

The Compliance of Argentina's Migration Law with Human Rights Discourse and Principles

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SABRINA ANDREA AVIGLIANO, APR 25 2021

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The Argentinian Republic is, at its core, a country of migrants. The last decades of the 19th century were marked by a period described as the Alluvial Era, in which important contingents of European people began to arrive at the port of Buenos Aires motivated by the war and economic and social chaos. So why did they choose a country in the southernmost tip of South America, and across the Atlantic Ocean? Probably because of the lenient migration policies enacted by the state that encouraged the entry of foreigners. The 1853 Constitution had granted protection to aliens and extended them the same civil rights as nationals. It also encouraged European immigration under the pretense that European characteristics were convenient and desired for the rising nation. The Immigration and Colonization Law (commonly known as Avellaneda Law) was passed in 1876. It promoted the reception of foreign farmers as settlers on lands contributed by the state. It is no surprise then that, by 1889, about 261,000 immigrants had entered the Argentinian Republic, and that the capital city harbored 100,000 foreigners out of a total population of 214,000 (Romero 1951, V). As a result, this first wave of immigration changed the social structure of the country, leading to the construction of a national identity that merged diverse customs and traditions. According to the results of the census in 1914, a third of the country's inhabitants were foreigners. World War I eventually interrupted the massive European migratory flow and, since then, migratory currents have come mostly from neighboring Latin American countries and, to a lesser extent, Eastern Europe, Asia, and Africa (Modolo 2016, 208).

Between 1976 and 1983, Argentina lived through a military dictatorship. Migration policies became regressive – as evidenced by the 1981 General Law on Migration and Immigration Promotion (also known as Videla Law). It contained clauses that affected constitutional rights and guarantees, such as the power to detain people and expel them without legal or judicial control over the administrative decision of the immigration authority. It also contained clauses outlining the obligation of all public officials and of people in general to denounce the presence of irregular immigrants and restrictions on the rights to health and education, among other restrictions. It took 21 years – even long after democratic order had been restored – for the Congress to approve a new migration law.

The Sanction of the National Migration Law No. 25.871

Under President Kirchner's center-left administration, there was a change in legislation when the Migration Law No. 25.871 was developed at the beginning of 2004. This implied a paradigm shift at the national level, as it complied with the international commitments assumed by the Argentinian Republic regarding human rights, mobility, and integration of aliens into society. The law defines a migrant as 'any foreigner who wishes to enter, transit, reside or settle permanently, temporarily, or incidentally in the country' (Article 2, Law No. 25.871). It expressly establishes the fundamental right to migration, determining that the 'right to migration is essential and inalienable for the person and the Argentinian Republic guarantees it on the basis of the principles of equality and universality' (Article 4, Law No. 25.871). Its primary focus is on the migrant as a subject of rights. Therefore, it acknowledges equal rights and treatment for both nationals and foreigners, as well a series of actions that facilitate admission, income, stay, and their access to basic social services in health, education, justice, work, employment, and social security. This is

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granted regardless of the person's immigration status, making the application of the principle of non-discrimination based on any criteria indisputable (Articles 6 to 13, Law No. 25.871). One of the general principles guiding the law is to 'promote the labor integration of immigrants residing legally for the best use of their personal and work capacities to contribute to the economic and social development of the country' (Article 3, subsection H, Law No. 25.871). Other obligations are outlined in Article 17 of the law, which foresees that the state will provide 'whatever is necessary' to adopt and implement measures aimed to facilitate the regularization of foreigners' immigration status.

There is no recognition at the international level of a person's right to settle in a country of their choice, other than that of their nationality. At most, the rules provide for freedom of movement, which does not necessarily imply the right to choose the place of residence. For this reason, according to Hines (2012, 309–310), the Migration Law represents 'a great step forward in the rights of immigrants, not only for Argentina, but worldwide,' both for repealing a restrictive law – the previously mentioned Videla Law – and for declaring migration as a human right. Because migration is now held as a human right, then all human rights principles such as non-discrimination, *pro homine*, reasonableness, non-regressivity, and others, apply to the right to migration.

The body in charge of applying migration policy throughout the Argentinian Republic has been the National Migration Directory. It was created in 1949 and falls under the executive branch. It has the aptitude and jurisdiction to act in the admission and granting of residents, to establish new delegations all across the country, to control the entry and exit of people to the country, and to exercise control over permanent residents in the entire territory of the Republic (Article 107, Law No. 25.871). It also has the authority to intervene whenever the Migration Law is violated. Upon detecting a foreigner with an irregular immigration status, the immigration authority can decide to expel or deport them – a measure that is generally accompanied by a temporary or permanent prohibition of re-entry to the country.

This regulates the administrative procedures regarding the admission, permanent residence, and expulsion of foreigners and incorporates reinforced guarantees for the judicial review of the decisions of the immigration authority. Consequently, it provides for a system of both administrative and judicial appeals when the admission or residence of a foreigner is denied; the authorization of permanent, temporary, or transitory residence is canceled; a foreigner is ordered to leave the country, her expulsion is decreed or the application of fines and sureties, or her execution is resolved (Article 79, Law No. 25.871). About restrictions or impediments to entering the country, the rule determines causes linked mainly to criminal matters and administrative irregularities at the moment of entering the territory (Article 29, Law No. 25.871).

Although it is the power of the state's authorities to establish mechanisms to control the entry into and departure from its territory in relation to individuals who are not nationals, these devices must be compatible with the human rights protections to which the state has committed itself. As such, it is evident that foreigners are unaware of the country's legal system and are in an aggravated situation of vulnerability, which is why the Inter-American Court of Human Rights (IACHR), in the case of *Velez Looz v. Panama*, acknowledged that the states have to guarantee individuals' effective access to justice, regardless of their immigration status, and must provide legal counsel to satisfy the requirements of procedural representation. It also acknowledged that the accused is to be advised about the possibility of other remedies against acts that affect individual rights. This obligation was materialized in Article 86 (ACHR, 2021) that read:

Foreigners who are in national territory and who lack economic means will have the right to free legal assistance in those administrative and judicial procedures that may lead to the denial of entry, return to their country of origin or expulsion of the Argentine territory. They will also have the right to the assistance of an interpreter if they do not understand or speak the official language. The regulations to the present, that in its case are dictated, must protect the exercise of the Constitutional Right of defense.

For that reason, in all cases where a migrant makes a written objection at the time of being notified of the expulsion order, the National Migration Directory must give immediate intervention to the Public Ministry of Defense, ordering the suspension of any procedure and of the current deadlines in the administrative actions, until the Ministry becomes involved or the interested party receives the legal assistance necessary to safeguard their interests.

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Another aspect of the law is that it incorporates as a standard of residence, the relation to an Argentinian relative or another permanent resident (Article 22, Law No. 25.871). As well as the traditional filing factors, such as work, study, and medical treatment, the Migration Law recognizes Argentina's commitment with the Southern Common Market (MERCOSUR) in order to harmonize the legislation to achieve the strengthening of the integration process by allowing as criteria the residence by nationality of MERCOSUR country or associated countries (Article 23, subsection I, Law No. 25.871). This is so anyone in the region can establish residence in Argentina for that fact alone. This has constituted an important step towards the free movement of people in the region, as they are permitted to exercise their labor rights on equal terms with nationals. It additionally generates an increasing commitment to mutual cooperation between the various states that are part of MERCOSUR.

Family constitutes an important aspect of the Migration Law, as does the objective to 'guarantee the exercise of the right to family reunification' (Article 3, subsection D, Law No. 25.871). Argentinian Law additionally ensures that 'the State shall guarantee the right to family reunification of immigrants with their parents, spouses, minor unmarried children, or older children with different abilities' (Article 10, Law 25.871). The National Migration Directory may waive entry impediments because of family unity or humanitarian reasons (Article 29 and 62 in fine, Law No. 25.871). This means it is possible to annul an expulsion order when the existence of a family with strong emotional ties is verified, as it is considered that this protected asset is superior to the crime committed or administrative infraction that originated the expulsion proceedings.

In light of all this, there is no doubt that the Migration Law lies at the forefront of respect for the human rights of migrants and reflects the open-door policy enshrined in the Argentine Constitution.

Modifications Introduced by Decree of Need and Urgency No. 70/2017

After more than a decade of the center-left administration of the Kirchners, in December 2015, a liberal conservative government with a center-right ideology led by Mauricio Macri assumed the presidency. In 2017, the executive branch issued the Decree of Need and Urgency No. 70/2017 (DNU), which modified several aspects of Law No. 25.871, on the basis of alleged increase in crime at the hands of foreigners. The law highlights that 'the population of people of foreign nationality in the custody of the Penitentiary Service has increased in recent years until reaching 21.35% of the total prison population in 2016'. Currently, foreigners represent only 4.5 percent of the population of Argentina. Nevertheless, when analyzing exclusively the total number of people arrested for drug trafficking, the number of foreigners rises to 33 percent (Recital No. 15 and 16, DNU No. 70/2017). This reasoning clearly associates migration to delinquency and reinforces the thought that migrants are dangerous and a threat to nationals. Therefore, the proposed solution is to deport them at a more rapid pace. This approach holds all people who come from other countries under permanent suspicion even after formalizing their immigration status.

The DNU affirms that each state has 'the sovereign prerogative to decide the criteria for the admission and expulsion of non-nationals' (Recital No. 8, DNU No. 70/2017). In this regard, it says that this capacity is currently hindered by the duration of the administrative and judicial processes that could 'reach seven years of processing' to expel someone from the country (Recital No. 13, DNU No. 70/2017). Instead of detecting the bureaucratic obstacles or other hassles that could have caused these delays, it was decided to modify the expulsion procedure, reducing the time limits and the instances of appeal, imposing more requirements to access to free public aid, and restricting the application of exemptions from expulsion orders, among other changes.

Even if there were an actual need to reform the Migration Law, no justifiable reason can be invoked to resort to the use of such special mechanisms as the DNU, especially when the decree is much more restrictive, overriding human and fundamental rights of migrants, which makes the state capable of generating international responsibility. The fact that the executive branch issued a decree that modified the procedure created by a law and produced another, vastly different procedure, invades the powers and competencies of the legislative branch and constitutes a serious violation of the division of powers and the republican principle of government as stated by the Constitution.

As previously mentioned, the most critical aspects of the DNU are related to the setbacks in terms of guarantees of due process, access to justice, and access to regular immigration. On the subject of these guarantees, the American

The Compliance of Argentina's Migration Law with Human Rights Discourse and Principles

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Convention on Human Rights (CITATION) provides in Article 8 that

Everyone has the right to be heard, with due guarantees and within a reasonable time, by a judge or competent, independent and impartial court, previously defined by law, in the substantiation of any criminal accusation made against it, or for the determination of its rights and obligations of a civil, labor, fiscal or any other nature.

In addition, Article 25 of the same instrument states that

Everyone has the right to a simple and quick recourse or to any other effective recourse before the competent judges or courts, which protects them against acts that violate their fundamental rights recognized by the Constitution, the law or this Convention, even when such violation is committed by persons acting in the exercise of their official functions.

Inter-American jurisprudence has been emphatic in stating that immigration procedures must be developed in accordance with the guarantees of due process, regardless of whether they apply to regular or irregular migrants. Therefore, any judicial or administrative procedure that may affect a person's rights must be followed in such a way that people have the necessary means and can adequately defend themselves from any act emanating from the state (Case of the Constitutional Court v. Peru, 69).

However, the summary procedure originated by the DNU implies a unilateral alteration of the rules of the game and means a substantial reduction in the procedural deadlines – from 30 days to three business days for the event of filing of appeals – which significantly damages the person who must exercise his defense in such a meager time, and in practice, makes it impossible for the migrant to have his right to be heard, to offer and produce all the evidence that he needs, and that in general implies an impairment of the right to defense in court. To that effect, the DNU states that rights and guarantees of migrants are recognized, but the deadlines that are imposed turn them into a clear illusion and make it extremely difficult to comply with them. The requirements contained in the norm invalidate any defense instrument that the migrant seeks to use, which implies a substantial limitation on the right of defense. The increase in expulsion orders and the short appeal period have reduced the possibilities of providing an effective and efficient service from public defense offices and private legal assistance. On that subject, the DNU exclusively admits the right to free legal aid to those foreigners who expressly request it and, at the same time, accompany supporting documentation that proves their lack of financial resources. If these requirements are not met, the procedure will continue without the migrant having legal representation during the expulsion process, which not only includes the exit from the territory, but also the establishment of a re-entry ban that may be permanent (Article 86 Law No. 25.871, modified by DNU 70/17).

Additionally, the decree interferes with the orbit of the judiciary by setting up deadlines within the issue must be resolved. Regarding judicial control, the exemption of expulsion for reasons of family unity and humanitarian reasons is limited to a small group of impediments and cannot be subject to judicial review, as it is the exclusive and discretionary power of the National Migration Directory (Articles 29, 62 and 63 Law No. 25.871, modified by DNU 70/17).

In this manner, the impediment to the judiciary of reviewing and granting the dispensation for reasons of family unity undermines both the rights of the person subjected to the expulsion process, their family, and their children in particular. The right to family life constitutes a limit on the power of the state to determine its immigration policy and to define the requirements for entry, stay, and expulsion of non-nationals from their territory as it is displayed in Article 17 of the American Convention on Human Rights, as well as in Article VI of the American Declaration of the Rights and Duties of Man, both of which articulate the right to protection of the family, recognizing that the family is the natural and fundamental unit of society and must be protected. This does not imply that the state cannot exercise its power to expel a non-national resident based on a legitimate interest, but that this capacity must be balanced in light of the due consideration of deportation procedures in relation to the family connections of the deportee and the hardships that deportation can cause to all its members (UN Human Rights Committee, *Stewart v. Canada*, 12.10).

Another matter of concern is that the DNU allows the expulsion order to be issued in the mere beginning of the

The Compliance of Argentina's Migration Law with Human Rights Discourse and Principles

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migrant's criminal process. That is to say, before a judicial verdict that indicates the commission of the act and its responsibility. This violates the principle of innocence (Article 8.2 of the CADH) as it equates criminal record to 'any firm indictment, closure of the investigation, preparatory or comparable procedural act' (Article 29 Law No. 25.871, modified by DNU 70/17) without the need for the person to have a final judgment. The modification also broadens the range of crimes as a cause for expulsion to include infractions, misdemeanors, and minor felonies, such as manslaughter and other negligent crimes.

The administrative authority may request a judge to order the retention of the alien until their expulsion from the country can be materialized. Given that the retention, whether preventive or executive, implies an affectation of the physical freedom of the foreigner, in all cases the previous judicial order is necessary to be issued. Regarding preventive retention, it is provided that 'recursive actions or processes will suspend the counting of the retention period until its final resolution' (Article 70 Law No. 25.871, modified by DNU 70/17). Consequently, the deprivation of liberty of the migrant, which should have the sole purpose of making the expulsion order effective, becomes in practice an arbitrary detention due to the long duration of these procedures.

Under these new rules, the Committee Against Torture (CAT) has expressed concern about the sanction of the DNU and has urged the state to 'repeal or amend the provisions of the Decree of Necessity and Urgency No. 70/2017 so that people subject to expulsion can have enough time to appeal it at the administrative and judicial level and have access to immediate free legal assistance during the expulsion process in all instances' (CAT 2017, 34b) and 'ensure that immigration legislation and regulations only resort to the detention for immigration reasons only as a measure of last resort... for the shortest possible period of time' (CAT 2017, 34c). On the whole, the DNU has implemented changes in the Migration Law that resulted in a generalized obstacle to access to justice for migrants and despite the objections of international entities, social organizations, and members of the current government, it continues to be in force as of today.

Concluding Reflections

The last census, held in 2010, showed that 4.5 percent of the inhabitants of Argentina were foreigners: 1,471,399 come from neighboring countries plus Peru, while 299,394 were born in Europe, 31,001 in Asia, 2,738 in Africa, and 1,425 in Oceania (INDEC 2010). That is to say, Argentina's history as a nation has been shaped by migration flows and cannot be understood separately from migration.

By and large, most public policies in Argentina change according to who is in government at any given moment. Immigration policy is no exception. Initially conceived as an instrument to populate the territory and build a concept of the nation with European overtones, it was restricted during the last civic-military dictatorship. Despite the return of democracy in 1983, it was not until 2004 that the Migration Law was developed and enacted. It recognized migration as a human right. Moreover, it implemented more flexible requirements to access residences, especially for those foreigners from MERCOSUR, as well as the impediments to income and permanent residence. The powers of the National Migration Directory regarding the retention and expulsion of migrants were defined. Lastly, it established that judicial control of the expulsion order was to be exercised by the Federal Administrative Litigation jurisdiction and the Federal Justice based in the provinces, until the specific Immigration Court was created (Article 98, Law No. 25.871 original version), which obviously has never happened to date.

However, immigration policy became regressive again when former President Macri issued the DNU, which modified the aforementioned Migration Law. Although the Migration Law had been considered a role model across the world, through an exceptional executive order, various aspects of a regulation emitted by the National Congress were amended on the basis of an alleged wave of crime caused by non-nationals (Recital No. 13, 15 and 16, DNU No. 70/2017). The DNU presents a substantial reduction in guarantees of the rights of migrants. Among other measures, the conditions and requirements for entry and permanent residence in the country were limited, the possibility of judicial control of the measures taken by this public body were reduced, access to free legal aid was hampered, and an immigration regularization process was created that excessively delayed and bureaucratized the obtaining of Argentine documentation. Finally, it also produced a special summary procedure for the expulsion of foreigners which, as already explained, clearly violates the principles and guarantees enshrined in human rights instruments,

The Compliance of Argentina's Migration Law with Human Rights Discourse and Principles

Written by Sabrina Andrea Avigliano

such as the guarantees of due process, the principle of family reunification, and the best interests of the child, and it 'allows the possibility of holding a person in detention throughout this summary expulsion procedure regardless of the fact that no one may be deprived of liberty on grounds of immigration status' (Committee 2019, 10e). The establishment of the summary procedure not only implies the material impossibility of preparing an adequate defense, but also prevents access to free legal assistance, since the procedure and the resources become illusory.

For the aforementioned reasons, it is clear that this decree places the migrant in a situation of complete defenselessness and vulnerability in the face of the punitive state power. That is exactly why the Committee for the Protection of the Rights of All Migrant Workers and their Families (2019, 11) has urged Argentine authorities to 'take immediate steps to have Decree No. 70/2017 repealed by the relevant body and, pending the completion of this process, to suspend its implementation' and expressed its deep concern about the application of the DNU despite the fact that 'the Committee on the Rights of the Child and the Committee against Torture have recommended its repeal, and the Committee on Economic, Social and Cultural Rights has urged the State party to eliminate barriers to the enjoyment of economic, social and cultural rights and to facilitate the regularization of migrants' status' (Committee 2019, 10).

Although the abolishment of this decree is still pending and urgently needed, it is also relevant to notice that additional modifications are needed to be made about migration policy as a whole, and more specifically regarding the mobility of children and adolescents – which will be effectively respectful of the commitments assumed by the Argentine state in order to prevent incurring international responsibility.

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The Compliance of Argentina's Migration Law with Human Rights Discourse and Principles

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