

## **Diego Acosta Arcarazo, Luisa Feline Freier** **Turning the immigration policy paradox upside down? Populist liberalism and discursive gaps in South America**

**Article (Accepted version)  
(Refereed)**

**Original citation:**

Acosta Arcarazo, Diego and Freier, Luisa Feline (2015) *Turning the immigration policy paradox upside down? Populist liberalism and discursive gaps in South America*. [International Migration Review](#), 49 (3). pp. 659-696. ISSN 0197-9183

DOI: [10.1111/imre.12146](https://doi.org/10.1111/imre.12146)

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Available in LSE Research Online: October 2015

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## **Turning the immigration policy paradox up-side down? Populist liberalism and discursive gaps in South America<sup>1</sup>**

*A paradox of officially rejecting but covertly accepting irregular migrants has long been identified in the immigration policies of Western immigrant receiving states. In South America, on the other hand, a liberal discourse of universally welcoming all immigrants, irrespective of their origin and migratory status, has replaced the formally restrictive, securitized and not seldomly ethnically selective immigration rhetoric. This discursive liberalization has found partial translation into immigration laws and policies, but, contrary to the universality of rights claimed in their discourses, governments reject recently increasing irregular south-south migration from Africa, Asia and the Caribbean to varying degrees. This paper applies a mixed methodological approach of discourse and legal analysis and process tracing to explore in how far recent immigration policies in South America constitute a liberal turn, or rather a reverse immigration policy paradox of officially welcoming but covertly rejecting irregular migrants. Based on the comparative analysis of Argentina, Brazil and Ecuador, the study identifies and explains South American 'populist liberalism' in the sphere of migration. We highlight important implications for immigration theory, thereby opening up new avenues of research on immigration policy making outside Western liberal democracies, and particularly in predominantly migrant sending countries.*

The literature on immigration policy has long identified a substantial policy gap, or paradox, of “accepting unwanted migration” (Joppke 1998) in the immigration policies of Western immigrant receiving states. Since the 1980s, Western governments have embarked on increasingly restrictive immigration discourses, especially rejecting irregular immigration, while at the same time accepting the entry and residence of substantial numbers of migrants who remain in their territory without authorization (Freeman 1995; Sassen 1996; Hollifield 2000; Joppke 1998, 2000; Durand and Massey 2003; Cornelius et al. 1994, 2004; Mayda 2010; Czaika and de Haas 2013).

On first sight, South American countries seem to present the unique phenomenon of a

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<sup>1</sup> This paper would not have been possible without the research conducted in Brazil, Argentina and Ecuador. We would like to thank the Law departments at Fundação Getulio Vargas in Rio de Janeiro and Torcuato di Tella University in Buenos Aires for hosting Diego Acosta as visiting researcher for a one month period in each institution. The law is stated as of 1 July 2014.

reverse paradox. In the past fifteen years, the governmental immigration discourses, i.e. the “text and talk of professional politicians or political institutions, such as presidents ... and other members of government, parliament or political parties, both at the local, national and international levels” (van Dijk 1997, 12)<sup>2</sup> of many governments in the region have become increasingly liberal, with a clear emphasis on migrants’ rights and the promotion of universal human mobility (Mármora 2010; Ceriani 2011). In contrast to Europe and the U.S., where governmental discourses clearly distinguish between desired ‘legal’ and undesired ‘illegal’ immigration, South American politicians and civil servants stress the universality of migrants’ rights that apply to all migrants irrespective of their national origin and legal status. At the same time, however, South American countries are concerned with recent, albeit very small, increases of so-called “extra-continental immigration” from countries in Africa, Asia and the Caribbean, and seek to impede these inflows to varying degrees (Freier 2013b). Does the liberalization of governmental immigration discourses amount to the reverse immigration policy paradox of officially welcoming all immigrants but rejecting certain nationalities in practice? Or has there in fact been a liberal turn in South American immigration policy making?

The analysis of Argentina, Brazil and Ecuador shows that legislative and policy reforms have mirrored the liberalized immigration discourses of governments to a certain

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<sup>2</sup> In political science, discourse is seen as a form of political action. “Indeed, most political actions (such as passing laws, decision making, meeting, campaigning, etc.) are largely discursive. Thus, besides parliamentary debates, bills, laws, government or ministerial regulations, and other institutional forms of text and talk, we find such political discourse genres as propaganda, political advertising, political speeches, media interviews, political talk shows on TV, party programs, ballots, and so on” (van Dijk 1997, 18).

extent, as showcased in the unprecedented incorporation of the “right to migrate” in Argentinean and Ecuadorian legislation, Ecuador’s path breaking policy of visa-free access and Argentina’s new approach to the regularization of irregular migrants. Nevertheless, we also detect substantial gaps between liberal discourses and their translation into laws and policies. Recent reactions to increasing extra-continental south-south migration fall especially far from the governmental rhetoric. The finding that the case countries do not fully implement the perhaps elusive universal right to migrate, i.e. the *de facto* opening of borders through universal visa-free travel coupled with regularization mechanisms, perhaps is little surprising. The tensions between the unprecedented liberalization of South American governmental immigration discourses, but varying degrees of legislative and policy reform, and a possible reverse immigration policy paradox in the field of irregular immigration nonetheless are well worth exploring.

The paper makes three important contributions. First, it advances the debate on immigration policy paradoxes and policy gaps by showing the reverse scenario from what has been considered “a standard outcome” across Europe (Geddes 2008, 350), i.e. that governmental immigration discourses are more restrictive than immigration policies. Second, it advances theories addressing the determinants of immigration policies by exposing short-comings and suggesting necessary amendments for their applicability to predominantly migrant sending countries. Third, on an empirical level, the study improves our knowledge of immigration policy making and legislation in South America, a region that has undergone notable change in the past decade and takes a pioneering role in liberal immigration reforms, but remains surprisingly understudied.

Identifying developments in immigration policy making outside Western liberal democracies has substantial value for the purpose of theory building. It is essential to test the applicability of theories so far developed for Western liberal democracies, especially when considering the geographical bias of the migration literature. Mirroring the general focus of migration studies on south-north flows, the literature on immigration policies has unduly concentrated on Western immigrant receiving states, and specifically on the United States, France, Germany and the United Kingdom (Bonjour 2011). Given the fact that more than forty per cent of all international migration is made up by south-south flows (United Nations 2013), the neglect of immigration policies beyond Western liberal democracies ought to be of serious concern.

The paper proceeds as follows. The first section discusses the relevant literature on immigration policy paradoxes and policy gaps. The second part introduces the case countries Argentina, Brazil and Ecuador and the methodological approach of the paper. The third section analyses the liberalization of the governmental immigration discourses in the case countries. Section four asks to what extent these discourses have translated into legislative and policy change. Section five tests the consistency between the liberalization of immigration discourses and policies based on state reactions to recent extra-continental south-south immigration. The last section concludes with implications for immigration policy theory and avenues for future research.

### *IMMIGRATION POLICY PARADOXES*

The debate on immigration policy paradoxes has been ongoing for the last 20 years and offers three significantly different definitions (Hollifield 1992, 2004; Cornelius et al.

1994; Boswell 2007; Hollifield and Wong 2013). Hollifield (1992) first identified a “liberal paradox” in immigration policies based on international economic forces pushing states towards openness, whilst the international state system and domestic political forces are pushing towards greater policy closure. Cornelius et al. (1994, 2004) and Castles (2004), on the other hand, conceive the immigration paradox as the failure of states to effectively control immigration. A third group of authors understands the immigration paradox as the gap between what politicians say and do (Joppke 1998; Boswell 2007).

Hollifield’s theory of a “liberal paradox” in immigration policies builds on political economy, whereas Cornelius et al., Castles, Joppke (1998) and Boswell are concerned with the policy making process and its impact on immigration flows. In the case of the latter two definitions, substantial confusion about different types of policy gaps underlies the controversial debate about what constitutes the immigration policy paradox. For the sake of conceptual clarity it is crucial to distinguish between three types of gaps. (1) ‘Discursive gaps’ describe the discrepancy between the objectives stated in official discourses and policy outputs, i.e. legislation and policies on paper; (2) ‘implementation gaps’ measure the disparity between official legislation and policies and their implementation; and (3) ‘efficacy gaps’ describe the extent to which policies actually determine policy outcomes, i.e. migration flows (Czaika and de Haas 2013, 494).

Cornelius et al. (1994, 2004) and Castles (2004) prominent conception of the immigration policy paradox as a “control gap” thus describes an ‘efficacy gap’. Although influential, their argument has been exposed as a rather weak because it rests on the truism of discrepancies between *any* policy goal and policy outcomes (Bonjour 2011).

The main problem with theories of efficacy gaps is that they equate political discourses with policies, and compare what politicians *say* about their policy goals to policy outcomes (i.e. immigration rates), “without taking into account the political processes and hidden agendas that lead to various discursive and implementation gaps along the way” (see Geddes 2008, 350). It is critical to distinguish among governmental or policy discourses, policy outputs (legislation and policies) and policy outcomes (i.e. immigration rates) because each constitute a different phase of the immigration policy cycle.

In our view, the most significant immigration policy paradox thus far described by the literature is the *discursive gap* between restrictive political rhetoric and relatively liberal immigration laws and policies in Western liberal receiving states (Boswell 2007; Bonjour 2011). Instead of asking “why immigration policies fail” (Castles, 2004), other authors have asked “why liberal states accept unwanted migration” (Joppke 1998). The startling gap does not lie between restrictive political discourses and persisting immigration, which is erroneously interpreted as the ineffectiveness of restrictive immigration policies, but rather in the difference between restrictive discourses and relatively permissive policies and laws.

In the case of Europe, such a discursive gap in dealing with irregular immigration is widely acknowledged (Freeman 1995; Joppke 1998; Cornelius et al. 1994, 2004). Mirroring anti-immigration public opinion (Freeman 1995), governments throughout Europe have embarked on restrictive and securitized discourses of rejecting irregular immigration since the 1980s (Huysmann 2000; Cholewinski 2007). This restrictive rhetoric has been widespread both at national level (Geddes 2008; Boswell and Hough

2008) and at EU level (Edwards and Kraler 2009, 103-106). Although such restrictiveness is mirrored in the adoption of several measures criminalizing irregular migration through more stringent border controls, carrier sanctions or expulsion (Cholewinski 2007), European governments at the same time implement large scale regularizations.<sup>3</sup>

This paper explores in how far the reverse paradox exists in South America. Despite the fact that survey evidence suggests similarly or even more protectionist public opinion,<sup>4</sup> governmental immigration discourses in South America have become exceptionally liberal. To answer the question whether a liberal turn took place in South America in both immigration discourses and policies, or whether the region presents the reverse paradox of officially welcoming all immigrants but rejecting certain nationalities in practice, this paper analyses discursive gaps in the immigration policy making of the three case countries. Implementation and efficacy gaps are not the primary focus in the present analysis. Although it is often argued that the actual implementation of policies is more important than their promulgation, policy implementation is extremely difficult to measure. Therefore, official policies and laws are often used as a proxy for implemented policy (Czaika and de Haas 2013).

In order to analyse any gaps between immigration discourses and policies, we must first define immigration policies. On the most basic level, they are “rules and

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<sup>3</sup> E.g., more than five million third-country nationals in the EU were regularized between 1996-2007 (Edwards and Kraler 2009, 31-36).

<sup>4</sup> When comparing survey data from around the time the political discourses started to change in South America, e.g. the European Social Survey (2002-03) and Latinobarómetro (2002), South American respondents were more concerned about immigrants occupying their jobs than Europeans.

procedures governing the selection, admission and deportation of foreign citizens” (Brochman 1999, 9) into a state’s territory, especially of non-nationals intending to remain and/or work in the country. Although many scholars differentiate between immigration and integration policies (Meyers 2000, 1246), there is significant overlap. For example, liberal integration policies, such as regularization programs, may attract immigrants and compensate for restrictive access regulations. In this paper, we thus apply a broad definition of immigration policy and, without applying a set benchmark for policy liberalization, compare relevant policy changes on the constitutional level, in domestic immigration legislation, and in the areas of visa and regularization policies, to the political immigration discourses of each case country.

#### *IDENTIFYING A REVERSE IMMIGRATION POLICY PARADOX IN SOUTH AMERICA*

The paper applies a mixed methodological approach of discourse and legal analysis and process tracing (King et al. 1994; Mahoney 2012). It is based on 75 interviews with government officials and local experts working in academia, think tanks and NGOs, as well as on official documents, academic sources and reports of international organizations. Our analysis distinguishes between governmental discourses (both oral and written) and official laws and policies. The discussion of discourses is based on the analysis of official documents, government declarations and the interviews. Second, we analyse a selection of legislative reforms and policies that have occurred in the three countries, including ratifications of international conventions and agreements, reforms at the constitutional level, immigration laws, implementing regulations and decrees, and regularization programs. Given the difficulty to detect overall trends towards

restrictiveness and liberalism in immigration policies (Czaika and de Haas 2013), it is essential to identify regional developments and policy gaps in specific immigration policy areas. We thus further test the consistency between the liberalization of immigration discourses and policies by assessing political reactions to the recent increase in irregular immigration.

The three countries under analysis, Argentina, Brazil and Ecuador, share certain common traits. First, they are among the countries in the region that have experienced the largest immigration and/or asylum flows in past decades (IOM 2010a). These flows are mainly composed of citizens from other South American countries, which has led to the adoption of regional migration initiatives at the level of the Andean Community, MERCOSUR, and most recently UNASUR. At the same time, all three countries have recently experienced increasing irregular south-south immigration and asylum inflows from the Africa, Asia and the Caribbean (Freier 2013a). Despite these recent movements, the foreign born populations in the case countries do not represent a large percentage of total population.<sup>5</sup> Second, these countries experienced considerable emigration waves since the 1980s and 1990s, which accentuated during the first years of the 21st century (OAE 2011). Finally, in all three cases, legislative migration frameworks were adopted during the military dictatorships of the 1970s and 1980s, which were mainly concerned with population control as embedded in the state's security agenda.

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<sup>5</sup> According to the 2010 Census, there were 1,805,957 foreign-born nationals in Argentina representing 4.5%. In Ecuador there were 181,848 or 1.2% of the total population (IOM 2012) and in Brazil around 1.5 million or 0.8% in 2010 (IOM 2010b).

Despite these similarities, Argentina, Brazil and Ecuador also represent distinct cases along the liberalization continuum. Whereas Argentina has implemented the most comprehensive and progressive immigration reform, Brazil and Ecuador have taken more contradictory or hesitant steps to modernize their legislative frameworks, thus presenting larger gaps between their discourses, on the one hand side, and laws and policy on the other. We will emphasize the Argentinean case throughout the paper since it is the only of the three countries, which has adopted a comprehensive new immigration law since 2004. Furthermore, the Argentinean immigration reform is known to have influenced developments in immigration policy making at the regional level (Margheritis 2012; Ceriani 2011).

### *LIBERAL DISCOURSE*

In contrast to the increase of tougher immigration discourses in many Western liberal democracies since the 1980s, in which governments promise to crack down on irregular immigration (Huysmans 2000; Bigo 2002), the reverse development has taken place in South America. In the 1970s and 1980s, South American military dictatorships had tried to limit population movements as a means of political control with a complete disregard for migrants' rights (Schindel 2006; Durand and Massey 2010). Although the last military dictatorships in the Southern Cone subsided in the 1990s, the official immigration discourses remained securitized, restrictive and often openly racist (Oteiza and Novick 2001; Albarracín 2003; Domenech 2009; Ceriani 2011; Bastia and vom Hau 2013).

In the past fifteen years, however, a liberal tide has swept across South American immigration discourses, with an unprecedented focus on migrants' human rights (Mármora 2010; Ceriani 2011). This discursive paradigm shift is also apparent in various regional documents such as the declarations of the summits of the consultative process SACM (*South American Conference on Migration*), which reflect a “consensus against the criminalization of (undocumented) migrants” (Hansen 2010, 26). In fact it may be argued that South America, through the declarations of both the SACM and national governments, is the region with the most progressive discourse in terms of the recognition of universal migrants' rights, including those in an irregular situation.

In Argentina, a more liberal discourse took shape after Néstor Kirchner won the presidential election in 2003. Having himself been a persecuted victim of the last dictatorship, Kirchner left no doubt that human rights, including migrants' rights, were central to the agenda of his new government (Nicolao 2008; Maurino 2010). This discursive shift must be understood against the backdrop of the increasing cooperation between historically strong civil society organizations, for whom migration reform had long been a priority issue, and the first Kirchner administration (Bonner 2005; Ceriani and Morales, 2011). Kirchner won the 2003 presidential election with only 22% of the vote after his contender Carlos Menem declined to run for the required second round. Kirchner was in need of political allies and embarked on a human rights discourse, thereby seeking the support of the civil society.

In addition, the massive increase in emigration after the 2001 financial collapse<sup>6</sup> led the government's commitment to reforming their immigration policy in order to set an example for the kind of treatment they expected from European governments (foremost Spain) for Argentinean nationals (Nicolao 2008; Maffia 2010). In fact, the rejection of U.S.-American and European immigration policies, especially the Returns Directive -to be discussed below- became an important element of Argentina's liberalized immigration discourse (Acosta 2009). Such critique went hand in hand with calls for political solidarity and reciprocity. In the context of substantial Argentinean emigration to Spain after the 2001 economic crisis, Néstor Kirchner's administration repeatedly called on Spain to remember the historic solidarity Argentina had with thousands of Spanish emigrants at the turn of the 20<sup>th</sup> century and to regularize Argentinean immigrants based on the logic of historic reciprocity.<sup>7</sup>

While Néstor Kirchner's discourse focused on migrants' rights in the context of *emigration*, his successor (and wife) Cristina Kirchner went even further and discursively constructed historic *immigration* analogies between former European and more recent regional and extra-continental immigration. When implementing the regulation of the 2004 Immigration Law in 2010, she publically declared a historic continuity between European immigration and newer waves of Latin American and Asian immigration to Argentina. This shift in Argentina's immigration discourse is especially interesting

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<sup>6</sup> More than 200.000 Argentines left the country in the period 2000-2003 (Actis and Esteban 2007, 211 and 252).

<sup>7</sup><http://www.lanacion.com.ar/532881-proyectan-en-el-gobierno-un-acuerdo-migratorio-con-espana>

because racism in form of aspired ‘whitening’ of the population had been critical to Argentinean immigration policies since the mid-19<sup>th</sup> century (Bastia and vom Hau 2013).

Christina Kirchner has since embarked on a more polemic, populist position and has rejected the re-emergence of xenophobic sentiments in “so-called developed countries” in the context of the financial crisis and described Argentina as part of a worldwide, morally superior, avant-garde in immigration policy making.<sup>8</sup> Intriguingly, official statements of the formally often openly racist National Directorate for Migration (*Dirección Nacional de Migración*, DNM) (Albarracín 2003) also follow this rationale. In January 2013, State Secretary for Migration, Martín Arias Duval confirmed the DNM’s commitment to save-guarding migrants’ rights, comparing the motivations and vulnerability of south-south immigrants from the Dominican Republic and Senegal not only with European immigrants to Argentina, but with Argentines who had left the country in the aftermath of the 2001 economic crisis.<sup>9</sup>

Similarly, though with less political salience, migration re-emerged as an important political issue in Brazil in the context of increased emigration since the early 2000s. Brazil had historically been a destination for migrants until the 1960s (Póvoa and Sprandel 2010) but shifted to become an emigration country during the 1980s. The reduced number of immigrants in the country meant that immigration was mostly absent from the public debate at the turn of the century. However, the number of Brazilians abroad increased dramatically from around 2 million in 2002 to approximately 3 million in 2008 (IOM 2010b, 40). It is within this context of *emigration* that Brazil became more

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<sup>8</sup> [http://www.migraciones.gov.ar/pdf\\_varios/periodico/periodico\\_201005.pdf](http://www.migraciones.gov.ar/pdf_varios/periodico/periodico_201005.pdf)

<sup>9</sup> [http://www.migraciones.gov.ar/accesible/?mostrar\\_novedad=1755](http://www.migraciones.gov.ar/accesible/?mostrar_novedad=1755)

vocal in its defence of its nationals abroad, notably following Brazilian's expulsions from the United States or impediments to enter Spain, which found great repercussion in the media (Braga and Gonçalves 2008). During the adoption of the legislation establishing a regularization procedure in 2009, President Lula da Silva vehemently criticized restrictive immigration policies in Europe and the United States as inadequate. At the same time, he stressed Brazil's comparatively liberal approach to *immigration* and the country's respect for the human rights of migrants. He also presented Brazil as a country that was proud of its immigration history, and emphasized the need to be "generous with human beings from any part of the world who would like to live [in Brazil] and ... build a future".<sup>10</sup> The emphasis on migrants' rights can also be seen in the 2010 proposal for an immigration policy plan by the National Immigration Council (*Conselho Nacional de Imigração, CNIg*)<sup>11</sup> and in the official statements of its President Paulo Sérgio de Almeida (de Almeida, 2009).

Lastly, both Argentina's and Brazil's commitment to reforming their immigration laws are also related to the regional integration process in the context of MERCOSUR, in which both countries compete for ideological "post-neoliberal regional leadership" (Margheritis 2012). Argentina has historically been the most important migration destination country in the region, and therefore has taken the lead in the formulation of more progressive and social immigration policies (Nicolao 2008). In both countries,

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<sup>10</sup> Discurso do Presidente da República, Luiz Inácio Lula da Silva, durante cerimônia de sanção da lei que anistia estrangeiros em situação irregular no Brasil. Ministério da Justiça – Brasília-DF, 02 de julho de 2009, available at <http://www.imprensa.planalto.gov.br/>

<sup>11</sup> Proposal from the Conselho Nacional de Imigração: Política Nacional de Imigração e Proteção ao(a) Trabalhador(a) Migrante.

migration and human rights have become part of the political and social agenda they promote both at home and abroad (Margheritis 2012).

The Ecuadorian governmental migration discourse, which was equally constructed based on concerns about the treatment of emigrants in the United States and Spain, surpasses Brazil and Argentina in its ‘anti-imperial’ tone. Migration and specifically *emigration* have been priority issues in the populist political discourse of President Rafael Correa since his electoral campaign of 2006. Similarly to Argentina, migrants’ rights were a main theme in the construction of an identification platform for his political movement PAIS (*Patria Altiva I Soberana*) (Margheritis 2011). In the context of Ecuadorian mass emigration after the economic crisis of 1999, Correa was well aware that migrants’ rights and U.S.-American and European closure towards Ecuadorians were highly effective topics when he stood in the 2006 presidential election.<sup>12</sup>

In his campaign, Correa promised that he would lead a “migrants’ government” and after his ascension to power, the political migration discourse started to be framed around human rights (Margheritis 2011, 207). In 2008, Correa renamed the European Return’s Directive the “Directive of Shame”.<sup>13</sup> Around the same time, the Ecuadorian Foreign Ministry published an open letter signed by Correa addressing “all Ecuadorian citizens of the world”, in which he invites emigrants to return home, laments that the

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<sup>12</sup> In the so-called ‘emigration stampede’ (*estampida migratoria*) that followed the economic crisis of 1999, close to 140,000 Ecuadorians emigrated to the United States and some 320,000 to Spain until 2005 (Bertoli et al. 2011).

<sup>13</sup> [http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news\\_user\\_view&id=83481&umt=presidente\\_correa\\_critica\\_falta\\_voluntad\\_regional\\_para\\_protestar\\_contra\\_directiva\\_retorno](http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=83481&umt=presidente_correa_critica_falta_voluntad_regional_para_protestar_contra_directiva_retorno)

policies of past governments forced them to leave their “beloved home country” and criticizes the discriminatory immigration policies of northern receiving countries. The letter also touches on *immigration* policies in that it declares that there are no “illegal citizens, only practices that violate the rights of persons” and that Ecuador, as it demands rights for its citizens abroad, promotes these same rights for immigrants in Ecuador. Just days before the European Parliament approved the Returns Directive in June 2008, Correa further claimed that he would “do away with the invention of the 20<sup>th</sup> century of passports and visas”.<sup>14</sup>

In sum, governmental migration discourses in Argentina, Brazil and Ecuador shifted from closure and securitization to emphasize migrants’ human rights, non-racism, and non-criminalization. These often polemic and populist liberal discourses developed in the context of emigration and diaspora policies in strong counter-position to restrictive immigration rhetoric in the United States and Europe, from which South American governments demand solidarity and political reciprocity, i.e., the regularization of their nationals. Although the specific political context of liberalized immigration discourses was South American *emigration* to Western liberal democracies, proclaimed values of the universality of migrants’ rights and the necessity for regularization measures fed back into the country’s *immigration* discourses based on the logic of coherence and political reciprocity. The governmental immigration discourses in the case countries thus developed in the context of what we call ‘populist liberalism’. The popular support of

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<sup>14</sup> Agencia EFE, 12 June 2008, <http://www.hoy.com.ec/noticias-ecuador/correa-elimina-el-visado-a-los-extranjeros-297707-297707.html>

migrants' rights in the context of emigration led to the concurrent support of liberalized immigration discourses.

### *LEGISLATIVE AND POLICY LIBERALIZATION*

Placing a special focus on the policy field of irregular immigration, this section analyses in how far the liberalization of governmental immigration discourses in the case countries translated into legislative and policy change. Regarding the international legal framework, there have been some important steps affecting migrants in an irregular situation. Both Argentina (2007) and Ecuador (2002) have ratified the 1990 UN Migrant Workers Convention. Even more importantly, the entry into force of the MERCOSUR Residence Agreement in 2009 has transformed the migration regime for South American migrants. The Residence Agreement provides that any national of a MERCOSUR or associate member state<sup>15</sup> may reside and work for a period of two years in another member state if they have a clean criminal record. This temporary permit may then be transformed into a permanent one, provided the individual has enough resources to sustain himself in the territory of the host state.

#### *Argentina's New Law and the Right to Migrate*

In Argentina, the 1981 law,<sup>16</sup> popularly named after the country's infamous dictator Videla, significantly curtailed the rights of migrants, especially those in an irregular

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<sup>15</sup> MERCOSUR includes Argentina, Brazil, Paraguay, Uruguay and, since 2012, Venezuela. The Associate States, which benefit from the agreement, include Bolivia, Chile, Colombia, Ecuador and Peru.

<sup>16</sup> Decreto Ley 22.439/81, Ley General de Migraciones y Fomento de la Inmigración.

situation. Irregular migrants could be detained and expelled without judicial oversight and there was no maximum detention period established by law before expulsion took place (Ceriani and Morales 2011, 5). This restrictive approach, coupled with the very few possibilities that the law offered for regularization, kept large numbers of migrants, mainly from neighbouring countries, in an irregular situation. Undocumented immigrants lacked basic social rights, such as health care or education. Furthermore, there was a widespread obligation for civil servants in hospitals, schools, administrative authorities or notary publics to denounce migrants in an irregular situation. Citizens who helped irregular immigrants out of philanthropic reasons were subject to a fine (Mármora 2004).

In line with the previous tradition of regularizations (Sassone 1987), the first governments after the country's return to democracy approached the situation of substantial irregular immigrant populations with the adoption of two large-scale regularization procedures in 1984 and 1992, which benefited 136.000 and 224.000 migrants respectively (Pacecca and Courtis 2008, 43). However, these regularizations did not mark a shift in Argentina's restrictive immigration policies. Although counterintuitive, regularization programs can be part of restrictive immigration policies when they are used in order to "wipe the slate clean and begin afresh" (Massey 2007: 312), possibly employing even more restrictive measures. In fact, the Videla Law was not repealed and its decrees of 1980s and 90s, rather than softening some of its most restrictive provisions, aggravated the limited rights of migrants in an irregular situation.<sup>17</sup>

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<sup>17</sup> See Decretos 1434/87, 1023/94 and 1117/98.

The 2004 Argentinean Immigration Law,<sup>18</sup> on the other hand, represents a remarkable paradigm shift towards policy liberalization – a liberal turn, which did not seem likely at the time (Mármora 2004). Indeed, as late as 1999, and amidst widespread xenophobic governmental discourse, a draft law was proposed which would have deepened the discrimination against non-citizens (Oteiza and Novick 2001; Domenech 2009). The most noteworthy innovation in Argentina’s migration law consists in the recognition of the *right to migrate as essential and inalienable to the person*. According to Article 4, Argentina guarantees this right, which at the time of its adoption did not exist in any other legislation, on the basis of the principles of equality and universality, although subject to the conditions established in the law as Article 5 emphasizes.<sup>19</sup>

With its 2004 immigration law, Argentina opted for a new strategy, moving from the logic of criminalization and expulsion to the rational of legalization and integration. This is evident in the law’s social provisions since irregular migrants now have the right to education and health care. Moreover, the staff in educational facilities or hospitals are not obliged to inform the authorities about immigrants’ irregular situation, but shall rather guide them towards regularization.<sup>20</sup> Finally, they can only be detained to prepare their

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<sup>18</sup> Ley de Migraciones 25.871. The law is regulated by Decreto 616/2010.

<sup>19</sup> Article 5 Law 25.871 reads as follows: “The state will secure the conditions guaranteeing an effective equal treatment so that foreigners can enjoy their rights and fulfil their obligations, as long as they satisfy the conditions established for their entry and permanence in accordance with the laws in force” (authors’ translation).

<sup>20</sup> Articles 7 and 8 Ley de Migraciones 25.871 and Decreto 616/2010.

expulsion for a maximum period of 15 days and only after a judicial process with various possibilities for appeal.<sup>21</sup>

In our view, the situation of migrants in an irregular situation is an excellent case to test the meaning of this provision. If in fact a true right to migrate exists, those who, for one reason or another, irregularly reside in the country should have ample possibilities to regularize their status. The understanding of the obligation and suitability of facilitating the acquisition of regular status is well entrenched in the law and its implementing 2010 regulation. Article 17 establishes that the government shall provide the adoption and implementation of measures aiming at regularizing the migratory status of non-nationals.<sup>22</sup> In line with this, regularization has taken place through two different procedures: regularization programs and a regularization mechanism. We understand regularization programs as procedures, which run for a limited period of time and target specific categories of non-nationals in an irregular situation. By contrast, regularization mechanisms are procedures, which are enshrined in the law without a time limitation and from which any non-national in an irregular situation may benefit (Baldwin-Edwards and Kraler 2009, 8).

There have been two regularization programs in Argentina. The first one benefited non-MERCOSUR migrants in 2004,<sup>23</sup> whereas the second one, known as “Patria Grande”, anticipated the entry into force of the MERCOSUR Residence Agreement in 2009. Patria Grande developed in various steps. Article 23(1) of the 2004 Immigration

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<sup>21</sup> Article 70 Ley de Migraciones 25.871 and Decreto 616/2010.

<sup>22</sup> Article 17 Decreto 616/2010.

<sup>23</sup> Decreto 1169/2004, 13 September 2004.

Law provides that nationals of MERCOSUR, Bolivia and Chile can obtain a temporary residence based on citizenship criteria. This was later extended to the nationals of the other associate member states: Peru, Ecuador and Colombia.<sup>24</sup> Nationals of these countries who entered Argentina before 17 April 2006 were able to regularize their situation whereas those who entered after that date could directly benefit from the citizenship criteria in the law and obtain a temporary residence permit.<sup>25</sup>

As mentioned earlier, regularization programs had already been previously adopted in Argentina and have been extensively used in other countries in the EU (Baldwin-Edwards and Kraler 2009, 31) and South America. However, the Kirchner administration's public endorsement represents an important contrast to other regularization agendas. In the EU, regularization programs have been notoriously absent in the discourses and documents of common immigration policy making and can be considered a political taboo (Walters 2010; Baldwin-Edwards and Kraler 2009). Indeed, following the 2005 Spanish regularization (Sabater and Domingo 2012) and especially during the EU's French presidency in 2008, there were strong attempts, even if unsuccessful, to forbid regularization programs at EU level (Collett 2008).

Regularization mechanisms are the second approach Argentina's immigration law provides to irregular immigration. In the EU, many member states used them in the past or currently incorporate them into their immigration laws (Baldwin-Edwards and Kraler 2009, 48-50). There are however crucial differences between the European and Argentinean model. In the case of Europe, the conditions for regularization usually

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<sup>24</sup> Disposición Dirección Nacional de Migraciones 29.929/2004, 17 September 2004.

<sup>25</sup> See Disposición DNM 53.253/2005, Disposición (DNM) N° 14949/2006.

include a certain length of residence, which may need to be combined with a job offer, family ties or humanitarian reasons. The most significant EU legislation in the area of immigration, the Returns Directive, allows member states to provide third-country nationals with a residence permit for compassionate, humanitarian or other reasons. However, since the main purpose of the Directive is the termination of the illegal stay, the alternative mostly employed is the expulsion of the migrant in an irregular situation (Acosta 2011).

The Argentinean legislation, on the other hand, is ground-breaking by dramatically shifting the balance from expulsion to regularization. Indeed, the law provides that once the irregular situation of a migrant is established, the National Migrations Directorate is under the obligation to request him to regularize and to provide a period for that purpose of between 30 to 60 days.<sup>26</sup> This obligation is a distinctive attribute of the Argentinean law when compared with the EU. During that period, migrants may invoke one of the regularization requirements under Article 23 of the law, out of which the one most applied is having a binding job offer as an employee. In contrast to regularization mechanisms in Europe, length of residence is not a decisive element. Its regularization mechanism reads well with the declared right to migrate. However, the law has an important flaw, which impedes certain migrants from obtaining legal residence. Article 29 sets out that those having entered into Argentina clandestinely do not have the right to stay. The burden of proof falls onto the migrant who has to certify his regular entry, for example as a tourist, in order to regularize his status (Morales 2012, 336). Although Argentina's legislative reform largely mirrors its

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<sup>26</sup> See Articles 61 of the Ley de Migraciones 25.871 and Decreto 616/2010.

liberalized immigration discourse, and indeed presents a substantial liberal turn in the country's immigration policy making, a discursive policy gap exists between the promised *universal* right to migrate and its translation into law, which in practice only applies to immigrants with visa-free access to Argentina.

### *Brazil's Hesitant Approach to Migration Reform*

Brazil's immigration law, in force since 1980,<sup>27</sup> was adopted in less than three months under an urgent procedure by the former military dictatorship. It places strong emphasis on national security (IOM 2010, 53; CDHDI 2011, 15) and has a utilitarian approach to immigration linked to national development and the shortage of specialized labor. The law has been severely criticized because of its bureaucratic nature and the difficulties to obtain secure residence status (Sbalqueiro 2009). Indeed, it provides very few avenues for regular immigration and no mechanisms for regularization. There are provisions on deportation for irregular entry, overstay and working without permission (Articles 57-64 Law 6815). These provisions are, however, not applicable to irregular immigrants married to a Brazilian or having Brazilian children. With regard to social rights for those in an irregular situation, the 1988 Constitution grants access to health care, education and the reception of outstanding salaries (Sbalqueiro, 2009: 469).

Brazil has not yet reformed its 1980 migration law, which in some respects contradicts the 1988 Constitution (CDHDI 2011). A legislative proposal for a new immigration law (Projeto de Lei 5655) reached Congress in 2009 but falls short of what would be expected from the government's liberal discourse. In fact, it takes as its

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<sup>27</sup> Law 6.815/1980 and Implementing Regulation Decree 86715/81.

backbone the current legislative framework, and in some respects is even more restrictive, for example, with regard to naturalization by extending the number of years that a migrant has to reside in Brazil from four to ten. The proposed bill has been in Congress since 2009, without being adopted and there have been three new proposals in 2014; one by a commission of experts established by the Ministry of Interior, another one by the Ministry of Interior itself and a final one by a Senator, which is being discussed in certain commissions in the Senate.

Nevertheless, ministerial orders (*resoluções normativas*) of the National Immigration Council (*Conselho Nacional de Imigração*, CNIg) have softened the 1980 law during the last 15 years. The CNIg is dependent on the Ministry of Labor and is composed by representatives of different ministries and civil society, unions and business confederations. It is responsible for formulating Brazil's immigration policy and for adopting ministerial orders complementing the immigration law. These are hierarchically inferior to the law, and hence cannot contradict it, but rather define policy in areas not yet regulated. This legislative capacity represents a peculiarity of the Brazilian legal system. The CNIg's work has led to the partial liberalization in central issues of Brazil's immigration policy, such as family reunification, renewal of residence permits or access to regular status. The law's opposition to non-highly skilled immigration, however, limits the CNIg's work. The CNIg has made further important liberal policy proposals, not yet adopted, such as a new immigration policy plan or the recommendation to ratify the UN Migrant Workers Convention. Agreeing on immigration policy priorities would be essential before passing new legislation, but there is internal disagreement between the

Ministries of Interior and Labor as well as the Presidency's Strategies Affairs Secretariat, on what such policy should entail (Ventura and Illes 2012).

The CNIg also supported the 2009 regularization program, by which 45.000 migrants obtained residence (de Almeida 2009). This was Brazil's fourth regularization procedure after previous ones in 1981, 1988 and 1998 granted legal residence to around 115.000 non-nationals (CDHDI 2011). The procedure provided two years residence permits, which could be renewed and transformed into permanent residence under certain conditions, notably having regular employment, exercising a profession or having sufficient resources.<sup>28</sup> Brazil also adopted a bilateral agreement with Bolivia in 2005, by which around 20.000 Bolivians regularized their situation (de Almeida 2009, 24). With the internal adoption of the MERCOSUR Residence Agreement in 2009, Bolivians have the right of entry to work and reside in Brazil. Although Brazil's outdated immigration law does not capture its open political discourse on immigration issues, the CNIg has had some leeway to develop policies in line with a less restrictive and securitized vision of international migration.

### *Ecuador's Constitution and its Contradictory Legal Regime*

In Ecuador, the legislative migration framework in force since 1971<sup>29</sup> constitutes another example of a largely restrictive, and in comparison to the liberalized discourse, 'outdated'

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<sup>28</sup> Portaria Ministério da Justiça - MJ nº 1700, 28.07.2011, D.O.U.: 29/07/2011.

<sup>29</sup> There were two different pieces of legislation adopted in 1971: Ley de Extranjería (Aliens Law) adopted by Supreme Decree D.S. 1897, R.O. 382, 30-12-1971, codification 23, R.O. 454, 4-11-04; and Ley de Migración (Migration Law) adopted by Supreme Decree D.S. 1899, R.O. 382, 30-12-1971, codification 006, R.O. 563, 12-04-2005.

approach that criminalizes migrants in an irregular situation and limits their rights (Arcentales and Garbay 2012). The law provides for no regularization mechanisms for those whose visas have expired, not even when the person has children with Ecuadorian citizenship (Arcentales and Garbay 2012, 34). Furthermore, there are very few avenues to obtaining a regular residence permit for non-skilled or self-employed workers (Hurtado and Gallegos 2013, 17). Against the background of the significant Colombian population present in Ecuador – with an estimated 90,000 Colombians with rejected asylum applications (Hurtado and Gallegos 2013, 11) – this has led to an increasingly large number of migrants in an irregular situation.

The 1971 law favors deportations and the administrative authorities enjoy wide powers during the expulsion procedure with few possibilities for redress, which has led to various instances of collective expulsions (Benavides et al 2007, 57-58). Detention before expulsion in prisons or in overcrowded detention centers is a widespread practice (ibid. 59-62; Hurtado and Gallegos 2013, 20). Moreover, according to Article 37 of the Migration Law, those migrants who, having been expelled, re-enter into the territory without a valid authorization, may be imprisoned between six months and three years. Finally, irregular migrants face obstacles in accessing basic rights such as payment of outstanding salaries, education and health care (Hurtado and Gallegos 2013).

To date, Ecuador has not reformed its 1971 migration law. Efforts to develop a comprehensive ‘Law of Human Mobility’ covering immigration, emigration, transit, return migration and asylum, are ongoing within the Vice-Ministry of Human Mobility, formerly known as the National Secretariat of Migrants (SENAMI), and are supported by international actors, such as the International Organization for Migration (IOM) and the

UN Committee on the Protection of the Rights of Migrant Workers. However, the liberalization of the governmental migration discourse found representation at the constitutional level and in Ecuador's visa policy.

The 2008 Constitution enshrines the state's commitment to define and implement a migration policy that will support migrants' universal rights, combat discrimination, and even promote the ideal of universal citizenship. Article 9 lays down the same rights and obligations for Ecuadorians and non-nationals and Article 40, following the Argentinean example, recognizes the right to migrate and provides that no human being will be considered as an illegal due to their migratory status. In turn, Article 416 invokes the concept of universal citizenship as a guiding principle for Ecuador's international relations. The constitution further incorporates an anti-imperial, post-colonial discourse and "advocates the principle of universal citizenship, the free movement of all inhabitants of the planet, and the progressive extinction of the status of alien or foreigner as an element to transform the unequal relations between countries, especially those between North and South" (Article 416). Finally, Article 11 imposes a prohibition to discriminate on several grounds, including the ethnicity, origin and migratory status of a person.

Ecuador's constitution represents significant innovation in comparative perspective, since it is the first constitution in the world, in which the right to migrate is enshrined. Theoretically, it transforms the government's control over the relationship between territory and population by deconstructing the link between rights and citizenship as well as the assumption that individuals automatically renounce to rights when migrating (Arcentales and Garbay 2012, 7). This approach to migrants' rights goes even further than other proposals on postnational membership (Soysal 1994), since

judges, administrative authorities and civil servants shall directly apply the constitution and international human rights treaties even if the parties to the dispute do not expressly invoke them (Article 426). These constitutional ideals, however, are severely limited by the outdated legislative framework.

The constitution's prohibition of the criminalization of irregular migrants obliges the state to adopt regularization measures (Arcentales and Garbay 2012, 31). The state has however habilitated very few possibilities for regularization. In 2010, it provided two regularization programs that benefited 400 Haitian and approximately 300 Venezuelans and 650 Cubans (Arcentales and Garbay 2012, 47-49). Although Ecuador has signed permanent migratory agreements with the countries from which most immigrants originate, Peru and Colombia, the agreement with Colombia has not yet been implemented. Finally, it took Ecuador five years to finally implement the MERCOSUR Residence Agreement in April 2014. This should, if properly implemented in practice, solve the situation of Colombian and Peruvian nationals who, together with nationals from Argentina, Brazil, Chile, Paraguay, Uruguay and Bolivia, now have the right to reside and work in Ecuador.<sup>30</sup> However, the high fees imposed to obtain the temporary (230 US dollars) and permanent (350 US dollars) residence permits may act as a deterrent considering that the minimum monthly wage in Ecuador is of 340 US dollars.

Recent changes in Ecuador's visa policy, on the other hand, at least in a first instance, reflected the president's liberal discourse. On 20 June 2008, Ecuador adopted a policy of open borders, withdrawing visa requirements for all countries in the world. This

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<sup>30</sup> See Ministerio de Relaciones Exteriores y Movilidad Humana, Acuerdo Ministerial número 000031, 2 April 2014.

unprecedented policy of universal visa freedom, implemented by presidential decree, allowed any foreigner to enter Ecuador's territory for up to 90 days. The official goals of this policy were two-fold: one was to encourage tourism, the other to implement the principle of universal citizenship (Freier 2013b). This policy reads well with the constitution's declaration of the right to migrate. However, in order to extend the permitted stay of 90 days, the individual needs to apply for a residence permit. The limited possibilities for obtaining a permit, as provided by the current legal regime, has led to a further increase in the number of migrants in an irregular situation. Furthermore, visa requirements have been reintroduced for a selected number of nationals, as will be discussed below.

In sum, Ecuador's populist liberal migration rhetoric is mirrored by the 2008 Constitution, which stipulates the human right to migrate, and the 2008 policy of visa freedom. However, the lack of a comprehensive reform on the legislative level leads to incoherence with these discursive and constitutional ideals. The continued criminalization of irregular migration through the secondary migration legislation in force since 1971, as well as the government's unwillingness to implement regional agreements on mobility, further leave Ecuador in the place of publicly proposing and internationally demanding progressive immigration policies based on universal citizenship and migrants' human rights, without passing and implementing such policies at home.

*A REAL PARADIGM SHIFT? CONFRONTING RECENT LEGISLATIVE CHANGES WITH SOUTH-SOUTH MIGRATION*

It might be argued that changes in discourses always precede changes in policy, and that discursive gaps in Brazil's and Ecuador's visa policies are thus just an issue of timing. Indeed, with regards to agenda setting and consensus building, South American states have taken decisive steps into the direction of immigration policy liberalization at both the domestic and the regional level. The actual translation of this new policy consensus into legislation and policies might simply take longer. It is, of course, not unthinkable that the adoption of new legislations, following the Argentinean model, will narrow the gap between discourse and law in Brazil and Ecuador. As discussed above, in both countries comprehensive legislative immigration reforms are currently subject to debate. However, discursive gaps have persisted for about fifteen years in the case of Brazil, and ten years in the case of Ecuador, and can thus not simply be ascribed to the time needed for policy adoption. Furthermore, a full translation of governmental rhetoric, i.e. granting a 'universal right to migrate' through *de facto* opening of borders coupled with regularization mechanisms, is little likely in all three countries.

In order to further test for discursive gaps in policies targeting irregular immigration, this section analyses government's reactions to recent irregular south-south migration from extra-continental origins. Governmental discourses in Argentina, Brazil and Ecuador proclaim the universality of migrants' rights, irrespective of legal status and national origin. Asian and African immigrants and immigrants of colour have historically been most discriminated against in South America (Cook-Martín and FitzGerald 2010, 2014; FitzGerald 2013). Governments' approaches to recent increases in south-south inflows from Africa, Asia and the Caribbean thus offer a "least-likely" case to assess in how far the universal liberal discourses translate into policy measures in practice.

We have argued that Argentina is the case country, which has undergone the most coherent development between discourse and practice, and that its right to migrate may be understood in two possible ways: as an obligation of the state to provide regularization avenues and as an individual right to have a time period in which to attempt to regularize. However, migrants having entered the country clandestinely do not have the right to stay (Article 29 Immigration Law). Given that citizens of neighbouring countries and most OECD countries can enter Argentina without visas, this mostly affects south-south migrants from Africa, Asia and the Caribbean who started arriving in Argentina irregularly, mostly via Brazil, during the past decade (Freier 2013a). The government's response to these new inflows will be illustrated by the case of Senegalese and Dominican immigrants.

The Senegalese population in Argentina is estimated at 3,000 to 5,000 (Kleidermacher 2012, 113). Senegalese nationals encounter two main problems to regularize: First, most entered Argentina clandestinely. Second, due to their precarious job situation – many work in the informal sector – they cannot fulfil the legal requisite to be working under the direction of another person to regularize their status (Nejamkis and Álvarez 2012). Faced with this situation, the Argentinean government decided to launch a new regularization program, specifically for Senegalese nationals, on 4 January 2013,<sup>31</sup> with the duration of six months. According to the regularization's legislative disposition, there were a number of reasons that led to its adoption: the willingness of Senegalese nationals to settle, the impossibility to regularize their status under the permanent mechanism due to Article 29, the negative effects their irregular situation had not only for

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<sup>31</sup> Disposición 002 Dirección Nacional de Migraciones, 04 January 2013.

their insertion into the labour market, but more importantly for exercising their rights, which may lead to situations of abuse, and finally, the obligation of the state to take measures in accordance with Article 17. On the same day, another regularization program was adopted specifically for Dominican immigrants.<sup>32</sup>

Based on these cases, it might be argued that Argentina's approach to irregular immigration shows a considerable level of coherence with its liberalized discourse. However, all Senegalese and Dominican nationals who entered the country after 4 January 2013 continue to face problems to regularize. The same applies to all other nationals from Africa, Asia or the Caribbean who entered Argentina without a valid visa. Hence, despite the adoption of regularization programs for Senegalese and Dominicans, a discursive gap exists in the field of irregular immigration because these offer temporary regularization for immigrants of selected nationalities only.

Brazil's official reaction to the increase in extra-continental south-south migration has been more cautious. The most significant group of recent south-south immigrants are Haitians, who usually reach South America via Ecuador, given the possibility of visa-free entry, and then travel by land via Peru or Bolivia to Brazil (Freier 2013b). Faced with the arrival of around 15,000 thousand Haitian nationals since 2010 (Fernandes et al. 2013), the National Committee on Refugees (CONARE) did not grant Haitians refugee status since their arrival was driven by environmental issues, notably the situation in Haiti following the January 2010 earthquake (Fernandes et al. 2013). However, in cases

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<sup>32</sup> Disposición 001 Dirección Nacional de Migraciones, 04 January 2013.

involving humanitarian circumstances, the CNIg has the final word on the possibility of granting residence permits.<sup>33</sup>

This allowed the CNIg to grant residence permits for humanitarian reasons to the approx. 4000 Haitians who reached Brazil before January 2012. From 12 January onwards, the CNIg adopted Ministerial Order 97/12, valid for two years, by which Haitians could obtain a visa and residence permit because of humanitarian reasons in the Brazilian Embassy in Port au Prince. This was then extended until January 2015 by Ministerial Order 106/13 of 24 October 2013. The permit is valid for five years and may be renewed and transformed into a permanent permit, provided the person is regularly employed in Brazil.

The number of residence permits was originally capped to 100 per month. This number was adopted in order to avoid the establishment of a Haitian diaspora in Brazil, taking into account the alleged limited capacity of Brazil's labor market. It was also adopted considering that, in the government's view, not many Haitians would have the economic means to migrate to Brazil. It was further argued that providing these permits would put an end to the irregular flows in which smugglers were involved.<sup>34</sup> This visa cap was then lifted by Ministerial Order 102/2013 of 26 April 2013, as Haitians kept arriving irregularly in Brazil since they could not obtain a visa once the 100 visas had been issued (Fernandes et al. 2013: 66-67). Faced with the continuous arrival of irregular Haitian immigrants, the Brazilian government decided not to deport them but to continue

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<sup>33</sup> According to Ministerial Order 27/1998, the CNIg has the competence to solve cases not regulated in the law, such as granting residence permits in special situations.

<sup>34</sup> Ata da Reunião extraordinária de 12 Janeiro de 2012 do Conselho Nacional de Imigração.

granting them a residence permit based on humanitarian grounds. However, irregular immigration flows to Brazil recently also include increasing numbers of nationals from Nigeria, Senegal or Bangladesh, who cannot regularize their status.

Thus, in the Brazilian case, there also is a gap between the government's rhetoric and policy reactions to irregular extra-continental immigrants. Similar to the case of Senegalese and Dominicans in Argentina, the Brazilian government found a special solution for Haitians displaced in the aftermath of the 2010 earthquake. Nevertheless, the law does not provide any regularization mechanism, and irregular extra-continental immigrants depend on the discretionary power of the CNIg to legalize their status.

Ecuador, in turn, represents the country where the gap between liberal discourse and policy reactions to extra-continental immigrants is widest. Correa had claimed that he would "do away" with passports and visas, and indeed passed policies of open borders. However, universal visa freedom to Ecuador was short-lived. Only six months after its introduction, visa requirements were reintroduced for Chinese citizens, and 18 months later for citizens of Afghanistan, Bangladesh, Eritrea, Ethiopia, Kenya, Nepal, Nigeria, Pakistan and Somalia. State Secretary of Migration, Leonardo Carrion, linked the decision of the partial reintroduction of visas to emerging "unusual immigration flows" from the above countries. A majority of visitors from these countries, he explained, overstayed the permitted visa-free period of 90 days. It needs to be pointed out that the immigration of the concerned nationalities increased only on an extremely small scale after the introduction of visa-free access. With the noteworthy exception of Chinese, Cubans and Haitians, the yearly immigration rates for other African and Asian nationals, for whom visas were reintroduced, averaged at just above 300 per year from 2008-2010

(Freier 2013b). With the reintroduction of visas, Ecuadorian policy was responsive to its own unintended impact, namely the increase of immigration from Africa, Asia and the Caribbean. Given that there are no regularization measures, there are currently thousands of extra-continental immigrants, most prominently Cubans,<sup>35</sup> in an irregular situation in Ecuador.

The above analysis shows considerable variation in government reactions to irregular extra-continental immigration. Argentina and Brazil present similar cases. Both governments found solutions for the largest groups of irregular extra-continental immigrants in the countries, Senegalese, Dominicans and Haitians. In Argentina, the regularization program could only be achieved after extensive lobbying of the Ombudsman and civil society organizations, and does not extend to all other immigrants who entered without a visa. Brazil presents a similar situation, where initial government reactions to increasing inflows of Haitians were ambiguous at best, but the CNIg could push through regularization procedures. Other migrants in an irregular situation do not have the possibility to regularize their status. In Ecuador the gap between discourse and policy reactions to extra-continental immigration is widest. Extremely small inflows of extra-continental migrants led the government to abandon its policy of universal visa free access, and there are almost no regularization measures in place.

Restrictive reactions to irregular immigration in themselves might not be surprising. In the South American context, however, they present a reverse immigration policy paradox of publically welcoming all immigrants regardless of legal status or

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<sup>35</sup> [http://ecuadorinmediato.com/index.php?module=Noticias&func=news\\_user\\_view&id=139408&umt=cubanos\\_en\\_situacion\\_irregular\\_no\\_pueden\\_ser\\_deportados\\_del\\_ecuador](http://ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=139408&umt=cubanos_en_situacion_irregular_no_pueden_ser_deportados_del_ecuador)

national origin, but *de facto* excluding south-south immigrants from Africa, Asia and the Caribbean. As a result there persists a gap between what South American governments demand from Western migrant receiving states, i.e. regularization policies irrespective of the legal status and national origin of immigrants, and the policies they implement at home.

There are at least two reasons, which may be advanced in an effort to try to explain this reverse paradox. First, immigration policy liberalization, most notably regularization procedures and the MERCOSUR residence agreement, primarily targets *regional* migrants. Most migratory movements in South America are intra-regional and it was the large percentage of regional migrants in an irregular situation that led to policy liberalization (Mármora 2010). Second, restrictive reactions to extra-continental immigrants may also be intertwined with racial discrimination. It is well documented that racial and ethnic discrimination continue to be contentious issues across Latin America (Wade, 1997; Beck et al. 2011). At least in the Ecuadorian case, alleged security concerns that officially determined the restrictive reaction to the increase in extra-continental south-south migration are closely intertwined with ethnic considerations (Holloway 2012; Freier 2013b). Anti-racism can thus be politically salient in populist systems and at the same time, as Cook-Martín and FitzGerald (2014) suggest, fragile. Politicians are likely to be caught in the dilemma of serving somewhat schizophrenic public opinion; the demand for migrants' rights and regularization programs for emigrants in Europe and the U.S. and the concurrent acceptance of the liberalization of immigration policies in the light of political coherence, on the one hand, and protectionist, and even racist, public opinion, on the other. Indeed, Ecuador seems to be a

paradigmatic case in this regard. Over 60 per cent of Ecuadorians agree that rich countries have the responsibility to accept immigrants from poorer countries, but at the same time approximately 75 per cent believe that only few or no ethnically distinct immigrants and immigrants of poorer countries should be allowed in Ecuador (Latinobarómetro 2007, 2009).

### *THEORY-BUILDING AND FURTHER RESEARCH*

This study challenges what has been considered common wisdom in theories on immigration policy, i.e that, in line with public opinion, countries' governmental immigration discourses are significantly more restrictive than their immigration policies in practice. Our three South American case countries indeed present a reverse immigration paradox of populist liberalism, in which the immigration discourses of governments are considerably more liberal than their policies and laws. Existing theoretical approaches to explaining immigration policies are not readily applicable to the South American context because they are framed around the assumption that immigration discourses are inherently more restrictive than their corresponding policies. Rather than presuming such a fixed relationship, the development of immigration policy theory should be based on an unbiased analysis of the dynamics and interaction of political discourses and corresponding policies and laws. Accordingly, given the empirical case studies presented here, the relevance of political perspectives on migration should be evaluated.

The main theoretical approaches in political migration theory can be broadly categorized as political economy, neo-institutionalist and constructivist approaches

(Boswell 2007). Contradicting Hollifield's "liberal paradox", political economy approaches argue that concentrated group interests outweigh diffuse collective interest in decision making processes, and, more specifically, that employers and immigrant groups will lobby more intensively to promote liberal immigration policies, than those, who perceive to be negatively affected by immigration, will lobby against it (Freeman 1995). Doubts have been raised regarding the empirical plausibility of the political economy approach (Boswell 2007). Most importantly, it overlooks the fact that the state is more than a mediator and in fact plays an active and discrete role in defining immigration policies (Boswell 2007). In the South American context, the demands of interest groups as a driving force of immigration policies have been further discarded, at least for the case of MERCOSUR, due to the top-down structure of its policy making process (Margheritis 2012). The relatively small levels of immigration in South America, which range between 0.8 and 4.5 percent of the total population in our case countries, are another reason to question the applicability of political economy approaches.

Neo-institutionalists deny the possibility of reducing an explanation of social phenomena to the agency of individuals or interest groups and instead stress the importance of institutions. Pointing out that the state is no monolithic entity, they distinguish between the system of party politics and the administration, and different, possibly competing agencies within it. Neo-institutionalist approaches also stress that state interests may significantly diverge from societal interests (Boswell 2007). These are important contributions, which are applicable to our cases, for example, in Ecuador. The contradictory ideological alignments of the constitution and the migration law, and the question, which one should prevail, have led to serious tensions between different

ministries and departments dealing with immigration management, depending on their political alignment to the president (Freier 2013b). However, existing neo-institutionalist theories do not readily apply to the South American context, because, just as political economy approaches they focus on constraints – whether the state’s own bureaucratic structure, the judiciary, or supranational actors (e.g. Cornelius et al. 1994, 2004; Joppke 1998) – to implementing restrictive policies, and assume the tension between protectionist immigration discourses and relatively liberal policies as a given.

Furthermore, neo-institutionalist approaches underestimate the governments’ own interests. Boswell (2007) thus pledges for focusing on explanations of *why and under which* conditions the state is constrained by institutions. We find her approach of conceptualizing immigration policy making in the context of governments’ functional imperatives 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 policies. We do, however, find that scholars have to go further in questioning *which interests* and norms the state feels compelled to take into account and to *which degree* as to avoid the pitfall of presuming a fixed relationship of immigration discourses being more restrictive than their corresponding policies. Importantly, none of Boswell’s five types of policy responses (2007, 94) are applicable to our case countries. Most importantly, Boswell categorizes a “populist” policy response towards immigration as a high degree of restriction, whereas this study has shown that in South America, immigration policies developed in the context of populist liberalism.

Regarding constructivist approaches to explaining immigration policies, our cases confirm what Bonjour (2011) shows for a “typical Western liberal democratic case” (the

Netherlands), that ideas, ideology and moral considerations of politicians and bureaucrats play a substantial role in the immigration policy making process. Our cases suggest combining constructivist and rationalist approaches in the analysis of immigration discourses, policy *and* law making, thereby providing alternative evidence to the usefulness of limiting constructivist approaches to law making as suggested by Guiraudon and Lavah (2000) who argue that “[a] constructivist approach to norms ... may work in the domain of law, whereas a rationalist one seems more appropriate to understand executive agencies’ resistance to these legal norms” (Guiraudon and Lavah 2000, 189). The rights-based liberalism (Cornelius et al. 1994: 9-11) that is often described as lying *outside* the state and limiting it to implement restrictive policies, is propelled from *within* the state in our case countries. New, liberal norms on immigration policies have clearly emerged and reinforced each other in South America on both the domestic and regional level. At the same time, policy makers have both been actively involved in propelling these norms and drawing on them, at the very least discursively, based on domestic political interest.

Our study also speaks to the literature on immigration policies and race. A dominant strand of the literature describes a general development away from ethnic selectivity, i.e. immigration policies that address immigrants according to categories of race, ethnicity, nationality or country of birth (Brubaker, 1994; Freeman, 1995; Joppke, 2005, Cook-Martín and FitzGerald, 2010, 2014; FitzGerald, 2013). Contrary to the prognosis of the demise of ethnically selective immigration policies in Latin America (FitzGerald, 2013), our study suggests that ethnic selectivity needs to be considered as a persistent determinant of immigration policies in Latin America. At the same time, our

cases confirm a central argument of Cook-Martín and FitzGerald's work (2010, 2014), which questions the antithesis between democracy and racism and shows that undemocratic states were the first in the Americas to outlaw racial discrimination in immigrant selection. Indeed, Ecuador's shift towards "competitive authoritarianism" (Levitsky 2010) under Correa increased his discretion to implement visa freedom despite security concerns and racist prejudice among representatives of the institutions responsible for immigration (Freier 2013 b).

Based on the case studies, we suggest three theoretical avenues for future research. First, scholars should further explore South American populist liberalism in the area of migration policies, and in this context analyze the relationship between the region's political turn to the left and its (discursive) liberal turn in migration policies. We have shown that this liberal shift in governmental immigration discourses and policies is based on the rejection of previous restrictive approaches to immigration of former authoritarian regimes, and, more importantly, the rejection of U.S.-American and European immigration policies. The political salience of emigration and restrictive policies of Western migrant receiving states thus suggests focusing not only on domestic disputes but on how populist liberal immigration policies are shaped by international relations and other countries' policies in the area of migration (see Cook-Martín and FitzGerald 2014).

Second, the tensions we have traced between populist liberal immigration discourses and policies and public opinion further offer a promising avenue of future research regarding immigration policies and race. Populist support for liberal reform, which is based on the rejection of U.S.-American and European immigration policies,

challenges established ideas of elite consensus equaling liberal tendencies and populism equaling protectionism in immigration policies (Cornelius et al. 1994; Freeman 1995; Joppke 1998; Freeman et al. 2013). Restrictive responses to recent extra-continental south-south immigration can be partly explained by schizophrenic public opinion, which welcomes immigration policy liberalization in theory but rejects poor and ethnically ‘unwelcome’ immigrants. The empirical detection of elite racism, as theoretically advanced by Valluy (2008), in the paradigmatic case of Ecuador by Holloway (2012) and Freier (2013b) invites us to test for this in other cases.

Third, regarding policy gaps and paradoxes, an important theoretical question to ask is in how far populist liberal immigration discourses leave less room for manoeuvre for actual policy adoption than restrictive discourses because they do not oppose international human and migrants’ rights norms, but on the contrary, propel them. Domestic and international activist groups, in such cases don’t have to fight restrictive policies, but can rather press for coherence of liberal policies, simply by taking politicians by their word.

Empirically, we suggest that further research on Latin American immigration policies should be both narrowed down and broadened in scope. On the one hand side, the dynamics of domestic policy making, that could only be superficially traced in this comparative study, should be further untangled in in-depth case studies. At the same time, large N studies should test whether similar developments are taking place in other South and Central American, and Caribbean countries. Although the latter two sub-regions have experienced similarly or even higher emigration rates, it is likely that closer affiliation to the United States weakens their liberal immigration discourses. Comparative

studies should eventually include other predominantly migrant sending regions to test whether the tensions and dynamics between emigration concerns and immigration discourses and policies play out in a similar fashion.

### *CONCLUSION*

In contrast to the much discussed puzzle of “why liberal states accept unwanted migration”, which rests on the definition of the immigration policy paradox as the gap between restrictive immigration policy discourses and relatively liberal immigration policies, it is the exceptionally liberal immigration rhetoric of governments that is most surprising in South America. The development of populist liberalism in the sphere of immigration has been driven by concerns regarding emigration and diaspora policies and took place in counter-position to the immigration rhetoric of Western immigrant receiving states that rejects and criminalizes irregular immigration. Our study suggests substantial variation in the degree to which legislative and policy change have followed discursive immigration policy liberalization. While Argentina’s immigration policies and the 2004 Immigration Law present a significant liberal turn, larger discursive gaps persist in Brazil and Ecuador, which thus far have not embarked on comprehensive immigration reforms. Regarding policy reactions to irregular extra-continental south-south migration, all three countries present the reverse policy paradox of publically welcoming all immigrants regardless of legal status or national origin, but *de facto* excluding immigrants from Africa, Asia and the Caribbean, albeit to varying degrees.

The aim of this study has not been a normative acclaim of recent developments in immigration policy making in South America. Nevertheless, we would like to conclude

by emphasizing that some of these developments, such as Argentina's new immigration law, are remarkable from the perspective of the promotion of migrants' rights. In how far there will be a sustainable shift in immigration policy making throughout South America, and whether the region could even become a model for policy and law making other parts of the world, remains to be seen.

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