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Abstract:

The paper examines the relation between citizenship and regional migrations in recent legislative changes in Argentina from a comparative perspective. The article discusses how these legislative changes are shaping a new migration paradigm and conceptions of citizenship; providing with relevant information about migration and citizenship in the Common Market of the Southern Cone (MERCOSUR). The article first gives a general review of the literature on citizenship and migration, with a focus on Latin America. In this framework, the contribution explores the factors which have driven recent legislative changes on migration and citizenship in Argentina and their implications in the light of the Supreme Court's case law on migrant's rights and access to citizenship. The article further underlines the impact of MERCOSUR regulations on migration and citizenship issues at internal level.

ESSAY

**CITIZENSHIP, MIGRATION AND REGIONAL INTEGRATION:
RE-SHAPING CITIZENSHIP CONCEPTIONS IN THE SOUTHERN CONE**

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1. Introduction

Although there is a vast literature on the interplay between citizenship and immigration in European and North American countries, no extensive research has so far been carried out on other countries. In the case of Argentina, new migration patterns and the signature of regional agreements on migration have brought legislative and policy changes regarding migration and citizenship.

In the paper, we present a study on how these factors have driven a shift in the migration paradigm in Argentina. Thus, the main goal is to analyze the relation between citizenship and regional migrations in recent legislative changes in Argentina from a comparative perspective. We aim at examining how these legislative changes are shaping a new migration paradigm and conceptions and representations of citizenship. Furthermore, the study provides with relevant information about migration and citizenship in South America.

From 1870 until 1913, migration flows were from Europe to the Americas. Argentina was one of the main receiving countries: approximately seven million European people arrived in the country. On the contrary, in the last decades of the XX century Argentina converted into an emigration country, in particular, of highly skilled migrants. At the same time, the country was receiving regional migration flows coming from neighboring countries.⁸¹

Since 1876, the immigration policy had been partially covered by rules adopted by executive decrees and a law enacted during the last dictatorship. Only towards the end of 2003, and after two decades of the return to democracy, the Congress repealed the previous immigration law and approved a new migration act (2004 Migration Act - Ley de Migraciones No. 25 871). This law represents the first general legislation on migration enacted by a democratic government in compliance with international standards on the protection of fundamental human rights of migrants. At the same time, and since 2000 Argentina's Supreme Court has introduced more flexible criteria to interpret the requirements to access to citizenship.

⁸¹ In 2001 migrants from neighbouring countries in Argentina represented 2.6 % of the total of the population. In 2010, approximately 3 %. Source: INDEC (National Institute for Statistics and Census).

Another relevant development is the signature at regional level of the 2002 agreements to regularize undocumented migrants from MERCOSUR (Common Market of the Southern Cone)⁸² member and associated states. Consequently, Argentina has introduced specific provisions in its immigration legislation to grant a special status based on nationality to citizens from MERCOSUR member and associated states and implemented a regularization programme for undocumented regional migrants present in its territory.⁸³

By examining these legal ‘turning points’ we intend to shed new light and present a new focus on the construction and evolution of contemporary conceptions of citizenship in Argentina. In this paper, we will use the term “citizenship” with two different meanings: formal and substantive.⁸⁴ By formal citizenship we understand the “formal link between an individual and a state, to the individual belonging to a nation-state, which is juridically sanctioned by the possession of an identity card or passport of that state”.⁸⁵ As for substantive citizenship, it consists of “the bundle of civil, political, social, and also cultural rights enjoyed by an individual, traditionally by virtue of her or his belonging to the national community”.⁸⁶ Even though these two aspects are closely linked, sometimes it is possible to enjoy citizenship rights under another legal status.⁸⁷

This paper is organized as follows. The first section gives a general review of the

82 MERCOSUR was established by the Treaty of Asuncion signed in 1991 by Argentina, Brazil, Paraguay and Uruguay. Venezuela was admitted as member state in 2006, but its full membership is still pending upon its approval by the Paraguayan Congress. Up to the present Bolivia, Chile, Colombia, Peru and Ecuador are associated states.

83 See R Benencia and A Gazzotti, 'Migración Limítrofe y Empleo' (1995) 10 (31) *Estudios Migratorios Latinoamericanos* 373; S Montoya and S Pertcará, 'Los inmigrantes en el mercado de trabajo urbano. Alcances y perspectivas' (Seminar 'Impacts of immigration on Argentinean society', Buenos Aires, 1995); L Reboiras Finardi, 'Migración internacional en el Gran Buenos Aires: sus vinculaciones con el desempleo y la discriminación en el ámbito laboral' (Centro Latinoamericano de Demografía 1995) 39.

84 There is no general agreement on the concept of citizenship itself. As Martiniello points out, “conceptions of citizenship vary according to the academic discipline but also according to the school of thought within the various academic disciplines”. See M Martiniello, 'Citizenship of the European Union' in T Aleinnikoff & D Klusmeyer (eds) *From Migrants to Citizens* (Carnegie Endowment for International Peace 2000) 345.

85 Ibid.

86 Ibid.

87 This situation is defined as “citizenship rights of non-citizen residents”. See R Bauböck (ed), *Migration and Citizenship: Legal Status, Rights and Political Participation* (Amsterdam University Press - IMISCOE Reports, University of Chicago 2006) 23.

literature on citizenship and migration, with a focus on Latin America. The second section provides with an explanation about the empirical factors which have driven recent legislative changes in Argentina. The third section addresses the main modifications regarding Argentinean citizenship and migration laws and the Supreme Court's case law on migrant's rights and access to citizenship. The fourth section is devoted to the study of MERCOSUR and how its regulations have an impact on migration and citizenship issues at internal level. The author's opinion is summarized in the last section.

2. Contemporary debates on citizenship and international migrations in Europe and the Americas: An overview

Over recent years, the linkage between citizenship and immigration has become an important topic. Indeed, scholars of citizenship have shown how migration has brought various changes to the traditional Marshallian concept of citizenship.⁸⁸ The debate in Europe and in the United States about citizenship in the context of international migration has been on the agenda for a long period.⁸⁹ Scholars have mainly focused on the study of citizenship and immigration in industrialized states, in particular in North America and Western Europe, overlooking other geographical areas.⁹⁰ There is little knowledge of these ongoing processes in other geographical areas, such as Latin America. Preliminary evidence would seem to suggest that this is a broader trend.

A brief overview of the main theories and mainstream debates on migration and

88 Ch Jopkke, 'How immigration is changing citizenship: a comparative analysis' (1999) 22 (4) *Ethnic and Racial Studies* 629. The conception provided by TH Marshall on the evolution of citizenship from the civic arena to the political and on to the social one has been frequently the basis for developing new conceptualizations about citizenship. See TH Marshall, *Citizenship and Social Class* (Cambridge University Press 1950) 28, 29.

89 S Castles and A Davidson, *Citizenship and migration - Globalization and the politics of belonging* (MacMillan 2000); C McKinnon and I Hampsher-Monk (eds), 'Civil Citizens' in *The Demands of Citizenship* (Continuum Publishing 2000). L Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press 2008). In the past decade there has been a proliferation of research on 'citizenship' in different contexts. Thus, it was discussed in the context of political transformations of Central and Eastern Europe, with respect to the renewed challenges of globalization and migration and in the decline of the welfare state since the 1980s.

90 Even in the case of Europe, studies have addressed the question by focusing on the traditional receiving countries such as France, Germany, the United Kingdom and the Netherlands. See, for instance, E Ersanilli and R Koopmans, 'Rewarding integration? Citizenship Regulations and the Socio-Cultural Integration of Immigrants in the Netherlands, France and Germany' (2010) 36 (5) *Journal of Ethnic and Migration Studies* 773.

citizenship provides with the theoretical framework for our study. At the same time, and in order to complete the analysis, it is necessary to take a look at contemporary conceptions of citizenship in Latin America.

In the migration context, for the purposes of this study, three different approaches to citizenship can be distinguished. The first is the approach oriented towards the analysis of the traditional liberal concept of formal citizenship as a legal status linked to the nation-state.⁹¹ In this perspective, citizenship laws and migration legislation are two fundamental aspects of the definition of who is entitled to hold the status of citizen. Citizenship at birth can be based on place of birth (*jus soli*) or parental origins (*jus sanguinis*), or in certain cases on both. In the case of migrants, citizenship can be acquired through naturalization based on legal residence in the receiving country. In this case, migrants must meet certain requirements such as possessing knowledge about the country or of its main language. Only under certain conditions are migrants allowed to retain their citizenship of origin (dual citizenship).

According to the second approach, substantive citizenship is more relevant than the formal possession of citizenship status. Scholars following this approach emphasize migrants' entitlement to and enjoyment of citizenship rights more than formal citizenship. With regard to the substantive concept of citizenship, Castles suggests that the European debate on citizenship for immigrants has focused mainly on the issue of formal citizenship – in particular on the rules for access to citizenship for immigrants and their descendent – and than less attention has been paid to the rights and obligations connected with being a member of a state (substantial citizenship).⁹² K. Calavita refers to this as “*de facto*” citizenship.⁹³ The second approach also encompasses theories which consider citizenship as a process of negotiation of rights articulated through the concepts of practices and agency.⁹⁴

The third perspective, however, goes beyond the boundaries of the nation-state

91 R Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press 1992).

92 S Castles, 'Migration and Community Formation under Conditions of Globalization' (2002) 36 (4) *International Migration Review* 1143.

93 K Calavita, 'Law, Citizenship, and the Construction of (Some) Immigrant ‘Others’' (2005) 30 (2) *Law & Social Inquiry* 407.

94 S Kron and K Noack (eds) *¿Qué género tiene el derecho?-Ciudadanía, historia y globalización* (Collection *Fragmentierte Moderne in Lateinamerika*, Tranvía – Verlag Walter Frey 2008).

and takes into account notions such as transnationalism⁹⁵ and Soysal's concept of a new form of "postnational membership" in the European post-war context based on a discourse on human rights.⁹⁶ This third approach starts from the idea of a separation between citizenship and the nation-state in the analysis of international migration⁹⁷ and includes theories about "transnational citizenship", "postnational citizenship", "transborder citizenship" and "flexible citizenship".⁹⁸

As can be perceived, when it comes to immigration there is a tension between the formal and the substantive notions of citizenship.⁹⁹ In the migration context, a shift in the correspondence between these two concepts can be noticed. Some scholars of citizenship have argued that formal citizenship is no longer as relevant as it was before in the dichotomy between foreigner-citizens and other legal memberships guaranteeing the enjoyment of rights.¹⁰⁰ Y. Soysal, for instance, argues in the case of guest workers that they have achieved membership status without becoming citizens.¹⁰¹ K. Calavita destabilizes the traditional citizen-foreigners dichotomy by recognizing different degrees of

95 N Glick Schiller, L Basch and C Szanton Blanc, 'Transnationalism: a new analytic framework for understanding migration' in N Glick Schiller, L Basch & C Szanton Blanc (eds), *Towards a Transnational Perspective on Migration* (New York Academy of Sciences 1992) 1, 24.

96 YN Soysal, *Limits of citizenship- Migrants and Postnational Membership in Europe* (University of Chicago Press 1994) 144.

97 S Sassen, 'The repositioning of citizenship: emergent subjects and spaces for politics' (2002) 46 *Berkeley Journal of Sociology* 4.

98 R Bauböck, *Transnational Citizenship. Membership and Rights in International Migration* (Edward Elgar 1994); L Bosniak, 'Universal citizenship and the problem of alienage' (2000) 94 (3) *Northwestern University Law Review* 963; S Kron and K Noack (eds) *¿Qué género tiene el derecho?-Ciudadanía, historia y globalización* (n 14); A Ong, *Flexible Citizenship: The cultural logic of transnationality* (Duke University Press 1999) 1,8.

99 Quoting Brubaker, it can be said that formal citizenship "(...) is neither a sufficient nor a necessary condition for substantive membership (...): one can possess formal state membership yet be excluded (in law or in fact) from certain civil, political, or social rights". R Brubaker, *Citizenship and Nationhood in France and Germany* (n 11) 36.

100 M Martiniello in problematizing the formal concept of citizenship and following the terminology used by T Hammar, distinguishes between various categories among migrants: "full citizens" (who enjoy the legal status of nationality), "denizens" (legally staying foreigners) and "margizens" (undocumented migrants). See M Martiniello, 'Citizenship of the European Union: a Critical View' in R Bauböck (ed) *From Aliens to Citizens-Redefining the Status of Immigrants in Europe* (Avebury, Aldershot 1994) 28, 47.

101 T Hammar, *Democracy and the Nation-State: Aliens, Denizens and Citizens in a Word of International Migration* (Avebury, Aldershot 1990) 15, 23.

membership: the so-called “in between” memberships.¹⁰² As A. Ong in an analysis of current international migrations suggests, “we have moved beyond the idea of citizenship as a protected status in a nation-state, and as a condition opposed to the condition of statelessness”.¹⁰³

In this general debate on citizenship and migration, it is worth referring to the main theoretical approaches in Latin America. Most of them take the marshallian conception of citizenship (and the revision by T. Bottomore on the enjoyment of civil and social rights) as starting point.¹⁰⁴ In particular, these theories acknowledge the distinction between formal citizenship and substantive citizenship: formal citizenship, as membership to a nation-state and, substantive citizenship, which implies entitlement to rights and the enjoyment of them, with participation in the public and private sphere, within the three areas defined by Marshall. The common feature of these theories is the crisis of the conception of formal citizenship, due to various phenomenon, such as migration and the internationalization of legal work.¹⁰⁵

In Latin America, citizenship is in the middle of the dualism between inclusion-exclusion. After a period of dictatorships, in a democratic context the emphasis is on building up social systems which guarantee inclusion. In this framework, citizenship is understood as the effective enjoyment of certain “basic rights”. There is a further distinction made in the Latin American context between “full citizenship” and “uncompleted citizenship” (*ciudadanías deficitarias*).¹⁰⁶

In the contemporary debate on citizenship in Latin America, various approaches can be recognized. For instance, we can mention N. García Canclini (1995), who in his study on the consumption and cultural policies, emphasizes that citizenship reflects the fight for certain rights to be recognized and the “others” as subjects with valid interests, pertinent values and legitimate

102 K Calavita, ‘Law, Citizenship, and the Construction of (Some) Immigrant ‘Others’ (2005) 30 (2) *Law & Social Inquiry* 401.

103 A Ong, ‘Mutations in Citizenship’ (2006) 23 (2-3) *Theory, Culture & Society* 499 <<http://www.humnet.ucla.edu/mellon/Mutations.pdf>> accessed 7 December 2011.

104 T Bottomore, ‘Citizenship and social class, forty years on’ in TH Marshall and T Bottomore, *Citizenship and Social Class* (Pluto Press 1992).

105 *Ibid.*

106 This lack of the enjoyment of a full citizenship can be seen in the case of women or members of ethnic groups.

demands.¹⁰⁷

Scholars like Calderón, Hopenhayn and Ottone (1996) focused on the analysis of the construction of a social citizenship and inclusion. In their view, the progress of the process of social integration in the field of extended citizenship does not occur in a sequential and organized way.¹⁰⁸ On the contrary, there is a tendency towards the enlargement of the equity on a symbolic level.

There are also approaches to citizenship which emphasize the idea of citizenship and rights as the outcome of a social process. In this regard, E. Jelin (1993) up-rises the social construction of rights, as a process giving rise to rights that engender social responsibilities.¹⁰⁹ According to Jelin and following up on H. Arendt's theory, the essential right is the right to have rights.¹¹⁰ In the same venue, according to Sojo citizenship's substantive rights are not accumulative; they are not recognized in the law and are the outcome of social conflict.¹¹¹

As for the studies on migration and citizenship in Latin America, they have focused on the relationships between immigration and the nation-building process in the XIX and the first half of the XX century.¹¹² In Argentina, for instance, G. Germani conducted extensive research on the political participation as “assimilation” of immigrants.¹¹³ In the contemporary migration context, most of the studies have examined the migrations from Latin American countries to developed countries. Some scholars have addressed the impact of regional migrations in the conceptions of citizenship. In Central America, S.

107 N García Canclini, *Consumidores y ciudadanos. Conflictos multiculturales de la globalización* (Grijalbo 1995).

108 F Calderón, M Hopenhayn and E Ottone, *Esa esquivia modernidad: Desarrollo, ciudadanía y cultura en América Latina y el Caribe* (UNESCO/Nueva Sociedad 1996).

109 E Jelin, 'Cómo construir ciudadanía? Una visión desde abajo' (1993) 55 *Revista Europea de Estudios Latinoamericanos y del Caribe* 25.

110 H Arendt, *The origins of totalitarianism* (Harcourt, Brace & World 1973).

111 C Sojo, 'La noción de ciudadanía en el debate latinoamericano' (2002) 76 *Revista de la CEPAL* 37.

112 See H Sábato and E Cibotti, 'Hacer política en Buenos Aires: Los italianos en la escena pública porteña: 1860-1880' [1990] 3 (2) *Boletín del Instituto de Historia Argentina y Americana* Dr. E. Ravignani 7.

113 G Germani, *Política y sociedad en una época en transición. De la sociedad tradicional a la sociedad de masas* (Paidós 1968). However, the nationalization rates those days were extremely low. Germani found the explanation for this in the loyalty to the country of origin, the low educational level and the low political participation of immigrants in their respective countries of origin.

Kron has studied processes which are transforming citizenship, underlying the transnational conception of citizenship, such as transborder movements on the frontier between Mexico and Guatemala.¹¹⁴ In South America, E. Jelin argued that new conceptions of “nation and nationhood” are emerging in the case of MERCOSUR.¹¹⁵ In particular, and concerning migrants, E. Jelin advocates the need to study substantive citizenship (*ciudadanía sustantiva*) alongside formal citizenship. This implies real access to citizenship rights and duties and effective participation in the receiving country.¹¹⁶

As can be observed, there is a broad array of conceptions on migration and citizenship, with the peculiarities arising from the Latin American context. In the following sections, we will discuss to what extent these conceptions are present in recent legislative changes introduced in Argentina.

3. Regional migrations in Latin America and Argentina: Current patterns and challenges

Relevant empirical data shows a significant change in the migration patterns in the Americas over the past thirty years.¹¹⁷ Apart from the internal rural-urban migration, an increase in the international periphery-centre migrations can be observed.¹¹⁸ Migration literature has focused mainly on these migratory patterns.¹¹⁹ However, other migration flows can be observed among peripheral countries, which consist of intra-regional migrations.¹²⁰

These intra-regional migrations are driven by different factors: economic,

114 S Kron and K Noack (eds) *¿Qué género tiene el derecho?-Ciudadanía, historia y globalización* (n 14) 259.

115 E Jelin, 'Cultural Movements and Social Actors in the New Regional Scenarios: The Case of MERCOSUR' (2001) 22 (1) *International Political Science Review* 85.

116 A Grimson and E Jelin (eds) *Migraciones regionales hacia la Argentina – Diferencia, desigualdad y derechos*, (Prometeo Libros 2006).

117 ECLAC/CEPAL, 'International migration and development in the Americas Symposium on International Migration in the Americas' (CEPAL 2000).

118 See J Rodríguez, G Busso, 'Migración interna y desarrollo en América Latina entre 1980 y 2005. Un estudio comparativo con perspectiva regional basado en siete países' (CEPAL 2009).

119 See, for instance, the analysis of Di Filippo on South-North migrations in the Americas and the comparison with intra-regional migration. A Di Filippo, 'Globalización, Integración Regional y Migraciones' (CEPAL/Siglo XXI 2000).

120 Since most countries do not publish migration data on cross-border flows, most of the studies on migration in Latin America rely on Census data.

social, cultural and political.¹²¹ Within these patterns of intra-regional migrations, some scholars describe these movements as “horizontal migrations”. Horizontal migration is defined as “a type of migration which does not result from push-pull effects on the macro-level of social development but from differences of opportunities due to specific individual interest or qualifications”.¹²²

In this general context, the particularities of migration patterns in Argentina should be emphasized. On the whole, Argentina can be seen as the outcome of the contributions made by diverse groups of immigrants to the economic, demographic, and cultural structure of the country, from immigration from overseas to contemporary cross-border immigration.¹²³

Transoceanic migrations that took place from mid of the XIX century contributed to the settlement of the country. In the period 1881-1914 more than 4.200.000 people migrated to Argentina.¹²⁴ The main migration flows arrived before the First World War. In 1914, the stock of immigrants in the country reached its highest level ever, in relative terms, representing 30% of the total population.¹²⁵ At that time, the return rate of migrants was also relevant, around 35%, however, it remained below the level observed in other American countries.¹²⁶ European immigration was mostly composed by male young people of rural origin, which arrived in the country by the influence of migration chains, having settled in urban areas but also contributed to development within the country, colonizing the land so far not-exploited.¹²⁷ These immigration flows took place in a context of the growth of Argentina's economy.

In the last few decades, migration flows from neighboring countries have

121 It is the case, for instance, of migration flows between Haiti and Dominican Republic or Costa Rica and Nicaragua.

122 W Hein, 'International Migration and Regional Integration: The Case of Central America' in H Kleinschmidt (ed), *Migration, Regional Integration and Human Security* (Ashgate 2006) 153, 157.

123 International Organization for the Migrations (IOM), Report on Argentina. 'Perfil Migratorio de Argentina 2008' (IOM 2008) <http://publications.iom.int/bookstore/free/argentina_profile.pdf> accessed 10 October 2011.

124 Among them, the prevalent communities were: Italian (2.000.000), Spanish (1.400.000), French (170.000) and Russian (160.000).

125 IOM Report on Argentina. 'Perfil Migratorio de Argentina 2008' (n 43).

126 Ibid.

127 Ibid.

increased in Argentina.¹²⁸ The main migration drivers, among others, are the favorable labor market conditions, the availability of social services, and perceptions about possibilities for personal improvement. These migratory flows can be seen to a certain extent as horizontal migrations. Paradoxically, meanwhile, nationals migrate to other countries due to the lack of job opportunities, better prospects for personal and professional development and institutional problems.¹²⁹ Nowadays, immigrants arrive in Argentina mostly from countries in the region, and in less number from Asia and Eastern Europe.¹³⁰ Whereas Argentinean migrants head mainly to Spain, the United States, as well as Israel, Canada, Italy, and Australia. At the moment, the immigrant stock in Argentina represents 4,5 per cent of the total population.¹³¹ In contrast, according to the records, the number of Argentinean nationals living abroad has risen.¹³²

Taking into account these migratory movements in Argentina, one can notice how the country assumed a dual role in recent years, becoming both a host country and a country of emigration. The role of receiving country distinguishes it from other countries in the region, due to the ability of attracting people, reflected in the stock of foreigners registered in its territory, which transformed it into a reference point of migration in the Southern Cone (sub-regional migration center).¹³³

In most of the cases, migration to Argentina is linked to labor mobility.¹³⁴ Migrant workers search better conditions for their insertion in labor markets, higher salaries, or possibilities for social improvement. Many of these migrant workers are excluded or marginalized from labor markets in their countries of

128 According to the 2010 Argentinean Census, citizens from MERCOSUR neighbouring countries amount to 1.245.054 distributed as follows: Bolivia 345.272; Brazil 41.330; Chile 191.147; Paraguay 550.713; Uruguay 116.592 and Peru 157.514. Source: INDEC (National Institute for Statistics and Census).

129 IOM Report on Argentina. 'Perfil Migratorio de Argentina 2008' (n 43).

130 For a detailed analysis on the contemporary migration flows to Argentina, see MI Pacecca and C Courtis, 'Inmigración contemporánea en Argentina: dinámicas y políticas' (CELADE 2008).

131 Ibid.

132 Approximately 800.000 Argentinean nationals are living abroad. World Bank, *Development Prospects Group Migration and Remittances Factbook* (World Bank 2008).

133 Latin American and Caribbean Demographic Center (CELADE), IMILA (Investigation of International Migration in Latin America).

134 MI Pacecca and C Courtis, 'Inmigración contemporánea en Argentina: dinámicas y políticas' (n 50).

origin, where they face limited possibilities for professional advancement, migrants move abroad in search of better opportunities.¹³⁵

Traditionally, border migrations were driven by seasonal work. Indeed, neighboring migration has always played a certain role in the form of seasonal migration of agricultural workers across the borders. Migrants perform different activities in rural areas, such as, sugar harvest, wool, and production of yerba mate, among others.¹³⁶

In this respect, it should be emphasized that neighboring immigration has represented along Argentina's history between 2% and 3% of the total population.¹³⁷ The origin of these communities has changed over different periods: from the predominance of Uruguayans in the early twentieth century to the predominance of Paraguayans and Bolivians in the beginning of the new millennium.

In the pattern of migration coming from neighboring countries, one can observe that until the mid twentieth century, migrants established in areas closed to the borders, supplying rural workers in areas lacking population. From mid of the twentieth century onwards, a significant part of migrants from neighboring countries is directed towards urban areas, with a preference for the metropolitan area of Buenos Aires.¹³⁸

Furthermore, the recent migration phenomenon in Argentina has other connotations, such as: the growth of transnational migration; the spread of

135 Ibid. In general, the labor insertion of migrants is complementary and additional, as they take up jobs that national workers are less willing to accept because of low salaries or the low-skilled type of employment and associated labor conditions. See, as well, IOM Report on Argentina. 'Perfil Migratorio de Argentina 2008' (n 43).

136 Ibid.

137 The Latin American and Caribbean Demographic Center (CELADE) have conducted since the early seventies in Latin America a project (Investigation of International Migration in Latin America- IMILA), aimed to collect and consolidate data on migration of various national censuses that are carried out in the Americas. According to CELS (Centro de Estudios Legales y Sociales/ Center of Legal and Social Studies), the 1869 Census showed 41.000 residents in Argentina which were born in neighbouring countries; in 1895, there were 115.000 migrants coming from neighbouring countries; in 1914, 206.000; in 1947, 313. 000; and in 1991, 817. 000. In the 1991 Census, the total number of foreigners living in Argentina amounted to 1.800.000, of which approximately a little less than half were from neighbouring countries. See CELS, 'Annual Report' (CELS 2000) <http://www.cels.org.ar/common/documentos/informe_2000_cap_6.pdf > accessed 10 October 2011.

138 IOM Report on Argentina 'Perfil Migratorio de Argentina 2008' (n 43).

social networks linked to migration; the increased activity linked to remittances; the larger role of women in migration flows; the creation of associations of and for migrants; the rise of smuggling and trafficking in persons; forced migration; seasonal migration with new time periods and underlying strategies; the specific character of migration of qualified workers.¹³⁹

Migratory issues have gained increased prominence on the agenda of governmental authorities. In order to address contemporary migration's challenges, different bilateral and multilateral migration policies have been adopted. In recent years, Argentina shows various achievements in its migration policy. Such developments focused on the approval of new norms (migration and refugee laws) and the ratification of bilateral and multilateral agreements, which are all inspired by international treaties on human rights.

4. Past and present immigration and citizenship legislation in Argentina

The above describe trends and modifications in the migration patterns have been reflected in the legislation and migration policy adopted in Argentina over the different centuries. The analysis of the legislative changes in migration and access to citizenship gives us a clear idea of the transitions operated in Argentina towards the adoption of a new paradigm. It is also relevant to consider the way in which the Supreme Court (the main judicial body) fostered the change, issuing rulings on the access to citizenship and protection of migrant's rights.

As in other Latin American countries, in Argentina the formation of the nation-state in the past century was shaped by immigration, which implied the adoption of the *jus solis* at birth principle in the citizenship laws.¹⁴⁰ Accordingly, the Argentinean Constitution in Article 20 establishes: "Foreigners enjoy within the territory of the Nation all the civil rights of citizens; they may exercise their industry, trade and profession; own real property, buy and sell it; navigate the rivers and coasts; practice freely their religion; make wills and marry under the laws. They are not obliged to accept citizenship nor to pay extraordinary compulsory taxes. They may obtain naturalization papers residing two uninterrupted years in the Nation; but the authorities may shorten this

139 Ibid.

140 For a detailed analysis on citizenship laws from a historical point of view, see G Bertocchi and Ch Strozzi, *Citizenship laws and international migration in historical perspective* (Verlag WZB 2004).

term in favor of those so requesting it, alleging and proving services rendered to the Republic (sic).”¹⁴¹ This provision is complemented by Article 25: “The Federal Government shall foster European immigration; and may not restrict, limit or burden with any tax whatsoever, the entry into the Argentinean territory of foreigners who arrive for the purpose of tilling the soil, improving industries, and introducing and teaching arts and sciences (sic)”¹⁴²; and also by Article 75 par. 12 when referring to the Congress' power “to enact general laws of naturalization and nationality for the whole nation, based on the principle of nationality by birth or by option for the benefit of Argentina (sic).”¹⁴³

Following the constitutional provisions, the Citizenship law is based on the application of the *jus soli* principle at birth and the acquisition of citizenship after two years of residence.¹⁴⁴ Dual citizenship is not generally recognized by Argentina, except in the case of countries with which Argentina has an agreement providing for that.¹⁴⁵

In the XIX century Argentina adopted an open immigration policy. The first norm on migration was the Law No. 817 of Immigration and Settlement passed in 1876, known as “Avellaneda law”, which created institutional arrangements that promoted and facilitated the entry, residence, employment and social inclusion of foreigners which arrived until the first decades of the twentieth century.¹⁴⁶ Under this legislation, all foreigners entering the country with the

141 Argentinean Constitution. Official version <http://www.argentina.gov.ar/argentina/portal/documentos/constitucion_ingles.pdf> accessed 9 December 2011.

142 Ibid.

143 Ibid.

144 The first citizenship law (Ley N° 346) was adopted in 1869. This law was replaced by a new legislation (Ley de nacionalidad N° 21.795) enacted on 18 May 1978, during the dictatorship. In 1984 with the return of the democracy, the law 21.795 was abolished and the previous legislation was re-established. The consolidated version of the citizenship law (Law 346 including all its reforms) was approved in 2004.

145 As of May 2005, such countries were: Colombia, Chile, Ecuador, Honduras, Nicaragua, Panama, El Salvador, Spain, Italy, Switzerland, Norway and Sweden.

146 The first law on immigration policy is called the "Avellaneda law" No. 817 (1876) after the President who was in charge when was enacted (Nicolás Avellaneda). It should, however, be noted that later on two restrictive laws were passed: the Residence Act No. 4114 (1902) and the Law of Social Defence No. 7209 (1910). The latter rules, altogether, are considered as the first regulations that legitimize the discretionary actions of the executive branch in immigration matters. For a further analysis of the previous regulations on migration, see among others, G Romagnoli, *Aspectos Jurídicos e Institucionales de las Migraciones en la República Argentina*

required documentation were granted immigrant status and residence permits, and enjoyed the same civil rights as nationals. Regarding labor rights, they were not subject to any prohibition or restriction.

Even after the period of immigration from overseas, European immigrants continued to be the focus of immigration law and policies to encourage immigration. According to the legislation enacted after the Avellaneda law, Latin American migration was not object of promotion policies, and rarely appeared as an explicit target of migration norms taking into account its features.

Moreover, when analyzing the subsequent legislative changes, especially since 1960, one can observe that the rules became more restrictive, introducing distinctions (illegal entry and stay), specific admission criteria fragmenting the categories of permanence (transit stay, temporary stay, precarious stay, permanent residence) and, in general, making the requirements more complicated.¹⁴⁷

Parallel to these restrictions, which hindered the legalization of the residence of neighboring migrants, there was an increased delegation of police power in administrative instances. The norms adopted were namely inspired by the doctrine of national security, resulting from the sum of a fragmented and unsystematic series of rules approved outside the regular parliamentary process.

In this context, the General Law of Migration No. 22. 439 (known as “Videla law”) was passed in 1981 under the last military regime.¹⁴⁸ This law was in force for a long period and for over twenty years of democracy in Argentina, in violation of fundamental rights enshrined in the Constitution.

(Organización Mundial para las Migraciones- OIM 1991) and F Devoto, *Historia de la Inmigración en la Argentina* (Sudamericana 2003).

¹⁴⁷ For instance, several personal documents sealed and a labour contract signed before a public notary were required, the law established to prove certain skills (related to working capacity and ability to integrate in the society, etc.) and implemented prohibitions (eg to turn a tourist visa into a temporary residence permit). Different migrant rights' organizations verified an increase in the controls concerning undocumented migration in Argentina since 1966. See Comisión Chilena de Derechos Humanos, Centro de Estudios para el Desarrollo Laboral y Agrario de Bolivia (CEDLA), Centro de Asesoría Laboral de Perú (CEDAL) and Centro de Estudios Legales y Sociales (CELS), *Derechos Humanos de los Migrantes. Situación de los derechos económicos, sociales y culturales de los migrantes peruanos y bolivianos en Argentina y Chile* (Capítulo Boliviano de Derechos Humanos, Democracia y Desarrollo 1999) 122.

¹⁴⁸ Ley N° 22.439/81, Ley general de migraciones y fomento de la inmigración, 25 June 1981 <<http://www.unhcr.org/refworld/docid/3db93ab74.html>> accessed 6 December 2011.

It is worth referring briefly to this law and its implications. The “Videla law” distinguished between legal and illegal entry for permanence, and defined three categories: permanent residents, temporary residents and people in transit, establishing that only the first category enjoyed constitutional rights. In fact, one of the main critiques to this law was the restriction imposed on the enjoyment of fundamental rights (civil, economic and social) to those migrants who found themselves in irregular situation. In particular, the law provided the legal obligation to report before the migration authority, the existence of any foreign person without a residence permit.¹⁴⁹

In the meantime, and since the mid-twentieth century, successive democratic governments attempted to remedy the situation of irregularity caused by these restrictive regulations, through the mechanism of amnesty programs. There were in total six amnesties: three general (1949, 1958, 1984) and three specific for migrants born in neighboring countries (1964, 1974, 1992). Moreover, in 1994 a facilitation program provided for the regularization of Peruvian migrants.¹⁵⁰

The persistence of the “Videla law” on migration represented a heavy burden to the democratic governments, until the approval of a new Migration Act (Ley No. 25.871) at the end of 2003.¹⁵¹ The enactment of this law was the outcome of a continuous struggle over decades of religious institutions, human rights organizations, migrant associations, NGOs and researchers.¹⁵² This new Migration Act constitutes the core of what the government has called the “new paradigm” on migration, and involves a discursive shift that incorporates two innovations: a human rights perspective and a regional approach.

The new Migration Act (Law No. 25. 871) recognizes the human right to migrate and the right to family reunification, including different guarantees for

149 This obligation affected teachers, doctors, clerks, civil servants, merchants and entrepreneurs.

150 Resolution 3850/94 of the Ministry of Interior, this process covered approximately 9.900 Peruvian nationals who had entered Argentina prior to 1 October 1994.

151 The Law 25.781 was approved by the Congress on 17 December 2003 and enacted by the Executive branch on 20 January 2004. The regulation defining specific aspects of the law (Reglamento Migratorio) was passed in 2010 through the adoption of the Decree 616/2010 on 6 May 2010.

152 See S Caggiano, 'Migrantes y luchas por derechos: Posibilidades y limitaciones de la articulación entre organizaciones, (Crisis global y estrategias migratorias: hacia la redefinición de las políticas de movilidad', FLACSO, Quito, Ecuador, May 2011 <http://www.flacsoandes.org/web/imagesFTP/1309206623.Ponencia_Sergio_Caggiano.pdf> accessed 30 November 2011.

migrants during the proceedings.¹⁵³ Besides, the law provides with specific regulations on the residence and work permits for citizens from South American countries. On the whole, the new law is in line with international standards defined by the Inter-American Court of Human Rights in the protection of migrant's rights.¹⁵⁴ The law specifically mentioned as state responsibility, to ensure equal treatment of aliens who are in a regular situation. The law recognizes on an unrestricted basis (regardless of the migrant's legal status) the right to basic education and the access to health care.¹⁵⁵

Moreover, the law specifies that foreigners enjoy social rights on an equal basis with Argentinean citizens.¹⁵⁶ Besides, it overrides the obligation to report irregular migrants that the old law established, and encourages the promotion and dissemination of the obligations and rights of migrants. The new legislation also refers to the actions on the part of the state to promote the integration of migrants¹⁵⁷ and to facilitate the consultation or participation of foreigners in decisions concerning public life and administration of communities (cities, towns) where they reside. Another significant change in the new legislation has to do with the affirmation of the right to due process in situations of detention and deportation. Currently, the law establishes that deportation can not be based on administrative prerogatives and it has to be ordered with the intervention of the judiciary.

The new migration policy was completed in 2006, when the Congress passed the law on the Recognition and Protection of Refugees (Ley No. 26.156) also promoted by different social actors and the United Nations High Commissioner

153 According to B Hine this principle “is not found in the immigration laws of any other large immigrant-receiving country nor explicitly in any international human rights conventions”. See B Hine, ‘The Right to Migrate as a Human Right: The Current Argentine Immigration Law’ [2010] 43 Cornell Int'l LJ 471.

154 *Opinión Consultiva “Condición Jurídica y Derechos de los Migrantes Indocumentados”/ Advisory Opinion on the rights of Undocumented Migrants* (2003) IACHR OC-18/03.

155 See Centro de Estudios Legales y Sociales (CELS), Federación Internacional de Derechos Humanos (FIDH), ‘Argentina. Avances y asignaturas pendientes en la consolidación de una política migratoria basada en los derechos humanos’ (CELS/FIDH 2011).

156 The law recognizes and protects the following rights: right to equal treatment (Article 5); the right to access of the immigrant and his family, on a non discriminatory basis, to social services, public goods, health, education, justice, labour, employment and social security (Articles 6, 8, 19); the right to information (Article 9) and the right to family reunification (Article 10).

157 For example, public authorities shall understand and appreciate cultural expressions of immigrants and offer courses to learn Spanish.

for Refugees (UNHCR).¹⁵⁸ Finally, in 2010 through a consultative process involving human rights organizations, religious institutions and UN agencies, the government enacted the regulation of the Migration Act.¹⁵⁹

In line with this migration policy, it is also worth mentioning the agreements signed by Argentina with Latin American countries related to the situation of the Bolivian, Peruvian and Paraguayan migrants in Argentina aiming at fulfilling the legal requirements in order to comply with current immigration criteria. Thus, in 1998 Argentina signed an agreement with Bolivia¹⁶⁰ and Peru.¹⁶¹ In November 2000 Argentina signed the Additional Protocol to the Convention on Migration between Argentina and Bolivia, with the main goal of regularizing the situation of immigrants staying in both countries.¹⁶²

With respect to the inclusion of a regional perspective (which will be further analyzed in the next section) the new Migration Act reflects the nationality criteria outlined in the Agreement on Residence for Nationals of the States of MERCOSUR, Bolivia and Chile. This opens the possibility for those migrants who did not meet any of the criteria established by the previous law or by bilateral agreements.

The issues concerning migration and access to citizenship have been reflected in the Argentine Supreme Court's case law. For this reason, a closer look at the case law is in order. Since the first migration wave, the Argentine Supreme Court's have addressed in its case law different issues concerning the implementation of immigration and citizenship laws, having gone through different periods.¹⁶³

158 This Act replaced the decree 464 of 1985, which had created a basic mechanism for the eligibility of petitioners for asylum in the Argentinean territory.

159 Decree 616 (2010), B. O. 6th May 2010 <<http://infoleg.mecon.gov.ar/infolegInternet/anexos/165000-169999/167004/norma.htm>> accessed 11 October 2011.

160 The agreement was approved by Law 25.098 and then ratified by the Executive Branch.

161 The agreement was approved by Law 25.099 and then ratified by the Executive Branch

162 However, the regulations issued by the Dirección Nacional de Migraciones (DNM) ignored negotiations and international commitments. Thus, the Argentinean state itself through the DNM took a position contrary to international commitments, creating an assumption of international responsibility.

163 See the following cases before the Supreme Court (SC): *Eladio Rodríguez* [SC 1943 197:332]; *Sosa, Lino* [SC 234:20]; *Brítez, Silvestre, B de Zlatnik, Juliana* [SC 182:39]; [SC 205:628]; *Bairamis, Jorge y otros* [SC 206:165]; *Grunblatt, Jenó* [SC 293:154 and 741]; *Gorza, Marini, Edilio* [SC 293:663]; *Lerer, Boris* [SC 293:741]; *Cristoff, Miron* [SC 294:9]; *Imundo, José Carmelo* [SC 298:541].

During the first period (1890-1920) the Supreme Court decided in various cases on the situation of undocumented migrants, using broad criteria in order to recognize rights.¹⁶⁴ On the contrary, between 1920 and 1970 the Supreme Court upheld restrictive migration policies. Accordingly, the state could establish rules to control the entry and stay of foreigners in the territory, and in case of breach of rules, to proceed with administrative expulsion or reject applications for nationality submitted to federal judges. The only exception admitted to the expulsion was to prove “good civic behavior” through a certificate. The Court established that this certificate had to demonstrate “correct behavior and the absence of criminal or police records.”¹⁶⁵ However, it was not clear who was supposed to issue the certificate or on which grounds it was granted. In the 80's and the 90's the few precedents on migration confirmed the decisions of administrative authorities which rejected requests for residence and, without judicial supervision, detained and expelled foreigners from Argentina.¹⁶⁶ In this phase among the rulings issued by the Court on the rights of foreigners, there have been almost no exceptions against restrictive immigration policies.

Since 2005, the Supreme Court's case law on the human rights of migrants has changed partly because immigration policy was also modified. The judicial interpretation of the legislation on migrations and access to citizenship suggests a more flexible approach. It can be said that with these precedents the Supreme Court accompanied the legislative reform, as a way of backing up the transition from the restrictive “Videla law” to the new law adopted in a democratic context. This new case law, along with the mechanisms of free legal advice, strengthened the institutional framework for effective advocacy for human rights of migrants embodied in the legislation.

Therefore, the Supreme Court has recently issued judgments on the access to citizenship, for instance in the cases Zhang (2007) and Ni, I Hsing (2009).¹⁶⁷ In

164 L Ricart, 'Los derechos de los extranjeros en la jurisprudencia argentina (1994-2005)' in V Abramovich, A Bovino and Ch Courtis (eds), *La aplicación local de los tratados de derechos humanos: la experiencia de una década (1994-2005)* (Ed Del Puerto 2007); E Rodríguez Miglio and L Toledo, 'Jurisprudencia argentina en materia de derechos de los migrantes' in Ceriani y Fava (eds) *Políticas Migratorias y Derechos Humanos* (UNLa-Universidad Nacional de Lanús 2009).

165 See for instance, the case *Hermogenes Imaz Vda de Zabalza –solicita carta de ciudadanía* [SC 1951 220:51].

166 This trend can be seen in the following cases: *Victor Antonio Cardozo Galeano* [SC 1990 313:101] and *De la Torre, Juan Carlos s. Habeas Corpus* [SC 22 December 1998].

167 See *Ni, I Hsing s/carta de ciudadanía*, Corte Suprema de Justicia de la Nación [SC 2009 330:4454].

the Zhang case, the Supreme Court established that the immigration procedures should be considered as additional evidence to prove the two years of residence in Argentina in the process to obtain the citizenship. In the Ni case, the Supreme Court overturned a judgment with a restrictive interpretation of the requirement of residence in order to obtain the so-called “carta de ciudadanía”.¹⁶⁸ The Supreme Court found that the two year- period does not refer to the accreditation of legal residence (in terms of the old law of migration) but rather to a matter of fact to be justified through various forms of evidence. In both judgments, the Supreme Court adopted a broad interpretation of the requirement of two years of residence in Argentina in order to apply for citizenship by naturalization under the citizenship law. Thus, the Supreme Court reversed a generalized restrictive interpretation of that requirement applied by federal courts.

Besides, there have been cases dealing with the enjoyment of rights by migrants and long-term residents. In the Reyes Aguilera Case (2007), the Supreme Court overthrew a provision requiring a minimum of twenty years of residence, in order to access to social benefits.¹⁶⁹ In particular, judges Petracchi and Argibay underlined that the norm itself was in contradiction with the constitutional provision which forbids any discrimination based on the national origin.¹⁷⁰ The judges stated that the rule in question “... provides differential treatment between nationals and foreigners, imposing greater demands on the latter to access a benefit conferred by the state. This situation determines that in its literal sense the article 1, paragraph "e" of the Decree 432/97 (the norm in question) is directly opposed to the constitutional norms that prohibit discriminatory treatment based on national origin (...) This is in direct contradiction to the text of the Constitution, and forced to consider the categorization made by the decree as “suspected of discrimination” and

168 The Supreme Court reversed the decision of the Federal Chamber of Córdoba, which had denied the request for Ni, since it had not established legal residence in Argentina, according to the report provided by the National Directorate of Migration.

169 See *Reyes Aguilera D and others v. Estado Nacional-Ministerio de Desarrollo Social* [SC 15th September 2007]. The controversial issue was the access of a disabled child of Bolivian citizenship (Daniela Reyes Aguilera) to social security disability benefits. In the ruling, the Court declared the provision in question inapplicable to the case, and the girl could obtain the benefits. This solution, however, was *inter alia* and it is only applicable to that specific case.

170 The remaining votes of the majority sustained the constitutionality of the norm in other criteria and methods of interpretation. Justices Zaffaroni and Fayt, considered that the provision affected the minimum standard of social security law, and that the right to life and health of Reyes Aguilera was at stake. Justice Maqueda, meanwhile, conducted an analysis of reasonableness and considered that the requirement of 20 years of residence to access to social benefits was not justified and, therefore, unconstitutional. Justice Lorenzetti voted in minority, considering that the distinction was fair.

therefore the presumption of unconstitutionality applies ... ".¹⁷¹

In the Supreme Court's case law, it is worth mentioning as well other previous cases dealing with migrants' rights such as Repetto (1988), Calvo (1998), Hooft (2004) and Gottschau (2006). In the Repetto Case, the Supreme Court examined and recognized the right of an American professor to teach in Argentina without being a national.¹⁷² In the Calvo Case, the Supreme Court addressed the right of a Spanish psychologist (whose admission was denied due to the lack of nationality) to practice in a public hospital.¹⁷³ In the Hooft Case, the Supreme Court guaranteed the possibility that a judge of Dutch nationality (who succeeded in the Argentina national competitions to access to the judiciary) could integrate a Chamber.¹⁷⁴ In the Gottschau Case, the Supreme Court recognized the right of a German lawyer to participate in the public competition for the position of Deputy Clerk of a Court in the City of Buenos Aires.¹⁷⁵ All these foreigners had legally entered the country for a certain period of time, with a career and income. The Supreme Court held in these cases that the distinctions were "categories suspected of discrimination" and that the state should explain the reasons and purposes of such limitations.

Yet, the cases cited do not refer to migrants belonging to groups particularly vulnerable (such in the case of undocumented migrants) or historically discriminated or, at least, it does not arise from the facts of the cases. In the past, when the Supreme Court faced a discrimination of groups particularly vulnerable or historically discriminated against, in order to assess the constitutionality of the government's decisions or omissions, the Court established before the list of rights that have been affected rather than considered the existence *prima facie* of "categories suspected of discrimination".¹⁷⁶

In the aforementioned Reyes Aguilera Case, the Court left open the possibility for a wider application of the criteria of "categories suspected of

171 Ibid.

172 See *Repetto, Ines v Provincia de Buenos Aires, s/acción declarativa de inconstitucionalidad* [SC 8th November 1988].

173 See *Calvo y Pesini, Rocio v Provincia de Cordoba* [SC 24th February 1998].

174 See *Hooft Pedro Cornelio v Provincia de Buenos Aires, s/acción declaración de inconstitucionalidad* [SC 16th November 2004].

175 See *Gottschau, Evelyn v Consejo de la Magistratura de Buenos Aires s/amparo* [SC 8th August 2006].

176 For instance cases dealing with indigenous peoples' rights.

discrimination”. The judges Petracchi and Argibay sent a message to the judiciary as a whole by stating: "The judges of the case have not done a proper analysis of the constitutional provision in question, as they have followed an opposite path to the one they should follow for cases like this, according to the jurisprudence of this Court. Indeed, both the judge of first instance and the Court of Appeal departed from the presumption of constitutionality of the norm and have conducted a simple test of reasonableness, which (...) is insufficient to assess the categorization of a *prima facie* unconstitutional discrimination. "¹⁷⁷

As can be seen, there has been a shift in the migration paradigm in Argentina, not only regarding new legislation on migration and asylum, but also with respect to the way in which these provisions are interpreted. The measures taken, aimed at protecting migrants, granting them citizenship and guaranteeing the enjoyment of rights, evidence the present Supreme Court's position. Moreover, the current interpretation about the discrimination based on the national origin may have a significant impact in the future. Hence, the assessment of the right at stake, the levels of enforcement and the scope of the legislation will be important in the light of the classification of such distinctions as “categories suspected of discrimination”.

5. International migration and regional integration: the case of MERCOSUR.

Another important factor in the modifications of the migration paradigm and the legislation was the adoption of agreements at MERCOSUR level on the legal status of regional migrants. Indeed, one recent feature of regional migrations in South America concerns the relationship between the politics of regional integration and the intensification of migration flows among countries.

In general, and from a push-pull perspective, regional integration could impact migration flows in different ways.¹⁷⁸ First of all, if regional integration successfully contributes to give citizens similar opportunities it might reduce the push-pull differential between the countries in the region.¹⁷⁹ On the contrary, regional integration can create or strengthen previous structures of

177 *Reyes Aguilera D and others v Estado Nacional-Ministerio de Desarrollo Social* (n 89).

178 See W Hein, 'International Migration and Regional Integration: The Case of Central America' (n 42) 153, 157. See also A Di Filippo, 'Globalización, Integración Regional y Migraciones' (n 39).

179 *Ibid.*

uneven development within a region, as a consequence, there is going to be an increase in the migration occurring predominantly between regions with different levels of economic development.¹⁸⁰ But also, regional integration might generate other migration dynamics, such as the above referred horizontal migration.¹⁸¹

The creation of an intergovernmental integration project¹⁸² such as MERCOSUR¹⁸³ suggests an increase in the migration between the countries which are involved in the integration process (mainly Argentina, Brazil, Paraguay, Uruguay and Venezuela as member states and Chile and Bolivia as associated countries).¹⁸⁴ Besides, economic integration should facilitate the movement of people between the member states.¹⁸⁵ However, the founding treaty (1991 Asuncion Treaty) did not reckon the free movement of individuals in its provisions.¹⁸⁶ In fact, among MERCOSUR goals, the treaty contained only references to “the free movement of goods, services and factors of production between countries through, *inter alia*, the elimination of customs duties and non-tariff restrictions on the movement of goods, and any other equivalent measures”.¹⁸⁷ In sum, at an initial stage MERCOSUR was conceived as a pure economic integration process and, therefore, the freedom of circulation of

180 Ibid.

181 Ibid.

182 The 1991 Asuncion Treaty provided for an intergovernmental set-up with different decision-making bodies. The main MERCOSUR bodies are: the Common Market Council; the Common Market Group and its various Working Sub-groups; the MERCOSUR Trade Commission; the Parliament of MERCOSUR (created in 2005 and in function since 2007); the Economic-Social Consultative Forum and the Secretariat.

183 MERCOSUR belongs to the so-called a sub-regional integration agreement or, in other words, an integration process in which states have a shared history, cultural links, and sense of interdependency. Under this category, we include MERCOSUR, the Andean Community (CAN), the Central American Integration System (SICA) and the Community of the Caribbean (CARICOM).

184 A Pellegrino, 'Las migraciones entre los países del Mercosur: tendencias y características' in *Las migraciones humanas en el Mercosur. Una mirada desde los derechos humanos* (Observatorio de Políticas Públicas de Derechos Humanos en el Mercosur 2009) 17.

185 As a significant precedent, we should mention that in the 1970's the Andean Community adopted norms concerning the free movement of people and granting a permanent status. Nevertheless these norms were not enforced.

186 H Mansuetti, 'Circulation of Workers in MERCOSUR' in F. Filho, L. Lixinski and B. Olmos Giupponi (eds), *The Law of MERCOSUR* (Hart 2010).

187 Treaty Establishing a Common Market between the Argentinean Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay. See article 1, first part.

individuals was not explicitly recognized.

Some scholars have argued that in this wording, individuals are included in the formula, not as human beings but rather as “productive factors”.¹⁸⁸ According to this interpretation, labor was considered as a productive factor in the achievement of the common market.¹⁸⁹ This conception implies the elimination of any kind of restrictions to migrant workers which are national of MERCOSUR member states within their territories.¹⁹⁰

Despite these limitations, the evolution of MERCOSUR in the 1990's and 2000's brought significant modifications in terms of freedom of movement, migrant worker's rights and regional migration. This evolution can be seen as the outcome of two related processes. On the one hand, the subsequent developments occurred in MERCOSUR introduced the recognition of migrant workers' rights. On the other hand, the discussion of migratory issues within MERCOSUR and the debates on the MERCOSUR citizenship fostered the adoption of specific agreements at regional level.

Concerning the protection of migrant workers, we must mention the signature of various binding instruments related to free movement of MERCOSUR citizens¹⁹¹. It is worth emphasizing, for instance, the protocols on educational integration, with mutual recognition of certificates and elementary school and secondary school- non technical degrees¹⁹²; recognition of secondary school and technical degrees¹⁹³; recognition of university degrees¹⁹³ in order to attend post-graduate studies in universities of MERCOSUR member states¹⁹⁴, and also to teach at university level as well¹⁹⁵ and post-graduate human resources level.¹⁹⁶

188 See the discussion on this question in H Mansuetti, 'Circulation of Workers in MERCOSUR' (n 106).

189 Ibid.

190 O Ermida Uriarte, 'Derecho a migrar y derecho al trabajo' in *Las migraciones humanas en el Mercosur. Una mirada desde los derechos humanos* (Observatorio de Políticas Públicas de Derechos Humanos en el Mercosur 2009) 27.

191 See AM Santestevan, 'Free Movement Regimes in South America: The experience of the MERCOSUR and the Andean Community' in R Cholewinski, R Perruchoud and E Mac Donald (eds), *International Migration Law* (Asser Press 2007) 363.

192 Signed in Buenos Aires, 5 August 1994, ratified by Argentina by law 24.676.

193 Signed in Asuncion, 5 August 1995, ratified by Argentina by law 24.839.

194 Signed in Fortaleza, Brazil, 16 December 1996, ratified by Argentina by law 24.997.

195 Signed in Asuncion, 14 June 1999, ratified by Argentina by law 25.521.

196 Signed in Fortaleza, Brazil, 16 December 1996, ratified by Argentina by law 25.044.

In this process of recognition of migrant workers' rights, in the mid 1990's the adoption of a sub-regional human rights charter was included on the agenda of MERCOSUR, becoming a crucial topic.¹⁹⁷ Different actors were involved in these debates and the Southern Unions Federation (Coordinadora de Centrales Sindicales del Cono Sur – CCSCS) submitted a proposal on the approval of a comprehensive Charter of Fundamental Rights in 1994.¹⁹⁸ Besides, in 1997 member states signed the Multilateral Social Security Agreement¹⁹⁹. As a consequence of this process, the MERCOSUR Socio-Labour Declaration (Declaración Socio Laboral “DSL” in Spanish, hereinafter referred to as the "Declaration") was adopted in 1998.²⁰⁰ The Declaration recognizes a series of principles and rights at the workplace. It includes, *inter alia*, the decision of the states parties to strengthen through a common instrument, the progress already achieved in the social dimension and support future and ongoing advances in this field particularly through the ratification and implementation of ILO main agreements, as well as other international instruments mentioned in preamble of the DSLM.²⁰¹

With regard to the second process, the migratory issues were first discussed at the MERCOSUR Meeting of Interior Ministers (Reunión de Ministros del Interior) established in 1996. In this framework, the Specialized Forum on Migrations (Foro Especializado Migratorio del MERCOSUR) was created in 2003, with the objective of analysing regional migrations and proposing regional measures and migration agreements. Among the outcomes of this Forum, it must be underlined the adoption of the Santiago Declaration on

197 The debates on the adoption of a Social Charter in MERCOSUR could be perceived as a mirroring trend, following the European Union's experience with the European Social Charter.

198 For an analysis of the draft project on MERCOSUR Declaration of Human Rights see MB Olmos Giupponi, *Derechos Humanos e Integración en América Latina y el Caribe* (Tirant Lo Blanch 2006).

199 The MERCOSUR Multilateral Social Security Agreement was signed in December 1997 by MERCOSUR member and associated states.

200 The Socio Labour Declaration of MERCOSUR was approved by the Common Market Council (CMC) in the framework of the Summit of the Heads of State of MERCOSUR, held in Rio de Janeiro in 1998.

201 The Declaration has been adopted as a soft law instrument, it consequently was not ratified by member states and nothing in its provisions requires compliance, approval or a mechanism for its internalization and implementation. However, internal courts have been applying it as a guideline in the interpretation of labor rights. See MERCOSUR Secretariat, *Segundo informe sobre la aplicación del derecho del MERCOSUR por los tribunales nacionales (2004)* <<http://www.mercosur.int/innovaportal/file/734/1/2inaplicaciondermcs.pdf>> accessed 6 December 2011.

Migratory Principles (Declaración de Santiago sobre Principios Migratorios) in 2004.²⁰²

Apart from the inclusion of migratory issues in the agenda, and likewise the EU's ideas of citizenry²⁰³, scholars have been arguing about the MERCOSUR citizenship.²⁰⁴ In this vein, there has been a discussion on the idea of a MERCOSUR citizenship based on the recognition of human rights including those related to migrant workers.²⁰⁵ From a different theoretical perspective, some commentators emphasize that even if the core of MERCOSUR is the economic integration and it is a top-down process, there would be the space for non-governmental actors and social movements to participate and to build up citizenship rights through a bottom-up process.²⁰⁶ Additionally, on a rhetorical level, official authorities and also scholars reaffirmed ideas such as “regional identity”, “common identity and destiny” or “brotherhood”.²⁰⁷

202 Some of MERCOSUR achievements in terms of regional migrations have been included in the negotiations of UNASUR (South American Union). See A Chueca Sancho, 'Libre circulación de personas en Sudamérica: Una aproximación' (2008) 2 (1) REIB <http://www.urjc.es/ceib/investigacion/publicaciones/REIB_02_01_A_G_Chueca_Sancho.pdf> accessed 5 December 2011.

203 In Europe, the intra-European migration and the establishment of an EU citizenship for nationals of the member states have contributed to the debate on citizenship. There are a multitude of studies on European Union's citizenship. For the relevance for this study, we would like to underline Bauböck's work on the EU's citizenship and the access to citizenship for migrants in Europe. See, for instance, R Bauböck, 'Why European Citizenship? Normative Approaches to Supranational Union' (2007) 8 (2) *Theoretical Inquiries in Law* <<http://www.bepress.com/til/default/vol8/iss2/art5>> accessed 6 December 2011; R Bauböck (ed), *Migration and Citizenship. Legal Status, Rights and Political Participation* (Amsterdam University Press, IMISCOE Report Series, 2006) and R Bauböck 'Three citizenship regimes in the European Union' in *EU Citizenship and the Market* (UCL/EUI, London, 2011) <http://www.ucl.ac.uk/european-institute/comment_analysis/publications/Final.pdf> accessed 8 December 2011.

204 In our previous article on MERCOSUR citizenship we explained the question in the light of the implementation of MERCOSUR Parliament, MB Olmos Giupponi, Chapter: 'Mercosur y ciudadanía (Mercosur and citizenship)' in *Modelos de integración y procesos integradores* (Pretextos 2008). See as well J Grugel, 'Citizenship and governance in MERCOSUR: Arguments for a Social Agenda' (2005) 26 (7) *Third World Quarterly* 1061.

205 See O Ermida Uriarte, 'La ciudadanía laboral en el Mercosur' [1998] XLI (190) *Revista Derecho Laboral* 321. See as well K Schaffer, 'Mercosur and Labor Rights: The Comparative Strengths of Sub-Regional Trade Agreements in Developing and Enforcing Labor Standards in Latin American States' [2006-2007] 45 *Colum J Transnat'l L* 829.

206 E Jelin, 'Los movimientos sociales y los actores culturales en el escenario regional: el caso del Mercosur' in G. De Sierra, *Los rostros del Mercosur* (CLACSO 2001) 257, 274.

207 In the wording of different instruments, treaties and declarations emerge the notion of a regional identity. E Jelin, 'Dialogues, understandings and misunderstanding: social movements

These two processes altogether contributed to include regional migrations in the MERCOSUR agenda and to the recognition in formal agreements of a legal status for citizens from MERCOSUR member and associated states. Thus, after more than ten years of the signature of the Asuncion Treaty, the MERCOSUR Regularization and Residence Agreements (*Acuerdos de Regularización y Libre Residencia de MERCOSUR*) were approved at the end of 2002.²⁰⁸ These agreements represent a step forward in the direction of guaranteeing a legal status to MERCOSUR citizens and, at the same time, addressing the situation of undocumented regional migrants.

In terms of guaranteeing a specific legal status to MERCOSUR citizens, the agreements contain a series of fundamental rights to be respected. The main principle included is non discrimination or, in other words, “equal enjoyment of rights”: nationals of MERCOSUR states who have been granted the residence will enjoy the same than the nationals of the receiving country. The agreements also comprise the right to family reunification; the right to receive an equal treatment, the right to transfer remittances and to access social security benefits. A relevant provision ensures the rights of the children of regional migrants to have a name and a nationality, to be registered and to have access to basic education.²⁰⁹

With regard to the situation of undocumented regional migrants, the agreements provided the basis for a regularization programme to be applied by each state. This regularization programme designed for migrants from

in MERCOSUR' (1999) 51 (159) *International Social Science Journal* 37. See as well A Grimson, 'El debate de la identidad en la bibliografía sobre MERCOSUR', paper presented at the Second Meeting on 'MERCOSUR: A space for interaction, a space for integration' (ANPOCS, Brazil, 1997). A Grimson, 'Fronteras, estados e identificaciones en el Cono Sur' in D Mato (ed), *Cultura, política y sociedad Perspectivas latinoamericanas* (CLACSO-Consejo Latinoamericano de Ciencias Sociales 2005) 127, 142 <<http://bibliotecavirtual.clacso.org.ar/ar/libros/grupos/mato/Grimson.rtf>> accessed 6 December 2011.

208 Agreement approved by the Council of the Common Market (MERCOSUR/CMC/DECNo28/02). The agreements adopted on 5th and 6th December 2002, are: 1. Agreement No. 11/02, International Migratory Regularization of MERCOSUR Citizens, 2. Agreement No. 12/02, International Migratory Regularization Citizens of MERCOSUR, Bolivia and Chile, 3. Agreement No. 13/02, Residence for Nationals of the Member States of MERCOSUR, and 4. Agreement No. 14/02, Residence for Nationals of the Member States of MERCOSUR, Bolivia and Chile, implemented by Argentina through Resolution 345/2003 of the Ministry of Interior.

209 According to the agreements, the access of children of migrants to basic education can not be denied or limited because of the irregular stay of their parents.

MERCOSUR member and associated countries was undoubtedly a measure expected and demanded for years. However, MERCOSUR Regularization and Residence Agreements only entered into force in 2009 and not all states that have signed them launched regularization programmes.²¹⁰ This lack of enforcement undoubtedly affects the recognition and enjoyment of migrant's rights and hampers the efforts to ensure free movement and residence to MERCOSUR citizens in the region.

As we claimed in the introduction, these provisions on migration at regional level have driven modifications at internal level in Argentina. And this is reflected in the inclusion of a specific status for MERCOSUR citizens in the migration law and in the adoption of a specific programme to regularize undocumented migrants from MERCOSUR member and associated states. The current legislative changes on migration being implemented in Argentina represent as well a good occasion to test how these MERCOSUR regulations are being implemented.

Up to the present, MERCOSUR citizens living in Argentina are mainly from Uruguay, Bolivia, Paraguay and Peru. Traditionally, citizens from Uruguay represented the first group, but this situation has change over recent decades: although they continued to migrate to Argentina, they preferably went to developed countries like the United States and Spain.²¹¹ In these changes in the migration patterns, three migrant groups (Bolivians, Paraguayans and Peruvian) have shown dynamism in recent times and, therefore, their numbers have increased significantly. According to the last census, Paraguayan and Bolivian immigrants represent the main groups. In the period 1980-2001, immigration from Bolivia has increased steadily. Although the increase in its stock was relatively moderate in the early eighties (up to 21.5%), the unfavorable economic conditions in Bolivia joined the job placement opportunities in Argentina and a favorable exchange rate, impacted on immigration and the migration flows

210 The agreements entered into force on 4 December 2009. Argentina ratified the agreements on 19 July 2004; Bolivia on 11 April 2005; Brazil on 18 October 2005; Chile on 18 November 2005; Uruguay on 8 March 2006 and Paraguay on 28 July 2009. Source: MERCOSUR <<http://www.mre.gov.py/dependencias/tratados/mercosur/registro%20mercosur/mercosurprincipal.htm>> accessed 9 December 2011. On the implementation of the agreements, see T Muñoz Bravo, 'El proceso de internalización del Acuerdo sobre Residencia en el Mercosur: Una evaluación del compromiso de seis Estados de crear un área de libre residencia y trabajo' (Red Internacional de Migración y Desarrollo, 2011) <http://rimd.reduaz.mx/ponencias_flasco/PonenciaTomasMunoz.pdf> accessed 7 December 2011.

211 W Cabella and A Pellegrino, 'Una estimación de la emigración internacional uruguaya entre 1963 y 2004' (2005) Programa de Población de la Unidad Multidisciplinaria - Facultad Ciencias Sociales, Working Paper 70/2005 .

intensified in the nineties.²¹² These new flows were also promoted by the existence of extensive social migratory networks.²¹³

The new migration law included a new category to access migratory regularization and obtain a residence in the country, based on the citizenship from MERCOSUR countries. While the traditional criteria are maintained, such as work, family ties or because of studies, a new category has been added directly linked to the vast majority of migrants living in Argentina: the access to a residence permit on the basis of holding the nationality of a MERCOSUR member or associated country. In fact, Article 23.d) of the Act provides that " (...) It shall be considered as temporary residents those foreigners who enter the country, under the conditions prescribed by regulation, in the following subcategories: [...] 1) Nationality: Native Citizens of MERCOSUR States, Chile and Bolivia have authorization to remain in the country for two (2) years, renewable with multiple entries and exits."²¹⁴

The implementation of this criterion of nationality as a ground to access to a residence permit is regulated in the Programme called "Patria Grande", launched in April 2006.²¹⁵ The initiative envisaged that regularization of all

212 See R Benencia, 'Apéndice. La inmigración limítrofe' in F Devoto, *Historia de la inmigración en la Argentina* (Sudamericana 2003).

213 In these years the stock increased by 62.3%, so over the past two decades the number of Bolivians living in Argentina has almost doubled. From a transnational perspective, various studies on the migrant associations have been conducted. In the case of Bolivians in Argentina, for instance, CEMLA and IOM developed a diagnostic study in 2004 on the associations of the Bolivian community in Argentina. The study found the existence of 161 associations of this community settled in the following cities: Buenos Aires, Buenos Aires, La Plata, Partido de la Costa, Bahía Blanca, Mendoza, San Luis, Salta, Jujuy, Santa Fe, Córdoba, Tucumán and in several towns in Patagonia. These immigrant associations focus their attention on current problems of immigrant communities such as health and social care, fighting discrimination and legal advice for immigrants. The federations are a form of collective organization and represent the set of organizations, like social clubs, sports and cultural associations. See M Santillo, 'Las organizaciones de inmigrantes y sus redes en la Argentina', Simposio sobre Migración Internacional en las Américas (San José de Costa Rica, 2000).

214 This criterion was applied by order of the National Directorate of Migration in 2004, affecting first citizens from Bolivia, Brazil, Chile, Paraguay and Uruguay, then it was extended to nationals of other MERCOSUR associated countries. This DNM second resolution does not expressly mention the countries, but includes a generic reference to the States of the regional bloc. Therefore, its scope will be extended automatically to all people from countries that are part of (or subsequently join) MERCOSUR.

215 M Cerrutti, 'Diagnóstico de las poblaciones de inmigrantes en la Argentina' (Serie de Documentos de la Dirección Nacional de Población 2009) <http://www.mininterior.gov.ar/poblacion/pdf/Diagnostico_de_las_poblaciones_de_inmigrantes_en_Argentina.pdf> accessed 6 December 2011.

migrants living in the Argentinean territory prior to April 17, 2006 who are nationals of Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Uruguay and Venezuela and could obtain a residence within two years.²¹⁶ For immigrants who enter the country since April 2006, the criterion of nationality (of the countries mentioned) begin to take effect according to article 23 inc. d of the new Migration Act.

According to information released by the National Directorate of Migration (Dirección Nacional de Migraciones-DNM), between April 2006 and February 2008, as part of the “Patria Grande” Programme, 448.433 people (living in the country before 2006) benefited from the regularization, and 119.886 people started procedures to obtain their residence permits based on nationality.²¹⁷ The DNM had to extend three times the validity of temporary residence certificates issued within the framework of the “Patria Grande” Programme, in response to a significant number of people who were unable to complete the formalities for obtaining a permanent residence in Argentina.²¹⁸ The number of people who applied for regularization in the framework of the “Patria Grande” gives an idea of the large number of people covered by the immigration policy described above.

The regularization process in Argentina represents a progress in granting legal status and rights to regional migrants. Despite this, some MERCOSUR states have not yet implemented comprehensive regularization programmes.²¹⁹ The full application of the agreements will only be achieved when all member and associated states have implemented them by adopting similar criteria.²²⁰ Thus,

216 For a critical appraisal of the programme see E Domenech, ‘La `nueva política migratoria’ en la Argentina: las paradojas del programa `Patria Grande’ in C Pizarro (ed) *Migraciones internacionales contemporáneas: Estudios para el debate* (CICCUS 2011).

217 It is noteworthy to mention the following distribution taking into account the different nationalities of the migrants participating in the programme: Paraguay (52.8%), Bolivia (27.1%), Peru (12.3%), Uruguay (2.6%), Chile (1.8%), Brazil (1.5%), Colombia (1%), Ecuador (0.5%) and Venezuela (0.3%).

218 In this sense, according to the National Immigration Office: 423.697 people were enrolled in the program; 98.539 people were granted permanent permits; 126.385 people were granted temporary permits; 187.759 people enrolled did not complete the required documentation for filing the regularization. Official data released in August 2010 evidence that many people could not obtain a temporary or permanent residence permit in Argentina, even in the context of a regularization programme.

219 Chile has implemented a regularization programme as well. As for Paraguay, a regularization programme for Brazilian migrants living in that country was launched in 2010.

220 The ratification of the agreements took so long, and even if they are in force the implementation at internal level is different in each country.

these agreements will not benefit all migrants in the region until then. Regardless of the decisions and policies adopted by each state under its own immigration policy, the non-enactment of the agreement contradicts the scope of MERCOSUR (including member and associates states) which is, at the present, to create and consolidate an area where people can move freely and choose their country of residence, only proving their nationality, without needing other requirements such as a contract or work permit.

The successful accomplishment of these agreements can eventually lead in the future to the establishment of a MERCOSUR coordinated immigration policy.²²¹ In this regard, it is necessary to make some considerations related to the project of regional integration of MERCOSUR in terms of migration. On the one hand, member states should consider the adoption of policies that ensure all human rights to all persons within their countries. This requires targeting inequalities that exist within and between countries, such as overcoming the structural lack of enjoyment of social rights. On the other hand, regional integration should be achieved without restricting the rights of migrants from other regions. In other words, freedom of movement and residence for nationals from the countries of the region can not justify the restriction or denial of human rights for migrants who come from other countries or regions.

The debate on regional integration and the recognition and protection of regional migrants is still ongoing. In this process, it is important to bear in mind that the new categories cannot lead to create broad differences among migrants whose rights would be recognized, awarded, expanded and reduced according to nationality they possess.

6. Concluding remarks

As discussed above migration is changing the conceptions of citizenship and this phenomenon has a broad impact. In this framework, the specific migratory profile of Argentina shows that this country has become as a sub-center of regional migration. In the Argentinean case, we can observe as well a link between the regional integration process and intra-regional migration patterns. The last legislative changes introduced can be seen as an attempt to adjust to the current migration patterns and regional regulations adopted in MERCOSUR.

221 S Novick, A Hener, P Dalle, 'El proceso de integración Mercosur: de las políticas migratorias y de seguridad a las trayectorias de los inmigrantes' (2005) Gino Germani Institute Working Paper 46/2005 <<http://lanic.utexas.edu/project/laoap/iigg/dt46.pdf>> accessed 6 December 2011.

The 2004 Migration Act represents the assumption of a human rights-based approach to migration. The new regulation resulted in clearer requirements for obtaining residence permits and the recognition of migrants' rights in line with international standards. Besides, the new law guarantees the access to basic health care and education to all migrants, regardless of their legal status. In particular, the legislative change has contributed to improve the situation of regional migrants by introducing a residence permit based on the possession of the citizenship of MERCOSUR member and associated states.

In the adoption of this new migration paradigm, the judicial interpretation of the norms on migration and citizenship has contributed to protecting migrant's rights. The Argentine Supreme Court's case law in the last decades shows the shift from restrictive migration policies to open migration policies. Through the protection of migrant's rights in controversial cases, the judiciary confirmed this trend and supported the transition to the current migration paradigm.

The signature of MERCOSUR agreements aiming at granting specific legal status for regional migrants represented another relevant exogenous factor in the modifications operated in the Argentinean migration policy. The application of these agreements and the regularization programme implemented in Argentina provided legal status to a large number of undocumented regional migrants. At the same time, these advances in MERCOSUR promoted the debates on the emergence of a regional membership and the development of regional approaches in order to coordinate migration policies.

As result, we can conclude that these various changes are shaping new conceptions of citizenship in the migratory context in Argentina. These new conceptions are reflected in the adoption of more flexible criteria in the access to formal citizenship (nationality) and in the enforcement of migrant's rights as a basis for the enjoyment of substantive citizenship.