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## THE RIGHT TO MIGRATE: A HUMAN RIGHTS RESPONSE TO IMMIGRATION RESTRICTIONISM IN ARGENTINA

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### ABSTRACT

*Within days of President Donald Trump's 2017 Executive Orders on border security and immigration enforcement, President Mauricio Macri of Argentina issued a Decree to address what he declared was an urgent problem of immigrant criminality. The timing of the two Presidents' actions triggered concerns that U.S.-style restrictionist immigration regulation was spreading to South America, a continent that has taken progressive steps towards recognizing the human rights of migrants in recent years. Until Macri's 2017 Decree, Argentina was considered a leader in this regard, with its 2004 immigration law that boldly codified a "right to migrate" and included robust substantive and procedural protections for immigrants. While the Decree marked the end of an era of progressive immigration policy in Argentina, the persistence of international human rights protections for migrants could provide the means to uphold key aspects of the right to migrate. This Article tracks jurisprudential developments under the 2004 law, and then demonstrates how the 2017 Decree undermined many of the advances achieved under the prior legislative framework. The Article also provides an overview of*

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*current litigation to defend the immigrant bill of rights and key procedural and judicial protections. The Article argues that the application of international human rights law on migration could fend off some of the more pernicious features of the 2017 Decree in Argentina. The Article concludes that the right to migrate in Argentina has been weakened, but that its essence will persist if the Argentine judiciary reinforces human rights protections for migrants.*

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## I. INTRODUCTION

In early 2017, President Mauricio Marci of Argentina issued a Decree to toughen immigration regulation in response to what his administration articulated as an urgent problem of criminality among immigrants.<sup>1</sup> This action was instantly compared to the executive orders issued just days earlier by United States President Donald J. Trump.<sup>2</sup> The similarity in the rhetoric each President used to justify his actions drew the attention of the Argentine public and officials throughout Latin America.<sup>3</sup> This is in part because Argentina had made great strides over more than a decade to forge a reputation as a model for progressive immigration policy, in stark contrast to the United States, which has responded to immigration with increasingly harsh deportation and detention practices during the same period.<sup>4</sup> Indeed, the Argentine legislature enacted a progressive immigration law in 2004, and in it established a “right to migrate,” which many have suggested lays the conceptual foundation for understanding migration as a human right.<sup>5</sup>

Argentina’s cutting-edge Law 25.871 of 2004 (“the 2004 Law”) was enacted against the backdrop of a troubled history of immigration regulation. The law in effect prior to the enactment of the 2004 Law was a dictate of the military junta that ruled Argentina from 1976-83.<sup>6</sup> The Videla Law, as it was known, provided the National Department of

1 Decreto 70/2017, Modifying Law No. 25.871, Jan. 27, 2017, [33555] B.O. 1 [hereinafter DNU] (translation by author).

2 Simon Romero & Daniel Politi, *Argentina’s Trump-Like Immigration Order Rattles South America*, N.Y. TIMES (Feb. 4, 2017), <https://www.nytimes.com/2017/02/04/world/americas/argentinas-trump-like-immigration-order-rattles-south-america.html>.

3 See, e.g., Border Security and Immigration Enforcement Improvements, Exec. Order No. 13,767, 82 Fed. Reg. 8793, § 1 (Jan. 25, 2017) (stating that “[a]mong those who illegally enter are those who seek to harm Americans through acts of terror or criminal conduct. Continued illegal immigration presents a clear and present danger to the interests of the United States.”); see also Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13,768, 82 Fed. Reg. 8799, § 1 (Jan. 25, 2017) (“Tens of thousands of removable aliens have been released into communities across the country . . . . The presence of such individuals in the United States . . . [is] contrary to the national interest.”).

4 Marisa Franco & Carlos Garcia, *The Deportation Machine Obama Built for President Trump*, THE NATION (June 27, 2016), <https://www.thenation.com/article/the-deportation-machine-obama-built-for-president-trump/>.

5 Barbara Hines, *The Right to Migrate as a Human Right: The Current Argentine Immigration Law*, 43 CORNELL INT’L L.J. 471 (2010); Lila García, *Migraciones, Estado y una política del derecho humano a migrar: ¿hacia una nueva era en América Latina?*, 88 COLOMBIA INTERNACIONAL 107, 109-10, 112 (2016).

6 Ley General de Migraciones y Fomento de la Inmigración, Law No. 22439, Mar. 23, 1981, [24637] B.O. 6.

Migration (in Spanish, “DNM”) with largely unreviewable powers to manage the task of immigration enforcement as it deemed appropriate.<sup>7</sup> A decade later, in unmistakable reaction to the authoritarian government that had taken nearly thirty thousand civilian lives in the name of public order, Argentina had passed the 1994 Constitution, which placed core international human rights treaties on par with the constitution itself.<sup>8</sup> While that same constitution established that non-citizens have the same civil rights as citizens,<sup>9</sup> human rights did not permeate the sphere of immigration law until the legislature promulgated Law 25.871.<sup>10</sup> The 2004 Law, passed with the overwhelming support of lawmakers at the time,<sup>11</sup> established a right to migrate, and included a range of legal protections and policy objectives in furtherance of immigrant rights and the human dignity of migrants.<sup>12</sup>

In order to advance immigrant rights, the 2004 Law established robust substantive and procedural protections for migrants seeking lawful status to remain in Argentina. First, it includes a bill of rights that reinforces the notion of equal rights between non-citizens and citizens established under the 1994 Constitution, provides expansive social and economic rights guarantees, and promotes family unity through a variety of provisions.<sup>13</sup> The bill of rights further includes the novel concept of a right to migrate, puts the burden on the State to provide irregular migrants with public assistance to regularize their situation, and mandates the development of regularization programs.<sup>14</sup> Second, the law codified robust procedural guarantees, which included multiple levels of appeal of adverse decisions, free legal assistance for immigrants in expulsion proceedings at the

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7 Barbara Hines, *An Overview of Argentine Immigration Law*, 9 IND. INT’L & COMP. L. REV. 395, 405-06 (1999). Hines recalls that, under the Videla Law, there were no regulations governing the “initiation of expulsion proceedings, bond, burden of proof, or the conduct of the hearing.” *Id.* at 405. There were no immigration courts or independent judges, and thus, the “majority of cases [were] resolved without formal hearings, bond, or appeals.” *Id.* The lack of direct judicial review of a negative decision provided the Immigration Department with largely unreviewable authority. A party seeking to appeal a negative decision was able only to proceed by means of a “constitutional amparo, or habeas corpus.” *Id.* at 406.

8 Art. 75.22, CONSTITUCIÓN NACIONAL [Const. Nac.] (Arg.).

9 *Id.* art. 20.

10 Hines, *supra* note 5, at 482-84.

11 Susana Novick, *Migración y políticas en Argentina: Tres leyes para un país extenso (1876-2004)*, at 142-43, in *LAS MIGRACIONES EN AMÉRICA LATINA: POLÍTICAS, CULTURAS Y ESTRATEGIAS* (Susana Novick ed., 2008).

12 PABLO CERIANI CERNADAS & DIEGO MORALES, FEDERACIÓN INTERNACIONAL DE DERECHOS HUMANOS, ARGENTINA: AVANCES Y ASIGNATURAS PENDIENTES EN LA CONSOLIDACIÓN DE UNA POLÍTICA MIGRATORIA BASADA EN LOS DERECHOS HUMANOS, 9-10 (2011).

13 See Law No. 25871, Jan. 21, 2004, [30322] B.O. 2 [hereinafter the 2004 Law].

14 *E.g. id.* arts. 17, 61, 70.

expense of the State, and a presumption against detention during those proceedings.<sup>15</sup>

The 2004 Law is not only about migrants' rights, however, and it includes more traditional immigration priorities related to public security and economic development. One evident limitation on the right to migrate appears in a set of provisions that prevent persons who have committed certain crimes from entering or remaining in the country.<sup>16</sup> In essence, the right to migrate is tempered by certain expectations that a migrant comply with the laws in his home country as well as the laws of Argentina, and a failure to meet such expectations can lead to the State's refusal to grant entry or the termination of legal residency.<sup>17</sup> Notably, only serious crimes prevented migration under the 2004 Law, and these legal impediments were clearly balanced against fundamental human rights considerations such as family unity.

On January 27, 2017, President Macri issued a Decree of Necessity and Urgency (in Spanish, "DNU"), a novel feature of the 1994 Constitution that permits a sitting President to pass a law, if both houses of Congress do not oppose the law.<sup>18</sup> The DNU set forth statistics, claiming that immigrants were disproportionately represented in the prison population, and that a substantial proportion of them were imprisoned for drug crimes.<sup>19</sup> These statistics, together with President Macri's observation that expulsion proceedings "may last" as long as seven years, were used to justify the establishment of a summary expulsion procedure for persons with criminal history, as well as other irregular migrants, and greater authority to detain migrants in expulsion proceedings.<sup>20</sup> Shortly after the DNU was issued, civil society organizations argued that the President had overrepresented the actual proportion of immigrants in prison, and that the modifications to the existing law were not justified by a situation of

15 *See id.* tit. VI.; *see also id.* art. 70.

16 *See id.* arts. 29, 63.

17 Article 5 of the 2004 Law is evidence of this tempering or restriction of the impact and reach of the anti-discriminatory aims of the 2004 Law. Article 5 requires that "the government guarantee . . . equal treatment . . . so long as [foreigners] satisfy the established conditions for their entry and stay [in the country], according to the laws . . ." Hines, *supra* note 5, at 490-91 (citing the 2004 Law, art. 5.) Hines argues that "[a] literal reading of the text of this article could lead to the conclusion that some type of disparate treatment might still be permissible against persons in irregular status. Such an interpretation would contravene the more liberal provisions of the law . . ." *Id.*

18 Art. 99.3, CONSTITUCIÓN NACIONAL [Const. Nac.] (Arg.).

19 DNU, *supra* note 1, Preamble (claiming that while immigrants only made up 4.5% of the Argentine population overall, they made up more than 21% of the prison population, and that 33% of all persons incarcerated for drug crimes were immigrants).

20 *Id.*

necessity or urgency.<sup>21</sup> At that point, however, the DNU was law and there was insufficient political will for both houses of Congress to nullify the Decree, as required by the constitution.<sup>22</sup>

The DNU drastically expanded the types of criminal activity that will provide a basis for the denial of admission or the cancelation of residency. Under current law, if there is a reason to believe that a non-citizen has committed a crime that could be punished with imprisonment, the non-citizen is inadmissible, and if the immigrant has lawful residency, that status is automatically canceled.<sup>23</sup> For many, there is no defense, and no opportunity to argue equitable considerations such as family unity. Such non-citizens are funneled into a summary expulsion procedure that provides only three days to respond to the charges, and another three days to appeal an adverse decision.<sup>24</sup> Moreover, the law increases the likelihood of detention during the pendency of those proceedings.<sup>25</sup>

At the time of this writing, the DNU is embroiled in litigation with an appeal pending before the Argentine Supreme Court that will decide the fate of the Decree. First, a federal judge largely rejected a collective legal challenge to the DNU brought by civil society organizations, suggesting that individuals must challenge the law to defend their individual rights.<sup>26</sup> Then, an appeals court ruled that the DNU is unconstitutional, with two judges finding that the President had failed to establish the requisite “necessity and urgency,” and a third judge finding that the Decree violated various rights guarantees under Argentine law.<sup>27</sup> The case is now pending

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21 See, e.g., Senate Debate, Feb. 16, 2017 (translation by author).

22 This conclusion is drawn from interviews with immigration experts in Argentina, and can be inferred from a Senate debate that began in February 2017, and to date has not reconvened to finish discussion or vote on the matter.

23 DNU, *supra* note 1, art. 4 (modifying article 29 of the 2004 Law); *id.* art. 7 (modifying article 62 of the 2004 Law).

24 DNU, *supra* note 1, arts. 9-20.

25 DNU, *supra* note 1, art. 21 (modifying article 70 of the 2004 Law).

26 Juzgado Contencioso Administrativo Federal No. 1 [1a Inst.] [Federal Administrative Litigation Court], 18/10/2017, “Centro de Estudios Legales y Sociales y Otros c. EN-DNM / Amparo Ley 16.986,” <https://www.diariojudicial.com/public/documentos/000/075/903/000075903.pdf>, at 3-4 (agreeing with an opinion filed by the Public Minister who found that the collective process was an inappropriate mechanism to bring claims related to the termination of residency and the family reunification waiver due to the individualized nature of the rights at issue, and pronouncing that the court would not analyze these claims so as not to be redundant).

27 Cámara Contencioso Administrativo Federal [CNFed.] [National Court of Appeals in Federal and Administrative Litigation], sala V, 22/3/2018, “Centro de Estudios Legales y Sociales y Otros c. EN-DNM / Amparo Ley 16.986 (expte. no. 3061/2017),” <https://www.cels.org.ar/web/wp-content/uploads/2018/03/fallo-camara-migrantes.pdf>, at 45 (Judge Treacy finding that the DNU is an unconstitutional overreach of executive power, inasmuch as it constitutes legislation that does not meet the specific constitutional requirements of necessity and urgency set forth in article 99.3 of the constitution); *id.* at 47 (Judge Gallegos Fedriani adopting the opinion of Judge Treacy); *id.* at 17-19

before the Argentine Supreme Court, which granted the government's petition for extraordinary review, leaving the fate of the 2017 Decree uncertain.<sup>28</sup> The pending appeal suspends the judgment of the appeals court, and permits the government to continue to apply the DNU,<sup>29</sup> such that individual immigrants are now compelled to formulate their own challenges to the law to defend against expulsion.

This Article argues that the persistence of the right to migrate under Argentine law, together with international human rights norms embedded in the 2004 Law and the Argentine Constitution, may provide an important safeguard against the most deleterious effects of the DNU. The discussion will proceed in three parts. The first part will examine the evolution of immigrant rights in Argentina. It will begin with a brief historical account of immigration regulation in Argentina, and describe the forces that brought about the seismic shift in the 2004 Law. It will then summarize the main provisions of the 2004 immigration law and the 2010 regulations that accompany that law, with a particular focus on the law's substantive rights and procedural guarantees.

The second part of this Article will present the DNU, its rationale, and its main provisions, and will highlight the ways in which the DNU modifies the 2004 Law. In particular, this section will examine those ways in which the DNU serves to undermine the progressive provisions of the 2004 Law summarized in the first section. It will emphasize in particular the predictable effects of the summary expulsion procedure, as compared to the robust procedures that existed under the prior law, and the likely strain on the fundamental right to family unity. This section will then examine the early results of a collective action that challenged the constitutionality of the DNU, denouncing various provisions of the law as inconsistent with international human rights law and the Argentine Constitution.

The third part of the Article will argue that international human rights law, applied directly through Argentine law, may be used to uphold some key aspects of the right to migrate in Argentina. In particular, this section

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(Judge Alemany invalidating the summary expulsion procedure, the detention provisions, and the limitations on the family reunification waiver, discussed in sections X, XI, and XII of his opinion, respectively) (translation by author).

28 Maia Jastreblansky, *Inquietud en el Gobierno por un fallo de la Corte que define el alcance de los DNU*, LA NACIÓN (July 10, 2018), <https://www.lanacion.com.ar/2151660-inquietud-en-el-gobierno-por-un-fallo-de-la-corte-que-define-el-alcance-de-los-dnu>.

29 Martín Bravo, *La Corte deberá resolver otro tema sensible para el Gobierno: el DNU por los extranjeros*, CLARÍN (Apr. 12, 2018), [https://www.clarin.com/politica/corte-debera-resolver-tema-sensible-gobierno-dnu-extranjeros\\_0\\_r1Ub8gaoM.html](https://www.clarin.com/politica/corte-debera-resolver-tema-sensible-gobierno-dnu-extranjeros_0_r1Ub8gaoM.html).



will present relevant human rights norms that protect the substantive rights of migrants, most notably to family unity, as well as procedural protections that should be accorded to them. There is potential, through individual litigation, if not the collective litigation still pending on appeal, to assert core international human rights protections for unauthorized migrants and residents alike who face summary expulsion procedure under the new law. By ensuring the dignity of migrants, made exceedingly vulnerable under the DNU, Argentina may still prevent the complete erosion of the right to migrate established under the 2004 Law.

## II. THE EVOLUTION OF IMMIGRANT RIGHTS IN ARGENTINA

Argentina passed an immigration law in 2004 that has been widely regarded as a model for humane immigration regulation. One of the most ground-breaking developments in this regard was the decision by Argentine legislators to characterize migration as a right, which many have suggested laid the groundwork for understanding migration as a human right.<sup>30</sup> This is particularly significant when understood in the context of Argentine history, inasmuch as the 2004 Law followed a century of repressive immigration regulation. This section will examine the evolution of immigrant rights in Argentina through a brief review of the history that led to the passage of the 2004 Law. It will consider the novel legal framework enacted in 2004, and focus in particular on clusters of provisions that establish substantial substantive rights for migrants and robust procedural and judicial protection for persons in expulsion proceedings.

### A. *A brief history of Argentine immigration law*

In the early years of the Argentine Republic, the government viewed immigration as essential to the growth and establishment of the State. This idea was enshrined in the Argentine Constitution in 1853, which announced that “to govern is to populate,” suggesting both that immigration policies were intertwined with the authority of the State, and that such policies should promote immigration.<sup>31</sup> This was reflected in the first immigration law, the Avellaneda Law, passed in 1876 with the goal of encouraging immigration to populate and develop the vast Argentine

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30 See Hines, *supra* note 5.

31 See Hines, *supra* note 7, at 395-96.

territory.<sup>32</sup> A policy of largely open borders continued as the country received waves of European migration through the nineteenth century, but with the express understanding that migration should be European.<sup>33</sup>

In 1902, the Argentine legislature passed the Residence Law, Law No. 4144, which limited immigration. Specifically, the Residence Law “authorized the executive branch to expel or prevent the entry of foreigners whose conduct compromised national security or public order,” which provided the authority to discriminate against migrants on the basis of political ideology.<sup>34</sup> The law’s origins date back to a Senate debate in 1899, in which Senator Miguel Cané proposed that the Senate deport “foreigners who endangered order and security.”<sup>35</sup> He spoke of immigrants with powerful and condemning language, saying that they were “enemies of the social order with the intent of committing the foulest of crimes in pursuit of a . . . chaotic ideal that defies intelligence and chills the heart.”<sup>36</sup> The following years in Argentina marked the growth of labor movements, and immigrants formed the base of Argentina’s new urban working class.<sup>37</sup> The Residence Law ushered in a period of institutional and systematic discrimination against the immigrant community as a response to this societal shift.<sup>38</sup>

Under the Residence law, the Executive had the power to order individuals deported and to detain them from the moment of the order until their final deportation.<sup>39</sup> They would be deported in three days, with

32 Novick, *supra* note 11, at 3-4.

33 Article 25 of the Constitution of 1853 stated that “the Federal Government shall encourage European Immigration.” Art. 25, 1853 CONSTITUCIÓN ARGENTINA. Some argue that this article expresses merely a “preference” toward European immigration because the subsequent clause decrees that all persons coming to Argentina from abroad “to carry out the goals listed in the Constitution have the right to enter the country.” Hines, *supra* note 7, at 396. Hines argues that “[n]evertheless, the fact that the Constitution specifically promotes European immigration affects the current immigration debate, given that the majority of recent immigrants are from neighboring Latin American countries.” *Id.* at 396-97.

34 See Hines, *supra* note 5, at 480. This law can be compared to the Immigration Act of 1920 in the United States, which “provid[ed] for the exclusion of [individuals] who advocated [for] the overthrow of the government[,] . . . opposed organized government, or who was a member of any organization teaching [such] views.” *Id.* at 480 n.20.

35 Gabriela Anahí Costanzo, *The Inadmissible Turned History: The 1902 Law of Residence and the 1910 Law of Social Defense*, 3 SOCIEDAD (BUENOS AIRES) (2007), [http://socialsciences.scielo.org/scielo.php?script=sci\\_arttext&pid=S0327-77122007000200001](http://socialsciences.scielo.org/scielo.php?script=sci_arttext&pid=S0327-77122007000200001).

36 See *id.*

37 Jeane DeLaney, *National Identity, Nationhood, and Immigration in Argentina: 1810-1930*, 5.2 STAN. ELECTRONIC HUMAN. REV. 7 (1997), <https://web.stanford.edu/group/SHR/5-2/delaney.html>.

38 María Inés Pacecca, *Personas extranjeras en cárceles federales: vulnerabilidad y discriminación*, in *Discriminaciones étnicas y nacionales: un diagnóstico participativo* 127, 127 (Corina Courtis & María Inés Pacecca eds., 2011).

39 See *id.*

no means provided, judicial or otherwise, to defend themselves or fight the order.<sup>40</sup> In the first week after passing the law, 500 people were deported.<sup>41</sup> In addition to this broad power to deport, article 3 of the Residence Law also gave the executive the power to block the entry of anyone whose background indicated that they may compromise the public order.<sup>42</sup> In 1932, the Supreme Court decided a constitutional challenge against the Residence Law on behalf of thirty-three detained migrants in the *Transporte Chaco* case.<sup>43</sup> The Court upheld the Residence Law, reasoning that the right of migrants under the Constitution to “till the soil, improve industry, and teach the arts and sciences, did not prevent the government from expelling those whose residence did not fulfill these goals.”<sup>44</sup> The Court also held that the Constitution’s guarantee of the right to work and reside in Argentina did not protect those who “threaten[ed] the public order.”<sup>45</sup>

The military government that came to power in 1976 doubled down on the commitment to restrictive immigration regulation with the 1981 Videla Law, which gave near complete authority to the executive in immigration matters.<sup>46</sup> The stated purpose of the Videla Law was “to promote immigration of those persons ‘whose cultural characteristics allow for adequate integration into Argentine society.’”<sup>47</sup> Notably, this corresponded with a demographic shift in migration to Argentina during this time. Indeed, while migrants to Argentina had primarily been European through the first half of the twentieth century, regional migration from Latin American was on the rise in this period.<sup>48</sup> Regardless, even for those

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40 *See id.* at 128.

41 *See Costanzo, supra* note 35, at 4.

42 Law No. 4144, Nov. 22, 1902, [1889-1919] A.D.L.A. 560, 560.

43 *See Hines, supra* note 5, at 480, n.56.

44 *See id.* (citing Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 6/5/1932, “Simón Scheimberg y Enrique Corona Martínez / habeas corpus en representación de treinta y tres extranjeros detenidos en el ‘Transporte Chaco’ de la Armada Nacional,” Fallos (1932-164-344) (Arg.)).

45 *See id.*

46 Law No. 22439, Mar. 23, 1981, [XLI-A] A.D.L.A. 1581. Notably, the undocumented population increased as a result of the restrictive nature of the Videla Law. Experts and government officials widely agree on this. *See Hines, supra* note 5, at 475-76. The Videla law “provided very few avenues for legal immigration, particularly for those from neighboring countries and delegated near unbridled discretion to immigration officials to deny, delay, or impede applications for legal status.” *Id.*

47 *See Hines, supra* note 5, at 481 (citing Law No. 22439, art. 2., Mar. 23, 1981, [1981-A] L.A. 273 (repealed)).

48 *See Hines, supra* note 7, at 397 (citing Raúl C. Rey Balmaceda, *El Pasado: la Inmigración en la Historia Argentina*, in 2 GEODOMOS 19, 44 (Graciela M. de Marco et al. eds., 1994) (noting that 17.8% of the immigrant population in Argentina hailed from neighboring Latin American countries by

migrants who had the desired “cultural characteristics,” legal paths for immigration were seldom available.<sup>49</sup>

The military government practiced systematic grave violations of human rights in order to maintain social and political control over the country, and this extended to immigration regulation as well.<sup>50</sup> Non-citizens were deported “for illegal entry, violation of the terms of stay, criminal conduct, and threats to national security or public order, without even minimal due process.”<sup>51</sup> Furthermore, the Videla Law had harsh mandatory reporting requirements, which demanded that both citizens and government officials “report undocumented immigrants who engaged in commercial transactions, attempted to marry, or sought medical treatment.”<sup>52</sup> These provisions, coupled with largely unfettered authority provided to officials to conduct searches for immigration violations “without reasonable suspicion, probable cause, or a court order,”<sup>53</sup> led to frequent abuses of power in the detention and expulsion of immigrants.<sup>54</sup>

When the military dictatorship was finally ousted in 1983, political leaders mobilized to install a system of government that would respect fundamental human rights. This impulse was enshrined in the 1994 Constitution, which directly incorporated major international and regional human rights treaties into domestic Argentine law, and in some cases, codified human rights as on par with the Constitution itself.<sup>55</sup> Nevertheless, the 1994 Constitution gave broad authority to the Argentine legislature to regulate immigration in the manner it deemed appropriate

1960, and by 1980 regional migration had increased significantly).

<sup>49</sup> *Id.*

<sup>50</sup> Article 20 of Law No. 22439 decreed that the “right of a foreigner to enter, reside and leave the country, a right guaranteed to all inhabitants under article 14 of the Argentine Constitution, is limited by the immigration laws.” See Hines, *supra* note 7, at 395-96 (citing Law No. 22439, art. 20, Mar. 23, 1981, [1981-A] L.A. 273 (repealed)). This provides context on the power of the immigration laws to restrict the rights afforded to migrants.

<sup>51</sup> See Hines, *supra* note 5, at 481 (citing Law No. 22439, art. 3, Mar. 23, 1981, [1981-A] L.A. 273 (repealed)) (discussing the authority to remove immigrants for not following the law).

<sup>52</sup> *Id.* (citing Law No. 22439, arts. 32, 105, 101, 103, 104, 106, Mar. 23 1981, [1981-A] L.A. 273 (repealed)).

<sup>53</sup> *Id.* (citing Law No. 22439, art. 107, Mar. 23, 1981, [1981-A] L.A. 273 (repealed)).

<sup>54</sup> The Videla Law also restricted the ability of undocumented immigrants to integrate into Argentine society. For example, the law decreed that only permanent or temporary residents could attend secondary school. *Id.* (citing Law No. 22439, art. 102, Mar. 23, 1981, [1981-A] L.A. 2713 (repealed)). Undocumented immigrants were also not permitted to purchase or rent property, and any seller or landlord who allowed for this would be fined. *Id.* (citing Law No. 24393, art. 48, Nov. 18, 1994, [1994-C] L.A. 3228 (modifying Law No. 22439, art. 48, Mar. 23 1981, [1981-A] L.A. 273); Law No. 22439, arts. 32, 48, Mar. 23, 1981, [1981-A] L.A. 273 (repealed)).

<sup>55</sup> Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT'L L. 281, 288-92 (1999).

and in the national interest.<sup>56</sup> Indeed, the new Constitution did nothing to specifically curtail the broad immigration authority of the executive under the dictatorship era Videla Law, notwithstanding inconsistencies between the exercise of that authority and human rights law.<sup>57</sup> Notably, during this same period, the trend of increased regional migration continued with nearly half of the immigrants in Argentina originating from Latin American countries.<sup>58</sup>

In 2002, in a drastic shift in the restrictive immigration policy that had characterized the previous century, Argentina entered into a free movement agreement with other member nations of the South American trading bloc, Mercosur. Negotiations that ultimately led to the approval of the “Agreement on Residence for Nationals of State Parties in Mercosur” opened with a Brazilian proposal for a “migration amnesty for Mercosur nationals living elsewhere within the bloc without authorization.”<sup>59</sup> However, based on its own recent experience with such regularization programs, Argentina was unconvinced that a temporary amnesty would be sufficient to alleviate the problem of irregular migration and countered with a proposal for a “permanent, rather than temporary, mechanism for Mercosur citizens to gain access to regular status.”<sup>60</sup> Ultimately, Argentina’s proposal prevailed and created a pathway to permanent residency for Mercosur citizens living and working within the bloc.<sup>61</sup> It also established many rights for migrants, such as the right to family reunification, the right to equal working conditions, and the right to

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56 Article 75, paragraph 18 of the Constitution of 1994 allows for “Powers of Congress . . . [t]o provide whatever is conducive to the prosperity of the country, to the progress and welfare of all the Provinces and for the advancement of . . . immigration . . . .” Hines, *supra* note 7, at 396 n.5. Article 67, paragraphs 11, 16, and 28 of the Constitution of 1853 are also examples of the broad powers provided to the government to regulate immigration, according to Hines. *See id.*

57 Of particular importance were lawsuits brought by the Centro de Estudios Legales y Sociales (CELS) and the Comisión Argentina de Refugiados (CAREF). The government actually stated to CELS in negotiations on the case of Juan Carlos de la Torre, which was a case in front of the Inter-American Commission for Human Rights of a Uruguayan individual who had resided in Argentina with his Argentine-born wife and children, that it was willing to reform the Videla Law in order to comply with human rights standards. *See* Hines, *supra* note 5, at 483-84 (citing Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 22/12/2998, “Recurso de hecho deducido por la defensa de De La Torre, Juan Carlos en la causa De la Torre, Juan Carlos / habeas corpus,” Fallos (1998-321-3646) (Arg.)).

58 *See* Hines, *supra* note 7, at 397-98 (citation omitted) (highlighting that roughly half of Argentina’s foreign-born population of 1.6 million came from surrounding Latin American countries in 1991).

59 Diego Acosta, *Free Movement in South America: The Emergence of an Alternative Model?*, MIGRATION POL’Y INST. (Aug. 23, 2016), <https://www.migrationpolicy.org/article/free-movement-south-america-emergence-alternative-model>.

60 *Id.*

61 *Id.*

education for children.<sup>62</sup> This treaty “transformed the migration regime for South Americans,”<sup>63</sup> and Argentina followed this exceptional regional development with the progressive national immigration legislation in 2004.

Argentina’s 2004 Law 25.871 set forth four clusters of objectives for immigration regulation in Argentina.<sup>64</sup> The first clear and overarching concern was with the development of the nation. This is evidenced by the interest in pursuing demographic goals in terms of population distribution and growth,<sup>65</sup> the goal of advancing commerce, tourism, science and technology,<sup>66</sup> and incorporating labor migrants for the benefit of the republic.<sup>67</sup> At the same time, there was a second, perhaps more subtle concern for the integration of migrants into Argentine society. This was expressed through the articulated needs to fortify Argentine culture through immigration,<sup>68</sup> and to integrate permanent residents into the social fabric of the country.<sup>69</sup> Third, there was expressed concern for the relationship between immigration and criminality. Indeed, the law articulated the objectives of denying entry or expelling those persons engaged in acts punishable under Argentine criminal law,<sup>70</sup> as well as combating international organized crime through immigration regulation.<sup>71</sup> Finally, the law promoted the fundamental human rights of migrants.<sup>72</sup> It recalled the country’s international obligations in the areas of human rights, equality, and human mobility,<sup>73</sup> and made specific reference to the needs to promote family unity<sup>74</sup> and combat discrimination.<sup>75</sup>

62 *Id.*

63 *Id.*

64 *See* The 2004 Law, *supra* note 13, art. 3.

65 *Id.* art. 3(b).

66 *Id.* art. 3(i).

67 *Id.* art. 3(h).

68 *Id.* art. 3(c).

69 *Id.* art. 3(e).

70 *Id.* art. 3(j).

71 *Id.* art. 3(k).

72 The 1994 Constitution gave “constitutional hierarchy to ten major international treaties that Argentina had ratified at the time of the reform.” It was within this context of focus on human rights that Argentina enacted and crafted the 2004 Law. *See* Hines, *supra* note 5, at 482 (citing Levit, *supra* note 55, at 288-91). The 2004 Law was compatible with the constitution, according to Eugenio Zaffaroni, a constitutional scholar and member of the Supreme Court in Argentina. He stated that the passage of the 2004 law “signifie[d] the reestablishment of legal compatibility with constitutional directives.” *Id.* at 485 (citing Eugenio Raúl Zaffaroni, *Migración y Discriminación: La Nueva Ley en Perspectiva Histórica*, in *MIGRACIÓN: UN DERECHO HUMANO* 45 (Prometeo 2004)).

73 The 2004 Law, *supra* note 13, art. 3(a).

74 *Id.* art. 3(d).

75 *Id.* art. 3(f).

The first three categories of objectives set forth in the law are common in immigration legislation, and unsurprising when considered against the backdrop of the century of immigration regulation that preceded the 2004 Law. Rights protection as an aspect of immigration regulation is much more novel. Javier de Lucas writes that states are often concerned with: (1) managing the immigrant population within the country, usually with a focus on meeting the needs of the labor market, maintaining public order, and integrating immigrants; (2) regulating migrant flows, commonly reduced to border policy; and (3) conducting foreign relations with countries that send migrants.<sup>76</sup> According to de Lucas, states often do little to legislate immigrant rights because they are not viewed as essential to the primary considerations of security and the market.<sup>77</sup>

Moreover, states are generally disinclined to approach migration as a right because such a conception limits their authority to manage immigrant flows. Miguel Carbonell has suggested that states resist the characterization of migration as a right because it requires a reexamination of the rationale of borders in a socio-legal context, and a movement towards the individual liberty of migrants.<sup>78</sup> While the 2004 Argentine law reflects the three major areas of concern highlighted by de Lucas, it is remarkable in the strides it made to articulate and protect migrants' fundamental rights.<sup>79</sup>

### *B. The rights protective framework of the 2004 Law*

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<sup>76</sup> Javier de Lucas, Por qué no son prioritarios los derechos humanos en las políticas de inmigración (July 7, 2002) (7th Óscar Romero Migration & Solidarity Conference Committee paper), [http://www.comitesromero.org/murcia/jornadas/DeLucas.html#th\\_sEc3](http://www.comitesromero.org/murcia/jornadas/DeLucas.html#th_sEc3) (elaborating on the reasons and evidence that immigrant rights are not taken seriously in the debate about immigration policy).

<sup>77</sup> *Id.* at 2.

<sup>78</sup> Miguel Carbonell, *Derecho a Migrar*, in INSTITUCIONES SOCIALES EN EL CONSTITUCIONALISMO CONTEMPORÁNEO 59, 62-63 (Héctor Fix-Zamudio & Diego Valadés eds., 2d ed. 2011), [http://miguelcarbonell.com/artman/uploads/1/Derecho\\_a\\_Migrar.pdf](http://miguelcarbonell.com/artman/uploads/1/Derecho_a_Migrar.pdf).

<sup>79</sup> This focus on fundamental human rights is not only evident in the text but is also clear in the statements made by Argentinian officials at the time. For example, Argentine Ambassador, Leonardo Franco, spoke to the United Nations about the 2004 Law and said,

[T]he search for better conditions of life in other countries must not be reproachable and [must be] much less criminalized . . . . Argentina sealed this new spirit in its migrations policies through the National Law of Migrations in 2004. This new law reflects the commitment of our country to guarantee the full respect of human rights of the migrants and their families and the same [sic] time establishes mechanisms of easy access to regulate migration, thus contributing to the elimination of any form of discrimination, xenophobia or racism.

Hines, *supra* note 5, at 485. (citing Susana Novick, *Una Nueva Ley para un Nuevo Modelo de Desarrollo en un Contexto de Crisis y Consenso*, in *Migración: un Derecho Humano* 19, 67, 84-85 (Prometeo 2004)).

This section considers the specific legal provisions of the 2004 Law as a means of exploring a broader conception of immigrant rights in Argentina. This discussion is divided into two parts, and begins with an examination of the first title of the law that sets forth what could be considered an immigrant bill of rights. This discussion examines the novel “right to migrate” introduced by the 2004 Law, and discusses other key protections such as the rights to equal protection of the law, family unity, and the mandate that the State must regularize the situation of migrants.

The second part of the discussion explores the procedural and judicial protections under the 2004 Law. These include an opportunity for immigrants to regularize their status before the State may pursue expulsion, a robust system of administrative and appellate review of an expulsion order, and free legal services provided by the State to indigent immigrants throughout this procedure.<sup>80</sup> There is also a presumption against immigrant detention and strong judicial control over any detention that does occur in this context. Together, the immigrant bill of rights in conjunction with procedural and judicial protections created a progressive and rights-centered model of migration regulation.

### *1. An immigrant bill of rights*

The first chapter of the 2004 Law is titled “The Rights and Liberties of Foreigners,” which suggests an immigrant bill of rights. The bill of rights includes a novel right to migrate;<sup>81</sup> equal protection under the law and freedom from discrimination;<sup>82</sup> access to education and healthcare;<sup>83</sup> access to information and the means of integration;<sup>84</sup> the right to family unity;<sup>85</sup> political rights;<sup>86</sup> labor rights;<sup>87</sup> property rights;<sup>88</sup> and a catch-all

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<sup>80</sup> This is consistent with the way advocates speak about immigrant rights under the 2004 Law. See, e.g., CENTRO DE ESTUDIOS LEGALES Y SOCIALES, MIGRANTES 1, 62 (Paula Arturo trans., 2013), <https://www.cels.org.ar/web/wp-content/uploads/2016/10/Migrantes.pdf> (indicating that the 2004 Law “required the State to establish mechanisms for regulating immigration, ensuring access to justice in any deportation or detention procedure, while eliminating distinctions between the rights of Argentine nationals and those foreign born.”).

<sup>81</sup> The Law of 2004, *supra* note 13, art. 4 (translation by author).

<sup>82</sup> *Id.* arts. 5, 6, 13 (this broad anti-discrimination provision of the law establishes as discriminatory all acts or omissions motivated by ethnicity, religion, nationality, ideology, political opinion, sex, gender, economic situation or physical characteristics, which arbitrarily impedes equal enjoyment of rights guaranteed under laws, the constitution, or international treaties).

<sup>83</sup> *Id.* arts. 7, 8.

<sup>84</sup> *Id.* arts. 9, 14.

<sup>85</sup> *Id.* art. 10.

<sup>86</sup> *Id.* art. 11.

<sup>87</sup> *Id.* art. 16.

<sup>88</sup> *Id.* art. 15.



provision that incorporates rights guaranteed under international law.<sup>89</sup> Finally, the bill of rights creates an obligation on the State to implement measures to regularize the legal status of migrants.<sup>90</sup>

The revolutionary scope of the 2004 Law is perhaps embodied in the “right to migrate.”<sup>91</sup> The right to migrate is described as “essential and inalienable,” and the Republic of Argentina commits to guarantee this right in accordance with the principles of equality and universality.<sup>92</sup> The law itself does not elaborate on the content of this right, but courts have since described it as a “paradigm shift” in the State’s relationship with migrants that compels Argentine authorities to regularize migrants, interpret the law favorably to the migrant, and treat expulsion as a measure of last resort.<sup>93</sup>

In an early decision interpreting the 2004 Law, a federal appeals court made clear the significance of the change in immigration policy that emanated from the codification of a right to migrate. In *Li Yun, Lingyan Zheng, and Yu Junyun*, a court reviewed the case of three Chinese migrants who had been detained by immigration authorities after crossing the border without authorization.<sup>94</sup> In discussing the rights of the women, the court referred to the right to migrate as a “revolutionary precedent” that converted migration into a “substantive right that does not depend on the will of any State.”<sup>95</sup> The court expressed concern that this sentiment had not penetrated actual practices of migration officials on the border, but emphasized that the 2004 Law had heralded a new era after the persecutory Videla Law.<sup>96</sup> The court in turn ordered that the three women should be released from detention, guaranteed a lawyer at the expense of the State, and provided assistance in regularizing their immigration status.

This shift is stunning when considered against the backdrop of the previous century of immigration regulation in Argentina. It is also remarkable in its implications for the limits on sovereign authority over the entry of non-citizens into Argentine territory. The right to migrate

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89 *Id.* art. 12.

90 *Id.* art. 17.

91 *Id.* art. 4.

92 *Id.*

93 Juzgado Contencioso Administrativo Federal No. 3 [1a Inst.] [Federal Administrative Litigation Court], 11/11/2013, “García Castro, Jhon Darwin c. EN-M Interior-DNM-Disp. 264/10 (Expte. 2.167.684/06) / recurso directo para juzgados,” (No. 10879/2010), 8-9 (translation by author), <https://jurisprudencia.mpd.gov.ar/Jurisprudencia/GC,%20JD.pdf>.

94 Cámara Federal De Apelaciones de Paraná [CFed.], 10/12/2004, “Li Yun, Lingyan Zheng y Yu Junyun / habeas corpus,” L.S. Crim. (2004-II-396) (Arg.) (translation by author).

95 *Id.* at 3.

96 *Id.*

bestowed certain rights on the individual migrant that the State could not infringe, and thus represented a “paradigm shift.” Indeed, the 2004 Law not only prevented authorities from detaining irregular migrants at the border, it required that they facilitate the entry of such migrants by supplying them with legal counsel and time to prepare a case for residency.<sup>97</sup>

Just as the “right to migrate” facilitated the entry of some, it converted expulsion into an “extreme measure of last resort.”<sup>98</sup> Indeed, in *GC, JD* a court cited the “right to migrate” in nullifying the expulsion order of a Uruguayan man who had been convicted of a drug trafficking crime and sentenced to approximately one year in prison while living without authorization in Argentina. This case required that the court interpret article 29(c) of the 2004 Law, which provided various criminal grounds for inadmissibility, including drug trafficking or a crime punishable by three years or more under Argentine law.<sup>99</sup> The court interpreted the provision of the law to require a sentence of three years or more for the drug trafficking crime, a generous interpretation that blocked the application of article 29(c) to the man, who was permitted to remain in Argentina.<sup>100</sup>

This jurisprudence on the “right to migrate” demonstrates that it may be deployed to assist persons crossing the border to get out of detention and secure representation, or assist someone defending against an order of expulsion. The scope of this right to enter or stay, however, is really just the tip of the iceberg, as the immigrant bill of rights offers an expansive set of affirmative rights to immigrants present in Argentina.

For example, the bill of rights includes a proclamation of rights parity between nationals and migrants in social services, public goods, healthcare, education, justice, labor, employment, and social security. Moreover, regulations promulgated in 2010 to provide greater guidance explicitly recognized the role of the State in promoting the equal rights of migrants by requiring the immigration authorities to act as the guardians of human rights and the right to migrate announced in the 2004 Law.<sup>101</sup> The regulations further created a mandate for the federal government to

97 Juzgado Contencioso Administrativo Federal No. 3 [1a Inst.] [Federal Administrative Litigation Court], 11/11/2013, “García Castro, Jhon Darwin c. EN-M Interior-DNM-Disp. 264/10 (Expte. 2.167.684/06) / recurso directo para juzgados,” (No. 10879/2010), 8 (translation by author), <https://jurisprudencia.mpd.gov.ar/Jurisprudencia/GC,%20JD.pdf>.

98 *Id.* at 9.

99 *Id.* at 8.

100 *Id.* at 9-10.

101 Decree 616/2010, Regulation of Law No. 25.871, May 3, 2010, [318989] B.O. art. 6.

collaborate with provincial and municipal governments on programs to integrate migrants into society and guarantee their equal access to the wide range of rights set forth in the law.<sup>102</sup> This naturally reinforces the obligation on the State established under the 2004 Law to facilitate the integration of migrants, including through language classes, orientations about rights and responsibilities, events honoring the culture and traditions of immigrant populations, and courses to promote multiculturalism and anti-discrimination.<sup>103</sup>

The 2004 Law also elaborates on the rights to education and healthcare, which it implicitly recognizes as among the most fundamental rights for migrants. In terms of education, the law states that immigration status should never hinder access to education at any level, public or private.<sup>104</sup> Similarly, it requires that access to healthcare must be provided to all, independent of immigration status.<sup>105</sup> Further, the law creates an obligation for educational institutions and healthcare providers to assist migrants with the regularization of their immigration status.<sup>106</sup> This makes explicit the bridge between the mandate to guarantee social and economic rights to migrants in Argentina, and the mandate to regularize the status of the immigrant population, discussed more below.

The bill of rights also creates an obligation on the Argentine State to provide information to migrants about their rights under the law, and in particular the legal requirements for their admission and stay.<sup>107</sup> The law further emphasizes that the State will coordinate the provision of this information with employers and unions, and that the information will be free and in languages that migrants can understand.<sup>108</sup> The 2010 Regulations that followed further require regular capacity-building seminars for immigration agents, including immigration police, on the rights of migrants under the law.<sup>109</sup> They also include a broader mandate to organize a system of information and education for both public and private entities that have regular contact with immigrants, including the education, health, housing, and transportation sectors.<sup>110</sup>

The 2004 Law includes a unique mandate to promote the right to

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102 *Id.*

103 The Law of 2004, *supra* note 13, art. 14.

104 *Id.* art. 7.

105 *Id.* art. 8.

106 *Id.* arts. 7, 8.

107 *Id.* art. 9.

108 *Id.*

109 Decree 616/2010, Regulation of Law No. 25871, May 3, 2010, [318989] B.O. art. 9(a).

110 *Id.* art. 9(b).

political participation of migrants in Argentina, recognizing their right to a voice in the selection of persons who will govern them. Broadly, the law requires the government to provide foreigners with the knowledge and means to participate in decisions about public life,<sup>111</sup> and the 2010 regulations provided the specific requirement for the City of Buenos Aires to orient migrants about their right to vote.<sup>112</sup>

The immigrant bill of rights also directly incorporates all international legal obligations to protect migrant rights.<sup>113</sup> The 2004 Law gives particular emphasis to the right to family reunification for immigrants, and defines relevant family members as spouses, parents, minor children, and children with limited capacity no matter their age.<sup>114</sup> The 2010 Regulations specifically provided the Convention on the Rights of All Migrant Workers and Their Families as one source of the legal protection of immigrant families,<sup>115</sup> inasmuch as it requires “appropriate measures to ensure the protection of the unity of the families of migrant workers.”<sup>116</sup> This right to family reunification has developed into a core feature of the “paradigm shift” under the 2004 Law, and it is important to elaborate on the contours of that protection.

The importance of family reunification under the 2004 Law is evident in the number of prominent references to this right. Indeed, family unity is listed as one of the overarching objectives of the law,<sup>117</sup> as one of the core protections in the immigrant bill of rights,<sup>118</sup> and it is a basis for a waiver of inadmissibility and cancelation of residence, even when an immigrant has committed a crime.<sup>119</sup>

One example of how the right to family reunification influences immigration policy can be found in the 2007 case *Zhang, Hang*, in which the spouse of a Chinese resident in Argentina was denied a visa after she allegedly tried to bribe a consular officer at the Argentine embassy in

111 *Id.* art. 11.

112 *Id.*

113 *Id.* art. 12.

114 *Id.* art. 10.

115 *Id.*

116 G.A. Res. 45/148, 1990, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Dec. 18, 1990).

117 The Law of 2004, *supra* note 13, art. 3(d) (Article 3(d) sets forth as an objective of the Law to “guarantee the exercise of the right to family reunification.”) (translation by author).

118 The Law of 2004, *supra* note 13, art. 10 (Article 10, in the title “rights and liberties,” orders that “the State guarantee the right to family reunification of immigrants with their parents, spouses, minor children, and children with disability whatever the age.”) (translation by author).

119 *See id.* arts. 29, 62 (The last paragraph of Article 29 (inadmissibility) and Article 62 (cancellation of residence) contain the respective waiver provisions.)

China.<sup>120</sup> After the decision to deny admission was upheld on appeal, the Argentine Supreme Court reversed, writing that “the new Argentine immigration policy, Law 25.871, not only repealed the old law . . . but also established . . . a substantial change in objectives that must be kept in mind for the admission of foreigners.”<sup>121</sup> The court rejected the government’s decision to deny the visa based on “criminal proclivity,” holding such a denial was incompatible with the 2004 Law, and that the principles of family reunification must govern all admission decisions.<sup>122</sup>

There are also a number of cases that concern the eligibility of an immigrant convicted of serious crimes for a waiver of the grounds of criminal inadmissibility under article 29(c) of the 2004 Law.<sup>123</sup> One of the most widely cited cases in this regard is *Barrios Rojas*, in which an appeals court reviewed the expulsion order of a Peruvian woman who had

120 Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 23/10/2007, “Zhang, Hang c. Estado Nacional-Ministerio de Relaciones Exteriores y Culto / recurso de hecho,” Fallos (2007-330-4554) (Arg.) (translation by author).

121 *Id.* at 4.

122 *Id.* at 5-6.

123 *See, e.g.*, Cámara Federal de Apelaciones de Salta [CFed.] [Federal Court of Appeals of Salta], 9/3/2015, “Franco Herhuay, David Santiago c. Ministerio del Interior de la Nación-Dirección Nacional de Migraciones / Impugnación de Acto Administrativo,” Causa No. FSA 1100053/2012 (finding a man convicted of four years and eight months for drug trafficking should not be expelled on account of the negative impact that would have on his three Argentine daughters); Cámara Federal de Apelaciones de Salta [CFed. Salta] [Federal Court of Appeals of Salta], 13/03/2015, “Cerruto Baleriano c. Ministerio del Interior de la Nación – Dirección Nacional de Migraciones / Amparo Ley 18.986,” <https://jurisprudencia.mpd.gov.ar/Jurisprudencia/C,%20B.pdf> (finding a Bolivian woman convicted of six years and five months should not be expelled on account of her three Argentina children, husband and mother, all of whom resided in Argentina); Juzgado Contencioso Administrativo Federal No. 3. [1a Inst.] [Federal Administrative Litigation Court], <https://jurisprudencia.mpd.gov.ar/Jurisprudencia/EN,%20WL.pdf> (finding a Peruvian man sentenced to three years for identity fraud should not be expelled because the man had most of his family in Argentina, he had no close family left in Peru, he had reformed his behavior after release from jail, and had obtained a steady job); Juzgado Contencioso Administrativo Federal No. 5 [1a Inst.] [Federal Administrative Litigation Court], 12/8/2015, “C.C.R. c. EN-M Interior-Resol 715/11-DNM (expte. 808848/08) / Recurso Directo Para Juzgados,” [https://jurisprudencia.mpd.gov.ar/Jurisprudencia/CC,%20R%20\(JCAF\).pdf](https://jurisprudencia.mpd.gov.ar/Jurisprudencia/CC,%20R%20(JCAF).pdf); Cámara de Apelaciones en lo Contencioso Administrativo Federal [CNFed.] [Federal Court of Appeals in Administrative Litigation], sala I, 1/9/2016, “C.C.R. c. EN-M Interior-Resol 715/11-DNM (expte. 308848/08) s/ Recurso Directo Para Juzgados,” [https://jurisprudencia.mpd.gov.ar/Jurisprudencia/CC,%20R%20\(CNACAF\).pdf](https://jurisprudencia.mpd.gov.ar/Jurisprudencia/CC,%20R%20(CNACAF).pdf) (finding a Bolivian woman sentenced to four years and six months for drug trafficking should not be expelled on account of her Argentine husband and the child they had together); Juzgado Contencioso Administrativo Federal No. 8 [1a Inst.] [Federal Administrative Litigation Court], 2/5/2016, “Benavides Aguilar, Mabel Leidy y Otro c. En-M Interior-RSL 1072/11-DNM-RSL87560/09 (expt. 242169/08) / Recurso Directo DNM,” <https://jurisprudencia.mpd.gov.ar/Jurisprudencia/BA,%20ML.pdf> (finding a Peruvian woman sentenced to three years in prison for drug trafficking should not be expelled on account of the fact that she was pregnant and currently lived with her boyfriend and his parents, and that her parents and siblings also lived in Argentina).

been convicted of drug trafficking and sentenced to six years in prison.<sup>124</sup> Notably, this case concerned a Mercosur citizen, who would otherwise benefit from the regularization plan described above.<sup>125</sup> Upon review of her application for residency, immigration authorities found that Zoyla Cristina Barrios Rojas was inadmissible because of her crime, ordered her expelled, and prohibited her readmission for fifteen years.<sup>126</sup> An appeals court reviewed the trial court's decision to deny her a waiver of inadmissibility for "humanitarian reasons or family reunification" under article 29. The appeals court held that the agency action must survive a reasonableness test, and found the agency had exercised its discretion in a manner that was unreasonable when considering Barrios Rojas's twenty years of residence, marriage in Argentina, and her extensive family connections in the country.<sup>127</sup> Importantly, the court relied both on the provisions of the 2004 Law, and also international human rights law on family life and due process.<sup>128</sup>

The *Barrios Rojas* case brings together a number of key considerations with regard to the immigrant bill of rights. First, the case arises in the context of a regularization plan that broadly promotes regional migration.<sup>129</sup> Second, the case demonstrates how courts will balance the provisions of the law that would serve as a basis for expulsion with the humanitarian provisions of the law. In this regard, the case exemplifies a broader trend in cases where an immigrant who has committed a crime is not expelled because of considerations of family integrity. The case is characteristic of a body of jurisprudence that is firmly rooted in international human rights obligations that bind Argentina.

Finally, this case exemplifies the nexus between substantive rights and

124 Cámara de Apelaciones en lo Contencioso Administrativo Federal [CNFed.] [Federal Court of Appeals in Administrative Litigation], sala V, 31/3/2015, "Barrios Rojas, Zoyla Cristina c. En-DNM Resol 561/11 (exp. 2091169/06(805462/95)) y otro / recurso directo para juzgados," <https://jurisprudencia.mpd.gov.ar/Jurisprudencia/BR,%20ZC.pdf>, at 1 (translation by author).

125 *Id.* at 2; *see also* Decree 616/2010, Regulation of Law No. 25871, May 3, 2010, [318989] B.O. art. 22(a)-(c); *see also* Hines, *supra* note 5, at 510 (citing Decree 616/2010 and explaining that "temporary residents of the Mercosur are eligible for permanent residence after two years, while temporary residents of other countries become eligible after three years.").

126 Cámara de Apelaciones en lo Contencioso Administrativo Federal [CNFed.] [Federal Court of Appeals in Administrative Litigation], sala V, 31/3/2015, "Barrios Rojas, Zoyla Cristina c. En-DNM Resol 561/11 (exp. 2091169/06(805462/95)) y otro / recurso directo para juzgados," at 2.

127 *Id.* at 5-6.

128 *Id.* at 3-4.

129 *See also* Decree 616/2010, Regulation of Law No. 25.871, May 3, 2010, [318989] B.O. art. 17 (requiring that immigration authorities issue dispositions to make immigration processes more accessible, develop a specialized focus on regions of the country that merit such attention, and pursue agreements with the public and private sector, as well as foreign governments with resident populations in Argentina).

the substantial procedural and judicial protections that were afforded to Mrs. Barrios Rojas. Indeed, this was a case in which immigration authorities exercised their discretion to prioritize the criminal provisions of the law over family unity, and the matter had to arrive at a federal appeals court to achieve the proper balancing of those considerations. In this regard, it is an appropriate segue to a discussion of the law's procedural and judicial protections.

## 2. *Procedural and judicial protections*

There are many layers of procedural and judicial protection envisioned by the 2004 Law, so as to guarantee that migrants have every opportunity to regularize their status in Argentina and to defend themselves against expulsion. As a preliminary matter, it is important to highlight the requirement that immigration authorities must work to regularize the situation of any irregular migrant. This initial period during which immigration impediments are not enforced is important for two reasons. First, it gives the migrant time to secure a lawyer, which the State will provide for free if the migrant is indigent. Second, it gives the migrant time to organize a defense.

The significance of this protection was evident in the *Li Yun, Lingyan Zheng, and Yu Junyun* case discussed above, and was reiterated in 2011 in a case called *Dai Jianqing, and others*.<sup>130</sup> In *Dai Jianqing*, a court ordered the release from detention of a group of Chinese women who had attempted to enter Argentina clandestinely, and took the opportunity to emphasize the significance of procedural protections in upholding the right to migrate.<sup>131</sup> The court reiterated that every migrant present in the national territory must have the opportunity to regularize their situation before being expelled.<sup>132</sup> Moreover, the court highlighted that there were procedures set forth for such regularization, and that a migrant has a right to counsel provided by the State in confronting those procedures.<sup>133</sup> Finally, the court recalled that detention of migrants was only appropriate after an expulsion order had been issued, and that could only happen after the migrant had been given the opportunity to regularize his or her status with the assistance of counsel.<sup>134</sup>

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130 Cámara Federal de Apelaciones de Paraná, 11/6/2011, "HC deducido por Dai Jianqing, Lin Xuehui, Xie Chenguang y Zhuang Bisheng," Causa No. 5-17.559-20.768/2011.

131 *Id.* at 8-9.

132 *Id.*

133 *Id.* at 6.

134 *Id.* at 7.

The specific framework for this initial procedural opportunity to regularize a migrant's status is set forth in the 2004 Law, and elaborated upon in the 2010 Regulations to the law. Specifically, Title III of the 2004 Law that outlines the rules for entry and exit from the country requires that DNM officials should assist irregular migrants in regularizing their status when such persons come to their attention.<sup>135</sup> The 2010 Regulations provide a procedural framework for this process, and give an irregular migrant thirty days to regularize her status after she is identified by the DNM, with a possible thirty-day extension.<sup>136</sup> Nevertheless, if the person's immigration status is not regularized within the framework provided by the law, the law requires that the DNM issue an expulsion order.<sup>137</sup> As an added protection, however, the law provides for the suspension of the expulsion order issued, allowing for subsequent review by the appropriate tribunal.<sup>138</sup>

Next, the 2004 Law provides legal representation at the expense of the State for all administrative actions that may lead to a denial of entry at the border, a return to the country of origin, or expulsion from Argentina.<sup>139</sup> The 2010 Regulations instruct the DNM to refer all appropriate cases to the Defense Division of the Public Ministry,<sup>140</sup> which has set up a Commission on Migration with broad authority to intervene on behalf of immigrants in administrative and judicial proceedings.<sup>141</sup> The 2010 Regulations provided the additional protection that suspends the process while the migrant's appointed counsel makes contact and formulates a defense.<sup>142</sup>

Two seminal Argentine Supreme Court cases that elaborate the scope

<sup>135</sup> The Law of 2004, *supra* note 13, art. 61.

<sup>136</sup> Decree 616/2010, Regulation of Law No. 25.871, May 3, 2010, [318989] B.O. art. 61.

<sup>137</sup> The Law of 2004, *supra* note 13, art. 61.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* art. 86.

<sup>140</sup> Decree 616/2010, Regulation of Law No. 25.871, May 3, 2010, [318989] B.O. art. 86.

<sup>141</sup> See Resolución D.G.N. No. 569/11, 13/5/ 2011, <http://www.mpd.gov.ar/index.php/programas-y-comisiones/56-comision-del-migrante> (providing authority to represent: "a) Detenidos a disposición de la justicia federal en procesos de expulsión (Ante las Delegaciones de la Dirección Nacional de Migraciones de todo el País); b) Detenidos a disposición de la justicia federal que se opongan a una expulsión (Sólo respecto de los expediente administrativos en trámite ante la Dirección Nacional de Migraciones – delegación Ciudad Autónoma de Buenos Aires- ); c) Detenidos cuyo trámite de expulsión devenga de una condena dictada por un Tribunal Provincial y se opongan a su salida del país (Sólo respecto de los expediente administrativos en trámite ante la Dirección Nacional de Migraciones – delegación Ciudad Autónoma de Buenos Aires); and d) En los casos de personas cuya expulsión sea consecuencia de una irregularidad administrativa (Sólo respecto de los expediente administrativos en trámite ante la Dirección Nacional de Migraciones – delegación Ciudad Autónoma de Buenos Aires- ).

<sup>142</sup> Decree 616/2010, Regulation of Law No. 25.871, May 3, 2010, [318989] B.O. art. 86.



of this right are *Mabuza* and *Peralta Valiente*,<sup>143</sup> both of which concerned unrepresented migrants who had missed the deadlines to appeal their orders of expulsion. In these cases, the court found that the migrants' rights had been violated because they had not been advised of their right to appointed counsel, and had not benefitted from the defense of counsel at a hearing.<sup>144</sup> In *Mabuza*, the court further found that the DNM had the obligation under the law to detect such due process violations and that it should revoke an expulsion order in such circumstances.<sup>145</sup> In *Peralta Valiente*, the court recalled that the uneven playing field between migrants and the DNM required such protection in order to uphold migrants' rights to due process and judicial protection.<sup>146</sup>

Notably, courts have also extended the same spirit of these protections to cases in which migrants were represented by counsel. For example, in *DM, E*, an appeals court reviewed a case in which appointed counsel for a migrant made an untimely filing with the court, which had in turn denied the case based on the untimely filing.<sup>147</sup> The appeals court found that the right to counsel required the lower court to reopen the proceeding in order to give effect to the migrant's right to an adequate defense.<sup>148</sup> In *CA, EJ*, another appeals court extended this reasoning to a case where appointed counsel was unable to contact a migrant to formulate a defense, and a trial court denied an extension and ordered expulsion.<sup>149</sup> The appeals court considered that the law required appointed counsel to provide a defense, and it was unreasonable to expect counsel to make a defense if the migrant was unavailable.<sup>150</sup> The appeals court insisted that the guarantee of access to justice required a suspension of the procedural deadlines if the defense counsel could not communicate with the migrant, and ordered that the

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143 Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 6/9/16, "Mabuza Moses c. EN-DNM – Disp. 578/12 (Expte. 149957/10) / recurso directo DNM;" Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/4/2016, "Peralta Valiente c. EN-M Interior – DNM / recurso directo DNM."

144 "Mabuza Moses," at 5-6; "Peralta Valiente", at 10.

145 "Mabuza Moses," at 7 (referring to Law No. 25.871. art. 90).

146 "Peralta Valiente," at 7-8.

147 Cámara de Apelaciones en lo Contencioso Administrativo Federal [CNFed.] [Federal Court of Appeals in Administrative Litigation], sala V, 31/3/2016, "Diop Matar, Elhadji c. EN-M Interior – DNM / recurso directo DNM," <https://jurisprudencia.mpd.gov.ar/Jurisprudencia/DM,%20E.pdf>.

148 *Id.* at 3-4.

149 Cámara de Apelaciones en lo Contencioso Administrativo Federal [CNFed.] [Federal Court of Appeals in Administrative Litigation], sala I, 13/9/2016, "Chein Alvarado, Errol James c. EN-M Interior-DNM / recurso directo DNM," <https://jurisprudencia.mpd.gov.ar/Jurisprudencia/CA,%20EJ.pdf>.

150 *Id.* at 4.

process should be reopened.<sup>151</sup>

In addition to the right to judicial protection in the form of the right to counsel, the 2004 Law includes a robust system of administrative and judicial appeals. First, the law gives a right to administrative review of any decision to deny entry at the border, cancel residence, order expulsion, or levy a fine for an immigration-related infraction.<sup>152</sup> The review may come in the form of a request for reconsideration from the immigration official that issued an adverse decision,<sup>153</sup> or a request that the DNM review the decision.<sup>154</sup> If the DNM denies the case on review, the migrant has the right to either request an additional level of administrative review by the Minister of the Interior,<sup>155</sup> or finalize administrative review and make a judicial appeal.<sup>156</sup>

The judiciary has authority to review the final administrative decision to ensure that it complied with the requirements of legality, due process, and reasonableness.<sup>157</sup> An important line of cases in this regard are those that exercised judicial review in cases denying residency under the article 29(c) criminal inadmissibility provision of the 2004 Law, and declining to apply the waiver provision for reasons of family reunification.<sup>158</sup> In considering whether a decision to uphold an order of expulsion is reasonable, an appeals court may consider (1) the right to family reunification; (2) the best interests of the child; and (3) criminal justice, considering that expulsion for crimes may be construed as an additional sanction, thereby violating the principle of *ne bis in idem*.<sup>159</sup> In other words, the judiciary will review the reasonableness of a discretionary administrative decision when it may result in an expulsion that is contrary

151 *Id.*

152 The 2004 Law, *supra* note 13, art. 74 (translation by author).

153 *Id.* arts. 75-77 (describing the process for a request for reconsideration).

154 *Id.* art. 78 (describing the process for administrative review by the DNM, called “hierarchical” review).

155 *Id.* arts. 79, 81.

156 *Id.* arts. 79, 84.

157 *Id.* art. 89.

158 *See, e.g.*, Cámara Federal de Apelaciones de Salta [CFed. Salta] [Federal Court of Appeals of Salta], 9/3/2015, “Franco Herhuay, David Santiago c. Ministerio del Interior de la Nación-Dirección Nacional de Migraciones / Impugnación de Acto Administrativo,” <https://jurisprudencia.mpd.gov.ar/Jurisprudencia/FH,%20DS.pdf>; Cámara Federal de Apelaciones de Salta [CFed. Salta] [Federal Court of Appeals of Salta], 13/3/2015, “Cerruto Baleriano c. Ministerio del Interior de la Nación – Dirección Nacional de Migraciones / Amparo Ley 18.986,” <https://jurisprudencia.mpd.gov.ar/Jurisprudencia/C,%20B.pdf>.

159 *See* “Franco Herhuay, David Santiago c. Ministerio del Interior de la Nación-Dirección Nacional de Migraciones / Impugnación de Acto Administrativo,” at 3 (*ne bis in idem* is more commonly referred to as “double jeopardy” under American law).

to the goals of the 2004 Law and its fundamental rights protections.<sup>160</sup>

During the process of administrative and judicial review, the detention of migrants is only permitted in exceptional circumstances. The 2010 Regulations provide that the DNM must seek a judicial order to detain a person in such cases, and that they must make a case for why the person will not comply with administrative orders.<sup>161</sup> Moreover, where the court does issue a judicial order to permit detention, the law requires that the DNM provide a report every ten days justifying continued detention.<sup>162</sup>

However, when the expulsion order is final, the 2004 Law does give the authority to the DNM to detain the migrant for the sole purpose of effectuating the expulsion order.<sup>163</sup> A migrant may avoid such detention with a guarantee that he will leave the country of his own accord. Moreover, there is a fail-safe for detained persons who may challenge both their detention and expulsion if they have established family ties to an Argentine parent, child or spouse.<sup>164</sup> In such cases, the law provides for the migrants' immediate release and access to a summary regularization procedure.<sup>165</sup>

This last point emphasizes once again the interconnectedness between the fundamental right to family reunification and procedural protections. As illustrated by this discussion of the law itself, as well as the substantial body of jurisprudence interpreting the scope of the law, these stand as two pillars of protection of immigrant rights in Argentina. However, President Macri took aim at both of these protections in his 2017 Decree, and the effects on substantive and procedural rights have been substantially deteriorated as a result. The following section discusses these developments in detail.

### III. RESTRICTIONIST REFORM AND THE ATTACK ON MIGRANTS' RIGHTS

On January 27, 2017, President Mauricio Macri issued Decree of Necessity and Urgency ("DNU") 70, modifying Law 2004.<sup>166</sup> The President of Argentina is enabled under the constitution to issue such an executive edict with legislative effect in circumstances in which there is insufficient time, or it is otherwise impractical to legislate though the

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160 *Id.* at 7.

161 Decree 616/2010, Regulation of Law No. 25.871, May 3, 2010, [318989] B.O. art. 70.

162 *Id.*

163 The 2004 Law, *supra* note 13, art. 70.

164 *Id.*

165 *Id.*

166 DNU, *supra* note 1.

normal process.<sup>167</sup> Such a decree automatically becomes law and can only be overturned if both chambers of the Argentine legislature oppose the change.<sup>168</sup> Nevertheless, this is a tool that has been used repeatedly by Argentine Presidents over the last two decades, and legislative intervention is rare.<sup>169</sup> Accordingly, the Decree of Necessity and Urgency has become a reliable means for Presidents to create national laws without subjecting their initiatives to normal legislative scrutiny.

Macri's DNU 70 is generally considered to have broken with a decade of rights-centered immigration policy in Argentina.<sup>170</sup> Perhaps in recognition of this tradition, Macri framed the DNU in terms of human rights. Indeed, he cited the Inter-American Court of Human Rights in recalling that the State has the sovereign prerogative to establish criteria for admission and expulsion of non-citizens.<sup>171</sup> He further recognized that the State must exercise that prerogative with full respect for human rights, and suggested that it was inconsistent with due process protections to subject non-citizens to lengthy immigration procedures.<sup>172</sup> In this way, Macri recast the due process question in terms of timeliness rather than robustness of appellate review, and he made the unprecedented claim that lengthy immigration procedures constituted due process violations against immigrants.

President Macri's attempt to couch his decree in the language of human rights notwithstanding, a securitization rationale is evident in the DNU. The President claimed that lengthy immigration procedures also interfered with the enforcement of immigration laws, and therefore undermined national security.<sup>173</sup> He noted that procedures intended to last approximately one year may last as long as seven years, enabling

<sup>167</sup> Art. 99.3, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (stating that “[o]nly when due to exceptional circumstances the ordinary procedures foreseen by this Constitution for the enactment of laws are impossible to be followed . . . he shall issue decrees on grounds of necessity and urgency . . .”).

<sup>168</sup> *Id.*

<sup>169</sup> Laura Capriata, *Kirchner firmó cada seis días un decreto de necesidad y urgencia*, LA NACIÓN (April 13, 2008), <http://www.lanacion.com.ar/1003971-kirchner-firmo-cada-seis-dias-un-decreto-de-necesidad-y-urgencia>.

<sup>170</sup> See Senate Debate, Feb. 16, 2017; see also Letter from Academics and Social Scientists to the Senate and National Officials, *Cientistas sociales convocan al Poder Legislativo a rechazar el DNU 70/2017 que modifica las Leyes de Migraciones (No 25.871) y de Nacionalidad y Ciudadanía (No 346)* (Feb. 28, 2017), <http://blogs.ffyh.unc.edu.ar/antropologia/files/2014/11/Cientistas-sociales-rechazan-DNU-70-2017.pdf>.

<sup>171</sup> DNU, *supra* note 1, at 1-2.

<sup>172</sup> *Id.* at 2.

<sup>173</sup> *Id.* (citing the timeframes established under the 2004 Law *supra* note 13, and arguing that an expulsion case would last approximately one year if an immigrant takes all administrative and judicial recourses available to her).

immigrants to prolong enforcement procedures while they take full advantage of all of the appeals available to them.<sup>174</sup> Macri also cited a low rate of expulsion orders executed out of the total number of expulsion orders issued by the DNM arising from criminal convictions.<sup>175</sup> According to Macri, this represented a public safety problem because there was a high level of criminality among immigrants.<sup>176</sup> Specifically, he claimed that while immigrants only made up 4.5% of the Argentine population overall, they made up more than 21% of the prison population, and that 33% of all persons incarcerated for drug crimes were immigrants.<sup>177</sup> Macri justified reforming the 2004 Law through a Decree of Necessity and Urgency with this narrative of endemic immigrant criminality unchecked by an immigration system that failed to expeditiously expel criminal immigrants.

Observers have offered responses both to Macri's assumptions and his evidence, arguing that lengthy procedures are caused by delays on the part of the State, and that Macri's statistics were manipulated to overrepresent the proportion of immigrants in prison.<sup>178</sup> The following discussion, however, will focus on the legal provisions of the DNU, so as to understand what exactly Macri achieved in legal terms. The goal of this inquiry is to question the continued existence of a right to migrate in Argentina, and it will engage this question through an analysis of the extent to which the DNU has derogated from the norms established in the 2004 Law and reinforced by international human rights law. The final part will review developments in the litigation to challenge the DNU, ongoing more than a year after the decree came into effect, and pending before the Argentine Supreme Court at the time of this writing.

#### A. 2017 Decree limitations on immigrant rights

The DNU makes a number of specific changes to the 2004 Law that increase the circumstances in which people will be denied residency or have their residency revoked, and it creates a summary expulsion procedure for the expulsion of certain migrants that aggravates this situation by making it difficult to defend the rights that remain. Notably,

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 2-3.

<sup>177</sup> DNU, *supra* note 1, Preamble.

<sup>178</sup> See, e.g., Senado Argentina, *Comisión Bicameral Permanente de Trámite Legislativo Ley 26.122*, YOUTUBE (Feb. 16, 2017), <https://www.youtube.com/watch?v=Yb3O7kKXtsY> (comments by Mariela Belski); see also *id.* (comments by Pablo Ceriani) (Feb 16, 2017).

the DNU does not specifically amend the right to migrate or any of the provisions of the immigrant bill of rights. However, modifications to the procedural and judicial protections certainly affect the ability of migrants to defend their rights in expulsion proceedings.

The DNU specifically addressed Macri's concerns about immigrants' disproportionate involvement in criminal activity and their ability to consistently evade expulsion because of extensive procedural protection. First, the DNU expanded categories of crimes that make migrants either inadmissible in the first instance or deportable after acquisition of residency.<sup>179</sup> Notably, this expansion of the range of crimes that have immigration consequences does not require a conviction; rather, initial criminal enforcement proceedings are enough to deem a migrant subject to expulsion. The DNU also limits protection of the right to family reunification of such persons.<sup>180</sup> Second, the DNU routes migrants caught in the new criminal immigrant dragnet into a summary expulsion procedure that provides a very limited opportunity to defend themselves, by limiting both their defenses as well as their opportunities for administrative and judicial review.<sup>181</sup> The following discussion reviews the expansion of criminal grounds for expulsion, accompanied by a reduction in procedural protection.

### *1. Expanded criminal grounds for expulsion*

The DNU creates very broad impediments for persons to acquire residency if they have any criminal activity in their past, which ostensibly prevents the regularization of these persons. Specifically, the DNU modified article 29 of the 2004 Law that sets forth the grounds for inadmissibility, and expanded the circumstances in which persons would be declared inadmissible for certain criminal activity.<sup>182</sup> The 2004 Law had barred entry of persons who were convicted or otherwise criminally processed for trafficking in arms, drugs, or people; money laundering or investment in illegal activity; or any crime that is punishable under Argentine law with a deprivation of liberty of three years.<sup>183</sup> Indeed, many of the cases discussed in the previous sections on the immigrant bill of rights and accompanying procedural protections concerned persons who

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<sup>179</sup> See DNU, *supra* note 1, arts. 4 (substituting art. 29 of the 2004 Law, *supra* note 13), 6 (substituting art. 62 of the 2004 Law, *supra* note 13).

<sup>180</sup> *Id.* arts. 4, 6.

<sup>181</sup> See DNU, *supra* note 1, arts. 9, 10.

<sup>182</sup> DNU, *supra* note 1, art. 4 (modifying art. 29 of the 2004 Law, *supra* note 13).

<sup>183</sup> The 2004 Law, *supra* note 13, art. 29(c).

had initially been ordered expelled under article 29 of the 2004 Law.<sup>184</sup>

The DNU drastically expanded article 29 by making inadmissible any person who is convicted or otherwise criminally processed for any crime that is punishable with a deprivation of liberty under Argentine law.<sup>185</sup> Argentine criminal law provides for many offenses punishable with jail,<sup>186</sup> including non-violent property crimes,<sup>187</sup> which can now lead to a denial of residency and expulsion under Argentine immigration law.

Along with the expansion of the grounds for inadmissibility under article 29, the DNU also placed limits on the substantive rights protections enshrined in the 2004 Law. Specifically, while the 2004 Law included a waiver provision that permitted exceptions to the criminal grounds of inadmissibility in cases of family reunification or humanitarian concern,<sup>188</sup> the DNU made the waiver unavailable for persons barred for criminal activity punishable with three or more years in prison.<sup>189</sup> Additionally, while the 2010 Regulations provided that prior crimes would not trigger inadmissibility under article 29 after ten years had passed,<sup>190</sup> the DNU replaced the text of the article without reincorporating that protection. Arguably, then, the DNU eliminated this temporal limitation on the immigration consequences of crimes.

The practical effect of these modifications is that a crime committed at any time in the past can lead to a determination of inadmissibility, without the consideration of any humanitarian or family-related concerns, if the activity was punishable by three years in prison.<sup>191</sup> Notably, nearly all the cases discussed or cited in the prior discussion of the right to family unity involved crimes punished with three or more years in prison. For example,

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184 See *supra* note 123.

185 DNU, *supra* note 1, art. 4 (modifying art. 29 of the 2004 Law, *supra* note 13).

186 See generally CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] arts. 79-313 (2011) (Arg.).

187 CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 162 (1984) (Arg.) (providing that: “Será reprimido con prisión de un mes a dos años, el que se apoderare ilegítimamente de una cosa mueble, total o parcialmente ajena.”).

188 The 2004 Law, *supra* note 13, art. 29.

189 DNU, *supra* note 1, art. 4 (modifying Article 29).

190 Decree 616/2010, Regulation of Law No. 25.871, May 3, 2010, [318989] B.O. art. 29 (stating that crime would expire, or “caducar” in Spanish, according to the rules set forth in article 51 of the Penal Code, which provides that crimes punishable by a deprivation of liberty expire after 10 years; see also CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 51 (1984) (Arg.).

191 The DNU also creates a waiver provision for informants, which allows for exceptions from the inadmissibility provisions for individuals who: (1) contribute to the prevention of the crime; (2) clarify facts that are being investigated; (3) reveal the identities of perpetrators; (4) cause a significant advance in an investigation; or (5) identify the whereabouts of instrumentalities or material evidence of the crime. See DNU, *supra* note 1, art. 4. It is not clear from the text of the DNU whether persons may benefit from this waiver even if the nature of their crime makes them ineligible for the humanitarian waiver.

Mrs. Barrios Rojas was sentenced to six years in prison for drug crimes.<sup>192</sup> Other cases involving three-year sentences,<sup>193</sup> or four-year sentences,<sup>194</sup> also stand out as examples of cases in which courts overturned decisions by the DNM to deny a family reunification waiver. Not only does the new DNU regime contemplate the expulsion of migrants in this exact circumstance, but Mrs. Barrios Rojas and others could now be subject to cancelation of their residency under the DNU.

Indeed, the DNU also modified provisions of the 2004 Law that prescribed certain conduct that would trigger a cancelation of residency. The 2004 Law provided grounds for the cancelation of residency that overlapped in some measure with the grounds for inadmissibility,<sup>195</sup>

<sup>192</sup> Cámara de Apelaciones en lo Contencioso Administrativo Federal, Sala V, 31/03/2015, “Barrios Rojas, Zoila Cristina c. En-DNM Resol 561/11 (exp. 2091169/06(805462/95)) y otro / recurso directo para juzgados,” <https://jurisprudencia.mpd.gov.ar/Jurisprudencia/BR,%20ZC.pdf>; see also Cámara Federal de Apelaciones de Salta [CFed. Salta] [Federal Court of Appeals of Salta], 13/3/2015, “Cerruto Baleriano c. Ministerio del Interior de la Nación – Dirección Nacional de Migraciones / Amparo Ley 18.986,” <https://jurisprudencia.mpd.gov.ar/Jurisprudencia/C,%20B.pdf> (finding that Bolivian woman convicted of six years and five months should not be expelled on account of her three Argentina children, husband and mother, all of whom resided in Argentina).

<sup>193</sup> See, e.g., Juzgado Contencioso Administrativo Federal No. 3 [1a Inst.] [Federal Administrative Litigation Court], 21/9/2015, “Encomenderos Noriega, Walter Luis c. En-M Interior-DNM-DISP 2358/10 (expte. 225826/01) / Recurso Directo DNM,” <https://jurisprudencia.mpd.gov.ar/Jurisprudencia/EN,%20WL.pdf> (finding that a Peruvian man sentenced to three years for identity fraud should not be expelled because the man had most of his family in Argentina, he had no close family left in Peru, he had reformed his behavior after release from jail, and had obtained a steady job); Juzgado en lo Contencioso Administrativo Federal No. 8 [1a Inst.] [Federal Administrative Litigation Court], 2/5/2016, “Benavides Aguilar, Mabel Leidy y Otro c. En-M Interior-RSL 1072/11-DNM-RSL87560/09 (expt. 242169/08) / Recurso Directo DNM,” <https://jurisprudencia.mpd.gov.ar/Jurisprudencia/BA,%20ML.pdf> (finding that a Peruvian woman sentenced to three years in prison for drug trafficking should not be expelled on account of the fact that she was pregnant and currently lived with her boyfriend and his parents, and that her parents and siblings also lived in Argentina).

<sup>194</sup> See, e.g., Cámara Federal de Apelaciones de Salta [CFed. Salta] [Federal Court of Appeals of Salta], 9/3/2015, “Franco Herhuay, David Santiago c. Ministerio del Interior de la Nación-Dirección Nacional de Migraciones s/ Impugnación de Acto Administrativo,” <https://jurisprudencia.mpd.gov.ar/Jurisprudencia/FH,%20DS.pdf> (finding that a man sentenced to four years and eight months for drug trafficking should not be expelled on account of the negative impact that expulsion would have on his three Argentine daughters); Juzgado en lo Contencioso Administrativo Federal No. 5 [1a Inst.] [Federal Administrative Litigation Court], 12/8/2015, “C.C.R. c. EN-M Interior-Resol 715/11-DNM (expte 808848/08) / Recurso Directo Para Juzgados,” [https://jurisprudencia.mpd.gov.ar/Jurisprudencia/CC,%20R%20\(JCAF\).pdf](https://jurisprudencia.mpd.gov.ar/Jurisprudencia/CC,%20R%20(JCAF).pdf); Cámara de Apelaciones en lo Contencioso Administrativo Federal [CNFed.] [Federal Court of Appeals in Administrative Litigation], sala I, 1/9/2016, “C.C.R. c. EN-M Interior-Resol 715/11-DNM (expte 308848/08) / Recurso Directo Para Juzgados,” [https://jurisprudencia.mpd.gov.ar/Jurisprudencia/CC,%20R%20\(CNACAF\).pdf](https://jurisprudencia.mpd.gov.ar/Jurisprudencia/CC,%20R%20(CNACAF).pdf) (finding that a Bolivian woman sentenced to four years and six months for drug trafficking should not be expelled on account of her Argentine husband and the child they had together).

<sup>195</sup> See, e.g., The 2004 Law, *supra* note 13, art. 62(e) (expressly incorporating Article 29(d) and (e) ground for inadmissibility as grounds for cancelation of residency).



providing for such cancelation where a resident was convicted of a crime and sentenced to five or more years of imprisonment, or was convicted of repeated criminal offenses.<sup>196</sup> The 2004 Law included some important legal protections in this regard. First, it required immigration authorities to wait two years after the completion of the sentence before canceling residency.<sup>197</sup> Second, it provided immigration authorities with a thirty-day window to initiate the cancelation proceeding, or forfeit the right to do so.<sup>198</sup> The 2004 Law also included a provision that waived the cancelation of residency of a parent, child, or spouse of an Argentine citizen, unless immigration authorities are able to provide support for their decision under the law.<sup>199</sup> In essence, the 2004 Law protected migrants from cancelation of their residency by requiring that the conduct that triggered cancelation be egregious, by placing the onus on the State to initiate the cancelation procedure in a tight timeframe, and by including a generous protection for families.

The DNU substantially alters all of these protections and creates a framework that greatly facilitates the cancelation of immigrants' residency. First, the DNU provides that any crime, committed in Argentina or abroad, that may be punished with a deprivation of liberty under Argentine law, will trigger a cancelation of residency.<sup>200</sup> Further, the DNU provides that the conviction of such a crime will automatically cancel the residency, no matter how long the immigrant has held the residency, and that expulsion will automatically follow.<sup>201</sup> Finally, the DNU limits the extent to which an immigrant can challenge their expulsion on family reunification grounds by creating a limited waiver.<sup>202</sup> The waiver limitations are threefold: (1) it is only available to a person whose sentence does not exceed three years; (2) it may only be invoked if the family relationship is to a parent, child or spouse; and (3) it is unavailable if the person has withdrawn financial support for the relevant family member.<sup>203</sup>

The provisions of the DNU both limit the possibility for certain

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<sup>196</sup> The 2004 Law, *supra* note 13, art. 62(b).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> DNU, *supra* note 1, art. 6 (creating a new Article 62(c)).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* While the DNU emphasizes that this is the only waiver for the expulsion of criminal immigrants, it does provide a fail-safe in stating that such expulsion may not violate the national law on refugee protection. *Id.* (referencing Law 26.165 on the protection of refugees).

immigrants to regularize their situation, and limit the recourse against immigration restrictions based on family ties. Moreover, there exists a connection between the harshening of legal provisions that govern the admission and residence of migrants, and a new summary expulsion procedure that was created by the DNU.

## 2. *The procedure for summary expulsion*

The extent of the procedural modifications made by the DNU is quite staggering, and when read together they largely nullify the 2004 Law's protections for persons against whom criminal proceedings have been initiated. As an initial matter, the DNU provides that all decisions about the limited family reunification or humanitarian waivers mentioned above belong to immigration authorities, and there is no recourse to the courts in the event that such waivers are denied.<sup>204</sup> Indeed, the DNU goes as far as to strip the judiciary of the competency to waive the provisions of the law that deny admission or cancel the residency of anyone who has engaged in criminal activity that could be punished with jail.<sup>205</sup> This makes the discretionary power of the immigration authorities in such cases nearly complete, and harkens back to the Videla Law era.

The effects of this jurisdiction stripping provision are substantial. Indeed, the majority of cases reviewed in the sections above on the immigrant bill of rights and judicial and procedural protections concerned a decision not to waive grounds for inadmissibility for family reunification or humanitarian reasons.<sup>206</sup> Accordingly, under the new DNU regime, these cases would have resulted in expulsion. In fact, all of the migrants who obtained their residency in those cases could now have cancelation of residency proceedings initiated against them, and the exact same criminal grounds that were waived previously under judicial review would not be subject to review under the new regime.

Perhaps the most significant change to the procedural protections in the 2004 Law was the DNU's addition of a new chapter establishing a "special summary migration procedure."<sup>207</sup> The scope of the summary expulsion procedure is broad, in that it applies to all cases of inadmissibility, and most cases of cancelation of residency, and in

204 DNU, *supra* note 1, art. 7.

205 *Id.*; *but see supra* note 203 (referencing Law 26.165 on the protection of refugees).

206 *See* cases cited *supra* note 123.

207 DNU, *supra* note 1, art. 9 (creating Chapter I Bis of Title V, and titling the new chapter: "Del Procedimiento Migratorio Especial Sumarismo").

particular those arising from criminal provisions.<sup>208</sup>

This new procedure, that will provide the framework for the vast majority of expulsion proceedings in Argentina moving forward, delivers on its promise of summary consideration. Indeed, once a proceeding initiates to exclude or expel an immigrant, such person has three days to request information from the government in order to prepare a defense, and just two days if the government decides to detain the person.<sup>209</sup> The DNU provides an additional three days to review the charges against the immigrant.<sup>210</sup> After the passage of these deadlines, the immigration officer decides the case, and if it is an adverse decision, the DNU provides just three days to make an administrative appeal to immigration authorities.<sup>211</sup> Once the appeal is resolved, or the three-day deadline for appeal expires, the administrative process concludes.<sup>212</sup> Notably, the DNU prohibits the extension of any of these deadlines.<sup>213</sup>

To the extent that an adverse decision may be appealed to the judiciary,<sup>214</sup> the law provides three days to file an appeal with the DNM, which then has three days to forward the appeal and its response to the appropriate court.<sup>215</sup> The court of first instance has one day to determine whether the case has been appropriately filed, and may reject the case for want of jurisdiction as a preliminary matter.<sup>216</sup> After jurisdiction is established, the court of first instance has three days to issue a final decision.<sup>217</sup> An adverse decision by the court of first instance must be appealed to the appropriate appeals court in three days, and the appeals court has three days to issue its own decision in the case.<sup>218</sup> The appeals court decision is final, as motions to reconsider or further appeals are prohibited.<sup>219</sup>

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208 DNU, *supra* note 1, art. 10 (including in the scope all grounds of inadmissibility in Articles 29(a)-(k), and cancellation of residency Articles 62(a), (b), (c), and (f), which are the provisions relating to immigration fraud and all criminal bases for cancellation).

209 DNU, *supra* note 1, art. 12 (establishing Article 69 *ter.*, which sets forth timeframes for documents request in subsections (a)-(c)).

210 DNU, *supra* note 1, art. 13.

211 DNU, *supra* note 1, art. 14.

212 *Id.*

213 DNU, *supra* note 1, art. 10.

214 As discussed above, the DNU strips the judiciary of the competency to waive the provisions of the law that deny admission or cancel the residency of anyone who has engaged in criminal activity that could be punished with jail, therefore these matters are not appealable. *See supra* note 205.

215 DNU, *supra* note 1, art. 16.

216 *Id.*

217 *Id.*

218 DNU, *supra* note 1, art. 18.

219 DNU, *supra* note 1, art. 19; *see also* DNU, *supra* note 1, art. 26 (deleting the provision for reconsideration from the 2004 Law. *supra* note 13).

While the DNU retains the right to counsel at the expense of the State on its face, it places the burden on the immigrant in expulsion proceedings to request an attorney.<sup>220</sup> The DNU further dictates whether someone qualifies for counsel at the expense of the State, and if a case is referred to the public defender's office, the DNU provides the defense lawyer three days to respond to the charges in the expulsion proceeding.<sup>221</sup>

In addition to substantially speeding up expulsion procedures, and limiting procedural protections as a matter of fact and law, the DNU loosens restrictions on immigration detention. First, the DNU extends the allowable period of post-order detention from a maximum of thirty days,<sup>222</sup> to thirty days renewable by judicial order for thirty-day periods, and without a firm outward limit.<sup>223</sup> Further, the DNU limits the family reunification fail-safe against detention,<sup>224</sup> by referring such claims back into the limited waiver procedures created by the DNU and described above.<sup>225</sup>

Subtler, though equally troubling, is the evident encouragement in the DNU for the expanded use of detention before an expulsion order is final. Indeed, while the DNU retains the language that pre-order detention should be "exceptional," it provides that immigration authorities may seek detention at the initiation of the summary expulsion procedure in order to facilitate the ultimate execution of the expulsion order.<sup>226</sup> This simultaneously communicates the idea that expulsion is inevitable in such summary proceedings, and that detention is an important tool to ensure this outcome. It further emphasizes that the DNM may make a detention request at any point in an administrative or judicial proceeding.<sup>227</sup> Finally, the DNU provides that that the DNM may seek the detention of an immigrant in the context of the review of the expulsion order before a court, and that it need not initiate a separate proceeding to authorize detention.<sup>228</sup>

Immigrant rights advocates expressed alarm at the passage of the DNU, manifesting concerns about the President's demonization of immigrants,

220 DNU, *supra* note 1, art. 24.

221 *Id.*

222 Decree 616/2010, Regulation of Law No. 25.871, May 3, 2010, [318989] B.O. art. 70 (allowing for a judicial detention order of fifteen days to carry out an expulsion, which was renewable one time for fifteen days).

223 DNU, *supra* note 1, art. 21.

224 The 2004 Law, *supra* note 13, art. 70.

225 DNU, *supra* note 1, art. 21.

226 DNU, *supra* note 1, art. 11.

227 *Id.*

228 DNU, *supra* note 1, art. 17.

as well as the substantial reduction in legal protections for migrants.<sup>229</sup> One group of rights advocates filed a collective action challenging the legality of the DNU, which has provided a framework to think about the widespread changes that are under way.<sup>230</sup>

*B. Litigation to challenge the 2017 Decree*

As provided in the Argentine Constitution, the legislative debate on the DNU began in earnest within weeks of its issuance,<sup>231</sup> but the legislature did not conclude the debate nor did it take a final vote on the Decree. Recognizing the absence of political will, prominent civil society organizations (“petitioners”) in Argentina filed a legal challenge against the Decree,<sup>232</sup> arguing that it violated the Argentine Constitution and human rights treaty obligations with constitutional hierarchy.<sup>233</sup> The petitioners argued that the DNU exceeded the limits of presidential power defined by the constitution,<sup>234</sup> and that the DNU interfered with access to justice and the right to a defense,<sup>235</sup> impeded access to free legal counsel at the expense of the State,<sup>236</sup> and violated the right to family reunification.<sup>237</sup>

First, the petitioners argued that the Supreme Court had interpreted the constitution to permit a decree of necessity and urgency only when: (1) it is impossible for the legislature to convene, or (2) “exceptional circumstances” require immediate action that cannot be accomplished through the regular legislative process.<sup>238</sup> With regard to the justification provided by the President for the DNU, the petitioners argued that the President’s comparison of the percentage of immigrants in Argentina (4.5%) with the percentage of immigrants in federal penitentiaries for drug crimes (33%) was misleading.<sup>239</sup> They argued that it was more appropriate to consider the entire population of people jailed for violations of the

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229 *See infra*, Sec. III.b.

230 *See infra*, Sec. III.b.

231 *See, e.g.*, Senado Argentina, *Comisión Bicameral Permanente de Trámite Legislativo Ley 26.11*, *supra* note 178.

232 The petitioners included the Centro de Estudios Legales y Sociales (CELS), Comisión Argentina para los Refugiados y Migrantes (CAREF), and Colectivo por la Diversidad (COPADI). *See Amparo Colectivo contra Decreto de Necesidad y Urgencia (DNU) 70/2017* [hereinafter *Collective Action*] (on file with author) (translation by author).

233 *Collective Action* §§ VIII-XII.

234 *See id.* § VII.1.a

235 *See id.* § VIII - IX.

236 *See id.* § VIII.

237 *See id.* § XI.

238 *See id.* § VII.1.a.

239 *See id.*

controlled substances law,<sup>240</sup> including both provincial and federal facilities, and that the immigrants represented only 17% of that carceral population.<sup>241</sup> Further, they highlighted that immigrants made up only 6% of the entire carceral population, without regard for the crime at issue.<sup>242</sup> The petitioners argued that by presenting the statistics he did, President Macri intended to misrepresent the nature of the alleged problem of immigrant criminality in order to justify his emergency use of the exceptional power bestowed on his office by the Argentine Constitution.<sup>243</sup>

Another argument focused on the constitution's prohibition against using the decree of necessity and urgency in matters concerning criminal law,<sup>244</sup> taxes,<sup>245</sup> or elections and political parties.<sup>246</sup> Specifically, the petitioners argued that the expansion of criminal grounds for expulsion created a situation in which a person who served time for a crime could then be deprived of their liberty for an immigration infraction for an extended period of time in relation to the prior crime.<sup>247</sup> By extending the criminal law punishment through expulsion and detention, the petitioners argued that the DNU modified criminal law and therefore should be declared invalid as violative of the constitution.<sup>248</sup>

Next, the petitioners argued that the DNU violated minimum standards of due process and access to justice by imposing a summary expulsion procedure that violated fundamental rights to adequate procedure and freedom from arbitrary detention.<sup>249</sup> Specifically, they argued that the short timeframes in which migrants were expected to prepare and present a defense against expulsion created an "illusory" process, inasmuch as it would be impossible for any migrant to respond adequately in the time provided.<sup>250</sup> Further, petitioners argued that this summary expulsion procedure was accompanied by increased authority to subject migrants to preventative detention in violation of their right to freedom of

240 Law No. 23737, Oct. 11, 1989, [26737] B.O. 4 (Arg.) amends the penal code and sets forth a wide variety of controlled substances crimes and the punishments for those crimes.

241 *See* Collective Action, *supra* note 233, § VII.1.a.

242 *See id.*

243 *See id.*

244 *See id.* § VII.2.

245 *See id.* § VII.3.

246 *See id.* § VII.2.a.

247 *See id.* § VII.2.b.

248 *See id.* § VII.2.c (suggesting that the distinction between the migratory policy and the criminal sections appears hazy).

249 *See id.* § VIII.

250 *See id.* § VIII.1.

movement.<sup>251</sup> Moreover, they argued that the restrictions on access to counsel, administrative review, and judicial review aggravated this problem and unduly limited access to justice.<sup>252</sup>

The petitioners further argued that limitations on the right to counsel violated basic legal protections.<sup>253</sup> Specifically, they identified provisions that required a migrant to explicitly request publicly provided counsel, and demonstrate their economic need in order to secure counsel.<sup>254</sup> In the event that the immigrant does not expressly request counsel and/or fails to prove sufficient economic necessity to warrant assigned counsel, the time continues to run on the procedural deadlines, leaving them at grave risk of missing their opportunity to challenge an expulsion order.<sup>255</sup> Under the 2004 Law, all procedural deadlines were suspended until the defense counsel entered an appearance,<sup>256</sup> whereas by shifting the burden onto the immigrant to invoke a right to counsel and prove a need, the DNU virtually assured that poor migrants would go without counsel.<sup>257</sup>

Finally, the petitioners highlighted with grave concern limits that the DNU placed on the right to family reunification.<sup>258</sup> They highlighted that the 2004 law itself protected the right to family reunification, and that this right under the law was reinforced by various international human rights obligations.<sup>259</sup> By denying many migrants in expulsion proceedings the ability to allege family reunification as a means to acquire residency, or for courts to review these arguments on appeal, the DNU left this fundamental right to the discretion of immigration officials.<sup>260</sup> This process was further burdened by additional requirements to demonstrate qualifying familial relationships.<sup>261</sup>

Later that year, Federal Prosecutor Miguel A. Gilligan exercised his authority to issue an advisory opinion on the matter.<sup>262</sup> In it, Gilligan responded to each of the petitioners' arguments in turn. First, he concluded

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251 *See id.* § X.

252 *See id.* § VIII.1–3.

253 *See id.* § VIII.3.

254 *See id.*

255 *See id.*

256 *See id.*

257 *See id.*

258 *See* Collective Action, *supra* note 233, § XI.

259 *See id.*

260 *See id.*

261 *See id.*

262 Advisory Opinion of Miguel A. Gilligan, Federal Prosecutor, National Public Ministry, on “Centro de Estudios Legales y Sociales y Otros c. EN (expte. no. 3061/2017) / Amparo Ley 16.986, Juzgado No. 1, Secretaria No. 1, (Sept. 19 2017), <https://www.fiscales.gob.ar/fiscalias/pidieron-que-se-declare-la-inconstitucionalidad-parcial-del-dnu-que-modifico-la-ley-de-migraciones/>.

that the DNU was not barred by the criminal law exception,<sup>263</sup> and then that it did meet the standard for “necessity and urgency.”<sup>264</sup> Second, with regard to the substance of the DNU, he identified the need to identify those rights that were appropriately vindicated through a collective legal challenge of this nature.<sup>265</sup> He found that issues relating to access to justice, such as the procedural alterations and the right to a defense, were collective,<sup>266</sup> while issues concerning the right to family reunification and freedom from arbitrary detention were individual, and not appropriately raised in this litigation.<sup>267</sup>

Gilligan went on to examine the due process and judicial protection challenges raised in the litigation.<sup>268</sup> He provided an extensive discussion of the international human rights obligations that bind Argentina, in particular articles 8 and 25 of the American Convention on Human Rights.<sup>269</sup> He emphasized State obligations to eliminate obstacles to a defense,<sup>270</sup> provide adequate time to prepare a defense,<sup>271</sup> and ensure sufficient time to collect evidence to support a case.<sup>272</sup> Gilligan concluded that the three-day deadline for both the administrative and judicial appeals and the requirement that a migrant invoke her right to counsel violated Argentina’s human rights obligations.<sup>273</sup>

In October 2017, the trial court issued its decision on the collective action against the DNU, rejecting all of the petitioners’ arguments except one.<sup>274</sup> First, the court agreed with Gilligan that the challenges to the family reunification provisions were matters that must be taken up in individual cases, and therefore declined to address the merits of those claims.<sup>275</sup> Second, the court found that the DNU was not prohibited under the criminal law exclusion, and further said that it was still under consideration by the Senate, which was the appropriate body to determine

263 *Id.* at 28.

264 *Id.* at 34.

265 *Id.* at 38.

266 *Id.* at 43.

267 *Id.* at 47-48.

268 *Id.* at 49-72.

269 *Id.* at 56.

270 *Id.* at 53.

271 *Id.* at 54-55.

272 *Id.* at 55.

273 *Id.* at 59, 69-70.

274 Juzgado Contencioso Administrativo Federal No. 1 [1a Inst.] [Federal Administrative Litigation Court], 18/10/2017, “Centro de Estudios Legales y Sociales y Otros c. EN-DNM / Amparo Ley 16.986 (expte. no. 3061/2017),”

<https://www.diariojudicial.com/public/documentos/000/075/903/000075903.pdf>.

275 *Id.* at 3-4.



whether it was duly issued.<sup>276</sup>

Third, the court specifically disagreed with Gilligan and found the summary expulsion procedure and the detention provisions of the DNU to be reasonable and consistent with Argentina's obligations under international law.<sup>277</sup> With regard to the summary expulsion procedure, the court emphasized that nothing in human rights law contradicted the sovereign right of Argentina to regulate the entry and exit of non-citizens into its territory.<sup>278</sup> In terms of whether the process set forth in the DNU was too abbreviated, the court found that it was not when compared to other speedy judicial measures under Argentine law.<sup>279</sup> With regard to the detention provisions, the court understood the need for detention in order to effectuate expulsion, and found that the time limits and judicial protections established in the DNU were reasonable.<sup>280</sup>

Finally, the court took up the petitioners' argument regarding the DNU requirement that a migrant in expulsion proceedings invoke her right to counsel at the expense of the State. The court emphasized that Argentina has the clear obligation to guarantee defense counsel to indigent migrants, and that it was highly unlikely that it could meet this obligation in the summary expulsion procedure without specifically informing the migrant of her right to counsel.<sup>281</sup> Accordingly, the court ordered that the DNU should be modified to require the State to inform any indigent migrant facing expulsion or cancelation of residency of her right to counsel provided by the State.<sup>282</sup>

The petitioners appealed the decision of the trial court to a chamber of the administrative appeals court, and received an opinion that vindicated all of their claims.<sup>283</sup> Three appeals court judges issued separate opinions, each validating some of the petitioners' arguments, and together nullifying the DNU as unconstitutional.

First, Judge Jorge Federico Alemany found error in the trial court's decision that the DNU's provisions on summary expulsion, detention, and family reunification did not violate the constitution. Judge Alemany first

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<sup>276</sup> *Id.* at 7.

<sup>277</sup> *Id.* at 12 (finding on summary expulsion procedure), 15 (finding on detention).

<sup>278</sup> *Id.* at 12.

<sup>279</sup> *Id.* (referencing habeas corpus, the *amparo* action, and a summary criminal procedure).

<sup>280</sup> *Id.* at 14-15.

<sup>281</sup> *Id.* at 16.

<sup>282</sup> *Id.* at 16, 17-18.

<sup>283</sup> Cámara Contencioso Administrativo Federal [CNFed.] [National Court of Appeals in Federal and Administrative Litigation], sala V, 22/3/2018, "Centro de Estudios Legales y Sociales y Otros c. EN-DNM / Amparo Ley 16.986 (expte. no. 3061/2017), <https://www.cels.org.ar/web/wp-content/uploads/2018/03/fallo-camara-migrantes.pdf>.

found that the three-day deadline for submitting administrative and judicial appeals was insufficient to guarantee the fundamental due process rights.<sup>284</sup> Next, the Judge found that the new detention framework permitted detention for the duration of expulsion proceedings, which violated protections against arbitrary detention.<sup>285</sup> Finally, the Judge found that the DNU's jurisdiction stripping provisions that prevented the review of the DNM's decision to deny family reunification waivers violated clearly established human rights protections.<sup>286</sup>

Second, Judge Guillermo F. Tracey found error in the trial court's decision that the DNU met the constitutional standard for "necessity and urgency." The Judge began by elaborating the constitutional standard for exceptional circumstances that justified the issuance of legislation without congressional action.<sup>287</sup> The Judge then reviewed the factual allegations set forth in the DNU that expulsion proceedings were not leading to actual expulsions, and that immigrants were overrepresented in the carceral population in Argentina.<sup>288</sup> The Judge then reviewed official government statistics, and found not only that there had been no increase in the proportion of non-citizen inmates, but that the percentage of immigrants in prison had actually dropped in 2016.<sup>289</sup> The Judge concluded that the DNU failed to meet the constitutional standard for "necessity and urgency."<sup>290</sup>

The third judge, Pablo Gallegos Fedriani, joined the opinion of Judge Treacy, providing a majority that declared the DNU unconstitutional because it failed to provide the requisite exceptional circumstances that permit the President to legislate under the constitution.<sup>291</sup> Judge Gallegos further elaborated his perspective, not shared by the other two judges, that the DNU should be declared unconstitutional pursuant to the subject matter limitation on decrees that modify criminal law.<sup>292</sup> Summary expulsion proceedings conducted while a person was detained, he reasoned, were administrative sanctions analogous to criminal punishment and therefore inappropriate matters to regulate through a decree of necessity and urgency.<sup>293</sup>

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284 *Id.* voto Judge Jorge Federico Alemany, sec. X.

285 *Id.* sec. XI.

286 *Id.* sec. XII.

287 *Id.* voto Judge Guillermo F. Tracey, sec. V.2.

288 *Id.* sec. V.4.

289 *Id.*

290 *Id.*

291 *Id.* voto Pablo Gallegos Fedriani, sec. I.

292 *Id.* sec. V.

293 *Id.*

All three appeals court judges relied heavily on international human rights law and the jurisprudence of the Inter-American Court of Human Rights,<sup>294</sup> as had the trial court judge<sup>295</sup> and Macri himself in issuing the DNU.<sup>296</sup> It is evident from the litigation thus far that human rights law will be of fundamental importance in resolving any challenge to the DNU. Moreover, as expulsions continue to take place under the auspices of the DNU during the pendency of the Supreme Court appeal, individuals must challenge the application of the Decree in their cases as violations of the right to family reunification, protections against arbitrary detention, and other procedural violations. The DNU has undoubtedly cast a shadow over the right to migrate in Argentina, but core human rights protections may yet serve to reinforce this concept and defend the immigrant rights achievements of the last decade.

#### IV. HUMAN RIGHTS REINFORCEMENT OF THE RIGHT TO MIGRATE

The essence of the paradigm shift that occurred in Argentina with the right to migrate is best captured by the cases of unauthorized migrants at the border who were released from detention and provided with a lawyer and time to regularize their status.<sup>297</sup> The DNU regime places such migrants directly into summary expulsion procedure and facilitates the decision to detain them while the expulsion orders issue, and thus could easily be considered to have ended the era of the right to migrate. It is still too early, however, to write the obituary of this novel right, and while signs point towards the hardening of Argentina immigration enforcement, a legal framework for the protection of the right to migrate is still available to Argentine courts.

Most notably, the prominence of international human rights protections under Argentine law inspires hope for the perseverance of right to migrate. However, while human rights law conceptualizes rights as inherent to the human person, and limits state action with regard to such rights, a well-established norm of international law guarantees states authority to create

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294 *Id.* at 6, 47-49.

295 Juzgado Contencioso Administrativo Federal No. 1 [1a Inst.] [Federal Administrative Litigation Court], 18/10/2017, “Centro de Estudios Legales y Sociales y Otros c. EN-DNM / Amparo Ley 16.986 (expte. no. 3061/2017),” 12, <https://www.diariojudicial.com/public/documentos/000/075/903/000075903.pdf>.

296 DNU, *supra* note 1, at 1-2.

297 Cámara Federal De Apelaciones de Paraná [CFed.], 10/12/2004, “Ali Yun, Lingyan Zheng y Yu Junyun / habeas corpus,” L.S. Crim. (2004-II-396) (Arg.); Cámara Federal de Apelaciones de Paraná [CFed.], 11/6/2011, “HC deducido por Dai Jianqing, Lin Xuehui, Xie Chenguang y Zhuang Bisheng,” Causa No. 5-17.559-20.768/2011.

rules to regulate entry and exit from their national territory. Indeed, Macri cited this principle in the opening considerations of the DNU, as did the trial court and the court of appeals in the DNU litigation.<sup>298</sup> While Macri overstated the support that international human rights law provides for his DNU, it is important to recognize a tension in international human rights law at the outset of this analysis.

This tension is present in the very foundational documents that establish the universal and regional systems of human rights that bind Argentina. The Universal Declaration of Human Rights (Universal Declaration) and the American Declaration of the Rights and Duties of Man (American Declaration)<sup>299</sup> leave states wide latitude in matters of immigration regulation by articulating the freedom of movement as the rights to circulate within a state, leave a state, and enter one's own state—notably excluding any right of entry into any other state.<sup>300</sup> Similarly, the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live sets forth broad human rights protections for migrants,<sup>301</sup> but prefaces those protections with the following:

Nothing in this Declaration shall be interpreted as legitimizing the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens . . .<sup>302</sup>

While it is true that these foundational human rights documents suggest that the protections they articulate will not limit sovereign authority in matters of immigration regulation, a number of important norms of

<sup>298</sup> See cases cited *supra* notes 274, 283.

<sup>299</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter Universal Declaration]; American Declaration of the Rights and Duties of Man, OEA/Ser.L./V.II.23, doc. 21, rev. 6, at 17 (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1 [hereinafter American Declaration].

<sup>300</sup> Universal Declaration, *supra* note 299, art. 13 (stating specifically that: “(1) [e]veryone has the right to freedom of movement and residence within the borders of each state;” and “(2) [e]veryone has the right to leave any country, including his own, and to return to his country”); American Declaration, *supra* note 299, art. VIII. (stating specifically, that “[e]very person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will”).

<sup>301</sup> G.A. Res. 40/144, United Nations Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live (Dec. 13, 1985), arts. 5-10.

<sup>302</sup> *Id.* art. 2.1.

protection have evolved in human rights law. The two sections that follow will explore immigrant rights norms that protect family life from arbitrary state interference and guarantee due process, and judicial protection in the context of immigration regulation and enforcement. Each of these protections is enshrined in Argentine law in a variety of ways, and they represent some of the clearest lines of defense of the right to migrate.

*A. Defending the right to family reunification*

The protection of the family is prominent in the Universal Declaration, which established both the right to create a family, and the imperative to protect the family as the “natural and fundamental group unit of society.”<sup>303</sup> In the immigration context, the right to family life provides both the basis for a right to migrate for purposes of family reunification as well a family unity defense against the expulsion of migrants, and therefore limits state authority with regard to the regulation of entry and residence of migrants.<sup>304</sup> The right to family life was reiterated in the International Covenant on Civil and Political Rights (ICCPR),<sup>305</sup> and the Human Rights Committee (“HRC”) has interpreted that right as including “the adoption of appropriate measures . . . to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.”<sup>306</sup> The HRC has extended this protection to the immigration context, announcing limits on state discretion over the terms of entry and residence of migrants.<sup>307</sup>

Specifically, the HRC has resolved a number of individual cases involving the right to family life as a defense against expulsion.<sup>308</sup>

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303 Universal Declaration, *supra* note 299, art. 16; *see also* Universal Declaration, *supra* note 299, art. 12 (providing that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”).

304 Vincent Chetail, *The Transnational Movement of Persons Under General International Law—Mapping the Customary Law Foundations of International Migration Law*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND MIGRATION 41-42, (Vincent Chetail ed., 2014).

305 International Covenant on Civil and Political Rights, arts. 17, 23, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

306 39th UN Human Rights Committee, *CCPR General Comment No. 19: art. 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, ¶ 5 (July 27, 1990).

307 27th UN Human Rights Committee, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, ¶ 5 (Apr. 11, 1986) [hereinafter *General Comment No. 15*] (stating that “[t]he Covenant does not recognize the right of aliens to enter or reside in the territory of a State party . . . . However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of . . . respect for family life arise”).

308 *See, e.g.*, UN Human Rights Committee, *Gonzalez v. Republic of Guyana*, CCPR/C/98/D/1246/2004 (2010); UN Human Rights Committee, *Dauphin v. Canada*, A/64/40 vol. II,

Examples drawn from the Western Hemisphere are particularly telling. In *Gonzalez v. Republic of Guyana*, the HRC found that Guyana's refusal to process a Cuban citizen's marriage-based naturalization due to potential political repercussions in the bilateral relations between the two countries constituted a violation of the right to family life.<sup>309</sup> In *Dauphin v. Canada*, the HRC concluded that the expulsion of a Haitian man, who had lived in Canada since the age of two and whose parents and siblings were all Canadian citizens,<sup>310</sup> constituted a violation of the right to family life, notwithstanding a conviction for robbery with violence which earned him a thirty-three month sentence.<sup>311</sup>

The American Declaration mirrors the Universal Declaration in its protections of the family, including the right to form a family,<sup>312</sup> as well as a protection against abusive attacks by the state against the family.<sup>313</sup> In *Wayne Smith, Hugo Armendariz, et al. v. United States*, the Inter-American Commission found that these obligations under the American Declaration constrained the authority of the United States to expel individuals from its territory.<sup>314</sup> The Inter-American Commission relied, in part, on the authority of the HRC referenced above, as well as the jurisprudence of the European Court of Human Rights,<sup>315</sup> in concluding that the United States was required to consider the effects of expulsion on the families of Mr. Smith and Mr. Armendariz.<sup>316</sup> Where the United States had failed to consider these effects, due to drug crimes committed by Mr. Smith and Mr. Armendariz, the Commission found that it had violated

Annex VII.SS 427 (2009); UN Human Rights Committee, *Madafferi v. Australia*, Communication No. 1011/2001, U.N. Doc. CCPR/C/81/D/1011/2001 (2004).

<sup>309</sup> UN Human Rights Committee, *Gonzalez v. Republic of Guyana*, CCPR/C/98/D/1246/2004 (2010) ¶ 14.4 (2010).

<sup>310</sup> UN Human Rights Committee, *Dauphin v. Canada*, A/64/40 vol. II, Annex VII.SS ¶ 8.2 (2009).

<sup>311</sup> *Id.* ¶ 9. Similarly, the HRC found that the expulsion of an Italian man who had overstayed his tourist visa in Australia and married an Australian citizen and had four children would violate his right to family life, even though he had a criminal conviction in Italy that led to a conclusion that he had "bad character." UN Human Rights Commission, *Madafferi v. Australia*, Communication No. 1011/2001, U.N. Doc. CCPR/C/81/D/1011/2001 ¶¶ 2.1-2.4, 9.8 (2004).

<sup>312</sup> American Declaration, *supra* note 299, art. VI (establishing that "[e]very person has the right to establish a family, the basic element of society, and to receive protection thereof").

<sup>313</sup> American Declaration, *supra* note 299, art. V (establishing that "[e]very person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life").

<sup>314</sup> *Wayne Smith, Hugo Armendariz, et al. v. United States*, Case 12.562, Inter-Am. Comm'n H.R., Report N. 81/10 (2010), <http://www.oas.org/en/iachr/decisions/merits.asp>.

<sup>315</sup> *Id.* ¶¶ 52-54.

<sup>316</sup> *Id.* ¶ 60.

each man's human right to family life and judicial protection.<sup>317</sup> The Commission further considered the children left behind when the United States expelled Mr. Smith and Mr. Armendariz, and found the United States had violated its obligation to consider the best interests of the child.<sup>318</sup>

The strength of the protection of family life is arguably at its apex when the interests of children are concerned. The main UN instrument in this regard is the Convention on the Rights of the Child ("CRC"), which sets forth the principles that a child should not be separated from her family against her will, unless it is in her best interest.<sup>319</sup> The CRC expounds on this right with reference to "applications by a child or his or her parents to enter or leave a State Party for purposes of family reunification," and requires that such requests are dealt with in a "positive, humane, and expeditious manner."<sup>320</sup> While this guarantee is procedural in nature, it suggests favorable treatment of such requests. Moreover, the near universal ratification of this instrument suggests that such principles may be on their way to attaining the status of customary international law.<sup>321</sup> In fact, some scholars have argued that a customary norm exists to facilitate the reunification of a nuclear family of documented migrants.<sup>322</sup>

In its Advisory Opinion 21 ("AO-21"), the Inter-American Court provided guidance on the specific question of the scope of protection for children in cases in which one or both parents might be subjected to expulsion due to their migratory status.<sup>323</sup> In that opinion, the court began with a conceptual clarification that it understands family to encompass more than a child's parents for purposes of protection under the right to family unity, and that a State has the obligation to determine the composition of a child's family unit in each case.<sup>324</sup> The court acknowledged the tension that exists between the State's right to regulate

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317 *Id.*

318 *Id.*

319 Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

320 *Id.* art. 10(1).

321 Chetail, *supra* note 304, at 46.

322 *Id.* at 43. While this position is certainly contested, more have coalesced around the proposition that a state is required to reunite a minor child with her family legally residing in a state's territory. *Id.* at 44.

323 Rights and Guarantees of Children in the Context of Migration And/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶ 263 (Aug. 19, 2014) [hereinafter Advisory Opinion OC-21/14] (specifically reviewing this question with reference to Articles 8, 17, 19 and 25 of the American Convention and Articles VI and XXV of the American Declaration).

324 *Id.* ¶ 272.

entry and exit of non-citizens and its obligations to afford special protection to children, and emphasized that every exercise of the State's right must comply with the requirements of (a) suitability; (b) necessity, and (c) proportionality.<sup>325</sup>

Specifically with regards to proportionality, the court indicated that because it will never be in the best interest of a child to be separated from her parent through expulsion, "the State concerned has the obligation to weigh, adequately and strictly, the protection of the family unit against the legitimate interests of the State."<sup>326</sup> Among other considerations, the court requires a state to weigh: (a) the duration of stay and extent of ties of the person to be expelled; (b) the nationality, residency, and custody of the child if expulsion takes place; (c) the scope of harm to the family unit; and (d) the scope of disruption to the child's daily life.<sup>327</sup> Importantly, the court found that in cases where a child is a citizen or permanent resident of the host country, "it is axiomatic that the child must conserve the right to continue enjoying her or his family life in said country and, as a component of this, mutual enjoyment of the cohabitation of parents and children."<sup>328</sup> The court concluded that:

[T]he rupture of the family unit by the expulsion of one or both parents due to a breach of immigration laws related to entry or permanence is disproportionate in these situations, because the sacrifice inherent in the restriction of the right to family life, which may have repercussions on the life and development of the child, appears unreasonable or excessive in relation to the advantages obtained by forcing the parent to leave the territory because of an administrative offense.<sup>329</sup>

In perhaps the most progressive interpretation of a child's right to family life, the court found expulsion of one or both parents for immigration violations per se unreasonable where a child is a national or a permanent resident of the country. Inasmuch as countries throughout North and South America have adopted birthright nationality in their national constitutions, this Inter-American Court rule creates a broad limitation on States' authority to expel non-citizens in the Americas.

The standards described in the preceding paragraphs strongly suggest

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325 *Id.* ¶ 275.

326 *Id.* ¶ 278.

327 *Id.* ¶ 279.

328 *Id.* ¶ 280.

329 *Id.*



that the DNU violates the well-articulated protections of family life and the best interests of the child under Inter-American and UN human rights law. Most specifically, the provision of the DNU that makes people inadmissible when they make a request for residency if they have committed a crime punishable with jail, and only makes a waiver available to immigrants who have been sentenced to less than three years, violates this protection. Perhaps a dozen cases published by courts throughout Argentina and discussed in the first section of this Article concern the cases of irregular migrants who have lived many years in Argentina, established families, and raised Argentine children. All of those cases would trigger the inadmissibility ground that the DNU incorporated into article 29. Many of them would not be eligible for the family unity waiver due to the fact that their sentences exceeded three years. If Argentina applies the DNU to these cases, it will certainly violate its human rights obligations under the American Convention as elaborated by the Inter-American Court.

This same analysis applies in the cases of cancelation of residency, but the likely outcome in those cases under the DNU is even more troubling. That is because cancelation of residency proceedings could be initiated under the DNU against all of the respondents from the cases referenced in the previous paragraph. As a matter of law under the DNU, certain people who were granted a waiver to protect their right to family unity five or ten years ago would be ineligible for such a waiver now, and their expulsion would be mandatory. Notably, the decisions of many of those courts were firmly rooted in human rights protections as incorporated into Argentine law. Therefore, the President was certainly on notice that he was issuing an edict that brought Argentina directly into conflict with its international treaty obligations.

The collective action challenging the DNU raised this problem. The trial court believed that the right to family reunification would be more appropriately addressed through individual cases, reasoning that it was an individual right that requires an analysis of the individual circumstances of each case.<sup>330</sup> This failed to appreciate the rules of law established by the Inter-American Commission and Court, which have found that simply receiving a three-year sentence could never be grievous enough to justify the incursion into the right of an Argentine child to be unified with her parents.<sup>331</sup> The minority opinion of the appeals court Judge Alemany more

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330 See Collective Action, *supra* note 233, at § XI.

331 See Advisory Opinion OC-21/14, *supra* note 323, ¶ 280.

faithfully incorporated international human rights law on this point,<sup>332</sup> but this is still very much an open question in the DNU litigation.

If the Supreme Court does not resolve this systematic violation of non-citizens' right to family life and special protections for children, then the individual litigation suggested by the trial court will be the only remaining avenue. In order to effectively pursue this avenue, it will be necessary to also challenge the restrictions on judicial protection implemented by the DNU, which remain in place during the pendency of the appeal.

### *B. Restoring due process and judicial protection*

International human rights law also articulates important protections in terms of due process and judicial protection. International human rights bodies have often developed these norms in conjunction with substantive human rights protections including, for example, the right to family life. Indeed, respect for family life in the immigration context requires procedures for balancing the equities of a non-citizen's life against the authority of the State to expel her or him.<sup>333</sup> Additional procedural protections include guarantees of individualized consideration of a migrant's case, an opportunity to contest the reasons for expulsion, and the ability to seek review of any decision to expel.

UN human rights treaty law provides specific due process guarantees that apply to expulsion procedures. For example, the ICCPR provides that non-citizens "lawfully in the territory of a State Party" may only be expelled for reasons established in the law, and that they must be permitted to present arguments against their expulsion before a competent authority.<sup>334</sup> These procedural protections have arguably become part of general international law,<sup>335</sup> but they do not extend to irregular migrants.

For irregular migrants, the clearest protection appears to be the absolute prohibition on collective expulsions.<sup>336</sup> While the ICCPR does not explicitly incorporate this protection, the HRC understands this

332 Cámara Contencioso Administrativo Federal [CNFed.] [National Court of Appeals in Federal and Administrative Litigation], sala V, 22/3/2018, "Centro de Estudios Legales y Sociales y Otros c. EN-DNM / Amparo Ley 16.986 (expte. no. 3061/2017), voto Judge Jorge Federico Alemany, sec. XII, <https://www.cels.org.ar/web/wp-content/uploads/2018/03/fallo-camara-migrantes.pdf>.

333 See Wayne Smith, Hugo Armendariz, et al. v. United States, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10, ¶¶ 61-65 (2010), <http://www.oas.org/en/iachr/decisions/merits.asp> (finding independent violations of American Declaration Articles XVIII and XXVI, which include due process and fair trial guarantees).

334 ICCPR, *supra* note 305, art. 13.

335 Chetail, *supra* note 304, at 54.

336 *Id.* at 55.

protection to be implicit.<sup>337</sup> Moreover, this prohibition is explicit in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (“ICRMW”), which requires individualized consideration of all expulsions.<sup>338</sup> Moreover, the ICRMW requires that expulsions only take place in pursuance of a decision by a competent authority in accordance with the law,<sup>339</sup> that the decision is communicated in a language the non-citizen can understand and in writing if so requested,<sup>340</sup> and that the non-citizen has the opportunity to submit the reasons he should not be expelled, and to seek a stay of expulsion, unless the decision is made by a judicial authority.<sup>341</sup>

There are divergent opinions about the right to judicial review of an expulsion order under general international law. Prominent experts in migrant rights argue alternatively that all non-citizens have a right to judicial review, that only those who are lawfully present have such a right, or that none, lawfully present or otherwise, hold such a right.<sup>342</sup> Of course, treaty law clarifies which of these positions prevails in certain contexts. In particular, the American Convention protects due process and judicial protection in its articles 8 and 25 respectively,<sup>343</sup> and the Inter-American Court’s jurisprudence in this area suggests that the summary expulsion procedure under the DNU is deficient.

The Inter-American Court, for example, has interpreted the right to a fair trial enshrined in the American Convention to guarantee the right to challenge an expulsion order before a court, as well as the right to a public hearing and to present a complete defense.<sup>344</sup> The need for the full application of this right in the Argentine context in order to ensure respect for human rights is evident, particularly in light of the previous discussion on the rights to family unity and special protections for children. Indeed, the DNU has established that the DNM has exclusive authority to grant waivers of grounds of crime related inadmissibility and cancelation of

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337 *General Comment No. 15*, *supra* note 307, ¶ 10.

338 G.A. Res. 45/158, art. 22(1) (Dec. 18, 1990).

339 *Id.* art. 22(2).

340 *Id.* art. 22(3).

341 *Id.* art. 22(4).

342 Chetail, *supra* note 304, at 56 (summarizing the positions of Guy Goodwin Gill, Maurice Kamto, and Richaerd Plender, respectively).

343 Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, arts. 8, 25.

344 Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶¶ 124-27 (Sept. 17, 2003); *see also* Vélez Loor v. Panama, *infra* note 351, ¶ 146; *but cf.* 90th UN Human Rights Committee, *General Comment No. 32*, art. 14, ¶ 17, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007).

residency.<sup>345</sup> The practical result of this is that the violations of the right to family life and special protection for children that will systematically occur with the unavailability of a humanitarian waiver for persons with sentences that exceed three years will not be reviewed by courts. This was precisely the problem that the Inter-American Commission detected in *Wayne Smith, Hugo Armendariz, et. al*, when it found that the United States had not only violated the substantive rights of the petitioners, but had also violated their procedural rights by prohibiting U.S. courts from balancing the equities in the cases.<sup>346</sup>

This problem was not specifically addressed in the decision of the trial court in the collective action litigation,<sup>347</sup> but was denounced in the minority opinion of the appeals court Judge Alemany.<sup>348</sup> This is another question that may be resolved by the Supreme Court, but must be challenged by individual non-citizens in expulsion proceedings while they await that opinion.

In a broader sense, beyond this subject-matter limitation on the review of federal courts embedded in the law by the DNU, there is the question of whether the successive three-day deadlines violate due process protections under human rights law. The trial court determined that this issue was reviewable, and while the court upheld the summary expulsion procedure in that case,<sup>349</sup> Judge Alemany of the appeals court found the three-day deadlines violated due process principles.<sup>350</sup>

Due process standards under the American Convention support Judge Alemany's conclusion. First, the right to due process has been extended to the administrative context, and to expulsion proceedings in particular.<sup>351</sup>

345 See DNU, *supra* note 1, art. 7.

346 See *Wayne Smith, Hugo Armendariz, et al. v. United States*, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10, ¶¶ 61-65 (2010), <http://www.oas.org/en/iachr/decisions/merits.asp>.

347 See generally *Juzgado Contencioso Administrativo Federal No. 1 [1a Inst.] [Federal Administrative Litigation Court]*, 18/10/2017, "Centro de Estudios Legales y Sociales y Otros c. EN-DNM / Amparo Ley 16.986," <https://www.diariojudicial.com/public/documentos/000/075/903/000075903.pdf>.

348 *Cámara Contencioso Administrativo Federal [CNFed.] [National Court of Appeals in Federal and Administrative Litigation]*, sala V, 22/3/2018, "Centro de Estudios Legales y Sociales y Otros c. EN-DNM / Amparo Ley 16.986 (expte. no. 3061/2017), voto Judge Jorge Federico Alemany, sec. XII, <https://www.cels.org.ar/web/wp-content/uploads/2018/03/fallo-camara-migrantes.pdf>.

349 *Juzgado Contencioso Administrativo Federal No. 1 [1a Inst.] [Federal Administrative Litigation Court]*, 18/10/2017, "Centro de Estudios Legales y Sociales y Otros c. EN-DNM / Amparo Ley 16.986," 12, <https://www.diariojudicial.com/public/documentos/000/075/903/000075903.pdf>.

350 *Cámara Contencioso Administrativo Federal [CNFed.] [National Court of Appeals in Federal and Administrative Litigation]*, sala V, 22/3/2018, "Centro de Estudios Legales y Sociales y Otros c. EN-DNM / Amparo Ley 16.986 (expte. no. 3061/2017), voto Judge Jorge Federico Alemany, sec. XII, <https://www.cels.org.ar/web/wp-content/uploads/2018/03/fallo-camara-migrantes.pdf>.

351 *Vélez Loor v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct.

Moreover, the Inter-American Commission has indicated that where fundamental rights are at stake in expulsion proceedings, the most expansive reading of due process rights is appropriate.<sup>352</sup>

The Inter-American Commission requires that migrants have a meaningful opportunity to be heard, and present their defense when they face expulsion.<sup>353</sup> This includes having adequate time to collect evidence,<sup>354</sup> and the Commission has gone as far as to require that the State provide the opportunity for migrants to examine witness and present expert testimony to shed light on the circumstances relevant to their expulsion.<sup>355</sup> Thus, the Commission has found that a State violates these obligations when it conducts expulsion proceedings in an unreasonably short period of time.<sup>356</sup>

In the decision of the trial court upholding the three-day timeframes for the summary expulsion procedure established under the DNU, the court indicated that comparable procedures under Argentine law had similarly short timeframes. Without disputing this, the complexity of expulsion proceedings, that include reconstructing immigration histories, as well as the circumstances of underlying criminal convictions, and any mitigating factors, would certainly seem to require more than three days.

The trial court did recognize a migrant's right to counsel in finding that the government must notify the migrant of her right to an attorney at the expense of the State if she cannot afford one.<sup>357</sup> Even if the three-day timeframe does not begin to run until the attorney enters an appearance, the notion that an attorney could adequately prepare a defense in the time provided defies all logic. The attorney would need to meet with the client to understand all the relevant details of the case, collect evidence,

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H.R. (ser. C) No. 218, ¶¶ 141–42 (Nov. 23, 2010).

352 Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz v. Mexico, Case 11.610, Inter-Am. Comm'n H.R., Report No. 49/99, ¶ 70 (1999), <http://cidh.org/annualrep/98eng/Merits/Mexico%2011610.htm>.

353 INTER-AM. COMM'N H.R., SECOND PROGRESS REPORT OF THE SPECIAL RAPPORTEURSHIP ON MIGRANT WORKERS AND THEIR FAMILIES IN THE HEMISPHERE, <http://www.iachr.org/annualrep/2000eng/chap.6a.htm>.

354 Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz v. Mexico, Case 11.610, Inter-Am. Comm'n H.R., Report No. 49/99, ¶ 55 (1999), <http://cidh.org/annualrep/98eng/Merits/Mexico%2011610.htm>.

355 Inter-Am. Comm'n H.R., *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*, OEA/Ser.L/V/II, doc. 46/15, ¶ 311 (Dec. 31, 2015).

356 *Id.* ¶ 60.

357 Juzgado Contencioso Administrativo Federal No. 1 [1a Inst.] [Federal Administrative Litigation Court], 18/10/2017, "Centro de Estudios Legales y Sociales y Otros c. EN-DNM / Amparo Ley 16.986," 16-18, <https://www.diariojudicial.com/public/documentos/000/075/903/000075903.pdf>.

including the testimony of any witnesses or experts, and present a well-reasoned defense. Even if this was the only thing that an attorney did for three days, it would pose an insurmountable challenge. Moreover, expecting that an attorney would only work on that one case simply does not account for the realities of law practice, and cannot be sustained under the American Convention standards elaborated above.

Judge Alemany from the appeals court expressed a particular concern with the three-day timeframe for administrative and judicial appeals, identifying jurisprudence from the Argentine Supreme Court that supported this conclusion.<sup>358</sup> Moreover, individual challenges that highlight the inability of lawyers to adequately prepare a defense may succeed in raising the human rights problem represented by the three-day timeframes. Indeed, the jurisprudence presented in the first section of this Article suggests that untimely filings by counsel,<sup>359</sup> as well as an inability to contact the migrant, are bases to find a violation of the migrant's right to counsel.<sup>360</sup> As attorneys document their inability to adequately defend their clients through a procedure that is an ineffective means of vindicating migrants' rights, courts should find that human rights require extensions of the timeframes provided by the summary expulsion procedure.

Finally, the prohibition against arbitrary detention is a well-established principle of general international law codified in a broad range of treaties, and it has been applied fairly consistently to the context of immigration detention.<sup>361</sup> For example, the ICCPR protects against arbitrary detention,<sup>362</sup> and the HRC has interpreted that right as specifically extending to immigration detention.<sup>363</sup> That said, detaining immigrants for purposes of immigration regulation and enforcement of immigration laws

358 Cámara Contencioso Administrativo Federal [CNFed.] [National Court of Appeals in Federal and Administrative Litigation], sala V, 22/3/2018, "Centro de Estudios Legales y Sociales y Otros c. EN-DNM / Amparo Ley 16.986 (expte. no. 3061/2017), voto Judge Jorge Federico Alemany, sec. XII, <https://www.cels.org.ar/web/wp-content/uploads/2018/03/fallo-camara-migrantes.pdf>.

359 See Cámara de Apelaciones en lo Contencioso Administrativo Federal [CNFed.] [Federal Court of Appeals in Administrative Litigation], sala V, 31/3/2016, "Diop Matar, Elhadji c. EN-M Interior - DNM / Recurso Directo DNM," 3-4, <https://jurisprudencia.mpd.gov.ar/Jurisprudencia/DM,%20E.pdf>.

360 Cámara de Apelaciones en lo Contencioso Administrativo Federal [CNFed.] [Federal Court of Appeals in Administrative Litigation], sala I, 13/9/2016, "Chein Alvarado, Errol James c. EN-M Interior-DNM / recurso directo DNM," 4, <https://jurisprudencia.mpd.gov.ar/Jurisprudencia/CA,%20EJ.pdf>.

361 Chetail, *supra* note 304, at 50.

362 CCPR, *supra* note 305, art. 9.1.

363 16th UN Human Rights Committee, *CCPR General Comment No. 8: art. 9 (Right to Liberty and Security of Persons)*, ¶ 1 (June 30, 1982).

has not been found to be arbitrary per se.<sup>364</sup> Indeed, the HRC recognized in an individual communication against Australia that there was no basis under international law to conclude that the detention of an entering asylum seeker was necessarily arbitrary.<sup>365</sup> Three specific limitations do inform an inquiry into whether the detention of migrants is arbitrary: (1) whether it is authorized by the law; (2) whether the deprivation of liberty is reasonable, necessary and proportionate; and (3) whether there is a right to challenge the lawfulness of the detention in court.<sup>366</sup> The Inter-American Court for its part has required that a detained migrant be informed of the reasons for his detention and the nature of the proceedings being conducted against him.<sup>367</sup>

In the early cases on the right to migrate, Argentine courts found that the detention of Chinese migrants prevented the State from meeting its obligations to facilitate the regularization of migrants and guarantee their access to counsel to formulate a defense.<sup>368</sup> This early association between the freedom from detention and the ability to access a lawyer and build a defense has important human rights dimensions. Indeed, migrants continue to have a right to counsel and a right to regularize their status, which factors in to the determination whether detention would be “reasonable, necessary, and proportionate.” Indeed, while the above cited international human rights standards appear to permit the detention of irregular migrants in Australia, the same body of law likely mandates a different outcome in Argentina, where migrants continue to have a right to counsel and an opportunity to regularize their status.

Human rights law provides a complete response to the DNU’s degradation of the right to family reunification, summary expulsion procedure, and increased reliance on detention. Argentina’s human rights obligations require robust timeframes for expulsion proceedings to protect the right to counsel, and the right to mount a defense. Moreover, the expulsion procedure must permit full consideration of requests to reside in Argentina to permit family reunification, which is guaranteed by both the immigrant bill of rights and human rights law. The DNU has certainly degraded the right to migrate in Argentina, but human rights law provides a means to defend its essence.

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364 Chetail, *supra* note 304, at 50.

365 UN Human Rights Committee, *A. v. Australia*, CCPR/C/59/D/560/1993 (Apr. 3, 1997).

366 Chetail, *supra* note 304, at 51–52.

367 *See Vélez Loo v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 109 (Nov. 23, 2010).

368 *See, e.g.,* Cámara Federal de Apelaciones de Paraná [CFed.], 11/6/2011, “HC deducido por Dai Jianqing, Lin Xuehui, Xie Chenguang y Zhuang Bisheng,” Causa No. 5-17.559-20.768/2011.

## V. CONCLUSION

The timing of President Macri's restrictionist DNU, just days after President Trump issued his 2017 executive orders on immigration, suggests some relationship between national trends of criminalization of migrants and securitization of borders in the region. However, there are some key differences between the Argentine legal system and the U.S. legal system that will likely prevent Argentina from backsliding into the same troubling patterns of U.S. immigration enforcement that have been the subject of rebuke for decades. Most notably, Macri's DNU did not touch the immigrant bill of rights promulgated as part of the 2004 Law. This means that a right to migrate persists under Argentine law, and international human rights law continues to be directly embedded in that concept through the 2004 Law and the Argentine Constitution.

The right to migrate represented a paradigm shift in how Argentina managed migrant flows, ensuring that all irregular migrants got the opportunity to regularize their status, free from detention, and with the assistance of counsel provided by the State. Macri's DNU would have Argentina shift back to a system that relies on the broad discretion of immigration officials, makes expulsion the default for irregular migrants and those who have committed crimes, and increases the likelihood of detention. These steps strike at the heart of what the right to migrate has come to signify, but the persistence of that right in the body of the law should be understood as a counter measure to defend the core content of that right. In this regard, international human rights law could provide the framework to resist this incursion into the right to migrate.

The right to family reunification is central to the 2004 Law, and human rights law helps to define the content of that right in a way that is meaningful in Argentina. The right to family life of persons in Argentina means that they should be able to reunite with family members living abroad and stay with their family members in Argentina, even when they have violated criminal laws. Immigration procedures and recourse to judicial protection should assist Argentines and immigrants alike in vindicating this and other important substantive rights, and to the extent that they do not, human rights law requires their amendment. If Argentina restores procedural fairness and provides immigrants with sufficient time to secure counsel and articulate a defense, including the right to family reunification, it will have retained the spirit of the right to migrate.

There is much work to do in Argentina to address the harm wrought by President Macri's campaign to disparage immigrants, who have been unfairly cast as criminals who threaten national security. Important aspects



of the process of societal healing is the defense of the fundamental rights of those immigrants whose place in Argentina society has been drawn into question and the reassertion of the right to migrate.