

the future? Waibel's answer is a qualified yes: '[t]he preconditions for effective arbitration in the future include dedicated and durable institutions, the progressive development of the international law on public debt, and protection for the country's essential public services in financial distress' (at 323). Although there is space for disagreement, it cannot be put more clearly.

As happens with great books, there are many ways to gain from reading the one under review. As I went over the chapters, I imagined international legal scholars thinking about the ways in which this book could be the basis for either a course on international dispute settlement, or a seminar on international investment arbitration, or a post-graduate class on state responsibility or state succession on public debt. I have also thought about practitioners writing in the margins of the book about their future legal strategies in proceedings involving sovereign defaults, or judges and arbitrators looking for the best available argument to solve a difficult case involving international law on public debt. In a world in which the law of sovereign debt is in need of serious development, *Sovereign Defaults before International Courts and Tribunals* is a fine and enduring piece of scholarship, which will be crucial in framing the discussion of the adjudication of sovereign defaults for years to come.

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Bas Schotel. ***On the Right of Exclusion: Law, Ethics and Immigration Policy***. Oxford and New York: Routledge, 2012. Pp. 218. £42.99. ISBN: 9780415575379.

A commonplace assumption of migration law is the concept, sometimes called a rule, of inherent sovereign power. Accordingly, a state is said to possess an unbridled power to exclude any or all foreigners from admission into its territory. This assumption is trumpeted as a hallmark of the nation-state system and a foundation of national communities. It is, however, highly questionable, and arguably discredited by general practice and the writings of qualified publicists since the 17th century. In fact, states normally admit limited numbers of foreigners, not only out of self-interest but also for reasons of international cooperation, solidarity, and other motivations premised in *opinio juris*. Still, the inherent sovereignty rule labours on against the evidence, not so much among policymakers and busy administrators, who ordinarily know better, but among academic writers, who should know better. Unfortunately, the concept is not just academic. Instead, it shapes public understanding and discourse about human migration and contributes to unnecessarily restrictive paradigms within which national and international regulation of migration is moulded.

In the book under review, Bas Schotel of the University of Amsterdam casts a critical eye on the so-called right of exclusion, and debunks the underlying concept of inherent sovereign power as a basis for excluding 'normal migrants'. He defines these persons as those who, unlike refugees and members of a permanent resident's family, do not have what he calls a legal right to admission. Instead of having an inherent sovereign power to exclude aliens, Schotel argues to the contrary that states must justify the exclusion of normal migrants. What is more, to discharge that burden, they must provide sound, substantial, and specific reasons for exclusion. Without such justification applicants for admission to the territory of a state are unable to challenge refusals of admission in courts of law. Consequently, they are unfairly denied access not only to territory, but also to welfare opportunities, labor markets, security, social and political life, and a new legal order in which to conduct their lives. Thus, exclusion without justification,

by which Schotel means detailed justification, can be a kind of *bête noire* for normal migrants, at least in Europe.

On the Right of Exclusion makes three types of claims: legal, ethical, and institutional. From the start, Schotel views the practice of exclusion without proper justification as fundamentally a legal problem, not a policy option. In analysing the problem, he thoroughly rejects the rationale of an inherent sovereign power. Yet, he neither challenges nor justifies the concept of sovereignty itself – what the late Louis Henkin famously referred to as the ‘s-word’ in the lexicon of international relations and law. Instead, Schotel’s legal analysis is based on an original strategy. Rather than using familiar tools of international custom, general principles of international law, and the canon of scholarly appraisal, he relies on contemporary political and legal theory. The result is an admirably innovative study that reinforces the established scepticism about extravagant claims of sovereign exceptionalism in the realm of migration policy, law, and decisions.

Nearly half of the book draws upon the writings of modern theorists from Carl Schmitt to Joseph Raz. Schotel applies this learning to argue that the misbegotten concept of inherent sovereign power relies on a crucial but untenable distinction between inside and outside dimensions of the legal realm. Legal pluralism, he argues, has undermined the reality of spatial unity so that the legal order lacks a well-defined ‘inside’ and ‘outside’. Therefore, inclusion in a national community of certain categories of persons such as citizens, permanent residents, and temporary guests does not imply the shunning of others (otherwise known by the chilling term ‘aliens’). In his appealing simile, it cannot be assumed that the host of a party has intended to exclude all uninvited guests. On the contrary, uninvited guests may be welcome at the party, each perhaps for a different reason (such as status as the spouse or friend of an invited guest or a newcomer to the local community).

Within this theoretical construct, Schotel challenges a spatially defined dichotomy between ‘inside’ and ‘outside’ to distinguish, respectively, between the migration-related categories of admitted and excluded persons. Put another way, he sees no reason to picture normal migrants outside an inclusive legal realm. In practical terms, territoriality and national borders should not be factors in determining the status of persons seeking formal admission.

Schotel argues that law’s purpose is to mediate among values, all of which are enclosed within an inclusive legal order but may be potentially incommensurable. This leads to his concept, drawing upon the writings of Bruno Latour, of orders without borders in which what should govern the status of normal migrants are reasonable connections of authoritative texts and decisions with people, facts, and past legal decisions. Ultimately, in conducting this inquiry, the test of legitimate authority to exclude aliens is its capacity to meet minimal requirements inherent in the structure of law. This seems to require finding acceptable grounds for the exclusion of persons based on values and data within an inclusive legal order. This is the opposite, Schotel explains, of a state of exception where an appeal to reasonableness is not regarded as an adequate basis for claims of admission. If the exclusion of normal migrants is to be based on reasonable justifications, it is not enough for authorities simply to recite legal texts. Instead, they must connect those texts with values, legal data, and circumstances that may vary from one context of admission to another. The question then becomes exactly what connections yielding what justifications offer compelling reasons for the admission or exclusion of normal migrants. The answer lies primarily in established principles of ethics and national law.

Schotel’s ethical claims entail a rejection of communitarian values, national identity, or self-determination as reasons to justify exclusion, contrary to what Michael Walzer and other political and legal theorists have argued. Although these considerations may be relevant to justify the exclusion of normal migrants, they should not be controlling. Schotel also concludes that any connection between immigration and the protection of resources is weak. Instead, since immigration authorities have superior knowledge and access to data about local conditions – the economy, social cohesion, the welfare system, housing potential, security, the current stock of

immigration, and so on – they must bear the first burden of justifying the exclusion of normal migrants in specific terms that correspond to the empirical data and not simply to common ethical assumptions.

In line with the EU's Charter of Fundamental Rights, which the Lisbon Treaty converts into a legally binding document, authorities must give specific reasons for their actions that affect non-citizens and citizens alike. The authorities must therefore demonstrate the necessity of exclusion in order to pursue the objective of a particular immigration policy, and exclusion of a normal migrant must be the least burdensome means available. (Schotel expresses the latter requirement as a conjunctive – 'the only *and* the least burdensome measure available' – but perhaps it might be read in the disjunctive – 'the only *or* least burdensome measure available'.) The authorities must give reasons, substantiated by data and analysis, why the admission of a person or class of persons would pose a specific and actual risk to a state if the basis for exclusion is to have any integrity as a legal rule. Here, Schotel relies on the authority thesis of Joseph Raz, according to which authoritative instructions, to be legitimate, must improve conformity with reason.

Institutionally, Schotel highlights an EU draft directive on movement of persons¹ that enlists principles of necessity and proportionality to satisfy the burden of justification. Accordingly, just because a normal migrant's profile generally seems to pose a risk to public policy or national policy does not justify his or her exclusion; instead, the migrant's actual conduct must pose a specific risk to society. As to the scope of EU law and the competence of Member States to regulate migration, Schotel predicts that although the Lisbon Treaty calls for a common European policy on immigration, Member States will retain substantial competence to implement that policy as they see fit. Tensions are less apt to arise between the EU and its Member States than among EU institutions. Indeed, Schotel foresees an imminent struggle among those institutions for competence to regulate migration, not unlike that inherent in the separation of powers and checks-and-balances structure of the constitutional system in the United States.

Despite what might appear to be a rather high threshold for exclusion of normal migrants, Schotel explicitly rejects the nomenclature of either a general or a qualified duty of admission. In effect, however, his proposed application of the principle of proportionality and its necessity test would seem to give effect to a qualified duty of states to admit migrants unless they pose a substantial risk to public safety, health, morals, general welfare, or the most vital interest of a state.² Indeed, his advocacy of necessity as the test of proportionality to justify exclusion would seem to be even more generously disposed to normal migrants than reliance on a state's qualified duty of admission, a legal construct which he rather hastily discounts. This anomaly in Schotel's analysis may bespeak his impatience with orthodox sources of international law such as international custom and nuances in the writings of publicists who do not rely on political and legal theory. His brisk dismissal of the well-documented bases for essentially the same outcome that he advocates, though expedient and understandable in clearing the brush for his theoretical exploration, is unfortunate insofar as the two approaches are mutually reinforcing.

The book's level of analysis is not always clear, as it veers between the macropolitical issues of policy and statutory law, on the one hand, and the micropolitical issues of authoritative decisions

¹ Formally, the draft Directive on Minimum Guarantees for Individual Freedom, Security and Justice in Relation to Decisions Regarding Movement of Persons.

² Variations and limitations of this qualified duty appear in Nafziger, 'The General Admission of Aliens Under International Law', 77 *AJIL* (1983) 804, at 830–831, amidst a discussion concerning the lack of historical or jurisprudential foundations for the concept of an inherent sovereign power to exclude persons at will.

about individual petitions by persons for admission, on the other. The book's geographical scope is also somewhat unclear. Schotel does state that the book 'is mainly oriented toward admission regimes in the EU' (at 9), and then draws mostly on the writings of European theorists and an EU draft directive. But he also states that '[a]s this scheme is generic it will capture the structure of most admission regimes, including the non-European countries' (at 9). This may be correct, but the problem of exclusion without proper justification, though a problem outside Europe, too, is not necessarily susceptible to the European scheme that Schotel suggests. For example, the principle of proportionality, derived from German law and applied in terms of necessity, does not resonate deeply in the global legal conscience.

The book's observation that the status of refugees should not be conflated with that of normal migrants, though certainly orthodox, merits further examination. It is not clear that either the circumstances of mass expulsion, the humanitarian exigencies of refugees, or the treaty basis of their protection merits a conceptual or normative distinction from normal migrants. Also, the author's related assumption of a 'right of admission' (at 1) for refugees and members of a permanent resident's family, however compelling for humanitarian reasons, does not seem to square with his uncontroversial rejection of a general right of admission, nor, in fact, the specific admission requirements and procedures normally imposed on refugees and members of a permanent resident's family.

These question marks should not be exaggerated, however. The reader is made aware of the book's thesis that macropolitical issues are significant primarily as they have practical implications at the micro-level. Also, the book's dominant orientation towards European law and institutions is apparent, as is the relaxation of normal admission requirements for refugees and members of a permanent resident's family.

What is also clear is Schotel's preference for national and regional approaches to immigration issues. He rejects a human rights approach (beyond what the law of the EU and the Council of Europe may mandate) or other internationally coordinated approaches because they detract from what he asserts can and should be done nationally and regionally. Even within the framework of European human rights, he finds only one material right – that of family life – to support challenges to exclusion. This observation leads to his scepticism about the efficacy of EU and Council of Europe developments as a basis for improving the legal position of normal migrants. Schotel accepts, however, that an infringement of not only rights but also legitimate interests of a normal migrant should trigger the application of the proportionality principle to determine the admission or exclusion of normal migrants.

By relying not on the usual sources of international legal authority and legitimacy, but rather on a theoretical analysis of the fundamental structure of law, this book makes a unique and substantial contribution to the literature on migration law. It ably deploys political and legal theory to deconstruct the hoary rule of inherent sovereign power and its progeny, the exclusion thesis. Academic writers, in particular, should get out of the habit of mindlessly reporting or restating these fictions and thereby ignoring the essential logic within the legal order that the book has so carefully articulated to refute the fictions. Instead, national authorities carry a burden of justification – and a substantial, sound, and specific justification at that – for the exclusion of normal migrants. Such a reversal of the default position of admission laws merits serious consideration in our era of mass migration.

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