The Ethics of Immigration symposium

So what does The Ethics of Immigration tell us about the European Union?

The Ethics of Immigration symposium: So what does The Ethics of Immigration tell us about the European Union?

by Jo Shaw on June 3, 2014

So why did the organisers of this symposium also offer the opportunity to a European Union lawyer – not a theorist mind, but a vanilla lawyer – to make a comment on Joseph Carens' magisterial book on The Ethics of Immigration? It should have been obvious that I could add nothing to the excellent contributions by other normative theorists who are commenting directly on these aspects of Carens' work. So it must have been for some other reason.

It was presumably in order to provoke a reflection upon the peculiarities of the EU's own combined system of internal soft borders ('free movement') and external hard borders ('Fortress Europe', some might say) in the light of Carens' arguments about the ethical demands of states in relation to borders and migrants. To that extent, my reflections are less about the book than about the issues which the book is helping me to think through – and for that I am very grateful to Joseph Carens for his wonderful text and also to the organisers for indulging my preferences.

Now EU internal free movement is not unconditional; incomers should be totally self-sufficient for the first three months and thereafter there is no right of residence under the EU treaties or secondary legislation for a person who is an 'unreasonable' burden on the host state. Carens recognises this characteristic of the EU system when he states that a form of free movement which does not give incomers immediate access to all aspects of the host social and welfare systems represents an ethically acceptable outcome. Carens would be less pleased, doubtless, by the continuing ability of Member States to deport EU citizens on public policy or public security grounds, provided they can demonstrate that such persons represent a present and continuing threat to the host state, and even after they have reached the so-called safe harbour of 'permanent residence' after five years. He reserves some of his harshest criticisms for systems which routinely deport foreign national prisoners, and he would probably be alarmed to discover that despite the protections in law for EU citizens (e.g. individual determination of risk, protection of family life, etc.), in practice harsh decisions are made at the national level and the system does not quite work in practice as it was intended, as we discovered in a recent project when you dig below the surface.

In contrast, the EU is a polity with hard external borders in almost every respect. The system is, though, quite complicated. It is an area of shared competence, but with scope for some states to opt out of many key aspects. For example, the UK and Ireland opt out from many aspects of the legislative framework in place to deal with immigration from third countries, with the exception of measures related to the treatment of asylum-seekers and the process for the determination of asylum status, and many of the measures related to what is now termed on the Commission's website 'irregular immigration' (although the word illegal still sticks in most media discourse). However, the overwhelming majority of the EU-level measures are those related to the policing the external border against irregular incursions – demanding the sanctioning of carriers and employers and managing the external border more effectively, which often means externalising

various aspects of border control e.g. through readmission agreements. The UK and Ireland do generally opt out of the limited number of measures related to regular migration, e.g. on family reunion or the rights of long term residents. Meanwhile, the fundamental issues of 'choice' in relation to the selection of migrants from third countries remain largely with the Member States. Member States are free to set their own levels of immigration from third countries.

In one key respect, the stark distinction between the outside and the inside is much more blurred and this is one area where the EU system (which in practice is a combined multi-level system of shared competences with the Member States) raises some ethical questions. One group of third country nationals who have free access to the EU – and thus to the enormous benefits of rights of residence, right to work, freedom of travel across the Member States – are those who also have the citizenship of one of the Member States. As Member States are free to determine their own regimes of citizenship acquisition and loss, provided that in so doing they abide by the key principles of EU law such as non-discrimination, they remain free to institute ethnic preferences for those residing in other states in relation to the acquisition of citizenship. This has long been the situation with Italian and Greek citizenship. Italian citizenship is easy to re-acquire for those able to show an Italian ancestor. Greek citizenship is in fact quite hard to lose. Some new Member States have strong ethnic preferences making external citizenship possible for those not only in widespread global diasporas, but also in the near abroad (e.g. Hungary's kin state minorities in states such as Serbia, or Croatia's minorities in Bosnia and Herzegovina) residing in states which aspire to membership of the European Union at least in the medium term, but whose citizens have tired of waiting for the wheels of conditionality and Union absorption capacity to wind around to the 'ready' position. Unsurprisingly, citizens in those circumstances look around themselves to see what opportunities might lie in acquiring a new passport based on ancestorship or some sort of even tenuous kin state link.

Moreover, we should not be surprised at the surge in various schemes of 'investor citizenship' (e.g. in Malta and Cyprus) or 'investor residence' (in almost all Member States in one form or another). Protected not so much by the Member States' ethical preferences to have a system of human capital development based on free movement and the right to work across a substantial open market, but rather by the link between the free movement of persons and other elements of the single market (free movement of goods, services and capital), Member States are relatively free to treat access to citizenship as a fungible asset. Only 'relatively free', though, as there have been plenty of behind the scenes conversations between national governments and the European Commisson, as the latter has sought desperately to assert the higher value of intra-EU solidarity and loyalty between the Member States as a means of holding off the crassest of efforts to commoditise passports.

It might be comforting to think that the EU system of free movement represents a bulwark in a world of states that seem increasingly hostile to immigration, despite immigration being both a complement to globalisation, global inequality and continued insecurity within and across state borders. Indeed, despite the hostility to many aspects of the free movement of persons seen not only in the UK but also in many Member States in recent years, there has as yet been little evidence of the whole structure unravelling, although – as I just suggested – not for ethical reasons, so much as because the Member States are aware that it is impossible to sever the free movement of persons from other aspects of the single market to which they are committed for political and economic reasons. But states are free to ramp up a discourse distinguishing between good and bad EU citizens, and they find willing collaborators in the media. The increasing gap between the rhetoric of free movement and the actual experience of many of those who take advantage of these rights, highlight that intra-EU free movement is now politicised in exactly the same ways as any other form of immigration. In that context, identifying and the advocating for an ethical course is just as hard inside the EU as it is across the EU's external borders, or in any other immigration context.

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{ 4 comments }

1

Ed Herdman 06.03.14 at 2:18 pm

> This is really useful grounding context; for example, the first point answers a refrain seen in the responses to many of the previous commentaries – whether or not there is an agreed-upon limitation to free use of host resources.
>
> The point about ethnic preferences for gaining citizenship has been bouncing around in my mind – many people put a premium on ancient land rights and safeguarding ancient cultures (in North America, this prominently includes aboriginals), yet free borders do promise to compete with these projects. I don't think it's an intractable problem, but it still seems to represent a paradox.

2

Matt 06.04.14 at 1:09 pm

> Thanks for this informative contribution, Jo. It's hard to keep up w/ changes in EU law, and their interactions w/ member state laws, so this was very helpful. I was surprised not to see Germany listed w/ countries that give "ethnic" preferences for citizenship. My understanding was that, while it's now easier for non-"ethnic Germans" to get citizenship, there are still quite a lot of advantages given to "ethnic Germans" (much more generous and expansive jus soli citizenship, easier access to dual citizenship, much easier access to citizenship by non-natives, etc.) Do you know if this is still the case?

3

Jo Shaw 06.05.14 at 3:42 pm

> I concentrated, for cases of ethnic preferences to external citizens, on the cases where the commodity being 'sold' here is effectively EU citizenship. Yes, German has some ethnic preferences for non resident 'kin', but Germany being Germany people who acquire that citizenship mainly want to be in Germany. That's not the case with Italian citizenship in Latin America, which is acquired often for the purposes of living/working elsewhere in the EU, or – even – the US, where Italian citizenship is better than, say, Brazilian.

4

Matt 06.05.14 at 6:10 pm

> Thanks, Jo- I see your point better now. That's a very interesting and useful one.

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