

The Coherence, of EU Free Movement Law

Constitutional Responsibility and the Court of Justice

NIAMH NIC SHUIBHNE

*Professor of European Union Law,
University of Edinburgh*

OXFORD
UNIVERSITY PRESS

Contents

<i>Table of Cases</i>	xii
<i>Table of Legislation</i>	xxv
<i>List of Abbreviations</i>	xxvii

1. Introduction: The Court of Justice, Constitutional Responsibility, and the Scope of EU Free Movement Law	1
1. Introduction	1
2. The Court of Justice and constitutional responsibility	8
(a) The responsibilities of constitutional courts	8
(b) Constitutional responsibility and the Court of Justice	12
(i) The nature of the EU legal order	13
(ii) Normative perspectives	15
(iii) Functional constitutionalism	16
3. The significance and scope of free movement law	21
(a) Significance: why free movement law?	21
(b) Stages: restriction, justification, and proportionality	24
(c) Scope: general approach and chapter map	29
2. Coherence, Fragmentation, and the Free Movement Case Law	31
1. Introduction	31
2. Coherence and fragmentation	31
(a) From convergence to coherence	32
(b) The meaning—and limits—of coherence and fragmentation	36
3. Key drivers of fragmentation in EU free movement case law	41
(a) Proliferation	41
(b) The multiple—and unsettled—objectives of the internal market	43
(c) Realizing the protection of fundamental rights	50
(d) The structure of the Court	54
4. Conclusion	62
3. The Negative Scope of Free Movement Law: 'Who-Based' Exclusions	63
1. Introduction	63
2. Definitional exclusion from the scope of the Treaty	64
(a) Material scope	64
(b) Personal scope: the basic framework	66
(c) Personal scope: the substantive dimension	71
(d) Is there a hierarchy of rights in free movement law?	74
(i) The citizen-worker	74
(ii) The human (rights) dimension	81
(e) Definitional exclusion from the scope of the Treaty: interim conclusions	84

3. Abuse of (EU free movement) rights.	85
(a) Abuse of rights in free movement law: the emergence of a concept	86
(b) A widening gap between concept and impact?	90
(c) Three points of discord	94
(d) Abuse of rights: interim conclusions	98
4. The horizontal scope of free movement law	100
(a) How horizontal? The different reaches of the Treaty freedoms	100
(i) Collective regulatory impact	103
(ii) Member State responsibility	104
(iii) Full horizontal reach	107
(b) Distilling the Treaty's objectives: the catalyst of discrimination	108
(c) The curbing of private autonomy	110
5. Conclusion	113
4. The Negative Scope of Free Movement Law: Cross-Border Connections and the Significance of Movement	115
1. Introduction	115
2. What does movement mean and why does it matter (so much)?	116
3. The incredible shrinking concept: does movement matter less?	123
(a) Admissibility of (internal) national disputes under Article 267 TFEU	124
(b) The changing significance of movement in law	126
4. Standing at the constitutional crossroads: the specific case of citizenship and purely internal situations	130
(a) A changing matrix? Citizenship, movement, and the protection of fundamental rights	131
(b) Recalibrating the weight of movement	143
5. Conclusion	155
5. Between Negative and Positive Scope? The Principles of <i>De Minimis</i> and Remoteness	157
1. Introduction	157
2. Too little: is there a <i>de minimis</i> test in EU free movement law?	158
(a) Free movement and <i>de minimis</i> -, the case against	158
(b) Challenges to the status quo	163
(c) <i>De minimis</i> , remoteness, and conceptual spillage	169
3. Too far: the principle of remoteness	171
(a) Is remoteness a principle or principles?	172
(b) Hypothetical restrictions	173
(c) The core test: too uncertain and indirect	177
4. Between negative and positive scope: renewing or reframing the boundaries of Treaty-caught restrictions on movement?	185
5. Conclusion	188

6. The Positive Scope of Free Movement Law: Discriminatory Restrictions	189
1. Introduction	189
2. Restrictions: the basic framework	190
3. Discriminatory restrictions	193
(a) The significance of discrimination	194
(b) Direct and indirect discrimination	198
(c) Questions at the edge	199
4. The limits of discrimination	205
7. The Positive Scope of Free Movement Law: Non-Discriminatory Restrictions	209
1. Introduction	209
2. Non-discriminatory restrictions and market access: emergence and entrenchment	210
(a) Emergence and evolution: market access and non-discriminatory restrictions	211
(b) Entrenchment: the use of goods case law	224
3. From concept to principle: access to what, and when?	234
(a) Defining access as a principle: what is it trying to achieve?	234
(i) Definitional ambiguity	236
(ii) Questions of overreach	242
(b) Access as a principle: refining the limits	250
4. Conclusion	256
Conclusion	257
<i>Index</i>	261