

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 to examine the role of the state in international migration flows. One of the key questions underlying 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 (ibid.: 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 passively reacting to the claims of different interest groups or to merely finding some utility-maximising compromise between organised interests (Boswell 2007: 79). Classic examples of this approach are seen in Shughart, Tollison and Kimenyi (1986) and 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 it 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 where immigrants settle).

From a state-centred perspective, immigration policies have been explained as 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, independent of their degree of participation in the policymaking process (structuralists).¹ In fact, their conclusions were not so different from those stressed by a society-centred perspective. In both cases, the state has basically been presented as responding to economic imperatives or, in more straightforward terms, 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). 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 influencing state decisions on migration policies. Calavita's (1992: 9) study of the United States Immigration and Naturalization Service's role in the implementation of the Bracero Program, which 'imported' temporary contract labourers from Mexico from 1942 until 1964, observed how state institutions and bureaucracies are pervaded by structural contradictions that, depending on the location of these institutions within the state apparatus, lead to different dilemmas and responses.² 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. 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 level of public services, labour market protection and a preservation of 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 to each other) in the field of migration policy.

Boswell (*ibid.*) identifies four tasks to be fulfilled by liberal welfare states. They are: 1) to provide international and internal security for its citizens (*security*); 2) to contribute to economic growth and accumulation

(*accumulation*); 3) to promote a just pattern of distribution and protect the privileged rights of its nationals (*fairness*); and 4) to 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 other contemporary scholars (Sassen, Soysal, Hollifield, Joppke, Guiraudon), she does not conceive of rights as constraining a state's capacity from without – under the watch of 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 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 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 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 terms 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 (1978: 471-482) and Sassen (Sassen-Koob 1978: 516-518; Sassen 1988: 27), labour demands result from any situation in which the characteristics of the labour supply threaten existing or foreseeable levels of accumulation. Labour demands,

then, do not always result from absolute labour shortages. Employers have also welcomed immigrants as a cheap and flexible labour force. That is, 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 who 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 working in the field of historical migration studies have recently shown that they have more similarities than previously 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 Europeans (for example, convicts) did take place (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 reproduction of the workforce. Similarly, it has been portrayed 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 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 e.g. 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. Since then, immigrants were no longer required as blue-collar workers in leading industries, but rather to provide labour for 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 a newly emergent 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 highlighted (see e.g. Chang 2000; Parreñas 2001; Ezquerro 2008). This 'international transfer of caretaking', in Parreñas' (2000) words, means that paid reproductive labour has moved into the international sphere. 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 enlist 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 enlist the even lower-wage services of poorer women left behind in their homelands, with this local transfer of caretaking making their migration possible (Chang 2006: 41). This has notably been so 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 comprising women) to perform these functions. This leads Sciortino (2002) to conclude that, in contexts of rising activity rates among women and ageing populations, labour demands in the care sector are the product of specific welfare regimes.

As described 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 Turks 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 invoking the men's *brazos*, Spanish for 'arms') in the fields of the American agriculture industry, as waiters in urban restaurants, or producing all kinds of cottage-industry items. Neither

should we forget the millions of workers from the Middle East and Asia who 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 and Nepalese who can be found in the newly industrialised countries of Asia, working on plantations and construction sites, in factories, households and other services.

It would be erroneous, though, to assume all labour migrants move freely in response to push and pull factors. Or, that they answer 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 is the following: if 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 this question calls for a good look at the walls 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 towards 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 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 (*ibid.*: 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. Consequently, 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 a 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. They have been perceived as unfair competitors who tend to accept lower wages and 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) states 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), namely, 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 and around 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 an apparently intractable dilemma between the demand for foreign labour and the demand for closed membership? Historically, this predicament has been solved – or attempted to be solved – by the introduction of guestworker programmes (see Garcés-Mascareñas 2004). These programmes allowed 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 curtailing 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 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 encouraged 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 aimed at maintaining high levels of labour migration, while also strictly regulating immigration and closing national borders. The first wave of guestworker programmes was grounded particularly in the process of institutionalising the idea of the nation-state as a prospectively homogeneous ethnocultural unit (Torpey 2000: 21–56). Prussia embarked on 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, 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 (1995: 6) points out, war exacerbated xenophobia while at once requiring a boost in manpower to maximise wartime production. This compelled countries such as France, the United Kingdom, Germany and the US to set up temporary foreign labour schemes.

After World War II, new guestworker programmes were implemented in Europe (the UK, France,⁴ Switzerland, Belgium, the Netherlands and West Germany) and the US. This second wave was not only the result of demands to preserve cultural unity, but also a response to the expanding attributions of the social state (Garcés-Mascareñas 2004: 3). First, 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 also explains 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. Second, 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, etc.), the more urgent it became to curtail or, at least 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 economic boom in the countries of South-East Asia and the Middle East, bringing in large numbers of high- and low-skilled workers. These new labour schemes have become increasingly feminised as a consequence of the so-called 'maid trade'. Moreover, the sending governments have played a more important role, not only controlling labour transactions, but also marketing – in the Philippines, for instance – their citizens abroad (Hahamovitch 2003: 89).

While temporary labour schemes have 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 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' (in Hollifield 2005). 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' yet 'closed membership'. In a context of rights, the compromise between markets and citizenship was thus a mirage (Martin & Teitelbaum 2001) or proved to be an illusionary solution (Papademetriou, Martin & Miller 1983) in the long run.

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 an object of the law and a locus of rights – civil and human rights can sabotage restrictive policies, thus counteracting 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 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 being internally rather than externally produced. They emphasise how all Western constitutions enshrine a catalogue of elementary human rights that, together with strong and independent judiciaries, would hamper state capacity to restrict immigration. This is 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 a historical perspective, these authors refer to nationally defined rights and the role of courts to explain the extension of social and residence rights to post-war guestworkers and their families, as well as 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 increasingly globalised world, but rather from the functioning of the legal system (or rule of law) in liberal states. As Joppke (1998b: 290) notes in a seemingly tautological sentence: '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 a key explanatory factor for the persistence of international migration to liberal states.

Freeman (1995) began 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 identifies the political process, rather than the legal system, as the major factor of self-limited sovereignty in liberal states, arguing that their immigration policy is characterised by a 'client politics' and a universalistic idiom of liberalism that prevents political elites from playing the ethnicity or race card. In this context, he explains the expansionist, 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. Freeman's 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 if not hostile general public.

Though constituting a first important step in attempts to clarify the logic of immigration policy within the political process of liberal democracies, Freeman's work has been severely criticised. Three main disputations are worth mentioning here. First, Brubaker (1995) observes that many of the trends identified by Freeman are either a general feature of migration or a 'particular feature of particular discursive fields'. Thus, Brubaker 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) points out that Freeman's approach to immigration policy as client politics seems to work better in settler societies, where immigration coincided with nation-building. By contrast, in European societies, where immigration post-dated nation-building, Joppke finds immigration politics more likely to have been guided by a restrictionist national interest. 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.

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.⁵ Two basic reasons for this are forwarded. 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 (*ibid.*: 7). Second, there is the suggestion 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 up for discussion,⁶ Ruhs and Martin conclude (*ibid.* 8) 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 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 migrants' membership, this would imply that these states are *de facto* compelled to adhere to a policy of low numbers and high rights. 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 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 (the US, Canada, Australia and New Zealand), Arango distinguishes between democratic and non-democratic or autocratic societies. The former would recognise moral and political obligations *vis-à-vis* the immigrants while attempting to keep the numbers admitted as low as possible; the latter would tend to have no compunctions about letting in large numbers of people, though only on the condition that they be temporary labourers with limited rights. In brief, to recall the words of Ruhs and Martin (2006), 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 end of post-war guestworker programmes, really opt for a policy of low numbers and high rights? If so, to what extent did the policy succeed in a context of high labour demands? That is, 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 because the state is not – or at least 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, in contrast with liberal democracies, to what extent can they solve the dilemma, if there is one, 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 (1988: 36) 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'. 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 practice a policy of open borders but closed membership and thereby solve the contradictions between markets and citizenship and between 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. Thus, 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? That is, how far are liberal democracies constrained by rights when dealing with illegal migration?

1.5 Migration policies

If state migration policies' choices 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 (1985) definition, 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 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' (see e.g. 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 (*ibid.*: 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 policymakers 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 (2004: 5), this gap would result from inadequate policy implementation or enforcement and its unintended effects. In more specific terms, this gap is explained by four main factors: 1) 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 scholars 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 losing control (Sassen 1996), that migration flows are far beyond the states' capacity for control (Massey 1998) and that policies do not always matter (Thielemann 2003). There could be objection, however, that, at least in part, such conclusions arise from the definition of the problem and particularly from the initial distinction between policymaking, policy goals, implementation and outcomes. If we expand the notion of policy on the whole, so as to embrace policymaking, implementation and outcomes, the resulting picture would almost certainly be substantially different. That is, 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 riddled with inconsistencies, contradictions and inefficiencies. This inferred question is central to 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 simple: illegal migration proves the ineffectiveness of migration policies because if it 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 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 the law and illegal migration is by focusing on how the law serves the interests of powerful economic and political groups, basically needs 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. 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 very 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 for inquiry.

If the law creates the category of 'illegal', the next question is what it means to be categorised as such. For Coutin (2000: 30), illegality means 'a space of forced invisibility, exclusion, subjugation and repression'. 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 (*ibid.*: 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 'undeported', everyone is vulnerable. According to De Genova, this deportability reproduces the physical borders of nation-states 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 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 US, Coutin (2005: 23) observes how they challenge the attribution of illegality by arguing that they migrated to the US 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. Using Van Schendel and Abraham's terms (2005), their main claim was that Salvadorians' movement and stay in Spain was illegal yet licit, that is, 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, NGOs and sympathetic civil servants have opened loopholes for illegal immigrants in an increasingly protected job market and welfare state⁷ (see e.g. Van der Leun 2003).

Although this 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, 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 nation-state, be it liberal or otherwise?

