

EDITORIAL

Benedict S. Wray*

CITIZENSHIP & MIGRATION: THE PROBLEM OF WHO SHOULD REGULATE

It is difficult to imagine a more important or pressing question for academia right now than migration and its corollary, citizenship. The scale of the current crisis has engendered protectionism of all types across the world, but not least in the ramping up of immigration controls on a large scale, particularly in western democracies fearful of the floodgates of economic migration. Meanwhile the imminent threat of migration linked to climate change is one that must be met head-on if we are not to witness a host of humanitarian disasters in the decades to come.

But what of the underlying questions behind migration and citizenship? Is the approach of the European Union, one which serves as a model for other economic integration zones, the right one? More importantly, can regionalism really deal with the transnational nature of modern migratory flows or do we need a more cosmopolitan, more global approach? With the introduction of quotas for non-EU work visas in the United Kingdom, economic migration has become all but impossible from outside of Europe, with the exception of a few specialist jobs. One may question whether that is a desirable result, particularly at a time when skilled labour is necessary to help re-start growth in a troubled economy. On the other hand, it is doubtful whether a global approach is materially or politically feasible, let alone whether it is desirable. Indeed, authors such as Wenar have suggested in the development context that we need far more empirical research into the consequences of global initiatives as often well-intentions attempts to aid those in other countries can go awry. Might the same risk be present in the migration context?

The other alternative would appear, on the face of it, to be a return to nationalism, and grounding the idea of citizenship in the nation-state which in turn necessitates national control of migration in order to maintain coherence in the concept of national citizenship. Yet, I would argue, such an isolationist solution carries with it its own particular risks, which could in fact lead to a decrease in national sovereignty and national

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power. The degree of dependence that big business has upon national support is a debated question, but it is clear that following the growing pace of globalization in recent decades, we are no longer in the world imagined by the ICJ in the *Barcelona Traction* case, a world in which each state has perfect control over companies incorporated under its laws. Rather, we have arrived at a situation where transnational corporations may bargain on an equal footing – or even in some cases from a position of power – *vis-à-vis* individual states. The justification presented by the British Prime Minister, David Cameron, for his recent veto of EU treaty modification to cope with the Euro crisis, namely that increased regulation in the City of London could scare away banks from emerging markets such as Brazil, India and China, provides an illustration of the extent to which states may fear the departure of significant transnational business interests. It is precisely this easy mobility of capital that erodes national power, yet if protectionist immigration and citizenship policies are adopted, they may only serve to increase the relative imbalance between labour and capital, leaving the benefits of immigration and citizenship subject to the whims of business interests and the implied threat of divestment.

I do not pretend to have answers to any of these concerns, but it is interesting to note that EU immigration policy is often justified on economic grounds. Our first article, by Anna Kocharov, offers an interesting analysis of current EU immigration law in light of its supposed economic aims. Second, Ferri and Marquis provide a suggestion for (re)framing the ‘social market economy’ as introduced by the Lisbon Treaty, through an examination of state aid incentives to encourage the employment of people with disabilities, ultimately arguing that the latter provides an interesting expression in positive law of the marriage between social policy and market economics. For them, the concept of a social market economy ‘has significant potential as an interpretive guideline for the EU as it carries out its activities’. Third, Panos Stasinopoulos analyses the evolution of the concept of citizenship in the case-law of the Court of Justice and examines in particular the relationship between economic activity, or citizens *qua* workers, and citizenship *per se*, concluding that the Lisbon treaty is the launching pad for a ‘more inclusive’ conception of citizenship, something already to be seen in the early post-Lisbon jurisprudence of the Court.

Still in the vein of regional approaches to immigration and citizenship policy, M. Belén Olmos Giupponi offers a comparative look at changes in immigration laws in Argentina and the MERCOSUR. One particularly interesting feature of her article, apart from its examination of the impact of regional integration in the MERCOSUR on migration flows, is the

discussion of the interplay between citizenship and migration, something clearly relevant beyond the South American context.

The last article in our symposium, by Juan M. Amaya-Castro, takes a very different approach to the other four, focusing on the notion of ‘illegality regimes’ and their potentially corrosive effects on citizenship. There are obvious parallels here to current research into states of emergency and temporary zones of illegality brought into being to cope with such situations, as well as to the Sousa Santos idea of ‘interlegality’.

ALSO IN THIS ISSUE

Beyond the migration and citizenship context, we have several articles on general topics in this issue. In EU law, Pedro Cara de Sousa argues that the CJEU does not take sufficient cognizance of institutional ability and legitimacy in making its decisions, something it must take account of urgently if it is to find a legitimate way of balancing the competing normative aims of the economic freedoms, on the one hand, and fundamental rights on the other. Loïc Azoulay takes a different tack, examining the familiar use of the ‘retained powers’ adage in the reasoning of the Court. In a call to other scholars, he argues that great scrutiny of the invocation of this formula by the court – supposedly to safeguard the interests of Member states while enabling the protection of interests protected by EU law – is essential to prevent arbitrariness and to meet criticisms of the EU’s ‘creeping competence’.

Meanwhile in legal theory Guerra-Pujol makes the case, going back to Wendell-Holmes, for a predictive approach to law, and uses a formal Bayesian model of litigation dubbed ‘the litigation game’ to argue that positive litigation outcomes are, in fact, a reliable indicator of a defendant’s guilt. Finally, Jean-Sylvestre Bergé takes a look at global legal pluralism and the role of hierarchy, both in different legal orders and in legal reasoning.

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