Ahead of the game?

The human rights origins and potential of Argentina's 2004 migration policy

Susanne Melde

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Statement

I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another University for the award of any other degree.

The sources of this thesis consist in archival documents from the Congress of Argentina, key informant interviews I conducted between August and December 2013 in Argentina and a review of secondary literature.

Signature: _____

Susanne Melde

Date: _____

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UNIVERSITY OF SUSSEX

SUSANNE MELDE

PhD

AHEAD OF THE GAME? THE HUMAN RIGHTS ORIGINS AND POTENTIAL OF ARGENTINA'S 2004 MIGRATION POLICY

SUMMARY

A restrictive discourse on migration calling for increased border control dominates the political agenda of many governments throughout the world. In stark contrast, Argentina's 2004 Migration Law was based on human rights, both in rhetoric and on paper. This is perhaps even more striking given that the Law was adopted two years after a devastating political and socio-economic crisis.

This thesis seeks to identify the factors that led Argentina to choose to base its reformed Migration Law on human rights. It also assesses whether this process arose in circumstances that are unique to Argentina or whether it could be reproduced as a model for other countries elsewhere. To do so, it relies on several methods, including interviews with key actors in the policy-making process.

Analysis demonstrates that a combination of at least four elements led to the human rights approach. Firstly, the tradition of an open migration law and constitution until 1981 – but often being undermined by other, restrictive legislation and policy – and the historical link of national identity with immigration up to the present day. Secondly, the salience of human rights achieved by civil society activists, during the democratic transition after the last dictatorship (1976–1983), who innovatively applied human rights advocacy strategies to change the Migration Law in the early 2000s. Thirdly, the consultative and multi-stakeholder policy-making process itself encouraged a consensus on the human rights basis of the Migration Law. Fourthly, the context of the 2001 socio-economic and political crisis, leading to increased levels of emigration, put the rights of migrants on the political agenda. This last was linked to a new regional, post-neoliberal, ideological consensus in the region on the universality of migrants' rights regardless of status – led, in particular, by Argentina. The thesis finds that the stars aligned at the right place at the right time.

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List of acronyms

ACHR	American Convention on Human Rights
APDH	Permanent Assembly for Human Rights (Spanish acronym)
CAREF	Comisión Argentina para los Refugiados y Migrantes, Argentine Commission for Refugees and Migrants
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEJIL	Centro por la Justicia y el Derecho Internacional, Center for Justice and International Law, known by its English acronym CEJIL
CELS	Centro de Estudios Legales y Sociales, Centre for Legal and Social Studies
CEMLA	Centro de Estudios Migratorios Latinoamericanos
CMW	United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families
CNIg	National Immigration Council (Brazil)
CONADEP	National Commission on the Disappearance of Persons
CONARE	National Refugee Commission
CPRH	Population and Human Resources Commission
CRC	Convention on the Rights of the Child
DNM	Dirección Nacional de Migraciones, National Migration Directorate
EAAF	Equipo Argentino de Antropología Forense, Argentine Forensic Anthropology Team
FCCAM	Fundación Comisión Católica Argentina de Migraciones
GFMD	Global Forum on Migration and Development
HDI	Human Development Index
IACHR	Inter-American Commission on Human Rights

IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
INDEC	Institute of National Statistics and Census (Spanish acronym)
IOM	International Organization for Migration
MERCOSUR	Common Market of the Southern Cone (Spanish acronym)
MP	Member of Parliament
NGO	Non-governmental organisation
OAS	Organization of American States
SACM	South American Conference on Migration
SDG	Sustainable Development Goal
UK	United Kingdom
UN	United Nations
UNASUR	Union of South American Nations (Spanish acronym)
UNHCR	United Nations High Commissioner for Refugees
US/USA	American/United States of America
USD	US Dollar

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PART I: A human rights-based law

Chapter 1: Introduction

1.1 The object of this study: the emergence of Argentina's 2004 Migration Law

At the end of 2003 Argentina adopted Migration Law 25.781 (hereafter referred to as Migration Law or Law 25.781).[1] The Migration Law which entered into force in January 2004 is widely known for its liberal human rights provisions (Acosta Arcarazo and Freier 2015; Ceriani Cernadas 2015; Freier and Acosta Arcarazo 2015; Giustiniani 2004; Hines 2010; Slater 2009; UN CMW 2011). This reputation is well earned: Law 25.871 goes far beyond any provision found in international human rights law, let alone other domestic laws.

Its most well-known and unique aspect is the establishment of a new 'right to migrate' ('*derecho a la migración*', translated as 'right to migrate' in English in all publications on the topic) in Article 4. This right does not merely confirm the right to leave one's country, which has long been protected in international human rights law, but also includes the right to enter Argentina. Moreover, the right to migrate applies to all individuals, not to just foreign workers and members of their families as called for in the International Convention on the Rights of Migrant Workers and Their Families (ICMW).

A second remarkable feature of the Migration Law is the prominent safeguarding of the human rights principles of equality and non-discrimination. Certain articles of the Migration Law aim to ensure that immigrants in an irregular situation cannot be deprived of fundamental rights such as access to health care, education, work and other social services. These provisions extend the protection of migrants' rights even beyond those of the ICMW. Having said this, Law 25.871 also contains provisions that limit the protection offered to immigrants in

[1] For the full text of the Law (in Spanish) see http://www.migraciones.gov.ar/accesible/indexP.php?normativa (accessed on 14 February 2016). All references to Articles refer to the 2004 Migration Law unless indicated otherwise. In this thesis all translations into English are mine except if indicated otherwise.

an irregular situation. In other words, it is neither free from tensions nor establishes an entirely open border regime or a full protection of migrants' rights.

It is the nationals of Member States of the Common Market of the Southern Cone (MERCOSUR in Spanish) who are the main target and beneficiaries of the Migration Law. Under Law 25.871, citizens of MERCOSUR countries are to be granted temporary residence permits based on nationality. To reduce the large number of irregular immigrants from countries from the region and, to a lesser degree, elsewhere, the Migration Law prescribed regularisations which were conducted in 2004 and 2005.

The Migration Law also includes stipulations for emigrants (from Argentina to other countries in the world), which is unprecedented in Argentina (Novick 2007) and an unusual combination for a major destination country. Covering emigrants alongside immigrants in the same legislation is significant given how Argentina has built its national identity on being a country of immigration (Margheritis 2016: 99).

The very advanced human rights pronouncements in the Migration Law are most remarkable since the legislation was adopted two years after a severe economic and financial crisis brought the country to the brink of bankruptcy. In the context of so-called Western liberal democracies and the scholarship on their immigration policies, economic crisis is usually associated with increased rhetorical calls for stricter border control and enforcement in light of the presence of large numbers of irregular immigrants (e.g. Castles 2004; Cornelius *et al*. 1994; Freeman 1995, 2006; Hampshire 2013; Hollifield 1992, 2004, 2008; Meyers 2000, 2004). Passing a liberal migration law in the almost immediate aftermath of a crisis by consensus and even going further by granting unprecedented rights to immigrants and regularising them is more than counter-intuitive at first sight.

1.1.1 Research questions

Given this puzzle, this thesis tries to understand how the adoption of the 2004 Migration Law was possible and can be explained. It analyses the different factors influencing the emergence of the Argentine Migration Law by looking at the following research questions.

1. Why and how did Argentina choose to base its 2004 migration policy explicitly on a human rights-based approach?

2. Can Argentina's Migration Law be considered unique and due to specific circumstances, or could it be considered a model which could be reproduced elsewhere, in other countries?

1.1.2 Defining migration policy

In other words, this thesis is concerned with migration policy, a term which can be understood in different ways (Czaika and de Haas 2013). I consider that policies on international migration 'are rules (i.e. laws, regulations, and measures) that […] states define and implement' (Czaika and de Haas 2013: 489) 'governing the selection, admission' (Brochmann 1999: 9) and exit of foreigners as well as citizens.

My definition encompasses the emigration of nationals. This element is generally neglected in the comparative migration policy literature on Western liberal democracies, which focuses on immigration (with the exception of de Haas and Vezzoli 2011). The topic of nationals leaving their country of origin is usually considered in the specific literature on diaspora policies by developing countries, but less in a systematic way in migration studies in general (de Haas and Vezzoli 2011; see also Gamlen *et al.* 2013). However, the concept of migration entails both emigration and immigration. Including exit provisions in my analysis aims to counter the general assumption in countries of destination that 'migration' only refers to immigration.

Some authors differentiate between the various types of policy, such as entry and integration (de Haas *et al*. 2014; Meyers 2000: 1246;), family reunification (Bonjour 2011), permanent residence visas, non-immigrant visas for purposes other than work, non-immigrant visas for work, welfare for immigrants, non-immigrants and asylum-seekers, and asylum-seekers in general (Freeman 2006), border control and exit (de Haas *et al*. 2014). This thesis favours a broad definition as it is concerned with the various aspects of a relatively comprehensive migration policy, including the regulation of entry, visa policy, integration, regularisation, labour migration, the exit of foreigners and the emigration and return of Argentine[2] nationals.

The discussion of migration policies in the literature has been quite controversial, which can be attributed to confusion about underlying concepts, such as between policy effects and

[2] In this thesis, the word 'Argentine' is used to denote citizens of Argentina and refers to anything from Argentina. The more common 'Argentinian' used in the United Kingdom is considered as demeaning by Argentine authorities.

effectiveness (Czaika and de Haas 2013: 488). Following Czaika and de Haas (2013: 494), it is useful to distinguish between four levels of analysis: (1) migration policy discourses, (2) the textual content of migration policies, (3) actual policy practice and (4) outcomes resulting from these policies.

The second level of analysis is presented here, being concerned with the passing of Argentina's Migration Law of 2004, the purpose of which is to stipulate 'the fundamental direction and establish the strategic basis' of the country's migration policy (Article 3.a). According to the definition I use, adopting legislation is part of policy-making. I consider that the Migration Law codifies the policy and should thus be looked at not just in legal terms, but also as a norm for political decision-making procedures. I therefore use the 2004 migration policy and Law 25.871 as synonyms. The study focuses on the 2010 regulating Decree of Law 25.871 as well as other relevant regulations and decress passed between 2004 and 2016 on migration which implement the Migration Law.[3] Where information is available I am also focusing on issues related to implementation (level 3 above). However, the main aim of the thesis is not to study the application of the 2004 Migration Law in detail or systematically as this would necessitate a different methodology. Some examples of implementation will be given to illustrate how some aspects of the Migration Law are more rhetorical than actually applied. I therefore do not address the role of courts beyond an example of the City of Buenos Aires (cf. Section 2.4.1). Studying the jurisprudence that is likely not applying Law 25.871 further than the case study cited could nonetheless provide insights into the limits of the rule of law in Argentina more generally but goes beyond the scope of this thesis. The thesis does also not study the process of the adoption of the 2006 refugee law[4] three years after the Migration Law (In Chapter 2, I nonetheless observe how the Migration Law is used as a faster protection mechanism than asylum application procedures for those fleeing violence) or the 2008 trafficking law.[5]

[3] On 30 January 2017, the President signed Decree 70/2017 DNM amending Migration Law 25.871. It could not be fully integrated in the study. I will look at the most recent developments in the conclusion in Chapter 7, as the Decree highlights the context-specificity of the adoption of Law 25.871 in 2003.

[4] Law 26.165, General Law on the Recognition and Protection of the Refugee, adopted on 8 November 2006 (see http://www.migraciones.gov.ar/conare/pdf/Ley_26.165.pdf, accessed 28 January 2017).

[5] Law 26.364, Prevention and Penalties of Trafficking in Persons and Assistance of its Victims, adopted on 9 April 2008 (see http://www.migraciones.gov.ar/accesible/indexP.php?normativa, accessed 19 March 2017).

1.1.3 Defining human rights

The concept of 'human rights' is also central to this thesis. Dembour (2010) has shown that the concept is not as clear-cut as one would expect, and has identified a number of overlapping 'schools of thought'. In this thesis, 'human rights' principally refers to international legal norms binding those states that have ratified them. In this sense, they seem to correspond to Dembour's deliberative school, which considers human rights as 'agreed upon' (Dembour 2010: 2), i.e, 'political values that liberal societies chose to adopt' (2010: 3) and exist as 'a goal rather than a fact' (Dembour and Kelly 2011: 14). However, in addition to this perspective, I recognise the natural origin of the human rights concept (Dembour's 'natural school'). Moreover, I pay attention to the importance of activists' struggles (Dembour's 'protest school'), which is particularly important in the Latin American context, where social movements have recently played an important role in fights for social justice built upon rights claims. Finally, I take the point that human rights can have a legitimising effect through 'human rights talk' in politics (Dembour's 'discourse school'), as a gap between rhetoric and practice often persists (Hafner-Burton and Tsutsui 2005).

This thesis asks how 'human rights' came to be the dominant influence of the Migration Law (whilst recognising that this did not translate into a perfect realisation of human rights practice, possibly an unrealisable utopian dream).

My findings demonstrate that some factors for the adoption of Argentina's human rights-based Migration Law are specific to the context of Argentina. At the same time, some features became a model for other countries in the region, despite having emerged in the unique circumstances of Argentina, as we will see in the next sections. Nonetheless, the implementation of Law 25.871 faces several obstacles – as do most laws – such as discrimination and racism, including discrimination of third-country nationals in the application of the Migration Law, as well as the continuing exploitation of workers undermining the application of the right to equality for foreigners.

1.2 How the Migration Law emerged

This thesis argues that only a confluence of factors can explain the human rights basis of Argentina's 2004 Migration Law. To answer the main research questions, I firstly study Argentina's long-term history and how it influenced Law 25.871. Secondly, I analyse the immediate events that gave rise to the Law, to understand the political process, the importance of time and place as well as the relevance of ideology and regional integration. Yet this does not sufficiently explain the human rights origins. I therefore thirdly consider how the last dictatorship (1976–1983) and the social resistance to it were important reasons why a human rights understanding developed. This importance of human rights discourse and norms of social justice would later resonate in the Migration Law of 2004. In combination with rising numbers of emigrants and a fast-recovering economy, the human rights discourse on migration in a sense outplayed any potential closing-down reflex during the economic crisis.

1.2.1 The historical origins of the equality of immigrants and the importance of immigration for national identity

To understand the current Migration Law, I start by reviewing the literature on how Argentina was constituted as a country, who was allowed to enter and why, and how this shaped attitudes towards immigrants – and also racism. Immigrants were the foundation of Argentina's nation-building. The aim was to receive settlers from Europe, who were thus granted rights as 'inhabitants', in stark contrast to the indigenous population, which was excluded from citizenship rights until the mid-twentieth century. Starting in the nineteenth century and immediately after independence, the Argentine government sought to populate its vast country with desired 'civilised' settlers from Northern Europe and to replace the indigenous population which the political leaders had nearly exterminated. The 2004 Migration Law thus continues to entail the types of rights granted to the early new inhabitants from the Old Continent – who arrived in considerable numbers in the nineteenth and the first half of the twentieth centuries.

1.2.2 Domestic migration politics: process, timing and actors

While the historical analysis draws out a constitutional and legal tradition of an open migration law, it is not sufficient to explain the explicit and far-reaching human rights notions, in particular for immigrants from countries in the South American region. Therefore, in 2013 I

interviewed key stakeholders who participated in this process. I further reviewed the Congress of Argentina's official records of the public debates with other actors outside of Congress and discussions within Congress between 1999 and 2003 (see CPDH 2010a, b; República Argentina 2003a, b). The qualitative interviews and the archival work allowed me to understand the political process leading to consensus on the Migration Law, the importance of timing and how human rights matched the ideology of the government in power at the time, as well as regional integration on migration.

The legislative process in Argentina's bicameral Congress, consisting of a House of Representatives and an equally powerful Senate, starts with a bill of law (*Proyecto de Ley)* being introduced by a Member of Parliament. A non-partison staff member of the congressional support unit, the *Secretaría Parliamentaria,* assigns the bill to one of the Standing Committees. In the case of Law 25.871 the Population and Human Resources Commission (CPRH in Spanish, hereafter Population Commission) of the House of Representatives discussed the bill. Rubén Giustiniani was the President of this Population Commission. He represented the Socialist Party, a small party that was part of the largest opposition bloc,[6] while President Néstor Kirchner's Peronist bloc represented the majority in both Chambers of Congress. In order to be discussed in the plenary of the House of Representatives, the majority of the Standing Committee members needs to endorse a report on the bill. For a debate to take place a quorum of at least 50 per cent of the members of the House need to be present. These and other steps in the legislative process favours bills adopted by consent and allow minority parties considerable leverage, preventing the majority party blocs from imposing legislation. Once approved by the House, the bill then also needs to be passed by majority in the Senate and afterwards needs to be approved by the President of the country, who has a veto power. Very few legislative proposals reach the stage of actually becoming a law (Calvo 2014).

Studying the actors beyond law-makers involved in the policy-making process reveals important insights. The multitude of actors lobbying for the human rights of migrants and the four-year-long preparatory process enabled the Migration Law to be passed by consensus in 2003. The executive branch, through the Ministry of Foreign Affairs, media and public opinion, focused on the destiny of Argentines abroad and was thus equally in favour of a new policy (García 2014: 8).

[6] In Argentina, a legislative bloc consists of at least three members of parliament and can represent an individual party, a party faction or several political parties (Calvo 2014: 31).

In tracing the different steps, this research highlights how the policy-making process further benefitted from timing, combining three unique circumstances. Firstly, the 2001 socio-economic crisis put the issue of emigration on the agenda of the political elite, the middle class and the public. In order to legitimise the calls for protection of the rights of irregular Argentines abroad, the government had to change its own immigration approach for the sake of political coherence. Secondly, the signature of the MERCOSUR Residency Agreement in 2002 enabled the government to justify the preferential access for nationals from other MERCOSUR countries (Margheritis 2012).

Thirdly, the political changes shortly before and during the passing of the Migration Law worked to the advantage of the reform: President Néstor Kirchner took office and promoted a human rights agenda just half a year earlier, in May 2003. In September 2003 the Inter-American Court of Human Rights published its Advisory Opinion on the principle of equality and non-discrimination also applying to irregular migrants. Just a month later the Executive agreed to solve a case brought to the Inter-American Commission on Human Rights (*De la Torre v. Argentina*, cf. Chapter 4) by civil society in a friendly settlement outside the Commission, as the government agreed on the need to reform the previous migration law and protect immigrants' rights. In addition, the Deputy of the National Congress of Argentina, Rubén Giustiniani, who was the key protagonist of the process, moved from the House of Representatives to the Senate to vote on the law twice in December 2003 (República Argentina 2003b). The imminent summer break of parliament in December 2003 further pushed for the Migration Law to be voted on. The Law was thus passed in the right place, at the right time. Since the law reform process had already started in 1999, it was continued, despite the socio-economic crisis which actually helped to pass the new Law in several rather unconventional ways.

1.2.3 Human rights activism since the last dictatorship and the link to the Migration Law

Nonetheless, neither the liberal migration law tradition nor the policy-making process itself can fully explain why the 2004 Migration Law became so advanced in the protection of migrants' rights, only why the consultations allowed the Law to be passed with consensus. During my interviews I therefore asked key informants about their understanding of human rights. This research reveals that the salience of human rights in Argentina is linked to the

traumatising experience of the last dictatorship, which lasted from 1976 to 1983. I thus apply the scholarship on transitional justice in the democratic transition in Argentina and on civil society mobilisation for domestic change to the Migration Law reform case, which makes it clear that the authoritarian past had an important influence on the emergence of the human rights basis in the Migration Law. In this way I am able to posit that the human rights basis actually enabled the passing of Law 25.871 and did not impede it, as other cases would seem to assume.

In the transitional justice period in the 1980s and 1990s, Argentine human rights activists developed successful strategies for holding the members of the military regime accountable for human rights violations committed during the authoritarian past. These processes led to the development of a strong belief in human rights in society. Therefore advocators of the 2004 Migration Law from both civil society and parliament phrased their aspirations in the language of human rights, which coincided with the ideology of the new administration of President Néstor Kirchner when he took office in 2003. The new President thus agreed to the settlement of the *De la Torre v. Argentina* case outside of the Inter-American Commission on Human Rights in favour of changing the migration law in force in Argentina. This achievement seems somewhat exceptional for a non-governmental organisation (see Grugel and Peruzzotti 2010 for the case of the Convention on the Rights of the Child).

Investigating the role of human rights in Argentina's recent history further allows us to understand the pivotal role which civil society actors played in holding the members of the military junta of 1976–1983 accountable for their crimes. The importance of civil society is exemplified through the activism of the famous Mothers and Grandmothers of the Plaza de Mayo. The relatively high standing of NGOs in Argentine politics and their experience in employing a number of strategies to achieve the protection of specific, often advanced interpretations and creations of human rights were two of the reasons why the migration law in Argentina was reformed in 2003. In this way, I am able to demonstrate that the same NGOs were able to influence the policy-making process on migration and why the topic of migration was approached from a rights angle.

Social justice was the basis for the human rights values that civil society – and both legislature and executive – agreed upon. Argentina's ratification of important international human rights instruments in 1994 was the argument used by NGO activists to make the case for reforming

the migration law dating back to the dictatorship, in the same way that other legislation was changed at the same time. The migration legislation was thus one of the laws that needed to be changed in order for it to be in line with Argentina's international human rights obligations according to the triple alliance of civil society, parliamentarians and Néstor Kirchner's administration. My key informant interviews revealed that many Argentine migration scholars and practitioners considered human rights as 'agreed upon' and a goal worth pursuing in a country that takes its international human rights obligations seriously – as stated in the objectives of its law and policy. Social justice thus helped to advance the cause of immigrants in Argentina in a distinct manner.

The constitutional tradition of granting equality to immigrants, the human rights legacy of the last dictatorship, and the timing of economic and, in particular, political events at national and regional (Inter-American) levels are factors that are specific to Argentina and explain the human rights focus of the 2004 Migration Law. Yet other factors, such as the influence of regional integration, the Inter-American human rights system (consisting of the Court and the Commission) and human rights rhetoric, are also of importance in other countries. Argentina's Migration Law became a model in the region. So why is it important to study Argentina's Law 25.871?

1.3 Significance of the case study: the Argentine Migration Law in comparative perspective

The case of Argentina's 2004 Migration Law is significant for several reasons. Firstly, it puts migration policy in a different light to that presented by the dominant scholarship on migration (dealing mostly with European and US experiences). The case concerns the study of a country that presented itself as inviting and being relatively open to immigrants in both rhetoric and on paper. Secondly, Argentina's Law 25.871 enables an examination of the way in which the Law fares in a comparative perspective.

1.3.1 More rights, fewer restrictions: countering control bias in the scholarship on immigration politics in Western liberal democracies

Studies on immigration politics in Western liberal democracies tend to be marked by a bias towards control, despite the fact that migration policies overall have become less restrictive (Acosta Arcarazo and Freier 2015; de Haas and Vezzoli 2011; de Haas *et al*. 2014). Since the 1990s, the literature on immigration politics has mostly focused on the 'liberal paradox' (Hollifield 1992) of the discourses by policy-makers being more restrictive than actual immigration outcomes in terms of numbers (eg Castles 2004; Cornelius *et al*. 1994; Freeman 1995, 2006; Hampshire 2013; Hollifield 1992, 2004, 2008; Hollifield *et al*. 2014; Meyers 2000, 2004). This so-called 'control gap' debate among political scientists can be summarised as 'why liberal states accept unwanted migration' (Joppke 1998). It highlights the tension between open economies in need of cheap labour and the political costs of immigration (Hollifield 2004: 886) through an assumed public opinion that calls for restrictions. While overall migration policies have become less restrictive, border control continues to be reinforced across countries (de Haas *et al*. 2014).

Existing studies tend to focus on control and why it is not successful. Most research on immigration politics in Western liberal democracies focuses on the efficacy gap – the extent to which implemented policies are able to affect migration (Czaika and de Haas 2013: 494); Cornelius *et al*. (1994: 3) called it the 'gap hypothesis' – or the implementation gap (the disparity between policies on paper and their implementation – see Czaika and de Haas 2013: 494). Yet both gaps are difficult to measure. 'Why migration policies fail' (Castles 2004) is then attributed to structural constraints, including those of supply and demand in labour markets in a globalised system that these policies do not and possibly cannot address.

Alexander Betts highlighted, in his seminal book *Global Migration Governance*, how this control and selection focus in policies misses one important aspect:

> *One of the greatest challenges for global migration governance is to develop structures that are compatible with and reinforce the human rights of migrants* (2011: 28).

Argentina's 2004 Migration Law is thus illustrating one such a different, human rights-based approach to migration governance (see Taran 2009: 150) with all its advances and inherent limitations. The study of advanced rights protection in Argentina's Migration Law counters

many of the control-based assumptions elaborated on above. The aim of Argentina's policy was not to restrict immigration or be selective but to be welcoming and to enable immigrants to regularise their status and thus allow them to escape from marginalisation. Policy rhetoric did not stir anti-immigrant sentiments, probably due to a preoccupation with emigrants leaving after the socio-economic crisis of 2001, a topic which will be taken up in Chapter 5.

Usually, business lobbyists are expected to be influential enough to ensure that the migration legislation remains open while politicians reply with a tough stance on immigration rhetorically in order to appease the public. In the case of Argentina, human rights NGOs rather than the private sector played a role in the passing of the Migration Law, as we have seen above. While this had been predicted by Freeman (1995, 2006), the case study sheds light on their role in establishing coalitions with two of the three government branches: the legislature and the executive, while building on an earlier alliance with the judiciary in the 1990s that led Argentina to ratify the remaining international human rights conventions.

Different immigration politics approaches can explain parts of the policy-making process on migration, but have mostly been derived from and tested on a small number of countries with similar levels of governance (democracies), development (industrialised countries) and economic systems (neoliberal). Being a relatively fragile democracy but a high-income economy that was, until recently, based on import substitution makes Argentina an interesting example to study.

1.3.2 Countering the geographical bias in studies on migration politics

Relatively little is known about the adoption of migration policies outside of a few Western countries. Acosta Arcarazo and Freier (2015) called for the need for case studies, in particular on Latin American countries, to examine these processes in depth (cf. Meyers 2004: 226). In a footnote, Freeman (1995: 882) already highlighted, more than 20 years ago, that Argentina is an interesting case to examine.

The mostly Anglophone literature focuses on the similarities and differences of a few democracies in Europe, North America, Oceania, Korea and Japan (Acosta Arcarazo and Freier 2015; Boucher and Gest 2015; de Haas *et al*. 2014: 5–6; Freier and Acosta Arcarazo 2015; and see, for instance, Boswell 2007; Castles 2004; Cornelius *et al*. 1994; Ellermann 2009; Freeman 1995, 2006; Hampshire 2013; Joppke 1998; Lee 2013; Meyers 2000, 2004). Although migration

between developing countries is at least as important as that of migrants moving from a country in the global South to an industrialised country (UN DESA 2012), migration studies and, in particular, immigration policies, are biased towards Western destination countries (Acosta Arcarazo and Wiesbrock 2015; Freier and Acosta Arcarazo 2015; Melde *et al.* 2014). Notable and fairly recent exceptions are the *Determinants of International Migration (DEMIG) POLICY database* at the University of Oxford, which includes 13 countries outside Europe, Northern America and other countries considered as Western,[7] as well as the emerging scholarship on Latin America. The latter is exemplified by the recent work of Acosta Arcarazo and Freier (2015), Freier and Acosta Arcarazo (2015), Freier (2016) and FitzGerald and Cook-Martín (2014) on migration policies of Argentina, Brazil and Ecuador and other select South American countries compared to the United States and Canada. The case study is particularly interesting and novel, as Argentina is the most important immigration country in Latin America in absolute terms of immigrant stocks (OAS 2011a, 2015) and accounts for a very high level of human development.[8]

Some native Spanish-speaking authors focused on Argentina (Giustiniani, Mármora, Novick, Ceriani Cernadas, Domenech), but did not analyse in detail the domestic politics and process behind the migration policy reform. In terms of Anglophone literature, Hines (1999, 2010) and Slater (2009) studied the Migration Law from a comparative legal perspective. Acosta Arcarazo and Freier published several seminal works (Acosta Arcarazo and Freier 2015; Freier and Acosta Arcarazo 2015; Freier 2016) from a political science viewpoint, often in comparison to other countries in the region. Bastia and vom Hau (2013) published an article entitled 'Migration, race and nationhood in Argentina' and Paulo Cavaleri (2012) wrote a short article on refugee resettlement as part of the overall migration policy. However, the Migration Law has received relatively little attention at the international level, one exception being the state-led, informal process called *Global Forum on Migration and Development (GFMD)* (2010), while academic articles, in particular critical analysis, have been relatively few.

[7] Argentina and other countries not considered to be Western liberal democracies – or at least not covered by the literature on domestic migration politics whose common denominator seems to be being developed –, such as Brazil, Chile (though an OECD member), China, India, Indonesia, Mexico (OECD member), Morocco, South Africa and Turkey. Analysis of them is thus a lot more representative than most literature on Europe, Northern America and Australia. They also include Japan and the Republic of Korea – equally OECD members but often not included in analyses of immigration policies and politics.

[8] According to the categorisation recommended by Bakewell (2009), those countries with a very high Human Development Index (HDI) should not be considered as part of the 'South' – understood as a synonym for 'developing country'. Argentina has had a very high HDI since 2011, see http://hdr.undp.org/en/content/human-development-index-hdi (accessed 18 September 2016).

Studying Argentina's migration policy-making process enables a comparative analysis. My thesis highlights differences in existing approaches through a focus on the rights protection of immigrants and on regularisations and how these measures are both unique and advance international migration law. At the same time, likening Law 25.871 to legislation in other South American and Latin American countries and to other laws around the world underlines how some of its provisions represent a regional trend and continuity as well as existing stipulations in similar legislation (see Chapter 6 for more details).

1.3.3 Linking rights, ideas and non-state actors to migration politics

The case study of Argentina innovatively illustrates how the motivations and ideals of non-state actors were able to influence the policy-making process on migration and addresses a gap in the literature. In their state-centric international approaches to regimes – such as on human rights and/or migration – neither realists nor liberals of theories of international relations take domestic factors into account, such as the creation of transnational links by NGOs (Hasenclever *et al*. 1997; Krasner 1993: 141). The influence of domestic power relations, actors and institutions on codifying human rights and, in particular, successfully advocating for compliance with the ratified international conventions have been considered key shortcomings by Haggard and Simmons (1987: 516). I take non-state actors into account, as well as the way in which these stakeholders interact strategically to achieve an increased human rights protection of migrants (Simmons 2009, see also Chapters 4 and 5 of this thesis).

The use of process tracing to study policy-making processes and actors involved beyond state representatives is an understudied field (see Gurowitz 1999; Joppke 1998). Based on Bonjour's (2011) analysis of the influence and principles of policy-makers, this thesis analyses the interests and ideas of actors beyond those state actors involved in the process. The wide range of non-state actors involved in the process in Argentina went well beyond merely agents implementing control measures delegated by the state, whom Lahav and Guiraudon (2006: 212) described in a general paper. Among the few existing studies on the different types of stakeholders and their interests, Ellermann (2009) compared actors involved in the process of agenda-setting and legislative and executive policy-making, as well as the implementation of deportation in the United States and Germany. Ellermann noted effective resistance to state coercion only after the policy was adopted. Argentina's case study differs in that, already in the policy-making stage, non-governmental organisations (NGOs) working on human rights,

migrant associations, church groups and the Ministry of Labour were able to establish an alliance with parliamentarians.

1.4 Methodological issues

1.4.1 Methodology

To study the human rights origins of the 2004 Migration Law and policy, I applied several methods. This methodology enables the combination and triangulation of methods and different sources. In addition to a review of the relevant literature from different disciplines and the legal analysis of Law 25.871, I conducted semi-structured interviews with key informants and examined archival work on the debates both within and outside the Argentine Congress. I have analysed both primary sources with qualitative data-analysis software NVivo 10, which enabled me to identify key themes.

While the official transcripts on hearings and discussions within Congress and consultations with other actors do not convey the atmosphere of those events, they enable me to identify those topics which dominated the discussions by highlighting the number of speakers referring to them and referring back to points made by previous speakers. I thus consider multiple references to a point to be more likely to represent an issue of concern as opposed to a point only made once, where it is difficult to examine ex-post how representative this point might have been.

The qualitative interviews with key stakeholders who participated in this process were carried out in Buenos Aires between September and December 2013, with a first Skype interview in August of that year. Setting up the semi-structured qualitative interviews with 54 key stakeholders took more effort than I had expected, but I achieved it within the timeframe. The interviews were mostly conducted in the Autonomous City of Buenos Aires, though some were also held with informants based in the province of Buenos Aires and in San Luís, in the interior of the country, to see whether any differences exist between the centralised and the decentralised spaces. All information from the interviews was anonymised to protect the confidentiality of the key informants; this was achieved by using numbers instead of names in the transcripts and citations in the thesis. Names are only cited where they concern key

individuals known for their roles in the archives and literature or in cases where they represent important institutions. These people both agreed in writing to be cited before the interview took place and later approved the citation, as can be seen in this study.

In the selection of interview partners, I used a range of sampling methods. I took different types of actor in the policy-making process into consideration. I thus interviewed representatives of the National Migration Directorate (DNM), which is part of the Ministry of the Interior, the Ministry of Foreign Affairs and Worship, the Ministry for Justice and Human Rights, the National Ministry of Education, the Ministry of Health of the Autonomous City of Buenos Aires, the Ministry of Labour, Work and Social Security, members of the National Congress, the Institute of National Statistics and Census (INDEC), the provincial government of San Luís, migrants' rights organisations, church groups, academics, an employers' union, a trade union and an international organisation (for exact numbers and more background information, see Annex 1). I stopped interviewing once it had become clear that new interviews would add little in the way of new insights on the policy-making process and its current implementation (see Small 2009). I did not seek representativity for this qualitative research, as that is not the purpose of key informant interviews. Instead, I follow what Small calls 'case study logic' (2009: 24), with consecutive interviews being considered as an individual example 'such that each case provides an increasingly accurate understanding of the question at hand' (2009: 24).

In addition, I used a wide range of gatekeepers, contacted counterparts directly (like the Statistics Bureau INDEC) and attended events on migration in Buenos Aires in order to establish contacts and to receive recommendations for other interviewees. Using multiple gatekeepers helped to avoid being identified with a particular gatekeeper, in either a positive or a negative way which may not be obvious to me (see Hammersley and Atkinson 2007).

Unexpected difficulties in contacting interviewees included, firstly, identifying representatives in their respective institutions who already worked there in the early 2000s when the Migration Law was discussed and adopted. Most had already changed jobs and/or institutions since then. Therefore most interviews I conducted contributed to a better understanding, such as by pointing to archival and other primary sources, assessing whether the Migration Law can be considered a model, and/or the respondents focused on how the Migration Law is applied (or not) and what challenges remain in different domains, such as the engagement with

emigrants or other ongoing programmes. Nonetheless, I was able to interview a number of key actors that were involved in the process of adopting Law 25.871 and thus mostly cite those in the thesis when they provided insights beyond other primary sources (see references).

A second aspect which I did not foresee when preparing my fieldwork in 2013 was the difficulty of accessing more than one representative of an entity for the interviews. To avoid only receiving the 'official version', up to six individuals from key institutions were interviewed (see Annex 1) in order to try to ascertain what the contradictions and the contentious points were outside of the 'public message' of the debates. It was not always easy to establish contacts with several people in the same institution as my respondents considered that one person was sufficient to communicate the institution's view. With some effort and different gatekeepers, I was still able to speak to several people in the majority of the institutions.

Unfortunately, it was not possible to gain access to any representatives of political parties, the Cabinet of the President of Argentina or the UN representative for the High Commissioner for Refugees (UNHCR). It would have been useful to analyse official party documents of the main party in power as well as those of opposition parties. However, I was told informally that no party line exists during elections. Politicians' actual agendas only emerge during the time of their term in office, as will be discussed in Chapter 5 concerning President Néstor Kirchner (2003–2007). Thus, it is still possible to understand the ideological foundations that may have contributed to the design of the migration policy. As for the UNHCR, I attended a presentation on human rights and migration in MERCOSUR in Brazil in July 2016 and talked with the UNHCR regional representative. The information I received was then validated by primary source data and used in Chapter 6 on the regional comparative dimension.

My own background in international relations (with an interdisciplinary approach based on international law, economics, political science and history) and human rights (from an interdisciplinary approach again, mostly looking at anthropology and political science), my extensive work experience in an intergovernmental organisation working on migration as well as my time as a student in Argentina in 2005 (and thus the knowledge acquired there) shaped my analysis. Having asked respondents during the in-depth interviews how they themselves understood the different concepts in which I am interested, I then tried to circumvent them in order to project my own understanding on others (see Charmaz 2006: 15). I explored themes such as the process of adopting Law 25.871, regional integration, the role of international and

regional human rights conventions, implementation, and underlying concepts and discourse (such as 'human rights', migration and migrants' rights) (see Annex 2 for my guiding questions). By framing the topic of my thesis on human rights, which I informed respondents about when contacting them for interviews and in the form providing informed consent, answers may have been biased towards rights. I thus changed the initial order of the guiding questions to focus on the process first before discussing human rights conventions and concepts, which included questions on the notion of human rights – which proved to be an important contribution of my research (see Chapter 4).

I hoped to be able to identify differences in how the process of adopting the Migration Law is interpreted. Respondents did raise some contradictions in the application of Law 25.871 but otherwise, in particular in the National Migration Directorate, provided surprisingly uniform answers. The representatives of the National Migration Directorate, at least those at the more technical level, did not want to create the impression that they were not doing their job, and provided the institutional perspective in line with the Law. This may have been related to me being a foreigner or it may have been institutional policy in general. They could, for instance, have tried to paint a nicer picture for me as an 'outsider', a European, to ensure that Argentina is portrayed in very positive terms. I ensured a reflective approach when analysing the interview transcripts. It will be difficult to ascertain whether informants '[were] willing and able to tell us what they really think' (Castles 2012: 22), which is, in itself, an important point of methodology. Therefore I compared the narratives about an event from the interviews with the official minutes of those meetings. As mentioned above, a limitation was that most interview partners were not involved in the process themselves which took place 10 years before the field work. For this reason and when possible I cited official sources, such as the meeting minutes of the well-documented process as well as the book that the proponent of the Law, Rubén Giustiniani published in 2004. The change of institutions, retirements and sometimes not being available for interview due to health or professional reasons explains the relatively low number of citations from the qualitative research conducted for this thesis. Nonetheless, some of the interviews with stakeholders that were not involved in the process itself or not working in an institution with a link to migration at the time proved to be gatekeepers for accessing those that were linked to the process.

Nationality and mother-tongue (although I speak Spanish fluently) divided me and my respondents into what is referred to in the literature as 'insiders' and 'outsiders' (see Miller

and Glassner 2011). Having been associated with the University of Buenos Aires as an invited researcher at the time and doing the interviews as part of my PhD research greatly helped to gain access to and the trust of interviewees when trying to arrange the interviews. Being an 'outsider' may have been beneficial in the sense that respondents may have explained in more detail about the process and felt less constrained than when interviewed by a co-national. Nonetheless, my European nationality, which can also be inferred from my being a PhD student at a university in the United Kingdom, may have reinforced the 'Europeanised' identity and may possibly have hidden other more important aspects. Having kept these constraints in mind during the interview and during the analysis of the data, I hope to have minimised their effect on the final analysis for the thesis. Furthermore, with the questions I asked I demonstrated my knowledge of the issues at hand, which led respondents to reply in detail.

1.4.2 Theoretical frameworks

The human rights base of Argentina's Migration Law can be traced to a multitude of factors which, together, made it possible for the Law to emerge. This diversity of factors cannot be studied through reference to one sole theoretical framework. Consequently, this thesis builds on a multitude of theoretical approaches and is very much interdisciplinary. Each empirical chapter builds on a slightly different conceptual lens: international law, history, human rights and the policy process.

Chapter 2 uses international law and migration studies. The tension between state sovereignty to decide who can and who cannot enter a country and stay and the rights of non-citizens counters the demise of the nation-state expected by some political scientists earlier on (see, for instance, Sassen 1996). While the international human rights regime has generally not been as limiting on states' sovereignty as Soysal (1994) had anticipated, the influence of these international norms on national policies can be applied to the case study of Argentina's 2004 Migration Law. However, the fragmented international migration law regime (Chetail 2012) and the national security doctrine still existant in Argentina as well, albeit with lesser influence, led to inconsistencies surrounding the extension of rights to non-citizens as will be discussed as a unique contribution to the literature in Chapter 2.

Chapter 3 builds on historical analyses, demographic approaches and studies of ethnic selection, nation-building and racism in order to trace the historical antecedents of and influences on the Migration Law. The literature on the history of immigration politics

juxtaposes the often rather covert or unnoticed demographic engineering of nations based on large-scale immigration and the official liberal principles the state and nation was aimed to be built on (Zolberg 2006). Ethnic selection has been found to influence nation-building in several case studies but also laid the ground for how racism became institutionalised across these countries, including the US (King 2002; Zolberg 2006) and Brazil (Marx 1998). The selection of a desired ethnic group to 'whiten' the nation had implications for discrimination against other ethnic sub-groups among immigrants but in particular the racial degrading of domestic ethnic groups considered inferior (King 2002; Marx 1998). FitzGerald and Cook-Martín (2014) argue eloquently in *The Democratic Origins of Racist Immigration Policy in the Americas* that liberal immigration norms and racism are not mutually exclusive. I use their, King, Zolberg and Marx's approach to demonstrate how liberal notions such as rights of individuals, and racism can co-exist in migration policy and practice as can be observed in Argentina to the present day.

Justifications for ethnic selection of immigrants can be distinguished based on assimilation as Zolberg's (2006) work on the US, individual rights or 'the notion of state-transcending community' (Joppke 2005: 24). Joppke asserts that the rights-based approach and 'positive discrimination' of a particular ethnic group are more in line with liberal principles and thus more likely to persist in liberal states, while assimilationist tendencies are more easily discredited as racist and against the principle of non-discrimination, as occurred in the US in the 1960s to keep out Asians (King 2002). The often overlapping justifications for ethnic selectivity in liberal policy is useful to study Argentina's only slowly changing preferences and complex underlying approaches in immigration policy.

Joppke (2005) further observed a demise of ethnic selection and a turn towards universalism in source countries in liberal immigration policies in a select number of case study countries. The case of Argentina's immigration history and 2004 law counters this story (FitzGerald and Cook-Martín 2014: 299–300) as will be demonstrated in Chapter 3. According to Joppke (2005: 27–28), the salience of selectivity based on ethnicity depends on wether this approach can be challenged through liberal principles, such as anti-racism, non-discrimination or other principles. As I shall argue in Chapters 3, 4 and 5, the effective exclusion of South Americans in Argentina's immigration regime provided the point of contestation by civil society and later matched the interests of the executive and legislature based on the notions of social justice and liberal rights to equality and non-discrimination but also foreign policy considerations. At

the same time, seeking ties with emigrants through citizenship provisions are taken to be an example for continuing ethnic policies (Joppke 2005: 30).

Chapter 4 concerns human rights as ideas in domestic politics and the role of civil society building coalitions to advance migrants' rights. The literature on the policy-making process of migration in Western liberal democracies considers the judiciary's expansion of rights for individual immigrants against the administration's will (Joppke 1998), and its blocking or limiting of restrictive laws (Guiraudon 2000; Guiraudon and Joppke 2001; Hollifield 2004, 2008). In addition, supranational actors like the European Union and the international human rights regime are seen as limiting the state's room for manœuvre (Sassen 1996). Joppke (1998) and other authors' (Hollifield 2004; Sassen 1996) assumptions have been considered overly optimistic in that the role of courts, particularly in Europe, only applies to a few cases – which is far from entirely changing the overall migration policy course (Bonjour 2011; Dembour 2015). The case study of Argentina counters these criticisms as a supranational actor, based on the regional human rights regime, helped to change legislation towards a higher level of protection of non-citizens as Sassen (1996) and Soysal's (1994) approaches suggest. However, this was only possible because the Executive agreed to restrict aspects of state sovereignty to protect rights of individuals. The Argentine case is rare in that not domestic courts but civil society using a supranational institution at the regional level helped to extend rights to non-nationals. Existing theoretical approaches on the role of domestic and supranational courts in immigration politics can thus only partially explain the human rights basis in Argentina's 2004 Migration Law.

To understand the role of civil society mobilisation and human rights as ideas in domestic migration politics, the chapter combines the scholarship on transnational social networks and transitional justice with ideational literature. The latter, also referred to as 'ideational turn' (Blyth 1997) in political science, underlines the role of ideas in explaining policy and institutional change by firstly analysing how certain actors use the substantive content of ideas such as rights as vehicles. Boswell and Hampshire (2017: 134) categorize these approaches using ideas as tools mobilised as 'instrumentalist', contrasting them to 'institutionalist' approaches that take ideas such as norms as constraints on actors. A useful concept from an institutionalist perspective is the concept of 'social learning', developed by Hall (1993) to study how the perceived outcome of a previous policy and new ideas by actors beyond the government lead to shifts in overarching 'policy paradigms' (or what Schmidt (2008, 2010) calls

philosophies embraced by both the public and policy). 'Discursive institutionalism' as put forward by Schmidt (2008, 2010) seeks to combine both instrumentalist and institutionalist approaches to explain why, when and where ideas are used and how they can influence actors at the same time and beyond large (mostly external) shocks that Hall (1993) studied. Agency is then explained both by (sometimes newly) constructed ideas and exchange about them, such as how transnational activists helped spread international human rights norms to developing countries (see Finnemore and Sikkink 1998). Schmidt (2008, 2010) focuses on three levels, being philosophies, policies and programmes. Based on these levels, Boswell and Hampshire (2017) highlighted several discursive strategies: using ideas by emphasising one of Schmidt's three levels (world views, policies and programmes) and glossing over the two others; selectively mobilising notions of philosophies and leaving the more problematic aspects aside; or establishing a connection with previous programmes or policies by invoking the idea of 'policy legacies' (see also Hall 1993). However, at the theoretical level studying the motivations and causal links between actors' mobilisation and agency and policy change still lack clarity (Berman 2013: 223).

The notion of human rights as ideas is a normative variable (see Schmidt 2008, 2010). In addition, rights also represent an ideology, which can be defined as 'creat[ing] their own communities, composed of individuals joined to each other by nothing more than belief in and commitment to the ideology itself.' (Berman 2013: 225) I study the concept of human rights as an ideology that was able to unite a diverse group of actors with similar morals and ideas in Argentina in the 1980s and 1990s, which greatly influenced the approach to migration policy change in the early 2000s (see also Chapter 5 for the latter). Bonjour (2011) similarly described ideas, norms and beliefs of policymakers as a vehicle for change in a case study of family reunification in the migration policy of the Netherlands. Process tracing was recommended by Schmidt (2008, 2010; see also Hall 1993 and Berman 2013: 220 discussing Hall), which I also use for the migration policymaking process in Chapter 5.

Yet the case study of Argentina goes beyond the political arena on migration policymaking, meaning '(a) coordination among policy actors in policy and program[me] construction and (b) communication between political actors and the public in the presentation, deliberation, and legitimation of those ideas' (Schmidt 2008: 322). To explain the development and success of advocacy strategies in courts, I refer to the approaches by Sikkink (2005, 2008) and Finnemore and Sikkink (1998) on transitional justice and strategic advocacy coalitions by social activists

and Simmons (2009) on the domestic politics of compliance with international norms. My contribution is that I newly apply these insights from the scholarship on human rights to the field of migration policy-making. Sikkink termed strategic alliances by social movements with transnational actors for achieving human rights accountability 'insider-outsider coalitions' (2005), while Blyth considers ideas as common goals as 'coalition-building resources' (2002: 37). This is an example of how discoursive interaction can emanate from below and not top down by or among political elites (see Schmidt 2008: 311, 2016: 329). Yet legal strategies have received less attention in this scholarship, albeit being closely linked to discourse and 'change through ideas that contest the status quo' as described by Schmidt (2011: 118) with a focus on protest leading to agenda setting. I build on Sikkink's transnational social movement approach in the empirical chapter on human rights by identifying such a strategic 'insider-outsider coalition' (Sikkink 2005) but also rights as ideas that were mobilised by civil society and later taken up by the judiciary, executive and legislature. In addition, I build on Beth Simmons' (2009) work on strategic litigation by social movement actors. A precondition of her approach, however, is the ratification of international human rights instruments. As this was not the case in Argentina in the early 1980s, social movement scholarship by authors such as Brysk (1993), Levy (2010), and in particular Sikkink (2005, 2008) and Sikking and Booth Walling (2006) highlight how human rights NGOs first developed different coalitions to put human rights norms on the domestic political and judicial agenda and later enshrine them in legislation at national, regional and international levels. This legal entry point then further helped to mobilise human rights norms as ideas, including on migration policy.

The political science literature on ideas further alludes to how ideas relate to interests and power positions. Blyth underlined how ideas and interests are 'essentially embedded elements of institutional change' (2002: 7), and 'how, in periods of economic crisis, ideas both give substance to interests and determine the form and content of new institutions.' (2002: 15) A theoretical shortcoming is the case when migration policy (change) is not driven by economic interests. Ideas can explain how actors' motivations go beyond material interests and thus 'have other, nonmaterial interests and goals' (Berman 2013: 231). Having access to decision-makers is decisive as to whether certain ideas become part of the public philosophy (see Schmidt 2008, 2010) or not. In the words of Schmidt, 'actors can gain power from their ideas even where they may lack the power of position – as in the case of social movements or entrepreneurial actors who set the agenda for reform in policy or political spheres.' (2010: 18) Certain actors, such as civil society activists, can become influential with the help of ideas.

Chapter 5 uses comparative approaches to immigration politics and the migration governance literature to study the process, actors and timing of events that led to the adoption of the 2004 Law 25.871 in Argentina. In so doing, the chapter refers to the issues of client-based and other interest group-based politics, embedded rights, institutionalism and 'institutional legitimacy', state imperatives as well as ideas mentioned above. Gary Freeman's (1995, 2006) political economy approach considers small, organized groups lobbying for policy change as 'client politics' (1995: 886; 2006: 229). According to his model of four policy typologies, '[c]oncentrated benefits and diffuse costs produce client politics' (Freeman 2006: 229), meaning a 'client' such as employer interest groups using their influence to push for more legal immigration. However, Freeman's (1995, 2006) approach has been criticized as overemphasizing the role of the typical organized groups of employers and businesses (see Boswell 2007; Hampshire 2013; Joppke 1999; Statham and Geddes 2006) which may not hold true outside the US, including in Argentina. Some evidence speaks for Freeman's argument though (Hampshire 2013: 42–43). Georg Menz (2009) contrasts the economic gains of labour migrants and the resulting relative success of employers' lobby groups and trade unions to refugees and asylum seekers. He finds that in Europe humanitarian NGOs advocating for the latter are less successful than business interest groups as humanitarian migration is met with more resistance by the public. As stated above, while Freeman (1995, 2006) mentions the role of human rights organisations lobby work, theoretical approaches cannot really account for policy change in the absence of clear economic interests. The 2004 migration policy in Argentina points out how existing theories can only contribute in part to the study of Argentina's Migration Law of 2004 based on human rights motivations.

The extension of liberal rights to migrants ('fairness' or issues of redistribution in a welfare state, Boswell 2007: 90) follows the logic of 'embedded liberalism' (Hollifield 1992). This institutionalist approach seeks to explain how rights granted to individuals in liberal democracies link certain entitlements to the extension of those rights to other minority groups, including immigrants, refugees and asylum-seekers. This poses limits on the state's ability to restrict these rights (Freemann 2000; Guiraudon 2000; Hollifield 1992; Joppke 1998). Hampshire has labelled this aspect 'constitutionalism' as part of four 'contradictory imperatives of the liberal state' (2013: 2). Tichenor (2002, 2008) further draws attention to unusal coalitions between more conservative, pro-employer lobby groups and those supporting the civil rights of immigrants in pursuit of more open immigration policy.

Human rights as ideational values invoked by civil society actors can help to explain why certain audiences in Argentina were receptive, matching the interests of different political actors. One helpful notion coined 'institutional legitimacy' by Boswell includes aspects of 'the rule of law, separation of powers, conformity with the constitution and respect of civil liberties' (Boswell 2007: 91). Boswell's approach is 'useful to account for the state's dilemma of wanting to meet competing requirements and expectations, and thus, possibly intentionally choosing incoherence in the field of immigration politics' (Acosta Arcarazo and Freier 2015: 29), as can also be seen in Argentina's Migration Law of 2004. Hampshire's (2013) four state imperatives of representive democracy, constitutionalism, capitalism, and nationhood equally aim to address these conflicting notions in immigration policy-making. While neoliberal, economic arguments apply less to the case at hand, legislative processes, building the nation and constitutional rights are part of the factors that explain the 2004 migration policy in Argentina.

Bonjour (2011) and Acosta Arcarazo and Freier (2015) question the validity of both political economy and neo-institutionalist approaches as biased towards the 'control gap' described above. Contrary to most other existing case studies in the literature, in Argentina the political discourse was liberal and not restrictive and led to a liberal policy (Acosta Arcarazo and Freier 2015; see also FitzGerald and Cook-Martín 2014). Developing Boswell's 'Third Way' as alternative to political economy and neo-institutionalist approaches further, Acosta Arcarazo and Freier (2015) call for a study of different actors' interests and which norms state actors actually take into consideration or are able to integrate in policies. Boswell (2009) also ascertained that evidence from research can play a role in the process of legitimation by political actors. These works form the basis for my conceptual approach in this chapter.

The extent to which existing theories on migration politics can help explain the Argentine case is rather limited and patchy. I will discuss the limitations of the underlying control and geographical assumptions in the theoretical approaches to migration policy in the conclusion in Chapter 7 by underlining how the case study of Argentina questions some of these theoretical lenses. Being only able to explain cases dominant in the scholarship on migration politics highlights the weaknesses of those theories.

The concept of migration governance is not a particularly well-developed field, therefore theoretical approaches are few. Studies on migration governance tend to focus at different inter-state levels – bilateral, regional, transnational or supranational (Betts 2011: 4). The stages involved in governance include agenda-setting, negotiation and consensus building, and the application of the new approach, for instance by amending migration laws and policies (Acosta Arcarazo and Geddes 2014: 29; Betts 2011: 4). Emma Carmel (2016; forthcoming) recently developed a less state-centric approach which includes actors, processes and structural conditions in 'governance analysis' at the domestic level, as 'social actors engage with, selectively interpret and reproduce complex policy-making and governance environments in political processes which unfold over time' (Carmel forthcoming). In this approach, she includes the impact of policies and the actual room for manœuvre of different social actors in a wider socio-economic context, which seems to account better for the Argentine case at hand than the state-centric definitions of political scientists such as Betts. I will thus use Carmel's approach to governance to study Argentina's migration policy-making process, in combination with the stages involved which Betts developed. Human rights are the shared values and interests that Bonjour (2011) and Boswell (2007) have identified in domestic migration politics and that are the basis for Argentina's 2004 Migration Law.

Chapters 6 and 7 build on the theoretical frameworks laid out in particular in chapter 5 on immigration politics, comparing the Argentine case to migration policies in other countries (Chapter 6). The concluding Chapter 7 underlines the contribution of the Argentine case study to the literature by countering many existing theoretical approaches that mostly seem to apply to a small number of case studies in the Global North.

1.5 Outline

The thesis is divided into three parts. The first part introduces the Migration Law, with Chapter 2 setting the scene by analysing the Migration Law itself. In addition to focusing on its extraordinary features, Chapter 2 asks if Law 25.871 is really as unique and far-reaching as proponents say, by drawing out certain tensions and inconsistencies.

The second part of the thesis is devoted to the factors that explain the emergence of the human rights basis for Argentina's Migration Law and why it was developed in Argentina. Chapter 3 explains the historical background and how the Migration Law resonates with

elements of Argentina's history and consciousness of itself. The chapter describes the long-term history of Argentine immigration, nation-state building and the link to national identity. This helps to underline the fact that the government aimed to attract Europeans as settlers and granted them equal rights. When the long-standing labour immigration from neighbouring South American countries became more important and visible after the 1960s, these migrants were left out, as the constitution and migration law continued to focus on Europeans. This only changed in the early 2000s, with the ideological perception of South America being morally better than Europe, whose immigration policies were rejected as restrictive.

Chapter 4 looks at where the human rights focus came from. It starts by presenting how human rights consciousness developed in Argentina in the 1980s and 1990s and how the country has been at the forefront of developing new norms, despite not being a country traditionally considered as Western. Chapter 4 draws out how civil society was able to build a coalition with the judiciary, resulting in Argentina ratifying international human rights conventions. The main human rights activist organisations then built on their successful strategies in litigation at both domestic and regional levels and applied them to a migration case, thus linking up with the Executive in pushing through domestic change against the will of the judiciary, which opposed the migration law reform.

Chapter 5 studies the actors and the temporal occurrence of events in the migration policy-making process. It highlights how the 2001 socio-economic and political crisis actually helped, by having an administration and legislators in charge who were interested in appeasing the increasing number of Argentine emigrants. This linked well to the ideals of civil society, which aimed to push for the protection of immigrants, in particular those from the MERCOSUR region. Regional integration in the Southern Cone became highly politicised and based on the ideology of the left-wing governments in power, building an identity at the regional level through a politically motivated human rights discourse by post-neoliberal governments (Margheritis 2012, 2016). Argentina was one of the leaders of this development, especially by actually changing its migration policy.

Part 3 then discusses the global significance of the study. Chapter 6 puts the findings on Argentina's Migration Law in a comparative perspective. Argentina clearly became a trend-setter in the South American region, where several other countries adopted similar human rights-based legislation on migration. At the same time, Argentina's Law 25.871 followed

existing tendencies in the region, notably on humanitarian entry categories and emigrant provisions in the migration legislation. Compared to other existing laws, Argentina's Migration Law is not as far-reaching in terms of free movement at the regional level as the European Schengen area, but it established other advanced stipulations on due process safeguards prior to expulsion and on criminal records impeding entry.

The study closes with concluding observations in Chapter 7. The rights focus of Argentina's Migration Law can only be explained within specific historical circumstances, already illustrated by the changed, more restrictive stance on immigration adopted by the administration of President Mauricio Macri (2015–present). The case study contributes new insights into a country from outside the traditionally considered 'Western liberal democracies'. Applying the scholarship on social movements and transitional justice revealed why the human rights of migrants were not only an unlikely focus when viewed from the outside, but were also actually decisive in the case of Argentina. The notion of rights helped to pass arguably the most advanced legislation in protecting migrants' rights worldwide.

Chapter 2: Migration Law 25.871: human rights basis and limits

> *The ground-breaking premise of Law 25.871 – that the right to migrate is a human right – is a significant advancement in the promotion of the human rights of immigrants* (Hines 2010: 509).

The human rights basis of Argentina's 2004 Migration Law 25.781 represents a historical achievement. Some of the human rights-based provisions in the Migration Law of 2004 are actually more advanced than those codified in existing international law. This is true of the right to migrate and, to a large extent, of the principles of equality and non-discrimination, which are applicable to immigrants in both a regular and an irregular situation.

However, this does not mean that the law provides for absolute and limitless protection for migrants. '[Argentina's 2004 Migration] […] [L]aw does not provide for open borders, it nevertheless reflects a philosophical and human rights orientation' (Hines 2010: 488; see also Domenech 2013). Immigrants in an irregular situation still face substandard housing and employment barriers. Furthermore, another problem is that some of the practice is not in accordance with the law, which is an issue faced by most policies, not just on migration (Bonjour 2011: 91; Czaika and de Haas 2013: 492; see also FitzGerald and Cook-Martín 2014).

The Migration Law includes several features worth noting, as follows:

1. **The right to migrate:** Article 4 enshrines the right to migrate – to both immigrate and emigrate. Yet Article 4 is not entirely universal in application. Immigrants still need to fit into immigration categories, mostly limited to those immigrants with a work contract and/or who are nationals of a member-state of MERCOSUR.

2. **The equality and non-discrimination of migrants – up to a point:** The Migration Law reflects the tension between the state prerogative to decide who can enter and stay in the country and the protection of the individual rights of non-citizens. The extent of the right to migrate and the principles of equality and non-discrimination of migrants – including those in an irregular situation – enshrined in

Law 25.871 make it exceptional though, at the same time, not free of inconsistencies.

3. **The state obligation to regularise undocumented migrants:** A third noteworthy aspect is Article 17, which stipulates that the state has to adopt measures to regularise foreigners who are in an irregular situation. Argentina was facing unknown numbers of immigrants from the region who had no legal means by which to regularise their status until 2004. Article 17 provided the basis for regularisation programmes for both extra-regional and intra-regional immigrants in 2004 and 2005, as well as specific programmes for nationals of the Dominican Republic and Senegal in 2013 and the Republic of Korea in 2014. While the 2004 Migration Law shifts the focus from expulsions to regularisation (Freier and Acosta Arcarazo 2015: 46), piecemeal regularisations still need to be used to correct the shortcomings of the overall migration policy.

4. **Freer movement for MERCOSUR nationals:** Nationals of MERCOSUR member- and associate states[9] receive preferential treatment under Law 25.871. Nonetheless, immigration control measures for immigrants from the region have not entirely subsided. In practice, a few thousand nationals of MERCOSUR countries and associate states continue to be expelled (DNM n.d.a), expulsions which are linked to some immigrants from the region still not being able to regularise their status. In addition, this preferential access for intra-regional immigrants *de facto* excludes nationals from third countries, representing an unintended side effect of the goal to facilitate movement within the MERCOSUR bloc.

5. **Access to justice:** Contrary to the previous law, the 2004 Migration Law – on paper – enables immigrants to access justice in expulsion proceedings. However, at least in the large city of Buenos Aires until 2010, the National Migration Directorate continued to detain immigrants without being ordered to by a competent judge as called for in Article 70.

6. **The right to vote:** Article 11 extends the right to participate in decisions relative to public life and the local administrations in Argentina to foreigners in the areas in

[9] Nationals of the MERCOSUR member-countries of Brazil, Paraguay, Uruguay and Venezuela, as well as of the associate states of Bolivia, Chile, Colombia, Ecuador, Guyana, Peru and Surinam.

which they reside. Immigrants can therefore vote in municipal and provincial elections in a few provinces but not in national polls (Ceriani Cernadas and Freier 2015: 24–25). At the same time, Argentine nationals residing abroad have had the right to vote, even in presidential elections, since 1991. Immigrants are thus treated less equally with regards to voting rights than are Argentine citizens. However, the voting rights of immigrants are noteworthy.

7. **The inclusion of emigrants in the Migration Law:** In an unusually comprehensive approach, Argentina's Migration Law does not only focuses on immigrants but also covers Argentine emigrants, albeit in only three of the 126 articles in total.

The competent authority for the implementation of the Migration Law is the Migration Directorate (Article 107). In terms of entry into force, Law 25.871 repeals the previous legislation, which is referred to as the 'Videla Law' based on the military general of the last dictatorship (1976–1983) who was in charge when it was adopted in 1981, and on the latter's regulation (Article 124), yet not without contradictions. Article 124 of the current Migration Law stipulates that the Videla Law and its regulation remained in force until the 2004 Law and its regulation entered into force (Gordillo 2004). Thus, until 2010, when the regulation finally entered into force, the migration agency continued to implement the restrictive regulation of the Videla Law. This could be described as the influence of the domestic 'organisational culture' (Legro 1997: 37, 58) that still prevailed within Argentina's migration agency on compliance with the new domestic norms on migration. While the new Migration Law needed to be implemented with or without an accompanying decree, in practice the administration of the DNM – the organisation in charge of the realisation of the law – waited for a decree issued by the Executive to actually apply to at least some parts of the law (Interview 2, 14 November 2013; Interview 40, 9 December 2013; Gordillo 2004).

The decree is considered to be a compromise of sorts. Whereas some articles are regulated in more detail, others are left open and are prone to controversies over their interpretation by the DNM on the one hand, and certain ministries, civil society and academics on the other. Nonetheless, the overall spirit of the law has not been changed in the regulation, contrary to that which often tends to occur (Interview 2, 14 November 2013 with Rubén Giustiniani). This can be considered a success in itself.

Implementation issues and the inherent contradictions of the Migration Law are understandable. The tension between state sovereignty and the aspiration of universal human rights is unescapable in today's world (see, among others, Chetail 2012; Dembour 2015; Perruchoud 2012). Yet it is important to analyse the more subtle inconsistencies of the Migration Law that its proponents have not necessarily dwelt on. The contribution of this thesis is to for the first time drawing out the limitations, contradictions and discrepancies in the 2004 Law.

This chapter will analyse the Migration Law's more liberal features with regards to the rights of migrants and 'the promotion of free human mobility' (Freier and Acosta Arcarazo 2015: 33) as well as its possible limitations. In it I will draw out the unique 'right to migrate' enshrined in Article 4 of Argentina's 2004 Migration Law and its potential limits. The second part focuses on the principles of equality and non-discrimination in the law which follow the Inter-American Court of Human Rights' (IACtHR hereafter) 2003 *Advisory Opinion No. 18* on irregular migrant workers.[10] Section 3 focuses more specifically on the provisions for nationals of MERCOSUR and its associate states and the new focus on the state obligation to regularise immigrants. The last section then highlights the important issue of access to a judge in the expulsion proceedings of immigrants, and of other political and civil rights, which may be guaranteed on paper but not yet in practice. Despite some of its inherent contradictions and shortcomings, the 2004 Argentine Migration Law represents a significant leap in the progression of the human rights of migrants.

2.1 The right to (im- and e)migrate

2.1.1 A new category in international law: the right to immigrate

Probably the best-known feature of Argentina's 2004 Migration Law is the 'right to migrate' enshrined in Article 4. Uniquely, Article 4 of Argentina's Migration Law does not limit the right to migrate to workers *per se* – as is called for in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) – but extends it to all individuals. Therefore, the right to migrate goes beyond the provisions of the ICMW, albeit

[10] IACtHR *Juridical Condition and Rights of Undocumented Migrants.*Advisory Opinion OC-18/03 (IACtHR), 17 September 2003.

that the latter reflects a limited state practice with a minority of only 49 states being party to the ICMW to date[11] (Hines 2010: 488). Law 25.871 is also more liberal than the Convention as the Argentine right to migrate includes the state obligation to guarantee it (Novick 2008).

With the right to migrate, Argentina established a new concept, as the binding international human rights conventions do not entail a complementary right to the right to leave one's country (Hines 2010: 472–473). In international law, the right to leave one's country of nationality or long-term residence is legally codified in Article 12 of the International Covenant on Civil and Political Rights (ICCPR), which builds on the non-binding Universal Declaration of Human Rights. The ICCPR specifies that '[e]veryone shall be free to leave any country, including his [*sic*] own' (Article 12.2 ICCPR) and that '[n]o one shall be arbitrarily deprived of the right to enter his [*sic*] own country' (Article 12.4 ICCPR). The right to leave and return to the country of nationality is binding on all states that have ratified the ICCPR[12] (Chetail 2012: 60, 65) and has been considered to be customary international law (Perruchoud 2012: 130), which means a state practice accepted as law and the conviction by states to be bound by the norm even if they did not sign the ICCPR or other relevant treaties. However, this right can be subject to 'restrictions […] provided by law, [that] are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant' (Article 12.3 ICCPR). However, fewer countries – including but not limited to, China, Cuba and the Democratic People's Republic of Korea, restrict the right to leave one's country compared to the right to immigrate (Perruchoud 2012: 141–142; see also de Haas and Vezzoli 2011).

International law on migration is far from coherent. It has been described as 'a giant unassembled juridical jigsaw puzzle' (Lillich 1984: 122, cited in Chetail 2012: 91) with an unknown format. International migration law is based on 'substance without architecture' and lacking coherence (Aleinikoff 2007: 467, 468). The known pieces of the puzzle are international treaties – such as the core human rights conventions and treaties for specific types of migrants

[11] As of 5 January 2017, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en.

[12] 168 states ratified the ICCPR, and 7 of which are signatories which entail a number of obligations (as of 5 January 2017, http://indicators.ohchr.org/). A number of other global human rights treaties protect the right to emigrate and re-immigrate to one's own country, including the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5), the almost universally ratified Convention on the Rights of the Child (CRC) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW). At the regional level in the Americas, Article 22 of the American Convention on Human Rights (ACHR) enshrines the right to leave and return to one's country (Perruchoud, 2012: 127–128).

(refugees, migrant workers, and trafficked and smuggled persons) – international customary law norms and 'soft law', meaning non-binding declarations such as the Universal Declaration of Human Rights and other instruments (Chetail 2012). The issue with many of these conventions and, in particular, with their implementation at national level, is that the concept of 'human being' is linked to 'citizenship', and thus distinguishes the applicability of the treaties between citizens and non-citizens. Argentina overcame these distinctions in some regards.

Contrary to what happens with regard to their nationals leaving and returning, states have the authority to decide which non-nationals to admit as long as the admission criteria are in line with the principle of non-discrimination. Discretion by states is thus considerable (Perruchoud 2012: 131), a situation which Argentina aimed to reduce by introducing the right to migrate. The right of entry under Argentina's Migration Law is thus far broader than that proclaimed in most countries and provided for in international human rights law.

2.1.2 The potential and limits of the right to immigrate

The explicit objective of Argentina's Migration Law is to 'abide by the intrinsic obligations in the field of human rights, integration and mobility of migrants' (Article 3.a). Article 4 of the 2004 Migration Law considers migration as an 'essential and inalienable' right that needs to be guaranteed by the government. The right to migrate enshrined in Article 4 of Law 25.871, however, does not apply to 'any' immigrant through restrictions in other articles of the law and is thus not entirely universal.

Immigrants from the MERCOSUR region can enter Argentina based on their nationality. The country unilaterally implemented the 2002 MERCOSUR Residency Agreement in the 2004 Migration Law a few years before the Residency Agreement entered into force in 2009. The Residency Agreement arguably provides the right to movement and thus to immigrate within MERCOSUR ratifying states.[13] Articles 23 (l) of Argentina's Migration Law and its 2010 regulation provide citizens of MERCOSUR member- and associate states with the right to

[13] The Residency Agreement applies to nationals of the MERCOSUR member-states of Argentina, Brazil, Paraguay and Uruguay, as well as the associate states of Bolivia, Chile, Peru, Colombia and Ecuador. Although Venezuela has been a MERCOSUR member since 2012 and Guyana and Surinam have been associate states since 2013, as of March 2016 they had not ratified the Residency Agreement – see http://www.mercosur.int/innovaportal/v/6425/5/innova.front/residir-y-trabajar-en-el-mercosur (accessed 5 January 2017).

enter, reside and work in Argentina for two years. The 2004 Migration Law, however, ends neither border controls nor application procedures for residency permits.

Like the equality provisions analysed below, the right to migrate reflects but also extends constitutional safeguards for immigrants dating back to 1853. Article 25 of Argentina's Constitution of 1853 is still part of the current Constitution in force since 1994. It stipulates that immigrants wanting to work in Argentina cannot be prevented from doing so.[14] Among the possible entry categories in Article 23 of the 2004 Migration Law, paragraph a) excludes self-employed workers from the categories of migrant workers to be admitted. The latter are defined as having to work in a 'relation of dependence', meaning that they need a work contract to enter the country. The requirement of a job offer reflects the criteria of productivity of immigrants enshrined in constitutional law since the nineteenth century. Article 19.c) specifies that only after entering the country with a work contract can someone become an independent worker. Once an immigrant receives permanent residence status, self-employed work is possible (Article 51). So without a permanent status, freelance work is almost impossible, in particular for those who do not receive automatic temporary residence permits as is the case for MERCOSUR nationals.

Third-country nationals are thus effectively excluded from self-employment and therefore legal entry. This has led the Senegalese – who mostly work as street vendors – to face problems with regularising their status. The DNM had to pass a decree in 2013 (cf. section 2.3) to allow all Senegalese to regularise. However, this has not helped those who entered the country after June 2013, when the deadline of the decree expired, nor those who could not provide the required documentation on time or who were simply not aware of the possibility of receiving temporary residency.

'Transit residents' represent another category of entry of migrants banned from taking up remunerated activities, but who can at least enter the country. Transit residency categories include tourists, transit passengers, those involved in border transit from neighbouring countries, airline personnel, seasonal workers, academics, those nationals entering to receive medical treatment and others with specific reasons authorised by the DNM (Article 24). Only seasonal workers, those with authorisation from the DNM or those covered by international agreements are allowed to work (Article 52). However, it seems unlikely that no tourist ever

[14] 'The federal government will promote European immigration; and cannot restrict, limit nor levy any tax on the entry of foreigners into Argentine territory who come with the objective to work the soil, improve the industries, and introduce and teach sciences and arts'.

engages in any work, given the popularity of the country, in particular for young travellers, although no data are available on those who might be working on tourist visas.

Until a residence permit in one of the other residency categories (permanent, temporary or transitory residents) is issued, a so-called 'precarious residence' is granted temporarily for up to 180 days. Article 29 enshrines the conditions which exclude a foreigner from obtaining any residence status.[15] These impediments to a legal status in Argentina can be waived by the competent authority responsible for the implementation of the law – the DNM (Article 107) – for family reunification or humanitarian reasons, which are thus the only justifications considered more important than having to fit into work or nationality-related immigration categories.

Article 29.c) and its regulation govern which criminal records and sentences impede entry into Argentina. The two conditions are only taken into account if they constitute a crime under Argentine law and imply at least three years of jail time.[16] In practice, Article 29 of the Argentine Migration Law would mean that, if homosexuality is illegal in the country of origin and someone has been condemned for it, that person would not be counted as having a criminal record or having a verdict against them when entering the country, as Argentina does not criminalise homosexuality. One could argue that the general principle of double incrimination applied in international criminal law could also be applied to immigrants who want to enter a country. Double incrimination means that a person will not be extradited to another country for a crime or felony which is not punishable under the legislation of the state that has been requested to extradite the person. Since states prefer to retain discretionary power in decision-making on migration, Article 29.c) is rather unusual. The right to (im)migrate is thus largely limited to nationals of MERCOSUR and associate countries and immigrant workers with a job offer, thus barring third-country nationals from entering. Furthermore, the right to migrate even does not fully apply to nationals from the South American region, given the continuous expulsions of those in an irregular status as explained in Section 2.3.1 below. Its application is thus limited despite its universal claim and needs to be problematised more.

[15] These conditions include falsifying documents (Article 29.a), having been denied entry, having been expelled or denied re-entry (Article 29.b), having committed a crime that is subject to three years in prison in Argentina (crimes that are not punishable under Argentine law are not taken into consideration, Article 29.c), having committed crimes against humanity, war crimes, genocide (Article 29.d), smuggling migrants into Argentina (Article 29.f), having promoted prostitution (Article 29.h), having avoided immigration control (Article 29.i) or not complying with the requirements of the law to obtain a residency status (Article 29.k).

[16] The new Decree 70/2017 DNM 2017 reduces this to 0 years, not allowing anyone with a criminal record regardless of crime to enter the country and thus be deported if already in the country.

2.1.3 Humanitarian protection through the right to immigrate

The inclusion of a humanitarian entry category stands out as part of a migration policy. Article 23.m) of Decree 616/2010 DNM (2010) specifies humanitarian reasons as a category of temporary admission. Humanitarian reasons apply in the case where a person is not granted refugee protection under the 1951 Convention Relating to the Status of Refugees (Refugee Convention) and 1967 Protocol but falls under the principle of *non-refoulement* and cannot regularise their immigration status under any other article of the Migration Law (Article 23.m) Regulation of the Law. The Migration Directorate determines whether this 'special treatment' will be granted, making it less a right and more a political decision.

It was possibly the lack of specific refugee legislation until 2006 which led to the inclusion of 'fleeing conflict' as an entry category in the Migration Law. This is to the advantage of persons fleeing the Syrian conflict, as refugee determination procedures take considerably more time. Nationals of the Syrian Arab Republic and Palestine represent one such humanitarian case in Article 23.m) of Law 25.871. With Order DNM 3915/2014, which expired in October 2015, was subsequently extended by one year in 2015 (Order DNM 4499/2015) and – in 2016 (Decree DNM N°4683/2016) – until the conflict ends, Syrians and their families, together with Palestine nationals residing in Syria after having been assisted by the United Nations Relief and Works Agency for Palestine Refugees (UNRWA), are granted humanitarian visas under the so-called 'Syria Programme' ('Special Programme of Humanitarian Visas For Foreigners Affected by the Conflict in the Syrian Arab Republic'). These entry visas entail a temporary residency permit for two years, which can be renewed for another year. After those three years beneficiaries can apply for permanent residence. Interestingly Argentina thus uses its general Migration Law to provide protection to those fleeing the violent conflict in Syria and *not* its 2006 refugee law. Between 2011 and 2015, 290 Syrians were granted refugee status (CONARE 2017). The 'Syria Programme' led to the granting of 502 humanitarian visas between October 2014 and 14 October 2016 (DNM 2017). While this figure is considerably higher than that for those granted protection status under Refugee Law, it remains a very small number compared to those in the major destination countries for Syrians – such as Turkey and Lebanon, which each host millions of Syrian refugees.

In 2005 Argentina started a resettlement programme for refugees – with the support of the United Nations High Commissioner for Refugees (UNHCR) – which is linked to the 2004 Mexico Plan of Action to resettle Colombians, in particular (Cantor 2015: 198; Cavaleri 2012: 49). However, with about 5,000 refugees overall (UNHCR 2016), Argentina hosts only a small number. Annual refugee applications did not exceed 1,000 between 2003 and 2015, except in 2012 and 2015 – due to the increase in applications from Senegalese nationals (CONARE 2017; see Table 2.1) who were not able to use other immigration channels.

Table 2.1: Asylum applications in Argentina by main nationalities 2011–2015

Nationality	2011	2012	2013	2014	2015	Total	In %
Senegalese	89	**706**	78	100	**419**	**1,392**	**28**
Other	163	193	111	164	167	798	16
Colombian	342	222	88	58	53	763	15
Cuban	38	52	109	153	169	521	10
Syrian	0	50	122	91	159	422	9
Dominican	135	171	9	45	42	402	8
Haitian	28	11	52	65	110	266	5
Ukrainian	6	6	5	86	106	209	4
Indian	14	32	30	56	23	155	3
Nigerian	54	24	10	12	14	114	2
All	869	**1,467**	614	830	**1,262**	**5,042**	**100**

Source: CONARE (2017: 4).

Note: Highlights by author.

Cavaleri (2012: 49) thus concludes that 'Argentina has chosen to adopt a different strategy: an open and human rights-based migration policy, preserving the resettlement [of refugees] tool for a smaller caseload of persons with specific protection needs' and thus treating migration as a 'tool of protection'. An example he cites are Colombians, of whom 'a substantial proportion … have special protection needs but […] preferred to enter the country as regular residents rather than as refugees' (Cavaleri 2012: 49; see also Table 2.2 which shows that the low number of Colombians having been granted refugee status equals 21 per cent of asylum applications).

Table 2.2: Refugee status granted in Argentina by main nationalities 2011–2015

Nationality	2011	2012	2013	2014	2015	Total	In %
Syrian	0	40	136	59	55	290	**39**
Others	15	47	60	14	24	160	**21**
Colombian	55	42	49	5	7	158	**21**
Ghanaian	11	8	17	1	0	37	5
Ukrainian	0	0	6	0	23	29	4
Haitian	12	1	11	3	1	28	4
Cuban	4	1	6	0	4	15	2
Ivorian	15	0	0	1	0	16	2
Nigerian	0	3	2	5	2	12	1
Armenian	0	5	0	0	0	5	1
All	**112**	**147**	**287**	**88**	**116**	**750**	**100**

Source: CONARE 2017: 8.

Note: Highlights by author.

In order to reduce the burden on the asylum system, the immigration authorities in Argentina implemented regularisation programmes for Senegalese immigrants in 2013. Senegalese nationals were found to misuse the asylum channel due to the lack of possibilities for them to enter the country legally if they had not obtained a visa beforehand – a cumbersome process as Argentina does not have an embassy in Senegal, so nationals would have to travel to Nigeria just to obtain the visa. At the same time, Senegal does not have an embassy or consulate in Argentina which could support its nationals abroad (Interview 33, 29 October 2013 with a representative of a Senegalese association). Furthermore, the majority of Senegalese immigrants would not be able to present a work contract as they tend to work as street vendors. Following the regularisation in 2013, asylum applications by Senegalese nationals decreased from 706 in 2012 to 78 and 100 in 2013 and 2014, respectively. However, as the regularisation campaign ended in 2014, asylum applications increased again to 419 in 2015 (CONARE 2017; see Table 2.1). Specific regularisation campaigns are thus only a temporary measure not able to address the gaps in realising the 'right to migrate' for certain nationalities of immigrants in Argentina. Tables 2.1 and 2.2, for instance, show that Cuban nationals would also need a regularisation campaign since very few asylum applicants (less than 3 per cent) were granted refugee status.

Argentina is therefore, on the one hand, promoting a faster entry category for those fleeing violence, in order to focus the asylum and refugee protection channels on those the most in need (see Table 2.2). One explanation could be the increase from 167 asylum applications in

1996 to 1,484 in 1999, a figure which dropped again to 364 in 2004 (CONARE 2017). Humanitarian visas thus helped to avoid overburdening the asylum and refugee channel. On the other hand, the authorities made sure that the asylum channel was not misused by migrants of certain nationalities who could not enter via the existing migration channels.

The humanitarian category is also applicable to those fleeing natural disasters and not just conflicts. 'Humanitarian conditions' in the country of origin or natural or man-made disasters impeding immediate return are considered 'special reasons' under Article 24.h) of the Migration Law and its regulation to grant 'transitory' residency permits. Haitians who fled the country after the devastating earthquake of January 2010 were granted residence permits under this category (Chillier *et al*. 2011: 9). Humanitarian visas provide a unique protection mechanism to account for people who have to leave their country due to environmental degradation exacerbated by climate change and tectonic disasters such as earthquakes and tsunamis. This provides a national-level response to the absence of a global category of protection for those who are sometimes erroneously called 'climate refugees', since the 1951 Refugee Convention does not include environmental factors as reasons for seeking protection. As we will see in Chapter 6, the use of regular immigration categories for immigrants who left their countries due to such hazards reflects a regional trend in the Americas (see Cantor 2016).

2.1.4 Rights of emigrants

In a comprehensive approach, three Articles (102–104) in Argentina's Migration Law also cover emigrants. Article 102 stipulates that Argentina can sign bilateral agreements to 'ensure the equality or integration of workers' rights and rights to social security [for Argentine emigrants] that are in force in the destination countries'. Under the principle of reciprocity, the rights granted by Law 25.871 to those nationals whose countries impose restrictions on Argentine immigrants can be curtailed in a similar vein. This provision in Article 102 highlights Argentina's focus on protecting the rights of its own emigrants.

Furthermore, the sending of remittances should be enabled in these agreements for Argentines residing abroad. Article 103 ensures that all Argentines residing for more than two years abroad are exempt from having to pay a re-import tax on their belongings, up to the limit established by the authorities in Argentina. Article 104 imposes the duty of Argentine embassies and consular offices to inform Argentines abroad about import taxes and other exemptions in force for those wishing to return to Argentina. The clear aim was thus to

establish a link with emigrants through offering them support in the destination countries and ensuring the protection of their rights, while also facilitating their return.

In conclusion, the right to immigrate is granted in a liberal way, yet is not without its limitations. The approach has rightly been described as 'revolutionary' (Chillier and Semán 2011: 105) given that it presents a novel legal approach. Yet the uniqueness of the right to migrate goes further, in that it encompasses both immigration and emigration provisions. The human rights foundation of the right to migrate in Argentina's Migration Law has advanced thinking on the rights of migrants, and Argentina grants some of the most advanced rights to immigrants, regardless of their status, as discussed in the next section. Nonetheless, the right to migrate still seems to be mostly rhetorical in practice.

2.2 The equality and non-discrimination of immigrants – up to a point

In addition to the right to migrate, the human rights principles of equality and non-discrimination represent key features of the Migration Law. While certain articles of the law aim to ensure that immigrants in an irregular situation cannot be deprived of their fundamental rights, other articles, nonetheless, serve to limit the protection of some rights of this often-vulnerable group.

2.2.1 Equality and non-discrimination versus regulation of admission and stay

Equality and non-discrimination, as enshrined in Articles 4, 5 and 6, are central to the Migration Law. Article 5 of Law 25.871 enshrines the positive obligation on the part of the state to guarantee equality in the treatment of foreigners, enabling the latter to enjoy their rights and abide by their obligations:

> *The state will ensure the conditions that guarantee an effective equality of treatment with a view to foreigners being able to enjoy their rights and fulfill their obligations, provided that they meet the conditions established for their entry and stay, in accordance with the prevailing laws.*

The Migration Law thereby aims at eliminating all forms of discrimination, racism and xenophobia (Frassia 2004; Giustiniani 2004). Article 6 reads:

> *The state will ensure in all its jurisdictions equal access for migrants and their families in the same conditions of protection, support and rights that nationals enjoy, in particular in reference to social services, public goods, health, education, justice, work, employment and social security.*

Conventionally, the prerogative of states to decide whether and how aliens can enter their territory is juxtaposed with individual rights that (may) apply to all human beings, regardless of migration status (Chetail 2007: 16, 19; Perruchoud 2012: 126). Under Argentina's Migration Law, foreigners have to 'meet the conditions established for their entry and stay, in accordance with the prevailing laws' (Article 5). This condition mirrors the discretion which states have to regulate the entry and stay of non-nationals. Despite their right to migrate and to equality, foreigners still need to fit into an immigration category and thus have a regular status (except for access to health care, education and other social services). Conversely, if an immigrant does not satisfy the conditions at points of entry, his/her rights to immigrate into Argentina and to be treated equally do not have to be guaranteed by the state.

The 2004 Migration Law neither resolves nor completely eliminates the tension between state sovereignty and the individual rights of non-citizens. The Migration Law thus does not grant free movement without border controls, as in the Schengen Agreement of the European Union (Acosta Arcarazo 2016), as even MERCOSUR nationals have to present an identity document on entry into the country and apply for a residency permit.

The relatively higher importance granted to individual rights in the Argentine Migration Law, while not entirely leaving the notion of state sovereignty and border control behind, is partially reflected in ongoing discussions. The prerogative of states to control the entry and residence of non-nationals as [a] 'well established [principle] in international law' (Dembour 2015: 3) has been questioned by some scholars (see, for instance, Dembour 2015; Schotel 2012). Similarly, the regional court in the Americas protects the rights of individuals over state sovereignty (Dembour 2015), an approach which has probably influenced Argentina's Migration Law.

2.2.2 Equality and non-discrimination: norms influenced by Advisory Opinion No. 18 of the IACtHR

The principles of equality and non-discrimination in Articles 4 to 6 of the Migration Law reflect Advisory Opinion No. 18 of 17 September 2003 of the Inter-American Court of Human Rights (IACtHR) on the rights of undocumented migrant workers. The IACtHR declared the principle of equality and/or non-discrimination applying to the labour rights of irregular migrant workers as a *ius cogens* norm in international law, meaning it is binding upon all states and cannot be derogated (Chetail 2012; Dembour 2015: 282–283; Weissbrodt and Divine 2012). This was a bold step in international human rights law. Argentina's Migration Law ensures that its immigration law cannot trump labour law, as workers' rights should be protected regardless of immigration and employment status. While the provisions to protect irregular migrant workers' labour rights in Law 25.871 were already included before the Advisory Opinion was published, the latter probably helped to ensure that no resistance to these stipulations emerged in Argentina.

In international law, the differential treatment of migrants/non-nationals is justifiable if it is proportionate to the implementation of a state's immigration policy, thus leaving considerable latitude for manœuvre (Chetail 2012: 81). Nationality was explicitly recognised as legitimate grounds for discrimination in the two International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights respectively. Despite accepting this difference in treatment, the Committee for the Elimination of All Forms of Racial Discrimination, the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, and the Human Rights Committee of the United Nations (UN)…

> *… each confirmed the inclusion of migrants and non-citizens, irrespective of immigration status, within the core protection conferred by these treaties. They then began more effectively to integrate migrants into their monitoring of how individual states implement international human rights law in their domestic legal systems* (Grant 2011: 43).

While the work of these committees is not binding under international law, 'they [the committees] retain a particularly persuasive authority' (Chetail 2012: 68) and thus their work represents an important step towards the protection of non-citizens under existing human rights treaty law. As the Argentine 2004 Migration Law grants immigrants and their families almost the same rights as nationals, it represents an interesting case study questionning why

Argentina chose to explicitly protect the rights of non-nationals. This is even more the case considering that even the predominant understanding among international law specialists does not go as far as to claim equal rights for citizens and migrants/non-nationals.

Although being applauded by some human rights scholars, the 2003 Advisory Opinion No. 18 of the IACtHR has been questioned in its claim to universal application, including in the region (see, for instance, Cavallaro and Brewer 2008; Neuman 2008). The 'gap […] between the law as states have consented to […] and the law as posited by the Court' (Dembour 2015: 309), in the Advisory Opinion No. 18, 'obviate[s] state consent altogether' (Neuman 2008: 102). The IACtHR referred to both non-binding instruments – such as United Nations and expert conference declarations – and binding international human rights treaties (Paragraph 86, note 33, IACtHR 2003: 95). Critics thus argue that the Advisory Opinion is not based on state practice, considered the precondition for a norm becoming binding international law.

However, I argue here that, contrary to expectations and disputed normative and peremptory value, Advisory Opinion No. 18 may indeed have 'yielded immediate practical effects' and does not just 'remain [a] reference […] in human rights law' (Dembour 2015: 312). Argentina's Migration Law, adopted merely three months after the Advisory Opinion was published (cf. Chapter 5.1), established the principles of the equality and non-discrimination of migrants in Article 6. Reflecting calls for the equal and fair treatment of irregular migrants at the national level and probably having been reinforced by IACtHR Advisory Opinion No. 18, Article 16 of Argentine Law 25.871 enshrines the labour rights of irregular migrant workers. This has been understood to entail an obligation that employers apply the labour legislation equally to workers in both a regular and an irregular situation (Giustiniani 2004), even though employers will face fines for employing the latter:

> *Article 16: The adoption of all necessary and effective measures by the state to eliminate the contracting of immigrants in an irregular situation for work purposes, including the imposition of sanctions on employers, will not derogate the rights of immigrant workers towards their employers in relation to their employment.*

Legal immigrant workers' rights are protected in the Migration Law which, at the same time, establishes measures to limit the protection of the rights of irregular workers among immigrants (who could be legal immigrants who do not have the right to work). The approach Argentina has taken to increase the number of regular migrant (worker)s is less discriminatory than other legislations but does not grant irregular migrant workers entirely equal rights with

regular employees. This approach mirrors that of the ICMW (see Vandenhole 2014: 226) but still goes further in also protecting the labour rights of irregular workers.

Article 16 of Law 25.871 foresees the passing of sanctions on employers who hire migrant workers with an irregular migrant status. Article 16 thus recognises the role of employers in creating exploitative working conditions (Slater 2009). It has been argued that the aim of Article 16 is to prevent 'informal labour and its negative effects for the protection of workers and social security' (Ceriani Cernadas and Freier 2015: 24), which is somewhat unconvincing given that, in 2009, more than a third (34.6 per cent) of Argentine nationals were still employed in the shadow economy, down from almost half (47.4 per cent) in 2003 (Baer *et al.* 2011: 66). Informality in the work place is thus not specific to migrant workers only, but is a reality for a number of Argentine nationals too.

The impact of the ability of undocumented immigrants to regularise and, to a lesser extent, of employers facing potential sanctions, is noticeable, with the share of informal employment among foreigners from South America decreasing from 65.2 per cent in 2003 to 56.8 per cent in 2009 (Baer *et al.* 2011: 66). This decrease in informal employment among immigrant workers from the region is likely to be influenced by other factors as well, including the overall improved economic situation, but is still remarkable. Yet labour exploitation continues to be an issue (Ceriani Cernadas 2015: 146), in Argentina as elsewhere. The fact that the great majority of immigration checks between 2012 and 2015 focused on supermarkets and very few on textile factories (DNM n.d.b: 5) known to abuse workers' – including irregular immigrants' – rights, shows that the government is far from prioritising the enforcement of employer sanctions.

Despite the protection of the labour rights of irregular migrant workers, Articles 53 and 55 state that irregular migrants should not be allowed to receive pay for work or to engage in profitable activities, regardless of the type of contract or work (self-employed or employed) they take up. Thus irregular migrant workers need not be paid because they should never have been allowed to be employed in the first place (Slater 2009: 707). This not only represents a contradiction between Article 16, which protects labour rights on the one hand, and Articles 53 and 55, which prohibit paid employment for irregular immigrants, on the other. The contradictory provisions in the different articles of the law are probably reflecting a compromise between demands by different actors involved in the policy-making process for

both more liberal and also more restrictive stipulations at the same time. The thinking behind this may have been to avoid any exploitation of immigrant workers in the future by aiming to ensure their lawful employment, though effectively rendering their labour rights void.

In a similar vein to Article 16 on labour rights for migrant workers, Articles 7 and 8 stipulate that an irregular status can in no instance be a justification for hindering immigrants in accessing education or health care respectively. These provisions aimed to respond to the difficulties which immigrants faced during the time in which the preceding Videla Law was in force. Yet it could also be an indication that those rights that are not specified to apply also to undocumented immigrants may, in practice, only apply to legal residents:

> *Article 7: In no case the migratory irregularity of a foreigner will impede his/her admission as a student in an educational institution regardless of whether the institution is public or private; national, provincial or municipal; primary, secondary, higher education or at university level. The authorities of the educational institutions will be obliged to offer orientation and counseling regarding the corresponding procedures in order to correct the migratory irregularity.*
>
> *Article 8: In no case the access to the right to health, social assistance or medical assistance will be denied or restricted for all foreigners who require it, irrespective of his/her migratory status. The authorities of the medical institutions will offer orientation and respect for the corresponding procedures in order to correct the migratory irregularity.*

These two provisions are even more remarkable when we consider that access to public education and health care is free, and migrants are treated on an equal footing as nationals in the law, regardless of status.

Furthermore, both Articles 7 and 8 place an obligation on public-service providers to guide migrants in an irregular situation through the documentation needed to regularise their status. Providing migrants – irrespective of their migration status – with access to the right to health and education, which are part of the social and economic rights enshrined in Articles 12 and 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), is unusual (Giustiniani 2004). This is even more the case if we consider that Argentina uses these paths of access as another situation in which state representatives are required to inform irregular immigrant parents how to obtain a regular status, thus ensuring in the meantime that their children have the right to attend school and access health services beyond emergency care.

Granting such rights as the entitlement to access education and health care regardless of immigration status also seems to be a novelty under national law. According to the non-binding interpretation of the Committee of the International Covenant on Economic, Social and Cultural Rights, the Covenant entails certain obligations for states to ensure that everyone in their jurisdiction, including non-nationals, has access to employment, basic shelter, water and sanitation, health services and education (Weissbrodt and Divine 2012). Yet, in practice, irregular immigrants are often excluded, in particular from higher education and from anything but emergency health care (see Acosta Arcarazo 2013 on Brazil, Spain and Portugal).

Article 7 of the Argentine Migration Law also goes a step further than Article 30 of the ICMW by including the right – for both irregular migrants and their children – to access higher and university education as well as the obligation of teachers to provide counseling on regularisation procedures. Article 8 of Law 25.871 extends beyond the right to emergency medical treatment guaranteed in Article 28 of the ICMW. The two articles thus provide more extensive rights to immigrants, be they in a regular or an irregular situation, than the ICMW, which has mostly only been ratified by countries of origin. Many major destination countries in the North did not become signatories of the ICMW, as their long-term residents already benefitted from most of the rights that their nationals did. Argentina thus went beyond the stipulations of the ICMW before signing the Convention in 2004 and ratifying it in 2007.[17]

However, in practice neither those articles nor the Migration Law in general are known among teachers, doctors, nurses and administrative staff in schools and hospitals, and if they are, they are ignored. The Migration Law particularly lacks dissemination among public and service providers alike (Interview 11, 8 October 2013, Ministry of Health of the City of Buenos Aires; Interview 17, 11 October 2013, Ministry of Education; Ceriani Cernadas 2015: 145; Chillier *et al*. 2011: 18; CMW 2011: 6). Issues such as a lack of intercultural understanding in treating immigrant patients who do not speak Spanish and difficulties in communicating are prevalent (Interview 10, 7 October 2013, Ministry of Health of the City of Buenos Aires). Continuous obstacles also include the requirement of a national identity card when making doctors' appointments, effectively barring many undocumented immigrants from accessing public health care. In Buenos Aires, an advocacy group of health workers, established in 2007, successfully addressed some of these shortcomings – for instance, the need to show an

[17] See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en (accessed 5 March 2016).

identity card on the maternal and infant health programme NACER (‘Being born’) (Interview 11, 8 October 2013; Ministry of Health of the City of Buenos Aires).

As one representative of the Ministry of Education highlighted, some implementation issues persist as ‘discriminatory discourses’ continue to take place at all levels of society, media and government and ‘certain old things [like discrimination pervasive in society] take time to change’ (Interview 17, 11 October 2013). Yet, similar to the health-care sector, materials for students and teachers have been prepared by an Inter-Institutional Working Group coordinated by the University of Lanús (where Pablo Ceriani Cernadas, current member for Argentina of the UN International Committee on Migrant Workers, is based) and UNICEF (Ceriani Cernadas 2015: 145–146).

In sum, the safeguarding of labour rights for irregular migrant workers as enshrined in Article 16 can be taken to reflect the IACtHR’s Advisory Opinion No. 18, which states that the irregular status of migrants does not affect their enjoyment of workers’ rights (Chetail 2012; Weissbrodt and Divine 2012). In the case of the Argentine Migration Law, these rights include pay and benefits when the work ends, regardless of the legal status of the migrant. However, other articles in Law 25.871 impede the right to payment for irregular workers, effectively rendering Article 16 – protecting irregular migrant workers’ rights – null and void, with the aim of decreasing the number of irregular workers. At the same time, expulsions do not affect the enjoyment of other rights, including that of receiving remuneration (Articles 67 and 68). Certain safeguards for irregular migrants mirror the rights-based approach of the IACtHR’s Advisory Opinion No. 18 (2003) and provisions in the ICMW, which are extended to a universal right to access health care and education. Yet internal inconsistencies and a dissemination gap in the Migration Law persist.

2.2.3 Irregular immigrants are less equal

In addition to not being allowed to have a gainful occupation, as described previously, irregular migrants cannot be provided with paid accommodation (Article 55). It is not clear whether this means that they are allowed access to free housing, though. The reverse – the housing irregular migrants being an illegal act under the Migration Law – would mean that the human right to an adequate standard of living, including housing, is not reflected in the Migration Law and ‘arguably forces irregular immigrants into substandard and illegal housing’ (Hines 2010: 496). This would contradict the objective of the law, which is to protect international human

rights norms (Article 3.a) and the principles of equality and non-discrimination, although one could argue that there is considerable resistance to the acknowledgement that basic human rights apply to irregular migrants. The obligation to report any irregular migrant selling, buying or applying mortgages to real estate or trying to register or be part of an NGOs or a company (Article 57) does not seem to be a great improvement on the previous Law, where teachers and medical personnel had to report undocumented migrants attending their schools or seeking medical aid in hospital. This latter prohibition to join NGOs and other associations would be a political right, one of a group of rights which is under-represented in the law, as analysed below. Irregular migrants are thus far from being treated as equal under the law, despite specific safeguards covering a number of rights.

One highly unusual provision has been claimed to treat migrants more favourably than nationals. After serving no more than just over half of their prison sentence after a criminal conviction,[18] irregular foreign residents can be expelled from the country immediately. The removal is then considered as equal to the remaining prison sentence by the respective tribunal (Article 64.a). The aim was probably to keep detention costs low. Some Argentine scholars consider this distinction, which is based on immigration status, as contrary to the constitutional principle of equality before the law, as immigrant prisoners would just be sent back to their of country of origin without having to serve the second half of their sentence, as nationals and legal residents would have had to. For Bluske (2013) and Dibur (2005), Article 64 is thus simply unconstitutional. Dibur further asserts that the fact that someone from the administration can annul part of a prison sentence by the judiciary is against the principle of the division of powers in government.

Many other academics (Ceriani Cernadas 2004; Dembour 2015: 161–195; Hines 2010: 501) contend that the usual practice – in other countries – of expelling immigrants after they have served prison sentences is discriminatory treatment, as it adds yet another element in addition to serving the prison term. In this line of argument, the deportation of those foreigners who served half of their prison sentence (Article 64.a) Law 25.871), could then actually be a way to counter the discrimination of foreign nationals who are deported *in addition to* serving their full prison term. However, assessment would be necessary to decide whether half of each verdict is actually comparable to the effects of the deportation, as the length of judgments varies. It could be argued that expulsion from a country of residence, thus probably cutting

[18] In other types of sentence, this would mean having served between three and 15 years (see Article 17.I and II, Law 24.660 on the Execution of Imprisonment 1996).

family and other social ties, has a significant effect on the life not only of the immigrant but also of her/his family (Dembour 2015: 161–195). Whether this would amount to a favourable treatment of immigrants remains to be decided.

In sum, the principle of equality only needs to be protected if a number of conditions are fulfilled by the immigrant, in particular the meeting of entry requirements such as a visa, residence or work permits when needed. Equality of treatment *is* thus granted to immigrants, but not necessarily to those who enter and/or work irregularly, which contradicts the Migration Law's universal and inalienable claim. In particular, immigrants from many non-South American and non-European countries are *de facto* excluded from the right to migrate and to adequate housing and employment if they cannot obtain a visa. Whilst aspiring to provide a universal right to movement, Argentina's 2004 Migration Law continues to accept the need to regulate admission in detail. Domenech thus argues for Law 25.871 being part of 'policies of "control with a human face"' (2011: 67; 2013) of the larger migration governance approach globally.

The inherent contradictions continue to be reflected in the translation of rights on paper into rights in practice. While the claim to eradicate racism and xenophobia has still not materialised, despite the work of the National Institute against Discrimination, Xenophobia and Racism (INADI in Spanish, founded in 1995 – see Ceriani Cernadas and Morales 2011; CMW 2011: 4; Sutton 2008), access to education and health care, for instance, seems to have greatly improved for immigrants from the region and from third countries. Civil society commentators have, however, raised problems with the laws' continuing exploitation of domestic and other low-skilled workers.

2.3 Some are more equal than others: preferential access and regularisation for MERCOSUR nationals

2.3.1 Freer movement for MERCOSUR nationals

A key feature of Law 25.871 gives priority/preferential treatment to MERCOSUR nationals, thereby reflecting regional integration commitments, including the goal of freedom of movement among MERCOSUR member-states (Giustiniani 2004). As mentioned previously,

Article 23 (l) provides MERCOSUR nationals with, among other entitlements, the right to apply to reside and work in Argentina for two years.

This does not mean that control has completely disappeared for MERCOSUR nationals, as the number of expulsions indicates. Arguably, if every person has the right to immigrate into Argentina – with the exception of those with a criminal record – then convicted criminals would be the only applicants not allowed to stay and thus to be expelled. Between 2004 and June 2015, 10,928 persons were expelled from the country – 42 per cent of those based on criminal convictions (Article 29.3)) (DNM n.d.a). While this figure is relatively low, the majority of expulsions – 58 per cent or 6,333 persons – occurred due to migrants not having regularised their status upon request by the DNM when they were found to have an irregular status (Article 61 of the Law). Almost three-quarters (74.5 per cent) of those expelled for irregularity of status between 2009 and the first half of 2015 came from MERCOSUR and associate countries (my own calculations based on DNM n.d.a), and could receive a residency permit just based on their nationality.

Pablo Ceriani Cernadas, a member of the UN Committee on Migrant Workers, an academic and an NGO activist (Interview 3, 23 September 2013), called for the complete suspension of all expulsions on the grounds that they are against the aim of the law. In 2004, the Government of Argentina suspended the expulsion of nationals from neighbouring countries (Decree 2074/04 DNM), though these deportations were quickly continued again. The call to again end expulsion was unlikely to be taken up, given the nature of the nation-state system and the related control of entry, stay and exit paradigms that Argentina still faces, even if this is to a lesser degree than in other countries. The large numbers of immigrants regularised under plans like '*Patria Grande*' (Great Homeland, see next sub-section) could be an indication that the stipulation to regularise immigrants before expelling them is working well (Hines 2010: 499). However, ideally and even though their numbers are comparatively small, these continuing expulsions should barely be necessary if all immigrants really benefitted from a regular status. Ensuring that all immigrants were able to enter the country with a regular status may also cost the state less than conducting deportations would.

Annex II of the 2010 decree which implements Law 25.871 provides immigrants with a relatively short timeframe within which to regularise their status – an impediment to the realisation of the right to (im)migrate. Following notification, irregular immigrants are only

given ten working days to regularise their status (Annex II, Article 16 of the 2010 Decree). In her PhD thesis, Lila Emilse García (2013) has revealed how, in the autonomous city of Buenos Aires between 2004 and 2010, the Migration Directorate sent immigrants their expulsion orders to the place of residence which the latter listed when first registering in Argentina. As the majority of irregular migrants also face a precarious housing situation due to their status and their first shelter upon arrival is often temporary accommodation, most had since then moved on. Even when the notification is returned to the DNM because the addressee is unknown at that address, the expulsion process continues. The next time that the immigrant concerned makes contact with the authorities for whatever reason, he or she is deported without having previously been aware that a process had been opened against them. García convincingly argues that these processes *in absentia* (2013: 358, 361) infringe on the right of the migrants concerned to be heard by a judge, a right which has constitutional ranking (Article 86 Law 25.871).

This may explain why a few MERCOSUR nationals are still expelled based on Article 61 of Law 25.871 and its 2010 Decree, which regulate that the DNM has to ensure that an irregular immigrant regularises his/her status. Failure to do so within 30 days leads to expulsion. Many irregular immigrants were not aware that the DNM was in the process of having them expelled and consequently could not exercise their right to defence in time. At least until 2010, state practice had thus changed little in ensuring that illegal immigrants received due process guarantees and access to a hearing by a judge before being removed. Article 26 of Law 25.871 stipulates that, if immigration and regularisation procedures take too long, the DNM has to make sure that this does not inconvenience the immigrants. In practice this statute did not seem to be applied, at least not until the regulation of the Migration Law was passed in 2010.

One could say that the Migration Directorate does not seem to fulfill the aim of the Migration Law, which is to regularise irregular immigrants or else avoid their irregularity given that they represent more than half of all those expelled from Argentina. The approach based on border control is still eminent in some sections of the Migration Law, including Article 34, which regulates the kinds of measure which the DNM can take to carry out its mandate and control the entry and exit of persons. According to the influential NGO Centro de Estudios Legales y Sociales (CELS, Centre for Legal and Social Studies) Article 35 should have decreased the ‘administrative discretion’ (Baladrón *et al.* 2013: 21) to refuse entry at the borders. However, this does not really seem to have been a long-lasting trend. García highlights that a relatively

high number of refusals of entry at border posts is taking place due to migrants' lack of adequate documents. She suspects that, since MERCOSUR nationals only need their national identity card, third-country nationals are again disproportionately affected (2013: 352–353). However, this needs to be investigated further, since MERCOSUR nationals make up three-quarters of all expulsions due to an irregular status (my calculations based on DNM n.d.a).

In cases of conflicting legal provisions originating from a variety of sources, the stipulation the most favourable for the migrant should apply (Article 28). This was spelt out in order to avoid officials resorting to the most restrictive norm still in place. Article 28 further states that the principle of the equal treatment of immigrants does not affect the possibility of Argentina entering into bilateral agreements or treating nationals within the MERCOSUR region favourably, as free movement in the latter is considered a priority. One could argue that, in the case of MERCOSUR nationals, then indeed the most favourable clauses apply whereas, in practice, third-country nationals face more obstacles than was foreseen by the drafters of the law, who focused more on intra-regional migrants. This was probably not their intention but it has effectively led to obstacles for others (Interview 3, 23 September 2013; Interview 7, 30 September 2013), thus questioning the universality of the right to migrate.

2.3.2 The state obligation to regularise migrants in an irregular situation: pouring old wine in a new glass?

As per Article 17, the state is bound to introduce measures to regularise all migrants without a regular migration status. This feature is particularly noteworthy. It was introduced after representatives of the Catholic Church recognised that irregularity is due not so much to a fault attributable to the irregular migrants themselves as to a failure of past migration policy to adequately respond to migration realities (CPDH 2010b). Domenech (2011, 2013) argues that Law 25.871 continues to divide migrants into regular and irregular, with regularisations aimed to 'control', 'order' and thus legalise flows (which should be universally legal by aspiration of the Law).

Argentina had been facing large numbers of irregular immigrants from neighbouring countries in the 1990s; for this reason, a large-scale regularisation programme – *Patria Grande* – was established in 2004 after the Migration Law was passed in the same year. *Patria Grande* focused on intra-regional immigrants already in the country at a certain point in time (Decree 836/2004 DNM 2004, Decree 578/2005 DNM 2005), and where Paraguayans and other

MERCOSUR nationals represented the largest groups (Ceriani Cernadas 2015: 141; Ceriani Cernadas and Morales 2011). According to the NGO CELS, the DNM expected 750,000 migrants from MERCOSUR countries to regularise their status (Baladrón *et al.* 2013: 41). However, according to DNM (2010a) figures on the *Patria Grande* programme, only about 225,000 actually did so. Almost half – 190,000 out of 425,000 or 44.3 per cent – of the immigrants who were inscribed on the programme were not able to present the required documentation (Ceriani and Morales 2011). The reasons cited included, *inter alia*, a lack of information on the process (see also CMW 2011: 8), no proof that they had legally entered the country – a bus ticket is sufficient (Interview 28, 22 October 2013) yet difficult to produce when immigrants have lived in the country for decades already (García 2013) – and the cost of the process. In their shadow report to the United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), civil society representatives concluded that 'the objectives of the programme were not attained' (Chillier *et al*. 2011: 7). The authorities allegedly considered that 'those persons who had not completed the migration regularization procedure of Patria Grande do not have the will to do so' (Baladrón *et al.* 2013: 42). A specific regularisation programme was also adopted for extra-regional migrants already residing in the country in 2004 (Decree 1169/2004 DNM 2004).

According to civil society, the DNM thus concluded that immigrants who do not regularise their status should be expelled. Civil society commentators have further raised issues around the lack of information on regularisations, even though the government had aimed to remedy the situation. A few years ago, the authorities established Mobile Immigration Offices and offered one-stop shops aimed at supporting regularisation procedures across the country under the Territorial Engagement Programme – '*Programa de AbordajeTerritorial*' (OAS 2015: 69).

The Migration Law allows the regularisation only of those nationals who enter the country with a valid visa or are from countries which are visa-exempt (Freier and Acosta Arcarazo 2015: 48), and preventing, in particular, third-country nationals such as the increasing number of West Africans and migrants from the Caribbean entering Argentina. A regularisation campaign targeted solely at Senegalese migrants took place between 14 January and 14 July 2013 (Order 2 DNM 2013), which could be seen as a strategy which the UN Committee on Migrant Workers (CMW 2011: 5) recommended that the State of Argentina employ in order to enable Senegalese to regularise their status. At about the same time, another regularisation targeted irregular immigrants, mostly believed to be women and victims of human trafficking (Chillier *et*

al. 2011: 29) from the Dominican Republic (Order 1 DNM 2013). The great majority (about 90 per cent) of the 1,732 Senegalese and 2,207 Dominican applications were recognised and the migrants granted residence status. Yet certain obstacles – such as the need to present a clean criminal record certificate, which can only be obtained in Senegal (Interview 33, 28 October 2013), making it a very costly procedure – continued to bar all from regularising their status. Both regularisation campaigns were the outcome of a series of dialogue between the respective authorities and civil society, including the immigrant associations of nationals of both Senegal and the Dominican Republic (Ceriani Cernadas 2015: 146). This process demonstrates the willingness of the DNM to address the shortcomings which certain nationalities have faced and to implement the obligation to regularise foreigners in an irregular situation as per Article 17 of Law 25.871. However, in so doing, it also took on board recommendations by international bodies, probably with a view to increasing the country's reputation at the international level (cf. Chapter 5). Yet the piecemeal approach to regularisations continued in 2014, when a similar procedure was implemented for South Korean nationals (OAS 2015: 70; Decree 97/2014 DNM).

As can readily be seen, one of the shortcomings of previous immigration policies – the creation of irregular migrants – continues to pose a challenge. Those who enter after specific decrees for their nationality have expired have no way in which to regularise their status (Freier and Acosta Arcarazo 2015). The list of countries whose nationals are required to obtain a visa is similar to the EU's list as, for instance, all migrants from African states except South Africa need a visa (Freier and Acosta Arcarazo 2015: 48). Immigrants still need to apply for visas and, if these are not granted, those wishing to enter seem to be left in a situation of irregularity until specific programmes enable them to legalise their status.

Article 17 shows that the approach of using regularisations to correct shortcomings in the migration policy applied in the twentieth century still exists today. Although the regularisations are considered a state policy rather than an amnesty (Ceriani Cernadas 2015: 143), the continued need for regularisations highlights the inherent tension between the aspiration of the right to migrate and the state control of borders. While the emphasis has clearly shifted away from expulsions – which are now comparably low in number – to the use of regularisations to correct the shortcomings of the law, this approach is not entirely new. The current Migration Law thus continues to create some of the shortcomings which previous

legislation had, albeit affecting a smaller group of immigrants – in this case third-country nationals.

2.4 Access to justice and other political and civil rights

2.4.1 Access to justice

An important advance accomplished by Law 25.871 has been to enable access to justice in different parts of the migration cycle. Irregular migrants have the right to seek redress or legal remedy on expulsion decisions. Contrary to the previous law, Article 70 of Law 25.871 states that the detention of immigrants always needs to be ordered by a competent judge and not by the DNM or the Ministry of the Interior. The judge can only order detention when the expulsion decision is confirmed (in exceptional cases the Ministry of the Interior or the DNM can ask a judge for the detention of immigrants even if the decision to expel them from the country has not yet been confirmed by a judge). Article 70 further specifies that those with Argentine relatives (the parents, children or spouses of Argentines who married before the expulsion order) cannot be expelled or held in detention centres before being sent back to their country of origin.

Access to justice during deportation procedures for irregular migrants was an important concern voiced in the public consultations on the draft Migration Law in 2000 and 2002 (CPDH 2010a, b). Thus, the problematic issue was not detention in view of removal/following an expulsion order, but lack of access to a judge. However, in practice the previous approach whereby the National Migration Directorate was taking administrative decisions without the migrant being able to question them in court (CPDH 2010b) was continued at least until 2010, when García (2013) conducted her research and the regulation was adopted. Prior to the regulation, the DNM refused to implement the 2004 Migration Law (Interview 40, 9 December 2013). Yet, in 2011, the National Ombudsman Office (*Defensoría General de la Nación*) enshrined the right to due process guarantees in expulsion procedures due to criminal records or to migrants having an irregular status in a resolution (Resolution 569, 13 May 2011; see Chillier *et al*. 2011: 17).

In its 2010 judgment (IACtHR 2010: paragraph 146), the Inter-American Court of Human Rights confirmed the right of irregular immigrants to a fair trial, including the right to challenge expulsion in a court, the right to a public hearing and the right to defence, as enshrined in the American Convention on Human Rights. Furthermore, and acknowledged as applicable in international law, besides the regional protection in the Americas of the right to a fair trial, the right to an effective judicial review of the decision to be expelled applies to immigrants, in particular when the right to a family and private life are considered to have been infringed (Dembour 2015: 374). Argentina was thus ahead of its time with its due process safeguards for irregular migrants facing pre-removal detention. The Argentine Migration Law was a precursor to guarantees later identified by the IACtHR.

Yet two factors stand out as impeding the effective application of access to justice, particularly for irregular immigrants. Firstly, with regards to the role of the judiciary in the implementation of the law, García equates the function of courts in ensuring the upholding of the human rights obligations of the state towards immigrants to 'a dialogue between the deaf' (2013: 351). In her research on court cases in the autonomous capital of Buenos Aires between 2004 and 2010, she found, firstly, that most judges did not seem to be aware of the judicial guarantees of the law. The Migration Directorate still enacted its administrative powers without the judiciary ensuring the rights of immigrants to judicial protection enshrined in the Migration Law. One explanation could be that no new decree had as yet been issued, but the lack of judicial protection was unlikely to depend only on the decree. In the cases which García (2013: 355) analysed in the city of Buenos Aires, hardly any judges opposed the DNM's common practice of detaining immigrants before expulsion without the intervention of a judge. This is contrary to Article 70 of the Migration Law. According to the law and its regulation, the DNM can only hold immigrants in detention before the decision to be deported is granted *after* approval by a judge. In practice this does not seem to be the case, thus effectively rendering ineffective the right to detention only being ordered by a judge, thus continuing the previous practice. The discrepancy between the codification and the realisation of human rights is a common challenge: 'Focus on the assumption that, once codified, rights will be enforced, distracts from the political conditions that might make enforcement more or less likely' (Schick 2006: 322).

Secondly, García (2013: 354) argues that there is a disproportionate absence of any obligation for the DNM to justify the detention of an immigrant before expulsion, compared to the extensive documentation required by immigrants to *not* be expelled. How the safeguards of

taking into consideration family relations, length of stay in Argentina, the immigrant's professional circumstances and other personal and social conditions are not clear (see Article 61 Law 25.781).

On the positive side, Article 86 stipulates that those immigrants in Argentina who do not have the financial means to defend themselves in a situation where they are refused either entry into or exit from Argentina, or expulsion, have the right to a free defence lawyer and interpreter if they do not speak Spanish. It also specifies that the decree and regulations of this article have to safeguard the migrants' constitutional right to defence before a court and thus this right cannot be derogated in practice. Articles 87 and 88 establish that not being able to pay administrative fees for any procedure should not prevent a migrant from accessing it. This follows the recommendations made in public consultations to ensure that justice can also be accessed by poor migrants. Furthermore, the human rights NGO CELS also won an application in December 2003 for an injunction of those fees violating constitutional rights to present administrative appeals (Baladrón *et al.* 2013: 19). More research needs to take place to determine whether these provisions are respected in practice.

2.4.2 Further political and civil rights

The general stipulations on equality, freedom from discrimination, and safety (from poverty that many flee) discussed before and Article 106 on the foundation of unions and freedom of association guarantee the civil rights of immigrants. While the Migration Law goes beyond Article 20 of the Constitution,[19] which stipulates equality with regard to civil rights, in also guaranteeing socio-political and cultural rights, political rights are less developed. Article 11 of Law 25.871 guarantees the political participation of foreigners in decisions relative to public life and local administration in their area of residency. Currently immigrants can only vote in municipal and provincial elections in a few provinces, and not in national elections (Ceriani Cernadas and Freier 2015: 24–25). This mirrors the voting rights of citizens of countries of the European Union residing in another member-state, arguably one of the most advanced regional groupings, and represents an important step for the inclusion of foreigners in Argentina. Very

[19] 'Foreigners on the territory of the nation enjoy all the civil rights of citizens; they can practise (in) their industry, trade and profession; own, buy and transfer real estate, navigate the rivers and coasts, exercise their worship freely, and attest and marry in conformity with the laws. They are not obliged to obtain citizenship, nor to pay extraordinary forced property taxes. They can obtain naturalisation after residing for two consecutive years in the nation, but the authority can shorten this stipulation in favour of whomever requests it, if this is put forward and proven to be in the interest of the Republic.'

few countries worldwide grant foreigners the right to vote in national elections in their host society. A civil society campaign called 'I live here, I vote here' ('*Aquí vivo, aquí voto*') has been established to address the issue.[20]

Argentina had already granted emigrants the right to vote, including in presidential elections, in 1991.[21] Argentine nationals thus have their right to participate in elections guaranteed, whereas immigrants are treated less equally. While this reflects approaches in other countries, equality thus seems to cover most human rights, but not all.

Integration instead of exclusion is an important guiding theme of the law. Integration (Article 14) includes not only Spanish classes in schools and recognised foreign cultural centres, but also the dissemination of information on the rights and obligations of foreigners. Furthermore, the training and information of public officials and private-sector employees who are responsible for promoting a multicultural society and addressing 'discriminatory behaviours' (Article 14.d) is specified. This responds to recommendations and requests made in the consultations in 2000 and 2002. However, this is one of the key aspects where the Migration Law and its implementation are still very far apart. In addition, the 'cultural, recreational, social, economic and religious contributions by immigrants' (Article 14.c) should be recognised and valued. To this end, the DNM organises the *Fiesta de las Colectividades* once a year in September, in celebration of the National Day of Immigrants. During my interviews in 2013 (Interview 31, 26 October 2013) it became apparent that some migrant associations felt generally supported by the government. How this relates to 'good practice' in integration policies, such as the need for Argentines to respect the cultural identity and customs of immigrants, should be studied further and goes beyond the remit of this dissertation. Immigrants also have obligations, which include obeying national laws and respecting the cultural identity of Argentines (Giustiniani 2004).

Conclusion

With the passing of Law 25.781 on migration, Argentina has considerably advanced human rights thinking and practice for migrants. The 'right to migrate' of Article 4 was a novelty and is

[20] http://www.aquivivoaquivoto.blogspot.com/ (accessed 26 February 2016).
[21] Law 24.007 1991. For a discussion see Chapter 5.3.

unmatched in international law. The principles of equality and non-discrimination of, in particular, irregular immigrants are safeguarded prominently in the Migration Law. At the same time, we have seen how this particular group of immigrants is treated less favourably compared to those immigrants in a regular situation. Thus the advances of the Migration Law, which even surpass those of the ICMW in the protection of migrants, are not free from incoherence and some tension. The human rights-based approach in Law 25.871 curtails the state's prerogative to decide who enters and remains in the country, but the latter approach is not abandoned.

While the Migration Law does not imply universal free movement in and out of Argentina, it has enabled the largest group of immigrants to become registered and take important steps out of a situation of marginalisation. As a probably unintended side-effect, nationals of non-MERCOSUR or European countries still face the same obstacles as the largest immigrant group from the region did until 2004. However, it is noteworthy that the authorities have tried to remedy this situation by issuing decrees. While these regularisation campaigns are only punctual, they do reflect the commitment of the Migration Directorate to uphold the 'spirit of the law': to enact a 'right to migrate' – meaning allowing migrants both to enter the country and to leave it with the protection which the state can provide.

PART II: Why Argentina? The human rights origins

Chapter 3: Nation-building, immigration and racism 1853–2004: the liberal Migration Law tradition and the changing migration reality

This chapter locates the 2004 Migration Law within a complex national history of migration law, policy and regulation, as well as racial understandings of national identity linked to immigration. It is the first of three chapters shedding light on the factors that led to the human rights basis of the Migration Law. Argentina's current Migration Law and policy cannot be understood without considering its historical antecedents, as well as the migration reality which has evolved over time. While the law seems innovative and advanced in terms of rights protection at first sight, the legal principle of the equality of foreigners with Argentine citizens actually dates as far back as 200 years, albeit in a racialised way. The settlement of foreigners played a decisive role in the history and development strategies of Argentina (Novick 2004). Large-scale European immigration from the nineteenth until the mid-twentieth centuries shaped the country's national identity and continued to do so long after the decline of this particular group of immigrants. This meant that Argentina developed in a way which favoured an open-door policy – at least for some.

By 1914, Argentina was the country with the highest share of immigrants on the American continent, even surpassing the United States in the competition for settlers (FitzGerald and Cook-Martín 2014: 302). Contrary to other countries, the high number of the preferred and solicited Europeans entering Argentina made entry restrictions or overt discrimination by nationality or ethnicity (for non-Europeans) redundant. Argentina was the only country on the continent with a non-racist immigration law. In fact, it shared racist ideologies propagated by elites in European countries of origin and destination countries like the United States (see King 2002), Australia (see Joppke 2005) and Canada but racism took more covert forms than official legislation. Its continuous explicit preference for Europeans singles it out on the continent and means that discrimination took place against Jews, gypsies (*gitanos*) (FitzGerald and Cook-Martín 2014: 299–300) and those considered non-white – firstly indigenous populations but then including nationals from neighbouring countries (Devoto 2001). A similar approach of ethnic selection toward white Anglo-Saxon, European immigrants leading to the creation of

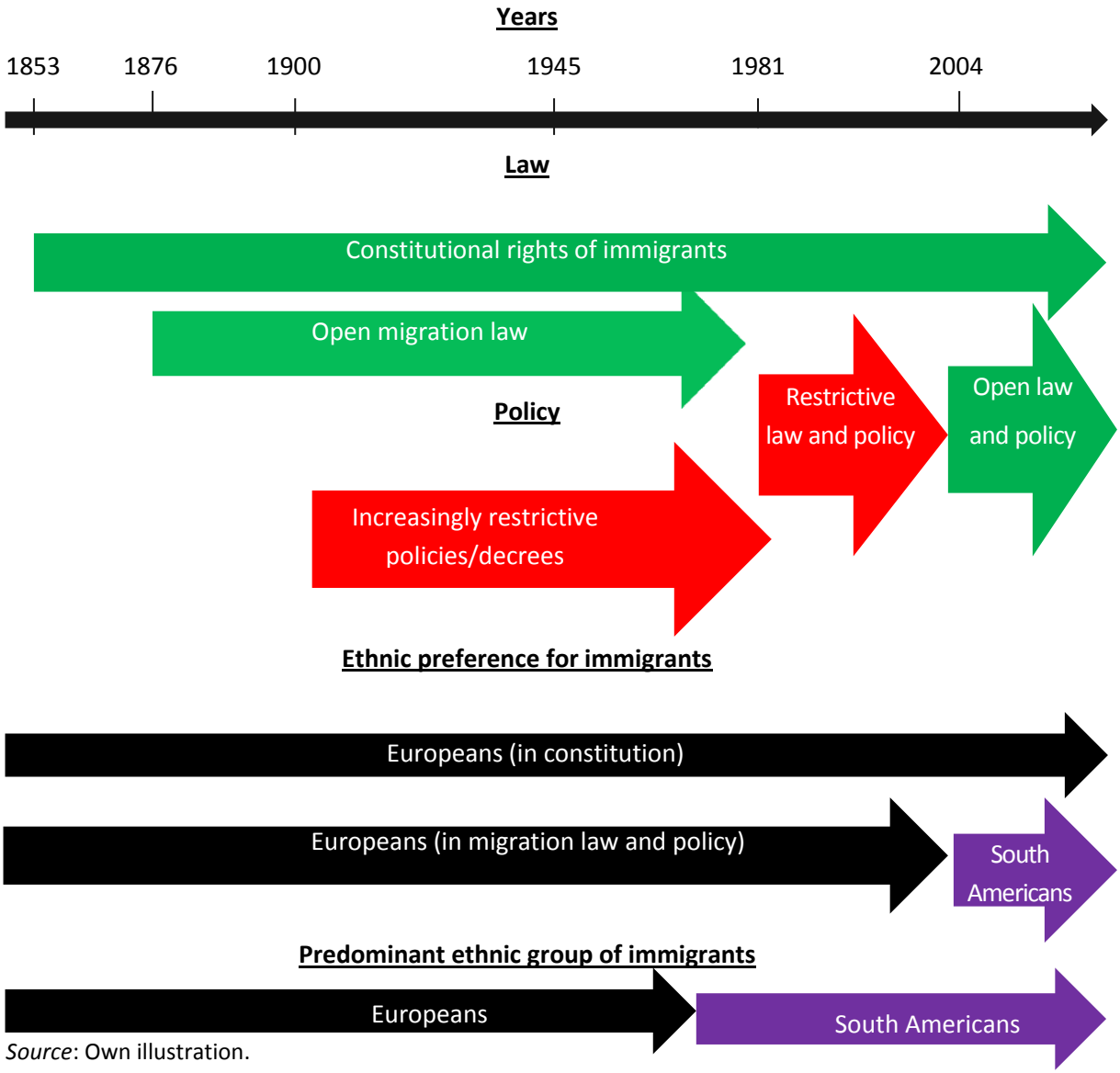
second-class citizens has been described by King (2002) in the US in the 1920s, in this case discriminating and segregating African Americans. However, Argentina's Constitution still enshrines a preference for Europeans (FitzGerald and Cook-Martín 2014: 299–300), while its 2004 liberal Migration Law favours MERCOSUR nationals, questioning the occurring of a '"de-ethnicisation"' or end of ethnic selection (cf. Joppke 2005: 30) in the case of Argentina.

The officially open migration law in Argentina dates back to the 1870s. While this law was not changed until the early 1980s, in the twentieth century it was undermined by increasingly restrictive policy through additional laws and practice (Mármora 2011: 3), which culminatedin two decades of restrictiveness between 1981 and 2004 (see Figure 3.1). The Migration Law passed in 2004 is thus not really novel. It constitutes a return to the initial liberal legal tradition at the end of the nineteenth century. At the same time, the 2004 Migration Law acknowledges that South Americans have been the predominant groups of immigrants in Argentina since the 1980s (see Figure 3.1).

While similarly to the US (cf. Zolberg 2006) the image of openness continues to be part of the official narrative until this day, the reality in the twentieth century was more complex in Argentina's migration policy. In 1902 the Argentine Government issued the first restrictions on entry conditions for immigrants. This counter-approach to the openness in the nineteenth century was continued during the numerous arrivals of Europeans after World War I. After World War II, the rise of Perón and his sympathy with fascist ideology enabled the arrival of many fleeing the war in Europe, despite Perón's government issuing covert administrative measures to try to hinder Jews from seeking refuge. The post-war period was characterised by effective openness due to the sheer number of arrivals and the contradicting administrative regulations in place. Military regimes in the 1950s and 1960s adopted several restrictive decrees, whereas democratic governments in between and after those military rulers granted amnesties for immigrants from South America (Novick 2010). After the high level of restriction since the last dictatorship (1976–1983), the current policy is once again based on an open approach. Since administrative discretion and restrictive laws were used to undermine the overall liberal character of the migration legislation in the past, it remains to be seen if the 2004 Migration Law will face the same challenge – that of implementation and new or changed legislation undermining the openness of the law and policy.

While revisiting the historical course of events, it is important to think about how racism has developed. To further our understanding of the ambiguous impact of racism on the 2004 Migration Law I will study the ways in which racism expresses itself and its reality is constantly being denied. 'Racism' is a very value-laden word but I feel I must use it for reasons which will become clear in the course of this chapter. As I review how migration law and policy have developed over 200 years, I systematically pay attention to the way in which migration policy relates to the 'racial' configurations of Argentine society. The 'racist anti-racism' (Wade 2015: 1295) in which Argentina engaged in the 1940s as a counter-position to the dominance of the United States in the hemisphere (FitzGerald and Cook-Martín 2014) still characterises discrimination today. The historical focus on settlers from Europe has led to an entrenched racism towards Latin Americans, Asians and others that is still so widespread today that it may well undermine the effective realisation of the Migration Law and policy of 2004. Race has played a role in creating a national imagined community and racist approaches have changed over time.

Figure 3.1: Timeline of constitutional and immigration law and policy convergence versus ethnic preferences and realities



Source: Own illustration.

This chapter reviews the historical context that resonates in the understanding of both human rights and how the 2004 Migration Law emerged. It analyses five historical factors that can help to explain the absence of resistance to the adoption of the 2004 Migration Law. The first consists in a history of an open migration law, which wwas partly offset by administrative decrees, laws and other policy practice. Nonetheless, the open migration law was only entirely revoked in 1981 for a period of about 20 years. The 2004 Migration Law thus represents the return to a constitutional but at the same time a more complex legal and policy tradition. The second factor is the immigrant past being a key component of the national identity. Thirdly, it is important to bear in mind that immigration has always been, and continues to be, part of Argentina's population policy. The only difference lies in the focus having moved away from

European settlers, who should ideally become citizens, and towards migrant workers, whose rights are more ambivalent. Fourthly, in absolute terms Argentina continues to be the most important country of immigration within Latin America, where it largely outnumbers emigration. The relative geopolitical unimportance of Argentina allowed it to contest and resist the influence of the United States during the twentieth century (FitzGerald and Cook-Martín 2014), at least until the dictatorship in 1976. This fifth factor enabled successive Argentine governments to pursue a unique migration law without formal discrimination long before the United States abandoned its racist immigration provisions in the 1960s (FitzGerald and Cook-Martín 2014; see King 2002; Joppke 2005; Zolberg 2006 on the US). Argentina's legislation merely used the less-obvious administrative level instead.

Building on the analysis of census data, the first section of this chapter focuses on the period of large-scale immigration at the turn of the twentieth century – especially from Italy and, to a lesser extent, Spain. It reviews the laws and policies in place, which aimed to encourage settlement in order to populate the country and which represented a rather unique development policy. The section also highlights the fundamental role of immigration for Argentina, which became a 'settler society' (Freeman 1995: 882) alongside the United States, Canada, Australia and New Zealand, even though it never reached the same development levels as these latter countries after the 1929 crisis. The second section of the chapter relates to the perception in Argentina that those arriving originated from countries other than those envisaged and thus did not always bring about 'progress' and 'civilisation' but, rather, unwanted, radical left-wing ideologies and practices. In this section I detail the restrictive policy measures set up to minimise the entry of communists and other 'undesirable' workers. It explains how the open-door approach enshrined in the 1853 Constitution and the 1876 migration law became increasingly restrictive in the twentieth century through the implementation of policy regulations and decrees. Argentina was the destination of a second wave of European immigrants after World War II. Yet there were so many regulations in place that hardly anyone still had an overview of them all, leading to inconsistencies in their implementation which made the immigration practice *de facto* open again. The third section of the chapter focuses on changing migration patterns after the 1950s on the one hand, and the restrictive 1981 Videla Law and policy on the other. Racism towards, in particular, the poorer classes of Latin Americans increased – though in a carefully disguised form – as this part of the population became more visible after the decline of European immigration. At the same time, emigration became a noticeable new trend which increased exponentially with the 2001 crisis.

The last sub-section discusses racism. Racial thinking has played a role throughout Argentina's recent history. Only because the country does not consider itself as having an issue with racism – which is understood to be affecting the United States only – does not mean that racism does not occur.

3.1 Open doors for Europe: the historical origins of equality

Similar to the US (Zolberg 2006), '[t]he question of who would come and who would become a citizen has been central to Argentina's nation-making projects' (FitzGerald and Cook-Martín 2014: 302). Argentina is a very early example of an immigration country in the global South that explicitly and early on based its population and economic development strategies on the contribution of immigrants. The guiding principle of the policy was to populate the vast interior of the country with settlers from Europe in order to replace the almost-eradicated indigenous population.

Europeans arrived in unprecedented numbers. Until the 1950s, Argentina was the second most important destination in the Americas, exceeded in numbers only by the United States; in relative terms, as a share of the total population, it was the leading destination for immigrants on the continent (FitzGerald and Cook-Martín 2014: 36). This next section will look at the specificities of Argentina's migration law tradition, the large influxes of migrants from Europe and the early influence of the ideal of the European immigrant on the identity both of Argentines and of Argentina as a nation.

3.1.1 Constitutional rights for immigrants as 'inhabitants' and pro-immigrant legislation

Migration legislation in Argentina dates back two centuries. After almost 300 years of colonial rule by the Spanish crown, the Spanish Viceroy was ousted in 1810 and Argentina declared its independence in 1816 (Torre Revello 1938: 82).[22] After the end of Spanish colonialism but still before independence, the first decree on migration was adopted in 1812. The decree protected all foreigners and their families residing in Argentina. Immigrants were granted the

[22] At the time, Argentina was called United Provinces of the River Plate (*Provincias Unidas del Río de la Plata*), which remains one of the official names of Argentina.

same rights as Argentine citizens, and had to respect the public order and laws like everyone else. European peasants were granted land to work on, which developed into large land holdings (Nugent 1992: 117–118). Others were encouraged to acquire the necessary equipment for mining. Many migrants, nonetheless, settled in the capital, Buenos Aires, working in the commercial sector. In 1820, the Immigration Commission was established in order to reach out to European farmers and craftsmen and incite them to move to Argentina; its other role was to support immigrants already in Argentina in their search for employment. Only two years later, the Commission was discontinued. In 1826, a law on long-term land lease (emphyteusis) was adopted, which allowed foreigners to rent public land (Giustiniani 2004: 26).

As of the mid-nineteenth century, immigrants were granted constitutional rights as 'inhabitants'. With the National Constitution of 1853, 'a migration policy of open doors was established' (Giustiniani 2004: 26; see also Oteiza and Novick 2010). It was based on two principles which are still (partly) in force today, through the 1994 Constitution: on the one hand, all those who are living on Argentine soil are objects of the Constitution and the Federal Government cannot restrict the entry of anyone who wants to 'work the soil, improve the industries, and introduce and teach sciences and arts' (Article 25 of the Constitution of 1853).[23]

On the other hand, the Federal Government of Argentina must support European immigration. Simply encouraging European immigration was considered less damaging to Argentina's international reputation as a destination country than an explicit exclusion of certain nationalities or quotas would have been. The latter was the way the US approached selection, which was discredited as racist in the 1960s (Joppke 2005). Argentina took a mixed approach to justifying ethnic selection, combining an assimilationist approach with civic rights (cf. Joppke 2005). The constitutional provision on immigration directly results from the demographic aim of populating Argentina (Zaffaroni 2004) through 'mass immigration' (Freeman 1995: 896) from Europe and from the willingness to grant them the same rights as citizens (Ceriani Cernadas 2004). The focus on the citizenship rights of immigrants stands in contrast to the limited – if any – citizenship rights of indigenous and peasant populations in several Argentine territories (that only later became provinces of Argentina) in the interior of the country, including La Pampa, El Chaco, Jujuy and Formosa, at the time (Salomón Tarquini 2013: 187–189).

[23] See also article 25 of the Constitution of 1994, http://www.senado.gov.ar/web/interes/constitucion/capitulo1.php (accessed 12 April 2013).

An expression of Argentina's pro-immigrant approach continued in the latter half of the nineteenth century (Novick 2012; Oteiza and Novick 2010). In 1876, the Immigration and Colonization Law 817 was adopted, better known as 'Ley Avellaneda' (hereafter Avellaneda Law) after the Argentine president, Nicolás Remigio Aurelio Avellaneda (1874–1880), who introduced it. This migration law was designed to attract European immigrants. It was formally in force for over a century – until 1981, when it was replaced by the Videla Law during the military dictatorship.

The concept of 'immigrant' was defined in the Avellaneda Law as 'every foreign day labourer, craftsperson, industrial or agricultural worker or teacher who, being under 60 years of age, and acknowledging his/her morality and skills, arrives in the Republic [of Argentina] with the aim of establishing him/herself in it' (Article 12, Avellaneda Law). This definition, in line with the constitutional provision, highlights the country's focus on skilled immigrants, who need to be willing to make use of their abilities for the benefit of Argentina, which probably left out low-skilled immigrants from neighbouring countries. According to Giustiniani (2004), this functional and liberal value-oriented approach needs to be understood as essentially driven by the economic crisis in the country at the time, as well as by the fact that European and intra-regional immigration was still lagging behind the expectations of the political elite. The aim was to increase production and national income, as well as the level of education in the country, to 'consolidate the elements of civilization, order and peace' (Avellaneda n.d., cited in Giustiniani 2004: 28). In short, the 1876 Avellaneda Law was meant to support the process of increasing welfare and of making the country supposedly more 'civilised', as in the European model.

3.1.2 The 'civilising force' of white, Northern European immigration in the nineteenth century

The influential Argentine intellectual Juan Bautista Alberdi wrote, in 1852, '[t]o govern is to populate'. The maxim reflects the demographic focus of the Argentine approach to migration governance at the time. '[I]n the mercantilist view of nineteenth-century state-makers [the national population] would be better if large' (Cook-Martín 2006: 574). Alberdi meant to refer to all of the Americas with his dictum (including the United States). Indeed, he saw the United States as a model which attracted immigrants from Europe who were more advanced in terms both of experiences with freedom and of industrial development (FitzGerald and Cook-Martín 2014: 304–305).

Alberdi acknowledged that all seemingly 'spontaneous' immigration was once deliberately created. In the case of Argentina this happened through colonialism by the Spanish. With his differentiated view of Europe, Alberdi did not believe that all immigrants should be equally welcomed (thus foreseeing issues that arose in the early twentieth century). He considered that there were 'two Europes', one 'free, rich, civilised' and the other 'ignorant, vicious, backward, corrupt' (1852: 18) – and both needed to be considered when policy was devised. In the 1850s, the elite of the country considered that 'beggars [for European immigrants] can't be choosers' (FitzGerald and Cook-Martín 2014: 305). Alberdi considered that only 'bad' immigrants would come voluntarily to Argentina if it had nothing to offer, in the sense of unwanted persons that the supposedly 'civilised' Europe did not need. They would only 'pollute' and 'degenerate' (1852: 18) Argentina. This probably explains the reference to 'honorable and hard-working' immigrants with useful skills in the 1876 migration law (Article 3.3).

Europe was the model for the Argentine nation-state, including in terms of race. Trying to influence the demographic and ethnic composition of the nation by encouraging European settlers to populate the vast land amounted to 'demographic engineering' (see Morland 2014). 'Civilisation', 'progress' and 'modernisation' were racialised conceptions (Joseph 2000: 342) meant to 'whiten' the population (Bartolomé 2003: 167). Argentine leaders considered the most desired group of immigrants to be 'white' Northern Europeans, amongst whom Anglo-Saxons were especially favourably looked at due to their political – meaning liberal – traditions (FitzGerald and Cook-Martín 2014: 305). Northern Europeans and Anglo-Saxons were considered as hard-working and as having the desired supposedly biological characteristics such as fair skin and reason, as opposed to the dark skin and backwardness of the indigenous and peasant populations in the pampas of the country (Bastia and vom Hau 2013; Joseph 2000).

In contrast to the desirability of whiteness, populations living in the interior of the country were referred to as the 'black race' (*Segundo Censo de la República Argentina Mayo 10 de 1895* 1898, volume II: XLVI). In the text accompanying the 1895 census, the state representative authoring the census report referred to the 'uncivilised indigenous population […], finding itself outside of the action of governments and in a state of perpetual war with them' (*Segundo Censo de la República Argentina Mayo 10 de 1895* 1898, volume II: XLVIII). The

need for land resulted in the indigenous population being forcibly evicted and killed, with the aim of replacing them with immigrants (see also Domenech 2007: 10). This resulted in the eradication of native and *mestizo* populations in the Argentine desert in the 1870s – known as the 'Conquest of the Desert', *la Conquista del Desierto* – which some do not hesitate to qualify as genocide today (Bartolomé 2003; Delrio *et al.* 2010). Once the 'desert' was 'unpopulated, it was necessary to populate [it] again' (Bartolomé 2003: 167), this time with ideal immigrants. As Bartolomé (2003: 165) points out, the 'desert' was not deserted as it was inhabited by indigenous tribes. Yet the latter were excluded from citizenship while European settlers – despite their low interest – were able, if they wished, to become citizens right from the start (Penchaszadeh 2008). Indigenous populations could not vote until the mid-twentieth century (Salomón Tarquini 2013: 189). Latin Americans, Africans, Arabs and Asians were similarly despised for racialised reasons (Bastia and vom Hau 2013; FitzGerald and Cook-Martín 2014: 309; Joseph 2000). Former slaves, whom Argentina never imported on the scale of neighbouring Brazil, do not seem to have been part of the debates at the time, but were probably similarly suppressed and without any rights.

In an analogy to the US again and partly Brazil, the same focus on Northern Europeans in Argentina's immigration policy at the end of the nineteenth and first half of the twentieth century led to the discrimination and exclusion of undesired, 'uncivilised' native populations within the country and later on immigrants from neighbouring countries (Devoto 2001). Racism in Brazil was 'somewhat more muted' (Marx 1998: 46) than in the US (and Argentina), but African descendants still discriminated against. Nonetheless, black persons were also the lowest in the social order and the ruling elite preferred focusing on encouraging white European immigration instead of enabling equality for the freed former slaves (Marx 1998: 161–163).

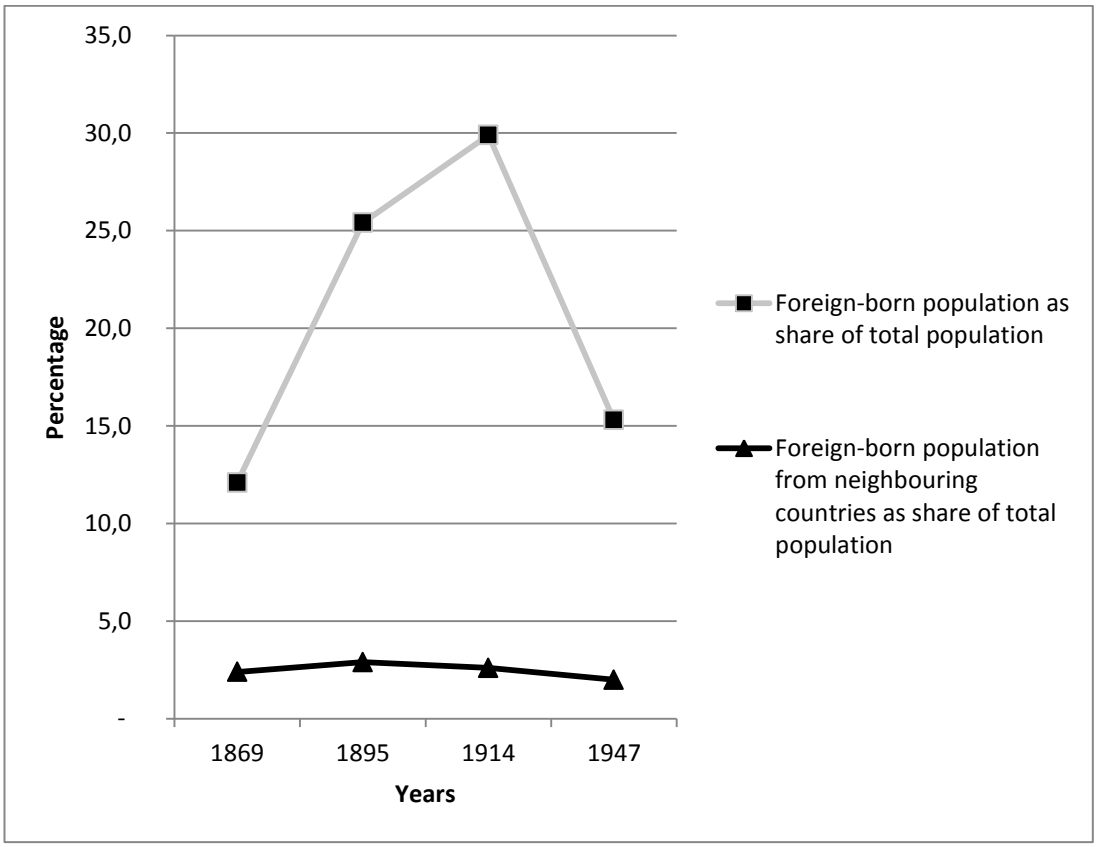
The 'civilising' and 'whitening' of the Argentine nation did not work quite as imagined, though. Firstly, and again similarly to the US (King 2002), it was not the desired migrants who arrived. Three out of five immigrants (61 per cent, *Segundo Censo de la República Argentina Mayo 10 de 1895* 1898) in 1895 had come from Italy. At that time, Italian immigrants were so numerous that they represented 11.8 per cent of the total Argentine population. Almost every fifth immigrant was from Spain (17.4 per cent, census data) – in other words, the preferred Anglo-Saxons were under-represented. Immigrants from France (representing 9.9 per cent of the total immigrant population), the United Kingdom (2.1 per cent), Austria (1.7 per cent) and

Switzerland and Germany (1.5 per cent each) were arriving in negligible numbers, at least compared to Italians and Spaniards (*Segundo Censo de la República Argentina Mayo 10 de 1895* 1898).

3.1.3 European mass immigration: demographically engineering the nation

Arrivals of immigrants from Europe peaked between 1890 and 1914. In the 25 years between the census of 1869 and that of 1895, the number of immigrants increased fivefold from 210,000 to more than 1 million. Immigration accounted for 65 per cent of the population increase during that period, meaning that, for every additional Argentine born, two more immigrants arrived. In relative terms, the share of immigrants as part of the total population doubled from 12.1 per cent in 1869 to 25.4 per cent in 1895 (*Primer Censo de la República Argentina 1869* 1872; *Segundo Censo de la República Argentina Mayo 10 de 1895* 1898: XLI). In 1914, 1.36 million additional immigrants resided in Argentina (compared to 1895), reaching about 2.36 million, while the total population doubled from about 4 million in 1895 to 8 million in 1914 (República Argentina 1916). Immigrants represented a record 29.9 per cent of the population in 1914 (República Argentina 1916; see Figure 3.2 below).

Figure 3.2: Foreign-born population in Argentina 1869–1947



Source: Own illustration based on INDEC (1997), cited in INDEC (2004).

European immigration peaked between 1895 and 1914 – the beginning of World War I – with many fleeing to Argentina (INDEC 1997, cited in INDEC 2004; see Figure 3.2). By 1914, Italians reached almost 1 million persons, or an 11.8 per cent share of the total population of Argentina, but decreased in relative terms among all immigrant groups, representing only 30 per cent of the immigrant share. The 1914 census counted more than 800,000 Spaniards. Representing 10.5 per cent of the total population and 27 per cent among immigrants, the Spanish thus became a more important group among the foreign-born, in both absolute and relative terms. While the preferred group of Northern Europeans increased in absolute terms, they were still largely outnumbered by Southern Europeans (República Argentina 1916).[24] Although the constitutional preference for Europeans translated into immigrants from the 'old continent' constituting by far the largest share of immigrants until the 1980s, Europe was not

[24] Important to note, though, is that, the 68,000 Germans who resided in Argentina in 1914, for instance, largely outnumbered the approximately 58,000 Germans who started immigrating to Brazil between 1919 and 1932 (German census data, Statistisches Reichsamt (1930): 229 and Bickelmann 1980: 143, 149, cited in Rinke 2008: 40–1), when German migration to Argentina probably also increased much further (but no Argentine census data are available).

the only region of origin. Immigration from neighbouring South American countries has remained fairly stable in relative terms since the nineteenth century.

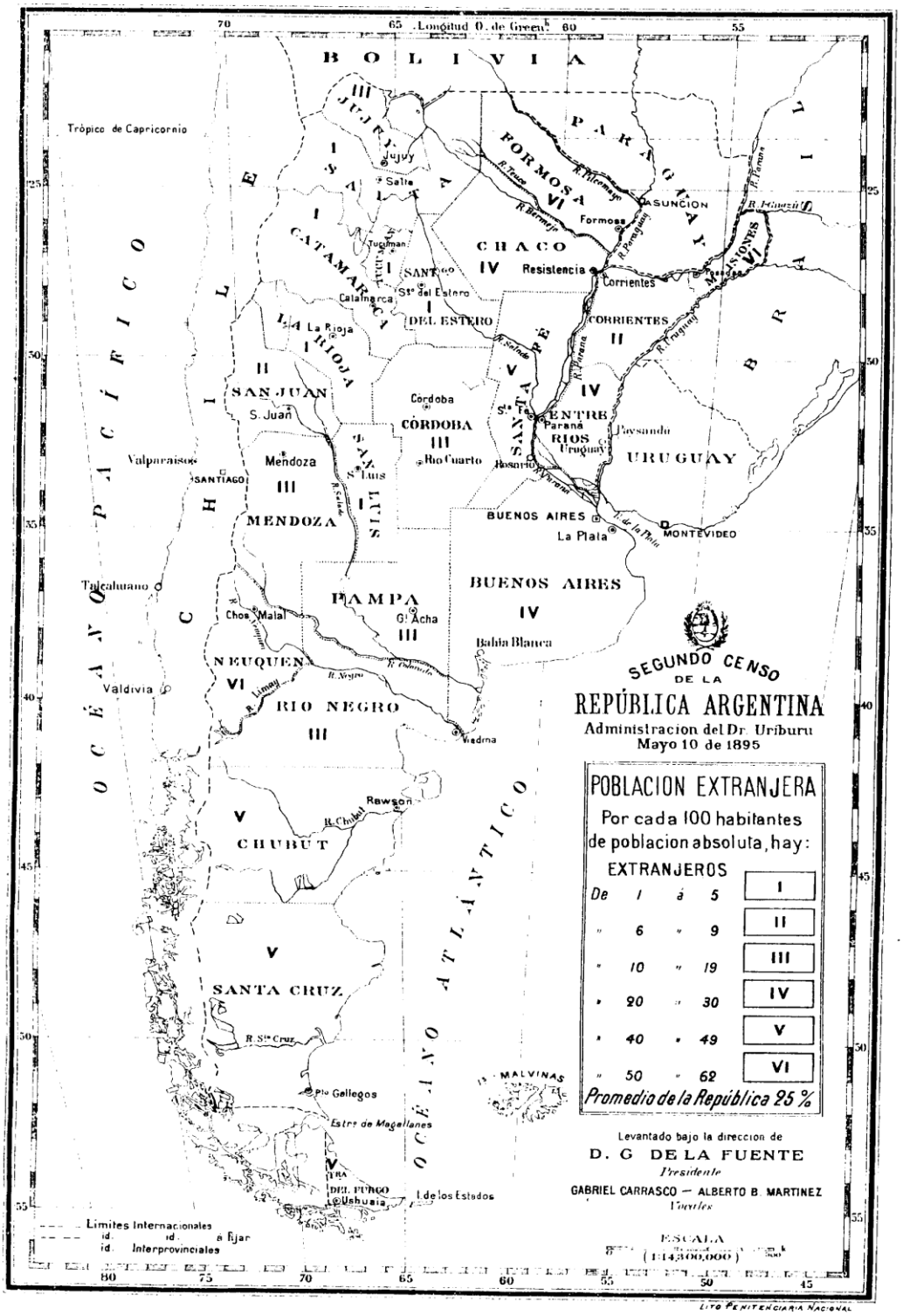
Between 1905 and 1914, only 40,000 immigrants naturalised to become Argentine citizens. Of those, the largest groups were the Spanish (almost 15,000 naturalisations) and the Italians (about 12,000). Far fewer Uruguayans (about 2,000) and Russians (about 1,500) took Argentine citizenship, while all other countries' quotas did not exceed the hundreds (República Argentina 1916: 212). 'Citizens and noncitizens had such similar rights that legislators worried immigrants would have little incentive to naturalize' (FitzGerald and Cook-Martín 2014: 308), something the figures do not contradict. In addition to the little difference in rights for immigrants and citizens (except the right to vote), a second explanation for the low number of naturalisations is that not all of the large numbers of Southern Europeans who arrived came to stay. Many Italians came as seasonal workers for the harvest, often year after year (Nugent 1992: 114; 119–120).

The economic growth strategy based on immigration was extremely successful, in particular from the 1860s on (FitzGerald and Cook-Martín 2014: 302; Scobie 1971: 5). By the turn of the twentieth century, Argentina was the eighth-richest country in the world, with a *per capita* income similar to that of Germany and the Netherlands, thereby surpassing countries like Spain, Italy, Sweden and Switzerland (Moya 2006: 11). Development was very concentrated in Buenos Aires, in particular in the city, but also in the surrounding province (Scobie 1971: 5) and the large-scale land owners of the interior (Nugent 1992: 117). Investors from the United Kingdom, France and Germany, for example, provided the capital and the demand for agricultural goods, whereas an open migration policy encouraged migrant workers to provide the much-needed labour force (Hyland Jr. 2011: 553; Novick 2000, 2010, 2012). The United Kingdom was one of Argentina's preferred trading partners, which was reflected in the maxim 'meat for rails': Argentina provided meat and cattle, the British Empire invested in the construction of railroads (Hyland Jr 2011: 553). This close relationship with the United Kingdom may have influenced the image of the ideal immigrant as promoting the liberal values developed there, as described above.

Based on census data (*Segundo Censo de la República Argentina Mayo 10 de 1895* 1898), Figure 3.3 shows how, in 1895, the share of immigrants was particularly high in the southern provinces of Santa Cruz, Tierra del Fuego, and the protectorate of El Chubut, where they

represented 40–49 per cent of immigrants, and over 50 per cent in Neuquén, in the central-west of the country, and in Formosa, bordering Paraguay. In the province of Buenos Aires, immigrants accounted for 20–29 per cent of the population.

Figure 3.3: Foreign-born population in Argentina by province as share of total population, 1895



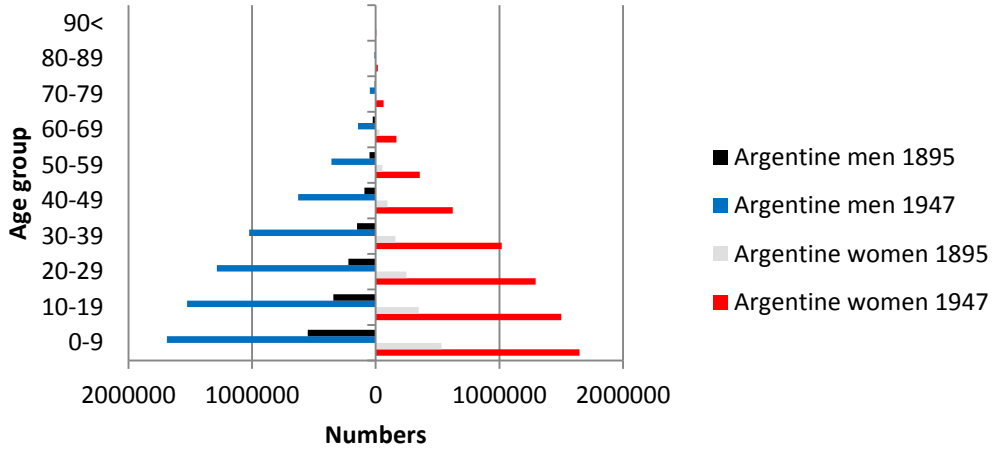
Source: *Segundo Censo de la República Argentina Mayo 10 de 1895* (1898), Volume II: XL.

Yet influxes to Argentina were not only based on pull factors. They also need to be analysed in the context of the push factor referred to by Moya as 'the first sustained population explosion in human history' (2006: 4). High fertility and rapid growth in the labour force in Europe in the

nineteenth century created both the demand for food products from countries like Argentina and the supply of workers from a demographic surplus in Europe (Moya 2006: 4). This new mobility pattern emerged from trade relations across the Atlantic. Argentina, together with the United States, was one of the main producers of wheat and meat. In particular, it was the high wages which attracted immigrants, not necessarily the migration policy. The 'emigration "fever"' (Moya 2006: 5) of Europeans, probably fueled by the economic prosperity of Argentina at the time, was met with the political will to freedom of movement at destination (Moya 2006). Political stability, the availability of vast lands expropriated from the indigenous population for large-scale agricultural development, better means of transportation and refrigeration as well as modern ports allowed Argentine beef, grain and goods to be shipped to Great Britain, fueling economic growth that, in turn, attracted immigrants (FitzGerald and Cook-Martín 2014: 303).

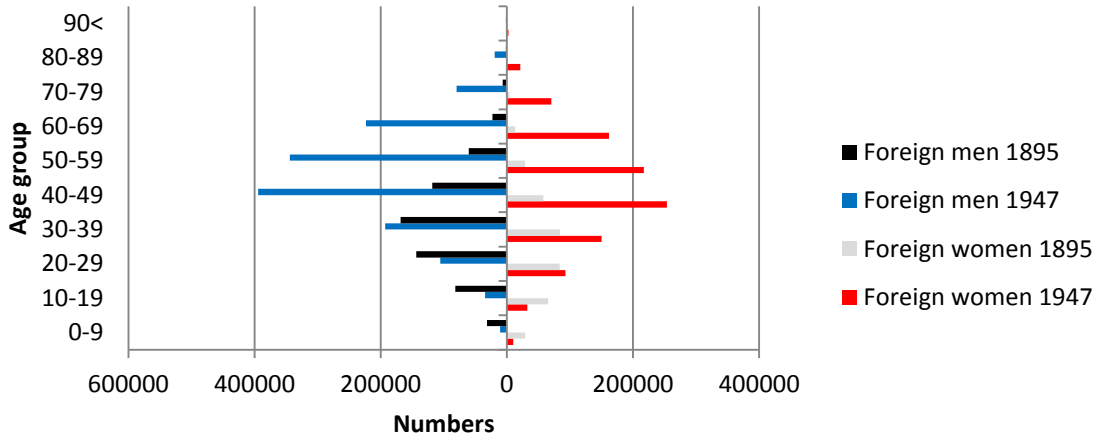
Figures 3.4 and 3.5 illustrate the demographic contribution of immigrants to the working population, comparing 1895 and 1947. In 1895, 85 per cent of the Argentine population was younger than 40, and 60 per cent – or three in five – were younger than 20 years. Conversely, the majority of immigrants were of working age, meaning between 20 and 49 years. They filled the many job openings associated with the economic growth of Argentina.

Figure 3.4: Age distribution of the Argentine population without the foreign-born, 1895 and 1947



Source: Own illustration based on *Segundo Censo de la República Argentina Mayo 10 de 1895* (1898); Dirección Nacional del Servicio Estadístico (n.d.).
Note: Data on unknown age not included.

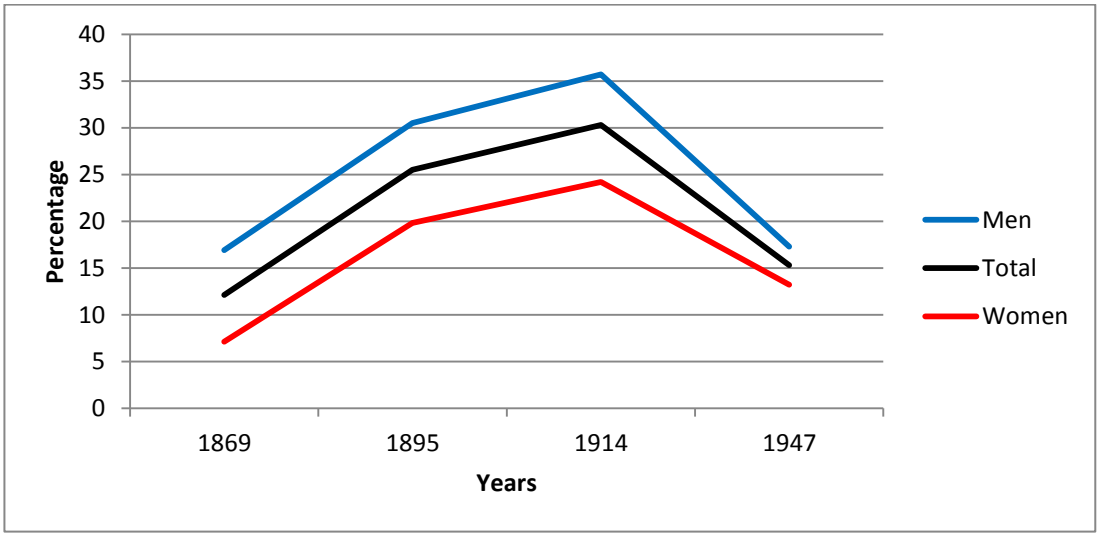
Figure 3.5: Age distribution of the foreign born in Argentina, 1895 and 1947



Source: Own illustration based on *Segundo Censo de la República Argentina Mayo 10 de 1895* (1898); Dirección Nacional del Servicio Estadístico (n.d.).
Note: Data on unknown age not included.

The many new arrivals changed the demographic composition of Argentine society, in particular in the capital city, Buenos Aires, which saw an over-representation of male workers (Novick 2000). While, among Argentines, women slightly outnumbered men in both 1895 and 1947, immigrants consisted mostly of men (Dirección Nacional del Servicio Estadístico n.d., see Figure 3.6). Male immigrants were also highly represented in the overall population, accounting for as many as 30.5 per cent of the total male population in 1895 and 35.7 per cent in 1914. With as many as one in three men being foreign-born, immigrants married Argentine women, thus facilitating their integration. Yet not all would be able to marry or were even looking for a spouse, given that their families remained in Europe.

Figure 3.6: Share of foreign-born among total population, disaggregated by sex



Source: Own illustration based on Dirección Nacional del Servicio Estadístico (n.d.).

The overrepresentation of males among immigrants was in line with 'Argentina's interest in men as workers, and in women and children as supporting members of family production units' (Cook-Martín 2006: 575). Migration policies had been gendered right from the beginning: the 'immigrant' had always been understood as a masculine category. This made it almost impossible for a woman to qualify for the entry requirements; instead, she faced associations with sex work and forced labour if she was unmarried (Cook-Martín 2006; FitzGerald and Cook-Martín 2014: 313). Education and mandatory military service for the children of immigrants were supposed to cut all ties with the countries of origin and homogenise them into Argentine society (Zaffaroni 2004) in an assimilationist approach (cf. Joppke 2005).

The economic crisis, subsequent social tensions and large numbers of new arrivals at the end of the 1880s fueled negative feelings against the immigrants from civil society groups, the press and the political elite. Since the much-wanted, supposedly 'civilised', Anglo-Saxon immigrants were not arriving, '[c]oncerned citizens criticised federal immigration policy, questioning whether or not the immigrants' idiosyncrasies and customs could help Argentina's progress directly or transform these people into citizens of a modern nation' (Hyland Jr 2011: 554).

European workers and peasants did not want or need to naturalise while, at the same time, the remaining indigenous populations had to fight for their citizenship rights and access to land. When the two groups started claiming rights – workers' rights in the case of Southern European immigrants and citizenship and land rights in the case of the indigenous populations – they were accused of being communists. Assimilation was thus the predominant preoccupation of the governing elite in terms of integrating immigrants. The anti-liberal tendencies in this policy soon led to democratic contestations and countervailing tendencies in the immigration policy, countering the myth of an open immigration regime in the twentieth century that the official narrative likes to portray until this day (see Zolberg 2006 on stark similarities with the US).

3.2 The incoherence between legal norm and migration policy in the twentieth century

In the early twentieth century, an increasing incoherence between the migration policy and the underlying legal norm began to emerge. The state-led model of 'modernising' the country through attracting 'good' and 'progressive' immigrants quickly showed its ambiguities when most arrivals did not correspond to the ideal of the political elite. This section highlights firstly how the 'undesired' immigrants who arrived also led to a shift in how the national identity was imagined by the political elite. The second section details how immigrants from countries like Italy and Spain were suspected of being 'subversive elements' – anarchists, communists and other left-wing activists feared by the Argentine elite (FitzGerald and Cook-Martín 2014: 21; Sutton 2008) as questioning the political system and power constellations in the country. The last section then explains the impact on migration policy and practice of the large wave of immigrants, refugees and others arriving after World War II.

3.2.1 The first reconfiguration of 'white': the national identity U-turn based on actual immigration

As a result of the majority of immigrants actually being Southern Europeans – mostly Italians and, to a lesser degree Spaniards, with a peasant background – 'the social value of whiteness' (Moya 2006: 20) decreased and the class dimension evolved. At the dawn of the twentieth century, the aim of 'civilising' race through immigrants, modernising the country and fostering economic growth were replaced with that of 'transform[ing] such a heterogeneous society into a "homogeneous nation" with a distinct Argentinian identity' (Bastia and vom Hau 2013: 7). The political elite's early anti-Spanish feelings gave way to

> *Hispanism, a neoromantic and anti-positivist reaction tied to cultural nationalism. In a country with few indigenous people [left], plenty of non-Iberian newcomers, and all the social tensions of an urban mass society, Hispanism became a form of nostalgia for an idealised premodern and pastoral past that embodied the autochthonous and genuine. […] As a result, nationalism emerged as anti-liberal, elitist, Catholic, and Hispanophilic in Argentina* (Moya 2006: 20).

The political elite's new approach, based on Spanish origins and Catholic values elsewhere considered backward, also meant a complete reversal of the distinction between 'good' civilisation and bad 'barbarism' propagated by former President Sarmiento. The *gaucho*, the

Argentine version of the cowboy in the vast pampas, who had almost disappeared, was idealised as distinctively national and assumed to be of European origin, while (recently arrived) immigrants were considered as inferior and heterogenous and were blamed for 'cosmopolitan decadence' (Bastia and vom Hau 2013: 7; see also Joseph 2000). This historical period was characterised by the rather arbitrary assumption that Argentina was indeed white (and thus no longer in need of being 'whitened') based on its Hispanic ancestry, despite and probably in light of its failure to attract the desired liberal Northern Europeans. While the 'race' of Argentines had not changed, it was now considered as probably white enough or whiter – thus better – than the recent diverse group of immigrants. In contrast, Marx (1998) argues that the less exclusive approach but still persistent racism in Brazil is based on the preference for white workers from Europe to similarly 'whiten' the population. However, mixed-race marriages were more common than in the US and many Brazilians with African origins re-categorised as *mestizos* whereas those considered of mixed race before changed to self-identifying as white. This 'flexibility' in race relations did not surface in Argentina.

The revival of Hispanicism in Argentina occurred in stark contrast to some other places, including Mexico (Moya 2006). The national identity 'U-turn' which considered the population that was previously not 'white and civilised enough' as exactly representing that ideal was eclipsed. It seems that the contradictions entailed by this entire change of what was considered the national identity did not surface. The need at the time was to integrate the new arrivals, and this became the order of the day which dominated official policy. At the same time, the return to neo-Hispanicism and Catholic values in Argentina was accompanied by an increasingly restrictive stance toward the 'unwanted' left-wing, anarchist, Jewish and other groups of immigrants, just as indigenous populations continued to be repressed.

3.2.2 The impact of 'subversives' from Southern Europe: the start of restrictions

Restrictive migration policies were introduced as early as 1902 (Domenech 2011; Giustiniani 2004: 28–29; Novick 2000, 2012; Penchaszadeh 2008).[25] Instead of the hard-working immigrants from Northern Europe,

> *[…] many of those [Europeans who arrived] neither wanted to work the soil nor to be disciplined workers. On the contrary, they were fervent followers of the thoughts of*

[25] Law 4114 on Residency of Foreigners 1902; Law 7029 on Social Defense 1910; and the decree of 31 December 1923, regulating the Law Avellaneda.

> *Marx and the actions of [Russian revolutionary anarchist Mikhail] Bakunin. From there the unexpected workers' unions appeared, and the necessity to pass the Residency and Social Defense Law [of 1902]. The policies of expulsion made it evident that the doors were not open and that they closed every time a bit more* (Statement by Oliveira in the 2000 consultation, CPDH 2010b).

In this excerpt from a talk by the ombudsperson of Buenos Aires in 2000 during a public consultation conducted for the forthcoming Migration Law of 2004, Oliveira intended to show that the alleged tradition of a liberal migration regime was at least partly a myth with regards to the policy undermining the law.

The Argentine elite long denied the existence of social conflicts. Immigrants were thus blamed once conflicts surfaced which were internal to Argentine society, just as immigration became an important phenomenon (Devoto 2001). This was not helped by the fact that migrants joined and increasingly supported the foundation of workers' unions. Immigration consequently began to be considered as affecting (national) security (FitzGerald and Cook-Martín 2014: 21; Novick 2000). In response, the administration expanded the possibilities for holding immigrants in detention and expelling them without access to appeal mechanisms, especially if they were considered unwelcome (*non-gratos*) or thought to endanger the interests of the country (Giustiniani 2004: 29; Penchaszadeh 2008). Migration policy continued to focus on the contribution which immigrants could make to the development of the country, but increasingly undermined the constitutional principle of equality between immigrants and nationals before the law.

Instead of introducing quotas, as other immigration countries such as the United States, Australia, Cuba and New Zealand did, successive Argentine governments opted for regulating the individual characteristics of immigrants. As of 1919, two decrees increased the restrictions in place in Article 32 of the Avellaneda Law, implemented by President Hipólito Irigoyen (1916–1922, 1928–1930). The new regulations were motivated by a fear of social unrest. In 1923, faced with increasing arrivals of immigrants – which could have been due to tighter rules imposed by the United States on immigrants, thus diverting movements of populations elsewhere – the decree regulating the Avellaneda Law introduced more restrictions on immigrants in Argentina (Devoto 2001). This happened in line with the role of the Immigration Department becoming that of protecting 'honorable' and 'hard-working' immigrants, while at the same time curtailing immigration flows that would be 'vicious' and 'useless' (cited in Giustiniani 2004: 31). Government officials called representatives of workers' unions, socialists

and anarchists '*gringos degenerados*' ('degenerate white foreigners') in public; these latter were to be barred from entering the country.

In 1932, legal strategies against the Residency Law of 1902 were unsuccessful. However, they highlighted an issue that would continue to be raised by civil society until it was finally included in the 2004 Migration Law. To avoid the application of the controversial Residency Law of 1902, opponents tried to use the justification of *habeas corpus,* the entitlement to a legal remedy against unlawful detention through access to a judge or court being applied to immigrants in this case. This strategy was finally successful in 1958 when the restrictive Residency Law was abolished. The expulsion of foreigners was not based on a judicial decision, but considered to be a purely administrative measure. Only the 2004 Migration Law achieved – on paper – that a penal sanction can exclusively be imposed by the judiciary and cannot constitute an administrative measure contrary to the National Constitution of Argentina (Giustiniani 2004: 29). Thus the principles of the constitutional right to equality of foreigners and citizens, including that of seeking legal remedy, on the one hand and, on the other, the principles of state sovereignty and national security often invoked to this day when restrictive immigration policies are brought into force, have long been debated in Argentine migration policy implementation.

Subsequent governments continued to govern migration through the regulations of the pro-immigrant Avellaneda Law or by imposing new decrees through the Executive branch. This way they avoided the political costs of adopting a restrictive immigration law that breached the rights guaranteed to immigrants in the National Constitution. These new impositions made the legal framework for immigrants confusing and contradictory. Restrictive regulations implemented the Avellaneda Law by increasing the number of obstacles for immigrants through the sheer number of new rules in place (Giustiniani 2004). The aim of the 1876 Law was contradicted through restrictive implementation and various administrative and executive provisions, even though the Avellaneda Law's substance was not changed due to a lack of consensus for new migration law proposals. New draft migration laws were presented in 1923, 1938 and 1949, but not passed (Devoto 2001).

One might be tempted to think that economic considerations, such as the crisis or unemployment, were the reason for this migration policy of control. However, political motivations to 'modify [the] ethnic, national and religious origin' of immigration flows (Devoto

2003, cited in Giustiniani 2004: 32) seem to have been the main force behind the restrictions. Refugees, supposed communist sympathisers, Jews, the poor, the sick and the old were not allowed to enter. Whilst Argentina hosted many Europeans, like other Latin American countries it did not escape the anti-Semitic ideologies imported from Europe (FitzGerald and Cook-Martín 2014: 24). As for the fear of communist insurgents, this was linked to both external historical movements, such as the Russian and Mexican Revolutions (1917 and 1910–20 respectively), as well as to internal events such as the Tragic Week of January 1919.[26]

This is not to deny that economic factors also played a role. A lack of investors and the fall of prices on the global market due to the economic crisis not only impacted on Argentina's growth rates but also affected the local population. The rise in unemployment in the 1930s gave a new impetus to the further restriction of immigration (Novick 2012). However, the diminishing number of new arrivals was considered to be more an effect of the global crisis than Argentina's more selective immigration policy. Nor, in addition, was the ideology of linking European immigration with national progress affected by the more restrictive policy (Novick 2010). Urbanisation continued, while birth rates were stagnating further and death rates decreasing (Novick 2000).

In summary, the radical working class and Eastern European Jews were the unwanted migrants (Bastia and vom Hau 2013: 6). The political opinions of anarchist immigrants were judged as dangerous, whereas Jews were not considered as 'white'. The accompanying more restrictive migration policies were 'related to a more general change in official conceptions of race and nationhood' (Bastia and vom Hau 2013: 6). However, the paradigm of considering European immigration as beneficial was not affected by the reconfiguration of the racial discourse. Conversely, immigrants from South American countries were met with hostility (Bastia and vom Hau 2013). Immigration from neighbouring countries thus seems to have been judged not to be a part of the official strategy, and thus not of the undesired mobility.

[26] *La SemanaTrágica*, in Spanish, was a series of riots and massacres in Buenos Aires in the week of 7 January 1919, led by anarchists and communists – including Italian and Spanish immigrants who were later deported. The riots did lead to worker-friendly legislation, but also saw right-wing groups attack Jewish Argentines. The death toll is still disputed, but probably involved around 700 people, although other estimates are much lower. The anarchist and communist movements were considerably weakened through the government crack-down which followed.

3.2.3 'Racist anti-racism'[27] in the 1940s

According to FitzGerald and Cook-Martín (2014: 66), between 1933 and 1945 around 45,000 of the 100,000 Jews who escaped Nazi extermination by entering Latin America were able to immigrate to Argentina. Despite being a major destination country for Jews, Argentine officials used administrative techniques to restrict the entry of these refugees (FitzGerald and Cook-Martín 2014: 331). As of 1938, administrative measures were introduced which were aimed at reducing the arrival of refugees from Spain and Jews from Central and Eastern Europe, without ever making this discrimination explicit (FitzGerald and Cook-Martín 2014: 65; Giustiniani 2004). Political refugees were not considered immigrants. Due to the fact that they had to flee their origin country, their 'productive capacity' (Devoto 2001: 288) and willingness to integrate were assumed to be less than those of the 'desired' working class of immigrants. Refugees were also thought to be from urban areas and to wish to work in the service sector, thus not conforming to the ideal of rural peasants that Argentina's immigration policy favoured at the time (Devoto 2001; FitzGerald and Cook-Martín 2014: 65). A decree made the 'permit of free disembarcation' mandatory, in addition to all other requirements already in place. This new permit made the immigration system entirely arbitrary, leaving it to the discretion of the immigration authorities to decide who could enter and who could not (Devoto 2001). The decrease in new arrivals in Argentina was probably more attributable to the movement which restrictions imposed on refugees in Europe than to the success of the ever-more-restrictive policy implemented in Argentina (Giustiniani 2004: 32–33).

Geopolitics influenced migration policy, as Argentina had to withdraw a racist proposal to introduce a migration policy discriminating against Jews, Africans and Asians based on racial considerations. On the outside at least, the political elite continued to pretend to be following the United States' lead on providing refuge to those fleeing persecution in Europe, which had been discussed at the 1938 conference convened in Evian, France, by the United States. The suggested policy was considered to be damaging Argentina's international reputation, which had already suffered from the support lent to the Nazi regime in Germany (FitzGerald and Cook-Martín 2014: 32, 302). At the time, '[p]romoting liberal ideals of anti-racism did not matter as much as being seen to promote such ideals' (Wade 2015: 1294). Nonetheless, this does not mean that discrimination against Jews was discontinued in practice. Administrative

[27] Wade 2015: 1295.

discretion and secret circulars were used to this effect (FitzGerald and Cook-Martín 2014: 316–7; Giustiniani 2004).

Keeping track of all the contradictory requirements in place seems to have been a challenge not only for migrants but also for officials. While the administration tried to restrict the arrival of refugees from Spain and Jews from Eastern and Central Europe, the Ministry of Agriculture (which then hosted the immigration authorities) expanded contracts with companies and the Jewish Colonisation Association, using the 'peasant' category for Jewish refugees. The latter never had to prove that they had actually been working in agriculture beforehand, thus contravening the official restrictive refugee policy implemented by the Ministry of Foreign Affairs through consulates abroad. This double-edged implementation underlines the lack of coherence within even the executive branch of the same government (Devoto 2001). Furthermore, low-ranking officials illegally sold immigration documents and competed with higher-ranking bureaucrats for bribes (FitzGerald and Cook-Martín 2014: 314). Enjoying access to networks and means made everything possible; it allowed refugees of different political orientation to all arrive in Argentina (Devoto 2001). The migration policy not only contradicted the migration law and Constitution in place, but it was also strategically applied differently by the various administrative strands. This ambiguity worked to the advantage of migrants. It led Argentina to become an important host of refugees from Europe, despite its attempt to subtly restrict this type of immigration.

Before concluding this section, it is important to observe that the continuous focus on European immigrants, despite their declining numbers in the 1930s, meant that those from the South American region did not receive the same treatment as European immigrants. At the same time, increasing immigration from neighbouring countries was difficult to control given the vast extent of Argentina's borders with them. New border points and multi- and bilateral agreements with Brazil, Paraguay, Bolivia and Uruguay (Acuerdo de Inmigración del 3/2/1938 with all four countries and Convenio del 5/7/1939 with Uruguay, cited in Devoto 2001: 287) could not stem that mobility, but could 'order' (Devoto 2001: 287) these movements. Nonetheless, Latin American immigrants and those of Catholic countries in general had several proponents while, at the same time, the consensus on the need and will to receive European immigrants was very influential. The latter were encouraged through a 'law of colonisation' in 1940 (Devoto 2001: 292). Due to World War II, mass immigration was halted: only refugees continued to arrive in Argentina in the following years.

Despite the ideological motivations for effectively changing the migration regime, neither migration flows nor public opinion responded to these political aims. Being a country of immigrants, Argentine society could not reject foreigners arriving in the country without questioning itself and its own foundations (Devoto 2003, cited in Giustiniani 2004: 32). Devoto (2001: 283) highlights this persistence of nineteenth-century migration myths of liberty of immigration being the attraction of agricultural workers to farm the vast lands and plains of Argentina, which continued to be part of the understanding of immigration in the general population and could thus not be restricted by a new law. When trying to understand the 2004 Migration Law and policy of Argentina, it is important to keep in mind how central the idea is that Argentina's national identity has been built on immigration.

3.2.4 Mass immigration after World War II

After World War II, immigration from Europe increased again to levels which had last been seen before World War I. The number of European immigrants reached almost 1 million between 1945 and 1960 (FitzGerald and Cook-Martín 2014: 318). At the same time the political orientation of immigrants varied greatly compared to previous influxes. These inflows included large numbers of migrant workers in general as well as political refugees and deserters, among them war criminals from Europe. The administration did not have the human and financial resources to process the applications of 350,000 immigrants in 1947. Corruption and arbitrariness flourished again, with some groups – considered to be unproblematic – automatically receiving a permit to enter, particularly the Spanish, Italians and Portuguese (Devoto 2001: 297).[28] The incoherence in approving immigration applications continued to be applied in the consulates abroad as well, which probably supported the entry of war criminals from Europe, in particular from Germany (Devoto 2001).

Being confronted with a large influx of immigrants whilst restrictive regulations were in place was an irreconcilable mix for the immigration system of the country. This was further aggravated by the fact that the overall approach was still to host as many immigrants (in particular from Europe) as possible, despite simultaneously trying to restrict these inflows. The migration regime thus became highly incongruent, with numerous exceptions to the regulations in place occurring in practice. In

[28] During the first Peronist government, bilateral agreements were signed with Italy (1947, 1948) and Spain (1948) (Devoto 2001: 297).

some cases even incomplete documentation was suddenly accepted when presented a second time (Devoto 2001: 290).

The 'dual strategy' of administrative discretion in applying restrictive circulars in consulates and immigration institutions on the one hand and the continuous open constitutional law on the other (FitzGerald and Cook-Martín 2014: 324) made it possible to effectively select immigrants whilst preserving the country's international reputation for openness. The preference for Europeans in the Constitution and policy was continued due to the intra-regional consensus that considered 'cultural assimilability as an acceptable criterion for immigrant selection' (FitzGerald and Cook-Martín 2014: 323; cf. Joppke 2005). Since Europeans were considered to be the 'real Argentines', the preference for them was considered legitimate by other states. An ethnic preference for Europeans was politically more convenient than the geopolitical repercussions by, in particular, the United States over the introducion of quotas or other explicitly discriminatory practices. Furthermore, participation in the reallocation of European refugees through the work of the Intergovernmental Committee on European Migration (ICEM, now the International Organization for Migration, IOM) since 1951 made the ethnic selection of Europeans unproblematic for Argentina. This lack of a decline in selecting immigrants by countries of origin, even though being by preference rather than explicit exclusion of other groups, counters the move towards source country universalism posited by Joppke in *Selecting by origin* in 2005. One reason among the others discussed above and below could be that Argentina was far from a liberal state at the time.

Administrative implementation between 1919 and 1949 undermined the aim of the migration law (Devoto 2001). As in many countries, the history of Argentine immigration demonstrates that actual policy practice at different administrative levels (Cook-Martín 2006), as well as the migration reality, are both key. Racism continued to manifest itself through conceptualisations of the Argentine nation as basically European, despite representing an immigration fact of the past since the 1960s.

3.3 Immigration since the 1950s: institutionalised racism, regional flows and amnesties by democratic governments

Whereas the public policy approach to migration in Argentina may have changed over time, immigration ties continued to play a decisive role in fostering the national identity in the country in the second part of the twentieth century (Bastia and vom Hau 2013; Cook-Martín

2006; Novick 2004; Sutton 2008). The changing ethnic origins from Western and Northern Europe to Southern and Eastern Europe (and Asia) at the beginning of the twentieth century led to hostility towards new arrivals among the population in the United States (King 2002; Slater 2009: 697). In Argentina, in contrast and after similar initial suspicion and restrictions, Southern Europeans in particular became part of the national identity under Perón in the middle of the last century.

Since the 1960s, the era of European immigration in Argentina, Brazil and elsewhere – such as the United States (see King 2002; Marx 1998; Zolberg 2006; Zong and Batalova 2015) – was over. Global migration patterns changed from Europe being a main source continent of emigrants to becoming a destination for immigrants itself, due to declining fertility and rapid economic development. Immigration to Argentina decreased in the second half of the twentieth century, unlike, at least in relative terms, other settler societies such as the United States, Canada and Australia, which continued to be immigration magnets for people from all over the world (Czaika and de Haas 2014: 295; Zolberg 2006). However, despite the declining numbers of immigrants and, simultaneously, increasing emigration from Argentina since the 1960s (FitzGerald and Cook-Martín 2014: 301; Novick 2007: 310–311), Argentina remains an important net immigration country. This development was unlike other countries in Latin America such as Panama, Peru and Brazil, which 'have witnessed reverse migration transitions, from net immigration to net emigration countries' due to 'the declining position of Latin America in the global wealth ranking' (Czaika and de Haas 2014: 294).

Given the relatively stable levels of immigration, the foreign-born population continued to be part of the economic development policy of Argentina. With the decline in European immigration since the 1960s, Latin American immigration became more visible. Yet this new majority among immigrants was never integrated in the official development approach: immigrants from neighbouring and other South American countries were not welcome and had no opportunity to legalise their status.

3.3.1 Second national identity change in the twentieth century: a nation of Southern Europeans and Argentines from the interior under Perón

The change from first aiming at white Northern European immigrants to 'civilise' the country at the end of the nineteenth century, to suddenly considering previously 'barbarian' traits as 'white' and national at the beginning of the twentieth, was followed by yet another

reconfiguration. During the first period of Peronism (1946–1955), the 'emphasis on class […] was coupled with a substantial revision of the hegemonic idea of Argentina as a white nation' (Bastia and vom Hau 2013: 8). This seems to have resulted from Argentina having accepted *gauchos* and other inhabitants of the country's interior, but not indigenous groups, as 'truly Argentine' (see also Domenech 2007: 10). The Peronist government still linked European immigration to the modernisation of the country and thus supported it. Desirable migrants came from Southern European, Catholic countries (Bastia and vom Hau 2013) and not just Spain. Reflecting on the actual composition of migration flows at the time, this transformation of national identity by the government can be considered as a rather pragmatic move.

In addition to Southern European immigrants, Perón included internal migrants in reshaping the idea of the nation. Going further than only considering *gauchos* as the white Argentine ideal, an element of class was introduced to distinguish internal migrant workers (Bastia and vom Hau 2013). It is not clear how *gauchos* are different from 'migrant workers from the interior, often of darker skin colour' (Bastia and vom Hau 2013: 8). Under Peronism, the perceived homogeneous white Argentina was based on common Hispanic ancestry, as opposed to indigenous or Black origins.

> *The* crisol de razas *thus resembled* mestizaje *and its concern for cultural homogenisation and whiteness, yet with the particular caveat that the possibilities of mixture were limited to those already considered white* (Bastia and vom Hau 2013: 14).

Those considered to be white changed over time. Social class categorisation had reflected racial differences in Argentina ever since the edicts of Sarmiento and Alberdi. The higher, economically better-off classes were linked to European descent, whereas indigenous and *mestizo* populations were understood to represent the poor and working classes, similarly to Brazil (see Marx 1998). This 'racial coding of class' (Sutton 2008: 108) was sustained throughout the twentieth century. At the same time, Perón is credited for enabling indigenous populations to access documentation and thus become citizens who can move around the country freely and fully participate in political decisions (see Salomón Tarquini 2013: 189). The US granted civil rights to previously excluded domestic ethnic groups - in their case African Americans - due to more liberal contestation as well but only in the 1960s (King 2002).

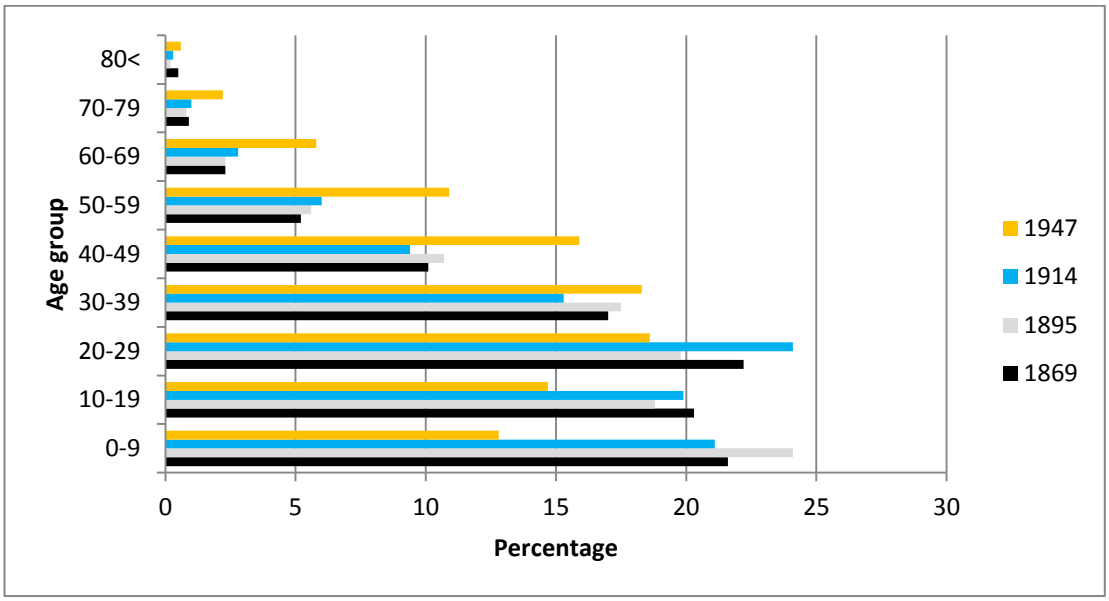
Most of Perón's support came from poor and working-class people from the interior of Argentina. With the industrialisation which followed in the 1930s, internal movements to

Buenos Aires largely increased. With an increase of urbanisation linked to export-led industries and the subsequent expropriation of land, *cabecitas negras,* literally meaning little black heads, was a term commonly used for new arrivals from the countryside, reflecting an underlying racism in class relations. These demeaning terms are still in use today, for instance through *negro villero* ('black' person from the slums). Yet the arrival of high numbers of internal migrants was met with discrimination by the inhabitants of Buenos Aires.

With the changing composition of immigrants, the age structure also changed. Immigrants arriving after 1914 or World War II were older than those who arrived in the nineteenth century (no census data are available between 1914 and 1947). In addition, while, in 1895, immigrants were of working age (*Segundo Censo de la República Argentina Mayo 10 de 1895* 1898), by 1947 most of those immigrants who still resided in Argentina had aged without a compensating inflow of younger migrants over the same period (Dirección Nacional del Servicio Estadístico n.d.). Hence the average age among immigrants increased. This led to foreigners representing about half of the elderly population in Argentina and outnumbering nationals in some age groups. For instance, in 1947, foreign men aged 60+ slightly outnumbered Argentines over 60 in absolute terms. In the case of women, foreign women over 70 were higher in number than nationals in the same age group (Dirección Nacional del Servicio Estadístico n.d.).

Figure 3.7 shows how the overall population aged between 1869 and 1947. While the average age of foreigners was 48.7 in 1947, it had marginally increased to 49 by 1960. Argentines were, on average, only half as old, with an average age of 24 and 26.6 respectively in 1947 and 1960 (Dirección Nacional del Servicio Estadístico n.d., Dirección Nacional de Estadística y Censo n.d.). Nonetheless, by representing a large share of the working population, in particular in previous decades, immigrants had contributed to social security and were not just a burden on the systems once they aged.

Figure 3.7: Total population by age group 1869–1947



Source: based on *Primer Censo de la República Argentina 1869* (1872); *Segundo Censo de la República Argentina Mayo 10 de 1895* (1898); República Argentina (1916); Dirección Nacional del Servicio Estadístico (n.d.).
Note: Data on unknown age not included.

Whereas the focus on the nation's imagined Southern European descent reflected migration patterns, the timing was not the best as the change came almost too late. Since the 1950s, European immigration had become increasingly less significant. The idea of the nation was thus, relatively quickly, once again focusing on a fact from the past rather than on the migration reality.

A third shift in how nationhood was created occurred under the military governments that followed the 1955 military coup and Perón's overthrow.

3.3.2 1950s–1981: the third national identity shift and racism, migration governance through exceptions and changing immigration patterns

Whereas, under Perón, internal migrants were considered part of the diverse social fabric of Argentina with their common Hispanic origin, they became labelled 'other' again under the military rulers. The recurrent military dictatorships which appeared after 1955 openly fostered discrimination against those who were considered non-white and culturally inferior. As Moya (2006: 9) states, '[t]he military governments' obsession with order was closely entwined with established ideas of racial hierarchies and the whitening of Argentina. A powerful example was the close association drawn between race, place of residence and migrant status in Buenos Aires under military rule'. Areas that would nowadays be categorised as slums developed

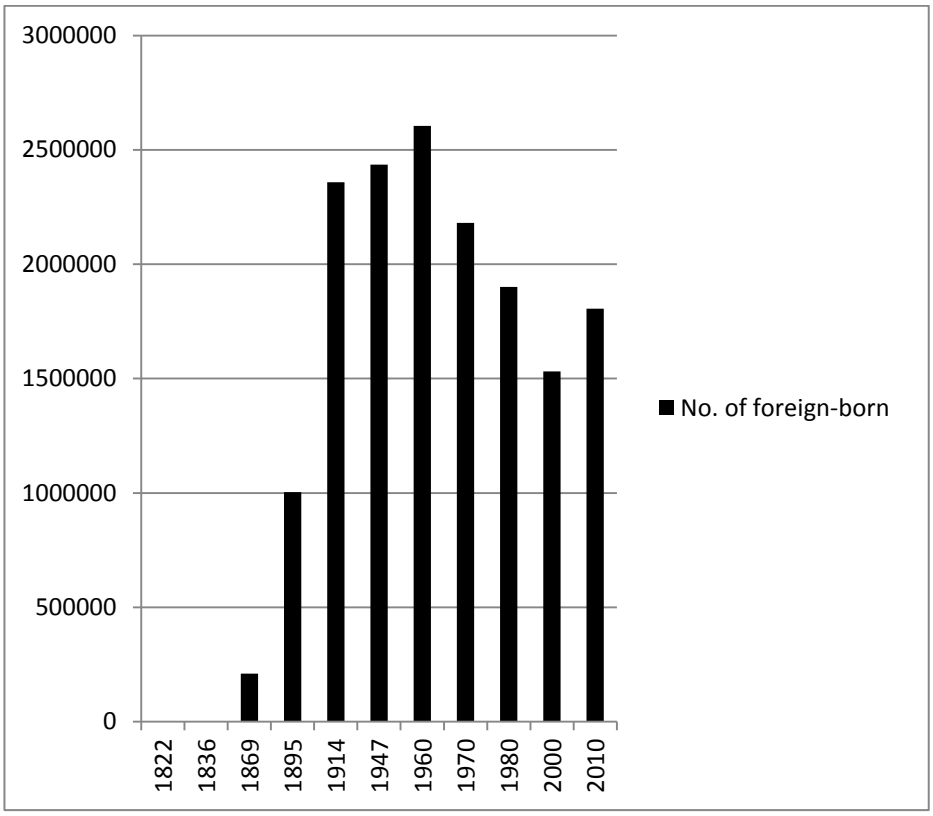
along with this rising internal migration to Buenos Aires. These *villas miserias* still exist today (see Bastia 2007). Similar to anarchist and 'subversive' European immigrants in the 1920s, the stigmatised internal migrants were seen as a threat to public security, leading to the forced eviction of about 200,000 people during the military regimes (Moya 2006).

From the 1950s onwards, immigration patterns into Argentina changed. Ever-increasing intra-regional mobility started to replace the largely decreasing transatlantic migration from Europe and this became a more accentuated trend as years went by. However, in absolute terms, immigrants reached their highest figure in 1960, at 2.6 million (Figure 3.8). Post-World War II inflows from Europe accounted for this increase.

Immigration from neighbouring countries was restricted through a lack of legal entry channels as these prospective migrants did not fit into the Eurocentric national image either. In the 1960s several restrictive law decrees were adopted, in particular during the military dictatorship from 1966 to 1973 (Law-Decree 4.805/63; Law-Decree 17.294/1967; Law-Decree 17.498/1967; Law-Decree 18.235/1969; see Domenech 2011: 47; Mármora 2011: 97; Giustiniani 2004: 33). Immigrants from Paraguay, Bolivia and other countries in the region faced the same challenges and discrimination as 'darker' internal migrants and the indigenous populations. This marginalisation of the most important group of immigrants – those from the South American region – since the 1960s would later become an important issue for advocates lobbying for the adoption of Migration Law 2004.

Overall, immigration decreased from the 1960s until 2000. Yet it has been increasing ever since, most probably due to economic growth since 2003 and the regularisations of 2004–2005, as explained in the previous chapter (cf. Chapter 2.3.2).

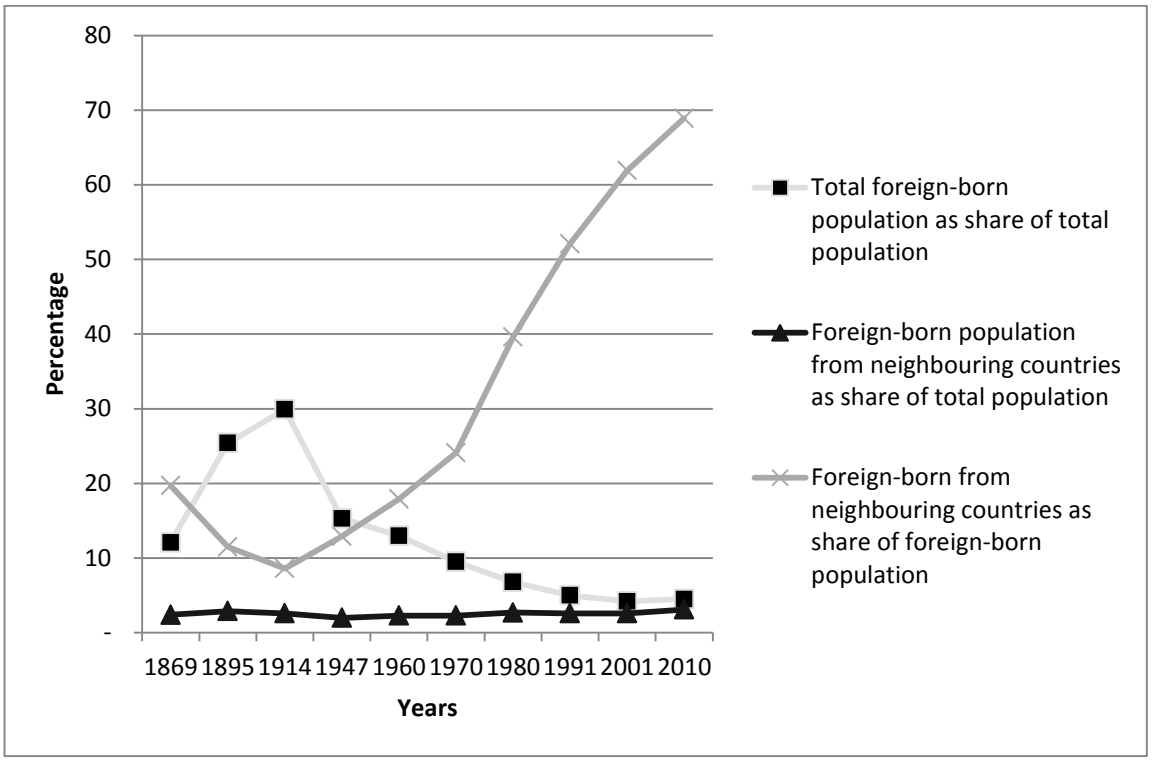
Figure 3.8: Foreign-born population in Argentina 1822–2010 (absolute numbers)



Source: Own illustration based on *Primer Censo de la República Argentina 1869* (1872); *Segundo Censo de la República Argentina Mayo 10 de 1895* (1898); República Argentina (1916); Dirección Nacional del Servicio Estadístico (n.d.); Dirección Nacional de Estadística y Censo (n.d.); Dirección Nacional del Servicio Estadístico (n.d.); INDEC (1971, 1982, 2001, 2012).
Note: No data on 1990 were available.

Not only did South American immigrants increase in number but, due to the decline of European immigration and of immigration more generally, they became relatively more important amongst the immigrant population and were more dispersed within the country (Domenech 2011: 33; INDEC 1971: 31–32; see Figure 3.9). The migration types changed from the long-term settlement of Europeans to cross-border seasonal labour migration, in particular for cotton and sugar-cane harvests (Giustiniani 2004: 33). This represented a shift away from an 'American/Australasian policy' of attracting European settlers to replace indigenous populations and towards a 'European-style immigration policy' focused on labour migrants, in this case from neighbouring countries. Yet this transition did not result in a change in the type of rights which regional immigrants were granted, thus continuously increasing their marginalisation.

Figure 3.9: Foreign-born population in Argentina 1869–2010



Source: Own illustration based on INDEC (1997) cited in INDEC (2004), and on INDEC (2001, 2012).

In the three decades between 1950 and 1980, the inconsistencies in the migration policy largely became hidden or invisible. This was mostly due to the amnesties offered for irregular migrants. Successive democratic governments once again took a positive stance on immigration, considering immigrants as a driving force for the economy and for progress in the country. In light of all the restrictive decrees and regulations still in place, migration was governed through exceptions – the regularisations of irregular migrants, thus foiling at the same time the public policy in place (Devoto 2001; Giustiniani 2004; Novick 2012; Oteiza and Novick 2010). Intra-regional immigration decreased due, partly, to the restrictive immigration policy and partly to less-attractive, diminishing salaries in Argentina, the economic recession in the country and the marginalisation of irregular migrants from neighbouring countries (Novick 2010). Emigration was mentioned explicitly in a policy for the first time in 1973 (Novick 2007: 311) and became a more prominent issue, thus not simply focusing the migration policy on immigration exclusively.

It is interesting to note that no authoritarian government was able to change the migration law until 1981. Public opinion continued to be favourable towards immigration, which is probably explained by the fact that most citizens were descendants of immigrants or self-identified that

way. The element of being a society built on immigration linked the issue of immigration inextricably to its own identity. Only in 1981 was a military junta able to change the underlying migration law, which had been favourable towards immigrants for more than a century, despite having been undermined by other legislation and policy.

3.3.3 The 1981 migration law: a convergence of restrictive policy and law

The increasingly restrictive measures and policy culminated in a revised and, for the first time, restrictive migration law in 1981, meaning that both the migration policy and legislation were exclusively based on elements of control. On 23 March 1981, the pro-migration Avellaneda Law of 1876 was replaced by Law-Decree 22.439, commonly referred to as the 'Videla Law'.[29] The civil rights of irregular migrants were constrained, as were the rights to employment, education and health care, through the obligatory denunciation of migrants in an irregular situation (Ceriani Cernadas and Morales 2011; Giustiniani 2004: 34; Nicolao 2013). This approach violated migrants' constitutional rights to equal treatment, which later formed the basis for lobbying to end these restrictions dating back to the dictatorship and thus adopting the reformed, rights-based 2004 Migration Law.

As the focus of the Videla Law was on attracting European immigration, nationals of countries of the South American region faced huge obstacles in regularising their status. This policy of intimidation and discrimination created an unknown number of irregular immigrants, a situation that the 2004 Migration Law aimed to address (Ceriani Cernadas and Morales 2011; Giustiniani 2004: 34; Nicolao 2013: 91). Public policy, including the legislation and policy on migration, was based on a 'national security doctrine' (Novick 2012) as well as selection by European ethnicity (Domenech 2011: 55). Immigrants from neighbouring countries were effectively barred from legal entry and work, whereas the ideal continued to be the European immigrant who, by then, was arriving in somewhat negligible numbers.

The Videla Law of 1981 enabled the administration to take decisions which were not subject to legal redress such as that guaranteed by *habeas corpus*. The law introduced lengthy and costly procedures by which the largest group of immigrants – those from neighbouring countries – could obtain legal residency status. They were thus openly discriminated against, a process that was contrary to the regional integration process (Ceriani Cernadas and Morales 2011;

[29] The official name of the law is *Ley General de Migraciones y de Fomento a la Inmigración* (General Law on Migration and the Promotion of Immigration).

Giustiniani 2004: 35) underway, at least at the economic level (Margheritis 2012; cf. Chapter 5).

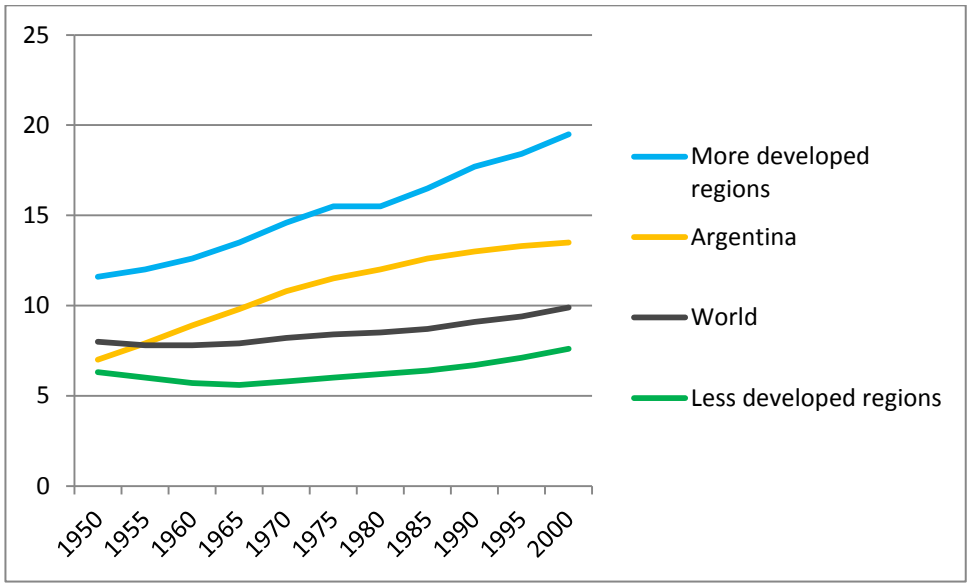
3.3.4 Post-dictatorship: the return of migration governance through exceptions, large numbers of irregular intra-regional migrants and increasing emigration

In 1987, the restrictive migration policy of 1981 was legitimised through a decree. While the official stance on immigration was restrictive, amnesties for immigrants from neighbouring countries, who were targeted in the restrictive law, continued to be passed. This was probably due to the acknowledged need for workers (Novick 2012). As discussed in Chapter 2, this approach still continues today. Several large regularisation campaigns, such as *Patria Grande* in 2004–2005, were implemented to correct the effects of the previous migration policies, first for third-country nationals who either entered the country illegally due to a reintroduced visa policy or who did not fulfil other entry requirements, and later for MERCOSUR nationals, who represented by far the largest group. *Patria Grande* represents a clear example of both a communitarian and a rights-based approach to ethnic selection (cf. Joppke 2005) by invoking the regional historical-cultural identity in Southern America. At the same time the regularisation programme and the preferential categories for MERCOSUR nationals in the 2004 Migration Law more generally highlight how a relatively liberal policy can still build on ethnic selection when rights-based (cf. Joppke 2005) and being linked to a vision of freedom of movement in a regional bloc. Argentina moved from a rights-based justification with its equality and citizenship provisions for immigrants in the nineteenth century, to a focus on assimilation in the twentieth century and back to a rights-based justification. Elements of ethnicity linked to a historical-cultural community continued throughout, having initially been tied to Europeans in the nineteenth and twentieth century and since 2004 to MERCOSUR nationals.

One must also consider aspects related to the demography of the country. Decreasing internal migration, declining birthrates and the ageing of the population continued to be reasons for fostering immigration and the 'colonisation of the interior' (FitzGerald and Cook-Martín 2014: 328) as a basis for the population policy of the 1980s (Novick 2000). Figure 3.10 illustrates how Argentina is 'in a more advanced stage of ageing' (UN DESA 2013: 11) in the group of less-

developed regions.[30] However, the graph also shows that ageing in Argentina, until the 1990s, clearly followed the path of the more-developed regions, with the share of the population aged 60+ almost doubling between 1950 and 2000 (from 7 to 13.5 per cent, UN DESA 2015). Argentina thus became more like Europe – on which Argentina wanted to design itself – as soon as European immigrants ceased going there after the 1950s.

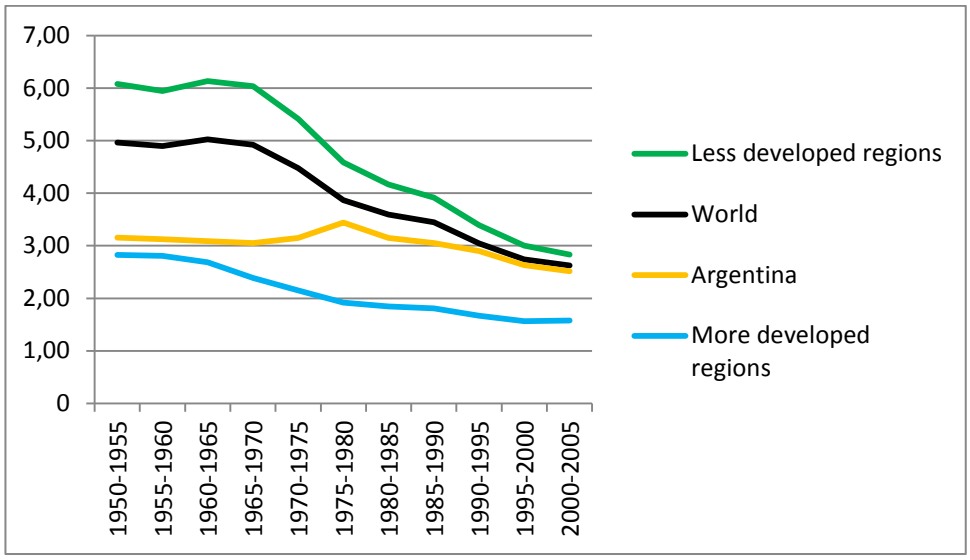
Figure 3.10: Share of the population 60 years and over, both sexes



Source: Own illustration based on UN DESA (2015) data.

[30] UN DESA includes Argentina in the less-developed regions although it has a very high Human Development Index: 'The less developed regions include all regions of Africa, Asia (excluding Japan), Latin America and the Caribbean, and Oceania (excluding Australia and New Zealand). The more developed regions include all other regions plus the three countries excluded from the less developed regions' (UN DESA 2013: iv). At the same time, Argentina is part of the high-income country group of the UN, see http://esa.un.org/unpd/wpp/General/Files/Definition_of_Regions.pdf (accessed 21 December 2015).

Figure 3.11: Total fertility (children per women)



Source: Own illustration based on UN DESA (2015) data.

Total fertility in Argentina declined only slightly, from 3.15 children per women in the period 1950–1955 to 2.52 in 2000–2005 (UN DESA 2015; see Figure 3.11), when the 2004 Migration Law was discussed and passed. Since the 1990s, the fertility rate is almost the same as the world average, thus below that of other less-developed regions but significantly higher than in the more-developed regions of the global north.

At the same time as society started facing the ageing of the population, decreasing birth rates and fertility, a policy aimed at facilitating the return of Argentine emigrants in exile was adopted under President Alfonsín (1983–1989). The approach to migration of the first democratic government after the dictatorship was thus somewhat ambivalent, as immigration continued to be restricted to Europeans while amnesties were granted (Novick 2012).

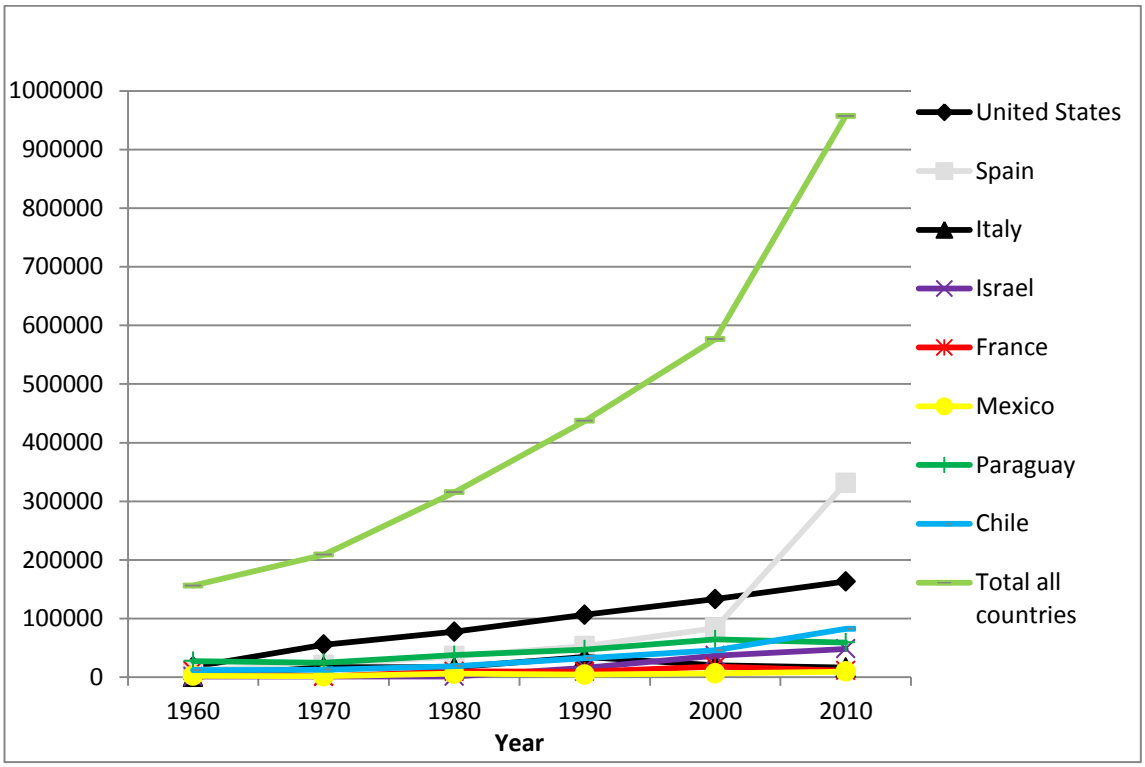
The ambiguous approach to migration policy, meaning a restrictive law and more-open, short-term measures, continued under President Menem (1989–1999) as well. The role of the diaspora in supporting national development efforts was recognised, which led to emigrants being granted the right to vote in a 1991 law (Novick 2007: 313). Thus Argentina never went for a 'de-ethnicisation' (Joppke 2005: 30) of its immigration policy but for an additional 're-ethnicisation' (Joppke 2005: 30) of its emigrant provisions. Amnesties for immigrants from MERCOSUR countries were continued, as it was considered that 'undocumented persons develop activities that are useful for the country' (Oteiza and Novick 2010: 10) and should therefore be allowed to regularise their status. Bilateral agreements on migration with Bolivia

and Peru were signed in 1998 and ratified in 1999 (Law 25.098 and Law 25.099) at a time when both countries were not members of MERCOSUR yet. The agreements stipulated the legalisation of migrant workers and entailed reciprocal clauses for granting residency and work permits to migrants and their family members. Furthermore, immigrants were granted voting rights in municipal and/or provincial elections in several provinces, thus laying the groundwork for the inclusion of these rights in the 2004 Migration Law.

At the same time, control measures increased even further compared to the previous government's policy (Novick 2012). Checks on immigrants' status were intensified with the aim of identifying those occupying houses illegally and of detecting other crimes allegedly committed by irregular immigrants. The drastic nature of the new regulations required a work contract prior to entering Argentina, despite half of the native population working in the informal sector at the time (Novick 2012; Oteiza and Novick 2010). This job requirement, introduced under Menem, was also integrated into the 2004 Migration Law.

The subsequent administration of Fernando de la Rúa, in power from 1999 until the economic and political meltdown of 2001, continued the neoliberal policies of his predecessors. While he tried to tackle corruption, the high national debt, soaring unemployment rates, the dependency on foreign creditors and increasing poverty led to the social unrest that resulted in de la Rúa resigning from his office (Novick 2012). This was the start of probably the worst crisis in Argentine history, with the country 'hitting rock bottom'. The 2001 crisis led to high levels of emigration by Argentines, who went to Spain, the United States and, to a lesser degree, to neighbouring countries such as Paraguay, Chile, Bolivia and Brazil (Ratha and Xu 2008; see Figure 3.12).

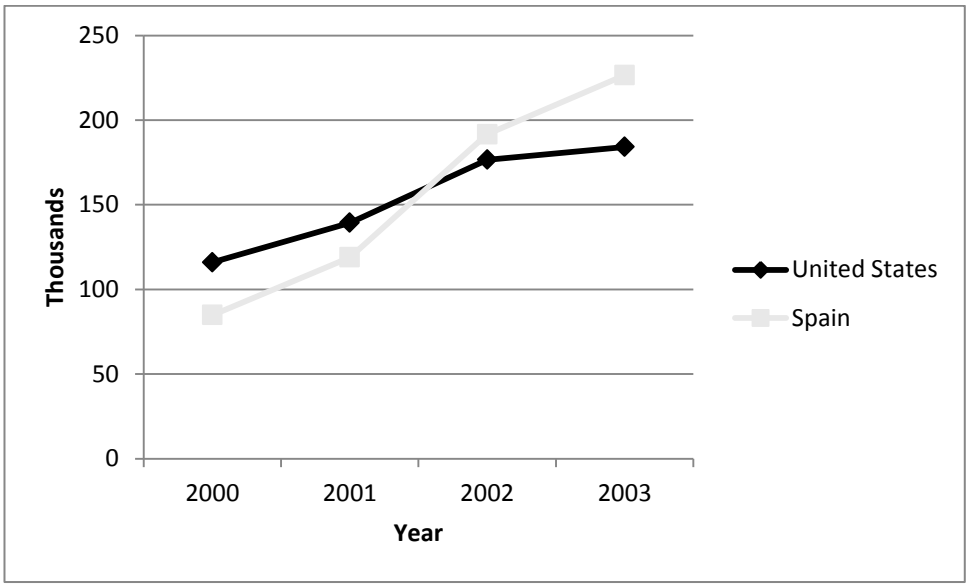
Figure 3.12: Stocks of Argentine emigrants abroad



Source: Own illustration based on World Bank (2015) *Global Bilateral Migration Database*.

According to World Bank data (2015), emigration from Argentina increased by two-thirds between 2000 and 2010. Spain and the United States received more than 50 per cent of Argentine emigrants, with an increase of almost 210,000 between 2000 and 2003, when the Migration Law was adopted (OECD 2015; Figure 3.13). Spain, due to historical and linguistic ties, was the preferred destination (see Figure 3.13).

Figure 3.13: Stock of foreign-born population in OECD countries born in Argentina



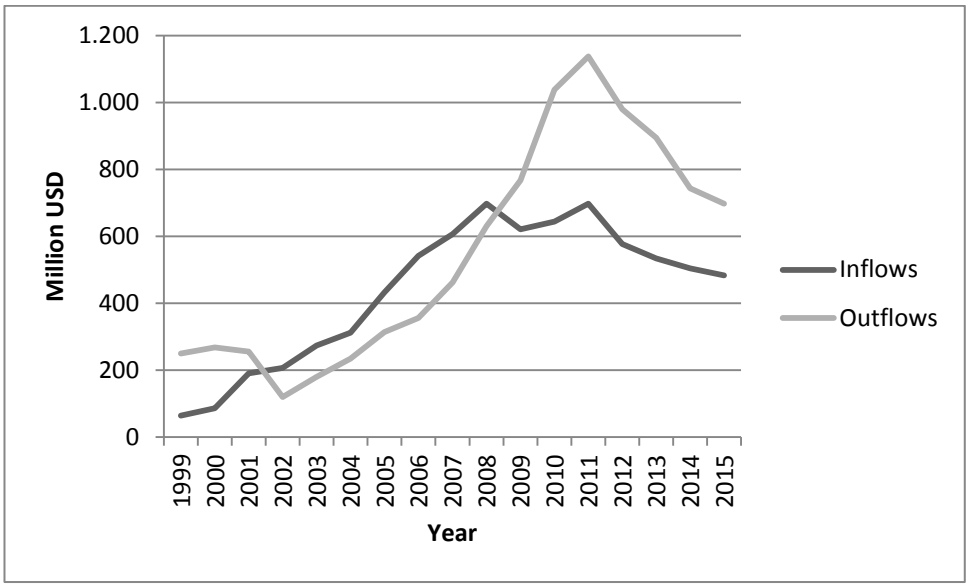
Source: Own illustration based on OECD (2015) data.

Remittance inflows increased vastly from 64 million USD in 1999 and 86 million USD in 2000 to 190 million in 2001 and 274 million USD in 2003, thus increasing by 428 per cent between 1999 and 2003 alone (World Bank 2016a; see Figure 3.14).[31] However, remittance outflows – the amounts sent by immigrants in Argentina to their origin countries – were initially higher and then plummeted during the crisis in 2001 and 2002. Nonetheless, they also resumed quickly (World Bank 2016b; see Figure 3.14).[32] In monetary terms, the funds emigrants sent to Argentina did become more important than remittances sent by immigrants in Argentina as of 2001, until Europe and the US were hit by the 2007/2008 crisis. This is remarkable for such an important immigration country in the region, and could be explained by Argentine emigrants being more-highly skilled and thus earning more than the mostly low-skilled immigrant workers in Argentina (see sub-section 5.2.2). The increase in remittances from Argentines abroad may also explain the interest of the government in engaging with them.

[31] Remittances peaked at 698 million USD in 2008 (and again in 2011) when the economic crisis hit the main destination countries of Spain, the US and Italy, among others. Despite this increase, they only represented 0.1 per cent of GDP in 2015 (483 million USD, World Bank 2016a; see Figure 3.14).

[32] The figures from the World Bank should, however, only be taken as an indication as they are based on the balance of payments communicated by countries to the International Monetary Fund. They only account for large transfers – for instance gains by transnational companies – and not small amounts remitted by migrants via relatives or money-transfer operators like Western Union.

Figure 3.14: Remittance flows to and from Argentina 1999–2015



Source: Own illustration based on World Bank (2016a, b) data.

However, Argentina overall remained – and remains – an immigration country, with immigration outnumbering emigration threefold in 2001: in 2001, about 1.5 million foreign-born immigrants (INDEC 2001) resided in the country, while an estimated 575,000 emigrants resided abroad (World Bank 2015). In 2010, immigration stocks were still twice as high as emigration, according to census and World Bank data (INDEC 2012; World Bank 2015). Data on emigrants vary according to the source used and due to the dual nationality of some Argentines who are then not counted as immigrants/foreigners in certain statistics such as those in Spain (Cook-Martín 2013: 100; Margheritis 2016: 149).

Although bilateral agreements between Spain and Argentina had long enabled Spaniards to settle in Argentina, Spain did not reciprocate this principle (Margheritis 2007; Vives-Gonzalez 2011). Argentine immigrants in Spain were thus faced with the same obstacles as Latin American immigrants in Argentina under the Videla Law (Zaffaroni 2004). Cook-Martín sees the mass movements between Italy and Spain to Argentina from 1850 to 1930 as having given way to nation formation and the influence on citizenship identities to this day:

> *Italy and Spain confronted the difficult task of administratively embracing as their own legions of their men and women who lived or spent a great deal abroad due to demographic and economic pressures at home, and the pull of emerging North and South American labor markets. Extremely underpopulated, Argentina faced the challenge of attracting workers and of extending citizenship to people already claimed as citizens by Spain and Italy, including many born on Argentine soil. […] The policies that emerged as a result of these dynamics […] affect migration and nationality even*

> *today when, in a reversal of historical trends, Argentines are claiming nationality in ancestral homeland states and/or retracing the steps of the European predecessors* (2006: 574).

As the social and economic crisis deteriorated in the 1990s, migrants were typically blamed for increasing levels of unemployment. In this context, the Videla Law conveniently offered a legal basis for the xenophobic political and public opinion discourse. It left unprotected migrants facing a double vulnerability: often irregular immigrants did not have the possibility to regularise their status and were, at the same time, probably being the hardest hit by the crisis which reached its peak in December 2001 (Zaffaroni 2004; cf. Chapter 5).

The new focus is on (labour) migrants from neighbouring countries, who make up the large majority of all immigrants. This represents a paradigm shift in terms of what type of migration the 2004 Law encompasses, in addition to the human rights conceptualisation it is based on (cf. Chapter 2). At the same time, the 2004 Migration Law 'is consistent with past immigration policy in its strategic decision to be widely inclusive in furtherance of national demographic policies (Article 3)' (FitzGerald and Cook-Martín 2014: 329). Arguably Argentina's migration policy continues to contain and never decreased elements of ethnic preference. On the contrary, rights- and community-based preferences in the 2004 immigration policy were matched with (some pre-existing) rights in the emigration part, overall presenting a counter-process to the observations Joppke (2005) made for a demise of ethnic selection in other countries.

3.4 Racism and national identity in Argentina to this day

Racism in Argentina remains largely unrecognised by the population. This should probably be attributed to the predominance of the country's European heritage and an understanding of racism limited to issues faced particularly in the United States and other northern countries. In an

> *implicit (or explicit) comparison with the United States, […] racism is construed as tension between blacks and whites associated with the legacy of slavery, racial segregation, and discrimination. From this perspective, racism is presented as almost the monopoly of the United States* (Sutton 2008: 108).

> *The prevailing emphasis is on an 'Argentine' national identity, but since this identity is coded as white and Europeanness is repeatedly asserted, we can conclude that 'race' matters to many Argentines despite rhetoric to the contrary* (Sutton 2008: 109).

With the understanding of racism as being about 'black' (meaning of African origin) and 'white' populations, other local nuances and facets of racial discrimination are obscured. In addition to racism supposedly being an issue only in the United States but not in Argentina, the common assumption that 'there are no blacks here' (Joseph 2000: 336) is a further factor explaining why this topic is considered irrelevant by Argentines (at least those of European descent and thus not affected themselves). Yet informal discrimination, in particular against populations from other South American countries, Jews, Muslims, Argentines from the interior of the country and those of African origin, continues to take place in a line of thinking evoking 'civilisation or barbarianism' (INADI 2005: 311) allegedly linked to desirable and undesirable immigrants.

This sub-section discusses how this identity of a nation based on race may have influenced the implementation of the 2004 Migration Law. Argentina's imagined community can be summarised as inextricably linked to white Europeans:

> *The 'others' who have also inhabited the country are seen as having conveniently disappeared. The alleged disappearance of Afro-descendents is often attributed to their having been killed in wars and by disease in the nineteenth century* (Sutton 2008: 107).

This quote underscores the acute marginalisation suffered by social groups who were not considered to be white Europeans in the predominant understanding of citizenship.

'[R]acism [in Argentina] is a relatively hidden but entrenched social problem' (Sutton 2008: 106) to this day. Important differences exist between the capital and the rest of the country. The topic of 'race in Buenos Aires, like class in the United States, is taboo: the proverbial elephant in the room' (Joseph 2000: 337). Analysing contemporary Argentina, Galen Joseph identifies differences and ambiguities between the identities of inhabitants of the capital of Buenos Aires and the rest of the country, which are based on historical developments (see Garguin 2007; Scobie 1971). '[W]hiteness crystallizes as a form of "cultural capital", a sign of belonging to an idealised European or first world community' (Joseph 2000: 334). Inhabitants of the capital, Buenos Aires, feel 'privileged within Argentina' (2000: 333), imagining that they belong to Europe or Northern America while, at the same time, being aware that their actual role is 'marginal in the world' (2000: 334). Racism still follows a class structure today, with the affluent imagining that they belong to Europe and trying to avoid any 'Latin Americanisation'

(Joseph 2000: 340). However, the identity issues of these *porteños*, as the inhabitants of the capital of Buenos Aires are known, are rather ambiguous: 'If we are white, Argentina is white, or if Argentina is not white, we are not Argentine' (Joseph 2000: 335). The descendants of European immigrants living in Buenos Aires are said to cultivate the image of being the 'other' in relation to the rest of the country and to non-European immigrants while, at the same time, trying to establish it as the norm. What is clear is that racism persisted despite an increased political and migratory rapprochement with South American countries under Presidents Néstor Kirchner (2003–2007) and Cristina Fernández de Kirchner (2007–2015) (cf. Chapter 5).

Despite high moral intentions in the 2004 Migration Law, immigrants are still subject to racial interpretations and meanings until this day. In a 2015 article, Cook-Martín and FitzGerald asked: 'Do reformed laws simply pour old racist wine into new skins?' (2015: 1319). They come to the conclusion that '[c]hanges in formal laws matter. Laws shape political opportunity structures, and immigration laws in particular shape who is present in a particular territory to be able to advocate for change. Even when ignored or applied unevenly, laws are symbolic manifestations of what state actors view as the emergent nation' (2015: 1320). The 2004 Migration Law for the first time explicitly fosters intra-regional immigration. At the same time, countries like Argentina have not 'reached a post-racial nirvana' (2015: 1320). Racial stigmatisation influences the implementation of the 2004 Migration Law and policy. Whether racism can be addressed once the 2004 Migration Law is realised will also depend on whether the national identity will continue to be re-defined by the focus on regional integration. If the contribution of South American immigrants, together with immigrants from Asia and, more recently, Africa (Marcelino and Cerrutti 2011; Oteiza and Novick 2010), is not officially valued and integrated in the view of the 'Argentine' society, the 2004 Migration Law will have a limited impact in changing the discrimination faced by these immigrants in their everyday lives.

Conclusion

It can be argued that five historical factors related to the history of immigration, nation-building and racism contribute to explaining the adoption of the 2004 Migration Law. Firstly, Argentina's current liberal Migration Law and policy is a return to the distinctively open approach of the nineteenth century. While many were surprised by Argentina's liberal approach to immigration, it actually presents a historical even if complex continuity and at least a constitutional tradition. This is not to say that the constitutional and legislative norms

were always implemented. While, as of 1902, restrictive laws, decrees and other policies undermined the migration law and constitutional provisions on immigrants, only from 1981 to 2004 equality and other rights of immigrants guaranteed by the Constitution were actually completely overridden. It is thus important to analyse the current Migration Law and policy in Argentina in this historical perspective of preceding legislation and the perceived image of openness and the tension with actual policy and administrative practice, similarly to Zolberg's (2006) analysis of US immigration policy history. It cannot be overstressed that the constitutional rights of immigrants as inhabitants of Argentina date back to the nineteenth century, despite having been focused on Europeans and not on South Americans. The transition from a settler and assimilationist policy focused on Europeans in the nineteenth and twentieth centuries to a more labour-migration-oriented policy in the twenty-first century, with a preference for South Americans, entails implications for the rights of the latter, who would not, as before, necessarily be encouraged to become citizens. Instead, regional identity and possible future South American citizenship are invoked, which explain why this ethnic selection is still included in a liberal law. Yet the focus on labour migration categories (in addition to MERCOSUR citizenship) as entry categories in the 2004 Migration Law are also grounded in the historical immigration provisions that aimed to attract workers.

Secondly, national identity is still closely linked to the history of immigration, albeit in a contradictory way – a similar myth to the one existing in the US (Zolberg 2006). Elites reconfigured Argentina's national identity several times, thus also influencing which ethnic groups of immigrants and other marginalised populations were considered 'the same group' (Europeans and sometimes Argentines from the interior, now possibly intra-regional immigrants) versus 'a different ethnic group' (Jews, *gitanos*, Arabs, South Americans and others). As immigration influenced the conceptualisation of the national identity with the aim of 'whitening' the population, the migration reality and shifting understanding of the nation had a concrete impact on racial thinking. Whereas the political elite in the second half of the nineteenth century aimed at 'civilising' the country, with Northern Europeans as the ideal of 'white' similarly to the US (cf. King 2002), the arriving majority of Southern Europeans led to the first reconsideration. The previously considered 'backward' internal population was now thought of as the 'real' or 'ideal' Argentine. The elite also no longer sought to have a critical stance on past Spanish colonialism and re-idealised Catholic values at the beginning of the twentieth century. A second shift occurred under Perón in the mid-twentieth century, including both Southern European ancestry for the upper classes, with *mestizos* and

indigenous populations from Argentina's interior representing the poor working class in understandings of the 'nation'. This second change in how the Argentine nation was conceptualised was, as the previous one, quickly focusing on a past reality. During the several dictatorships of the second half of the twentieth century, a third shift occurred, this time back to an exclusive focus on white European ancestry. In contrast to Perón's approach and similarly to African Americans in the US (King 2002) and to a lesser degree African descendants in Brazil (Marx 1998), populations from Argentina's interior and its neighbouring countries were considered inferior. A fourth shift occurred and is reflected in the 2004 Migration Law. In line with regional integration and the predominance of left-wing governments in South America, the identity (and ideology) promoted by President Néstor Kirchner (2003–2007) focused on being Latin American (Acosta Arcarazo and Freier 2015). This latest direction coincidentally reflects shifting global demographics influencing migration patterns in turn and was ideologically motivated.

However, the new regional focus since 2004 should not be taken to end ethnic selection and preclude racism. Certain social relations are racialised. These racial hierarchies reflect the very diverse paces of development of the capital, Buenos Aires, and the provinces. Racism needs to be understood in the context of urbanisation, international immigration and the early predominance of supposedly skilled, liberal and white Europeans. How the daily discrimination of Latin American and other supposedly 'non-white' immigrants is reflected in the national imagery could play a role in how the 2004 Migration Law and policy are realised. For FitzGerald and Cook-Martín, Argentina illustrates how the 'administrative selection of immigrants […] has been an effective tool of ethnic selection in practice whatever the law on the books may be' (2014: 331–2) and countering the demise of ethnic policies put forward by Joppke (2005). Potential administrative discretion applied in view of underlying racism, including as it is expressed in understandings of the national identity, thus seems to pose the greatest challenge to the application of the 2004 Migration Law, despite the 2010 decree following the law's liberal logic.

Thirdly, Argentina is a very early example of how a country of destination built its own development strategy – including the path to industrialisation – on immigration as a demographic variable. Immigration became a defining feature of the nation. Geopolitically, in the nineteenth century Argentina actively encouraged European immigration and adjusted to United States policy influencing migration flows in the region. Contrary to the United States,

though, Argentina deliberately encouraged migrant workers to come and fill its gaps in skilled and semi-skilled labour. Even so, this need for migrant workers was not always officially recognised, in spite of its being tolerated and, to some extent, encouraged through regularisations even during the most restrictive post-1981 migration policy. Migrants thus played a key role in shaping the development of the country and nation, which is still very present today. The 2004 Migration Law and policy represents a historical continuity in its focus on migration as a component of its population policy.

Fourthly, not only was immigration important numerically and historically but it continues to be to this day, at least compared to other countries in the region. In 2001, when the 2004 Migration Law was about to be discussed, Argentina remained the most important immigration country in Latin America in absolute terms (Czaika and de Haas 2014). This is still the case to this day (OAS 2011a, 2015). Emigration levels increased exponentially during and after the economic and political crisis of 2001 but never reached the extent of immigration levels. Therefore Argentina's development path is quite different from that of other 'developing' countries, as it has never become a net emigration country with increased levels of development, despite 'los[ing] some of [its] attraction' (Czaika and de Haas 2014: 311) as an immigration country.

Lastly, Argentina's geographical distance from the United States and marginal geopolitical importance since World War II – with the exception of the dictatorship from 1976–1983, as we will see in the next chapter – allowed it to follow its own path of unrestricted immigration, at least on paper. This relative independence from geostrategic considerations in the hemisphere must also be taken into account when reflecting upon what allowed Argentina to follow a historically unique and varying open approach to migration policy.

Chapter 4: A country hungry for human rights after the dictatorship (1976–1983): the role of civil society in the assertion of human rights

Chapter 3 explained the historical trajectory of Argentine immigration law and policy and how Law 25.871 connects with enduring elements of the country's past and may therefore not be as innovative as it may at first sight appear. This chapter moves on to another factor that helps to explain the emergence of the 2004 Migration Law. This second factor encompasses the salience of human rights as normative ideas (see Schmidt 2008, 2010) resulting from civil society activism during Argentina's transition to a democracy in the 1980s and 1990s. The concept of human rights acquired an important meaning and represented a key vehicle mobilized to bring members of the military junta to justice. Human rights ideas are therefore still intrinsically linked to the achievement of the junta's accountability for the atrocities of the recent past. For this reason, the migration legislation – which formed part of the legacy of the dictatorship – was reformed so that it could be based on human rights ideas, like other legislation that needed to be amended to be in line with the human rights norms protected by the Constitution.

Concentrating on recent decades, this chapter draws out the historical significance of both the concept of human rights norms and the role of civil society in achieving remarkable transitional justice milestones after the last dictatorship (1976–1983) by building on and developing normative ideas and legal strategies. A few NGOs have become human rights champions in Argentina, using their experience and expertise to apply similar legal strategies to those that they had developed in their struggle to hold accountable the perpetrators of human rights violations during the dictatorship and to mobilise for the 2004 Migration Law reform. The grounding of the 2004 Migration Law in the concept of human rights is partly explained by their important historical role in seeking justice for suppressed and marginalised groups in society.

Argentina's 2004 Migration Law explicitly refers to human rights. Framing a new migration policy as a human rights issue instead of 'managing' or restricting movements would make the passing of a new migration policy even more unlikely in other countries. In the distinct case of Argentina, however, the use of human rights ideas in both language and arguments was decisive. The centrality of the notion of human rights in the transitional justice movement

after the last military dictatorship in Argentina, together with the general leverage of human rights in the region and the country, explain why the Migration Law was formulated from a human rights and not purely a migration perspective. Linked to the recent historical and political context, migration was conceptualised in that of broader human rights issues which consider migrants as members of vulnerable populations to be protected.

Several scholars – including Acuña and Smulovitz – underline the remarkable advances in human rights accountability in Argentina: 'In the context of Latin American politics, the Argentine democratic transition has been exceptional' (1997: 93). Human rights NGOs were important actors in mobilising to change the Videla Law on migration, due to their role in advocating for accountability for past human rights violations through innovative strategies and in helping to develop new international human rights norms during the democratic transition which started in the 1980s. This chapter specifically links the influence of the international human rights regime – and, initially, the Argentine courts for their advancement of the application of human rights norms in Argentina – to civil society strategies for legal reform, as this unique combination explains the explicit human rights focus of the 2004 Migration Law.

Based on the importance of the country's authoritarian past in our understanding of human rights as highlighted by key informants in my interviews, I go back to the recent history of Argentina and review the relevant literature. In this chapter I apply the literature on ideas on politics, the role of social movements in transitional justice in Argentina, and on domestic politics of compliance with international norms, to the advocacy and specific litigation strategies which the same civil society actors used to reform the Migration Law. In this way I link domestic politics on human rights as ideas with those at regional and international levels (cf. Haggard and Simmons 1987: 515–516) and trace this process through a decisive migration case at the Inter-American Commission of Human Rights (IACHR). Only the combination of my interviews, where I inquired about the conceptualisation of human rights (see Annex 2), and the literature on Argentina's social movements on human rights made me understand both the importance of human rights to this day and the fact that the strategies used for adopting the 2004 Migration Law were not new but built on existing, successful approaches to human rights accountability. As domestic, regional and international institutions provided ample opportunities to seek justice during democractic transitions, human rights NGOs sought legal actions in domestic and regional courts whenever other national avenues were blocked and

not advancing their causes further. The domestic arena was decisive for political change, whereas the regional and international spheres were used in a complementary way (Sikkink and Booth Walling 2006: 313).

This chapter is divided into three sections corresponding to three major elements related to the human rights and civil society landscape in Argentina. The first section examines the human rights innovations developed during the democratic transition after 1983. Transnational advocacy networks have been recognised as enabling access to regional and international institutions and politics (Keck and Sikkink 1998). Argentina became a protagonist in developing and advocating for new human rights norms at the global level, changing its image as a pariah state and explaining the importance of the social human rights movement to this day. Human rights NGOs helped to create what would later become international law against forced disappearances and torture and setting a precedent for truth commissions and other innovative approaches in transitional justice worldwide.

The second section describes the enshrining of international human rights conventions in Argentina's constitution. An alliance between civil society and the judiciary advocated for this ratification of international treaties at the domestic level through Argentina's 1994 Constitution. This constitutional ranking of international human rights norms would later offer an important justification for reform of the Migration Law, despite the judiciary opposing or ignoring it. The Migration Law reform of 2004 was part of a larger adaptation of existing legislation to make it conform to human rights and can be better understood when put into this wider context.

The last section analyses the alliance between civil society actors and the executive in the *De la Torre v. Argentina* case at the IACHR. The section thus builds on techniques developed by Argentine civil society during the democratic transition described in the first section and the international human rights norms that Argentina agreed to apply presented in the section. Two well-known NGOs and the Argentine administration used the Inter-American system of human rights to force the judiciary to accept the Migration Law reform. The use of documentation of human rights violations and strategic litigation at both domestic and regional levels had been successfully applied in bringing military officials to justice in previous decades.

Civil society was not only the lead partner in preparing the 2004 Law, but the motor for key human rights developments and advocacy techniques since the last dictatorship. The social movement on human rights formed alliances with all three powers consecutively: the Judiciary in the 1990s; the Legislature, to pass the new Migration Law (1999 to 2003, cf. Chapter 5) and the Executive, in the Inter-American human rights system, from 2003 to 2009. Regional and global norms and the regional human rights regime were instrumentalised to advance the agenda of the Executive, with the help, and based on the initiative, of NGOs. This was a unique process in Argentina, which could, however, have leverage in other countries in the region with an affinity for (populist) human rights discourses.

In order to help the reader to follow the various elements analysed in this chapter, Figure 4.1 presents them in chronological fashion.

Figure 4.1: Timeline of events 1976–2010

Year	Political events	Human rights advances	Migration Law and policy
1976 – 1983	**Military dictatorship, mass "disappearances"**	1979: **OAS on-site visit**	1981: Restrictive **Videla Law**
1983	Raúl **Alfonsín** becomes President	**Truth commission**	
1984		1st Forensic organization **Transitional justice trials** **Ratification of ACHR**	
1985		**Final report truth commission** **Ratification of CEDAW**	
1986/ 1987		Amnesty laws passed **Case by NGOs against amnesty laws at IACHR** **Petition at IACHR truth trials** **Ratification of ICCPR, ICESCR, CAT**	
1989	Carlos **Menem** becomes President		
1990		Pardon of convicted army generals **Ratification CRC**	
1992		IACHR declares amnesty laws violating ACHR	
After 1995		Truth trials, right to identity children of "disappeared"	
2001	Succession of Presidents	Domestic court finds amnesty laws violating human rights obligations	
2003	Néstor **Kirchner** becomes President	Argentine Congress passes law nullifying amnesty laws	October: **Friendly settlement IACHR *De la Torre v. Argentina* starts** December : **Law 25.871 adopted**
2004			**Law 25.871 in force**
2005		Argentine Supreme Court declares amnesty laws unconstitutional	
2007	Cristina **Fernández de Kirchner** becomes President		
2009			**Friendly settlement reached**
2010			**Decree 616/2010 DNM adopted**

4.1 Argentina at the forefront of human rights innovations: the development of human rights norms and consciousness

During the last military dictatorship from 1976 to 1983, tens of thousands of individuals disappeared – abducted, imprisoned without charges, tortured and killed. The National Commission on the Disappearance of Persons (CONADEP in Spanish) documented 8,960 deaths and disappearances between 1975 and 1983. However, human rights NGOs estimated the total number at between 15,000 and 30,000, as many cases were not reported (Acuña and Smulovitz 1997: 98; Sikkink and Booth Walling 2006: 304). These opposition members were held as political prisoners while their children were given up for adoption without their knowledge, something they only found out decades later. Repression was targeted at any potential or actual dissidents – mostly middle-class, educated Argentines. Foreigners were also targeted but to a far lesser extent. In parallel, Congress was dissolved and legislative power given to the presidency. The composition of the Supreme Court and other higher provincial courts was modified and the independent judiciary suppressed. Unions, the media and civil society associations faced state terror for allegedly disrupting public order (Acuña and Smulovitz 1997; Brysk 1993; Sikkink 2008; Sikkink and Booth Walling 2006).

> *The only sector of Argentine society that consistently and effectively resisted […] widespread state terror was a human rights movement, composed of grieving families of victims, principled civil libertarians, and some concerned religious figures. The movement survived the dictatorship and secured international and social recognition, catalyzing (although not causing) the transition to democracy* (Brysk 1993: 261–262).

As a consequence of the repression and abductions, Argentine NGO activists, at the end of the 1970s and during the 1980s, came to the fore in developing new human rights standards against the crime of forced disappearances and torture outside Argentina – at both regional and global levels. At the same time, Argentine human rights activists were developing a range of innovative strategies for mobilisation and seeking justice. The report by Argentina's Truth Commission in 1984 influenced similar institutions in other countries (Levy 2010; Lutz and Sikkink 2003; Sikkink 2008). The first forensic anthropology group based on human rights and truth trials was also established in the country.

The rise of the social human rights movement in Argentina provides a framework for explaining why the Migration Law reform was conceptualised as a *human rights* and not a

migration issue. The literature on social movements, transitional justice, international regimes and foreign policy is the basis for this section. New social movement approaches draw out a common identity around an issue such as the centrality of human rights in civil society mobilisation, enabling these movements to add new issues of concern to the political agenda. Information played an important role when the Argentine human rights advocates used transnational networks to pressure the Argentine regime leaders through governments of other countries. Thus domestic pressure empowered through links at both regional and international levels shaped the regime change and democratic transition in Argentina.

4.1.1 The Inter-American human rights regime and social movements

In order to analyse the importance of human rights for Argentina, it is important to keep in mind the way in which the regional human rights system works. In the Americas, the human rights regime is based on the institutions and norms of the Organization of American States (OAS). In 1959, a decade after the 1948 American Declaration on the Rights and Duties of Man and the Universal Declaration of Human Rights, the OAS passed a resolution establishing the Inter-American Commission on Human Rights (hereafter IACHR; OAS 1960), which began its work in 1960 and gradually specified and expanded its mandate. The Protocol of Amendment to the Charter of the OAS ('Protocol of Buenos Aires', OAS 1967), signed in 1967 and in force from 1970, specified that the IACHR could receive complaints not only *by* governments, but also by individuals *against* governments if granted their prior consent. The IACHR members considered the commission's jurisdiction to include the initiation of investigations of individual or general human rights violations in a country (Farer 1997: 514; Hillebrecht 2012). Country reports were often supplemented by on-site observations pending approval by the respective governments (Cooper and Thérien 2004; Farer 1997: 522; Harris 1998: 2). The 1969 American Convention on Human Rights entered into force in 1978. On the normative side, it enshrined rights in a legally binding document. Institutionally, it specified a new role for the IACHR and created the Inter-American Court on Human Rights or IACtHR (Farer 1997: 521).

The region is considered a stronghold given that '[h]uman rights principles have long resonated in Latin America' (Lutz and Sikkink 2003: 639; see also Carozza 2003; Cooper and Thérien 2004: 734; Grugel and Peruzzotti 2010; Méndez and Cone 2013). This general openness towards human rights was further strengthened with the return to democracy, in

most countries, in the 1980s (Sunstein 1997: 36). Thus 'a rapid shift [occurred] toward recognizing the legitimacy of human rights norms and international and regional action on behalf of those norms' (Lutz and Sikkink 2003: 638).

The use of human rights language and its acceptance as a norm for achieving social justice is common in Latin American countries:

> *[T]he change is more profound than the adoption of language; it reflects recognition and acceptance of the normative framework of international law about how governments treat their populations. The change has come about through a gradual process of incorporating these norms into domestic legal systems, with an increasing tendency to give them effect through local courts* (Méndez and Cone 2013: 955–956).

Access to domestic and regional institutions in order to hold perpetrators accountable for human rights violations greatly influences the success of civil society and other actors in seeking justice. While the judicialisation of politics is generally presumed to be the most advanced in Europe, Latin America also had a very high level of institutionalisation, which shaped human rights activism in the 1980s and 1990s. This legal and institutional framework provided the political opportunity structure that was used by different activist groups and officials. Without actors actually seeking and achieving accountability, the mere existence of norms and institutions does not lead to higher compliance (Sikkink and Booth Walling 2006).

This regional importance of human rights also applies to Argentina. This can be seen as one of the reasons why the advocators of the 2004 Migration Law chose to phrase their aspirations in the language of human rights. Scholarship recognises the Argentine case as representative of the Latin American region and also as being unique in its advances:

> *[T]ransitional justice developments during the 1980s in Argentina and other parts of Latin America have set legal, cultural and institutional precedents which would subsequently shape the articulation of globally salient human rights practices* (Levy 2010: 581).

It would therefore be incorrect to assume that global norms and compliance are first developed and promoted by influential industrialised countries – they also emanate from actors and states, including those that used to be considered pariah states and/or in opposition to powerful countries.

> *[The] dynamism of the Argentine human rights sector is even more interesting and important in the context of active U.S. hegemonic opposition to the expansion of international human rights law, because it suggests that the advancement of human rights institutions may proceed even in the face of opposition from the United States* (Sikkink 2008: 22).

4.1.2 'Made in Argentina': discursive and legal strategies for human rights innovations

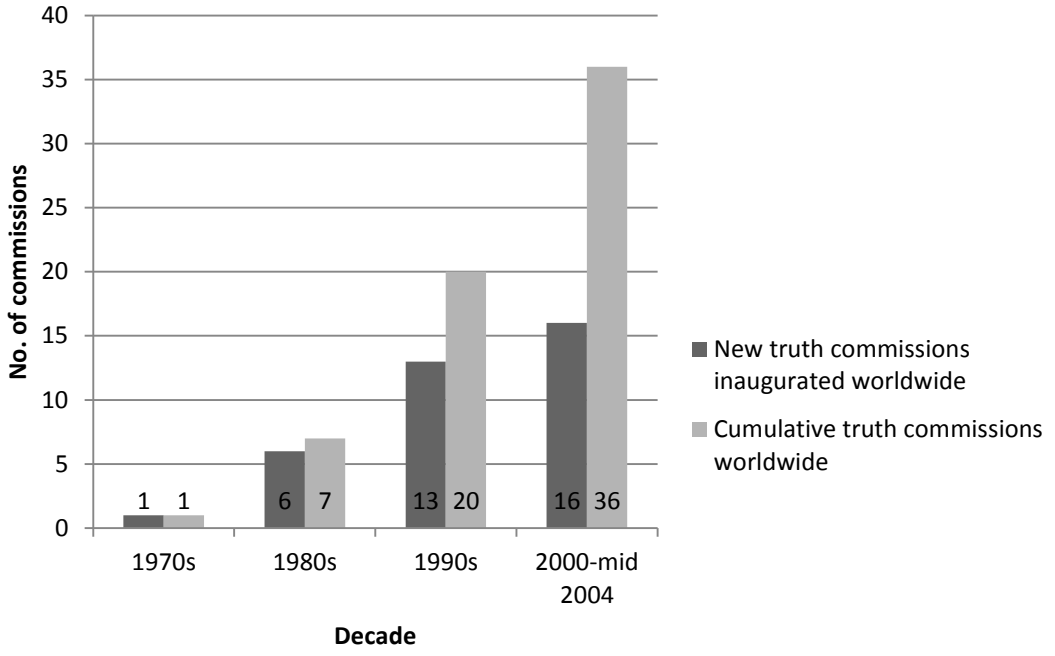
Argentine human rights NGOs and some state officials such as judges applied novel human rights strategies and transitional justice instruments in a bid to hold former military personnel responsible for their human rights violations. Civil society actors developed several new human rights norms through both discursive (see Boswell and Hampshire 2017; Schmidt 2008, 2010) and legal strategies (see Sikkink 2008; Simmons 2009) in the 1970s and 1980s. Even though the details of these approaches may not seem directly relevant to the 2004 Migration Law, it is worth going through these dynamic creations (cf. Schmidt 2008, 2010) and techniques, as they help to explain why human rights discourse became a prominent feature of the 2004 Law and demonstrate that the right to migrate was not the first new norm emerging 'from below' (Schmidt 2008: 311) in Argentina and spreading beyond the country. In particular Sikkink's (2008) analysis is a very useful explanation which can facilitate our understanding of the human rights consciousness in Argentina that had a sort of 'spill-over' effect on the migration policy.

A key question in discursive institutionalism on the power of ideas concerns the strategies and ideas actors employ in achieving change (cf. Schmidt 2008, 2010; Boswell and Hampshire 2017). As concerns the content of the ideas used during the democratic transition in Argentina, the first aspect concerns the institution of a truth commission, which could be taken to be at the programmatic level as described by Schmidt (2008, 2010). The truth commission CONADEP – established in 1983 by the first democratically elected president after the military dictatorship, Raúl Alfonsín (1983–1989) – has rightly been hailed a 'standard bearer' and 'landmark' (Levy 2010: 586) for the globalisation of transitional justice movements. Since the army had passed self-amnesty laws, the generals could not be prosecuted. Argentina was one of the first countries to use the mechanism of a truth commission. The title of Argentina's Truth Commission Report *Nunca más* (Never Again) has become both a motto and a symbol of

transitional justice worldwide (Sikkink 2008: 6–7). While other countries had already established this kind of transitional justice mechanism (Uganda in 1974 and Bolivia in 1982), they were less influential. Argentina's final report was particularly well documented, which helped to increase its visibility outside the country (Bakiner 2014; Levy 2010; Sikkink 2008; Sikkink and Booth Walling 2006). The Argentine commission was the model for subsequent similar commissions, including that in Chile in 1990 (Levy 2010: 586). Argentina was one of the protagonists of the transitional justice shift in the region and contributed to the initiation of a broader trend, as illustrated by Figure 4.2 on the number of truth commissions worldwide following that in Argentina in 1983 (Sikkink and Booth Walling 2006).[33] The idea of a truth commission thus became the new framing for accountability as part of the broader philosophy based on transitional justice. The meticulous documentation of human rights violations and the international recognition likely helped to make it a powerful vehicle for change. The *Nunca más* imperative became an important discursive tool for the first democratic president after the dictatorship to demonstrate his commitment to the idea of accountability for past human rights violations.

[33] The number of truth commissions varies from one author to another, depending on which definitions were used. Therefore Sikkink's account was not updated until 2016/2017. Most authors put the total number at between 40 and 60 in 2007 (see Bakiner 2014: 11).

Figure 4.2: Number of truth commissions worldwide until 2004



Source: based on Sikkink and Booth Walling (2006: 309).

A second new and again programmatic idea was the use of forensic documentation. In 1984 Argentine students established the first forensic organisation based on human rights (Equipo Argentino de Antropología Forense, EAAF – Argentine Forensic Anthropology Team), in order to accomplish forensic work on the graves of the disappeared. Based on orders by judges investigating cases of disappeared persons, the EAAF conducted the exhumations of thousands of victims and thus 'pioneered' (Sikkink 2008: 11) the use of forensic sciences for the documentation of human rights violations. The EAAF later trained other similar forensic teams worldwide (Sikkink 2008). Collecting evidence was part of the transitional justice approach at the level of a programme (cf. Schmidt 2008, 2010) that supported the democratic transition.

Thirdly, the activist NGOs included many lawyers who revealed the practice and termed the new concept of 'disappeared' persons, thus introducing it into the human rights vocabulary (Sikkink 2008: 5). Human rights NGOs, especially the Centre for Legal and Social Studies (CELS for its Spanish acronym) – that would later be active in lobbying for the new Migration Law – used regional and international links to instigate norms on forced disappearances. Using a new

formulation supported the discourse led by lawyers, who achieved the codification of this discourse in international norms as detailed in the discussion on the strategies below.

Concerning the techniques used to mobilize and symbolize ideas, the influential and prominent human rights movement of the Mothers of Plaza de Mayo (and later the Grandmothers) formed identity-based transnational alliances. The movement was established during the military regime at the end of the 1970s, and called for justice for, and the truth about, the disappearance of their children and later grand-children at the hands of the junta. Based on nuclear family relations (Brysk 1993), this type of human rights activism has been called 'maternal' (Sikkink 2008: 4). The Mothers of the Plaza de Mayo became the most prominent human rights organisation in Argentina, although the movement overall counted on diverse NGOs and associations (Sikkink 2008: 4). The social movement used strategies based on the politics of information and strong images to communicate with and persuade international publics and by-standers in Argentina alike and to challenge repressive institutions both in Argentina and the region. Civil libertarians, mostly lawyers, documented and reported human rights infringements to actors in other countries, a tactic labelled 'information politics' by Keck and Sikkink (1998: 16). The same strategy was later used when civil society lobbied for a change to the 1981 Videla Law on migration, as discussed in Chapter 5. The maternal rights activists applied the approach of 'symbol politics' (Keck and Sikkink 1998: 16) and the Mothers of the Plaza de Mayo used symbols and identity in public protest when they held their weekly marches in front of the presidential palace, wearing white scarfs and holding pictures of their children who had disappeared. 'The image of grieving mothers in silent weekly vigil before the seat of power (the Plaza de Mayo) […] promoted identification with the victims of repression as "every mother's son"' (Brysk 1993: 264). This raised domestic awareness and mobilised support for the idea of justice outside the country, mostly in the United States and Europe.

'[A] more intransigent and combative political culture' (Sikkink 2008: 22) can be taken as another discursive strategy. Many lawyers had been active on labour rights. In general, the political culture is based on finding loopholes in the face of obstacles (Sikkink 2008: 22). This political culture then later allowed the use of a legal strategy and the convincing of parliamentarians of the need to reform the former migration law (see Chapter 5). A second technique besides discourse expressed through symbols and information combined transnational support with legal tactics, so not just relying on discursive approaches described in the literature on discursive institutionalism. The social movement included lawyers with the 'degree of "legal

literacy"' (Simmons 2009: 132) necessary to access judicial strategies. The legal work of Argentine civil society started as early as 1979, when it was consulted during the 1979 on-site visit of the IACHR (OAS 1980; Sikkink and Booth Walling 2006: 305). The lists of the disappeared provided by CELS and the Permanent Assembly for Human Rights (APDH in Spanish) were included in the 1979 report of the IACHR to the OAS (Brysk 1993: 265). Thus the human rights groups which were previously isolated at both domestic and international levels used opportunities at the regional and international levels which were open to their calls for justice (Sikkink and Booth Walling 2006: 305), similar to the 'demand for new ideas' identified by Berman (2013: 227). At the global level, civil society mobilisation also supported the establishment of the UN Working Group on Enforced and Involuntary Disappearances in 1980 – at a time when the UN Commission on Human Rights was not allowed to investigate the allegations against Argentina (Brysk 1993: 270; Keck and Sikkink 1998: 97; Méndez and Cone 2013; Sikkink 2008: 5; UN OHCHR 2015). This led to the 1992 UN General Assembly Declaration on the Protection of All Persons from Enforced Disappearances. The first binding instrument on disappearances was adopted in 1994 at the regional level: the Inter-American Convention on the Forced Disappearance of Persons, which entered into force in 1996 (OAS n.d.). Ten years later, these norms were also enshrined at the international level, in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, which entered into force in 2010 (UN 2015). The legal norms on disappearances developed by Argentine human rights NGOs thus finally culminated in the adoption of an international law treaty.

The novel legal strategies developed by civil society included criminal trials of the military commanders of the dictatorship. Following pressure by human rights NGOs, Congress revoked the self-amnesty laws of the military regime, paving the way for the first-ever criminal proceedings against nine high-ranking generals in 1985. Activism by these human rights NGOs, including the successful garnering of public support through the new discourse on transitional justice and accountability for rights violations, was decisive for the transitional justice trials of key members of the military junta (Keck and Sikkink 1998: 109; Sikkink 2008: 7). The legal approach to justice, as opposed to the previous 'political logic' (Acuña and Smulovitz 1997: 105), in the discourses on the past explains why the legal concept of human rights continues to be so important in Argentina to this day. Discourse on norms in particular thus does not only need to be political (cf. Schmidt 2008, 2010; Boswell and Hampshire 2017) but can be a legal strategy by involving domestic and regional courts. It is thus necessary to combine insights

from the literature on the role of ideas in change with the scholarship on transnational movements (Keck and Sikkink 1998; Sikkink 2008), transitional justice (e.g. Acuña and Smulovitz 1997; Sikkink and Booth Walling 2006) and politics in realizing norms (cf. Grugel and Peruzzotti 2010; Simmons 2009). It was not courts alone that used legal tactics as described in the scholarship on migration politics but civil society actors who found like-minded actors in the Judiciary. Contrary to Simmons' (2009) examples, in Argentina the norms were not codified yet in international agreements or national legislation. Civil society actors created new normative ideas and used courts and transnational links to achieve change to the legal impunity that characterized the dictatorship. The Judiciary, which had been afraid of 'leftist threats' (Farer 1997: 513) but had at the same time been suppressed so that it could not act against the government, quickly took on an active role in Argentina, surprising both the former military leaders and the president, who was interested in keeping the peace with the former juntas (Acuña and Smulovitz 1997; Pion-Berlin and Arceneaux 1998: 648).

Despite these judicial advances, the president was dependent on domestic power constellations. When the army regained political influence, he passed *de facto* amnesty laws called *Ley de Punto Final* (Full Stop Law) in 1986 and *Ley de Obediencia Debida* (Due Obedience Law) in 1987 (Levy 2010; Méndez and Cone 2013: 966; Pion-Berlin and Arceneaux 1998: 650–651). In 1990, Carlos Menem's government (1989–1999) pardoned the convicted commanders-in-chief. Nonetheless, their sentences were not overturned (Acuña and Smulovitz 1997: 93) but only the possibility of more trials was blocked (Sikkink and Booth Walling 2006: 307). The proceedings against the military leaders came at a high cost for them through public convictions and ensured the acceptance of the new democratic regime by former members of the junta. Thus domestic politics became a constraint of transitional justice norms but could not overturn their achievements in holding perpetrators of rights violations accountable.

In addition to new norms developed successfully with the help of innovative legal strategies, civil society also combined ideas with strategies. One such innovation was the so-called truth trials, combining the institution/idea of a truth commission with criminal proceedings described above. Human rights NGOs continued to advance human rights in cooperation with judges. Innovative, legal thinking by family members of the disappeared led to the launch of a petition in 1995. The relatives linked to the NGO CELS argued that they 'had the "right to truth" and could pursue that right through judicial investigations' (Sikkink 2008: 12-13). Thus,

they found a way to circumvent the amnesty laws denying family members access to criminal prosecutions and to seek information and testimonies about the fate of their disappeared children. The truth trials also had a pedagogical effect in showcasing how human rights violations *can* be brought to justice (Levy 2010: 588; Sikkink 2008: 13; Sikkink and Booth Walling 2006).

Finally, in a second combination of new norms and legal approaches, the Mothers of the Plaza de Mayo, as the grandmothers of the children of the disappeared, successfully claimed that the right to identity of their minor grandchildren had been infringed when they were given away by military officers for adoption by regime supporters. Furthermore, they argued in court that these rights fell outside the amnesty laws benefiting the former military. This new idea linked to a legal tactic bore fruit as of the mid-1990s (Sikkink 2008: 12). The following quote from an interview with Estela Barnes de Carlotto, President of the Grandmothers of the Plaza de Mayo in the 1990s, illustrates well how activists became involved based on their personal experiences:

> *When they kidnapped my daughter, I didn't know anything about Amnesty International, or the Inter-American Commission on Human Rights, or the United Nations. We began to learn about these organizations through people in Argentina that had an international vision, like Emilio Mignone.*[34] *He told us 'you have to petition the OAS, you need to send letters to Amnesty'. We didn't send letters directly to these places because we knew that they wouldn't arrive if they were addressed to Amnesty International, so we always took advantage when someone traveled abroad to send letters* (Keck and Sikkink 1998: 93).

By pressuring the Argentine Government at the end of the 1980s to include the right to identity in the Convention on the Rights of the Child (CRC, Articles 7 and 8), the grandmothers of children taken away from parents tortured and killed during the 'Dirty War' had the legal means to pursue justice for their grandchildren. The relevant articles in the CRC are informally referred to as the 'Argentine articles' (Sikkink and Booth Walling 2006: 319, see also Carrozza 2003: 312), highlighting yet another international recognition of the new ideas and mobilisation based on rights by civil society in Argentina's recent democratic transition.

As this sub-section has shown, the dictatorship sowed the seeds for a strong human rights consciousness and mobilisation of these normative ideas in Argentina. This pronounced belief

[34] Founder of the very active human rights NGO CELS, and vice-president of human rights NGO ADPH.

in and struggle for human rights and building on the track record of international human rights innovations from Argentina proved to be a determining influence for later discussions of the Migration Law in the new millennium.

4.1.3 Why in Argentina and not elsewhere?

At the same time, as Kathryn Sikkink observes, the success story of human rights advances in Argentina represents a puzzle:

> *Argentina was the source of an unusually high level of human rights innovation and protagonism. [It] has been an exporter of human rights tactics, ideas, and experts. But other countries experienced repression as great as or greater than that in Argentina and did not put forth the same vibrant response from both civil society and governmental actors* (2008: 2).

So why was change based on mobilization of normative ideas possible in Argentina? Activists successfully used both legal and discursive strategies invoking human rights ideas. The demand for new ideas during the dictatorship opened up space for their development (or 'supply', cf. Berman 2013: 227). Furthermore, the way the dictatorship came to an end provided a relatively favourable context for new ideas. Together with material resources and non-material interests of human rights litigators those are three factors which explain both the importance of human rights norms to this day and why the 2004 Migration Law was adopted from a human rights angle, based on the call for social justice for marginalised intra-regional immigrants.

Firstly, the level of repression was very high during the last dictatorship. More Argentines were killed under the dictatorship than in Chile, Brazil and Uruguay combined. The number of deaths was so high that it created 'incentives and constraints for people to undertake collective action' (Sikkink and Booth Walling 2006: 301), reflecting both the notion of ideas as instruments to achieve change and structural limits posed by the authoritarian regime that discursive institutionalism seeks to combine (see Boswell and Hampshire 2017: 134). The disappearances created a certain political opportunity structure or demand for ideas described by Berman (2013: 227), in this case to end repression. The disappeared were relatively young (four out of five were under 35 years old). The uncertainty about their plight led to a situation in which family members could only continue to hope that their relatives could still be alive

and saved. The situation being such a 'matter of life or death' motivated family members to resist and embrace activism despite the constraints of repression and potentially risking their own lives in this endeavour.

Secondly, the context of the end of the dictatorship mattered (cf. Schmidt 2010: 12–13). The democratic transition started with the military regime having to step down due to the disaster of the Falklands War in 1982. The members of the junta were not in a position to negotiate their own conditions for the transition, such as amnesties, as had occurred in Chile, Uruguay and South Africa. This situation enabled prosecutors to hold trials against the military leaders in Argentina, which was not replicable in so-called '"pacted" transitions' (Sikkink and Booth Walling 2006: 307) in other countries (Pion-Berlin and Arceneaux 1998: 634, 644–645; Sikkink 2008). This enabled advances through discursive and legal strategies based on normative ideas.

Thirdly, social movement theories refer to opportunities in the political field that need to be identified and created by advocates. Thus a third factor consisted in the organisational, financial, social and cultural resources on which the Argentine human rights movement could build. The multitude of civil society organisations, with their diverse constituencies, members and practices, enabled them to put human rights on the political agenda of the democratic transition, although to a different degree under successive governments (Brysk 1993: 264). A telling example is that President Alfonsín had belonged to an important human rights NGO – APDH (Sikkink 2008: 19). He made human rights a central point of his platform in his 1983 election, considered decisive for his unexpected victory, in line with demands in society that he address the human rights violations that had occurred during the military regime (Acuña and Smulovitz 1997: 103; Pion-Berlin and Arceneaux 1998: 633). The group of NGOs supporting the 2004 Migration Law showed the same degree of diversity as those NGOs fighting for human rights accountability in the 1980s and 1990s.

More than two-thirds of those who had disappeared were from the educated middle class and from urban areas. Their families and friends were ready to bring in their own human and financial resources in order to resist these practices through protests and other techniques. Financially this was later supported by the reparations paid by the Argentine state, which were then re-invested into human rights work. Argentina also had a very high number of lawyers

with the background necessary for filing complaints, court cases and general reports on violations of rights, in contrast to social movements in other countries linked to more marginalised groups, like indigenous people in Guatemala. Trials of the juntas and truth trials as strategies would not have been accessible to most activists in other contexts (Sikkink 2008). In addition to material resources, pursuing non-material interests, the lawyers working at these same NGOs then used their knowledge of the national and Inter-American systems of human rights to file migrant cases, as discussed later in this chapter.

External sources of finance, links for technical support and for educating Argentines living abroad, as well as increasing the legitimacy of the Argentine human rights movement abroad provided the movement with important support. The human rights NGO CELS was created with the support of and funding from US-based civil society organisations. The central role of the courts in politics in the United States has led to a high degree of specialisation in litigation among US advocacy NGOs (Keck and Sikkink 1998: 24–25), which may have had an influence on Argentine civil society organisations which were largely supported by US-based NGOs. The award of the Nobel Peace Prize to Adolfo Perez-Esquivel of Argentine human rights NGO *Servicio Paz y Justicia* (SERPAJ) in 1980 was an important milestone for the legitimacy of the movement (Acuña and Smulovitz 1997: 100; Brysk 1993: 272).

The success of the human rights movement in Argentina built on the mere protection of lives through international visibility and protest against the detention of key leaders that the regime could no longer make disappear, thus undermining the legitimacy of the state. However, these important advances did not mean that Argentina's general human rights record was perfect. President Néstor Kirchner had been criticised for focusing on the atrocities during the previous dictatorship and thus diverting attention from more-contemporary human rights issues during his presidency from 2003 to 2007 (Sikkink 2008: 2). He thus used the discursive strategy developed by Boswell and Hampshire (2017) of selectively focusing on the transitional justice part of the human rights philosophy. He emphasized the level of transitional justice and accountability for human rights violations that occurred during the dictatorship over the general protection of all human rights under his own government.

At the international level, Argentina became an important supporter of human rights. The country's delegation sided with Western European countries and the United States on the

universality of human rights at the 1993 Vienna World Conference on Human Rights, and not with China and other developing countries which questioned them as representing cultural domination by the United States (Lutz and Sikkink 2003: 659). Argentina was also among the small group of countries which pushed for the establishment of the International Criminal Court (ICC). Furthermore, Argentine lawyers and diplomats have taken up key positions in the United Nations' human rights system. One of the most prominent examples is Luis Moreno Ocampo, who was the first-ever Chief Prosecutor of the ICC from 2003 to 2012. Previously he was assistant prosecutor in the trials of the military junta in 1985. Victor Abramovich served as a member of the IACHR from 2006 to 2009 and was the Executive Director of the NGO CELS before that, including during the consultations on the Migration Law in 2000 and 2002 that I discuss in the next chapter. Several other Argentine human rights lawyers served in UN institutions – Patricia Valdez as executive secretary of the UN Truth Commission on El Salvador and Monica Pinto as the Special Rapporteur on Guatemala of the UN Human Rights Commission in the 1990s (Sikkink 2008: 15–16; Sikkink and Booth Walling 2006: 320). Pablo Ceriani Cernadas, a human rights lawyer who also used to be affiliated with CELS and is currently teaching at the University of Lanús in the province of Buenos Aires, became a member of the UN Commission on Migrant Workers in 2014.[35] His candidacy was supported by the government of Argentina under President Cristina Fernández de Kirchner (2007–2015).

Cutting-edge human rights protagonism is a key historical explanation for the framing of the 2004 Migration Law as a human rights issue. The legacy of the dictatorship is a trauma that persists as one of the most important topics in Argentine society and has created a very specific relationship with human rights. The understanding, mobilization of and discourse on human rights is intrinsically linked to the military junta and those who disappeared. Therefore anyone opposing human rights is considered to be a supporter of military dictators. This may also explain why no politician was able to speak out against the 2004 Migration Law proposal. While the actual implementation of human rights obligations continues to be a challenge to this day, the evident support for these norms in society explains their strong resonance with the population (Pion-Berlin and Arceneaux 1998).

[35] See http://www.ohchr.org/EN/HRBodies/CMW/Pages/Membership.aspx, accessed 14 June 2015.

4.2 Civil society–judiciary alliance: constitutional ranking of human rights treaties in 1994 and adaptation of several laws

As we have seen, human rights are of great importance in Argentina and the region, intrinsically linked to a return to democracy in many countries in the 1980s and 1990s. Argentina reflects the regional approach of a very high level of institutionalisation of these norms. This section analyses how the ratification of international human rights conventions allowed civil society and judges to lobby for granting constitutional status for these human rights in 1994, which provided the basis for ensuring that the 2004 Migration Law integrated these same norms.

The timing of international conventions entering into force proved crucial for the advancement of human rights in Argentina (Brysk 1993: 266; Sikkink 2008: 3; Sikkink and Booth Walling 2006). Globally the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) – key international human rights treaties – entered into force in 1976,[36] when the Argentine military junta came to power through a *coup d'état*. Two years later, the American Convention on Human Rights (ACHR) entered into force at the regional level.[37] This established the Inter-American Court of Human Rights (IACtHR). These global and regional instruments provided important sources of international law for mobilisation and strategic litigation.

With the return of democracy, Argentina signed and ratified a number of international human rights instruments, as the country 'was eager to rejoin the global community' (Grugel and Peruzzotti 2010: 44). These were the ACHR (signed and ratified in 1984),[38] CEDAW (ratified in 1985), the ICCPR and its Protocol (ratified in 1986), the ICESCR (ratified in 1986), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, signed in 1985 and ratified in 1986) and the CRC (ratified in 1990).[39]

[36] See http://indicators.ohchr.org/ (accessed 16 January 2015).
[37] See http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (accessed 16 January 2015).
[38] See http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (accessed 16 January 2015).
[39] See http://indicators.ohchr.org/ (accessed 6 March 2015).

The exact reason(s) for the ratification of different international instruments in Argentina in the 1980s is(are) difficult to ascertain. Grugel and Peruzzotti claim that it 'was simply part of a regional trend of domestic incorporation of international human rights norms after or alongside democratisation' (2010: 36). Potential domestic instability for the relatively young democracy may also have been a motivation, as the ratifications create a democratic identity and the willingness to be part of the international community of democratic states. Policy-makers at national level 'who believed in the human rights ideals' (Lutz and Sikkink 2001: 7) may well have played an important role in Argentina, especially given President Alfonsín's (1983–1989) human rights NGO background. A norm cascade, meaning the increasing importance and acceptance of human rights ideals at the regional level by most governments, further explains these ratifications (Lutz and Sikkink 2001).

Based on advocacy by NGOs and the judiciary, Argentina granted constitutional ranking to all ratified conventions in 1994. Initially, during the two terms of President Carlos Menem (1989–1999) mandate, human rights principles were not high on the political agenda. However, civil society continued its mobilisation and found allies in judges in the domestic arena. Through their case law, the judiciary progressively undermined the conservative stance of the government and military. The civil society–judiciary alliance pushed for a reform of the constitution in 1994, which included enshrining international human rights norms above national laws in Article 22 (Levy 2010). Article 23 enshrines the obligation of the state to adopt 'positive measures to guarantee real equality of opportunities and treatment, and the full enjoyment and exercise of the rights' protected by international conventions and under the constitution.[40]

Once all international human rights conventions signed by Argentina were ratified in the constitution in 1994, their norms provided an important vehicle for mobilisation. In Argentina, several laws were reformed to make them conform to the international human rights treaties to which the constitution obliges Argentina to adhere. Among them were the law on the rights of the child (Grugel and Peruzzotti 2010), legislation on the disabled and the Migration Law. Civil society actors lobbied for change in the Migration Law using rights language similar to that used in the child law reform, which was also changed based on successful civil society

[40] Constitution of the Argentine Nation 1994, available at http://www.senado.gov.ar/bundles/senadoparlamentario/pdf/institucional/constitucion_nacional_argentina.pdf (accessed on 16 January 2015).

advocacy (Grugel and Peruzzotti 2010). The constitutional ranking of international human rights norms further explains why the 2004 Migration Law reform was framed as an aspect of human rights, like other legislative changes in relation to other issues which were occurring in the same period.

One difference compared to what happened in relation to child rights is that no specific human rights-based migration treaty existed that activists and other actors could invoke. The ICMW was signed only in August 2004 by Argentina (probably as a consequence of passing the Migration Law just months before and the friendly settlement discussed next) and then ratified in February 2007. The basis for the Migration Law reform efforts was not an international treaty governing the specific field of migration but the constitutional ranking of international human rights norms enshrined in Article 22 of the constitution. The case thus differs from Simmons' indication that 'international treaties influence the probability of mobilization' (2009: 135) as the norms enshrined in the human rights conventions proved sufficient for lobbying to change the migration legislation.

In sum, in the early 1990s, civil society actors found allies in the Argentine judiciary and jointly successfully achieved the constitutional ranking of international human rights conventions. This Article 22 of the constitution later became an important basis for the mobilisation of a group of human rights NGOs and certain parliamentarians in order to change the migration law dating back to the dictatorship. Mobilising around the constitutional human rights norms to amend the Migration Law was part of a wider process of legislative reforms and was based on previous human rights strategies; it cannot, therefore, be viewed in isolation. The constitutional ranking of international human rights conventions provided an important stepping stone in convincing the executive to change the migration law still in place, as we will see in the next section.

4.3 Civil society–executive alliance: the impact of the *De la Torre v. Argentina* Inter-American case

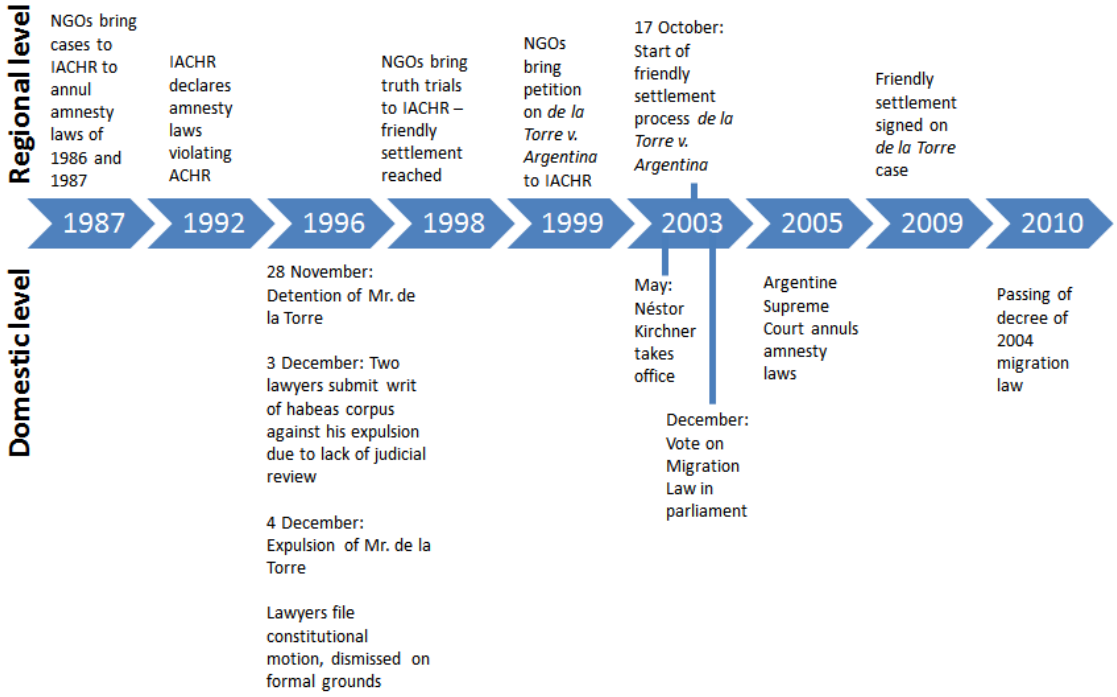
As we saw in the first section of this chapter, civil society developed innovative strategies to achieve human rights accountability in the 1980s and 1990s. This third section now focuses on

how the very same techniques and international norms with constitutional status were used to advocate for the new Migration Law. It discusses how the human rights movement formed an insider–outsider coalition to revoke the amnesty laws of 1986 and 1987 – a precedent which was later used to change the migration legislation in force. The tactical use of 'naming and shaming' the government at the international level and accessing the Inter-American system of human rights would later be applied by some of the same leading human rights NGOs in strategic case law for a human rights-based Migration Law reform at the end of the 1990s.

4.3.1 The litigation strategy by the human rights movement

Mobilisation by human rights NGOs has influenced the leverage of the concept of human rights in Argentina up to the present day. The movement used the very same techniques that they had applied in transitional justice avenues in the 1980s and 1990s when it came to the reform of the Migration Law – namely the strategic use of information or 'information politics' (Keck and Sikkink 1998: 16) which will be discussed in Chapter 5 – and strategic litigation (cf. Simmons 2009).

Figure 4.3: Timeline of domestic and regional case law 1987–2010



Source: Own illustration.

With the democratic transition starting in the 1980s, both domestic and regional case law began to develop (see Figure 4.3). As domestic, regional and international institutions provided ample opportunities to seek justice, human rights NGOs sought legal action in domestic and regional courts whenever other national avenues were blocked and not advancing their causes further. During the democratic transition, bringing members of the military junta to justice was of strategic importance to human rights NGOs. When no advances were made at the domestic level, human rights lawyers continued to resort to the very accessible Inter-American human rights system (Cooper and Thérien 2004). 'NGOs are instrumental for bringing human rights cases to the tribunals and helping victims navigate the technical aspects of working with the Inter-American Human Rights tribunals' (Hillebrecht 2012: 972). Still in 1987, when the second amnesty law was adopted, Argentine NGOs – led by CELS – filed several cases at the IACHR, since they had exhausted all possibilities at the domestic venue. In 1992 the IACHR declared the amnesty laws as violating the American Convention on Human Rights that Argentina had ratified in 1985 (IACHR 1992, see Figure 4.3).

Strategic litigation at the domestic level was further continued by the Grandmothers of the Plaza de Mayo. In the mid-1990s, the trials on the truth about the children of the disappeared were starting to be successful. Most of those convicted of the kidnapping and changing of identity of minors were lower-level members of the military and the families who adopted the children of the disappeared. Nonetheless, these truth trials represented an important milestone in seeking justice for these crimes by circumventing the amnesty laws. In 1998, when domestic avenues were again blocked for the continuation of the truth trials, human rights advocates filed another petition at the IAHCR. This led to a friendly settlement with the government, which was an approach to resolve a dispute outside of court in a mutually agreeable way. The settlement allowed the truth trials to continue at the domestic level (Sikkink and Booth Walling 2006: 314). Litigation both at national and regional levels thus became 'also a political strategy' (Simmons 2009: 132) which was matched byh the agenda-setting power of the Executive (cf. Hillebrecht 2012: 985).

Thus the 'insider–outsider coalition' (cf. Sikkink 2005) between domestic human rights NGOs on the one hand and the IACHR (and pressure by European governments) on the other, led to important advances in bringing military commanders to justice. After the historical annulment

of the amnesty laws in 2005, other legislation was amended to ensure its conformity with human rights standards (Interview 40, 9 December 2013).

Overall the extensive record of new human rights tactics and advances developed and achieved from the end of the 1970s to the 1990s makes Argentina a very unique case. Strategies that emanated from the struggle to hold military leaders accountable for their atrocities continued to be applied by civil society. These tactics include information politics and strategic litigation at national and regional levels. Civil society actors identified varying allies with or via whom to apply these strategies: firstly the judiciary, to ratify key international human rights conventions as discussed in Section 4.2, then the Executive, to change the migration law based on Argentina's human rights obligations that will be presented next.

4.3.2 The civil society–Executive alliance for migration law reform: the *De la Torre v. Argentina* case

Human rights advocates from Argentina used the Inter-American human rights system when prospects of success for reforming the migration legislation in the domestic judicial system were slim. The *De la Torre v. Argentina* case at the Inter-American Commission on Human Rights helped to change the Videla Law on migration. As part of a friendly settlement process, the government committed to reforming the Migration Law in 2003 (and did so in 2004), long before the settlement was officially reached and signed in 2009. This sub-section presents the case as a background for tracing its implications on the 2004 Migration Law and subsequent decree. Interestingly, Mr De la Torre himself may remain unaware of the impact his case had had on Argentine legislation, as most domestic and regional processes helping to adopt the new law took place after he had already been expelled from the country (his ban on re-entering Argentina was lifted in 2005 by the DNM (OAS 2011b: 3), but whether this news reached him or not is uncertain).

Mr De la Torre was an immigrant of Uruguayan origin, who entered Argentina legally in 1974. After more than 20 years of residence in the country, he was detained on 28 November 1996 without judicial order and without being informed of the charges against him. When two lawyers learnt that Mr De la Torre was to be deported that same night, on 3 December, they presented a writ of *habeas corpus* to a national court, claiming that both the Videla Law and

the accompanying decree in force were unconstitutional. However, Mr De la Torre was expelled in a process without judicial protection in the early hours of 4 December 1996 (OAS 2011b).

After Mr De la Torre was expelled, the same lawyers filed a constitutional motion at the domestic level, to the effect that the migration law of 1981 and its decree were unconstitutional. The Argentine Chamber of Cassation granted the constitutional motion. However, in its ruling, the court declared the motion inadmissible after all, as it was not clear whether the lawyers were actually acting on behalf of Mr De la Torre. Thus the unconstitutionality of the migration law was confirmed by a domestic court, but the specific case was dismissed for formal reasons. An appeal based on the alleged infringement of due process guarantees and a judicial review of the administrative decision to expel him were dismissed by the Supreme Court by majority vote. Since Mr De la Torre had already been expelled, the objective of the appeal – the restriction of liberty – was no longer at issue and the case had become 'abstract' (OAS 2011b: 2). It thus seems that the claims *per se* were valid but, since the Uruguayan immigrant had already been returned and was free again in his country of origin, the respective judges did not see the need to continue the legal challenge.

When the domestic avenues for seeking a change in the norms were blocked, CELS used the regional level as complementary to the domestic sphere in order to pressure the government. On 7 July 1999, CELS and, later, the Center for Justice and International Law (*Centro por la Justicia y el Derecho Internacional*, known by its English acronym CEJIL) presented a petition to the IACHR concerning the violation of the right to personal liberty, fair trial, judicial protection, non-interference in a person's private life and the protection of the family of Mr Juan Carlos De la Torre, as safeguarded in the American Convention on Human Rights.

Shortly before the vote began on the Migration Law in the Argentine Congress in December 2003, the executive branch of the government and the two NGOs agreed, on 17 October 2003 in a working meeting, to 'explore the possibility of a friendly settlement' (OAS 2011b: 2). Interestingly, the IACtHR published its Advisory Opinion on irregular migrant workers just a month before, which may well have influenced the willingness of the government to resolve the *De la Torre v. Argentina* case on what was also a migration issue.

The working agenda of the meetings that started in 2003 as part of the friendly settlement process included a review of existing normative and administrative measures (OAS 2011b). Thus, already in 2003, the new Kirchner government committed to changing the migration law. This actually happened – also for other reasons – before the settlement at the IACHR was officially reached in 2009. Working meetings between representatives of the government of Argentina and CELS and CEJIL were held on the margins of the regular sessions of the IACHR.[41] Already, in 2005, the parties agreed that the friendly settlement could be signed; this eventually took several years to achieve – and the settlement was signed on 4 November 2009.

In short, an unusual alliance between civil society and the Executive saw a case at the Inter-American Court on Human Rights pave the way for the commitment by the government to change the migration law of 1981. This case also particularly influenced the 2004 Migration Law's decree.

4.3.3 The impact of the *De la Torre* case on the Migration Law and Decree

During the friendly settlement process, a lot was going on behind the scenes. The IACHR was clearly used as the venue for domestic reform. According to the friendly settlement report by the IACHR (2011: 3) '[t]he initiated process contributed in a decisive way to the repeal of the migration law which was in force at the time, known as "Videla Law", and its substitution by Law 25.871, passed on 20 January 2004'. The timing was decisive.

The two lawyers acting on behalf of Mr De la Torre took it upon themselves to pursue a case for an individual who had been expelled and had not instructed them to act. Taking up cases of migrants who disappear is very difficult for lawyers (Dembour 2015) and, in this case, Mr De la Torre was not even their client. They documented how his human rights had been abused just as they had in other cases during the democratic transition. In an interview I conducted in 2013 with the Director for Human Rights (International Litigation) of the Argentine Ministry of Foreign Affairs, Javier Salgado (who represented the Argentine state in the *De la Torre* case, see OAS 2011b: 3), he indicated that the government had considered the petition by CELS

[41] 5 March and 26 October 2004, 2 March and 19 October 2005, 8 March and 7 December 2006, 11 October 2007 and 4 November 2009, when the friendly settlement was signed.

inadmissible because domestic recourses had not been fully utilised. This was because Mr De la Torre had not appealed against the expulsion order (which is a precondition for resorting to a supranational judicial organ). Taking the case directly to the IACHR is notable, as normally it would mean reaching a direct dead-end due to the non-exhaustion of national remedies. The petitioners nonetheless continued to argue that the case was admissible and violating provisions of the American Convention on Human Rights.

When the new President of Argentina, Néstor Kirchner, took office in May 2003, the legal arguments by the government regarding the case did not change. However, the Executive was interested in changing the Videla Law, as it dated back to the dictatorship and as the new government considered that the 1981 migration law did not adhere to international human rights standards enshrined in treaties like the American Convention on Human Rights:

> *[T]he parties left their legal arguments about the admissibility of the case […] out. Notwithstanding those differences, the state and the petitioners agreed that the legislation of the Videla Law, the law of the dictatorship, was incompatible with [international human rights] standards and therefore the individual case [of* De la Torre*] allowed the opening up of a space aimed at seeing how the legislation could be modified, taking what had happened with* De la Torre *as a starting point* (Javier Salgado, Interview 52, 17 December 2013).

Salgado further ascertained the link between the Migration Law reform process and the *De la Torre* case:

> *[There was a] very strong interaction between the effort of the legislative initiative and what support […] the existence of an international case brought. In other words, just the fact that there was a complaint against Argentina which brought the migration norm into question contributed decisively to facilitating a better and faster development of the activities of the Congress, achieving consensus, [and] the support by the executive branch [for the new Migration Law]* (Javier Salgado, Interview 52, 17 December 2013).

Pablo Asa of CELS, with whom I spoke in December 2013, confirmed this view. The Ministry of Foreign Affairs was voicing the willingness of the government to change the migration law, 'thus the Ministry of Foreign Affairs and Culture also promoted the legislative reform in a certain way' (Interview 40, 9 December 2013) by acting as the spokesperson for the Kirchner administration.

The human rights basis of the new Migration Law fit well with the overall policies of the Kirchner administration (cf. Hillebrecht 2012: 973). In September 2003, shortly after President Nestor Kirchner took office in May, he announced his political agenda based on human rights (Levy 2010: 590) at the UN General Assembly:

> *The defense of human rights occupies a central place in the new agenda of the Argentine Republic. We are the children of the mothers and grandmothers of the Plaza de Mayo, and we therefore insist on permanently supporting the strengthening of the system for the protection of human rights and the trial and conviction of those who violate them. All of this is based on the overarching view that respect for persons and their dignity arises out of principles preceding the development of law, whose origins can be traced to the beginnings of human history. Respecting diversity and pluralism and relentlessly fighting impunity have been unwavering principles of our country ever since the tragedy of recent decades* (UN GA 2003: 8).[42]

Kirchner explicitly referred to the human rights violations during the dictatorship and close ties to the most representative of the human rights NGOs – the Mothers of Plaza de Mayo – as a reason for this human rights-based approach in his public policies, highlighting the influence of this historical experience for the importance of human rights, as previously argued. This official approach also included the IACHR, as highlighted by Luis Hipólito Alen, Sub-Secretary of Human Rights Protection, Secretariat of Human Rights, Ministry of Justice and Human Rights, Argentina:

> *Since 2003, all Argentine policies with regards to how we act in front of the Inter-American system [of human rights] are a decision by the government […]. [G]iven the policy of considering human rights as the core part of public policies in our country since 2003, we always have to find a way to reach a friendly settlement that takes the rights of all parties into account, and often these settlements lead to the implementation of legislative modifications […]* (Interview 43, 11 December 2013).

According to representatives of the Ministry of Foreign Affairs and Culture and the Ministry of Justice and Human Rights, the *De la Torre* case was not the only friendly settlement at the IACHR which led to reforms in various fields to ensure conformity of the respective legislation with human rights obligations (Interview 43, 11 December 2013; Interview 52, 17 December 2013). The need to change the migration law from the times of the dictatorship was also often mentioned during the public consultations on the draft Migration Law in 2000 and 2002 (CPDH 2010a, b).

[42] Translation from Spanish into English by the UN. Available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/531/33/PDF/N0353133.pdf?OpenElement (accessed 26 April 2015).

Besides representing a push factor for the government to support the passing of the 2004 Migration Law, the influence of the friendly settlement on the framing of the Migration Law is not entirely clear. The Law's content had already been drafted before the friendly settlement process at the IACHR was initiated. According to a key informant, the friendly settlement had therefore more of an impact on the substance of the regulating Decree (Interview 43, 11 December 2013). The process of regulating the new migration law took six years and thus longer than passing the Migration Law itself. This delay resulted in a wide legal inconsistency between 2004 and 2010 as the 2004 Migration Law and the regulation of the previous Videla Law that continued to be in force until 2010 followed two different logics – while the former focused on human rights, the latter focused on national security. Furthermore, the somewhat lengthy friendly settlement process at the IACHR could explain the delay, as the drafting of the regulation was part of the discussions.

The Migration Agency drafted several regulations of the Migration Law up to 2008. These were commented on and rejected by civil society and migrants' associations (Baladrón *et al.* 2013). For instance the first was allegedly a copy of the very restrictive decree that had been regulating the Videla Law (Interview 40, 9 December 2013). In June 2008 and as part of the friendly settlement process at the IACHR of the *De la Torre* case, a more formal Advisory Commission for the drafting process of the decree was established by the government through the DNM. It consisted of representatives of the human rights NGOs CELS and APDH, FCCAM, the Catholic research centre CEMLA, and the international organisations IOM and UNHCR (Baladrón *et al.* 2013; Hines 2010). The government consulted various civil society actors through the newly established Advisory Commission, which prepared a text from June to October 2008.

The friendly settlement required two things from the government: first, that it pass the regulation within one month – which, in the end, took slightly longer (half a year, until May 2010), probably due to administrative procedures – and second, to continue consultations with civil society in the working group on the implementation of the Migration Law, which were still ongoing by the time of writing – 2015 (cf. OAS 2011b) – but which may have been discontinued or weakened since the government of Mauricio Macri took office in 2015. The implementation of the migration law by the DNM only started in 2010 when the new decree

was adopted (Interview 40, 9 December 2013; Interview 2, 14 November 2013 with Rubén Giustiniani), except for the regularisations in 2004 and 2005 (cf. Chapter 2).

The influence of the rather long friendly settlement negotiations of the *De la Torre v. Argentina* case went well beyond implemention of the Decree. It led to the ratification of the International Convention on the Rights of Migrant Workers and Their Families in 2007 – two years before the settlement was reached. The process was also linked to the alleged suspension of migration inspections and the detentions and deportations of immigrants, as well as the decrees for the regularisation of both MERCOSUR and third-country nationals in 2005 (OAS 2011b). However, expulsions continued after the passing of the 2004 Migration Law and, in practice, were never entirely stopped (cf. Chapter 2).

With regards to implementation (2004–2010)[43] of the 2004 Migration Law, the courts were continuing as if the previous law was still in place (cf. Chapter 2). Judges play an important role, as the application of legislation is not only the responsibility of the Executive. The tension between the executive and legislature branches protecting the rights of immigrants in the 2004 Migration Law on the one hand, and the opposition to the application of Law 25.871 either knowingly or by ignorance of the judiciary on the other, continued. Thus, despite the commitment by the state to protect migrants' rights in the friendly settlement and legislation, judicial practice had been undermining the 2004 Migration Law. In her case study on the Inter-American Court of Human Rights, Huneeus has noted that '[t]he more separate state branches or institutions an injunctive order involves, the less likely its implementation becomes' (2011: 508 ff.). While the Executive's willingness to change the migration law concurred with the draft law in Congress by the Legislature in 2003 (cf. Chapter 5), the judiciary branch did not follow suit. Given the resistance of the courts and probably legislators at sub-state level (and no doubt the Macri administration more generally), many laws at national, provincial and municipal levels remain to be changed (Novick 2008: 149).

In sum, the executive branch of the government agreed with the petitioners of the *De la Torre* case – in content – to change the Videla Law on migration, but questioned their arguments on formal grounds. Tracing the process of domestic politics of adopting the decree and

[43] At least until 2010, when Lila García (2013) conducted her PhD research, no more recent research into the implementation of the Migration Law was available.

compliance with the law (cf. Gurowitz 1999 in the case of Japan) highlighted how different actors paved the way for the Migration Law at different historical stages and supported the creation of historical precedents. The judiciary did not support the same migration regime change that the executive and legislature branches were about to undertake. This was the motivation for using external pressure through the Inter-American Human Rights Commission in an unusual strategic alliance between civil society, the Ministries of Foreign Affairs and those of Justice and Human Rights:

> *The question linked to the administration of justice is a complex problem in the region and represents one of the great debts in the region in the field of rule of law […]. What is for sure is that, even though we have progressive constitutions and advanced laws and so on, if we do not have the judicial branch that implements them adequately, that guarantees that the person under the jurisdiction of this state is under adequate protection, an effective judicial custody, we will necessarily have to continue to go beyond the national sphere and move to the context of the international systems of protection [through case law at the IACHR]* (Interview 52, 17 December 2013).

A tension thus persisted between the different state actors concerning the law and its implementation, a tension which is likely to increase further with the change of administration in 2015 and thus its ideology.

The involvement of diverse civil society actors in the passing of the Decree can also be considered a success through strategic litigation. Keck and Sikkink assert that transnational advocacy networks 'also promote norm implementation, by pressuring target actors to adopt new policies, and by monitoring compliance with international standards' (1998: 3). The experience of the human rights lawyers with the Inter-American system in the 1990s in advancing their goal of repealing the amnesty laws whenever the process was halted at national level was useful and applied again to the Migration Law. However, actual compliance with the 2004 Migration Law has been a lot less successfully advocated for by civil society than the passing of the new legislation (Brumat and Torres 2015).

Conclusion

Political scientists have explored the role of the international human rights system (Sassen 1996) and national courts (Joppke 1998) in advancing human rights. In the case of migration policy-making in Argentina, the liberal notion of human rights was not an external influence through the international regime, but one emerging from within (Acosta Arcarazo and Freier 2015) through successful mobilisation of ideas by NGO actors. The traumatic experience of the last dictatorship and the subsequently developed transitional justice innovations and discursive tactics explain the importance of the idea of human rights in Argentine politics and law and the strong role and thus power position of civil society even though they are not state actors (cf. Schmidt 2010: 18). Argentina's 2004 Migration Law thus represents a case where not economic interests motivated actors to mobilise for policy change but immaterial motivations. Human rights helped to delegitimise neoliberal economic ideas' impact on social justice for migrants. Experienced human rights lawyers from civil society applied the same legal strategies of documenting the human rights situation of victims (in this case of immigrants) and strategic litigation at the regional level when the domestic judicial arena for changing the migration law was blocked. One important difference is that no support from external governments could be expected in the field of migration law.

Cortell and Davis analysed the salience of a norm based on its effects on 'the national discourse, the state's institutions, and state policies' (2000: 70). In the case of Argentina, the concept of human rights was a legitimate concern, as reflected in the political rhetoric by President Kirchner, public institutions like the reformed Supreme Court and the role of courts in enshrining international norms at domestic level, as well as reformed policies, including the 2004 Law on Migration. My key informants pointed out that Kirchner's administration was susceptible to human rights cases on migration in a bid to avoid affecting his reputation at the regional and domestic levels. He had a clear interest in a clean human rights record focusing on the past and migrants, and therefore pushing other rights issues during his tenure to the background.

The Migration Law reform was not a unique occurrence, but part of a larger process in the country and region. In the 1994 constitutional reform, international human rights treaties were granted constitutional status. This, then, was one of the starting points for the alliance between a small group of human rights NGOs and members of parliament in reforming the

Migration Law, as the next chapter will detail. At the same time and against all the odds, civil society actors achieved a friendly settlement to reform the law and pass a decree with the political will of the executive branch of the Argentine government. The two lawyers were bold in using the Inter-American human rights system – despite not having exhausted all domestic remedies – and ultimately succeeded. Human rights NGOs in Argentina that previously had advocated for other human rights concerns later lobbied for the Migration Law. Since 1994 civil society found allies in all three branches of the government: in the judiciary in the 1990s, and the legislature and executive in the early 2000s. Establishing these three justice and rights coalitions is a remarkable achievement and each and every single one helped to pave the way for the adoption of the 2004 Migration Law.

The abundant literature on transitional justice, social movements and transnational advocacy networks in Argentina combined with the scholarship on the role of ideas in achieving change in discursive institutionalism provide an important insight into why certain discursive and legal techniques of human rights NGOs were successful and why it was necessary that the migration law reform be framed as a human rights issue. This analysis demonstrates not only the importance of historical context. Using an interdiscipliny approach beyond migration studies helped drawing out the fact that the human rights ideas in the 2004 Migration Law build on a track record of innovations since the 1980s and cannot be seen in isolation from the influence of the recent past but as a sort of human rights policy paradigm that helped change the migration legislation.

Chapter 5: Migration politics and governance: process, actors and timing

Process tracing in the previous chapter showed that civil society not only allied with the judiciary, but also with the executive, which ultimately led to the reform of the Migration Law reform. Human rights NGOs obtained the commitment of the administration to reform the migration legislation only weeks before the Migration Law was voted on in Congress. Two decades after the return to democracy and two years after Argentina's most devastating political and economic crisis, the Argentine Chamber of Deputies and the Senate passed the Migration Law at the end of 2003. It then entered into force in early 2004.

This chapter traces the legislative process in detail to demonstrate the politics behind the human rights basis of Argentina's 2004 Migration law. One focus will be the alliance civil society actors established amongst themselves and with the legislature. The long-standing human rights activism analysed in Chapter 4 explains the success of civil society in setting the agenda, negotiating the human rights basis of the Migration Law and helping to build a consensus. Analysing the policy-making process will show how it was possible that the Migration Law was passed unanimously in Congress, a remarkable feat in itself. One factor that contributed to this legislative change was the high number of intra-regional immigrants in an irregular situation. Another was timing, including the effect of the 2001 crisis on the President in power, his political discourse and priorities, but also on rising emigration levels.

The 2001 political and economic crisis led to two counter-intuitive consequences for migration: It firstly highlighted the responsibility of politicians, and not immigrants, for the high unemployment among the general population and secondly increased the emigration of Argentines. The government thus had to first change its own stance towards marginalised immigrants in Argentina if it wanted to make credible claims that destination countries of Argentines in Europe and the United States must protect its own nationals abroad.

A wide range of actors participated in the consultations which led to the adoption of the 2004 Migration Law. The process which took place became a key determinant of the success of the liberal migration policy-making in Argentina. Participation by a wide range of stakeholders ensured not only a more comprehensive view on migration, but also the unlikely political

consensus on the draft Law in both houses of Congress. The timing of the circumstances was perfect which will be hard to replicate elsewhere, and which led to 'the stars aligning' (Interview 4, 25 September 2013) or being at the right place, at the right time. Analysis of the passing of the Argentine migration policy shows that, contrary to most existing studies (for instance, FitzGerald and Cook-Martín 2014; Freeman 1995, 2006; Menz 2009; Tichenor 2002, 2008), interest groups such as employers, labour unions and political parties played no noteworthy role in its adoption. Instead, the main advocacy groups in Argentina were human rights organisations based both on their historical pivotal role in human rights achievements and the constitutional guarantees of international human rights norms (cf. Chapter 4). These NGOs provided information on the reality faced by migrants. Questions of principle were their main motivation, not generating the wealth which business lobbyists would pursue.

Civil society representatives discredited the existing migration policy using evidence that the policy had led to large inflows of irregular immigrants from neighbouring countries, a situation civil society sought to remedy. A key achievement of NGOs was the evidence-based approach taken in reforming the Migration Law, which was also supported by statistics used by government officials. Information was not used selectively, as in a case study in the UK mentioned in one of the few articles focusing on the evidence base in migration politics by Boswell (2009). In the UK, migration policy-makers only used the data that supported their own policy preferences whereas, in Argentina, migration statistics demonstrated the need to reform the legislation overall. Most immigrants originated from South America, but were barred from legal entry by the migration legislation. Basing the information strategy on official statistics certainly helped to ensure it received greater credibility among government actors in the legislature and executive branches. Civil society had raised immigration issues using their own background studies, which were then backed up by the 2001 census figures, again pointing to the favourable timing of the process. The commitments in the 2002 MERCOSUR Residency Agreement and the historical importance of immigration further enabled the change of the migration legislation.

This chapter focuses specifically on domestic migration politics, as well as on their interplay at the regional and global levels. FitzGerald and Cook-Martín have called domestic politics 'the vertical dimension' (2014: 11), being the first category of three. Politics across countries and regions represents the second, the 'horizontal dimension' (FitzGerald and Cook-Martín, 2014:

20). Newly elected President Kirchner's human rights ideology was an important reason why the liberal Migration Law was adopted. FitzGerald and Cook-Martín (2014: 18) refer to these belief systems as a third category in migration politics.

The first section of the chapter traces the policy-making process, who was involved and how its timing played out. I will first introduce the context, being the pivotal 2001 socio-economic, financial and political crisis. The section goes on to show how the 2004 Migration Law was adopted, followed by a more detailed look at the arguments which were advanced by different actors. Section 2 focuses on the domestic and foreign politics implications of rising numbers of emigrants. I analyse how the changed emigration reality was taken into consideration in domestic politics on migration. The last section analyses the impact of the large numbers of irregular immigrants from the region on the interplay between re-shaping the domestic migration policy and regional integration and politics. The chapter concludes that migration politics and governance in Argentina can be explained by the variety of actors involved, the policy-making process itself and the context of the 2001 crisis, which led to increasing numbers of emigrants, as well as to advances in regional integration to address that many South American immigrants were not able to regularise their status.

5.1 Civil society – legislature alliance: consensus through participation and timing

The policy-making process itself facilitated the adoption of the Migration Law for a number of reasons. Firstly, the process consisted of two public consultations led by the proponent of the Law, Congressman Rubén Giustiniani, in 2000 and 2002. He headed the Population and Human Resources Commission (CPRH), which laid the groundwork for the passing of the Migration Law. Secondly, the participation of a wide range of stakeholders in the process, as well as the historical importance of human rights analysed in the previous chapter, ensured that Law 25.871 was passed unanimously, without any dissent being expressed. Last but not least, the timing was on the side of the proponents of the law throughout the process.

5.1.1 The context: the devastating economic and political crisis of 2001

> *Throughout the end of 2001 and the beginning of 2002, Argentina made news around the world. A rapidly deteriorating economic situation weakened the indecisive government of President Fernando de la Rúa of the Radical Civic Union (UCR) past the point of no return. Unrest broke out in the streets, as crowds in the poorer suburbs looted supermarkets while middle-class groups in the capital city of Buenos Aires marched on the Casa Rosada (the seat of the executive branch) beating pots and pans. As a result, and after 30 people had lost their lives in the disturbances throughout the country, first Economy Minister Domingo Cavallo, then the rest of the cabinet, and finally the president himself all resigned on December 20–21* (Schamis 2002: 81).

In 2001, Argentina faced an economic default resulting from a number of decisions that turned out to be disastrous in the context of a dire economic situation. A political vote of no confidence for President de la Rúa reinforced and exacerbated the economic crisis and led to the devastating 2001 socio-economic and political crisis in Argentina. The crisis resulted in demonstrations in the street and the resignation of ministers and then of President de la Rúa himself. He was followed by a succession of five presidents in the space of about a week at the end of 2001, which ended with Eduardo Duhalde accepting the interim presidency for two years. At a certain point in 2001, Argentina was no longer able to service its large external debts, a situation aggravated by the flight of capital and plummeting foreign investment. As a consequence, the country's economy defaulted, leading to the collapse of the banking system and the overnight evaporation of the savings of the middle classes (Setser and Gelpern 2006).

The economic reasons for the crisis resided, firstly, in pegging the peso to the US dollar in a one-to-one conversion rate. The then Minister for Economic Affairs, Domingo Cavallo, took the decision on the convertibility in 1991 when the country was facing hyperinflation of up to 3000 per cent and the population was demanding macro-economic and financial stability through low inflation rather than through lower unemployment. Secondly, having and wanting to service a high external debt at all costs in volatile times in the international financial market in the 1990s, with countries such as Mexico (in 1994) and Brazil (in 1998/1999) having faced currency devaluations, and defaulting like Russia in 1999, turned out to be unachievable. High fluctuations in the exchange and interest rates for the debt rising excessively further contributed to making the debt service impossible by the end of 2001. The International Monetary Fund, which considered Argentina as its 'poster child' in the 1990s, is considered to have turned a blind eye to the country's ill-advised economic policies and continued to provide

loans despite the dire economic situation (see Kehoe 2003; Setser and Gelpern 2006). Thirdly and finally, several consecutive years of economic recession with a 20 per cent unemployment rate in 2001 without reductions in public spending exacerbated the first two issues (Kehoe 2003; Ocampo 2003; Schamis 2002; Setser and Gelpern 2006; Szusterman 2007). By the beginning of 2002, the convertibility to the US dollar was abandoned at great cost (Kehoe 2003; Ocampo 2003). The poverty rate in urban areas rose from 38 per cent in 2001 to 58 per cent in October 2002 (and only fell to below 34 per cent in 2005 (World Bank 2006), after the Migration Law was adopted).

Some sectors of society, like the newspaper *Ámbito Financiero,* were accused of knowingly presenting false numbers on immigrants, with the intention of creating an image of mass immigration. The lack of reliable information on irregular foreigners residing in the country helped to spur the anti-immigrant discourse in the media, in a sort of 'quantitative racism' (Gurrieri as cited in the 2000 consultation, CPDH 2010b). The public anti-immigrant sentiment was thus similar to other major immigration countries. At the same time, a consultative process greatly supported by civil society and not employers as in other contexts (cf. Freeman 1995, 2006; Menz 2009) had been taking place for changing the previous migration legislation.

5.1.2 The public consultation process: 2000–2002

The process that led to the adoption of the Migration Law was based on consultations with a broad range of stakeholders and lasted more than three years. Such a consultative approach including civil society was unprecedented in Argentina (see also Brumat and Torres 2015: 57).

A strategic alliance of civil society organisations founded in 1996 had documented and analysed the obstacles that immigrants were facing and advocated for a change in the migration legislation (Chillier and Semán 2011: 104). Based on this background work achieved in the 1990s (Correa 2004), when Rubén Giustiniani became President of the Population Commission of the National Chamber of Deputies in 2000, the Migration Law reform became a priority of this entity (Giustiniani 2004: 13).

In order for a draft law to be passed, it first has to be discussed and approved in one of the committees of the Congress. Once supported by a majority of that committee, it can be

discussed in one of the two chambers. According to Calvo (2014: 32), between 70 to 90 per cent of bills never reach the plenary of a chamber. The National Chamber of Deputies and Senate discussed several drafts for a new law and policy on migration that had been approved by the respective population committees of one of the two chambers, so already made the initial threshold. Some were more restrictive, other drafts more liberal, but none reached the second stage of being approved in one of the two Chambers[44] (Giustiniani 2004: 13; Novick 2008).

In December 1999, the members of the Population Commission agreed to work further on a liberal draft presented by Congressman Juan Pablo Cafiero (Giustiniani 2004; Novick 2008). Given the difficulties to pass a draft bill through both Chambers once approved in the Population Commission, prior to the presentation of the draft law to Congress for approval several consultations took place. On 1 December 2000, a seminar on 'Migration Policy and Norm in Argentina' with invited experts was organised by the Ministry of the Interior, the Population Commission of the House of Representatives and the International Organization for Migration (IOM) (CPDH 2010b). The participants included experts from a broad range of institutions: members of Congress, different ministries, academics, and representatives of civil society organisations such as NGOs and migrant associations, personnel from embassies and consulates as well as international organisations (CPDH 2010b). Migration legislation in European countries and the US was also studied to form the basis of the drafting process (Giustiniani 2004: 40). The main outcome of these discussions represented the starting point for the draft Law presented for debate by the President of the CPRH at the end of 2001 (Giustiniani 2004: 35).

Public discussions on the draft continued in 2002 at the Population Commission. Most importantly, a larger public consultation was held on 26 September that year, organised by the Commission (CPDH 2010a). About 150 participants represented the same institutions as in the 2000 seminar (CPDH 2010a; Giustiniani 2004: 35; 271), thus continuing the participatory approach to legal reform. The aim was to improve the draft Law that the Commission's President, Giustiniani, had prepared based on the general points made in the 2000 seminar (Giustiniani 2004: 271). The draft was sent to the participants beforehand to enable them to

[44] According to research by Calvo (2014: 35), of the 10 to 30 per cent of bills that are discussed in one chamber, half are dropped at this second stage.

prepare their statements, which were not limited in time (CPDH 2010a). The process was clearly specified to participants.

No speaker opposed the draft *per se* during the consultations. Given that in numerous previous attempts draft migration laws had never previously passed in Argentina, it is noteworthy that not a single participant questioned the comparatively more liberal approach of the draft law. This might have been due to the political inclination of those participating in a consultation which clearly aimed at reforming the law. Equally strikingly, no employer representatives took the floor according to the official minutes.

Based on these broad consultations with outside actors and once approved in the Population Commission, the draft migration law was passed to the House of Representatives. To discuss support and/or any dissent on a bill to be presented in the plenary, pre-floor meetings take place in each political party bloc. Bloc leaders will gauge their members' preferences and are informed about the other blocs' take on the bill, which allows for consensus to be built already before the voting on a draft bill takes place. Then the Chamber Directorate, consisting of the president of the House, two vice-presidents and the leaders of each political bloc, convenes to discuss the order in which draft laws will be discussed. At this stage it is already known whether a bill will be passed by unanimous consent and thus put first on the agenda, or whether the draft laws are more controversial and will thus be taken into consideration later in the plenary meeting. Since the members of the respective Chamber Directorate are not representative to the seat distribution, minority parties have the opportunity to list their preferred proposals by otherwise threatening to provide the needed quorum of 50 per cent to be able to vote on bills at all (Calvo 2014: 36). However, without support by the initiating committee or Chamber Directorate proposals by minority parties, such as the draft Law 25.871, are unlikely to succeed (Calvo 2014: 38–39). In December 2003 the Migration Law passed both Chambers of Congress in unanimity. The Migration Law was never debated in the House of Representatives, which means consensus was already reached before in the Population Commission, pre-floor meetings and the Chamber Directorate. Members of Congress, who would have been expected to be critical, do not seem to have opposed the law either, as will be explained below. The president then did not veto the law either and it thus entered into force in January 2004.The next sub-sections elaborate on the elements of the process which made this possible.

5.1.3 Participation-driven consensus

A number of actors were involved in the policy-making process: parliamentarians and civil society built an alliance that lobbied for a rights-based Migration Law. The Executive supported the new Law, whereas there was clear tension between the administration and the courts (cf. Chapter 4.3). Employers were conspicuous by their absence but would likely have been pro-migrants if they had participated. Public opinion was too diffuse to have an impact, with the exception of trade unions which initially voiced opposition. The main protagonists were human rights organisations together with migrant associations in Argentina, which also lobbied for the 2004 Law.

Human rights NGOs wanted to ensure that Argentina realised its international law obligations enshrined in the Constitution since 1994. It should be said that civil society having been an active protagonist does not make the process necessarily more democratic since NGOs do not constitute elected representatives. At the same time, the fact that civil society has influenced politics since the return to democracy in 1983 can be taken as an indicator of an increasingly democratic debate (lobbying by employers is not necessarily democratic either as they are no more or less representative than NGOs). The role of civil society to build consensus in parliament described in the previous sub-section counters Hampshire's (2013) assumption that majoritarian democratic institutions would lead to more restriction in immigration policy by invoking the protection of the national identity but confirms the leverage of the imperative of liberal rights claims. I aim here to describe the role that civil society actors played in migration politics – which is an understudied field (see Menz 2009 for an exception) – elaborating on the history of how NGOs have been instrumental in developing the human rights consciousness in Argentina, as recounted in Chapter 4. NGOs advocated for reform of the existing law and found allies in parliamentarians who shared the concern to advance human rights protection and not responding to anti-immigrant mobilisation as in other contexts (cf. Hampshire 2013; Menz 2009 among others). One reason could be that the focus was on migrants more generally, that Menz (2009) described as being considered 'more productive' and hence useful than refugees and asylum-seekers being regarded as creating a burden on social systems. The economic benefits of labour migrants from the South American region certainly played a role

in the Argentine economy that was recovering quickly from the 2001 crisis by 2003 as discussed below.

Employers, who in other countries are understood as important lobbyists for open migration policies (see Freeman 1995, 2006; Menz 2009; Tichenor 2002), did not show much interest in the topic. They participated in the process (Interview 2, 14 November 2013 with Rubén Giustiniani) but only played a marginal role. Acosta Arcarazo and Freier (2015: 686) attribute this to the relatively small number of immigrants in the country, accounting for only 4.5 per cent of the population in Argentina in 2010 and a similar proportion in 2001 (4.2 per cent) before the 2004 Migration Law was passed (INDEC 2001, 2012).[45] Building on Ruhs and Martin's (2008; Ruhs 2013) argument, one could say that, with such low proportions of (labour) migrants as there were in Argentina in 2001, a country can afford to have a more-open border and rights-based system. Nonetheless, in absolute terms, Argentina still hosted – and hosts – the largest number of immigrants in Latin America and the Caribbean which employers continue to rely on.

Employers may have been worried about the economic crisis at the end of 2001 (cf. section 5.1.1) and its consequences and thus had other priorities than lobbying for immigrants. In an interview with me (Interview 5, 26 September 2013), Lélio Mármora, former Migration Director and Regional Director of IOM and now an academic, underlined the fact that the demand for cheap labour in the overall improving economic climate may well have helped the passing of this Law. Employers would not have opposed an open Migration Law as it was actually in their interest. In the literature on Western liberal democracies, employers are attributed the role of lobbying for a more liberal migration policy given the need for workers (Freeman 1995, 2006; Hampshire 2013; Menz 2009; Tichenor 2002, 2008). Since the 2004 policy in Argentina followed a new direction by facilitating labour migration and the economy began to grow again quickly,[46] the intervention by employers was not needed but may have

[45] This represents a total transformation compared to the situation a century earlier, when immigrants represented as much as 30 per cent of the population, as discussed in Chapter 3.

[46] Economic growth was restored very quickly after the crisis in 2001, with growth rates of around 8 per cent of the Gross Domestic Product (GDP) between 2003 and 2009 according to national data (cited in Baer *et al.* 2011: 57). At the same time, in 2003, unemployment among immigrants in urban areas, at 11.7 per cent was lower than the average for the entire population – 15.6 per cent (Jachimowicz 2006). The unemployment rate among immigrants fell from 16.5 per cent in 2003 to 7.6 per cent in 2009 – this latter even slightly lower than the 8.7 per cent unemployment rate among native Argentines in 2009 (Baer *et al.* 2011: 67).

made for an even stronger argument had they participated. Together with an expansion by 32 per cent of employment among immigrants between 2003 and 2009 (compared to 18 per cent among native Argentines, Baer *et al.* 2011: 66), the growth of the economy led to increasing numbers of immigrants entering the country after 2003 (see IOM 2012: 35). Most South American immigrants worked in the commercial sector (21 per cent), domestic work (18 per cent) and construction (16 per cent) in 2003 (12.9, 18.6 and 18.7 per cent in 2009 respectively, Baer *et al.* 2011: 69). Demand for mostly low-skilled and low-wage labour, in particular for seasonal employment in rural areas affected by out-migration of Argentines to cities, and the great impact of the informal economy explain Argentina's continuing role as a regional immigration magnet. Employers were thus not vocal in making the case for migrants and their rights.

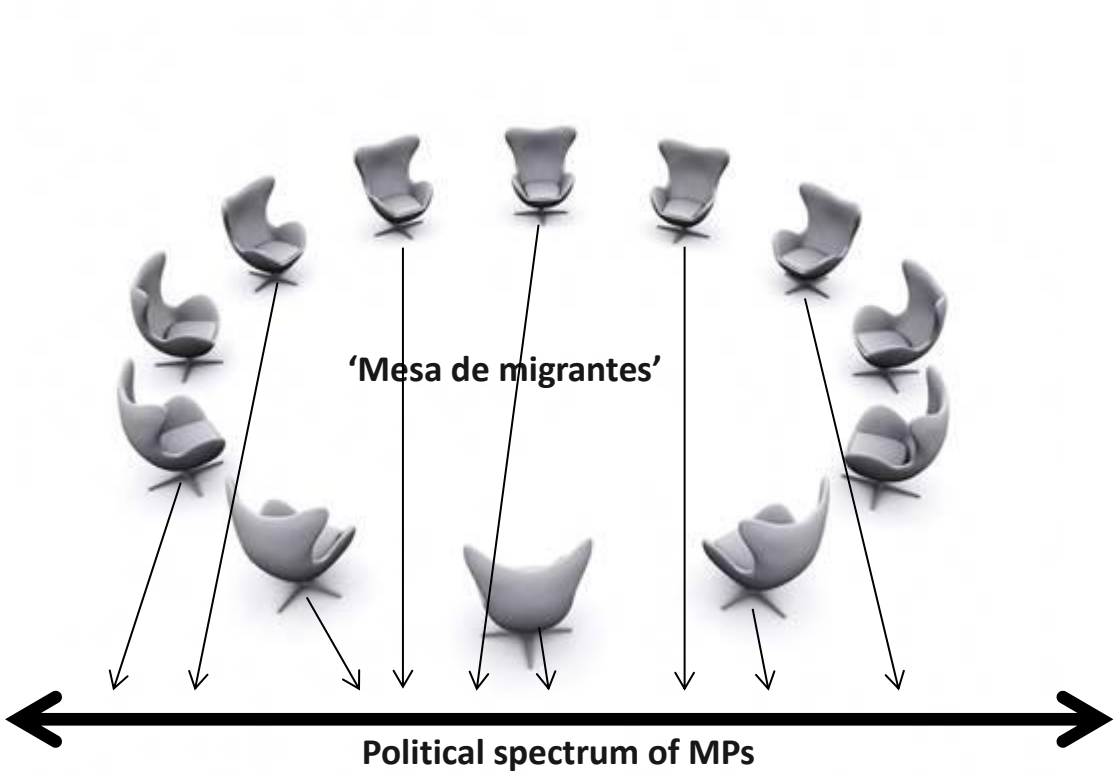
During the first years of the process from 1999 onwards the economic situation was very difficult and thus more likely to have played against the support for migrant workers. Therefore immigrants initially faced opposition from trade unions, which started by rallying against them during the 1990s, culminating in xenophobic attacks during the 2001 crisis, but then changing to inclusion as part of regional integration in MERCOSUR and solidarity (Munck and Hyland 2013; Interview 5, 26 September 2013; Interview 27, 22 October 2013). One of the unions was even part of the civil society roundtable lobbying for the inclusion of regional immigrants in the reformed migration policy (Correa 2004: 177).

The fundamental role of immigrants for nation-building in Argentina meant that political parties did not have the option what Freeman described for Western liberal democracies as unable to 'attack immigration as a means of appealing for votes. Instead, there is a marked tendency to develop an interparty consensus' (Freeman 1995: 888). The newly elected government of President Néstor Kirchner was an important actor, whose party led the majority bloc in both Chambers since 2002 (see among others Calvo 2014: 77) and supported the Migration Law. Most ministries, including the Ministry of the Interior in charge of implementing the restrictive Videla Law in force at the time, and the Ministry of Labour, to name but two, were in favour of the new Migration Law (CPDH 2010a).

Consultations and participation were the pillars of the process and enabled reaching consensus. In the words of Giustiniani, 'we could not carry [it] out only from the Chamber of

Deputies of the Nation, but we had to carry it out with those that are the protagonists every day' (CPDH, 2010b). Civil society established a double alliance. The first alliance was amongst themselves through the establishment, in 1996, of the roundtable of organisations defending the rights of immigrants (referred to as the '*Mesa de migrantes*', Correa 2004: 176, illustrated schematically in Figure 5.1 with several chairs) – a strategic alliance consisting of nine civil society actors (Chillier and Semán 2011: 104). The roundtable included the more conservative Catholic and Protestant Churches, non-religious groups, academia and the migration department of a more radical left-wing workers' union (Correa 2004: 176–177). Secondly, all members of the Roundtable worked with certain constituents of parties across the political spectrum, from left-wing, to centre and right-wing orientations, to convince each of them to support the draft law (Interview 2, 14 November 2013 with Rubén Giustiniani; Interview 5, 26 September 2013; see Figure 5.1 for a schematic illustration). According to official records (República Argentina 2003b, c), this second coalition with parliamentarians across partisan lines ensured that the Migration Law was passed without dissent in both the House of Deputies and the Senate. The consultative process ensured that most, if not all, sectors of the political spectrum agreed to the Migration Law given the heterogeneous group of civil society actors, in particular, which lobbied for the new legislation.

Figure 5.1: Double alliance among NGOs and with parliamentarians



Source: Own schematic illustration.

> *When the draft Law was signed in the Population Commission of the House of Representatives, all political blocks signed off on it, from all parts of the political spectrum, from right-wing to left-wing. And [this occurred] precisely because in the [Population] Commission the migrants' associations, the human rights organisms, the Migration Pastoral, the members of the government took a seat like another Deputy* (Interview 2, 14 November 2013 with Rubén Giustiniani).

> *This Law was also the product of participation. The chosen path for its elaboration was the longest: seminars, forums for debate, and public hearings that took place for more than three years. This […] facilitated its passing, as the representatives of the involved sectors [of society] were the ones who mobilised with each obstacle [in the way] and defended the draft law as their own* (Giustiniani 2004: 14).

Giustiniani considered non-political actors to be a crucial voice in the law-making process from 1999 to 2003. Civil society was an ally in mobilising support across parties 'behind the banners of the human rights movement' (Szustermann 2007: 220). Giustiniani, representing the Socialist Party in 2002–2003, a small party that was however part of the main opposition

Alianza (Alliance) party bloc,[47] is unlikely to have achieved the political consensus by himself with just the support of his colleagues from his legislative bloc.

Through its advocacy work, the diverse group of civil society organisations was a convenient partner for Giustiniani as they were able to convince some parliamentarians, who may initially have been more inclined to follow the calls for continuing a restrictive immigration policy by the public. Public opinion was as opposed to immigration as in other destination countries. 38 per cent viewed immigration as a '"very big" problem according to a poll in 2002 in Argentina, compared to 37 per cent in the US and 46 per cent in the UK (Pew Research Center 2002: 32). While the media stirred a xenophobic atmosphere (Acosta Arcarazo and Freier 2015; Ceriani Cernadas 2015: 130; Slater 2009: 703), one part of society engaged actively in supporting marginalised groups of immigrants from neighbouring countries. Thus the lack of public support was overridden by a well-organised and well-established group of organisations and associations that teamed up with key law-makers (as well as the Executive, cf. Chapter 4.3). One could thus argue that NGOs thus 'challenged the monopoly of political parties' (Brumat and Torres 2015: 60) and employers as emphasized in most studies (see Freeman 1995, 2006; Menz 2009; Tichenor 2002, 2008) in linking civil society and state institutions as party politics and corporate interests seem to not have played a role.

Pablo Ceriani Cernadas explained that the Migration Law was one of the first where such a broad consultative approach was taken, and in which civil society played such a considerable role (personal communication of 25 September 2014, on record with author; Ceriani Cernadas 2015: 138). The participatory process was later applied in other law-making processes on audiovisual communication services, same-sex marriage, the reform of the civil and commercial codes and the law on pensions.[48] The legislators therefore created a novel practice. The Migration Law consultations were attended by experts upon invitation, as opposed to a public hearing which any citizen interested could attend and make their voices

[47] Until 2001 Giustiniani's party belonged to the FREPASO (*Frente País Solidario*, the Solidary Country Front) bloc, that also President de la Rúa (1999–2001) belonged to. It was dissolved due to the political crisis at the end of 2001.

[48] The law on audiovisual communication services (2009), the law on same-sex marriage (2010, see http://www.lanacion.com.ar/1273705-comenzaron-las-audiencias-publicas-por-la-ley-de-matrimonio-gay (accessed 4 October 2014)), the reform of the civil and commercial codes (2012, see http://www.pagina12.com.ar/diario/elpais/1-201767-2012-08-24.html (accessed 4 October 2014)) and the law on pensions (2012, see http://m24digital.com/2010/08/25/el-82-movil-se-votara-en-octubre-y-antes-habra-audiencias-publicas/ (accessed 4 October 2014)).

heard. Arguably civil society can be compared to other actors – such as corporatist groups and labour unions – that tend to lobby for migration law and policy reforms and which are not more or less objective or unbiased.

Before the voting procedures in the two Chambers of Congress, no Deputy or Senator took the floor. This process of passing directly to the vote without a discussion is called '*libro cerrado*' (closed book, Interview 5, 26 September 2013). It is unusual for no discussions to take place at all, an occurence which, in this case, can probably be attributed to three factors: firstly, the consensus reached through the consultative process; secondly, the historical importance of human rights such that parliamentarians are unlikely to risk being seen to oppose them in public as this could make them appear as a pro-military regime (cf. Chapter 4); and thirdly the timing. Shortly before the summer break lengthy debates are avoided so as to ensure that all drafts can be passed without having to resume discussions during the next legislative year. The Migration Law was passed just in time before losing 'parliamentary status' (García 2014: 8). Moreover, in the aftermath of the economic crisis, attention was probably focused on other topics.

5.1.4 Timing and institution: the right time, the right places

Néstor Kirchner became president in May 2003. The newly elected administration under Kirchner's majority Peronist legislative bloc supported the new Migration Law despite it having originated from the opposition (Calvo 2014: 77; Chillier and Semán 2011: 105). He only won the election as his rival, the former President Carlos Menem, withdrew from the run-off election. Kirchner thus only had the support of 22 per cent of the electorate, which was widely regarded as low (Szusterman 2007) and could explain why he supported a bill launched by an opposition party bloc, the Alianza (which however also had a left-wing orientation).

In addition, abandoning the Videla Law still being in force was an uneasy legacy for the administration, which sought redress for the crimes of the military junta against human rights (Nicolao 2008). Giustiniani confirmed in my interview with him that the political imperative of having to discard the remnant law of the military junta seems to have been more important than other ideological considerations for Kirchner. Institutional legitimacy (Boswell 2007) thus clearly played a role for Kirchner in the post-dictatorship context. Nonetheless, the rights-

based approach of the Migration Law did indeed fit into the left-wing political ideology of the Peronist party of Néstor Kirchner and helped pushing the human rights agenda through new migration legislation (Interview 2, 14 November 2013; Nicolao 2008). The administration instructed its party's congressmen (forming the majority legislative bloc at the time, see among others Calvo 2014: 77) to vote in favour of the Law (Interview 52, 17 December 2013).

The majority and minority blocs thus coincided in the approval of the draft bill, which was pushed by the Population Commission President Giustiniani. His agenda setting power together with the institutional rules of Congress enabled him to push for consensus on the bill. Contrary to assumptions in the literature and public, according to Calvo (2014: 33) the opposition in Argentina is able to pass a relatively high number of legislative pieces, the 2004 Migration Law being one of them:

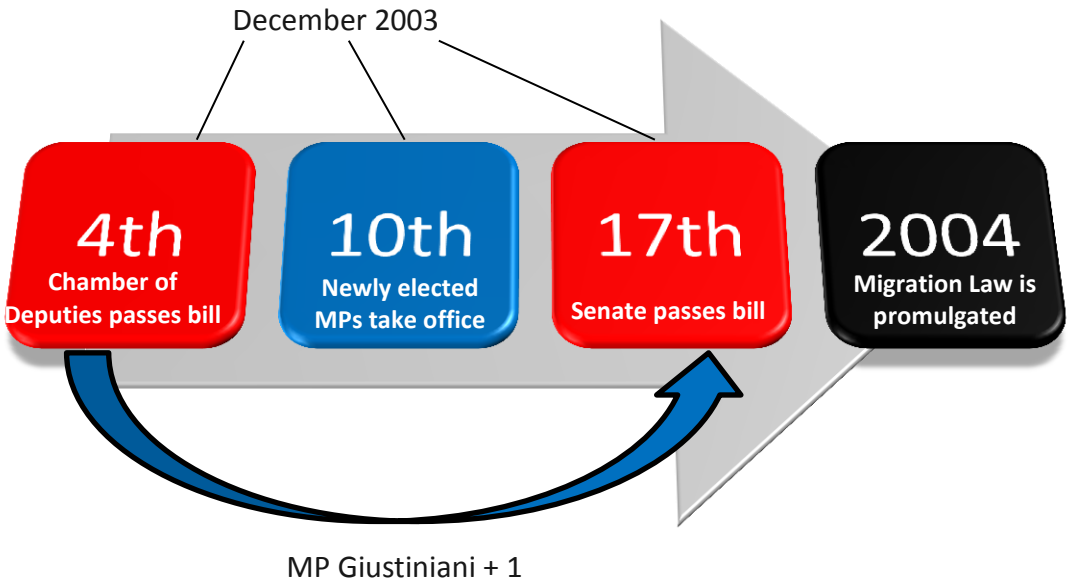
> *[…] the legislative process in the Argentine Congress provides minority parties with multiple resources to slow down or altogether veto the policy preferences of the majority party, thereby increasing the cost of pursuing strict partisan agendas or failing to accommodate the legislative preferences of minority parties. The result is that much legislation enacted by the Argentine Congress is approved under unanimous consent rules and almost all other legislation initiated by [Members of Congress] MCs is approved by super-majority support* (Calvo 2014: 32).

Timing seemed to have played a role in supporting the passing of the Law. With the new Migration Law, Kirchner focused, in particular, on the human rights of Argentine emigrants (Acosta Arcarazo and Freier 2015: 667; see section 5.2). In addition, on 17 September 2003, the Inter-American Court of Human Rights published its Advisory Opinion on the rights of irregular migrant workers, which may well have contributed to the political pertinence of passing the Migration Law in Argentina three months later. Yet the applicability of the principles of equality and non-discrimination to migrants regardless of their status were mirrored in Argentina's draft Law even before the Advisory Opinion, highlighting the importance of 'embedded liberalism' (Hollifield 1992) in Argentina's migration law reform. The Advisory Opinion probably reinforced the proponents of the orientation that the draft Migration Law took. As we saw in Chapter 4, Kirchner's government agreed to reach a friendly settlement in the *De la Torre v. Argentina* case at the Inter-American Commission on Human Rights in October 2003, thus one month after the Inter-American Court's Advisory Opinion was published and two months before the vote on the Migration Law in Argentina's Congress.

The Migration Law was passed in the Chamber of Deputies and in the Senate at the end of the legislative periods in December 2003. The Chamber of Deputies declared preferential treatment for Giustiniani's and others' legislative proposal on 11 November 2003 (República Argentina 2003a), which means consensus was already reached on it in the pre-floor meetings of all legislative party blocs and the discussion of the Chamber Directorate when approving the schedule of the plenary session. Therefore, the draft Law was treated and passed in the next and last regular session of the administrative year of the Chamber of Deputies on 4 December 2003 (República Argentina 2003b) just shortly before the summer break in Argentina and losing parliamentary status again. Finally, on 17 December 2003, the Senate followed suit and also approved the Law in their last session of the year (República Argentina 2003c, see Figure 5.2). The Law was promulgated on 20 January 2004 and published in the official bulletin the following day (Migration Law 25.871).

This may, however, not have happened had it not been for an unusual constellation in which newly elected legislators took office in the period after the draft had passed the Chamber of Deputies on 4 December 2003 and just before being presented in the last session of the Senate. On 10 December 2003, one week before Law 25.871 was adopted by the Senate on 17 December, newly elected deputies and senators took office. Deputy Giustiniani who until then was a member of the Chamber of Deputies became Senator. Together with another Member of Parliament (MP) he thus voted on the Migration Law both as a Deputy in the Chamber of Deputies on 4 December and in the Senate in his new office on 17 December 2003 (República Argentina 2003a, b). This was a most unusual sequence of events (see Figure 5.2).

Figure 5.2: Timing of the migration law-making process in the two houses of parliament



Source: Own illustration.

In terms of timing, it seems that it was the right time for the Migration Law to be passed in the right places. In addition, the participation in the policy-making process of a broad range of actors ensured both a more evidence-based approach, and the unanimous passing of the Migration Law. The process was unique and the result of the specific political and socio-economic context at the time.

5.2 Migration reality and evidence-based policy (I): emigration after the 2001 crisis and foreign policy

In addition to the human rights-based law reform and non-restrictive regulation (cf. Chapter 2 and 4.3), NGOs' achievement was to ensure that the legal reform was based on evidence. My interviewees explained that the unprecedented socio-economic and political crisis of 2001 entailed important implications not just for Argentine society but also for immigrants and emigrants. The inability of the government to end the economic recession, high inflation and unemployment demonstrated to the public that it was actually government officials who were to blame, and not immigrants. At the same time, mostly young Argentines, Paraguayans,

Bolivians and other South American immigrants left Argentina as a consequence of the 2001 crisis. Some Bolivians also moved from Argentina to Spain, together with Argentines. The parity between the Argentine peso and the US dollar during the crisis also significantly reduced the ability of immigrants to send remittances (IOM 2012; Parrado and Cerrutti 2003). The Executive had a vested interest in engaging with the Argentines who had left, which explains why the Migration Law also included provisions on emigrants (however limited) and was supported by the government.

In Argentina, studies and analyses carried out during the 1990s by academic institutions like the University of Buenos Aires (UBA) and civil society – in particular NGOs focusing on human rights (CPDH 2010a) – played a key role. An evidence-based policy was motivated by the desire 'that we work with maybe not myths, maybe not fears, but with the realities' (Statement by Giustiniani in the 2000 consultation, CPDH 2010b).

5.2.1 The 2001 crisis and emigrants: 'game changer'

The most noteworthy change in migration patterns in 2002 was the rapid increase in the number of emigrants from Argentina, unprecedented in the country's history (Cook-Martín 2013). The emigration of Argentines was not a new phenomenon but one which was greatly accelerated by the 2001 crisis (Novick 2007, see Figure 3.12 in Chapter 3) and very much present in the press at the time (Margheritis 2016: 105). When Argentine nationals began leaving in great numbers in the early 2000s (see Figure 3.12 in Chapter 3), it was not only the media which took up the issue but also the government:

> *[E]migration momentarily acquired preeminence in the domestic and international agenda, and new institutional spheres and interinstitutional collaboration practices were created and transnational links proliferated. That was a remarkable shift for a country that built its identity around the idea of being a receiving nation* (Margheritis 2016: 99).

Mármora thus spoke of 'Argentina los[ing] its migratory narcissism, […] and find[ing] itself with Argentines also leaving to go abroad' (Interview 5, 26 September 2013).

Participants in the consultation on the Law in 2000 thus called for the principle of reciprocity for Argentine emigrants (CPDH 2010b). Few legal channels existed for Argentine emigrants to move to countries like Spain. Besides family reunification, Argentines with Spanish, Italian or other European ancestors could also acquire those countries' citizenship due to Argentina's dual nationality policy and voting laws in Italy (Cook-Martín 2013: 102-3; Vives-Gonzalez 2011: 229). Yet many migrated to Spain irregularly. In '2003, cases of undocumented Argentines residing in Spain acquired a lot of attention' (Novick 2007: 317).

Emigration due to the 2001 crisis may well have been a 'game changer' as it happened just as the draft Migration Law was being discussed in Congress. Giustiniani emphasised the concern about Argentines abroad in his opening remarks of the 2002 public consultation:

> *[I]n the current times that our country is facing, where the economic, social, political and institutional crisis, a crisis of a great profoundness [is occurring], I think that we all have compatriots, brothers, relatives that today in the United States, or in Spain, or in another country of the so-called 'first world' have to suffer discrimination and mistreatment. And this Congress of the Nation has aimed to address the situation in different projects. We have started procedures to resolve the issue, we prepared requests, orders, to those countries so that they protect the rights of our migrants. And this seems contradictory to us that when we still do not have proper legislation enshrining those rights [of immigrants]* (CPDH 2010a).

Giustiniani noted that it seemed inconsistent of the government to ask the countries of destination of Argentine emigrants to protect their rights on the one hand while, on the other, treating immigrants in Argentina in the same way that they criticised other countries for doing. The state was aiming to 'legitimise' the protection of Argentine emigrants, which was, incidentally, a key motivation for protecting immigrants in Argentina in order to adhere to the same standards that Argentina was requesting from Spain and other countries (Frassia 2004; Novick 2008: 144).

De Haas and Vezzoli underline the bias in migration policies towards 'a receiving-country, Eurocentric perspective' (2011: 32). The migration legislation in Argentina is an exception, as it covers not only *im*migrants, but also *e*migrants, making it a truly comprehensive migration policy (cf. Hollifield 2008). Few domestic laws refer to or regulate emigration in Western liberal democracies. In 1973, Argentina's population policy mentioned emigrants for the first time (Novick 2007: 311, cf. Chapter 3). The 2004 Law thus represents a historical continuity with regards to emigration, as it does to immigration provisions that reflect the migration legislation in force before 1981.

Nonetheless, the section on emigrants in the Migration Law only includes three articles (102–104) – on social security agreements to support emigrants abroad, freedom from import taxes upon return if the Argentine citizen resided abroad for at least two years and the role of embassies and consulates in informing citizens abroad. The section on emigration is in line with other approaches by countries of origin worldwide focusing on the return of their highly skilled migrants (de Haas and Vezzoli 2011).[49] In contrast to other countries of origin, though, the number of emigrants from Argentina was not on as large a scale as in other countries (although significant at the time) and the motivation was based less on unemployment than on long-term employment prospects (Cook-Martín 2013; Margheritis 2016).

In sum, the Argentine crisis in 2001 helped to counter some of the xenophobic tendencies towards immigrants as public opinion shifted its focus on the failure of the government to avoid the economic crisis. In terms of Boswell's (2009) category of institutional legitimacy, the financial default at the beginning of the millennium, and public concern about the situation of irregular Argentines in Spain, in particular, forced the government of Argentina to reach out to the country's emigrants, probably one of the most important motivations for changing the Migration Law. While this puts Argentina in line with the regional approach to emigrants, it makes Law 25.871 quite unique in enshrining a holistic notion of migration as composed of immigration *and* emigration. What, nevertheless, was the government's motivation for reaching out to emigrants?

[49] Extensive literature exists on the notions of 'brain drain' (see for instance Beine *et al.* 2001) and 'brain gain' (see Stark *et al.* 1997 among others).

5.2.2 Ideology, domestic and foreign policy: shortly reaching out to Argentines abroad

The government was engaging with emigrants through the Ministry of Foreign Affairs as a kind of 'social debt' (Margheritis 2007: 100), in order to remedy the faults of the previous government in steering the country into the 2001 crisis that forced many Argentines to leave. '[T]he emergency situation created by the economic collapse of 2001 gave legitimacy to the Kirchners' claim to change and to their appeal of leading Argentina in a new direction' (Malamud 2011: 89). The new Kirchner government was probably also thinking of votes (Margheritis 2007), but likely not until after the law was passed (as Kirchner was elected in 2003, he did not need votes immediately back then). Thus 'institutional legitimacy' as described by Boswell (2007) was not only linked to the authoritarian past that Kirchner sought to break with, but also of rectifying the political crisis that previous presidents had led the country into in 2001.

The Ministry of the Interior initiated the 'Province 25' programme for Argentines abroad in 2004. The latter were considered to form their own 'province' in addition to the 24 provinces within the country (Cook-Martín 2013: 88; Margheritis 2016: 107–108). Since 1991, Argentine emigrants have been able to vote, but voter turnout among those registered with Argentine embassies abroad has been low (García 2014; Novick 2012: 226, see Table 3 below). Despite efforts by the government to increase the involvement of Argentines abroad through out-of-country voting, the results have been limited except for the 100 per cent increase in overseas voter participation in the 2003 presidential election prior to Kirchner's engagement (see Table 5.1).

Table 5.1: Participation of Argentine residents abroad in electoral processes (1993–2005)

Year	*Type of election*	*Citizens enrolled*	*Votes issued*	*Voter turnout (percentage)*
1993	National delegates	8 814	5 337	60.55
1995	Presidential	18 118	9 576	52.85
1997	National delegates	23 405	5 737	24.51
1999	Presidential	26 013	8 824	33.92
1999	National delegates	25 138	7 862	31 28
2001	National delegates	28 158	3 589	12.75
2003	Presidential	29 293	6 420	21.92
2005	National delegates	35 704	2 992	8.38

Source: Ministry of the Interior Argentina (2007, cited in Novick 2012: 226).

When asking Spain to regularise Argentines, Néstor Kirchner invoked the principles of solidarity and reciprocity, reminding Spain of its large-scale emigration to Argentina at the turn of the previous century (Freier and Acosta Arcarazo 2015: 39; Vives-Gonzalez 2011: 236). President Kirchner visited Spain in July 2003,[50] where he met with Argentine emigrants and initiated a joint programme with the Spanish government to help residents abroad to regularise their status – 13,191 Argentines participated in the online registration to facilitate the process of acquiring the paperwork required for regularisation (Novick 2007: 317–318).

A recent analysis of the framework governing emigration from Argentina comes to the conclusion that the provisions and programmes have had a limited impact on the actual outcomes of protecting emigrants' labour rights. Most existing programmes focus on the return of qualified nationals (García 2014; Novick 2007), whereas the most relevant of the three articles – article 102 – focuses on the protection of workers' rights, the transferability of social security benefits and the enhancing of remittances. In 2007 and 2008 Argentina signed social security agreements with the Slovenian Republic and France respectively (García 2014: 13), two countries which are not, however, the main destinations of Argentine emigrants (see Figures 5.3 and 5.4). The bilateral agreement with Spain (signed in 1997) was modified in 2005. The agreement with Italy, another major destination country along with Spain, was signed as early as 1981 (García 2014: 13), during the time of the dictatorship. The emigration policy can thus be categorised as 'minimal regulation and *laissez-faire*' according to de Haas and Vezzoli (2011: 20). The impact of the 2004 Migration Law on promoting emigrants' rights seems to have been somewhat rhetorical and symbolic, underlining the focus on legitimacy rather than actual rights protection in practice. The engagement of the government of Néstor Kirchner with emigrants preceded the 2004 Law and was limited to a few destination countries, in particular Spain, links to associations of Argentines abroad and cooperation among some institutions (Margheritis 2016: 113–114; 2007; Vives-Gonzalez 2011). The outreach thus occurred at a relatively low level of intensity and was characterised by discontinuities (Margheritis 2016: 113–114).

[50] At the same time as other European countries (the UK, Belgium and France), see http://elpais.com/elpais/2003/07/17/actualidad/1058429818_850215.html (accessed 24 January 2016) and Novick (2007: 317).

In their outreach, both Kirchner administrations seem to have been according a lot of attention to Argentina's reputation and legitimacy at the international level. Ana Margheritis describes the government's approach as 'courting' their emigrants after the 2001 crisis (2016: 99). The particular context of the aftermath of the 2001 crisis led the political leadership to reach out to its emigrants, probably in an attempt to reach voters but also to highlight the government's moral superiority with regard both to previous Argentine governments, as well as to those of the destination countries of Argentine emigrants. Diaspora policies are generally underpinned by neoliberal thinking on development by focusing on the responsibility and contribution of the individual. In contrast to this approach, Argentina and other South American countries furthered a 'postneoliberal discourse that emphasises the state's renewed role and links among social policies, equity, and development.' (Margheritis 2016: 152) This neopopulist approach is not devoid of ambiguity, as the discourse surrounding emigrants did not translate into action in terms of support at the local level for Argentines abroad beyond the regularisation in Spain in 2005 (Margheritis 2016).

At play were not only foreign policy links to emigrants but also international politics. Both President Néstor Kirchner (2003–2007) and Cristina Fernández de Kirchner (2007–2015) positioned Argentina's migration policy in opposition to the immigration policies of the United States and Europe, which were perceived as restrictive (Acosta Arcarazo and Geddes 2014). In 2010, Cristina Kirchner saw Argentina as continuing to be ahead of the policy game with regards to the participatory and human rights-approach taken when she was speaking on the occasion of the adoption of the decree of the 2004 Migration Law (DNM 2010b; cf. Chapter 4.3). Considering Argentina to be 'morally superior' (Freier and Acosta Arcarazo 2015: 39), she criticised the return of racism and the scapegoating of immigrants for unemployment and crime in Western countries (DNM 2010b). This counter-position to, in particular, Europe mirrors consensus in the region against the 'criminalisation of Latin American emigrants in Europe and the United States' (Ceriani Cernadas and Freier 2015: 21; see also Acosta Arcarazo and Geddes 2014; Margheritis 2015: 67). Regional governments collectively emphasised the notion of belonging to South America (Margheritis 2015). This seems to have led to an albeit possibly short-lived reconfiguration of the Argentine national narrative of being 'descendants of the boats' from Europe in the previous century to an emphasis on ethnic ties among Latin Americans to foster social inclusion through a neo-populist discourse. This discourse underlines the ideological orientation of the government, which contributed to passing

Migration Law 25.871 and was used to support Argentina's reputation for being advanced in terms of the protection of the rights of migrants.

The Kirchner administrations also underlined their novel and '*avant-garde*' approach in several international fora. The Argentine delegation presented the human rights-based approach in a contribution to a background paper on irregular migration for the 2010 Global Forum on Migration and Development (GFMD), an informal, state-led meeting taking place annually since 2007. The 2010 meeting took place in Mexico and for the first and only time focused on the human rights of migrants, indicating the regional importance of the topic beyond South America. Other global meetings where Argentina presented its human rights-based migration policy include the 2006 UN High-level Dialogue on International Migration and Development (UN GA 2006) and the Ibero-American Conference on Migration and Development in the same year (Chillier *et al*. 2011: 4). However, a human rights-based Migration Law does not make Argentina free of xenophobia, as discussed in Chapter 3. In addition, Cristina Fernández de Kirchner herself resorted to scapegoating of immigrants from the region for her crime-based approach in the last years of her presidency (Acosta Arcarazo and Freier 2015: 668)[51] (– not to mention current President Mauricio Macri (2015–present), who already blamed immigrants for crimes during his previous post as Mayor of the City of Buenos Aires in 2010, CMW 2011: 4).

Néstor Kirchner's approach to emigrants and his country's own Migration Law were led by institutional legitimacy, foreign policy considerations and international politics. The governments of the Kirchners, in particular of Néstor Kirchner (2003–2007), initially actively engaged with and supported emigrants (Acosta Arcarazo and Freier 2015: 667–668; Margheritis 2007, 2016; Novick 2007). Coinciding with the Kirchner administration's foreign policy focus on emigrants, parliamentarians' position on migrants' rights was influenced by the increasing number of emigrants. The direct link to emigrants, like many of the young people wanting to emigrate and queuing in front of European, US and Israeli consulates who were the children of public officials, probably helped to generate the necessary empathy among the different law-makers for the situation of immigrants in Argentina.

[51] See also http://www.casarosada.gob.ar/informacion/discursos/27974-anuncio-de-envio-al-congreso-del-proyecto-de-nuevo-codigo-procesal-penal-por-cadena-nacional-palabras-de-la-presidenta-de-la-nacion (accessed 6 January 2016).

5.3 Migration reality and evidence-based policy (II): high numbers of irregular immigrants from the region, regional integration and politics

Faced with large but unknown numbers of irregular immigrants in particular from the region, the Argentine Executive governed migration based on furthering regional integration not only in MERCOSUR but in also other regional consultative processes. Migration Law 25.871 was the first to implement the MERCOSUR Residency Agreement, which was initiated by the Argentine delegation and then used domestically to justify the new Migration Law. Furthermore, neo-populism around left-wing ideologies characterized public policy, including on migration, that were also in vogue in the region at the time. Lastly, as previously discussed, Argentine migration governance focused on emigration.

5.3.1 Large numbers of irregular immigrants from the region

One of the key issues that several participants of the 2000 seminar and the 2002 public hearing highlighted was 'the need to adjust the migration legislation to reality' (Alfonso, representing the Ministry of the Interior, cited in CPDH 2010b). The relative importance of immigrants from neighbouring and other South American countries had been stable over the past century (INDEC 1997 cited in INDEC 2004; INDEC 2001, 2012), whereas immigration – especially from Paraguay and Bolivia – had been increasing in absolute terms (see IOM 2012). '[T]he disappearance of European mass immigration made Latin American immigration more visible' (Oteiza speaking at the 2000 seminar on the reform of the migration law, CPDH 2010b) in the second half of the twentieth century (cf. Chapter 3.3, Figure 3.9). According to census data (INDEC 2001, 2012), the reality was that, in 2001, 75 per cent of immigrants were born in neighbouring countries and Peru. However, this fact went largely unnoticed by the political elite (CPDH 2010b). In 2010, this share increased to 80 per cent (INDEC 2012).

The presence of large numbers of irregular immigrants led law-makers in Argentina to the conclusion that a very different policy response was needed compared to the one in force. The existing migration policy of 1981 was considered inadequate by several speakers at the public consultations in 2000 and 2002 (CPDH 2010b). Which migrants benefited from past amnesties was unknown as no specific criteria were applied. Jorge Gurrieri, former Director of the Migration Agency and later an official for the International Organization for Migration,

highlighted that 'something in reality is not working, as this share [of migrants being able to regularise their status] demonstrates that the application of these [immigration] criteria that only accumulate irregular migrants who, at some point, […] before the situation gets out of hand or in certain political contexts, are regularised' (CPDH 2010b).

The existence of a large number of irregular migrants had not been intended by the military junta, who had wanted to restrict the entry of immigrants from the region. Their presence further demonstrated that the policy was not achieving its objectives. The problem to be addressed in the policy narrative (Boswell *et al*. 2011: 5) was the entry and presence of a presumably large number of undocumented immigrants, mostly from MERCOSUR countries. Since South American immigrants faced large obstacles in regularising their migration status under the previous Videla Law, Argentina was confronted with an unknown but large number of irregular migrants at the beginning of the twenty-first century (Nicolao 2013: 92). Amnesties granted from 1981 onwards were believed to have regularised only about 30 per cent of those deemed to be in irregular status (Correa 2004: 176). Estimates in 2000 reached 3.3 million irregular migrants (CPDH 2010b) with, a few years later, 750,000 who were expected to regularise in 2005 and 2006 (DNM, cited in Ceriani Cernadas and Morales 2011: 30).

The media and public officials, in particular, were criticised for their anti-immigrant discourses, especially by one participant of the 2002 consultation, who highlighted the targeting of the Chinese immigrant community (CPDH 2010a). As Father Ildo Gris from the Argentine Catholic Commission for Migration put it, some sectors of the media and political spectrum fostered discrimination and xenophobia which 'damage even more our democratic institutions' (CPDH 2010b).

Already in the 2000 consultation on the migration policy reform – a time of depression and the ensuing unemployment – several participants pointed out two myths with regard to migrants: firstly the scapegoating of immigrants for supposedly competing with nationals over scarce jobs (Ceriani Cernadas 2015: 130) and, secondly, the myth inciting fears about more immigrants arriving. The stereotyping of immigrants is a recurrent theme in most destination countries throughout the world, not just in Europe or Northern America (Crush and Ramachandran 2010). In Argentina, hitting rock bottom in 2001 seems to have rebuked the first myth and showed that unemployment and increasing crime rates were actually not the

responsibility of immigrants, but rather the failure of the political elite to govern the economy (Ceriani Cernadas 2015: 137). 'Here when the crisis happened, the people went on the street and asked that all the politicians should leave, not all the migrants' (Interview 5, 26 September 2013). This is a reference to the famous slogan of the popular uprising at the end of 2001, which was '*¡Qué se vayan todos!*' (All of them should go!), calling for the resignation of all politicians whose inability to govern the country had led it into bankruptcy.[52]

Regarding the second myth, the relative share of immigrants as a percentage of the total population increased marginally from 4.2 per cent in 2001 to 4.5 per cent in 2010; one cause may be immigrants leaving due to the crisis in 2001 followed by increases in immigration as economic growth was restored, as well as the regularisations in 2005 as part of the law reform (IOM 2012: 35). Thus fears of a large wave of new immigrants following the new Migration Law did not materialise. In hindsight, the crisis in Argentina was found to have affected levels of remittances which migrants were able to send home, as the artificial exchange rate of 1 peso equalling 1 US dollar could not be sustained. As immigrants were less able to send money home, Argentina lost its attractiveness as a migration destination in the region, at least temporarily.

Senator Giustiniani stated, after the event, that the policy-making process 'was not linked to the 2001 crisis as it was an effort that already took place' (Interview 2, 14 November 2013; cf. Interview 5, 26 September 2013). However, the crisis had some unexpected effects on the process and was thus probably decisive in enabling the law to be passed in its current form. Contrary to other, well-researched industrialised immigration countries, the role of the Argentine crisis for its migration policy was 'counter-intuitive' (Bastia and vom Hau 2013: 12). According to Lélio Mármora: 'The crisis had an influence opposite of what all the books say, the crisis allowed an advance in human rights in general, not only with regards to migrants. There [was] a raising of awareness in the need for social justice, equal[ity], of respect for human rights' (Interview 5, 26 September 2013). The Argentine crisis actually seems to have supported the process of passing a liberal migration policy. It ended, at least temporarily, the scapegoating of immigrants for social ills, as policy-makers were preoccupied with more

[52] Mármora claimed in the interview that the xenophobic tendencies at the end of the 1990s were stirred by the government of President Carlos Menem who wanted to justify the buying of a very expensive electronic immigration system from the German company SIEMENS. The deal was, however, cancelled by the succeeding government of President de la Rúa.

pressing economic (and emigration) issues. The Migration Law and policy reform was thus presumably not the top priority in 2001 and 2002 and the lack of attention may have helped to advance the migration agenda by law-makers and civil society in the meantime.

5.3.2 Unilateral implementation: the regional and domestic politics of the MERCOSUR Residency Agreement

The regional integration process further helped to advance the Migration Law reform agenda at the domestic level. In the 2000 consultation on the new law, Congressman and Vice President of the Population Commission Herrera Paez called for 'a responsible, human population policy that shows solidarity, similar to a migration legislation that is coherent with the needs and realities of the population' (CPDH 2010b). Solidarity and social justice were key themes on which to advance the aims of regional integration.

According to Margheritis (2012), Argentina chose to push for innovative agreements in the realm of free movement and equal rights for nationals of the MERCOSUR member-states, given the predominant economic power of Brazil. The Government of Brazil did not take up a leadership role in the regional bloc as it prioritised, and probably still prioritises, global rather than regional partners.[53] Migration as part of the social agenda thus provided an opportunity for the Argentine government to take the lead in the early twenty-first century. Furthermore, changing socio-economic realities in the 1990s and increasing intra-regional migration put mobility on the political agenda at both national and regional levels.

The 1997 Multilateral Agreement on Social Security establishes the right to common social security benefits for MERCOSUR nationals working in another member-state. The 2002 Residency Agreement, signed before Argentina's current Migration Law was adopted, and ratified in 2009 (cf. Chapter 2), 'is considered a milestone in the process of harmonization of migration policies' as it 're-direct[s] the integration process, placing a renewed emphasis on social issues as a remedy for the excesses of the previous market-centered approach' (Margheritis 2012: 6) in the MERCOSUR bloc.

[53] Brazil is one of the BRICS countries (Brazil, Russia, India, China and South Africa), considered the emerging economies at the global level, thus making Brazil a global player which does not need to rely on regional integration to further its position in the global economy.

Giving priority and therefore preferential treatment to MERCOSUR nationals is a key feature of the Migration Law (Giustiniani 2004, cf. Chapter 2). As members of MERCOSUR and as enshrined in the 2004 Argentine Migration Law (Article 23 (l)) implementing the 2002 MERCOSUR Residency Agreement, nationals of Brazil, Paraguay, Uruguay, Venezuela, Chile, Bolivia, Peru, Colombia, Ecuador, Guyana and Surinam have, among other entitlements, the right to reside and work in Argentina. The 2004 Migration Law also stipulates that the Argentine state can enter into bilateral agreements. In case of conflicting stipulations in the Law and other conventions, those which are the most favourable for the migrant must apply (Article 28). This had been raised in the public consultations to avoid officials being able to resort to the most restrictive norm still in place. Article 28 further elaborates that the principle of the equal treatment of immigrants does not affect the possibility for Argentina entering into bilateral agreements or treat nationals within the MERCOSUR region more favourably. One could argue that, in the case of MERCOSUR nationals, indeed the most favourable clauses apply, whereas in practice third-country nationals face more obstacles than were foreseen by the drafters of the law by focusing on intra-regional migrants. Argentina aimed to move away from selecting migrants based on their ethnic origins and towards a rights-based approach (with limited success, as Law 25.871 still exemplifies both, cf. Chapter 3). Like global trends analysed by de Haas *et al*. (2014), in practice 'migration [was seen] as a tool for selection rather than restriction'. Free-movement rights for MERCOSUR nationals and other stipulations of the Migration Law effectively exclude third-country nationals (cf. Chapter 2). The intention to regularise MERCOSUR nationals led to the *de facto* exclusion of others, albeit in an unintended way (Interview 3, 23 September 2013; Interview 7, 30 September 2013), thus questioning the universality of the 'right to migrate'.

The MERCOSUR Residency Agreement calls for the harmonisation of national legislation, and stipulates civil, socio-economic and cultural rights (thus with the absence of political rights) for migrants and their families. It seems that it was influenced by the discussions on the Argentine Migration Law, since it not only mirrors the type of rights enshrined in the 2004 Argentine migration legislation, but according to research by Margheritis (2012: 7) and Alfonso (2012: 47-52; Interview 12, 8 October 2013) was also based on a proposal put forward by the Argentine delegation in the second half of 2002 in the regional bloc. Thus the MERCOSUR Agreement was negotiated and adopted a year before the 2004 Migration Law but while the consultations in Argentina were ongoing, and was subsequently used to justify to Argentine Migration Law

domestically in the context of the regional integration impetus. '[R]egional agreements have been subject to the urgencies and domestic political needs of member states' (Margheritis 2012: 8). These bargains were supported by information from and the advocacy work of transnational expert networks. The representatives of the nation-states, in the case of MERCOSUR often presidents, were the key decision-makers at the regional level, giving way to a sort of 'inter-presidentialism' (Malamud 2003) instead of inter-governmentalism.

5.3.3 Ideology and consensus-building at the regional level

In the Southern Cone, the issue of mobility – outside purely economic considerations – gained momentum at the beginning of the twenty-first century and thus regional integration became highly politicised (Margheritis 2012, 2016). Several authors (Acosta Arcarazo and Freier 2015; Alfonso 2012; Margheritis 2012; Nicolao 2008) see the socio-political agenda of the Kirchner administrations as well as other MERCOSUR countries as important factors in this development. The neo-populist left-wing ideologies of several governments also explain why such a marginalised topic in MERCOSUR gained prominence despite the economic turmoil of the 1990s and 2000s. This neo-populism of governments in the region was based on values expressed through the emphasis on an egalitarian, human rights-based and anti-xenophobic discourse. This discourse developed, in particular, with regards to emigrants (the preferred term in Argentina) and diaspora policies by several countries in the region (Freier and Acosta Arcarazo 2015; Margheritis 2016: 151-152, 2012). Through the use of state interventionism under humanitarian ideals of the human rights protection of emigrants of the respective MERCOSUR countries, it was possibly easier for post-neoliberal governments to gather political support. Backing for regional migration policies more generally would have been politically risky, just as it was at domestic level.

MERCOSUR can be seen 'as an alternative pole of integration' (Grugel 2005: 1064) in Latin America in opposition to the neoliberal US-led push for a Free Trade Area of the Americas (FTAA) (Grugel 2005: 1064). The negotiations on the latter were never successfully concluded, including those based on the mobilisation of social movements in the region. In a process of consensus-building, governments in the MERCOSUR region agreed on the importance of fostering regional integration, promoting liberal democracies led by presidents and the universality of migrants' rights regardless of status (Acosta Arcarazo and Geddes 2014: 36, 38;

Grugel 2005: 1064). This 'convergence' of ideas was based on the conclusion that unilateral policy approaches were insufficient as they had led to high numbers of irregular immigrants, social tensions and increased trafficking in human beings as well as the smuggling of migrants. Thus multilateral approaches became necessary, not least due to the unquestionable importance of intra-regional immigration (Acosta Arcarazo and Geddes 2014: 36, 38), including in Argentina. At the same time, several economic and political crises in the region, notably in Brazil (1999) and Argentina (2001), called hegemonic neo-liberal economic approaches into question and enabled a reframing of regional free movement as a socio-political rather than an economic issue on the agenda of MERCOSUR. Social inclusion featured in the post-Washington consensus on development, rejecting the previous, neoliberal approach (Grugel 2005: 1068). The number of emigrants leaving the region as a result of these economic downturns put migration high on the political agenda both domestically and abroad (Acosta Arcarazo and Geddes 2014: 30; Freier and Acosta Arcarazo 2015; Margheritis 2016) as has been demonstrated for Argentina before.

In a second step after the agenda-setting, the regional consultative process of the South American Conference on Migration (SACM) supported the development of a consensus on human rights discourses on migration, including in Argentina. SACM declarations constitute soft law, meaning non-binding instruments that can influence the development of hard law. The non-binding nature of the state-led SACM meetings, which have been taking place since 2000, therefore facilitated consensus-building around migration policies. All MERCOSUR members are also part of SACM. All declarations between 2000 and 2003[54] – therefore prior to the adoption of Argentina's Migration Law – mention the need to protect the human rights of migrants. The first SACM meeting took place in Buenos Aires, indicating a very high level of availability of the Government of Argentina to support this socio-political agenda. SACM's informal nature and its link to a formal body of MERCOSUR explains its pivotal role in enabling countries in the region to agree on fostering regional integration, especially at the social level, by enabling the free movement and protection of rights for MERCOSUR's and associate states' nationals. The SACM declarations were then taken up in the Specialised Migration Forum of MERCOSUR and its associate states' Ministers of the Interior, created in 2003. Often representatives of states attended both SACM and the Specialised Migration Forum of MERCOSUR, enabling a sharing and flow of ideas. The Specialised Migration Forum's

[54] See http://csm-osumi.org/ (accessed 17 July 2016).

resolutions are then sent to the ministers for endorsement and to reach a potentially binding character. This helped the building of a regional consensus on human rights-based approaches to migration policies, including those enshrined in the 2002 MERCOSUR Residency Agreement. Expert networks of researchers, members of think-tanks and technocrats further supported moving migration onto the regional integration agenda. The ratification of the ICMW and the obligation to report on its implementation by most countries except Brazil, Surinam and Venezuela further contributed to the regional consensus (Acosta Arcarazo and Geddes 2014: 32-33; Freier and Acosta Arcarazo 2015; Margheritis 2015), but only after Argentina had already passed its 2004 Migration Law.

Regional integration was based on 'presidentialism', 'the role of presidents to keep integration from stalling' (Malamud 2003: 64). In terms of timing, Luiz Inácio – 'Lula' – da Silva took office as President of Brazil on 1 January 2003, the same year as Néstor Kirchner in Argentina. At that time both were 'relatively vulnerable political leaders' (Grugel 2005: 1069) and needed to distinguish themselves through a social democratic agenda. The latter 'is in sync with the populist and nationalist orientation of the political parties in government' (Margheritis 2015) in Argentina and Brazil, as well as in other countries like Bolivia. Néstor Kirchner's human rights foreign policy agenda, increasingly visible emigration from Argentina and the competition of Argentina with Brazil over predominance within MERCOSUR turned the government of Argentina into a key player in putting the human rights of migrants on the MERCOSUR agenda and thus enabling a regional consensus (Acosta Arcarazo and Geddes 2014; Margheritis 2012, 2015; Simonoff 2008: 11). However, apart from the rhetoric and actual practice in Argentina, not many South American countries actually adopted, let alone implemented, such human rights-based migration policies (Acosta Arcarazo and Geddes 2014: 32-33; Freier and Acosta Arcarazo 2015; Margheritis 2015; see also Grugel 2005: 1069, cf. Chapter 6). The socio-economic crises in Argentina and Brazil in 2015–2016, as well as the changes in the political leadership in both countries in 2015 and 2016 respectively, further highlight that the consensus on the need to protect the rights of migrants was linked to both the ideology of the presidents in power and the approach they took to economics. Once the economic situation had deteriorated considerably, the new presidents returned to a more neoliberal approach and moved away from a pro-rights approach to migration.

Conclusion

Human rights idealism of the NGOs and key parliamentarians as well as the beneficial timing of the policy-making process are not the only factors related to migration politics explaining the passing of the 2004 Migration Law. The governance of migration by the Argentine government is further embedded in a complex interaction of economic downturn leading to emigration, the interest in engaging with these emigrants and the incoherence created by the defence of emigrants' rights juxtaposed with large numbers of irregular immigrants without effective rights and the required implementation of the MERCOSUR Residency Agreement. Migration politics and governance at different levels provide insightful explanations on the adoption of Argentina's 2004 Migration Law.

The lack of comprehensive theories hampers the study of migration policy-making processes. Emma Carmel's focus on actors, process and conditions provides the best theoretical approach to migration governance at domestic, regional and global levels in the case of Argentina. Civil society establishing a double alliance amongst its members and with parliamentarians, as well as the ideological concurrence of the Kirchner administration with the values of human rights of migrants, were the actors and factors at the domestic level. When human rights issues have been strong advocacy tools and prominent concerns for recent democratic transitions, civil society can use them with more leverage than in other countries. The policy-making process itself is remarkable, not least due to its timing but also institutional procedures enabling the opposition to pass laws and favouring consensus. The 2001 crisis provided the backdrop against which the visibility of emigrants put migration on the domestic political agenda, in favour of concerns for immigrants which reflected those of emigrants. Regional integration on migration as a socio-political issue, as evidenced by the 2002 MERCOSUR Residency Agreement, led by Argentina among others, further helped to justify the Migration Law domestically in 2003. The timing of the 2003 Advisory Opinion of the Inter-American Court of Human Rights on irregular migrants was likely to have worked in favour of Argentina's Migration Law, as it was published just three months before Congress voted on the Law in December. In addition, as we saw in the previous chapter, it probably contributed to the endangering of the reputation of the recently elected President Néstor Kirchner, whose administration agreed to an amicable solution outside the Inter-American Commission on Human Rights and committed to reforming the Migration Law. The opportunity for this reform

presented itself a mere two months after the friendly settlement procedure started. All in all, the political processes at domestic, MERCOSUR and Inter-American levels seem to have occurred at the right time, at the right place.

At the regional level, the various presidents shaped integration by setting the agenda on irregular immigrants and the human rights protection of migrants. A consensus on these topics was soon reached and witnessed in subsequent declarations as a form of policy diffusion among countries in the Americas (FitzGerald and Cook-Martín 2014: 22). Structural conditions probably included low fertility rates and labour shortages in both Argentina and Brazil. Ideological concurrence on human rights ideals is likely to have helped to further migration governance.

In terms of international politics, the Argentine executive emphasised its own ideological and moral superiority in opposition to the main destination countries, in particular in Europe. This occurred in the context of a still-fragile democracy and post-crisis transnationalism (Margheritis 2016: 115). The aim to differentiate its own policy from that of Europe coincided with an unprecedented shift of Argentina's migration policy away from an orientation towards immigrants from Europe. This change reflected the importance of intra-regional immigrants, as well as a higher degree of independence from the influence of the United States. The relative freedom to develop its own regional approach to migration distinguishes South America from countries located further north on the continent.

> *The South American sub-region has taken the lead in immigration policy liberalization 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* (Ceriani Cernadas and Freier 2015: 29).

FitzGerald and Cook-Martín (2014) came to the same conclusion with regards to Argentina's distinct approach to racism over the past 150 years.

With Law 25.871, Argentina set a trend in the region, at least until 2015, when left-wing governments in the region, including that in Argentina, lost in national elections. Economic

crises, such as those in Argentina and Brazil since 2015, are a test to the regional consensus on the human rights of migrants and Argentina's Law. It remains to be seen how much the country itself will continue applying its innovative and initially unique legislation with the change of government and thus ideology in 2015. As we have seen, the underlying ideology of the Executive was one of the factors enabling the passing of the Migration Law. Changing values and priorities in the Executive may well undermine the aspirations of the migration legislation. Argentina's migration policy history may thus repeat itself, albeit for different reasons. Whereas, in the early-twentieth century, Argentina's governing elite did not agree with some of the left-wing ideals of fair wages and the right to create unions that immigrants demanded, in 2015 the ideology of the government changed from left-wing populism back to neoliberalism, which had prompted the necessity of and political conditions for the 2004 Migration Law in the first place.

Part III: Global significance

Chapter 6: The Argentine Migration Law in a comparative perspective: model or common provisions?

Chapters 6 and 7 discuss the implications of the human rights basis of Argentina's Migration Law, with Chapter 6 seeking to situate Argentina's 2004 Migration Law in a comparative perspective. It outlines how the human rights-based approach to migration governance made Argentina the leader in the South American region (Section 6.1) yet, at the same time, followed certain existing trends both on the American continent (Section 6.2) and globally (Section 6.3).

Argentina has not remained alone in its endeavour to take a human rights-based approach to migration. It started a regional trend, with other countries following suit soon thereafter. While the content of the Migration Law follows a regional consensus, as discussed in the previous chapter, Argentina remains one of the few countries to move from rhetoric to action. The regional context can explain Argentina's Law. However, freedom of movement is not as established as in the European Union. Argentina's migration legislation, together with that of most other member-states and associates of MERCOSUR implementing the 2009 Residency Agreement, is thus not as advanced as the European Union in terms of the freedom of movement of MERCOSUR nationals.

I argue that the uniqueness of Argentina's Migration Law is based on the ideas it embodies, not necessarily on all its actual provisions. Regarding those, many have already now been adopted elsewhere in the region or are reflecting existing standards in some countries around the globe. Having said this, Argentina's Migration Law nonetheless retains some remarkably unique features.

6.1 Argentina as regional leader in South America

Social justice movements have played a role in many societies in the region in advocating human rights accountability. 'Latin America has a more propitious regional opportunity structure for human rights activism than Asia, for example, because of the existence and density of the Inter-American human rights norms and institutions, while Asia has no such regional human rights regime' (Sikkink and Booth Walling 2006: 302). Méndez and Cone underline that the use of human rights language and the acceptance of them as norms through which to achieve social justice are common in Latin American countries:

> *Latin American communities have adopted the language of international human rights, perhaps more so than other regions of the world, to advance the construction of more just and free societies with accountable governments* (2013: 955).

This section focuses on how far this is applicable with regards to the rights of migrants. At the regional level, Argentina was the first state to enshrine human rights ideas in its migration law. As such it functioned as a model for other South American countries. Among the largest and most developed countries in the Southern Cone of the Americas, the comparison with neighbouring Uruguay is of importance, as the latter is considered the most stable democracy in Latin America according to the *Democracy Index 2015* (Economist Intelligence Unit 2015) situated, as it is, very close to the Argentine capital. I also contrast Argentina's Migration Law to those of Brazil – which is a large country – and of Chile, as they, together with Argentina and Uruguay, are the most economically developed countries in South America. Mexico is an important country of destination, but also transit and emigration. I will also compare Argentina's Migration Law with other South American countries, such as Bolivia, Ecuador, Paraguay and Peru, to demonstrate regional tendencies and differences. Other cases, such as from Central America and the Dominican Republic, will also be alluded to.

6.1.1 The right to (im)migrate and social justice: a policy pioneer followed rhetorically by the region

Argentina's Migration Law was, overall, more advanced than in any other country at the time that it was adopted, despite inherent contradictions which can be explained by a law usually benefiting from input from opposing parties. Argentina's Migration Law was the first to include

the right to migrate in its legislation; it then became a model for other countries in the region. Following Argentina's example, Uruguay (Article 1, Law 18.250, 2008), Ecuador (Article 40, Constitution, 2008; Article 43, Organic Law of Human Mobility, 2017)) and Bolivia (Article 12 II 1., Law 370, 2013) enshrined the right to migrate in their migration laws and the constitution in the case of Ecuador. Uruguay's law goes even further in rights protection than Argentina's Migration Law as it ensures equal treatment with regard to housing (Article 8 Law 18.250, which is not restricted further, as in Argentina's Article 55 Law 25.871) and taking up employment even if in an irregular situation (Article 17 of Uruguay's Law 18.250 compared to the restrictions for workers with an irregular status in Argentina, Articles 53 and 55 Law 25.871). Peru similarly passed more liberal migration legislation in 2015 (Legislative Decree 1236, 2015), which was replaced by a new law in January 2017 (Legislative Decree 1350, 2017).

It seems that the idea of the universal right to migrate and human rights of migrants found leverage relatively quickly in the region, whereas its practical realisation is more complex. Similar to constitutional provisions in the region in the nineteenth century (which also included Argentina, Acosta 2017), Ecuador granted the right to migrate constitutional status in 2008. Nonetheless, the universal right to enter – initially amounting to an abolishment of visa requirements for any foreigner – was countered by visa policies reintroduced for several countries from outside the region quite quickly and was contradicted by the restrictive immigration legislation of 1971 in force until 2017, as discussed by Acosta Arcarazo and Freier (2015: 679); Ceriani Cernadas and Freier (2015); Freier and Acosta Arcarazo (2015).

Argentina has had a major influence on the trend in the South American region, at least on the discursive level and on paper (Ceriani Cernadas and Freier 2015), which is a considerable impact beyond the country. In practice other countries (Brazil, Chile, Ecuador until early 2017) similarly lag behind in the liberalisation of their laws as destination countries in the north, as explained by Acosta Arcarazo and Freier (2015); Ceriani Cernadas and Freier (2015: 29) and Freier and Acosta Arcarazo (2015). Acosta Arcarazo and Freier (2015) called this approach 'Turning the immigration policy paradox upside down'. Thus, not 'assum[ing] the tension between protectionist immigration discourses and relatively liberal policies as a given' (Acosta Arcarazo and Freier 2015: 687), in some South American countries the official migration discourse was very liberal, meaning that it is open to immigrants and to promoting the protection of migrants' rights (see Acosta Arcarazo and Freier 2015), while the actual

legislation and implementation are more restrictive. Policies are more control-based than the rhetoric of politicians made one expect, at least in the cases of Brazil and Chile. In Argentina, the discourse was very liberal and led to a liberal policy, making it a unique case (Acosta Arcarazo and Freier 2015; see also FitzGerald and Cook-Martín 2014), at least until rhetoric became more restrictive again from 2014 on.

Thus, Argentina was the first country to actually include the right to migrate in its policies without contradicting legislation, as in Ecuador until recently. One reason, as analysed in Chapter 4, has been the influence of Argentina's authoritarian past. Uruguay (1973–1985), Chile (1973–1990) and Brazil (1964–1985) experienced similar dictatorships to Argentina's. Yet only Uruguay was able to reform its migration legislation in 2008. The resulting human rights movements in Chile and Brazil, however, did not focus on and achieve the revision of the migration laws from the authoritarian past, based on a wide-ranging human rights approach, at least not by the time of writing.[55] Both countries are discussing draft laws on migration,[56] which are, however, in some instances more restrictive than Argentina's Migration Law. Whether these different outcomes in Argentina and Uruguay on the one hand, and Chile and Brazil on the other, could be due to the different democratic transitions after the dictatorships and the influence of civil society would be an interesting comparative approach for future studies.

On paper, human rights have considerable leverage but, in practice, many challenges remain. The rule of law has been one of the greatest shortcomings of Latin American democracies until the present day and thus not an issue exclusively affecting Argentina. Recent political changes, with left-wing governments having been replaced by centre-right ones in Argentina in 2015 and Brazil in 2016, are likely further to impact on the regional consensus on the rights of migrants and, in particular, on the implementation of Argentina's Migration Law. The country's historical experience in the twentieth century has already shown that protection of liberal rights in the migration law is not sufficient if undermined by restrictive application. Brazil's 2016 draft migration law falls behind civil society's expectations of a rights-based approach.[57]

[55] January 2017.
[56] As of January 2017. Changes after this point in time are not reflected in the thesis.
[57] See http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=F9409397E4C369A5106470ED07C95921.proposicoesWeb1?codteor=1366741&filename=PL+2516/2015 (accessed 7 October 2016). It still needs to be adopted by Congress (see

Colombia and Ecuador similarly returned to restrictive measures aimed at Cuban and Haitian irregular immigrants, despite these latter groups being relatively small in number (Acosta Arcarazo 2016).

Argentina is a case in point showing how representatives from civil society and the state, in a country that was not considered as part of a small group of influential Western powers, could develop and institutionalise new human rights norms. The right to migrate and extending 'the aspirational application' (Acosta Arcarazo 2016) of fundamental principles codified in international law to irregular migrants are the most noteworthy features. Following this logic, I argue that the human rights basis of Argentina's 2004 Migration Law was the first of a partly unique normative approach and idea to protect the rights of migrants. However, it remains to be seen whether it can remain institutionalised despite the political changes in Argentina in 2015 in the executive (in particular restrictive Decree 70/2017 DNM 2017) and whether its example will be followed by more states. Furthermore, the 2002 Residency Agreement of MERCOSUR seems to have been influenced by the Argentine Migration Law discussions, since not only does it mirror the type of rights enshrined in the 2004 Argentine migration legislation, but was also a proposal by the Argentine delegation (Alfonso 2012: 47-52; Margheritis 2012: 7; Interview 12, 8 October 2013).

6.1.2 Nascent model for consultative approaches to reforming migration laws

As we have seen in the previous chapter, consultations were the basis for the policymaking process in Argentina. This consultative approach was subsequently applied not only in other policymaking processes in Argentina but also in neighbouring countries. The outreach to key stakeholders has since been used in the process to devise a new migration policy in Paraguay, as well as in Brazil's ongoing process of changing the migration law in force since the last dictatorship in 1980.[58]

In conclusion, the mobilisation of civil society in Argentina based on successful human rights litigation at national and regional institutions distinguishes Argentina in the region. However,

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http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=1594910, accessed 7 October 2016).

[58] See http://www.paraguay.iom.int/?q=node/80 (accessed 7 October 2016) and http://www.participa.br/comigrar/ (accessed 12 December 2014).

the notion of human rights has considerable leverage in South America, not the least as pushed by Argentina in the framework of regional groupings such as MERCOSUR, SACM and the Union of South American Nations or UNASUR (Ceriani Cernadas 2015: 150; Domenech 2007: 3). While the MERCOSUR Residency Agreement was adopted before the 2004 Migration Law was passed in Argentina, the Argentine executive was one of the key protagonists behind this development, which then continued to be reflected in other regional declarations. Argentina could thus be considered the trendsetter in human rights-based migration policies, the more so as as quite a number of other countries have followed this trend but few beyond pure rhetoric.

6.2 Argentina's broad continental alignment on several migration provisions

At first sight, one might expect that Argentina's liberal Migration Law could easily be applied to a context outside South America. On closer inspection, the country's 2004 Migration Law follows not only regional but also continental practices in several regards. Regularisations to remedy shortcomings in the migration legislation, the granting of social rights to immigrants, the use of humanitarian visas in the migration legislation for protection purposes and the reaching out to emigrants are all applied in a similar way in other countries in the American hemisphere. In some respects, Argentina's Migration Law mereley mirrors existing provisions in migration legislation from across the continent, including other settler societies such as the United States and Canada.

6.2.1 Regularisations and the right to migrate

Many countries in the region continue using expulsion 'as the principle sanction for irregular immigration in Latin American immigration laws' (Ceriani Cernadas and Freier 2015: 22). This is rather similar to the criminalisation of irregular immigrants in the United States and Europe (for the latter, see Acosta Arcarazo and Geddes 2014: 41–42), in particular that of emigrants from Latin America. Thus countries in Latin America apply the same approach to deportation they oppose in main destination countries of their emigrants. Argentina's and Uruguay's migration laws are an exception as they appear to prioritise regularisation over expulsion

(Ceriani Cernadas and Freier 2015: 23). However, in reality, at least in Argentina, this did not fully lead to the aspired outcomes; the expulsion of immigrants from the region continues because those affected are assumed to 'not want' to regularise their status (cf. Chapters 2 and 5). Furthermore, Decree 70/2017 DNM 2017 facilitates and expedites expulsion further for immigrants with any criminal record, however minor the offense may have been.

Other countries in the region similarly struggle with (in)adequate regularisation procedures. In Uruguay, regularisations are handled on an individual basis, which adds to the length of the procedure and even surpasses similar timeframes in European countries such as Spain. In the case of Bolivia, it was only once a decree was adopted after the passing of the law in 2013 that the government allowed for the regularisation process of immigrants in an irregular situation to take place. It is unclear how those irregular migrants who later entered the country, or have since become undocumented, will be able to regularise their status. Arguably the full implementation of the right to migrate may not necessitate regularisations, but experience from other countries, including Argentina, has shown that this right (ideal) has not been translated into practice. After Ecuador abandoned all visa requirements for all countries worldwide in 2008, it started to re-introduce visa requirements for Chinese citizens six months later and for several African and Asian countries – Afghanistan, Bangladesh, Eritrea, Ethiopia, Kenya, Nepal, Nigeria, Pakistan and Somalia – 18 months later (Freier and Acosta Arcarazo 2015: 49). These reactions were based on the perception that high inflows of immigrants had occurred from those countries, even though no evidence to support this supposition was ever produced. Freier and Acosta Arcarazo (2015: 49) rightly conclude that '[t]he restrictive reaction to tiny inflows of extra-continental immigrants is inconsistent with the ideal of a universal right to migrate'.

6.2.2 Social rights: priority in several countries

The issue of social protection is not unique to Argentina. Social rights, including rights to health, education, social security and housing, are equally enshrined in migration legislations in Uruguay (Article 8, Law 18.250 2008), Mexico (Article 8, Migration Law 2011), Nicaragua (Article 11, Law 761 2011), Bolivia (Article 12, Law 370 2013) and Ecuador (Articles 51 and 52, Organic Law of Human Mobility 2017). The laws of Uruguay (Article 16, Law 18.250 2008), Nicaragua (Article 151, Law 761 2011) and Bolivia (Articles 48 and 49, Law 379 2013) also

protect the labour rights of immigrants in a similar way to Argentina's Migration Law, by making legal residence a criteria for enjoying them (see also Ceriani Cernadas and Freier 2015: 23–24). The US equally sanctions companies for employing irregular immigrants, but does not grant undocumented workers access to labour laws (Slater 2009: 698–699, 714).

The changes in migration legislation in Panama (Law Decree 3 2008), Costa Rica (Law 8764 2009), Mexico (Migration Law 2011) and Nicaragua (Law 761 2011) are similar to Brazil's and Chile's draft migration laws, making them less advanced and prone to more significant tensions than Argentina's Migration Law. In Mexico, the changes include restrictive provisions on detention. Other countries in Latin America and the Caribbean, such as the Dominican Republic's 2004 Migration Law (Law 285 on Migration) and 2010 constitutional reform (Constitution of the Dominican Republic 2010), continue to prioritise national security in the immigration legislation (Ceriani Cernadas and Freier 2015: 17-18). Geographical location, meaning being at long distance from the United States and an absence of transit movements towards the United States as is the case for Mexico and Central American countries, seems to be linked to more liberal migration policies (Ceriani Cernadas and Freier 2015: 29). Whether the United States actually did influence migration legislation in Mexico, Central America and the Caribbean would need to be studied further. It is noteworthy, however, that the country arguably at greatest geographical distance from the US – Argentina – was able to adopt the most liberal migration law, at least initially.

6.2.3 Moving beyond traditional refugee protection: humanitarian entry categories in the Migration Law

At the same time as being at the forefront of advanced rights protection in migration policies at the regional level with Law 25.871, Argentina aligned with specific regional trends on providing humanitarian entry categories for two types of situation in origin countries. These included, first, the use of migration legislation to provide a special visa to persons fleeing violence. Second, Argentina's Migration Law allows those affected by disasters to enter the country on humanitarian grounds, as is customary in a number of other countries on the continent such as the United States, Mexico and Brazil.

The novelty of including humanitarian reasons – for those fleeing armed conflict – as an admission category under the migration policy (Article 23.n 1.-2. Decree 616/2010 DNM 2010; cf. Chapter 2) is an issue that has received less attention in the literature on Argentina's Migration Law. In this way, Argentina reserves refugee and asylum protection via separate legislation for a few individuals in the most need of protection (Cavaleri 2012). At the same time, the refugee legislation was passed two years after the 2004 Migration Law (cf. Chapter 2). It could thus be that the protection of persons fleeing violence, persecution and discrimination was included in the Migration Law rather than specific refugee legislation for pragmatic reasons. In addition, entering a country through the migration channel is less time-consuming than lodging an asylum claim. Some nationalities, such as Colombians, who were not fleeing state repression but, rather, non-state paramilitary actors, may thus also not fear returning to their country of origin for visits or other reasons that may be the case for refugees fleeing state violence. In this case the international law principle of *non-refoulement,* prohibiting the return of a person to the persecutor, which is usually the state, is not a major concern and accounting for the changing nature of conflicts away from solely state actors violently supressing dissent to non-state actors engaging in violence against the population.

In a side event on MERCOSUR migration policies at the World Social Forum on Migration in Brazil in July 2016, a representative of the UNHCR in South America stated that several other countries in the region are applying the principle of using the free-movement provisions in the MERCOSUR Residency Agreement to allow Colombians to enter rather than making the latter access protection through asylum procedures (Terminiello 2016). Since Argentina was the first to ratify and apply the 2002 MERCOSUR Residency Agreement with its 2004 Migration Law and provides humanitarian visas to nationals such as from Colombia, it arguably contributed to the initiation of what is a very important protection regime in South America. As we have seen in Chapter 2, this humanitarian protection is also applied to those fleeing the civil war in Syria, as well as to Palestinians. Brazil started granting Syrians humanitarian visas in 2013 as a special administrative measure and not as part of its migration legislation (Lyra Jubilut *et al*. 2016). Ecuador's 2017 migration law stipulates that persons seeking international protection will be granted humanitarian visas (Article 58, Organic Law of Human Mobility). It will be interesting to study this phenomenon in a comparative perspective and, in the long-term, especially, in light of the current erosion of the international refugee protection regime with the perceived 'refugee crisis' in Europe in 2015/2016.

A second entry category for humanitarian concerns refers to natural and environmental, man-made disasters (Article 24.h) Decree 616/2010 DNM 2010), as analysed in Chapter 2. This approach is based on a distinct trend on the continent. Exceptional humanitarian visas following hazards such as earthquakes and hurricanes are similarly granted by the United States, Mexico – since 2011 (Articles 41 and 127, Migration Law) –, Brazil, since 2012 (Cantor 2016; Lyra Jubilut *et al*. 2016) and Ecuador (Article 58, Organic Law of Human Mobility 2017). Temporary Protected Status (TPS) in the United States is long-standing, having been established in 1990 by the US Congress. Central Americans and Haitians have been granted TPS after hurricanes and the 2010 earthquake, respectively (Messick and Bergeron 2014). It is thus likely that the US influenced other countries in the Americas and set the trend that Argentina has been following with its 2004 Migration Law.

Brazil has been granting humanitarian visas linked to disasters to Haitian nationals since 2012. Interestingly, the humanitarian visa entails fewer requirements than the tourist visa, thus facilitating entry by recognising that those fleeing disasters or war may not be able to present all the documentation required for a normal visa. However, the humanitarian visa does not entail a guaranteed migration status, which has led many Haitians to seek asylum, thus increasing the burden on the system (an estimated 85,000 Haitians have arrived in Brazil since the 2010 earthquake, according to Lyra Jubilut *et al*. 2016: 77). Since Haitians were not fleeing conflict or other persecution but, rather, the effects of the 2010 earthquake and the subsequent potential socio-economic hardship in the poorest country of the hemisphere more generally, their claims were passed to the National Immigration Council (CNIg) in charge of 'special or not regulated' cases (Lyra Jubilut *et al*. 2016: 77). The CNIg granted permanent residence permits to these Haitians on humanitarian grounds. However, as in the case of expulsions under Argentina's previous migration policy, the executive branch is granting the visas. Without access to the legal means to revoke these decisions, the humanitarian visa regime in Brazil 'depend[s] on the political will of the government' (Lyra Jubilut *et al*. 2016: 78). As governments and/or priorities change, these groups of immigrants may be left in limbo. Like the *ad hoc* regularisation decrees in Argentina for certain nationalities found to be left out of the migration channels, humanitarian visas in Brazil are granted to specific nationalities considered to be affected by particular circumstances. Other nationalities or persons affected by similar wars or disasters are excluded (Acosta Arcarazo and Freier 2015: 683; Lyra Jubilut *et*

al. 2016: 78). Other countries, such as Bolivia in 2013 (Article 30 (4), Law 370), included provisions in their migration legislation to allow those fleeing disasters to enter temporarily via exceptional migration categories.

Thus, overall, the executive branches of the governments in the region tried to remedy a situation where certain nationalities are in need of immediate protection due to civil war. The United States introduced the use of humanitarian visas for persons affected by disasters, a tool which Argentina and other countries adopted in similar ways. Arguably Argentina was the first in the South American region to pass legislation enabling nationals of MERCOSUR members and associate states to immigrate without having to use the asylum channel. To avoid an overburdening of the asylum system, the migration law – in the spirit of the right to migrate – is applied instead. However, the often exceptional humanitarian categories for disasters and conflicts are dependent on the political will of the government in power and remain selective, temporary programmes. They may thus be more effective for the specific nationality or group of persons in a particular situation; however, they are, in fact, not more equal but are creating a preferential entry category for some while necessarily leaving out others.

6.2.4 Emigration provisions: a typical country-of-origin perspective?

As in Latin America in general, the emigration provisions in Argentina's Migration Law are geared towards the protection of the human rights of emigrants in major receiving countries in the North (Mármora 2010: 88). The focus of the engagement of the Argentine government with emigrants (and the provisions in the Migration Law) lay on the resources and knowledge of the highly skilled rather than on the financial transfers called remittances, as in other origin countries in Latin America and elsewhere (Margheritis 2016: 108, 112). In particular, reaching out to highly skilled emigrants is a typical approach of origin countries, often as part of development policies, and thus puts Argentina in line with these countries in the global South.

Yet, unlike many other countries of origin in the global South with an explicit emigration policy, Argentina's emigrants are relatively highly skilled (Margheritis 2016). The comparatively better situated Argentine emigrants considered long-term professional aspirations to be more important motivations to migrate than the employment prospects which Argentina was able to offer at the time when they left (Cook-Martín 2013). This contrasts with many other emigrants

from the region, who leave their country of origin first and foremost in the search for employment opportunities and are mostly medium- and low-skilled workers (Margheritis 2016; see figures for 2010-2011 at OAS 2012: 29). The characteristics of Argentina's emigrants can be linked back to Argentina's very high level of human development (rank 40 of 188 in 2014, cf. Chapter 1).[59] The low prioritisation of incoming (and outflowing) remittances indicates that the Argentine executive was, at the time, interested in their reputation among nationals residing abroad and the networks to which Argentines are linked, rather than merely their private funds that many developing countries aim to 'leverage for development' (Margheritis 2012, 2016). Thus, while Argentina's emigration policy mirrors similar approaches in the region, emigrants are more highly skilled and led the executive to be motivated by more ideational and political links to its emigrants rather than economic and financial benefits such as in the form of remittances (although probably still welcomed given the extent as presented in Chapter 5.2).

Argentina took longer to devise its transnational policies than other countries, such as Ecuador and Brazil (Margheritis 2016: 113). Ecuador's new Organic Law of Human Mobility (2017) prioritises the rights of Ecuadorian nationals abroad over the rights of immigrants, at least in terms of them being more prominent (Articles 5 to 24, Articles 25 to 41 focus on Ecuardorian returnees, Organic Law of Human Mobility 2017). A country with similar emigration provisions in its migration law is Uruguay (Articles 71 to 76, Law 18.250 2008). However, the actual implementation of these articles in the Uruguayan and very recent Ecuadorian legislation has not yet been analysed. As we have seen in the previous chapter, the 2001 socio-economic and political crisis explains the state-led transnationalism in Argentina (Margheritis 2016: 114–115). At the same time, the legacy of the last dictatorship and the economic failure leading to the 2001 financial and economic collapse created a certain level of distrust among Argentines abroad toward the government, like that felt by Ecuadorians but more pronounced (Margheritis 2016: 164). The Argentine state has thus engaged in transnationalism in the same way as other countries in the Latin American region and the global South, but the composition, skill levels and lack of engagement in migrant associations of Argentine nationals residing abroad made the approach patchy and lacking continuity. This could be due to the relatively better standing of Argentines in host countries, as many aspired to apply for double citizenship

[59] See http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/ARG.pdf (accessed 5 February 2017).

as a way to access the labour markets there. Argentine migrants may perceive themselves to be needing less support by the Argentine state, while the state itself counted on the former to restore its domestic socio-political reputation (Cook-Martín 2013; Margheritis 2007, 2016).

A rights-based approach, the country's authoritarian past and its implications for the democratic transition as well as the 'necessary reparations' (Margheritis 2016: 115) and need for institutional legitimacy after the political and economic collapse of 2001 all made the Argentine government more engaged with its emigrants. However, other countries developing diaspora policies for their emigrants have not necessarily followed suit with similar policies for immigrants at the domestic level. Other reasons given in previous chapters thus explain how Argentina's 'voting through its feet' with the leaving of its nationals considerably advanced the agenda on the rights of immigrants.

Argentina's Migration Law thus does break ground in some areas, which established it as the leader on migrants' rights protection in the South American sub-region. However, at the same time, the migration legislation in Argentina needs to be considered within existing practices in Latin America and the Caribbean as well as on the continent as a whole. Argentina's Migration Law in certain respects represents a continuity of similar rights in other migration legislation and is not entirely unique, as the comparison to practices around the world in the next section demonstrates.

6.3 Argentina's commonality and uniqueness amongst countries of high immigration

This section identifies which parts of Argentina's 2004 Migration Law actually follow other legislation. An example is the aspiration to be a region of free movement which recalls but not quite reaches free movement law of the European Union. Another is granting of voting rights to immigrants in local elections. This section also observes how Argentina's migration legislation retains distinctive features while applying an existing trend. Two cases in point are the proclamation of access to justice during pre-removal detention and the stipulation that convicted criminals only have to serve half of the prison sentence before being expelled.

6.3.1 Freedom of movement and family reunification for nationals from the region: not quite EU-level yet

Enabling nationals of MERCOSUR member-states and associates to enter the country legally (and to regularise those already residing in Argentina) represented one of the main motivations for Argentina's 2004 Migration Law. Yet, importantly, 'the full abolition of internal border controls, something similar to Europe's Schengen Area, has not happened in the region' (Acosta Arcarazo 2016). We saw in Chapter 2 how Argentina's Migration Law is prone to tension between the border control prerogative and the rights of individuals, in this case of non-citizens. Debates began in 2010 on a supranational South American citizenship in UNASUR and MERCOSUR, but no comparable approach to the free movement regime in the EU's Schengen Area has been reached (Acosta Arcarazo 2016).

Contrary to that of the European Union, MERCOSUR law does not supersede national law in the member-states, leading to differing implementation of the international treaty (Acosta Arcarazo and Geddes 2014). Argentina grants nationals of all 11 MERCOSUR member-states and associates the rights guaranteed under the MERCOSUR Residency Agreement, while Uruguay grants permanent residencies right away. Chile does not apply the agreement to nationals of Peru, Ecuador or Colombia, countries that became associates of MERCOSUR (2003 for Peru and 2004 for the two others) more recently than Chile and Bolivia (both in 1996).

In contrast to what is granted in EU free movement law, in Argentina and other MERCOSUR countries fully applying the Residency Agreement, nationals of other member-states and associates receive a two-year temporary but extendable residence permit upon entry (Acosta Arcarazo 2016). In the EU, nationals of other member-states need to prove, after three months, that they have sufficient resources to sustain themselves (Article 7, Directive 2004/58/EC). This condition only applies to MERCOSUR nationals after two years when applying for permanent residency (Article 22.c Decree 616/2010 DNM 2010 regulating the Migration Law in Argentina; see also Acosta Arcarazo 2016; Acosta Arcarazo and Geddes 2014: 32). Thus, nationals of MERCOSUR member-states and associates can enter Argentina for a longer period, but still need to go via the permit system, making freedom of movement an aspiration, not a borderless practice as in the EU (at least until some member-states reintroduced internal controls in 2015).

In the EU, the right to family reunification covers both EU nationals residing in another member-state and non-EU nationals with a valid residence permit for at least one year and aiming to reside in the host country in the long run (Council Directive 2003/86/EC). Argentina's Migration Law equally covers family reunification in Articles 3.d and 10 of the Migration Law and Decree, the latter in accordance with the provisions of the ICMW. The right to be reunited with next-of-kin in Argentina's Migration Law thus mirrors stipulations in the EU, though it has been assessed as not as extensive (Acosta Arcarazo and Geddes 2014: 42).

The unique proclamation of equality of treatment in Argentina's Migration Law differs from several processes of including and excluding foreign nationals in the European Union. The several steps to accessing rights in the EU have been compared to a 'revolving door' (Acosta Arcarazo and Martire 2014: 366). The latter only enables persons to enter individually but which, at the same time, can also mean a fast exit through expulsion if certain conditions, such as language competence and other prerequisites linked to integration, are not met in time as observed by Acosta Arcarazo and Martire (2014). Argentina's Migration Law tries to avoid these limbo situations through which EU law exposes third-country as well as EU nationals when aiming to access certain residency categories.

Overall Argentina's Migration Law aims to facilitate the entry and residence of nationals of neighbouring countries as part of regional integration under MERCOSUR. The provisions are, however, not as far-reaching in their implementation as the abolition of internal border controls (until 2015) in the EU Schengen Area or free movement rights under EU law. Interestingly, Argentina and other countries in the region thus fare less well in comparison with the EU in terms of the mobility of nationals. At the same time, the EU's approach has been 'an experiment which is not seen as worth repeating' (Acosta Arcarazo and Geddes 2014: 41–42) by countries in the South American region with regards to irregular migration from outside of Europe. It seems, though, that South America can still learn from the EU in some respects, in particular concerning intra-regional freedom of movement.

6.3.2 Political rights: a follower in granting immigrants voting rights in local elections

Argentina grants voting rights to both its nationals abroad and immigrants residing in the country. Back in 1991, Argentina granted the former the right to vote while residing abroad. This mirrors a trend in countries across the hemisphere, including Bolivia, Colombia, Ecuador, Mexico, Peru, Chile, El Salvador, the United States and Canada (Ceriani Cernadas and Freier 2015: 24) and in other countries such as Belgium and Germany. For Brazilian and Belgian nationals, voting is mandatory regardless of residence within or outside the country. The Philippines, an important country of origin of migrants whose government has engaged in far-reaching outreach efforts to protect nationals abroad, only granted them the right to vote while residing out of the country in 2003 (Republic Act No. 9189 2003).[60]

At the same time, foreign nationals residing in Argentina can vote in local elections at the municipal and provincial levels, but are barred from casting ballots in national elections. The former puts Argentina in line with similar legislation in Bolivia, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay and Venezuela[61] and the inability to vote at the national level with Costa Rica (Ceriani Cernadas and Freier 2015: 24-25). Having the right to vote in local government elections is similarly practiced for nationals of the European Union residing in another member-state. Argentina's enfranchising foreign residents in local elections makes it part of in increasing trend.

6.3.3 Due-process safeguards in pre-removal detention: advanced on paper

In Argentina, detention upon arrival for irregular migrants was not an important topic in the debates prior to reform of the 2004 Law. The fact that this was a relatively absent discussion represents a key difference with anglophone case studies, such as the United States (see Heeren 2010), the UK (see Bosworth 2011), and Malta (see DeBono 2011). Detaining irregular immigrants trying to enter the country did not seem to be practiced on a large scale: only refusal at the border, with presumably immediate return.

[60] The Act was revised in 2013 by Republic Act No. 10590.

[61] See the database on European Union Democracy Observatory on Citizenship, conditions for electoral rights – non-citizen residents (http://eudo-citizenship.eu/databases).

Nonetheless, detention before removal was and is practiced, having prompted advocates of the legislation to call for the inclusion of due-process safeguards in the 2004 Migration Law. By providing immigrants with legal avenues to review administrative detention, Argentina's Law 25.871 is one of only a few jurisdictions worldwide that require the intervention of a judge before expulsion orders can be enforced (see Lyon 2014: 180). However, due to resistance by the executing body to actually involve judges, the detention of irregular immigrants prior to removal is applied in the same way as in Argentina's previous law and in European countries, including in the UK (see Bosworth 2011; Cornelisse 2011; Dembour 2015). In the United States, 66 per cent of immigrants who will be expelled are detained in a mandatory way (Heeren 2010: 601).

Despite the limited application of due-process safeguards in pre-removal detention, Argentina is one of several countries in Latin America to include these provisions in their migration law – and potentially the first. It probably influenced Uruguay's migration law, which also includes access to justice. Uruguay's (Article 53, Law 18.250 2008) and Costa Rica's legislation (Article 216, Law 8764 2009) guarantees that expulsions can only be conducted once all remedies have been exhausted, thus deferring the deportation process while recourse is sought. Panama's (Article 67, Law Decree 3 2008) and Ecuador's (Article 141, Organic Law of Human Mobility 2017) migration legislation includes due-process safeguards – but not access to judges – and the suspension of deportations while legal remedies are sought. While Argentina's Migration Law, on paper, is thus more advanced than the due-process guarantees later identified by the Inter-American Court of Human Rights, in practice, judges do not seem to play the role accorded by law (García 2013). The further away other countries with similar provisions are, both geographically and, probably more importantly, in ideological terms of their governments, the less likely immigrants are to be granted access to justice in removal procedures.

6.3.4 Impeding entry: criminal records

Canada applies the same principle as Argentina of only considering those acts that are considered a crime under national law as a reason for not allowing a migrant to enter the country.[62] The European Union refers to the future risk that a national of an EU member-state

[62] http://www.cic.gc.ca/english/information/inadmissibility/index.asp (accessed 7 October 2016).

may pose to the public order/security of another member-state as a reason to refuse entry,[63] whereas New Zealand – another well-researched OECD country - specifies the time of imprisonment (more than five years) as a criterion.[64]

However, the stipulation that foreigners can be expelled after only serving half of their prison sentence is unusual (cf. Chapter 2). Unlike Argentina, having to serve the remaining part of a sentence is a condition of the government of Brazil when returning convicted Argentine nationals (Dibur 2005).

Conclusion

> *The reasoning that undocumented workers should be granted legal status for human rights reasons is unlikely to gain much credence in the U.S.* (Slater 2009: 727).

While Argentina's 2004 Migration Law may not enable freedom of movement and does not represent an end to the border regime, it is very advanced in granting rights to immigrants regardless of status. Argentina's 2004 Migration Law includes several distinctive features – ahead of the migration policy game – which are unlikely to be replicated in other major immigration countries outside South America. The Migration Law can thus be considered unique and a model at the same time, albeit the latter at this stage only at the regional level. Setting a trend in the Southern Cone is a remarkable achievement in itself, as it established a practice countering what is considered to be 'the standard' in most of the literature on migration policies.

Some provisions in Argentina's Migration Law reflect regional practice, others actually initiated it. Humanitarian visas in Argentina cover those having to move due to disasters, thus reflecting an interesting approach initiated by the United States on the continent. An innovative and thus far largely overlooked aspect of Law 25.871 is the granting of protection to those fleeing conflict and violence outside the refugee regime. By offering both more legal-entry categories

[63] 'A previous criminal conviction can be taken into account only if they are evidence of personal conduct constituting a present threat to the requirements of public policy. The authorities must base their decision on an assessment of the future conduct of the individual concerned.' (2009) http://europa.eu/rapid/press-release_MEMO-09-311_en.htm?locale=en (accessed 11 November 2014).
[64] http://glossary.immigration.govt.nz/Goodcharacter.htm (accessed 11 November 2014).

regardless of skills level compared to other destination countries and humanitarian visas for specific countries facing conflict and crises, the Migration Law helps to avoid overburdening the refugee system and ensures a faster way of entry than through lengthy refugee determination procedures. Many Colombians thus entered on the grounds of their nationality rather than through refugee determination procedures (cf. Chapter 2). The changing nature of some conflicts, where (regular) return to the country of origin is still desired by the individuals as they are fleeing paramilitary, non-state actors rather than the government, enables different approaches to protection, as the principle of *non-refoulement* does not (always) apply. In addition, taking a somewhat non-traditional approach to asylum enabled the Argentine authorities to recognise when certain nationalities did not have a legal channel for entering Argentina and thus had to pretend to apply for asylum to regularise their status. In response, also in consultation with several authorities and NGOs on the ground, the Migration Agency created specific regularisation opportunities. While this will not solve shortcomings in the entry categories, such as the exclusion of self-employed workers from third countries, it acts on why citizens of certain countries can only use the refugee procedures if all other immigration channels are closed to them. In the current climate in Europe, where many countries have increased restrictions for refugees and asylum-seekers even further, this represents a different approach with a view to enabling legal migration.

A few stipulations in Argentina's Migration Law have been applied in a similar vein elsewhere on the continent or in the world, or differ in detail in some aspects but not overall. Granting voting rights to both emigrants and immigrants, albeit at differing levels of government, is noteworthy but already existing elsewhere. Despite President Cristina Fernández de Kirchner's critique of countries in the European Union over their perceived securitised approach to migration policy, free movement in the EU is still more advanced than in Argentina (and other MERCOSUR countries). The moral high ground of the previous Argentine administration *vis-à-vis* Europe may thus not be as well-founded as initially thought, at least if one considers the 'right to migrate' literally. Decree 70/2017 DNM 2017 further exemplifies how Argentina is returning to implementing more restrictions in its actual policy.

Chapter 7: Conclusion: the right(s) time at the right(s) place

Argentina's 2004 Migration Law was distinctive in at least two ways when it was adopted: first, it established the 'right to migrate', which links the existing international law principle of the right to leave one's country with a corresponding right to enter Argentina. This right is granted not just to migrant workers and their families, as in the corresponding international convention, but theoretically also to migrants by virtue of humanity and not category. Nonetheless, its application is rather limited in practice, but overall still more progressive than in other countries. Secondly, the 2004 Migration Law grants (at least on paper) equality of treatment to immigrants – compared to nationals – on core issues, including access to education, health care and other social rights, regardless of status. Argentina was the first country to proclaim these types of rights, which go beyond the stipulation in even the most advanced international law conventions and principles.

Despite a similar history of attracting settlers, the human rights-based approach taken by legislators and the executive in Argentina to address the number of irregular immigrants since 2004 is unlikely to be followed by the United States or other major destination countries in the global North beyond providing amnesties.

> *The Argentine plan is probably too liberal for the United States* (Slater 2009: 730).

Nonetheless, other countries in South America and some in Central America passed similar legislation or passages to Argentina's Law 25.871.

The fact that Argentina is setting a trend in the region and originally adopted one of the most liberal migration legislation by basing it explicitly on human rights principles can only be explained by a number of factors. This confluence of factors is due in some regards to specific circumstances and a very opportune moment in Argentina, given its history of settlement and immigration on the one hand and human rights innovations and progress led by civil-society actors after the 1976–1983 dictatorship on the other. Other aspects, such as regional integration, ideology and increasing numbers of emigrants, are issues that other countries in the region faced in a similar vein, and could probably explain why some of them followed suit

in reforming their own migration legislation, basing it on human rights to one extent or another.

This chapter highlights the human rights conceptualisation of migration in Argentina, which is decisive for how the Migration Law was developed and adopted; it also reveals new insights from the Argentine case for studies of domestic migration politics and underlying processes/transitions that explain the emergence of the human rights-based Migration Law.

7.1 The human rights origins of Argentina's 2004 Migration Law

7.1.1 The historical importance of settlement and immigration for the Argentine nation

The concept of equality for immigrants in Argentina is not new (cf. Chapter 3). Already, as a newly independent country in the nineteenth century, its 'inhabitants' were granted equal rights, regardless of nationality. The aim was to attract settlers who would integrate, make a contribution through hard work and their profession, and bring with them the liberal values that the political elite at the time expected the desired settlers to have. The focus lay on the new arrivals' support of the economic and intellectual development of the country, in particular in the rural areas which were home to supposedly inferior populations that could be replaced with the desired Europeans. However, only a few of the Europeans who arrived in the nineteenth and early-twentieth centuries took Argentine citizenship right from the start, whereas most indigenous and other populations in Argentina's interior did not even have this option (cf. Chapter 3).

The role of immigrants, mostly Europeans, in making Argentina one of the most advanced economies in the early twentieth century, and their high numbers among the working age population, entrenched settlement and immigration in the concept of the Argentine nation. While the national identity changed according to political priorities and, to a lesser degree, actual immigration patterns, it remained closely linked to immigration.

The latest shift in understanding of national identity at the beginning of the millennium was part of a new regional orientation toward a perceived morally higher South Americanism, based on human rights, which is reflected in the Migration Law. My analysis revealed a transition, over the decades, from an initial settler society reaching out to Europeans in the nineteenth and twentieth centuries to a society importing labour from neighbouring countries, a transition which was finally recognised in state policy. Over the same time period, a young society with high birth rates was suffering from increasingly low fertility, which immigration would help to counter.

Over the course of almost two hundred years, the country moved from the inclusion of immigrants in the nineteenth century to their exclusion in the twentieth, before returning to inclusion in 2004. Ironically the country moved from an 'American/Australasian settler policy' – when it aimed to attract Europeans to inhabit rural parts of the country – to a more 'European policy' of attracting workers while wanting to distinguish itself from European policies. The aim was that early settlers should become citizens, whereas more recent workers should not, or should at least be in an ambivalent position. The recent initiative for a South American citizenship in the Union of South American Nations (UNASUR) demonstrates that the aim is to retain a regional link, but not necessarily to the host state. Selecting by ethnicity has remained a constant aspect of Argentina's migration policy history. The 2004 policy combines elements of community and rights-based approaches to ethnic migration for MERCOSUR nationals and even increased further with rights for emigrants, countering the demise of ethnic policies observed by Joppke (2005).

The fact that Argentina's immigration legislation had been liberal in the nineteenth century and that the constitutional rights of immigrants had remained liberal facilitated the return to an open approach. Nonetheless, previous legislation was continuously undermined by other laws, decrees and other policy, an issue which the advocators of the 2004 Migration Law aimed to address. With the return to a neoliberal government in 2015, the effects of the migration policy are likely to be more restrictive than before as the Decree 70/2017 DNM of January 2017 suggests.

7.1.2 The human rights legacy of the dictatorship enabling a new migration law

When discussing the situation of immigrants, in particular those in an irregular situation, human rights are not often the prism that states, in particular immigration countries, choose to take. As analysed in Chapter 4, my interviews and review of primary and secondary data sources revealed that members of parliament, civil society and the executive conceptualised migration as a human rights issue, not just as a migration topic. I highlight how Argentina's 2004 Migration Law can thus only be understood if one studies the importance of human rights ideas in the country – in particular, rights mobilised and linked to traumatic experiences under the most recent dictatorship, which initiated an important human rights movement successfully advocating for a rights-based approach to many policies. Migration is one of the reformed policies, but not the only one. A law from the military junta even outplayed ideology for Kirchner and shows how a dictatorial past could in a unique sequence of events help to protect rights of a minority, being immigrants.

The proponents of the 2004 Migration Law in Argentina clearly 'believe[d]in human rights' (cf. Dembour 2006). Common rights values were invoked as a way to end social injustice. I analysed how the understanding of and use of human rights ideas influenced the emergence of the Law, thus innovatively linking the human rights scholarship to the understudied field of process tracing on migration policymaking as well as the ideational scholarship based on primary research. Practitioners from parliament joined civil society in fighting for the rights of migrants – representing what Dembour refers to as the 'protest school' in conceptualising human rights. Once the values of social justice were 'agreed upon' (see Dembour 2010: 2) when Argentina ratified important international human rights conventions and granted them constitutional status in the 1990s, civil society asked parliamentarians and the executive for accountability in applying them to all human beings, including immigrants.

Extending individual, liberal rights to immigrants as a minority group – a process referred to in the literature as 'embedded liberalism' (see Freeman 2000; Hollifield 1992) – thus partly explains the emergence of Argentina's 2004 Migration Law. The influence of the human rights discourse on national policies proposed by Soysal (1994) and so far considered too optimistic has proved to be applicable to Argentina, due to the influence of its authoritarian past and the regional consensus at the time. The Argentine Migration Law shows that the human rights

regime can indeed influence migration politics and policies, but here in the very specific context of a democratic transition/fragile democracy and successful mobilisation of normative ideas, and not economic interests that most of the migration politics scholarship focuses on.

The study makes a contribution on how Argentina is a good example of representatives of civil society and the state, from a country that is not considered as part of influential Western powers, could develop and institutionalise new human rights norms. These latter refer, in particular, to the right to migrate and the extension of the 'aspirational application' (Acosta Arcarazo 2016) of fundamental principles codified in international law to irregular migrants. Following this logic, I argue that the human rights basis of Argentina's 2004 Migration Law is a partly unique normative approach to migrants. The uniqueness lies in the ideas behind the legislation, not the provisions which, in part, reflect regional and global practice and are rather rhetorical in application.

However, it remains to be seen whether the Migration Law can continue to be institutionalised in the long term, given the political change in 2015, and/or whether it will be followed by a significant number of other states outside the region. Argentina's Migration Law already demonstrated its potential in South America through migration laws adopted in Uruguay in 2008, Bolivia in 2013, Peru in 2015, in Ecuador in 2017 and the new constitution of Ecuador drawn up in 2008 (cf. Chapter 6). It could either represent the start of a state practice or remain a historical occurrence.

7.1.3 Migration politics: compliance, crisis and ideology

The politics behind Argentina's Migration Law are threefold (cf. Chapter 5). Firstly, they involve the regional integration process under MERCOSUR; secondly, the increase in emigration helped to protect immigrants' rights; and thirdly, the Kirchner administration wanted to change a legal legacy from the authoritarian past and ideologically supported a rights-based approach. Regarding the first point, the Argentine delegation pushed for the MERCOSUR Residency Agreement, granting residency and work rights to nationals of MERCOSUR member tates and associates. Once signed, the Argentine Government pushed for the ratification and application of the Residency Agreement domestically (Margheritis 2012), which is why nationals from the region benefit from several favourable entry categories.

The comparative increase in the number of Argentines leaving the country after the 2001 crisis represents the second factor related to migration politics. Facing a sharp increase in emigrants, and thus shifting the attention from immigration to emigration, put the issue of the rights of migrants on the political agenda. Without providing any protection to immigrants from the region, the executive could not lobby on a moral high ground for the protection of the rights of Argentine nationals abroad, in particular in Spain. The human rights coalition of the 'Migrant roundtable' (*mesa de migrantes*) used this 'soft spot' of the government and requested the same standards for immigrants in Argentina. The interest of the government of Néstor Kirchner in emigrants equally explains the inclusion of emigration provisions in the 2004 Migration Law, combining immigration and emigration in one piece of legislation. Furthermore, as the analysis of my interviews has shown, ideologically the rights basis aligned well with President Kirchner's platform. The values of social justice and accountability for human rights impeded the government's opposition to the extension of rights protection to immigrants. This human rights-based approach of the government seeking institutional legitimacy (cf. Boswell 2007) also aligned well with the regional integration process on migration, as well as with neo-populist ideologies of other left-wing governments.

This thesis thus argues that some factors led to the adoption of a reformed migration law based explicitly on human rights principles. While the notion of human rights has received great leverage in the South American region, it played a particular role in the democratic transition in Argentina in the 1980s and 1990s. This strong belief in human rights and its presence on President Kirchner's political agenda are probably explanations for why countries such as Chile and Brazil have not adopted similar laws, as these principles did not achieve the same standing and applicability in national laws. One such indicator, at least in the case of Brazil, is that the country has not signed or ratified the ICMW.[65]

7.2 New insights from the Argentine case study

This thesis has demonstrated that the case of Argentina's 2004 Migration Law is, in many ways, unique. Existing studies and theoretical approaches to migration politics can, at best,

[65] See http://indicators.ohchr.org/ (accessed 5 January 2017).

only partly explain the case study for several reasons. Firstly, not many countries in the world base their migration legislation on human rights principles, which makes comparison with other countries with somewhat opposite approaches quite difficult. Secondly, the scholarship on migration policies and, in particular, politics, focuses mostly on industrialised destination countries and on those outside this group of liberal democracies – often only in terms of countries of origin, but not in their capacity of immigrant host countries, however large or small the numbers of immigrants. Thirdly, and linked to the second point, gaps in theoretical approaches to migration politics impede the testing of hypotheses in other contexts. One such case is Argentina's 2004 migration legislation.

7.2.1 Countering geographical and control biases

The existing literature on domestic migration politics mostly focuses on explaining the control gap between restrictive rhetoric and effectively less-restrictive policies and implementation in Western liberal democracies (eg Castles 2004; Cornelius *et al*. 1994; Freeman 1995, 2006; Hampshire 2013; Hollifield 1992, 2004, 2008; Hollifield *et al*. 2014; Meyers 2000, 2004). Argentina is a democracy – albeit a more fragile one – that considers itself as having the same values as countries in the West (Margheritis 2016). However, its migration policy reform in 2004 was not driven by attempts to restrict immigration rhetorically, but rather with the aim of basing it on the notion of human rights – both in the official rhetoric and on paper. This case study questions the geographical and control bias on which most research is based, in particular Anglophone scholarship (Acosta Arcarazo and Freier 2015; de Haas and Vezzoli 2011). A small but growing scholarship on South America (Acosta Arcarazo and Freier 2015; Ceriani Cernadas and Freier 2015; Freier and Acosta Arcarazo 2015; Margheritis 2012, 2015, 2016) is better placed to explain the specificities of the case at hand.

In addition, Argentina's Migration Law, at least initially, countered the assumption that elites are following the calls for restrictiveness by public opinion in times of crisis, which was no less xenophobic in Argentina than elsewhere (Ceriani Cernadas 2015; Domenech 2011). The Migration Law is – and initially the official discourse by the government was at the time when the Law was passed – liberal. However, in practice the law excludes third-country nationals without preferential treatment, meaning that non-MERCOSUR nationals and non-Europeans still need a visa to enter the country. The liberal Law on paper – and at least initially in public

policy discourse while, at the same time, excluding certain regions – actually reverses the liberal immigration policy paradox of restrictive discourses and relatively lax implementation through having been accompanied by liberal discourses with a more restrictive implementation (Acosta Arcarazo and Freier 2015: 684). However, in the last years of her presidency, the discourse by Cristina Kirchner had become more ambivalent towards immigrants,[66] closing in on the restrictive discourses in Europe and the United States which she publicly despised as well as on public opinion. Current President Mauricio Macri (2015–present) also used immigrants as scapegoats for crimes during his previous function as mayor of the City of Buenos Aires in 2010 – a behaviour that was met with concern by the International Committee on Migrant Workers in their 2011 assessment of Argentina's implementation of the ICMW (CMW 2011: 4).

7.2.2 The case for interdisciplinarity: how ideational, social movement and transitional justice approaches can help to explain migration legislation advocacy in Argentina

In his seminal work, political scientist Freeman (1995) predicted that, in English-speaking settler societies, human rights organisations are one of the interest groups supporting an open migration policy. In Argentina, civil society was a well 'organized group' (Freeman 1995: 888) that had access to the proponents of law reform in the House of Representatives, which shared the same goals. This alliance of interests was the motor behind the law reform in Argentina, contrary to findings related for example to the UK, where the political elite's room for manœuvre was relatively independent from the interests of NGOs (Statham and Geddes 2006).

The role of civil society actors in Argentina in lobbying for a new migration law can be explained by both the important standing of NGOs on human rights matters in Argentina and the fact that the strategies used built on experience with other human rights issues. A review

[66] See, for instance, her 2014 discourse on the new penal code, both highlighting the open nature of Argentina's Law and blaming crimes on immigrants due to the need for 'protection that we Argentines deserve' in light of 'an increasing phenomenon of foreigners entering the country with the objective to commit a crime' – see http://www.casarosada.gob.ar/informacion/discursos/27974-anuncio-de-envio-al-congreso-del-proyecto-de-nuevo-codigo-procesal-penal-por-cadena-nacional-palabras-de-la-presidenta-de-la-nacion (accessed 6 January 2016).

of the historical developments since Argentina's independence in the nineteenth century highlights the importance of immigrants for building the nation state and the national identity. Yet processes that occurred during the two decades prior to the passing of the 2004 Migration Law are pivotal in the emergence of the law.

Simmons (2009) theoretically described the double alliance between civil society and parliamentarians to ensure the human rights conformity of laws after the ratification of international treaties, on the one hand, and 'strategic litigation' pursued by the civil society – executive coalition – on the other. Simmons' ground-breaking interdisciplinary work of linking the influence of human rights norms enshrined in international law conventions with actors actually being able to advocate based on these norms provides a very useful approach when applied to what is traditionally not viewed as a human rights realm: (parts of) the migration policymaking process in Argentina.

Applying the literature on ideas in politics, social movements in Latin America as well as transitional justice achievements, I have argued here that well-connected civil society actors used their experience in strategic litigation and successfully transferred it to the often sensitive topic of immigration in a unique way. I have shown that as domestic and transnational mobilization for human rights accountability was an important mechanism for activists in the recent democratic transition, NGOs could invoke these ideas in a more successful way for the migration policy reform than in neighbouring countries, such as Chile and Brazil. The experiences of the latter two neighbouring countries in dealing with human rights violations during their dictatorships were different from those of Argentina. The latter it seems could not build on civil society actors similarly well-connected with different branches of government in changing their migration legislation to a coherent human rights-based approach.[67]

The fact that civil society in Argentina developed new human rights norms linked to disappearances during the military regime highlights the innovative potential of these actors in further developing international norms. Therefore I point out how the innovations in Law 25.871 build on a track record of human rights 'made in Argentina'. Developing new norms is thus not new for the country that has been considered a 'norm entrepreneur', which is defined as 'attempt[ing] to convince a critical mass of states (norm leaders) to embrace new norms.'

[67] As of January 2017.

(Finnemore and Sikkink 1998: 895) and has confirmed this reputation by extending it to the realm of migration. The right to migrate may well be another international law principle that will be linked to Argentina's vibrant civil society, despite thus far only entailing regional acceptance and, even there, mostly rhetorically rather than on paper. The relatively high share of lawyers among the proponents of the 2004 Migration Law represented through civil society organisations helps to explain the origin of this new type of migrant right.

While, in other contexts, a strategy to advocate for new migration legislation based on human rights may well end any chance of passing such a law, in Argentina it was decisive. Since 1983, when the military junta in Argentina had to step down, human rights have been and are considered a stronghold against similar regimes and atrocities. Human rights ideas had considerable leverage due to the social justice and equality-ideological orientation of both civil society actors and the executive and legislature branches of the government which all coincided when the Migration Law was passed. In addition to the formal ratification, a widespread 'belief' in human rights, in particular in those principles enshrined in international covenants, helped the advocacy for the rights of a marginalised group of intra-regional immigrants. This work thus addresses a gap in the literature on how a country was able to establish a different, human rights-based approach to migration governance and not based on economic or other material interests.

7.2.3 Process orientation: actors, evidence and timing

As in all political matters, adopting a new law often occurs at the end of a complicated and lengthy process. Yet remarkably few studies trace migration policymaking processes and focus on actors beyond policymakers themselves (see the notable exceptions of Ellermann 2009 on the United States and Germany; and Gurowitz 1999 on Japan). Different actors with possibly diverging interests and power play a role in what a policy will look like once passed. This study addresses a gap by tracing the Migration Law reform in Argentina, which set the example for a novel consultative process which was later replicated both in other legislative reforms domestically in Argentina as well as in neighbouring Brazil and Paraguay in their migration legislation reforms. The important role which civil society was able to play in these consultations in Argentina can be explained by its historical role in achieving human rights accountability, as I have pointed out previously.

The ‘accumulation of wealth’ (Boswell 2007) or other economic motivations (Hollifield 2008: 211) have not been influential in Argentina – at least openly and traceably – neither in the discussions nor in the qualitative interviews I conducted in 2013, where I enquired about the role of employers. These private-sector representatives, who supposedly have a clear economic interest in a liberal migration policy regime, participated in the process (Interview 2, 14 November 2013, with Rubén Giustiniani) but only played a marginal role, if any. The relatively small share of immigrants in the country could be one explanation (Acosta Arcarazo and Freier 2015: 686) as could concerns about the economic crisis affecting the private sector which, by 2003 when the Law was passed, again needed immigrant labour. Migration policies in other countries tend, at least officially, to aim at cutting immigration in some areas (de Haas *et al*. 2014). As this was not the case in Argentina, business lobbyists did not have to oppose the law which facilitates labour immigration. The encompassing demand for cheap labour in the overall economic situation – which was restored very quickly after the crisis – may well have helped the passing of this Law (Interview 5, 26 September 2013).

Since, arguably, human rights NGOs did not have an economic interest in the law, political economy may not be the best approach through which to explain the Argentine case (cf. Acosta Arcarazo and Freier 2015: 686) and would need to be complemented by other theoretical considerations. It is more civil society’s interest in the ideals and values of human rights that can explain the adoption of the law.

Although not solely attributed as a success to civil society, human rights NGOs and church groups did succeed in putting the topic of migration law reform on to the political agenda. We have seen that this was also linked to the importance of emigration for the political elite and was thus a coincidence of timing. In Argentina, official data from the National Statistics Institute INDEC on intra-regional immigration were equally taken on board as figures demonstrating increasing numbers of emigrants. However, as in the case of the UK (see Boswell 2009), data and research presented by public institutions such as the Statistics Institute INDEC were considered more credible than academic studies and those by civil society (Interview 2, 14 November 2014). The free-movement aspirations of intra-regional migrants in the Migration Law reflected actual migration patterns at the time. Invoking the

migration reality has thus been in the interest of law-makers. The data were based on official statistics and used in a convincing way by different actors in the public consultations.

The study of the temporal dimension of the migration policymaking process in Argentina revealed how the timing of different events probably influenced the outcome of the policy. This analysis includes the timeline of events at the national level: the 2000 and 2002 consultations, interrupted by the severe political and socio-economic crisis of 2001 and the subsequent and linked political changes in 2003, with the new president taking office in May and the newly elected senators in Congress in December 2003, which enabled the most important proponent in the House of Representatives, Rubén Giustiniani, to vote on the legislation in both houses of parliament. The institutional procedures of the legislative process in Argentina enables the opposition – the Giustiniani represented – to pass their draft bills by consensus with a high likelihood (Calvo 2014). At the regional level in 2002, the MERCOSUR Residency Agreement was signed, which put pressure on the Argentine government to ratify its provisions. In addition, in September 2003, just months before the Migration Law was adopted in December 2003, the Inter-American Court of Human Rights published its Advisory Opinion on the rights of irregular migrant workers. This almost certainly had a positive influence on the leverage of a liberal migration law protecting these rights in Argentina. In particular, it probably influenced the willingness of the Kirchner administration to agree to a friendly settlement of the *De la Torre v. Argentina* case at the Inter-American Commission on Human Rights (cf. Chapter 4). Linked to the same regional body, the latter institution was probably planning to follow the Advisory Opinion of the Inter-American Court of Human Rights (IACtHR). The IACtHR approach has been considered to entail a '*pro-homine* bias' (Dembour 2015: 6), meaning favouring individual rights of migrants over state sovereignty. Putting Kirchner's human rights reputation at stake at the Inter-American (and consequently at the domestic) level probably helped to convince his majority party bloc to agree to the migration legislation change before civil society could 'name and shame' him with the *De la Torre v. Argentina* case.

From 1999, civil society actors thus played key roles in two parallel processes which in conjunction achieved the law reform in 2003: one at the Inter-American human rights system and one in Congress. The process tracing in this study also highlighted how civil society teamed up with both the legislature and executive after establishing a coalition amongst themselves

and with the judiciary. Each of the four coalitions achieved taking a step in the direction of passing the new Migration Law – the constitutional ranking of human rights norms with the judiciary in 1994, the commitment by the executive to change the Videla Law in October 2003 and the passing of the new Migration Law by consensus led by Population Commission President Giustiniani in December 2003.

Among these events and civil society-led alliances at domestic and regional levels, the influence of the 2001 crisis on increasing numbers of emigrants and the coalitions human rights NGOs established with all three branches of government over a decade were specific to Argentina. The occurrences at the MERCOSUR level were, however, not unique to Argentina, but had different implications in the country compared to, for instance, neighbouring Brazil or Chile. The smaller countries of Uruguay and Bolivia followed suit only after Argentina had set the example. The consultative approach applied in Argentina cannot, alone, explain the emergence of the 2004 Migration Law, but only in conjunction with several other events and the human rights context in Argentina. The stars aligned in the case of Argentina. Only replicating a few of the same factors in neighbouring countries and even in Argentina at another point in time might not achieve the same result.

7.2.4 Migration politics: rights as ideas and institutional legitimacy

The example of Argentina highlights how most existing theoretical approaches of domestic migration politics in Western liberal democracies at best only partly explain outcomes in Argentina. The influence of the past, rights being embedded in liberal policies and mobilised as ideas and non-material interests trumped other aspects discussed in the migration politics literature on liberal democracies (national security/'nationhood' (Hampshire 2013; see also Boswell 2007), and predominantly economic interests or capitalism (Freeman 1995, 2006; Hampshire 2013; Menz 2009; Tichenor 2008)). Seeking institutional legitimacy is exemplified by including NGOs in the policy-making process (Domenech 2007: 5) as well as reaching out to emigrants and probably played a role in the implementation, as demonstrated by the willingness of the DNM to correct shortcomings in the Migration Law, in particular with regards to the regularisation of persons of specific nationalities. More-recently developed theoretical models, such as those by Emma Carmel on migration governance linking actors, processes and context (2016, forthcoming) and Beth Simmons (2009) on combining the

salience of international norms with successful advocacy for applying them, in practice, through advocacy in domestic politics, are more applicable to the case study of Argentina.

Party politics played a negligible role in the migration policymaking process in Argentina in ways similar to those which Freeman (1995) described for European and Northern American countries. In Argentina 'state policies and not policies of any political party' (Interview 5, 26 September 2013) are in place. The broad consensus, sought through the large and diverse coalition with civil society, enabled any potential party politics between the party in power and having the majority in both Chambers of Congress, and the opposition party bloc in this case to be overcome. In addition, the main ideology behind the migration policy, human rights, was the key feature of President Kirchner's political agenda, which became clear only after his election (Acosta Arcarazo and Freier 2015: 667; Levy 2010: 590).

More decisive than seeking votes among immigrants or 'working class support' (Schain 2008: 468) for Giustiniani's party was the importance of human rights language in adapting existing laws to international obligations, and the government's (and Giustiniani's) interest in engaging with emigrants. Rights were used as a left-wing populist concept by the ruling party (with which the opposition party, pushing for the Migration Law, agreed), in opposition to the use of xenophobic approaches by right-wing parties to influence policymaking, and the elitist use of rights language elsewhere (Acosta Arcarazo and Freier 2015; see also Boswell 2007; Schain 2008).

Some European immigration countries, such as Spain and Portugal a few years ago, became emigration countries again due to the economic and financial crisis that started in 2008. The same occurred during the 2001 crisis in Argentina. With its inclusion of emigration provisions, the Migration Law put the country in line with other vocal origin countries. Most Latin American countries have been very active in promoting the protection of the rights of migrants in discussions on human development (Freier and Acosta Arcarazo 2015), in particular regarding their own emigrants (Mármora 2010: 86–90). This occurred especially in the South American Conference on Migration, the Specialized Forum on Migration of MERCOSUR and the Andean Migration Forum (see Freier and Acosta Arcarazo 2015; Mármora 2010: 86–90). Furthermore, the 16 December 2008 EU Return Directive (Directive 2008/115/EC), together with legislation on irregular immigrants in several US states, strengthened regional consensus

in South America against the criminalsation of irregular immigrants (Ceriani Cernadas and Freier 2015: 13).

The 'locus of decision-making' (Freeman 2000: 8) in institutions can explain the migration policymaking process in Argentina. Contrary to relying on domestic courts to extend liberal rights to foreigners (see Joppke 1998), part of the government and civil society in Argentina used a supranational institution, the Inter-American Commission on Human Rights, in order to be able to adopt a human rights-oriented approach with regards to migration. Thus, it was not transnational institutions curtailing the state's room for manœuvre but, rather, the state administration's – in this case the executive branch's – resorting to the regional human rights system to force the third government branch – the judiciary – to follow its liberal stance on migration. In the literature on domestic compliance with human rights rulings and recommendations of regional institutions, the political will of the executive, coupled with the support of the judiciary and the legislature, are identified as making an impact on human rights policies (Hillebrecht 2012). Contrary to other cases and thus underlining a diverging approach from the existing literature, domestic courts in Argentina are, thus far, undermining state policy through ignorance and non-application of the Law.

Kirchner's first term in office has shown that ideology and populism can also lead to fewer restrictions in migration policy if the focus is on the protection of emigrants and not necessarily on increased levels of immigrant selection. The examples of Argentina and other South American countries demonstrate that belief systems, especially if linked to notions of human rights, do not necessarily have to promote the exclusion of certain social groups – such as certain types of migrants – especially if focused on emigrants. This can be seen as comparable to Asian and African countries after independence, with a similar advocacy for emigrants leading to fewer entry restrictions based on ethnicity (see FitzGerald and Cook-Martín 2014: 10).

Political scientist Eytan Meyers has suggested that '"liberal policies" indicate greater willingness of dissimilar racial, ethnic, and cultural composition, while "restrictive policies" indicate a lesser willingness to accept such immigrants, instead favouring immigrants of similar composition' (2004: 11). Taking this line of argument, Argentina's 2004 Migration Law could be considered as restrictive, in the sense that it favours nationals of countries from the region.

These countries were considered to be of 'similar composition', as part of the moral high ground that South American leaders felt in comparison to supposedly restrictive immigration policies in Europe. Nonetheless, Argentina's policy could, in this type of logic, probably be considered a hybrid, as the Argentine identity remains closely linked to those of Europeans and enables all workers to enter – and, in an aspirational way, other nationalities besides Europeans and South Americans. Argentina's Migration Law and policy of 2004 is thus a lot more complex and subtle than what its proponents have put forward.

7.3 Recommendations for further research

Two main issues represent possible recommendations for further research. Firstly, a comparative approach via several case studies could be useful to test the hypothesis of several factors explaining the adoption of a rights-based migration policy beyond one specific case, and could be a focus for further research. While Acosta Arcarazo, Freier and Ceriani Cernadas have conducted comparative analyses of the rhetoric, and the actual migration policies on paper of, Ecuador, Brazil and other countries, the policymaking process in Argentina demonstrates how different interests, ideas and rights are integrated in different stages of policymaking and can thus explain the outcome. Actors, the socioeconomic and political context at the time, and structures to enable access to decision-making may account for the different outcomes. It would be interesting to compare the migration policymaking processes in Uruguay and Argentina with those in Brazil and Chile, all advanced economies in the Southern Cone.

Furthermore, more analysis of the actual implementation of migration policy in Argentina would be useful, including the role of courts. Some PhD research has focused on the jurisprudence in the city of Buenos Aires from 2004–2010 (García 2013) as well as on the implementation of the Residency Agreement in a few MERCOSUR countries, including Argentina (Vanduynslager 2015). A further systematic study on Argentina's migration policy would help to understand whether any differences between the Kirchner and the Macri administrations became apparent in realising the policy and whether other policy arenas may also have affected migration.

Since the focus of this thesis, through a rights-based approach, is the process of adoption of the 2004 Migration Law in Argentina, less emphasis has been put on comprehensively studying its implementation beyond questions to key informants (see Annex 2) and a review of the existing literature. To a certain extent, an all-encompassing analysis of the realisation of the Migration Law goes beyond the focus of this thesis, partly due to the difficulty of examining policy effects and clearly attributing it to a specific policy. Impacts are often outside the scope of just one policy by being linked to structural constraints and the impacts of other areas, such as foreign, social, integration and labour market policies (see Castles 2004; Czaika and de Haas 2013). Yet since a policy, on paper, often diverges from a policy in practice, such an analysis would help to complete any study of Argentina's 2004 Migration Law.

States are currently seeking to measure 'the implementation of planned and well managed migration policies', as enshrined in Sustainable Development Goal (SDG) 10.7 and Indicator 10.7.2 of the UN's Agenda 2030, adopted globally in 2015. One challenge in this regard is how to define 'planned and well managed migration policies'. The study of Argentina's migration policy could be a starting point in developing sub-indicators on human rights, representing the first principle of the Migration Governance Framework adopted by Member States of the International Organization for Migration (IOM 2015) and foreseen to be used in measuring SDG Indicator 10.7.2. This work can also provide input into the discussions on the Global Compact for Safe, Orderly and Regular Migration to be adopted in 2018.

Conclusion: it's the rights issue, stupid!

The adoption of Argentina's 2004 Migration Law was in many ways unique. While Argentina had been a settler country like the United States, Canada and Australia in the nineteenth and the first half of the twentieth centuries, its international standing and economic development soon fell behind other settler countries in the second half of the last century. Argentina nonetheless remained, and remains, an important immigration country in Latin America, though no longer of settlers but of migrant workers who are expected to return at some point to their country of origin – despite the focus on settlers' capacity to work early on in the history of Argentina. The shifting dynamics of the types of immigrant changed the conditions for citizenship, as migrant workers were, and are not necessarily encouraged to become,

naturalised. The country moved from the inclusion of the European settlers to the exclusion of intra-regional immigrants over the course of the twentieth century, just like the early exclusion and extermination of indigenous people in rural areas of Argentina.

The 2001 socio-economic and political crisis led to several counter-intuitive reactions, making its consequences unique. Firstly, the financial collapse of the economy shifted attention from immigration to the rising levels of emigration. Secondly, the political crisis at the end of 2001 enabled the election of President Néstor Kirchner, leading the country to adopt more or less typical origin-country diaspora outreach policies and a state policy based on human rights. In an unlikely occurrence, the crisis actually helped the protection of migrants, albeit only since the protection of emigrants' rights become a concern that needed to be met with the same level of protection at domestic level in order to make legitimate claims. This approach to expanding migrants' rights after a socio-economic crisis counters other practices where governments seem to follow public opinion calls for restricting immigration when facing an economic downturn and related rising unemployment levels. The 2004 migration legislation again focused on rights without, however, being fully able to address the still-prevalent issues of racism. Political change and the desperation of Argentines leaving the country after the crisis thus together led to an unlikely scenario whereby the protection of migrants' rights advanced beyond what had previously existed at the global level.

Argentina's case shows that countries facing large numbers of emigrants and trying to promote the protection of their rights abroad – albeit only rhetorically – could be more willing to grant the same rights to immigrants. However, few other origin countries have done so, except a few states in South America, pointing to a localised regional practice. In addition, when human rights issues have been key means of successful mobilization in a recent democratic transition, civil society may be able to apply them with more leverage to related but often separated topics such as migration compared to other countries. One could even argue that the Migration Law is thus more advanced than society where xenophobia and linking immigrants to crime continue to be prevalent and even on the rise. The strong standing of human rights organisations in civil society in Argentina enabled successful lobbying on behalf of immigrants. However, this vibrant civil society and its room for manœuvre may not exist in other countries or the issue of immigration may be overlooked in countries that tend to focus on the development mantra of 'diaspora engagement'.

Argentina further highlighted the importance of semantics. While, in the literature (and in practice), migration is often understood as a synonym for immigration, the migration politics and policy of Argentina include both immigration and emigration. In addition to the increasing importance of Argentina's diaspora members abroad, political commitments as part of the advancing political and social regional integration can explain the adoption of the 2004 Migration Law. However, the support of emigrants is largely of a rhetorical nature and not comparable with the far-reaching implications of Law 25.871 for immigrants in the country.

In 2015 the party in power changed, with the current President Macri having a track record of scapegoating immigrants for social ills. His neoliberal platform and recent Decree 70/2017 DNM 2017 represent a move away from the human-rights focus of his predecessors, with its probable implications for approaches to social protection and social justice. As in the twentieth century, this may lead to a more restrictive implementation of the migration policy due to additional laws undermining the 2004 legislation. However, Macri chose to not take the route of parliamentary law-making, but used an executive law-decree instead. The need for inter-party consensus to pass most legislation was probably one reason for not using the Congress. The recent political changes equally highlight that the adoption of the 2004 Migration Law occurred at a specific point in time in a particular human rights-prone political context in the country and region. This window of opportunity has closed in the meantime, however, making the study of this process still worthwhile for understanding an important immigration country with a recent turn in its migration patterns towards emigration.

Argentina's Migration Law is a glimpse of hope in an environment where the blame for policy failures often falls on a minority in society with little capacity to defend itself publicly. It is an inspiring example of how post-factual approaches have been successfully countered by providing the evidence on and enshrining solidarity with more marginalised groups. History will tell whether this legislation and policy can survive in times of economic recession and hardship that Argentina is facing again in 2016/2017 and whether the history of an open law undermined by restrictive policy is about to repeat itself.

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Interview	Date in 2013
2	14 November
3	23 September
4	25 September
5	26 September
7	30 September
10	7 October
11	8 October
12	8 October
17	11 October
27	22 October
28	22 October
31	26 October
33	29 October
40	9 December
42	11 December
52	17 December
53	17 December

Annex 1: List of institutions interviewed

Governmental representatives[68]

- 4 current (at the time of the interviews) and 2 former representatives of the **National Migration Directorate** when the Migration Law was passed to discuss issues related to the implementation of the policy as the DNM is the key state organ in charge of it. I was not able to interview a representative of the **Ministry of Interior and Transport** which would have been useful as the DNM and the migration policy more generally lies under its competency (see for instance article 3 of the 2010 regulation);
- 3 representatives of the **Ministry of Foreign Affairs and Worship** to discuss the implications of the migration policy for Argentina's foreign policy, a case at the Inter-American Commission on Human Rights (see chapter 4) and the discussions in the framework of MERCOSUR countries, where Argentina pushed for the migration agenda;
- 4 representatives of the **Ministry for Justice and Human Rights** as the law falls under its mandate, yet is has not been as decisive on migration matters in the institutional architecture as the DNM under the Ministry of Interior and Transport and the Ministry of Exterior;
- 3 members of the **National Congress** who participated in the preparation and passing of the law between 1999 and 2004: Rubén Giustiniani, Eduardo Santín and Juan Pablo Cafiero. Cafiero and Giustiniani were also presidents of the Population Commission in the Chamber of Deputies of the Congress during that time period;
- 3 representatives of the **Institute of National Statistics and Census** (INDEC) to discuss key migration trends, plus Lélio Mármora, who led INDEC and was previously Regional Representative of IOM;
- 1 representative of the **National Ministry of Education** and 2 representatives of the **Ministry of Health** of the Autonomous City of Buenos Aires which hosts most immigrants in the country. Those ministries are in charge of implementing articles 7 and 8 of the law (To enable access to education and health irrespective of migration status), in accordance with the regulation of 2010;
- 3 representatives of the **Ministry of Labour, Work and Social Security** as labour migration touches upon its mandate (see Taran, 2009), yet is has not been as decisive on migration matters in the institutional architecture;
- To contrast the view between the central government and provincial governments, I also conducted 2 interviews with administrators of the **provincial government** of San Luís in central Argentina. San Luís is a province that is not significantly affected by immigration or emigration but does have a reserve for indigenous tribes. Although I hoped to be able to flag regional differences, the representative of the DNM answered in the same way as those in the headquarters. For time reasons it was not possible to

[68] See here for an overview of the structure of Ministries: http://www.sgp.gov.ar/dno/Org%20Total/mes.pdf (accessed 4 February 2013).

interview local migration authorities in provinces more affected by immigration and emigration;

Civil society actors

- **migrants' rights organizations**, including the *Centro de Estudios Legales y Sociales* (Centre for Legal and Social Studies, CELS), a renown non-governmental organization active in human rights litigation since the 1980s, and the Argentine Commission for Refugees and Migrants, CAREF;
- **church groups** such as the *Pastoral para la Migraciones* due to the fact that the Catholic church plays an important role in the predominantly Catholic country;
- **academics** working on the topic, such as Prof. Pablo Ceriani Cernadas of the University of Lanús in the Province of Buenos Aires, who is currently a Vice-Chair of the UN Commission on the ICMW;
- other **civil society actors** working on migration and development such as other members of the *Mesa de organizaciones para la Defensa de los Derechos de los Inmigrantes* (Table of organizations for the defense of the righs of immigrants);[69]

Other important actors

- **international organizations** such as IOM, whose former Regional Representative for South America, Lelio Mármora, was equally involved in the consultations on the law and also worked for the Statistics Agency INDEC and currently at a private university in Buenos Aires;
- **an employers' umbrella union**;
- **a trade union** representative
- **and representatives of migrants' organizations** from Peru and Senegal to discuss the actual implementation of the law.

[69] It includes the CELS, the *Asamblea permanente para los derechos humanos* (Permanent Assembly for Human Rights, APDH), *Servicio de Paz y Justicia* (Peace and Justice Service, SPJ), *Fundación de la Comisión Católica de Migraciones* (Foundation of the Catholic Migration Commission, FCCAM), *Centro de estudios migratorios latinoamericanos* (Centre for Latin American migration studies, CEMLA), *Servicio Ecuménico de apoyo y orientación a inmigrantes y refugiados* (Ecumenical Support and Orientation Service for immigrants and refugees, CAREF) and the *Confederación de trabajadores argentines* (Confederation of Argentine workers, CTA).

Annex 2: Guiding questions semi-structured interviews (English)[70]

Before starting the interviews, I asked for the respondent's written consent to the interviews and ask whether I can record our conversation in addition to taking notes. The privacy of individuals was protected as original files are stored in an encrypted format.

Process

- What factors contributed to the adoption of the migration law?
- What role did civil society play?
- What role did the Catholic Church play?
- Did employers play a role? And unions?
- Did the crisis play a role?
- Do you think this law could be replicated anywhere else in the world? If no, why?

Regional integration

- Did the regional integration under MERCOSUR influence the development, content and adoption of the law?

International and regional human rights conventions

- Was the general approach influenced by regional and global conventions?

Implementation

- Is the migration law of 2004 implemented well?
- If not, what are areas that you know are problematic when it comes to its implementation and why?
- Do you think rights of emigrants are now better protected?
- Is there still discrimination and racism?

The concepts and discourse

- What do 'human rights' mean in Argentina?
- How would you define 'human rights'? Do you think this definition is universally held or controversial?

[70] In Argentina I used the Spanish translation.

- Does the migration policy constitute an ideological (paradigmatic) change compared to the previous policy?