

## Introduction: A paradigm shift in Latin American immigration and asylum law and policy?

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Over the past decade, a paradigm shift in migration and asylum law- and policymaking appears to have taken place in Latin America. Does this apparent ‘liberal tide’ of new laws and policies suggest a new approach to the hot topics of migration and refugees in Latin America distinct from the regressive and restrictive attitudes on display in other parts of the world? The question is urgent not only for our understanding of contemporary Latin America but also as a means of reorienting the debate in the migration studies field towards the important developments currently taking place in the region and in other parts of the global south. This book brings together eight varied and vibrant new analyses by scholars from Latin America and beyond to form the first collection that describes and critically examines the new liberalism in Latin American law and policy on migration and refugees.

This introduction outlines the volume’s key themes. It starts by identifying how the study of the new dynamics of migration and asylum law- and policymaking in Latin America contributes to existing literature on migration and refugees. It argues that the ways in which Latin American states are presently pushing the boundaries of the field represent an area of research with important implications for broader debates on migration and asylum. An explanation of the book’s structure is then furnished, encompassing a summary of each chapter, in order to help orient the reader in identifying the particular contributions made by each study to the volume as a whole. Overall, the book shows that the topic of migration dynamics, and the responses being developed in national and transnational fora in Latin America, is one of genuine importance.

### **Migration law and policy within Latin America**

The academic literature on migration and asylum continues to be characterised by a geographic south-north bias. Thus, an extensive literature exists on migration to, and asylum in, receiving countries in the global north and

on the determinants and effects of their laws and policies.<sup>1</sup> Yet, by contrast, south-south migration and related trends in migration and asylum law- and policymaking in the global south are only just beginning to be appreciated.<sup>2</sup> Such neglect of the dynamics of international migration beyond Europe and North America is somewhat surprising, especially considering that south-south migration today makes up more than half of all international migration.<sup>3</sup>

Existing scholarship on Latin America reproduces this bias in the broader migration literature. The bulk of it thus deals with the south-north migration corridor that runs from Central America through (and to) Mexico and onwards to the United States of America (USA) and Canada, particularly in terms of North American migration law and policy.<sup>4</sup> Similarly, a reasonably established set of studies explores the phenomenon of Latin American migration to Western Europe.<sup>5</sup> What is much less evident is the existence of any coherent body of scholarship examining south-south migration dynamics within and to Latin America.

Yet contemporary Latin America offers a fascinating – and increasingly important – field of study for those researching or working on international migration. For a start, migration dynamics within the region are in flux. Latin America stands at a historical juncture where emigration to the United States and Europe is decreasing, while new flows of migrant workers within the region and even from countries outside of it – in the Caribbean, Africa and Asia – are gathering pace.<sup>6</sup> These are mixed with distinctive new forced migration patterns generated by the violent organised criminal groups in Central America and Mexico,<sup>7</sup> and by natural disasters in countries such as Haiti (see

- 1 Examples of the literature concerning migration and asylum policies in receiving countries in the global north include Martin, 'The new asylum seekers', pp. 1–20; Freeman, 'Models of immigration politics in liberal societies', pp. 881–902; Gibney, 'The state of asylum: democratisation, judicialisation and evolution of refugee policy', pp. 19–45; Cornelius et al. (eds.), *Controlling Immigration*; Hollifield, 'The emerging migration state', pp. 885–912; Price, *Rethinking Asylum*.
- 2 See International Migration Review Special Collection on South-South Migration (spring 2014), <http://cmsny.org/imr-spring-2014-issue-launches-golden-anniversary-and-features-special-collection-on-south-south-migrations/> (accessed 24 Oct. 2014).
- 3 United Nations Population Division, international migration wallchart, 2013 (New York: United Nations), <http://esa.un.org/unmigration/wallchart2013.htm> (accessed 24 Oct. 2014).
- 4 An important example of this extensive literature is the American Academy of Political and Social Science's special issue 'Continental divides: international migration in the Americas'.
- 5 See, for UK examples, contributions to the fascinating volume edited by McIlwaine, *Cross-Border Migration among Latin Americans*.
- 6 Cordova, 'Migratory routes and dynamics between Latin American and Caribbean (LAC) countries and between LAC and the EU'; Freier, 'Migrantes extracontinentales en América del Sur: Estudio de casos'.
- 7 See, for example, Cantor, 'The new wave: forced displacement caused by organised crime in Central America and Mexico', pp. 34–68.

chapter 6). Yet what makes present-day Latin America truly distinctive from the perspective of migration studies, is the wave of new laws and policies on migrants and refugees presently being adopted by the countries of this region. Unfortunately, law- and policymaking on migrants and refugees in the area is a topic that has been especially marginalised thus far, even within the relatively circumscribed existing scholarship on Latin American migration dynamics.<sup>8</sup> As such, dedicated research is now urgently required in order to better understand the emergence of this new regional trend and its relationship to the empirical dynamics of migration and refugee protection.

A golden thread that connects many of these legal and policy instruments is their avowedly progressive character. Thus, in the migration field, Latin American countries that, in many instances, inherited restrictive immigration legislation from the military dictatorships of the 1970s and 1980s have adopted new laws and policies rooted in the protection of international migrants' human rights (see chapters 2, 4 and 6). Some governments, such as those of Argentina, Uruguay and Ecuador, have even incorporated into recent legislation the concept of a fundamental human right to migrate (see chapters 1 and 2). Yet it is plain that some restrictive practices persist, even within this increasingly liberal regional context for migration (see chapters 1 and 6).

In parallel, Latin America espouses its own 'generous tradition of asylum'. This has influenced the region's subsequent engagement with international refugee protection concepts.<sup>9</sup> In this field, the tendency has also been towards a principled expansion of the international refugee law regime through the regional framework underpinned by the 1984 Cartagena Declaration and other refugee instruments.<sup>10</sup> In recent years, national laws and policies formally implementing the international provisions have also been adopted or updated by increasing numbers of Latin American countries (see chapters 7 and 8). However, concerns about the nexus between refugee flows and wider migration patterns have also driven a countervailing movement among some states towards tightening their asylum systems (see chapter 8).

This liberal tide of new migration and asylum law- and policymaking in Latin America stands in stark contrast to the 'race to the bottom' taking place in other parts of the world, particularly in the global north. Indeed, the migration literature paints the past decade as a time when most countries in

8 Notable exceptions include Oteiza and Novick, 'Inmigrantes y refugiados'; Domenech, *Migración y política: el Estado interrogado. Procesos actuales en Argentina y Sudamérica*; Ceriani Cernadas, 'Luces y sombras en la legislación migratoria latinoamericana', pp. 68–86.

9 See Esponda Fernández, 'La tradición latinoamericana de asilo y la protección internacional de los refugiados', pp. 77–124.

10 The Cartagena Declaration is reproduced in United Nations High Commissioner for Refugees (UNHCR), *La Protección internacional de los refugiados en América Central, México y Panamá*, pp. 332–9.

Europe and North America have adopted increasingly restrictive migration and refugee laws and policies on the pretext of national security, the ‘war on terror’ or the global economic crisis.<sup>11</sup> By contrast, in the same period, many Latin American countries have moved towards migration and asylum laws and policies based more on protecting migrants’ rights, and less on national security, as all chapters in this volume demonstrate.

The role played by transnational institutions and standards in facilitating this liberal tide in Latin America is a topic that requires particular attention. For instance, it seems that recent shifts in Latin American policymaking on migration must be understood in the context of sub-regional integration projects, such as the Mercado Común del Sur (Mercosur)<sup>12</sup> and the Andean Community, including their rejection of restrictive trends in northern destination countries (see chapters 1 and 2). Meanwhile, in the refugee field, the United Nations refugee agency has played a vital role in promoting the adoption of progressive asylum laws and policies in Latin America, including through regional projects such as the Cartagena process (see chapters 5, 7 and 8).

Finally, Latin America also provides an intriguing model of how law and policy can attempt to regulate the ‘grey area’ in which ‘voluntary’ and ‘forced’ international migration flows entwine. In theory, the migration framework covers ‘voluntary’ migration, such as that driven by economic or social pull factors, whereas the asylum framework governs ‘forced’ migration as seen in refugee flows. Yet in Latin America, as elsewhere, the boundaries between migrants and refugees can be blurred: they move along the same pathways in ‘mixed flows’ and are assisted by the same smuggling networks (see chapters 5 and 6). A distinctive feature of contemporary Latin American law- and policymaking is the innovative attempts by some states to respond to this blurred empirical reality (see chapters 5 and 6).

## Structure of the book

This volume aims to shed light on the new dynamics of migration and asylum law- and policymaking in Latin America. The objective is not simply to provide a description of this apparent liberal tide of novel legislation and policy on both ‘voluntary’ and ‘forced’ migration but also to contextualise, explain and

11 See Guiraudon and Joppke (eds.), *Controlling a New Migration World*; Amoore, ‘Biometric borders: governing mobilities in the War on Terror’; Cholewinski, ‘The criminalisation of migration in EU law and policy’, pp. 301–36; Hamlin, ‘Illegal refugees: competing policy ideas and the rise of deterrence in American asylum politics’, pp. 33–53.

12 Spanish acronym for Latin American Southern Cone Market (aka Common Market of the South), South America’s leading trading bloc. Member states are: Brazil, Argentina, Uruguay, Paraguay, Venezuela, and Bolivia (pending ratification in the case of Bolivia). Associate members include Chile, Peru, Colombia, and Ecuador, with Guyana’s and Suriname’s associate membership pending ratification.

critically analyse the phenomenon from a range of social science and humanities standpoints. This picture is built up through a series of separate analyses that address the broader phenomenon from the perspective of particular thematic issues and in different country or sub-regional contexts. Taken together, their combined effect is to address some of the lacunae identified above in the migration and asylum scholarship in relation to Latin America.

The next eight chapters are reworked versions of a selection of the academic papers presented at an international conference convened in London in March 2013 by the Refugee Law Initiative and the Institute of Latin American Studies, both of the School of Advanced Study, University of London.<sup>13</sup> The resulting chapters benefited from the interaction between the new and more established academics that make up the emerging group of scholars working on Latin American migration and asylum law and policy, and also between academics and policymakers working in international organisations, national governments and non-governmental bodies. The conference, and this volume, equally represent the start of a renewed dialogue between Latin American and European scholars researching migration and asylum in Latin America.

The chapters bring together, for the first time, the detailed analyses of this new cohort of researchers from different Latin American and European countries. Their contributions take the reader on a journey through a selection of the most critical issues in the new wave of laws and policies of Latin American states relating to migration and asylum. Their research counteracts the under-representation of scholarship on Latin America in the broader fields of migration and refugee studies by tracing these themes across different groups of 'voluntary' and 'forced' migrants, different historical epochs and a range of transnational approaches at the regional, sub-regional and national levels. However, ultimately, each of the chapters revolves around the key theme that orients the overall volume, that is, a critical examination of this liberal tide in Latin America and its implications for the study of migrants and refugees.

This concern is addressed directly for the migration policy context in chapter 1, the first substantive chapter, contributed by **Pablo Ceriani Cernadas**, Argentine scholar and member of the UN Committee on Migrant Workers, and German academic **Luisa Feline Freier**. They offer the most general account of recent developments in Latin American and Caribbean immigration policies. The chapter discusses recent changes on the national, regional and sub-regional level, distinguishing between measures in the areas of: 1) access and residence;

13 The conference, 'A Liberal Tide? Towards a Paradigm Shift in Latin American Migration and Asylum Policy-making', took place on 18 March 2013 at Senate House, London. It benefited from generous financial support in the form of a Future Research Leaders grant from the Economic and Social Research Council (ESRC), held by the first author [grant number ES/K001051/1], and a conference grant from the Institute of Latin American Studies, School of Advanced Study.

2) migration control; 3) social rights; 4) political rights; and 5) children's rights. The authors show that liberal discourses are not always reflected in practice, and stress the coexistence of restrictive and progressive policies, rising xenophobia and the ongoing conflict between the newly emerging rights-based approach to migration management and national security concerns. Although they identify a clear tendency towards abandoning the notion of immigration as a problem or threat towards understanding migration in the context of human rights, the new paradigm is still delicate and severely limited by pending reforms in many countries.

Chapter 2, by **Luisa Feline Freier** and Spanish academic **Diego Acosta Arcarazo** takes a closer look at what they call the reverse immigration policy gap. In contrast to Europe and North America, where many governments use restrictive discourses of rejecting immigration, while at the same time accepting the entry and residence of substantial numbers of (irregular) immigrants, South American countries embark on liberal immigration discourses but comparably restrictive laws and policies. In the past 15 years, the majority of South American countries have liberalised their official immigration discourses, with a strong emphasis on migrants' rights. Based on the analysis of the immigration laws of Argentina, Brazil, Bolivia, Chile, Ecuador and Uruguay, the authors find that there are many instances of policy liberalisation, but that inconsistencies persist between liberal discourses and outdated immigration laws in some countries, and between discourses and certain legislative provisions of newer laws in others.

The focus then shifts to the sub-regional level with Argentine scholar **Ana Margheritis** who, in chapter 3, critically analyses the framing of the migration theme by the rules of Mercosur. She finds a distinctive dynamic in the negotiation of such norms that contrast with that in other policy fields. Yet, far from representing a clear shift towards a liberal approach, Margheritis argues that the ideas embodied in the new agreements combine a rhetorical focus on the defence of human rights and citizenship with an emphasis on maintaining domestic social order via border controls and residency norms, as well as the expectation that a common (regional) position would enhance bargaining power in global fora. She further points to the impact of transnational policy networks on such negotiations, in addition to governments' efforts to avoid the potentially disturbing domestic effects of intra-regional flows while capturing the political and economic benefits of workers' mobility.

Colombian academic **Beatriz Sánchez Mojica**, in chapter 4, makes the final contribution towards dealing squarely with migration. She provides a detailed case-study of national migration policy development showing how Colombian migration policy is currently undergoing a process of profound transformation. It describes the Colombian authorities' efforts to move away from a migration

regime premised on internal conflict, oversupply of labour and successive economic crises to one which sees immigration as an asset for development and growth, bringing the country highly-qualified workers, leading academics and capital investment in the extractive sector. Sánchez argues that this shift has resulted in processes to develop the institutional and regulatory frameworks, which are underpinned by liberal concepts such as that of respect for migrants' rights and the premise that migration is an important positive tool for the development of the state.

As noted above, flows of persons in Latin America – as elsewhere – sometimes take a 'mixed' form, blending asylum-seekers and economic migrants with trafficked and other vulnerable persons. The policy response to this phenomenon in Latin America is addressed in chapter 5 by Costa Rican lawyer **Diana Trimiño Mora**. She furthers consideration of the liberal tide trend by examining the progressive development of mechanisms for the identification of vulnerable persons within mixed-migration movements in Central America and related protection mechanisms at the national and regional levels. Yet the complex reality of mixed-migratory flows, Trimiño argues, poses significant challenges to states in protecting vulnerable groups while managing migration more generally, including the lack of adequate data to assess the situation, as well as the lack of human and financial resources for the effective implementation of national policies and protocols at all levels.

This 'grey area' between migration and asylum also forms the topic of chapter 6. Here, the Brazilian scholars and practitioners **Andrea Pacheco Pacifico, Erika Pires Ramos, Carolina de Abreu Batista Claro and Nara Braga Cavalcante de Farias** consider the innovative new legal and policy framework for permanent residency on humanitarian grounds that the Brazilian authorities recently adopted in response to the exodus from Haiti to Brazil of a group of vulnerable migrants, who were the victims of insecurity and poor economic conditions in the aftermath of the 2010 earthquake. This progressive policy deals expressly with one south-south migration stream, although the authors also point to its utility in Brazil's wider international politics, as well as deficiencies in its practical implementation in certain parts of the country.

Brazil's regional powerhouse is also the subject of chapter 7. By contrast, though, this contribution from **José Fischel**, Brazilian academic and staff member from the United Nations High Commissioner for Refugees office (UNHCR), focuses expressly on legal and policy responses to refugee flows. Moreover, his is a historical analysis of the development of Brazilian refugee policy between 1921 and 2014, which shows how tangible events and policy reactions during this time period provide a vital historical context for understanding the emergence of Brazil's current refugee protection regime as well as its role as a resettlement country. Like other contributors, he points

to the role of international politics in producing progressive refugee policies. Thus, Brazil's refugee framework is in line both with its avowed human rights and humanitarian outlook, and with its strategy to assert its regional leadership (including south-south cooperation) and to play a meaningful – though still modest – role at the global level.

Finally, in chapter 8, the British academic **David James Cantor** reflects on refugee law and policy across Latin America. He concludes that a liberal trend in this field can indeed be identified, although it is balanced by the adoption of more restrictive measures by certain states in recent years. His study also finds that the framing of Latin America as an exceptional case coheres with the region's distinctive history, as well as its contemporary regional and international identity. Much like Fischel, Cantor attributes such legal developments to empirical events and perceptions, explaining new measures as a reaction to specific challenges in the region. He also notes the relatively low impact of public opinion on legal and policy development, the influence of European trends in informing and inspiring developments in the region, and the gap between law and policy on the one hand and their practical implementation on the other.

## **Future directions**

This volume provides a first attempt to respond to the under-representation of Latin America in the scholarly literature on migration and refugees, particularly in relation to the laws and policies created to deal with these topics. As such, it identifies and critically examines how many Latin American countries have challenged global trends – apparently towards increasingly restrictive migration policies – by adopting and implementing increasingly liberal migration and asylum policies, extending protection to the most vulnerable and consecrating a positive conception of the migrant and respect for migrants' rights.

Even so, the contributions to this volume merely scratch the surface of the plethora of perspectives and challenges concerning contemporary Latin American migration and asylum law and policy. A broader enquiry is required into the wider gamut of countries, regional and sub-regional organisations than is represented here. Moreover, detailed and sensitive research at the level of implementation is needed in order to explore the limits of this apparent liberal tide of new laws and policies. The success of this endeavour will depend ultimately on renewed and proactive participation by scholars, practitioners and policymakers from the region and beyond.



## References

- American Academy of Political and Social Science (2010) 'Continental divides: international migration in the Americas', *The ANNALS of the American Academy of Political and Social Science* 630 (1).
- L. Amoore (2006) 'Biometric borders: governing mobilities in the War on Terror', *Political Geography* 25, pp. 336–51.
- D.J. Cantor (2014) 'The New Wave: forced displacement caused by organised crime in Central America and Mexico', *Refugee Survey Quarterly* 33 (3), pp. 34–68.
- R. Cordova (2013) 'Migratory routes and dynamics between Latin American and Caribbean (LAC) countries and between LAC and the EU' (Brussels).
- P. Ceriani Cernadas (2011) 'Luces y sombras en la legislación migratoria latinoamericana', *Nueva Sociedad* 233, May/June, pp. 68–86.
- R. Cholewinski (2007) 'The criminalisation of migration in EU law and policy', in A. Baldaccini, E. Guild and H. Toner, *Whose Freedom, Security and Justice?* (Oxford), pp. 301–36.
- W.A. Cornelius et al. (eds.) (2004) *Controlling Immigration: a Global Perspective*, 2nd edn. (Stanford).
- E. Domenech (2009) *Migración y política: el Estado interrogado. Procesos actuales en Argentina y Sudamérica* (Córdoba).
- J. Esponda Fernández (2004) 'La tradición latinoamericana de asilo y la protección internacional de los refugiados', in L. Franco (ed.), *El Asilo y la Protección Internacional de los Refugiados en América Latina* (San José), pp. 77–124.
- G.P. Freeman (1995) 'Models of immigration politics in liberal societies', *International Migration Review* 29 (4), pp. 881–902.
- L.F. Freier (2013) 'Migrantes extracontinentales en América del Sur: estudio de casos', *OIM Cuadernos Migratorios* 5 (Buenos Aires).
- M.J. Gibney (2003) 'The state of asylum: democratisation, judicialisation and evolution of refugee policy', in S. Kneebone (ed.), *The Refugees Convention 50 Years On: Globalisation and International Law* (Aldershot), pp. 19–45.
- V. Guiraudon and C. Joppke (eds.) (2001) *Controlling a New Migration World* (London).
- R. Hamlin (2014) 'Illegal refugees: competing policy ideas and the rise of deterrence in American asylum politics', *Refugee Survey Quarterly* 31 (2), pp. 33–53.

- J. Hollifield (2004) 'The emerging migration state', *International Migration Review* 38 (3), pp. 885–912.
- D.A. Martin (1988) 'The new asylum seekers', in D.A. Martin (ed.), *The New Asylum Seekers: Refugee Law in the 1980s* (Dordrecht), pp. 1–20.
- C. McIlwaine (ed.) (2011) *Cross-Border Migration among Latin Americans: European Perspectives and Beyond* (New York).
- E. Oteiza and S. Novick (2000) 'Inmigrantes y refugiados', in CELS (ed.), *Derechos Humanos en Argentina. Informe Anual* (Buenos Aires), pp. 287–342.
- M.E. Price (2009) *Rethinking Asylum: History, Purpose, and Limits* (Cambridge).
- United Nations High Commissioner for Refugees (UNHCR) (1984) *La Protección internacional de los refugiados en América Central, México y Panamá: problemas jurídicos y humanitarios – Memorias del Coloquio en Cartagena de Indias 1983*, pp. 332–9.