
A Review of David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship*

David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship*. Baltimore: Johns Hopkins University Press, 1996.
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Incubated in both national and international law, the universe of human rights has been potent in recasting the boundaries of statehood and the citizen's locus therein. Privileging *personhood* above citizenship as the repository of rights was always a radical proposition. Now, the legitimacy of the sovereign state is seen in David Jacobson's *Rights Across Borders* as "shifting from an entity that embodies the people's will (national self-determination) to an entity that advances transnational rights"¹ — with negative consequences for citizenship.

It is not only the post-World War II normative regime, stemming from the *Universal Declaration of Human Rights* and the ensuing International Covenants,² that accord primacy to the person vis-à-vis society and state. The French Declaration of the Rights of Man and the Citizen³ and the American Declaration of Independence⁴ — along with the constitutions of both nations — blazed the trail in their universal aspi-

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¹ *Rights Across Borders: Immigration and the Decline of Citizenship* (Baltimore: Johns Hopkins University Press, 1996) at 11.

² *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71; *International Covenant on Civil and Political Rights*, 19 December 1966, Can. T.S. 1976 No. 47, 999 U.N.T.S. 171 (entered into force 23 March 1976) [hereinafter *Universal Declaration*]; *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, Can. T.S. 1976 No. 46, 993 U.N.T.S. 3 (entered into force 3 January 1976). See generally L. Henkin, *The Age of Rights* (New York: Columbia University Press, 1990).

³ (1789).

⁴ (1776).

rations even as they recognized the state as the enabling framework.⁵ Those aspirations were echoed and advanced during eighteenth-century romanticism, with Kant as a pivotal figure in altering the mechanistic premises of the Enlightenment into a vision of human liberty and individuality.⁶ The nationalism of the age was civic, inclusive and universalist, seeking the autonomy of the individual and society alike.

But the Westphalian order of nation-states was also pervaded by more mundane concerns. Mercantilism and the rule of law were the norm, with state sovereignty built on the principle *cuius regio, eius religio* (religion determined by the sovereign). The Industrial Revolution and mass trans-Atlantic migration began to change that in the nineteenth century; by the early twentieth, states were becoming more centralized — and tightening the regulation of citizenship. Indeed, the passion for boundaries extended to colonial empires, where they were drawn with an arbitrariness whose legacy unfolds today from Central Africa to Central Asia. Jacobson's preoccupation, however, is with the "Euro-Atlantic core", including the Organization for Security and Co-operation in Europe (OSCE) of which Canada is a member.⁷

Jacobson's argument in *Rights Across Borders* is twofold. First, he holds that a new "international and constitutional order based on human rights"⁸ is reducing the state to an administrative bureaucracy for that order. Second, he contends that the cardinal force behind this change is transnational migration, which has thwarted the "citizen-alien distinction" and *ergo*, the idea of citizenship.⁹ A mosaic of transnational societies rather than a global society is the outcome, engendering a Euro-Atlantic community. Although the trend has many congenial aspects from a human-rights perspective, Jacobson casts it as subversive of a host of societal relations that center on sovereignty, most notably, the bonds of citizenship.

Migration and the New Human Rights Order

Jacobson observes that, attracted by a confluence of economic, cultural and social-welfare factors, over two-thirds of foreigners in the European Union (then the European Community) resided in France or Germany by 1987.¹⁰ A "web of ties" to trade unions, religious institutions, civic and ethnocultural organizations has anchored

⁵ See Henkin, *ibid.* at 144; Olwen Hufton, ed., *Historical Change and Human Rights: The Oxford Amnesty Lectures* (New York: Basic Books/Harper Collins, 1995).

⁶ As argued elegantly in I. Berlin's essay, "Kant as an Unfamiliar Source of Nationalism" in *The Sense of Reality: Studies in Ideas and their History* (London: Chatto & Windus, 1996) at 232.

⁷ Formerly the Conference on Security and Co-operation in Europe (CSCE) under the 1975 *Helsinki Final Act*, it was renamed at the 1994 Budapest meeting to signify a new East-West relationship. This was pursuant to the *Charter of Paris for a New Europe* signed by the then 35 members of the CSCE (including Canada and the United States) in 1990, which placed human rights at the center of the Organization: 30 I.L.M. 190 (1991). See generally: T. Buerghenthal, ed., *Human Rights, International Law and the Helsinki Final Accord* (Montclair, N.J.: Allanheld, Osmun, 1977); H.H. Koh, "Transnational Public Law Litigation" (1991) 100 Yale L.J. 2347.

⁸ *Supra* note 1 at 2.

⁹ *Ibid.* at 9.

¹⁰ *Ibid.* at 21.

a large proportion of guest workers in new homelands — while often legitimizing workers or visitors overstaying their initial permits.¹¹ Yet France and Germany represent strikingly varied traditions of nationhood: the former a “territorial nation” under the banner of *fraternité*, the latter an “ethnic nation” shaped by the *Volkgeist*.

Although the disparate traditions have resulted in a predictably higher rate of annual naturalization in France than Germany, the latter was quicker in allowing petitionary access to the *European Convention on Human Rights*¹² — and to international law at large. France, like the United States, was reluctant to do so, but like Germany (and unlike Britain), it has readily accorded primacy to international rather than domestic law. Amidst the growing caseload of the European Court on Human Rights, there has been a rise in petitions by and relating to aliens throughout the region. Moreover, Protocol No. 4 of the *European Convention* has, since 1968, added specific safeguards for aliens and citizens alike.¹³ With the loosening of frontiers in an expanding European Union, and the widening scope of the OSCE, international human rights law continues to reconfigure and harmonize sovereign norms with regard to the status of aliens.

Meanwhile in the United States, the same factors that have drawn large scale migration to Western Europe, coupled with a porous southern border and a robust tradition of migration, have repeatedly reshaped the demographic landscape. Ethnic and ideological criteria dominated official policy through much of this century, and even the repeal of national origins quotas by the 1965 *Immigration and Nationality Act*¹⁴ left intact the dubious provisions of the 1952 *McCarran-Walter Act*,¹⁵ apropos “communist” migrants and visitors.¹⁶ Jacobson observes that net migration accounted for 4.1 per cent of the population between 1900 and 1910 and remained well below that (dipping to zero in the Depression) until 1980, when it reached 6.2 per cent.¹⁷ Mere numbers cannot explain why immigration has become a major political issue in the United States since the 1980s.

Manifestly, the change in the ethnic composition of immigrants away from the predominance of Europeans to that of Asians and Hispanics has had a significant social impact but it is the issue of illegal aliens that has engaged most attention. Their numbers were estimated by demographers at between 2.5 and 3.5 million during the

¹¹ *Ibid.* at 33-38.

¹² (1950) Eur. T.S. No. 5, 213 U.N.T.S. 222 [hereinafter *European Convention*].

¹³ While prohibiting the collective expulsion of aliens, it adds specific protections for nationals and to that extent, Jacobson duly notes, buttresses the citizen-alien divide. Both France and Germany have ratified the Protocol.

¹⁴ *Immigration and Nationality Act Amendments of 1965*, Pub. L. No. 89-236, 79 Stat. 911.

¹⁵ *Immigration and Nationality Act of 1952*, ch. 477, 66 Stat. 163 (codified as amended at 8 U.S.A. §§ 1101-1537 (1994)).

¹⁶ Enacted during the Korean War, the legislation incorporated the *Internal Security Act of 1950*, ch. 1024, 64 Stat. 987 (codified as amended at 50 U.S.C. §§ 831-835 (1994)), citing the Communist Party and fellow travellers. President Harry Truman’s objection to ethnic quotas in the Act was overridden.

¹⁷ *Supra* note 1 at 53.

1980 census — a figure that today stands at about four million.¹⁸ As in Western Europe, economic forces have prompted hazardous migrations to the country, generally heavy demand for migrant labor, and opposition to it in some quarters. Again, the legal culture has often resorted to international norms in eroding a rigid divide between citizens and aliens.

Despite earlier judicial circumspection, the prevailing trend is reflected in *Fernandez v. Wilkinson*¹⁹ and *The Paquete Habana*,²⁰ affirming the propriety of recourse to clear international law in assorted contexts.²¹ Since the legislative and executive branches have to attend increasingly to the judiciary, “regime legitimacy has come to rest on the courts, focusing above all on human rights,” says Jacobson.²² Individuals and non-state actors have a tangible role in global affairs at the expense of sovereignty.

Rights Across Borders is dismissive of the contribution of states as well as non-governmental organizations (NGOs) to the prominence of human rights in international affairs. These and other transnational factors are acknowledged, but thought to pale in comparison with the impact of migration. No evidence or analysis is offered in support of this contention; if it were, it would surely fail to withstand scrutiny. The *Universal Declaration* proclaims itself a response to the scourge of war, and its normative aftermath had much to do with the ideological conflict during the Cold War. Aliens availed themselves of *existing* domestic and international norms — the “other” seeking to be “just another” — among a plethora of claimants against state power. Without the concurrence of national political and judicial institutions in a deepening of pluralist democracy, along with the remarkable work of NGOs, aliens would fare no better in the West than, for example, in Eastern Europe or Northeast Asia.

As for traditional sovereignty, it could hardly be sustained against the century’s exponential growth in state interdependence. This runs the gamut in issue-areas from commerce and investment to the environment and narcotics control, to terrorism and transborder pollution. Certainly the statist thrust of international law has been diluted by human rights, which adds the individual and supranational agencies to the picture.

¹⁸ Official estimate cited in E. Schmitt, “Milestones and Missteps on Immigration” *The New York Times* (26 October 1996) 1.

¹⁹ 505 F. Supp. 787 (1980), affirmed on other grounds in *Rodriguez-Fernandez v. Wilkinson*, 654 F. 2d 1382 (10th Cir. 1981).

²⁰ 175 U.S. 677 (1900): “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination” (at 700, Grey J.).

²¹ As in the instance of civil liability for war crimes, for which the Bosnian Serb leader Radovan Karadzic was indicted by the International War Crimes Tribunal. A federal appeals court in New York ruled in favor of jurisdiction under the *Alien Tort Claims Act*, 28 U.S.C. 1350 (1994); *Kadic v. Karadzic* and *Doe v. Karadzic*, 70 F. 3d 232 (2d Cir. 1995). The decision was upheld by the United States Supreme Court: certiorari denied, 116 U.S. 2524 (1996). See also: N.A. Lewis, “U.S. Backs War Crimes Lawsuit Against Bosnian Serb Leader” *The New York Times* (27 September 1995) A10; L. Greenhouse, “War Crimes Jurisdiction” *The New York Times* (18 June 1996) A14.

²² *Supra* note 1 at 105-06.

Other transnational factors, however, have also undercut a compact view of sovereignty: the International Monetary Fund (IMF), the World Bank and the World Trade Organization (WTO) — not to mention the North American Free Trade Agreement (NAFTA), especially from the Canadian/Mexican perspective — have an increasingly direct impact on national life. Moreover, the “Euro-Atlantic core”, which Jacobson chooses as his focus, is a hotbed of sovereignty when compared with under-resourced Afro-Asian regions where borders and central authority barely hold.²³

The End Of Citizenship?

Among the laudatory effects of a new human rights order, Jacobson acknowledges, would be “the increasing ability of groups to be recognized outside territorial frameworks,” allowing them to partake in history and to exercise their right to self-determination to a degree hitherto impossible.²⁴ Conflict resolution may be enhanced by the recourse of groups to redress from supranational law and institutions.

As well, humanitarian intervention will become easier in an order that de-emphasizes sovereignty. Yet, with rights now predicated on residency rather than citizen status, he sees transnational migration as ineluctably undermining the distinction between citizen and alien. Citizenship is therefore “devalued”.

This phenomenon is illustrated by a 1985 survey which indicated that of the 70 per cent of foreign residents eligible for naturalization in Germany, only 6.2 per cent wished to do so.²⁵ The trend was common across Western Europe. Only 16 per cent of the 600,000 legal Mexican arrivals in the United States between 1970 and 1979 had naturalized by 1992, reflecting a trend among migrants since 1965.²⁶ The attitude towards citizenship (and voting) seemed to be characterized by indifference. Why bother to acquire citizenship, the argument goes, when the courts will confer virtually the same package of rights, short of voting, to aliens? In *Plyler v. Doe*,²⁷ for example, the United States Supreme Court obliged state authorities to provide free public education to the children of undocumented aliens on the basis of the Constitution’s equal-protection clause with its open-ended embrace of personhood. Jacobson’s reading of *Plyler* is doleful: “Constitutionally, accepting, and reinforcing, the erosion of the distinction between alien and citizen has its own destructive dialectic; what does the Constitution represent, if not a political and national community?”²⁸

²³ For harrowing evidence of these frailties from Sierra Leone to Uzbekistan, see R.D. Kaplan, *The Ends of the Earth: A Journey at the Dawn of the Twenty First Century* (New York: Random House, 1996). Indeed, the vast majority of the world’s more than 13-16 million refugees live in makeshift sites on frontiers in the Near East, Central Asia and Sub-Saharan Africa.

²⁴ *Supra* note 1 at 135.

²⁵ *Ibid.* at 40.

²⁶ *Ibid.* at 65.

²⁷ 457 U.S. 202 (1982) [hereinafter *Plyler*]. The court was not persuaded that a right to free education can be grounded in customary international law as evidenced in major human rights instruments.

²⁸ *Supra* note 1 at 103.

As it happens, the prospect of being deprived of such rights under new state and federal laws has prompted a drastic reversal of the foregoing trends among migrants in the United States. Over 2.3 million naturalizations were recorded between 1992 and 1996, the highest figure for new citizens in any four-year cycle since 1924.²⁹ On election day, 6 November 1996, amidst the worst overall voter turnout in recent American political history, Hispanic voters recorded a thirty per cent increase nationwide having previously lagged behind most of the population in participation.³⁰ No doubt a primary impetus for those trends was the impending federal legislation to curtail benefits to legal migrants, while effectively diminishing assorted legal protections for migrant workers and asylum applicants.³¹

Developments here in Canada also demonstrate a lack of enthusiasm towards immigration. In the autumn of 1997, the government announced a one-third shortfall in the migrant intake program for the year compared with its original target. This invoked a negative public opinion that was expressly stated to be wrong by the immigration minister.³² Then, a draft regulation in *The Canada Gazette*³³ proposed what is effectively an annual quota for refugees applying from outside our borders — including those in the privately sponsored class, which Ottawa hitherto sought to encourage.³⁴ Yet “official” Canada commonly perceives itself as more generous than Western Europe and the United States in this regard. In reality, Canadian elites have tended to circle the wagons on an assortment of issues that entail greater cultural and demographic diversity despite the increasingly permeable nature of political frontiers.³⁵

²⁹ See S.A. Holmes, “Influx of Immigrants Is Changing Electorate” *The New York Times* (30 October 1996) A16.

³⁰ See B. Drummond Ayres Jr., “The Expanding Hispanic Vote Shakes Republican Strongholds” *The New York Times* (10 November 1996) 1.

³¹ *Ibid.*; see also Schmitt, *supra* note 18. Some one million immigrants face losing welfare benefits under the law: R. Pear, “Legal Immigrants to Get Letters on Welfare Cut” *The New York Times* (6 February 1997) A16.

³² See P. Peirol, “Immigrant levels reflect backlash” *The Globe and Mail* (30 October 1996) A1. Against an election promise to admit 300,000 immigrants and refugees for the year, a target figure of 195,000-220,000 was announced, with the actual intake not expected to exceed 200,000. Restrictive immigration policies also prevail across the Atlantic: see: E. Mortimer, “Hurdles to safety — Central Africa’s refugee problem has highlighted how reluctant industrialized countries are to grant asylum” *The [London] Financial Times* (27 November 1996) 10; C.R. Whitney, “France Blasts European Parliament for Attacking Immigration Bill” *The New York Times* (27 February 1997) A4; A. Freeman, “Changes in citizenship law derailed by German party” *The Globe and Mail* (13 November 1997) A11.

³³ SOR/97-183.

³⁴ See P. Peirol, “Refugee quota planned” *The Globe and Mail* (8 March 1997) A1. The Immigration Department insisted it was imposing a “numerical limitation” rather than a “quota”, a distinction that most see as semantic. Moreover, Canada’s projected refugee intake for 1998 (including for government-assisted refugees) has been capped at 1997 levels despite escalating global flows, while the proportion of economic migrants is being increased: S. Feschuk, “Federal liberals keeping the lid on 1998 immigration” *The Globe and Mail* (24 October 1997) A4.

³⁵ See A.B. Sajoo, “New Dances With Diversity” (1994) 15 *Policy Options* (Montreal) 14.

Jacobson fails to recognize that migrant attitudes toward a traditional concept of citizenship are broadly integral to the change in the citizen-state nexus as a whole. General voter apathy in liberal democracies, most notably the United States, is one symptom of that change. Again, as regional convergence across the spectrum of public policy occurs within an expanding European Union, easily the world's most advanced effort at such harmonization, 70 per cent of those polled in every member-state in 1995 did *not* think of themselves as European first.³⁶

Rights Across Borders evokes a patchwork of "imagined communities"³⁷ that span the continents rather than being confined to national boundaries. Jacobson persuasively argues that this concept, rather than the much heralded unitary global society, is likely to be dominant in the coming decades. However, these communities are not merely ethno-cultural diasporas: they are also professional, class-based, cause-driven, or even information technology-sharing associations. More often than not, they straddle the divides of culture, ethnicity and nationality — which does not necessarily mean that they wish to dispense with the local *terra firma* of law and society.

* * *

The principal contribution of this scholarly volume is to sketch the intertwining themes of migration and human rights in trans-Atlantic contexts past and present. Certainly, the flow of people differs from other cross-border diffusions, given the implications for national and international order. But the deep change wrought by human rights, not least within the variegated domain of law, is integral to this century's vistas as they shift from sovereign to global and then to local. Migrants have drawn upon and reinforced those trends, including the redefinition of citizenship, with the support of key national institutions. Rather than being devalued, citizenship may be renewed in a fresh ethos: that of pluralist civil society, resistant to homogenized identity.³⁸ Skeptics need hardly look further than the contemporary Canadian landscape.

³⁶ See "Cultural Explanations" *The Economist* (9 November 1996) 23. The survey was conducted for the European Commission. Even the President of the Commission has rejected the vision of "a united states of Europe": V. Smart, "Superstate is not our target — Santer" *The European* (13-19 February 1997) 1.

³⁷ After Benedict Anderson's *Imagined Communities: Reflections on the Origins and Spread of Nationalism*, 2d ed. (London: Verso, 1991).

³⁸ For an especially engaging reflection in this regard, see W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995).