

Sovereignty, human rights, and international migrations

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ABSTRACT

This article discusses the relationship between sovereignty and human rights concerning the elaboration of immigration policies. It deals with the role of the State in international migrations, the effects of the development of an international human rights legislation over the immigration question, and finally discusses the idea that the increasing international migration is leading the State to lose control over its population and territory, two central features of the sovereignty concept.

Key words: Human rights; Immigration policy; Sovereignty; Nationality; Refugees.

On August 28, 2001, a freighter ship called Tampa, of Norwegian flag, rescued 438 people from an Indonesian boat floating adrift in high seas. Most of them came from Afghanistan, but there were also passengers from Sri Lanka and Pakistan, all of them trying to reach Australia. The press became divided on referring to the ship as “full of refugees” or “full of illegal immigrants”. Australia refused to admit the vessel, saying that either Indonesia or Norway was responsible for the Tampa’s “cargo”. Indonesia threatened to send the army to protect the harbor and prevent the refugees from disembarking, although afterwards this country changed its attitude and accepted to receive them. The passengers, in their turn, refused to go back and decided to initiate a hunger strike. During a week, the vessel remained at sea, kept under surveillance by the Australian navy and forbidden to anchoring anywhere in the world.

The situation of such ship serves as a metaphor for the contemporary problem of immigration. The figure of a ship forbidden to lay anchors reflects the situation of millions of people around the world. The dilemmas and controversies aroused during the negotiations about the destination of the Tampa’s passengers synthesize in a certain way a series of general problems related to the political aspects of international migrations in our days. Or, to put it in just one question: after all, what prevents an individual from traveling abroad or living in a certain country?

Considering that it is increasingly easier for anyone, both in terms of costs and transportation technology, to move from one side of the planet to the other, and having in mind the fact that the economic opportunities are so unequally distributed in geographical terms, why then people can’t simply leave one place and go to another in search for a better life?

Immigration and the state

The simplest answer to this question is the immediate recognition that the world is divided into states, and these are associations which, among other characteristics, have the monopoly over the legitimacy of mobility, i.e.:

[...]modern states, and the international state system of which they are a part, have expropriated from individuals and private entities the legitimate means of movement, particularly though by no means exclusively across international boundaries. (Torpey, 2000, p. 4).

Nowadays, nobody can cross the border of any country without a passport and, in many cases, a visa, except when there is an agreement between the countries involved as, for instance, that existing between the member countries of the European Union. So, the Tampa's passengers could not disembark in Australia without the country's consent. Monopoly over the legitimacy of mobility is considered one of the bases of state sovereignty.¹

Protests may be made, and in this case they occurred inside and outside Australia, but finally, in this particular aspect, there is no organization superior to the state that could force it to accept someone in its territory. The state's autonomy in the domain of immigration is one of the main characteristics of International Law. Under this paradigm, the individual is a non-subject, what is to say that he does not exist. Internationally, who maintains relations with each other are the states, i.e., there is no relationship between individuals of a given nationality and states of another. When, by chance, a conflict occurs in these terms as, for instance, when a state offends in any form a citizen of another, the question is treated on the governmental sphere, assuming the form of an offense of one state against another, and it is only between states that it can be discussed and solved (Lilich, 1984). So, the fundamental characteristic distinguishing international migrations from other types of migration is that they imply a movement of the individual between two entities, between two different political systems. In this sense, it may be said that international migrations are not only a social phenomenon, but inherently a political one, "which arises from the organization of the world into a congeries of mutually exclusive sovereign states, commonly referred as the Westphalian system". (Zolberg, 1999, p. 81).

To acknowledge the importance of the state in international migrations does not mean that it is necessarily the most relevant factor in the formation and maintenance of migration flows. International migrations are neither exclusively nor mainly caused by state action. However, through its policies of immigration and citizenship, the state is an important explanatory factor in the process through which these flows are formed, and helps to mold the forms they take.

In the case of the Tampa vessel, since Australia decided not to accept the passengers, the ship would then have to turn back to Indonesia, wherefrom they were departed. However, invoking the same principle of sovereignty, this country initially also decided not to receive them. In their turn, the passengers did not want to go back to their countries of origin and, even when Indonesia accepted receiving them, they refused the offer. Their allegation was that they were seeking political asylum; and, in such case, the international rules prescribe that, before any action is taken, the pertinence of the demand should be judged. Therefore, in forcing them to turn back, Australia would be violating article 33 of the Geneva Convention, known as the *non-refoulement* rule, a disposition included as well in the New York Protocol, which regulates the issue of refugees in terms of International Law.

The Geneva Convention and the New York Protocol represent a constraint for the state's autonomy of decision regarding the control of its borders, and so they are not inserted in the logic of the traditional International Law which assures national sovereignty in the control of migratory movements.

The *Convention Relating to the Status of Refugees* was signed in Geneva, in 1951, and had a very limited and precise scope, that is, the situation of those individuals dislocated by the totalitarian regimes of Europe in the years 1930, and by the Second World War. In 1954, the *Convention Relating to the Status of Stateless Persons* was agreed upon, and was also basically referred to the post-war situations. Yet, with the persistence of armed conflicts and dictatorships in subsequent years, these mechanisms were extended and improved to take account of new situations. The *Convention on the Reduction of Stateless Persons* was signed in 1961 and, in 1967, the New York *Protocol relating to the Status of Refugees*, which extended the concept of refugees to other types of situation.

The Geneva Convention establishes, among other things, that the signatory states are obliged to analyze the requests of asylum and to grant the refugees the same treatment enjoyed by their citizens concerning educational, health and employment conditions. In addition, it determines that there should not be discrimination against asylum candidates, even in those cases where such candidates have entered the country without authorization. Since the New York Protocol, the Geneva Convention began to be applied also to cases not directly related to the events occurred before 1951.

The 1954 *Convention Relating to the Status of Stateless Persons* basically says that individuals not considered national citizens by any country should have their rights guaranteed by the state where they live, which should be responsible as well for the emission of identity documents, besides facilitating the process of naturalization. The 1961 Convention addresses the prevention against creating stateless persons through compromising the signatory states to concede their nationality to the individuals born in their territories or born in other territories, but having “nationals” of such states as parents - otherwise, these individuals would become stateless; and also requiring the signatory states not to punish with loss of nationality the cases of change in the person’s *status*, as marriage, divorce, adoption, or acquisition of another nationality.

The legislation concerning the problem of refugees and stateless persons, although expanded and improved, remains based on a logic of exception, without questioning the foundations of the Westphalian paradigm. On account of sovereignty, no state is compelled to accept refugees, but just forbidden to send them back to those countries accused of persecution (*non-refoulement* principle). In addition, there is no supranational organism able to control or punish the states violating the law (Bhabha, 1998; Mbaya, 1998).

In the general domain of human rights, the conventions on refugees and stateless persons, in spite of their limitations, represent a turning point in international law, since for the first time on the international scenario the existence of the individual is recognized. Universal individual rights independent of the state are being gradually acknowledged, following a trend that was being intensified since the end of the Second World War.

In fact, even before that, the international concern with the individual is already perceptible in the creation of the League of Nations, of the International Labor Organization, and in the existence of an international law on warfare. But it is only after the Second World War that an international regime of human rights begins to be created with the installation of the Nuremberg’s Tribunal, between 1945 and 1946, for judging war criminals, and the adoption by the UN, in 1948, of the *Universal Declaration of Human Rights*.

In the sphere of immigration properly, it is worth noticing that the Declaration, under its article 15, grants the individuals the right to have rights, i.e., the right to have a nationality, of not losing it, and the possibility of changing nationality; under article 14, the right to seek asylum in cases of persecution; and under article 13, paragraph 2, the right to leave and return to the country of origin according to will. These advances, however, do not represent a rupture with the former paradigm. The decisional autonomy of the state respecting who can enter or live in its territory remains unquestioned. The same article 13, in its first paragraph, makes clear that

the freedom of movement is restricted to “inside the boundaries of each state”. There is nothing like a “right to enter” which could be comparable to the right to leave. Article 14 assures to a “victim of persecution [...] the right to seek and enjoy asylum in other countries”, but no country is compelled to accept him or her.

In its more traditional interpretation, the Declaration of Human Rights would serve to regulate just the relationship between the states and its citizens. However, with the growing recognition of the individual in the international sphere, and with the increase in numbers of immigrants in the world, it became more and more frequent its utilization as a regulation parameter for the relations between host states and immigrants. Article 16, paragraph 3, for instance, affirms that “the family is the natural and fundamental nucleus of society and is entitled to be protected by the state”. A more liberal interpretation of this article gives margin to an immigration policy foreseeing the concession of visas to foreign members of “nationals” or legal immigrants’ families, even when it is not in the State’s interest receiving more immigrants. Nevertheless, most of the host countries, even those maintaining a policy of family reunification, are reluctant in admitting this kind of interpretation and in validating the formal existence of such right. Besides, the question remains as how to determine which persons belong to a family, that is, which types of familial ties justify the inclusion of an individual in a program for family reunification.

In face of such situations, the Declaration of Human Rights started to be seen as not sufficient to deal with problems occurring in the relationship between states and foreign individuals. The first international organism producing a specific legislation on such matter has been the International Labor Organization (ILO). In 1949, that organization produced the *Migration for Employment Convention* (n. 97) and, in 1975, the *Migrant Workers Convention* (n. 143). These two conventions recommended the states an effort in order to publicize information that could facilitate the process of immigration, and sought to guarantee that immigrants received the same treatment and had the same rights as “national” workers, regardless of their nationality, race, religion or sex. The second of these two conventions included articles related to the problem of the illegal immigration and the traffic on persons, in addition to the incorporation of paragraphs referring to cultural rights. Both conventions, however, have a low ratification rate, especially the second (41 countries ratified the first, and only 18 ratified the second). In both cases, countries like Australia, the United States, and France, large recipients of immigrants, are absent. Yet, the situation affecting immigrants has been increasingly attracting attention of international organisms. Since the middle of the 1970’s, the UN, on different occasions and through its different organs, has expressed its concern with the need for a further international regulation on the matter.

In 1990, the UN General Assembly approved the *International Convention on the Protection of the Rights of Migrant Workers and of Their Families* (Dec. 18, 1990), which demands not only equal treatment in labor relations to “national” citizens and legal immigrants, but also that the latter receive information on their rights in a language understandable to them, and have the right to appeal to the judiciary system in case of deportation. In addition, it establishes rules for the recruitment of foreigners. This convention achieved the minimum of ratifications on March 14, 2003, and became effective from the first of July that same year. Yet, the main receptive countries did not sign the convention.

Besides international conventions, there are as well regional conventions and bilateral treaties regulating specific situations. The Organization of African States has conventions of its own for the situation of refugees, the same occurring with the Middle Eastern countries, the Organization of American States, the European Council and the European Union. The latter, in fact, has the single binding international mechanism, the *European Declaration of Human Rights*. Furthermore, the member countries are working toward the adoption of a common immigration policy, a point to which we will return later on in this article.

The increasing importance of international migrations in the world scene can also be measured both through the proliferation of meetings where this subject became the main theme (*International Seminar on the Cultural Dialogue between Countries of Origin and Destination of Migrant Workers*, 1989), and through the significance attached to the theme in larger conferences, as those related to population, employment, and the struggle against racism (*World Conference on Human Rights*, part 2, paragraphs 33-35; *International Conference on Population and Development*, chapter 10; *World Summit on Social Development*, chapters 3 and 4; and *IV International Conference on Women*, chapter IV.D).

Besides the issue of refugees and the problems involving family reunification, one of the prevailing points in the debate over state sovereignty and the rights of the individuals in the area of international migrations refers to the treatment given to the undocumented immigrants. There is much controversy about the duties of states towards individuals in irregular situation within their territories. In more abstract terms, what this amounts to is to know which individual rights are to be guaranteed even to those individuals who are “out of the law”. Many states fear that a policy granting many rights to the undocumented immigrants would serve as an incentive for the illegal migration of more and more people. The international conventions have been recommending that the states, instead of putting pressure on the illegal immigrants themselves, act especially in the sense of restraining the employment of illegal workers and repressing the international networks trafficking on persons.² In spite of this, illegal immigration is being increasingly criminalized in the domestic legislation of host countries, with ominous consequences for all immigrants.

In the case of the current Brazilian emigration movement, the problem of the undocumented migrants is particularly important and already begins to worry sectors of the country’s government, since a large portion of Brazilian emigrants are living abroad as immigrants in an illegal situation (1/3 of the total, according to estimations of *Itamaraty*, the Ministry of Foreign Affairs). The fragility of the legal situation of these immigrants converts them into easy targets for disrespect of their human rights. In this sense, the involvement of the state of origin is of fundamental importance in this case.

Recently, the Brazilian state is assuming a more active position regarding the situation of such illegal immigrants. Traveling to Portugal in 2003, the Brazilian President included in the agenda of the conversations a discussion about the situation of Brazilian illegal immigrants in that country. It is estimated that the Brazilian illegal population in Portugal involves from 15,000 to 25,000 people, and that 1,800 Brazilians have already been deported since the last reform of Portuguese immigration laws became effective, in November, 2001 (*Folha de S. Paulo*, 07/09/2003). On July, 11 that year, the two countries signed an agreement in order to facilitate the regularization of such population. This notwithstanding, according to *Casa do Brasil*, an entity formed by Brazilian immigrants in Portugal, out of 10,793 individuals who have applied for regularization, only 562 have been granted the visa for employment (up to the end of February 2004).

The involvement of the Brazilian state has also been important in obtaining an agreement for the deportation of hundreds of Brazilians who had been arrested in the United States under the accusation of illegal immigration. A commission of Brazilian congressmen negotiated with the American government the terms of a settlement in order to assure, in the words of Representative João Magno, that “the repatriated will be treated as citizens and not as criminals; they will not come handcuffed or enchained, or in prisoners’ clothes”.³ “The ‘Disembark Operation’, as it was called, mobilized around two hundred people, among civilian, military and federal policemen, civil defense agents, federal attorneys [*Ministério Público Federal*], *Itamaraty*, and the Ministry of Justice”; and the government of the United States assumed travel expenses (*Folha de S. Paulo*, 01/29/2004).

In addition to the cases mentioned above, there are accounts referring illegal Brazilians facing problems in Paraguay (the second largest population of Brazilians abroad, estimated in 350 to 400 thousand people), in England, and in French Guyana, among other countries.

The problem of the undocumented persons is at the center of various controversies affecting host countries and countries of origin. In the beginning of the 1980's, one of the most important events in this area involved the polemic approval, in a plebiscite in California, of a measure intended to exclude from public schools the children of illegal immigrants. The 187 Proposition, as it became known, has been revoked by the Supreme Court, which considered education not only an inalienable right of every human being, but also that children should not be punished by crimes committed by their parents.

The study of the evolution of the international regime of human rights shows the growing recognition of the individual as holding rights independently of his or her nationality, but at the same time such study reveals that the implementation of these rights remains basically dependent on the states; and, specifically in the case of international migrations, on host states. In the case of that Norwegian vessel on Australian coasts, for example, there was not even a consensus on which country should be responsible for enforcing the law. Australia insisted upon attributing the problem to the responsibility of Norway (whose flag was displayed on the ship) or Indonesia. Yet, the Geneva Convention specifies that, in situations of danger, immigrants should be taken to the nearest harbor. Since the immigrants had been rescued near the Australian sea, the international pressures fell over this country. The UN Secretary General, Kofi Annan, declared that "this is not a manner of dealing with a situation involving refugees" (*New York Times*, 08/30/2001); Mary Robinson, the UN high commissioner for human rights, was more emphatic: "it is very regrettable the fact that a country with a great reputation as Australia is incapable of extending its hand to these people, in appropriate terms and according to established practices" (*Le Monde*, 08/31/2001). After one week with the refugees at sea, Australia decided to collaborate for the solution of the case. Those seeking the status of refugees were transferred to a boat belonging to the Australian Navy, the HMAS Manoora, and taken to New Zealand, Papua-New Guinea and Nauru (a country situated in a small Pacific island), where UN officers conducted interviews to decide on their status and, afterwards, send them to a host country, having Australia assumed the compromise of accepting some of them.

The situation involving the Tampa makes evident the tension existing between the respect to individual rights and the state sovereignty, which is one of the most significant aspects of the immigration policies. However, in the same situation as that of the passengers of the Tampa, there are millions of people ⁴ in the world – candidates to family reunification, illegal immigrants, and even people born and living in the same country, but nevertheless considered as immigrants, as is the case of many countries where the *jus sanguini* ⁵ is the basis for citizenship.

Immigration, Citizenship and Nationality

In addition to the monopoly over the mobility of individuals, states detain the monopoly over the individual's identity, his nationality. If all individuals were born and died within the same state, perhaps the definition of their nationality would be less problematic. In fact, nationality is almost always attributed to the individual regardless of his will. He can even leave his country's territory if he can find another country willing to receive him, but he can hardly renounce his nationality. In subverting the relation people /state / territory, immigration compels the state to formalize, by means of its policies of immigration and citizenship, the rules permitting access to its territory and its nationality. The access to nationality is important to the extent that the very legitimacy of the Westphalian world order is based on the so-called national self-determination principle, which

[...] establishes that a people should be offered the possibility of freely conducting its political, economic, and cultural life according to democratic principles. The free handling of its political life demands in the first place that the political power be under control of that people, and that such control be exerted on democratic and egalitarian bases (the so-called internal self-determination, equivalent to democracy), and, secondly, that such control be exerted freely from the dependence on third parties (the external self-determination, equivalent to independence) (Ikeda, 2001, p. 75).

The greatest problem in the use of the national self-determination principle as a form of defining political units is that, “in the end, within the limits of the self-determination formula, it does not exist anything that serves as guidance in the definition or concretization of what could be this self” (Whelan, 1994, p. 103). This problem ends up being solved in a case by case basis, that is, each political entity aiming at self-organization as a state will seek to affirm its singularity, its own version of what would be a nation, in order to justify its existence as an independent political entity (Hobsbawm & Ranger, 1984; Hobsbawm, 1990).

Those in favor of the self-determination principle, in spite of their differences in terms of the particular solutions they propose, usually confer an ethnic connotation to the concept of nation, intending therefore to establish sovereign political entities as ethnically homogeneous as possible. Although such homogeneity cannot be complete, “the burden of proof would always rest with those who proposed to deviate from the principle of national self-determination, which remained the touchstone of the Versailles system.” (Keylor, 1995, p. 3).

The association between state and nation, a product of modern times, as well as the principle of internal self-determination, implies the formation of a connection between nationality and citizenship. In other words, as the nation-state becomes the generalized form of politically organizing the world, citizenship turns out to be assigned as a function of nationality. This means, among other things, that the access to the rights of citizenship is dependent on the possession of a nationality.

The definition of nationality is as complicated as the definition of nation. There are no “logical” or “natural” criteria for deciding about the composition of the nationality. In general, such criteria are established according to two traditions – one of them based on the political contract; the other, on culture. These are also known, respectively, as the French and the German traditions, for they are historically identifiable with those two countries, although none of them have policies exactly corresponding to the paradigms to which their names are associated. From the French standpoint, nationality would be a choice; from the German perspective, a destiny. According to the French republican tradition, nationality is based on the individual’s willing attachment to the nation. The 1791 Constitution attributes French citizenship to all those

[...] born in France from a French father, [*or*] born in France from a foreign father and having fixed residence in the country, [*or*] having come to settle in France and having taken a civil oath, [*or*] born of a foreign father, descending from a Frenchman or a Frenchwoman expatriated by religious motives, and desiring to settle in France and take the civic oath.

In this case, the idea of citizenship absorbs the idea of nationality. The revolutionary ideal of citizenship as an act of will not only influenced all the French legislations that followed, but also served as inspiration to other nationality codes around the world, although no country, not even France, had faithfully restored that proposition (Bernard, 1993).

Originated in the Romantic period, the German tradition rests on an ethnic and cultural conception about the people, and considers as “nationals” only those persons belonging to the country’s dominant culture, which is transmitted by blood. The nation, in this case, would be a

community of blood and language. Some of the major theoreticians of this orientation, as Herder, have developed their ideas in clear opposition to the ideals of the Enlightenment which inspired the French Revolution. His main criticism to these ideas and, specifically, to Rousseau's thoughts, was that they were based on an abstract concept of mankind, distant from the human reality (Herder, 1995). To this abstraction, Herder opposed the concept of "laying roots" [*enraizamento*], that is, the idea that people are imbedded in cultures, from which they are not dissociable, and that cultures have profound roots which signal effective differences among individuals. According to the German conception, these differences are not considered by philosophers like Rousseau, when they preach equality among all men.

In consonance with this concept of culture, Germany has developed a policy of nationality which, until recently, only acknowledged the right of blood, for the culture would be transmitted by the family. This position caused some problems to the German state, mainly after the fall of the Berlin wall, because many residents in Eastern Europe had German descent and, thus, the right to German nationality, although they had no ties with the country anymore. On the other hand, the Turkish descendants settled in Germany for three generations hardly have access to German nationality, forming an enclave of people dwelling in the country and living as Germans, but without the same rights as them. As from the year 2000, a reform of the German nationality code acknowledged, although in a very restrictive form, the possibility of the *jus solis*, that is, the assignment of nationality based on the place of birth.

The attribution of nationality as an act of will (political attachment or choice of a place to live) or as an ethnic and cultural belonging, is present in all modern states. This is not always clear: many times both traditions appear combined and often different combinations of *jus solis* and *jus sanguini* succeed one another in different times within the same state. Before the decade of 1980, however, the question of identifying the portion of the population that would have right to a determined nationality was not in general a serious problem for the states. Yet the increase in immigration and the settlement of foreigners in the territory, which were occurring since the 1970's, generate the necessity of rethinking the policies of nationality and immigration. Since then, the major host countries have been systematically changing their policies in this area.

The policies of nationality and of immigration are closely related. In order to define who the immigrant is, it is necessary, first of all, to define who the "national" is. In addition, the state needs to define if it wishes or not that the immigrant becomes a national citizen, and which type of immigrant would be in that situation and, furthermore, which should be the adequate criteria for this process.

Different conceptions of nation favor different nationality / citizenship policies, and the corresponding immigration policies. Depending on the conception of nationality, the immigration policies - be they more open or more closed - may privilege a certain type of individual or a determined nation. For instance, in the case of the State of Israel, which is self-defined as a Jewish state, Jews from all over the world have the right to immigrate, right denied to other ethnicities. In the case of the European former colonial metropolises, for a long time the ex-colonials have been allowed to freely circulate through the territory of those countries, which recognized them as already having been participants of the nation-state. In the United States, at the beginning of the twentieth century, the idea of the country as a nation of white Protestants had an important role in the definition of the policy of quotas for immigration. The examples, after all, are largely variegated.

The form in which these policies are modified in the course of history reveals itself along with the changes in the national state's self-understanding. This is not the same as saying that these policies are a mere transposition to reality of those abstract ideas of nationality. In fact, the migration and nationality policies reflect economic and demographic interests, and political circumstances. Yet, because of their natures, they force the actors involved in their formulation to express themselves in terms of a discourse of nationality and to try to answer the question of

“who are we” or “who we want to be”, and, in this sense, such policies end up being an interesting reflection of the form through which the image of the nation is constructed.

In modern times, as stated before, citizenship is connected to nationality and, therefore, the rights associated with citizenship are subordinated to the possession of a nationality. The state has to define which are the exclusive rights of their citizens and how can a person have access to such rights. In defining their internal and external boundaries,⁶ the states have to deal with questions as the following: What type of individual can or cannot enter their territory, and why? Among those allowed entering, which can become residents and which cannot? Of those becoming permanent residents, which can become citizens and which cannot?

Post-National Citizenship?

In recent years, a series of studies indicate a change in the relationship between nationality / citizenship and sovereignty / immigration. According to these new researches, the strengthening of an international regime of human rights has forced the states to redefine their boundaries, both internal and external, as a function of the universality of individual rights. This process would have two characteristics: on the one hand, the states would be seeing their sovereignty weakened in face of the individual; on the other, the ties attaching the rights of citizenship to nationality would be turning weaker. This means, among other things, that the state would not be able anymore to define, as a function of its interests, who is allowed to enter and settle in its territory, and, furthermore, that the rights are being assigned increasingly in the name of the dignity of the human person rather than of his nationality, so that the very distinction between national and non-national would be losing its importance.

The creation of an international regime of human rights would thus be leading to a loss of autonomy of the state in the task of deciding over questions related to the right to entry, the type of differentiation between nationals and foreigners within its territory, the right to settle permanently, and the criteria for nationalization. In face of this picture of transference of rights from the citizen to the individual, some authors consider that the state is losing control over its boundaries, and that a kind of post-national or international citizenship is emerging.

As to the loss of control over the borders, it is said that the state is being more and more constrained to accept an undesired immigration, which was defined by Jopke as one that

“is not actively solicited by States, as in the legal quota immigration of the classic settler nations. Rather, it is accepted passively by States, either for humanitarian reasons and in recognition of individual rights, as in asylum-seeking and family reunification of labor migrants, or because of States sheer incapacity to keep migrants out, as an illegal immigration”. (1997, p. 266).

According to this line of argumentation, the growing and decisive influence of human rights in the field of immigration policies induced a great expansion of especially three types of immigration: of family reunification, of refugees, and of illegal immigrants. The family reunification policies are based on the idea, present in different articles of international legislations, that all human beings have the right to a normal family life; the policies for refugees rest on the idea that everyone has the right to escape when his life is being threatened – a right that is recognized by various of the already mentioned articles and international conventions; and illegal immigration would result, to a large extent, from the incapacity of the state in imposing sanctions against this type of immigration, which is also due to the acknowledgment of the illegal immigrants’ individual rights.

The growing influence of human rights would have also generated what Gary Freeman (1992) calls an “anti-populist rule”, by which the political elites of the liberal states, because of the

universalistic discourse of liberalism, cannot refer to the problem of the ethnic and racial composition of the migratory flows. Thus, social and political actors would have been forced to adapt to the new paradigm.

Analyzing the particular case of the United States, Debra DeLaet develops an argument close to that of Freeman. According to her,

Whereas broad acceptance of racially-based distinctions shaped U.S. immigration policy in the first half of the twentieth century, growing support for civil rights coupled with increasing opposition to racial discrimination provided the foundation for the liberalization of U.S. immigration policy since the 1960s. Thus, interest group politics, increasingly shaped by liberal norms in recent decades, largely explain why the U.S. government adopted liberal immigration policies in the face of widespread public support for new immigration restrictions in the 1980's. Ultimately, then, domestic politics and liberal ideas have contributed significantly to the increase in immigration to this country in recent decades by leading to the passage of liberal immigration policies (DeLaet, 1998, p. 4).

In the same line, James Hollifield argues that, although economic and sociological conditions are important for a continued migration,

[...] the sufficient conditions were political and legal. In the last three decades of the twentieth century, a principal factor that has sustained international migration (both south-north and to a lesser extent, east-west) is the accretion of rights for foreigners in the liberal democracies, or what I have called elsewhere the rise of "rights-based liberalism" (Hollifield, 2000, p. 148).

Hollifield, Jopke and Freeman emphasize domestic mechanisms in the formation of those policies. All of them build on studies accomplished in democratic and liberal lawful states. Yasemin Soysal (1998) and Saskia Sassen (2000), in their turn, prefer to emphasize the role of the international mechanisms protecting immigrants.

The rights and claims of individuals are legitimated by ideologies grounded in a transnational community, through international codes, conventions, and laws in human rights, independent of their citizenship in a nation-state. Hence, the individual transcends the citizen. This is the most elemental way that post-national model differs from the national model (Soysal, 1998, p. 194).

As already mentioned, the emergence of an international regime of human rights is pointed out not only as cause of the State's fragility in deciding on who can pass through its borders and settle in its territory, but also as determinant of a dissociation between rights and citizenship; due to the growing recognition of the universal rights of the person, rights exclusive to citizenship would be decreasing. The immigrants have increasingly the same rights as the citizens, and to obtain such rights, they do not need to become citizens, to get naturalization.

Membership and access to rights, which previously were defined by nationality, came to be codified in terms of international humanity, a new form of membership that transcends the boundaries of the nation-state. Thus, a profound transformation in the conception of citizenship would be under way, in its institutional logic and in the form of its legitimacy. The idea of states as exclusive associations has been questioned, for instance, by the recognition that an individual may be simultaneously citizen of more than one state, that he may have multiple citizenships (Brubaker, 1992).

Soysal bases her theory on the study of the western European countries' policies of integration, through which immigrants were presumably being incorporated into various aspects of the host

society, as the labor market and the educational system, and getting other advantages resulting from the welfare state, without having obtained the nationality and, therefore, the citizenship of those countries. In other words, they would be getting access to rights of citizenship without the necessity of becoming citizens. To the author, this situation characterizes a contradiction between two constitutive aspects of citizenship – identity and rights. “Whereas rights and claims to rights, become universalized and abstract, identity is still conceived of as particular and bounded by national, ethnical, regional, or other characteristics” (Soysal, 1993, p. 8).

Thus, a whole set of legal instruments, based on the human rights discourse, would be in progress and acting as “providing guidelines as to the management of migrant affairs for national legislation, by standardizing and rationalizing the category and status of the international migrant” (Soysal, 1998, p. 200). According to this author, these new orientations constrain the nation-states to grant civil, social, political, and other rights to individuals, regardless of their nationalities. In short, the state would be losing control over its boundaries - the external, territorial, and the internal, of citizenship – and, with this, it would be losing also an important part of its sovereignty.

Nevertheless, the study of the evolution of the international regime of human rights shows that, despite the growing acknowledgement of the individual as a holder of rights regardless of his nationality, the implementation of such rights remains basically dependent on the state, and, in the specific case of the international migrations, of the host state. This is to say that the right to come and go on the international circuit – the right to migrate internationally – is not recognized as a human right. The bulk of the international legislation refers only to concrete situations, where the immigrant already exists. It is not by chance that the conventions usually refer to the rights of immigrant workers, and not to a right to migrate. In fact, the latter exists solely in those cases of “justified fear”, foreseen in conventions related to refuge and political asylum. Yet, even in these cases, the last word belongs to the state, and it is significant that there is no international coercive organism able to verify whether the states are complying with the law.

The critique of this interpretation of the relationship between citizenship and rights considers that citizenship is not definable from its content, for the latter has never been established: “different societies will assign different rights and duties to the status of citizen, since there is no universal principle determining the inalienable rights and duties of citizenship in general” (Barbalet, 1989, p. 18). Fifty years ago, cultural rights, for example, were not even considered rights. Citizenship means, above all, equality before the law and equality in the access to rights, and, definitely, under these aspects, there is no identity between immigrants and “national” citizens. The fact that nowadays foreigners enjoy a greater number of rights does not change the nature of citizenship. The foreigner remains in a precarious situation as compared to the citizen.

Citizens alone enjoy an unconditional right to remain and reside in the territory of a state (...) The territory of the state is their territory, and they can plan their lives accordingly. Noncitizens’ entry and residence rights, in contrary, are never unconditional. Some non-citizens – clandestine entrants, for example, or persons at the end of a legally limited period of residence, have no such rights. But even privileged non-citizens - those formally accepted as immigrants or settlers - remain “probationary” residents, subject to exclusion or deportation in certain circumstances (Brubaker, 1992, p. 24).

As important as the absence of the right to establish permanent residence is the fact that foreigners do not participate in the decisions relating to their own situation, the fact that they do not have political rights. In general, regardless of which rights are accorded to their citizens, all modern democracies define exclusion above all as exclusion from the political rights. These rights - defined by Marshall as “the right to participate in the exercise of political power, as a member of the body invested with political authority or as an elector of the members of such

body” (Marshall, 1998, p. 94) - are fundamental components of the idea of citizenship, so that defining citizenship is impossible if this aspect is excluded.

Political participation is fundamental in the definition of nationality/citizenship, and that is why, throughout history, there have always been so many disputes to decide who was member of the polis. To define who can be a citizen is one of the most important questions for the political life of a country. In countries that consider themselves democracies, such decision is still more important, because it defines who will participate in the political process. Being as well a question of rights’ distribution, the definition of citizenship involves a political struggle over quite concrete goals. In the episode of the 187 proposition, for instance, the government of the State of California had the greatest interest that education would have been considered a privilege of the citizenship or, at most, of legal immigrants, because, according to that State, the costs generated by the liberal federal policy relating the immigrants would end up as a burden on the State’s government, responsible for the expenses in the educational area. In their turn, Californian farmers prefer a looser policy concerning illegal immigrants, who constitute a fundamental labor force for the agricultural business, at least under its actual form of organization. As recognized by an American anti-immigration organization in a recent document: “Residence in the United States is one of the most valuable privileges in the world” (Symcox, 1997).

In the disputes over such privilege, different interest groups uphold different conceptions of nation in order to justify their political choices. That is the reason why it is so difficult to attribute to a single conception of nation the determinant role in the formulation of nationality and immigration policies. The legislation on citizenship ends up being an outcome of a process of adjustment among contradictory interests articulated around different discourses.

Considering that societies, especially those receiving immigrants, are increasingly characterized by a plural composition, it is clear that the conceptions of nation also become diversified, that is, different groups with different conceptions of nation try to impose their views to the construction process of the nations’ boundaries, by means of immigration and nationality policies. The pluralism of opinions and the complexity of the formulation process of such policies are reflected in the final form of the legislation on these questions. Especially in liberal democracies, such policies effectively are not the fruit of the action of an abstract entity, the “State”, but the outcome of the struggle and adjustment of divergent interests in society and within the state itself.

In parallel with the strengthening of the discourse about rights, the idea that immigration and immigrants jeopardize the security and integrity of the state has spread, and, with it, that they are a problem for national security. A large part of the population in the host countries, either motivated by the economic crisis, or by the threats of terrorism or narcotraffic, or simply by xenophobia, presses their governments in the sense of closing their doors to immigration. The existence of pressure groups with so dissimilar interests, allied to economic and political interests of various natures, contribute to the formulation of complex policies of immigration and nationality, which are often incoherent and not satisfactory for any side, thus being considered inefficient both by those supporting a greater closing, and by those in favor of a greater liberalization of the borders. What the literature reviewed in this article considers as a limitation of the role of the state, would be, in fact, just a reflection of the fact that there is not a clear and indivisible will of one single actor – the State. Immigration policies reflect the dissent of different actors, inside and outside the state, about the boundaries’ building process. The presumed inefficacy of the immigration and nationality policies does not result from a loss of sovereignty on the part of the state, as a function of the development of the economy or of the evolution of human rights, but is in fact a mirror of the difficulties to reach a consensus when the matter has to do with the delimitation of the state’s boundaries. When one aligns public opinion with the supporters of restrictive measures, and makes the allegation that the human rights of immigrants do not have social bases, he does not take into account the fact that there are as well supporters of those rights. He also does not consider the fact that it is very difficult for the opinion researches to capture, even among those preferring to reduce the level of immigration, which would be their

priorities, that is, whether they would accept a restriction on rights in the name of restrictions on the number of immigrants.

In spite of so much controversy, however, the existence of state boundaries is treated by the international legislation as something evident, and the autonomy of the states in deciding about their borders remains undisputed. There is much discussion on how and where to establish these borders, but practically nobody is supporting their extinction or considering that the decision about borders should not be taken by the state. The question of immigration continues to be regulated basically by the state, besides being treated, in most cases, as a problem of public security and as a matter of police. As we have seen, Australia has treated the problem of the Tampa since the beginning as a problem of national security, mobilizing its air force to intercept the ship and to force it to turn back to international waters. The European Union, in its turn, discusses a common policy of immigration within the same working group that is discussing terrorism, narcotraffic, and questions related to internal security. The United States, especially after September 11, 2001, also considers the issue of immigration as mainly a problem of national security.

So, rights and identity remain fundamentally interconnected. The definition of who participates in the “we” - of who is “national” and, therefore, citizen - is the basis for the assignment of determined rights. Up to now, it is fundamentally the “we” who decides on the nature of such rights.

What the argument about international citizenship and the state’s loss of control over its borders say is that, in face of the new international context, the “we” would be losing this capacity of deciding on the identities and on the rights associated with them. That is to say that the state not only would be becoming impotent when confronted with the circulation of individuals through its borders, but also that national identity would be losing its centrality as source of recognition of the rights of citizenship. What is asserted is that the decision about borders is no longer a political decision, and that borders are established by international conventions, treaties and legislations, according to criteria related to universal individual rights.

However, borders continue to exist, both the territorial ones and those of membership, and, furthermore, they continue to have an important meaning, despite the significant evolution of the international regime of human rights and of the recognition of these rights in the host countries’ domestic legislation. The non-recognition of an immigration right, and the autonomy of the state in deciding who can be part of its population, maintain the division of the world in states as membership associations. The exclusion of the immigrant from the decisional processes affecting his own situation assures the continuity of this situation. A clear demonstration of this point has been recently given by the United States with the restrictions on the civil rights of foreigners after the terrorist attacks of September 11, 2001.

NOTES

¹ The requirement of an authorization does not mean that nobody can succeed in crossing the border without the consent of the state. It does not exist, nor ever existed, a state with impermeable borders or absolute control over who enters or leaves the country.

² In November 2000, the UN approved two protocols related to the problem of trafficking illegal persons, the Protocol against the Traffic on Persons and the Protocol against the Smuggling of Immigrants, Traffic refers to an immigration process involving coercion, while smuggling concerns the facilitation of the illegal movement of persons through the borders.

³ Cf. site (www.consciencia.net/2004/mes/01/eua-brasil.html).

⁴ In 2001, according to UN data, there were 150 million people living outside their countries of origin. Out of this total, it is estimated that between 80 and 97 million are workers and their families, and 12 million are refugees (ILO, OIM, OHCHR, 2001).

⁵ According to the *jus sanguini*, nationality is transmitted through descent. The other more usual form of attribution of nationality is the *jus soli*, where it is assigned according to the place of birth.

⁶ The distinction between internal and external boundaries has been made by Rogers Brubaker (1992). Internal border is defined by rights and refers to citizenship; external border is the territorial one.

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