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Recent Past Argentine Migration Policy: The Symbolic Role of Law and Human Rights

Política migratoria argentina reciente: función simbólica del derecho y derechos humanos

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ABSTRACT

Executive Decree 70/2017 profoundly modified the legal regime for migration in Argentina. This article aims to analyze the use of this legal reform as a symbolic instrument of criminal policy and contrast them with human rights standards. The methodological approach combines legal analysis with the theoretical study of the reform. The work shows that the decree sought to link immigration and criminality and convey a message of firmness from the State in the fight against crime. As well as provide an update of the debate on the legal reform considering what happened subsequently. It is concluded that the reform has increased the margins of state discretion, generating a greater degree of legal insecurity for migrants. Although limited to a specific national case, the research may have theoretical implications for the study of similar cases.

Keywords: 1. migration policies, 2. symbolic function of law, 3. human rights, 4. Argentina, 5. Latin America.

RESUMEN

El decreto 70/2017 modificó profundamente el régimen legal de las migraciones en Argentina. El objetivo de este artículo es analizar el uso de esa reforma legal como un instrumento simbólico de la política criminal y contrastar su contenido con los estándares de derechos humanos. La aproximación metodológica combina el análisis jurídico con el estudio teórico de las transformaciones estudiadas. El trabajo muestra que el decreto buscaba vincular inmigración y criminalidad y transmitir un mensaje de firmeza del Estado en la lucha contra el delito y aporta una actualización del debate sobre la reforma legal a luz de lo sucedido con posterioridad. Se concluye que la reforma ha aumentado los márgenes de discrecionalidad estatal, generando un mayor grado de inseguridad jurídica para los migrantes. Aunque limitada a un caso nacional concreto, la investigación puede tener implicaciones teóricas para el estudio de casos semejantes.

Palabras clave: 1. políticas migratorias, 2. función simbólica del derecho, 3. derechos humanos, 4. Argentina, 5. América Latina.

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INTRODUCTION

The issue of migration has been very present throughout Argentine history ever since the national State was established in the 19th century. Important changes in immigration policy have taken place since then, the last of which occurred four years ago with the issuance of Executive Decree 70/2017. This decree altered fundamental aspects of immigration policy, such as the conditions of entry and stay in the territory, the administrative and judicial procedure regime, and the circumstances under which imprisonment of migrants is possible. The decree first thought of as a criminal policy instrument, reinforced the elements of the *security paradigm* on migration, to the detriment of the *rights paradigm* (Treacy, 2020).

The goal of this paper is to examine this decree and its impacts from two points of view: that of the message it sends and that of human rights.[2] Both approaches are closely related, as we are to see. Section two will set the context by introducing the generals of the historical evolution of Argentine immigration policy. In section three the reform is addressed globally to evidence the messages sent by means of the decree, understood as a symbolic device. Section four addresses some specific aspects of the reform in greater detail, to contrast its provisions with normative constitutional and international human rights.

It is necessary to first explain some methodological details. First of all, it should be noted that this paper aims at studying the 2017 reform as a symbolic instrument. Further details about what is understood by the symbolic role of law will be provided in section three. What should be clear in any case is that this work understands the law as a discursive instance. Otherwise said, the empirical effect of law in the formation of social representations is not addressed here, nor, conversely, the incidence of social representations in the creation and interpretation of the law. There are other works available addressing these matters, and the interested reader should refer to them (González & Tavernelli, 2018).

Second, there is a clear link between the creation and application of the law, mass media, and public opinion (Luhman, 2000). However, and following what was said in the previous paragraph, this aspect will not be dealt with here either. In this sense, whenever press articles are mentioned, it is not to consider them objects of analysis in themselves, but only because they provide some relevant information for the study of law as a discursive instance.

Third, although the main message of the reform was the resoluteness of the State in the face of criminality, the extent to which the immigration reform has been an effective criminal policy tool will not be addressed here either. Instead, the way in which various provisions of the immigration regime were modified in the pursuit of this goal, and the compatibility of the new state of affairs with normative human rights, will be discussed. The main hypothesis is that, beyond the particularities of this or that specific amendment, the decree has expanded the spaces of legal uncertainty, not only because it has expressly given greater discretionary powers to

[2] After the editorial acceptance of this paper, Executive Decree 70/2017 was repealed in its entirety by Executive Decree 138/2021. Thus, the reforms introduced by the former in the Law on Migration were without effect. However, the study carried out for this article remains valid as an analysis of what happened at a certain moment of Argentine immigration legislation.

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administrative authorities, but also because of the great ambiguity resulting from the very poor drafting of the modified legal dispositions.

Fourth, it must be understood that this analysis does not cover the overall recent Argentine immigration policy. On the one hand, because the article focuses only on some relevant aspects of the 2017 reform; on the other, because altogether with the explicit migration policies resulting from formal regulations such as those detailed herein, there are migration policies implicit in the practices of the agents involved in migration management (Mármora, 2002). This paper does not empirically address the practices of migration management agents.

Finally, it should be made clear that the constitutive ambiguity of the 2017 reform, which is as already stated an essential element in the creation of spaces of legal uncertainty, is not exclusive to it. It is a fact acknowledged by legal sociology that in many Latin American countries it is not easy to determine exactly what the current governing law is. This situation may be due not only to radical situations of *legal pathology* derived from the impossibility of identifying the rule of recognition (in Hartian terms) (Garzón Valdés, 1982) but also simply to the scant care taken in the technical preparation of legal regulations, as is the case of the reform hereby studied.

THE EVOLUTION OF IMMIGRATION POLICY IN ARGENTINA

The current Constitution of Argentina was implemented, in its original text, in 1853. The authors of the Constitution saw immigration as a key element in the construction of the State and for its economic development. The constitutional text approved in 1853 outlined a project of the population by European immigration for the vast Argentine territory. However, neither the 1853 Constitution nor any of its subsequent reforms fully equated foreigners to Argentine nationals, nor did they establish an unlimited right to enter and stay in the territory (for immigration policy in the Constitution see Arlettaz, 2018).

Article 25 of the Constitution, in force and unchanged since 1853, establishes the duty of the federal government to promote "European immigration" and prohibits it from "restricting, limiting or imposing any tax on the entry into the Argentine territory of foreigners who aim to till the land, improve the industries, and introduce and teach sciences and arts." The 1853 Constitution is not meant to protect just any type of immigration, but only *useful* immigration (that is, one that can contribute to the country in terms of its development). This makes it evident that the immigration policy of the 1853 Constitution was not based on a —back then non-existent— conception of a human right to migrate as part of a personal life plan, but rather on a collective economic and social development project. That is why the Constitution makes a distinction between welcome and unwelcome foreigners. As a court ruling was to state years later, foreigners who are not welcome "cannot adduce an individual right more powerful than that of the sovereignty of the State on which the right to prevent them from entering the country or to expel them if they already entered is based" (Federal Court of the Capital, 1932, p. 362).

The immigration program of the 1853 Constitution takes into full account the civil equality of nationals and foreigners outlined in Article 20, also in force today in its original wording. Despite this equalization, the law can subordinate the enjoyment of civil rights by foreigners to the regularity of their stay in the territory, as the Supreme Court of Justice has admitted on

several occasions (1932a; 1932b; 1934; 1967; 1980). However, certain rights cannot be subordinated to that condition, such as those that have to do with the person's dignity or with access to courts of law.

The first law on migration was the Immigration and Colonization Law (Law 817, 1876), known as the *Avellaneda Law.* This well-documented law (Novick, 2008) aimed at promoting immigration; it did not establish a general regime on the status of foreigners, but only specific rules on the colonization of the territory from the point of entry of foreigners on (although various subsequent decrees regulated the status of foreigners not covered by this law).

Immigration, as favored by the Avellaneda Law, allowed the massive arrival of Europeans, mainly Italians and Spaniards, from the end of the 19th century to the middle of the 20th. Among them, anarchist, socialist, and trade unionist militants could be found, who were perceived as a threat to the established order. Two laws were thus implemented that made it possible for the expulsion of foreigners deemed dangerous to public security and order: the Residence Law of 1902 and the Social Defense Law of 1910. The Criminal Code of 1921 (Law 11179) repealed the Social Defense Law (1910). The Residence Law (1902) was repealed in 1958, then re-established in 1969, and finally repealed definitely in 1973. The repressive purpose and biologicist inspiration of both laws were openly admitted. An observer of the time stated that it was an inherent right of sovereignty that of "organizing the exclusion of all *unhealthy elements* that may be *seeds of disturbance* not harmonizing with the constitutional structure to which organized society obeys" (emphasis added) (Prosecutor in the Court of Original Jurisdiction, 1932, p. 350).

In the long period between the implementation of the Avellaneda Law (Immigration and Colonization Law, 1876) and its repeal in 1981, a varied regulation of lower rank completed the legal regime, in a not always harmonious and coherent way. Among the regulations from this period, the following can be pointed out, which are relevant because of their connection with the security control of migrations (the first four examples cited below) or because of their general nature (the last example). During the government of Victorino de la Plaza, two decrees were approved (Executive Decree without number 1916a & 1916b) that required immigrants who were to enter the country certain certificates, decrees that were rigorously observed during the government of Hipólito Yrigoyen. In 1923, during the presidential term of Marcelo T. de Alvear, regulation of a restrictive nature was also approved that followed along the same line. A decree implemented during the government of Agustín P. Justo required having an employment contract as a requirement for immigration (Executive Decree without number, 1932). During the government of Arturo Illia, a new migration decree was issued (Executive Decree 4418/1965).

The General Law on Migration and the Promotion of Immigration (Law 22439, 1981), also known as the *Videla Law*, replaced the Avellaneda Law in 1981. Dictated under the inspiration of the doctrine of national security, it was strongly permeated by a conception of migration as a public order problem (Novick, 2008). Unlike the previous law, the new one did contain a general regime on the status of foreigners. It is a generally accepted fact that the 1981 law favored excessive bureaucratic logic and arbitrary administrative practices in migration management (Rodríguez Miglio & Toledo, 2009).

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Meanwhile, there was a change in the profile of the migration flows entering Argentina. Since the 70s and with greater emphasis from the 90s of the 20th century on, the country came to receive migrants from other Latin American countries, and to a lesser extent from Asia. On the other hand, the recovery of the constitutional order in 1983 had an ambiguous effect on immigration policy. During the government of Alfonsín, the regulatory decree that specified the *Videla Law* (Executive Decree 1434/1987) was issued, which somehow softened its rigor, yet at the same time and as a consequence of the serious economic crisis of the late 80s, access to residence permits was restricted to people of a particular professional or economic profile. During Menem's administration, a new regulatory decree of the law was issued (Regulatory Decree of the General Law on Migration and the Promotion of Immigration, 1992), which expanded the powers of the administrative authority for migration control, and by which various provisions that brought in strong security overtones into migration management were implemented (Courtis, 2006; Aruj, Oteiza, & Novick, 1996).

In contrast to this restrictive policy, a constitutional transformation had an indirect, and perhaps unexpected, effect on migration policies. The 1994 constitutional reform provided a constitutional hierarchy to a set of international human rights treaties. This means that these treaties, among which are the American Convention on Human Rights (1969) and the International Covenant on Civil and Political Rights (1966), hold the same normative force as the Constitution (on the incidence of the American Convention in migration matter, see Arlettaz, 2014; Arlettaz, 2015). To the extent that these treaties account for many rights to which all people are entitled (regardless of their nationality or immigration status), the 1994 reform meant an expansion of the reach of the constitutional protection of migrants.

In 2004, the *Videla Law* was succeeded by the Law on Migration currently in force and on which there are multiple studies available (Novick, 2004; Chausovsky, 2004; Hines, 2010). The new law, despite its frankly improvable legislative technique (Gordillo, 2004), is driven by a guaranteeing spirit much more in line with constitutional principles and international human rights law. A few years later the regulatory decree of the law was implemented (Executive Decree 616/2010). In January 2017, the Executive Branch introduced a large number of changes to the Law on Migration by means of an emergency decree without prior Congress approval (Executive Decree 70/2017). Very defective technique was used, which led to greater confusion in the drafting of a law that, as stated lines above, was not characterized by conceptual precision, to begin with.

The 2017 decree shortened the term of the provisional residence permit (a permit granted provisionally while the definitive one is processed) and created a new type of permit (that of temporary residence) valid for the duration of the procedure of administrative or judicial appeal against the resolution of the migratory irregularity. The decree also increased the number of reasons to prevent the entry and stay of foreigners, the cases in which a residence permit can be revoked, and those in which previously expelled foreigners can be banned from re-entering the country. Also, a *summary special immigration procedure* was instituted (aimed at expediting the expulsion of foreigners), cases in which imprisonment can take place before expulsion were added, and the requisites to access certain procedural guarantees were modified.

THE 2017 REFORM AND THE SYMBOLIC ROLE OF LAW

Fighting Crime

The symbolic role of law, that is, the function of law to *make statements* as opposed to its function of *controlling behavior*, has received increasing attention from specialists (Díez Ripollés, 2002; Sunstein, 1996; Hassemer, 1995). This symbolic role of law is usually contrasted to its *instrumental role*; or in other terminology, its *expressive function* to its *material function*. This contraposition may be somewhat artificial: given the linguistic nature of law, any of its functions or roles will necessarily be symbolic.

In fact, a whole tradition of legal sociology understands the law as the form par excellence of legitimate symbolic violence whose monopoly belongs to the State, and which can come along with physical violence. This tradition would explain that, from a language that is intended to be neutral and universal, the body of legal texts, authoritatively interpreted by a group of specialists invested with specific social and technical competence, embodies the legitimate vision of the social world. The State is in turn the principle producing this legitimate representation, that is, the principle of organizing consent as adherence to the social world (Bourdieu, 2014; Bourdieu, 1986).

Even considering that generally the law always functions as a symbolic device, in this paper, we still keep to the contraposition set forth above. Thus, we will make use of the expressions *instrumental function* or *material function* to show how the law seeks to directly control behaviors; and on the other hand, we will make use of the expressions *symbolic role* or *expressive role* to refer to the capacity of the legal system to arouse emotions or evaluative representations in the population and thus indirectly guide behaviors. We are aware, of course, that both functions are located in a continuum and not in radical opposition.

The symbolic role implies a displacement of meaning: it is implied to the extent that a mediate meaning is pointed out, added to the immediate meaning of the action itself (Gusfield, 1967). Certain negative aspects of the symbolic use of law have been exposed, such as when the symbolic dimension of a constitutional text is hypertrophied to hide its material ineffectiveness (Neves, 1994, p. 132). The symbolic dimension can of course also have positive effects, for example when the constitutional text is symbolically exploited in favor of overcoming an authoritarian political tradition (Neves, 1994, p. 162); another example would be that the symbolic exploitation of human rights can contribute to overcoming concrete situations where those rights are transgressed against (Neves, 2004).

The 2017 decree itself stated among its purposes that of increasing State control over the migrant population.[3] As shown elsewhere (Canelo, Gavazzo, & Nejamkis, 2018), several government officials made public statements endorsing the tightening of control over the migrant population. Human rights organizations drew attention to this hardening of the *security-driven* discourse (Amnesty International, 2017).

[3] The symbolic role of law should not be identified with hidden functions (*latent functions* as opposed to *manifest functions*, in sociological language). Some symbolic roles of law are clearly recognized as such by the legal agents involved, as is our case here.

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In a way, the instrumental function of the decree was to drive migration policy into a more restricted sense, increasing the power of the State to safeguard a public order that was presented as in need of protection, for reasons that the decree itself disorderly stated: excessively long administrative and judicial processes; presence in the country of foreigners with criminal records, and the link between organized crime and foreigners; difficulties in enforcing the expulsion of foreigners.

To this instrumental function of the decree, an equally visible symbolic one was added: that of showing the resoluteness of the State in the face of crime (Courtis & Penchaszadeh, 2020; García & Nejamkis, 2018). This dimension of the reform was acknowledged by President Macri himself, who when announcing the reform stated that he was not to allow "criminals to continue choosing Argentina as a place to come and break the law" (El Día, 2017, n/n). Regardless of whether the link between criminality and foreigners referred to in the decree was relevant or not, there was a legislative overreaction to the problem of crimes committed by foreigners: the modifications included in the reform affect the global universe of migrants regardless of an eventual conflict with criminal law. Here we can see what has been called *activist laws* (Díez Ripollés, 2002, p. 92), that is, laws that seek to arouse among citizens a sense of confidence that something is being done in the face of unresolved problems, regardless of the actual effect of the legal norm on such problems.

The link between migration policies and criminal policies is not new or exclusive to Argentina, as other studies have shown (Stumpf, 2006). Intertwining migration and criminal law is a known strategy to construct migration as a problem for the security of the host country. This construction serves to position the State (and the government currently in power) as an active defender of the interests of nationals against strange and threatening foreigners. In its action of conveying the message of the State's resoluteness in the face of crime, the 2017 reform built an image of the immigrant as a strange and threatening *other*, thus justifying the exercise of increased State power of vigilance.

Fernández, the current president who succeeded Macri in 2019, was in favor of repealing the decree that, by preventing the entry or stay in the country of people with a criminal record but without a final criminal conviction, "punishes [migrants] under the mere presumption" of them having committed a crime (Infobae, 2020, n/n). However, one year after taking office as president, the decree remained in force.[4] On the other hand, it should be clarified that although the decree reinforced the security-oriented direction of the migration legislation, this change was more one of degree than of quality: the law in force when the reform took place already allowed, in some cases, to consider criminal records without a final criminal conviction.

Excessive Presidential Power

The activist nature of the reform is evidenced, for example, in the medium employed to undertake it: an emergency decree without prior Congress approval issued by the President. Legislative power in the Argentine constitutional system corresponds to the Congress, the Executive Branch intervening to the extent determined by the Constitution itself. According to

[4] See note 2.

the Constitution, provisions of a legislative nature issued by the Executive Branch are absolutely and irreparably null and void (Constitution of Argentina, 1853, Article 99, subsection 3). The Constitution does however include an exception: thus, "when exceptional circumstances make it impossible to follow the ordinary procedures established by [the] Constitution for the enactment of laws," the Executive Branch may "issue emergency decrees without prior Congress approval" (Constitution of Argentina, 1853, Article 99, subsection 3).

The Supreme Court has set strict standards to determine when such extraordinary circumstances are met (Supreme Court of Justice, 1998; Supreme Court of Justice, 2002; Supreme Court of Justice, 2010). However, recourse to emergency decrees without prior Congress approval has been growing within the framework of a trend towards strengthening presidential authority, to the detriment of other State branches (Cherny, Feierherd, & Novaro, 2010; Ferreira Rubio & Goretti, 1996). The introduction of a reform to the Law on Migration by way of an emergency decree without prior Congress approval seems to fit in with this trend of advancing presidential power. According to the Constitution, immigration is a strictly legislative matter (Article 75, subsections 12, 17, 18 & 19, among other constitutional provisions), and so its regulation must be made by Congress. Only under the "exceptional circumstances" noted above could it be admitted for immigration matter to be decided by the presidential power.

The message of fighting crime implicit in the decree and the recourse by the Executive Branch to excessive powers are intimately related. Indeed, it was the urgency to fight crime that shaped, in the opinion of the individual issuing the decree, the need for constitutionally approved "exceptional circumstances." This emergency scenario that called for an exceptional solution was thus built. To serve this purpose, a discursive strategy was deployed that sought to transform a social phenomenon into a crisis that called for rapid State action. The issue of migration was developed into a *social problem* (Spector & Kitsuse, 2001), that is, into a set of harmful or unfair facts meriting a public response.

However, as evidenced (Ombudsman's Office of the City of Buenos Aires, 2017), the criminal statistics used to justify the decree are strongly biased. It was the decree itself that built a threat, sent the message that this threat was being fought, and then relied on that fight as an argument to resort to extraordinary powers. This of course does not imply that there is no transnational (in some cases, very serious) criminality or that there are no foreigners in conflict with criminal law. Nor does it imply denying that migration policies can sometimes be useful in the fight against crime. Yet in the case studied, there were no extraordinary criminal dynamics at the time the decree was issued that needed to be urgently addressed. In 2017 and 2018, two important court rulings declared the reform decree as unconstitutional, as it had been issued without meeting those "exceptional circumstances" (National Court of Appeals in Administrative Federal Matters, 2018a; Federal Chamber of the National Court of Appeals in Civil and Commercial Federal Matters, 2018). This matter is still waiting for a final response from the Supreme Court of Justice.

Regardless of which is the correct solution from a legal point of view, the decree clearly stated the President's intention to show (another of the symbolic roles of the reform) his determined action to face a situation presented as problematic. This presidential undertaking was favored by an institutional regime that cares little for controlling the presidential exercise of excessive

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powers. In those cases in which the Constitution (Constitution of Argentina, 1853) allows the president to exceptionally exercise legislative powers, it does require for the issued decree to be presented before a Permanent Bicameral Committee that must report to the Chambers of Congress, to expressly examine it (Article 99, subsection 3). The law on emergency decrees without prior Congress approval provides that as long as Congress does not reject the decree, it will remain in force (Article 17). However, for the decree to be considered rejected, both Chambers must issue negative resolutions (Article 24).

The regime of this law is hardly in accordance with the spirit of the Constitution since it allows a president who only has the support of one of the Chambers to legislate through decrees, without the Congress being able to reject them. Moreover, the law provides that the acceptance or rejection by Congress must be expressed (Article 22), yet it does not establish what happens if Congress is indefinitely silent. In such a case, in fact, the decree remains in force. And this is what happened in the case of immigration reform: Congress has not yet spoken.

The relationship between the symbolic role exercised (showing the resoluteness of the State and the leading role of the presidential power in the fight against crime) and the legal uncertainty resulting from the reform should also be noted. This uncertainty is due, on the one hand, to the greater decision-making power granted to the administrative authority, that is, to a bureaucratic structure that depends on presidential power. State resoluteness and the leadership of the Executive Branch are implied not only by the instrument of the reform (a presidential decree) but also by its content (the increase in administrative discretion).

On the other hand, this uncertainty also stems from poorly drafted legal precepts. It cannot be ruled out that in this case uncertainty is linked to the instrument chosen for the reform: an *emergency* decree without prior Congress approval. Legal regulation under a permanent emergency regime is a constant in Argentina. Legal uncertainty is possibly avoidable and yet not avoided the effect of legislative improvisation.

THE 2017 REFORM AND HUMAN RIGHTS

Entry and Stay in the Territory

The State's power to regulate the entry and stay of foreigners in the territory cannot be exercised in a discretionary manner. According to an old jurisprudence of the Argentine highest court (Supreme Court of Justice, 1913, 1990), reinforced by international human rights treaties,[5] the exercise of this power is subject to the principle of legality. The law must be sufficiently clear

[5] The American Convention on Human Rights (1969, Article 22, subsection 6) and the International Covenant on Civil and Political Rights (1966, Article 13) make explicit the principle of legality in relation to expulsion, although only for foreigners whose presence in the territory is regular. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) also provides that migrant workers and their families, in a regular or irregular situation, can only be expelled in compliance with a decision by the competent authority in accordance with the law (Article 22, subsection 2); in the case of migrant workers or their family members who are in a regular situation, the grounds for expulsion must also be provided for in the law (Article 56, subsection 3).

and predictable, which is why it is of particular importance to determine the circumstances that make it possible to prohibit the entry or expulsion of a foreigner from the territory.

The Law on Migration sets forth these circumstances in two articles: Article 29 sets forth the impediments to entry and stay in the territory; Article 62 regulates the grounds for revocation of the residence permit. The relationship between the two provisions was problematic before the 2017 reform and continues to be so after it. Without delving into the detailed technical-legal matter here, we will assume that Article 29 sets forth a generic list of impediments (applicable to the entry and stay of those who do not have a residence permit, including those who are in an irregular situation in the territory, taking into account that the irregularity is in itself an impediment to stay) and that Article 62 sets forth the grounds for revoking a residence permit already granted. The wording of both articles was already confusing, not only because of its overloaded, ambiguous, and repetitive tone but also because one article would refer to the other in a manner not always clear.[6] The 2017 reform, as we are to see, did not improve upon this.

The circumstances that were only mentioned as impediments to entry and stay have not been modified: the existence of an entry ban, circumvention of immigration control, non-compliance with the requirements established by law (such as not having a residence permit when the law requires it, that is to say, to be in an irregular situation) and impediments for establishment. The circumstances that were only grounds for revocation of the residence permit have also remained unchanged: absence from the country for a certain time, non-compliance with the conditions of establishment in the country when subsidized, and denaturalization of the circumstances that had justified the granting of the residence permit.

Conversely, some circumstances that functioned at the same time as impediments to entry and stay and grounds for revocation of the residence permit have been modified. Prior to the reform, showing false or altered documentation impeded entering and staying, and grounds for revocation of the permit; the simulation of facts or incurring fraud to obtain immigration benefits was also grounds for revocation of the permit. To these impediments and grounds is now added the omission to report on criminal records and judicial or security forces requirements, thus implicitly creating the obligation to report on those records and requirements.

Before the reform, prison sentences for three years and up impeded entry and stay; sentences for crimes of moral turpitude meriting imprisonment for over five years, or recidivism in the commission of crimes were grounds for revocation of the residence permit. After the reform, any sentence (even if not final) for a crime meriting imprisonment is an impediment to entry and stay, and grounds for revocation of the permit; and any record for these crimes is an impediment to entry and stay. But it also lists certain specific crimes that are impediments (in case of a sentence, even if not final, or a record) and grounds (in case of a sentence, even if not final):

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[6] As an example, subsection b of Article 62 established that the revocation of residence due to a prison sentence should be ruled definitively once the sentence has been served, based on "the *possible* incursion by the foreigner into the impediments provided for in Article 29." Why *possible* incursion? Article 29 established a lower standard than Article 62: any criminal conviction in Article 62 necessarily fitted Article 29. Furthermore, the deadline for revocation of residence was extremely peculiar: no earlier than two years after the sentence had been served, not after two years and thirty days.

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trafficking in weapons, people, drugs, organs or tissues, money laundering, investments in illegal activities, and corruption offenses. It is not clear why this special enumeration is added (except for the aforementioned symbolic role of conveying resoluteness) since for all practical purposes all the crimes listed merit prison sentences and are included in the general regulation.

Other circumstances that were impediments and grounds have remained unchanged: participation in acts of terrorism, genocide, war crimes, crimes against humanity, any other act meriting judgment by the International Criminal Court or falling within the criminal regulations for the protection of the democratic regime. But the reform has caused some circumstances that were only impediments (but not grounds) to fall into both categories: the facilitation, for-profit purposes, of the illegal entry, stay or exit of foreigners (only the sentencing, before the reform; the sentencing or "having incurred or participated in," after the reform); having shown false documentation for the obtainment of an immigration benefit (before and after the reform, as long as there is a sentence or record); certain acts related to prostitution (the wording being so confusing that it was not and is not clear whether a sentence, a record or mere participation was and is required).

In principle, the noted defects in drafting are a technical issue related to the wording of the laws. However, this wording has obvious human rights implications. The Law on Migration regulates a right recognized in the Constitution and international treaties. The regulation of rights must be clear and predictable. Technically flawed legislation can violate the elementary principle of legal certainty. In fact, the National Directorate of Migration itself recognized in a judicial proceeding the error of an expulsion decision issued based on a confusingly drafted legal precept (Court of Appeals in Administrative Federal Matters No. 4, 2003).

On the other hand, how the impediments and the grounds were drafted was and is very varied, as has been noted. In some cases, a criminal sentence is required, in others, it is enough to have a record,[7] and sometimes the mere participation in certain activities (leaving open the question of how it is verified that someone has incurred or participated in a certain act —for example, in an act of promoting prostitution— if there is no sentence for it) will suffice. The confusion is such that certain acts (such as, for example, terrorism) were and are mentioned twice in the law: in one case the mentioned circumstance is "having incurred or participated" and in another "having a record, having incurred or having participated."

This disorder of expressions not only violates the principle of legal certainty but also raises a serious question on the presumption of innocence. Because if in some cases it can be considered admissible to prohibit entry or stay in the country based on a simple administrative finding (for example, in the case of circumvention of immigration control), in other cases it is more than doubtful that the administrative authority can act without a prior sentence issued by a judge.

In summary, the reform produced a hardening of the conditions of entry and stay in the territory by modifying the impediment regime and the grounds for revoking the residence permit.

[7] The reform has clarified in the text of the law what is understood by *record* ("any final indictment, closure of the preparatory investigation or comparable procedural act"). However, Executive Decree 616/2010, which regulates the Law on Migration (2010), contained (and contains, because the 2017 reform did not modify it) a different definition of what is understood by record ("the non-final sentence or the final processing").

This hardening is not, in itself, contrary to normative human rights. The problem here is the uncertainty resulting from inadequate drafting of law regulations. An abstruse legal regime hinders the normal action of legal agents and ends up harming citizens. This merits an example: in May 2018, the Supreme Court of Justice decided that the expulsion of a person of Peruvian nationality, issued in 2010, was not admissible (Supreme Court of Justice, 2018). The whole discussion revolved around the interpretation of Article 29: there were no other questions of fact or law being debated. The imprecise wording of a legal article led the Argentine administrative and judicial system to spend eight years arguing about its correct interpretation, with the consequent uncertainty for the State and, above all, for the people involved.

Family Reunification, Stay in the Country, and Humanitarian Reasons

The application of the impediments to entry or stay and of the grounds for revocation of the residence permit is not automatic. Due to the requirements of human rights standards, the State may be forced, in some cases, to balance its (legitimate) interest in prohibiting the entry or expulsion of a foreigner with other (equally legitimate) interests of the foreigner himself to enter. Thus, multiple human rights instruments protect family life,[8] forcing the State to take the family ties of the person affected by the prohibition of entry or expulsion into account. The Supreme Court emphasized the importance of family reunification by pointing out that, in any case, making the State's interest in preventing the entry or expelling a foreigner prevail, thus breaking family ties, could have "irreparable damaging consequences to all members of the family for the possible actions of one of them" (Supreme Court of Justice, 2007, p. 4560). On the other hand, it is possible that in some cases the State must take into account, before ordering the expulsion, how long has the person lived in the country, since it would not be reasonable for a minor offense to prevail over a long stay (see Supreme Court of Justice, 1944; Supreme Court of Justice, 1956). Finally, in some cases, there may be humanitarian reasons that advise against banning entry to or expelling a foreigner.

The original version of the Law on Migration did set forth the possibility of dispensing with impediments to entry and stay, as well as the grounds for revocation of the residence permit (Articles 29 & 62). There were three avenues for this: 1) the National Directorate for Migration, after intervention by the Ministry of Home Affairs and by means of a well-founded resolution, *could* waive the impediments to entry and stay for humanitarian reasons or family reunification; 2) the Ministry of Home Affairs *should* waive with the grounds for revocation of the residence permit if the foreigner was the father, son or spouse of an Argentine unless a duly founded decision was otherwise made; 3) the Ministry of Home Affairs *could* waive with some of the grounds for revocation of the residence permit (fraud in obtaining the permit, criminal conviction, absence from the country or denaturalization of the granting circumstances) in response to the period of stay of the foreigner in the country (which should be no less than two years, legal and immediately before incurring in the grounds for revocation) and taking into account their personal and social circumstances.

[8] American Convention on Human Rights (1969, Article 17). International Covenant on Civil and Political Rights (1966, Article 23). International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990, Article 44).

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The disparity of these avenues was an obvious technical incongruity. On top of that, two of the three avenues were possibilities yet not obligations for the administration, and so the situation of the foreigner was at the mercy of administrative discretion (Ceriani, 2005). After the 2017 reform, the dispensation corresponds exclusively to the National Directorate for Migration (Articles 29 and 62 according to the new wording), thereby partially softening said technical inconsistency. However, the disparity of the reasons for dispensation remains: 1) the impediments to entry and stay can be dispensed for reasons of family reunification, humanitarian reasons, or reasons of aid to justice (that is, if the foreigner provides accurate, verifiable, and credible information on the commission of a crime against the immigration order); 2) the grounds for cancellation of the residence permit may be waived if the foreigner is the parent, child or spouse of an Argentine. In the second case, to grant the waiver, the time that the person has been residing in the country must be taken into special consideration. In this sense, it seems that the waiver mechanism for entry and stay impediments should also apply to the grounds for revocation of the residence permit since the former is broader than the latter and it is not reasonable that whoever has a residence permit is in a worse situation than someone who does not.

Now, after the reform, not every impediment or any grounds for revocation may be waived. The impediments of false statements or omission to report on criminal records, entering the country avoiding controls, non-compliance with the requirements of the law, and sentences or records for crimes meriting imprisonment may be waived (in the latter case, provided that the crime of moral turpitude does not merit more than three years). The grounds for revocation due to fraud, imprisonment (as long as it was due to a negligent offense or crime of moral turpitude meriting a prison sentence of no more than three years under national legislation, and that it was not due to any of the particularly serious crimes listed apart), and denaturalization of the reasons for granting the permit can be waived. The reform also added requirements for the waiving of impediments or grounds for family reasons: it is now necessary that the coexistence is accredited, and that the foreigner had not emotionally or financially distanced from the person whose family bond he invokes. These added requirements were criticized by international bodies (Committee for the Protection of the Rights of All Migrant Workers and Members of Their Families, 2019).

The reform also reinforced the margin of administrative discretion, the waiver being optional in all cases. Vanessa Gómez Cueva, a Peruvian national, was expelled from the country in 2019 due to a four-year prison sentence for drug trafficking. The expulsion took place even though the sentence had already been fully served and that it meant separating Mrs. Gómez from two of her children of Argentine nationality, one of them still of breastfeeding age. Faced with criticism from civil society organizations and international bodies, the Argentine State finally rectified, granted a waiver, and annulled the ban on re-entering the country (Center for Legal and Social Studies, 2019). The entirely discretionary nature of the waiver could be, in some cases, contrary to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), according to which at the time of the expulsion of a migrant worker or family member in a regular situation, the State *must* take into account any humanitarian considerations and the time the person has been living in the State (Article 56, subsection 3).

On the other hand, according to the amended text, a waiver for the impediments and grounds for revocation cannot be judicially granted (Article 62 bis). In 2020, the Supreme Court declared, in a case resolved in light of the Law on Migration in the version before the reform, that in those cases in which the law left the waiver to the discretionary decision of the administration, this decision could not be replaced by judicial authorities (Supreme Court of Justice, 2020). In other decisions made before the Supreme Court ruling, but already after the implementation of the reform regime, even if the judicial authority did not grant the waiver, it did annul the expulsion decision and ordered the administrative authority to re-study the matter, considering the family situation of the migrant (something the administrative authority had not done) (National Court of Appeals in Administrative Federal Matters, 2018b).

It is logical that in the cases in which a legislative regulation leaves the assessment of a circumstance to the administrative authority, judges cannot overwrite it (exception made if the act is illegal or arbitrary). What seems less appropriate is that the granting of the waiver be left to administrative discretion. In other words: what is contrary to normative human rights, in this case, is not the absence of judicial control over certain discretionary aspects of an act, but the discretion itself, which makes such review impossible.

The Immigration Procedure

The Law on Migration does not contain a systematic regulation of the administrative procedure applicable in migration matters, but only some specific regulations. Except for these specific provisions, the rest of the common administrative procedure regime applies. Now, the reform of Executive Decree 70/2017 (Reform to the Law on Migration, 2017) introduced a special summary procedure for determining the irregularity of a foreigner in the territory and eventual expulsion when this determination is made based on some (most) of the impediments and grounds of Articles 29 and 62 of the Law on Migration. The purpose of the special procedure is to speed up the expulsion of the foreigner as much as possible. For this, provisions are established that limit the terms, the admissible evidence, the hearing of the file, the available remedies, etc. (Articles 69 to 69 decies).

One of the most questioned aspects of the reform was establishing a very short period (three days) to file a judicial appeal against the administrative decision ordering expulsion (Article 69 septies) and to appeal the decision of the judge of the original jurisdiction before the highest judicial court (Article 69 nonies). On the other hand, although the reform kept to the principle that the filing of administrative or judicial appeals suspends the effects of the appealed act until the appeals are finally resolved (Article 82), it included an exception. While the complaint for denial of the federal extraordinary appeal is being processed before the Supreme Court, the expulsion decision can be executed (Article 69 nonies). The reform also limited the administrative remedies available before judicial review.

The regime of administrative and judicial appeals against the decisions of the immigration authority is the main means to enforce the right of the interested party, acknowledged in international treaties, to present arguments against the decision of expulsion, and to submit this

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decision for authorities to review.[9] One of the rulings that declared the unconstitutionality of the 2017 decree correctly posited that there is no constitutional or conventional guarantee to enjoy a specific remedy, so that the reduction of available administrative resources is not illegitimate (National Court of Appeals in Administrative Federal Matters, 2019). This interpretation seems in line with the jurisprudence of the Supreme Court according to which the existence of administrative remedies is not a constitutional guarantee, provided that judicial review of the administration act is guaranteed (Supreme Court of Justice, 1960; Supreme Court of Justice, 1983). Also, according to the jurisprudence of the Supreme Court, a single judicial instance of review of the administrative act would suffice to satisfy the constitutional and conventional guarantees (Supreme Court of Justice, 2014). A different issue pertains to the brevity of the deadlines established to file judicial remedies, regarding which the United Nations Committee Against Torture expressed its concern (Committee Against Torture, 2017). On this point, the above-mentioned ruling determined that the terms are excessively short, and therefore undermine the effectiveness of the appeal. Other court rulings, however, did not find this brevity to constitute a violation of normative human rights (National Court of Appeals in Administrative Federal Matters, 2017; National Court of Appeals in Administrative Federal Matters, 2018c).

Imprisonment

As pertaining migration processes, imprisonment is regulated in general terms by Article 70 of the Law on Migration. Administrative authorities cannot order imprisonment on their own but must request it from a judge, who must order it by means of a well-grounded resolution and only to the extent that it may be strictly necessary to comply with an expulsion order. Imprisonment can be requested once the expulsion decision is final; however, exceptionally, it can also be requested in advance if the circumstances of the case justify so. Exception made of a modification on the competent authority to request the imprisonment (previously the Ministry of Home Affairs or the National Directorate for Migration, now only the latter), the 2017 reform represented no innovation to this regime.

Prior to the reform, judges would only take into consideration for imprisonment truly exceptional circumstances (Federal Court of Paraná, 2004a; Federal Court of Paraná, 2004b). After the reform, it has been set forth that if the extraordinary appeal is denied by the Court itself, it is possible to order the detention without the need to prove exceptional circumstances since the law allows the execution of expulsion decisions while the Supreme Court resolves the complaint (National Court of Appeals in Administrative Federal Matters, 2019).

It is in detention time where actual changes can be found. According to the previous version of the law, the detention time (with or without a final resolution) could not exceed the time strictly necessary to effect the expulsion of the foreigner. Now, the detention period is, if there is a final expulsion decision, 30 calendar days extendable by court order for the same term; and if the expulsion decision is not final, the time strictly necessary to carry out the expulsion until recursive means are exhausted. However, the new wording has not eliminated the pre-existing

[9] International Covenant on Civil and Political Rights (1966); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).

expression according to which the detention time cannot exceed what is strictly necessary to effect the expulsion of the foreigner; this is redundant in the case of non-final decisions (because it is the same as stated before) and raises interpretative doubts in the case of final decisions (is the maximum time in this case 30 days or the strictly-necessary time?).

It has been discussed whether this configuration of the imprisonment regime is contrary to normative human rights (in the sense that the imprisonment would be disproportionate: National Court of Appeals in Administrative Federal Matters, 2018a; in the opposite sense: National Court of Appeals in Administrative Federal Matters, 2018c; National Court of Appeals in Administrative Federal Matters, 2018d). What is indisputable is that the reform has increased, also on this point, the margins of legal uncertainty. And this leads to an expansion of the scope of administrative and judicial discretion when deciding on imprisonment. The reform indeed kept the power of the administrative authority to order provisional release on bail if the expulsion cannot be carried out within a reasonable period or if there are justifying causes for it (Article 71). But it is, once again, discretionary power of the administration.

From what has been said so far, it follows that for the imprisonment of the foreigner to be possible, there must be an expulsion decision (final or not). However, Article 69 bis incorporated by the reform did cast doubt on this interpretation, as it provides that the detention request can be made at the beginning or any given point during the administrative procedure or the judicial process. In other words: that imprisonment can take place without a decision to expel having been made yet. It is not clear, however, if this is to apply only to the summary procedure or also to the common administrative immigration procedure.

The possibility of imprisonment without a final decision (already provided for in the previous version of the law for exceptional cases) or even without a decision whatsoever (that is, while the procedure that may eventually lead to expulsion is ongoing, not provided for in the previous version) is problematic from a human rights perspective. The United Nations Working Group on Arbitrary Detention expressed concern regarding imprisonment being allowed before an expulsion order is issued (Office of the United Nations High Commissioner for Human Rights, 2017). It also understood that the 2017 decree eliminated the requirement to justify the necessity and proportionality of the detention before a judicial authority, which would mean that imprisonment is no longer an exceptional measure. A similar criticism appeared in the report of the Committee Against Torture (Committee Against Torture). The confusing wording of the legal precepts makes it difficult to determine what is really needed to justify imprisonment.

Imprisonment is a key element in the use of immigration law to send the message of resoluteness in the face of crime. Shortly before the reform hereby discussed, the government announced the creation of a detention center for migrants in the city of Buenos Aires (La Nación, 2016). The announcement was met with opposition from many civil organizations linked to immigrant communities (Tuchin, 2017). The center was never inaugurated (Nation's Penitentiary Office, 2017).

CLOSING REMARKS

In 2017, an emergency decree without prior Congress approval issued by the Argentine President amended the Law on Migration in-depth, resulting in an important shift in the spirit of

immigration policy. The instrumental function of the reform, as expressly admitted in the introductory paragraphs of the decree, was to make the administration of migration flows more efficient and to deal with some public order problems related to the commission of crimes by foreigners. As we have explained, the decree also fulfilled the (explicit) symbolic role of sending a message of resoluteness in the face of criminality and the (not so explicit) symbolic role that it was the President himself who was dealing with the problem. This second role was communicated by the shape the legislative amendment had assumed: a presidential decree exercising excessive power, instead of a law discussed by Congress.

Obviously, pointing out that a legislative reform fulfills certain symbolic roles is not to question this reform. Every legal regulation involves the public affirmation of emotions and values. A different matter altogether is the actual content through which this expressive role is exercised. In the present case, the message of resoluteness in the fight against crime was conveyed affirming the existence of a strong link between criminality and foreigners. As specialized studies have shown, this link is much less clear than what the author of the reform would have it.

On the other hand, the specific content of the reform must be analyzed through human rights standards. Beyond the questions that may be made on each particular piece of the legislation, the reform has had a clear overall result. This result has been an increase in State discretion when managing migration. This is not only because the reform has expressly increased the margins of discretion of the legal regulation, but fundamentally because the reform added more confusion to a legal text that was in itself very unclear. When a legal regulation is unclear, State authority increases its margins of discretion; and with them, the possibilities of arbitrary decisions and the legal uncertainty of citizens.

Translation: Fernando Llanas

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