

The challenges when protecting the rights of migrant workers in an irregular situation and members of their families – The Argentine experience.

Paulo Cavaleri.

Among the unforeseen consequences of 9/11 the past ten years have witnessed a clear deterioration of the human rights of migrants in general and of irregular migrants particularly. The all-pervading focus on security concerns and the blatant disregard of human rights have affected them in a disproportionate manner. Developed countries find collective expulsions increasingly difficult to implement and frontier control authorities often have a final say in such a complex issue as migration. From a legal perspective we witness the vicious circle of the creation of new restrictions than in turn give birth to additional categories of irregular migrants; as Professor Chetail has expressed there seems to be a legal order that increasingly confines a growing number of persons to illegality. On the other hand, the status quo concerning irregular migrants with few rights benefits directly entire sectors of the economy such as agriculture and construction. Finally the handling of human trafficking, stressing the role played by criminal organizations often puts irregular migrants on a same footing as the criminals who abuse, exploit and sometimes kill them.

Argentina had for many years a very restrictive migratory legislation and abuses like the ones I have mentioned were frequent in many sectors of society, affecting mainly the human rights of regional irregular migrant workers coming from Bolivia, Paraguay and Peru. In 2003 when the worst national economic crisis was not over Argentina decided to take bull by the horns and Congress passed a new migration law soon to be followed by a comprehensive regularization process and other legislation to protect migrant workers. Even if I believe that the lessons drawn from this experience cannot be applied universally, they represent nevertheless good practices worth mentioning as useful means to protect irregular migrant workers.

Some of the good practices implemented and their historical context:

Argentina has a long standing tradition of immigration. It seems therefore appropriate to put current Argentine good practices in a historical context. Several currents of European migration impacted Argentina along its history: 1) 1870-1914; 2) 1919-1939; 3) 1945-1960. This was due mainly to relative high wages, economic prosperity and a liberal legal framework, encouraging immigration. At the 1914 National census 1/3 of the population of the country was born in Europe. In Buenos Aires the rate was well over 50 %.

Later in the 1980s-1990s Argentina witnessed the arrival of regional migrant flows, attracted by job opportunities and high-exchange rates. Paradoxically the national legal framework and the country's migration policies were increasingly restrictive. The National Constitution dictated in 1853 was adamant in the promotion of European immigration and the new reality of Latin-American migrants was at best ignored as they were officially not welcome. Notwithstanding this fact, during the 1990s several social studies clearly demonstrated that regional migrants were making a useful contribution to Argentine society. Among the nationalities concerned were Paraguayans, Bolivians, Peruvians, Chileans and Uruguayans. Their presence was particularly felt in the following

economic sectors: Construction, Domestic work, Textile industry, Retail trade and Services.

By the end of the 1990s some predictable consequences were neatly perceived: The situation was clearly evolving to a two-tier society in which a growing underclass had few or no rights (labour, education, access to health). Besides, their stigmatization was favored by current legislation encouraging administrative denunciation of irregular migrants. Even some powerful national trade-unions would at that time finger-point regional migrants as « stealing jobs ». On top of that, regional Migrants were becoming ideal scapegoats for an increasingly complex economic situation.

This macroeconomic trend ended up in the national economic downturn of 2002-2003: 300 % devaluation of national currency; unemployment rate rose to 20%; under-employment rate was 17%, the population under poverty line: 42% and extreme poverty: 27 %. By then regional migrants were overtly targeted as responsible for high crime rates and unemployment.

A new migration policy took place in 2003 with the adoption of a three-prong approach for the protection of migrant workers:

- 1) A new migration law based on human rights of migrants and not national security concerns +
- 2) a regularization program “Patria Grande” focused on regional migrants +
- 3) a series of antidiscrimination practices.

The turning point was the political decision that year to introduce radical changes concerning the protection of migrants. There was a clear shift from national security considerations to a migrant-as-human being centered policy:

The new migration law N° 25.871 provides a general policy framework unlike the regularization program “Patria Grande” which aims essentially at migrant workers from Mercosur countries (full members and associates) residing irregularly in Argentina before June 2006. Between 2006 and 2010 the regularization program benefited 224.924 regional migrants - who were granted permanent and temporary residence - of 423.697 who started regularization procedures.

As mentioned, the new national migration law is explicitly focused on the human rights of migrants and their families not on the security of the National State. The regularization program “Patria Grande” on the other hand recognizes the positive contribution of regional migrant workers to argentine economy and society and facilitates their integration through permanent and temporary residence.

Law N° 25.871/04, inter alia :

- Recognizes Human right to migrate, drawing heavily from 1990 UN Convention of Migrant Workers.
- Provides equal treatment between nationals and foreigners.
- Guarantees the right to family reunification.

- Guarantees access to health, education and social assistance of foreigners irrespective of their migratory status.

National Programme of Documentary Normalisation »Patria Grande » 2006

- Focuses on nationals of MERCOSUR & Associated countries: Brazil, Bolivia, Colombia, Chile, Ecuador, Paraguay, Peru, Uruguay and Venezuela.
- Guarantees right to stay, leave and re-enter Argentina.
- Guarantees right to study and obtain working permits.
- First step to permanent residence
- Facts & figures: 224.924 regional migrants regularized since its inception until May 2010.

Besides there are additional tools linked to the new national migration law & regularization worth mentioning:

- INADI (National Institute against Discrimination, Xenophobia and Racism), promoting anti-discrimination measures and diversity. Receives complaints and takes them to court.
- Tripartite Commission on Gender Labour Equality (MoL) Special focus on female migrant workers.
- National Education Law (N°26.206) guarantees access of undocumented migrants to primary and secondary school as well as university.

An evaluation of these good practices in Argentina should take into account the following facts and figures:

- Since 2004 unemployment has fallen to 8 %, underemployment to a similar rate.
- Poverty indexes diminished from 54 % to 23,4 %, extreme poverty from 27,7 % to 8,2 %
- The incidence of foreigners in the total number of criminal convictions has stayed around 28 % but currently 70 % of them represent drug-trafficking and connected crimes and concern mainly foreigners in transit, not regular residents.
- 59, 1% of the Argentine population agrees that migrants should benefit of the same human rights as nationals (health, education, access to justice). (Source: Infobarómetro survey, May 2010).

Among other conclusions I share the view that as a norm « irregular migrants” often respond to genuine labour market needs, taking on jobs for which there are insufficient candidates among legal residents and natives. Related to this point, another lesson learned is that contrary to a general perception a successful regularization process can be undertaken in times of economic downturn, without damaging native employment. Furthermore, the Argentine experience shows that through liberal migratory legislation, regularization and policies centered on migrants themselves a balance can be struck between the legitimate needs of a given State and the protection of human rights of individuals. Regularizations need to be preceded or accompanied by changes in legislation and migration policy to address the underlying causes of irregular migrant workers rather than attempt only to prevent it. Otherwise, the phenomenon risks repeating itself.

Accordingly, there is a need to underline that States that do not provide a rights-based migratory legislation and regularization programs to protect low-skilled migrant workers, that mix up human traffickers and their victims, end up turning a blind eye to discrimination, exploitation and abuse of one the most vulnerable categories of persons, and consent thus to have a two-tier society with an underclass of irregular migrant workers.