

**MIGRATION AND SECURITY: THE ROLE OF NON-STATE ACTORS
AND CIVIL LIBERTIES IN LIBERAL DEMOCRACIES**

*Gallya Lahav*¹

In an era of growing security concerns and heightened State efforts to curtail immigration to the developed world, Western democracies are increasingly caught between their liberal ethos and their ability to effectively and securely control their borders. An examination of *policy implementation* in the United States and Europe reveals that liberal States have responded to these cross-pressures by: a) reinventing their modes of immigration regulation; and b) adopting strategies which are converging. States have shifted the level of policy-making to *non-State actors*, who have the economic and/or political resources to facilitate or curtail travel, migration and return. These include a complex web of actors incorporated by the State, and the transfer of State functions to non-centralized jurisdictions. Liberal States have been able to extend their realm of action, and overcome certain constraints by changing the gatekeepers at external and internal sites, to include: private (i.e., airlines, travel companies, employers), local (i.e., civic actors, such as churches, elected officials, trade unions), and international/supranational agents (i.e., the EU, Mexico, ICAO). Together they reflect an enlarged ‘migration playing field’ in an increasingly global world. State agencies have thus been able to solve the control dilemma in ways that can at once appease public anxieties over migration and security, short-circuit judicial and normative constraints and still promote trade and tourist flows.

The expansion of an immigration regulatory playing-field has been evictedI97TD 0 r5.75 Tw2r modes

on international migration, that include two UN experts' Coordination meetings, and the launching of an independent Global Commission on International Migration bear witness to the changing nature of migration. In the language of international relations, migration issues have shifted from the technical domain of 'low politics' to those related to security or 'high politics'. The growing tendency to view international migration-related questions through a national security heuristic has also coincided with the re-emergence of anti-immigrant politics on the extreme-right. The question posed especially since the tragic events of September 11th 2001 has been, what has changed?

The link between migration and security is not new. Security in its various forms has assumed various meanings across cultures and time. The traditional security agenda has been embedded in the notion of protection from external aggression, or national interests in foreign policy, and has thus been linked to State sovereignty and identity. The term however has been broadly attached to societal, personal, national, or more basic human security, including economic, physical, health, environmental, cultural and political dimensions (see, the 1994 Human Development Report of the UNDP). A few scholars developed the link between international migration and security as early as the 1980s. While Myron Weiner (1992; 1993) was the first political scientist to address the relationship between immigration and security issues, several scholars indirectly captured this linkage in their work on immigration and refugees in the US foreign policy (Teitelbaum, 1984; Zolberg, 1995). More recently, scholars of European politics have broadened their security-migration focus to include demographic (Koslowski 2000; 2001; Weiner and Teitelbaum, 2001), societal and cultural conflicts (see, Huysmans 1994; Heisler and Layton-Henry, 1993; Lavenex, 1999) as well as identity politics (Waever *et al.* 1993). Although the security ramifications of immigration have thus been evident for a long time, the broad security agenda that has emerged more recently makes clear that there is still no consensus regarding the scope and definition of security as it relates to international migration.

Similarly, the mechanisms States adopt with regards to migration control when security concerns loom large do not appear so new. In face of security and global pressures, States in the post-Cold Wars system are embracing an older repertoire of strategies they employ when seeking more effective immigration control (Lahav 1998; Lahav and Guiraudon 2000). They incorporate and enlist actors at the private, local and international levels in gatekeeper functions. There are two innovations here. First, globalization has afforded migration control an extraordinary degree of sophisticated and extensive new technology. Second, the post-WWII context of liberal judicial norms that States have to overcome in order to pursue these national interests is also unprecedented. That is, formal constitutional guarantees as well as activist administrative and constitutional courts have significantly circumscribed both the authority and the capacity of States to prevent family unification or to dispose of migrants at will (see Schuck, 1998; Legomsky, 1987; Hollifield, 1992; Guiraudon, 2000b; Joppke, 1998). The "liberal epoch" of human rights norms that facilitated humanitarian migration alongside labor recruitment (family unification and asylum) strikingly contrasts to earlier periods. One only needs to recall the expulsions of 400,000 Poles from Germany in 1885-1886 (Herbert, 1990), or the exclusion of Chinese immigrants before the turn of the century in the United States to realize the normative evolution that has taken place in the migration policy domain. Moreover, liberal States concerned with promoting modern trade and commerce cannot unambiguously embrace policies that hinder the movement of people across borders. Free trade requires a degree of openness that impedes calls for tighter border controls (Sassen, 1996).

In an era of growing security concerns, Western democracies are increasingly caught between their global market and rights-based norms on one side, and political and security pressures to effectively control their borders, on the other. The key question is how far can liberal States go in pursuing national security interests?

B. HOW FAR CAN LIBERAL STATES GO?

The extent to which immigration regulation has converged throughout Europe and North America reinforces the commitment towards immigration regulation. The most striking policy developments towards

this goal include tighter border controls, increased visa requirements, readmission agreements, carrier sanctions, accelerated return procedures, employer sanctions, labor enforcement, detention and removal of criminal aliens, changing benefits eligibility, and computer registration systems. These initiatives were evident by the late 1980s, but soared after 9/11. Europe has adopted buffer zones, Eurodoc fingerprinting and Schengen Information System databases, ‘safe third country’ principles and increasing coordination. In a similar vein, American observers have witnessed the Patriot Law of 2001 and the passage of the Enhanced Border Security and Visa Entry Reform Act in 2002. Direct legislative responses to the terrorist attacks, these acts paved the way for electronic innovations, visa screening, racial and ethnic profiling, acceleration of procedures, unprecedented security checks, the modernization of immigration controls with the latest technology, such as the use of biometrics, the SEVIS database for foreign students, as well as the formation of a new Office of Homeland Security (which brought 22 federal agencies under one umbrella) to coordinate activities with a reorganized INS. The latter represents the first significant addition to the US government since 1947, when Harry Truman merged the various branches of the US Armed Forces into the Department of Defense to better coordinate the nation’s defense against military threats (US Department of Homeland Security, www.dhs.gov). The largest contingent (40%) is passenger and baggage screeners, a federal job that did not exist before Sept. 11, 2001 attacks, when private companies alone ran airport security. (Chattanooga Times Free Press, August, 26, 2003)

While national legislation and immigration reforms represent the most obvious policy responses to immigration, administrative decisions and policy implementation may provide more practical implications of the character of immigration control. What has gone unnoticed in all these policy developments has been the reliance on third-party, non-State actors who provide services, resources and non-public practices that are otherwise unavailable to central government officials (Gilboy, 1997). More specifically, policy implementation has relied on the enlistment or collaboration (also known as ‘burden-sharing’ in political jargon) of non-State actors, who have the economic, social and/or political resources to facilitate or curtail immigration and return. They represent efforts of States to extend the burden of implementation *away* from central governments and national borders, and *to the source* of control, thereby increasing national efficacy and reducing the costs to central governments. Most of these processes have relied on reinvented modes of ‘remote control’ mechanisms that enable States to control migration.

The development of the relationship between States and non-State actors in meeting security goals captures a global era marked by both a political desire to control movement and agents willing and able to play on the link between migration, crime, and security. Thus, any analysis of an enlarged migration ‘playing field’ needs to go beyond the typical analysis of State policies in terms of legislation and focus on implementation structures. In this framework, we can reconceptualize State and public regulatory modes by identifying the number of levels available to policy-makers in controlling migration.

Figure 1: Non-State Actors in Remote Control Immigration Policy

International

<ul style="list-style-type: none"> • EU • NAFTA • Schengen • Consulates (visa policy) • Foreign countries 	<ul style="list-style-type: none"> • Airlines • Security agencies • Ship/transport carriers
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Public

- Local jails
- Mayors
- Schools/universities
- Health care
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the airline's responsibility to ensure that passengers have the necessary travel documents. Apart from ICAO guidelines, many countries have introduced laws that increase the responsibilities of carriers and levy fines against them for non-compliance. In 1994, all EU countries, with the exception of Spain, Ireland, and Luxembourg passed laws increasing carriers' responsibilities.

The abolition of internal borders critical to European integration has been essentially mitigated by the flurry of legislation and implementation of the carriers' liability to check passengers. Indeed, more stringent security checks at airports--of identity cards, tickets, boarding passes, baggage, and so on--have made the absence of passport controls virtually irrelevant. International instruments have further sanctioned the role of States in controlling their borders. In the European Union, member-States refer to their obligations to Article 26 of the 1990 Supplementation Agreement of the Schengen Convention in relying on carriers to serve as immigration officers.

Although private actors have long been incorporated in European policy-making through neo-corporatist arrangements, even in the United States, independent commissions to regulate inter-State commerce had been established by the late 1880s. Devolution of inter-State regulation to expert bodies in the US may be traced back to federal government adoption of the Interstate Commerce Act regulating the railways and setting up a corresponding regulatory body (Interstate Commerce Commission). The United States Congress, thereby delegated its own power to regulate an important part of interstate commerce, namely railway traffic to an agency designed especially for the purpose. This was an important institutional innovation at the federal level (Majone, 1996: 16). It represented the transfer of activities of State interests to private actors. In this way, market activities may be generally regulated in areas which are considered important, and in need of protection

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Table 2: Third Party Non-State Actors in Immigration Regulation (in select liberal democracies)

Country	Transport Companies (sanctions)	Employers (sanctions)	Immigrants (punishment for illegal)	Civil Society (sanctions for harboring illegal)
Belgium	Y	Y	Y	Y
Canada	Y	Y	Y	Y

Denmark

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removal of undocumented workers as a means of protecting legal workers. In contrast, in the United States, inspectors from the Immigration and Naturalization Service have traditionally been concerned about the workers' legal status, rather than about their wages or working conditions, while the State labor inspectors are

guest-worker programs, a feature of the initial 30-year post-War period until 1973. At the core of this system are quotas, negotiated between government, employers and trade unions. Although reminiscent of the

In the U.S., the Illegal Immigration Reform and Responsibility Act of 1996 put into motion a shift in liabilities away from courts and toward individual migrants. Eliminating the authority of federal courts to review decisions by the INS in deportation and legalization cases, the Act essentially stripped both the rights of non-citizens to file complaints against the agency in court; and the rights of courts over what in the past has been considered the last line of defense against abuse of official power. It practically placed the INS beyond judicial scrutiny. Since 9/11, indefinite detention is valid without an initial court hearing, as part of the anti-terrorist campaign.

With the US Patriot Act, Attorney General John Ashcroft put into effect sweeping changes that include the indefinite detention of those who enter the country illegally. While in the past, denial of release required a court ruling that the person was dangerous or would flee if released, since 2001, an illegal immigrant could be denied release if he/she raised national security fears (not necessarily a risk) among US government agencies (*The Boston Globe*, April 25, 2003). The focus on detention of immigrants has been speculated to become a lucrative business,⁸ and has come under attack by civil rights advocates who have repeatedly lost the battle to security interests. Thus, for example, in the US, the Supreme Court has consistently upheld the government's secret detention hearings, where the foreigner was deemed to be a "special interest" case. The Court has rejected appeals from the American Civil Liberties Union over the government's surveillance powers, and those from the international community over the detention of hundreds of prisoners picked up in Afghanistan and held at Guantanamo Bay, Cuba without formal charges or access to lawyers. These decisions were made on the grounds that national security concerns outweigh public access to such hearings (*St. Louis Post-Dispatch*, Missouri, May 28, 2003).

At the core of privatizing regulations for immigrant stays has been the role of the family and private citizens. In the United States, the burden on families has emerged in the form of more restrictive sponsorship rules and practices that are now enforceable. New sponsorship rules affect legal immigrants who are typically sponsored by relatives or by business.⁹ Until the recent Immigration bills, sponsors of immigrants were typically required to assure that anyone they brought into the country would not become a 'public charge'. Since these pledges had become unenforceable in court, the more recent bills aimed to make this support binding. Sponsors, rather than taxpayers, are required to provide a more substantial safety net for immigrants by making the sponsor's affidavit of support a legally enforceable document (up to 10 years or the immigrant becomes a citizen). For the first time, the notion of "becoming a public charge" has been carefully defined with the intention of making this a realistic ground for deportation.

Similarly, the controversy in France over a proposed Government law aiming to prevent illegal immigration reflects State efforts to "transform all citizens into police informers" (*New York Times*, 20 February 1997). The new bill proposed that French hosts who have foreign guests on special visas inform the town hall when their guests leave, allowing the French government to compile computer records on the movements of foreigners. Although due to heavy protests the article of the bill was amended, efforts to

The role and liabilities of non-State actors in sharing the burden of regulation has developed almost uniformly in the countries of Europe as well as the United States, and are manifest in the use of more stringent deterrent methods such as sanctions (see Table 2). On the one hand, these shifts in liabilities represent an incorporation of private actors in State regulatory functions; on the other they constitute more general trends occurring in other policy areas, namely to shift the externalities of policy-making outside of the central government. Privatization, loosely defined as the shift of a function from the public sector to the private sector, involves a dependence on market forces for the pursuit of social goods, and may turn local actors or contractors into regulators (Feigenbaum and Henig, 1994). Both the incorporation of private actors through sanctions and the privatization of migration regulation through 'contracting out' of implementation functions involve the extension of State control over migration outside and beyond its borders. These strategies which operate *before* the border or at the control site facilitate the movement of tourists and businessman while preventing unwanted migrants. In this way, liberal States can respond to the consequences of globalization: sustained migration pressures, tourism, free trade flows, and global terror networks.

While many of these instruments are not new, their novelty lay in the current context of liberal norms. They are now deployed to circumvent legal constraints absent in the early twentieth century. However, these areas are where the most significant problems occur, as exemplified by the notorious JetBlue Airways episode. They challenge the Western commitment to civil liberties and democratic values amidst a climate of heightened threat.

Local Actors

Local actors too have gained a bit of prestige from their expanded jurisdiction. Through processes of decentralization, national governments have delegated substantial decision-making powers to local elected officials, in ways that have been considered to be exclusionary and detrimental to foreigners' rights. A major reason behind this kind of decentralization is that national elected officials concur and depend on local elected officials, who under financial and political pressure to attract more funds and votes by adopting exceptionally harsh measures against immigrants.

In France, for example, mayors have become actors in migration control through their authority over marital and residential certificates. City halls have the prerogative to inspect the veracity of marriages between nationals and foreigners. A 1993 law granted mayors the possibility to refer a marriage involving an alien to the *Procureur de la République* (State prosecutor), who can delay the marriage for a month and then, if they see fit, prevent it. A 1996 survey on this measure revealed significant geographical diversity in its implementation, and a use of the measure to arrest illegal aliens (Weil, 1997).¹⁰ Since 1982, when the Deferre laws on decentralization were voted in France, mayors have gained in clout and local political debate has intensified even outside electoral campaigns. Mayors in urban areas or in the Southeast, where the National Front has made electoral headway have used their new monitoring role in migration control policy to the fullest (Lahav and Guiraudon, 2000).

In the trend in liberal democracies to use integration policy to affect immigration flows, national governments have increasingly shifted monitoring functions of immigrant stays and rights downwards to local actors. By devolving implementation of such measures as barring the children of undocumented migrants from public schools to local actors, the theory is that undocumented migrants will be discouraged from migrating, or from staying illegally. In France, following the passage of the Act on Immigration Control and Conditions of Entry and Residence of Foreigners (1993), foreigners living in the country illegally no longer

¹⁰ 41.6 per cent of the marriages suspended by mayors involved an undocumented alien (Weil, 1997).

qualify for social security (i.e., child allowances, health insurance, old age pensions, and unemployment benefits) (UN, 1997: 368). In these cases, local governments are bearing the direct costs. In the United States, Proposition 187, and the Gallegly Amendment, measures to bar the undocumented and their children from public schools and welfare programs, while ultimately failing, focused on the liabilities of local actors for implementation. These demands for more local power concur with national plans for restrictions of foreigners' rights. The 1996 Welfare Reform Act marked the end of the sixty-one year-old federal guarantee of cash assistance for the nation's poorest children; it revoked federal benefits like food stamps and Supplementary Security Incomes from non-citizen immigrants, (NY Times, 21 February 1997: 18). This new law also gave States vast new authority to run their own welfare programs with lump sums of federal money. It thus represented renewed efforts to grant States (local actors) more control over traditionally unfunded mandates, creating a mechanism for uneven integration policies among States and regions.

Of course, the incorporation of local actors in migration regulation is not new. In the United States, State and local governments have long regulated the movement of people across legal borders, through the use of

case, it is ultimately up to the U.S. Congress to authorize States to play a role in immigration policy, as the latter did in 1996 with respect to welfare benefits. In part, these trends have led to renewed conflicts between federal, State, and local mandates (see Neuman, 1993; Olivas, 1994). Thus, the 1996 Illegal Immigration Reform and Immigrant Responsibility Act, which permitted the INS to train and deputize local police officers to enforce immigration laws has received uneven political reception. In New York City, home to one of the most diverse immigrant populations in the U.S., Mayor Bloomberg, for example, under pressure from immigration groups and the City Council was forced to revise his immigration policy to make it more difficult for city agencies to report illegal immigrants to federal authorities (*New York Times*, September 18, 2003: B1). Such political wranglings are seen not only to heighten turf wars, and contradictory goals of different arms of the State (i.e., the police, judiciary, public administration), but also the lines between national

represents the first time that EU members have formally coordinated their efforts in this way, and according to Spain's interior minister, Angel Acebes, the operation "could be and should be" the precursor to a common European border police force (NY Times, January 29, 2003).

To a less degree, but in the same vein, the joint United States.-Mexican border patrol taskforces have attempted to coordinate strategies to deal effectively with illegal migration as NAFTA has been consolidating. Institutional reforms are closely linked to the deployment of control strategies and philosophies or norms that reflect a major shift in operational strategies from illegal apprehensions *after* crossing (i.e., "Operation Hold

and third-party actors, and thus shift levels of policy elaboration upwards to international and transnational political spaces

The potency of international actors and rules in sanctioning States to adopt all types of restrictive migration policies has greatly been underestimated by theorists of globalization and policy-makers, who have overlooked the role of international agreements in bolstering national interests. Indeed, when national interests coalesce, favorable conditions leading to the pooling of sovereignty may lead to migration coordination in order to "upgrade common interests" (Keohane and Hoffmann, 1990). European regional integration for example represents a prevalent supranational order which consists of strong States committed to pooling sovereignty, based on restrictive migration policies and more effective control. Unlike international regimes for capital, goods, and services, international cooperation on migration matters may be less than "liberal," serving to *inhibit* immigration rather than to promote it. Indeed, up to date, cooperation predominantly exists in the prevention of migration (Münz, 1996: 14). While a shift in regulatory functions upwards to international or foreign State actors is in an infant State, it is becoming increasingly institutionalized as reflected in the 1997 Amsterdam and 1999 Nice Treaties in Europe (see Baldwin-Edwards, 1997; Lahav 2004). The proliferation of transnational and international actors, agreements and cooperation may be interpreted as national efforts to more effectively control migration. Through international and transnational cooperation, liberal States have managed to use foreign actors to fortify and extend their borders, well before immigrants even arrive, and even after, by circumventing more liberal national jurisprudence. The interests of international actors, particularly civil servants and emergent institutions, are to expand the agency's recognition and jurisdiction, while gaining more national prestige back at home. For States, of course, it offers an essential border shift outward.

D. COST-BENEFIT ANALYSIS

Actors at different levels have different incentives and constraints in participating in such collaborative
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been shown to accompany general immigrant intolerance and rejection (Lahav 2004; Inglehart, 1997). Threat increases ethnocentrism, in-group solidarity, and xenophobia. It promotes intolerance and a willingness to forego basic civil liberties, and leads to closed-mindedness (see Huddy, Feldman, Lahav and Taber, 2003 for overview).

Indeed, public opinion polls have revealed that since September 11th, the role of civil liberties and human rights have been seen as a price of shifting security concerns – a trade-off of certain democratic values, sanctioned by citizen or a willingness to compromise civil liberties and personal freedom for a greater sense of security from immigration, terrorism, and globalization (Davis and Silver, 2002; Huddy, Feldman, Lahav and Taber, 2003; Gibson, 1996, 1998; Sniderman *et al.*, 1996) In the United States, since 9/11, Americans have reported support for racial and ethnic profiling of Arab Americans, greater FBI invasion of citizens' privacy and a close monitoring of legal immigrants (Polling Report 2001). They are more likely to entertain national identity cards and to be inconvenienced by surveillance schemes for more security.

E. CONCLUSIONS

To what extent have these trends been reversed since 9/11?

that context has yielded restrictive and exclusion outcomes. They are sanctioned by their public and by the modes of regulation to compromise their rights-based norms.

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