

An Immigration Policy for a Just Society?

LOUIS HENKIN*

Thanks largely to *A Theory of Justice*, Professor John Rawls' modern classic, justice has been a preoccupation of political philosophers in the second half of the Twentieth Century. But Rawls — and Aristotle, who was occupied with justice 2,300 years earlier, and virtually all the many others in between — addressed the just society as self-contained, as if it were the only society on earth, or hermetically sealed off from all others. Rawls — and Aristotle — knew there were other societies in fact, but their inquiries did not include asking how a society committed to justice should behave in relation to other societies, or how an individual committed to the pursuit of justice would behave in relation to individuals in other societies.

That considerations of justice (or morality, or “the right”) might be relevant to relations between states did not escape other perceptive, sensitive spirits. The most famous instance, no doubt, is to be found in Thucydides' History of the Peloponnesian Wars. Thucydides tells us that when Athens made demands on the Melians under threat of military attack, the Melians invoked considerations of justice, and the Athenians denied their relevance, declaring that the strong do what they can while the weak do what they must. But even the Athenians admitted that the question of right might be relevant between “equals.” Long after Thucydides, but long before our day, Thomas Aquinas and others assumed the relevance of justice in relations between states, notably in exploring the idea of “just war.”¹ In our day too, theologians, at least, struggle with issues of justice (or

* Professor Emeritus, Columbia University. 1994 Nathaniel L. Nathanson Memorial Lecture Series Speaker. January 13, 1994.

1. The Bible too tells of negotiations between countries that ring of claims of justice, as in the story of Jephthah in the Book of Judges.

ethics) in international affairs.

Intuitively you and I recognize the relevance of principles of justice in interstate relations. If we cannot readily determine the principles of international justice, we probably could agree that some policies and practices are unjust.² For some easy examples, one can assume that in a political system consisting of independent states, a just society does not invade its neighbor's territory, or seize its vessels or its bank accounts. A just society, which recognizes that it must not allow its own inhabitants to starve, might also decide that it is obliged not to let the inhabitants of a neighboring state to starve. Some may be disposed to argue whether a state does so from considerations of justice or of charity but the difference between them is not always obvious, and various religious traditions treat charity not as voluntary generosity but as moral (even legal) obligation. In our day, many hold strongly the view that a just society should not remain indifferent when Cambodia commits genocide or the Republic of South Africa practices apartheid, or Serbia perpetrates "ethnic cleansing."

If considerations of justice are relevant in the instances cited, it is presumably because elements of justice in relations between individuals are deemed to have analogues (more or less) in inter-state relations. Aggression or spoliation by one state of another is unjust because aggression or spoliation of a fellow human being is unjust. If principles of distributive justice apply within a society, it is not obvious that they have no application between states or between their inhabitants. If discrimination within a society on grounds of race or religion is unjust, do such distinctions lose their moral significance across international boundaries? Are state boundaries also moral boundaries? If we decide that the same principles do not apply in the same way, it must be not because the principles are inapplicable but because they apply differently and the differences have to be explained and justified.

I. JUSTICE IN IMMIGRATION POLICY

If justice is relevant to interstate affairs generally, might it not be relevant also to issues of immigration?

Prima facie, it is not implausible to apply to immigration the same elements of justice (or injustice) applicable to other interstate relations. For example, if racial or religious discrimination is unjust, a just society does not discriminate in its immigration policy on grounds of race or religion. It is difficult to believe that we would consider it moral, or right, or just, today to deny someone entry as

2. For the suggestion that there may be wider agreement on what is unjust than on what is just, see Edmond N. Cahn, *The Sense of Justice* (1949).

an immigrant only because he or she is Muslim, or Jewish, or atheist or — as we once did — because he or she was of Asian origin. Is it just for a state that determines by law to admit people having certain characteristics or qualities, to do so without a rational-fair procedure — due process of law — to determine whether the applicant has the necessary characteristics or qualities?

If immigration policy is subject to the same considerations of justice that are applicable in international relations generally, immigration policy may be subject to particular justice-related considerations. A just society will not be guilty of “refoulement” or “pushing them back”: it will not deliver refugees who have fled oppression back into the hands of their oppressors. When the Nazi Gestapo was pursuing Jews who sought to escape their clutches, a neighboring state could not — in justice — push them back. More generally, can a just society remain impervious to requests for asylum by refugees — by those persons who flee their country because their lives or freedoms are threatened?³

Less confidently, I offer the suggestion that would-be immigrants may have a different, broader claim that smacks of “justice.” In 1868, the Congress of the United States declared that: “[t]he right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness, and in recognition of this principle, this government has freely received immigrants from all nations.” During the same year, a treaty between the U.S. and China also declared “the inherent and inalienable right of man to change his home and allegiance.” If it is a human right for every human being to choose where he or she would live, with which community he or she would conclude his or her “social contract,” do not considerations of justice require a society to hold out its hand to such a contract? Can it be that a human right to change one’s allegiance is only half a right, that there is no justice-related obligation on others to accept that person?

II. LIMITATIONS ON JUSTICE

Justice, if relevant, may not be the only good or the paramount good, and other considerations may “trump” what justice demands. Indeed, countervailing considerations may themselves appeal to principles of justice. Justice to the state’s inhabitants may demand that

3. The Universal Declaration of Human Rights indeed recognizes a human right to leave one’s country and to seek and enjoy asylum.

it deny entry to persons carrying contagious disease or deny entry to dangerous criminals. Even when immigration into the United States was free, Congress barred "paupers." Arguments for restrictive immigration have urged that it is unjust to the present inhabitants to flood the country with immigrants who will take away their jobs or impose heavy economic burdens to provide them the benefits of a welfare state. Other considerations not foreign to our conceptions of justice have been suggested as reasons why a society is entitled — indeed required — to set up immigration barriers. Every community, it is argued, is entitled to, owes it to itself, to maintain its character and to exclude those who might threaten that character. From a different perspective, it has been suggested that considerations of justice require states not to practice "brain-drain," in other words, not to drain the brain power (*e.g.*, all the nuclear physicists or the fine doctors) of other countries, by welcoming their most productive elements.

III. A JUST IMMIGRATION POLICY FOR THE UNITED STATES

Considerations of justice, and countervailing principles, governing immigration policy should apply to the United States as to others. But a policy for the United States has to take account of other considerations as well, considerations that seem not removed from justice.

The first is President Franklin Roosevelt's lesson to the Daughters of the American Revolution. A few of you will recall, some of you may have read about, a famous incident. The Daughters of the American Revolution were not happy with the policies espoused by F.D.R.; some of them called him a traitor to his class (some called him worse). For years, the D.A.R. refused to invite the President to its annual convocation. Finally, it became more embarrassing not to invite him, so they did. The President accepted. He came to the podium and addressed the group: "My fellow immigrants."

So, fellow immigrants — all of us, except those among us who are Native Americans, and those whose ancestors came here by compulsion of slavery, and hardly to be called immigrants — what does justice demand of us, fellow immigrants? Would it be wholly unrelated to considerations of justice for us "to pull up the gangplank" now that we are safely aboard?

Other considerations deriving from our situation as Americans also suggest that justice may require us to keep the gangplank out. Our immigration policy should be just to those of us already here, particularly to the less fortunate among us. But if justice is at stake, justice requires that determinations of facts, and estimates and

prognostications, be made scrupulously. Justice requires that we examine carefully whether justice to the would-be immigrant would in fact be unjust to those already here, or whether policies of exclusion might be motivated by xenophobia or racial prejudice, by lack of compassion, or by unwillingness to share or to pay taxes. Especially when we seek to offset, to "trump" the justice claims of others, our self-serving claims of justice are suspect and require strict scrutiny. What in fact is the impact of immigrants in given numbers on employment and unemployment? Do immigrants as a group pay more in taxes than they cost in welfare benefits? Do they create urban problems or do they help meet urban needs? In sum, do they contribute more than they cost? And when we obtain the best answers to such questions, and if the answers suggest that immigration creates net burdens, we might still have to ask whether justice might require that we assume these burdens, raise taxes and compensate those already here who became disadvantaged. And justice may require that in what we are not willing to do ourselves, we take the lead in assuring that others will share the burden, that we address problems of refugees by preventive, cooperative policies with other states.

Some may find particularly unpersuasive, as applied to the United States, the argument that those who are here are entitled to maintain the character of their community and exclude immigration that would alter or dilute it. Earlier in this century, in the National Origins Act of 1924, the United States claimed to be doing approximately that, declaring that we were doing so in order to keep the "societal mix" congenial by bringing in new immigrants to match those already here. Whatever might be true of some other countries, the American community is built on diversity. Whether one sees the United States as a melting pot or as a vessel that maintains a plurality of intact, diverse, demographic "chunks," some would remind us that fear for the character of the community has been the history of U.S. immigration. If the natives did not know to say that to Columbus 500 years ago, at every new wave of immigration those who were here have protested "there goes the neighborhood." Considerations of shame, if not of justice, require us erstwhile immigrants to stop greeting every new immigration with "there goes our community."

In sum, considerations of justice may suggest that in shaping immigration policy the U.S. has special obligations deriving from its history, its demography, its wealth and its receptive capacity. A just society of immigrants ought not hide a "pull-up the gangplank"

mentality, xenophobia, even "racism" behind "community," and unwillingness to be taxed behind claims of unavailability of "resources."

IV. THE CONSTITUTION AS JUSTICE

Citizens of the United States are proud of their Constitution. Rightly, we think that, whatever its original "genetic defects," (slavery, inequality) after 200 years the Constitution ordained by "we the people" may indeed have established a decent measure of justice. Increasingly, however, it appears that the justice established by the U.S. Constitution is domestic, for "we the people" who live here. The Constitution does not require us to be just beyond our borders.

For our purpose, it is well established that the Constitution is not available to assure a just immigration policy. Repeatedly, the Supreme Court has told us that the Constitution does not govern immigration policy. It does not require even due process of law; whatever process Congress provides is all that is constitutionally "due" to the immigrant. Consider:

—The Constitution therefore does not require justice in admission: it does not forbid racial discrimination, as in the Chinese Exclusion Act, or the euphemistic National Origins Act of 1924. It does not forbid even "refoulement," turning refugees back to face death or oppression.

—The Constitution does not prevent the detention of persons not lawfully admitted into the United States. The United States detained many hundreds, even thousands, of "Marielito" Cubans in indefinite detention, for years, for no reason other than that we did not wish to admit them and no other country would receive them.

—The Constitution does not prevent deportation — for any reason or no reason — even of someone who has lived here lawfully, peacefully, for decades, but has not been naturalized. Forty years ago Justice Frankfurter wrote:

In the light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens.⁴

Unfortunately, Mr. Frankfurter continued, "the slate is not clean."⁵

I suggest it is time, surely, to start a clean Constitutional slate in respect of immigration. Our failure to bring immigration into the Constitutional fold may have encouraged the courts to refuse to cure

4. 347 U.S. 522, 530 (1954).

5. *Id.*

the defects of our constitutional system by international undertakings. Twice recently a majority of the Supreme Court interpreted treaties to which the United States is a party — in opinions widely condemned as incredible distortions. The Court permitted reaching out beyond our borders to seize Haitians and send them back to repression, if not death; and sending agents into Mexico to kidnap a Mexican doctor (who was later acquitted) to bring him to trial in the United States, rather than seek his extradition pursuant to treaty.

But justice depends not only on our Constitution. If, in immigration, the Constitution does not guarantee justice, we might do so by law, or by international treaty to raise us to the minimum international standards. Instead, we have been refusing to assume international obligations to do more than our Constitution requires, as in the reservations we attached to our ratification of the International Covenant on Civil and Political Rights. In matters of immigration that attitude is disastrous, since the Constitution offers no protection.

If we are to have a just immigration policy we will have — at least — to write a new constitutional slate, folding immigration back into the Constitutional fold, subjecting our immigration policy to our fundamental values, to due process of law, to equal protection of the laws. We would do well indeed to ask generally what kind of Constitution we the people do ordain. We would turn back recent tendencies to read the Constitution as only a family affair for our own comfort and security. For many, I suggest, it is an ordinance to our leaders that what we seek — in immigration policy as elsewhere — is to establish justice, making our Constitution a compact of conscience, establishing a community of righteousness.

In the end I have no firm confident immigration policy to offer. But I am satisfied that considerations of justice ought to imbue our policy, and that our policy would be different in important respects and degrees if we recognized that considerations of justice are relevant. We might suggest that the United States has special obligations deriving from our history and special opportunities due to our wealth and the assimilative power of our society. In particular, we might suggest that justice requires our society to resist a “gang-plank” mentality, xenophobia, racism; to define our available resources with justice if not with compassion, including a willingness to share and be taxed; to recognize the strength and assimilative capacity of our pluralistic community; that we lead in efforts to enforce respect for human rights and provide economic assistance so as to discourage emigration — a kind of preventive immigration policy;

and that we insist that other states, too, have obligations of justice. Their failures do not excuse ours but may warrant us in leading the world in justice to immigrants and refugees, demanding and shaming them to be just.

We often see ourselves and our society as a beacon on the hill. It is a fine metaphor and we are right to be proud of it. But a beacon on the hill, bright and attractive, is also distant and inaccessible.

Maybe we can find a better metaphor for ourselves as a haven of freedom and justice, as this country has been for us, my fellow immigrants.