

1. Migration policies and policymaking in Latin America and the Caribbean: lights and shadows in a region in transition¹

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At first sight, a restrictive trend appears to have taken hold of global migration policies in the past few decades. An instrumentalist and selective logic of trying to regulate immigration flows according to ‘national interests’ (or, more specifically, the interests of certain social, economic and political sectors of receiving states) has informed the policies of the most prominent western immigrant-receiving states. In the context of current globalisation processes, this restrictive approach to migration management has proven ineffective and outdated, not least because ostensibly restrictive policies often try to serve contradicting interests simultaneously² and irregular migration has increasingly become a structural element of the international system due to its functionality in receiving countries’ informal labour markets.

Very often, discourses based on stereotypes, myths and misrepresentations regarding the ostensible negative effects of immigration on national economies, security and public spending in host countries precede restrictive changes in policies and laws. There is no unambiguous evidence of the harmful impact of immigration, including irregular immigration. Indeed, polemic political debates on its supposed negative effects tend to replace discussions about the real causes for economic and social problems in host countries, and try to justify discrimination based on the nationality and/or migratory condition of a person. Restrictive immigration policies, such as strengthening migratory controls (whether extra-territorial, at borders or within national territories), push migrants without legal residence towards precarious and unstable jobs, to the advantage of certain labour market actors, but to the detriment of the migrants themselves and society at large.

1 This chapter builds on Ceriani Cernadas, ‘Luces y sombras en la legislación migratoria latinoamericana’, pp. 68–86.

2 Czaika and de Haas, ‘The effectiveness of immigration policies’, pp. 487–508.

In the United States such restrictive tendencies have become clearly evident since the 1996 migratory reforms,³ for example in securitised immigration discourses following the 9/11 terrorist attacks, the notable increase of detentions and expulsions,⁴ which have led to the separation of tens of thousands of families,⁵ and the criminalising of immigration initiatives at the state level.⁶ In the European context, various developments reflect a similar restrictive shift: the growing support for far right parties which often use anti-immigrant discourses as their flagships;⁷ the adoption of measures that violate basic rights and guarantees, such as the Returns Directive and healthcare reforms in Spain,⁸ or the externalisation of migration controls outside European Union borders.⁹

In recent years, Latin American countries have officially challenged these restrictive, if not repressive and discriminatory, measures practised by northern immigrant-receiving countries both unilaterally and on a regional level. The positions assumed by states in the region represent a significant departure from traditionally securitised and restrictive views on immigration and the treatment of migrant populations. In some countries, this discursive shift has been followed by political and normative change, which introduces a new outlook on migration management with a focus on the protection of migrants' human rights.

The objective of this chapter is to examine more closely these recent developments in the immigration policies of Latin American and Caribbean (LAC) countries, to highlight continuities and contradictions, and to address the general question that informs this volume, whether one can speak of a true paradigm shift in Latin American immigration policies. The central aim is thus a comparative analysis of normative migration frameworks in the LAC region. It will also trace developments towards liberalisation and restrictiveness in political initiatives at the regional and sub-regional level. The chapter will pay particular attention to the migration laws (or partial reforms) adopted in the past few years, highlighting the most significant liberal and restrictive

- 3 Among other initiatives, the Illegal Immigration Reform and Immigrant Responsibility Act adopted the retroactive deportation without fundamental guarantees of migrants who have committed a crime, irrespective of how many years they have been legally resident and of their family ties or employment status. See Morawetz, 'Rethinking retroactive deportation laws and the due process clause', pp. 97–161.
- 4 See Rosenblum and Meissner, *The Deportation Dilemma: Reconciling Tough and Humane Enforcement*.
- 5 See Human Impact Partners (HIP), *Family Unity. Family Health*.
- 6 These include the immigration laws of Alabama, Arizona and Georgia.
- 7 Fekete, 'Anti-fascism or anti-extremism?', pp. 29–39; Archer, *Immigration in Europe at a Time of Economic Hardship*.
- 8 Médicos del Mundo, *Dos Años de Reforma Sanitaria: más vidas humanas en juego*.
- 9 McNamara, 'Member state responsibility for migration control within third states', pp. 319–35; Ceriani Cernadas, 'Control migratorio europeo en territorio africano', pp. 188–214.

aspects of each one. It will, moreover, discuss laws that have not been reformed, stressing their shortcomings in relation to the protection of migrants' rights. The chapter offers a broad overview of recent trends, but is far from exhaustive at individual case level.

The first section will introduce the discursive shift in the position of Latin American states on international migration. A short overview of some of the most pressing problems regarding migrants' human rights in the region will be provided in the second part. Scenarios such as the daily transmigration of thousands of migrants in northern Central America and Mexico, or the vulnerability of Haitian migrants to the Dominican Republic will be examined here. The main section will discuss recent developments in migration management at the national, regional and sub-regional level, distinguishing between measures aimed at: 1) access and residence; 2) migration control; 3) social rights; 4) political rights; and 5) children's rights. In section four, we will discuss some recent initiatives regarding migrants' rights and the circulation of people within Mercosur and other sub-regional blocs, such as the Conferencia Regional sobre Migraciones (Regional Conference on Migration – RCM). Finally, the chapter will elaborate on the central question of this volume, whether it is possible to speak of a liberal paradigm shift in Latin America in the sphere of migration policies.

Critique of northern countries and commitments towards the region

Approximately ten years ago, LAC countries started questioning the restrictive immigration policies of northern migrant-receiving countries and regions. This discursive shift goes back partly to the political demands of domestic civil society organisations and Latin American emigrants abroad, but also to Latin American politicians taking the initiative.¹⁰ The Returns Directive of the European Union and the criminalisation of immigration in various US states resulted in very strong political opposition in the region.

Building on this criticism, South American states, in particular, have emphasised that there is a pressing need to adopt measures within the region which honour international commitments regarding migrants' rights 'guaranteeing migrants inside our region, the same rights that we seek for our nationals in transit and destination countries..., in order to ensure the principles of coherence, quality and non-discrimination'.¹¹ In the case of

10 See Acosta Arcarazo and Freier, 'Turning the immigration policy paradox upside down? Populist liberalism and discursive gaps in South America'.

11 Declaration of the IX Conferencia Sudamericana de Migración (South American Conference on Migration – SACM), Quito, 2009, §5. Since its creation in 2000, all South American states have been SACM members.

Central and North America, the action plan adopted, in 2009, by the RCM¹² included the protection of migrants' rights as one of its three strategic pillars to guide the migration management of its member states.¹³

Without underplaying significant differences between the two regions,¹⁴ it can be noted that both regional processes increasingly address questions about the causes of migration, such as unemployment, poverty and discrimination. South American discussions further emphasise the need to promote a legal, political and economic framework that addresses the structural elements of the asymmetries and inequalities in the relationship between countries, which have determining repercussions for the conditions under which international migration takes place.¹⁵

Some countries in the region have adopted immigration policies that mirror the aforementioned liberalisation in the discursive positions of regional declarations. Nevertheless, we also identify a number of normative and operational mechanisms, which remain more in line with the kind of restrictive migration management models that the respective governments officially reject. Can we thus speak of a true search for coherence in LAC immigration policymaking which seeks to bring policies in line with promised liberalisation?

A diverse and complex migration context

In order to understand the changes and contradictions in immigration policymaking in the LAC region, it is important to consider its migratory context and the triple-condition of being a region of origin, transit and destination. On the one hand, Mexican and Central American emigration to the United States has increased in the past decades, with an unprecedented peak in the irregular migration of unaccompanied children.¹⁶ At the same time the number of Caribbean, South American, African and Asian migrants

12 Also known as the Puebla Process, the RCM was created in 1996. Its members are Belize, Canada, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, México, Nicaragua, Panama and the United States.

13 The other two pillars are politics and migration management; and migration and development. See www.crmsv.org/Principal.html (accessed 24 Oct. 2014).

14 Ramírez and Alfaro, 'Espacios multilaterales de diálogo migratorio: el Proceso Puebla y la Conferencia Sudamericana de Migración'.

15 See the SACM declarations, especially post-2007, www.csmigraciones.info (accessed 24 Oct. 2014) and the Declaration of the XV RCM meeting, Tapachula, 21 May 2010, <https://www.iom.int/jahia/webdav/shared/shared/mainsite/microsites/rcps/puebla-process/2010-Declaration-Tapachula.pdf> (accessed 9 Dec. 2014).

16 Ceriani Cernadas (ed.), *Niñez Detenida. Los derechos de niños, niñas y adolescentes migrantes en la frontera México-Guatemala*.

crossing the border between Mexico and the United States has also increased in recent years.¹⁷

On the other hand, the traditional destination countries of south-south migration flows, such as Argentina, Costa Rica and the Dominican Republic, receive most of the immigrants from neighbouring countries although, more recently, other countries have begun to take in significant numbers of regional migrants as in the cases of Colombian migrants to Ecuador, Nicaraguan migrants to Honduras, migrants from El Salvador, Peru and Bolivia to Brazil and Chile, and Haitian migrants to the Bahamas. Additionally, African, Asian and Eastern European immigrants have been arriving in growing numbers in the region, mostly to Argentina and Brazil.¹⁸

The protection of migrants' rights is extremely challenging in some of the migratory contexts within the region. The Mesoamerican situation highlights the magnitude of this problem. The entire migratory route from Honduras to the south of the United States is characterised by human rights abuses and threats to migrants in search of work, protection from the violence they have faced in their home countries and reunification with their family members, to name some of the most important motives for migrating. The combination of inadequate, ineffective, or even rights-violating public policies, and the criminal activities of groups linked to drug-trafficking are the main reasons for the escalation of violence and violation of migrants' rights in Mesoamerica.¹⁹

One of the most tragic examples of the violation of migrants' human rights is the Tamaulipas massacre in Mexico, where 72 migrants of various Latin American origins were assassinated in August 2010 by organised criminal groups. The individual histories but common destiny of these 72 victims reflect the complexity of irregular migration in the region.²⁰ At the same time, this case – and other similar ones that have occurred subsequently – illustrate the dramatic vulnerability of some migrants in the region, with the levels of violence against them exceeding those in most other countries in the world.

Taking into account important quantitative and qualitative differences, other countries in the region also face significant challenges in the safeguarding of migrants' rights. Among the most noteworthy cases are Haitian migration to the Dominican Republic and other countries in the Caribbean, and Nicaraguan migration to Costa Rica, where manifestations of xenophobia, discrimination and human rights abuses are common. In the South American context,

17 Pizarro (ed.), *América Latina y el Caribe: migración internacional, derechos humanos y desarrollo*; Freier, 'Las corrientes migratorias contemporáneas de Asia, África y el Caribe en Sudamérica', pp. 84–114.

18 Ibid.

19 Cruz, 'Through Mexican eyes: Mexican perspectives on transmigration', pp. 1019–52.

20 The 72 murdered people's reasons for migrating can be found at <http://72migrantes.com/recorrido.php> (accessed 16 Dec. 2014).

xenophobia is also widespread,²¹ including in migrant-receiving countries such as Argentina, Chile, Ecuador and Brazil. Moreover, human rights abuses are still especially common at borders.

Against this background of widespread violation of migrants' rights, immigration policies – and particularly those concerning the treatment of immigrants, asylum-seekers and refugees – are politically relevant throughout the entire region and in some cases, due to being publicised by the media, have found representation in public debates. Without negating important inter-country differences in the political and social processes that have led to changes in immigration policies, a common characteristic is the increasing presence of migrants' rights both on the discursive level and in new normative frameworks.

Indeed, the individual migrant and his/her rights stand at the centre of most of the immigration policy reforms in Latin America. In spite of the differences and scope of each of these changes, as well as the problems and challenges in terms of implementation, it is undeniable that a new human rights approach is at the core of the discussions and the legislative/policy reforms, both at national and regional level.

Mapping policy liberalisation

Recognition of migrants' human rights varies significantly in Latin American immigration laws.²² Most generally, there is a divide between a small group of states that have recently modified their immigration laws and the majority of countries that have not yet reformed their normative frameworks, most of which were developed by military dictatorships in the 1970s and 1980s and have a securitised outlook on immigration. This second group represents a heterogeneous mix regarding the content, orientation and reach of legislative reforms. In a third group of countries immigration reforms are currently under discussion.

Three countries that have in the past decade implemented migration reforms with a significant focus on human rights are Argentina, Bolivia and Uruguay.²³ In 2004, Argentina replaced its infamously restrictive law, known as Law Videla (named after military dictator Jorge Rafael Videla, 1976–81) and passed a new law with a strong focus on migrants' human rights. In 2008, Uruguay passed a migration reform mirroring and even further expanding the rights enshrined in the Argentine law. In both cases, and especially in Argentina, these laws were to a large extent a response to the permanent demands made by a strong network

21 Wade, *Race and Ethnicity in Latin America*.

22 Asa and Ceriani Cernadas, 'Migrantes, derechos sociales y políticas públicas en América Latina y el Caribe'.

23 Argentina: Ley no. 25,871, 2004; Bolivia: Ley no. 370, 2013; Uruguay: Ley no. 18,250, 2008.

of civil society organisations, comprising human rights bodies, institutions linked to both the Catholic and Protestant churches, academics, immigrant associations and trade unions.²⁴ In 2013, Bolivia passed its new immigration law, which incorporates some important human rights principles, based on the work of an inter-institutional working group coordinated by the Foreign Ministry.

In Mesoamerica, new immigration laws have been passed in Costa Rica, Mexico, Nicaragua and Panama.²⁵ Although they have all advanced human rights provisions, not one is free from significant shortcomings and contradictions, especially in the cases of Costa Rica and Mexico. In the former country the new law of 2010 replaced a profoundly restrictive and controversial legislative framework that had been adopted in 2006. Nevertheless, the 2010 law still presents problems regarding human rights, rigid detention clauses being one example. The current Integral Plan for Migration Policy 2013–23 includes an important focus on human rights.²⁶ At the same time, various parliamentarians have jointly brought forward a reform project for the legislative migration framework in order to strengthen the protection of migrants' rights.²⁷

The Mexican case is particularly important, not only because it is numerically the most significant country of origin and transit on the continent (and to a lesser extent, also a destination country) but also because of the growing total of serious human rights abuses experienced by immigrants living on Mexican territory. In 2011, and after a process repeatedly criticised by civil society, the government passed the new Migration Law, which replaced the outdated, restrictive *Ley General de Población*. The new law focuses on human rights: the recognition of social rights, for example. However, the law also has questionable aspects from a human rights perspective, such as the legalisation of arbitrary practices in the area of detention and deportation, as will be discussed below.

In other migration laws (or reforms) that have been passed in Latin American countries since the return to democracy, the human rights perspective is not prioritised. Although there might be some relevant clauses, the logic of these laws is based on control mechanisms without substantial changes to the

24 Correa, 'La nueva ley de migraciones y la participación de las organizaciones de la sociedad civil', pp. 173–7; Domenech, 'La ciudadanización de la política migratoria en la región sudamericana', pp. 73–92.

25 Costa Rica: Ley no. 8764, 2009, Mexico: Ley de Migración, 2011; Nicaragua: Ley de Migración y Extranjería, 2011; Panama: Decreto no. 03, 2008.

26 See www.avina.net/esp/10747/costa-rica-revaloriza-el-papel-del-migrante/ (accessed 24 Oct. 2014).

27 See www.nacion.com/nacional/politica/Migracion-trabajadores_ilegales-diputados-Asamblea_Legislativa_0_1366863566.html (accessed 24 Oct. 2014).

traditional securitised approach to immigration, often including dispositions that violate migrants' basic rights.²⁸

In some countries, migration reform took place at the constitutional level. Two opposing examples are Ecuador and the Dominican Republic. Ecuador's 2008 constitution speaks of universal free human mobility and explicitly recognises migrants' human rights, independent of their migratory condition (Art. 40). The Dominican Republic's 2010 constitutional reform, on the other hand, withdrew the *Ius Soli* right conferring citizenship on children born to irregular immigrants.²⁹ The Dominican Republic had furthermore changed its migration law in 2004,³⁰ limiting the social rights of migrants, the access to nationality of children born to migrant parents in irregular status, and expanding migration control mechanisms without due process guarantees.³¹

As mentioned above, most countries still uphold the migration laws passed by authoritarian governments. The most significant case is Chile, where Pinochet passed the legislative migration framework in 1975.³² Likewise, the legislative frameworks of Brazil³³ and Ecuador³⁴ go back to authoritarian governments, despite reforms that have partially modified the laws since. In all three countries, immigration reform projects have dominated political debate for many years. The Chilean initiative was largely questionable regarding human rights³⁵ and it is expected that the new administration will submit a new proposal, whereas the Ecuadorian project envisions a high degree of human rights protection, which would consolidate the values of the 2008 constitution. In Brazil, a new draft law prepared by a specialist commission initiated by the Ministry of Justice was finalised in April 2014 following the failure of a reform project presented in 2009. The law, which includes a broad catalogue of human rights, at the time of publication has not yet been discussed in Congress.

In the case of Caribbean countries, most legal migration frameworks are outdated (many go back to the mid 20th century), and do not correspond to today's migratory realities in the region. Most of these laws follow a restrictive

28 For example Colombia: Decreto no. 4000, 2004; Guatemala: Decreto no. 95, 1998; Honduras: Decreto no. 208, 2003; Ley de Migración y Extranjería, 2004; Paraguay: Ley de Migraciones no. 978, 1996; Venezuela: Ley de Extranjería y Migración no. 37,944, 2004.

29 Constitution, 2010, Art. 18.3.

30 Ley sobre Migración no. 285, 2004.

31 Tejeda, 'Migración haitiana y ley de migración en República Dominicana "Le Blocage".'

32 Decreto no. 1094, 1975.

33 Lei Migratoria no. 6815, 1980.

34 Ley de Migración, no. 1899, 1971.

35 Olea, 'Derechos humanos de los migrantes y refugiados', pp. 123–62.

and discriminatory logic. In some cases, partial reforms have incorporated a number of human rights principles, but they remain the exception.³⁶

The following sections will take a closer look at the most important characteristics of the immigration laws in the region. We will pay particular attention to five topics that have a particular impact on migrants' rights: 1) access and residence; 2) migration control mechanisms; 3) social rights; 4) political rights; and 5) children's rights. Given its spatial limitation, rather than providing a full-fledged analysis of each law, it will discuss the most paradigmatic examples for each of these areas in order to trace current trends in the region. We are examining children's rights because of the particular vulnerability of child migrants, and as a specific test for the protection of human rights in Latin American immigration policies.

Access and residence: between selectivity, regularisation and free human mobility

The criteria and requirements for access and residence permits for non-nationals are a strong indicator of the objectives and priorities of a country's immigration policy. Different residence categories (such as work, study, family reunification) and their requirements, as well as the implementation of these regulations by the responsible ministries and government departments, significantly determine immigrants' legal status (that is, the number of regular *v.* irregular immigrants) and thus throw light on the importance the laws give to the protection of migrants' rights and the promotion of their social inclusion and integration.

The majority of migration laws in the region provide the same kind of criteria for issuing entry and residence permits as traditional instrumental and selective immigration policies. In the case of the most simple access barrier, the tourist visa, most LAC countries mirror European and US-American policies, and have visa requirements in place for the vast majority of African, Asian and Middle Eastern countries, while nationals from most western liberal democracies can enter without having to apply for a tourist visa in their country of residence. Ecuador is the most significant exception to this rule. In the spirit of free human mobility, President Correa stipulated general visa freedom in June 2008. However, tourist visa requirements were reintroduced for ten Asian and African nationalities within two years.³⁷ Other countries have recently embarked on reciprocal visa policies. Brazil now demands tourist visas for US-American citizens and, similarly, Argentina requires US citizens to pay an entry reciprocity fee of US\$160 .

36 For example Antigua and Barbuda: Immigration and Passport Act, 1946; Bahamas: Immigration Act, 1967; Barbados: Immigration Act, 1976; Jamaica: The Aliens Act, 1946; Trinidad and Tobago: Immigration Act, 1949.

37 See Freier, 'Open doors (for almost all): visa policies and ethnic selectivity in Ecuador'.

Perhaps the most restrictive characteristic of access policies in the region is the persistence of discriminatory admission criteria. To date, restrictions to access and residence remain in place not only regarding the lack of economic means or a profession, but based on physical or mental handicaps, carrying infectious diseases, working as prostitutes, or even being considered 'lazy', 'useless', a 'charlatan', or a 'witch lord'.³⁸

Another restrictive aspect worth mentioning is the excessive prosecution of 'false marriages' in law and in practice, which often leads to the application of arbitrary criteria that violate people's privacy and the right to family unification. It also constitutes an intrusion by the migration authorities into areas they are incompetent in (such as the validity of marriages).³⁹

The most noteworthy liberalisation in the area of access and residence, on the other hand, is the recognition of a right to free human mobility, as implied in the right to migrate in the Argentine, Bolivian and Uruguayan laws and Ecuador's 2008 constitution. The recognition of a right to migrate represents an important philosophical paradigm shift in countries that formerly saw immigration as a potential threat to national security and thus tried to regulate it based on the discretion of the state exercising its sovereignty.

In Argentina, the right to migrate has been concretely applied in the shape of the new Mercosur residence category, which currently applies to nationals of almost all South American countries. This means that the numerically most significant destination country of intra-regional south-south migration grants the region's nationals (which make up about 90 per cent of immigrants in Argentina) temporary residence for two years and subsequent permanent residence. Nevertheless, migrants from outside the Mercosur region still have to fulfil other residency requirements.⁴⁰ As Acosta Arcarazo and Freier show in this volume (chapter 2), south-south migrants from Africa, Asia and the Caribbean remain in a vulnerable situation, often finding it impossible to regularise their status.⁴¹

Another important point regarding the liberalisation of access and residence policies is a new approach to the regularisation of migrants. Indeed, a number of regularisation programmes have been implemented in the region in the past

38 See Antigua and Barbuda: Immigration Act, Art. 7b; Barbados: Immigration Act, Prohibited Persons; Belize: Immigration Act, Art. 5.1; Brasil: Ley no. 6815, Art. 65; Dominican Republic: Ley no. 285, Art. 15; Ecuador: Ley de Migración no. 1899, Art. 9; El Salvador: Ley de Migración, Art. 10b; Honduras: Ley de Migración y Extranjería, Art. 81; Paraguay: Ley no. 978, Art. 6; Peru: Ley de Extranjería, Arts. 28, 29; Trinidad and Tobago: Immigration Act, Art. 8c

39 For example Panama: Decreto Ejecutivo no. 26/2009, Art. 222.

40 Ceriani Cernadas, 'Improving migrants' rights in times of crisis: migration policy in Argentina since 2003'.

41 Also see FIDH-CELS, *Argentina. Avances y Asignaturas Pendientes en la Consolidación de una Política Migratoria Basada en los Derechos Humanos*.

decade.⁴² Although their impact has been diverse, it is worth emphasising that these programmes are today considered a necessary and valid political tool – contrasting with Europe, where they are still politically taboo.⁴³ Indeed, recent regional declarations – originally in South America, but more recently also in LAC countries – consider regularisation programmes and mechanisms as vital for the promotion of human rights and the human development and integration in the region.⁴⁴

Migration control: ongoing criminalisation, detentions and deportations

One of the most striking restrictive aspects persisting in the immigration laws of Latin American states is the continued criminalisation of undocumented immigrants. This is intriguing, given that it was precisely the rejection of the criminalisation of Latin American emigrants in Europe and the United States that was the main driving factor behind the region's migration reforms. Here, 'criminalisation' is interpreted in the narrow sense of positive law,⁴⁵ that is, certain infractions of migratory norms, such as entering and remaining in the territory without permission, are considered to be criminal offences.

Chile's so-called 'Law Pinochet' punishes irregular immigration with penalties of up to ten years' imprisonment.⁴⁶ Less rigorous sanctions, carrying imprisonment from 30 days to three years, can be found in the laws of Antigua and Barbuda, Barbados, Belize, Ecuador, El Salvador, Nicaragua, Jamaica and Paraguay.⁴⁷ Mexico and Panama repealed clauses that proposed imprisonment for irregular migrants (of up to ten years in the case of Mexico and three years in the case of Panama) in 2008.⁴⁸

A related core aspect of restrictive immigration control is the imprisonment of irregular migrants, not in the form of sanctions but as part of their expulsion process. Numerous laws in the region foresee detention as part of the expulsion process. In most cases no additional condition (apart from the migratory

42 Since 2004 regularisation programmes have been adopted in Argentina, Brazil, Chile, Ecuador, Mexico, Panama and Venezuela.

43 Acosta Arcarazo and Freier, 'Turning the immigration policy paradox upside down?'

44 'Declaración especial sobre la regularización migratoria como un mecanismo para lograr el ejercicio pleno de los derechos de las personas migrantes y sus familiares y el fortalecimiento de la integración regional', adopted at the II CELAC Summit, La Habana, 29 Jan. 2014.

45 In a wider sense, the criminalisation of irregular immigrants also employs social discursive processes giving them negative branding as 'illegals' to justify restrictive immigration policies.

46 Chile: Decreto no. 1094, Arts. 69 and 87.

47 Antigua and Barbuda: The Immigration and Passport Act, chapter 208, Arts. 40 and 41; Bahamas: Immigration Act, Art. 19(2); Barbados: Immigration Act, Art. 30; Belize: Immigration Act, Art. 34.2; Ecuador: Ley de Migración no. 6540, Art. 37; El Salvador: Ley de Migración, Art. 60; Jamaica: The Aliens Act, Art. 20; Nicaragua: Ley no. 240 de Control del Tráfico de Migrantes, Art. 21; Paraguay: Ley de Migraciones, Art. 108.

48 Mexico: Decreto por el que se reforman y derogan diversas disposiciones de la Ley General de Población, 21 July 2008.

one) is needed to justify imprisonment, which means that the threshold for incarceration is even lower than in the case of penal law. In this context, arbitrary migration controls and detentions are widespread.

In many of the region's countries no time limits exist for detentions, nor are the prison facilities and conditions of imprisonment legally regulated to guarantee migrants' basic rights, including due process. Only a few countries have established alternative measures for detention, which will be discussed below. Consequently, prolonged detentions in prisons and other inadequate locations, based on arbitrary procedures and without the possibility of accessing judicial aid to appeal detentions and deportations, continue to be the norm across the region.⁴⁹

Regarding alternative measures to detention, the laws of Uruguay, Bolivia and Peru do not stipulate incarceration, and the Venezuelan legislation prohibits any kind of imprisonment in migratory procedures. Honouring the principle of due process, the Argentinean law establishes that only the judiciary (and not the national immigration authority) can dictate detentions. The law further establishes the principle of non-detention during the entire expulsion procedure (administrative and judicial), although it allows for exceptional detentions in cases where all recourse is exhausted.⁵⁰ The Nicaraguan law stipulates that detention can only occur in special facilities, and never in prisons.⁵¹

Mexico is especially important in this regard, because it is the country with by far the most detentions in the region. According to official statistics, in 2014 the national migration authority, Instituto Nacional de Migración, detained over 127,000 people, of which almost 11,000 were unaccompanied children and teenagers (2,000 of which were under the age of 11 years).⁵² The new migration law retains detentions as a migration management tool, without prioritising alternative measures. However, in the case of unaccompanied children, the law does stipulate that they cannot be kept in detention centres. Unfortunately, this reform has until now hardly been applied.⁵³

In sum, deportations (or expulsions or repatriations, depending on the terminology used in each country) prevail as the principle sanction for irregular immigration in Latin American immigration laws. In many cases there are no alternative sanctions or measures that allow migrants to remain in the country, not even in cases related to family unification, work or settlement and so on. Thus, the regional discourse, which severely criticises expulsions by European

49 Abramovich et al., *Estudio sobre los Estándares Jurídicos Básicos Aplicables a Niños y Niñas Migrantes en Situación Migratoria Irregular en América Latina y el Caribe*.

50 Ley no. 25,871, Art. 70.

51 Argentina: Reglamento de Migraciones, Decreto no. 616/2010, Art. 72; Nicaragua: Ley no. 761, Art. 134.

52 See www.inm.gob.mx (accessed 6 Nov. 2014).

53 See www.ninezmigrante.blogspot.com.ar (accessed 6 Nov. 2014).

countries and the USA as a simplistic or even inhumane answer to the multidimensional phenomenon of irregular migration, displays an intriguing lack of coherence. Noteworthy exceptions are the Argentinean and Uruguayan laws defining that irregular immigration should primarily be addressed through facilitating the regularisation of the population concerned.

Finally, as mentioned above, most migration laws in the region do not guarantee due process in the deportation process, including access to the judiciary, free legal aid and an effective appeals process.⁵⁴ Here, Mexico is again of special concern, given the elevated number of people that are deported each year without the basic procedural right of appealing deportation orders. Exceptions are the Argentine, Costa Rican, Panamanian and Uruguayan legislations, although only Argentina and Uruguay guarantee access to the judiciary and the suspensive nature of appeals (that is, deportations can only be carried out once all recourse has been exhausted).⁵⁵

Social rights: significant steps towards liberalisation

A central aspect of the liberalisation of immigration laws in Argentina, Bolivia, Mexico and Uruguay is the granting of social rights to immigrants. These countries now grant migrants the same social rights as nationals in the areas of health, social security, housing and education,⁵⁶ and stipulate that lack of legal status has no effect on accessing these rights.⁵⁷ In the same vein, the Ecuadorian constitution recognises nationals' and foreigners' equality of rights, emphasising that no individual can be considered 'illegal', or be deprived of any rights based on his migratory condition (Art. 40). Although few other laws in the region explicitly negate such rights to immigrants, the explicit granting of equality constitutes significant liberalisation, especially taking into account the background of widespread discrimination against immigrants in social services.

In the area of employment, various laws (for example, Argentina, Bolivia, Nicaragua and Uruguay) explicitly recognise that immigrants' labour rights must be respected and protected under all circumstances,⁵⁸ as prescribed by the Inter-American Court of Human Rights (IACoHR) in 2003.⁵⁹ However,

54 Abramovich et al., *Estudio sobre los Estándares Jurídicos Básicos Aplicables a Niños y Niñas Migrantes*.

55 For the Argentine case see Giustiniani, *Migración: un derecho humano*; Costa Rica, FIDH, *Costa Rica. Políticas Migratorias y Derechos Humanos en la Región de las Américas*.

56 Argentina: Ley no. 25,871, Art. 6; Bolivia: Ley no. 370, Art. 12; Uruguay: Ley no. 18,250, Art. 8; Mexico: Ley de Migración, Art. 27; Nicaragua: Ley de Migración y Extranjería, Art. 11.

57 For example, Argentina: Ley no. 25,871, Art. 6; Bolivia: Ley no. 370, Art. 12; Uruguay: Ley no. 18,250, Art. 9.

58 Argentina: Ley no. 25,871, Art. 16; Bolivia: Ley no. 370, Art. 48; Nicaragua: Ley no. 761, Art. 151; Uruguay: Ley no. 18,250, Art. 16.

59 IACoHR, Opinión Consultiva OC-18/03, *Condición Jurídica y Derechos de Migrantes Indocumentados*, 17 Sep. 2003.

all laws link the right to work to legal residence. In principle, prohibiting irregular immigrants from working could fulfil the objective of preventing informal labour and its negative effects for the protection of workers and social security (though advantageous for employers regarding the cost of labour). However, it has been shown that without large-scale and effective regularisation programmes, such prohibitions increase precarious working conditions and the social exclusion of irregular immigrants.

Finally, in some countries legal dispositions regarding migration control that date back to the military dictatorships continue to affect migrants' social rights negatively by obliging civil servants to control the migratory status of persons and denounce any irregularities.⁶⁰ In these cases, employees in hospitals, schools, civil registries, social programmes or the judiciary act as migration control agents and lead to immigrants avoiding the public services they might even be legally entitled to, with negative repercussions for the immigrants themselves and society at large.

Political rights: lack of immigrant integration

Two central aspects mark the current debates and tendencies regarding the political rights of migrants in Latin America. First, the migration reforms in various countries in the region extend the right to vote to their nationals abroad: Argentina, Bolivia, Colombia, Ecuador, Mexico, Peru, Chile and El Salvador.⁶¹ Other countries have not yet extended this right to their nationals, despite the appearance of such demands in domestic political debates, such as Cuba, Guatemala, Nicaragua and Uruguay.⁶²

Second, regarding the rights of immigrants in the country of residence, there are four different groups of legislations. The first prohibits foreigners from participating in any kind of political action (Mexico, Dominican Republic, Nicaragua),⁶³ the second negates immigrant participation in national elections (Argentina, Costa Rica),⁶⁴ the third grants political rights after a certain number

60 Chile: Decreto no. 1094, Art. 76; Dominican Republic: Ley no. 285, Art. 28. Up to 2003, the entire public administration of Argentina was required to control and report irregularities in individuals' migratory status.

61 Argentina: Ley no. 24,007, 1991; Bolivia: Constitution, Art. 27; Colombia: Ley no. 39, Art. 5; Ecuador: Ley no. 81; Mexico: Código Federal de Instituciones y Procedimientos Electorales (COFIPE), Arts. 313–39; Peru: Ley no. 26,859, Art. 224; Chile: Constitutional Reform Bulletin no. 9069-07; El Salvador: Decreto no. 398.

62 For Uruguay see Institución Nacional de Derechos Humanos y Defensoría del Pueblo (INDDHH), *Addendum al Informe presentado al Comité de la ONU sobre Derechos de Migrantes* (2014).

63 Mexico: Constitution, Arts. 8, 33, 35, 41; Dominican Republic: Constitution Art. 25 I; Nicaragua: Constitution Art. 27. For the Dominican Republic see OSF, 'Dominicanos de ascendencia haitiana y el derecho quebrantado a la nacionalidad'.

64 Argentina: Código Nacional Electoral, Art. 1; Costa Rica: Ley no. 8765, Art. 144.

of years of legal residence (Chile, Uruguay),⁶⁵ and the fourth group of laws allows foreigners to take part in local government elections on the municipal and provincial level (Argentina, Bolivia).⁶⁶

Obstacles to, or outright prohibition of, immigrants' political participation limits their integration and thus the social cohesion in multicultural receiving countries. Denying immigrants political rights weakens democracy because it withholds from that section of society basic mechanisms allowing participation in forming policies and laws that apply to all – nationals and foreigners.⁶⁷ Based on such concerns, Latin America mirrors other regions in that there are various campaigns for the extension of political rights to immigrant populations.⁶⁸

Migrant children: moving out of the shadows?

For an extremely long period, the increasing (irregular) migration and vulnerability of (unaccompanied) children in Latin America remained politically invisible, with serious implications for the effective protection of children's rights.⁶⁹ Most migration laws in the region lack specific dispositions protecting the rights of (un)accompanied child migrants. Nor does the specific context of migration figure in general policies and laws on child protection.

The most serious infringement of children's rights is the detention and deportation of young people through practices that ignore the child's best interest and thus violate the rights and guarantees recognised in the Convention on the Rights of the Child (which all countries in the region have ratified). This problem is particularly acute in Mexico and Central America's northern triangle.⁷⁰ It should be emphasised that Mexico's new migration law explicitly incorporates the child's best interest and other guarantees for unaccompanied minors. However, the law, and certainly Mexico's immigration policy in practice, continue to prioritise securitised immigration control, considering (unaccompanied) migrant children to be the objectified recipients of social assistance.⁷¹

The countries of origin of unaccompanied migrant children also fall short of fulfilling their consular protection responsibilities (in other Latin American countries and the USA), as well as reintegration policies in cases of voluntary

65 Chile: Constitution, Art. 14; Uruguay: Constitution, Art. 78.

66 Bolivia: Constitution Art. 27, Ley no. 370, Art. 12. For a discussion of the Argentine provinces that recognise immigrants' right to vote, see Ceriani Cernadas, 'Los derechos políticos de extranjeros en España desde un enfoque de derechos humanos', pp. 481–520.

67 De Lucas and Solanes (eds.), *La Igualdad de los Derechos: claves de la integración*.

68 For the Argentine case, see www.aquivivoaquivoto.blogspot.com (accessed 6 Nov. 2014).

69 Abramovich et al., *Estudio sobre los Estándares Jurídicos Básicos Aplicables a Niños y Niñas Migrantes*.

70 See Ceriani Cernadas (ed.), *Niñez Detenida*; Appleseed, *Children at the Border*.

71 See Ceriani Cernadas (ed.), *Niñez Detenida*.

return or deportation.⁷² Despite these serious ongoing challenges to the protection of migrant children's rights in the LAC region, the problem has become more visible in recent years. Mexico, Guatemala and El Salvador have embarked on various specific initiatives to improve the situation of unaccompanied migrant children and the children of migrants raised in those countries. The topic was also given careful consideration by the RCM.⁷³ Civil society in LAC countries is also increasingly vocal in demanding the protection of child migrants.

Another point worth mentioning is the advisory opinion on rights of child migrants and asylum-seekers, which was presented by Mercosur member states before the IACHR. The Court accepted the proposal, and numerous governments, international agencies and civil society organisations have presented *Amici Curiae* and reports about the situation and the standards the court should enforce in the area.⁷⁴ Its resulting advisory opinion of 2014 will help significantly towards establishing standards of child migrant protection in the region and will thereby strengthen initiatives of policy and legislative liberalisation.⁷⁵

Regional initiatives: liberal tendencies but lack of policy implementation

Some concrete steps have been taken towards policy liberalisation on the regional level, and especially in Mercosur. In December 2002, Mercosur members and associate states adopted a residence agreement, which recognises the right of all member and associate state nationals to reside in the joint territory.⁷⁶ Mercosur residence breaks the instrumental logic, which tied granting residency to a migrant's utility in the receiving labour market and in practice increased the number of irregular migrants. The agreement only came into force when Paraguay was the last country to ratify it in 2009. Since then the ratifying countries have been adopting measures for its internal implementation, although at very different rates.⁷⁷

72 Casa Alianza, *Análisis de la Situación de Derechos de la Infancia Migrante No Acompañada*.

73 The governments of the RCM member states met at the Seminario Técnico en Materia de Niñez y Adolescencia Migrante, in Antigua, Guatemala, in Aug. 2013.

74 See <http://corteidh.or.cr/index.php/observaciones/> (accessed 6 Nov. 2014).

75 IACHR, 'Rights and guarantees of children in the context of migration and/or in need of international protection', 19 Aug. 2014, Advisory Opinion OC-21/14, Series A no. 21.

76 For a detailed analysis of the Mercosur agreement see Asa and Ceriani Cernadas, 'Política migratoria en el conosur: los acuerdos del MERCOSUR y la nueva ley de migraciones en Argentina', pp. 39–65.

77 See 'Declaración de Montevideo relativa al Acuerdo sobre Residencia para Nacionales de los Estados Partes del MERCOSUR, Bolivia y Chile, del 2 de octubre de 2009, sobre internalización del acuerdo en la legislación cada país'.

Furthermore, a political plan exists for the progressive development of a Mercosur citizen statute with the following objectives: free circulation of people in the region; equality of social, civil, cultural and economic rights and liberties for the nationals of all member states; equality of access to work, healthcare and education; and the gradual recognition of political rights, including the possibility of eventually electing a Mercosur parliament. It is anticipated this plan will come into force by 2022.⁷⁸

The Mercosur citizenship initiative is clearly of fundamental importance to regional integration and the rights of regional migrants. At the same time, the proposed plan mirrors the exclusionary principles of the European Union, which Latin American governments have so vehemently criticised. Extending equality of rights to nationals of member states only risks the introduction of discriminatory practices against immigrants from other regions. From the human rights perspective, regional integration and the free circulation of people are incompatible with a bounded and exclusionary notion of citizenship (which is often confounded with nationality).⁷⁹

In other sub-regional blocs, such as the Caribbean Community (CARICOM), the Andean Community (CAN)⁸⁰ or Central America (CA4),⁸¹ various other initiatives for facilitating the circulation of people have been introduced, albeit with a focus on temporary circulation of three to six months. Finally, the two largest regional associations in the region, the Union of South American Nations (UNASUR) and the Community of Latin American and Caribbean States (CELAC) should be mentioned. UNASUR's 2008 constitutional objectives include the free circulation of people and South American citizenship, but thus far no steps have been taken to reach these goals. CELAC, on the other hand, has included migrants' rights as a central theme of its agenda and has brought forward specific declarations on the matter – for example on the importance of regularisation programmes.⁸²

Conclusion

In the past decade, there have been significant immigration policy reforms in the LAC region on the domestic and regional level. Despite significant variation in the quality and magnitude of these reforms, we can speak of a philosophical paradigm shift in the region's immigration policies, that is, a new outlook on

78 Decision MERCOSUR/CMC/DEC, no. 64/10, Foz de Iguazú, 16 Dec. 2010.

79 Ceriani Cernadas, 'Ciudadanía, migraciones y libre circulación en el MERCOSUR'.

80 See www.comunidadandina.org (accessed 5 Jan. 2015).

81 The CA4 includes El Salvador, Guatemala, Honduras and Nicaragua.

82 'Declaración especial sobre la regularización migratoria como un mecanismo para lograr el ejercicio pleno de los derechos de las personas migrantes', adopted in the II CELAC Summit, La Habana, 29 Jan. 2014.

migration that brings the individual migrant and human rights into the centre of policymaking. The right to migrate that is now enshrined in Argentine, Bolivian, Ecuadorian and Uruguayan migration laws, and in various regional declarations, symbolises this new approach to migration management. Its consolidation across the region will take time and is by no means guaranteed.

In some countries, the gradual teardown of the criminalisation of migration, which was the dominant paradigm of immigration control during the military dictatorships as well as the implementation of alternative measures to detention and deportation and the guarantee of the right to due process, amount to significant policy liberalisation. Likewise, the recognition of equal social rights between nationals and foreigners, and the introduction of regularisation programmes significantly increase the quality of life and social inclusion of migrants in the region. On a regional level, international declarations and agreements regarding migrants' rights and the free circulation of people, although varying in depth and scope, support domestic policy liberalisation.

At the same time, in most countries in the region policies and practices with a selective and instrumental outlook on migration management coexist with these liberal advances. These include outdated normative frameworks, or reforms that never go beyond initial stages. In many countries, there are at least some political actors who continue to see migration as a problem or even a threat to the economy, national security, sovereignty or national identity. In some cases, migration management even corresponds to a 'state of emergency', which is used to justify arbitrary and indefinite detentions under unacceptable conditions and deportations. Even when normative frameworks do not provide for restrictive measures and grant migrants certain – for example social – rights, in practice immigrants often remain subject to arbitrary restrictions on accessing such rights, based on their nationality or migratory condition.⁸³

The challenges and threats that the most vulnerable migrants in LAC countries face encompass discrimination, xenophobia, violence, labour and sexual exploitation, separation of families, and arbitrary detentions and deportations. These complex scenarios call for profound policy change in the short and long term. Obstacles to effective political responses lie in exclusive notions of citizenship and national sovereignty, and conflicts within and between countries that hinder domestic reforms and the regional integration process.

83 See civil society organisation reports from Argentina, Bolivia, Chile, Ecuador, El Salvador, Guatemala, Mexico and Uruguay, that were presented between 2010 and 2014 at the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CMW (accessed 24 Oct. 2014); Defensoría de los Habitantes de Costa Rica, *Informe Anual de Labores*.

The South American sub-region has taken the lead in immigration policy liberalisation and thus holds an especially strategic position to further reinforce reforms on the regional and international level. South American governments enjoy significantly more autonomy in the development of their immigration policies than Central American and Mexican governments because transit migration towards the US-Mexican border leads to US-American diplomatic pressure to maintain restrictive policies. Notwithstanding, even in South America, various restrictive laws remain in force, and some recent initiatives carry the risk of falling back on securitised notions of migration.

In sum, although important cross-country differences exist, there has been significant change in the immigration discourses and policies of LAC countries in the past decade, with a clear tendency towards abandoning the notion of immigration as a problem or threat towards understanding migration in the context of human rights. But can we talk of an established new paradigm? Perhaps it is too early to answer this question conclusively. Despite significant policy liberalisation in some countries, reforms are still pending in others. In addition, the challenge of designing public policies on the national and regional level that address the root causes of migration – poverty, inequality, unemployment, discrimination and social exclusion – remains.

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