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# Citizenship in an independent Scotland: legal status and political implications

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

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## **Citizenship in an independent Scotland: legal status and political implications**

Jo Shaw, University of Edinburgh<sup>1</sup>

### **Abstract**

Defining citizenship status and allocating citizenship rights would be an independent Scotland's 'Who Do We Think We Are?' moment, giving concrete form to the tricky question of 'who are the Scots?'. Determining who its citizens are would be one of the main prerogatives of a newly sovereign Scottish state. Yet the questions of citizenship status and citizenship rights have received much less attention than many of the other issues which the prospect of independence raises, such as monetary matters and Scotland's economic prospects in a globalised world, defence and security, and pensions and the welfare state. Drawing on research on citizenship across Europe, especially the case of the new states of south east Europe, this paper looks at the options for citizenship in a new Scotland. It takes into account the complex history of citizenship across the United Kingdom and Ireland, and suggests that relations across these islands will be amongst the main determinants of both the initial determination of the citizenry at the moment of independence and of citizenship policy in the future.

### **Keywords:**

Citizenship, Scotland, referendum, independence, nationality, international law, dual citizenship, devolution, secession

## **1. Introduction**

Defining citizenship status and allocating citizenship rights would be an independent Scotland's 'Who Do We Think We Are?' moment, giving concrete form to the tricky question 'who are the Scots?' Determining who its citizens are would be one of the main prerogatives of a newly sovereign Scottish state. Yet the questions of citizenship status and citizenship rights have received much less attention than many of the other issues which the prospect of independence raises, such as Scotland's international relations and economic prospects in a globalised world, the currency,

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<sup>1</sup> Salvesen Chair of European Institutions, School of Law, University of Edinburgh. This paper draws on my work within the CITSEE project ([www.citsee.ed.ac.uk](http://www.citsee.ed.ac.uk)) (ERC 230239) and the EUDO Citizenship Observatory ([www.eudo-citizenship.eu](http://www.eudo-citizenship.eu)). I am especially grateful to Rainer Bauböck, Jelena Dzankic and Igor Štikš for their detailed comments on drafts of this paper, and to Anja Lansbergen, David Owen and Neil Walker for comments on specific issues. I have also benefited from the opportunity to present the paper at a number of events where I have received helpful comments and questions from other colleagues, including the 2013 IMISCOE Conference in Malmö, the St Gallen Workshop on Political Rights in an Age of Globalisation, September 2013 and the Royal Society of Edinburgh Public Discussion Seminar on Borders, Immigration and Citizenship, September 2013. Comments and questions to the author are very welcome: [jo.shaw@ed.ac.uk](mailto:jo.shaw@ed.ac.uk).

monetary union and the financial sector, as well as the thorny issues of defence and security, and pensions and the welfare state. Citizenship (described as 'nationality' in the Scotland Act) may be a reserved matter under the current devolution arrangements for Scotland in the United Kingdom (along with immigration and asylum),<sup>2</sup> but the fact that something is a reserved matter has not hitherto precluded lively discussion in many other areas. Yet in public debate and in commentaries on independence, the question of who might be the citizens of an independent Scotland and what that might then mean has received only superficial attention.

What would it mean to define citizenship status? Substantively, any new state must make certain choices about defining the new citizenry *ab initio* (who are the new Scottish citizens?) and then determining – for the future – under what conditions and with what processes citizenship is acquired both at birth and after birth, as well as lost (or removed). These are citizenship rules and they are often to be found both in national constitutions and in national citizenship legislation and administrative measures. These are opportunities for an independent Scotland to define itself as similar to or distinct from rUK<sup>3</sup> in citizenship terms. These rules will need to be read together with the approach taken in any future rUK legislation to British citizens resident in Scotland and therefore no longer resident in rUK and to British citizens born in Scotland but now resident outside the UK, matters upon which there may perhaps be agreements between rUK and Scotland. Together these dispositions will determine the citizenship status of most of the 5.3m residents in Scotland (2012 ONS estimates) after independence, subject to *caveats* surrounding the following groups:

- In 2012, it was estimated that there were 285,000 persons with non-UK nationality living in Scotland (with the numbers of people who were non-UK born estimated at around 375,000).<sup>4</sup>
- Of the UK citizens living in Scotland, it is estimated that around 450,000 were born in England, Northern Ireland or Wales.<sup>5</sup>
- Meanwhile, 850,000 persons born in Scotland live elsewhere in the UK<sup>6</sup> and perhaps a further 200,000 persons born in Scotland live outside the UK.<sup>7</sup> Together these figures indicate that around 20 per cent of the Scottish-born

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<sup>2</sup> Scotland Act 1998, schedule 5, section B6.

<sup>3</sup> Throughout this paper, I use the term 'rUK' rather than just 'UK' to designate the rest of the UK as a state, once Scotland has separated. References to 'UK' are references to the current union state.

<sup>4</sup> C. Vargas-Silva, 'Migrants in Scotland: An Overview', *Migration Observatory briefing*, COMPAS, University of Oxford, UK, September 2013, <http://migrationobservatory.ox.ac.uk/projects/scotland>. The figures are based on the 2012 ONS survey.

<sup>5</sup> *Scotland Analysis: Devolution and the implications of Scottish Independence*, Cm 8544, 2013, at 20.

<sup>6</sup> *Ibid.*

<sup>7</sup> J. Carr and L. Cavanagh, *Scotland's Diaspora and Overseas-Born Population*, Scottish Government Social Research, Edinburgh, 2009. These figures are based on 2001 census figures for destination countries, or sometimes even older figures.

population is not resident in Scotland, which would represent a very high figure for a state.

- It is clear from these figures, and from well-known historical patterns of migration, that very large numbers of persons inside and outside the UK must be able to claim a first, second or more distant generational connection with Scotland through parents or ancestors born in the territory, or with long residence in the territory.

Taking both the importance of citizenship and the scale of the task reflected by the figures above as givens, this paper sets out to accomplish two tasks. The first is the descriptive task of setting out the options for Scottish citizenship as a new state. Here we can try to draw on previous experience of the establishment of new state citizenship regimes, including those in the successor states of the former Yugoslavia and Czechoslovakia. That said, the unique character of Scotland's putative separation from the rest of the United Kingdom needs to be emphasised, especially the care that has been taken throughout the process to foster the democratic character of any decisions about Scotland's future. The second task is to contextualise and frame the presentation of Scotland's putative citizenship regime, by considering how the definition of citizenship status, especially for a new state, is linked to much larger questions about the nature of the polity. One vital question is that of democratic participation and especially voting rights (who can vote for what, when and why?). Here three key questions arise:

- Who can vote in the referendum on 18 September 2014, a matter settled by legislation?
- Who would be able to vote in a first Scottish general election (planned for May 2016 in the event of a 'yes' vote with independence following in less than two years after the referendum)?
- And who might participate – and how – in any constitutional convention to prepare a long term written constitution for Scotland, as envisaged by a February 2013 Scottish Government paper on *Scotland's Future: from the Referendum to Independence and a Written Constitution?*<sup>8</sup> To what extent might this convention contain participation from groups that may not be able to vote in the election (e.g. resident non-citizens or external citizens or diaspora groups)?

We should also bear in mind how citizenship may be used both to distinguish an independent Scotland from rUK and also to emphasise commonalities across this proposed state break-up. We will return to the challenges posed for Scotland and rUK by this 'soft secession' approach at the end of the paper.

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<sup>8</sup> Available at <http://www.scotland.gov.uk/Publications/2013/02/8079/0>.

## 2. What do we know about citizenship in an independent Scotland?

The Scottish Government has said little publicly about citizenship. Short general comments can be found in the *National Conversation* documents. These were issued during the first minority SNP government, in 2009, prior to the firm decision to call a referendum, which came after the election in 2011. They thus belong to the first preparatory period of debate on independence and are unsurprisingly broad brush in approach. We can find, for instance, a short comment picking up on responses to a question in the consultation process asking 'who will qualify for Scottish citizenship should/when it becomes independent?' According to the Government in its White Paper *Your Scotland. Your Voice*<sup>9</sup>:

Citizenship in an independent Scotland will be based upon an inclusive model. Many people in Scotland have ties to the rest of the United Kingdom, including familial, social and economic connections. An independent Scotland could recognise the complex shared history of Scotland and the United Kingdom by offering shared or dual citizenship. As a member of the European Union, Scottish citizens would have free access across Europe.

A little more detail can be found in a related document on *Europe and Foreign Affairs*.<sup>10</sup> It argues that:

It is important that people can identify with the community in which they live and that they feel valued and part of Scottish society. Citizenship in Scotland would be based on an inclusive model designed to support economic growth, integration and promotion of diversity. Given Scotland's close ties to the other parts of the British Isles a positive approach to dual citizenship would be essential; and given the existence of EU citizenship consideration could also be given to the creation of enhanced citizenship arrangements with the nations of the rUK.

The key points in these short texts are the following:

- There are references to 'an inclusive model' (although inclusion of what or whom is left unclear);
- links are drawn between citizenship status and immigration (through the reference to integration) and minority protection issues (through the reference to diversity), as well as economic prosperity;

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<sup>9</sup> Scottish Government, *Your Scotland. Your Voice. A National Conversation*, Edinburgh 2009 <http://www.scotland.gov.uk/Publications/2009/11/26155932/0>, November 2009, at 135 (para. 8.22).

<sup>10</sup> Scottish Government, *Europe and Foreign Affairs. Taking Forward our National Conversation*, Edinburgh, 2009, <http://www.scotland.gov.uk/Resource/Doc/283886/0086022.pdf>, at 24-25 (para. 5.13).

- the continuing relevance for citizenship after independence of relationships (and shared histories) across these islands because of family ties is acknowledged and it is proposed to respond to these through dual citizenship and something called ‘shared citizenship’; and
- reference is made to the possibility of using EU citizenship as a model to build ‘enhanced’ citizenship arrangements with the rUK.

The next paragraph of *Europe and Foreign Affairs* re-emphasises the immigration/citizenship nexus, stating that Scotland would encourage non-EEA migrants to seek Scottish citizenship. This suggests that the vision of inclusion is one which focuses on the importance of residence as the basis for a link with the territory and its legal form, the state. It suggests also that in post-independence Scotland long-term residence – in accordance with accepted notions of what constitute ‘liberal’ citizenship policies<sup>11</sup> – should normally lead to the acquisition of citizenship by those who have made their home in Scotland, without too many obstacles (fees, tests, income requirements, probity and residence qualifications) being placed in their way. This focus on residence receives further support from the approach taken to the franchise for the referendum.<sup>12</sup> The franchise, based on the local government and Scottish Parliament electoral register with the addition of 16 and 17 year olds, is entirely residence-based and rejects the voting claims of non-resident ‘Scots’, whether they reside in the rest of the UK or elsewhere in the world, however recently they departed and however they claim to be ‘Scottish’ (by descent, prior residence or birth).

On the other hand, the citizenship claims of non-resident Scots seem to be receiving a stronger welcome than their right to vote in the referendum, although so far we have only informal indications of what this might involve. First Minister Alex Salmond, delivering a speech at the beginning of 2013, spoke of a different sort of ‘inclusion’ – an ethno-cultural version. He held out the possibility of the acquisition of citizenship based on descent for non-resident Scots, matching the current Irish approach.<sup>13</sup> The latter makes it easy for citizenship to be handed on at least up to the grandchildren of those born in Ireland, although for subsequent generations this becomes more complex because of registration requirements.<sup>14</sup>

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<sup>11</sup> E.g. J. Carens, *Immigrants and the Right to Stay*, Cambridge: MIT Press, 2010; J. Seglow, ‘Arguments for Naturalisation’, (2009) 57 *Political Studies* 788-804.

<sup>12</sup> See below at 76.

<sup>13</sup> ‘Salmond: SNP favours Irish-style citizenship after independence’, *The Herald*, 17 January 2013, <http://www.heraldscotland.com/news/home-news/salmond-snp-favours-irish-style-citizenship-after-independence.1358446515>.

<sup>14</sup> On the Irish case, see in brief the Written Evidence of Professor Bernard Ryan to the Scottish Affairs Select Committee, 29 August 2012, <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmsscotaf/139/139we02.htm> and at greater length, J. Handoll, *EUDO Citizenship Observatory. Country Report: Ireland*, October 2012, [www.eudo-citizenship.eu](http://www.eudo-citizenship.eu), especially at 10.



More recently, the Scottish Government paper of February 2013 on *Scotland's Future: from the Referendum to Independence and a Written Constitution* was significant for its commitment to the idea of an independent Scotland adopting a written constitution, but this would be under the guidance of the first Scottish parliament in the independent state. A 'constitutional platform' would be designed to take Scotland forward from a 'yes' vote in the referendum via independence day to the first election day. But the document provides no further guidance on the content of citizenship or citizenship rights in the sense of who might vote.<sup>15</sup>

Nor can we look to academic writings or other sources to fill the gaps.<sup>16</sup> An evidence session before the Scottish Affairs Select Committee of the House of Commons on 5 September 2012 in which this author and Professor Bernard Ryan were the witnesses did assist in clarifying some of the issues<sup>17</sup> and provoked a limited amount of press reflection,<sup>18</sup> and there have been a number of recent events addressing the issue, often in conjunction with questions about borders and immigration to which the topic of citizenship is linked, but not in every respect related.<sup>19</sup> Looking further back, we can find the SNP's draft constitutional text of 2002, prepared by the late Professor Sir Neil MacCormick, which focuses heavily on residence in Scotland and does not place conditions such as the prior holding of British citizenship.<sup>20</sup> In what appears to be a throwback to an earlier age, the 'Model

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<sup>15</sup> *Scotland's Future*, above n.8 at para. 2.14.

<sup>16</sup> A brief note has been issued as part of the Migration Observatory project on Scotland (<http://migrationobservatory.ox.ac.uk/projects/scotland>): J. Gallagher, 'Citizenship, Borders and Migration in an Independent Scotland', Migration Observatory Policy Primer, September 2012, <http://migrationobservatory.ox.ac.uk/policy-primers/citizenship-borders-and-migration-independent-scotland>. While helpful guidance on many future legal issues for an independent Scotland is provided by a Law Society of Scotland discussion paper compiled by the Society's Scotland's Constitutional Future Working Group with the assistance of stakeholder meetings: *Scotland's Constitutional Future: Views, opinions and questions*, August 2013, <http://www.lawsocot.org.uk/members/independence-referendum-2014>, very little assistance is given to help us understand the citizenship issues. In an appendix to that paper, reference is simply made to the brief 'National Conversation' statement quoted at the beginning of this paper, with the comment (at 19) that 'This is an area where negotiations with the UK would be necessary to give clarity to a number of issues including: dual nationality; reciprocal rights, e.g. such as voting rights for non-citizens – compare Irish citizen voting rights; and the status of non-EU citizens who have been granted leave to remain.'

<sup>17</sup> Oral evidence can be found here:

<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmsscotaf/139/120905.htm>. For the written evidence presented to the Committee see

<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmsscotaf/139/139we04.htm> (Shaw) and

<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmsscotaf/139/139we02.htm> (Ryan).

<sup>18</sup> K. Devlin, 'Scots may choose to be British in the wake of yes vote', *The Herald*, 8 September 2012, <http://www.heraldscotland.com/politics/political-news/scots-may-choose-to-be-british-in-wake-of-yes-vote.18823542>.

<sup>19</sup> E.g. a public discussion seminar at the Royal Society of Edinburgh on 25 September 2013, [http://www.royalsoced.org.uk/1066\\_BordersImmigrationandCitizenship.html](http://www.royalsoced.org.uk/1066_BordersImmigrationandCitizenship.html).

<sup>20</sup> Available on the website of the charity Constitutional Commission, which was established in 2005 to explore possible constitutional options for Scotland whether via independence or via enhanced devolution arrangements: <http://constitutionalcommission.org/resources.php>.

Constitution’, prepared in 2011 by W. Elliot Bulmer on behalf of the charity Constitutional Convention, of which he is the Research Director, refers to British ‘subjecthood’ as a prior condition (plus either residence or birth in Scotland) as the condition for acquiring citizenship at the point of independence in a new Scotland.<sup>21</sup> And mirroring the ‘constitutional platform’ mooted by the Scottish Government in *Scotland’s Future*, the model Constitutional Platform Act 2015 drawn up to elaborate on these ideas by the Constitutional Commission simply presupposes the existence of citizenship and talks about the rights that would be guaranteed, presumably as human rights which are not limited to citizens alone, and avoids the tricky topic of who can vote in any elections.

Citizenship is, therefore, one of the many topics on which the Scottish Government’s eagerly awaited White Paper of autumn 2013 will provide much needed illumination, enabling the issue of citizenship to take its place alongside the many issues which will be fully debated during the run up to the independence referendum. For citizenship is not just a technical issue, but rather one which forms an essential pillar of polity-building and, as we shall see below, is linked not only to issues of immigration policy but also to fundamental issues of democracy and political community (*inter alia* via the right to vote and to stand as a candidate). Citizenship incorporates both individual justice elements and collective community and solidarity elements.

### 3. What is citizenship?

Citizenship encompasses several key elements of status, rights and identity.<sup>22</sup> In that sense, as a descriptor of polity membership, ‘citizenship’ is much ‘thicker’ than the concept of ‘nationality’. The latter term is primarily now found in international law and – tellingly – in much of the legislation that still underpins citizenship in the UK as well as in the Scotland Act.<sup>23</sup> Something approximating to a modern notion of citizenship<sup>24</sup> was introduced into the UK, at the end of empire and the dawn of the

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<sup>21</sup> Available at <http://constitutionalcommission.org/resources.php> and elaborated in more detail at W. Elliot Bulmer, *Model Constitution for Scotland, A: Making Democracy Work in an Independent State*, Edinburgh: Luath Press, 2012.

<sup>22</sup> C. Joppke, ‘Transformation of citizenship: status, rights and identity’, (2007) 11 *Citizenship Studies* 37-48.

<sup>23</sup> Terminological usage of ‘citizenship’ and ‘nationality’ (or equivalents) is not stable across different languages: see the survey at <http://eudo-citizenship.eu/databases/citizenship-glossary/terminology>. In relation to ‘nationality’, the principal distinction is between the formal use of nationality in international law as a jurisdictional criterion, and its use to designate ethnic or ‘national’ belonging in many of the states of Central and Eastern Europe, especially those where the territory was earlier part of the Austro-Hungarian Empire where separate nationalities were recognized from the nineteenth century onwards.

<sup>24</sup> Citizenship of the United Kingdom and Colonies. For the history, background and present day details of British Citizenship, see C. Sawyer and H. Wray, *EUDO Citizenship Observatory. Country Report: United Kingdom*, November 2012, [www.eudo-citizenship.eu](http://www.eudo-citizenship.eu).

Commonwealth, by the British *Nationality Act 1948* (italics added). The first piece of UK legislation with 'citizenship' in the title was not passed until 2009 in the shape of the Borders, Citizenship and Immigration Act. Nationality is now widely understood as the externally validated legal link between the state and its nationals, or citizens. It is thus a narrower concept than 'citizenship', which contains, in comparison, many more of the key elements of polity membership such as rights and belonging, and is often understood via sociological and political frames of reference. This becomes clear when we recall that no one talks of 'nationality rights', but rather of 'citizenship rights'.<sup>25</sup> But despite being claimed by academic disciplines as diverse as sociology, economics and geography, and despite being in widespread general usage as a broad descriptor for civic responsibility and attachment ('good' citizens, 'active' citizens, etc.), citizenship still continues to retain the hard legal core, via certain documents, institutions and formal statuses, which is an irreducible minimum for all persons if they are to have the 'right to have rights'.<sup>26</sup>

The 'death' of national citizenship is often announced (i.e. the suggestion that it is becoming unimportant), but in practice it never quite seems to occur. Rights have in some respects become detached from the state as privileged protector. International human rights law is an important supplement to domestic constitutional charters of rights, and many states now routinely give most rights historically granted to citizens alone also to all those who are lawfully on the territory (e.g. many rights to welfare and often certain local rights to vote). EU law has pushed the Member States hard on this matter, including in relation to property rights where EU single market rules prohibit discrimination on grounds of nationality, as well as in relation to the rights to vote in local and European Parliamentary elections granted by the treaties to EU citizens on the basis of residence.<sup>27</sup> EU citizenship is not a new 'nationality' as such, but rather a range of rights and options which mobile EU citizens in particular can claim. As to status, long-term residence will usually offer enhanced protections against deportation, especially in conjunction with international human rights guarantees. And in nested polities such as Scotland-UK-EU, identities are often plural in character.<sup>28</sup> Thus

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<sup>25</sup> See J. Shaw and I. Štiks, 'Introduction: what do we talk about when we talk about citizenship rights?' in J. Shaw and I. Štiks (eds.), *Citizenship Rights*, Aldershot: Ashgate, 2013, xi-xxv.

<sup>26</sup> H. Arendt, *The Origins of Totalitarianism*, San Diego: Harcourt-Brace-Jovanovich, 1973 at 296.

<sup>27</sup> See generally J. Shaw, *The Transformation of Citizenship in the European Union*, Cambridge: Cambridge University Press, 2007.

<sup>28</sup> The finding of the 2011 UK census that no less than 62% of those resident in Scotland and completing the census form identified as Scottish alone (rather than British alone (9%), or Scottish and British (18%)) may be contestable in the light of the limitations of the census form. In a blog post on this issue, John Curtice highlighted the difference between this census finding and that in the Scottish and British Social Attitudes surveys, with the latter finding that no fewer than 53% per cent of those resident in Scotland identified as British (either alone or in tandem with Scottishness). He also highlighted the difference in the formulation of the questions and the approach to offering the possibility of ticking multiple boxes (much more obvious in the Social Attitudes Survey). His conclusion was that while 'the emotional glue of Britishness may not be as prevalent or as strong

increasingly the boundary lines between citizens and non-citizens have become blurred.

But they have not disappeared entirely. Citizenship continues to be practically and symbolically important for individuals, even in the context of EU membership, not least because the right to hold high public office<sup>29</sup> and the unconditional right to enter and remain upon the territory are in most states reserved exclusively to citizens. Joppke, for example, observes a simultaneous de-ethnicisation (in the form of rights often being given to non-citizens) and re-ethnicisation (with an increased interest in many states in external citizenship and stricter 'belonging' conditions being imposed in many states on naturalisation processes).<sup>30</sup> There is also an increasing willingness on the part of some states, including the UK, to use the possibility of deprivation of citizenship for public interest reasons often precisely in order to keep a person out of the territory. Almost all UK acts of deprivation (usually on terrorism grounds) occur when the subjects of those decisions are outside the UK.<sup>31</sup> This signals the importance of the territorial rights associated with citizenship, as does the UK's enhanced use of deportation as an additional sanction upon foreign national prisoners at the conclusion of their sentence.<sup>32</sup>

From the perspective of international law, the definition of the citizenry is essential for a new state as it delivers a stable population. In the classic definition of a state provided by Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, states need 'a) a permanent population; b) a defined territory; c)

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north of the border as many a unionist would like, but the limitations of the census seems to have left it ill equipped to detect the feelings of Britishness that do still exist': J. Curtice, 'Who do we really think we are? On national identity and the census', 27 September 2013, <http://blog.whatscotlandthinks.org/2013/09/who-do-we-really-think-we-are-on-national-identity-and-the-census/>.

<sup>29</sup> See J.-T. Arrighi, R. Bauböck, M. Collyer, D. Hutcherson, L. Khadar, M. Moraru and J. Shaw, *Franchise and Electoral Participation of Third Country Citizens residing in the European Union and of European Citizens Residing in Third Countries*, Study for the European Parliament, Committee on Constitutional Affairs, Brussels, 2013, PE 474.441, <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=94778>, Chapter 5 (FRACIT Report).

<sup>30</sup> C. Joppke, 'The inevitable lightening of citizenship', (2010) 51 *Archive Européenne de sociologie/European Journal of Sociology* 9–32.

<sup>31</sup> H. Wray, 'United Kingdom: the use of deprivation of nationality increases', EUDO Citizenship News, 4 March 2013, <http://eudo-citizenship.eu/news/citizenship-news/813-uk>; Bureau of Investigative Journalism, 'Former British citizens killed by drone strikes after passports revoked', 27 February 2013; <http://www.thebureauinvestigates.com/2013/02/27/former-british-citizens-killed-by-drone-strikes-after-passports-revoked/>; Bureau of Investigative Journalism, 'Home Secretary Strips Two More People of British Citizenship', 16 May 2013, <http://www.thebureauinvestigates.com/2013/05/16/home-secretary-strips-two-more-people-of-british-citizenship/> 'Three Court of Appeal judges have now said at a pre-appeal hearing that this appeared to be 'a deliberate exercise... Once they are out of the country, you then make jolly sure they cannot get back in.'

<sup>32</sup> M. Bosworth, 'Deportation, detention and foreign-national prisoners in England and Wales', (2011) 15 *Citizenship Studies* 583-595.

government; and d) capacity to enter into relations with the other states.’ While the controversies relating to state succession (or not), EU membership, and other international obligations for a putative independent Scotland lie beyond the scope of this paper,<sup>33</sup> the international law framework for nationality or citizenship is none the less important. International law recognises the prerogative of states to determine who are their nationals, but imposes some limitations. For example, international law, in the guise of the famous *Nottebohm* judgment of the International Court of Justice,<sup>34</sup> offers us the concept of the ‘genuine link’ as the basis for nationality, since in that case the ICJ refused to accept that Mr Nottebohm’s naturalisation in Liechtenstein amounted to a ‘real and effective nationality’. International law does recognise the right to a nationality. Article 15 of the Universal Declaration of Human Rights declares that:

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

International law provides some input both in respect of the positive obligations of best practice for citizenship that states can take on in the form of the European Convention on Nationality of 1997 (especially its guarantee of non-discrimination),<sup>35</sup> and in respect of the negative obligation of avoiding statelessness. For the latter case, the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession<sup>36</sup> is the most relevant and recent document, clearly elaborated under the shadow of the problems of statelessness that occurred in the aftermath of the breakup of the former Yugoslavia. While the UK has not ratified either of these texts, they none the less contain the key international law principles that qualify the state prerogative to determine nationality questions, so far as concerns the protection of values such as human rights and non-discrimination. With Alex Salmond’s commitment that Scotland should behave as a good global citizen,<sup>37</sup> the current Scottish Government’s awareness of the broader relevance of

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<sup>33</sup> A report commissioned by the UK Government from the international lawyers James Crawford and Alan Boyle occasioned particular controversy with regard to the issues of state succession and ‘new’ states, and the implications of this for EU membership: J. Crawford and A. Boyle, *Annex A: International Law Aspects*, annexed to *Scotland Analysis: Devolution and the implications of Scottish Independence*, Cm 8544, 2013. The range of views on this highly contested issue are helpfully canvassed in T. Mullen and S. Tierney, *Scotland’s Constitutional Future. The Legal Issues*, Report of presentations made during seminars at Glasgow School of Law on 27 January 2012 and Edinburgh Centre for Constitutional Law on 16 March 2012, University of Edinburgh School of Law Research Paper 2013/16, <http://ssrn.com/abstract=2235348>, especially 35-37.

<sup>34</sup> *Liechtenstein v Guatemala (Nottebohm)* 1955 ICJ 4.

<sup>35</sup> CETS 166; <http://conventions.coe.int/Treaty/en/Treaties/Html/166.htm>.

<sup>36</sup> CETS 200; <http://conventions.coe.int/Treaty/en/Treaties/Html/200.htm>.

<sup>37</sup> A. Salmond, ‘Scotland as a Good Global Citizen’, Address to the Brookings Institution, Washington DC, 9 April 2013, <http://www.scotland.gov.uk/News/Speeches/scotland-global-citizen>. See also the

international law and international relations to citizenship issues in the widest sense, such as the relationships between citizenship and immigration, development, humanitarian and human rights questions, might suggest that some of these principles would be instantiated in a future Scottish citizenship law.

Absent state action of a constitutional or legislative character, international law would step in, since state practice – according to Crawford and Boyle<sup>38</sup> - ‘supports the view that the nationality of a population follows a change of sovereignty, subject to any particular arrangements’. To put it another way, if no other steps were taken, then the population of Scotland would simply become Scottish in citizenship terms, in the event of the creation of a new sovereign state of Scotland. But such inaction is, of course, unlikely and would leave many gaps as the increasing complexity of Scotland’s population (and its ‘diaspora’) highlight. The International Law Commission’s (non-binding) *Articles on the Nationality of Natural Persons in Relation to the Succession of States*,<sup>39</sup> also invoked by Crawford and Boyle, make provision both for states to avoid statelessness in the event of state succession and to give preference to a habitual residence test as the basis for extending their nationality or citizenship. The articles do recognize the possibility of a right of option in relation to nationality, and finally the option for the predecessor state in a situation akin to that in which Scotland and the rUK find themselves to withdraw nationality subject to principles relating to habitual residence and the respect for ‘connections’ to the predecessor state.

While the international law perspective might suggest that citizenship law is quite a technical issue, when we turn the lens internally, and start thinking politically as well as legally, the picture looks different. The internal perspective also offers us more assistance in thinking about how to deal in citizenship terms with the complex overlapping and mobile populations of territories which are the mark of democratic states like the UK (including Scotland). It is clear, as Vink and Bauböck have argued,<sup>40</sup> that citizenship laws have a number of complementary societal purposes. Perhaps the most important is the assurance of a stable population, especially through the transmission of ‘membership’ across generations, where most people acquire citizenship involuntarily at birth. But citizenship laws must also provide for the relevant degree of territorial inclusivity by setting out the terms under which long term resident immigrants and their families can become citizens. In addition, they will determine whether citizenship must be an exclusive relationship, or

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evidence of the Deputy First Minister Nicola Sturgeon to the Foreign Affairs Select Committee of the House of Commons on 28 January 2013, Minutes of Evidence, HC 643, in answer to Q224, <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmfaaff/643/130128.htm>.

<sup>38</sup> Crawford and Boyle, above n.33 at 104.

<sup>39</sup> See GA Res 55/153 (2000), a UN General Assembly Resolution to which the Articles are annexed; [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/55/153&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/55/153&Lang=E).

<sup>40</sup> M. Vink and R. Bauböck, ‘Citizenship configurations: Analysing the multiple purposes of citizenship regimes in Europe’, *Comparative European Politics* advance online publication, 17 June 2013; doi:10.1057/cep.2013.14.

whether a person may hold dual or multiple citizenships. Citizenship laws also regulate issues such as special ties to the state, or other forms of genuine link for those who have left the territory or are attached to it only by descent from a citizen born in the territory. Citizenship laws not only regulate who can *acquire* citizenship, but also who *loses* it, whether through absence from the territory, through voluntary acts of renunciation, or through involuntary acts of deprivation, e.g. decisions taken by state authorities on public interest or national security grounds.

Many states choose to embed at least some of these notions in a written constitution, linking formal concepts of citizenship or membership to broader concepts of 'the people',<sup>41</sup> and this is an approach that Scotland may follow, distinguishing itself from rUK in its embrace of a written constitution. But citizenship laws offer one of the routes by which an independent Scotland can simultaneously both distinguish itself from rUK (e.g. on the conditions it places on naturalisation, in its approach to external citizens, or in the procedures that it adopts), and also reassure new Scots of the validity of their continuing social and economic ties across these islands, as part of a tactic of postulating secession as a relatively 'soft' process in which some key aspects of life will not change, or will change little, and in which changes will come about consensually and through democratic processes. Citizenship laws would also allow Scotland one means to respond to its distinctive demographic challenges in terms of a falling population (until recently when immigration both from central and eastern EU Member States and from third countries has corrected a continuing decline in the native-born population<sup>42</sup>) and – in common with other advanced post-industrial states – an ageing population.<sup>43</sup>

Citizenship theories provide some assistance in organising our thinking about citizenship regimes. Societal factors such as patterns of immigration and emigration are amongst the historical and demographic contingencies that tend to affect the choices that states make on questions such as 'who belongs'? Questions of identity and how a nation defines itself whether by reference to ethno-cultural belonging, attachment to a particular territory or a sense of civic belonging within a pluralist and multicultural community based on residence are also important. From a normative theory perspective, the challenge is that of establishing sets of rules on both the initial determination of the citizenry and the rules of acquisition of loss which are defensible against claims that they over- or under-inclusive, or indeed arbitrary. These choices can be conceptualised using the established literatures

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<sup>41</sup> For an overview see K. Rubenstein and N. Lenagh-Maguire, 'Citizenship and the boundaries of the constitution', in T. Ginsburg and R. Dixon (eds.), *Comparative Constitutional Law*, Edward Elgar: Cheltenham, 2011, 143-169.

<sup>42</sup> For an overview see Migration Observatory Commentary, *Bordering on confusion: International Migration and Implications for Scottish Independence*, 16 September 2013, <http://migrationobservatory.ox.ac.uk/projects/scotland>.

<sup>43</sup> Scottish Parliament Finance Committee Report, *Demographic Change and an Ageing Population*, 2<sup>nd</sup> Report, 2013 (Session 4), 11 February 2013, [http://www.scottish.parliament.uk/S4\\_FinanceCommittee/Reports/fiR13-02\\_rev.pdf](http://www.scottish.parliament.uk/S4_FinanceCommittee/Reports/fiR13-02_rev.pdf)

within citizenship theory, which have postulated various normative models of citizenship which rarely precisely fit any particular national citizenship regime, but which provide guidelines on trends as well as basic principles. In recent years, the dominant models have been the variants of liberal nationalism espoused by writers such as David Miller,<sup>44</sup> the theory of affected interests associated in particular with Robert Goodin<sup>45</sup> and – in the European context – with Dora Kostakopoulou,<sup>46</sup> and the theory of ‘stakeholder’ citizenship developed by Rainer Bauböck.<sup>47</sup> Meanwhile, a further theory of transnational citizenship defended by David Owen focuses specifically on the issue of the right to vote, in particular whether external citizens should be permitted to vote in national elections.<sup>48</sup> Each of these theories takes a different view of the legitimacy of states giving preferences to certain types of insiders and outsiders, of imposing prescriptive conditions on those who arrive as immigrants in the society, of instituting various types of probity tests which might lead to the loss of citizenship in certain circumstances, and finally of giving certain rights to non-citizens as well as citizens (e.g. social and political rights).

But thinking about citizenship regimes needs to go beyond the paradigm of ‘what to do about long term resident immigrants and their families?’ which has dominated much of Anglo-American political thought on citizenship since the Second World War (i.e. the ‘receiving state’ perspective). Bauböck in particular has paid close attention to the issue of external citizenship, which is an important issue not only for so-called ‘sending states’ but also for new states, which develop or re-develop conceptions of diaspora and ethnic kin.<sup>49</sup> This has led him to develop the idea of ‘citizenship constellations’, which are structures ‘in which individuals are simultaneously linked to several such political entities, so that their legal rights and duties are determined not only by one political authority, but by several.’<sup>50</sup> This framework of analysis is useful when thinking about scenarios where it is not only individuals who are mobile, but also state boundaries. A citizenship constellations perspective reminds us that understanding citizenship in a future independent Scotland also means understanding the evolution of citizenship policies in rUK and

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<sup>44</sup> E.g. D. Miller, ‘Immigrants, Nations and Citizenship’, (2008) 16 *Journal of Political Philosophy* 371-390.

<sup>45</sup> Robert Goodin, ‘Enfranchising All Affected Interests, and Its Alternatives’, (2007) 35 *Philosophy and Public Affairs* 40-68.

<sup>46</sup> D. Kostakopoulou, ‘Why Naturalisation?’, (2003) 4 *Perspectives on European Politics and Society* 85-111.

<sup>47</sup> R. Bauböck, ‘Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting’, (2007) 75 *Fordham Law Review* 393-447; R. Bauböck, ‘Global Justice, Freedom of Movement and Democratic Citizenship’, (2009) 1 *European Journal of Sociology* 1-31.

<sup>48</sup> D. Owen, ‘Transnational citizenship and the democratic state: modes of membership and voting rights’, (2011) 14 *Critical Review of International Social and Political Philosophy* 641-663.

<sup>49</sup> R. Bauböck, ‘The rights and duties of external citizenship’, (2009) 13 *Citizenship Studies* 475-499; see also C. Dumbrava, ‘External Citizenship in EU Countries’, *Ethnic and Racial Studies*, 2013 <http://dx.doi.org/10.1080/01419870.2013.826812>.

<sup>50</sup> R. Bauböck, ‘Studying Citizenship Constellations’, (2010) 36 *Journal of Ethnic and Migration Studies* 847-859.



across these islands (i.e. also including Ireland, which itself has a citizenship regime which interlocks in many respects with that of the UK).

This paper is not limited just to mapping the possible future terrain of Scottish citizenship. It also aims to locate the issue of citizenship within the broader political landscape of debate about the independence referendum and beyond, and the meaning of independence from a broad constitutional perspective. The evidence base offered by a descriptive census of options for citizenship if Scotland is to become independent can enhance our political understanding of citizenship's place within the panoply of ideas about the future of the polity, including the ever important interface between citizenship and democracy, especially the right to vote and to stand for election and the principle of universal suffrage. This reflection drives a parallel consideration of the scope of citizenship and the right to vote throughout the two expository sections which follow (Sections 4 and 5).

Beyond the theme of electoral rights, we shall finally take a look at how citizenship fits into an independence debate in which one side – arguing for a 'yes' vote in the independence referendum – regularly chooses to highlight how little would change in the event of independence, including retention of the same head of state and the same currency, not to mention the 'social union' that binds together the people in these islands in complex configurations of affiliation and identity based on shared and divided cultures.<sup>51</sup> If this type of independence is a form of 'soft secession' (and one might question also how it might differ from a situation of so-called 'devo max' with enhanced fiscal autonomy and tax-spend responsibilities for a Scottish Parliament), how does citizenship as a status and citizenship rights, especially political rights, fit into this framing idea?

#### **4. Who is a citizen? Initial determination of citizenry and the interplay with political rights**

As noted already, a distinction needs to be drawn between the initial determination of the citizenry (along with the processes whereby that body of citizens is administratively determined e.g. through registration or opt-in arrangements) and the rules of acquisition and loss of citizenship operating after independence for new citizens born or becoming Scottish after independence. But to amplify the intimate links between citizenship and the right to vote, we can also suggest that initial determination involves two key elements:

- who votes in any referendum that might drive a process of new state formation forwards where a new citizenship is to be defined?

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<sup>51</sup> A. Salmond, 'Scotland's place in the world', Hugo Young lecture, 24 January 2012, London, <http://www.snp.org/blog/post/2012/jan/hugo-young-lecture-scotlands-place-world>: 'And I will close by making it clear that the social union which binds the people of these islands will endure long after the political union has been ended...'

- who would be defined as citizens at the moment of independence and would thus participate in the first and subsequent democratic elections (and – if these are not to be confined to citizens only – who else may be able to vote)?

As this implies, one of the tricky questions is who determines who are the citizens at the very beginning? In the absence of a state, there is no constitutionally defined '*demos*' (i.e. people) to say who are the citizens in the future, and indeed who can vote in which elections (resident citizens? non-resident citizens? resident non-citizens?). In states where a concept of citizenship has evolved over centuries (e.g. out of feudal concepts of subjecthood), the basic scope of the citizenry was established so long ago that there is no memory of this happening (and indeed it probably did not happen at a point in time when modern citizenship in its current form actually existed). Where this notion has to be thought out afresh in a new state, clear guidelines are less easy to see. Of course, the underlying citizenship regime of the UK may well be a guide to help determine rules of acquisition and loss for the future, but it is less useful for the task of initial determination. Here is one of the moments where Scotland can – if it so chooses – distinguish itself rather sharply from the rUK by making an inclusive offer to legal residents.

a) *The initial body of citizens*

For the initial determination of the citizenry, the following would be the primary menu of options against which decision-makers would settle the appropriate degree of connection with Scotland, which could be demanded for a person wishing to be a Scottish citizen:

- Birth in the territory
  - But what might be the impact of subsequent long periods of residence away and especially non-residence on the date of independence?
  - Will it matter whether that later residence is elsewhere in the UK, or outside the UK?
- Residence in the territory
  - When?
  - For how long?
  - Must it still be subsisting at the date of independence?
- Consanguinity to those born or residing in the territory?
  - How close?
  - By what means? Automatically or only on (timely) registration?
  - Across how many generations is citizenship transmitted to the children of expatriates and subject to what conditions?
- Is prior UK citizenship an underlying condition to be included in the initial body of Scottish citizens whether by birth or residence?
  - What about children who have been born in Scotland to non-UK citizen parents who have long residence (e.g. >5 years) but are still subject to

immigration control,<sup>52</sup> or indeed to parents who have arrived in the UK illegally but who have very long prior residence (e.g. >10 years)?

- Might there be special rules for recognised asylum-seekers who have arrived (but have not yet received a decision on their case) or received recognition as refugees in the years leading up to independence?
- Should either EU citizens with permanent residence or third country nationals who are settled or who have indefinite leave to remain resident in Scotland be able to acquire Scottish citizenship (either automatically or with a minimum of formalities during an initial transitional period) despite the fact that they may have chosen not to take UK citizenship whilst Scotland was part of the Union?

The precise mix of choices selected by the body empowered to fix these questions (this will be the 'constitutional platform' according to the Scottish Government's *Scotland's Future* paper<sup>53</sup>), plus any relevant transitional provisions adopted to protect those with existing residence periods served in the UK, will depend upon both principles of fairness and also a certain degree of political expediency. As noted in the introduction, the high levels of mobility between Scotland and the rest of the UK, both recently and historically (and resulting large numbers of cross-national families), as well as emigration outside the UK over many generations, means that determining the first generation of Scots will involve very tricky choices about the level of connection required. Some may become Scots automatically (although they may not necessarily wish it); for others, being Scottish citizens may be an issue of option or application. Then there are the large and increasing numbers of Scottish residents who were not born in Scotland but in a third country, not all of whom have (yet) acquired British citizenship or even the increasingly hard to achieve status of indefinite leave to remain. Will Scotland want to make a generous offer to this group in order to kickstart its immigration policies, and if so might rUK object on the grounds that once Scottish citizenship has been granted this group will then effectively obtain the right to migrate to and work within the rUK (either by virtue of special arrangements made between Scotland and rUK akin to Ireland and UK, or by virtue of EU free movement rules)? Deflection effects, or side effects, from generous citizenship acquisition rules have been documented in a number of contexts. Approximately 10% of those immigrants who acquire citizenship in Canada leave again – mainly for the US. Citizenship is treated

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<sup>52</sup> S1(1) of the British Nationality Act 1981 as amended confers a conditional *ius soli* right on children born in the UK, provided one parent is a British citizen, or is 'settled' (i.e. no longer subject to immigration control). Those whose parents are not settled would not obtain citizenship automatically at birth, but would have the right to register as citizens once they reached the age of 10 (s1(4) BNA) (or naturalise once no longer minors). For such groups, absent an immediate offer of citizenship, transitional provisions would be needed to allowed 'time served' before independence to count also for the purposes acquiring citizenship at a later stage.

<sup>53</sup> See above at n.15.

as a good which allows easier circulation into the US labour market.<sup>54</sup> Italy's energetic promotion of external citizenship, especially in Latin America, has resulted in strategic use of these laws for the purposes of acquiring mobility within the EU labour market, or even to obtain easier access to the US via visa waiver arrangements.<sup>55</sup>

What guides can we find to help us understand new state citizenship? Much of the recent literature on citizenship in new states has been written under the shadow of the end of the Cold War, and the assumption that the creation of new states in Europe after 1989 (e.g. through the dissolution of Yugoslavia, the break up of the Soviet Union or the splitting of Czechoslovakia) was driven by newly resurgent and primarily 'ethnic' nationalisms, assumed to find their particular place in central and eastern Europe, and less so in the west of the continent. Of course, the picture is never as simple as that because such nationalisms do not somehow arise 'naturally' or pre-politically, but rather are forged and re-forged in a crucible of political processes in which the actions of political elites in particular to safeguard their own political power are often the crucial elements. Rogers Brubaker was one of the few writers to realise the significance of citizenship policies in the context of the new states that emerged, for example, after the break up of the Soviet Union, and for that context he devised a three-way model that others have used, with some success, to illuminate citizenship policies in other new state contexts.<sup>56</sup>

Brubaker distinguished between a 'zero option' model, where citizenship was given to all permanent residents at the moment of independence (very widely used, e.g. in the Ukraine, Russia, Belarussia and the republics of Central Asia), a 'restored state' model predominantly used in the Baltic states of Estonia and Latvia to recognise a historic statehood and a 'mixed' model drawing on elements of each (used, for example, in Lithuania). In fact, Brubaker's concentration on the Soviet Union led him to miss a fourth model of citizenship in new states, evident in the breakup of Czechoslovakia and the dissolution of Yugoslavia, namely the 'federal upgrading model' where a previous 'republican' or 'provincial' citizenship was upgraded to a state citizenship at the moment of independence, giving a different baseline for the first cut of new state citizens. The main problem, in all these cases, was what to do about those who were 'citizens' of (or originated in) another part of the state that has now dissolved. In the absence of immigration into the Soviet Union during the Cold War, the issue of what to do about permanent resident non-citizens, which is bound to arise wherever immigration has occurred on a relatively large scale, did not in fact arise. The permanent residents were, by and large, fellow former Soviet citizens, as was also the case in the former Yugoslavia. Moreover, as Oxana

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<sup>54</sup> D. DeVoretz, *Immigrant Circulation and Citizenship: Hotel Canada?*, IZA Discussion Paper No. 4312, July 2009.

<sup>55</sup> G. Tintori, 'The Transnational Political Practices of "Latin American Italians"', (2011) 49 *International Migration* 168-188.

<sup>56</sup> R. Brubaker, 'Citizenship Struggles in Soviet Successor States', (1992) 26 *International Migration Review* 269-291.

Shevel has demonstrated in subsequent research,<sup>57</sup> the fact that many former Soviet states used the zero option did not mean in practice that those states' citizenship laws were somehow purely 'civic' in nature. In fact, the majority of those states using the zero option *also* offered citizenship on preferential grounds to so-called 'co-ethnics' including those outside the territory. As Shevel observes,

the politics of national identity (defined as contestation between citizenship policymaking elites over the question of the nation's boundaries) is a particularly important source of citizenship policies in new states.

It is also possible to see how a citizenship law designed to be civic in every way, such as the citizenship regime of Kosovo, can operate in practice in such a way as to strengthen the ethnic majority and create a stratified and differentiated framework of citizenship.<sup>58</sup>

Of course, all these examples from new states in south eastern, central and eastern Europe and elsewhere in the former Soviet Union should be treated with caution when it comes to the case of Scotland. None the less, we can see parallels in the pressure already placed on the Scottish Government to recognise the stake of 'Scots' in their homeland. We can therefore expect it to see pressures for some elements of citizenship policy-making explicitly to recognise affinities, e.g. with co-ethnics abroad. This may prove to be the case with Scotland, if Salmond's speech about non-resident Scots accessing Scottish citizenship based on some connection to Scotland leads to policy outcomes in the future. Given the grumbles amongst some non-resident Scots about not being able to vote in the independence referendum,<sup>59</sup> this is a classic move by a political leader, using identity issues in order to keep these groups onside at a crucial time during the pre-referendum debate. But at the same time, clearly there will be continued contestation within Scotland, across the rUK, and more broadly wherever there are communities which believe that they have a stake in Scotland – whether as independent or as part of the United Kingdom – about what it means to be 'Scottish'. All of this may well mean that the question of who belongs may take some time to be settled in a manner that gains widespread consent, and could lead to citizenship regime changes in the future as a result of external pressures.

The experience of the new and generally rather small states established in the wake of the break up of Yugoslavia from 1991 onwards has shown that political elites

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<sup>57</sup> O. Shevel, 'The Politics of Citizenship Policy in New States', (2009) 41 *Comparative Politics* 273-291.

<sup>58</sup> G. Krasniqi, 'Equal citizens, uneven 'communities': differentiated and hierarchical citizenship in Kosovo', CITSEE Working Paper 2013/27, <http://www.citsee.ed.ac.uk>.

<sup>59</sup> See A. Miller, 'Let us Scottish 'expats' vote on independence,' *The Guardian*, 2 July 2013, <http://www.theguardian.com/commentisfree/2013/jul/02/scots-scotland-vote-on-independence>, which is a mild plea for expatriate voting rights in relation to the referendum for just five years, focused on a recent generation of jobless graduates who have moved to England to look for work (see also <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-16607480>).

may manipulate the rules of acquisition and loss, and consequential political and socio-economic rights attached to citizenship, in problematic ways both at the point of independence and many years after a state is first established. As a preliminary point it is important to know that in all the former Yugoslav states in the new post-Yugoslav state(s)<sup>60</sup> except Kosovo,<sup>61</sup> the initial body of citizens was largely defined on the basis of the 'republican' citizenship held by all citizens of Socialist Federal Republic of Yugoslavia (SFRY), in addition to their federal citizenship. This arrangement had its own problems because the citizens' registers, from the 1980s and before, on which the registers of citizens in the new states were based were sometimes incomplete and inaccurate. When citizens migrated internally within Yugoslavia, the registers were not updated.<sup>62</sup> As a result, when Yugoslavia broke up many citizens found themselves resident in states other than the one of which they were a republican citizen, and found it hard to access citizenship in their state of residence. While this precise scenario will not occur in Scotland, because of the absence of a sub-UK form of citizenship (except in a 'social' sense because of asymmetric patterns of welfare state rights<sup>63</sup>) the experience of several of the successor states where certain often vulnerable groups, such as Roma, found it hard to access citizenship reminds us that oftentimes in these circumstances it is the administrative arrangements and the accessibility of bureaucratic processes that is as important as the formal legislative rules. The example of the 'erased' in Slovenia, primarily citizens of other Yugoslav republics who did not obtain Slovenian citizenship under the relatively broad arrangements put in place on Slovenian independence in 1992 but who were then removed even from the register of permanent aliens by the administration,<sup>64</sup> is one that should be avoided at all costs in a future independent Scotland, via arrangements that take full account of the vulnerable within society as well as those who would be comfortable navigating the inevitable bureaucratic steps in a new state.

Citizenship is not – as the concept of citizenship constellations has shown us – a legal framework which exists in the walled garden of one state alone. There are

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<sup>60</sup> In some cases there have been successive dissolutions and state formations. Details of citizenship policies and practices in the successor states of the former Yugoslavia can be found on the CITSEE project website: [www.citsee.ed.ac.uk](http://www.citsee.ed.ac.uk), and – placed in a wider European context – on the website of the EUDO Citizenship Observatory: [www.eudo-citizenship.eu](http://www.eudo-citizenship.eu).

<sup>61</sup> Kosovo – unlike the other six states – was never a republic of the SFRY. As a part of the Socialist Republic of Serbia, it had extensive autonomy until the 1989 when martial law was instituted as a repressive measure against the majority Albanian population. See generally G. Krasniqi, 'Overlapping jurisdictions, disputed territory, unsettled state: the perplexing case of citizenship in Kosovo', in J. Shaw and I. Štikš (eds.), *Citizenship After Yugoslavia*, Abingdon: Routledge, 2013, 69-82.

<sup>62</sup> I. Štikš, 'A laboratory of citizenship: shifting conceptions of citizenship in Yugoslavia and post-Yugoslav states', in Shaw and Štikš, above n.61, 15-37, esp. 20-21.

<sup>63</sup> A. Lansbergen, *Social Citizenship in Asymmetric Constitutions: The reconfiguration of membership across state and sub-state polities of the European Union*, PhD, University of Edinburgh, 2013.

<sup>64</sup> T. Deželan, 'In the name of the nation or/and Europe? Determinants of the Slovenian citizenship regime', in Shaw and Štikš, above n.61, 129-145, at 135-136.

complex interdependencies between an independent Scotland and the rUK, Ireland, other EU Member States and other third country states of origin. The complexities will be legion as regards the interdependencies between Scotland and rUK as we might expect to see a relatively large constituency of dual citizens across the two states (especially in comparison to the overall population of Scotland), and a consequential pool of external citizens for both states. For a 'positive approach' to dual citizenship in an independent Scotland has been promised since 2009,<sup>65</sup> and the point has been regularly repeated since that time.<sup>66</sup>

Again, an example from the former Yugoslavia may be instructive. In Montenegro the restrictive rules on dual citizenship operate to limit the possibility of those residents of Montenegro who identify as 'Serbs' becoming citizens of Serbia unless they renounce Montenegrin citizenship.<sup>67</sup> Yet the concept of 'Montenegrin' identity was exclusive of a Serb component until the late 1990s, as successive censuses in the former Yugoslavia had shown. Will there be analogous posturing when the initial determination of the citizenry in Scotland is set up against ongoing rUK citizenship (on the assumption that rUK is understood to be a continuing state but with revised boundaries), and might changes to rUK citizenship be contemplated to mitigate against the possibility of there being large numbers of external rUK citizens resident in Scotland (who may or may not willingly embrace Scottish citizenship)? While the UK has long been fully tolerant of dual citizenship for both incoming and outgoing citizens,<sup>68</sup> the issue of dual citizenship has emerged as a potential source of tension and conflict between the rUK and an independent Scotland, with the Home Secretary Theresa May choosing to take the opportunity of a Westminster parliamentary question about whether Scots would be able to retain UK citizenship after independence in order to reinforce that UK citizenship was a matter for the UK Government and the continuation of the present approach to dual citizenship could not be guaranteed.<sup>69</sup> Specifically she reinforced both the interdependent nature of Scottish and rUK citizenship and the independent character of rUK dispositions on citizenship, stating that

Decisions on UK citizenship are for the UK Government. Any decisions on the retention of UK citizenship by Scottish citizens after independence would be affected by future Scottish Government policy decisions. To date, the current

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<sup>65</sup> See text accompanying n.10 above.

<sup>66</sup> 'Nationalists plan for dual citizenship', *The Herald*, 11 March 2013, <http://www.heraldscotland.com/politics/referendum-news/nationalists-plan-for-dual-citizenship.20466623>.

<sup>67</sup> See J. Džankić, 'Understanding Montenegrin Citizenship', in Shaw and Štiks, above n.61, 53-67.

<sup>68</sup> Sawyer and Wray, *EUDO Country Report: United Kingdom*, above n.24, at 14.

<sup>69</sup> 'Scottish independence: UK passport loss indication', *The Scotsman*, 11 June 2013, <http://www.scotsman.com/the-scotsman-2-7475/uk/scottish-independence-uk-passport-loss-indication-1-2961819>.

Scottish Government have not set out what their proposed policies would be in these areas.<sup>70</sup>

The ILC articles on state succession,<sup>71</sup> based at least in part on the codification of state practice, would suggest that the rUK would be entitled to withdraw citizenship from those lacking a connection with rUK, and not to embrace the arrangements that the Scottish Government would appear to desire – namely the institution of widespread dual citizenship. Whether such an approach is politically realistic is less clear, although it can certainly garner press attention because of the way in which it highlights possible future conflicts between the two putative states.<sup>72</sup> The electoral consequences for any rUK government that set about effectively splitting up cross-border families in this way would be interesting to see.

The Scottish Government has made proposals to settle what processes would occur between the independence referendum delivering a ‘yes’ vote, and the actual independence day. *Scotland’s Future: from the Referendum to Independence and a Written Constitution*<sup>73</sup> proposes that the ‘constitutional platform’, operating through a mix of legislation of the current Scottish Parliament and the Westminster Parliament ‘in the spirit of the Edinburgh Agreement’ would ‘define entitlement to Scottish citizenship on independence day and subsequently’. The report recognises that the constitutional platform would be essentially conservatory in nature, without prejudice to the sovereign powers of the future Scottish (state) parliament to give voice to the will of the people in the form of a new written constitution and perhaps changes to the initial citizenship legislation. In that sense, the constitutional moment of self-definition is not confined to the moment of independence and the ‘first cut’ of who are the Scots, but will be subject to political contestation in the context of any future constitutional convention which will lay the groundwork for the rules of acquisition and loss, discussed in the next section. This platform will, presumably, also settle the question of who can vote in the first general election in an independent Scotland, reminding us of the intimate connection between citizenship and democracy, and the *Scotland’s Future* report tells us that it would be this first Scottish parliament which would settle the arrangements for any future constitutional convention to create a long term constitutional settlement for Scotland.

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<sup>70</sup> House of Commons, Hansard, 10 June 2013, Column 16, in answer to a question by Michael McCann, Labour MP for East Kilbride, Strathaven and Lesmahagow.

<sup>71</sup> See above n.39.

<sup>72</sup> E.g. ‘Independence could lead to clashes over citizenship, says academic’, *The Herald*, 26 September 2013, <http://www.heraldscotland.com/politics/referendum-news/scots-warned-over-citizenship.22264113> drawing on B. Ryan, ‘What about the neighbours? An independent Scotland’s nationality and immigration control’, contribution to the RSE public discussion seminar on Borders, Immigration and Citizenship, Edinburgh, 25 September 2013, [http://www.royalsoced.org.uk/cms/files/events/programmes/2012-13/speaker\\_notes/Bernard%20Ryan.pdf](http://www.royalsoced.org.uk/cms/files/events/programmes/2012-13/speaker_notes/Bernard%20Ryan.pdf).

<sup>73</sup> See above n.8.



b) *Political rights, referendums and citizenship*

The question of who can vote in the referendum has already been settled. The relevant legislation has been adopted as part of the pre-referendum process for which the Scottish Parliament has been given formal responsibility by the Westminster Parliament pursuant to the Edinburgh Agreement between the Westminster and Scottish Governments. This Agreement was adopted to ensure that a referendum can take place which has a clear legal basis and which is conducted in such a way as to command the confidence of the parliaments, governments and the people.<sup>74</sup> In the Scottish Parliament, the majority of the debate on the scope of the franchise was devoted to the issue of excluding prisoners from the franchise, reflecting an ongoing conflict between the UK authorities and the European Court of Human Rights on this matter,<sup>75</sup> and the proposal to allow 16 and 17 year olds to vote (which is an important innovation). The Scottish Independence Referendum (Franchise) Act,<sup>76</sup> passed by the Scottish Parliament in June 2013 under a section 30 order arrangement under the Scotland Act 1998, uses the local government and thus the Scottish Parliament franchise,<sup>77</sup> giving the vote in the referendum to resident EU citizens but denying it to any person *previously* resident in Scotland, whatever their citizenship, who is no longer on the electoral register. Rather little attention was paid to the question of whether it was right to base the franchise on this register and thus to exclude all non-resident voters with the exception of 'Service Voters' (i.e. those serving in the UK armed forces) who had made a service declaration based on an address elsewhere in the UK, but outside Scotland.

It might be thought that the use of this register for the referendum was a matter of administrative convenience, to avoid drawing up a special register that excluded EU citizens but did not include external voters.<sup>78</sup> In fact, because of the novelty of including voters aged 16 and 17, canvassing for and completing the register will actually involve a good deal of additional effort for registration officers (not to mention a political education effort that needs to be directed as this new group of young voters). In citizenship terms, therefore, it is interesting to see that the

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<sup>74</sup> Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, Edinburgh, 15 October 2012,

<http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence>.

<sup>75</sup> See L. Khadar, *EUDO Citizenship Observatory. Access to Electoral Rights. United Kingdom*, June 2013, [www.eudo-citizenship.eu](http://www.eudo-citizenship.eu) (UK FRACIT Report).

<sup>76</sup> 2013 asp 13, <http://www.legislation.gov.uk/asp/2013/13/contents/enacted>.

<sup>77</sup> For a more extended discussion of electoral rights in the UK – in the respective shadows of EU electoral rights and 'asymmetric' devolution of powers in some parts of the country – see J. Shaw, 'Citizenship and Electoral Rights in the Multi-Level 'Euro-Polity': the case of the United Kingdom', in H. Lindahl (ed.), *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice*, Oxford: Hart Publishing, 2009, 241-253. The UK FRACIT report (above n.75) provides a more comprehensive overview.

<sup>78</sup> For that latter reason the Westminster electoral register would not be suitable, as it would enfranchise expatriate Scots resident outside the UK but not – unless some special arrangement were made – those resident elsewhere in the UK. The failed 1979 devolution referendum used the then Westminster franchise (before external voters were included).

referendum is being conducted on the basis of a wider franchise than might normally be expected to be able to vote in a post-independence general elections in a new state, as these are – in most cases in most states, with some exceptions in the UK (Irish and Commonwealth citizens) – restricted to those who are citizens.

The rejection of any form of external voting except for some service personnel in the referendum might also presage a strict – but increasingly rare<sup>79</sup> – line on external voting in Scottish national or general elections after independence. But the answer to that question is unclear as no indications have yet been given in Scottish Government documentation. A large number of external citizens can be a destabilising factor for a new state, but in any event the existence of a potential pool of external citizens, even if they are not granted citizenship in the first ‘cut’, can also have an influence on party politics and political interests after independence, because they often lobby to be included or given preferential naturalisation rights (with or without residence), and are seen as likely to reward, in electoral terms, those who respond to the lobbying by campaigning for citizenship laws to be more externally inclusive and also to incorporate external voting rights. These processes have been observed in a number of states in central and eastern Europe (e.g. Hungary) and in the new states in South East Europe (e.g. Croatia and Slovenia), where access by external citizens to citizenship and to the right to vote has been widened gradually over the years since democratisation and/or independence occurred. By the same token, it is worth noting that the rUK would face having a large number of (potential) external citizens as a result of the changes to the territory of this state and this could have significant impacts because of the interface with external voting rights (limited to 15 years in the UK at present).

Interestingly, Heather Green has speculated that a successful legal challenge by prisoners to the blanket exclusion from voting in the independence referendum might have significant implications for expatriate Scots, as they too might be able to challenge their exclusion.<sup>80</sup> That said, the cases about the exclusion from the franchise brought by a number of Scottish prisoners,<sup>81</sup> seemed to suffer a significant blow in mid-2013. The Court of Human Rights rejected the petition in *McLean and Cole v. United Kingdom* which covers, amongst other matters, the exclusion of prisoners from voting in the national referendum on the alternative vote,<sup>82</sup> *inter alia* on the grounds

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<sup>79</sup> See FRACIT Report, above n.29 Chapter 2.

<sup>80</sup> H. Green, ‘Prisoners and other people: the right to vote in the Scottish Independence Referendum (Franchise) Bill’, 18 July 2003, *Scottish Constitutional Futures Blog*, <http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/1951/Heather-Green-Prisoners-and-Other-People-the-Right-to-Vote-in-the-Scottish-Independence-Referendum-Franchise-Bill.aspx>.

<sup>81</sup> ‘Scottish prisoners challenge ban on voting in independence referendum’, *The Guardian*, 28 June 2013, <http://www.theguardian.com/politics/2013/jun/28/scottish-prisoners-ban-voting-independence-referendum>; ‘Two killers launch legal bid for right to vote in referendum’, *STV*, 25 September 2013, <http://news.stv.tv/east-central/240900-two-killers-launch-legal-bid-for-right-to-vote-in-referendum/>.

<sup>82</sup> Application nos. 12626/13 and 2522/12, 26 June 2013.

that the protective scope of Article 3 of Protocol 1 regarding the right to participate in elections to the *legislature* does not extend to cover also referendums.

## 5. Rules of acquisition and loss in a new state – the freedom to choose versus the long shadow of state formation

### a) *Rules of acquisition and loss*

Rules of acquisition and loss of citizenship are required by all states, whether new or old, but they have a particular meaning in the context of newly established states, where the shadow of separation can linger for a longer time, and where special connections with groups of ethnic kin outside the territory – perhaps elsewhere within the confines of the ‘old’ state or indeed elsewhere in the world – become politically more important in the new state than perhaps they were in the old one. Expatriate Scots inside or outside the UK thus have a different meaning as a group once Scotland becomes an independent state. A diaspora linked to a state is very different from the type of culturally and linguistically based diaspora that Scotland, under its current dispensation within the UK, could be said to possess, whatever its economic importance. This has very important consequences for external citizenship, not least because demands for citizenship often lead on to demands for the right to vote as external citizens and perhaps even – longer term – specific representation in the Scottish Parliament.

When it comes to the acquisition of citizenship, and the stable rules on this that a polity needs,<sup>83</sup> a distinction should be drawn between:

- acquisition at birth (whether on the basis of birth in the territory (*ius soli*), or birth to one or more parents who hold Scottish citizenship (*ius sanguinis*), or a combination of the two factors); and
- acquisition after birth (naturalisation of immigrants; possible facilitated naturalisation for returning diaspora or persons with special merits).

Citizenship acquisition *at birth* tends to be an automatic, involuntary and unconditional process, although in some circumstances a registration process may be required. More often than not the registration process is merely evidentiary, not constitutive of citizenship. But acquisition *after birth* is not only a voluntary act, as one must apply for citizenship, but it also tends to be conditional. So, for example, immigrants must satisfy conditions such as length of residence, probity tests, integration/language tests, possible oaths of allegiance or loyalty tests, and fees.

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<sup>83</sup> Different modes of acquisition of citizenship are presented in M. Vink, O. Vonk and I. Honohan, *EUDO CITIZENSHIP Database on Modes of Acquisition of Citizenship in Europe*, San Domenico di Fiesole: European University Institute, 2013, searchable online at <http://eudo-citizenship.eu/databases/modes-of-acquisition>. For analytical purposes the database distinguishes between 27 different modes of acquisition.

There is still generally a discretionary element in most ordinary naturalisation processes.<sup>84</sup>

The recent ACIT study of citizenship, naturalisation and the integration of foreign-born immigrants across Europe conducted under the auspices of the EUDO Citizenship Observatory<sup>85</sup> has provided data allowing us to better evaluate the interrelationships between immigration, the conditions under which foreign-born immigrants may naturalise (including the administrative procedures they must follow), and the various societal factors around immigration and integration, such as the rate of naturalisation and the economic and educational outcomes for the immigrants and families. A high rate of naturalisation is generally shown to be good, as it correlates positively with good outcomes for the migrants themselves (e.g. lower rate of unemployment; better economic outcomes). Detailed findings on the UK suggest that as a state it stands around the average for the EU states for the rate at which immigrants naturalise, and for the time it takes them so to do (average 8.5 years). Citizenship laws themselves are obviously major determinants of whether immigrants naturalise, and on the whole the UK's laws are slightly more inclusive than the EU average, not least because the period of required residence is shorter than average. Particular sticking points are the restrictions on family members acquiring citizenship (which are now matched in the UK by increased restrictions relating to income on family migration<sup>86</sup> that have been highly controversial and the subject of a debate by the All Party Parliament Group on Migration<sup>87</sup>), including the requirement that foreign-born children naturalise separately to their parents and the absence of socialisation-based naturalisation for children based on long residence.<sup>88</sup>

The availability of detailed qualitative data on citizenship laws<sup>89</sup> and citizenship procedures<sup>90</sup> and of extended analyses of the interrelationships between the integration of immigrants and the acquisition of citizenship from the ACIT project together make it possible for a future independent Scotland to benchmark itself against European best practices and also to review the likely impact of the different laws and policies on ordinary naturalisation that it might choose to adopt in advance. The rUK may be a starting point, and a point of reference that an

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<sup>84</sup> T. Huddleston, *The Naturalisation Procedure: Measuring the Ordinary Obstacles and Opportunities for Immigrants to Become Citizens*, RSCAS Policy Paper 2013/16, EUDO Citizenship Observatory, ([www.eudo-citizenship.eu/about/acit](http://www.eudo-citizenship.eu/about/acit)).

<sup>85</sup> See [www.eudo-citizenship.eu/about/acit](http://www.eudo-citizenship.eu/about/acit).

<sup>86</sup> For a review of the changes see *Changes to Immigration Rules for Family Members*, House of Commons Library Standard Note, SN/HA/6353, 22 August 2012, <http://www.parliament.uk/briefing-papers/SN06353>.

<sup>87</sup> <http://www.appmigration.org.uk/family-inquiry>.

<sup>88</sup> See Migration Policy Group, *Access to Citizenship and its Impact on Immigrant Integration. Handbook for the United Kingdom*, EUDO Citizenship Observatory, 2013, [http://eudo-citizenship.eu/images/acit/acit\\_handbook\\_uk\\_english.pdf](http://eudo-citizenship.eu/images/acit/acit_handbook_uk_english.pdf).

<sup>89</sup> On citizenship laws of the UK see Sawyer and Wray, *Country Report: United Kingdom*, above n.68.

<sup>90</sup> On naturalisation procedures in the UK see H. Wray, *EUDO Citizenship Observatory. Naturalisation Procedures for Immigrants. United Kingdom*, April 2013, [www.eudo-citizenship.eu](http://www.eudo-citizenship.eu).

independent Scotland will continue to relate to over the longer term, given geographical proximity and overlap of populations, but there are other examples that Scotland might also follow. Scotland might, for example, deliberately choose, both in relation to immigration rules and initial settlement and then also in relation to accessing citizenship via ordinary naturalisation, to 'compete' with rUK by offering lower fees or tests which focus better on the skills and knowledge that immigrants need to show to be effective in the labour market, rather than the much derided 'Life in the UK' test, especially its most recent variant.<sup>91</sup> Or it might decide that the principle-driven approach already in place under devolution, which places the rights of the child at the centre of the concerns of the body politic,<sup>92</sup> demands a different approach to naturalisation (and the promotion of the citizenship acquisition) in family contexts.<sup>93</sup> More generally, the work done on mapping the international context within the framework of the EUDO Citizenship Observatory<sup>94</sup> also suggests a number of best practices that Scotland may wish to achieve in the context of independence in relation to matters as varied as ensuring rights of appeal and judicial review in respect of negative decisions on citizenship, and providing high quality statistical data on rates of citizenship acquisition so that researchers can continue to measure the relationship between immigration, integration and naturalisation.

As we have noted, states often set up preferential arrangements for ethnic kin based on ancestral relationships and these can be less burdensome than the ordinary naturalisation process.<sup>95</sup> Other states are less concerned about co-ethnics, and more interested in using citizenship as a lever to bring investment or talent<sup>96</sup> into the state. There is relatively little difference between using citizenship status for these purposes (except when it comes to the question of national representation in sports), as opposed to offering preferential possibilities for settlement to those with investment funds or special talents, as widely practised by many states including the UK. In this case, Scotland's wish to kickstart its economy as an independent country might mandate the choice of preferential arrangements for settlement and/or citizenship for those bringing investment. That said, there is the perception that such

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<sup>91</sup> T. Brooks, *The 'Life in the United Kingdom' Citizenship Test: Is It Unfit for Purpose?*, Durham: Durham University, 2013, available from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2280329](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2280329).

<sup>92</sup> See generally the work of the Scottish Commissioner for Children and Young People, <http://www.sccyp.org.uk/>.

<sup>93</sup> Council of Europe, *Study for the Feasibility of a Legal Instrument in the Field of Nationality Law and Families*, CDCJ (2012) 11 Fin, Strasbourg, 11 February 2013.

<sup>94</sup> See L. Pilgram, *EUDO Citizenship Observatory. International Law and European Nationality Laws*, March 2011, [www.eudo-citizenship.eu](http://www.eudo-citizenship.eu) at 5.

<sup>95</sup> See the references on external citizenship at n.49 above.

<sup>96</sup> A. Schachar, 'Picking winners: Olympic Citizenship and the Global Race for Talent', (2011) 120 *Yale Law Journal* 208802139; J. Džankić, 'Sportizenship: the complex links between citizenship, sports and national identity', *Citizenship in South East Europe*, 24 October 2012, <http://www.citsee.eu/citsee-story/sportizenship-complex-links-between-citizenship-sports-and-national-identity>.

arrangements turn citizenship into a tradeable good<sup>97</sup> or open up possibilities for institutional corruption,<sup>98</sup> and that these are seen as undesirable outcomes.

As was the case, as we saw, for the initial determination of the citizenry, so the new states of south east Europe which have emerged out of the former Yugoslavia provide some insights into how political elites can manipulate or 'engineer', especially along ethnic lines, the rules of acquisition and loss in the years following the creation of a new state. Slovenia, for example, tightened its language proficiency requirements in the years after independence, making it increasingly difficult for migrant workers from the south of Yugoslavia, especially from Bosnia and Herzegovina, to acquire Slovenian citizenship, whilst at the same time making it easier for descendants of Slovenians who had lost or never acquired Slovenian citizenship.<sup>99</sup> A similar turn can be seen in Croatia with its long awaited 2011 amendments to the 1991 citizenship law. It is, according to Viktor Koska, a 'country closed to settlement for regular migrants and open to ethnic Croats regardless of their residency'.<sup>100</sup>

Whatever the conditions set for non-resident Scots to acquire Scottish citizenship which are instituted in the first cut of the rules of acquisition and loss, it can be anticipated that in future political parties will find themselves lobbied by non-resident Scottish diaspora groups for changes to open up or widen the opportunities for citizenship acquisition and participation. For example, even if at first external citizenship is restricted only to those who were born in Scotland and moved away before independence, perhaps to encourage them to return home, there would doubtless be subsequent attempts to widen the circle and to include, for example, groups who had never held UK citizenship but were part of a wider self-identified Scottish diaspora related to Scotland's long history of emigration. Unfortunately, the wider south east Europe provides some over-inclusive and rather indeterminate examples of citizenship regimes including preferential naturalisation for external ethnic kin. For example, in Bulgaria it suffices to show a 'Bulgarian origin' for parents or grandparents, which can be done through Church certificates, schools, or association with an association for Bulgarians abroad.<sup>101</sup> An independent Scotland

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<sup>97</sup> J. Džankić, *The Pros and Cons of Ius Pecuniae: Investor Citizenship in Comparative Perspective*, RSCAS 2012/14 EUI Working Paper; J. Džankić, 'Investor Programs: attempting to cure the struggling European economies?', *Citizenship in South East Europe*, 12 December 2012, <http://www.citsee.eu/blog/investor-programs-attempting-cure-struggling-european-economies>.

<sup>98</sup> L. Johnston, *A Passport at Any Price? Citizenship by Investment through the Prism of Institutional Corruption*, Edmond J. Safra Working Papers, No. 22, Harvard University, 2013, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2324101](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2324101).

<sup>99</sup> Deželan, above n.64 at 134-135.

<sup>100</sup> V. Koska, 'Twenty years after: The Amendments and Modifications to the Law on Croatian Citizenship', *Citizenship in South East Europe*, 4 March 2013, <http://www.citsee.eu/blog/twenty-years-after-amendments-and-modifications-law-croatian-citizenship>.

<sup>101</sup> D. Smilov and E. Jeleva, *EUDO Citizenship Observatory. Country Report: Bulgaria*, May 2013, [www.eudo-citizenship.eu](http://www.eudo-citizenship.eu), at 13.

may wish to avoid the arbitrariness of such an approach in the future regarding external citizens.

Loss of citizenship is less frequently studied than acquisition, although the EUDO Citizenship Observatory does offer a database based on fifteen different modes of loss, with country information for more than 30 European countries.<sup>102</sup> In recent years, the most intensive discussion has been around the interface between loss of citizenship and security issues, and specifically the use by the UK Government of the power under the British Nationality Act 1981, s.40 was amended by the Immigration Asylum and Nationality Act 2006, s.56, to allow the Secretary of State by order to deprive a dual national British citizen of their citizenship if it is considered 'conducive to the public good.' The changes, first introduced in 2002 and strengthened in 2006, reversed a historic process of 'liberalising' loss of citizenship since it was first introduced in 1910, which saw it come increasingly under the control of judicial review, limiting the discretion of the executive.<sup>103</sup> The new power, although holding a certain veneer of liberalism in that it can only be used if it does not render a person stateless and is subject to judicial review, has been used increasingly often over the last ten years (21 orders and counting) and operates – according to some commentators – as a form of medieval exile.<sup>104</sup> This is because the act of deprivation normally occurs when the person in question is not in the UK. Subsequently, when the affected party tries to re-enter the UK, immigration powers are used to refuse entry on the ground that he or she is now a non-citizen. The new power, especially in its most recent 2006 format, goes way beyond the historic 'stripping' power, which was generally used to remove citizenship from those who committed acts of fraud in the context of naturalisation,<sup>105</sup> and has been used against 'birthright' UK citizens. For some observers, how an independent Scotland would deal with these challenges, along with those associated with deportation where the side effects have also been to remove British citizen children from the UK,<sup>106</sup> will be a litmus test of its claims to be a good global citizen and build on its claims to operate,

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<sup>102</sup> M. Vink, O. Vonk and I. Honohan, *EUDO CITIZENSHIP Database on Modes of Loss of Citizenship in Europe*, San Domenico di Fiesole: European University Institute, 2013, searchable online at <http://eudo-citizenship.eu/databases/modes-of-loss>. See now for more detail the 2013-2015 ILEC project on Involuntary Loss of European Citizenship: <http://www.ilecproject.eu/>.

<sup>103</sup> M. Gibney, 'A Very Transcendental Power': Denaturalisation and the Liberalisation of Citizenship in the United Kingdom', *Political Studies*, 2012, early online, doi: 10.1111/j.1467-9248.2012.00980.x; M. Gibney, 'Should Citizenship Be Conditional? The Ethics of Denationalization', (2013) 75 *Journal of Politics* 646–658.

<sup>104</sup> For criticisms from a liberal and human rights perspective, see the commentaries noted above at n.31.

<sup>105</sup> C. Sawyer, "'Civis Britannicus sum" no longer? Deprivation of British Nationality', [2013] *Journal of Immigration, Asylum and Nationality Law* 23–40.

<sup>106</sup> C. Sawyer, 'Not Every Child Matters: the expulsion of British citizens from the UK', (2006) 14 *International Journal of Children's Rights* pp 157–185.

for example, the asylum system in a more humanitarian way that it does in the UK at present.<sup>107</sup>

Vink and Bauböck have analysed the citizenship laws of 36 states in Europe against measures of ethnocultural and territorial inclusion and their work gives us some patterns against which to judge any future Scottish citizenship regime bearing in mind the multiple purposes of citizenship laws.<sup>108</sup> Ethnocultural inclusion measures the tendency to include ethnic kin through preferential schemes, with or without residence in the territory. Territorial inclusion looks, in particular, at the ease with which long term resident immigrants and their families can acquire citizenship in the host state.

In their work, Vink and Bauböck discern four broad types of citizenship regimes. An ethnoculturally selective regime, is one with high levels of ethnocultural inclusion, and low levels of territorial inclusion (most of the regimes in central and eastern Europe). Insular regimes (a small number including Denmark, Austria and Switzerland) are exclusive on both territorial and ethnocultural measures. The UK finds itself within a third group, of both territorially inclusive and relatively ethnoculturally exclusive regimes (termed territorially selective regimes), while Ireland is to be found in a group of expansive regimes, which are inclusive on both measures. However, in practice Ireland actually has administrative processes for naturalisation that make it relatively hard – despite recent changes – for immigrants to naturalise, and the UK in turn finds itself quite close to the boundary line which would give it an ethnoculturally inclusive regime. In other words, the UK and Ireland are not – on the coding undertaken by Bauböck and Vink – far apart as citizenship regimes, and we might perhaps find a putative Scottish regime occupying similar terrain in the future.

*b) Political rights and citizenship after independence*

Many of the points made regarding the interplay between political rights and the initial determination of the citizenry apply in the same way as regards the relationship between the application and evolution of the rules of acquisition and loss over time and the question of who can vote (and stand for election) in which elections.

Rights to vote in national or general elections are reserved in most states for citizens alone,<sup>109</sup> although the UK and Ireland with their now reciprocal arrangements<sup>110</sup> and the arrangements for Commonwealth citizens to vote in the UK, represent together an important exception to that pattern.<sup>111</sup> This is an area where the

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<sup>107</sup> See *Europe and Foreign Affairs. Taking Forward our National Conversation*, above n.10 at para. 5.15.

<sup>108</sup> Vink and Bauböck, above n.40.

<sup>109</sup> For reviews, see Shaw, above n.27 **Error! Bookmark not defined.**, especially Ch. 3 and FRACIT Report, above n.79, especially Ch. 4.

<sup>110</sup> See Shaw, above n.27 **Error! Bookmark not defined.**, 202-206 on the development of rights to vote for UK citizens in the *Dail*.

<sup>111</sup> See generally Khadar, *UK FRACIT Report*, above n.77.



evolution of rUK/Scotland relations will be interesting to observe and where citizenship status and electoral rights will be intimately interwoven. We have already seen the potential for conflict over the issue of dual citizenship, whereby – if it were instituted in Scottish citizenship and maintained in place in rUK citizenship – this would give rise to substantial possibilities for external voting rights to be claimed and used by external citizens, depending upon the arrangements instituted by each state. The alternative would be the institution across Scotland, rUK and perhaps Ireland of arrangements for non-citizen voting mirroring those between the UK and Ireland, or the UK and the Commonwealth. It is not clear whether Scotland would propose to adopt the same arrangements as exist in the current UK for Irish and Commonwealth citizens to be able to vote. The Irish and Commonwealth citizen voting rights have themselves come under scrutiny as historical anachronisms in the 2008 Goldsmith report on citizenship in the UK,<sup>112</sup> illustrating the ambiguity of the UK's relationship with Ireland.<sup>113</sup> Instead, Goldsmith suggested a different principle under which he believed more clarity would be brought to the concept of UK citizenship. He recommended

that the government gives consideration to making a clear connection between citizenship and the right to vote *by limiting in principle the right to vote in Westminster elections to UK citizens*. This would recognise that the right to vote is one of the hallmarks of the political status of citizens; it is not a means of expressing *closeness between countries*. Ultimately, it is not right to give the right to vote to citizens of other countries living in the UK until they become UK citizens' (emphasis added).<sup>114</sup>

In fact, this recommendation – like the rest of Goldsmith's report – has not been taken up. This is perhaps because, as I suggested in an earlier paper,<sup>115</sup> it is actually quite hard in the context of nested and interrelated polities such as the UK, Ireland and the EU (which also confers certain voting rights) and, presumably, *a fortiori* an independent Scotland and the future rUK, to 'tidy up' citizenship rights without running into further areas of ambiguity and complexity which result in the tidying impulse foundering definitively. This exemplifies neatly the lack of clarity around a single membership model in the current UK citizenship regime. Goldsmith himself mentioned both the EU electoral rights – which have been extended also to give all EU citizens rights to vote in the UK's devolved assemblies – and the citizenship arrangements in Northern Ireland since the Good Friday Agreement

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<sup>112</sup> Lord Goldsmith QC, *Citizenship: Our Common Bond*, Citizenship Review, March 2008; available from <http://webarchive.nationalarchives.gov.uk/20091009063042/http://www.justice.gov.uk/reviews/docs/citizenship-report-full.pdf>

<sup>113</sup> M. Fealty, 'Goldsmith and the Irish Vote', *The Guardian*, 12 March 2008, <http://www.theguardian.com/commentisfree/2008/mar/12/goldsmithandtheirishvote>.

<sup>114</sup> Goldsmith, above n.112 at 76.

<sup>115</sup> Shaw, above n.77 at 249-250.

which allow all those born in Northern Ireland to identify with either the UK, or Ireland, or both states, and thus to have the citizenship of either or both states,<sup>116</sup> and which Goldsmith recognised would need to be excluded from his proposed update of voting rights.

If there is to be an independent Scotland before the end of the second decade of the twenty first century this will occasion not only the creation of a new Scottish citizenship regime (encompassing also electoral rights issues) but also a substantial revising and review of the (r)UK's own model, including associated questions about electoral rights. This is the alternative to simply grafting the arrangements already in place for Ireland onto Scotland. But overall, it is surely unthinkable that Scotland's consensual secession might result in a worse situation for Scottish citizens vis-à-vis rUK than currently exists for Irish citizens vis-à-vis the UK. In any event, any such rethink of citizenship and voting could not be done without regard to the constraints imposed by EU law, so long as both or all three states (i.e. Ireland) were members.

A large open question for an independent Scotland is whether – the Scottish Parliament having deemed EU citizens as having a sufficient stake in the future of the polity to be permitted to vote in the referendum – the future 'constitutional platform' or later Scottish constitution could legitimately decree that the same group could not vote in a future Scottish general election, as this right should be reserved to Scottish citizens only. This reinforces the intense interdependence of citizenship and the right to vote. If residence is indeed to be the basis of the initial determination of the citizenry, which the approach to the franchise might suggest would be the case, how far might this go? If the offer is sufficiently wide to constitute an open offer to resident EU citizens to acquire Scottish citizenship at the beginning (in addition to their existing citizenship – at least as far as Scotland was concerned), then might it be legitimate to suggest that only those who take up this offer should be able to vote in the future? An alternative scenario might see Scotland continuing the rather wide and ultimately voluntary franchise that exists under devolution<sup>117</sup> (as there was no EU law obligation on the UK to give voting rights in devolved elections to EU citizens) into a similar arrangement under independence. Of course, in a scenario of independence in the EU, where rUK remains in/joins the EU also, the situation is complicated by the fact that some, indeed perhaps the majority, of those EU citizens in Scotland *after* independence will be former fellow UK citizens from *before* independence. What, if any, special (reciprocal?) voting arrangements might be made across these islands, bearing in mind the existing comments on UK/Ireland above?

It is also worth recalling that wherever there are external citizens, there are also claims for external voting rights. Once again, the case of south east Europe can be instructive, this time Croatia. Croatia has large numbers of external citizens in the

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<sup>116</sup> '...it is 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 [the two governments] 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.'

<sup>117</sup> See s.11 of the Scotland Act 1998.

region of the former Yugoslavia (in Western Bosnia, for example), elsewhere in Europe (e.g. in Switzerland and Germany), and in other parts of the world (e.g. US, Canada and Australia).<sup>118</sup> Croatia's external citizens have historically been expected to vote for the conservative Catholic HDZ (Croatian Democratic Union) party originally headed by Franjo Tuđman, and only fully democratised and brought into the mainstream of European parties of the right after the death of Tuđman in 1999.<sup>119</sup> The electoral dominance of the HDZ in turn retarded the liberalisation of many restrictive aspects of Croatian citizenship law which only started to occur in the second decade of the twenty first century.<sup>120</sup> For states with relatively small electorates, these issues of electoral calculus can be challenging waters for new states to navigate if they want to avoid making the limits of citizenship too inclusive or too exclusive.

Current debates in the Constitutional Convention in Ireland, established in 2012 to consider possible amendments to the Irish constitution, especially so far as affects the political system, highlight the enduring claims of diaspora communities to political representation, given that Ireland – as it stands – is one country with a rather restrictive set of rules largely excluding external voting.<sup>121</sup> In September 2013, the Convention held a debate on the issue of external voting in Presidential elections, bringing in representatives of Irish communities not only in the north of the island, but also around the world.<sup>122</sup> By a large majority, the members of the Convention – including citizens selected at random as well as political party representatives – voted to allow those resident outside Ireland to vote in presidential polls, although only 38% of members agreed that this should be without restrictions by reference to the time a person had lived outside Ireland.<sup>123</sup> The clarity of the outcomes was complicated by an additional vote – supported by 73% of members – to allow Irish citizens resident in Northern Ireland to vote. This complex interdependency is one which might eventually be replicated for Scotland given the numbers of Scots in rUK who may be given external citizenship. Whether the process in the Convention will

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<sup>118</sup> V. Koska, 'Framing the citizenship regime within the complex triadic nexuses: the case study of Croatia', in Shaw and Štiks, above n.61, 113-127.

<sup>119</sup> M. Kasapovic, 'Voting Rights, Electoral Systems, and Political Representation of Diaspora in Croatia', (2012) 26 *East European Politics and Society* 777-791.

<sup>120</sup> See F. Ragazzi, I. Štiks and V. Koska, *EUDO Citizenship Observatory. Country Report: Croatia*, February 2013, [www.eudo-citizenship.eu](http://www.eudo-citizenship.eu).

<sup>121</sup> See FRACIT Report, above n.29 Chapter 2 and – canvassing the relevant arguments – I. Honohan, 'Should Irish Emigrants have Votes? External voting in Ireland', (2011) 26 *Irish Political Studies* 545-561.

<sup>122</sup> See generally <https://www.constitution.ie/>. 'Convention on the constitution to debate voting rights for Irish abroad', *The Journal*, 28 September 2013, <http://www.thejournal.ie/emigration-irish-abroad-constitution-1103260-Sep2013/>.

<sup>123</sup> See 'Convention supports voting rights for Irish emigrants', *Irish Times*, 29 September 2013, <http://www.irishtimes.com/news/politics/convention-supports-voting-rights-for-irish-emigrants-1.1542915> and Press Release of the Convention with detailed figures: <https://www.constitution.ie/AttachmentDownload.ashx?mid=be5fb014-a32a-e311-96d5-005056a32ee4>. A full report is available at <https://www.constitution.ie/Meetings.aspx#minutes>.

result in constitutional changes in Ireland remains to be seen, but the proceedings highlight the contested nature of external voting rights.

Finally, we should note that national elections may not be the only space within which resident non-nationals and external citizens claim a right to participate in an independent Scotland. In addition, there will be the putative constitutional convention which will elaborate a written constitution for adoption within Scotland. Who should participate in such a convention? Should it also include participation (representatives?) from wider groups – under an all-affected-interests principle – who may not be citizens but who would be subject to such a constitution?<sup>124</sup> Or is this a ‘constitution for Scots’ writ more widely, in which case the claims of external citizens or diaspora to representation, participation or the right to have a say in the adoption of such a constitution might be viewed as overwhelming? These are the many difficult questions that would face the new Scotland.

## 6. The EU perspective

One of the starting points for the discussion in this paper was that it remains a prerogative of states, under international law, to determine who are their citizens. The existence of multiple overlapping regimes of citizenship can lead to difficulties under international law. In some cases, especially in a jurisdictional context, two regimes may come into conflict, and here private international law will come into play in order to determine questions such as the applicable law or the appropriate forum, especially in family law or criminal procedure cases. In other contexts, a citizenship regime may be perceived to fall short of accepted international standards, for example, by discriminating against women, making it hard or impossible for them to transmit their citizenship by descent to their children. International human rights law can step in here to set a minimum standard. A different type of international constraint is posed by the European Union.

Scottish independence would be a unique event in the history of new state creation. The factor that makes it unique is that it would be the first case of the break up of an EU Member State, with both states aspiring – we assume – to keep or acquire EU membership. It is, of course, true to say that some of the state break-ups that have occurred in Europe since 1989, such as the dissolution of Czechoslovakia, the independence of the Baltic states, and the break up of Yugoslavia, have occurred under the *shadow* of EU law. But it is clearly going to be a different type of situation where the existing state is already a member of the EU, both succeeding states are likely to aspire to continued and uninterrupted membership, there are EU citizens exercising their EU citizenship rights in both states (and citizens from both those states who are exercising their rights elsewhere), and where EU law has now – as it

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<sup>124</sup> See D. Owen, ‘Resident Aliens, Non-resident Citizens and Voting Rights’, in G. Calder *et al* (eds.), *Citizenship Acquisition and National Belonging: Migration, Membership and the Liberal Democratic State*, Basingstoke: Macmillan, 2010, 52-73.

has since 1993 – stepped into the political domain by requiring that EU citizens should be able to vote in local elections under the same conditions as nationals on the basis of residence in the host state.

The question of how continued EU membership might occur can be left to one side although it is interesting to see that an argument around the normative force of the EU legal order and specifically EU citizenship has been made in this context,<sup>125</sup> but for these purposes let us assume that Scotland and rUK will both be members (after an appropriate period of negotiation), with separate but overlapping citizenship regimes, where such citizens would then in turn also (continue) to be EU citizens.<sup>126</sup> EU law does not as such constrain the new state in relation to the choices that it makes about who are its new citizenry and how citizenship would be passed on through the generations, but the broader EU context, and the rights that are held by current EU citizens (both UK citizens and citizens of other Member States resident in Scotland) does have significant potential to influence a number of issues around citizenship.

If Scotland does decide on an inclusive residence base, this could include also lawfully resident and settled third country nationals who at present may not yet qualify for UK citizenship, or who may have decided not to take it. If Scotland effectively ‘naturalises’ a large group of third country nationals, through an inclusive approach by using residence as a proxy for a sufficient connection to Scotland to merit citizenship, it thus gives them the right to exercise EU citizenship rights, including the rights of free movement and residence, and the right to work, in all other EU Member States. Similar issues could also arise were Scotland to be externally inclusive with its citizenship acquisition, giving citizenship to descendants of emigrants who do not currently qualify for UK citizenship because of current limits on the intergenerational transfer of UK citizenship. Such issues are a matter of concern to other EU Member States, and states are in principle under an obligation to consult and cooperate with each other on such matters, although in practice many Member States, including the most recent one Croatia, but also others, such as Italy,

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<sup>125</sup> E.g. by A. O’Neill, ‘A quarrel in a faraway country? Scotland, independence and the EU’, 14 November 2011, <http://eutopialaw.com/2011/11/14/685/> and in a more nuanced way by D. Edward, ‘Scotland and the European Union’, 17 December 2012, *Scottish Constitutional Futures Blog*, <http://www.scottishconstitutional-futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx>. The O’Neill view has been rejected from the perspective of international law by Crawford and Boyle in their report, above n.33 at 107, and the Edward point was rejected in the UK Government’s own report (*Scotland Analysis: Devolution and the implications of Scottish Independence* above n.33 at 51) with which the Crawford and Boyle report was published.

<sup>126</sup> If this assumption is incorrect, and Scotland is not an EU Member State and its citizens are therefore not EU citizens, then see the Crawford and Boyle report (above n.33) at 105, para. 171 where they suggest that ‘it is conceivable that the ECJ might attach independent significance to EU citizenship in the form of individual rights. Although it is not necessary to discuss the content of any such rights, there is a real possibility that their existence might influence the ECJ in its approach to Scottish independence if Scotland did not become an EU Member State.’

have generous intergenerational transfer arrangements for emigrants which have brought substantial numbers of persons thought to be third country nationals within the actual or potential scope of EU citizenship by allowing them to become citizens under preferential arrangements. The EU principle of sincere co-operation could apply here. Article 4(3) TEU states:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

Article 4(3) TFEU and its predecessor – formerly Article 10 EC – has been considered by the Court of Justice in many cases but it was only in the case of *Rottmann*<sup>127</sup> that this principle has been referred to in the context of citizenship. In *Rottmann*, the European Court of Justice stepped into the tricky territory of national sovereignty in relation to the determination of acquisition and – in that case – loss of citizenship as the case concerned the power of a Member State to withdraw nationality conferred by naturalisation upon a person, where that naturalisation had been obtained by fraud. In this case the applicant, originally an Austrian citizen, would have become stateless, at least in the interim, if German nationality had been withdrawn by the German authorities because of fraud, as Austrian nationality lapses automatically when a citizen takes on a second citizenship. The Court has made it clear that while this is in principle a matter for national law, none the less states must act in such a way that a person who is an EU citizen is not deprived of substantially all the rights of EU citizenship. The duty of cooperation was mentioned by Advocate General Poiares Maduro in his Opinion in the *Rottmann* case:

Other rules capable of restricting the legislative power of the Member States in the sphere of nationality include the provisions of primary Community legislation and the general principles of Community law. Thus, mention has been made in academic writing<sup>128</sup> and by the Hellenic Republic in its observations, of the Community principle of sincere cooperation laid down by Article 10 EC, which could be affected if a Member State were to carry out, without consulting the Commission or its partners, an unjustified mass naturalisation of nationals of non-member States.<sup>129</sup>

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<sup>127</sup> Case C-135/08 *Rottmann v Freistaat Bayern* [2010] ECR I-1449.

<sup>128</sup> The texts cited by Poiares Maduro are: G.R. de Groot, 'The relationship between nationality legislation of the Member States of the European Union and European citizenship', in M. La Torre (ed), *European citizenship: an institutional challenge*, Kluwer Law International 1998, p. 115, specifically at 123 and 128-135 and A. Zimmermann, 'Europäisches Gemeinschaftsrecht und Staatsangehörigkeitsrecht der Mitgliedstaaten unter besonderer Berücksichtigung der Probleme mehrfacher Staatsangehörigkeit', *EuropaRecht*, 1995, No. 1/2, 54, specifically at 62-63.

<sup>129</sup> At para. 30 of the Opinion.

It is arguable that this could affect decisions about granting Scottish citizenship to external citizens and could potentially also apply in case the UK were to take action to try and limit the number of external citizens that it might acquire as a result of Scottish independence and the moving of the boundaries of the state.

## **7. Conclusion: Scotland and Scottish citizenship within ‘these islands’**

These reflections leave us, then, with a menu of options on the basis of which the constitutional authorities of an independent Scotland can legitimately fix the boundaries of both the citizenry and also the franchise. Much of the material presented so far has pointed in the direction of the urgency of understanding the complex interdependencies of citizenship and democratic rights, especially the right to vote. But the scope for political pressures upon the Scottish authorities from groups of citizens and other states, especially rUK, is considerable. The demography of Scotland is becoming increasingly complex. We have seen, in recent years, the continuation of historical patterns of emigration – with perhaps a million persons born in Scotland not resident there at present. But Scotland has also become a migration destination and there are increasing numbers of non-UK citizens and non-UK born UK citizens resident in Scotland. Scotland continues to mirror patterns of immigration visible elsewhere in the UK (although thus far with lower numbers of migrants and thus lower levels of diversity in those areas where immigrant density is greatest).

But it seems likely to be relations across these islands that will dominate much of the debate about citizenship, once it finally arrives. As noted earlier, it would seem that existing UK citizens in Scotland would be likely to continue to hold rUK citizenship, perhaps alongside Scottish citizenship, unless the rUK government changed the rules on holding rUK citizenship and in so doing broke the link to the historic traditions of UK citizenship which appear to be tolerant of dual or multiple citizenship. It has not hitherto been the UK’s practice to deprive people of citizenship because they leave the UK territory or because they acquire another citizenship; the question is whether it is different because it would be the UK territory that, in a sense, has left them, and if the other citizenship was one not necessarily of their own choosing. If the rest of the UK was seen as a new, re-constituted state which itself must define its citizenry from scratch, then it might be possible, via intergovernmental negotiations, for these two new states to ‘carve up’ the existing UK citizenry and avoid substantial overlap of citizenship between the populations. This does not seem to be what the Scottish Government envisages, because it has spoken of new Scottish citizens having the right to opt (i.e. presumably to choose to be ‘British’ and/or ‘Scottish’) and about the importance of dual citizenship. It looks, presumably, to the right of option in Northern Ireland as the guide for this. Even if agreement were reached on a large scale separation, then it seems unlikely that there would be widespread social acceptance of a complete separation of the two citizenship regimes as was achieved – to a large extent – in the velvet divorce of the

Czech Republic and Slovakia on the breakup of Czechoslovakia. In that case there was republican sub-state citizenship on which to fall back. Furthermore, experience with the creation of new states highlights that whether people choose to 'adopt' new citizenships that they are given after birth as a result of the establishment of a regime of citizenship in a new state tends to be the result mainly of pragmatic considerations, especially if they can access more than one such citizenship. These include access to travel documents, political and socio-economic rights such as the right to live and work in more than one state, or to welfare rights, perhaps with a dash of 'identity' thrown in.<sup>130</sup> For those who voted against independence, would taking a Scottish passport be seen as approving separation after the event?

Obviously there have been precedents when the Dominions and the colonies (as well as Ireland) became independent from the UK (although these almost all predate the modern conception of UK citizenship, which was itself in many ways a reaction to the 'downgrading' of the UK from an Empire (back) to the Union state we have today), but the physical co-location of Scotland with most of the rest of the UK on the same island, the high levels of mobility, the factor of common EU membership, and the arrangements that have been made in relation to citizenship in Northern Ireland (where persons can opt for either or both UK and Irish citizenship) suggest that similar types of arrangements might need to be made for Scotland and the UK. A mass deprivation of UK citizenship from Scottish residents who are Scottish citizens by operation of law might prove to be politically tricky even if not necessarily legally problematic for the UK authorities provided statelessness is avoided. In practice, an arrangement based on choice for individuals (hence seeing citizenship as a voluntary act), plus an attempt to resolve the electoral rights issues in such a way as to avoid, for example, the creation of a West Lothian Question writ large are likely to be the options taken forward in intergovernmental negotiations between the two states which would then be enshrined in legislation. In that context, dual citizenship will undoubtedly help to maintain flexibility, but such an extended intermingling of two citizenship regimes post-independence would be a novel scenario never attempted elsewhere. The UK has a strong tradition of tolerating dual citizenship both for the children of mixed citizen parentage and for migrants (immigrants and emigrants). This would be a useful principle for it to continue to adhere to, and for Scotland also to adopt as has already been suggested, although this could be at the cost of significant numbers of external citizens over a number of generations, if Scotland decides to give an opt-in to people born in Scotland (or their children/grandchildren) or to those with long residence but who no longer reside in Scotland.

Much of what has gone before in this paper suggests that arrangements may be adopted in which Scotland does not proactively seek to know who its citizens are. One might suggest that nothing actually needs to be done until a person 'claims'

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<sup>130</sup> For anecdotal evidence of passport pragmatism more generally see 'Twenty readers who switched nationality', *BBC News Magazine*, 2 October 2013, <http://www.bbc.co.uk/news/magazine-24357407>.



Scottish citizenship by seeking to vote as a Scot or to obtain a Scottish passport. There is a risk in such a *laissez faire* approach that political and civic institutions may be neglected, with citizenship effectively being 'hollowed out'. But of course Scotland could do much to make Scottish passports attractive, e.g. by competing on price or process with rUK. On the other hand, there are reasons why a new state is likely to want to know with reasonable certainty what the pool of actual and potential citizens might be in order, for example, to be able to say how many Council of Ministers votes or MEPs it could lay claim to within the European Union. It is worth noting that the history of Yugoslavia and its successor states indicates that it is often the bureaucratic processes of registration (e.g. for people who do not clearly fall within the new legislative definitions), rather than the actual legislation about the scope of citizenship, which have been the most contentious and fraught aspects of the whole process. These are pitfalls that could be avoided in the event of Scottish independence by careful future planning and by cooperation between the relevant authorities of the two states, and by ensuring that citizens do not fall between the cracks of definitions or end up stateless. This would be another of the dangers of taking a *laissez faire* approach, not having a register of citizens, and making Scottish citizenship a matter of gradual opt-in for residents to its political and civil dimensions.

All of these points raise a fundamental question which should lie at the heart of future political debate about Scottish citizenship. The Scottish Government's take on the journey towards independence and life after independence is one of persuading voters that they can enjoy an ideal of 'soft secession'. The residents of Scotland – whether they vote yes or no as individuals – can keep the Queen, the pound, and now – it would seem – their existing citizenship whilst also gaining something new. Is this what is meant by 'shared citizenship' as mentioned by the Scottish Government in its earlier documentation? But will the sharing be a two-way thing? The point of Theresa May's intervention on dual citizenship was to suggest the opposite. No, she is suggesting, citizenship is hard-edged, a matter of sovereignty – indeed 'our' sovereignty and not yours – and not a matter where secession can be treated as a 'soft' issue. You are in, or you are out. It was intended, of course, as a warning to wavering voters, and as an attempt to polarise the debate by reference to promised conflicts.

Indeed, there are pitfalls with all the possible approaches to new state citizenship canvassed in this paper, including the more inclusive approaches which risk creating uncertainty about who can vote in which elections, and carving out large populations of external citizens and potential voters who could affect the stability of a new, rather small, Scotland. And a substantial overlap of citizenship between Scotland and rUK might be thought of as interfering with the sovereignty of rUK. In addition, there may be other pitfalls – especially from an rUK perspective – if Scotland chooses to make a generous initial offer of citizenship to its lawfully resident settled non-citizens from EU and third countries, and this offer is widely taken up. The rUK may fear deflection effects from such an offer, with new and

unwanted migration flows coming to rUK from Scotland in the form of new Scottish citizens. In the end, Scotland may have to choose a compromise between these various dimensions. It may be possible to discern a principled stance which sees generous offers made on the basis of both residence and descent, in both cases because Scotland can make a case for needing more citizens, whilst at the same time the same government tries to preserve the nestedness of Scotland and its citizenship within the wider framework of these islands by trying to push tolerance of dual citizenship on all sides. In the end, though, one aspect may need to be traded against the other and – given the increasing hostility to immigration in many parts of the UK at present – one can easily imagine that it would be the open offer to settled immigrants that would be the easiest element to sacrifice.

While the issues surrounding citizenship and voting might never achieve the same prominence in the referendum debates as questions of economic prosperity or defence and security, the likely future complexities and implications for constitutional law and democracy certainly deserve, as I have tried to suggest, more critical attention than they have hitherto received.



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