Markets, citizenship and rights: state regulation of labour migration in Malaysia and Spain
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1. REGULATING LABOUR MIGRATION

1.1. THE STATE

While the concept of the State has always been central to political discourse and political analysis, until the 1990s theories of international migration paid little attention to the role of the State in this domain (see Zolberg 1999). Since the central focus has been on the forces driving migration flows (why people migrate), theories of international migration have mainly referred to 1) the structural forces in developing societies that promote emigration; 2) the structural forces in developed societies that attract immigration; 3) the motivations and goals of migrants themselves; and 4) the social and economic structures that connect emigration and immigration areas (Massey 1999: 304-305). However, in the wake of Zolberg’s claims, a body of literature has developed since the late 1990s examining the role of the State in international migration flows. One of the key underlying questions in these studies has been what accounts for State choices with regard to migration policies?

From a society-centred perspective, immigration policies have been analysed as the outcome of a political process characterised by competition between different interest groups within the bureaucratic, legislative, judicial and public arenas (Massey 1999: 307). By positing the causal primacy and political dominance of forces in civil society, this approach confines the role of the State to that of the simple broker that passively reacts to the claims of different interest groups or to merely finding some utility-maximising compromise between organised interests (Boswell 2007: 79). Classical examples of this approach are the study by Shughart, Tollison and Kimenyi (1986) and the work by Freeman (1995). In the former study, three key interest groups are identified in the political competition to formulate immigration policy: while local workers would struggle to limit the supply of labour, capitalists would favour expanding the labour supply to reduce wages and keep labour markets flexible, and landowners would join them in this effort as a means of increasing their rent revenues. In a similar vein, Freeman (1995) argues that the migration policymaking process is primarily determined by those groups that champion a liberal immigration policy (mainly, employers and immigrant groups) and, to a lesser degree, by those who oppose it (the local workforce and people living in neighbourhoods in which immigrants settle).

From a state-centred perspective, immigration policies have been explained as being a State-engendered product. The State is thus seen as enjoying substantial autonomy in the formulation and implementation of preferences that are independent of societal interests. In the 1960s and 1970s, a first set of Marxist-oriented studies presented the State as operating in the interests of the economic elite (instrumentalists) or in the long-term interests of capitalists, independently of their degree of participation in the policymaking process (structuralists). In fact, 1

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1 As Portes pointed out (1977: 33-34), US immigration policies that have historically
their conclusions were not so different from those stressed by the society-centred perspective. In both cases, the State has basically been presented as responding to economic imperatives or, more straightforwardly, as existing ‘to serve the needs of capital’ (Purcell & Nevins 2005: 215). Two criticisms could be made here. First, this argument is based on ‘the teleological fallacy of deducing purpose or cause directly from outcome’ (Calavita 1989: 816). In other words, the fact that outcomes end up responding to the ‘needs of capital’ does not necessarily mean that this was actually the intention of policies. Second, the empirical evidence does not always correspond with such conclusions. If States always served the demands of capital, it might be argued that there would be no need for restrictive migration policies.

In recent years, a second set of studies (from a state-centred perspective) has looked at other political imperatives that influence State decisions on migration policies. In her study of the role of the US Immigration and Naturalization Service (INS) in the implementation of the Bracero Program, which imported temporary contract labourers from Mexico from 1942 until 1964, Calavita (1992: 9) observed that State institutions and bureaucracies are pervaded with structural contradictions that, depending on the location of these institutions within the State apparatus, lead to different dilemmas and responses2. More recently, regarding the build-up of US-Mexico border enforcement in the 1990s, Purcell and Nevins (2005) have noted that migration policies also respond to the need to preserve what they call the state-citizen relation or the political legitimacy of the State in the eyes of its citizens. In particular, they suggest that what led to increasing border enforcement was the need to demonstrate to citizens that State actors were working to secure perceived citizen interests such as territorial security, a certain level of public services, protection in the labour market, and preservation of the national identity. Finally, from a more comprehensive perspective, Boswell (2007) has developed what she defines as a ‘theory of the functional imperatives of the State’. Her starting point is that the government must carry out certain tasks that are sometimes questioned (or tend to contradict each other) in the field of migration policy.

In particular, Boswell identifies four tasks to be fulfilled by the (liberal welfare) State: 1) provide international and internal security for its citizens (security); 2) contribute to economic growth and accumulation (accumulation); 3) promote a just

benefited capital are not the consequence of a ‘political stranglehold exercised by a particular group’ (in this case, employers) but, rather, are determined by ‘the latent structure of economic relationships and related political concerns’. Calavita (1984: 12) puts it similarly: ‘[…] the objective relation between capitalism and the state is based on the fact that the capitalist state’s function is, and must be, that of actively perpetuating the political economy, so that ultimately the state’s interests and the long-term interests of capital are similar’. 2 Calavita shows how the INS promoted the Bracero Program as a way to realise its own agenda of reducing illegal migration. At the same time, this policy was contested by the Department of Labour, which was pressed by organised labour to impose restrictions on the contract system. In Calavita's own words (1992: 10): 'Ultimately the two agendas were forced to present a 'united front', to compromise, and to coordinate their policies, but they did so reluctantly and only after sometimes prolonged and hostile negotiation.
pattern of distribution and protect the privileged rights of its nationals (fairness); and 4) conform to certain formal conditions considered vital for the preservation of democracy and liberty (institutional legitimacy). Boswell’s approach brings out the inherent tension between the State imperative to promote economic growth (accumulation) and that of protecting citizens’ privileged rights (security and fairness). Moreover, unlike most contemporary scholars (Sassen, Soysal, Hollifield, Joppke, Guiraudon), she does not conceive of rights as constraining State’s capacity from without – either by international human rights regimes or legal institutions – but from within – because the State’s legitimacy depends on its respecting its own laws and rights. Finally, by identifying the tasks of the State and assuming the difficulty of carrying them out simultaneously, Boswell concludes that the fundamental question is no longer one of elucidating to whom or to what States respond when formulating and implementing migration policies but rather how States manage to reconcile these conflicting demands (Boswell 2007: 92).

The present study takes up Boswell’s question as its starting point and, in particular, the assumption that the State is obliged to respond simultaneously to different and contradictory demands in the field of migration control. The main difference from Boswell’s approach is in the way in which State imperatives are labelled and identified. Instead of accumulation, I shall refer to the factor of markets, by which I mean the need to respond to employers’ demands for foreign labour. Instead of security and fairness, I shall use the term citizenship, which refers to the state-citizen relation as defined by Purcell and Nevins (2005). This shift from the concepts of security and fairness to that of citizenship aims to broaden the scope to include those demands for closure that respond not only to the demand for migration control or for limiting the access to socio-economic resources but also to other political requirements such as protection of the national labour market or the defence of cultural or ethnic homogeneity. Finally, what Boswell calls institutional legitimacy is here called rights. In this case, the difference is more in the term than in the content. My preference for the term ‘rights’ seeks to link the present research to the existing literature that discusses the extent to which rights constrain (liberal) States in their capacity to regulate and control migration flows.

1.2. MARKETS

The term markets has often been used to refer to the demand for foreign labour in receiving societies. As defined by Portes and Sassen, labour demands result from any situation in which the characteristics of the labour supply threaten existing or foreseeable levels of accumulation (Portes 1978: 471-482; Sassen-Koob 1978: 516-518; Sassen 1988: 27). Labour demands, then, do not always result from absolute labour shortages. Employers have also welcomed immigrants as a cheap and flexible labour force or, in other words, as a way of reducing the unitary cost of labour (by lowering wages) and increasing its flexibility (Portes & Walton 1981: 4;
Sassen 1988: 26; Zolberg 1999: 83). This explains why the demand for foreign labour does not necessarily drop in contexts of large-scale unemployment.

It would be mistaken to assume that the demand for foreign labour is exclusively characteristic of industrial economies. The supply of labour in large quantities and over long distances has been a constant since the very beginnings of the world economic system in the sixteenth century. African slavery, Asian indentured servitude and the migration of millions of European peasants that moved to agrarian colonies are part of the first phase in the world market for labour power. Although these migration stories have hardly been studied together, scholars within the paradigm of historical migration studies have recently shown that they have more similarities than assumed (Lucassen 2007). In particular, Mckeown (2004) has observed that transatlantic migration and Asian migration in the nineteenth century are not only comparable in volume but respond to the ups and downs of the same global economic structure. Furthermore, contrary to widely shared notions of free and unfree labour migration, coerced migration of white European did take place (for example, convicts) (see Bosma 2004) while most Chinese migrants were free and moved through personal networks of family and friends (Mckeown 2004).

The second phase began with industrialisation and, for the first time, involved Europe as a destination area from abroad. From a Marxist perspective, the importation of labour in industrial societies has been explained as a means of lowering the costs of labour and of reproduction of the workforce, and of operating as a buffer against seasonal or circumstantial downturns by exporting unemployment through the repatriation of immigrants or avoiding payment of unemployment compensation (Castles & Kossack 1973; Castells 1975; Sassen 1988). In explaining the structural demand for foreign labour, the dual labour markets theory has referred to the segmented character of the labour market (see Piore 1979), or the dichotomy between a capital-intensive primary sector, where most native workers are to be found, and a labour-intensive, low-productivity secondary sector, filled mainly by migrant workers. The reluctance of local workers to occupy ‘unattractive’ jobs cannot be disentangled from rising educational levels, increasingly negative attitudes towards unskilled manual labour and social welfare systems. In contrast, migrant workers would be more willing to accept such jobs because low wages in destination countries tend to be higher than those back home and the status and prestige that count for them have little to do with social expectations in the receiving societies (see Berger & Mohr 1975).

After 1973 the transnationalisation of capital and relocation of production plants to developing countries led to economic restructuring and a shift in foreign-labour demands in the so-called developed countries. Thenceforth, immigrants were no longer required as blue-collar workers in leading industries but to provide labour for the low-wage jobs in the service sector. Sassen (1988, 1991) has identified two areas in which immigrant workers have been increasingly in demand in the global economies. First, they tend to be concentrated in low-paid jobs servicing the high-income lifestyles of the newly emerged group of high-income
professional/technical workers. This includes, for instance, jobs preparing specialty and gourmet foods, producing decorative items, luxury clothing or other personal goods, or providing for cleaning, repair and other services. Second, immigrant workers have also been in great demand in the consumer sector catering to the population at large, and in the downgraded manufacturing sector such as sweatshops and industrial homework.

In this context, the increasing presence of female immigrants in the care sector has been particularly highlighted (see, for instance, Chang 2000; Salazar Parreñas 2001; Ezquerra 2008). This ‘international transfer of caretaking’, in Salazar Parreñas’s words (2000), means that paid reproductive labour has moved into the international terrain. If, in the past, this work was done by low-paid women of colour or from rural areas, today it is performed by immigrant women within a global system. Terms such as ‘nanny chain’, ‘love chain’ or ‘global care chain’ suggest that this transfer of caretaking is three-tiered: class-privileged women purchase the low-wage services of migrant women, which enables them to pursue salaried jobs without having to contend with the ‘second shift’ at home; migrant women simultaneously purchase the even lower-wage services of poorer women left behind in their homelands, this local transfer of caretaking making migration possible (Chang 2006: 41). This has especially been the case in those welfare regimes where the State does not provide a comprehensive set of social services (for instance, caring for children or the aged), leaving households (mainly women) to perform these functions. This leads Sciorlino (2002) to conclude that, in contexts of rising female activity rate and aging populations, labour demands in the care sector are the product of specific welfare regimes.

As argued in this section, labour demands are directly related with migration flows. First, Africans, Asians and Europeans migrated (or were forced to migrate) to work in the emerging colonial economies. Then new kinds of labour demands beckoned Southern European, Moroccans and Turkish people to migrate to Western Europe to work in its industrial and construction sectors. Mexicans, too, felt the tug when they left their hometowns to work as braceros (literally, arm-men) in the US fields, in urban areas as waiters, or producing all kinds of cottage-industry items. Neither should we forget the millions of workers from the Middle East and Asia that have been migrating to the Gulf countries since the 1980s to fill all kinds of vacancies in the private sector. Or the thousands of Indonesians, Filipinos, Bangladeshis or Nepalese that can be found in the newly industrialised countries of Asia working in plantations, industries, construction sites, services and households.

However, it would be erroneous to assume that all labour migrants move freely in response to push and pull factors and, in particular, answering the siren song of labour demands in receiving countries. As Zolberg notes (1999: 73), we should not forget that international migration flows through gates and these gates are flanked by high walls. In other words, legislative obstacles – beyond, at and within national borders – seek to obstruct entry and membership. While the benefits of foreign labour in capitalist economies have been extensively analysed by Marxist and
global-economy theorists, what remains to be answered then is: when foreign labour has played such a crucial role in colonial, industrial and post-industrial economies, why has labour mobility been restricted? In Zolberg’s words (1989: 409), ‘given the advantages of an “unlimited supply of labour”, why don’t capitalists deploy their clout to import many, many more, or even to obtain completely open borders?’ Any attempt to answer to this question calls for a good look at the walls that have been gradually built up around an increasingly inclusive, and accordingly increasingly exclusive, definition of citizenship.

1.3. CITIZENSHIP

While citizenship means full inclusion in the national community (see Marshall 1992), it also becomes a mechanism of closure when confronted with immigration (Brubaker 1992: 21-34). As pointed out by Bader (1995: 212), the tendency toward universalist inclusion within states has been, and still is, intrinsically interwoven with systematic exclusion of those categorised as non-members, non-citizens or foreigners. This means that while nation-states tend to be inclusive and democratic on the inside, they are apt to be exclusionary and undemocratic with regard to the outside (Joppke 1999: 2). The externally exclusive dimension of citizenship has led to restrictions being applied to both entry into the national territory and/or membership.

The restrictions enforced with regard to entry and stay, or territorial closure, cannot be extricated from a second key dimension of the nation-state: sovereignty. As noted by Joppke (1999: 5), state sovereignty makes territory rather than persons the primary reference point of rule. Before the modern nation-state, rule was exercised over particular sets of persons rather than over territories. The simple presence of foreigners did not entail political, administrative or legal inclusion. When it came to labour migration, African slaves and Asian indentured servants, in particular, could be brought permanently to the colonies without posing many challenges to the polity. Even if they settled, they had no access to membership. They remained foreigners or outsiders all their lives. By contrast, national state sovereignty leads to the identification of community or polity with territory. In consequence, the simple presence of foreigners within the territory is seen as a potential threat to the economic, social, political and cultural boundaries of the nation-state.

The response to this perceived threat has been the building up of visible and invisible walls in all these domains. In the labour market, migrants have often been seen as competing with local workers. In particular, they have been perceived as unfair competitors who tend to lower wages and the standards of working conditions, and even displace local workers within the labour market. Organised labour has therefore tended to demand some degree of closure, which mainly turns into market protection by means of imposing strictures on labour importation (see Penninx & Roosblad 2000). Like national labour markets, welfare states are also
perceived as being compelled to demonstrate some degree of closure (Guiraudon 2000: 74). Walzer (1983: 31) argues that ‘the idea of distributive justice presupposes a bounded world within which distributions take place: a group of people committed to dividing, exchanging, and sharing social goods, first of all among themselves’. This has led, once more, to the drawing of solid boundaries between members of the community (entitled to social rights and services) and non-members (not entitled). There is general consensus that only by restricting the ‘clientele’ towards whom a State is responsible (van Amersfoort 2001: 160; 2008: 7), is it possible to construct a ‘kind of safe house in which to shelter its members from the outside world’ (Freeman 1986: 52) and prevent it ‘from going bankrupt’ (Joppke 1998a: 7).

Some degree of closure has also been perceived as necessary for democracy\(^3\). As noted by Bader (2005: 348), democratic decision-making presupposes well-defined and relatively stable rules of membership (voters versus non-voters) and democratic culture and trust. Despite being unrelated to limited resources such as social services, political membership has been one of the most impermeable boundaries of the nation-state. This explains why, in contrast to economic and social rights, full political rights have only been given in case of full legal citizenship status. Finally, the nation-state is built on the principle that political and cultural boundaries should be congruent. Citizenship is therefore not only a legal status that bestows on its holders particular economic, social and political rights. Citizenship is also a form of identity that tends to be defined in terms of cultural homogeneity (see Kymlicka & Norman 1994: 369). This is why international migration has often been seen as a threat to the ‘imagined community’ (Anderson 1983) or, in other words, to its perceived linguistic, religious, ethnic and cultural homogeneity. And, here again, closure is deemed to be intrinsic to the nation-state.

Given the demands for closure in nation-states, it becomes clear that what makes immigrants suitable as (cheap and flexible) labour renders them undesirable from the perspective of membership in the receiving society (Zolberg 1989: 411). The question, then, is: how did states deal with the apparently intractable dilemma between the demand for foreign labour and the demand for closed membership? Historically this predicament has been solved (or attempts have been made to solve it) by the introduction of guestworker programmes (see Garcés-Mascareñas 2004). These programmes allowed the import of labour in the terms defined by markets. Employers could then recruit as many migrant workers as they wanted. At the same time, the demand for closure was satisfied by restricting membership instead of entry. First, this has been done by restricting the economic, social and political rights of migrants. For instance, their mobility within the labour market has often been limited to a particular economic sector or even employer; or they have often

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\(^3\) Noiriel (1991) describes in historical terms how French citizens became more interested in national politics and started to claim preferential treatment (including access to work and welfare) \textit{vis-à-vis} foreigners when they were given the vote. Hence, it would seem that exclusion with regard to the outside was brought about by the process of State formation and democratisation within the State.
had no access to certain social provisions. Second, their stay can only be
temporary. The expectation of repatriation or return is in fact what distinguishes
guestworkers from former forms of labour transfers: while slaves belonged to an
employer until the end of their lives and indentured servants were generally
couraged to stay after their contracts expired, guestworkers are, by definition,
‘guests’ who are expected to leave (Hahamovitch 2003: 72).

Guestworker programmes are thus the result of a State-fashioned compromise
aiming at maintaining high levels of labour migration while also strictly regulating
immigration and closing national borders. The first wave of guestworker
programmes was grounded, in particular, in the process of institutionalisation of the
idea of the nation-state as a prospectively homogeneous ethnocultural unit (Torpey
2000: 21-56). Prussia embarked upon state-sanctioned temporary migration in 1890
with Polish-speaking immigrants who fuelled the rise of German nationalism
(Herbert 1990: 18-34; Lucassen 2005: 50-73). Similarly, in the first decades of the
twentieth century, a migrant labour system was put in place to supply foreign
labour to the diamond and gold mines of Southern Africa with a view to importing
a large and malleable labour force while simultaneously placating whites who
wanted hermetic segregation from non-whites (Hahamovitch 2003: 76). This
uncomfortable cohabitation between foreign labour and national closure was to
become a more widespread phenomenon during the two World Wars. As Harris
points out (1995: 6), the war exacerbated xenophobia while at once requiring a
boost in manpower to maximise wartime production. This led countries such as
France⁴, the United Kingdom, Germany and the United States to set up temporary
foreign labour schemes.

After World War II, new guestworker programmes were implemented in Europe
(Britain, France, Switzerland, Belgium, the Netherlands and Western Germany)
and the United States. This second wave was not only the result of demands to
preserve cultural unity but was also a response to the expanding attributions of the
social state (Garcés-Mascareñas 2004: 3). As shown by Lucassen (1998),
increasing welfare arrangements led the State to become more interested in
protecting the national labour market so as to avoid unemployment among national
workers. The growing political importance of the labour movement do also
explain the increasing protection of the national labour market. This led post-war
guestworker programmes to adapt immigrant presence to the fluctuating labour
demands and to concentrate migrant workers within a secondary labour market.

⁴ Although formally not a guestworker programme, in the 1920s and 1930s, the French
government negotiated directly with foreign governments, concluding agreements with
Poland, Czechoslovakia and Italy. These agreements meant the increasingly state
intervention in immigration matters to channel workers into jobs where they would not be
directly competing with natives, to reduce competition among employers for scarce labour
and to mollify the governments of sending countries that started to insist about protecting
the working and living conditions of their nationals (Cross, 1983). In this regard, as we will
see in the next paragraph, these agreements foreshadowed the post-World War II
guestworker programmes.
Moreover, the rise of welfare states in the twentieth century fostered the tightening-up of borders in another sense. As said before, the more States promised their citizens in terms of services (workers’ compensation, old-age and child benefits, public education, et cetera), the more urgent it became to curtail or, in practice, to identify who was eligible for these services and who was not. The upshot was a gradual demand to exclude foreigners from the long-term benefits of the welfare state.

Since the 1980s guestworker programmes have also accompanied the boom in the countries of Southeast Asia and the Middle East, bringing in large numbers of high- and low-skilled workers. These new labour schemes have become increasingly feminised thanks to the so-called ‘maid trade’. In this new business, the sending governments have played a more important role, not only controlling labour transactions but also marketing – in the case of the Philippines, for instance – their citizens (Hahamovitch 2003: 89). However, although temporary labour schemes continued in non-Western countries, by the 1970s and 1980s there was general consensus that guestworker programmes had failed since there was nothing more permanent than temporary foreign workers (Martin 2000). The settlement of (part of) the guestworkers in receiving societies has been explained by the fact that migrants, unlike goods and capital, were entitled to certain rights under the aegis of liberal constitutions (see Hollifield 1992). As the Swiss novelist Max Frisch writes, European governments had ‘asked for workers but human beings came’ (quoted in Hollifield 2005: 29). By virtue of their humanity, guestworkers were entitled to social, welfare and eventually residence rights. The guestworker’s status as a human being and therefore as the subject of rights, clashed with the formula of ‘open entry’ but ‘closed membership’, making it virtually impossible to put into practice. In a context of rights, the compromise between markets and citizenship became thus a mirage (Martin & Teitelbaum 2001) or an illusionary solution in the long run (Papademetriou, Martin & Miller 1983).

1.4. RIGHTS

In the context of migration, civil and human rights translate into limitations on the State’s capacity to exclude foreigners. This is basically because civil and human rights are not citizenship rights, strictly speaking. Unlike the latter, the former are guaranteed not only to State members but to all foreigners (Sassen 1996: 89; Joppke 1998a: 71; Bader 2005: 348). As they are bestowed on individuals qua persons rather than qua citizens or, in other words, as they turn any individual into the object of law and locus of rights, civil and human rights can sabotage restrictive policies, counteracting thus the external exclusive dimension of citizenship.

Several scholars have signalled the extent to which human rights constrain State sovereignty and particularly its right to decide who enters and who does not, or who is an insider and who is not. The approach of these scholars varies, however,
in the way they define the source of these rights. First, scholars such as Soysal (1994) and Sassen (1996) have explained rights’ constraints on the State’s sovereignty by the rise of an international human rights regime based on international agreements and conventions enshrining the rights of migrant workers or the status of refugees which, they argue, would protect migrants regardless of their nationality. According to these authors, although there are no global mechanisms to guarantee the rights conferred by international conventions, the emergence of the individual as the object of international law and the growing ability of NGOs and individuals to make claims on the basis of international human rights instruments would have gradually forced states to be accountable not only to its citizens but also to all its residents.

Other scholars such as Hollifield (1992, 2005), Joppke (1998a, 1998b, 1999) and Guiraudon (1998, 2000, 2002) have understood rights limitations as internally rather than externally produced. They argue that all western constitutions enshrine a catalogue of elementary human rights that, together with strong and independent judiciaries, would hamper State capacity to restrict immigration, basically because any draconian measure in liberal states may be challenged and overturned by the courts as unconstitutional or as a violation of civil rights. From the historical perspective, these authors refer to nationally defined rights and the role of courts in order to explain the extension of (social and residence) rights to post-war guestworkers and their families, and the admission of major refugee flows in Western Europe from the 1980s onwards. From a more theoretical perspective, this brings them to the conclusion that rights constraints do not result from declining sovereignty in an increasing globalised world but rather from the functioning of the legal system (or rule of law) in liberal states. As Joppke notes in an apparently tautological sentence (1998b: 290), ‘accepting unwanted immigration is inherent in the liberalness of liberal states’. Similarly, Hollifield (2000: 148) has referred to what he calls the ‘liberal state thesis’, or the notion that ‘rights’ (beyond push-pull and social network factors) are one of the key explanatory factors for the persistence of international migration to liberal states.

Freeman (1995) started out from a similar observation when he noticed that, contrary to the widespread rhetoric of restrictionism, the politics of immigration in liberal democracies is ‘broadly expansionist and inclusive’. However, he identified the political process rather than the legal system as the major factor of self-limited sovereignty in liberal states, arguing that immigration policy in liberal states is characterised by a ‘client politics’ and a universalistic idiom of liberalism that prevents the political elites from playing the ethnic or racial card. In this context, he explained the expansionist and inclusive character of immigration policies by the fact that, while the benefits of immigration (such as cheap labour and – from the immigrant’s perspective – reunited families) are concentrated, its costs (such as increased social expenses or rising population) are diffuse. His argument suggests that such a distribution of costs and benefits would lead policymakers to be more responsive to their immigration-advocating clients (employers and immigrant groups) than to the more ambivalent or even hostile general public.
While it constituted a first and important step in the attempt to clarify the logic of immigration policy within the political process of liberal democracies, Freeman's work has been severely criticised. Three main disputation are worthy of mention here. First, Brubaker (1995) observed that many of the trends identified by Freeman are either a general feature of migration or a ‘particular feature of particular discursive fields’. Thus, he argues, some of the features are either to be found in other political systems or are the result of a cultural-political story about particular times and places. Second, Joppke (1998a: 19-20) pointed out that Freeman’s approach to immigration policy as client politics seems to work better in settler societies, where immigration coincided with nation-building. In contrast, in European societies, where immigration post-dated nation-building, Joppke argues that immigration politics are more likely to have been guided by a restrictionist national interest. Third and finally, Freeman does not identify the legal process as a separate source of expansiveness and inclusiveness toward immigrants. This is particularly problematic if we recall (see Guiraudon 1998, 2000) that (social) rights for immigrants were not only achieved in the open arena of democracy, where different interest groups may have a say, but also behind the closed doors of bureaucracy and the courtroom.

The discussion on the limits of migration control in liberal democracies (or the dilemma between citizenship and rights) has been central in most political analyses on migration policies. More recently, from a quite different perspective, the economists Ruhs and Martin (2006) have signalled that low-skilled migration in high-income countries inevitably entails a trade-off between numbers and rights, arguing that the more rights low-skilled migrants have, the less advantageous (or desirable) they are. They offer two basic reasons for this. First, if low-skilled migrants have the right to equal wages and all work-related benefits, their cost is higher and therefore fewer will be employed. The other side of the coin is that fewer and more limited migrant rights mean lower costs for employers and more migrants employed (Ruhs & Martin 2006: 7). Second, they suggest that migrants with lower-than-average incomes tend to pay less in taxes and, because of their lower incomes, may be eligible for more government-funded services. Although this is discussible, Ruhs and Martin conclude that, in order to minimise the fiscal costs of low-skilled migrants, high-income countries may limit migrant numbers or their access to welfare benefits (Ruhs & Martin 2006: 8).

Ruhs and Martin suggest that a key point regarding the role of rights in labour migration is that (low-skilled) migrants are desirable as long as their presence is restricted. If liberal states are self-constrained by rights and cannot therefore limit

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5 This coincides with what Portes observed several decades earlier, stating (1977: 34) ‘The more immigrants acquire a legitimate foothold in the host society, the less advantageous their presence is and the more they come to resemble the native proletariat. Conversely, the more they can be kept at the political fringes of the society, the more useful they are in fulfilling significant functions for the economy’.

6 Migration tends to take place during active professional years. This means that, in many cases, the costs of social reproduction remain in the countries of origin.
migrants’ membership, this would imply that these states are de facto compelled to adhere to a policy of low numbers and high rights. In Joppke’s words (2005: 47), ‘tight numerical restrictions may well have been the price for internally including the guestworker-turned-immigrants’. By this logic, countries with few rights constraints would be more inclined to admit numerically significant labour migration flows as they seem to have more ways of excluding the newcomers and hence shoring up the bulwark that protects citizenship. In fact, this same argument is implicit in the typology of different models of immigration suggested by Arango (2003: 3). Leaving aside what we might call the traditional countries of immigration (United States, Canada, Australia and New Zealand), Arango distinguishes between democratic and non-democratic or autocratic societies. While the former would recognise moral and political obligations vis-à-vis the immigrants while attempting to keep the numbers being admitted as low as possible, the latter would tend to have no compunctions about letting in large numbers of people but only on condition that they are temporary labourers with limited rights. In brief, to recall the words of Martin and Ruhs, the former would restrict numbers while the latter would restrict rights.

Although no systematic research has been done on these issues regarding less liberal states or non-Western countries, these are common assumptions among many Western scholars (see Hollifield 1992: 32; Hollifield 2005: 26; Ruhs & Martin 2006: 10). However, two sets of questions arise from these conclusions. The first refers to liberal democracies. Did liberal democracies, after the failure of post-war guestworker programmes, really opt for a policy of low numbers and high rights? If so, to what extent did the policy work in a context of high labour demands? In other words, could liberal democracies disregard the market factor in order to comply with the demands for closure and rights’ constraints? The second set of questions refers to less-liberal or non-Western states. To what extent can these countries choose a policy of low rights? What, then, is the role of the international human rights regime as defined by Soysal and Sassen? If we accept that in these countries membership can be much more limited as the State is not (or less) constrained by rights and courts, to what extent do they succeed in turning migrants into pure labour? To what extent can they really (not only by law but also in practice) open entry while restricting membership? Finally, to what extent – in contrast with liberal democracies – are they able to solve the dilemma, if there is a dilemma, between markets and citizenship?

Another issue to consider is the role of illegal migration. One venerable and well-documented proposition holds that illegal migration serves to create and sustain a legally vulnerable, thus tractable and cheap, reserve of labour (see, inter alia, Galarza 1964; Castells 1975; Bustamante 1976; Burawoy 1976; Jenkins 1978; Piore 1979; Portes & Walton 1981; Sassen 1988; Calavita 1990; De Genova 2002). Sassen, in particular, points out that ‘[…] border enforcement is a mechanism facilitating the extraction of cheap labour by assigning criminal status to a segment of the working class – illegal immigrants’ (Sassen, 1988: 36). This leads to two immediate questions regarding the limits of migration control in liberal
democracies. On the one hand, we might wonder to what extent illegal migration is a way of having a *de facto* policy of high numbers and low rights in liberal states. Since illegal migrants do not officially exist, to what extent does their presence allow liberal states to have, in practice, a policy of open borders but closed membership and thereby solve the contradictions between markets and citizenship, and citizenship and rights? On the other hand, illegal ‘migrant beings’ are also ‘human beings’ and theoretically – at least in the international canon – have civil and human rights, so how far can liberal states go in more or less ignoring the presence of illegal migrants and therefore restricting their rights and membership in society? In other words, how far are liberal democracies constrained by rights when dealing with illegal migration?

1.5. MIGRATION POLICIES

If State choices in terms of migration policies are analysed as a result of the conflicting demands between markets, citizenship and rights, the next step is to clarify what migration policies are. Following Hammar’s definition (1985), *immigration policy* regulates the entry and stay of foreigners whereas *immigrant policy* is concerned with their integration into host societies. While this definition is commonly accepted, what remains still unresolved is the question of where policy starts and where it ends. In this regard, many scholars seem to assume that policies are primarily and fundamentally policy documents or ‘stated policy objectives’ (Cornelius & Tsuda 2004: 5). This narrow definition of migration policies suggests that migration policymaking is understood as the formulation of rules and procedures, while their implementation and outcomes are processes that would seem to start where policy ends, often forcing changes in its content.

This clear-cut distinction between policymaking, stated policy goals (normally understood as policy as a whole), policy implementation and policy outcomes is what underlies the oft-cited *policy gap* (Cornelius & Tsuda 2004: 4-15). Although often mixed up, two different kinds of policy gaps have been identified. First, some scholars have observed a gap between public and policy-makers at the decision-making stage. For instance, Freeman (1995) notes a discrepancy between the desires of a largely anti-immigration public and the expansive bias of policies, which would be formulated under direct pressure from employers and immigrant groups. Another example of this approach is Joppke (1998b), who explains the gap between restrictionist rhetoric and an expansionist reality by referring to the self-limited sovereignty of liberal democracies. Second, other scholars have identified a gap between policy goals and outputs. According to Cornelius and Tsuda, this gap would result from inadequate implementation or enforcement of policy, and its unintended effects (Cornelius & Tsuda 2004: 5). In more specific terms, this gap is explained by four main factors: 1) the reliance on policy instruments with inherent flaws; 2) macro-structural processes, such as the structural demand for migrant workers or cross-national disparities and transnational economic and social ties; 3)
domestic and international constraints, which link up with Freeman’s and Joppke’s interpretations; and 4) ambiguous policy intentions.

Why governments continue to rely on flawed policies and the main ambiguities underlying migration policies are rarely explained. Despite these unresolved questions, many authors conclude that the persistent gap between policy objectives and outcomes – dubbed an ‘empirical fact’ by Cornelius and Tsuda (2004: 5) – proves that the State is loosing control (Sassen 1996), that migration flows are far beyond the States’ capacity for control (Massey 1998), or that policies do not always matter (Thielemann 2003). It might be objected, however, that, at least in part, such conclusions arise from the definition of the problem and, in particular, from the initial distinction between policymaking, policy goals, implementation and outcomes. If we expand the notion of policy to the whole, so as to embrace policymaking, implementation and outcomes, the resulting picture would almost certainly be substantially different. In particular, by making this shift from the part to the whole, the question is no longer why policies do not succeed in their purpose or why outcomes differ from stated official goals but, rather, why policies as a whole (on paper and in practice) are shot through with inconsistencies, contradictions and inefficiencies. This is one of the main inferred questions of this book.

1.6. LAW AND ILLEGAL MIGRATION

To understand policy outcomes as part of the policy itself entails establishing a direct link between illegal migration and migration control. This link has already been observed by many scholars from a very different perspective. The most common approach has been to explain illegal immigration as a result of ineffective and powerless law. Internalising the mores and norms of the modern state by portraying the law as a force that bars illegal entry and sojourn rather than as a process that defines who and what is illegal (Coutin 1996: 11), this approach focuses on the degree to which policies are capable of stemming illegal immigration. The conclusion is therefore simple: illegal migration proves the ineffectiveness of migration policies because if illegal migration continues to ‘take place’ and ‘illegal migrants’ continue ‘to be present’ in contemporary societies despite increasing border enforcement and more internal control, policies are evidently not working. This perceived failure of migration policies (or gap between policy goals and outcomes) is explained by the high costs of enforcement, the economic role of illegal labour, public unwillingness to punish migrants’ illegality, or the powerful thrust of the macro-structural forces of migration (Cornelius & Tsuda 2004: 9).

A second way of approaching the link between law and illegal migration is that of focusing on how the law serves the interests of powerful economic and political groups, basically the need of capitalists and capitalism. From this perspective,
migration policies are not analysed in their attempt to reduce illegal migration but rather in their function of placing illegal migrants in a more exploitable position. In other words, the criminalisation of illegal migrants is understood as a way of constructing and preserving the otherness on which the immigrants’ condition as a cheap, flexible labour force rests (Bach 1978: 537; Portes & Bach 1985: 474; Sassen 1988: 7; Calavita 2005: 46). Finally, in a less deterministic way, more recent studies have opened up what we could call a third approach to the legal production of migrants’ illegality (De Genova 2002; Coutin 2000; 2005). The question here is how immigration law constitutes individuals within immigration categories. In this regard, more effective migration policies do not mean less illegal migration (as assumed by the first set of studies) but rather that the State has refined its ability to set up categories of differentiation. The law thus creates the subjects that, on the surface, it seeks to bar. Whether these subjects do in fact constitute a cheap and flexible labour force is more an empirical question than a starting point of inquiry.

If the law creates the category of ‘illegal’, the next question is what it means to be categorised as such. For Coutin, illegality means ‘a space of forced invisibility, exclusion, subjugation and repression’ (Coutin 2000: 30). These forms of non-existence are imposed on migrants by mechanisms such as confining reality to that which can be documented; temporalisation of presence, where the possibility of regularisation depends on being able to prove illegal residence; ‘legal aconsanguinity’, in which certain kinship ties are nullified by immigration policies; ‘enforced clandestinity’; and restricted physical and social mobility (Coutin 2000: 30-33). Along similar lines, De Genova (2002: 438-439) defines migrant illegality as that space determined by a palpable sense of deportability, which is to say, the possibility of being removed from the space of the nation-state. What defines illegality is not deportation per se but rather the possibility of deportation. Even though only some are deported while most remain (un-deported), everyone is vulnerable. According to De Genova, this deportability makes the physical borders of nation-states loom large in the migrants’ everyday life and, in so doing, constructs a spatialised and racialised social condition that would certainly sustain the vulnerability and docility of illegal migrants as workers.

By focusing on the legal construction of ‘illegality’ as an immigration category, this third approach also reveals how immigrants turn the tables by using the law to claim, contest and reject these legal identities. In her study on Salvadorian migrants in the United States, Coutin (2005: 23) observes how they challenge the attribution of illegality by arguing that they migrated to the United States out of necessity, that they were participating and were therefore integrated into US society or that the US economy benefited from their labour. Similarly, Kyle and Siracusa (2005) show how Ecuadorian migrants in Spain were aware of breaking immigration law but rejected the idea that this made their venture illegal. These migrants justified their stance by referring to the responsibility of the Ecuadorian state elite, defined as a powerful mafia running a predatory State, and to the historical responsibility of Spain as coloniser of Latin America. In van Schendel’s and Abraham’s terms
(2005), their main claim was that their movement and stay in Spain was illegal but licit, considered illegitimate by the state but claimed as legitimate by themselves. While these authors have noted how the attribution of illegality has been contested in migrant discourse, other scholars have focused on how individual and collective coping strategies of the migrants themselves, non-governmental organisations and sympathetic civil servants have opened up loopholes for illegal immigrants in an increasingly protected job market and welfare state\(^7\) (for instance, see van der Leun 2003).

Although this third approach has brought key insights to the (contested) meanings and implications of migrant illegality, it has shifted the focus away from the causes underlying illegal migration. The question that remains to be answered is how to explain illegal migration. Is it, as argued by Cornelius and Tsuda, the result of ineffective, failed or inherently flawed immigration policies? Is it, as Portes, Sassen and Calavita would have it, a way of creating a cheap and flexible labour force? Or, in keeping with my own definition of migration policies, does illegal migration go hand in hand with the inconsistencies, contradictions and inefficiencies underlying migration policies? To be more precise, what is the causal relationship and to what extent is illegal migration a way of solving the contradictory demands of markets, citizenship and rights? And, if it works like this, to what extent does it meet these demands or, alternatively, pose new contradictions and dilemmas in the context of the (liberal or otherwise) nation-state?

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\(^7\) This refers to what have recently been called forms of ‘informal citizenship’. Sassen puts it as follows: ‘Certain dimensions of citizenship, such as strong community ties and participation in civic activities, are being enacted informally through these [mainly migrants’] practices. These practices produce an at least partial recognition of the individuals as full social beings’ (Sassen 2002: 282). This leads her to conclude that some degree of citizenship is partly produced by the practices of the excluded. Although this approach has contributed important insights concerning the limited but relevant set of rights granted to (or taken by) illegal migrants, it has also been criticised for emphasising ‘postmodern’ practical citizenship and ignoring forms of exclusion. In Varsanyi’s words (2006: 138), ‘For instance, imagine saying to an ‘illegal immigrant’ who is robbed on the way home from work but is scared to contact the police for fear of deportation that he should not be thinking of citizenship as ‘merely’ a ‘legal right’ but should rather be thinking of it as a “practice” or “identity.”’