

Beyond Sovereignty: Immigration Policy Making Today

Saskia Sassen

THE INTERACTION BETWEEN THE DENATIONALIZING OF KEY ECONOMIC INSTITUTIONS and spaces, on the one hand, and the renationalizing of politics on the other provides one of the main contexts for immigration policy and practice today. We see a growing consensus in the community of states to lift border controls for the flow of capital, information, services, and more broadly, to further globalization. Yet when it comes to immigrants and refugees, whether in North America, Western Europe, or Japan, we see the national state claiming all its old splendor and asserting its sovereign right to control its borders, a right that is a matter of consensus in the community of states.

What does it mean for the state to relinquish sovereignty in some realms and to continue to be sovereign in others? If we accept, as I do, that the state itself has been transformed by its participation in the implementation of laws and regulations necessary for economic globalization, we must accept as a possibility that sovereignty itself has been transformed. Elsewhere (1996b) I have argued that exclusive territoriality — a marking feature of the modern state — is being destabilized by economic globalization and that we are seeing the elements of a process of denationalization of national territory, though in a highly specialized institutional and functional way. Further, the particular combination of power and legitimacy we call sovereignty, which has over the last century become almost synonymous with the national state, is today being partly unbundled, redistributed onto other entities, particularly supranational organizations, international agreements on human rights, and the new emergent private international legal regime for business transactions (*Ibid.*). With all of this happening, what does it mean to assert, as is repeatedly done in the immigration literature, that the state has exclusive authority over the entry of non-nationals? Is the character of that exclusive authority today the same as it was before the current phase of globalization and the ascendance of human rights as a nonstate-centered form of legitimate power?¹

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My analysis focuses largely on immigration in the highly developed receiving countries. I use the notion of immigration policy rather broadly to refer to a wide range of distinct national policies. I should note that it is often difficult to distinguish immigrants and refugees. Yet there is (still) a separate regime for refugees in all these countries. Indeed, there is an international regime for refugees, something that can hardly be said for immigration. The focus in this brief essay is on the constraints faced by the state in highly developed countries in the making of immigration policy today.²

The Border and the Individual as Regulatory Sites

In my reading there is a fundamental framework that roots all the country-specific immigration policies of the developed world in a common set of conceptions about the role of the state and of national borders. The purpose here is not to minimize the many differences in national policies, but to underline the growing convergence in various aspects of immigration policy and practice.³

First, the sovereignty of the state and border control, whether land borders, airports, or consulates in sending countries, lie at the heart of the regulatory effort. Second, immigration policy is shaped by an understanding of immigration as the consequence of the individual actions of emigrants; the receiving country is taken as a passive agent, one not implicated in the process of emigration. In refugee policy, in contrast, there is a recognition of other factors, beyond the control of individuals, as leading to outflows.⁴ Two fundamental traits of immigration policy are, then, that it singles out the border and the individual as the sites for regulatory enforcement.

The sovereignty of the state when it comes to power over entry is well established by treaty law and constitutionally. The Convention of The Hague of 1930 asserted the right of the state to grant citizenship; the 1952 Convention on Refugees, which asserted that the right to leave is a universal right, remained silent on the right to entry — better silence than evident contradiction. (As is well known, the status of refugees and their right not to be forcibly returned are established in international law, but there is no corresponding right of asylum; such right is at the discretion of a receiving state.)

There are various human rights declarations and conventions that urge states to grant asylum on humanitarian grounds, but they all recognize the absolute discretion of states in this matter.⁵ A few states, notably Austria and Germany, give those formally recognized as refugees a legal right to asylum — though this is under revision. More recently, the various agreements toward the formation of the European Union (EU) keep asserting the right of the state to control who can enter. This is quite a contrast with the assertions in the GATT, NAFTA, and the EU about the need to lift state controls over borders when it comes to the flow of capital, information, services, and state controls over the domestic financial markets.

On the matter of the individual as a site for enforcement, two different operational logics are becoming evident. One of these logics — the one embedded in immigration policy — places exclusive responsibility for the immigration process on the individual, and hence makes of the individual the site for the exercise of the state's authority. There is a strong tendency in immigration policy in developed countries to reduce the process to the actions of individuals. The individual is the site for accountability and for enforcement. Yet it is now increasingly being recognized that international migrations are embedded in larger geopolitical and transnational economic dynamics. The worldwide evidence shows rather clearly that there is considerable patterning in the geography of migrations, and that the major receiving countries tend to get immigrants from their zones of influence. This holds for countries as diverse as the U.S., France, or Japan. Immigration is at least partly an outcome of the actions of the governments and major private economic actors in receiving countries. Economic internationalization and the geopolitics resulting from older colonial patterns suggest that the responsibility for immigration may not be exclusively the immigrant's. Analytically, these conditions only can enter into theorizations about the state and immigration when we suspend the proposition implicit in much immigration analysis — that immigration is the result of individual action. In the other logic, that embedded in human rights agreements, the individual emerges as a site for contesting the authority (sovereignty) of the state because s/he is the site for human rights. (For a detailed analysis of the interaction of these two logics, see Sassen, 1996b.)

Beyond Sovereignty: Constraints on States' Policy Making

When it comes to immigration policy, states under the rule of law increasingly confront a range of rights and obligations, pressures from both inside and outside, from universal human rights to not-so-universal ethnic lobbies. The overall effect is to constrain the sovereignty of the state and to undermine old notions about immigration control.

We see emerging a *de facto* regime, centered in international agreements and conventions as well as in various rights gained by immigrants, that limits the state's role in controlling immigration. An example of such an agreement is the International Convention adopted by the General Assembly of the United Nations (U.N.) on December 18, 1990, on the protection of the rights of all migrant workers and members of their families (Resolution 45/158). (See, e.g., Hollifield, 1992; Baubock, 1994; Sassen, 1996b: Part Three.) Further, there is a set of rights of resident immigrants widely upheld by legal authorities. We have also seen the gradual expansion over the last three decades of civil and social rights to marginal populations, whether women, ethnic minorities, or immigrants and refugees.

The extension of rights, which has taken place mostly through the judiciary, has confronted states with a number of constraints in the area of immigration and

refugee policy. For instance, there have been attempts by the legislatures in France and Germany to limit family reunification, which were blocked by administrative and constitutional courts on the grounds that such restrictions would violate international agreements. The courts have also regularly supported a combination of rights of resident immigrants that have the effect of limiting the government's power over resident immigrants. Similarly, such courts have limited the ability of governments to restrict or stop asylum seekers from entering the country.⁶

Finally, the numbers and kinds of political actors involved in immigration policy debates and policy making in Western Europe, North America, and Japan are far greater than they were two decades ago: the European Union, anti-immigrant parties, vast networks of organizations in Europe and North America that often represent immigrants, or claim to do so, and fight for immigrant rights, immigrant associations and immigrant politicians, mostly in the second generation, and, especially in the U.S., so-called ethnic lobbies.⁷ The policy process for immigration is no longer confined to a narrow governmental arena of ministerial and administrative interaction. Public opinion and public political debate have become part of the arena wherein immigration policy is shaped.⁸ Whole parties position themselves politically in terms of their stand on immigration, especially in some of the European countries.

These developments are particularly evident in the European Union.⁹ Europe's single market program has had a powerful impact in raising the prominence of various issues associated with free circulation of people as an essential element in creating a frontier-free community; the EC institutions lacked the legal competence to deal with many of these issues, but had to begin to address them. Gradually, EC institutions have wound up more deeply involved with visa policy, family reunification, and migration policy — all formerly exclusively in the domain of the individual national states. National governments resisted EC involvement in these once exclusively national domains. Yet now both legal and practical issues have made such involvement acceptable and inevitable, notwithstanding many public pronouncements to the contrary. There is now growing recognition of the need for an EC-wide immigration policy, something denied for a long time by individual states.

In the case of the U.S., the combination of forces at the governmental level is quite different, although it has similar general implications about the state's constraints in immigration policy making. Immigration policy in the U.S. today is largely debated and shaped by Congress, and hence is highly public and subject to a vast multiplicity of local interests, notably ethnic lobbies.¹⁰ We know well how very sensitive members of Congress are to the demographics of their districts. This has made it a very public process, quite different from other processes of policy making.¹¹

The fact that immigration in the U.S. has historically been the preserve of the federal government, particularly Congress, assumes new meaning in today's

context of radical devolution — the return of powers to the states.¹² There is now an emerging conflict between several state governments and the federal government around the particular issue of federal mandates concerning immigrants — such as access to public health care and schools — without mandatory federal funding. Thus, states with disproportionate shares of immigrants are asserting that they are disproportionately burdened by the putative costs of immigration. The costs of immigration are an area of great debate and wide ranging estimates.¹³ At the heart of this conflict is the fact that the federal government sets policy, but does not assume responsibility, financial or otherwise, for the implementation of many key aspects of immigration policy. The conflict is illustrated by the notorious case of the State of California and its \$377 million lawsuit against the federal government. The radical devolution under way now will further accentuate some of these divisions.

The Substance of State Control over Immigration

One of the questions raised by these developments concerns the nature of the control by the state in regulating immigration. The question here is not so much how effective a state's control over its borders is — we know it is never absolute. The question concerns rather the substantive nature of state control over immigration given international human rights agreements, the extension of various social and political rights to resident immigrants over the last 20 years, and the multiplication of political actors involved with the immigration question.

There is the matter of the unintended consequences of policies, whether immigration policies as such or other kinds of policies that affect immigration. For instance, the 1965 U.S. Immigration Act had consequences not intended or foreseen by its framers (Reimers, 1983; Briggs, 1994); it was generally expected that it would bring in more of the nationalities already present in the country, i.e., Europeans, given its emphasis on family reunion. Other kinds of unintended consequences are related to the internationalization of production and foreign aid (Sassen, 1988; *Journal für Entwicklungspolitik*, 1995; Bonacich et al., 1995). These often turned out to have unexpected impacts on immigration. Similar unintended consequences have been associated with military aid and subsequent refugee flows, e.g., El Salvador in the decade of the 1980s (Mahler, 1995; Jonas, 1991). Although immigration policy has rarely been an explicit, formal component of the foreign policy apparatus in the U.S., the latter has had significant impacts on immigration besides the well-established fact of refugee flows from Indochina. If one were to be discreet, one would say that foreign aid has rarely deterred emigration.¹⁴

Domestic U.S. policies with a foreign, overseas impacts have also contributed to promoting emigration to the U.S. There is the notorious sugar price support provision of the early 1980s: tax payers paid three billion annually to support the price of sugar for U.S. producers. This kept Caribbean Basin countries out of the

competition and resulted in a loss of 400,000 jobs there from 1982 to 1988; for example, the Dominican Republic lost three-quarters of its sugar export quota in less than a decade. The 1980s was also an era of large increases in immigration from that region.

A second type of condition that illuminates the substantive nature of the control by states over immigration is a twist on the zero sum argument. Recent history shows that if a government closes one kind of entry category, another one will have a rise in numbers. A variant on this dynamic is that if a government has, for instance, a very liberal policy on asylum, public opinion may turn against all asylum seekers and close up the country totally; this in turn is likely to promote an increase in irregular entries.¹⁵

A third set of conditions can be seen as reducing the autonomy of the state in controlling immigration. Large-scale international migrations are embedded in rather complex economic, social, and ethnic networks. They are highly conditioned and structured flows. States may insist on treating immigration as the aggregate outcome of individual actions and as distinct and autonomous from other major geopolitical and transnational processes. Yet they cannot escape the consequences of those larger dynamics and of their insistence on isolating the immigration policy question.

These constraints on the state's capacity to control immigration should not be seen as a control crisis. This type of analysis opens up the immigration policy question beyond the familiar range of the border and the individual as the sites for regulatory enforcement. It signals that international migrations are partly embedded in conditions produced by economic internationalization both in sending and receiving areas. Although a national state may have the power to write the text of an immigration policy, it is likely to be dealing with a complex, deeply embedded and transnational process that it can only partly address or regulate through immigration policy as conventionally understood.¹⁶

Although the state continues to play the most important role in immigration policy making and implementation, the state itself has been transformed by the growth of a global economic system and other transnational processes. These have brought yet another set of conditions to bear on the state's regulatory role. One particular aspect of this development is of significance to the role of the state in immigration policy making and implementation: the state in all the highly developed countries (and in many of the developing countries) has participated in the implementation of a global economic system and in furthering a consensus around the pursuit of this objective. This participation has transformed the state itself, affected the power of different agencies within it, and has furthered the internationalization of the interstate system. It is thus no longer sufficient simply to examine the role of the state in migration policy design and implementation; it is also necessary to examine the transformation of the state itself and what that can entail for migration policy and the regulation of migration flows and settlement.

For the purposes of immigration policy analyses, it is becoming important to factor in these transformations of the state and the interstate system precisely because the state is a major actor in immigration policy and regulation.¹⁷

Implications for Immigration Policy

Today we can see in all highly developed countries a combination of drives to create border-free economic spaces and drives for renewed border-control to keep immigrants and refugees out. The juxtaposition between these two dynamics provides one of the principal contexts in which today's efforts to stop immigration assume their distinct meaning.

Current immigration policy in developed countries is increasingly at odds with other major policy frameworks in the international system and with the growth of global economic integration. There are, one could say, two major epistemic communities — one concerning the flow of capital and information, the other immigration. Both of these epistemic communities are international and both enjoy widespread consensus in the community of states.

There are strategic sites where it becomes clear that the existence of two very different regimes for the circulation of capital and the circulation of immigrants poses problems that cannot be solved through the old rules of the game, where the facts of transnationalization weigh in on the state's decisions regarding immigration. For instance, there is the need to create special regimes for the circulation of service workers within GATT and NAFTA as part of the further internationalization of trade and investment in services (see Sassen, in progress). This regime for the circulation of service workers has been uncoupled from any notion of migration; yet it represents a version of temporary labor migration. It is a regime for labor mobility that is in good part under the oversight of entities that are quite autonomous from the government.¹⁸ This points to an institutional reshuffling of some of the components of sovereign power over entry and can be seen as an extension of the general set of processes whereby state sovereignty is partly being decentered onto other non- or quasi-governmental entities for the governance of the global economy.

These developments have the effect of reducing the autonomy of the state in immigration policy making and multiplying the sectors within the state that are addressing immigration policy and therewith multiplying the room for conflicts within the state. The assertion that the state is in charge of immigration policy is less and less helpful. Policy making regarding international issues can engage very different parts of the government. Though the state itself has been transformed by its participation in the global economy, it has of course never been a homogeneous actor. It is constituted through multiple agencies and social forces. Indeed, it could be said (*cf.* Mitchell, 1989) that although the state has central control over immigration policy, the work of exercising that claimed power often begins with a limited contest between the state and interested social forces. These interest

groups include agribusiness, manufacturing, humanitarian groups, unions, ethnic organizations, and “zero population growth” efforts. Today we need to add to this the fact that the hierarchies of power and influence within the state are being reconfigured by the furthering of economic globalization.¹⁹

The conditions within which immigration policy is being made and implemented today range from the pressures of economic globalization and its implications for the role of the state to international agreements on human rights. The institutional setting within which immigration policy is being made and implemented ranges from national states and local states to supranational organizations.

NOTES

1. Immigration can then be seen as a strategic research site for the examination of the relation between the idea of sovereignty over borders and the constraints states encounter in the design and implementation of actual policy on the matter.

2. The subject of the transformation of the state itself as a consequence of its participation in the implementation of global economic systems cannot be addressed here. See Sassen (1996b). For good recent reviews of what globalization has actually meant, see, e.g., Briggs, *Competition and Change* (1995), Rosen and McFadyen (1995), Mittelman (1996), and Knox and Taylor (1995).

3. There is a vast and rich scholarly literature that documents and interprets the specificity and distinctiveness of immigration policy in highly developed countries (e.g., Weil, 1991; Cornelius, Hollifield, and Martin, 1994; Weiner, 1995; Soysal, 1994; Thranhardt, 1993; Bade, 1992, to mention just a few). As a body this literature allows us to see the many differences among these countries. See also Shank (1994) for an examination of Japan.

4. Refugee policy in some countries does lift the burden of immigration from the immigrant’s shoulders. U.S. refugee policy, particularly for the case of Indochinese refugees, does acknowledge partial responsibility on the part of the government. Clearly, in the case of economic migrations, such responsibility is far more difficult to establish, and by its nature far more indirect.

5. One important exception is *The 1969 Convention on Refugee Problems in Africa* adopted by the Organization of African States, which includes the right to entry.

6. These efforts that mix the conventions on universal human rights and national judiciaries assume many different forms. Some of the instances in the U.S. are the sanctuary movement in the 1980s, which sought to establish protected areas, typically in churches, for refugees from Central America; judicial battles, such as those around the status of Salvadorans granted indefinite stays, though formally defined as illegal; the fight for the rights of detained Haitians in an earlier wave of boat lifts. It is clear that notwithstanding the lack of an enforcement apparatus, human rights considerations limit the discretion of states in how they treat non-nationals on their territory. It is also worth noting in this regard that U.N. High Commission on Refugees is the only U.N. agency with a universally conceded right of access to a country.

7. Although these developments are well known for the cases of Europe and North America, there is not much general awareness of the fact that we are seeing incipient forms in Japan as well. For instance, in Japan today we see a strong group of human rights advocates for immigrants, efforts by non-official unions to organize undocumented immigrant workers, and organizations working on behalf of immigrants that receive funding from individuals or government institutions in sending countries (e.g., the Thai Ambassador to Japan announced in October 1995 that his government will give a total of 2.5 million baht, about U.S.\$100,000, to five civic groups that assist Thai migrant workers, especially undocumented ones; see *Japan Times*, October 18, 1995).

8. Further, the growth of immigration, refugee flows, ethnicity, and regionalism raises questions about the accepted notion of citizenship in contemporary nation-states and hence about the formal

structures for accountability. My research on the international circulation of capital and labor has raised questions for me on the meaning of such concepts as national economy and national work force under conditions of growing internationalization of capital and the growing presence of immigrant workers in major industrial countries. Furthermore, the rise of ethnicity in the U.S. and in Europe among a mobile work force raises questions about the content of the concept of nation-based citizenship. The portability of national *identity* raises questions about the bonds with other countries, or localities within them, and the resurgence of ethnic regionalism creates barriers to the political incorporation of new immigrants. (See, e.g., Soysal, 1995; Baubock, 1994; Sassen, 1996a.)

9. There is a large and rich literature on the development of immigration policy at the European level; please refer to footnote 2 for a few citations. Longer bibliographies and analyses on the particular angle under discussion here — limitations on the autonomy of the state in making immigration policy — can also be found in Sassen (1996b, forthcoming).

10. Jurisdiction over immigration matters in the U.S. Congress lies with the Judiciary Committee, not with the Foreign Affairs Committee as might have been the case. Congressional intent on immigration is often at odds with the foreign affairs priorities of the executive. There is a certain policy making tug of war (Mitchell, 1989). It has not always been this way. In the late 1940s and 1950s, there was great concern with how immigration policy could be used to advance foreign policy objectives. The history of which government agency was responsible for immigration is rather interesting. Earlier, when the Department of Labor (DOL) was created in 1914, it received the responsibility for immigration policy. In June 1933, President Roosevelt combined functions into the Immigration and Naturalization Service within DOL. The advent of World War II brought a shift in the administrative responsibility for the country's immigration policy: in 1940, President Roosevelt recommended that it be shifted to the Department of Justice, because of the supposed political threat represented by immigrants from enemy countries. This was meant to last for the war and then INS was to be returned to the DOL. Yet it never was. It also meant that immigration wound up in Congress in committees traditionally reserved for lawyers, as are the Senate and House Judiciary Committees. It has been said that this is why immigration law is so complicated (and, I would add, so centered on the legalities of entry and so unconcerned with broader issues).

11. There are diverse social forces shaping the role of the state depending on the matter at hand. Thus, in the early 1980's bank crisis, for instance, the players were few and well coordinated; the state basically relinquished the organizing capacity to the banks, the IMF, and a few other actors. It was all very discreet, indeed so discreet that if you look closely the government was hardly a player in that crisis. This is quite a contrast with the deliberations around the passing of the 1986 Immigration and Reform Control Act — which was a sort of national brawl. In trade liberalization discussions, there are often multiple players, and the executive may or may not relinquish powers to Congress.

12. Aman, Jr. (1995) has noted that although political and constitutional arguments for reallocating federal power to the states are not new, the recent reemergence of the Tenth Amendment as a politically viable and popular guideline is a major political shift since the New Deal in the relations between the federal government and the states.

13. The latest study by the Washington-based Urban Institute found that immigrants contribute \$30 billion more in taxes than they take in services.

14. Take El Salvador in the 1980s: billions of dollars in aid poured in, and hundreds of thousands of Salvadorans poured out as U.S. aid raised the effectiveness of El Salvador's military control and aggression against its own people. The Philippines, a country that received massive aid and has had high emigration, is similar. In both cases it was foreign aid dictated by security issues. Emigration resulting from U.S. economic and political interventions is evident in the Dominican emigration in the 1960s and in the emigration from India and Pakistan to the U.S. — with the latter two associated also with security aid from the U.S. (I have long argued as a scholar that policymakers should have migration impact statements attached to various policies.)

15. Increasingly, unilateral policy by a major immigration country is problematic. One of the dramatic examples was that of Germany, which began to receive massive numbers of entrants as the

other European states gradually tightened their policies and Germany kept its very liberal asylum policy. Another case is the importance for the EC today that the Mediterranean countries — Italy, Spain, and Portugal — control their borders regarding non-EC entrants.

16. On a somewhat related matter, it seems to me that the sense of an immigration control crisis that prevails today in many of the highly developed countries is in some ways unwarranted, even though states have less control than they would like because immigration is caught in a web of other dynamics. When we look at the characteristics of immigrations over time and across the world, it is clear that these are highly patterned flows, embedded in other dynamics that contain equilibrating mechanisms, and have a duration (many immigrations have lasted for 50 years and then come to an end). There is more return migration than we generally realize (e.g., Soviet engineers and intellectuals who went back to Moscow from Israel, or Mexicans who returned after becoming legal residents through the IRCA amnesty program, feeling that now they could circulate between the two countries). We also know from earlier historical periods, when there were no controls, that most people did not leave poorer areas to go to richer ones, even though there were plenty of such differences in Europe within somewhat reasonable travel distances (Sassen, 1996a, in progress).

17. Crucial here are the changed articulation of the public functions of the state with major economic sectors and the displacement of what were once governmental functions onto non- or quasi-governmental entities (Sassen, 1996b).

18. Another instance of the impact of globalization on governmental policy making can be seen in Japan's new immigration law that was passed in 1990 (actually an amendment of an earlier law on the entry and exit of aliens). This legislation opened the country to several categories of highly specialized professionals with a Western background (e.g., experts in international finance, in Western-style accounting, in Western medicine, etc.) in recognition of the growing internationalization of the professional world in Japan; it made the entry of what is referred to as "simple labor" illegal (Sassen, 1993). This can be read as importing "Western human capital" and closing borders to immigrants.

19. For instance, an item on internal changes in the state that may have impacts on immigration policy is the ascendance of so-called soft security issues. According to some observers, recent government reorganization in the Departments of State, Defense, and the CIA reflects an implicit redefinition of national security.

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