With regards to the former, Soysal pointed to organisations such as NATO, the European Union and the United Nations as the source of '*transnational market and security arrangements*' that '*constrain the host states from dispensing with their migrant populations at will*'.[56] Previously within the '*exclusive preserve of the nation-state*', the areas of regulatory competence assumed by these bodies had '*become legitimate concerns of international discourse and action*'.[57] The 'de-nationalisation' of citizenship has been witnessed also by other theorists: Saskia Sassen, for example, has observed it in the grant '*by national states, of a whole range of 'rights' to foreign actors, largely and especially, economic actors – foreign firms, foreign investors, international markets, and foreign business people*'.[58]

'Transnational' and 'a-national' citizenship (rights extend beyond status, reflecting multiple and overlapping memberships in territorially-bounded polities)

Postnational theories of citizenship have been criticised for the extent to which they under-estimate the continued significance of national identity, and '*draw a wrong dualism between nation-states and individual rights*'.[59] Specifically, critics argue that viewing human rights as an '*external imperative*' underestimates the extent to which the '*global is embedded and filtered through the national'*,[60] with such rights constituting '*an inherent feature of nation-states qua liberal-constitutional state*'.[61]

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[54] Soysal (1994), page 140
[55] Ibid, pages 144-45
[56] Ibid, page 144
[57] Ibid, page 144
[58] Saskia Sassen, *The Need to Distinguish Denationalized and Postnational* (2000) 7 Indiana Journal of Global Legal Studies 575, page 581
[59] Joppke (1998), page 26
[60] Saskia Sassen, 'Towards Post-National and Denationalized Citizenship' in Engin F Isin and Bryan S Turner (eds), *Handbook of citizenship studies* (SAGE 2002)
[61] Joppke (1998), page 26. Similar criticism was equally advanced by Linda Bosnaik, who argues that '*the often-substantial membership rights that aliens enjoy are not grounded in the human rights regime at all, but in the national system itself*' (Bosnaik *Citizenship Denationalized* (2000), page 460).

Other reconfigurations of membership have sought to tread a mid-path between the bounded national societies advocated by Miller, and the form of global citizenship envisaged by Soysal. Rainer Bauböck's theory of 'transnational citizenship' progresses '*beyond the dichotomy of, on the one hand, internal rights of citizenship in closed societies where individuals live a complete life…and, on the other hand, human rights which serve as standard of justice in the international community of states'*.[62] This membership model reconceptualises citizenship in such a way as retains the significance of both the state system and national membership groupings, but which argues towards adapted mechanisms for the allocation of nominal and substantial citizenship in the face of the '*complex map of overlapping memberships'* that ensue from globalising societies.[63] Specifically, Bauböck argues that transnational citizenship advocates towards the optional naturalisation of persons who have resided within a territory for a minimum period,[64] and for the extension of rights to resident aliens.[65] Unlike theories of 'postnational' or 'global' citizenship, Bauböck's transnational citizenship does '*not adopt a radically cosmopolitan perspective for which a global state is the target*'.[66] Rather, he argues that transnational aspects of citizenship '*bridge these cleaves* [between populations and territories] *rather than level them out'*,[67] creating societies in which the allocation of rights '*reach beyond nation-states'*.[68]

Sassen points to the use of human rights instruments in national courts as '*instances of denationalization in so far as the mechanisms are internal to the national state*'(Sassen *Towards Post-National and Denationalized Citizenship* (2000), page 288)

[62] Bauböck (1994), page viii

[63] Bauböck argues that a '*comprehensive concept of citizenship which contains individual as well as collective rights, civil and political as well as social rights can only be institutionalized within communities bounded both territorially and in terms of membership*' (ibid, page 19).

[64] Ibid. pages 152-166. Ruth Rubio-Marín presents a similar suggestion, though she argues that '*after a certain residence period, permanent residents ought to be automatically and unconditionally recognized as citizens of the state*' (Ruth Rubio-Marín, Immigration as a Democratic Challenge (Cambridge University Press 2000), page 20).

[65] Ibid, page 331

[66] Bauböck (1994), page viii. Elsewhere, Bauböck argues that '[i]*f we theorize migrant transnationalism as a challenge to the nation-state system itself, we are likely to exaggerate its scope and to misunderstand its real significance*' (Rainer Bauböck, *Towards a Political Theory of Migrant Transnationalism* (2003) 37 International Migration Review 700, page 701). Rather, '[a] *comprehensive concept of citizenship which contains individual as well as collective rights, civil and political as well as social rights can only be institutionalized within communities bounded both territorially and in terms of membership*' (Bauböck (1994), page 19).

[67] Ibid, page 3

[68] Ibid, page 19

A more radical approach to navigating between closed societies and the global state is advanced by Dora Kostakopoulou, who suggests a revised institutional framework in which 'domicile', rather than nationality, serves to delineate membership organisations. Arguing that citizenship ought to be understood as a 'network good' with low excludability, Kostakopoulou searches for a revised framework capable of reflecting the multiple active connections that individuals have with a political community, and the webs of interactions of which they are a part.[69] She suggests three forms of 'domicile' (by which she refers to an individual's permanent home) through which membership may be acquired: domicile of birth, granted automatically through birth within the territorial jurisdiction of a given state; domicile of choice, acquired through application upon satisfying both the fact and intention of permanent residence; and domicile of association, acquired by virtue of a relationship of legal dependency.[70] Kostakopoulou suggests that the status of domicile would facilitate the maintenance of plural attachments,[71] would protect long-standing residents against expulsion, and would entitle residents to apply for citizenship after two or three years of residence.[72]

Differentiated citizenships (rights are differentiated in order to protect minority cultures: common national identity accommodates alternative identity groupings)

All models of membership that have sought either to defend or to realign national membership have struggled with the issue of how to accommodate multiplicious identities within the umbrella of a common membership. Two related but often distinguished challenges are posed by non-territorially located cultures and social groups that seek protection within an existing constitutional framework, and by territorially located national minorities that assert a right of self-determination.[73]

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[69] Kostakopoulou (2008), page 108
[70] Ibid, pages 120-122
[71] Ibid, page 131
[72] Ibid, page 141
[73] Miller, for example, accepts the right of self-determination asserted by territorially-located national minorities, whilst rejecting the claim of differentiated rights for minority cultures (Miller (1997)). Similarly, Will Kymlicka draws a distinction between ''*national minorities' (in multination states) and 'ethnic groups' (in polyethnic states)*' (Will Kymlicka, *Multicultural citizenship : a liberal theory of minority rights* (Clarendon Press 1995), page 6). Whilst the former expresses a 'societal culture' that warrants protection through the differentiation of rights, the latter does not (ibid, page 101). Bauböck differentiates between collective rights for regional populations (which he terms the 'least

Multicultural citizenship

Addressing the first of these issues, theorists have put forward several justifications for group-differentiated rights for minority cultures or social groups. Whereas some have identified the need for special rights to prevent oppression of social groups (Young),[74] others have argued for the protection of minority cultures as a means by which to maximise an individual's context of choice and to support self-identity (Kymlicka),[75] or as a means by which to challenge perspectives and to create a climate in which different cultures can engage in a mutually beneficial dialogue (Parekh).[76]

In her theory on differentiated citizenship, Iris Marion Young argued that 'social groups' play an important role in influencing an individual's choices: '*People necessarily and properly consider public issues in terms influenced by their situated experience and perception of social relations. Different social groups have different needs, cultures, histories, experiences, and perceptions of social relations which influence their interpretation of the meaning and consequences of policy proposals and influence the form of their political reasoning'*[77]

Young observes that a *'strict adherence to a principle of equal treatment tends to perpetuate oppression or disadvantage'* of social groups,[78] as a result of which she makes two primary suggestions. First, she argues towards group

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controversial'), age groups, social classes, ethnic and 'racial' minorities and women (Bauböck (1994), page 270), whilst Ferran Requejo distinguishes between four kinds of cultural pluralism: '*those which defend a 'single issue' (feminism, sexual minorities, etc.), those of a nationalist nature; those representing immigrants, and those which defend the rights of indigenous peoples'* (Ferran Requejo, *Cultural Pluralism, nationalism and federalism: A revision of democratic citizenship in plurinational states* (1999) 35 European Journal of Political Research 255, page 256). Such distinction is not, however, universally considered helpful: Iris Marion Young criticises Kymlicka's distinction between national minorities and ethnic groups as '*unnecessarily dichotomous* , claiming that '*Kymlicka's desire to develop two mutually exclusive categories of cultural minorities is misguided…it is far better to think of cultural minorities in a continuum'* (Iris Marion Young, *A Multicultural Continuum: A Critique of Will Kymlicka's Ethnic-Nation Dichotomy* (1997) 4 Constellations 48, page 50).

[74] Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship* (1989) 99 Ethics 250

[75] Kymlicka (1995)

[76] Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Macmillan Press 2000)

[77] Young (1989), page 257. She defines 'social groups' as '*an affinity with other persons by which they identify with one another, and by which other people identify them'* (ibid, page 259).

[78] Ibid, page 251

representation as a means by which to guard against exploitation, marginalization, powerlessness and cultural imperialism.[79] Secondly, Young argues that universal law and policy is biased in favour of privileged groups – whose experience sets the 'norm' – and further disadvantages oppressed groups. '*This'*, she argues, '*implies that instead of always formulating rights and rules in universal terms that are blind to difference, some groups sometimes deserve special rights*'.[80]

Whereas Young advocated towards differentiated rights for a broad range of social groups in order to guard against oppression, Will Kymlicka has advanced a theory of 'multicultural citizenship' in which he argues towards the protection of '*societal cultures*' through the grant of minority rights.[81] Societal cultures, he argues, are '*important to an individual's freedom'*,[82] as the play a role *'in enabling meaningful individual choice and in supporting self-identity…Cultural membership provides us with an intelligible context of choice, and a secure sense of identity and belonging, that we call upon in confronting questions about personal values and projects.'*[83]

A pervasive criticism levied against Kymlicka's theory lies in the extent to which his concept of 'societal culture' perpetuates a monolithic understanding of culture that replicates the homogeneous ideals of nationhood. Joseph Carens highlights this to be the '*greatest irony*' of Kymlicka's model, arguing that his characterisation of '*societal structure*' as '*more or less institutionally complete*' invokes the '*old logic of the nation-state'*.[84] Carens thus suggests that by focussing upon the transmission of a common culture, Kymlicka draws away from the problem

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[79] Young argued that '*a democratic public, however that is constituted, should provide mechanisms for the effective representation and recognition of the distinct voices and perspectives of those of its constituent groups that are oppressed or disadvantaged within it*' (ibid, page 261).

[80] Ibid, page 269

[81] Kymlicka defines 'societal culture' as '*a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres*' (ibid, page 76).

[82] Kymlicka (1995), page 80

[83] Ibid Bhikhu Parekh presents a similar argument, by which he suggests that cultural diversity '*is desirable for society as a whole and represents a valuable collective asset*'; *'since each culture is inherently limited, a dialogue between them is mutually beneficial'* (Parekh (2000), pages 196 and 337).

[84] '*The deepest problem – and the greatest irony – of Kymlicka's concept of societal culture is that it is much better suited to a monocultural conception of citizenship than to a multicultural one. This is not surprising if one considers how heavily Kymlicka's concept of societal culture rests upon Gellner's discussion of nationalism*' (Jospeh Carens, Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness (OUP 2000), page 65). See also Kostakopoulou (2008), page 61.

of multiculturalism understood as the persistence of cultural differences within a given state: *'the concept of societal culture obscures rather than illuminates the distinctive questions that national minorities raise'*.[85]

Plurinational Citizenship

Kymlicka's theory of multicultural citizenship has also been criticised for the way in which it deals with national minorities: Christian Joppke has argued that the 'levelling function' of multiculturalism trivialises the state-seeking ambition of national minorities who reject being seen as *'just a minority among other minorities'* in a multicultural society.[86] Many theorists would, however, reject Joppke's assumption that the differentiated rights claimed by national minorities need necessarily amount to statehood. Turning their attention to the issue of what differentiated rights for national minorities may require, several studies have observed that sub-state nationalist movements have moved away from singular ends of state-sovereignty. Several scholars have thus noted that *'many nationality movements do not want a state on traditional lines at all, but seek other expressions of self-determination'*,[87] and that *'self-determination need not necessarily result in independent statehood'*.[88] Michael Keating argues that '*there is not much historical support*' for the view '*that a territory given a special status, particularly if this is accompanied by recognition of its national identity, will not be content with the status of devolution but will press for further concessions and ultimately for*

[85] Carens (2000), page 66. Bhikhu Parekh criticises Kymlicka's notion of societal culture on the grounds that is gives an essentialist and reified account of society, overlooking that '*cultural boundaries are often porous and permeable…in which each culture both absorbs the influences of and defines itself in relation to others*' (Bhikhu Parekh, *Dilemmas of a Multicultural Theory of Citizenship* (1997) 4 Constellations 54, page 61)

[86] Christian Joppke, *Multicultural Citizenship: A Critique* (2001) 42 European Journal of Sociology 431, page 435. Carens expresses concern that the concept of societal culture may weaken the claim of smaller, more vulnerable national minorities that do not meet the standard of the societal culture that Kymlicka defines (Carens (2000), pages 56 and 61).

[87] M Keating, *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era* (Oxford University Press 2004), page 8). Rather, such movements seek '*other expressions of self-determination. The extraordinary persistence of the idea that nationality entails claims to statehood shows what a grip the idea of statehood has on the modernist imagination, a grip only gradually being prised loose with the transformation and demystification of the state in late modernity'*.

[88] Rainer Bauböck, *Paradoxes of self-determination and the right to self-government* (IWE - Working Paper Series, 2004), page 12

independence',[89] whilst Stephen Tierney challenges the '*common myth' that the dominant nationalist voices within territories such as Catalonia, Quebec, and Scotland are in fact 'separatist' ones.'*[90]

Such arguments centre around a model of 'national pluralism', in which it is observed that an individual may self-identify with one or more distinct national groups. The 'Moreno Question', developed as a means by which to measure national pluralism in Spain and the UK, has asked respondents in Scotland and Catalonia whether they regard themselves as:[91]

1. Catalan/Scottish, not Spanish/British
2. More Catalan/Scottish than Spanish/British
3. Equally Catalan/Scottish and Spanish/British
4. More Spanish/British than Catalan/Scottish
5. Spanish/British, not Catalan/Scottish
6. Don't Know

Results of the survey found that 53% of respondents in Scotland identified themselves within categories 1-3, thus displaying some form of 'duality', with 19% of respondents considering themselves to be equally Scottish and British.[92] These findings lent empirical weight to the normative claim made by theorists such as Michael Keating, who argued towards a need '*to recognize national identities as*

[89] Michael Keating, *What's wrong with asymmetrical government?* (1998) 8 Regional and Federal Studies 195, page 212

[90] Rather, Tierney notes that '*sub-state national societies are, with their new visions of what sovereignty can and does mean, presenting very complex claims to greater autonomy and enhanced recognition within the State, while at the same time attempting to negotiate some measure of discrete personality within the international institutions to which the State belongs; these aspirations therefore represent a deeply ambivalent strategy of operating more effectively inside, and when the opportunity avails itself and is attractive, partly beyond, the nation-State'* (Stephen Tierney, *Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation-State* (2005) 54 International and Comparative Law Quarterly 161, page 163).

[91] The 'Moreno Question' was developed by Luis Moreno during his doctoral studies (Luis Moreno, *Decentralization in Britain and Spain: The cases of Scotland and Catalonia* (Ph.D. thesis, University of Edinburgh, National Library of Scotland 1986))

[92] Luis Moreno, *Scotland, Catalonia, Europeanization and the 'Moreno Question'* (2006) 54 Scottish Affairs

plural rather than singular', explaining that '[i]*n plurinationalism, the very concept of nationality is plural and takes on different meanings in different contexts*'.[93]

In this context, limited claims of self-determination that fall short of state sovereignty are not the result of a political deadlock arising from the 'paradox of self-determination',[94] but rather present a solution in which the constituent nations (the parts and the whole) may achieve full expression of their multiplicious identity. Benoît Pelletier thus argues with regard to Canada that constitutional asymmetry is a '*powerful tool to help all Canadians meet their aspirations*' of differing visions of Canada.[95] Requejo argues that such reconceptualization should be considered *'not just as an inconvenient fact that must be borne as stoically as possible'*, but rather that it constitutes *'a normative and institutional refinement of liberal democracies in plurinational societies means seeing national pluralism as a value worth protecting'*.[96]

1.4. Contestation of the state

Reoccurring themes of discourse can be isolated from these membership models, all of which struggle to bridge the gap between national membership and the equality demanded of liberal citizenship. They all consider the respective importance that ought to be placed upon a shared civic status and common culture as the bases upon which membership rights are allocated. Three main points of enquiry can be identified within these discourses: 'what obligations do liberal states owe towards resident non-nationals?'; 'what obligations do liberal states owe towards minority cultures?', and 'what obligations do liberal states owe towards national minorities

[93] Keating (2002), pages 351 and 361

[94] This paradox refers to the tension between '*national minority self-government and the territorial integrity of a multinational state*' (Bauböck (2004), page 1). See also Susanna Mancini, who seeks to identify a procedural model for democratic secession within a constitutional framework (Susanna Mancini, *Rethinking the boundaries of democratic secession: liberalism, nationalism, and the right of minorities to self-determination* (2008) 6 International Journal of Constitutional Law 553). This issue has been the subject of judicial deliberation in the case of *Reference re Secession of Quebec* [1998] 2 S.C.R.217.

[95] Benoît Pelletier, '*Asymmetrical Federalism: A Win-Win Forumla!'* Asymmetry Series 2005 (17) <http://www.queensu.ca/iigr/working/asymmetricfederalism.html> accessed 7 August 2010

[96] Ferran Requejo, '*Federalism and the Quality of Democracy in Plurinational Contexts: Present Shortcomings and Possible Improvements'* Paper presented at the ECPR Joint Sessions of Workshops: 'Centres and Peripheries in a Changing World', Grenoble April 2001, <http://www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/grenoble/ws4/requejo.pdf> accessed 1 September 2010, page 8

asserting claims of self-determination?' Reconfigurations of equal membership that have recently grown to dominate citizenship scholarship are thus primarily concerned with challenges to the *nation* as the legitimating frame of equal membership, whilst assuming the continued primacy of the *state* as the predominant provider of the rights that form the substantive benefit of membership. They examine the role of formal status and national identity in securing rights, whilst adopting the perspective that allocation of those rights are a function of the state.[97]

Plurinational models of citizenship have, of course, envisaged revised constitutional structures as a means by which to accommodate the right to self-government asserted by national minorities. In doing so they illustrate the way in which reconfigurations of national identity may contest the dominance of the state framework, and how the state may protect national minorities. Such analysis has, however, stopped short of considering the flip-side to this question: how does citizenship operate within a non-state framework, once claims to self-determination have been accommodated within devolved structures? Whilst an emerging body of literature is devoted to the basis upon which such structures are formed and legitimated, little consideration has been given to the way in which membership is defined within that constitutional landscape, or how polities re-define and establish bounds of membership once operational. Of those mentioned above, Soysal's 'postnational' model of membership comes closest to unpicking the consequences for citizenship of the re-allocation of membership competences away from the State. Yet even this model is limited in that respect: Soysal herself recognises a 'dialectic tension' between what she perceives to be the external influence of human rights regimes and the realisation of postnational citizenship within the continued framework of sovereign states,[98] with regards to which she notes that, '[i]*ncongruously, inasmuch as the ascription and codification of rights move beyond national frames of reference, post-national rights remain organized at the national*

[97] Kostakopoulou, for example, specifically notes that '*a-national citizenship is not envisaged to affect either the recognition of states in the international arena or their central role. Nor does it threaten to usurp their competence to determine the beneficiaries of citizenship*' (Kostakopoulou (2008), page 127).

[98] The 'postnational' theory of membership that Soysal presented has received criticism from those who refute Soysal's characterisation of international human rights regimes as external limitations of sovereignty, and who argue that the protection of individual rights form an inherent part of the rule of law as expressed in the modern nation-state (see further at nn.59-61).

level. The nation-state is still the repository of educational, welfare and public health functions and the regulator of social distribution'.[99]

1.5. Examining social citizenship in two asymmetric constitutions

The purpose of this study is to investigate the boundaries of social citizenship in non-state polities. It examines how non-state polities engage in the same act of balancing rights, status and identity to allocate the benefits of membership within their control when legislative competence is transferred to polities above and below the state, and how the resulting models of polity membership at which they arrive interact across the interdependent polities.

Constitutional Asymmetry

The constitutional structures under examination in this study are referred to as 'asymmetric constitutions'. This term is used to identify to a constitutional structure that consists of 'nested' polities (in which both the whole and the parts are distinct territorially-bounded political communities), and in which legislative competence is allocated differentially across the constituent polities of the structure. Such structures have multiple dimensions. On a domestic level, they result from accommodation of national minority claims to self-governance in plurination states.[100] From a broader perspective, the European Union can in its entirety be conceived in terms of a constitutional asymmetry by reason of the 'variable geometry' of EU law across Member States,[101] and from the perspective of a plurination-state EU governance adds an additional 'layer' to the asymmetry experienced within the domestic framework.

The adjective 'asymmetric' within this label refers to variation across the constitutional structure, and is adopted from Charles Tarlton's exposition of symmetry in federal relationships as relating to '*the level of conformity and*

[99] Soysal (1994), pages 8 and 157
[100] See text, above, at n.86
[101] Variable geometry results from the ability of the UK, Ireland and Denmark to 'opt in' or 'opt out' of certain EU laws.

commonality in the relations of each separate political unit of the system to both the system as a whole and to the other component units'.[102]

Asymmetry can exist in two forms. *De facto* asymmetry may manifest in differences in the '*underlying social, cultural and political realities of the polity in question*',[103] and may also arise from diverging legal and policy choices made within a symmetrical constitutional framework. *De iure* asymmetry, by contrast, may be understood as that asymmetry that is proscribed within the constitutional framework, and which is enshrined within law.[104] Such asymmetry may manifest in the varying scope of competences enjoyed by given polities, or even in the very framework within which those competences are acquired.

Constitutional asymmetry presents a helpful characterisation of the constitutional structures under examination for purpose of this analysis, allowing a frame within which to analyse both the allocation of constitutional competences, and the underlying social and political divergences within which those competences are contextualised.[105] Ferran Requejo identifies two dimensions to which the asymmetry in federations refers, both *'to the degree of heterogeneity that exists in the relations between each member state and the federation, and between the member states*

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[102] Charles Tarlton, *Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation* (1965) 27 The Journal of Politics 861, page 867. Tarlton argued that traditional approaches to federalism had hitherto afforded insufficient recognition to the fact that the 'federalism' of any system '*is likely to be variegated and disparate among all the essential units*'. Such implicit classification of a system as '*federal as a whole*', he argued, led necessarily to an '*important distortion*' of any exposition of federalism. The symmetry of any given system was for Tarlton an indicator of its suitability for a federal constitution: whether a state can function harmoniously within a federal constitution is a result of the level of symmetry within it. '*The higher the level of symmetry,*' he argued, '*…the greater the likelihood that federalism would be a suitable form of governmental organisation. On the other hand, if the system is highly asymmetrical in its components, then a harmonious federal system is unlikely to develop*' (page 872).

[103] Ibid, page 866. Tarlton adopts a 'socio-cultural' approach towards federalism advanced by William Livingston, who considers that '*the essence of federalism lies not in the institutional or constitutional structure but in the society itself*' (William Livingston, A Note on the Nature of Federalism (1952) Political Science Quarterly 81, page 84, and Tarlton (1965), page 868). Summarising this approach Tarlton recognises an '*over-emphasis on legalistic concerns by pointing out that the institutional facade may or may not accurately express the social, cultural, and political realities of the society being studied.*'

[104] The distinction between *de facto* and *de iure* asymmetry was developed by Robert Agranoff (Agranoff R (ed), *Accommodating Diversity: Asymmetry in Federal States* (Nomos 1999); see also Agranoff R, *'Federal Asymmetry and Intergovernmental Relations in Spain'* Asymmetry Series 2005 (17) <www.queensu.ca/iigr/working/asymmetricfederalism/Agranoff2006.pdf> accessed 7 August 2010). Divergences in laws enacted within a symmetrical distribution of competences are characterised in the text above as *de facto* asymmetries, though other scholars may consider them by their nature to be *de iure* asymmetries.

[105]

themselves'.[106] We might characterise these two directions of asymmetry in terms of 'vertical asymmetry' – operating between the sub-state unit and the state, or between the state and the EU – or 'horizontal asymmetry', operating between sub-state units or between Member States of the EU.[107] To this we might add a third label of 'diagonal' asymmetry, referring to the relationship between sub-state polities and the European Union, or between sub-state units and non-devolved territories that are governed by central organs of state.[108]

The study examines how the boundaries of equal membership are determined across this web of constitutional relations. For this purpose it examines the allocation of membership in the constituent polities of the UK and Spain, as two asymmetric constitutions within the broader asymmetrical framework of the European Union. At a sub-state level, the study focuses primarily upon Scotland and Catalonia, though draws reference to other sub-state polities by way of contextual comparison. The study does not employ a strict comparativst approach between the UK and Spain, and nor are the observations noted within these case studies claimed to be extrapolable across all asymmetric constitutions. Rather, the study draws upon the context-specific experience of particular constitutional structures as a means by which to interpret the process of membership definition within nested polities. Its objective is to probe the complexities of these constitutional relationships and their significance for membership definition in order to provide a conceptual framework within which these experiences can be illuminated, rather than to furnish a comprehensive normative theory within which these tensions might be mitigated. The methodology

[106] Requejo (1999), page 270

[107] See Robert Agranoff (ed), (1999) *Accommodating Diversity: Asymmetry in Federal States* (Nomos), page 17

[108] The only nation within the United Kingdom that does not possess devolved authority is England. Two consequences flow from this observation.
First, the electorate in devolved regions have a disproportionate influence over 'State' policy that applies only within the non-devolved territory. For example, Members of the UK Parliament returned from Scottish constituencies are entitled to vote upon Bills presented to the UK Parliament that affect only England. By contrast, Members of the UK Parliament have no influence over devolved matters that affect only Scotland. This not only means that 'English' Members of Parliament cannot influence matters in Scotland, but also gives rise to the paradoxical situation whereby Scottish Members of the UK Parliament have no influence over certain matters that affect Scotland, though they can vote upon Bills that effect only England. This dichotomy was first raised as an issue before the House of Commons by Tam Dayel MP, and has since attracted much analysis in literature as 'The West Lothian Question'. Secondly, diagonal asymmetry poses the risk of assimilating the interests of non-devolved territories with 'State' interests. This is of particular concern when there is only one non-devolved territory, such as is the case in the United Kingdom, around which State-level political discourse becomes centred.

draws from Kim Lane Scheppele's approach of 'constitutional ethnography', which '*looks to the logics of particular contexts as a way of illuminating complex interrelationships among political, legal, historical, social, economic and cultural elements.'*[109] Constitutional ethnography has been harnessed as a methodology in a variety of socio-legal studies of citizenship,[110] which have identified that a contextual approach '*is essential to bring out the essential contestedness of citizenship, which may be a formal legal/institutional concept in one respect, but which is equally a multivalent and controversial concept'*.[111]

Polity membership defined through the grant of social citizenship rights

The study examines membership boundaries constructed through the grant of social, rather than political (or civic) rights. The reason for this is twofold: first, it is in the allocation of social citizenship rights that devolution to sub-state polities has most salience. The ability to pursue differential policy lies at the heart of devolved constitutional structures, and the greater the divergence in policy that ensues, the more contentious becomes the exercise of that competence. Secondly, the capacity of non-state polities to define the boundaries of equal membership by extending or withdrawing citizenship rights is limited to the allocation of social rights. Political membership of Scotland, for example, is not a product of a decision taken within the competence of the Scottish polity but rather is a decision taken by central organs of state. The purpose of this study is to progress beyond an examination of differentiated rights granted by the state, to consider how non-state polities engage in decisions that delineate the boundaries of their equal membership. It is in the

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[109] Scheppele (2004), page 390. Scheppele further explains that '*The goal of constitutional ethnography is to better understand how constitutional systems operate by identifying the* mechanisms *through which governance is accomplished and the* strategies *through which governance is attempted, experienced, resisted and revised, taken in historical depth and cultural context'* (ibid, page 391); and that '*constitutional ethnography is the study of the central legal elements of polities using methods that are capable of recovering the lived detail of the politico-legal landscape* (ibid, page 395).

[110] see Jo Shaw, *The Transformation of Citizenship in the European Union* (Cambridge University Press 2007), pages 16 and 83; Eldar Sarajlić, *Conceptualising citizenship regime(s) in post-Dayton Bosnia and Herzegovina* (2012) 16 Citizenship Studies, page 368; Jo Shaw and Igor Štiks, '*The Europeanisation of Citizenship in the Successor States of the Former Yugoslavia: an introduction'* CITSEE Working Paper 2010/1 (2010) <http://www.law.ed.ac.uk/file_download/series/178_theeuropeanisationofcitizenshipinthesuccessorstatesoftheformeryugoslaviaanintrod.pdf> accessed 28 March 2013 (pages 10-11)

[111] Shaw and Štiks (2010), page 9

allocation of social citizenship rights that fall within devolved competences that such decisions are evidenced.

It ought to be acknowledged that polity membership defined through the grant of social rights is of a different nature to polity membership defined through the grant of political rights, and that the national model of membership described above may resonate differently across the two.[112] There may be people excluded from the franchise because they lack formal status (and the loyalty and commitment that it is assumed to indicate), to whom social rights are extended on the basis of social justice or humanitarian grounds. Conversely, there may be non-resident nationals who retain political membership in the polity of which they are formal members, who do not receive the benefit of social citizenship rights.[113] Acknowledgment of these differences does not undermine the presumption that social citizenship rights have traditionally been linked with a national model of membership,[114] but simply necessitates a clear identification of the limits of the study: observations drawn from the study of social citizenship rights cannot be extrapolated to political membership.

Social citizenship has also never been exclusively unitary in nature across state territory in the same way as might be claimed of political membership of the state, or of nominal citizenship. Differentiated social citizenship at the sub-state level has long been evidenced in those states with established federal constitutions, where federal units have often retained significant competences in the field of social rights. Yet despite being an established feature of certain modern states, little scholarly

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[112] Bauböck, for example, notes that '[social rights of citizenship] *are different from civic and political ones, because the notion of need is strongly present as a background justification and cannot be eliminated as long as social rights are differentiated according to particular needs*' (Bauböck (1994), page 219).

[113] On the external dimension of political participation see Rainer Bauböck, *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting* (2007) 75 Fordham Law Review 2393

[114] On the contrary, Bauböck notes that '[o]*nce moral commands of mutual aid that aim at establishing obligations to satisfy the existential 'needs of strangers'…have been satisfied, social rights ought to be oriented towards enabling citizens in different situations of need to recognize each other as free agents in civil society and as equal members of the polity*' (Bauböck (1994), pages 219-220). See also Miller's claim that '*if we take nationality seriously, then we must also accept that positive obligations to protect basic rights (e.g. to relieve hunger) fall in the first place on co-nationals, so that outsiders would have strong obligations in this respect only where it was strictly impossible for the rights to be protected within the national community*' (see above, at n.45). Keating has also noted the '*strong assumption in the social welfare literature that the modern welfare state rests upon a unified territorial nation-state*' (Michael Keating, *Social citizenship, solidarity and welfare in regionalized and plurinational states* (2009) 13 Citizenship studies 501, page 501).

attention has been paid to how differentiated sub-state social citizenships challenge the paradigm model of national membership.

Such contestation is evidenced in established federal constitutions, notwithstanding that social citizenship was never fully nationalised, when the nation-state has continued to play an important function in guaranteeing social rights: a core of re-distributive functions often remain within the competence of the State,[115] and a shared state-wide national identity is commonly accredited with sustaining the provision of social goods and services even where those goods and services are organised by federal units.[116]

It is, however, in those states without a continuous federal history, in which the devolution of competences to sub-state legislatures and the differentiated social citizenship that ensue are relatively recent events, that such contestation is likely to be most salient. It is in these structures that the link between social citizenship and national membership has been strongest and most consistent, and is therefore subjected to the greatest challenge when faced with a transition to differentiated social citizenship. In the UK and Spain, which form the focus of this study, devolution has taken place within the last forty years following significant periods of state unity.

Whilst an emerging (and still relatively discrete) body of literature in the field of territorial politics has begun to examine the decentralisation of welfare within devolved states,[117] the focus of such studies is limited primarily to diverging policy trajectories and their implications for nation-building. None has considered how non-state polities define the boundaries of inclusion and exclusion within their respective competences, how these boundaries interact across the constitutional structure, and the new challenges that they present to the definition of equal membership outwith the nation-state.

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[115] In Germany, for example, public welfare is a matter that falls under the concurrent legislative powers of the Federation and the Länder (Grundgesetz Article 73(2)).
[116] See further at n.114, above.
[117] See e.g. Scott Greer (ed), (2009) *Devolution and social citizenship in the UK* (The Policy Press); Nicola McEwen and Luis Moreno (eds), (2005) *The Territorial Politics of Welfare* (Routledge); Keating (2009); Scott Greer, *Territorial Politics and Health Policy: UK Health Policy in Comparative Perspective* (Manchester University Press 2009).

Structure of the study

The following study selects two social citizenship rights through which to examine the boundaries of polity membership: receipt of minimum income allowances,[118] and fee regulation for publically-subsidised services of higher education and prescription charges.[119] These social rights are used within the study as 'lenses' through which to examine the exercise of polity competences to determine the boundaries of equal membership, and the interaction of those boundaries across the constitutional asymmetry.

Minimum income allowances were selected as a means by which to probe the State/EU dimension of the constitutional asymmetry for two reasons. First, social security regulation remains primarily a centralised competence. It therefore provides a means by which to isolate and to examine in detail the effect of EU competences upon a singular polity, foreshadowing consideration in chapter four of the way in which these competences interact with those of sub-state polities. Secondly, of those social security benefits provided by the state, minimum income allowances can most properly be characterised as a 'citizenship right': they are provided to members so as to secure '*a general enrichment of the concrete substance of civilised life, a general reduction of risk and insecurity, an equalisation between the more and the less fortunate at all levels*',[120] and as non-contributory benefits are not the product of a right 'bought' by insurance contributions. Differential fee imposition has been selected as a means by which to probe the interaction of state, sub-state and EU competences as, unlike more diffuse policy differentiation, differential fee imposition is directly comparable across polities and translates clearly in terms of 'advantage' of 'disadvantage'. It is for this reason that such policies are frequently harnessed in public imagination and attract the highest degree of political salience.

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[118] For a definition of minimum income allowances, see below at n.330.

[119] I adopt for this purpose Marshall's definition of a social right as a right to a '*modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society*' (see n.11, above), and Bauböck's definition that '*a right is a resource provided by social institutions which protects and legitimates the existence, the needs and interests, or the actions of the bearer of the right. The emphasis on institutions is meant to refute the idea that rights can be 'natural' in the sense of being attributes of individuals in a state of nature*'(Bauböck (1994), page 209).

[120]Marshall (1950), page 56. See also above at n.17.

The case studies of membership definition in chapters three and four are preceded in chapter two by a contextual examination of the regulatory framework determinative of membership competences across the two constitutional asymmetries. Its discussion on sub-state nationalism and European identity expands upon and contextualises the contestation of national identity that has been introduced earlier within this chapter, and the classification of competences developed within the chapter both serves as a means by which to unpick the regulatory framework within which membership allocation operates and provides necessary background for the case-studies to follow.

2. Membership competences across two asymmetric constitutions

2.1. Types of membership competence: provision, allocation, and control of access to social goods and services

The discussion in chapter one has claimed that citizenship is a principle of equal membership, ultimately secured through a bundle of civic, political and social rights that form the substantive benefit of membership. In the traditional national model of membership in which citizenship is tied to the nation-state, these rights are provided by the state and are allocated to nationals on the basis of a common identity.[121]

The objective of this chapter is to map the re-location of competences determinative of social membership across the constituent polities of two asymmetric constitutions. For this purpose, the chapter is structured around an examination of three types of 'membership competence': the competence to provide social goods and services,[122] the competence to allocate social goods and services, and the competence to control access to social goods and services. The competence to provide social goods and services is comprised of a legislative competence to determine the level of provision available, and an administrative responsibility to deliver it. The competence to allocate social goods and services refers to the legislative competence of a polity to stipulate a certain class of persons who are entitled to receive the benefit of those goods and services, and thereby the power to include or exclude a given individual. The competence to control access to social goods and services refers to a polity's legislative competence to precondition an individual's admission to that class of eligible persons, through control over such 'gateway' conditions as nationality and residence.

Exercise of these three forms of membership competence collectively determine whether an individual is able to benefit from measures that secure a '*general enrichment of the concrete substance of civilised life, a general reduction of risk and insecurity,* [and] *an equalisation between the more and the less fortunate at all levels'*,[123] and thus whether they receive the substantive benefit of the 'social

[121] A status, which, in turn, is an expression of participation in a common national identity.
[122] The terms 'social good' and 'social service' are used to refer to a broad range of goods and services provided by a polity that secure the 'social element' of citizenship.
[123] Marshall (1950), page 56

element' of citizenship. The following pages examine the re-location of these three types of membership competence to non-state polities across the two asymmetric constitutions under examination. Section 2.2 explores the competence of non-state polities to provide social goods and services (encompassing both a legislative competence to determine the level of provision available, and an administrative responsibility to deliver it). This type of competence is enjoyed by the sub-state polities of Scotland and Catalonia, but not by the European Union. The section opens with a contextual discussion of the nationalist and functionalist claims upon which devolution is predicated, before examining in greater depth the constitutional framework within which that autonomy is realised and the scope of competence enjoyed by the Scottish Parliament and Catalan Generalitat to pursue a distinct social policy.

Section 2.3 considers the competence to allocate social goods and services. In Scotland and Catalonia this competence is co-vested with the competence to provide social goods and services, in a general transfer of legislative competence that allows the sub-state legislature both to determine the level of welfare provided and to specify the persons to whom it is available. The section focuses upon allocation under EU law of those social goods and services that are provided by state and sub-state polities, by way of a requirement placed on those polities to secure equality of treatment for certain persons, and considers the jurisdictional limits to the requirement of equal treatment in the form of the 'wholly internal principle'. The section contextualises these competences within a discussion of the construction of a common European identity as a means by which to foster enhanced economic and social integration. Finally, section 2.4 examines the competence to control access to social goods and services, through the conferral of nationality, EU Citizenship, and rights of residence. It focuses upon the interdependence of state and EU competences in this area.

2.2. Competence to provide social goods and services

The competence of a polity to provide goods and services determinative of social membership is encompassed both of a legislative competence to regulate the level of

support available, and of an administrative responsibility for its delivery. This form of membership competence, traditionally the preserve of the state, has been devolved in certain policy areas to sub-state legislatures in Scotland and Catalonia. The European Union does not enjoy this form of membership competence: European institutions are not responsible for the delivery of social welfare, and neither does European Law regulate the level of welfare provided by state or sub-state polities.

2.2.1. Contextualising the competence of sub-state polities to provide social goods and services: Scottish and Catalan nationalist claims to autonomy

One of the central objectives of the devolution of competences to sub-state legislatures in the UK and Spain is to equip a sub-state membership grouping with the competences necessary to pursue a distinct social policy. This objective is driven primarily by claims to autonomy asserted by self-conscious nation of peoples that share in a common ethnicity, culture and language,[124] which are expressions of *de facto* 'vertical' asymmetries between the constituent unit and the state as a whole.[125] Such nationalist claims to autonomy (which consider self-determination to be desirable in and of itself, as a right that attaches to nationhood),[126] are further supplemented by functionalist claims to autonomy that invoke the practical benefits of enabling the polity to cater for the distinct social and economic needs of that nation. Functionalist and nationalist claims to autonomy are interdependent: functionalist claims necessarily operate within the confines of existing political and identity groupings, whilst the culture and identity constitutive of nationhood are reinforced by distinct functional requirements particular to that unit.[127] Both nationalist and functionalist claims to autonomy have been a driving force in the devolution to Scotland and Catalonia of the competence to provide goods.

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[124] See above at n.33.
[125] See above at nn.103 - 108.
[126] Claims to autonomy need not necessarily amount to the pursuit of independence; see above at n.87.
[127] Parks and Elcock warn that 'f*unctional regionalization may not succeed where an appropriate functional region cannot be defined without outraging established popular loyalties. Regionalism may also fail if it lack the cultural factors needed to stimulate the popular support for the creation of regional institutions*' (Judith Parks and Howard Elcock, *Why Do Regions Demand Autonomy?* (2000) 10 Regional and Federal Studies 87, page 98).

Nationalist claims to autonomy: shared language and culture

The self-conscious nationhood that generates claims to autonomy is founded in a common (and often distinct) language and culture. Language, in particular, plays an important role in shaping the national identity that lies at the heart of claims to autonomy in Catalonia. The '*centrality of language*' to the Catalan nation was recognised by the Catalan Cultural Committee in 1924, which stated that '[o]*ur language, the expression of our people, which can never be given up... is the spiritual foundation of our existence*'.[128]

The significance of the Catalan language in the nationalist agenda has been borne out in progressive legislative reform since the Constitution of 1978 afforded recognition to the six 'co-official' languages of Spain.[129] In accordance with the recognition of Catalan as an official language of Catalonia in the Catalan Statute of Autonomy 1979, the Law of Linguistic Normalisation, enacted by the Catalan Parliament in 1983, stipulates that all school-age children are required to learn both Castilian and Catalan.[130] Legislative reforms of 1997 introduced obligatory knowledge of Catalan for public sector workers, making command of the Catalan

[128] Catalan Cultural Committee 1942, cited in Goldie Shabad and Richard Gunther, *Language, Nationalism, and Political Conflict in Spain* (1982) 14 Comparative Politics 443, page 446. See also Encarnación, who highlights that '*the central cleavage and basis for claims of ethnic distinctiveness and nationalism in Spain is language rather than religion*' (Omar G Encarnación, *Democracy and Federalism in Spain* (2004) 15 Mediterranean Quarterly 58, page 66), and Elisa Roller, who claims that '[a]*lthough it has been argued that language is an artificial creation employed to symbolize national identity, in Catalan nationalist discourse language is employed as an inherent feature of national differentiation'* (Elisa Roller, *The 1997 Llei del Catalá: A Pandora's Box in Catalonia?* (2001) 11 Regional and Federal Studies 39, page 40).

[129] Article 3 of the Spanish Constitution 1978 provides that:
'*(1) Castilian is the official Spanish language of the State. All Spaniards have the duty to know it and the right to use it.*
(2) The other Spanish languages shall also be official in the respective Self-governing Communities in accordance with their Statutes.
(3) The richness of the different linguistic modalities of Spain is a cultural heritage which shall be specially respected and protected.' Languages which have gained official recognition, in addition to Castilian, are Eskudai (in the Basque region), Catalan, Valencian (a dialect of Catalan) Galician and Aranese. Prior to the 1978 Constitution, under Franco's regime, the use of Catalan in public spheres was prohibited. This was part of Franco's wider prohibition on the display of national identities, which extended to a prohibition on the display of national symbol such as flags, and even Catalonia's 'national' dance, la Sardana. Encarnación explains that these policies '*corresponded to the myth sustained by the Franco regime that Spain's multiple nationalities were at the root of the nation's proclivity toward anarchy and separatist violence*' (Encarnación (2004); see also Shabad and Gunther (1982)).

[130] *Llei 7/1983, de 18 d'abril de normalització lingüística a Catalunya*. See Roller (2001), page 44.

language a condition of admission to the civil service.[131] This law proved highly contentious, prompting some political elites to question the constitutionality of effectually extending the 'obligation' under Article 3 of the Constitution for persons to know Castilian, to include also an obligation to know Catalan.[132]

The intention to secure Catalan as the preferential language of public administration was later made explicit through reform of the Catalan Statute of Autonomy in 2006, which provided that '*Catalan is the official language of Catalonia, together with Castilian, the official language of the Spanish State. All persons have the right to use the two official languages and citizens of Catalonia have the right and the duty to know them*'.[133] The Statute further provided that '*Catalan is the language of normal and preferential use in Public Administration bodies*'.[134] These provisions, unlike their forerunners of 1997, did not escape review by the Constitutional Court. In a plenary sitting in February 2010 the Court declared the elevation of Catalan to equal status with the Castilian language to be unconstitutional, breaching the obligations set out in Article 3 of the Constitution.[135] The decision of the Court did not, however, require alternation of the corpus of the Catalan linguistic model, and Catalan continued to be a compulsory subject in

[131] *Llei 1/1998, de 7 de gener, de política lingüística*. See Roller (2001), page 46.
[132] The Convivencia Cívica Catalana, a platform formed from a coalition of the Partit dels Socialistes and Partido Popular, presented an official complaint regarding Llei 1/1998 to the Spanish Ombudsman. Despite the fact that the Constitutional Tribunal had already ruled upon and declared unconstitutional parts of a Basque language law requiring all new civil servants to know and use Eskudai, the Ombudsman refused to refer the issue for determination of the constitutionality of the law. See*Basic Law 10/1982 for the Standardization of the Use of Euskara*; Iñaki Lasagabaster, 'The Legal Status of Euskara in the French and Spanish Constitutional Systems' in Gloria Totoricagüena and Iñigo Urrutia (eds), *The Legal Status of the Basque Language Today: One Language, Three Administrations, Seven Different Geographies and a Diaspora* (Eusko Ikaskuntza 2008), page 128; and Robert Agranoff, '*Federal Asymmetry and Intergovernmental Relations in Spain*' Asymmetry Series 2005 (17), page 6).
[133]Catalan Statute of Autonomy 2006, Article 6.2
[134] Ibid, Article 6.1
[135] Constitutional Court Judgment No. 31/2010, of June 28. The Constitutional Tribunal invalidated a total of fourteen Articles of the revised Statute of Autonomy, and provided an interpretative reading for another twenty seven (Nationalism Studies, '*The Indissoluble unity of the Spanish Nation*' (2010) <http://nationalismstudies.wordpress.com/2010/07/14/the-indissoluble-unity-of-the-spanish-nation/> accessed 14 July 2010). Amongst those provisions declared unconstitutional were the characterisation under the Statute of Catalonia as a 'nation', the declaration that Catalan is the preferential language, the existence of the Catalan Justice Council and the limitations imposed on the principle of solidarity which make it conditional upon reciprocal efforts by other Autonomous Communities (Catalan News Agency, 'The Spanish Constitutional Court shortens the current Catalan Statute of Autonomy' (28 June 2010) <http://www.catalannewsagency.com/news/politics/the-spanish-constitutional-court-shortens-the-current-catalan-statute-of-autonom> accessed 14 August 2010).

schools.[136] The most recent recognition of co-official language rights of national minorities in Spain has been affected by the entitlement of members of parliament to debate in the Senate in five co-official languages, a right that has drawn criticism on the grounds of its costly implementation.[137]

Image 1: A placard reading 'Catalonia is not Spain', a popular slogan of the Catalan independence movement, is seen amidst Catalan flags in front of the iconic Gaudi house in a pro-independence rally of 2010. The scene is demonstrative of the self-awareness of the Catalan nation that is encouraged by distinct culture[138]

The national salience of a distinct language in Scotland is, in relation to Catalonia, comparatively low. Pressure for official recognition of Gaelic began in the mid 1990's, propelled by the Gaelic development organisation Comunn na Gàidhlig.[139] It wasn't however until 2005, following a revival of interest in Gaelic language protection at the time of the 2003 Scottish Parliamentary elections, that the language gained official statutory recognition. The Gaelic Language (Scotland) Act

[136] Ibid
[137] The Guardian, 'Lost in translation? Spanish senators allowed to debate in five languages' (19 January 2011) <http://www.guardian.co.uk/world/2011/jan/19/translation-spanish-senators-five-languages> accessed 10 July 2011
[138] Image downloaded from <http://www.flickr.com/photos/7455207@N05/4780884677/> (accessed 15 February 2013).
[139] Wilson McLeod, *Securing the Status of Gaelic? Implementing the Gaelic Language (Scotland) Act 2005* (2006) 57 Scottish Affairs 19, page 20

2005 stated as its purpose the establishment of '*a body having functions exercisable with a view to securing the status of the Gaelic language as an official language of Scotland commanding equal respect to the English language*'.[140] This body - *Bòrd na Gàidhlig* – is under the Act responsible for formulating a national Gaelic language plan, a non-binding strategic plan for the development of the Gaelic language. The extent to which the Act secures statutory protection of the Gaelic language is heavily limited by the vague wording of the statute. Wilson McLeod notes that '[t]*he phrase 'equal respect' has no clearly recognised meaning and was chosen precisely to avoid any suggestion that Gaelic would have equal validity or parity of esteem with English, or that the Act might be construed as imposing a general duty to institutionalise Gaelic-English bilingualism*'.[141] The limited significance of Gaelic language policy within Scottish nationalism contrasts starkly with the Welsh nationalist agenda, in which differential language policy has assumed much greater importance.[142] The Welsh Language Act of 1993 – accredited with igniting the campaign for equivalent recognition of the Gaelic language – succeeded in securing institutional parity for the Welsh language where the Scots Act would later fail.[143]

Cultural heritage also plays an important part in shaping the national identities upon which devolution is predicated. Distinct forms of art, literature, music, dance, food and costume all contribute to self-conscious nationhood of Scotland and Catalonia. The Modernisme movement in Catalonia during the late nineteenth century and early twentieth century is linked with the pursuit of a distinct Catalan national identity, and some of the most iconic symbols of Catalan identity

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[140] Gaelic Language (Scotland) Act 2005

[141] McLeod (2006), page 23

[142] Whereas the focus of this section has thus far been upon the 'vertical' asymmetries that distinguish the sub-state unit from the state as a whole, the differing salience of distinct language policy in Scotland and Wales is demonstrative of a 'horizontal' asymmetry between constituent sub-state units (see n.108, above).

[143] Section 5 of the Welsh Language Act 1993 requires notified public bodies to prepare a scheme specifying the measures it proposes to take to give effect, '*so far as is both appropriate in the circumstances and reasonably practicable, to the principle that in the conduct of public business and the administration of justice in Wales the English and Welsh languages should be treated on a basis of equality*' (Welsh Language Act 1993 s.5(2)). Details of the Welsh Language Scheme were recently updated by the Welsh Language (Wales) Measure 2011. Implementation of a bilingual system in the UK has not, however, occurred without problem, as highlighted by the public embarrassment of Swansea Council when a road sign reading '*No entry for heavy good vehicles. Residential site only*' appeared with the Welsh language translation '*I am not in the office at the moment. Send any work to be translated*' (BBC News, 'E-mail error ends up on road sign' (31 October 2008) <http://news.bbc.co.uk/1/hi/7702913.stm> accessed 31 October 2008).

emerged throughout this period. In turn, nationalism is in some instances accredited with a 're-discovery' of shared cultural practices: the tartan kilt – now an iconic representation of Scottish identity – was in fact reclaimed into modern scots culture in 1882 prior to the visit of King George IV to Edinburgh.

The existence of a common identity is necessary but not sufficient to establish nationhood and the claim for autonomy that it entails. The differentiation between a nation and mere ethnic and cultural groups arises out of the self-consciousness of the collective: Adrian Hastings argues that a '*nation is a far more self-conscious community than an ethnicity*',[144] whilst Keating suggests that '[n]*ations are to be distinguished from ethnicities or mere cultural groups on one hand or regions on the other partly by their self-consciousness of being a nation*'.[145] The self-consciousness of a nation may ensue from historic autonomy, and Rainer Bauböck argues that '*legitimate self-determination claims are always derivative from prior claims to self-government*'.[146] This is true of claims to self-determination of both Scotland and Catalonia.

The self-consciousness of the peoples – and of their assertion of a right to self-governance – that is constitutive of nationhood is driven and shaped by political actors. The claims arising out of sub-state units cannot be fully understood in isolation from the function of political elites in shaping demands for autonomy and in mobilising public support for the agendas that they set: the claims to autonomy that inform constitutional asymmetry are not simple revelations of collective will, developed in a political vacuum, but rather are the product of the actors and political discourse within which they exist. The primacy of this relationship has led Ernest Gellner to argue that '*it is nationalism which engenders nations, and not the other way around*',[147] a stance that rejects the antecedent dormancy of nations in favour of the creation of nationhood through the politics of claim making.

[144] Hastings (1997), page 3
[145] Keating (2002), page 357
[146] Bauböck (2004), page 19
[147] Ernest Gellner, *Nations and Nationalism* (Blackwell 1983), pages 55-56

Functionalist claims to autonomy

Nationalist claims to autonomy that arise out of a shared language and culture are supplemented and reinforced by functionalist claims that note the practical benefit of autonomy in light of the distinct needs of the nation. Disparities in regional wealth are a primary contributor to functional demands of self-governance.[148] Angustias Hombrado Martos identifies this correlation as operating in two directions: the '*over-development argument*', in which '*economically dynamic regions will try and avoid exploitation by a relatively poor centre*', and the '*under-development argument*', whereby units placed in a position of relative depravation by the process of differential industrialisation 'rebel' against the central organs of state.[149] Such claims are manifestations both of 'vertical' *de facto* asymmetry (between the relative wealth of the sub-state unit and the state as a whole) and of 'horizontal' *de facto* asymmetry (between constituent units that draw greater of lesser benefit from the re-distributive mechanisms of the state).

Functional demands for autonomy in Scotland and Catalonia are indicative of both of the correlations that Martos describes. Scottish claims to autonomy gravitate around the associated economic advantages of independence and the increased public expenditure that it would facilitate. The Scottish National Party thus claims that with independence Scotland will '*have the economic levers to create new jobs and take full advantage of* [its] *second, green energy windfall*',[150] enabling an independent

[148] Economic divergences are harnessed by political elites in support of claims to autonomy. Goldie Shabad and Richard Gunther highlight the '*crucial role*' of political elites '*in translating latent social conflict (as reflected in objectively definable social cleavages) into manifest or overt political conflict*', a function that '*is often performed by placing issues related to social cleavages on a governmental policy-making agenda, which raises the salience of those cleavages and provides an incentive for competing groups to mobilize resources in an effort to secure for themselves favourable policy outcomes'* (Shabad and Gunther (1982), page 456). The motivation of political elites in determining these agendas is often analysed as a function of utility maximisation, such that in bargaining with central government political elites '*will use the ethnic or economic features of the group to shape autonomy demands if – and only if – it gets them private gains*' (Angustias Hombrado Martos, *Rethinking Autonomy Demands in Asymmetrically Devolved Countries* (Paper presented at the 60th PSA Annual Conference, Edinburgh, 30 March - 1 April, 2001), page 7). Similarly, Michael Keating has noted that demands to autonomy motivated by a desire to 'catch up' with the level of autonomy acquired by other sub-state units arguably represent '*a power game for political elites rather than a desire for more autonomy on the part of provincial electorates*' (Keating (1998), pages 206-207)

[149] Martos (2001), pages 5 - 6

[150] Scottish National Party, *Scottish National Party Manifesto 2011* (2011), page 28 <http://manifesto.votesnp.com/independence> accessed 11 July 2011

Scotland to pursue such policies as enhanced State pensions and universal free childcare, in addition to continuing to protect the budget of the Scottish National Health Service and provide free higher education.

The relative wealth of Scotland, and the economic viability of its independence, turns largely upon the claim Scotland asserts over North Sea Oil and, more recently, in harvesting alternative energy sources for which the topography of Scotland is uniquely suited.[151] The Scottish National Party slogan of the 1970's, '*It's Scotland's Oil*', asserts that large revenues would accrue to an independent Scottish Government from ownership of North Sea oil, with the result that Scotland would '*tend to be in chronic surplus to a quite embarrassing degree and its currency would become the hardest in Europe, with the exception perhaps of the Norwegian kroner'*.[152] The veracity of these claims has more recently been called into question, with official figures indicating a £9 billion deficit in the year 2009-2010 even after inclusion of revenues from Scotland's geographical share of North Sea oil.[153]

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[151] Tidal power, for example, is resource of growing importance to the Scottish economy. The Pentland Firth, a stretch of sea between Orkney and mainland Scotland, has been labelled by First Minister Alex Salmond as '*the Saudi Arabia of marine energy*', and Scottish waters are considered capable of producing 25% of Europe's tidal energy (BBC News, 'Project Aims to Harvest Sea Power' (29 September 2008) <http://news.bbc.co.uk/1/hi/scotland/highlands_and_islands/7638242.stm> accessed 13 July 2011).

[152] G McCrone, (1974) *The Economics of Nationalism Re-examined*', 'McCrone Report' Commissioned by the Conservative Party (1974), page 8 <http://www.oilofscotland.org/mccronereport.pdf> accessed 12 July 2011. Division of the Continental Shelf under international law allocates an Exclusive Economic Zone to the UK as a sovereign entity. Domestic law, however, apportions a part of that zone to fall within the jurisdiction of Scots law Civil Jurisdiction (Offshore Activities) Order 1987 s.1(2), allowing the Scottish Nationalist party to claim that '*[m]ore than 90 per cent of the UK's oil revenues come from the Scottish sector of the Continental Shelf. So it really is Scotland's oil*' (Scottish National Party, '*Independence - The Benefits*' (2011) <http://www.snp.org/node/240> accessed 12 July 2011). The figure of 90% was based upon a study that modelled the allocation of Scottish waters according to the median line between Scotland and England (Alexander G. Kemp and Linda Stephen, (2008) *The Hypothetical Scottish Shares of Revenues and Expenditures from the UK Continental Shelf 2000 – 2013* <http://www.scotland.gov.uk/Resource/Doc/133434/0061924.pdf> accessed 12 July 2011). The determination of Scottish territorial waters in the event of secession will however be a complex process, such that Keating warns that it '*is likely that a ruling would have to be obtained from the International Court of Justice or from an agreed arbiter*' (Michael Keating, *The Independence of Scotland: Self-government and the Shifting Politics of Union* (OUP 2009), page 86). Moreover, valuation and the division of assets and the issue of compensation is likely to prove contentious.

[153] The Guardian, 'Study Undermines Economic Case for Scottish Independence, Opponents Claim' (22 June 2011) <http://www.guardian.co.uk/politics/2011/jun/22/new-study-undermines-economic-independence-scotland> accessed 12 July 2011. See also the Calman Commission on Scottish Devolution which notes that '[e]*ven if a geographical share of North Sea revenues is attributed to Scotland, the fiscal balance largely remains in deficit, albeit at a lower level*' (Commission on Scottish Devolution, (2009) *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century*<http://www.commissiononscottishdevolution.org.uk/uploads/2009-06-12-csd-final-report-2009fbookmarked.pdf> accessed 17 June 2009, page 74).

'Under development' economic claims have also manifested in Spain, with Martos observing that claims to increased autonomy by Andalucían political elites have utilised statistics in order to show that the economic policy of the central government '*favoured the development of other regions at their expense*'.[154] César Colino also notes that a decline of the relative economic strength of Catalonia during the 1990's and 2000s was attributed by some regional political elites to the central government's investment in Madrid at Catalonia's expense, thus '*causing resentment among Catalan parties and adding to pressures for devolution*'.[155]

Catalonia remains, however, one of the most economically developed regions of Spain, constituting a '*region of 7.5m inhabitants that contributes 19 per cent to Spain's gross domestic product'*.[156] The relative economic strength of Catalonia has initiated 'over-development' arguments along the lines suggested by Martos. Colino describes consistent objection of Catalan nationalist elites towards '*what they perceive as a negative balance between their region's contribution and its receipts from central government*',[157] whilst Ramon Tremosa I Balcells notes that the '*widening gap between taxes the central government.…collects each year in Catalonia and the monies Catalonia receives from the central government*' is widely recognised as a '*source of capital outflow*' that has become known as the '*Catalan fiscal deficit with the Spanish State*'.[158] Studies have estimated this deficit at between 7 and 9% of Catalan GDP over the years 1999-2001.[159]

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[154] Martos (2001), page 8

[155] César Colino, *The Spanish model of devolution and regional governance: evolution, motivations and effects on policy making* (2008) 36 Policy & Politics 573, page 579

[156] Financial Times, 'Catalonia in plea for funding' (2 June 2008) <http://www.ft.com/cms/s/0/2c4cae32-30ce-11dd-bc93-000077b07658.html#axzz1S05ZFQxO> accessed 11 July 2011 (see also Martos (2001)). Highlighting the pervasiveness of economic asymmetry in Spain, Robert Agranoff points out that seven of the Autonomous Communities are '*considerably above the country average and four considerably below*' (Agranoff (2005), page 5).

[157] Colino (2008), page 579

[158] Ramon Tremosa I Balcells, *The Catalan Funding Mechanism*, <http://www.ciu.cat/media/39164.pdf> accessed 11 June 2011, page 5

[159] Jordi Pons-i-Novell and Ramon Tremosa-i-Balcells, *Macroeconomic effects of Catalan fiscal deficit with the Spanish state (2002–2010)* (2005) 37 Applied Economics 1455, page 1457. Funding of the Autonomous Communities falls within two schemes, the 'foral' regime applying to Basque Country and Navarre and the 'common' regime applying to all other Autonomous Communities.The foral regimes raise taxes locally and pay a negotiated sum to central government, whilst the other 15 Autonomous Communities have limited tax raising powers (see Agranoff (2005), page 4, and Teresa Garcia-Milà and Therese J. McGuire, *Fiscal Decentralization in Spain: An Asymmetric Transition to Democracy* (2002) <http://www.econ.upf.edu/docs/papers/downloads/866.pdf> accessed 14 July 2011, page 5). The principles of *sufficiency* and *solidarity* are cornerstones of the Autonomous Community financial model, enshrined in s.158 of the Spanish Constitution in the form of a guarantee

Image 2: SNP Campaign leaflet's asserting claim to independence based on Scottish ownership of North Sea oil. The depiction of Conservative Prime Minister Margaret Thatcher as a blood-sucking vampire is indicative of a divergence in political cultures that contributes to the Scots national identity[160]

Reform initiatives have sought to increase the fiscal autonomy of Communities through increasing the proportion of centrally collected taxes that are ceded to the Autonomous Communities from which they are raised, thereby reducing the deficit experienced by wealthy Communities such as Catalonia. Josep Colomer notes that in '*the mid 1990's, the Catalans raised the issue of obtaining a fixed proportion of income taxes as the basis for the autonomy funding, effectively*

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to a minimum level of public service provision and by way of an inter-territorial compensation fund (Departamento de Economía y Conocimiento - Generalitat de Catalunya *Sources of Financing* (2011) <http://www20.gencat.cat/portal/site/economia/menuitem.6135b456613b7f9af813ae92b0c0e1a0/?vgnextoid=31b776b26721d210VgnVCM2000009b0c1e0aRCRD&vgnextchannel=31b776b26721d210VgnVCM2000009b0c1e0aRCRD&vgnextfmt=default&newLang=en_GB> accessed 12 July 2011; Ministerio de Economía y Hacienda - Gobierno de España *Autonomous Community Funding: Financing System* (2011) <http://www.meh.es/en-GB/Areas%20Tematicas/Financiacion%20Autonomica/Paginas/Regimen%20comun.aspx> accessed 13 July 2011

[160] Downloaded from the Scottish Political Archive hosted by the University of Stirling <http://www.flickr.com/photos/scottishpoliticalarchive/6794780155/sizes/l/in/photostream/> and <http://www.flickr.com/photos/scottishpoliticalarchive/8067324539/sizes/l/in/photostream/> (accessed 16 Feb 2013)

increasing the share of autonomously collected resources.'[161] A bilateral agreement between the Catalan government and the central organs of State initially set the proportion of ceded income taxes at 15%, a level that was later extended to 30% and applied to all Autonomous Communities.[162] The most recent reform of the Autonomous Community financing system was set in motion by the Catalan Statute of Autonomy in 2006,[163] following which the Law on the Financing of the Autonomous Communities was amended so as to provided that 50% of income taxes are ceded to the Autonomous Communities.[164]

Claims to enhanced autonomy arise also from the diverging socio-economic concerns that operate within them. The distribution of population in Scotland in particular necessitates diverging policy implementation, with the large percentages of inhabitants of remote and rural areas constituting distinct challenges to housing allocation and the provision of emergency response. Such challenges are often invoked in order to justify the higher spend-per-head in Scotland,[165] and the Scottish Liberal Democrat Steel Commission recommended proposed fiscal decentralisation on needs-based equalisation formula with indicators to take into account factors

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[161] Josep M Colomer, *The Spanish 'State of Autonomies': Non-Institutional Federalism* (1998) 21 West European Politics 40, page 48

[162] Ibid, page 48

[163] The eighth additional provision of the Catalan Statute of Autonomy 2006 provided that the '*first Government bill on cession of taxes to be passed after the entry into force of this Estatut shall…provide for cession of 50% of revenues from tax on personal income. The ceded revenue from personal income tax corresponding to taxable persons whose normal residence is in Catalonia is considered to be produced in the territory of the autonomous community of Catalonia.*'

[164] *Organic Law 3/2009 of 18 of December on the modification of Organic Law 8/1980 of the 22 of September on Financing of Autonomous Communities* (2009) amending (1980), *Organic Law 8/1980 of 22 September on Financing of Autonomous Communities*. A second initiative introduced by the 2006 Catalan Statute of Autonomy in order to reduce the fiscal deficit (whilst complying with the fundamental principle of solidarity) was through the creation of a national infrastructure investment programme. The third additional provision of the Catalan Statute of Autonomy provided that '*[w]ith the exception of the Inter-Territorial Compensation Fund, State investment in infrastructure in Catalonia shall be equal to the relative participation of Catalonia's gross domestic product in the gross domestic product of the State for a period of seven years'*. Negotiations with central government to implement this provision caused much controversy, with an agreement finally being reached in 2008 whereby '*Catalonia would receive a portion of territorialised infrastructure investment from the Spanish government over the 2007-2013 period equivalent to at least its proportional contribution to national GDP'*(Alfons Garcia Martinez, (2009) *Catalonia's fiscal balance after the deployment of the 2006 Statute of Autonomy* Paradigmes: economia productiva i coneixement <http://www.raco.cat/index.php/Paradigmes/article/viewFile/225493/306836> accessed 12 July 2011, page 242).

[165] The Calman Commission on Scottish Devolution note that some '*draw attention to factors – such as high levels of urban deprivation and large rural areas with highly dispersed populations and services – which argue for higher relative spending levels in Scotland justified by need*' (Commission on Scottish Devolution (2009), page 73).

including geography, rurality and distance from markets.[166] The decline of traditional industries within 'rust-belt' regions and the consequential need for strategies for industrial regeneration in particular have generated claims of enhanced autonomy in Scotland,[167] and the Scottish National Party has invoked independence as a means by which to allow for the establishment of '*a distinct population strategy, addressing the demographic and skills challenges that face the nation*'.[168]

The failure of state-wide policy to cater to the specific needs of the sub-state demographic not only gives rise to functionalist claims to autonomy, but serves also to engender a distinct political culture that reifies the shared identity constitutive of nationhood.[169] Refusal of government subsidy to the Upper Clyde Shipbuilders consortium in 1971 contributed to the resurgence of Scottish claims to autonomy throughout the 1970's, and political cleavages across the UK continued throughout the 1980's and 1990's with the failure of the Conservative Party, under the premiership of Margaret Thatcher, to respond to the particular social and economic interests of the Scots voters.[170]

2.2.2. Frameworks of devolution in the UK and Spain

Claims to autonomy asserted by Scotland and Catalonia have been accommodated through the devolution of competences to sub-state legislatures within their respective constitutional frameworks, allowing for the pursuit of distinct social policies within devolved matters. Scotland and Catalonia are not the only sub-state national groups to assert claims to autonomy within these states: in the UK, competence has also been devolved to sub-state legislatures in Wales and Northern

[166] The Steel Commission, *Moving to Federalism - A New Settlement for Scotland* (2006) <http://www.scotlibdems.org.uk/files/steelcommission.pdf> accessed 18 July 2010, page 104
[167] Parks and Elcock (2000), page 97. Keating however contests the claim that economic hardship gives rise to increase demands of autonomy, claiming that '*when Scotland is doing relatively well, ideas of nationalism or home rule thrive, while when it is doing badly Scots tend to cleave to the Union*' (Keating *The Independence of Scotland: Self-government and the Shifting Politics of Union* (2009), page 33).
[168] The Scottish Government, *Your Scotland, Your Voice: A National Conversation* (2009) <http://www.scotland.gov.uk/Resource/Doc/293639/0090721.pdf> accessed 21 July 2010, page 22
[169] Parks and Elcock (2000), page 97
[170] Withdrawal by the Scottish nationalists of their support for James Callaghan's minority Labour government in 1979 triggered the general election in which Margaret Thatcher became Prime Minister, a move that Callaghan famously likened to 'turkeys voting for Christmas'.

Ireland, and Catalonia is one of 17 Autonomous Communities (and two Autonomous Cities) that have been granted a degree of legislative autonomy from the Spanish state.

Image 3: Promotional material published by campaign group 'YES to an Independent Scotland', invoking a divergence in political cultures between Scotland and the UK as a whole in support of a claim to self-governance[171]

In both the UK and Spain, legislative competence is devolved differentially across the constituent sub-state polities, resulting in horizontal *de iure* asymmetries between the constituent units.[172] The degree of asymmetry that manifests between those polities at any given point in time is determined by the scheme within which sub-state units acquire competence, and differences in frameworks of competence acquisition themselves contribute an additional layer of horizontal asymmetry. In the UK, the devolution of competence to sub-state legislatures has taken place through individual Acts of the UK Parliament that operate in isolation from one another.[173] Each Act stipulates a different mechanism through which the respective competences

[171] YES to an independent Scotland, (2013) <http://www.facebook.com/SaorAlbaGuBrath> accessed 9 Jan 2013
[172] See nn. 104 -108, above.
[173] Scotland Act 1998; Government of Wales Act 1998; Northern Ireland Act 1998 (and subsequently the Government of Wales Act 2006 and Scotland Act 2012).

of each sub-national unit are defined, and devolves a different extent of competences to each sub-state legislature.[174]

By contrast, the devolution of competence to Autonomous Communities in Spain takes place within a single open-ended scheme established by the Constitution, which identifies three paths by which the autonomy of a community may be recognised. The first path to autonomy is a fast and simplified process that applies to the 'historic nationalities' of Spain, which are those that that had previously been governed by Statutes of Autonomy in the Second Spanish Republic.[175] The second is contained within section 143 of the Constitution, which provides that *'bordering provinces with common historic, cultural and economic characteristics, insular territories and provinces with historic regional status may accede to self-government*

[174] The Government of Wales Act 1998 created the National Assembly for Wales, a body corporate with competence to exercise, on behalf of the Crown, functions transferred to it from the Westminster Parliament. The Act conferred competence only to make subordinate legislation – a function otherwise exercisable by Ministers of the Crown – within specified areas. The extent of that competence was not defined in the Act by reference to subject matter, as was the case in the Scotland Act 1998, but rather the Act provided that ministerial functions would be transferred to the Assembly by an Order in Council approved by resolution of both Houses of Parliament. The Government of Wales Act 2006 allowed the National assembly to assume upon request the power to make primary legislation – known as 'Measures of the National Assembly for Wales' – within certain specified fields. On 5 May 2011, following a referendum in which a majority of the electorate voted 'yes' to the referendum question 'Do you want the Assembly now to be able to make laws on all matters in the 20 subject areas it has powers for?, the National Assembly assumed competence to enact 'Acts of the Assembly' in all matters specified in Part 1 of Schedule 7 of the 2006 Act (The Government of Wales Act 2006 (Commencement of Assembly Act Provisions, Transitional and Saving Provisions and Modifications) Order 2011).

Legislative competence was devolved to the Northern Ireland Assembly under the Northern Ireland Act 1998, following approval of the Good Friday Agreement. Devolved competences are defined within the Northern Ireland Act by reference to three categories of matters: transferred, excepted and reserved matters. Excepted matters are listed in Schedule 2 of the Act. A provision that deals solely with an excepted matter is outwith the legislative competence of the Assembly. The Assembly may however legislate on an excepted matter when that provision is ancillary to other provisions that deal with reserved or transferred matters, and the Secretary of State has given consent to the Bill. Reserved matters are listed in Schedule 3 of the Act. The Assembly may legislate in these areas with the consent of the Secretary of State. Any matter that is neither an excepted nor a reserved matter is a transferred matter and falls within the Assembly's legislative competence. Where the Secretary of State considers that a reserved matter should become a transferred matter, or vice versa, s/he may, after the Assembly has passed a resolution with cross-community support, lay before Parliament an Order in Council effecting the necessary change.

[175] Catalonia, the Basque Country and Galicia (Daniele Conversi, *The Smooth Transition: Spain's 1978 Constitution and the Nationalities Question* (2002) 4 National Identities 223, page 228; Spanish Constitution s.148 and transitional provisions). Catalonia became an autonomous community under the fast route for historic nationalities, and its first Statute of Autonomy was approved in 1979. The text of the Catalan Statute of Autonomy '*was accepted by the Assembly of Members of Parliament on 16 December 1978, was discussed and approved by the constitutional commission of the Spanish Parliament on 13 August 1979, and was approved by referendum on 25 October of the same year. On 18 December 1979, the Statute of Autonomy of Catalonia was sanctioned by King Juan Carlos I*' (Generalitat de Catalunya, *The restoration of the Government of Catalonia, 1977-1980* (2013) <http://www.gencat.cat/generalitat/eng/guia/antecedents/antecedents18.htm> accessed 5 March 2012).

and form Self-governing Communities'.[176] The third route to autonomy is achieved by authorisation by the Cortes Generales by way of Organic Act.[177] All autonomous communities were established through these mechanisms within a four-year period between 1979 and 1983. The mechanism through which an Autonomous Community may acquire competences that are not designated by the Constitution as within the exclusive competence of the State is determined by its historical status,[178] within a scheme that envisages – though not without controversy – the eventual symmetry of competence allocation to autonomous communities.[179]

Key areas of asymmetry between the competences devolved to sub-state legislatures in the UK relate to fiscal matters. Under the Scotland Act 1998, the Scottish Parliament has competence to vary the basic rate of income tax set by the

[176] Under this route to autonomy the right to initiate the process lies with all the provincial councils concerned, or with the consent of two-thirds of the municipalities, constituting a majority of the electorate of the province. Communities granted autonomy under the category of bordering provinces with common historic, cultural and economic characteristics include Aragon, Castilla y León, Castile-La Mancha, Extremadura and the Valencian Community. The Canary Islands and the Balearic Islands gained autonomy under this provision as insular territories with historic regional status, whilst Cantabria, Asturias, La Rioja, the Regions of Murcia and Navarra fulfilled the criteria of single provinces with historic regional status.

[177] This route to autonomy applies to territory not exceeding that of a province which does not possess historical regional status, and is exercised by the Cortes Generales in the sake of 'national interest'. The Community of Madrid was established as an Autonomous Community by the Cortes Generales under this provision.

[178] The three historic nationalities were able to immediately assume competence over all matters not reserved to the State. Other Autonomous Communities were subject to a scheme of progressive allocation of competences, outlined in s148 of the Constitution. Such Autonomous Communities were able immediately assume competences over such matters as the organisation of the institutions of self-government, changes in municipal boundaries within the territory, and the promotion of economic development of the autonomous community within the objectives set by national economic policy. After a period of five years, matters not reserved to the State could be assumed by Autonomous Communities as stipulated in their Statutes of Autonomy. Andalucía acquired competences under an 'exceptional route' which dispensed with the scheme of progressive allocation of competences when the initiative is ratified in a referendum by the overall majority of electors in each province (section 151 of the Constitution). It was agreed in the Autonomous Pact of 1981 that the exceptional route would be limited to Andalucia. Any matters that are not reserved to the State and are not claimed by an autonomous community as within its jurisdiction fall within State jurisdiction. The Autonomous Pact of 1992 raised the ceiling of those competences that could be acquired under the 'slow route' of competence acquisition.

[179] This objective is popularly referred to as '*Café para todos*' (coffee for all). Autonomous Communities have, however, resisted the convergence of symmetrical arrangements and the controversial Law on the Harmonisation of the Autonomy Process, which attempted to introduce heterogeneity within the autonomous process, was declared largely unconstitutional by the Constitutional Court in 1983. Significant parts of LOAPA that were declared unconstitutional included the possibility for the Cortes to overturn parliamentary laws or decisions of Autonomous Communities. Several harmonization provisions applying to the fourteen Autonomous Communities that did not acquire autonomy through the fast process did, however, survive. These provisions provided for '*uniform election dates, limits on the size of regional governments, regional supervision of provincial governments, transfer of civil servants to the regions, and harmonization of financing for the "common regime"*' (Agranoff (2005), page 10).

Westminster Parliament by up to 3 pence in the pound (the Scottish Variable Rate).[180] The tax-varying provisions under the 1998 Act were replaced under the Scotland Act 2012 with a power to levy an additional Scottish rate of income tax, securing a 10% income tax reduction for Scottish taxpayers and devolving correlative tax raising powers to the Scottish Parliament.[181] By contrast, Wales and Northern Ireland have no power to vary or raise taxes, and are funded primarily by block grant determined according to the Barnett formula.[182] None of the sub-state legislatures in the UK has competence in the matters of constitutional issues, registration of political parties, defence, nationality or immigration, whilst they all have some competence in the fields of education, health, transport and economic development (though the precise degree of these competences varies). Differences between the competences acquired by subnational units in the UK were most pronounced between 1998 and 2006, during which time the Welsh Assembly had powers only to enact subordinate legislation, and between 2002 and 2007, when the Northern Ireland Assembly was suspended.

Asymmetry also exists between the competences acquired by the sub-state legislatures in Spain. All autonomous communities have now assumed competences in areas not reserved to state, with main remaining differences primarily being the distinct tax regimes that are in place in Navarre and the Basque Region, and the competences of the Basque Country, Catalonia and Navarre over otherwise central powers, including their regional police force.[183] Catalonia, the Basque, Galicia and Andalucía all received the largest transfers of jurisdiction in the shortest period of time, and some of the slower-route Communities did not receive certain powers until

[180] Fiscal, economic and monetary policy is a reserved matter under Schedule 5, Part II, Head A, with the result that the Scottish Parliament had no competence to raise taxes other than at a local level (i.e. to determine the Council Tax rate to cover the cost of the provision of local services). This tax-varying power has never been used by the Scottish Parliament. Scottish variable rate

[181] These provisions replaced the tax varying power stipulated in Part 4 of the 1998 Act. They entered into force two months after the legislation was passed, but – according to their own terms – will take effect in respect of a tax year to be stipulated by order of the Treasury. It is currently anticipated that the Scottish income tax rate will apply from 6 April 2016 (the beginning of the 2016-17 tax year). These changes follow recommendations made by the Calman Commission on Scottish devolution, which suggested that, in order to improve the financial accountability of the Scottish Parliament, a proportion of the funding currently allocated by block grant be substituted for devolved tax revenue(Commission on Scottish Devolution (2009), pages 103-105).

[182] The Holtham Commission was established to investigate alternative mechanisms of funding to the National Assembly, but its recommendations have yet to be implemented.

[183] Agranoff (2005), pages 4-5

over twenty years after the four rapid-route Communities. Before the reforms of 2002 in which the last Autonomous Communities gained competence in the areas of education, health and social services, competences were unequally distributed amongst the Communities, with the four fast-route Communities possessing the largest sphere of autonomy.

2.2.3. Devolution to Scottish Parliament and Catalan Generalitat of the competence to provide social goods and services

The competence of the Scottish Parliament and the Catalan Generalitat to determine social policy is not comprehensive, but rather is limited to those matters that fall within their devolved competences. The legislative competence of the Scottish Parliament is negatively defined in the Scotland Act 1998, which created (or rather re-instated) the Scottish Parliament, and devolved to it a general legislative competence that was subject only to those limitations stipulated within the Act.[184] The majority of restrictions on the legislative competence of the Scottish Parliament are in the form of matters that are 'reserved' to the UK Parliament, but the Act also stipulates that it is outwith the legislative competence of the Scottish Parliament to enact legislation that is incompatible with the European Convention on Human Rights or with European Union law, or that seeks to modify stipulated 'protected provisions'.[185] The result of any attempt by the Scottish Parliament to legislate within these areas is such that the Act is not law.

The legislative competence devolved to the Scottish Parliament is not by law an exclusive competence: the Act stipulates that the UK Parliament retains the right to legislate for Scotland within areas that have been allocated within the competence

[184] Scotland Act 1998 s.54. The Act also effected a general transfer of ministerial functions from Ministers of the Crown to Scottish ministers in areas of devolved competences (s.53). The administrative competence of the Scottish administration is defined by reference to legislative competences: an administrative act is outwith the competence of the Scottish administration if it would be outwith the competence of the Scottish Parliament.

[185] This is also subject to other constraints: s.29(2) states that '*A provision is outside that competence so far as any of the following paragraphs apply: (a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland, (b) it relates to reserved matters, (c) it is in breach of the restrictions in Schedule 4, (d) it is incompatible with any of the Convention rights or with Community law, (e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland.*' Protected provisions (under Schedule 4) include the Act of Union, the European Communities Act, and the Human Rights Act.

of the Scottish Parliament,[186] with the result that all devolved competences are, strictly speaking, shared competences. This constitutes a vertical *de iure* asymmetry between the relative competences enjoyed by the constituent unit and the State: whereas the exclusive legislative competence of the UK Parliament is protected by law,[187] the competences enjoyed by the Scottish Parliament may be subject to encroachment by the UK Parliament. In practice, the UK Parliament is bound by a constitutional convention that prohibits it from legislating in devolved matters without first obtaining the consent of the Scottish Parliament.[188]

The scope of legislative competences that the Catalan Generalitat is able to acquire is negatively defined by the Spanish Constitution, which stipulates certain matters over which the State holds exclusive competence, and which states that '[m]*atters not expressly assigned to the State by virtue of the present Constitution may fall under the jurisdiction of the Autonomous Communities by virtue of their respective Statutes* [of Autonomy]'.[189] In line with this provision, the Catalan Statute of Autonomy identifies those areas that are not reserved to the exclusive jurisdiction of the state under the Constitution in which it has assumed power. The competences acquired by the Generalitat are designated as either 'exclusive powers', in which '*legislative power, regulatory power and the executive function correspond fully to the Generalitat*', or '*shared powers*', in which '*legislative power, regulatory power and the executive function are the responsibility of the Generalitat, within the*

[186] Scotland Act s.29
[187] See text at nn.185-186, above.
[188] The 'Sewel Convention' is contained in s.14 of the Memorandum of Understanding between the UK Government and the executive authorities of all devolved nations. The agreement states that: '*The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government'* In the event that the UK Government and the Scottish Executive agree that Westminster ought to legislate on a devolved matter, a motion (known as a 'Sewel Motion') is put to the Scottish Parliament to this effect. The frequency of use of Sewel Motions had led to criticism, with '*considerable disagreement as to whether this procedure is simply an efficient device in the management of interparliamentary relations, or an instance of Westminster encroaching upon the Scottish Parliament's autonomy*' (Stephen Tierney, *Giving with one hand: Scottish devolution within a unitary state* (2007) 5 International Journal of Constitutional Law 730, page 11).
[189] Article 149 of the Spanish Constitution

framework of the basic conditions established by the State as principles or lowest common legislative denominators in rules of legal rank'.[190]

Under these respective schemes of devolution, both the Scottish Parliament and the Catalan Generalitat have acquired legislative competence to approve a distinct social policy agenda in (amongst other matters) the fields of healthcare, education, housing and social care. Unlike in Catalonia, where reinstatement of the Generalitat followed a period of homogeneity of Spanish regulation under General Franco, differentiation of social policy in Scotland pre-dated the devolution of legislative competence under the 1998 Act. A substantial degree of differentiation in social policy can therefore be traced back prior to devolution.[191] Many of those legislative competences acquired by the Scottish Parliament to regulate social policy are thus administered by the Scottish Government within an institutional framework that was already well established by the time those competences were acquired.

Healthcare is a matter that is devolved to the Scottish Parliament, subject to certain very specific reservations in such fields as embryology and xenotransplantation.[192] Healthcare provision in Scotland is administered through the Scottish NHS; a body that pre-dates legislative devolution. Whilst the 'bases and general coordination of health matters' is a competence that is in Spain reserved exclusively to the State by the Constitution, the Catalan Generalitat has assumed control over the delivery and organisation of healthcare provision.[193] Delivery of healthcare is thus regulated primarily at the level of the Autonomous Community,

[190] Article 110 and 11 Catalan Statute of Autonomy

[191] Devolution of legislative competence to Scotland was preceded by the devolution of certain administrative functions to the Scottish Office, a dedicated department of the UK government created in 1885 and headed by the Secretary of State for Scotland. The Scottish Office assumed responsibility in such areas such as health, education, justice, agriculture, fisheries and farming, in which fields it pursued a distinct legislative agenda within the UK Parliament. Administrative devolution arguably precedes the creation of the Scottish Office, and can be traced back to the various administrative boards that emerged in Edinburgh in the nineteenth century (James Mitchell, *Governing Scotland: The Invention of Administrative Devolution* (Palgrave Macmillan 2003), page 12). Many of thedivergences that can currently be identified in subnational policy took place within asymmetrical governance structures that pre-date legislative devolution, and are a product of the devolution of administrative functions to the Scottish Office. Administrative devolution through the Scottish Office was however achieved within the confines of the UK polity: the Secretary of State for Scotland is accountable to a UK-wide demos, and legislation emanating from the Scottish Office was enacted by the UK legislature.

[192] Scotland Act 1998, Schedule 5, Part II, Head J ('Health and Medicines')

[193] Catalan Statute of Autonomy, Article 162

and is in Catalonia organised by the agency 'CatSalut' which purchases health services from independent contractors.

Education is a matter that is devolved in full to the Scottish Parliament, there being no general or specific reservations stipulated in the Scotland Act. The Catalan Generalitat has assumed both exclusive and shared powers over the provision of non-university education, which include the power of organisation over the education sector and establishment of syllabuses.[194] The Spanish Constitution reserves to the Spanish state the '*regulation of the conditions relative to the obtaining, issuing and standardisation of academic degrees and professional qualifications and basic rules for the development of Article 27 of the Constitution* [the right to education]', but the Catalan Generalitat enjoys a wide range of competences over the regulation and provision of higher education, including the power to create public universities and to authorise private universities, and the power to manage state funds for university education.[195] Scotland and Catalonia both also enjoy exclusive competence over housing and social care.

Not all areas of social policy are devolved to sub-state legislatures: in both the UK and Spain social security (as the primary re-distributive basis of welfare provision) remains within the competence of central organs of state. The Scottish Parliament has no legislative competence over 'social security schemes', defined in the Act as '[s]*chemes supported from central or local funds which provide assistance for social security purposes to or in respect of individuals by way of benefits'*, which are specifically reserved to the UK Parliament.[196] The Spanish State also has exclusive competence over the *'basic legislation and financial system of the Social Security*', though unlike in the UK social security is implemented by the Autonomous Communities. As is further indicated in chapter three, Autonomous

[194] Catalan Statute of Autonomy, Article 131(3)
[195] Catalan Statute of Autonomy, Article 172
[196] Section F1, Schedule 5, Part II of the Scotland Act 1998. Benefits for this purpose include pensions, allowances, grants, loans and any other form of financial assistance, with 'financial assistance' including the provision of assistance to those who qualify by reason of old age, survivorship, disability, sickness, incapacity, injury, unemployment, maternity or the care of children or others needing care; or those who qualify by reason of low income. under

Communities in Spain have also assumed competence over supplementary welfare and support allowances.[197]

Whereas sub-state legislatures have assumed competence over the provision of certain areas of social policy, the funds to support policies enacted in these fields are provided by centrally-collected taxes. The Scottish Executive is funded primarily through block grant from the UK State, which is calculated according to the controversial 'Barnett formula'.[198] With entry into force of the Scottish-rate income tax in 2016 income from the block grant will be supplemented with devolved tax revenues, thus increasing the financial accountability of the Scottish Parliament and reducing the extent to which the cost of devolved policies is borne across all constituent units of the UK.

The forthcoming Scottish-rate income tax follows a similar model to that which is in place in Spain, where Autonomous Communities have competence over 50% of income tax, which they can vary within stipulated limits. This tax is centrally collected and ceded to Autonomous Communities from the Spanish State. Mechanisms of levelling and solidarity apply to the financial resources of the Catalan Generalitat, with the funds available to an Autonomous Community adjusted according to indicators pertaining to population and fiscal capacity: Communities with a fiscal capacity that is lower than that which is required to fund essential public services receive a transfer from central funds, whereas Communities with a higher fiscal capacity contribute funds for re-distribution across other Communities.[199]

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[197] Under Article 166 of the Catalan Statute of Autonomy, the Generalitat has assumed exclusive competence over the '*Regulation and organisation of…social service technical benefits and payments designed as welfare allowances or to supplement other public benefit support systems.*'

[198] The formula '*provides that, where comparable, changes to programmes in England result in equivalent changes in the budgets of the devolved administrations calculated on the basis of population shares*' (Timothy Edmonds, *The Barnett Formula* (2001) <http://www.parliament.uk/documents/commons/lib/research/rp2001/rp01-108.pdf> accessed 10 August 2010, page 3). Application of the formula is widely criticised on the basis that it protects an average higher spend per-head for the Scottish bloc, though economic analysts have responded that a strict application of the formula would lead to a convergence of the average spend, in a process known as the 'Barnett squeeze' (David Bell, *The Barnett Formula* (2001) <http://www.economics.stir.ac.uk/People/staff/Bell/Barnett%20Formula.pdf> accessed 7 August 2010).

[199] Generalitat de Catalunya, *Sources of financing* (2012) <http://www20.gencat.cat/portal/site/economia/menuitem.6135b456613b7f9af813ae92b0c0e1a0/?vgnextoid=31b776b26721d210VgnVCM2000009b0c1e0aRCRD&vgnextchannel=31b776b26721d210VgnVCM2000009b0c1e0aRCRD&vgnextfmt=default&newLang=en_GB> accessed 16 Nov 2012

Summary

Regional claims to autonomy that are founded upon a shared national identity have been accommodated within asymmetric constitutional structures through the devolution of competence over certain areas of social policy to sub-state legislatures. Devolution of competence to provide social goods in some areas but not in others reinforces the nesting of social membership of both the state and the sub-state polity, as the sum of social rights that an individual receives is not determined by either one or the other, but rather the two collectively: an individual falls within the 'membership organisation' of sub-state unit for purpose of devolved matters such as education and healthcare, and within that of the state for reserved issues such as social security provision. That devolved social policies are largely financed from centrally collected funds preserves the re-distributive functions of the state, but in turn fuels claims for increased autonomy on the basis of the 'under-' and 'over-development' arguments that such redistribution generates.

2.3. Competence to allocate social goods and services

The competence of sub-state and state legislatures in the UK and Spain to provide social goods and services is co-vested with the competence of those polities to include or exclude persons from receipt of those goods or services: the Scottish Parliament, for example, may legislate both to determine the level of financial support available to students pursuing higher education, and stipulate who is entitled to receive the benefit of the goods that it provides. The competence of state and sub-state legislatures to allocate social goods and services is not, however, one that falls within their exclusive competence, but rather it is one that is shared with the European Union. As a result of EU competence to secure free movement of persons and equality of citizens, state and sub-state polities must extend the benefit of the goods that they provide to certain EU Citizens and third country nationals under the same terms as they do to their own nationals. The scope of this principle of equal treatment is further examined in context-specific case studies in chapters three and four, on the allocation of social rights.

Whereas the devolution of competences to sub-national legislatures is predicated upon the assertion of nationalist claims to autonomy by a self-aware nation with a distinct culture and language, the transfer of legislative competence to the European Union has been driven by the functional benefits of increased economic and social integration. Substantial discussion (by both academics and policy-makers) has focussed upon the need for a common 'European identity' to generate the social solidarity required to support and sustain the process of enhanced European integration. Klaus Welle, the secretary general of the European Parliament, has argued that '*[i]f we want to build a lasting union of solidarity we also need to invest in European identity*'.[200] The development of a common European identity has been pursued largely through the creation and subsequent development of a formal status of 'European Citizenship'.[201]

The roots of European Citizenship as an agenda distinct from the free-movement of persons throughout the common market trace back to the early 1970's, when a new focus on strengthening European identity emerged from the wake of the collapse of the Bretton woods system of monetary management.[202] The 1973 Copenhagen summit of Heads of State of the newly enlarged Union considered the issue of European identity as a means by which to '*achieve a better definition of their relations with other countries and of their responsibilities and the place which they occupy in world affairs*'.[203] Assuming the task of '*reviewing the common heritage, interests and special obligations of the Nine* [Member States]', the resulting declaration drew attention to shared '*attitudes to life, based on a determination to*

[200] EU Observer, 'We need to invest in a European Identity' (30 March 2012) <http://euobserver.com/political/115759> accessed 14 Feb 2013. This objective has loomed large on the political agenda, and 2013 has been designated as the 'European year of citizens'.
[201] See '

Annex 1: Background and development of European Citizenship, 1957 - 2011' (page 123) for a time-line of the relevant policy documents and legislation instrumental in the development of European Citizenship. The information in the timeline was sourced primarily from Commission reports on Citizenship (see references below) and from Antje Wiener, 'From Special to Specialized Rights – The Politics of Citizenship and Identity in the European Union' in Michael Hanagan and Charles Tilly (eds), *Extending Citizenship, Reconfiguring States* (Rowman & Littlefield 1999).
[202] Wiener (1999), page 205
[203] *Declaration on European Identity (Copenhagen, 14 December 1973)* Bulletin of the European Communities 1973 <http://www.cvce.eu/obj/Declaration_on_European_Identity_Copenhagen_14_December_1973-en-02798dc9-9c69-4b7d-b2c9-f03a8db7da32.html> accessed 9 April 2012

build a society which measures up to the needs of the individual' that were considered to be one of several *'fundamental elements*' of European identity.[204]

Discussions on European identity assumed the more concrete form of a citizenship agenda when discussed by the Heads of Government at the 1974 Paris summit. Following a proposal by the Italian Delegation to study the necessary conditions and feasible timetable for the grant of European Citizenship,[205] the Heads of Government resolved to instruct a working party to consider the grant of 's*pecial rights as members of the Community*' for the citizens of the Member States.[206] Despite continued political pressure by the European Parliament,[207] process on realisation of these rights stalled due to a lack of consensus in Council, with successive draft resolutions rejected by reason of the political and legal difficulties they raised within the Member States.[208]

The quest towards enhanced European identity once again drew attention at the Fontainebleau European Council Summit in April 1984. Under the heading of 'a people's Europe', the European Council conclusions considered it '*essential that the Community should respond to the expectations of the people of Europe by adopting measures to strengthen and promote its identity and its image both for its citizens and for the rest of the world'*.[209] The European Council identified four areas of action towards these ends; the creation of a single European passport, a single document for

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[204] Ibid

[205] European Commission, *Towards a citizens' Europe: Commission report on special rights* (1975), page 28

[206] Point 11 of the final communiqué of the Paris summit stated that '*Another working party will be instructed to study the conditions and the timing under which the citizens of the nine Member States could be given special rights as members of the Community*' (*Paris communiqué (December 1974)* Bulletin of the European Communities <http://www.cvce.eu/obj/Final_communique_of_the_Paris_Summit_9_and_10_December_1974-en-2acd8532-b271-49ed-bf63-bd8131180d6b.html> accessed 10 April 2012).

[207] In December 1977 the European Parliament adopted a resolution acknowledging the importance to the development of the European Community '*of strengthening ties of solidarity among its citizens by granting special rights falling within the category of civil and political rights*', and requesting the Commission to '*draw up proposals relating to special rights*' (OJ C 299, 12.12.1977, p.26). The Resolution adopted the recommendations of the Scelba report.

[208] *Commission report in voting rights in local elections* (1986) Bull EC supplement 7/86, page 12. The report notes that discussions '*revealed so many problems that, despite the best efforts of a number of Presidencies, the matter was left in abeyance'*.

[209] *European Council Fontainebleau Summit* (1984) Bull EC 6/1984 7, point 6 of the conclusions, page 11

the free movement of goods, the removal of internal frontiers and a system of equivalence for university diplomas.

Image 4: 'Entropa' artwork, subtitled 'Stereotypes are barriers to be demolished'[210]

Although the issue of special rights was addressed neither by the European Council conclusions on 'a people's Europe' nor in the Commission communication to the Council on the subject, the *ad hoc* committee established to examine the issues raised at Fontainebleau indicated its intention to '*report on wider issues*', including '*the possibilities…for strengthening the special rights of citizens, in particular voting rights*'.[211] The Adonnino report on 'A People's Europe' put the issue of special rights for Member State nationals firmly back on the agenda, recommending a uniform electoral procedure for elections to the European parliament, strengthening of the citizen's right of petition and consideration of the need for a parliamentary

[210] *Entropa* <http://c278424.r24.cf1.rackcdn.com/Insight_Catlin_Entropa.jpg > accessed 5 March 2013. The artwork was installed at the headquarters of the Council of Ministers in Brussels to celebrate Czech Republic's Presidency of the Council of the European Union in 2009. The controversial sculpture caricatured the distinct cultural stereotypes attaching to Member States, representing France as on strike, the Netherlands as minarets emerging from the sea, and Poland with priests erecting the rainbow flag symbolic of gay rights. The UK was notable by its absence (top left), in reference to British Euroscepticism. The artwork illustrates the absence of a uniform European culture or identity across all Member States.

[211] *Pietro Adonnino Report* (1985) Bull EC supplement 7/85, page 7

ombudsman as a means by which to '*increase the citizen's involvement in and understanding of the political process in the Community institutions*'.[212] In regard to citizens' participation in the political process in Member States, the report recommended that the Community institutions and Member States '*pursue in more depth the discussions begun previously on voting rights and eventually eligibility in local elections for citizens from other Member States under the same conditions as for citizens of the host country, subject to a certain period of prior residence in the host country*'.[213] Other relevant recommendations of the report include a generalised right of residence in another Member State[214] and co-operation in regard to consular representation for Member State nationals travelling outwith the Community.[215]

The recommendations of the Adonnino report were addressed by the European Parliament in 1985 in a resolution on a people's Europe, which called upon the Commission to investigate the grant of local voting rights to Member State nationals resident in a second Member State. The report submitted by the Commission concluded that '*an initiative on voting rights in local elections in the Member State of residence is a logical consequence of the desire to create 'a People's Europe'. The political and legal difficulties do not justify abandoning this idea which could demonstrate to the man in the street that the Community is relevant and give voters identical rights irrespective of their place of residence'*.[216] Such objectives however ought not, the report considered, to be pursued by the Commission in the absence of demonstrable political commitment by the European Parliament, a commitment soon provided by a resolution on voting rights in local elections for Community nationals residing in a Member State other than their own in 1987.[217] The resolution called upon the Commission to draft a proposal for a Council Directive on the issue of voting in local elections for Community nationals in their Member State of residence.[218] Progress however stalled once more, as

[212] Ibid, page 19
[213] Ibid, page 20
[214] Ibid, page 14. This had been the subject of a draft proposal by the Commission for a Directive in 1979 (COM (79)215 final; OJ C 207, p.14), but no agreement could be reached on whether a requirement of sufficient resources provided sufficient safeguard against an individual becoming an unreasonable burden on a host country.
[215] Ibid, page 21
[216] Ibid, page 44
[217] OJ C 13, 18.1.1988, p. 33
[218] COM(88) 371 final; OJ C 246, 20.9.88, page 3

discussions on the draft Directive were suspended in light of the forthcoming Intergovernmental conference on political union.

The journey towards European Citizenship rights gained a renewed impetus in the 1990's amidst preparations for the strengthening of political union. Discussions on European citizenship were during this period heavily influenced by a series of submissions made by the Spanish delegation,[219] which advocated toward the creation of a '*citizenship of the European Political Union as 'the personal and indivisible status of nationals of the Member States*'' to which special rights would attach.[220] The creation of such a status would, the memorandum argued, constitute a '*qualitative leap which will, inter alia, make the Community citizen who is at present little more than a 'privileged alien' into a citizen of the European Union*'.[221]

Political pressure upon the Member States to realise this goal was maintained following the IGC on political union by a European Parliament resolution on Union citizenship, and the subsequent 'Bindi' report on Union Citizenship published in 1991 by the European Parliamentary Committee on Institutional Affairs. The status of European citizenship was included in the draft Maastricht Treaty discussed at the Maastricht European Council of December 1991, later signed on the 7th of February 1992. Upon entering into force on the 1st November 1993 the Treaty on European Union conferred upon nationals of Member States the status of European Citizenship, and granted to them the to vote and to stand as a candidate at municipal elections in the Member State in which he resides, the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which they reside, the right to protection by the diplomatic or consular authorities of any Member State in the territory of a third country in which the Member State of which they are nationals is not represented, the right to petition the European Parliament, and the right to apply to the Ombudsman.

[219] Wiener (1999), page 12
[220] Second Spanish Memorandum on citizenship, '*The road to European citizenship*' 24 September 1990, re-published in Finn Laursen and Sophie Vanhoonacker (eds), (1992) *The Intergovernmental Conference on Political Union: Institutional Reforms, New Policies and International Identity of the European Community* (Kluwer Academic Publishers)
[221] Ibid

Despite initial scepticism as to the 'added value' of European citizenship over and above the free movement rights predicated upon an internal market, the new status of European Citizenship was soon given teeth by the European Court of Justice. Early citizenship case law such as *Martínez Sala* and *Grzelczyk* indicated that the new citizenship provisions provided a source of rights that was unfettered by its free-market roots, and the Court quickly established that '*EU citizenship is destined to be the fundamental status of nationals of the Member States'*.[222] European Citizenship has since been used consistently by the Court in hard cases as a tool for furthering European integration in line with its teleological approach,[223] and has given rise to some concern as to whether or not its Treaty basis can sustain the weight afforded to it by the Court.[224]

Whilst European citizenship has been invested by the Court with much more legal weight than was anticipated by many, its success in achieving the political goal of fostering a common European identity capable of driving the process of European integration from the roots upwards has been less certain. The public at large have demonstrated a lack of cognisance of the citizenship rights that were intended to foster a sense of European identity: a Eurobarmoter survey in 2010 found that '[a]*lthough the majority (79%) of EU citizens claim familiarity with the term "citizen of the European Union", only 43% say they know its meaning and less than one-third (32%) of respondents from the 27 EU countries consider themselves well informed about their rights as citizens of the European Union.*'[225] A perception in the European institutions that European citizenship is missing its political mark has led to the designation of 2013 as the 'European Year of Citizens', and a subsequent drive to publicise the rights that attach to European Citizenship.

Transfer of competence to the European Union thus exhibits a different relationship to 'membership organisations' predicated upon a shared identity than is seen in the devolution of competences to sub-state legislatures. Whereas competence

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[222] Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-061930 at para. 31

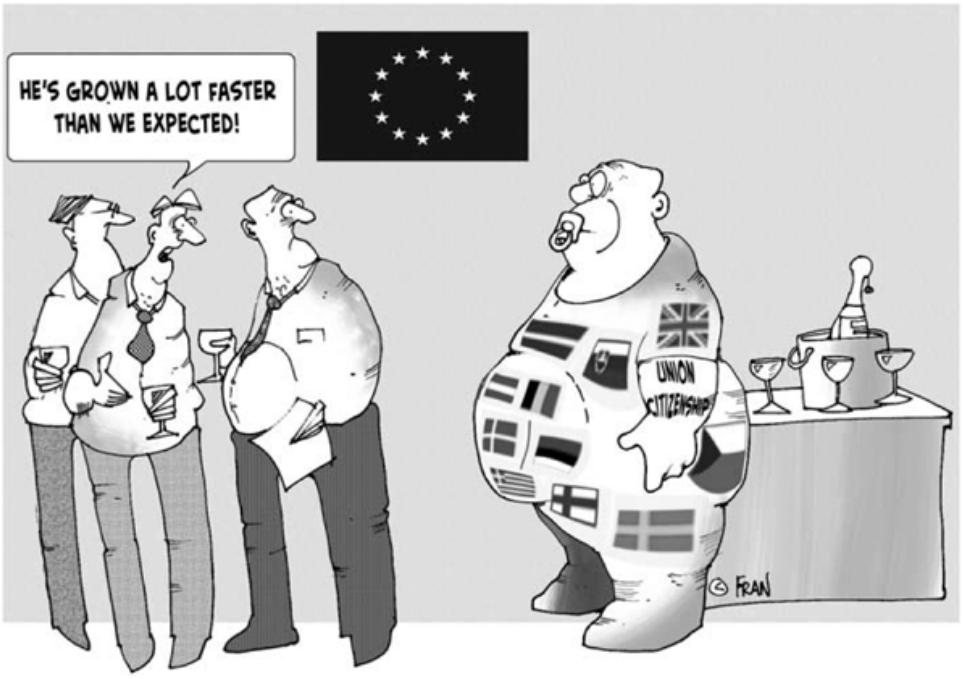
[223] See e.g. Case C-127/08, *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-06241; Case C-480/08, *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] ECR I-01107; Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECR I-01177

[224] Lansbergen (2012)

[225] Flash Eurobarometer No.294, Analytical Report <http://ec.europa.eu/public_opinion/flash/fl_294_en.pdf> accessed 16 February 2013, page 5

is devolved to sub-state legislatures in order to accommodate claims for self-determination that arise out of a shared national identity, the causality is reversed at the EU level: transfer of competence to the EU under Citizenship provisions serve the purpose of constructing a common European identity capable of sustaining a quest for enhanced economic integration.

Image 5: Case law of the European Court of Justice has given weight to the principle of European Citizenship that seemed uncertain at its inception.[226]



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2.3.1. Jurisdictional boundaries of equal membership: the wholly internal principle

Competence of the European Union to allocate social goods and services is circumscribed: EU jurisdiction is bounded by the 'wholly internal principle', with the result that the rights afforded to EU Citizens will only become operational when there is a 'sufficient link' with EU law, triggered predominantly by a cross-border

[226] Image taken from Dora Kostakopoulou, *The Evolution of European Union Citizenship* (2008) 7 European Political Science 285 (online version <http://www.palgrave-journals.com/eps/journal/v7/n3/full/eps200824a.html> accessed 15 Feb 2013)

situation.[227] The 'wholly internal principle' that limits the scope of EU law to cross-border situations has long been considered determinative of the jurisdiction of Union law. First elaborated by the European Court of Justice (CJEU) in a trio of cases in 1970's – *Knoors*, *Auer* and *Saunders*[228] – the principle dictates that *'[t]he provisions of the Treaty on freedom of movement for workers cannot…be applied to situations which are wholly internal to a Member State, in other words, where there is no factor connecting them to any of the situations envisaged by Community law.'*[229] The rationale underlying this statement identifies the limits of Union competence as confined to the pursuit of an internal market. Rights derived by individuals under the Treaties are limited by the scope of this function; they exist to protect against obstacles to exercise of the four fundamental freedoms and can therefore be triggered only upon movement between Member States. The continued application of the wholly internal principle to European citizenship was affirmed by the Court in *Uecker and Jacquet*, in which it was noted that *'citizenship of the Union, established by Article 8 of the EC Treaty, is not intended to extend the scope ratione materiae of the Treaty also to internal situations which have no link with Community law.'*[230]

Application of the principle to European citizenship has been criticised on the grounds that it results in 'reverse discrimination' against static EU citizens, an objection that has gathered momentum in step with the increasingly more substantial content of rights acquired by migrant citizens.[231] That static EU citizens are

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[227] For certain rights – for example, the right to vote in European Parliament elections, and the right to petition the Ombudsman – the Treaty provisions itself provide the required link with EU law, with the result that no cross-border movement is necessary before these rights become operational.

[228] Case 151/78, *Knoors v Staatssecretaris van Economische Zaken*, [179] ECR 399; Case 136/78, *Ministère Public v Auer*, [1971] ECR 437; Case 175/78, *The Queen v Vera Ann Saunders* [1979] ECR 1129. For further information on the history and development of the 'internal situation' principle see Mislav Mataija, (2009) *Internal Situations in Community Law: An Uncertain Safeguard of Competences within the Internal Market* Columbia Public Law Research <http://ssrn.com/abstract=1375663> accessed 21 March 2011.

[229] Case 175/78, T*he Queen v Vera Ann Saunders* [1979] ECR 1129 at para. 11

[230] Joined Cases C-64/96 and C-65/96, *Land Nordrhein-Westfalen v Kari Uecker and Vera Jacquet v Land Nordrhein-Westfalen* [1997] ECR I-03171 at para. 23

[231] This is particularly true as regards residency rights for third-country national family members of EU citizens, where there exists a substantial gap between static EU citizens whose family members are subject to application of national immigration laws at the point of entry into the Union, and migrant EU citizens whose family members derive a right of residency under EU law that can be limited only on grounds of public security (Case C-127/08, *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform*, [2008] ECR I-6241). The magnitude of the potential 'reverse discrimination' was presented to the Court in this case as grounds to decline the extension of rights, though this argument was rejected by the Court (*Metock* para. 76); see Anja Lansbergen,

prevented by application of the internal principle from accessing more favourable rights available under EU law to migrant EU citizens in comparable situations is arguably not only unjustified and inequitable, but is also potentially itself a contravention of Union law. This argument rests upon the claim that 'reverse discrimination' is a form of discrimination on the grounds of nationality contrary to Art. 18 TFEU, or otherwise more generally in contravention of the principle of equality of EU citizens as set out in Art. 9 TEU.[232]

Successive arguments presented to the Court in respect of the implications of 'reverse discrimination' have been summarily dismissed, in favour of retaining a clear jurisdictional boundary that preserves the sovereignty of Member States in matters considered to fall outwith the objectives of the Treaties. In *Metock*, the Court dismissed arguments regarding reverse discrimination with the statement that '*[a]ny difference in treatment between those Union citizens and those who have exercised their right of freedom of movement, as regards the entry and residence of their family members, does not…fall within the scope of Community law'*.[233]

As will be seen in the case studies to follow, reverse discrimination assumes even greater significance in the context of constitutional asymmetry. Whereas the crossing of state boundaries suffices to bring an individual within the jurisdictional membership bounds of EU Citizenship, the crossing of internal, sub-state boundaries by those who have not otherwise exercised a right of free movement throughout the Union does not.[234] This leads to the 'paradoxical' situation in which a Member State

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Metock, implementation of the Citizens' Rights Directive and lessons for EU citizenship (2009) 31 Journal of Social Welfare & Family Law 285.

[232] Dr Alina Tryfonidou thus argues that the '*reverse discrimination which emerges as a result of the limited scope of application of the citizenship provisions is, also, likely to be found to amount to a violation of the general principle of equality, unless a reason can be put forward which justifies treating Union citizens who fall within the scope of the citizenship provisions (as the scope has been defined by the Court) differently from citizens that are considered to be in a purely internal situation*'(Alina Tryfonidou, 'Purely Internal Situations and Reverse Discrimination In a Citizens' Europe: Time to "Reverse" Reverse Discrimination?' in Peter G Xuereb (ed), *Issues in Social Policy: A New Agenda - A Public Dialogue Document* (European Research and Documentation Centre/Progress Press 2009) <http://www.um.edu.mt/edrc/books/CD_MESA09/pdf/atryfonidou.pdf> accessed 20 March 2011 at page 29).

[233] Case C-127/08, *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform* [2008] ECR I-6241 at para. 77

[234] Case C-212/06, *Government of the French Community and Walloon Government v Flemish Government* [2008] ECR I-01683 (see further at n.504). By contrast, an internal frontier *is* sufficient to trigger EU law provisions securing the free movement of goods: in *Carbonati* the Court followed AG Maduro's Opinion and held that *'Article 14(2) EC defines the internal market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured',*

is entitled under EU law to erect barriers to the free movement of persons *within* its borders, but must abolish them for persons moving *across* state bounds.

The jurisdictional bounds of EU citizenship thus allow for the persistence of a fundamental divergence between the respective objectives of devolution and European integration: whereas the former facilitates the construction of boundaries below the state, the objective of the latter is to open up boundaries between states. This tension reflects a broader disconnect between the process of regionalisation and European integration. Jo Hunt notes that the European Union, founded on a system of intergovernmental treaties between states, '*privileges the voice of the central state and has traditionally acknowledged very little opportunity for the involvement of sub-national regions in its governance processes, even where those regions exercise extensive, perhaps exclusive power in a given policy field*'.[235]

Summary

The EU holds no competence to provide social goods or services, or to determine the level of provision of such goods and services, such as is enjoyed by both state and sub-state polities. That is not, however, to say that the EU has no competence to determine the boundaries of social membership. On the contrary, the right of equality derived by certain persons under EU law – both as a product of social security co-ordination to facilitate free movement, and latterly one that attaches directly to the status of European Citizen – conditions the ability of state and sub-state polities to exclude persons from receipt of the benefits that they provide.

The right of equality that serves to allocate the benefit of social membership attaches primarily to European Citizens, and generates derivative rights for their family members.[236] The status of EU Citizenship is not, however, sufficient to guarantee an individual the benefit of a right of equality. Application of the wholly internal principle carves out a privileged set of persons *within* the boundaries of EU Citizenship: whereas migrant EU Citizens and their family members are entitled to

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without drawing any distinction between inter-State frontiers and frontiers within a State' (Case C-72/03, *Carbonati Apuani Srl v Comune di Carrara*, [2004] E.C.R. I-08027 at para. 23).

[235] Jo Hunt, *Devolution and differentiation: regional variation in EU law* (2010) 30 Legal Studies 421, page 245

[236] Rights of equality are now enjoyed also by other third-country nationals in their own right – see further text below at n.401.

enjoy a right of residence in a Member State and equal treatment with nationals of that State, 'static' EU Citizens and their family members derive no such rights under EU law. The wholly internal principle thus enforces a second boundary of EU membership which is not the product of a conscious decision taken *within* the competence of the EU to extend or withdraw the right of equality to certain persons (as is the case for third-country nationals being excluded from its scope), but rather is indicative of the jurisdictional limits of the polity itself.

2.4. Competence to control access to social goods and services

Thus far two forms of membership competence have been identified: the competence to provide social goods and services, which has traditionally been enjoyed by the state but which has been devolved to sub-state legislatures in accommodation of their claims to self-determination, and the competence to allocate those goods and services, which in addition is enjoyed by the European Union by way of the right to equal treatment that it confers (primarily) upon EU Citizens and their family members. A third form of membership competence can be identified in the competence of a polity to determine the scope of persons eligible to access those goods and services that are provided by the state or sub-state polity, through the opening or closing of 'gateways' to social citizenship.

As is further explored in the case studies to follow, there exist three primary gateways through which a person is admitted into the class of persons eligible to receive the benefit of social rights: residence within the territory of the polity conferring the rights (which is encompassed both of a physical presence and a right of residence), and the statuses of nationality and European Citizenship. Of these gateways, nationality remains the dominant criteria: acquisition of EU Citizenship (and the rights that flow therefrom) is dependent upon Member State nationality, as are the rights of residence in state territory conferred both under national and European law.

2.4.1. Interdependency of European Citizenship and nationality

European Citizenship has since its inception in the Treaty of Maastricht been determined by reference to Member State nationality. As inserted in 1992 by the Treaty of Maastricht, Article 8(1) EC stated that '*[e]very person holding the nationality of a Member State shall be a citizen of the Union.*'[237] The Declaration of the Intergovernmental Conference on Nationality of a Member State, annexed to the Treaty of Maastricht, further stated that '*wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned.'*[238]

The Declaration is indicative of the concern of the Member States to ensure that the embryonic status of European citizenship remained firmly subordinate to national laws on citizenship acquisition and loss, as had been envisaged by the Spanish delegation memorandum that informed the drafting of the citizenship provisions.[239] This concern was addressed explicitly in the 1997 amendments to the Treaty, which added to the former Art 8(a) EC the statement that '*Citizenship of the Union shall complement and not replace national citizenship*'.[240] The wording of this provision has since changed slightly, with the current Art. 20 TFEU stating that '*[e]very person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship*'.[241]

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[237] Article 8(a) Treaty Establishing the European Community (EC), Consolidated version 1992 (as inserted by Article G.C of the Treaty on European Union (TEU)) OJ C 224, 31.8.1992, page 10

[238] Treaty on European Union (TEU), Declaration no.2,OJ C 191, 29.7.92, page 98. The European Council meeting in Edinburgh in 1992 further considered that '*[t]he provisions of Part Two of the Treaty Establishing the European Community relating to Citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. The question of whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned'* (Edinburgh Meeting of the European Council, Conclusions of Presidency, Part B ('Denmark and the Treaty on European Union) Annex 1, SN 456/92).

[239] See n.220, above.

[240] Article 17(1)EC, Consolidated version 1997 (as amended by Article 2(9) of the Treaty of Amsterdam), OJ C 340, 10.11.1997, page 186

[241] Article 20 Treaty on the Functioning of the European Union (TFEU). OJ C 115, 9.5.2008, page 56. Article I-10 of the ill-fated Constitutional Treaty similarly stated that '*Citizenship of the Union shall be additional to national citizenship and shall not replace it*'.

The principles as defined in the Treaties thus appear clear-cut: European Citizenship is automatically acquired and lost in conjunction with the nationality upon which it is dependent and to which it is subordinate. Case law of the CJEU in the 1990s initially affirmed the position that national law was authoritative in determining an individual's status as national of a Member State for the purpose of Union law. In *Micheletti* the Court considered that '[u]*nder international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality*'.[242] In *Kaur* it was argued before the Court that the principle enunciated in *Micheletti* – and specifically the proviso contained therein of '*having due regard to Community law*' – requires a Member State to define the concept of a national in accordance with the fundamental rights that form an integral part of Community law. The argument held little weight with the Court, which dismissed the application of EU law by pointing to the 1972 Declaration on Nationality as determinative for the purpose of '*determining the scope of the Treaty* ratione personae'. Adoption of the amended 1982 Declaration, the Court held, '*did not have the effect of depriving any person who did not satisfy the definition of a national of the United Kingdom of rights to which that person might be entitled under Community law. The consequence was rather that such rights never arose in the first place for such a person.*'[243]

The principle that European Citizenship is subordinated to nationality has however been brought into question by the CJEU in *Rottman*.[244] In that case the Court indicated that Member States must have due regard to the status of European Citizenship in determining matters of nationality, such that a decision by a national

[242] Case C-369/90, *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria* [1992] ECR I-4239, para 10. In this case the applicant was a dual Argentine and Italian national residing in Spain. The applicant's request for a permanent residence card as a Community national was rejected by the Spanish authorities on the grounds of Art 9 of the Spanish Civil Code. Art 9 dictated that in cases of dual nationality, the nationality corresponding to the habitual residence of the individual before his arrival in Spain takes precedence (see paragraph five of the judgment). The Court considered the issue of whether a Member State may deny a national of a second Member State the right of establishment under Community law, on the grounds that the individual also has nationality of a non-Member State and that the nationality of the non-member state takes precedence under national law. They concluded that it was '*not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for the recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty*'.

[243] Case C-192/99, *The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur* [2001] ECR I-1237 (para. 25)

[244] Case C-135/08, *Janko Rottman v Freistaat Bayern* [2010] ECR I-01449

court to withdraw nationality which results in the loss of Union citizenship is subject to a proportionality requirement under Union law. Once acquired, Union citizenship thus curtails the sovereignty of Member States to determine issues of nationality, leading some commentators to note that the relationship of Union citizenship dependent upon national citizenship has been reversed: as d'Oliveira argues, '*the nationality law of the member states becomes dependent on the fortunes of Union citizenship*'.[245] That the Court seems to allow to the national courts a wide margin of discretion in determining the proportionality of such withdrawal in light of legitimate aims pursued may offer cold comfort for the Member States who have sought through declarations to guard their sovereignty in this area.[246]

Rottman by no means settles the debate surrounding the nature of the relationship between Member State nationality and European Citizenship. Specifically, it leaves uncertain the issue of whether Union law enforces a similar proportionality requirement in respect of the *acquisition* (rather than the loss) of nationality in a Member State. The reasoning in *Kaur*, distinguished in *Rottman* on those grounds, would suggest that the acquisition of nationality falls outwith the scope of Union law. Several commentators have however noted that this distinction is hard to maintain,[247] and the Court appears to consider the acquisition of nationality to fall within the boundaries of Union law where the individual concerned had previously held and had been deprived of Member State nationality.[248] The

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[245] H.U. Jessurun D'Oliveira, *Decoupling Nationality and Union Citizenship* (2011) 7 European Constitutional Law Review 138, page 141. D'Oliveira notes at page 149: '*the dependent variable of Union citizenship is evolving in the Court's case-law towards a position in which Union citizenship as an independent variable dictates whether loss (or acquisition) of nationality may occur'*. See also Gareth T. Davies, 'The entirely conventional supremacy of Union citizenship and rights' in Jo Shaw (ed), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?* (EUI 2011) <http://eudo-citizenship.eu/docs/RSCAS_2011_62.pdf> accessed 7 June 2012

[246] D'Oliveira (2011) notes that '*The distinction that the Court makes between the member states' right to shape their own nationality law on the one hand, insofar as these are not bound to EU norms, and the application of that law, which must be done with regard to EU law, is an artificial one. One cannot underscore member states' autonomy to organise their own nationality law and at the same time grant Union law influence or something like indirect influence on this reserved domain'* (ibid, pages 147-148).

[247] De Groot thus argues that '[e]*ven though the Court differentiated between the situation in Rottman and that in Kaur…it appears rather ill-founded to assume that situations in which the granting of Union citizenship is at stake do not fall within the scope of Union law*' (G René de Groot and Anja Seling, *The Consequences of the Rottmann Judgment on Member State Autonomy - The European Court of Justice's Avant-Gardism in Nationality Matters* (2011) 7 European Constitutional Law Review 150, pages 154 and 157)

[248] In *Rottmann* the Court noted that the principles enunciated in the judgment for this reason apply equally to Austria, as the Member State of original nationality, as they do to Germany as the Member

continued ambiguity of this issue, combined with an apparent willingness of the Court to embrace Union citizenship as the 'independent variable',[249] has led some commentators to speculate as to whether the future may hold the de-coupling of Union Citizenship from Member State nationality.[250]

The principle that European Citizenship is derived from national citizenship is in the Spanish context quite straightforward to apply: all those with Spanish nationality also acquire European Citizenship. Applying the same principles to the UK context is, however, slightly more difficult in light of the fractured status of British nationality. The British Nationality Act 1981 provides for six types of nationality: British Citizens, British Overseas Territories Citizens, British Protected Persons, British Subjects, British Overseas Citizens and British Nationals (Overseas). British Citizenship and British Overseas Territories Citizenship are the two operative forms of nationality, with the other four categories largely directed towards individuals who were in receipt of other statuses prior to commencement of the Act. British Citizenship is the formal status associated with membership of the United Kingdom (constituted of England, Wales, Scotland, Northern Ireland and the Crown dependencies of the Channel Islands and Isle of Man), whilst British Overseas Territories Citizenship is the formal status associated with membership of British Overseas Territories.

The fragmentation of British nationality and the questions that it raises for the acquisition of European Citizenship are further enhanced by the differentiated constitutional status of British Overseas territories and Crown dependencies within the framework of the European Union. The British Overseas Territory of Gibraltar is bound by the Treaties (TEU and TFEU) as a territory for which UK is responsible for external relations,[251] but is subject to exemptions from CAP and from certain turnover taxes, and remains outwith the Customs Union.[252] The Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus (also British Overseas Territories) are in

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State of naturalisation (Case C-135/08, *Janko Rottman v Freistaat Bayern* [2010] ECR I-01449, paras. 60-61).

[249] D'Oliveira (2011), page 149

[250] Ibid

[251] Art 355(3) TFEU, OJ C 115, 9.5.2008, page 198; Declaration 55 TFEU, OJ C 115, 9.5.2008, page 356

[252] Art 28 Act of Accession 1972, OJ L 73, 27.3.1972, page 20

contrast bound by the Treaties only to extent that they achieve customs union.[253] All other British Overseas Territories (listed in Annex II TFEU) benefit from 'special arrangements of association' under the Treaties,[254] but are not parties to the Treaties nor are they bound by their provisions. The status of the British Crown Dependencies of the Isle of Man and Channel Islands is similar within the EU framework to that of the Sovereign Base Areas of Akrotiri and Dhekelia: the Treaties apply within the territory only to the extent that they achieve customs union.[255]

The relationship between the fragmented forms of British nationality and EU Citizenship remains governed by the 1982 Declaration on Nationality.[256] That Declaration states that British nationals are for the purposes of EU law to be understood as referring to British citizens, British subjects with the right of abode (who are thus exempt from UK immigration control) and British [Overseas] Territories citizens who acquire their citizenship from a connection with Gibraltar. The outcome of this Declaration is that those individuals who acquire British Citizenship by virtue of their relation to British Crown dependencies of Isle of Man and Channel Islands are EU citizens, notwithstanding that those territories are bound by the Treaties only to the extent that they achieve customs union. By contrast, those who acquire British Overseas Citizenship by connection with the Sovereign Base Areas of Akrotiri and Dhekelia, which have a comparable constitutional status within the EU framework, are excluded from EU Citizenship.[257] In further contrast, those who acquire British Overseas Citizenship by virtue of their relationship to Gibraltar,

[253] Art 355(5)(b) TFEU, OJ C 115, 9.5.2008, page 198; Protocol 3 Accession of Cyprus Treaty, OJ L 236, 29.3.2003, page 940

[254] Art 198 TFEU, OJ C 115, 9.5.2008, page 137; Art 355(2) TFEU, OJ C 115, 9.5.2008, page 197; Council Decision of 27 November 2001 on the association of the OCTs with the European Community (2001/822/EC), OJ L 314, 30.11.2001, pages 1–77

[255] Art 355(5)(c) TFEU, OJ C 115, 9.5.2008, page 198; Protocol 3 UK Accession Treaty 1972, OJ L 73, 27.3.1972, page 164

[256] The 1982 Declaration references the EC Treaty. Following the entry into force of the Lisbon Treaty and the subsequent recasting of the citizenship provisions in the TFEU, in addition to the change of name effected by the Overseas Territories Act 2002, the 1982 Declaration is to be read in light of Declaration 63 TFEU which states that '[i]*n respect of the Treaties and the Treaty establishing the European Atomic Energy Community, and in any of the acts deriving from those Treaties or continued in force by those Treaties, the United Kingdom reiterates the Declaration it made on 31 December 1982 on the definition of the term 'nationals' with the exception that the reference to 'British Dependent Territories Citizens' shall be read as meaning 'British overseas territories citizens''* (OJ C 115, 9.5.2008, page 358).

[257] The Sovereign Base Areas of Akrotiri and Dhekelia are part of the customs union, but do not participate in provisions on free movement of persons. Formal members are British Overseas Territories Citizens but not EU Citizens (Declaration on definition of United Kingdom "nationals" for European Community purposes, as amended by Declaration 63 TFEU, ibid.).

a territory outwith the customs union, *are* EU Citizens. The British example, then, illustrates a constitutional landscape in which differentiation between types of British nationals under national law – which is carried into the acquisition of European Citizenship through operation of the Declaration on Nationality – create incongruities between members of territorial communities from a European Constitutional perspective: members of territories that have a comparable constitutional status in the framework of the European Union do not acquire the status of European Citizen on an equal basis.

Significance of the coupling between Member State nationality and EU Citizenship

That the status of European Citizenship is ultimately tied to Member State nationality means that Member States may curtail the rights acquired by EU Citizens through conditioning the receipt of EU Citizenship to which those rights attach. This possibility was both recognised by and cautioned against by AG Sharpston in her Opinion on the controversial case of *Ruiz Zambrano*:

> *'if particular rules on the acquisition of its nationality are – or appear to be – liable to lead to 'unmanageable' results, it is open to the Member State concerned to amend them so as to address the problem…In so saying, I am not encouraging the Member States to be xenophobic or to batten down the hatches and turn the European Union into 'Fortress Europe'. That would indeed be a retrograde and reprehensible step – and one, moreover, that would be in clear contradiction to stated policy objectives. I am merely recalling that the rules on acquisition of nationality are the Member States' exclusive province'*[258]

Some Member States have over recent years exercised this opportunity, restricting the acquisition of nationality at birth with the intention of conditioning the rights received under EU law. Before *Ruiz Zambrano* had been determined by the CJEU, the Belgian Nationality Code had been amended so that the situation giving rise to the action before the referring Court would no longer be possible.[259] Reactive

[258] Opinion of Advocate General Sharpston, Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECR I-01177, Opinion of Advocate General, at para. 115

[259] The Code was amended so as to prevent a child born in Belgium to non-Belgian nationals from acquiring Belgian nationality 'if, by appropriate administrative action instituted with the diplomatic or

definition of nationality laws has also been witnessed in Ireland, where the Irish Nationality and Citizenship Act 1956 was amended in 2004 following the decision in *Chen* so as to ensure that *'a person born in the island of Ireland to Irish shall not be entitled to be an Irish citizen unless a parent of that person has, during the period of 4 years immediately preceding the person's birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years'*.[260]

The extent to which Member States are able to restrict their laws on jus soli in order to condition access to EU Citizenship is, however, subject to condition. A duty under international law to prevent statelessness means that Member States are unable to restrict jus soli where no other nationality can be acquired at birth. As noted above, following the decision in *Rottmann* the extent to which Member States can regulate the acquisition and loss of nationality is subject also to a proportionality requirement in light of the status of Union citizenship. Advocate General Sharpston in her Opinion added a caveat to this effect, highlighting that *'Member States – having themselves created the concept of 'citizenship of the Union' – cannot exercise the same unfettered power in respect of the consequences, under EU law, of the Union citizenship that comes with the grant of the nationality of a Member State.'*[261]

2.4.2. Control of residence

The chapter thus far has noted EU competence to allocate social goods and services (to be explored further in the case studies to follow), and has highlighted the conditioned competence that the EU holds over the acquisition and loss of EU Citizenship as a 'gateway' to social membership. Another form of membership competence enjoyed by the EU is the competence to control access to social

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consular authorities of the country of nationality of the child's parent(s), the child's legal representative(s) can obtain a different nationality for it.' (Law of 27 December 2006, see Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECR I-01177, Opinion of Advocate General, at para. 17)

[260] Inserted by Irish Nationality and Citizenship Act 2004 s(4), following a decision of the CJEU in Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State* for the Home Department [2004] ECR I-09925.

[261] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECR I-01177, Opinion of Advocate General, paras 114-115

membership through conferral of a right of residence in a second Membership State, to which the right of equality attaches.

The European Union enjoys two forms of competence that fetter the competence of a Member State to control residence within its territory (and thus the group of persons eligible to receive social rights). One is a facilitative regime intended to realise the objective of free movement as an integral part of a single market, and applies to EU citizens and their family members. The other is a common immigration policy that applies to third-country nationals, developed both as a necessary corollary to the abolition of internal borders within the Schengen Area and as part of a wider pursuit of an 'area of freedom, security and justice'. These two forms of immigration control differ not only as to their purpose but also as to their territorial application: as a fundamental part of the common market, the right of residence for Union citizens and their family members binds all Member States. By contrast, provisions facilitating a common European immigration and asylum system for (non-privileged) third-country nationals under Title V TFEU – previously outwith Union competence and initially falling under the 'third-pillar' – are subject to a system of 'opt ins' and 'opt outs' applied to the UK, Ireland and Denmark.

The right of residence of a European Citizen in a second Member State is guaranteed by Article 20(2)(a) and Article 21 TFEU, and is facilitated in secondary legislation by Directive 2004/38/EC (the 'Citizens' Rights Directive'). The Citizens' Rights Directive determines the conditions under which this general right of residence is exercised. It affords an unconditional right of residence for up to three months to all European citizens and their family members,[262] and thereafter limits the right of residence to those European citizens who are workers/self-employed persons, or who are students or in possession of 'sufficient resources' and who have comprehensive sickness insurance.[263] European citizens who are no longer workers or self-employed persons may retain that status (and thereby the right to residence in

[262] An individual may however lose this right in the event that they become '*an unreasonable burden on the social assistance system of the host Member State*' – Art 14(1) Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 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 L 158, 30.4.2004, p. 77–123

[263] Ibid, Art 7

a second Member State) under certain circumstances stipulated in the Directive.[264] A right of permanent residence is acquired by those '*Union citizens who have resided legally for a continuous period of five years in the host Member State*'.[265] That right is not subject to the conditions noted above, and once acquired can be lost '*only through absence from the host Member State for a period exceeding two consecutive years*'.[266]

The rights indicated above may be subject to certain administrative formalities, which are evidentiary rather than constitutive of the right contained therein.[267] Non-compliance with administrative requirements such as registration requirements may result in sanctions that are 'proportionate and non-discriminatory'.[268] A Member State may curtail the rights of residence granted by the Directive 'on grounds of public policy, public security or public health', and any measures taken on grounds of public policy or public security must conform with the principle of proportionality.[269]

Member States are able to revoke the right of residency should the individual concerned no longer satisfy the conditions of extended residency stipulated in Art 7 of Directive 2004/38/EC. For the purposes of establishing and retaining a right of residence, a Member State is not permitted to lay down a fixed amount which they regard as 'sufficient resources' but rather must take into account the individual circumstances of the individual concerned.[270] Moreover, recourse to the social assistance system may not automatically constitute grounds for expulsion of an EU

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[264] Ibid, Art 7(3)
[265] Ibid, Art 16(1). Art 16(3) elaborates that '*Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country*.' The CJEU has further determined that periods of residence within a Member State prior to the accession of the Member State of nationality to the Union count towards the period of continuous residence (*Joined Cases C-424/10 and C-425/10, Tomasz Ziolkowski and Barbara Szeja and Others v Land Berlin*, Judgment of the Court (Grand Chamber) of 21 December 2011), as do periods of residence completed before transposition of the Citizens' Rights Directive (Case C-162/09, *Secretary of State for Work and Pensions v Lassal* [2010] ECR I-09217).
[266] Directive 2004/38/EC, Art. 16.4 (*supra*, n.262)
[267] Ibid, Art. 25
[268] Ibid, Arts 8(2) and 9(3)
[269] Ibid, Art. 27
[270] Ibid, Art. 7(4)

citizen from a host Member State on the grounds of lack of sufficient resources.[271] In all cases, a host Member State may not impose a threshold for 'sufficient resources' that is higher than that for which nationals become eligible for social assistance.[272]

The ability of a host Member State to revoke an individual's right of residence in order to condition the social rights received under Union law is, however, limited. Once an EU citizen or a third-country national family member has acquired the right of permanent residence in a host Member State, their right to remain there is unconditioned by any requirement of sufficient resources. An individual who has acquired the right of permanent residence may thus be expelled only on 'serious grounds of public policy or public security', and is entitled to equal treatment in the receipt of all social welfare for the duration of their continued residency.[273]

A Host Member State is also unable to expel those who non-economically active EU Citizens who derive a right of residence from the primary right of their EU citizen child: in *Baumbast* the Court recognised the right of residence of a parent for the duration of the child's education, and in *Teixeira* it was made explicit that the continuation of such a right was not dependent upon fulfilment of the condition of sufficient resources.[274] Such a right has also been recognised for the third-country national care givers of EU citizen children: in *Chen*, a third country national parent acquired a right of residence as the primary carer of an EU citizen child.[275] In that case the third-country national in question had sufficient resources to maintain herself and her child and required no recourse to public funds, whilst in *Ruiz Zambrano* the Court went one step further, and required that the Member State grant a work permit to the third-country national parent of a (static) EU citizen child, in

[271] Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, [2001] E.C.R I-061930*, paras 42 and 43; Case C-456/02, *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECR I-07573, para 45; Directive 2004/38/EC Art 14(3). Member States are entitled to check whether an individual continues to hold sufficient resources where there is a reasonable doubt that he does not, but such checks may not be systematic (Directive 2004/38/EC Article 14(2)).
[272] Ibid, Art 7(4)
[273] Ibid, Article 28
[274] Case C-413/99, *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-07091; Case C-480/08, *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] ECR I-01107
[275] Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-09925

order to facilitate his acquisition of the sufficient resources required under the Directive.[276]

Family members of migrant EU citizens are also afforded rights of residence of residence under the Citizens' Rights Directive. These rights are 'secondary' rights that are derived from the family member's relation to the European citizen, and are intended to facilitate the free movement of European citizens within the Union. European citizens as well as third country nationals may benefit from the provisions relating to family members of migrant EU citizens, such that those European citizens who do not fulfil the necessary conditions of extended residency in their own right may nevertheless be eligible for residency as family members of EU citizens who do. The Directive makes a distinction between two categories of relation. 'Family members' of EU citizens are 'beneficiaries' of the rights of residence detailed in the Directive. The spouse or registered civil partner of an EU citizen, direct descendants of the EU citizen or their spouse/civil partner who are under the age of 21 or who are dependants, and dependent direct relatives in the ascending line of the EU citizen or spouse/civil partner fall within this category.[277] Article 3.2 of the Directive also identifies a group of persons for whom entry and residence shall be 'facilitated'. This group is constituted of '*the partner with whom the Union citizen has a durable relationship, duly attested*',[278] and of '*other family members…who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen*'.[279] The obligations placed upon Member States by the Directive in relation to such persons are limited to undertaking '*an extensive examination of* [their] *personal circumstances*' and justifying denial of entry or residence to them.[280]

Family members who are beneficiaries under the Directive receive rights of residence akin to those of EU citizens, charted above: if for example an EU citizen qualifies for a period of residency of more than three months, their non-EU citizen

[276] Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECR I-01177
[277] Directive 2004/38/EC Art 2(2)
[278] Ibid, Art 3(2)(b)
[279] Ibid, Art 3(2)(a)
[280] Ibid, Art 3(2)

family member receives a corollary right for so long as that EU citizen continues to fulfil the conditions of residence.[281] The right of residence of a non-EU national family member is evidenced by receipt of a 'residence card of a family member of a Union citizen', which is valid for a maximum period of five years from the date of issue.[282] The Directive provides for retention of the right of residence by family members in the event of death or departure of the EU Citizen,[283] and in the event of divorce, annulment of marriage or termination of registered partnership, though imposes differential conditions upon EU and non-EU national family members under these circumstances.[284] Family members of Union citizens acquire a right of permanent residence after legally residing in the host Member State for a period of five years, and for non-EU national family members this period of residence must have been spent residing with the Union citizen.[285] Non-EU national family members who acquire a right of permanent residence shall be issued with a permanent residence card, renewable automatically every ten years.[286]

Following entry into force of the Directive, some confusion existed amongst Member States as to the scope of non-EU national family members to whom it applied. Article 6.2 of the Directive states that the right of extended residence '*shall also apply to family members in possession of a valid passport who are not nationals of a Member State,* accompanying or joining *the Union citizen*'.[287] The implementation of this provision by Member States was substantially influenced by a CJEU determination that pre-dates the Directive itself, but which ruled on the application of prior Community legislation in the same area.[288] In *Akrich* the Court had determined that the Community instruments concerned covered only freedom of movement within the Community, being '*silent as to the rights of a national of a*

[281] Where the EU citizen has an extended right of residence in a second Member State by virtue of being a student with comprehensive sickness insurance, only the spouse/registered partner and dependent children will gain a secondary right of residence. Other family members will be treated as explained at n.280, above.
[282] Directive 2004/38/ECArts 10 and 11
[283] Non-EU national family members do not retain a right of residence upon departure of their EU citizen family member from the host Member State.
[284] Directive 2004/38/EC Arts 12 and 13
[285] Ibid, Art 16
[286] Ibid, Art 20
[287] Ibid, Art 6(2) (emphasis added)
[288] Case C-109/01, *Secretary of State for the Home Department v Hacene Akrich* [2003] ECR I-9607, making reference to Regulation (EEC) 1612/68 (OJ L 257, 19.10.1968, pages 2–12).

non- Member State, who is the spouse of a citizen, in regard to access to the territory of the Community'.[289] As a result, such a person '*must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated*'.[290] The Court reasoned that the rights granted to family members under EU law were intended to ensure that an EU citizen and family member did not receive less favourable rights when migrating to another Member State, and that in the absence of the non-EU national family member holding an initial right of residence within the Community there could be no question of receiving less favourable treatment in another Member State. The refusal to grant residence to such a family member could not therefore in these circumstances constitute a deterrent to the exercise of the EU citizen's right to free movement within the Community.

On the basis of *Akrich*, several Member States adapted their national instruments so as to make the right of residence of non-EU national family members conditional upon prior lawful residence in another Member State. Denmark, Ireland, Finland and the UK introduced this measure by legal instrument, while seven other Member States (Austria, the Czech Republic, Germany, Greece, Cyprus, Malta and the Netherlands) achieved this result through administrative guidelines.[291] The status of non-EU national family members was not, however, definitively determined by *Akrich*, not least because the precise scope of the decision was unclear. In the subsequent case of *Jia* the CJEU held that Community law 'does not require' prior lawful residence in another Member State for Community rights of residence to be accessed, but left unanswered the question of whether Member States were permitted to impose this condition.[292]

The issue was definitively settled by the CJEU in 2008, when the Court in *Metock* ruled that 'the refusal of a host Member State to grant rights of entry and residence to the family members of a Union citizen is such as to discourage that

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[289] Case C-109/01, *Secretary of State for the Home Department v Hacene Akrich* [2003] ECR I-9607, para. 49
[290] Ibid, para. 50
[291] *Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* COM(2008) 840 final <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0840:FIN:en:PDF> accessed 20 June 2009
[292] Case C-1/05, *Yunying Jia v Migrationsverket* [2007] ECR I-00001

citizen from moving to or residing in that Member State, even if his family members are not already lawfully resident in the territory of another Member State'.[293] Submissions made by several governments that the Member States retained exclusive competence to regulate the first access of non-EU national family members to Union territory were rejected by the Court, which confirmed that Union law requires national immigration laws to be dissaplied to family members of migrant EU citizens at their point of entry into Union territory.[294]

Metock confirmed that the family members of EU citizens were entitled to residence in the 'host' Member State to which that EU citizen had migrated, and that this right was unfettered by the initial application of national immigration law. Prior to recent case-law, such rights of residency were limited to the family members of *migrant* EU citizens, and were not enforceable against the Member State of nationality of the EU citizen in the absence of movement throughout the Union. This limitation was a product of the 'wholly internal principle', which had long dictated that Member State nationals could rely upon their rights as European Citizens only in 'cross-border' situations that were not 'wholly internal to a Member State'.[295] That principle was written into the drafting of the Citizens' Rights Directive itself, which was limited in application to '*all Union citizens* who move to or reside in a Member State other than that of which they are a national, *and to their family members…who accompany or join them*'.[296]

The extent of residency rights that family of 'static' EU citizens (i.e. those that had not yet exercised their right of free movement within the Union) can derive under Union law was re-considered in a trio of cases before the CJEU in 2011 and 2012. In *Ruiz Zambrano*, the Court was asked to consider whether a third-country national derived a right of residence in Belgium by virtue of the birth of his EU citizen children, notwithstanding that those children had never exercised their right of free movement within the Union. The CJEU concluded that, despite falling outwith the scope of application of the Citizens' Rights Directive, the applicant had both a right of residence in Belgium and a right to receive a work permit under EU

[293] Case C-127/08, *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241at para. 64
[294] For further analysis see Lansbergen (2009)
[295] Case 175/78, *The Queen v Vera Ann Saunders* [1979] ECR 1129 at para. 11
[296] Directive 2004/38/EC Art 3(1)

law on the grounds that *'Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.'*[297]

The significance of the decision in *Ruiz Zambrano* was potentially enormous, calling into question the continued validity of the wholly internal principle in its application to European Citizenship and, more specifically, raising the possibility that Member States may be required to dissapply national immigration law from the family members of its own nationals.[298] The scope of the judgment was however initially unclear, and generated much speculation as to the possible limits of those situations in which an EU citizen might be '*deprived of the genuine enjoyment of the substance of the rights*' conferred upon them.[299] The subsequent case of *McCarthy* did little to clarify matters, with the Court applying the *Ruiz Zambrano* test but reasoning that refusal of an EU residency permit to a static EU citizen (whose application was made with the sole purpose of thereby generating a dependant right of residency for her third-country national spouse) did not fall within the scope of deprivation.[300] The later case of *Dereci* proved more successful in clarifying the criterion relating to the denial of the genuine enjoyment as referring '*to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole*'.[301] The desirability of residing together with a family member within Union territory on economic grounds was for this purpose insufficient to establish that the Union citizen would otherwise be forced to leave the territory of the Union.[302]

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[297] Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi* [2011] ECR I-01177 at para. 42

[298] For further analysis of the significance of *Ruiz Zambrano*, see Anja Lansbergen and Nina Miller, *European Citizenship Rights in Internal Situations: An Ambiguous Revolution?* (2011) 7 European Constitutional Law Review 287

[299] See, e.g., Anja Wiesbrock, '*The Zambrano Case: Relying on Union Citizenship Rights in Internal Situations*' (2011) < http://eudo-citizenship.eu/citizenship-news/449-the-zambrano-case-relying-on-union-citizenship-rights-in-internal-situations> accessed 8 June 2011.

[300] Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department* [2011] ECR I-03375

[301] Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi* [2011] ECR I-01177 at para. 66

[302] Departamento de Economía y Conocimiento - Generalitat de Catalunya (2011), para. 68. For further analysis of implication of Dereci, see Anja Lansbergen, (2012) *Case Summary and Comment: Case C-256/11, Dereci and others v Bundesministerium für Inneres* <http://eudo-citizenship.eu/docs/Dereci%20Case%20Summary%20and%20Comment.pdf> accessed 7 July 2012

The cumulative effect of the *Metock* and *Ruiz Zambrano* line of case-law is that family members of all migrant EU citizens are exempt from the application of national immigration law, and family members of static EU citizens are exempt from immigration control only when denial of residency to them would deprive the EU citizen from the genuine enjoyment of his rights by forcing him to leave the territory of the Union. The relationship between the two remains however slightly unclear, as there is an argument to be made that no European citizen capable of independently exercising his or her right of free movement will be forced to leave the territory of the Union upon denial by a Member State of residency to their third-country national family member, as by virtue of *Metock* they have the option to reside together in a second Member State. The extension of the right of residence under EU law to family members of static EU citizens may well therefore be confined to those family members upon whom the EU citizen is dependent.

The discussion above concerns those provisions that facilitate residence for EU citizens and their family members with the objective of securing a common market. Harmonisation of immigration control outwith the objective of free movement for EU citizens has also developed as a necessary corollary of the abolition of internal borders within the Schengen Area, and as part of the Union's commitment to the development of an 'area of freedom, security and justice' for EU citizens and third-country nationals alike.

Initial entry to the Schengen Area is regulated by common visa provisions on short stay and transit visas, which allow for entry to and circulation within the Schengen area for a maximum of three months during any six-month period.[303] Long stay visas (for a period of stay exceeding 3 months, previously known as 'D' visas) fall within national competence, but once issued confer a right under EU law to limited circulation within the Schengen area. Since 2010, third country nationals issued with a long-stay visa by a Member State can move freely between Schengen states for up to three months in any six month period.[304] Regulation (EC) No

[303] Regulation (EC) No 810/2009, OJ L 243, 15.9.2009, pages 1–58

[304] Regulation EC No 562/2006 (OJ L 105, 13.4.2006, pages 1–32), as amended by Regulation 265/10 (OJ L 85, 31.3.2010, pages. 1–4). This puts them on the same footing as third country nationals holding valid residence permits. Prior to 2010, holders of long stay visas were authorised only to transit through other Schengen States (see Council of the European Union, (2010) *Free movement of*

539/2001 identifies a list of third countries from which visas are required to enter the Schengen zone, and identifies those individuals that are exempt from this requirement. Schengen visa provisions are applicable only to those 22 of the 27 Member States that are within the Schengen area, and to those three countries that are within the Schengen zone but which are not Member States.[305] Member States lying outwith the Schengen zone continue to apply national provisions on visa requirements, and retain their own country-specific lists as to those countries of origin subject to visa requirement.

Satisfaction of necessary visa conditions facilitates an individual's entry to the Schengen Area and legitimises their presence within the territory for a period of up to three months, but does not confer upon them the right of extended residence that acts as a gateway to social citizenship. The European Union enjoys limited competence over residence rights for third-country nationals within certain Member States, which is confined to procedural guarantees: a single application procedure for third-country nationals seeking residency and work permits within the Union is provided for by Directive 2011/98/EU (the 'Single Procedure Directive').[306] Provisions of that Directive are without prejudice to Schengen visa requirements detailed above, or (in the case of non-Schengen Member States and for the issue of visas for periods of stay exceeding 90 days) the visa requirements imposed under national legislation. The residence permit acquired under the harmonised process secures for the holder the right of entry and residence in the Member State of issue for the duration of validity of the card and also secures some rights of equal treatment in relation to working conditions,[307] but does not entitle holders to rights of residence in a second Member State. Member States are able to retain control over migratory flows through the capacity to declare an application inadmissible by reason of the volume of third-country nationals seeking entry and residence within their territory on the grounds of employment. The UK, Ireland and Denmark do not participate in the Single Procedure Directive.

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third country nationals with a long stay visa within the Schengen area <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/113463.pdf> accessed 6 Oct 2011).

[305] There is currently no mutual recognition of visas between Schengen and the UK and Ireland

[306] Directive 2011/98/EU, OJ L 343, 23.12.2011, pages 1–9. The deadline for transposition of this Directive is 25 December 2013.

[307] Ibid, Arts 11 and 12

Third country nationals who reside legally and continuously within the territory of a Member State for the period of five years immediately prior to application are entitled to receive the status of 'long term resident', and are granted a correlative right of equality that entitles them to receipt of social citizenship rights.[308] Periods of absence shorter than six months in duration and not exceeding a total of ten months within the five year period prior to application do not affect the continuity of residence for the purpose of acquisition of that status.[309] In order to acquire the status of long-term resident, a third-country national must evidence to the Member State of residence that they have sufficient resources for themselves and their family, and sickness insurance of the level required of nationals of the Member State concerned.[310] Once acquired, the status of long-term resident can be lost only by detection of fraudulent acquisition, expulsion or by absence from Union territory for a period of twelve consecutive months.[311] Those individuals in possession of the status of long term resident are entitled to be issued with a 'long term resident's permit', which is valid for a period of at least five years and is automatically renewable upon expiry.

Acquisition of the status of long-term resident entitles the holder to equal treatment with nationals of that Member State in a broad range of areas, including access to employment, social security and the receipt of tax benefits. Long term residents are protected from expulsion, and may be expelled only where the individual concerned *'constitutes an actual and sufficiently serious threat to public policy or public security'*.[312] Long term residents also acquire the right of extended residence (more than three months) in a second Member State, subject to evidence of stable, regular and sufficient resources and sickness insurance,[313] and thus benefit from the same principles of free movement that apply to European Citizens. Under Art 16 of the Long Term Resident's Directive, long term residents are entitled to slightly more beneficial rights of family reunification upon movement to a second Member State (see further below).

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[308] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, p. 44–53
[309] Ibid, Art 4
[310] Ibid, Art 5
[311] Ibid, Art 9
[312] Ibid, Art 12
[313] Ibid, Art 15

Those third country nationals that do not fulfil the requisite requirements for residency in their own right may be eligible to acquire a right of residence in a Member State by reason of Union provisions on family reunification. Council Directive 2003/86/EC on family reunification (the 'Family Reunification Directive') grants a right of residence to family members of those third-country nationals who are in receipt of a residence permit issued by a Member State for a period of validity of one year or more and who has 'reasonable prospects' of obtaining a right of permanent residence ('the sponsor').[314] Article 8 of the Directive further permits Member States to impose a requirement that the sponsor has stayed lawfully in the territory of the Member State for a period not exceeding two years, before having his/her family members join him/her.

Member States are obliged under the Family Reunification Directive to authorise the entry and residence of the sponsor's spouse and the minor children of either the sponsor or his or her spouse. They are also are entitled to authorise the entry of '*first-degree relatives in the direct ascending line of the sponsor or his or her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin*', and the '*adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health*'.[315] Authorisation of the entry and residence of the long term partner of the sponsor and the registered partner of the sponsor is at the discretion of national implementing regimes.[316] The right of residence under the Directive is subject to the conditions of adequate accommodation, basic sickness insurance and sufficient resources,[317] and is subject to curtailment on the grounds of public policy, public security or public health.[318]

Member States are obliged to provide qualifying family members with an initial residency permit of one year, which is renewable thereafter.[319] The sponsor's family members are entitled to access to education, employment and self-employed activity and access to vocational guidance and further training in the same way as the

[314] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, pages 12–18
[315] Ibid, Art 4(2)
[316] Ibid, Art 4(3)
[317] Ibid, Art 7
[318] Ibid, Art 6
[319] Ibid, Art 13

sponsor.[320] The Directive provides for the grant of an autonomous residence permit to the family member (i.e. issued to them in their own right, and independent from their relationship with the sponsor) after five years of residence. The UK, Ireland and Denmark do not participate in the Family Reunification Directive.

The provisions above detail the standard procedure for receipt of an EU residency permit on either the grounds of employment or family reunification, and for the receipt of long-term residency status. Specialised and privileged procedures apply for the entry and residence of third country nationals for the purposes of study, scientific research and for the purposes of highly qualified employment.

Entry and residence of third-country nationals within the Union for the purposes of highly qualified employment is regulated by the 'Blue Card Directive'.[321] The Directive allows Member States to retain overall control of the volume of admissions for such purposes, whilst harmonising the conditions and procedure of entry and residence.[322] Third-country nationals may apply for a blue card by presenting a valid contract or offer of 'highly qualified employment' for a period of at least one year, a document attesting to fulfilment of the requisite conditions of professional employment, a valid visa and residence permit and evidence of the level of sickness insurance required by nationals of that Member State. For the purposes of the Directive, 'highly qualified employment' refers to paid employment in the Member State with the requisite adequate and specific competence, proven by higher professional qualifications.[323]

Possession of an EU Blue Card entitles the holder to enter, re-enter and stay in the territory of the issuing Member State during period of validity.[324] Holders of the card are guaranteed equal treatment with nationals of the Member State of issue in regard to various aspects of employment conditions and criteria,[325] and are subject to privileged processes of family reunification and acquisition of long term residency

[320] Ibid, Art 14
[321] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, 18.6.2009, pages 17–29
[322] Member States are also entitled to verify whether the vacancy concerned could be filled by EU citizens, legally resident TCN or long term residents.
[323] Council Directive 2009/50/EC Art 2(b)
[324] Ibid, Art 6(4)
[325] Ibid, Art 14

status (see further below). After 18 months of legal residence in the first Member State, the holder of a Blue Card is entitled to move to a second Member State for the purposes of highly qualified employment.[326] Family members residing with the Blue Card holder in the first Member State are entitled to accompany or join the Blue Card holder upon movement to second Member State. The UK, Ireland and Denmark are not participating in the Directive.

The entry and residence of third-country nationals for the purposes of study is regulated by Directive 2004/114/EC,[327] and the admission of third-country nationals for the purposes of scientific research is regulated by Directive 2005/71/EC.[328] Neither The UK, Ireland nor Denmark is taking part in Directive 2004/114/EC, and of those countries only Ireland has opted to take part in Directive 2005/71/EC.

2.5. Conclusion: fragmentation of membership competences across constitutional asymmetries

The foregoing chapter has examined the transfer of legislative competence to non-state polities above and below the state, and has sought to contextualise the disaggregation of sovereignty against the recognition and development of alternative identity groupings. It has noted that the transfer of competence to sub-state polities in the UK and Spain result from *de facto* horizontal and vertical asymmetries that manifest between the constituent units and between the constituent units and the centre: devolution is the product of claims to autonomy asserted by self-conscious national minorities that have a history of self-governance, which in turn are supported by variations in wealth and demography across the state territory. By contrast, transferral of competence to the European Union is responsible for attempts to generate a common European identity capable of sustaining the goals of enhanced economic integration, largely pursued through the creation of the status of European Citizenship and the investment of rights therein.

The chapter has argued that there are three forms of membership competence determinative of the social rights that an individual receives, and thus which

[326] Ibid, Art 189
[327] Directive 2004/114/EC, OJ L 375, 23.12.2004, pages 12–18
[328] Directive 2005/71/EC, OJ L 289, 3.11.2005, pages 15–22

determine the extent to which he enjoys equality of membership in a given polity: the competences to provide social goods and services (encompassing the competence to determine the level of welfare provision available, and the administrative responsibility to deliver it), the competence to allocate social goods and services (the ability withdraw or extend those rights), and the competence to secure access to social goods and services through the 'gateways' of nationality, European Citizenship, and residence. In the traditional model of membership that operates within the boundaries of the nation-state, the competence to provide, to allocate and to precondition the receipt of membership benefits are all co-vested in the state, which thus has ultimate control over the boundaries of its citizenship.

With the transfer of legislative competence to non-state polities above and below the level of the state, these membership competences are fragmented across multiple polity levels. The competence to provide social goods and services is enjoyed by both the state and sub-state polities in Spain and the UK, in a transfer of competence that is bounded by subject matter. The two polities thus remain of concurrent relevance for the social rights that a given individual receives: a person may, for example, fall within a particular sub-state membership grouping for the purposes of a right to education or healthcare, and within a state-wide membership grouping for the purpose of receipt of social security.

The competence enjoyed by state and sub-state polities to allocate the benefits of the social goods and services that they provide is not exclusive, but rather is shared with the European Union by virtue of the right of equality enjoyed by European Citizens and their family members (and certain other groups of third-country nationals including long-term residents). The result of this relocation of competences is that polities at the sub-state, state and EU levels all have competence to allocate the benefits of social membership. The boundaries of inclusion in or exclusion from social membership at the state and sub-state levels is determined through allocation of social rights, whereas the boundaries of inclusion in and exclusion from social membership under EU law is determined by the scope of the right of equal treatment, upon which basis social rights are allocated to given individuals. Within these competences each polity must engage in the process of determining the boundaries of social membership, determining the basis upon which

those respective rights are allocated and thus who is entitled to receive the benefit of social rights or of equal treatment.

A final form of membership competence manifests in the competence to control residence and formal status as 'gateways' to membership, and thus to determine admission into the class of persons eligible to receive the benefits of membership. Competence over residence and nationality is in both Spain and the UK reserved to the State, with the result that sub-state polities have no competence to control admission to the group of persons entitled to receive the benefits of social membership. Transfer of competences to the European Union has also limited the competence of the state in this regard: the European Union has assumed competence to control the rights of residence of European Citizens and their family members in a second Member State, and also a limited control over the right of residence of certain other third-country national family members. Nationality is the dominant gateway through which both rights of residence and the parasitic status of European Citizenship are acquired. Control over this gateway, too, is now influenced partly by the European Union: whilst the conferral of nationality for the time being remains within the exclusive control of the State, withdrawal of nationality that leads to the loss of the status of European Citizenship is subject to a requirement of proportionality under EU law.

Two observations can be drawn from the distribution of these membership competences across the constitutional asymmetry. First, the competence to allocate the benefits of social membership is shared across polity levels, each of which must determine the basis upon which the benefits of rights are extended or withdrawn so as to meet the demands of social justice. Secondly, the fragmentation of these competences means that membership boundaries are interdependent, with the result that exercise of a competence in one polity has the capacity to influence the boundaries of social membership in another.

The following case studies aim to probe the significance of this fragmentation for the allocation of social rights as the substantive benefit of membership. The case studies draw examples from both the UK and Spain to illustrate the basis upon which non-state polities allocate social rights, and the way in which those membership boundaries interact across the constitutional asymmetry.

3. Effect of EU membership competences upon equal membership, examined through the lens of minimum income allowances

3.1. Introduction: equal membership and minimum income allowances

The equality of membership that lies at the heart of citizenship is realised through a bundle of civic, political and social rights, which form the substantive benefits of membership. Social rights, upon which this study is focussed, have been secured through welfare systems that have developed throughout the twentieth century. Welfare provision is paradigmatically linked with the nation-state: the 'nation' generates the social solidarity necessary to drive the pursuit of social justice, and the 'state' provides the organisational framework within which those objectives are attained.[329]

The fragmentation of membership competences across asymmetric constitutions presents certain challenges to this model. The competence of the European Union to secure free movement of persons between Member States widens access to those social rights provided from national resources through the conferral of rights of residence and a correlative right to equal treatment. States and sub-state polities consequently have more residents to whom to provide social welfare, raising issues of sustainability. Moreover, a broader *range* of residents enjoy entitlements to social welfare as a result, with more third-country nationals deriving entitlements to equal access under EU law than would otherwise be eligible to receive social rights under the national system. Member States have, in turn, sought to mitigate the impact of these developments by conditioning those rights conferred under EU law; restricting where possible initial rights of residence within their territory, and otherwise narrowing the eligibility criteria that circumscribe receipt of welfare.

Whereas these entitlements affect most areas of welfare provision, it is in the grant of non-contributory minimum income allowances that these tensions are most evident: such benefits are grounded exclusively in ideals of social justice (rather than as a right 'bought' by social insurance), and thus test most acutely the boundaries of equal membership. The following pages examine the effect of EU membership

[329] See text above between nn.111 and 118.

competences upon the parameters of equal membership, through a study of entitlement to minimum income allowances in the UK and Spain. For this purpose the following definition of a minimum income allowance is adopted:

> *'a universal non-contributory subjective and non-discretionary right to social assistance, granted generally under the form of a means-tested differential income. As main pillar of a dedicated scheme, it acts as (part of) the ultimate safety net of social protection in order to prevent individual or households, which are not covered by other social protection schemes and with insufficient resources to support themselves, to fall into (severe) poverty or under decent living standards as perceived in national societies.'*[330]

The chapter details the provision of minimum income allowances in the UK and Spain, and examines the eligibility criteria pertaining to nationality and residence that condition their receipt. It then examines entitlement to these benefits arising from the EU law principle of equal treatment, before turning to consider the reactive exercise of state competences to condition the impact of EU rights. The study concludes that EU membership competences alter the parameters of equal membership in two countervailing ways: EU law secures access to social rights for resident non-nationals who may otherwise have been ineligible under the national system, thereby extending the scope of equal membership provided by the State, which has in turn prompted a reactive constriction of the basis on which Member States allocate equal membership through the imposition of eligibility criteria that indirectly favour Member State nationals.

The following chapter examines exclusively the effect upon equal membership of the 'vertical' constitutional relationship between the European Union and the two Member States that form the focus of this study. This constitutional relationship is a complex one, and whilst both Member States and the Union as a whole enjoy protected spheres of competence (Member States through the principles of conferral and subsidiarity, and the Union through the principles of supremacy and direct effect), the balance between respective competences is such that Member

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[330] Ramón Peña Casas, '*Minimum income standards in enlarged EU: Guaranteed Minimum Income Schemes'* (2005) <http://www.eapn.ie/pdfs/155_paper%20II%20-%20Minimum%20income%20standards%20in%20enlarged%20EU.pdf> accessed 19 Feb 2013, page 18

States must ensure the conformity of national laws pertaining to social membership with EU law. Membership boundaries are thus subject to contestation not only by reason of *de facto* vertical asymmetries between national and EU membership decisions, but also in the *de iure* asymmetry that ensures the supremacy of EU law in the case of conflict between the two.

The focus in the following chapter upon vertical asymmetries between EU and Member State membership definition foreshadows investigation in chapter four of the additional sub-state dimension of this web of constitutional relations.

3.2. Provision and allocation of minimum income allowances in the UK and Spain

3.2.1. Minimum income allowances in the UK and Spain

Social security in England, Scotland and Wales is provided by the UK State.[331] Four main minimum income allowances can be identified from a group of benefits that in UK legislation are collectively referred to as 'income-related benefits': '*income-assessed jobseekers' allowance*', '*income-related employment and support allowance*', '*income support*' and '*state pension credit*'.[332] These benefits provide a

[331] Northern Ireland is the only sub-state legislature to which any competence in the field of social security has been devolved. The relationship between social security in Northern Ireland and in the rest of the UK is complex: separate systems have been in place dating back to 1920, and a principle of 'parity' governs the relationship between the two (see e.g. Northern Ireland Assembly, '*Parity and Social Security in Northern Ireland*' Research and Information Service Briefing Paper 99/11 (2011) <www.niassembly.gov.uk/researchandlibrary/2011/9911.pdf>). Moreover, certain elements of social security in Northern Ireland have remained within the control of the UK Parliament after the 1998 devolution settlement, whilst others have been devolved to the Northern Ireland Assembly (control and management of the Northern Ireland National Insurance Fund, and payments in and out of that fund, are excepted matters within Schedule 2, paragraph 10 of the Northern Ireland Act 1998). The following analysis focusses solely upon the interaction of UK-wide social security provision with EU membership competences, and the added dimension of diverging sub-state competences will be considered in greater depth in the next chapter.

[332] Also within this category fall 'housing benefit' (which provides financial assistance towards the cost of accommodation for persons on a low income) and 'council tax benefit' (which grants a reduction in the amount of council tax a person on a low income must pay). Both of these benefits can also be considered as a form of minimum income allowance, and are subject to the same threshold eligibility criteria relating to residence and nationality as is discussed further below. The system of benefits in the UK is undergoing substantial reform at the time of writing. In October 2013 a single 'universal credit' will replace the income-related benefits noted above. Council Tax Benefit will be abolished in April 2013 and replaced by a system of localised support, and the State Pension Credit will be amended from October 2014 to include help with eligible rent and dependent children(Department for Work and Pensions, '*Universal Credit*' (2012) <http://www.dwp.gov.uk/policy/welfare-reform/universal-credit/> accessed 15 Oct 2012).

minimum income allowance to persons falling within a defined set of circumstances, irrespective of the insurance contributions that they have made. *Income-assessed jobseeker's allowance* secures a minimum income for persons who are seeking employment. The allowance is available to persons aged 18-65 who have not made sufficient national insurance contributions to access contribution-based jobseekers' allowance, or who have exhausted their six-month entitlement under that scheme.[333] *Income-related employment and support allowance* secures a minimum income for persons below state-pension age who are unable to work due to illness or disability. *Income support* guarantees a minimum income for persons with familial dependents who are not seeking employment, and is available to a person between the ages of 18-65 who is pregnant, is a lone parent with a child under five, or is a carer.[334] *State pension credit* is available to persons above state pension age on a low income, and the allowance 'tops-up' the income of a recipient to the stipulated threshold amount. Receipt of all four of these benefits is means-tested against both household income and a savings cap, with the situation of an applicant's partner taken into account, and is not dependent upon the applicant having made insurance contributions.[335]

In Spain, both the Cortes Generales and the Autonomous Communities have a degree of competence over the provision of minimum income allowances. Three main forms of non-contributory minimum income guarantee are available within the Spanish welfare system: non-contributory employment benefits, non-contributory social security pensions, and a minimum integration allowance.[336]

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[333] Receipt is conditional upon the applicant not working more than 16-hours per week, and upon fulfilment of certain requirements relating to the pursuit of employment.
[334] Single persons may also be eligible to receive income support where they are unable to work.
[335] 'Income' for the purposes of state pension credit includes pensions, benefits, savings and earnings. All details on eligibility are sourced from UK Government, '*Jobseeker's Allowance and low income benefits*' (2012) <https://www.gov.uk/browse/benefits/jobseekers-allowance> accessed 12 Oct 2012.
[336] José A. Noguera, '*Basic Income and the Spanish Welfare State*' Basic Income European Network (BIEN) 8th Congress (Berlin, October 6-7, 2000) <http://www.basicincome.org/bien/pdf/2000Noguera.pdf> accessed 20 Feb 2013; Ana Arriba and Zyab Ibáñez, '*Minimum Income Guarantee and Social Assistance: Benefits for Low Income People and Increasing Low Wages*' Unidad de Políticas Comparadas (CSIC) Working Paper 02-12 (2012) <digital.csic.es/bitstream/10261/1526/1/dt-0212e.pdf> accessed 26 Feb 2013; Gregorio Rodríguez Cabrero, '*Assessement of Minimum Income Schemes in Spain*' (2009) <europa.eu/ey2012/BlobServlet?docId=9043&langId=en> accessed 18 Feb 2013; European Commission, *Your social security rights in Spain* (DG Employment, Social Affairs and Equal Opportunities 2011).

Non-contributory benefits for unemployed persons are regulated by the State, and consist of a special unemployment allowance (*subsidio por desempleo*) and an active integration income (*Renta Activa de Inserción Laboral*).[337] Unemployment allowance is paid when contributory–based unemployment allowances have been exhausted, are means-tested, and are conditional upon the applicant having '*dependant family charges*'.[338] Recipients must be signed up with an employment agency and must not have refused a suitable offer of employment or vocational training.[339] The active integration income '*aims at facilitating labour insertion for long term unemployed workers over 45 years of age'*, and is subject to means-testing.[340]

Non-contributory social security pensions (*Pensiones no Contributivas de la Seguridad Social*) are regulated within the national scheme of social security, but are managed in partnership with Autonomous Communities.[341] Non-contributory pensions were introduced in an overhaul of social assistance programmes in 1990, and are comprised of means-tested retirement pensions for persons over the age of 65, and means-tested invalidity pensions for persons aged between 18 and 65.[342]

Finally, minimum integration allowances (*rentas mínimas de inserción)* are regulated by Autonomous Communities, and form the 'last safety net' for social

[337] European Commission (2011), *Your social security rights in Spain*, page 32
[338] Cabrero (2009), page 8; Arriba and Ibáñez (2012), page 8; Noguera (2000) page 7. The benefit is paid for a period of six months, and is renewable for a period of up to a maximum of 18 months. Persons over 45 may renew for a period of up to 30 months, whilst eligible persons over the age of 52 may receive it until retirement age (European Commission (2011), *Your social security rights in Spain*, pages 31-32).
[339] European Commission (2011), *Your social security rights in Spain*, page 21
[340] Arriba and Ibáñez (2012), page 8. The allowance is also paid to other persons including those who are in receipt of an invalidity pension, or who are victims of domestic violence (Cabrero (2009), pages 12 and 14). The benefit is payable for a maximum of 11 months (European Commission (2011), *Your social security rights in Spain*, page 32).
[341] Cabrero (2009), page 8. See also European Commission (2011), *Your social security rights in Spain*, page 36: '*non-contributory benefits are recognised by the Autonomous Communities…that have had the functions for the institute of elderly and social services transferred to them*'; and Thomas Bahle, Vanessa Hubl and Michaela Pfeifer, *The Last Safety Net: A Handbook of Minimum Income Protection in Europe* (Policy Press 2011) at page 137: '*National social security also offers non-contributory pensions for older and disabled persons when they are not eligible for contributory pensions. While these categorical schemes are institutionalised by the central government, general social assistance is subject to the mesogovernments of the 17 Autonomous Communities and the Autonomous Cities of Ceuta and Melilla*'.
[342] Act 26/1990, Law of Non-Contributory Pensions of the Social Security. See Cabrero (2009), pages 8 and 12; Noguera (2000), pages 7 and 8; and Arriba and Ibáñez (2012), page 2.

protection.[343] Minimum incomes '*target those between the ages of 25 and 64 in situations of extreme poverty and with difficulties relating to social and/or employment integration'*.[344] Provision of minimum integration allowances differs substantially between Autonomous Communities, which each have '*different access requirements and, above all, varying protective intensities and conditions for social and labour market insertion*'.[345] Receipt of minimum integration allowance is discretionary under the schemes of most Autonomous Communities, and is only an entitlement in Basque, Navarre, Madrid, Asturius and Catalonia.[346]

In addition to these three general forms of minimum income allowance, there also exists a special minimum for Spanish persons residing abroad and returnees (*prestación por razón de necesidad a favor de los españoles residentes en el exterior y retornados*).[347]

3.2.2. Allocation of minimum income allowances: equality of residents

In both the UK and Spain, receipt of minimum income allowances is conditioned by the fulfilment of certain residence requirements.

In order to be eligible for a non-contributory invalidity pension from the Spanish State, a person 'must be legally residing in Spain and have been resident in Spain for at least five years, including the two years immediately preceding the date of application'.[348] In order to be eligible for receipt of a non-contributory retirement pension, a person 'must be resident in Spain and have been resident in Spain for at least ten years between his 16th birthday and the date of retirement, including the two

[343] Cabrero (2009), pages 4 and 12. Cabrero notes that the role of regional minimum insertion schemes '*is secondary, residual in comparison with the other social protection schemes…, but even so, they are of growing importance in the general system of guaranteed income'* (ibid, page 13).
[344] Ibid, page 8. See also Arriba and Ibáñez (2012), page 4: these programmes '*aim at facilitating social insertion of the recipient families (along the lines of the early principles established by the French RMI). Such benefits were intended to provide monetary resources to those citizens potentially active in the labour market confronting situations of need'*.
[345] Cabrero (2009), page 6. Arriba notes that common '*quasi-universalitic*' entitlements can be identified, including the use of families as units of reference, means-testing of applicants and residence requirements (Arriba and Ibáñez (2012), page 9).
[346] Cabrero (2009), pages 8 and 6. See also Bahle, Hubl and Pfeifer (2011), page 139.
[347] For Spanish nationals residing abroad, assistance is determined annually by the emigration office, and returnees are entitled to an amount equalling the non-contributory retirement pension. For Spanish nationals residing abroad, assistance is determined annually by the emigration office, and returnees are entitled to an amount equalling the non-contributory retirement pension (European Commission (2011), *Your social security rights in Spain*, page 35).
[348] Ibid, page 34. See also Bahle, Hubl and Pfeifer (2011), page 138.

calendar years immediately preceding the date of the application'.[349] A person is resident for these purposes if they are both legally and factually resident and domiciled in Spain.[350]

Unemployment allowances are not directly conditioned by residence requirements in the same way as are non-contributory pensions, but rather receipt of both the '*subsidio de desempleo*' and the '*Renta Activa de Inserción Laboral'* is dependent upon an individual being registered as unemployed with the relevant authorities.[351] An individual will cease to be registered if they go abroad, though registration is not interrupted by travelling for a period of 90 days or less within the European Union.[352] Special provisions apply for determining the amount of these benefits to which returning emigrants are entitled: such persons are entitled to receive unemployment allowances for 18 months rather than six, and can get integration income and the basis of their status as a returning emigrant.[353]

Catalan regulations on the minimum insertion income require an applicant both to be registered in a municipality of Catalonia, and to prove continuous and effective residence there for a period of one year prior to making the application.[354] Exceptions apply to this requirement: where the applicant has continuous and effective residence in Catalonia for four out of the previous five years, he will be eligible to receive minimum insertion income notwithstanding that he has not been

[349] European Commission (2011), *Your social security rights in Spain*, page 34

[350] Article 10 of Real Decreto 357/1991 states that '*El requisito de residencia legal para el reconocimiento y conservación del derecho a la pensión quedará acreditado siempre que teniendo el interesado domicilio en territorio español, resida en el mismo, ostentando la condición de residente*' (Real Decreto 357/1991, Boletín Oficial del Estado, núm. 69 de 21 de marzo de 1991, páginas 8958 a 8963. <http://www.boe.es/diario_boe/txt.php?id=BOE-A-1991-7270> accessed 28 Feb 2013).

[351] European Commission (2011), *Your social security rights in Spain*, page 31; Ministerio de Empleo y Seguridad Social (Servicio Público de Empleo Estatal), *Protección por desempleo: Subsidio de desempleo* (2013), page 2; Servico Público de Empleo Estatal (Subdirección General de Prestaciones por Desempleo), *Renta Activa de Inserción: Protección por desempleo* (Catálogo de publicaciones de la Administración General del Estado 2013), page 5

[352] Servico Público de Empleo Estatal (Subdirección General de Prestaciones por Desempleo) (2013), page 6

[353] Ibid, page 6; Ministerio de Empleo y Seguridad Social (Servicio Público de Empleo Estatal) (2013), page 1

[354] Miquel Àngel Purcalla Bonilla and others, *La Renda Mínima d'inserció Catalana en el Sistema de Protecció Social* (Generalitat de Catalunya. Institut d'Estudis Autonòmics 2006), pages 124-126. Absences for any reason of periods of less than 90 days in a year do not interrupt residence. A requirement of registration is found in the regulations of all Autonomous Communities (Cabrero (2009), page 15). See also Bahle, Hubl and Pfeifer (2011) page 139: *'All programmes require a period of residence prior to the application for benefits (6-12 months), a condition that aims to prevent 'welfare tourism' due to the varying benefit levels among the regions'.*

so resident for the previous year. Returning emigrants who are classified within the scope of 'Catalan communities abroad' do not have to fulfil a one year residence, and neither do women who have taken up residence in Catalonia in order to prevent abuse to themselves or their children.[355] In contrast to other Autonomous Communities, Catalan regulations do not dissaply this one-year residence condition to persons moving within Spain from other Autonomous Communities, by way of reciprocity.[356]

An individual's entitlement to minimum income allowances in the UK is conditioned both by his immigration status and by the nature of his residence in the UK.[357] These eligibility conditions are imposed in the form of two negative restrictions: in order to be eligible to receive income-related benefits an individual must be neither a '*person subject to immigration control*', nor a '*person from abroad*'.[358]

A '*person subject to immigration control*' is a person who is not an EEA national, and who requires leave to enter or remain in the UK but does not have it, has leave to remain that is subject to restrictions on access to public funds, or has leave to enter or remain subject to a written undertaking by a third person assuming responsibility for their maintenance and accommodation.[359] Application of this test creates a category of non-nationals that are exempt from the receipt of income-related benefits, a-priori to any examination of their actual residence in the UK.[360] In practice, the vast majority of third-country nationals granted leave to enter and remain in the UK are subject to conditions of no recourse to public funds, and will

[355] Bonilla and others (2006), pages 127-128
[356] Ibid, page 128
[357] For a list of relevant secondary legislation and the primary legislation under which it was enacted, see *Annex 3: Legislation determinative of minimum income guarantees in the UK*, page 133. For a detailed consolidated summary of the relevant eligibility criteria see *Annex 4: Eligibility criteria for receipt of minimum income allowances in the UK*, page 134.
[358] These restrictions are imposed through a combination of immigration and social security legislation.
[359] Immigration and Asylum Act 1999, s115. This category also includes persons who have continuation of leave to enter or remain subject to an impending decision on an appeal against refusal to vary limited leave or grant asylum.
[360] The exclusion applies to all of the income-related benefits noted above, plus some other forms of non-contributory benefits. Exceptions apply to the general exclusion of persons subject to immigration control, for example in circumstances in which the sponsor has died, or if the remittances that a 'person subject to immigration control' receives from abroad are temporarily interrupted.

thus be ineligible to receive income-assessed benefits by virtue of their status as a 'person subject to immigration control'.[361]

Persons who are not exempt from the receipt of income-related benefits in the UK by virtue of their status as a 'person subject to immigration control' must demonstrate '*habitual residence*' in the UK[362] in order to receive income-related benefits.[363] The condition of 'habitual residence' is comprised of both a legal and a factual element. Regulations stipulate that no person will be 'habitually resident' unless they have a '*right to reside*' in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland, and the regulations identify three categories of EU Citizens and their family members who do not have a 'right to reside' for these purposes.[364] The consequence of these provisions is that persons exercising a three-month unconditional right of residence in the UK under EU law, persons exercising an extended right of residence in the UK under EU law who are jobseekers or the family members of jobseekers, and persons exercising a right of

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[361] Social Security Advisory Committee, *Report by the Social Security Advisory Committee under Section 174(1) of the Social Security Administration Act 1992 and the statement by the Secretary of State for Social Security in accordance with Section 174(2) of that Act* (HMSO 1994), page 7

[362] Or in the Channel Islands, the Isle of Man or the Republic of Ireland.

[363] Persons who are not habitually resident in the UK are considered to be 'persons from abroad' and are not eligible for income-related benefits. UK regulations stipulate certain categories of EU citizens and their family members for whom the 'habitual residence' requirement is waived. These persons are: a) Member State national workers and self-employed persons; b) Member State nationals who have retained the status of worker or self-employed persons because they are temporarily unable to work due to illness, or are in involuntary unemployment; c) Family members of persons stated in (a) and (b); d) Persons who have acquired a right of permanent residence in the UK under Art 17 Directive 2004/38/EC (Exemptions for persons no longer working in the host Member State and their family members); e) Bulgarian or Romanian nationals who hold an accession worker authorisation document and who are working in accordance with the conditions set out in that document. (See
Jobseeker's Allowance Regulations 1996 (S.I. 1996/207), Regulation 85A(4)(a) – (f);
Income Support (General) Regulations 1987 (S.I. 1987/1967), Regulation 21AA(4)(a) – (f);
Employment and Support Allowance Regulations 2008 (S.I. 2008/794), Regulation 70(4)(a) – (f);
Housing Benefit Regulations (S.I. 2006/ 213), Regulation 10(3B)(a) – (f);
Council Tax Benefit Regulations 2006 (S.I. 2006/215), Regulation 7(4A)(a) – (f); and
State Pension Credit Regulations 2002 (S.I. 2002/1792) Regulation 2(4)(a) – (f)).

[364] These persons are a) persons exercising their three-month unconditional right of residence in the UK under EU law; b) persons with extended right of residence in the UK under EU law who are jobseekers or the family members of jobseekers; and c) persons with a right to reside in the UK under EU law as the primary carer of a British citizen (a '*Ruiz Zambrano*' right of residence). By way of exception, persons exercising an extended right of residence as jobseekers are not exempt from receiving income-assessed jobseekers allowance. (See
Jobseeker's Allowance Regulations 1996 (S.I. 1996/207), Regulation 85A(2) and (3);
Income Support (General) Regulations 1987 (S.I. 1987/1967), Regulation 21AA(2) and (3);
Employment and Support Allowance Regulations 2008 (S.I. 2008/794), Regulation 70(2) and (3); and
Housing Benefit Regulations (S.I. 2006/ 213), Regulation 10(2) and (3))

residence in the UK under EU law as the primary carer of a British citizen, are all prevented from accessing income-related social benefits in the UK.

Persons who are not exempted from receipt of benefits by virtue of their status as a 'person subject to immigration control' or through application of the 'right to reside' element of the habitual residence test must demonstrate actual habitual residence in the UK at the time of application in order to be eligible to receive benefits. Actual habitual residence is an objective test that focusses upon the 'fact and nature' of a person's residence.[365] 'Residence' for this purpose requires a '*more settled state than merely physical presence in a country*', such that an individual '*must be seen to be making a home*' there.[366] The 'habitual' nature of that residence is a question of fact to be determined by reference to 'the length, continuity and general nature' of a person's actual residence:[367] residence is habitual only after an 'appreciable period of time' of actual residence, which will vary depending on the circumstances of each case.[368] Factors that are relevant to the determination of the period of residence required before it may be considered 'habitual' include '*bringing possessions, doing everything necessary to establish residence before coming, having a right of abode, seeking to bring family, [and having] "durable ties" with the country of residence or intended residence*'.[369]

The residence requirements that condition receipt of minimum income allowances in both the UK and Spain do not simply refer to an individual's authorised presence within the territory at the time of the application, but rather

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[365] *Decision CIS/1067/1995*. See also *Nessa v. Chief Adjucation Officer* [1999] 1 W.L.R. 1937, in which Lord Slynn noted that '*as a matter of ordinary language a person is not habitually resident in any country unless he has taken up residence and lived there for a period*' (page 1942, Para E).
[366] *Decision CIS/1067/1995*, para. 19
[367] Ibid, para. 20
[368] Ibid, paras. 27-28. See also *Nessa v. Chief Adjucation Officer* [1999] 1 W.L.R. 1937: '*It is a question of fact to be decided on the date where the determination has to be made on the circumstances of each case whether and when that habitual residence had been established…The requisite period is not a fixed period. It may be longer where there are doubts. It may be short*' (1942 para H – 1943 para A).
[369] Ibid, at page 1942, Para H. Commissioner's Decision *CIS/4474/03* has stated that a '*period of between one and three months is likely to be appropriate to demonstrate that a person's residence is habitual in nature. Cogent reasons should be given where a period longer than three months is considered necessary*'. The claimant must provide evidence in support of these factors but if challenged in court the burden of proof lies with the Department of Work and Pensions to prove, on the balance of probabilities, that a claimant is not habitually resident for the purposes of receipt of social assistance (Steven Kennedy, '*EEA nationals: the 'right to reside' requirement for benefits*' (House of Commons Library Standard Note SN/SP/5972 2011), page 7).

require that an individual satisfy an extended period of residence prior to making the application. Residence requirements in this sense serve both to contain welfare provision within the territorial boundaries of the polity, and also identify persons eligible to receive benefits by reason of their established links within the society.[370] The objectivity of the residence requirements is greater in the Spanish system, in which a proscribed length of residence (five years in the case of disability allowances, and 10 for retirement allowances) suffices to demonstrate that an individual has the required link with Spain. The 'habitual residence' test applied in the UK is more subjective - the period of time required for an applicant to prove a sufficient degree of social integration varies on a case-by case basis, with reference drawn from such factors as family ties.[371]

The right to receive minimum income allowances in the UK and Spain is thus conditioned primarily by reference to residence (in the sense of physical presence in the territory), and by social integration (in the form of extended residence requirements), rather than by nationality. Non-resident nationals are exempted from receipt of these allowances by application of the residence criteria, and are thus ineligible to receive minimum income allowances from the state of which they formally are members.[372] Conversely, non-nationals may be eligible to receive minimum income allowances from the State by virtue of their residence and social integration.

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[370] The UK Supreme Court has recognised that the residence requirements seek to ensure that '*that the claimant has achieved economic integration or a sufficient degree of social integration in the United Kingdom or elsewhere in the Common Travel Area as a pre-condition of entitlement to the benefit*' (*Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, para 46).

[371] A variety of indicators that might be used to ascertain whether an individual has acquired habitual residence in the UK are outlined in the caseworker guidance issued by the Department of Work and Pensions. They include such questions as: '*What did the claimant do to establish his/her residence in the United Kingdom before arriving here?*'; '*What has the claimant done to bring his/her possessions with him/her to the United Kingdom?*'; '*Does the claimant have a family – spouse or children? If he/she does and they are not in the United Kingdom with him/her, does he/she intend that they will join him/her in the United Kingdom?*'; '*What existing ties does the claimant have with the United Kingdom?*'; and '*Did the claimant bring any money with him/her to assist him/her in settling in the United Kingdom?*' (Department of Work and Pensions, '*Code of Appeals Procedure (Appendix 7a: Response paragraphs – habitual residence)*' (2009) <http://www.dwp.gov.uk/docs/app07a.pdf> accessed 4 Nov 2102).

[372] Though, as noted above, this is subject to exception in Spain, where a special minimum income allowance is available to Spanish emigrants. A significant number of returning UK nationals are ineligible to receive income-related benefits by virtue of application of the habitual residence, test: in the twelve months to the end of November 2008, 2,948 British nationals failed the test (Kennedy (2011), page 3).

Within these parameters, nationality does, however, continue to be a relevant factor in determining eligibility to receive minimum income allowances in both the UK and Spain. A large proportion of resident non-nationals are exempt from receipt of minimum income allowances in the UK by virtue of their immigration status, irrespective of the length of time for which they are resident. Returning emigrants in Spain are afforded privileged rights when accessing minimum income allowances, and Spanish nationals can under certain circumstances access a specific minimum allowance when residing outwith Spanish territory. Social integration (inferred through a period of extended residence) is thus the predominant but not sole determinator of receipt of minimum income allowances, for which purpose an individual's nationality continues to be of significance.

3.3. EU competence to allocate social rights: EU law right of equal access to minimum income allowances

The conditions under which an individual is entitled to receive minimum income allowances within the UK and Spanish welfare systems is no longer determined exclusively within the competence of the respective legislatures responsible for the provision of those benefits. European Union law grants certain persons a right to work and/or reside in the UK and Spain, and grants to them a right of equal treatment with nationals of that State in the receipt of social benefits for the duration of their residence.

3.3.1. Background: co-ordination of social security and scope of right of equal treatment

Since the European Economic Community was first conceived it was recognised that territorially-bounded systems of social security presented a potential obstacle to the free movement of workers within a common market.[373] Two possible solutions to this problem presented themselves: the harmonisation of Member State social

[373] Rob Cornelison notes that the '*principle of territorially' refers to the 'freedom of Member States to use …territorial elements in defining the scope of their social security schemes*', a freedom which, he notes, '*could have harmful consequences for people moving from one state to another*' (Rob Cornelissen, 'Achievements of 50 years of European Social Security Coordination' in Yves Jorens (ed), 50 years of Social Security Coordination: Past – Present – Future (European Commission (DG Employment, Social Affairs and Equal Opportunities) 2009), page55).

security systems – either through the adoption of common minimum standards, or through the approximation of laws – or through the co-ordination of systems by their mutual adjustment in so far as they concern migrant nationals.[374]

Despite attempts by the French Prime Minister during negotiations on the Treaty of Rome to proceed on the basis of harmonization of social security systems,[375] the latter option of co-ordination prevailed and was written into Article 51 of the Treaty Establishing the European Economic Community. This provision is now contained in Article 48 TFEU, and states that '[t]*he European Parliament and Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers*'.[376]

Co-ordination of social security systems between Member States

Co-ordination of social security between Member States is achieved through four main mechanisms: determination of the Member State's legislation to which an individual is subject; prohibition of discrimination on the grounds of nationality vis-à-vis nationals of that state; protection of '*rights in the course of acquisition*', through the '*aggregation of periods of insurance and/or residence spent in each of the respective countries*'; and protection of rights already acquired, through allowing for the exportability of social benefits.[377] These four aspects of co-ordination are

[374] Simon Roberts, 'A Short History of Social Security Coordination' in Yves Jorens (ed), *50 years of Social Security Coordination: Past – Present – Future* (European Commission (DG Employment, Social Affairs and Equal Opportunities) 2009), page 16. Roberts explains that '*[c]o-ordination adjusts social security schemes in relation to each other to protect the entitlements of migrants while leaving national schemes in tact in other respects*'.

[375] Fritz W. Scharpf, *The European Social Model* (2002) 40 Journal of Common Market Studies 645, page 646; Roberts (2009), page 16

[376] The wording of Art 48 TFEU differs in some respects from Art 51 EEC: whereas Art 48TFEU allows for measures to be adopted through the ordinary legislative procedure, Art 51 EEC required unanimous approval by the Council. Art 48 TFEU also contains an additional provision, whereby a member of the Council may refer the proposed measure for consideration by the European Council, where it considers that the draft measure would '*affect important aspects of its social security system, including its scope, cost, or financial structure, or would affect the balance of that system*'.

[377] Roberts (2009), page 18. See also Sean Van Raepenbusch, 'The Role of the European Court of Justice in the Development of Social Security Law of Persons Moving Within the European Union' in Yves Jorens (ed), *50 years of Social Security Coordination: Past – Present – Future* (European Commission (DG Employment, Social Affairs and Equal Opportunities) 2009). Art 51 EEC expressly stated that measures enacted thereunder must make arrangements to secure the aggregation of periods under the laws of several countries for the purpose of determining benefits, and to secure the payment of benefits to persons resident in the territories of Member States.

contained in Regulation 883/2004 on the co-ordination of social security systems, which was enacted under what is now Article 48 TFEU (at that time Article 42 EC).[378] The general rule is that an individual is subject to the legislation of the Member State in which he is pursuing an activity as an employed or self-employed person, or otherwise in the Member State in which he is resident.[379] Equality of treatment with nationals of the competent Member State is set out in Article 4 of the Regulation, which states that '*Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof*'.

Material scope of co-ordination: social benefits

The right of equal treatment for persons falling within the scope of the Regulation is enjoyed in respect of the ten 'branches' of social security to which the Regulation applies. [380] The Regulation applies '*to general and special social security schemes, whether contributory or non-contributory*',[381] but does not apply to 'social and medical assistance'. The CJEU has consistently held that '*a benefit may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and provided that it concerns one of the risks expressly listed'* in the ten branches of social security.[382]

Social welfare provisions that are classified as 'social assistance' (and which are thus outwith the scope of Regulation 883/2004) may nevertheless still fall within

[378] Regulation 883/2004, OJ L 166, 30.4.2004, pages 1–123. The Regulation was enacted in order to 'modernise and simply' its predecessor, Regulation 1408/71, OJ L 149, 5.7.1971, pages 2–50 (see Regulation 883/2004 Preamble, point 3).
[379] Regulation 883/2004, Articles 11-16. Where an individual falls under the legislation of a given Member State, that Member State is referred to as the 'competent' Member State.
[380] Those ten branches are: sickness benefits; maternity and equivalent paternity benefits; invalidity benefits; old-age benefits; survivors' benefits; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits; pre-retirement benefits; and family benefits (Regulation 883/2004, Article 3(1)).
[381] Ibid,, Article 3(2)
[382] Case C-78/91, *Hughes v Chief Adjudication Officer* [1992] ECR I-4839, paragraph 15. Referenced also in: Joined Cases 379/85 to 381/85 and 93/86, *CRAM Rhône-Alpes v Giletti* [1987] ECR 955, paragraph 11; and Case 249/83, *Hoeckx v. Openbaar Centrum voor MaatschappelijkWelzijn* [1985] ECR 973, paragraphs 12 to 14).

the scope of equal treatment under EU law. Migrant workers are entitled to equal treatment in respect of 'social advantages', which the CJEU has broadly defined to be '*all those which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory*'.[383] Moreover, the development of European Citizenship has conferred a general right of equal treatment upon Union citizens in the receipt of social advantages, independently of their economic status.[384] That right to equality is subject to certain limitations that are intended to ensure that migrant EU Citizens and their family members do not become an 'unreasonable burden' on the host Member State: a Member State '*shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b)* [retention of right of residence by jobseekers]'.[385] The CJEU has held that conditions imposed upon access to social advantages can be justified only to the extent that those conditions serve to establish '*that a genuine link exists between the person seeking work and the employment market of that State*' (in the case of jobseekers'

[383] Case 207/78, *Ministère Public v Even* [1979] ECR 02019, para. 22

[384] Case C-85/96, *María Martínez Sala v Freistaat Bayern* [1998 ECR Page I-02691], para 61 – 63; Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193 paras 32-39; Case C-456/02, *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECR I-07573. This general right has since been included in Art 24(1) of Directive 2004/38/EC, which states that '*all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty*'.

[385] Directive 2004/38/EC Art 24(2). Protections of Member States' welfare systems are also built into the right to reside itself – persons seeking residence for the purpose of study and those seeking residence on the grounds of independent means must have comprehensive sickness insurance cover in the host Member State and have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence (Directive 2004/38/EC Arts 7(1)(b) and (C); Art 14(1)).

allowance),[386] or, in the case of maintenance grants for students, that a student has '*demonstrated a certain degree of integration into the society of that State*'.[387]

With the exception of income-support in the UK, all of the minimum income allowances examined above are 'social benefits' to which a right of equality attaches under Regulation 883/2004: those minimum income allowances are all granted on the basis of a legally defined position and '*without any individual and discretionary assessment of personal needs',*[388] and fall within one of the ten branches of social security stipulated in the Regulation.[389] Income-support in the UK had previously been considered as a social benefit falling within the scope of co-ordination regulations,[390] but the nature of that allowance has been adapted such that it no longer falls within one of the stipulated branches of social security.[391] It is now

[386] Case C-138/02, *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-02703: '*The existence of such a link may be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question*' (paras 69-70). The benefit under question was jobseekers' allowance. See also Joined Cases C-22/08 and C-23/08, *Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900* [2009] ECR I-04585, in which the Court held that '*in view of the establishment of citizenship of the Union and the interpretation of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 39(2) EC* [now Article 45(2) TFEU] *a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State*' (para 37). See further text below at n.422.

[387] Case C-209/03, *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-02119: '*The existence of a certain degree of integration may be regarded as established by a finding that the student in question has resided in the host Member State for a certain length of time*' (paras 57-59).

[388] Rentas mínimas de inserción provided by Autonomous Communities may or may not be classified as a social benefit within the scope of the Regulation. This will depend upon whether receipt of the allowance is discretionary (in Catalonia receipt is non-discretionary, but this is not the case in other Autonomous Communities), and whether it is granted by reason of ancillary cover to one of the stipulated branches of social security.

[389] Income-assessed jobseeker's allowance (UK) and non-contributory benefits for unemployed persons (ES) fall within the branch of 'Employment benefits'; Income-related employment and support allowance (UK), and non-contributory social security pensions (disability) (ES) fall within branches of 'invalidity'/'sickness' benefits; State pension credit (UK) and non-contributory social security pensions (retirement) (ES) fall within the branch of 'retirement benefits'.

[390] Income-support had been classed as a 'special non-contributory cash benefit' under Regulation 1408/71

[391] In a briefing produced by the European select committee in 2010, the then Minister for Employment, Chris Grayling, is quoted as explaining that '*Income Support is no longer a social security benefit but a social assistance benefit, as the extent of coverage and purpose of the benefit has changed over time, and social assistance benefits are not covered by the coordination rules. Additionally the list is amended to reflect the introduction of Employment and Support Allowance (income related) which replaces Income Support for those who are sick. The UK asked for both of these changes*' (UK Parliament, '*Documents considered by the European Scrutiny Committee on 2 February 2011'* (2011) <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/428-xv/42807.htm#note18> accessed 18 Nov 2012, para 5.15).

classed as social assistance, and thus falls outwith the scope of equal treatment conferred by Regulation 883/2004.

Exportability of social benefits is secured within Article 7 of the Regulation, which states that 'cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated.' The effect of this requirement is that Member States who otherwise condition receipt of social benefits by reference to residence criteria must disapply those conditions to persons who are insured within their system by virtue of Regulation 883/2004, and who reside elsewhere.

The general rule that social benefits are exportable, and thus cannot be conditioned by reference to a residence requirement, is subject to exception for 'special non-contributory cash benefits'. These benefits are defined by reference to their non-contributory nature ('*the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary*'), and 'special' intent to provide '*supplementary, substitute or ancillary cover'* against the risks covered by the ten branches of social security in order to *'guarantee the persons concerned a minimum subsistence income*'.[392] All of the UK minimum income allowances examined above (with the exception of income-support which, it has been noted, is not a 'social benefit' within the meaning of the Regulation) are classified as special non-contributory cash benefits within Annex X of the Regulation.[393] Of the three minimum income allowances available in Spain, non-

[392] Or to provide solely for the '*specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned*' (Regulation 883/2004, Article 70).

[393] Despite their classification under Regulation 883/2004 as special non-contributory cash benefits, UK regulations still, however, allow for the exportability of these benefits through the disapplication of the habitual residence requirement for the following persons:
a) Member State national workers and self-employed persons
b) Member State nationals who have retained the status of worker or self-employed persons because they are temporarily unable to work due to illness, or are in involuntary unemployment
c) Family members of persons stated in (a) and (b)
d) Persons who have acquired a right of permanent residence in the UK under Art 17 Directive 2004/38/EC (Exemptions for persons no longer working in the host Member State and their family members)

contributory social security pensions and minimum integration allowances provided by the Autonomous Communities are classified as special non-contributory cash benefits.[394]

Unemployment allowances granted by the Spanish State in the form of '*subsidio de desempleo*' and the '*Renta Activa de Inserción Laboral'* are not classed as special non-contributory cash benefits, but are nevertheless subject to special provisions that curtail their exportability in order to provide '*a fairer financial balance between Member States in the case of unemployed persons who reside in a Member State other than the competent State*'.[395] Entitlement to these benefits is '*retained for a period of three months from the date when the unemployed person ceased to be available to the employment services of the Member State which he/she left'*.[396]

Member States (and sub-state polities) are thus required under EU law to extend minimum income allowances on an equal basis to persons falling within the scope of the Regulation who are resident within their territory. Residence is defined within the Regulation as '*the place where a person habitually resides*',[397] which is a matter to be determined by reference to '*the duration and continuity of presence on the territory of the Member States concerned*' and '*the person's situation*', including '*the nature and the specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of any work contract*', '*his family status and family ties*', and '*the exercise of any non-remunerated activity*'.[398] EU law does not, however, confer entitlement to minimum income allowances upon persons who are otherwise insured in the UK and

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e) Bulgarian or Romanian nationals who hold an accession worker authorisation document and who are working in accordance with the conditions set out in that document (see list of legislation at n.363).

[394] Where those allowances are non-discretionary and supplement the receipt of non-contributory pensions, and thus are 'social benefits' within the meaning of the Regulation.

[395] Decision No U4 concerning the reimbursement procedures under Article 65(6) and (7) of Regulation (EC) No 883/2004 and Article 70 of Regulation (EC) No 987/2009, OJ C 57, 25.2.2012, pages 4–5

[396] Regulation 883/2004, Article 64. This provision correlates to the residence requirements under Spanish law discussed above, which allow a person to continue to receive the benefits when travelling within the Union for a period of up to 90 days.

[397] Regulation 883/2004, Article 1(j)

[398] Regulation 987/2009, Article 11, OJ L 284, 30.10.2009, pages 1–42

Spain (by virtue of their economic activity there), but who reside outwith the territory of the respective States.

Personal scope

The provisions of Regulation 883/2004 apply to 'nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors', and to 'the survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons, where their survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States.'[399]
The combined provisions of the Regulation entitle such persons who are 'habitually resident' in the UK or Spain to receive minimum income allowances on equal terms with nationals of those States.[400] By way of exception, family members of EU citizens are not entitled to equal treatment in the receipt of income-assessed jobseekers' allowance in the UK, or unemployment benefits in the form of '*subsidio de desempleo*' or '*Renta Activa de Inserción Laboral'* in Spain: as unemployment benefits, these minimum income allowances belong to a set of primary benefits that are available only to EU citizens.[401]

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[399] The initial regulation in this field - Regulation No 3 of 1958, OJ 17, 6.10.1958, pages 406–416 - referred to '*wage-earners and other assimilated workers*', but this definition was replaced in Regulation 1408/71 to refer to workers and family members. It was amended in 1981 to extend to self-employed persons and their family members (Council Regulation (EEC) No 1390/81, OJ L 143, 29.5.1981, pages 1–32), and again in 1999 to cover students and their family members (Council Regulation (EC) No 307/1999, OJ L 38, 12.2.1999, pages 1–5). Adaptations in Regulation 883/2004 to include all nationals (rather than just economically active) reflect increased scope as a result of Court's use of case-law having linked right of equality directly to status of European Citizenship, and bring in line with provisions of Directive 2004/38/EC that grant right of equality to all European Citizens (Case C-85/96, *María Martínez Sala v Freistaat Bayern* [1998] ECR I-02691; Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193). Van Raepenbusch notes that '*under the impulse of [the Court of Justice], Regulations (EEC) Nos 1408/71 and 574/72 have also become instruments of intended to guarantee the right of European Citizens to move and to reside freely within the European Union, independently of the exercise of any economic activity'* (Van Raepenbusch (2009), page 33).

[400] Family members for this purpose are defined by the national legislation under which the benefit is granted. Where there is no definition of family member provided under that legislation, family member is '*the spouse, minor children, and dependent children who have reached the age of majority shall be considered members of the family*' (Regulation 883/2004 Article 1(i)).

[401] The CJEU had previously held that family members were entitled to equal treatment only in respect of '*derived rights, acquired through their status as a member of the family or a survivor of a*

This right to equality in receipt of minimum income allowances has also been extended to certain other resident third-country nationals by legislation enacted under Article 79 TFEU (which confers a competence to define the rights of third-country nationals legally resident in a Member State). The personal scope of the right to equality under EU law in the receipt of minimum income allowances differs between the UK and Spain, as the UK has opted out of the majority of these provisions concerning third-country nationals. The United Kingdom is required under EU law to extend minimum income allowances to resident third-country national workers, self-employed persons and students and their family members who are in cross-border situations.[402] Spain, by contrast, is required to extend minimum income allowances to all third-country nationals who are in cross border situations and their family members (including those who are not economically active),[403] to third-country nationals who are 'long-term residents' in Spain,[404] and also under certain circumstances to third-country national workers who are not in a cross-border situation.[405] The differing application of EU law in the UK and Spain results from exercise of the UK's 'opt-outs' to legislation enacted under Title V TFEU, and is an example of the horizontal *de iure* asymmetry that manifests between Member States as a result of the variable geometry of EU law.

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worker', with the result that for a long period of time they were not entitled to any of the (personal) minimum income allowances under discussion (Case 40/76, *Slavica Kermaschek v Bundesanstalt für Arbeit* [1976] ECR 01669). A later judgment of the Court curtailed this principle, ruling that family members are entitled to receive personal benefits other than those that were specifically conferred upon a person by reason of their status as a worker (Case C-308/93 *Bestuur van de Sociale Verzekeringsbank v J.M. Cabanis-Issarte* [1996] ECR I-02097, paras 23-34).

[402] Having opted out of Regulation 1231/2010 (see n.403, below), the UK continues to apply Regulation 859/2003 (OJ L 124, 20.5.2003, pages 1–3), extending the (otherwise repealed) provisions of Regulation 1408/71 to third-country nationals in cross-border situations.

[403] Regulation 1231/2010, extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality, OJ L 344, 29.12.2010, pages 1–3

[404] Article 11 of Directive 2003/109/EC

[405] Third-country national workers enjoy a right of equal treatment with nationals of the Member State in which they reside under Article 12 of Directive 2011/98 (supra, n.306). Directive 2011/98 allows for Member States to restrict the right of equal treatment conferred upon third-country national workers under Article 12, but stipulates that Member States '*shall not restrict such rights for third-country workers who are in employment or who have been employed for a minimum period of six months and who are registered as unemployed*'.

3.3.2. Summary: EU allocation of minimum income allowances in the UK and Spain

Minimum income allowances secure a 'safety net' in order to guarantee a minimum standard of living that is acceptable to the society. In both the UK and Spain, those allowances – as a benefit of social membership – are conditioned primarily by reference to extended residence requirements (as an indicator of social integration), and are subject to certain restrictions that privilege nationals and exempt non-nationals.

The parameters of equal membership are subject to influence the of EU competence to allocate and to control access to social goods and services: EU law confers certain rights of residence in the UK and Spain, with the result that a higher volume of people are able to access minimum income allowances by virtue of their residence within the State territory.[406] Moreover, third-country national residents who would otherwise be ineligible to receive such allowances under national principles of allocation in the UK are entitled to receive minimum income allowances by virtue of the right of equal treatment. The effect of EU membership competences on equal membership is thus twofold: it both presents a challenge to the sustainability of minimum income allowances by reason of a larger volume of resident persons, but also changes the classes of persons who fall within the scope of equal membership, and thus the very basis on which equal membership is allocated. The concession in the scheme of social security co-ordination to the non-exportability of minimum income allowances has gone some way to mitigating this tension, in that it allows Member States to continue to frame equality of membership by reference to social integration and domicile, rather than participation in the labour market.

[406] For a summary of EU allocation of minimum income allowances in the UK, see *Annex 5: EU law entitlements to minimum income allowances in the UK*, page 136.

3.4. Reactive exercise of state and sub-state competences

3.4.1. Free-movement, co-ordination of social security and 'welfare tourism'

The free movement of persons throughout the Union and the right of equal treatment to receipt of social security benefits that it entails has prompted concern from some Member States over the possibilities for 'welfare tourism' – a pejorative term that supposes that persons exercise their rights of free movement in such a way as to maximise the social welfare benefits to which they are entitled, and in so doing are in some way 'abusing' the welfare systems of Member States.[407] Fears over 'welfare tourism' have grown in political salience in tandem with the expanding scope of EU social security co-ordination, in which a growing number of persons are entitled to a right to equality by reason both of an extension of rights to non-economically active European Citizens, and also through admission of new Member State nationals to that class of persons through successive enlargements of the Union.

Notwithstanding that empirical studies have found little or no correlation between welfare standards and migratory patterns (suggesting that social welfare does not constitute the 'pull factor' that is assumed by those who fear 'welfare tourism'),[408] the prominence of this issue in the domestic political arena – especially in those states in which there is an identifiable 'Eurosceptic' outlook – has led to the suggestion that welfare co-ordination could prompt a 'race to the bottom'. In the absence of any minimum welfare standards, the argument goes, states are

[407] Initial use of this terminology as part of a political agenda in the UK has been attributed to Conservative Home Secretary Peter Lilley in 1993 (Kennedy (2011), page 5; Philip Larkin, *Migrants, social security, and the 'right to reside': a licence to discriminate?* (2007) 14 Journal of Social Security Law 61, page 64). The same issue has been represented in less loaded terms within the phrase 'welfare migration', in a field of study that seeks empirical evidence of the extent to which migration patterns are driven by welfare standards (see, e.g., Corrado Giulietti and Jackline Wahba, (2012) *Welfare Migration (Centre for Population Change Working Paper Number 18)* ESRC Centre for Population and Change <http://www.cpc.ac.uk/publications/2012_Welfare_Migration_WP18_Giulietti_et_al.pdf> accessed 28 Feb 2013).

[408] A study conducted prior to the 2004 enlargement projected that there was '*little empirical evidence to support the assumption that welfare states with generous benefits and accessible labour markets will become magnets for welfare migration*' (Jon Kvist, *Does EU enlargement start a race to the bottom? Strategic interaction among EU member states in social policy* (2004) 14 Journal of European Social Policy 301, page 1). This projection was supported in a study in 2012, which found that '*it is plausible to conclude that fears about immigrant abuse of welfare systems are somewhat unfounded or at least exaggerated. Overall the empirical evidence on the welfare magnet hypothesis is mixed*' (Corrado Giulietti and Jackline Wahba, (2012), page 23).

incentivised to curtail the provision of social welfare in order to protect its sustainability.

There are three potential ways in which a state may exercise its membership competences so as to mitigate the impact of EU law upon welfare provision: they may reduce the level of welfare provision available, in order to reduce potential 'pull' factors and to accommodate the increased number of persons entitled to access those benefits (with the result that welfare provision becomes broader and thinner); they may attempt to increase the threshold required of social integration through making more strenuous those residence requirements that condition receipt of minimum income allowances; or they may seek to condition initial access to those benefits through revocation of rights of residence and control over access to the labour market.

Of the first, it is difficult to ascertain with any certainty a causality between levels of national welfare expenditure and the extension of social rights under EU law. At a purely abstract level it is clearly somewhat self-defeating for states to reduce welfare standards in order to secure their protection, and we might assume that such action would be one of last resort when faced with economic necessity.[409] What is worthy of note, however, is that there is evidence to suggest that the general process of European integration is in certain Member States responsible for an *increase* in general welfare standards. This trend has been observed in Spain, where the enhancement of social security provisions throughout the 1980s and 1990s has been attributed in part to the 'positive pressure' asserted by open co-ordination of the European social model during a period of significant transformation of the Spanish

[409] Such necessity has been evidenced in Spanish austerity programmes, instigated in response to the global economic crisis and enhanced under the terms of the European bailout of Spanish banks in late 2012. The Toledo Pact of 2010 '*envisages extensive pension reform and is supposed to achieve cuts to the value of four per cent of GDP by 2030'* (Arne Heise and Hanna Lierse, *The Effects of European Austerity Programmes on Social Security Systems* (2011) 2 Modern Economy 498, page 505). There has since been further reduction in welfare expenditure in both Spain and the UK: '*In Spain, public wages, public hiring and minimum wages were frozen and measures introduced in April 2012 imposed a cut of 10 billion euro per year in healthcare and education benefits. In the UK, infrastructure investment was increased but there was a cut in family policies and the introduction of a single tier pension for future retires despite the reduction of corporate tax'* (Piera Sciama, *Austerity: endangering the Welfare States, endangering Europe?* Nouvelle Europe (2013) <http://www.nouvelle-europe.eu/en/austerity-endangering-welfare-states-endangering-europe> accessed 1 March 2013).

welfare system.[410] One study on the impact of accession to the EU on the redesign of the Spanish welfare system in 2007 found that:

> *'significant Europeanization has taken place [in Spain]…qualitative progress in terms of gains in equity and social citizenship is notorious. Such progress was especially intense from the mid 1980s to the early 1990s. In particular, social citizenship was enhanced in the fields of healthcare, non-contributory benefits, social services for dependent people, and labour insertion policies.'*[411]

Whereas there is little evidence to suggest that the growing scope of equality under EU law has been responsible for reduction in levels of minimum income allowances provided in Spain and the UK, both of these States have implemented certain measures to reduce the number of persons entitled to receive those allowances.

3.4.2. Restriction of access: control of residence

One of the ways in which Member States seek to curtail the receipt of minimum income allowances by migrant EU Citizens and their family members is through exerting control over the right of residence to which a right of equality attaches.[412] The extent to which Member States may do this within the bounds of EU law is,

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[410] Ana Guillén, Santiago Álvarez and Pedro Adão E Silva, *Redesigning the Spanish and Portuguese Welfare States: The Impact of Accession into the European Union* (2007) 8 South European Society and Politics 231, page 263. The study further notes that '*For the Spanish and Portuguese populations, becoming Europeans meant, among other things, attaining 'European levels of social protection''*.

[411] Ibid, page 262. These findings have been widely supported in other research (see e.g. Cabrero (2009), page 5, and Luis Moreno, 'Spain in the European Union: the First Twenty-Five Years (1986-2011)' in Joaquín Roy and María Lorca-Susino (eds), *Spain in the European Union: the First Twenty-Five Years (1986-2011)* (University of Miami 2011)); and Ana M. Guillén and Santiago Álvarez, *The EU's impact on the Spanish welfare state: the role of cognitive Europeanization* (2004) 14 Journal of European Social Policy 285; Steen Mangen, *The 'Europeanization' of Spanish Social Policy* (1996) 30 Social Policy and Administration 305).

[412] It was made clear by the CJEU in Case C-456/02, *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECR I-07573 that so long as an EU Citizen remains lawfully resident in a Member State they are entitled to equal access to social advantages, notwithstanding that they are neither economically active nor self-sufficient: '*a citizen of the Union who is not economically active may rely on Article 12 EC where he has been lawfully resident in the host Member State for a certain time or possesses a residence permit.…it remains open to the host Member State to take the view that a national of another Member State who has recourse to social assistance no longer fulfils the conditions of his right of residence. In such a case the host Member State may, within the limits imposed by Community law, take a measure to remove him. However, recourse to the social assistance system by a citizen of the Union may not automatically entail such a measure*' (paras 40-45).

however, very limited: free movement is, after all, the foundation upon which the European Union is built.

One way in which Member States may seek to restrict rights of residence is to tighten administrative procedures so as to ensure that only those entitled to reside under EU law do so. This course of action has recently been adopted in Spain, where legislation was introduced in 2012 to police more closely the exercise of an extended right of residence under EU law. Prior to this amendment, Spanish law had granted a right of residence to persons solely on the basis of their status as European Citizens, and had not required that they meet the conditions attaching to a right of extended residence under Article 7(1) of Directive 2004/38/EC.[413] New legislation has now imported the conditions stipulated under the Directive into national law, requiring that EU citizens applying for residence in Spain produce '*evidence of sufficient financial means to support themselves (and dependants)'*, and stating that they '*may also be asked for proof of private or public healthcare insurance'*.[414] These measures were introduced with the express intent of protecting the provision of welfare services, as indicated in preamble of the amending legislation:

> *'Article 7 of Directive 2004/38/EC [has not been transposed] in literal terms. This circumstance has resulted in, and assuming it is left unchanged will continue to result in, a serious economic harm to Spain, especially in terms of the failure to secure the return of the expenses incurred in the provision of health and social services to European citizens.'*[415]

Whereas Spain is only recently adapting the transposition of Directive 2004/38/EC so as to enforce the conditions stipulated therein, many other Member States have adopted a restrictive interpretation of Directive 2004/38/EC that is more

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[413] COM(2008) 840 final, page 5 (*supra*, n.291)

[414] British Embassy Madrid, '*Entry & residence requirements*' (2013) <http://ukinspain.fco.gov.uk/en/help-for-british-nationals/living-in-spain/residence-req/> accessed 27 Feb 2013

[415] Real Decreto-ley 16/2012, de 20 de abril, de medidas urgentes para garantizar la sostenibilidad del Sistema Nacional de Salud y mejorar la calidad y seguridad de sus prestaciones ['Royal Decree 16/2012 on urgent measures to ensure the sustainability of the national health system and improve the quality and safety of its services'] Boletín Oficial del Estado Núm. 98 Martes 24 de abril de 2012 Sec. I. Pág. 31280 <http://www.boe.es/boe/dias/2012/04/24/pdfs/BOE-A-2012-5403.pdf> accessed 26 Feb 2013. The relevant amending paragraph is '*Disposición final quinta. Modificación del Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo*', (Pág 31309).

problematic in its compliance with EU law. A conformity study on the transposition of Directive 2004/38/EC into national legislation found that '*[t]he 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*'.[416] Specifically, the study noted that '[t]*he transposition of Article 5(2)* [the right of entry] is *often incorrect and/or incomplete, and the legislative shortcomings result in frequent violations of the rights of family members, notably those who are third country nationals*', and that '*twelve Member States have transposed the notion of 'sufficient resources' incorrectly or ambiguously. Problems relate mostly to setting a minimum amount regarded as sufficient and failure to take the decision on the basis of personal circumstances*'.[417] Such issues of non-compliance are however unlikely to be allowed to continue – in 2010 the Commission signified its intention to launch, where necessary, infringement proceedings on the incorrect transposition of Directive 2004/38/EC, and to pursue to as a priority the 63 enforcement actions in the area of free movement and residence of EU Citizens outstanding at that time.[418]

The competence of Member States to revoke rights of residence under EU law is also limited. Notwithstanding that conditions of self-sufficiency attach to the right of extended residence in a Member State for non-economically active persons and students,[419] recourse to the social assistance system of a host Member State may not itself constitute grounds for expulsion by reason of lack of sufficient resources.[420] Moreover, no requirement of sufficient resources attaches to the retention of a right of residence for EU citizen jobseekers and their family members, who '*may not be expelled for as long as the Union citizens can provide evidence that they are*

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[416] COM(2008) 840 final, Page 3

[417] Ibid, pages 5-6. The report did find, however, that most Member States had on the whole correctly transposed Articles 6 and 7 of the Directive (right of residence for up to three months, and right of residence for more than three months).

[418] *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee under Article 25 TFEU on progress towards effective EU Citizenship 2007-2010* COM(2010) 603 final <http://ec.europa.eu/justice/citizen/files/com_2010_602_en.pdf> accessed 10 Oct 2012, page 7 and 8

[419] See text above at n.385

[420] Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] E.C.R I-061930, paras 42-43; Case C-456/02, *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECR I-07573, para 45. Member States are entitled to check as to whether an individual has sufficient resources when there is reasonable doubt that they do not, but such checking may not be systematic (Directive 2004/38/EC Art 14(2) and (3)).

continuing to seek employment and that they have a genuine chance of being engaged'.[421] This right of residence has proved particularly contentious given the ruling by the CJEU in *Collins* and *Vatsouras* that such persons are entitled to claim non-contributory employment benefits for the duration of their residence in the host Member State.[422]

The limited circumstance in which EU law does allow Member States (indirectly) to control rights of residence is through the imposition of transitory controls on access to the labour market of nationals from newly acceded Member States, and both the UK and Spain have made use of these controls.[423] Spain removed initial controls on access to the labour market for both Bulgarian and Romanian workers when they were reviewed in 2009, but later re-instated restrictions on Romanian workers in 2011 with approval from the Commission, due to serious disturbances in the Spanish labour market.[424]

The UK, by contrast, chose to extend the period of transitory controls on both Bulgarian and Romanian nationals, which are now due to expire on 1st January 2014. The foreseeable end of these restrictions has reignited the debates that were voiced at the time of the 2004 enlargement on the anticipated increase in migration and its negative impact on the sustainability of welfare provision. Popular press has, as in 2004, played a prominent role in igniting these fears, with some tabloids employing inflammatory and discriminatory language to fan the flames:

> *'We're on our way to Britain: a year from now up to 29m Bulgarians and Romanians will have the right to settle in Britain and claim benefits. And the gypsies in the slums of Sofia can hardly wait…'*
> (Daily Mail, 23rd December 2012)

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[421] Directive 2004/38/EC Art 14(4)(b)
[422] Case C-138/02, *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-02703; Joined Cases C-22/08 and C-23/08, *Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900* [2009] ECR I-04585 (see n.386, above).
[423] Such measures may not directly prohibit free movement, but largely attain this effect by preventing persons from acquiring the status of worker or jobseeker that confers upon them a right of extended residence.
[424] Migration Advisory Committee, '*Review of the transitional restrictions on access of Bulgarian and Romanian nationals to the UK labour market*' (2011) <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/mac/-restrictions-worker1/transitional-restrictions.pdf?view=Binary> accessed 26 Feb 2013, pages 22-23. See also European Citizen Action Service, '*Who's afraid of the Latest EU Enlargement?*' (2008) <http://www.ecas-citizens.eu/content/view/203/260/> accessed 23 Feb 2012, page 32.

> *'The UK is much better than Romania. All my mates will come in 2014: A Tidal wave of Romanian and Bulgarian immigrants is threatening to swamp Britain — and flood our overstretched jobs market'*
> (The Sun, 11 Nov 2012)

There are limited projections as to the number of expected 'A2' nationals that will exercise their right of free movement to live in the UK; Deputy Prime Minister Nick Clegg has refused to disclose official projections, calling them '*unhelpful'*,[425] whilst Foreign Secretary William Hague has claimed that any attempt to estimate the number would be '*guesswork*'.[426] It has since been widely publicised that the UK Government, in response to these concerns, has considered running a negative advertising campaign to dissuade Bulgarian and Romanian nationals from exercising their Treaty right to move to the UK.[427] In contrast to the high levels of migration popularly anticipated, however, research has shown that '*statistics show a low interest of EU2 nationals to work in the UK',* pointing out that '*the fact that only salaried work is governed by transitional arrangements does not lead to masses of Bulgarians and Romanians coming into the country under self-employed status'*.[428]

[425] The Independent has reported that '*the leader of the liberal democrats said making the figures public would not help "public confidence in the immigration system", and that the figures were not "precise" and were more like "guesstimates"*' (The Independent, 'Nick Clegg refuses to reveal immigration estimates on LBC radio show' (20 Feb 2013) <http://www.independent.co.uk/news/uk/politics/nick-clegg-refuses-to-reveal-immigration-estimates-on-lbc-radio-show-8502919.html> accessed 20 Feb 2013

[426] BBC News, 'William Hague: 'Benefit tourism must end'' (3 March 2013) <http://www.bbc.co.uk/news/uk-politics-21647808> accessed 3 March 2013

[427] One minister is quoted as '*saying that such a negative advert would 'correct the impression that the streets here are paved with gold''* (The Guardian, 'Immigration: Romanian or Bulgarian? You won't like it here' (27 Jan 2013) <http://www.guardian.co.uk/uk/2013/jan/27/uk-immigration-romania-bulgaria-ministers> accessed 27 Jan 2013). This revelation has drawn anger from Romania and has been widely mocked by the liberal press, prompting the Guardian newspaper to compile a series of spoof adverts in this vein (The Guardian, 'Putting people off coming to Britain: your pictures' (29 Jan 2013) <http://www.guardian.co.uk/uk/gallery/2013/jan/29/immigration-britain-ministers-gallery#/?picture=403153052&index=0> accessed 29 Jan 2013)

[428] The relatively low levels of immigration to the UK from A2 nationals lend support to the argument that – the 'problem' of immigration notwithstanding – the UK on balance still benefits from EU law provisions that secure free movement. A report by the European Citizen Action Service thus noted that '[d]*uring the third quarter of 2007 930 Bulgarians and 2705 Romanian received their registration certificates for pursuing self-employed activity…By comparison: in total there are 1.57 million UK citizens living in other EU countries* (European Citizen Action Service (2008), page 37).

3.4.3. Effect of EU co-ordination upon allocation of minimum income allowances

The limited capacity of Member States to control rights of residence has prompted them instead to attempt to curtail the right of equality enjoyed by migrant EU Citizens and their family members. Such action has been witnessed in the UK, where regulations concerning the grant of minimum income guarantees in the UK have been amended with increasingly more restrictive residence criteria in 1994, 2004 and 2012, with the express intention of restricting the eligibility of migrant EU citizens and their family members.

The first relevant amendment to the UK regulations came in 1994 with the introduction of the 'habitual residence' test as a means by which to condition receipt of minimum income allowances.[429] The habitual residence test as it was introduced at this time consisted only of the 'factual' element described on page 107, above, under which a person is required to demonstrate an 'appreciable period of residence' and a 'settled intention to reside' in the UK before being entitled to receive income-related benefits.[430]

Preparatory documents drawn up by the Department of Social Security at the time at which the proposed amendment was laid before the Social Security Advisory Committee reveal the specific intent of the Government to reduce eligibility to income-related benefits in response to a perceived 'abuse' of the system by 'welfare tourists':

> *'The proposal is part of a process of narrowing access to benefit for people the taxpayer should not be asked to support. This is particularly relevant now as the Government takes measures to ensure that the burden of social security expenditure does not outstrip the taxpayer's ability to provide funding. In part, the proposal is also designed to deal with the well documented abuses of*

[429] By way of context, in March /April of 1994 accession negotiations were concluded with Austria, Sweden, Finland and Norway, and Hungary and Poland formally applied to join the EU (EUROPA, *'European Union History'* (2012) <http://europa.eu/about-eu/eu-history/1990-1999/1994/index_en.htm> accessed 20 Nov 2012).

[430] The test was introduced into social security legislation by 'The Income-related Benefits Schemes (Miscellaneous Amendments) (No. 3) Regulations 1994' (S.I. 1994/1807). Prior to this amendment, the category of 'persons from abroad' who were exempt from receipt of social benefits largely mirrored the immigration status criteria now applied through the exemptions of 'persons subject to immigration control'.

> *these income'-related benefits by some non-UK nationals, which have caused public anxiety'*.[431]

The Department implicitly acknowledged that these objectives were intended to counter the effects flowing from European free movement rights: the test was specifically designed with a view to the welfare systems of other EU Member States, and sought '*to place the conditions of entitlement to these benefits on a similar footing to the eligibility conditions for state benefits of other EEA Member States*'.[432]

Consternation arose throughout the drafting of these regulations that the test of habitual residence – intended to restrict access of EU migrants to minimum income allowances – would apply also to returning British migrants. The Social Security advisory Committee on this basis had recommended that the amending regulations, in the form that was laid before them, ought not to be enacted.[433] Specifically, the Committee noted that '*there will almost inevitably be cases where returning UK nationals are refused benefit, with consequent hardship. Although the numbers may be few, we share the view of our respondents that this would be a very undesirable outcome'*.[434] The issue was also debated before the House of Lords, with Earl Russell arguing:

> *'I think that everyone has an entitlement to one country which they can call their own, where they can go back and feel that they are entitled to relief, help and support in an emergency... What will happen to those people who return to what they believe to be their own country? They cannot obtain work instantly and yet they will*

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[431] Social Security Advisory Committee, *Report by the Social Security Advisory Committee under Section 174(1) of the Social Security Administration Act 1992 and the statement by the Secretary of State for Social Security in accordance with Section 174(2) of that Act* (HMSO 1994), appendix 2, para. 3

[432] Ibid, appendix 2 para 4. Recognition to this effect was also given in a debate of the regulation in the House of Lords, in which Earl Russell noted that '*the regulations to which I am calling our attention originate from a speech by the Secretary of State at the Conservative Party Conference in 1993 directed to the phenomenon of what has come to be known as benefit tourism —people from other countries within the European Union coming here and taking advantage of the benefit system, in effect, it is alleged, to have a free holiday. The language of that speech is something that it is not necessary for me to touch upon now; but I will say that it is agreed that the content needs to be taken seriously'*(Hansard, HL Deb 20 October 1994 vol 558 cc384-98).

[433] The Committee had also expressed other concerns, related to the complexity of the habitual residence test, and its impact upon Irish nationals and refugees. The Committee's recommendations in respect of the latter two groups were accepted by the Government and the Regulations were amended before being enacted (Social Security Advisory Committee (1994), page 419).

[434] Ibid,, page 14

receive no benefit. The likeliest outcome is that they will do what they did before the benefit system existed: they will beg.'[435]

Such criticisms illustrate a latent tension surrounding the basis on which the rights of social citizenship are allocated, which has been brought into the spotlight by increasing potential for intra-EU migration: although commonly accepted that extended residence as a measure of social integration is an appropriate basis on which to allocate rights, a popular sense remained that returning British citizens ought to derive rights by virtue of their nationality. Though there was little discussion as to the scope of the desired exception, (would it apply to British citizens who had been born abroad, and who had never resided in the UK? Would it apply to foreign nationals who had been born in the UK and lived there the majority of their life?), such arguments apparently envisage that something akin to 'domicile of birth' ought to constitute an alternative means upon which to allocate social rights.[436] The requisite societal links would in this event be established not only by a person having actually established residence in a territory, but on the basis of a historic sense of community belonging fostered by national identity. The Government rejected such proposals, noting that '[i]*t would be contrary to European law to introduce new legislation in this area which would discriminate, either directly or indirectly, on the basis of nationality*'.[437]

In the form in which it was introduced, the requirement of actual habitual residence still however raised certain issues of compatibility with EU law. Whilst the provisions on 'special non-contributory cash benefits' allow UK law to impose a condition of 'habitual residence', that term has been used in the UK to impose a minimum threshold of social integration rather than simply to apportion responsibility between Member States. The requirement under UK law that a migrant EU Citizen demonstrate an 'appreciable period of residence' in the UK before being entitled to receive minimum income allowances has been considered by the CJEU to be incompatible with EU law, with the Court ruling that '*the length of residence in the Member State in which payment of the benefit at issue is sought cannot be*

[435] Hansard, HL Deb 20 October 1994 vol 558 cc384-98
[436] Domicile of birth is a legal construct that allocates a domicile to a child on the basis of the domicile of her parents (see eg Kostakopoulou (2008), page 120).
[437] Social Security Advisory Committee (1994), page 3

regarded as an intrinsic element of the concept of residence' for the purpose of restricting access to minimum income allowances.[438]

The 'habitual residence' test was further amended in 2004 in response to fears over EU enlargement,[439] stating that no person would be 'habitually resident' in the UK unless he had a 'right to reside' there.[440] A submission by the National Consultative Committee on Racism and Interculturalism (NCCRI) to the Irish Department of Social and Family Affairs notes the context in which these amendments were enacted:

> *'There has been a sustained, emotive, xenophobic and irresponsible campaign in British tabloid newspapers which have resulted in a knee jerk reaction from the British government. The following headlines give some examples of the tenor of this form of journalism, some of which borders on incitement:*
>
> - *'Gypsies Guide to NHS Scrounging': Daily Star, 19 February 2004*
> - *'Aids and the NHS tourists': Daily Mail, 26 June 2003*
> - *'Migrants Invasion Warning': The Sun, 2 February 2004*
> - *'See you in May. Thousands of travellers are on their way': The Sun, 19 January 2004*
> - *'500 immigrants EVERY day to swamp Britain': Daily Express, 30 January 2004*
> - *'We must oppose liberals' scorn of our immigration fears': Daily Express, 6 February 2004'*[441]

The 2004 regulations were undoubtedly aimed at EU nationals and their family members as a direct response to the prevailing public fears that EU enlargement would bring unsustainable pressure to bear on the UK welfare system, but the scope of application of the right to reside test was initially somewhat ambiguous. Further amendments to the income-related benefit regulations in 2006

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[438] Case C-90/97, *Robin Swaddling v Adjudication Officer* [1999] ECR I-01075, para 30. The impact of this decision upon the interpretation of habitual residence is limited to application of that test to persons exercising Treaty rights: the Court of Appeal have since held that *Swaddling* necessitates no general re-interpretation of the habitual residence test outwith these bounds (*Gingi v Secretary of State for Work and Pensions* [2001] EWCA Civ 1685).

[439] The Social Security (Habitual Residence) Amendment Regulations 2004 (SI 2004/1232)

[440] Kennedy (2011), page 4

[441] National Consultative Committee On Racism and Interculturalism (NCCRI), '*Proposed Changes in the Social Welfare Code Arising from EU Enlargement*' Submission to the Department of Social and Family Affairs (2004) <www.nccri.ie/pdf/4thMarchEUaccession.pdf> accessed 4 Nov 2012, page 4

clarified those circumstances in which an individual would not have a 'right of residence' for the purposes of the habitual residence test,[442] and who are thus exempted from receipt of minimum income allowances: persons exercising an unconditional three month right of residence in the UK under EU law, and persons exercising an EU right of extended residence in the UK as a jobseeker or as the family member of a jobseeker.

In 2012 the scope of persons ineligible to receive income-related benefits by virtue of the 'right to reside' test was extended also to include third-country national care-givers of migrant EU citizens, in response to the acquisition by such persons of an EU law right of residence following the decision of the CJEU in *Ruiz Zambrano*.[443] The UK Government had delayed the process of adapting UK immigration regulations in accordance with the decision in *Ruiz Zambrano* – with twenty months elapsing between delivery of the Court's judgment and the necessary changes to UK immigration regulations entering into force[444] – and had ensured that the relevant amendments to the minimum income allowances were in place prior to that right being granted. Amendments to the Immigration (European Economic Area) Regulations 2006 and to the respective regulations on minimum income allowances entered into force concurrently on 8 November 2012, with the result that persons who had previously been exempt from receipt of benefits as third-country nationals subject to immigration control never acquired access to them by virtue of their new rights of residence under Union law.

Application of the 'right to reside' element of the habitual residence test as a means by which to condition access to minimum income allowances under EU law has been the source of much controversy, and its compatibility with the right of non-discrimination under Article 18 TFEU is highly questionable. This issue came before the UK Supreme Court in 2011 in *Patmalniece*,[445] in which the Court considered by majority verdict that the right to reside test indirectly discriminates against non-

[442] The Social Security (Persons from Abroad) Amendment Regulations 2006
[443] Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi* (ONEM) [2011] ECR I-01177. See also Lansbergen and Miller (2011).
[444] The judgment of the Court was delivered on 8 March 2011, and amendments to the Immigration (European Economic Area) Regulations 2006 did not enter into force until 8 Nov 2012.
[445] *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11

British nationals: the test puts nationals of other Member States '*at a particular disadvantage*', but it is one that '*some UK nationals may fail to meet…because, although they have a right of residence, they are not habitually resident here'*.[446] Invoking *Bidar* and *Collins,*[447] the Supreme Court considered that the indirect discrimination was justifiable on the grounds that it prevents the '*exploitation of welfare benefits by people who come to this country simply to live on benefits without working here*',[448] and that that justification is (as is required under the *Collins* formulation), independent of the nationality of the persons concerned: *'[a] person's nationality does, of course, have a bearing on whether that test can be satisfied. But the justification itself is blind to the person's nationality. The requirement that there must be a right to reside here applies to everyone, irrespective of their nationality*'.[449]

Delivering a dissenting opinion, Lord Walker of Gestingthorpe contested the finding of the majority that the 'right to reside' test pursued a legitimate objective that was independent of an intention to differentiate on the grounds of nationality. Accepting (with some reluctance) that the test was one of indirect rather than direct discrimination, Lord Walker was of the opinion that '*the correlation between British nationality and the right to reside in Great Britain is so strong that the issue of justification must in my view be scrutinised with some rigour'*.[450] He disagreed with the majority opinion that the objective of '*a sufficient degree of social integration*' operated independently of nationality, finding instead that such measures '*are probably aimed at discriminating against economically inactive foreign nationals on the grounds of nationality. Whether or not that was the intention of those who framed them, they have that effect*'.[451] Lord Walker thus argued that the measure could not

[446] Ibid. para 29
[447] See above, text at n.386 – 387
[448] Patmalniece v Secretary of State for Work and Pensions [2011] UKSC 11 para 46
[449] Ibid. para 52. Lord Rodger and Lord Brown agreed in full with the judgment delivered by Lord Hope, and Baroness Hale delivered a separate opinion that reached the same conclusions as Lord Hope. The judgment delivered by Baroness Hale differed primarily in its emphasis upon CJEU jurisprudence on the right to residence in a host Member State, which she interpreted as leaving it '*open to member states to make entitlement to such benefits dependent on the right to reside in the host country*' (para 106).
[450] Ibid. para 73
[451] Ibid. para 79

be justified by reference to a legitimate and objective aim that was independent of an individual's nationality.[452]

The issue of compatibility of the right to reside test with EU law – in particular whether such a requirement can be justified as a proportionate means by which to achieve a legitimate aim – is far from settled. In July 2009, the AIRE Centre and ILPA submitted a complaint to the European Commission about the potential infringement of EU law,[453] and at the time at which judgment in *Patmalniece* was delivered, the European Commission had issued a 'formal notice' inviting the UK to submit observations on the matter.[454] Subsequent to delivery of the *Patmalniece* judgment the European Commission has issued a 'reasoned opinion' to the UK Government as the first stage in enforcement proceedings which may effectively oblige the UK to disapply the right to reside test to EU citizens.[455] The UK Government responded to the reasoned opinion in November 2011 as required,[456] and – whilst the content of that response has not been made public[457] – it may be inferred from statements of successive Ministers of State for the Department for Work and Pensions that it indicated the intention of the UK Government to continue to make receipt of minimum income allowances conditional upon

[452] Lord Walker's position, rejected by the majority of the Court, had previously been adopted by the House of Lords in a unanimous decision in *Orphanos v Queen Mary College* HL 1 April 1985 [1985] 1 A.C. 761. In that case, which concerned a similar test of ordinary residence that circumscribes entitlement to financial support for higher education, the House of Lords concluded that the imposition of a residence requirement did constitute indirect discrimination on the grounds of nationality, and moreover that '*ordinary residence is…so closely related to their nationality that the discrimination cannot be justified irrespective of nationality*' (page 773, para B). *Orphanos* was not referenced in *Patmalniece*.

[453] The AIRE Centre and Immigration Law Practitioners' Association (ILPA), '*Note on European Commission infringement proceedings against the UK concerning the right-to-reside test*' (2011) <http://www.airecentre.org/data/files/Right_to_Reside_Infringement_Proceedings.pdf> accessed 27 Sep 2012

[454] Pursuant to Art 258 TFEU

[455] The Commission was of the opinion that '*as this test indirectly discriminates against non-UK nationals coming from other EU Member States it contravenes EU law. This is why the European Commission has requested the United Kingdom to stop its application. The request takes the form of a 'reasoned opinion' under EU infringement procedure*' (European Commission, (2011) *PRESS RELEASE: Social security coordination: Commission requests United Kingdom to end discrimination of EU nationals residing in the UK regarding their rights to specific social benefits (Reference: IP/11/1118)* <http://europa.eu/rapid/press-release_IP-11-1118_en.htm> accessed 27 Sep 2012).

[456] Hansard, 30 April 2012: Column 1327W

[457] In October 2012 I submitted a Freedom of Information Request to the Department of Work and Pensions to obtain the correspondence between the UK Government and the Commission on this issue, but on 6 November 2012 received a reply stating that this information was exempt from disclosure under s44 of the Act (Ref Fol 3737).

satisfaction of the test. In June 2012 the then Secretary of State Chris Grayling stated in the House of Commons that:

> *'I continue to have concerns about the efforts of the European Commission to increase its influence over the social security policies adopted by national Governments…I am determined that social security should remain a national matter, and will continue to resist efforts by the EU to interfere… I am absolutely clear that we have to get the Commission to change…We have to win battles in the Commission, the Parliament and the European Court.'*

Addressing the issue in September 2012, the then Secretary of State Iain Duncan Smith offered a similarly combative statement:

> *The European Commission wants to end the habitual residence test. As a result, we would have to pay benefits to EU migrants as and when they arrive and they would not have to prove that they have been here, are working and have a residence. I believe that that is fundamentally wrong, as do the Government. The habitual residence test is vital to protect our benefits system and to stop such benefit tourism. I also do not believe that the EU has any rights in that area… I want to put it on the record that the costs of the proposal could be enormous.*

Such statements by senior Cabinet ministers serve to highlight the depth of tension that exists between nationally-bounded welfare systems and EU rights of equal entitlement to minimum income allowances in the UK. They shine a bright spotlight upon the contested parameters of equal membership demanded by social justice, and illustrate clearly the way in which those parameters are being adapted in response to EU membership competences. The UK response has signalled a shift in the very justificatory basis of allocation of social rights, with eligibility criteria that (indirectly) distinguish on the basis of nationality displacing social integration as the basis of entitlement to social rights. In the UK context there has thus been a polarisation between the extension of social rights to EU Citizens under EU law, and a responsive shift back towards nationally-bounded models of social justice in the exercise of state competences.

3.5. Conclusion: the effect of EU membership competences upon equality of membership

The foregoing discussion has highlighted the tension that exists between the provision of minimum income allowances in a state-centric welfare system, and the extension of those rights to migrant EU Citizens and their family members under Union law. It has focussed exclusively on the vertical asymmetries between the EU and Member States that manifest in the respective spheres of competence of those polities and in the membership decisions taken within them. The case study has found that EU law rights of residence and of equal treatment grant a greater number of persons access to minimum income allowances than are eligible under the national system, creating problems of sustainability for the Member States. Moreover, EU law rights require that Member States grant minimum income allowances to a wider *range* of resident persons than who would otherwise be entitled to receive them under national provisions, where those systems otherwise impose restrictions on the rights received by resident non-nationals.

The depth of this tension has increased in line with the growing scope of persons entitled to equal treatment in the receipt of minimum income allowances under EU law, which has increased both by reason of the extension of rights to non-economically active persons on the basis of Europeans Citizenship, and the increasing number of persons vested with this status following successive enlargements of the Union. Fears over the sustainability of welfare systems in light of the increased number of recipients have prompted both the UK and Spain to take countervailing measures to restrict the impact of EU rights to equal treatment. Such action has been evidenced in attempts to control residence in State territory, and in the application of progressively restrictive residence criteria as a means by which to increase the threshold of social integration giving rise to entitlement.
Parameters of equal membership are thus subject to both direct and indirect contestation by EU competence: EU law widens the frame of equal membership provided by the State, and Member States have sought in response to condition the receipt of minimum income allowances with eligibility criteria that privilege nationals over non-nationals.

4. Effect of sub-state membership competences on equal membership, examined through the lens of differential fee imposition for higher education and prescriptions

The previous chapter has examined how the parameters of equal membership are contested by European Union competence to control access to social citizenship rights through conferral of rights of residence, and to allocate social rights by way of a requirement of equal treatment.

The paradigmatic model of membership in which social rights are tied to the nation-state[458] is subject also to contestation by the devolution of legislative competence to sub-state polities. Exercise of devolved legislative competence to determine and administer differential social rights constructs distinct (and privileged) membership groupings *within* the boundaries of national membership, and thus challenges the egalitarianism presumed of formal citizenship. Differentiated social rights have engendered public debate about 'discriminatory' and inequitable policies, a perception that stems largely from the fact that whilst sub-state legislatures have legislative competence to provide differentiated goods, that differentiated policy is financed either in whole or in part from shared national resources.[459] Such perception of social injustice is exacerbated in the UK context by measures taken by sub-state polities to curtail the rights enjoyed by persons moving within the state to access services in a polity other than that one which they are 'ordinarily resident', and through the extension of benefits to European Citizens from which nationals are excluded.

Whereas the previous chapter focussed exclusively upon the vertical asymmetries that manifest between the EU and Member States, the following chapter considers the additional layer of asymmetry that exists as a result of the devolution of competence to sub-state polities. It examines the construction of sub-state membership groupings in the UK and Spain through examination of differential fee imposition by sub-state polities. Unlike diffuse infrastructural policy variations, differential fees are clearly comparable across polities in terms of individual advantage, and affect all persons accessing that service on a direct and immediate

[458] See text above between nn.111 and 118.
[459] See above at n.198

basis. It is for this reason that they have been harnessed in public consciousness in terms of equality and privilege. Exercise of devolved competences resulting in differential fee imposition has attracted substantial attention in the UK context, where all sub-state legislatures have adopted measures that abolish prescription charges and provide more favourable regulation of higher education cost than is in place in England under UK legislation. These same issues have recently proved contentious in Spain, where prescription fees have been subject to variation in Madrid and Catalonia, and the cost of higher education differs between Autonomous Communities.

The case-study to follow commences with an overview of differential fee imposition in relation to higher education and prescription charges, charting the *de facto* horizontal asymmetries that manifest between sub-state polities as a consequence of the exercise of devolved competences. The primary focus is upon differential fee imposition across constituent polities of the UK, and the study also considers how these issues manifest within Spain by way of a contextual comparison. Having established an overview of the differentiated rights, the study then proceeds to consider in more detail the manner in which these sub-state membership groupings in the UK have been shaped by fears of intra-state 'welfare migration', before examining how they interact with the right of equal treatment enjoyed by migrant EU Citizens. Finally, the study considers the characterisation of differentiated social rights as 'discriminatory', and the implications that this holds for the stability of the constitutional asymmetry.

4.1. Differential policies and privileged membership groups

4.1.1. Tuition fees

Individual liability in respect of higher education tuition fees in the UK is determined by two forms of regulatory control that have been devolved to sub-state legislatures: regulatory fee controls limit the amount that Higher Education Institutions (HEIs) may charge a student in respect of tuition, and publicly-funded financial support reduces students' liability in respect of fees incurred.[460] Whereas regulatory fee caps

[460] See *Annex 6: Legislation determinative of higher education fees in the UK* (page 138)

are determined within the competence of the polity in which the HEI is located, financial support is provided to a student by the polity in which they are domiciled and is exportable throughout the UK.[461] Each sub-state polity adopts different rules as to the level of fee regulation and financial support, and the scope of persons entitled to benefit from them.[462] Individual liability in respect of tuition fees is thus determined by a complex interaction of differentiated regulatory measures enacted in both the 'receiving' and the 'sending' sub-state polity.

Fees charged by HEIs in Scotland to Scottish-domiciled students are subject to regulatory stipulation, at a level set at £1,820 for the academic year 2012/13.[463] Fees charged by HEIs in Scotland to persons domiciled elsewhere in the UK are unregulated, but in practice HEIs have agreed to cap fees that they charge to 'rest of the UK' students at £9,000.[464] Since 2001 the Scottish Government has provided non-means-tested grants to cover the full cost of fees for Scottish-domiciled persons studying in Scotland, with the result that such persons no longer pay towards the cost of their tuition.[465] Tuition grants provided by the Scottish Government are, however,

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[461] The term 'domicile' is used by government bodies to refer to the sub-state unit in which a student was ordinarily resident prior to commencing study (see further below on intra-state movement and boundaries of equal membership).

[462] For a consolidated summary of the eligibility criteria contained in UK regulations (relating to England), see *Annex 7: Eligibility criteria for regulatory fee cap and student support in England* (page 140).

[463] Student Fees (Specification) (Scotland) Order 2011 (SSI 2011/455) s.3, enacted under section 9 of the Further and Higher Education (Scotland) Act 2005.

[464] Education (Fees) (Scotland) Regulations 2011 (SSI 2011/389), enacted under section 1 of The Education (Fees and Awards) Act 1983. The Scottish Government has signalled its intention to formalise the £9,000 fee cap for 'rest of the UK' students through secondary legislation (Scottish Government, '*Consultation on the Draft Student Fees (Specification) (Scotland) Order 2011*' <http://www.scotland.gov.uk/Publications/2011/06/27091056/0> accessed 20 Aug 2012, page 12). Given that the average annual fee charged by HEIs in Scotland to 'rest of the UK' students has been significantly lower than this limit (£6,841 for the year 2012/2013), Universities Scotland have questioned the need to do so (Universities Scotland, '*Average RUK fee in Scotland is significantly lower than average fees charged by universities in England*' <http://www.universities-scotland.ac.uk/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=95&cntnt01returnid=17> accessed 13 Oct 2012); BBC News, 'Scotland's university leaders say legal cap on fees 'not needed'' (19 Feb 2013) <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-21502716> accessed 19 Feb 2013).

[465] On 27th January 2000 the Scottish Parliament endorsed the '*Framework Document: Working Together for Wider Access to Further and Higher Education and a Fair Deal for Students*', which documented of a package of proposals for '*widening access, promoting lifelong learning, alleviating hardship and providing support during study*', including the policy of providing non-means-tested grants to all 'Scottish-domiciled' students studying (HEIs) in Scotland (Scottish Parliament Enterprise and Lifelong Learning Committee, (2001) *Stage 1 Report on the Education (Graduate Endowment and Student Support) (Scotland) (No.2) Bill* <http://archive.scottish.parliament.uk/business/committees/historic/x-enterprise/reports-01/elr01-01-02.htm> accessed 15 Oct 2012). Thereafter, the Education (Graduate Endowment and Student

not exportable outwith Scotland, and Scottish–domiciled students who study elsewhere in the UK are entitled to a 'fees loan' of £9,000 per year to cover the cost of fees charged by those institutions.[466]

Regulatory control over higher education has followed a different trajectory elsewhere in the UK. Legislation enacted by the UK Parliament has progressively increased the regulatory cap on fees charged by HEIs in England. In 2004 the cap was increased from a flat-rate cap of £1,125,[467] to a variable-rate fee cap of between £1,200 and £3,000.[468] Those limits were increased exponentially in legislation enacted in 2010, and from September 2012 a person studying at a HEI in England is liable for between £6,000 and £9,000 per year in tuition fees.[469] Persons domiciled in England are entitled to a 'fee loan' from the UK Government in respect of the full

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Support) (Scotland) Act 2001 inserted section 73(f) into the Education (Scotland) Act 1980, allowing for the Secretary of State to make regulations determinative of the grant of allowances in respect of persons undertaking courses of education. The current regulations enacted under this basis are the Students' Allowances (Scotland) Regulations 2007 (SSI 2007/153), as subsequently amended. Introduction of tuition fee grants was initially accompanied by the levying of an 'endowment fee' upon grant recipients, who were required to repay £3,000 to the Scottish Government after graduation upon reaching threshold earnings of £25,000 (Education (Graduate Endowment and Student Support) (Scotland) Act 2001; The Graduate Endowment (Scotland) Regulations 2001). The Graduate Endowment Fee was abolished in 2008, since which time Scottish-domiciled students studying in Scotland have incurred no personal liability in respect of higher education tuition (Graduate Endowment Abolition (Scotland) Act 2008).

[466] Scottish domiciled students studying elsewhere in the UK may be eligible to receive a grant of up to £2,150 per year to reduce the level of their loan. Unlike the tuition fee grant provided to Scottish domiciled students studying in Scotland, this is a means-tested grant and persons with a family income of over £34,195 per year will receive nothing (Student Awards Agency for Scotland, '*What financial support can I get?*' (2013) <http://www.saas.gov.uk/student_support/scottish_outside/2006-2007/financial_support.htm> accessed 2 Feb 2013).

[467] Fee regulation was first introduced across the UK under s.26 of the Higher Education Act 1998. Between the years 1998 and 2002 the fee cap was set at £1,025 (S.I. 1999/496 s.11), rising to £1,100 in 2003 (S.I. 2002/195 s.11) and to £1,125 in 2004 (S.I. 2002/3200 s.11).

[468] Section 23 of the Higher education Act 2004 required the governing bodies of HEIs in receipt of a grant from the Funding Council to ensure that the fee that they charge to students for tuition fall within prescribed limits. Where an 'English approved plan' is in force (a plan which details how the HEI will comply with certain requirements related to access to higher education), the governing body must ensure that fees do not exceed the 'higher amount', and where an 'English approved plan' is not in force, the governing body must ensure that fees do not exceed the 'basic amount'. When the variable fee cap was first introduced in 2004 the basic and higher amounts were set at £1,200 and £3,000 respectively (S.I. 2004/1932, s.4), with these limits rising to £1,345 and £3,375 respectively for academic year 2011/2012 (S.I. 2011/432 reg.2(3)),

[469] This increase was achieved under the provisions of the 2004 Act. Secondary legislation simply increased the 'basic amount' to £6,000 (S.I. 2010/3021), and the 'higher amount' to £9,000 (S.I. 2010/3020).

cost of their tuition, which is paid directly to the HEI in settlement of tuition fees and is repaid by graduates upon reaching a threshold income after graduation.[470]

Persons domiciled in Wales and Northern Ireland and who are studying at HEIs in those respective polities are liable to pay £3575 per year towards the cost of their tuition. This is achieved through slightly different mechanisms: the Welsh Assembly has imposed a regulatory fee cap on HEIs in Wales of £9,000, and provides Welsh-domiciled students with a loan of £3575 and a grant for the remainder of the fee.[471] The Northern Ireland Assembly has set a fee cap of £3575 for students domiciled in Northern Ireland, and provides to them a loan for the full amount.[472] As in Scotland, fees for 'rest of the UK' students in Northern Ireland are unregulated but in practice are capped at £9,000. The grant provided to Welsh-domiciled students by the Welsh Government travels with the student when studying in other areas of the UK. Students domiciled in Northern-Ireland and studying elsewhere in the UK receive a fee-loan of £9,000 from the Northern Ireland Executive.[473]

The sum effect of differential policy enacted within these devolved competences is that the individual liability of a UK national in respect of tuition fees varies drastically depending both upon where in the UK that person is domiciled and where in the UK they study. Persons domiciled in England pay up to £9,000 per year in respect of their tuition irrespective of where in the UK they study, whereas persons domiciled in Wales pay £3,575 per year irrespective of where in the UK they study.

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[470] Section 22 of the Teaching and Higher Education Act 1998 provides the legal basis for the issuing of grants or loans in connection with undertaking a higher education course. The current regulations enacted under this provision are the Education (Student Support) Regulations 2011 (S.I. 2011/1986).

[471] UCAS, '*The cost of studying in the UK for 2013 entry*' (2012) <http://www.ucas.ac.uk/students/studentfinance/> accessed 20 Dec 2012; Student Finance Wales, '*What you can get*' (2012) <http://www.studentfinancewales.co.uk/portal/page?_pageid=616,7249166&_dad=portal&_schema=PORTAL>; Student Finance Wales, '*A guide to financial support for higher education students in 2012/2013*' (2012) <http://www.studentfinancewales.co.uk/pls/portal/docs/PAGE/WPIPG001/WPIPS002/WPIPS069/WPIPS108/WPIPS109/SFW_GUIDE_NEWSTUDENTS_ENGLISH_1213.PDF> accessed 20 Dec 2012

[472] Whilst these differing mechanisms mean that students who are domiciled in either Wales and Northern Ireland and who are studying at institutions in those respective polities are liable for the same amount of fees, they impact differently upon persons domiciled elsewhere in the UK who study within those polities.

[473] UCAS (2012); Student Finance Northern Ireland, '*Financial support for new students in 2013/14*' (2012) <http://www.studentfinanceni.co.uk/portal/page?_pageid=54,1266217&_dad=portal&_schema=PORTAL#section3> accessed 20 Dec 2012

Students domiciled in Northern Ireland pay a fee of £3,575 per year when studying in Northern Ireland, and up to £9,000 per year when studying elsewhere in the UK. Students domiciled in Scotland do not pay any fees to study in Scotland, but pay fees of up to £9,000 when studying in other polities in the UK.

Regional variance in the cost of higher education is also evidenced in Spain, where Autonomous Communities have the competence to regulate fees within central limits set by the General Assembly of University Policy. These limits were raised from 2012, and Autonomous Communities now fix tuition fees rates at between 15% and 25% of the total cost of proving the service.[474] The rise in regulatory limits has witnessed an increase in the regional disparity in fee charges: whereas fee rates in Galicia and the Asturias remained constant between academic years 2011/12 and 2012/13, the average cost of a bachelors' degree from a University in Catalonia increased by 66.7% in this period.[475] Prices for first enrolment on a bachelor's degree vary both according to the subject studied and the Autonomous Community in which it is undertaken, with fees for the academic year 2012/2013 ranging from €591 per year for the least expensive subjects in in Galicia, up to €2371.8 per year for the most expensive subjects in Catalonia.[476]

[474] Ley Orgánica 6/2001, Título II, Artículo 6 (Boletín Oficial del Estado Núm. 96, Sábado 21 de abril de 2012,Sec. I. Pág. 30977). See El Mundo, 'Los universitarios pagarán hasta 540 € más por tasas y se penaliza al repetidor' (19 April 2012) <http://www.elmundo.es/elmundo/2012/04/19/espana/1334852926.html> accessed 5 March 2013; and Reuters, 'Spain passes health, education reforms to cut costs' (20 April 2012) <http://www.reuters.com/assets/print?aid=USL6E8FKFBI20120420> accessed 5 March 2013.

[475] Asturias and Galicia saw no increase in fees from previous year (Gobierno de España (Ministerio de Educación Cultura y Deporte), '*Estadísticas precios públicos universitarios (Curso 2012-2013)*' (2012) <http://www.mecd.gob.es/educacion/universidades/estadisticas-informes/estadisticas/precios-publicos.html> accessed 5 March 2013; Gobierno de España (Ministerio de Educación Cultura y Deporte), '*Datos y Cifras del Sistema Universitario Español. Curso 2012/2013'* (2012) <http://www.mecd.gob.es/dctm/sue/datos-y-cifras-sistema-universitario-espanol.pdf?documentId=0901e72b814eed28> accessed 5 March 2013, page 39).

[476] The lowest per-credit fee for first-time enrolment in a Bachelor's degree in Galicia is €9.85/credit, and the highest is per-credit fee in Catalonia is €39.53 /credit (Gobierno de España (Ministerio de Educación Cultura y Deporte) (2012); Gobierno de España (Ministerio de Educación Cultura y Deporte) (2012), page 39). A bachelor's degree requires 240 credits, taken at an average of 60 credits per year (Gobierno de España (Ministerio de Educación Cultura y Deporte), '*The Spanish University System*' (2012) <http://universidad.es/en/spain/spains-universities/spanish-university-system> accessed 20 Dec 2012). Fees are much higher for students on a second enrolment, costing between 30% and 40% of total cost on second enrolment, and between 65% – 100% of cost on third enrolment (Real Decreto-ley 14/2012; El Mundo (2012)).

Table 1: Liability of UK domiciled students for contribution towards tuition for academic year 2012/2013

		Location of institution (regulation of fee rate)			
		England	Scotland	Wales	NI
Domicile of student (Regulation of student support)	England	£9,000/year (fee cap of £9,000 set by UK Parliament + loan of £9,000 from UK Government)	£9,000/year (fee rate of £9,000 agreed by Scottish HEIs + loan of £9,000 from UK Government)	£9,000/year (fee cap of £9,000 set by Welsh Assembly + loan of £9,000 from UK Government)	£9,000/year (fee rate of £9,000 agreed by HEIs in Northern Ireland + loan of £9,000 from UK Government)
	Scotland	£9,000/year (fee cap of £9,000 set by UK Parliament + loan of £9,000 from Scottish Government)	Nil (fee cap of £1,820 set by Scottish Parliament + grant of £1,820 from Scottish Government)	£9,000/year (fee cap of £9,000 set by Welsh Assembly + loan of £9,000 from Scottish Government)	£9,000/year (fee rate of £9,000 agreed by HEIs in Northern Ireland + loan of £9,000 from Scottish Government)
	Wales	£3,575/year (fee cap of £9,000 set by UK Parliament + loan of £3,575 and grant of £5,425 from Welsh Government)	£3,575/year (fee rate of £9,000 agreed by Scottish HEIs + loan of £3,575 and grant of £5,425 from Welsh Government)	£3,575/year (fee cap of £9,000 set by Welsh Assembly + loan of £3,575 and grant of £5,425 from Welsh Government)	£3,575/year (fee rate of £9,000 agreed by HEIs in Northern Ireland + loan of £3,575 and grant of £5,425 from Welsh Government)
	NI	£9,000/year (fee cap of £9,000 set by UK Parliament + loan of £9,000 from Northern Ireland Government)	£9,000/year (fee rate of £9,000 agreed by Scottish HEIs + loan of £9,000 from Northern Ireland Government)	£9,000/year (fee cap of £9,000 set by Welsh Assembly + loan of £9,000 from Northern Ireland Government)	£3,575/year (fee cap of £3,575 set by Northern Ireland Assembly + loan of £3,575 from Northern Ireland Government)

Whilst the 2012 rise in tuition fees caused some public consternation, the regional variation of fees has not attracted the same depth of criticism as in the UK.[477] The Spanish system of fee regulation displays more centralised conformity than in the UK, as variation operates within limits set by the State. Financial support in respect of these fees is centralised in order to guarantee the equality of Spanish nationals,[478] and persons moving between Autonomous Communities for the purposes of study are entitled to benefit from the same fee rate.

4.1.2. Prescription charges

A second area in which divergence in social policy has resulted in regional fee variation is in the charges levied on prescription medication, which are determined within the regulatory competence of the polity in which that medication is dispensed.[479] Scotland, Wales and Northern Ireland have now abolished prescription

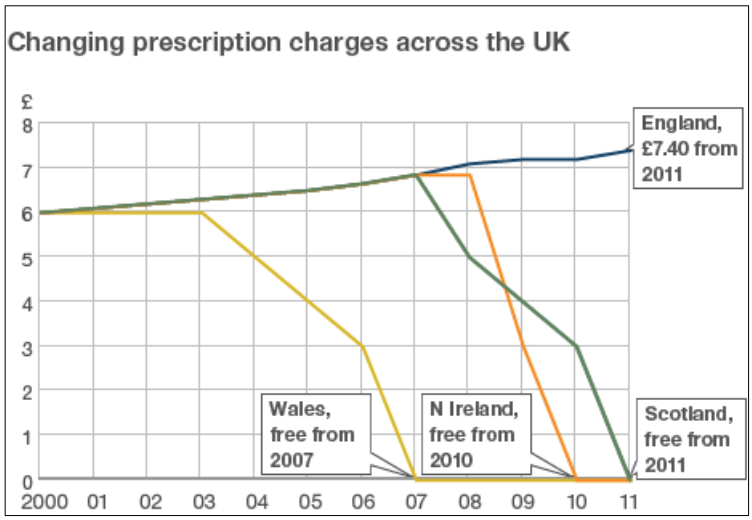
[477] Catalan News Agency, 'University fees to be raised 7.6% next September in Catalonia' (21 June 2011) <http://www.catalannewsagency.com/news/society-science/university-fees-be-raised-76-next-september-catalonia> accessed 4 March 2013

[478] A Eurydice report notes that '*in order to guarantee that all students, regardless of their place of residence, have the same opportunities to gain access to higher education, the State has established a general grants and assistance system charged to its general budget*' (European Commission Education Audiovisual and Culture Executive Agency, (2012) *Structures of education and training systems in Europe. Spain. 2009/10* <eacea.ec.europa.eu/education/eurydice/documents/eurybase/structures/041_ES_EN> accessed 20 Feb 2012, page 51). Financial assistance takes the form of short-term 'mortgage style' loans provided to Spanish and EU national students, which that must be repaid within three years of graduation (UK Government Department for Business Innovation and Skills, (2010) *Review of Student Support Arrangements in Other Countries* Research Paper Number 10 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31991/10-670-review-student-support-in-other-countries.pdf> accessed 3 March 2013, page 157). Variance in financial support does however manifest in the supplementary loans and bursaries are offered by Autonomous Communities. Under the scheme implemented in Catalonia, loans of up to €9,000 are available to persons enrolled on courses in Catalonia, and to persons registered as residents in Catalonia who are studying in non-Catalan universities (Generalitat de Catalunya Agència de Gestió d'Ajuts Universitaris i de Recerca, '*Pre-doctorate scholarships and grants: Pre-doctorate loans*' (2011) <http://www10.gencat.cat/agaur_web/AppJava/english/a_beca.jsp?categoria=predoctorals&id_beca=16648> accessed 15 Feb 2013; Generalitat de Catalunya Agència de Gestió d'Ajuts Universitaris i de Recerca, '*Bases del Programa de Préstamos Preferentes Subvencionados para Estudiantes Universitarios. Curso 2010-2011'* (2011) <http://www10.gencat.cat/agaur_web/generados/angles/home/recurs/doc/bases_prefe__2010_11_castella.pdf> accessed 21 Feb 2013).

[479] The statutory basis for charging for prescription fees is found in National Health Service Act 2006 s.172 (applying to England only); National Health Service (Scotland) Act 1978 s.69; National Health Service (Wales) Act 2006 s.121 (Wales); and Health and Personal Social Services (Northern Ireland) Order 1972/1265, Sch. 15. The following regulations enacted under these respective Acts are currently determinative of fees charged in respect of prescriptions: National Health Service (Charges for Drugs

charges for persons resident within their territory, whereas the charges levied for medication dispensed at pharmacies in England have risen steadily.

Trajectory of prescription fees up until 2011 (Source: BBC News)[480]



Several polities in the UK charge differential fees depending upon where a prescription was written, with the result that prescription charges in the UK vary dependent both upon the polity in which the service is delivered, and the polity in which the recipient resides.[481] Scottish, Welsh or Northern Irish prescriptions that are

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and Appliances) Regulations 2000 (SI 2000/620) (applying to England only); The National Health Service (Free Prescriptions and Charges for Drugs and Appliances) (Scotland) Regulations 2011 (SSI 2011/55) s.3; National Health Service (Free Prescriptions and Charges for Drugs and Appliances) (Wales) Regulations 2007 (S.I. 2007/121), s.3 and Charges for Drugs and Appliances (Abolition) and Supply of Appliances Regulations (Northern Ireland) 2010 (NI SI 2010/71).

[480] BBC News, 'Prescription charges abolished in Scotland' (1 April 2011) <http://www.bbc.co.uk/news/uk-12928485> accessed 20 Aug 2012

[481] As GPs apply a 'catchment area' to the services they deliver, persons are usually resident in the same polity in which the prescriptions issued by their GP are written. There are exceptions to this general rule: a person requiring the services of a GP when away from their place of residence can enrol as a 'temporary resident' (NHS Choices, (2012) <http://www.nhs.uk/chq/Pages/how-do-i-register-as-a-temporary-resident-with-a-gp.aspx?CategoryID=68&SubCategoryID=158> accessed 26 Feb 2013), and persons resident close to the English/Welsh or English/Scottish border may be resident in one polity, but their local GP may be registered in another. Persons registered with a GP in England but who are resident in Scotland or Wales are eligible to receive an 'Entitlement Card', which when presented with their prescription, entitles them to free prescriptions in the polity in which they are resident (The National Health Service (Free Prescriptions and Charges for Drugs and Appliances) (Scotland) Regulations 2011 (SSI 2011/55) s.4(1)(g); National Health Service (Free Prescriptions and Charges for Drugs and Appliances) (Wales) Regulations 2007 (S.I. 2007/121), s.11). See NHS Scotland, '*Entitlement cards*' (2013) <http://www.psd.scot.nhs.uk/doctors/entitlement-cards.html> accessed 17 Feb 2013; NHS Wales, '*Entitlement cards*' (2013) <http://www.healthcosts.wales.nhs.uk/entitlement-cards> accessed 19 Feb 2013. Exemptions from

cashed at pharmacies in Scotland are dispensed free of charge, whilst English prescriptions cashed at pharmacies in Scotland are charged at £7.65 each.[482] All prescriptions cashed in England are charged at £7.65, with the exception of prescriptions from Northern Ireland which are dispensed free of charge.[483] Prescriptions dispensed in Wales are free of charge, with the exception of English prescriptions which are charged at £7.65.[484] All prescriptions dispensed in Northern Ireland are free of charge.[485]

		Location of Pharmacy			
		England	Scotland	Wales	NI
Location where prescription form issued	England	£7.65	£7.65	£7.65	Free
	Scotland	£7.65	Free	Free	Free
	Wales	£7.65	Free	Free	Free
	NI	Free	Free	Free	Free

Prescription charges have also been subject to variance between Autonomous Communities in Spain. From June 2012 a €1 surcharge was levied on all prescriptions dispensed at pharmacies in Catalonia, as part of a package of measures

prescription charges apply in all polities for certain persons on low income or with certain illnesses, or in respect of certain medications.

[482] The National Health Service (Free Prescriptions and Charges for Drugs and Appliances) (Scotland) Regulations 2011 (SSI 2011/55), s.3(1) and 3(2)

[483] National Health Service (Charges for Drugs and Appliances) Regulations 2000/620 s.3(1) and s.7.D

[484] National Health Service (Free Prescriptions and Charges for Drugs and Appliances) (Wales) Regulations 2007/121, s.3; NHS Scotland, (2011) *Abolition of Prescription Charges* <http://www.psd.scot.nhs.uk/prescriptioncharges.html#FAQ2> accessed 17 Feb 2013; Northern Ireland Government Services, (2013) *Prescription Charges* <http://www.nidirect.gov.uk/prescription-charges> accessed 17 Feb 2013

[485] Charges for Drugs and Appliances (Abolition) and Supply of Appliances Regulations (Northern Ireland) 2010/71; Northern Ireland Government Services (2013)

enacted by the Catalan Generalitat intended to reduce the budgetary deficit.[486] Similar measures were subsequently enacted in Madrid.[487] The Catalan fee is reported to have generated €46 million of revenue in the first six months, reducing public expenditure on pharmaceuticals in Catalonia by 23.9% compared to the previous year.[488] The measure has proved contentious, not least because prior to entry into force of the Catalan charge, the Spanish Cortes introduced a centralised 'co-payment' scheme whereby all persons must pay between 10% and 60% of the cost of state-subsidised prescription medication.[489] Catalans are consequently '*affected by two fiscal measures for the same product*',[490] and the Spanish Government has challenged the constitutionality of the measures on the ground that they contravene the right to equality of all Spanish nationals. On 15th January 2013 the Constitutional Court admitted the Government's appeal against prescription fee, suspending the measures for a period of five months pending review.[491]

[486] Llei 5/2012, del 20 de març, de mesures iscals, inanceres i administratives de l'impost sobre les estades en establiments turístics. See Catalan News Agency, 'The Catalan Government keeps the drug prescription fee despite Madrid's additional measures' (19 April 2012) <http://www.catalannewsagency.com/news/politics/catalan-government-keeps-drug-prescription-fee-despite-madrid%E2%80%99s-additional-measures> accessed 10 Feb 2013; and Catalan News Agency, 'Catalan citizens start to pay the drug prescription fee from Saturday' (22 June 2012) <http://www.catalannewsagency.com/news/society-science/catalan-citizens-start-pay-drug-prescription-fee-saturday> accessed 10 Feb 2012.

[487] El País, 'Madrid follows Catalonia with drug prescription surcharge' (31 Oct 2012) <http://elpais.com/elpais/2012/10/31/inenglish/1351694298_854013.html> accessed 17 Feb 2013

[488] Catalan News Agency, 'The Constitutional Court halts Catalonia's drug prescription fee, bank deposit tax and judicial fees' (15 Jan 2013) <http://www.catalannewsagency.com/news/politics/constitutional-court-halts-catalonia%E2%80%99s-drug-prescription-fee-bank-deposit-tax-and-judi> accessed 15 Jan 2013

[489] Real Decreto-ley 16/2012, de 20 de abril, de medidas urgentes para garantizar la sostenibilidad del Sistema Nacional de Salud y mejorar la calidad y seguridad de sus prestaciones (Boletín Oficial del Estado, Núm. 98 Martes 24 de abril de 2012, Sec. I. Pág. 31278). See also IberoSphere, 'New co-payment scheme for Spanish medical prescriptions' (5 July 2012) <http://iberosphere.com/2012/07/new-co-payment-scheme-for-spanish-medical-prescriptions/6502> accessed 10 Feb 2013; and Barcelona Centre for International Affairs, '*Spanish Public Healthcare System: Is it Sustainable?'* (2013) <http://www.cidob.org/en/publications/articulos/spain_in_focus/february_2013/spanish_public_healthcare_system_is_it_sustainable> accessed 28 Feb 2013.

[490] Catalan News Agency (2013), reporting on the position adopted by the Spanish Government.

[491] Ibid. See also El País, 'Constitutional Court freezes one-euro prescription fee on medicines in Catalonia' (15 Jan 2013) <http://elpais.com/elpais/2013/01/15/inenglish/1358263600_236902.html> accessed 13 Feb 2012. On 29 January the Madrid surcharge was also suspended by the Constitutional Court (El País, 'Constitutional Court suspends copayment on prescriptions in Madrid' (29 Jan 2013) <http://elpais.com/elpais/2013/01/29/inenglish/1359464673_893000.html> accessed 24 Feb 2013).

4.2. Intra-state movement and parameters of equal sub-state membership

The foregoing overview of differential fee rates illustrates the disparities in social rights that ensue from exercise of devolved competences. It also indicates that those disparities are in the UK context not simply the product of territorially-differentiated social policy. Rather, they arise from curtailment of the rights of persons accessing services in a sub-state polity of which they are not a member, and – in the case of Scottish tuition grants – the curtailment of rights of persons exporting that benefit outwith the sub-state polity of which they are a member.

These distinct sub-state membership groupings have been constructed in response to concern that persons may travel within the state to access preferential services offered within a particular region, resulting in disproportionate pressure being exerted on resources of those sub-state polities with the most preferential arrangements. In the case of prescription charges, where the financial gain to the individual is relatively low, such intra-state 'welfare migration' is likely to be limited to border regions where people can access the service of a neighbouring polity with ease. Such patterns have been reported in Spain, where unofficial reports have suggested a 5% increase in persons accessing pharmaceutical services in Azuqueca de Henares – a town in the Autonomous Community of Castile-La Mancha that lies on the border with the Community of Madrid – following introduction of the €1 surcharge on prescriptions dispensed in the Community of Madrid.[492]

Both the scope and effect of such 'welfare-migration' is likely to be far greater in the case of tuition fees, with a mobile populous of students incentivised to move to one polity over another in light of the significant financial advantages that would result. Discussing the variance in tuition fee rates following the increase in the regulatory cap in England with effect from 2012, the Scottish Government noted that:

[492] El País reports that '[t]*he Castilla-La Mancha health department believes the impact of this drug tourism boom will be minimal. Citing the example of Aragon after Catalonia became the first region to apply a one-euro co-payment charge, it believes the practice will soon disappear*' (El País, 'Have prescription, will travel: Are drug charges creating pharmacy tourism boom?' (11 Jan 2013) <http://elpais.com/elpais/2013/01/11/inenglish/1357914446_299468.html> accessed 11 Jan 2013).

> *'Scotland will become the cheapest destination for higher education in the UK. Students who usually live in England could, for example, continue to pay fees of £1,820 per year to attend a Scottish university as opposed to up to five times that – £9,000 – in their home nation. This would create an unparalleled level of competition for places at Scottish universities, displacing suitably qualified Scottish domiciled students.'*[493]

In response to significant divergences in social policy, sub-state polities in the UK have thus reactively narrowed the bounds of equal membership, curtailing eligibility of persons who are accessing services or goods and who do not have the requisite link with that polity. In the case of prescription charges, the requisite link is established through residence, in a condition that is indirectly imposed upon the recipient by reference to the polity in which the prescription was written.[494] In 2005 the Welsh Health Minister explained the motivation behind measures to restrict the benefit of free prescriptions to persons presenting a Welsh prescription form:

> *'The measures announced today will overcome concerns raised that the reduced prescription charges in Wales could attract 'health tourists' from outside Wales, coming to benefit from the lower charges. We're committed to introducing free prescriptions for all in Wales by April 2007. Prescriptions will fall by another £1 on 1 April 2006 to £3 and will be the next step in meeting that goal. While there is little evidence of prescription tourism to date, as prescriptions gets cheaper, the risks will increase.'*[495]

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[493] Scottish Government (2011), page 7. The prudence of this measure as a means by which to protect places for Scottish students has been called into question, with some sources noting that Scottish students may lose out on places offered to English counterparts who pay higher fees (The Guardian, 'Competition for places at Scottish universities will be fierce in 2012' (12 Sep 2011) <http://www.guardian.co.uk/education/2011/sep/12/scottish-universities-uk-students-fees> accessed 28 Aug 2012).

[494] See above at n.481

[495] Welsh Government, *'Action on Health Tourism'* (2005) <http://www.wales.nhs.uk/news/3688> accessed 15 Aug 2012. See also comments made in 2005 by the (then) First Minister for Wales Rhodri Morgan: '*(Health tourism) isn't a problem yet, but it could be when the difference gets even starker next year or the year after*' (BBC News, '*Pledge to stop 'health tourists'* (1 April 2005) <http://news.bbc.co.uk/1/hi/wales/4402041.stm> accessed 17 Aug 2012). Such restrictions have not eliminated concerns regarding welfare migration, with several claims that people are 'cheating the system' by falsely registering with GPs in Wales when resident in England using addresses of friends, or failing to de-register when moving elsewhere (The Telegraph, 'Thousands of English patients go to Wales for free prescriptions' (17 April 2008) <http://www.telegraph.co.uk/news/uknews/1895846/Thousands-of-English-patients-go-to-Wales-for-free-prescriptions.html> accessed 13 Sep 2012). See also Daily Mail, 'Wales now has more NHS patients than people as English flock over the border for free prescriptions' (16 April 2008) <http://www.dailymail.co.uk/news/article-560103/Wales-NHS-patients-people-English-flock-border-free-prescriptions.html> accessed 15 Feb 2013.

Residence does not, however, prove sufficient to establish the necessary link between recipient and polity in the case of subsidised provision of higher education, where people often re-locate their residence in the course of accessing the service in question. Sub-national polities in the UK have consequentially restricted access to Higher Education benefits through what is colloquially referred to as an individual's 'domicile'. This concept – which in its technical form is a subjective test of a person's 'real' or 'permanent home' – is approximated in regulations through the condition of a qualified form of 'ordinary residence'. The natural meaning of 'ordinary residence' refers to a voluntary residence for 'settled purposes' as part of the 'regular order' of a person's life,[496] but where this term is used to condition access to higher education services it is accompanied by the interpretative provision that '*a person who is ordinarily resident in England, Wales, Scotland, Northern Ireland or the Islands, as a result of having moved from another of those areas for the purpose of undertaking…the current course…is to be considered to be ordinarily resident in the place from which the person moved*'.[497]

This qualified form of ordinary residence was initially used solely as a means by which to apportion jurisdictional responsibility for the provision of student

[496] The leading judgment concerning the interpretation of 'ordinary residence' is *R. v Barnet LBC Ex p. Shah (Nilish)* [1983] 2 A.C. 309, in which Lord Scarman explained that *'ordinarily residence refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration*' (page 343). Prior to this case, the Local Authorities that were at that time in charge of allocating grants had considered the concept of 'ordinary residence' from precluding persons that were so resident for the purpose of study. The House of Lords in *Shah* rejected this proposition: *'An attempt has been made in this case to suggest that education cannot be a settled purpose. I have no doubt it can be. A man's settled purpose will be different at different ages. Education in adolescence or early adulthood can be as settled a purpose as a profession or business in later years'* (page 344). As a result of this decision, regulations determinative of 'sufficient connection with the UK' that were at that time passing through Parliament were supplemented with the condition that a person must have been 'ordinarily resident' other than wholly or mainly for the purpose of receiving full time education (Education (Fees and Awards) Regulations 1983 (S.I. 1983/937)), reflecting the Government's intention to '*restore the situation broadly to what it was before the 16th December judgment* [in Shah]' (Hansard, HL Deb 12 May 1983 vol 442 cc634-46).

[497] Education (Student Support) Regulations 2011 (SI 2011/1986), s1(3) (English regulations). Similar provision is found in Scottish regulations: *'a person who is ordinarily resident in Scotland as a result of having moved from a part of the United Kingdom other than Scotland for the purpose of undertaking a course of education is to be considered to be ordinarily resident in the part of the United Kingdom from where they moved'* (Education (Fees) (Scotland) Regulations 2011 (SSI 2011/389), Regulation 2(3) and (4); Students' Allowances (Scotland) Regulations 2007 (SSI 2007/153), Regulation 2(3) and (4)). These conditions 'approximate' a person's domicile in that they provide objective from which the individual's 'real' or 'permanent' home is presumed. The two do not, however, necessarily coincide: a person (especially a postgraduate or mature student) may re-locate for the purpose of education but not, subjectively, retain a 'real' home elsewhere.

support between sub-state polities, ensuring that student finance is exportable from the sub-state polity from which the student had travelled rather than received in the sub-state polity to which they had moved to study. Such apportionment of responsibility creates differential rights between persons studying at the same HEI but who are subject to the regulatory control of different sub-state polities: a student at a HEI in Scotland who is accessing English student finance receives a fee-loan to cover the cost of their tuition, whereas a student who is accessing Scottish student finance is eligible for a fee grant.[498]

As the divergence between regulatory fee caps has increased, a condition of ordinary residence has also been used by sub-state polities as a means by which to distinguish between categories of persons falling within their regulatory control. Prior to amendments entering into force in 2012, all UK domiciled students were eligible to benefit from the regulatory fee stipulation at Scottish universities, irrespective of the sub-state polity in which they were resident prior to commencing study.[499] In 2011, the Scottish Parliament enacted measures to exempt students at Scottish universities who are 'ordinarily resident' in England from receiving the benefit of regulatory fee stipulation, in order to '*maintain current levels of cross border student flows within the UK and thereby protect opportunities for Scottish domiciled students*' in light of increase in fee rates at universities in England.[500]

4.3. Equal membership and inter-state migration: equality of EU Citizens

Discussion thus far has been concerned with the construction of membership boundaries within a group of UK-domiciled persons, and has considered the extent to which sub-state polities extend or withdraw the boundaries of equal membership in

[498] Differential student support arrangements introduced a 'middle tier' into individual liability for tuition in Scotland prior to removal of the fee cap in 2011: prior to this date, both Scottish- and 'rest of the UK'-domiciled students were charged the same fees, but those fees were met on behalf of Scottish-domiciled students by the Scottish Government.

[499] Education (Fees and Awards) (Scotland) Regulations 2007 (SSI 2007/152) s.7 and Schedule 1 required an individual only to have a 'relevant connection' with the United Kingdom (rather than to Scotland) in order to benefit from the regulatory fee cap.

[500] Scottish Government (2011), page 13. Similar measures have been introduced in Northern Ireland, where the regulatory fee cap of £3575 applies only to students domiciled within the territory, and an unregulated fee rate of £9,000 is applied by HEIs in Northern Ireland to 'rest of the UK' students. England and Wales make no differentiation between persons domiciled within constituent units of the UK for the purpose of fee regulation, requiring simply that a person is domiciled in the UK.

the context of intra-state movement. Sub-state competence to allocate membership benefits is, however, not exclusive, but rather is subject to the right of non-discrimination enjoyed by migrant EU citizens under EU law.[501] The interaction of sub- and supra-state competences is especially disruptive of equal membership in the context of higher education in the UK.

The right of non-discrimination under Art 18 TFEU secures access to higher education for EU Citizens in a second Member State on terms equal to those enjoyed by nationals of that Member State.[502] Scotland is therefore required to ensure that HEIs within its territory do not charge higher fees to migrant EU citizens than they do to UK nationals, and must make available fee loans and grants to migrant EU citizen students on the same basis as it does to UK nationals who are ordinarily resident in Scotland.[503] As a result of their EU law right of equal treatment, EU Citizens who move to Scotland for the purpose of study from another Member State are entitled both to benefit from the regulatory fee cap, and to receive a full grant in respect of tuition.

The CJEU has consistently held that the right to non-discrimination enjoyed by European Citizens cannot be invoked in a 'wholly internal situation', with the result that EU law allows for the construction barriers to intra-state movement by sub-state legislatures, in so far as those barriers differentiate between nationals of that Member State who have yet to exercise their right of free movement throughout

[501] The right of equal treatment is limited to EU citizens in cross-border situations, and does not extend to secure the equality of EU Citizens moving across internal borders within the territory of the state of which they are nationals. For this reason sub-state polities can distinguish between groupings of UK-domiciled persons under national law, but are prohibited from applying differential rights to migrant EU citizens under EU law.

[502] In Case 293/83, *Françoise Gravier v City of Liège* [1985] ECR 00593, the CJEU considered that imposition of a 'minerval' (a registration fee) upon non-Belgian nationals studying vocational courses at Belgian institutions was contrary to the right of non-discrimination. In arriving at this conclusion, the Court made reference to the common vocational training policy established under Art 128 EEC, and noted that '*[a]ccess to vocational training is in particular likely to promote free movement of persons throughout the Community, by enabling them to obtain qualification in the Member State where they intend to work*' (para.24). The subsequent case of *Blaizot* confirmed that university studies in general are regarded as vocational training (Case 24/86, *Vincent Blaizot v University of Liège and others* [1988] ECR 00379).

[503] In *Lair* the CJEU held that the right of non-discrimination attaches to access to higher education, requiring Member States to grant financial assistance on equal terms '*only in so far as such assistance is intended to cover registration and other fees, in particular tuition fees, charged for access to education*' (Case 39/86, *Sylvie Lair v Universität Hannover* [1988] ECR 03161, para. 16). Member States are entitled to restrict maintenance grants within certain limits (Case C-209/03, *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-02119; see discussion on minimum income allowances at n.387, above).

the Union.[504] This introduces an 'anomaly' in fee differentiation, whereby sub-state legislatures may curtail access of nationals moving within state territory, but are required under EU law to secure equality of treatment with EU Citizens moving from a second Member State. As a result, EU Citizens domiciled in a second Member State acquire more preferential rights when studying in Scotland than do UK nationals domiciled in England, Wales or Northern Ireland.

A second form of 'anomaly' occurs when considering the intra-state movement of EU Citizens domiciled in the UK. Although intra-state movement of UK nationals is a 'wholly internal situation' outwith the bounds of EU law, sub-state legislatures are prohibited under EU law from restricting the benefits enjoyed by *migrant* EU Citizens who move across internal state boundaries.[505] Addressing a measure enacted by a sub-state legislature in Belgium that restricted the benefit of a social insurance scheme to persons resident within its territory, the CJEU explained that:

> *'Migrant workers, pursuing or contemplating the pursuit of employment or self-employment in one of those two regions, might be dissuaded from making use of their freedom of movement and from leaving their Member State of origin to stay in Belgium, by reason of the fact that moving to certain parts of Belgium would cause them to lose the opportunity of eligibility for the benefits which they might otherwise have claimed'*[506]

The Court thus came to the conclusion that '*legislation of a federated entity of a Member State*' that limits receipt of benefits on the grounds of residence in that territory is contrary to the right of free movement throughout the Union, '*in so far as*

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[504] Case C-212/06, *Government of the French Community and Walloon Government v Flemish Government* [2008] ECR I-01683. Considering a care insurance scheme established by a sub-state legislature in Belgium, the Court considered that '*application of the legislation at issue in the main proceedings leads, inter alia, to the exclusion from the care insurance scheme of Belgian nationals working in the territory of the Dutch-speaking region or in that of the bilingual region of Brussels-Capital but who live in the French- or German-speaking region and have never exercised their freedom to move within the European Community. Community law clearly cannot be applied to such purely internal situations. It is not possible…to raise against that conclusion the principle of citizenship of the Union set out in Article 17 EC…The Court has on several occasions held that citizenship of the Union is not intended to extend the material scope of the Treaty to internal situations which have no link with Community law*' (para 37-39). On the wholly internal principle, see section 2.3.1 at page 50, above.

[505] By 'migrant EU Citizen' it is meant those that have exercised a right of free movement in a second Member State.

[506] *Walloon* para.48

such limitation affects nationals of other Member States or nationals of the Member State concerned who have made use of their right to freedom of movement within the European Community.'[507]

As a result of this approach, a migrant EU Citizen is entitled to benefit both from a regulatory fee cap and a full grant in respect of tuition, even where they had previously been domiciled elsewhere in the UK prior to commencing study in Scotland. Not only, then, are EU Citizens domiciled in a second Member State subject to more preferential rights than UK nationals domiciled in England, Wales, or Northern Ireland, but a UK national and a non-UK EU Citizen who are both domiciled in the UK outwith Scotland are subject to differentiated rights purely by reason of their nationality.

Table 2: Liability in respect of tuition under Scottish Regulations[508]

	Domiciled in Scotland	Domiciled elsewhere in UK	Domiciled in another Member State
UK national	Nil	£9,000	£9,000 if domiciled in England, Wales or Northern Ireland prior to exercising right of free movement Nil if domiciled in Scotland prior to exercising right of free movement
Non-UK EU citizen	Nil	Nil	Nil

This distinction attracted a substantial degree of attention when it was confirmed by the Scottish Government in the spring of 2012 that dual nationals holding both UK nationality and that of a second Member State who are domiciled in England, Wales or Northern Ireland are entitled to benefit from receipt of a fee grant in respect of tuition costs. Specifically, the Scottish Government confirmed that '*In*

[507] *Walloon* para. 60
[508] Education (Fees) (Scotland) Regulations 2011 (SSI 2011/389), Schedule 1

assessing whether a dual UK/EU national [is entitled to receipt of a grant] the approach taken by SAAS was to consider whether that person satisfies the criteria solely on the basis of the person's status as a national of an EU member state other than the UK'.[509]

This clarification gave rise to suggestions that UK nationals could acquire the nationality of a second Member State in order to bring themselves within the scope of more favourable conditions applied to non-UK EU citizens; an option available in particular to UK nationals born in Northern Ireland, who are entitled to acquire Irish citizenship under the terms of the Good Friday Agreement.[510] As tuition fees across the UK rose in 2012, several reports circulated noting the 'loophole' that allowed dual nationals domiciled in Northern Ireland to benefit from free tuition in Scotland, when they would otherwise be liable for fees of £3,575/year when studying in Northern Ireland and fees of up to £9,000/year when studying in England, Wales or Scotland. This situation was reported in overwhelmingly negative terms in the UK press, reflecting multiple discontents rooted in differentiation based on domicile, the perceived inequity of preferential rights afforded to migrant EU citizens, and the fact that one particular sub-national group are in a position to avoid differential fee imposition, where others are not:

> ***'Loophole that lets Irish students dodge Scottish tuition fees'*** *['Teenagers are exploiting a loophole that grants EU students free tuition while UK residents are forced to pay up to £9,000 a year']* Daily Express May 2nd 2012

[509] Scottish Government Education Circular LJ/002/2012 (unpublished), referenced in Scottish Government (Employability Skills and Lifelong Learning Directorate), '*Scottish Government Education Circular LJ/05/2012*' (2012) <http://www.scotland.gov.uk/Resource/0041/00415203.pdf> accessed 15 Oct 2012. See also Northern Ireland Assembly, *Scotland Tuition Fees and Northern Ireland Students* (Research and Information Service Briefing Note, Paper 68/12 (NIAR 264-2012), 2012).

[510] Article Art. 1(vi) of the 'Good Friday Agreement' states that: '*The birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both governments and would not be affected by any future change in the status of Northern Ireland.*' This right was inserted into s.6 of the Irish Nationality and Citizenship Act 1956 by the Irish Nationality and Citizenship Act 2001. Irish citizenship also has a particularly wide scope of *ius sanguinis* and can be acquired by second generation descents '*even where the parent entitled to be an Irish citizen had not obtained [Irish] citizenship*' (John Handoll, (2012) *EUDO Citizenship Observatory Country Report: Ireland* <http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=Ireland.pdf> accessed 15 Feb 2013, pages 6-7).

'Loophole 'lets Northern Irish students avoid Scottish tuition fees'' *['Scottish universities have denied they are facing an influx of so-called "fee refugees" from Northern Ireland after it emerged some students there are being told that they can obtain free tuition with an Irish passport']* The Scotsman 2 May 2012

'20% of NI students 'to exploit Irish passport loophole'' BBC News 28 May 2012

'Grannygate' row over loophole that will allow thousands of English students with Irish heritage to attend Scottish universities for free' [Thousands of English and Welsh students will be able to gain free tuition at Scottish universities by claiming Irish grandparents] Daily Mail 10 May 2012

Despite enrolment figures at Scottish universities for the academic year 2012/2013 having indicated that the number of persons from Northern Ireland accessing free tuition by these means were not as large as had been projected,[511] the Scottish Government still considered it necessary '*to take action to close it for future years to avoid any confusion for students and parents alike*.'[512] In September of 2012 it was announced that '*[w]ith effect from the 2013/14 academic year, dual nationals are not entitled to receive equal treatment with UK nationals normally resident in Scotland in relation to entitlement to be charged regulated fees and the availability of tuition fee support from SAAS simply because they are also a national of an EU member state other than the UK*'.[513] The revised policy requires an EU Citizen to provide proof of having exercised a right of residence throughout the Union (including in the Member State of which they are a national) before being eligible to access free tuition in Scotland as an EU Citizen.[514] It remains to be seen whether this policy will be challenged on the grounds of its incompatibility with the right to equal treatment of EU Citizens, given that the CJEU has consistently held that '*it is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that*

[511] The Scottish Government reported that '*the number of students with Northern Ireland postcodes accepted to Scottish institutions for session 2012/13 is down by 19 per cent according to UCAS statistics issued on 23 August. Equivalent figures for students with Republic of Ireland postcodes are down by 6 per cent*' (Scottish Government, 'Action on fees for dual nationality students' (14 Sep 2012) <http://www.scotland.gov.uk/News/Releases/2012/09/EU-students14092012> accessed 15 Sep 2012

[512] Ibid.

[513] Scottish Government (Employability Skills and Lifelong Learning Directorate) (2012)

[514] Northern Ireland Assembly, '*Scottish Universities – Proof of Residence*' (Research and Information Service Briefing Note, Paper 170/12 (NIAR 714-2012), 2012); Student Awards Agency for Scotland, '*Tuition fee support for dual EU (non UK) and UK nationals*' (2012) <http://www.saas.gov.uk/student_support/funding_update.htm> accessed 20 Oct 2012

nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty'.[515]

The 'anomalies' created by the juxtaposition of a national system that allows for sub-state polities to protect their educational systems against intra-state 'welfare migration', and a supra-state system that requires the opening of borders for persons moving between (and certain persons moving within) Member States would disappear in the event that Scotland gained independence. An independent Scotland would no longer be able under EU law to confer differential rights upon UK nationals, with the result that Scottish independence would necessitate removal of the 'rest of the UK' fee rate introduced in 2011, and all UK nationals moving to Scotland for the purpose of study would be able to access grants in respect of fees on the same terms as Scottish nationals. This requirement casts some doubt on the sustainability of a policy of universally-funded higher education, but whilst this matter has received some attention in political commentary, it has yet to be dealt with by the SNP Government campaigning for independence.[516] On the contrary, First Minister Alex Salmond has gone so far as to suggest that a universal right to free education ought to be embedded in a written constitution as constitutional rights.[517]

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[515] Case C-148/02, *Carlos Garcia Avello v État belge* [2003] ECR I-11613. The Court in this case found a link with Union law in respect of persons '*who are nationals of one Member State lawfully resident in the territory of another Member State. That conclusion cannot be invalidated by the fact that the children involved in the main proceedings also have the nationality of the Member State in which they have been resident since their birth and which, according to the authorities of that State, is by virtue of that fact the only nationality recognised by the latter*' (paras 27-28). See also Case C-353/06, *Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-07639.

[516] Speaking in a debate in the House of Lords, Lord Sewel asked '*does the noble Lord recognise the supreme irony in the Scottish Government's position? On the one hand, they are arguing for independence, but the policy they are pursuing can be carried out only while they remain members of the United Kingdom. If they achieved independence within the EU, they would not be able to have this pernicious policy*' (Hansard HL 2 Feb 2012: Column 1722). See also The Herald, 'The SNP policy on tuition fees will become even less affordable if Scotland becomes independent' (15 Feb 2012) <http://www.heraldscotland.com/politics/opinion/the-snp-policy-on-tuition-fees-will-become-even-less-affordable-if-scotland-becomes-independent.1329326656> accessed 12 Aug 2012; and BBC News, 'Twelve unresolved questions on Scottish independence' (25 Jan 2012) <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-16636325> accessed 25 Jan 2012.

[517] In a speech delivered in January 2013, the Scottish First Minister Alex Salmond noted: '*In Scotland we have a policy of the right to free education in keeping with our history as the nation which pioneered universal education…There is an argument for embedding those provisions as constitutional rights*' (Alex Salmond, '*Speech delivered at Foreign Press Association, London, January 16, 2013'* <http://www.scotland.gov.uk/News/Speeches/constitution-rights-16-01-2013> accessed 6 March 2013. See also Scottish Government, '*Scotland's Future: from the Referendum to Independence and a Written Constitution'* (2013) <http://www.scotland.gov.uk/Resource/0041/00413757.pdf> accessed 3 March 2013, pages 8-9.

4.4. Differential social rights and 'discrimination'

Differential social rights that result from the devolution of competence to sub-state units disrupt traditional frames of equality in several ways. First, the construction of sub-state membership groups means that a national who is subject to the regulatory competence of one sub-state unit may acquire more preferential rights than a national who falls within the jurisdiction of a second sub-state unit.

More problematically, divergences in social policy have prompted sub-state units to enact measures to prevent intra-state welfare migration, with the result that two nationals subject to the regulatory control of the same sub-state unit may acquire differentiated rights. This situation manifests in the UK in the form of the differential prescription charges incurred by persons presenting English prescription forms at pharmacies in Scotland and Wales, and differential fees regulations applied to 'rest of the UK' students at HEIs in Scotland and Northern Ireland. This form of 'inequality' does not exist in Spain, where the benefit of differential policy on higher education fees and prescriptions is bounded by the territory in which the service is provided.

Both of these situations present a challenge to the equality demanded of formal citizenship, and are perceived as inequitable especially given that those differential policies are largely funded through shared national resources.[518] That perceived inequity is thrown into even sharper relief in the case of access to higher education in the UK, given that EU law requires sub-state legislatures to extend benefits to migrant EU citizens. Differentiation of social rights has thus popularly been characterised in terms of unfair 'discrimination' – particularly against 'the English', whose rights are curtailed when accessing services in Scotland, Wales, and Northern Ireland. The following headlines give some indication as to how these issues have been represented in the British tabloid press:

> *'Taxpayers across country to foot £2bn bill for Scottish students' free university places'* Daily Mail 10 June 2007

[518] Speaking in a debate in the House of Lords, Baroness Liddell of Coatdyke noted that: '*it is largely the Barnett formula, which taxpayers throughout the United Kingdom contribute to, that allows the Scottish Government to act in this way* [to secure tuition free at point of access]. *We are discriminating against those taxpayers from England, Wales and Northern Ireland*' (Hansard HL 2 Feb 2012: Column 1722).

'Bitter pill for English as prescriptions rise again...just days after Scotland made them free' *['Prescription charges in England are to rise just days after Scotland scrapped them, prompting new claims of health apartheid in Britain']* Daily Mail 5 March 2011

'Free prescriptions for all in Scotland...never mind austerity for the rest of us!' *['While the English are tightening their belts in the wake of the credit crunch, Scotland will spend millions of pounds to abolish prescription charges.']* Daily Mail 3 March 2011

Such perceptions of discrimination have engendered attempts by several members of the House of Lords to introduce legislation that prohibits sub-state legislatures from differentiating between UK nationals based on their place of domicile. Lord Foulkes of Cumnock and Lord Forsyth of Drumlean each tabled amendments to the Scotland Bill in 2012 that would ensure equality of treatment for persons moving within the UK to access Higher Education. Speaking in favour of their respective amendments, both Lord Foulkes and Lord Forsyth highlighted their discontent with the differentiation between UK nationals on the basis of domicile, and the simultaneous grant of access to migrant EU Citizens:

> *'My Lords, it is my pleasure to move Amendment 22, which would prevent the Scottish Executive and the Scottish Parliament from imposing discriminatory fees on students at Scottish universities who are resident in England, Wales or Northern Ireland…What has been agreed by the Scottish Executive and Scottish Government is tremendously unfair discrimination against students from England, Wales and Northern Ireland who go to Scottish universities. It really is quite disgraceful. It is astonishing, when you think of it, that students from Lisbon, Madrid or Berlin will all get in free to Scottish universities, but students from Belfast, London or Cardiff will have to pay fees.'*[519] (Lord Foulkes)

> *'The new clause in my amendment is intended to make clear that the Scottish Parliament is free to exercise its powers, but it cannot exercise its powers in a way that discriminates against people from England, Wales and Northern Ireland relative to people in other European states. That is the real wickedness involved in what is happening now: Greeks, Germans, Poles and French all get the*

[519] Lord Foulkes, Hansard HL 2 Feb 2012: Column 1721-2

same deal as the Scots, but English, Welsh and Northern Ireland people do not.'[520] *(Lord Forsyth)*

Though neither of the proposed amendments to the Scotland Bill was accepted,[521] Lord Forsyth reintroduced his proposed amendments in the form of the 'Higher Education (Fees) Bill', which had its first reading before the House of Lords on 17 May 2012.[522] The stated purpose of the Bill is to '*ensure that Higher Education institutions in England and Wales and Scotland may not vary fees charged to British students based on a student's place of domicile; and to require organisations using public funds to assist students in paying fees not to vary support based on a student's place of study within the United Kingdom'*.[523] For this purpose it seeks to introduce a clause into the Scotland Act 1998 that curtails the legislative competence of the Scottish Parliament in respect of measures '*would result in residents of England, Wales or Northern Ireland being treated differently to citizens of other EU member states'*.[524]

4.4.1. A legal case for discrimination?

It has already been noted that the imposition of surcharges on prescriptions imposed by the Autonomous Communities of Madrid and Catalonia is currently the subject of legal contestation before the Spanish Constitutional Court, on the grounds that they contravene the constitutionally-protected right of equality of Spaniards.[525] Whilst there has been a significant degree of political rhetoric surrounding the differential fee rates charged been UK-domiciled students in respect of tuition, the perceived 'discrimination' resulting therefrom is unlikely to be justiciable under UK law. The prospect of litigation on this issue has been raised once: following enactment of the

[520] Lord Forsyth, Hansard HL 2 Feb 2012: Column 1724
[521] Lord Foulkes withdrew his amendment, stating that '*I hope that* [the Education Minister in Scotland] *can take some time out to talk to people about this anomaly, which clearly upsets so many people, not just in this Chamber but, far more importantly, outside it, and try to find a fair and equitable solution*' (Hansard HL 2 Feb 2012: Column 1743). Lord Forsyth's amendment was not moved.
[522] The first reading of the Bill is a formality, and as of 15 March 2013 a second reading has yet to be scheduled.
[523] Higher Education (Fees) Bill [HL] 2012-13 (HL Bill 22)
[524] Ibid.
[525] See text at n.491, above.

Student Fees (Specification) (Scotland) Order in 2011 in order to remove the regulatory fee cap from 'rest of the UK' domiciled students, there was a brief flurry of interest in a statement issued by Phil Shiner of 'Public Interest Lawyers' concerning his intention to mount a judicial review against the regulations, on the grounds that they are contrary to the prohibition of discrimination under the Equality Act 2010.[526]

Given that it held little prospect of success, it is unsurprising that this anticipated action never materialised. In order to bring a successful judicial review of the regulations under the Equality Act, a claimant would have to demonstrate that they belong to a group with common ethnic or national origins that are less able to meet the criteria of 'ordinary residence' in Scotland.[527] The 'English', 'Welsh' and 'Northern Irish' persons that are disadvantaged by application of this criterion are not, however, distinct national or ethnic groups, but rather are a set of persons domiciled in the UK. That group may include persons of any number of ethnicities and nationalities, including third-country nationals who are entitled to receive rights by virtue of their 'sufficient connection' to the UK.[528] Phil Shiner has reportedly argued that '*the argument about domicile and nationality doesn't hold water. If being Welsh, English, Irish or Scottish is not a matter of national origin then it makes a nonsense of the establishment of parliaments in each place*'.[529] In so claiming, he fails to distinguish between the dominant sub-state national identity that legitimates sub-state governance, and the group of domiciled persons that reap the benefit of

[526] The Guardian, 'Does Scotland's university fees system breach human rights laws?' (24 Aug 2011) <http://www.guardian.co.uk/law/2011/aug/24/scotland-university-fees-human-rights> accessed 25 Aug 2012; Halsbury's Law Exchange, '*The right to education: a legal challenge to Scottish university fees*' (2011) <http://www.halsburyslawexchange.co.uk/the-right-to-education-a-legal-challenge-to-scottish-university-fees/> accessed 6 Sep 2012; UK Human Rights Blog, '*University funding, Scotland and a question of equality*' (2011) <http://ukhumanrightsblog.com/2011/08/22/university-funding-scotland-and-a-question-of-equality/> accessed 10 Sep 2012

[527] Section 9(1)(c) of the Equality Act 2010 includes 'national or ethnic origins' within the definition of the protected characteristic of 'race'.

[528] Sub-state membership groupings based on domicile within a particular sub-state territory are nested within the requirement that an individual have 'sufficient connection' with the UK. A person has 'sufficient connection' with the UK if they are 'settled' there (they must be ordinarily resident in the UK with no restrictions on the period for which they remain), and have been ordinarily resident in the UK throughout the three year period prior to commencing study, other than wholly or mainly for the purpose of receiving full-time education (Education (Fees and Awards) (England) Regulations 2007 (SI 2007/779), enacted under The Education (Fees and Awards) Act 1983).

[529] The Guardian, 'Scotland's university fees 'discriminatory', says lawyer' (21 Aug 2011) <http://www.guardian.co.uk/education/2011/aug/21/scotland-university-fees-discriminate-lawyer> accessed 13 Oct 2012

devolved policy on the basis of their domicile in the territory. Whereas the former constitute a group of persons with shared 'national origins' falling within the protected characteristic, the latter do not.

Neither can persons domiciled in the UK outwith Scotland claim redress on the basis that they are discriminated against vis-à-vis EU Citizens by reason of their UK nationality: the Equality Act allows for differentiation on grounds of nationality or ordinary residence, in so far as that action is '*in pursuance of an instrument made by a member of the executive under an enactment*'.[530] Such 'reverse discrimination' also falls outwith the bounds of EU law, as a 'wholly internal situation'.[531] Whereas differentiated social rights are popularly perceived as inequitable, there is thus no legal redress under UK or EU law for those that perceive themselves to be subjected to such 'discrimination'.

4.5. Conclusion

Devolution of competence to sub-state legislatures in the field of social policy marks a departure away from the nation-state as the frame of equal membership, contradicting the presumption that rights constitutive of social citizenship are necessarily delivered by institutions of state and are legitimated and sustained by (a state-wide) national social solidarity.[532] Exercise of devolved competences has witnessed the emergence of distinct and privileged membership groupings below the level of the state, contesting the equality traditionally associated with national citizenship.

Public perception of differentiated social rights identifies an intrinsic tension within constitutional asymmetry, which requires a delicate balance between commonality and divergence across the constituent polities of the constitutional structure. On the one hand, differentiated social rights arguably secure equality of

[530] Equality Act 2010 Schedule 23(1)
[531] See above at page 50.
[532] Keating identifies the duality of this relationship when he explains that observers have '*noted the role of the welfare state in promoting integration across classes and religions or other social segments…later writers such as David Miller (1995) have insisted on the importance of shared nationality for solidarity and the welfare state. In this, the causation is reversed, with common nationality being the basis for social sharing, but the effect is similar*' (Keating (2009), page 501).

nationals through the protection of national minority groups.[533] Devolution is, after all, predicated upon the right of self-government of national minorities, and its very function is to give a sub-state polity the ability to respond to the distinct socio-economic needs expressed by that group. In this respect, it is arguably somewhat contradictory to devolve competence in order to secure equality for national minorities, only to maintain that equality demands that that competence be exercised in the same way across the territory.

On the other hand, the nation and the state both continue to play a prominent role in the benefits enjoyed by persons across all sub-state territories: certain social rights remain organised at the level of the state,[534] and funds for devolved policies largely come from shared state-wide resources that are predicated upon the social solidarity of the nation.[535] The continued relevance of the nation and the state leads to a presumption of a common core of social citizenship enjoyed by nationals across the constitutional asymmetry, with the result that differentiated rights are frequently perceived as an affront to social justice. That perception is heightened under those circumstances in which differential rights are a result of one sub-state polity curtailing the benefit of services accessed by non-members in response to fears over intra state 'welfare migration', and where that benefit is simultaneously extended to non-nationals. Defence of differentiated rights on the basis of the rights of national minorities has done little to quieten perceived injustice, as those differential fees do not in isolation protect a particular cultural characteristic or socio-economic trait of the national minority, and are extended to all within the territory on the basis of

[533] One school of thought contests that equality demanded by citizenship is achieved through the grant of universal rights, but rather suggests that equality in any meaningful sense demands group-differentiated rights. Iris Marion Young, who advocated the grant of differential rights to protect social groups facing oppression, argues that a '*strict adherence to a principle of equal treatment tends to perpetuate oppression or disadvantage*'. Group representation, by contrast '*is the best antidote to self-deceiving self-interest masked as an impartial or general interest…Group representation provides the opportunity for some to express their needs or interests who would not likely be heard without that representation*'(Young (1989), page 251). Will Kymlicka has argued that differential rights are legitimated for minority groups bound by a 'societal culture', in order to secure equality in those circumstances in which a national minority is facing an unfair disadvantage, or in order to protect diversity of cultures (Kymlicka (1995) pages 76-77 and 108).

[534] Social security, for example, remains largely organised at the level of the State, as was illustrated in the previous chapter.

[535] See n.198

domicile or residence. [536] Moreover, whilst the right to pursue a distinct social policy may legitimate divergences between sub-state policies, it does little to address the inequity that flows from the curtailment of benefits to persons moving between sub-state units, or the concurrent extension to migrant EU citizens.

Perceived inequalities stemming from substantially diverging social rights have the potential to undermine the social solidarity upon which the welfare state is predicated. Though the fragmentation of competences need not necessarily lead to an 'absolute decline' in social solidarity, which can be re-built in different forms and at different levels of government,[537] it may tip the balance of union and differentiation that bonds polities of the constitutional asymmetry. This concern has been reflected by the Calman Commission on Scottish Devolution, which in considering the future of Scotland within the Union emphasised the role of a '*social union*', an intrinsic part of which was a common understanding of social citizenship across the constituent polities of the asymmetric constitution:

> *'there are certain social rights which should also be substantially the same, even when it is best that they are separately run in Scotland. The most important of these are that access to health care and education should be, as now, essentially free and provided at the point of need. And when taxes are shared across the UK they should take account of that need. Our first recommendation is therefore that the Scottish and UK Parliaments should confirm their common understanding of what those rights are, and the responsibilities that go with them'*.[538]

[536] They are group-differentiated rights only in the indirect sense that they are the product of a broader right to self-determination and, under a generous interpretation, to the extent that they afford recognition to a distinct political preference.

[537] Keating argues that '*it is a mistake to believe that if social solidarity weakens at the level of the 'nation-state', this always and necessarily represents an absolute decline in solidarity…Of course, devolution does mean that individuals will be treated differently according to where they live within the state, as devolved governments make different policy choices. This is an anomaly and an injustice to those who see social citizenship as working only at the level of the whole state but not above or below it. …It is true that there may be a trade-off between solidarity at one territorial level and solidarity at another, and that solidarity at different levels may take different forms, be thicker or thinner, and rely on different policy instruments*' (Keating (2009), pages 504 and 506).

[538] Commission on Scottish Devolution (2009), page 6. The SNP, meanwhile, talk of a 'social union' between an independent Scotland and the rest of the UK, but fail to translate this into its real significance for terms of common policies on social rights.

In the absence of such an agreement, it is entirely possible that devolution will 'diminish the sense of, and importance of, shared and common interests that are at the heart of a national political community', and will 'become, in turn, a catalyst for new problems and further changes'.[539] Fragmentation of social citizenship may thus contribute towards the 'centrifugal forces' identified by Charles Tarlton as an intrinsic characteristic of constitutional asymmetry, foreshadowing state secession.[540]

[539] John Roberts, '*Asymmetrical Federalism: Magic Wand or 'Bait and Switch'* Asymmetry Series 2005 (17) <http://www.queensu.ca/iigr/working/asymmetricfederalism.html> accessed 7 August 2010, page 3

[540] Tarlton's initial exposition considered the importance of asymmetry to lie with its indication of the sustainability of a federal structure. '*When diversity predominates'*, he argued, *'the "secession-potential" of the system is high and unity would require controls to overcome disruptive, centrifugal tendencies and forces*' (Tarlton (1965), page 873).

5. Conclusions: equal membership in asymmetric constitutions

The foregoing study of social citizenship rights in two constitutional asymmetries has sought to tease out the complexities of equal membership in a constitutional structure in which legislative competence is fragmented across interdependent polities. The study is focussed upon highlighting the ways in which constitutional asymmetry sits uncomfortably alongside the traditional 'national' model of membership, in which membership benefits are granted to nationals on the basis of a shared national community.

Citizenship and the nation-state

The study is premised upon the understanding of citizenship as a principle of equality, secured through a bundle of civic, political and social rights that form the substantive benefit of membership. It starts from the assumption that membership benefits have traditionally been conferred by the state, to nationals, on the basis of a shared national identity (a 'national' model of membership). In support of this assumption, chapter one of the study considered how the revival of citizenship in its modern form developed contemporaneously with the nation-state: a rise of cultural nationalism in the eighteenth century created self-conscious 'membership organisations' that asserted a democratic right of self-governance, investing the sovereign power of the state in a unified body of peoples. The solidarity and loyalty associated with the national community are credited with providing the conditions under which egalitarian membership could fully be realised, through the universalization of political rights and the grant of social rights.

Contestation of the nation

The homogeneous identity upon which a national model of membership is predicated has, however, been subject to contestation: the nation is subject to challenges 'from above' by way of globalisation and the movement of people across borders, and has been contested 'from below' by self-conscious national minorities. National membership organisations no longer map neatly onto the territorial boundaries of the

state. Such contestation problematizes the national model of membership, raising the question of how membership based upon a singular national identity can meet the demands of a liberal theory of citizenship. In particular, it has raised the question of the obligation of states towards resident non-nationals, and has generated criticism that national models of membership afford insufficient recognition of and protection to minority cultures.

In chapter one it is suggested that much of modern citizenship scholarship can be understood as an endeavour to reconfigure the bounds of equal membership in terms of balance between rights, status and identity, so as better to meet the demands of social justice. Some have defended the use of formal status as a means by which to allocate rights, claiming that the nation is not only a practical necessity of the modern political order, but also is of intrinsic value in sustaining a common solidarity necessary for the operation of democracy and to sustain the re-distributive functions of the welfare state. Theorists such as David Miller have thus sought to reconcile a national model of membership with the demands of liberal theory by realigning national identity along a 'civic' axis: a common national identity is sustained through a shared civic status rather than through common culture or ethnicity, thus preserving the integrity and significance of national boundaries but rendering them permeable enough to admit resident non-nationals through naturalisation.

Other theorists have suggested a reconfiguration of national membership in such a way as retains the significance of formal membership, but which disputes the necessity of a singular cultural loyalty: Rainer Bauböck's theory of 'transnational citizenship' argues that the dual loyalties engendered by transnational migration eschew the exclusivity of national identity in favour of multiple and overlapping identities, whilst theories of differentiated or 'multicultural citizenship' argue towards the protection of minority cultures through group differentiated rights. A third group of theorists argue that the nation no longer constitutes the necessary foundation for egalitarian citizenship, and that liberal democratic citizenship can be sustained on grounds other than the loyalty fostered by a common culture. Such theorists reject the presumption that membership benefits ought to be allocated to nationals on the basis of a shared national identity: Yasmin Soysal's model of 'postnational citizenship' has observed that membership benefits are increasingly

allocated on the basis of a universal status of personhood, whereas Dora Kostakopoulou's 'a-national' model of membership has suggested a revised institutional design whereby membership benefits attach to a person's domicile, rather than to their nationality.

Contestation of the State

The review of citizenship theory in chapter one highlighted the emergence of a body of literature devoted to the potential inequity resulting when a national model of membership is applied to a heterogeneous state population. What has received much less attention is the way in which national membership is further problematized by the disaggregation of state sovereignty. The assumption made by many reconfigurations of national citizenship is that whilst the significance of the nation may shift, the state remains the dominant organisational framework within which membership benefits are distributed. Yet such an assumption is no longer necessarily true. Discussion in chapter two has demonstrated that contestation of the nation is intimately bound up with a shifting constitutional landscape: claims to self-governance asserted by national minorities have been accommodated through the devolution of competence to sub-state legislatures, and (in a reversal of causality) competences transferred to European Union have been underpinned by attempts to strengthen a common European identity. In this revised constitutional landscape, the organisation of certain membership benefits – notably social rights – has been transferred away from the state, and is delivered through alternative institutional frameworks below the level of the state.

The development of sub- and supra-state polities has been addressed in citizenship literature primarily in terms of the capacity of those polities to foster loyalties and solidarities capable of sustaining alternative locations of citizenship. Little attention has been paid to the basis on which membership benefits are allocated within this revised constitutional landscape, or the way in which non-state polities meet the demands of social justice by extending (or withholding) the rights that they provide. In contrast to the large volume of literature addressing the way in which states allocate membership benefits in response to challenges to national identity, there has been very little consideration of the way in which membership benefits

granted by non-state polities map onto the nested identities with which they are associated.

The concept of constitutional asymmetry – by which is meant both *de facto* variations in the underlying social and political fabric of the polities, and *de iure* variations in the scope of competences enjoyed by those polities – is used within this study as a means by which to represent the web of constitutional relations that characterise this shifting landscape. Such variation may occur between constituent territorial units (horizontal asymmetry), between a constituent unit and the polity as a whole (vertical asymmetry) and – in the case of England in the UK – between a constituent unit and non-devolved territory (diagonal asymmetry).

The conundrum of how to balance rights, status and identity in order to meet the demands of social justice is replicated across multiple and nested polities of a constitutional asymmetry, introducing a secondary tension into membership definition: not only must non-state polities determine the basis on which they extend or withdraw the rights under their control, but they do so in a context in which the demands of social justice in one polity diverge from that of another in which they are nested.

Constitutional asymmetry and the fragmentation of membership competences

Chapter two embarked upon the task of untangling the implications of constitutional asymmetry for membership definition, by mapping the fragmentation of legislative competences determinative of social membership across two asymmetric constitutions. It presented a threefold classification of 'membership competences' that collectively are determinative of an individual's access to substantive membership benefits: the competence to provide social goods and services (by which it is meant the competence to determine the level of benefit available, and the administrative responsibility to deliver it); the competence to allocate social goods and services (referring to the ability of a polity to include or exclude a particular group of persons from receipt of those goods); and the competence to determine access to social goods and services (through control of residence and nationality as 'gateways' to receipt of social rights).

The chapter examined the *de facto* asymmetries in culture and wealth between sub-state polities and the state (and between sub-state polities themselves) that have driven claims for increased autonomy, and mapped the resulting vertical and horizontal variations in competence across those structures.

Devolution of legislative competence in certain fields of social policy has meant that the competence to provide social goods and services – traditionally the preserve of the state – is now enjoyed by both the state and sub-state polities. Certain aspects of social welfare have been devolved to sub-state polities in the UK and Spain (namely competence in the fields of education, healthcare, social care and housing) whereas others (namely social security) remain organised at the level of the state. In both Spain and the UK, sub-state welfare provision is funded primarily through centrally-collected taxes by way of block grant, thus preserving 'redistributive' function of state and helping to retain its territorial integrity.

Competence to allocate welfare is not, however, the sole preserve of those polities responsible for its delivery: the right of equality bestowed upon certain persons under EU law demands that the state and sub-state polities make available the goods that they provide to certain persons on equal terms as they do to their own members. Goods that are provided at the sub-state and state level and which are funded by state are thus also allocated by the EU.

Finally, the membership benefits that an individual receives are determined also by controls over access to social goods and services. Control over residence and nationality, which form the 'gateways' to social citizenship, falls within the shared competence of the state and the EU. Competence to secure access to social rights is thus divorced from the competence to provide them: sub-state polities neither have control over their territorial borders, nor any capacity to confer or withdraw the status of nationality. The state has also surrendered some control in this area to the EU, and now has limited competence to restrict the right of residence enjoyed by EU Citizens and their family members (and, in so far as concerns Spain, certain other third-country nationals). Conversely, the scope of rights enjoyed under EU law is not ultimately determined within the competence of the EU, as Member State nationality provides the gateway through which an individual acquires the status of European Citizenship and the rights that flow from it.

The analysis in chapter two has illustrated two ways in which competence over membership definition in constitutional asymmetry differs from that of a sovereign state. First, it has illustrated that competence to allocate social rights is enjoyed at the sub-state, state and EU level, with the result that all of these polities adopt a position on the scope of persons entitled to benefit from the rights that they confer. Differential exercise of these competences, as is seen in the case studies in chapters three and four, contributes to the asymmetry that manifests across the constitutional structure. Secondly, the social rights that a given individual enjoys are determined by an interaction of fragmented competences to provide, to allocate, and to determine access to social rights, with the result that no one polity has exclusive control over the boundaries of social citizenship.

Constitutional asymmetry and national membership

The function of chapter two had been to demonstrate that the inclusion or exclusion of an individual from receipt of social rights is the product of multiple and interdependent decisions taken within the legislative competence of a number of polities. The purpose of the case studies in chapters three and four was to explore further the way in which these competences are exercised so as to define the boundaries of social membership, and to consider how those boundaries interact across the constitutional asymmetry. The two case studies focus upon different dimensions of the constitutional asymmetry: chapter three considers the vertical asymmetries in competence and membership definition that manifest in the EU-State relationship,, and chapter four considered the additional asymmetries that manifest between sub-state units (and, where the State legislates on behalf of a non-devolved territory, between sub-state territories and the State), and between sub-state units and the EU.

Three primary observations can be drawn from the case studies that illustrate how the fragmentation of legislative competence across a constitutional asymmetry sits uneasily with a national model of membership. First, examination of the criteria conditioning receipt of social rights illustrates that constituent polities of the constitutional asymmetries under examination do not directly condition receipt of social benefits on the basis of nationality, thus lending qualified support to a theory

of domicile-based citizenship in respect of social rights. Secondly, differentiated rights enjoyed by a particular sub-set of nationals are incompatible with the presumed equality of nationals under a national model of membership, and result in the perception of inequity and discrimination. Conversely, extension of rights to EU Citizens suggests that participation in a singular national identity is no longer determinative of the receipt of rights. Finally, the interdependence of membership competences across the constitutional asymmetry means that it is no longer possible for a polity to restrict the membership benefits that it provides purely on the basis of interests within its own control, with the result that constituent polities reactively define the boundaries of equal membership in response to the exercise of membership competences in other polities.

Criteria determinative of the allocation of social rights within the respective competences of sub-state, state and EU polities

Both case studies commenced with a consideration of the criteria according to which social rights are allocated within the respective competences of the polities under examination, indicating the balance that they draw between rights, status and identity. The case studies have shown that social rights under consideration are granted by the state primarily on the basis of an individual's residence within its territory, and are conditioned by requirements pertaining to the length of an individual's residence (in the case of minimum income contributions in the UK and Spain), and the purpose of their residence (in the case of access to higher education in the UK). Allocation of these social rights is, however, not blind to an individual's nationality, and in the UK a large number of non-nationals are excluded from accessing both minimum income allowances and the benefit of regulatory fee caps and student support by virtue of their immigration status.

Sub-state polities in both the UK and Spain have largely mirrored the external membership boundaries of the state when deliberating on the issue of inclusion of non-nationals, with the result that membership is 'nested': a person cannot receive the benefit of rights allocated from a sub-state polity without first having met the criteria of social membership of the state within which it sits. Sub-state polities also construct membership boundaries internally within the group of state members. Sub-

state polities in the UK have carved out a privileged group of state members by reference to the sub-state territory within which an individual is resident (in the case of prescription fees) or domiciled (in the case of higher education benefits). By contrast, sub-state polities in Spain have delineated the benefits of the social rights under examination purely by reference to the territorial limits within which that service is delivered.

The right of equal treatment under EU law is conferred primarily by reference to the formal status of EU Citizenship, though has progressively been extended to certain persons on the basis of their residence in a Member State (through the right of equality enjoyed by long term residents, and through the extension of social security co-ordination to third country nationals in cross border situations, and to third-country national workers resident in the territory of a Member State).

The case studies thus indicate that polities exercise their competences so as to allocate social rights primarily (though not exclusively) on the basis of residence within their territory. Both state and sub-state polities confer social rights on non-nationals, and sub-state polities have not sought to replicate a national model of membership 'writ-small', by making rights conditional upon a civic status that is demonstrative of the shared cultural membership upon which their right of self-determination is predicated. This would suggest that a national model of membership resonates less strongly in respect of social rights than it does with political rights.

Nationality remains, however, a determinative factor in the receipt of rights from all polities: EU law confers entitlement predominantly on the basis of EU Citizenship (which itself is derived from Member State nationality), and certain non-nationals are exempt from receipt of membership benefits from the UK and Scotland by virtue of their immigration status ('persons subject to immigration control' are precluded from accessing minimum income allowances in the UK, and persons who do not have indefinite leave to remain in the UK are exempt from the regulatory fee cap or student support in both the UK and Scotland). The national model of membership thus continues to assert influence over the allocation of social rights in the constitutional asymmetries under examination, as nationality remains a point of reference in the allocation of membership even for non-state polities.

Differentiated rights and 'discrimination'

The primary focus of the case studies has been upon those secondary tensions that result from the interaction of membership boundaries across the asymmetric constitutions and the extent to which they are compatible with a national model of membership. Chapter four focussed its attention upon the perceived inequity that flows from the pursuit of differential social policy by sub-state legislatures. In particular, it identified the perceptions of inequality that ensue from measures taken by sub-state polities in the UK to curtail the rights of persons accessing services in their territory who are domiciled elsewhere in the state (as seen in the de-regulation of tuition fees for 'rest of the UK' students in Scotland and Northern Ireland, and in the differential fee imposition for prescriptions cashed in Scotland and Wales), which have given rise to claims of one sub-state polity discriminating against the members of another (usually in terms of discrimination by Scotland/Wales/Northern Ireland against 'the English'). The interaction of sub-state and EU competences has also given rise to claims of discrimination in regard to other forums, notably between persons domiciled in England and migrant EU Citizens, but also between UK nationals and EU citizens on the basis of 'reverse discrimination' that privileges migrant EU citizens (and dual nationals taking advantage of 'passport movement') over UK-EU Citizens purely by reason of their nationality. The issue of differential rights and discrimination was also examined in chapter three, which considered discrimination from an EU law perspective. This case study examined the exclusion under UK law of certain EU Citizens from receipt of minimum income allowances, and the extent to which those measures are incompatible with the EU law right of non-discrimination on the grounds of nationality.

These studies of discrimination serve to illustrate an inherent tension in the definition of membership across constitutional asymmetries, in which the demands of social justice and the correlative bounds of equal membership asserted by interrelated polities are in contention with one another. Equality of EU Citizens demands that all (migrant) EU citizens are allocated social rights on the same basis of nationals of the competent Member State; equality of nationals generates an assumption of universal social rights and the ability to protect social welfare provision through the exclusion of non-nationals; and equality of minority national groups demands differentiated

social policy and the ability to exclude non-members in order to guarantee the sustainability of that differentiated policy. The perception of 'anomaly' or inequity that results from differentiated rights for a sub-set of nationals and the extension of rights to non-nationals is thus one that is informed from a nation-centric perspective: it does not necessarily mean that such differentiation is inequitable *per se*, but rather that it is incompatible with a model of membership predicated upon nationality being the dominant frame of equal membership.

Reactive definition of equal membership

Competing demands of equality have prompted state and sub-state polities to reactively define the boundaries of equal membership, so as to condition the rights that a given individual may derive by reason of his membership in another of the constituent polities.

The study of minimum income allowances in chapter three probed how the UK and Spain have taken decisions on the inclusion and exclusion of persons from social benefits in response to the conferral of rights under EU law. The chapter demonstrated that rights derived under EU law widen the scope of persons entitled to access benefits provided by the state: the right of residence enjoyed by persons under EU law increases the volume of persons that are entitled to receive social benefits from the State by virtue of their residence, and the right of equality conferred under EU law allows certain third-country nationals to access social rights who would otherwise be exempt by virtue of their immigration status.

In response to these developments, both the UK and Spain have reactively narrowed the bounds of equal membership in order to protect the sustainability of the welfare system. Both Spain and the UK have attempted to restrict access to social rights through control over an individual's residence – primarily through tightening administrative controls in order give full affect to the leeway afforded to Member States under EU law (as illustrated by recent legislative reforms in Spain), and also indirectly through control over access to the labour market (as illustrated by the transitory restrictions imposed on Bulgarians and Romanians). Moreover, the UK has narrowed the allocation of social rights, exempting from their benefit persons exercising particular rights of residence under EU law (namely persons exercising an

unconditional three-month right of residence under EU law, jobseekers exercising an extended right of residence under EU law, and carers of dependent UK nationals).

Reactivity of membership definition has also been identified in the relationship between the state and sub-state polities in the case study on differential fee imposition in chapter four. Study of the boundaries of social rights conferred by sub-state polities in the UK has demonstrated that Scotland has reactively narrowed the boundaries of equal membership in so far as concerns access to higher education, in response to significant divergence in social policy between sub-state units. Policy divergence has also prompted reactive membership definition from other constituent polities of the UK, albeit in a non-regulatory form: perceptions of disadvantage within England have prompted a wave of public resentment that some policy analysts fear will undermine the future of the Union.

Reactive definition of membership in Scotland is largely a response to fears over 'welfare-migration', a fear that is exacerbated by the lack of control that those polities providing (and funding) social rights have over the 'gateways' through which they are accessed. Whilst both the logic and empirical reality of welfare migration have been called into question, the perception thereof is sufficient to provoke a restriction in the boundaries of equal membership. The 'problem' of welfare migration thus lies not so much in its impact upon the social welfare systems of receiving states, but rather in the curtailment of equal membership that it engenders. In one sense, then, the reactivity of membership boundaries between polities of the constitutional asymmetry has witnessed a return to a national model of membership, to the extent that measures enacted within the competence of the state have attempted to privilege nationals over non-nationals (as was seen in the UK context by the introduction of the 'right to reside' test that exempts certain categories of EU Citizens and their family members from receipt of minimum income allowances). It has also driven the reactive exercise of sub-state competence to construct more restrictive boundaries within a group of nationals. In the broader perspective, the reactivity of membership boundaries thus suggests that constitutional asymmetry sits uneasily alongside a presumption that membership benefits are allocated primarily on the basis of national interest.

Constitutional asymmetry and the reconfiguration of membership

The study of allocation of social rights across the constituent polities of two asymmetric constitutions illustrates the additional challenge that the disaggregation of sovereignty presents to the definition of equal membership: not only is the national model of membership subject to contestation by reason of multiple identities, but is also subject to challenge by reason of the fragmentation of membership competences across nested polities. The transfer of membership competences away from the state has resulted in perceptions of 'discrimination' and inequality amongst nationals, and the interdependence of membership competences has encouraged polities at all levels to reactively define the bounds of equal membership in such a way as protects equality of alternative identity groupings.

What, then, does the future hold for citizenship in asymmetric constitutions? On the one hand, the reactive definition of polity membership – which invokes within a sub-state context the logic of closed boundaries previously associated with the nation-state – and the perception of inequality that ensues therefrom, may prove too destructive a force to overcome. In this scenario, the tensions inherent in membership definition within asymmetric constitutions contribute to the 'centrifugal forces' that Charles Tarlton envisaged would destabilize the constitutional framework and increase the 'secession-potential' of the constituent units.[541] Other theorists have noted the process of 'catch up' that ensues from enhanced autonomy and claims to independence, and many fear that a vote for independence in the forthcoming Scottish referendum would not only fuel other secessionist claims within the UK (as, for example, have recently been floated in Shetland, Orkney and the Western Isles),[542] but also for other sub-state units in Europe.[543] We might thus

[541] Tarlton's initial exposition considered the importance of asymmetry to lie with its indication of the sustainability of a federal structure. '*When diversity predominates'*, he argued, *'the "secession-potential" of the system is high and unity would require controls to overcome disruptive, centrifugal tendencies and forces*' (ibid, page 873; see further above at n.102). See also John Roberts, who argues that devolution will '*diminish the sense of, and importance of, shared and common interests that are at the heart of a national political community*', such that constitutional adaptations '*become, in turn, a catalyst for new problems and further changes*' (Roberts (2005), page 3).

[542] Guardian, 'Scottish independence: islands consider their own 'home rule'' (17 March 2013) <http://www.guardian.co.uk/politics/2013/mar/17/scottish-independence-islands-home-rule> accessed 17 March 2013

conclude from these tensions that constitutional asymmetry is doomed to fail, and will invariably see a return to independent states.

This is, however, not the sole and necessary consequence of the tensions identified within this study. In an alternative scenario, we might imagine a reconfiguration of citizenship that is tied less closely to national identity, within which membership delineation does not prove as destructive a force for the constitutional structure. The function of this study has not been to furnish a revised normative model of membership, but rather to provide a conceptual groundwork upon which further studies may be built. It has sought to illuminate the tensions inherent within membership definition in asymmetric constitutions, and in doing so to flag the need for further normative and empirical work in this field. Emerging theories of citizenship developed in response to national contestation may provide the building blocks by which we might reconcile some of these differences, but this study has demonstrated the need for such theories to pay closer consideration to how membership models operate across multiplicious and interdependent polities.

[543] There has been much speculation that Scottish independence would trigger increased momentum for separatist movements elsewhere in Europe (see, e.g. Vincent Manancourt, '*Will Scottish independence cause a domino effect?'* The Journal (2013) <http://www.journal-online.co.uk/article/10321-will-scottish-independence-cause-a-domino-effect> accessed 6 March 2013).

Annex 1: Background and development of European Citizenship, 1957 - 2011

Information sourced primarily from Commission reports on Citizenship (see references in table below) and Antje Wiener, 'From Special to Specialized Rights – The Politics of Citizenship and Identity in the European Union' in Michael Hanagan and Tilly C (eds), *Extending Citizenship, Reconfiguring States* (Rowman & Littlefield 1999), in conjunction with sources cross-referenced in the various reports This time-line was produced in the course of researching the development of European Citizenship as examined in chapter two (see n.201, at page 64)

Year	Content	Title	Reference
1957	Residence for economically active	**Treaty of Rome** (then) Arts 48, 52 and 59	
1961		Council of Europe adopts European social charter	
1964		Council Directive 64/221/EEC on coordination of special measures concerning movement and residence of foreign nationals justified on grounds of public policy, security or health	
1968		Council Regulation 1612/68 on the freedom of workers within the Community	1968 OJ L 257, p.1
1968		Council Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families	1968 OJL 257, p. 13
1970	Right of retired person to remain in host MS	Commission Regulation 1251/70 (right of workers to remain)	1970 OJ L142/30
1972		Council Directive 72/194/EEC extending scope of Council Directive 64/221/EEC to workers exercising right to remain	
1973		Council Directive 73/148 on the abolition of restrictions on movement and residence within the Community for	1973 OJL 172, p.49

		nationals of a Member State with regard to establishment and the provision of services	
1974	Right of retired person to remain in host MS	Council Directive 75/34 (right of self-employed to remain)	1975 OJ L 14/20
		Council Directive 75/35/EEC extending scope of Council Directive 64/221/EEC to self-employed exercising right to remain	
1973		Copenhagen summit, 'European Identity'	Europe Documents, No. 779
1974	'Special rights of citizens'	Communique following Paris summit 10 Dec 1974	Bull. EC 12-1974
1975		Towards a citizens' Europe: Commission report on special rights	COM (75) 321 final Bull. EC Supplement 7/75, pages 26-32
1976		Tindemans' Report on special rights	Bull. EC supplement 1, 1976
1976		Council 'Act concerning the election of the representatives of the Assembly by direct universal suffrage'	OJ L 278, 8.10.76, p.1
1977		Legal Affairs Committee: '**Scelba report**'	Doc. 346/77, 25.10.1977; PE 45.833 final
1977		EP Resolution on the granting of special rights to the citizens of the European Community (adopting Scelba)	OJ C 299, 12.12.1977, p.26
1979		First elections to European Parliament	
1979	Right of residence	Commission proposal for a Council Directive on a right of residence for nationals of Member States in the territory of another Member State (not just for economically active)	COM(79)215 final; OJ C 207,p.14
1981		Council resolution on creation of single passport	OJ C 241, 19.9.81
1983		Legal affairs committee: '**Macciocchi report**'	Doc 1-121/83
1983		EP Resolution on right of MS citizens in another MS to vote and stand in municipal elections	OJ C 184, 11.7.1983, p.28.

		(in favour of formal proposal for Directive)	
1984	'A People's Europe'	Fontainebleau summit	Bull. EC 6-1984, pg 7 (see point 6 @ pg 11)
1984		A People's Europe: Implementing the Conclusions of the Fontainebleau European Council (Communication Commission – Council)	COM (84) 446 Final
1985		Pietro Adonnino report (Includes 2 documents: 1st report submitted to Brussels European Council 29-30 March 1985, 2nd report submitted to Milan European Council 28-29 June 1985)	Bull. EC supplement 7/85
1985		Council Resolution on a people's Europe	OJ C 345, 31.12.1985, p.27
1986		**Single European Act** (signed 17 February 1986, entered into force on 1 July 1987) – aim completion of internal market as area without frontiers by 1992	OJ L 169, 29.6.1987
1986	Voting rights (MS)	Commission report in voting rights in local elections (following up point 2 of Andonnio 2nd report, pp. 19-20)	Bull. EC supplement 7/86
1987	Right of Petition	Establishment of parliamentary Committee on Petitions on 1 January 1987	
1988		Proposed directive on voting rights for Community nationals in local elections in their Member State of residence (suspended in light of IGC)	OJC 246, 20.9.1988, p. 3; amended in 1989: OJC 290, 18.11.1989, p. 4
1990	Right of Residence	Council Directive 90/364/EEC on the right of residence	1990 OJ L 180, p. 26
1990		Council Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity	1990 OJ L 180, p. 28.
1990		Council Directive 90/366/EEC on the right of residence for students: Annulled in Case C-295/90 *Parliament v Council* [1992] ECR1-4193 And replaced by Directive	1990 OJ L 180, p. 30

		93/96*	
1990		Letter from Spanish Prime Minister to inter-institutional conference	SEC(90) 1084; AE No. 5252
1990		**Dublin Council 25 – 26th June**: Spanish recommendation for consideration of European Citizenship	Europe Documents No. 1628 p.2
1990		Spanish second proposal on citizenship (20 Feb)	CONF-UP 1731/91, 20.2.1991
1990		Commission contribution on citizenship to IGC	SEC(91) 500, 30.3.1991 Bull. EC Supplement 2/91 pp.85
1990		IGC on political union, Rome 14 – 15th December	
1991		Interim report on Union Citizenship, EP Committee on Institutional Affairs	PE 150.034/fin, 23.5.1991
1991		EP Resolution on Union Citizenship	OJ C 183, 15.7.1991, p.473
1991		Draft treaty on 'the Union'	Europe Documents No. 1722/1723, 5 July 1991
1991		Final report on Union Citizenship by the EP **('Bindi report')**	PE 153.099/fin, 6.11.1991
1991		Maastricht European Council 9 – 10th December	
1992	Citizenship of the Union, JHA	**Maastricht Treaty** (signed 7 February 1992, entered into force on 1 November 1993)	OJ C 191 of 29.7.1992
1992		Communication of 8 May 1992 on abolition of border controls	SEC(92)877 final (@ p.10)
		Directive 93/96/EC on right of residence for students (replacing annulled directive 90/366/EC)	OJ L 317, 18/12/1993 p.59-60
1992		Van Outrive report to EP considers residence-based citizenship as means to address issue of TCN (Second report on entry into force of Schengen Agreements, European Parliament)	A3-0336/92
1993		Guidelines for the Protection of Unrepresented EC Nationals by EC Missions in Third Countries (EPC Working	

		Group on Consular Affairs)	
1993	Voting Rights (EP)	Draft proposal for a Council directive On EP voting rights (23 June 1993)	SEC(93) 1021 final
1993		Formal proposal for a Council Directive on EP voting rights	COM(93) 534 final
1993		Council Directive 93/109 on EP voting rights (6th Dec)	OJ L 329, 30/12/1993 p.34-38
1993	Right of petition	Parliament amended Rules of Procedure (Articles 156 to 158 of the new version adopted in September 1993 (former arts 128 to 130)	
1993	COM report on citizenship	First report on citizenship	COM(93)702 final
1994		Council Directive 94/80 on municipal voting rights	OJL 368, 31/12/1994 p.38-47
1995	Consular protection	Council Decision on consular protection	OJ L 314, 28/12/1995 p.73-76
1995		Schengen Agreement (26 March 1995)	
[1996		Council of Europe amends European Social Charter]	
1996		Council decision on emergency travel document	OJ L 168, 06/07/1996 p.4-11
1996		Launch of 'Citizens' first' dialogue to increase awareness of Union rights	
1997		Treaty of Amsterdam	
1997		Report of the High Level Panel on the free movement of persons chaired by Mrs Simone Veil presented to the Commission on 18 March 1997	http://tinyurl.com/7t3nk3n (accessed 20 March 2012)
1997	Single market for benefit of all citizens	Single Market Action Plan (reconfiguration of single market agenda)	SEC(97)1 final
1997		Action plan for free movement of workers	COM/97/0586 final
1997	COM report on citizenship	Second report on citizenship	COM(97)230 final
1998	Voting Rights (EP)	Report on EP Directive	COM(97) 731 final
1999		Tampere Summit 15 and 16 October 1999	http://tinyurl.com/ykh4r2y (accessed 1 April 2012)
2000		Lisbon Summit 23 – 24 March	http://tinyurl.com/6xgtxh

		2000	(accessed 1 April 2012)
2000		Nice summit 7 – 9 Dec 2000	http://tinyurl.com/7ucgojx (accessed 2 April 2012)
2000		Communication on European Elections Directive	COM(2000) 843 final
2000		Imbeni report to EP (& resolution adopting, 5 Sep 2000)	A5-0191/2000 (OJ C 135, 5.9.2000 p.59)
2001	COM report on citizenship	Third report on citizenship	COM(2001) 506 final
2002		Council Decision 2002/772 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage	OJ L 283, 21/10/2002 p.1-4
2003		Commission report on derogations on EP voting rights	COM(2003) 31 final
2003		Communication on EP voting in enlarged Union	COM(2003) 174 final
2003		Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents	OJ L 16, 23/1/2004, p.44
2004		Directive 2004/38/EC	OJ L 158, 30/4/2004 p.77
2004		Brussels summit 4 and 5 November 2004… (presidency conclusions)	14292/1/04 REV 1
		…adopting the Hague programme	OJ C 53, 3/3/2005 p.1
2004	COM report on citizenship	Fourth report on citizenship	COM(2004) 695 final
2005		Report on derogations to right to vote and stand in municipal elections	COM(2005) 382 final
2005		'A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union' (Commission communication)	COM(2005) 389 final
2006		Commission report on the participation of European Union citizens in the Member State of residence	COM(2006)790
2006		Proposal for amendments to	

		Directive on municipal voting	
2007		Report on effective consular protection	COM(2007) 767 final
2007		Report on derogations from right to vote in EP	COM(2007) 846
2008		Report on Directive 2004/38/EC	COM(2008) 840
2008	COM report on citizenship	Fifth Report on Citizenship	COM(2008) 85
2009		Lisbon Treaty	
2009		Communication on better transposition of Directive 2004/38/EC	COM(2009)313
2009		An area of freedom, security and justice serving the citizen (Commission communication)	COM (2009) 262 final
2009		Barrosso II commission guidelines	http://tinyurl.com/y9n2teb (accessed 5 April 2012)
2010		The Stockholm Programme — an open and secure Europe serving and protecting citizens	OJ C 115, 4/5/2010 p.1
2010		EU Citizens' Rights - The way forward - Consultation on strengthening Eu citizenship	http://tinyurl.com/86fjdql (accessed 5 April 2012)
2010	COM report on citizenship 'citizenship package'	Sixth Report on citizenship: Dismantling the obstacles to EU citizens' rights	COM(2010) 602
2010	'citizenship package'	Commission report on progress towards effective EU Citizenship	COM(2010) 603
2010	'citizenship package'	Report on 2009 EP elections	COM(2010) 605
2011		Consular protection for EU citizens in third countries: State of play and way forward	COM(2011) 149/2

Annex 2: Overview of 'gateway' competences in the UK

This table refers to the 'gateway' criteria of nationality, as discussed in chapter two (see n.**Error! Bookmark not defined.**, at page **Error! Bookmark not defined.**)

	Nationality	Entry and residence
Scotland	RESERVED Scotland Act 1998, Schedule 5, Part II (specific Reservations), Head B: B6. Immigration and nationality Nationality; immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens; free movement of persons within the European Economic Area; issue of travel documents. …	RESERVED Scotland Act 1998, Schedule 5, Part II (specific Reservations), Head B: B6. Immigration and nationality Nationality; immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens; free movement of persons within the European Economic Area; issue of travel documents. …
Wales	NOT DEVOLVED [no competences transferred]	NOT DEVOLVED [no competences transferred]
Northern Ireland	EXCEPTED Northern Ireland Act 1998, Schedule 2 (Excepted Matters): 8. Nationality; immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens; free movement of persons within the European Economic Area; issue of travel documents.	EXCEPTED Northern Ireland Act 1998, Schedule 2 (Excepted Matters): 8. Nationality; immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens; free movement of persons within the European Economic Area; issue of travel documents. [BUT 'domicile' is a reserved matter under Schedule 3]

Annex 3: Legislation determinative of minimum income guarantees in the UK

This table identifies the legislation determinative of receipt of minimum income allowances in the UK (see n.357, page 105)

Primary Legislation	Secondary legislation
Immigration and Asylum Act 1999 s115	Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 (S.I. 2000/636) s 2
Social Security Contributions and Benefits Act 1992	Jobseeker's Allowance Regulations 1996 (S.I. 1996/207), Regulation 85(4) and 85A; Schedule 5
	Income Support (General) Regulations 1987 (S.I. 1987/1967), Regulation 21(3) and 21AA; Schedule 7 para. 17
	Employment and Support Allowance Regulations 2008 (S.I. 2008/794), Regulation 69, 70; Schedule 5
	Housing Benefit Regulations (S.I. 2006/ 213), Regulation 10 (read in conjunction with Social Security Contributions and Benefits Act 1992 s.130)
	Council Tax Benefit Regulations 2006 (S.I. 2006/215), Regulation 7 (read in conjunction with Social Security Contributions and Benefits Act 1992 s131(1)(b))
	State Pension Credit Regulations 2002 (S.I. 2002/1792) Regulation 2 (Read in Conjunction with State Pension Credit Act 2002 s.1)

Annex 4: Eligibility criteria for receipt of minimum income allowances in the UK

The following categories provide a consolidated summary of the eligibility criteria determinative of the receipt of minimum income allowances in the UK (as stipulated in the legislation listed in Annex 3)

In order to be eligible for receipt of 'income-related benefits' in the UK, an individual:

a) Must not be a 'Person Subject to Immigration Control', *and*

b) Must not be a 'Person from abroad'[544]

'Persons Subject to Immigration Control'

2. A person is a 'person subject to immigration control' (PSIC) if they are not an EEA national and they:

    a) require leave to enter or remain but not have it,
    b) have leave to remain that is subject to restrictions on access to public funds,
    c) have leave to enter or remain subject to a written undertaking by a third person assuming responsibility for their maintenance and accommodation, *or*
    d) have continuation of leave to enter or remain subject to an impending decision on an appeal against refusal to vary limited leave or grant asylum.

[Immigration and Asylum Act 1999, s115]

Persons from Abroad

3. Subject to the exception noted in point 6 below (persons who are not persons from abroad), a person is a 'person from abroad' if they are not ***'habitually resident'*** in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.

[544] or 'person not in the UK' for the purposes of the State Pension Credit – the two concepts are entirely the same, and 'person from abroad' will be used throughout to represent both.

4. No person will be ‘habitually resident’ unless they have a ***right to reside*** in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland. The following persons do not have a right to reside for these purposes, and therefore are ‘persons from abroad’:
    a) Persons exercising their 3 month unconditional right of residence in the UK under EU law
    b) Persons with extended right of residence in the UK under EU law who are jobseekers or the family members of jobseekers
    c) Persons with a right to reside in the UK under EU law as the primary carer of a British citizen (a ‘Zambrano’ right of residence)

[Point 5(b) does not apply for the purposes of receipt of jobseekers’ allowance]

[Jobseeker’s Allowance Regulations 1996 (S.I. 1996/207), Regulation 85A(2) and (3)
Income Support (General) Regulations 1987 (S.I. 1987/1967), Regulation 21AA(2) and (3)
Employment and Support Allowance Regulations 2008 (S.I. 2008/794), Regulation 70(2) and (3)
Housing Benefit Regulations (S.I. 2006/ 213), Regulation 10(2) and (3)
Council Tax Benefit Regulations 2006 (S.I. 2006/215), Regulation 7(2) and (3)
State Pension Credit Regulations 2002 (S.I. 2002/1792) Regulation 2(2) and (3)]

5. The following persons <u>are not</u> ‘persons from abroad’, and thus their eligibility to receive income-related benefits is secured (irrespective of their residency status):
    a) Member State national workers and self-employed persons
    b) Member State nationals who have retained the status of worker or self-employed persons because they are temporarily unable to work due to illness, or are in involuntary unemployment
    c) Family members of persons stated in (a) and (b)

d) Persons who have acquired a right of permanent residence in the UK under Art 17 Directive 2004/38/EC (Exemptions for persons no longer working in the host Member State and their family members)

e) Bulgarian or Romanian nationals who hold an accession worker authorisation document and who are working in accordance with the conditions set out in that document

[Jobseeker's Allowance Regulations 1996 (S.I. 1996/207), Regulation 85A(4)(a) – (f)
Income Support (General) Regulations 1987 (S.I. 1987/1967), Regulation 21AA(4)(a) – (f)
Employment and Support Allowance Regulations 2008 (S.I. 2008/794), Regulation 70(4)(a) – (f)
Housing Benefit Regulations (S.I. 2006/ 213), Regulation 10(3B)(a) – (f)
Council Tax Benefit Regulations 2006 (S.I. 2006/215), Regulation 7(4A)(a) – (f)
State Pension Credit Regulations 2002 (S.I. 2002/1792) Regulation 2(4)(a) – (f)]

Annex 5: EU law entitlements to minimum income allowances in the UK

The following table identifies the eligibility criteria circumscribing EU law entitlements to minimum income allowances in the UK (see chapter three, n.406, page 118)

Eligibility criteria for EU law right of equal treatment to income related benefits in the UK

Income-related benefit	Eligibility criteria for equality with British nationals
Income assessed Jobseeker's allowance	1. An individual must either be: a) **an EU Citizen** who is/has been insured in one or more Member state; *or* b) **a third-country national worker, self-employed person or student** who is/has been insured in one or more Member State and who is in a cross-border situation and 2. The individual must be (legally) **resident** in UK
Income-related employment and support allowance	
State pension credit	

Income support Housing benefit Council tax benefit Child tax credit and working tax credit	1. An individual must either be: a) **an EU Citizen** who is/has been insured in one or more Member state and who is resident in a Member State; *or* b) **a third-country national worker or self-employed person or student** who is/has been insured in one or more Member State, who is legally resident in a Member State, and is in a cross-border situation and 2. The individual must be **insured** in UK (persons who are insured in the UK by reason of their employment or establishment need not be resident there in order to be eligible to receive income-related benefits on the same grounds as British nationals, but must be (legally) resident in a second Member State)

Sources:
Regulation 883/2004
Regulation 1231/2010
Regulation 859/2003
Regulation 1408/71

Annex 6: Legislation determinative of higher education fees in the UK

The following legislation is determinative of an individual's liability for higher education tuition fees in the UK (see n.460, page **Error! Bookmark not defined.**)

UK Legislation

Action	Primary legislation	Secondary legislation
Authorisation for HEIs to charge higher fees to those without 'sufficient connection' to the UK; authorisation for Secretary of State to confine awards in connection with education to persons with 'sufficient connection' to the UK	The Education (Fees and Awards) Act 1983, s.1	Education (Fees and Awards) (England) Regulations 2007 (S.I. 2007/779), s.4; Schedule 1
Regulatory fee cap for students at HEIs in England with 'sufficient connection' to the UK	Higher Education Act 2004, s. 23, 24, 29	Higher Education (Basic Amount) (England) Regulations 2010 (S.I. 2010/3021)
		Higher Education (Higher Amount) (England) Regulations (S.I. 2010/3020)
Tuition fee loans for students at a HEI in the UK with 'sufficient connection' to the UK	Teaching and Higher Education Act 1998 s. 22	Education (Student Support) Regulations 2011 (S.I. 2011/1986)

Scottish Legislation

Action	Primary legislation	Secondary legislation
Authorisation for HEIs to charge higher fees to those without sufficient connection to Scotland	The Education (Fees and Awards) Act 1983, s.1 [Act of UK Parliament]	Education (Fees) (Scotland) Regulations 2011/389 Scottish Statutory Instrument
Specification of fees payable by those with sufficient connection to Scotland	Further and Higher Education (Scotland) Act 2005, s.9 [Act of Scottish Parliament]	Student Fees (Specification) (Scotland) Order 2011/455 s.3 Scottish Statutory Instrument
Universal and full grants for tuition fees (paid directly to HEI)	Education (Scotland) Act 1980, s73(f) Act of UK Parliament relevant provision inserted by Education (Graduate Endowment and Student Support) (Scotland) Act 2001 [Act of Scottish Parliament]	Students' Allowances (Scotland) Regulations 2007 Scottish Statutory Instrument

Annex 7: Eligibility criteria for regulatory fee cap and student support in England

Criteria consolidated from legislation noted above in Annex 6 (see chapter four, n.462 at page 137). Categories are replicated subject to variation in Scottish legislation

The following persons are eligible to benefit from a regulatory fee cap and non-means tested loan in respect of tuition fees from the UK government. They are subject to various permeations of three central conditions of eligibility, all of which operate within restrictions on immigration status:

- Ordinary residence in England/the UK on the first day of the first academic year
- Ordinary residence in the UK/EEA or Switzerland throughout the three year period prior to the first day of the first academic year…
- …other than wholly or mainly for the purpose of receiving full time education

General: persons 'settled' in the UK

1. The individual on the first day of the first academic year of the course:
    a) is ordinarily resident in the United Kingdom with no restriction on the period for which he can remain ('settled' in the UK), *and*

    b) fulfils the following residency criteria:
        i. he has been ordinarily resident in United Kingdom and Islands throughout the three year period preceding the first day of the first academic year of the course, *and*
        ii. that residence has not during any part of the three year period been wholly or mainly for the purpose of receiving full time education

1A. For the purposes of being eligible for a tuition fee loan, the individual also must be ordinarily resident in England on the first day of the first academic year of the course. A person who is ordinarily resident in England, Wales, Scotland,

Northern Ireland or the Islands, as a result of having moved from another of those areas for the purpose of undertaking the course, is considered to be ordinarily resident in the place from which the person moved.

An EU Citizen or family member ordinarily resident in the UK

2. The individual on the first day of the first academic year of the course:
    a) is either:
        i. an EU citizen who is ordinarily resident in the United Kingdom, or
        ii. a third-country national who is ordinarily resident in the United Kingdom and who has a right of permanent residence in the United Kingdom under Directive 2004/38/EC

    b) fulfils the following residency criteria:
        i. he has been ordinarily resident in United Kingdom and Islands throughout the three year period preceding the first day of the first academic year of the course, *and*
        ii. where that residence has during any part of the three year period been wholly or mainly for the purpose of receiving full time education, the individual was ordinarily resident in the territory of the EEA/Switzerland [other than the United Kingdom] immediately prior to the three year period of residence in the UK

2A. For the purposes of being eligible for a tuition fee loan, the individual must also be ordinarily resident in England on the first day of the first academic year of the course. A person who is ordinarily resident in England, Wales, Scotland, Northern Ireland or the Islands, as a result of having moved from another of those areas for the purpose of undertaking the course, is considered to be ordinarily resident in the place from which the person moved.

An EU Citizen or family member ordinarily resident in the EEA or Switzerland

3. The individual on the first day of an academic year of the course:
    a) is an EU citizen or their family member undertaking a designated course in the United Kingdom, *or*

b) fulfils the following residency criteria:

i. he has been ordinarily resident in the territory comprised of the EEA and Switzerland [other than the United Kingdom] throughout the three year period preceding the first day of the first academic year of the course

ii. that residence has not during any part of the three year period been wholly or mainly for the purpose of receiving full time education

3A. For the purposes of being eligible for a tuition fee loan, the individual must be undertaking a designated course in England

3B. For the purposes of benefiting from the regulatory fee cap, the requirement in b)(i) does not apply to family members of EU citizens where that EU citizen is either

a) a UK national who has exercised their right of residence in a second Member State, or

b) a non-UK national who has been he has been ordinarily resident in the territory comprised of the EEA and Switzerland [other than the United Kingdom] throughout the three year period preceding the first day of the first academic year of the course

A UK national who is settled in the UK and who has exercised right of free movement

4. The individual is on the first day of an academic year of the course:

a) a UK national who is ordinarily resident in the United Kingdom, who has exercised a right of residence in a second Member State, and who was ordinarily resident in the United Kingdom prior to exercising that right of residence.

b) fulfils the following residency criteria:

i. he has been ordinarily resident in the territory comprised of the EEA and Switzerland [other than the United Kingdom] throughout the three year period preceding the first day of the first academic year of the course

ii. where that residence has during any part of the three year period been wholly or mainly for the purpose of receiving full time education, the individual was ordinarily resident in the territory of the EEA/Switzerland [other than the United Kingdom] immediately prior to the three year period of residence in b(i)

4A. For the purposes of being eligible for a tuition fee loan, the individual must also be ordinarily resident in England on the first day of the first academic year of the course (and prior exercising a right of free movement). A person who is ordinarily resident in England, Wales, Scotland, Northern Ireland or the Islands, as a result of having moved from another of those areas for the purpose of undertaking the course, is considered to be ordinarily resident in the place from which the person moved.

Workers/self-employed persons

5. The individual on the first day of the first academic year of the course:

a) is ordinarily resident in the United Kingdom and is either:

i. an EEA or Swiss worker/self-employed person,

ii. the family member of an EEA or Swiss worker/self-employed person

iii. the child of an EEA, Swiss or Turkish worker, *and*

b) fulfils the following residence criteria:

i. he has been ordinarily resident in the EEA/Switzerland throughout the three year period preceding the first day of the first academic year of the course

ii. [Applies only to the child of a Swiss worker: where that residence has during any part of the three year period been wholly or mainly for the purpose of receiving full time education, the individual was ordinarily resident in the territory of the EEA/Switzerland immediately prior to the three year period of residence in b(i)]

4A. For the purposes of being eligible for a tuition fee loan, the individual must also be ordinarily resident in England on the first day of the first academic year of

the course. A person who is ordinarily resident in England, Wales, Scotland, Northern Ireland or the Islands, as a result of having moved from another of those areas for the purpose of undertaking the course, is considered to be ordinarily resident in the place from which the person moved.

4B. The requirement that the person be ordinarily resident in the United Kingdom/England on the first day of the first academic year does not apply to frontier workers and their family members.

Sources:
Higher Education Act 2004 s.23, 24 and 29
The Education (Fees and Awards) Act 1983, s.1
Education (Fees and Awards) (England) Regulations 2007 (S.I. 2007/779), s.4 and Schedule 1
Education (Student Support) Regulations 2011 (S.I. 2011/1986), s.4 and Part 2 of Schedule 1

In these conditions noted above, a person is to be treated as ordinarily resident in the qualifying area if they would have been so resident but for a period of temporary employment abroad. Purpose restrictions are also waived for these persons

Annex 8: Evolution of 'sufficient connection' with the UK test for purposes of access to higher education

The following table charts the development of the eligibility criteria identified in Annex 7:

<table>
<tr><td colspan="2">England</td></tr>
<tr><td>Principal Regulations made under 1983 Act</td><td>Amendments</td></tr>
<tr><td rowspan="6">Education (Fees and Awards) Regulations 1983
(S.I. 1983/973)</td><td>S.I. 1984/1201</td></tr>
<tr><td>S.I. 1985/1219</td></tr>
<tr><td>S.I. 1987/1364
*inclusion of EC nationals ordinarily resident in EEA</td></tr>
<tr><td>S.I. 1988/1391
*removal of 9-month residency requirement conditioning eligibility of EC workers for maintenance grant</td></tr>
<tr><td>S.I. 1991/830</td></tr>
<tr><td>S.I. 1991/1839</td></tr>
<tr><td rowspan="2">The Education (Fees and Awards) Regulations 1994
(S.I. 1994/3042)

*provision for accession of states to EEA area: residence in new member states prior to accession is considered to be residence in EEA</td><td>S.I. 1995/1241</td></tr>
<tr><td>S.I. 1996/1640
*added exceptions for the spouse of an EEA migrant worker</td></tr>
<tr><td rowspan="3">The Education (Fees and Awards) Regulations 1997
(S.I. 1997/1972)</td><td>S.I. 1998/1965</td></tr>
<tr><td>S.I. 2000/2192</td></tr>
<tr><td>S.I. 2000/2945</td></tr>
</table>

*introduced requirement of settlement	S.I. 2003/3280 *Extended to include Switzerland
	S.I. 2006/483 *re-structured Schedule to implement provisions of Directive 2004/38/EC
	S.I. 2007/1336 *exceptions for children of Turkish workers, implementing Decision 1/80
The Education (Fees and Awards) (England) Regulations 2007 (S.I. 2007/779)	S.I. 2007/2263 *Added overseas territories as qualifying residence, and designated that those who move from Islands will be ordinarily resident in the Islands
	S.I. 2011/87 *narrows category of eligible irregular migrants
	S.I. 2011/1987 *removes the requirement for non-EU family members of EU citizens to have been ordinarily resident in the EEA for the 3 years immediately preceding the start of their course, where the EU citizen has been ordinarily resident in the EEA throughout the preceding three-year period
	S.I. 2012/1653 *clarifies that 'ordinary residence' requires lawful residence

Scotland	
	Principal Regulations made under 1983 Act
UK Statutory Instruments	Education (Fees and Awards) (Scotland) Regulations (S.I. 1983/1215)
	The Education (Fees and Awards) (Scotland) Regulations 1997 (S.I. 1997/93)
Functions of the Secretary of State were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998	
Scottish Statutory Instrument	The Education (Fees and Awards) (Scotland) Regulations 2007 (S.I. 2007/152)
	Education (Fees) (Scotland) Regulations 2011 (S.I. 2011/389)

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Declaration

I declare that this thesis has been composed by me, and has not been submitted for any other degree or professional qualification

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