

Emília Lana de Freitas Castro

# Transnational Law of Human Mobility

Voluntary Migration in Brazil, Germany,  
the Mercosul and the EU

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Berlin, Germany

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*To all humans on the move  
To my parents*

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# Abbreviations

AFSJ	Area of Freedom, Security, and Justice
CARICOM	Caribbean Community and Common Market
CMC	Common Market Council/ <i>Conselho do Mercado Comum</i>
GMC	Common Market Group/ <i>Grupo Mercado Comum</i>
CCM	Trade Commission of MERCOSUL/ <i>Comissão de Comércio do MERCOSUL</i>
CNIg	<i>Conselho Nacional de Imigração</i> /National Immigration Council
CONARE	<i>Comitê Nacional para os Refugiados</i> /National Committee for Refugees
CTPS	<i>Carteira de Trabalho e Previdência Social</i> /Brazilian Work and Social Security Registry
CPF/MF	<i>Cadastro de Pessoas Físicas do Ministério da Fazenda</i> /Brazilian Individual Taxpayers Register
DNRC	National Department of Commercial Registration/ <i>Departamento Nacional de Registro do Comércio</i>
FCEE	Economic and Social Consultative Forum/ <i>Foro Consultivo Econômico e Social</i>
ECJ	European Court of Justice
EEAS	European External Action Service
EEC	European Economic Community
EU	European Union
FEM	<i>Foro Especializado Migratório do Mercosul e Estados Associados</i>
FRG	Federal Republic of Germany
FTAA	Free Trade Area of the Americas
GATT	General Agreement on Tariffs and Trade
GC	Geneva Convention
GDR	German Democratic Republic
IBGE	<i>Instituto Brasileiro de Geografia e Estatística</i>

IOM/OIM	International Organization for Migration/ <i>Organización Internacional para las Migraciones</i>
LAFTA	Latin America Free Trade Association
LAIA/ALADI	Latin American Integration Association/ <i>Associação Latino-Americana de Integração</i>
MERCOSUL/MERCOSUR	Mercado Comum do Sul/ <i>Mercado Común del Sur/Ñemby Ñemuha</i>
OUA	Organisation of African Unity
PARLASUL/PARLASUR	<i>Parlamento del MERCOSUR/Parlamento do MERCOSUL/MERCOSUL's Parliament</i>
PIL	Private International Law
POP	<i>Protocolo de Ouro Preto/Protocol of Ouro Preto</i>
RMI	Meeting of MERCOSUL Internal Affairs Ministers/ <i>Reunião de Ministros de Interior</i>
STF	<i>Supremo Tribunal Federal/Brazilian Supreme Federal Court</i>
STJ	<i>Superior Tribunal de Justiça/Brazilian Superior Court of Justice</i>
TCN	Third country national
TEC	<i>Tarifa Externa Comum/Common External Tariff</i>
TFEU	Treaty on the Functioning of the European Union
TPR	<i>Tribunal Permanente de Revisão/Tribunal Permanente de Revisión</i>
UN	United Nations
UNASUL/UNASUR/USAN	<i>União de Nações Sul-Americanas/Unión de Naciones Suramericanas/Union of South American Nations</i>
UNHCR	The Office of the United Nations High Commissioner for Refugees
USA	United States of America
WTO	World Trade Organization
WW II	World War II
WSG No. 10	Working Subgroup No. 10 of the Common Market Group on Labor Affairs, Employment, and Social Security

# Chapter 1

## Introduction



Even though it is not recognized as such in the global economy in general, migration figures as one of the constitutive processes of globalization in today's world (Sassen 1998, p. xxi). According to this reality, as McGrew (1992) argues, globalization concerns processes acting on a global scale, which go across the national boundaries by integrating and connecting communities and organizations in new combinations of space-time, turning the interconnected world into a reality and an experience widely intertwined. The new time and space features, resulting from compression of distances and time scales, encompass the most important aspects of globalization, exerting an effect on cultural identities. In this context, the understanding of time/space compression and identity is influenced by a multi-connected world, leading to the decentralization and the displacement of individuals, influencing the way they act, think, and communicate. The new pace of society is confirmed by Marques' words:

You may name as you please the phenomenon of market opening, bringing together people and companies of different nationalities and domiciles, massification of communications, consumption and transport, whether it is globalization or simply postmodernity, the internationalization of private life is the reality nowadays. [...] There are not any longer those who do not know the strength of *lex mercatoria*, the franchise contract of international brands, the international banking and financial system, or students of the Faculties of Law, Economics, and International Relations who are not curious as to get to know more on these phenomena on the international scene (Marques 2008, pp. 321–323).

Czaika and de Haas, while analyzing the context of surging migration, also correlate globalization and migration, stating that the first has facilitated the latter:

The core idea is that growing social, economic, and cultural interconnectedness epitomized by the concept of “globalization” has facilitated migration in ever greater numbers between an increasingly diverse and geographically distant array of destination and origin countries. Other factors that seem to explain surging migration are increasing international and domestic inequalities, the persistent demand for high- and low-skilled migrant labor in the segmented labor markets of wealthy societies, and the lack of opportunities, population growth, oppression, and violent conflict in developing countries (Czaika and de Haas 2015, pp. 285–286).

Given this outlook, the phenomenon of globalization and the consequent expansion of international trade and capital flows encourage States to strive so as to meet the requirements of the New International Economic Order.<sup>1</sup> Using this economic discourse, Bauman problematizes mobility, affirming that it “climbs to the rank of the uppermost among the coveted values – and the freedom to move, perpetually a scarce and unequally distributed commodity, fast becomes the main stratifying factor of our late-modern or postmodern times” (Bauman 1998, p. 2). In this sense, the economic, administrative and legislative strategies of States shall be consistent with the intense pace of movement of markets and people, avoiding stratification of society caused by migration.

However, at the same time in which legal reforms have been created in order to facilitate capital flow, there has also been a lack of legal innovation when it comes to people’s movement around the globe (Sassen 1998, p. xxi). After all, as Dauvergne affirms, “the mobility of people, or in economists’ terms ‘labor’, is never assumed to be as great as that of capital within the globalized economy” (Dauvergne 2008, p. 43).

It is in this context of bringing individuals and people together that one realizes that the displacement of human contingents from one country to another, in order to have better living conditions, opportunities and work is a social phenomenon, which seems to have been intensified with the advent of globalization (Pereira 2006, p. 85). Migration can be considered as a parameter of globalization and it should be seen in a complementary way to other parameters of globalization, such as the movement of goods, services, information, money and investment (Trachtman 2009, p. 10). In Oltmer’s words, “(. . .) migrations contribute to transformation processes as a result of globalization – they have altered the makeup of populations, and they have modified economic and social structures, religious practices, and forms of artistic expression” (Oltmer 2015, p. 54). Therefore, migration has functioned as a key factor in globalization in the last centuries and it is likely to remain so in the future.

In fact, since the origin of the *Homo sapiens* species until today, humanity has been expanding over the entire planet. Nevertheless, over the course of world history humans “have gradually invented new technologies that have accelerated [. . .] migrations” (Fisher 2014, p. xxi).<sup>2</sup> Still, if one compares migration at the very beginning of humanity with the migration the world faces nowadays, there is a considerable difference to be mentioned. At that time, the world was not intensely populated, but now immigrants have to increasingly adapt themselves to the new community they arrive in or expel communities from their new home territory (or be expelled by the communities already living there) (Fisher 2014, p. xii). Also, modern migration differs from migration in the beginning of world history, as society is now organized (grossly expressed) into nation-states and such states retain the control over the mobility of its population, requiring passports, visas and—consequently—

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<sup>1</sup>In order to better understand the origins and developments of the New International Economic Order, see Golub (2013).

<sup>2</sup>In this sense, see also: Goldin et al. (2010, pp. 11–12).

controlling their borders (Hirst and Thompson 1999, p. 257). Whether it is due to “voluntary” or “forced migration”,<sup>3</sup> the fact is that the movement of people from one country to another or from one region to another can occur temporarily or permanently. However, these movements have always brought along deep changes in the lives of migrants in their home countries, and certainly, in the receiving States (Pereira 2006, p. 85).

These changes to the movement of people have also occurred in the largest South-American country, namely Brazil. The origins of the modern Brazilian population can be traced back to the encounter of native Brazilians with Portuguese colonizers (Sampaio 2004, p. 13). In this context, the settlement of people in Brazil mainly occurred through immigration of the Portuguese, as well as of the people being brought from Africa, due to the Atlantic slave trade.<sup>4</sup> However, nowadays, Brazil receives people from different nations. These newcomers see in Brazil the opportunity to undertake their businesses, complete or start their studies, or even escape from dire situations in their home countries.

It is of great importance to note that, for decades throughout the twentieth century, Brazilians had envisioned better life choices and livelihood abroad, and Brazil has been considered as a country of emigration.<sup>5</sup> However, more recently, Brazil became a pole of attraction for migration flows, which results in the reception of immigrants both of low education and less skilled labor and skilled workers. Moreover, the European debt crisis in 2009 (Reusens and Croux 2017, p. 108) changed the profile of immigrants arriving in Latin America and the Caribbean and Brazil follows this trend of receiving European immigrants, at least until 2014/2015.<sup>6</sup>

It is in this context, that there is a pressing need to develop the legal and public policy pillars in order to receive these various categories of migrants in Brazil. For the first time in history, Brazil has begun to consistently receive individuals and

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<sup>3</sup>An in-depth analysis of both forced and voluntary migrations will be presented in Chap. 2 of the present work.

<sup>4</sup>It is important to note that we are not affirming that slave trade corresponds to an immigration movement to Brazil, as it is explained in Chap. 3 of this work.

<sup>5</sup>It is important to note that the flexibility of the job market, production restructuring, complete internationalization of national economies, and high interest rates imposed by the macro-economic adjustment according to IMF guidelines, among other factors, have contributed to the destruction of jobs and stagnation of the economy in developing countries such as Brazil, see: Pereira (2006, p. 87).

<sup>6</sup>According to the report released by the International Organization for Migration, there is a trend of increased migration flows from the European Union (EU) to Latin America and the Caribbean (LAC) region. At the same time, there is a decrease in the movement of people in the other direction. In this regard, see: Organización Internacional para las Migraciones (2015). Also, a Eurocentric point of view towards migration makes one forget that “the largest migration flows currently take place within less developed global regions and within the area of the former Soviet Union” (Straubhaar 2015, p. 238).

migratory groups, including at its borders.<sup>7</sup> A situation that has become increasingly similar to the one faced by industrialized countries in Central and Western Europe, in particular Germany. Today, taking the lead as one of the strongest economies in Europe, Germany has immigration policies that attract skilled and highly qualified people, not just from the European Union (EU), but also from third-countries. Within the context of the EU, there is a legal framework, which may serve as inspiration, but also, as a negative role model for the reconceptualization of political and legal intentions of the Brazilian State with regards to the reception of migrants in the country. Under this context, the new Brazilian Migration Law, which entered into force in November 2017, and its related policies should try to bring protection to immigrants, to promote the integration between Brazilians and immigrants, and to maintain a balance as regards the opportunities made available, whether for nationals, or for immigrants. This new law aims to transform the idea of being a foreigner into being a *migrant* and, therefore, having their dignity and their human rights guaranteed.

In this respect, we<sup>8</sup> will carry out an in-depth study of Brazil's and MERCOSUL's<sup>9</sup> legal framework on migration, as well as their projects and aspirations aiming at the consecration of a more conscious immigration policy compatible with the most recent needs of the Brazilian State. In this sense, the study of Comparative Law will be necessary in the present work. We will analyze the level of protection granted to immigrants regarding their liberty of entry and stay into/within Brazil and MERCOSUL, using Germany's and the EU's legal framework on migration as a parameter of comparison. After all, we believe that comparison gives jurists the opportunity to find the best solution for juridical problems faced in distinctive juridical orders (Kötz and Zweigert 1996, p. 14).

The first goal of the present study, which is outlined in the second chapter, is to problematize the definitions that are given to the phenomenon of migration, exploring its various nuances, as well as understanding the legal nature of Migration Law in the contexts of Brazil, Germany, and the EU. A conclusion about the taxonomy of Migration Law is suggested putting the rights of migrants in a transnational law context. It is important to mention that the goals of the present work relate to

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<sup>7</sup>A recent inflow of Haitian nationals to Brazil is already considered to be the greatest migration wave to Brazil in the last 100 years and around 80 Haitians cross the Brazilian Amazon borders every day, see: Godoy (2011). Not to forget the recent Venezuelan influx into Brazil, which is also mentioned in the course of this study.

<sup>8</sup>The use of the of first-person plural pronouns in this work intends to evoke a sense of commonality and rapport between the writer and the reader.

<sup>9</sup>We have decided to refer to the Southern Common Market with the abbreviation MERCOSUL (*Mercado Comum do Sul*), once, in the present work, the Portuguese version of the name of the common market shall prevail rather than the Spanish one (*Mercado Común del Sur—MERCOSUR*).

voluntary migration: international refugee law and related aspects are not included in the analysis of the present work.<sup>10</sup>

The third chapter presents the history of migratory movements in Brazil and Germany and, at this point, we can already draw the first differences between the current migration law and policies of both countries. These historical comparisons are considered as an essential element for the understanding of the migration cultures of Brazil and Germany, and, consequently, in MERCOSUL and the EU, respectively, opening space for an easier development and comprehension of a new migration law for that South-American country.

The fourth chapter is dedicated to the study of the legal framework on migration in Brazil and in MERCOSUL. Firstly, we provide an in-depth study of the new Brazilian Migration Law. The chapter begins with a presentation of whom the new law addresses, followed by an analysis of its extensive principles and guarantees. Additionally, in order to understand the level of protection provided to immigrants in Brazil, we analyze and comment on the Brazilian Migration Law's provisions on immigrants' rights of entry and settlement, which includes provisions on border policies and visa requirements. Also, the provisions on mandatory departure of a non-Brazilian from the national territory are presented and analyzed (namely, the measures of repatriation, expulsion, and deportation), so that we can understand the legal limitations of an immigrant within Brazilian territory. In order to identify to what extent the national legal framework influences the supranational framework and/or vice versa, we present, still under the context of the fourth chapter of this work, MERCOSUL's general structure. Thereafter, we present the legal framework on migration existent in MERCOSUL, exposing its limited accomplishments under the scope of MERCOSUL law, as well its approach to both MERCOSUL citizens and non-MERCOSUL citizens in respect of the possibilities they have regarding their freedom of movement.

The fifth chapter draws a parallel with the fourth one, and, therefore, its structure is similar to the one contained in Chap. 4. Chapter 5 firstly explores the general rules of entry of immigrants of a third-country into German territory (Sect. 5.1). Following that, attending to a methodological cut-off (which is discussed at the beginning of the chapter), the subchapter separates the analysis into: (a) the rights of third-country nationals who reside in Germany for educational purposes; and (b) the rights of residence of third-country nationals who reside in Germany for economic purposes. We further analyze the third-country nationals' termination of stay within the country, establishing the rules for expulsion, removal, and deportation. Section 5.2 presents an analysis of EU law on the freedom of movement. In this regard, we relate EU citizenship to the freedom of migration of EU citizens within the EU, specifying its general rules on entry and stay of EU citizens and their family members within the Union. Restrictions on the right of free movement and residence on grounds of

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<sup>10</sup>This cut-off is substantiated in Sect. 2.1 of this book. Despite this methodological cut-off, it is fundamental to understand the differences between voluntary and forced migration, so that it can be possible to rethink both migration concepts, as we will see in the next chapter.



public policy, public security or public health are also discussed, as well as the protection guaranteed under EU Law against the expulsion, and the possibility of compulsory termination of stay, of EU citizens on the grounds of abuse of rights or fraud (Sect. 5.2.1).

The following Sect. 5.2.2 details the EU's approach on migration directed to third country nationals, which includes not only a brief explanation on the migration agreements between the EU and third countries, but also a selection of the EU's Directive on migration that rule the entry, stay and compulsory termination of stay of third-country nationals, namely: (a) Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents; (b) Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment; (c) Directive 2011/98/EC of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State; and (d) Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. All these Directives conform to the methodological cut-off used in Sect. 5.1. It is relevant to mention that both Chaps. 4 and 5 offer a synthesis of the most important legal elements inherent to the scope of the legal framework which is presented. In this sense, the reader shall not hope for a commentary on every single provision of the laws and acts presented, but he/she should be aware of the rights and conditions granted/imposed on to immigrants that play an important role on immigrants' freedom of entry and stay in Brazil/MERCOSUL and in Germany/EU.

This work will consist of legal hermeneutics, comparative research method,<sup>11</sup> and existing scholarly legal research.<sup>12</sup> The existing scholarly legal research will contribute to develop the work's research questions, as well as the concepts and definitions involved in the research study. For the legal hermeneutics, primary legal materials will be used, such as norms on constitutional and migration law from Brazil, migration laws from Germany, as well as primary and secondary legal sources of the EU that relate to migration. We will also make use of reports drafted by governments, international organizations and statutory bodies, as well as case law. Secondary legal materials such as textbooks, commentaries, law and social science articles, case commentaries, opinions and newspapers will also be used as sources to comprehend underlying legal reasoning of primary legal texts.

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<sup>11</sup>In the context of the present work, this relates to the comparison of national—and supranational—legal systems, putting aside the academic discussions on whether comparative law should be considered as a science or as a mere method of study and research (or only even a technique). For both sides of this discussion, see: Öricü (2007, p. 62). Jürgen Basedow, for instance, considers comparative law as a method, not as a science, see: Basedow (2014).

<sup>12</sup>We based our research methods on Corten (2009) and Goodrich (1985). Other insightful references are: Baude and Sachs (2017).

The comparative research method will consist of the micro- and macro-comparisons (Kötz and Zweigert 1996) arising from the doctrinal research that will be carried out on Brazilian and MERCOSUL laws on migration and the German and European legal framework on migration.<sup>13</sup> The conclusions taken from these comparative methods should be used in order to reflect upon the following research questions:

- Which is the most suitable taxonomy (or legal nature) to be given to migration law, considering the differences between the legal orders selected for this work?
- Which legal framework on migration (Brazilian, under the context of MERCOSUL law or German with the EU law background) provides greater protections of the freedom of movement?
- How effective is Brazil's new migration law in terms of freedom of movement (solely considering the facilitation of entering and staying into/within the country)?
- Is it possible to refer to a MERCOSUL legal framework on migration?

The final step and main goal of the work aims to suggest a model of public policy and immigration law to the Brazilian State, contributing to Brazil's inclusion in the list of countries that attract a foreign working force, and provide these people with equal legal treatment. It is necessary to envision, for Brazil, legal and political strategies, informed by mistakes and successes from foreign legal systems, and long-established immigration policies defined for some years now, so that it is possible to develop strategies and goals that correlate to the reality in which Brazil finds itself. The study of foreign legal systems provides the lawmaker in Brazil with a greater legal foundation,<sup>14</sup> so that it is possible to draw a parallel and better organize the immigration policies in Brazil; criticize the country's new migration law; and propose common public policies and legal instruments taking effect within MERCOSUL.<sup>15</sup>

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<sup>13</sup>The comparison of national legal systems is the most common geographical level of comparison, according to Van Hoeckel (2015, p. 3).

<sup>14</sup>Considering that Comparative Law has, as one of its goals, the improvement of one's own legal system, as systematically summarized in Van Hoeckel (2015, pp. 2–3).

<sup>15</sup>It is situating the object of study in comparative work that the legal scholar can innovate in his/her research, if he/she considers "a more diverse array of countries and legal systems, devoting more attention to the causes and consequences of different national and regional approaches, and drawing on social sciences methods", see: Roberts et al. (2015, p. 474). These thoughts are also brought by Peter Häberle (1992, pp. 1034–1035), when he affirms that, because the world moves together, different nations and countries share the same problems and, therefore, it is more likely that these problems could be solved in the same way around the globe. In this context, the acquisition from (at a first moment) foreign legal and cultural elements (*Rezeption*) might serve for the solution of a problem of a specific legal order.

## References

- Basedow J (2014) Comparative law and its clients. *Am J Comp Law* 62(4):821–857
- Baude W, Sachs SE (2017) The law of interpretation. *Harv Law Rev* 130(4):1079–1147
- Bauman Z (1998) *Globalization. The human consequences*. Columbia University Press, New York
- Corten O (2009) *Méthodologie du droit international public*. Éditions de l'Université de Bruxelles, Brussels
- Czaika M, de Haas H (2015) The globalization of migration: has the world become more migratory? *Int Migr Rev* 48(2):283–323
- Dauvergne C (2008) *Making people illegal: what globalization means for migration and law*. Cambridge University Press, New York
- Fisher MH (2014) *Migration: a world history*. Oxford University Press, New York
- Godoy GG (2011) O caso dos haitianos no Brasil e a via da proteção humanitária complementar. In: Ramos A, Rodrigues G, de Almeida GA (eds) *60 anos de ACNUR: perspectivas de futuro*. Editora CL-A Cultural, São Paulo, pp 45–68
- Goldin I, Cameron G, Balarajan M (2010) *Exceptional people: how migration shaped our world and will define our future*. Princeton University Press, Princeton
- Golub PS (2013) From the new international economic order to the G20: how the 'global South' is restructuring world capitalism from within. *Third World Q* 34(6):1000–1015
- Goodrich P (1985) Legal hermeneutics. An essay on precedent and interpretation. *Liverpool Law Rev* 7(2):99–155
- Häberle P (1992) Theorieelemente eines allgemeinen juristischen Rezeptionsmodells. *Juristenzeitung* 47(21):1033–1043
- Hirst P, Thompson G (1999) *Globalization in question: the international economy and the possibilities of governance*. Polity Press, Malden
- Kötz H, Zweigert K (1996) *Einführung in die Rechtsvergleichung: auf dem Gebiete des Privatrechts*. Mohr, Tübingen
- Marques CL (2008) Ensaio para uma introdução ao direito internacional privado. In: *Direito CAM, Trindade AAC, Pereira ACA (eds) Novas perspectivas do direito internacional contemporâneo: estudos em homenagem ao professor Celso D. De Albuquerque Mello*. Renovar, Rio de Janeiro, pp 319–350
- McGrew A (1992) A global society. In: Hall S, Held D, McGrew A (eds) *Modernity and its futures*. Polity Press/Open University Press, Cambridge, pp 61–116
- Oltmer J (2015) Migration is historically normal. Europe as source and destination of global population movements. In: Arcarazo DA, Wiesbrock A (eds) *Global migration – old assumptions, new dynamics, Volume I*. Praeger, an Imprint of ABC-CLIO, Santa Barbara, pp 31–58
- Organización Internacional para las Migraciones – OIM (2015) *Dinámicas Migratorias en América Latina y el Caribe (ALC), y entre ALC y la Unión Europea*. Available via [http://publications.iom.int/system/files/pdf/dinamicas\\_migratorias\\_2015.pdf](http://publications.iom.int/system/files/pdf/dinamicas_migratorias_2015.pdf)
- Örücü E (2007) Developing comparative law. In: Örücü E, Nelken D (eds) *Comparative law: a handbook*. Hart Publishing, Oxford, pp 43–66
- Pereira ACA (2006) Os direitos do trabalhador imigrante ilegal à luz da Opinião Consultiva 18/03 da Corte Interamericana de Direitos Humanos – CIDH. In: Barroso LR, Tiburcio C (eds) *O Direito Internacional Contemporâneo – Estudos em Homenagem ao Professor Jacob Dolinger*. Renovar, Rio de Janeiro, pp 85–109
- Reusens P, Croux C (2017) Sovereign credit rating determinants: a comparison before and after the European crisis. *J Bank Financ* 77:108–121
- Roberts A, Stephan PB, Verdier P-H, Versteeg M (2015) Comparative international law: framing the field. *Am J Int Law* 109(3):467–474
- Sampaio AM (2004) *Brasil, síntese da evolução social*. Scortecci, São Paulo
- Sassen S (1998) *Globalization and its discontents: essays on the new mobility of people and money*. New Press, New York

- Straubhaar T (2015) Towards a European refugee policy. *Intereconomics* 50(5):238–239
- Trachtman JP (2009) The international law of economic migration: toward the fourth freedom. W.E. Upjohn Institute for Employment Research, Kalamazoo. Available via [https://research.upjohn.org/up\\_press/14/](https://research.upjohn.org/up_press/14/)
- Van Hoeckel M (2015) Methodology of comparative legal research. *Law Method* pp 1–35

## Chapter 2

# On the Legal Nature of Migration Law in Brazil, Germany and the European Union



In this second chapter, we will conduct an analysis explaining how Migration Law is seen, both under Brazilian Law and EU Law, including some elements of German Migration Law. The main goal of this chapter is to identify—through Comparative Law—the differences regarding treatment given to the subject in these juridical orders. The reason for this comparison relies on the fact that, depending on the juridical order in which Migration Law is inserted, several names and different types of conduct can be attributed to the same social phenomenon, namely migration. This chapter tries to prove that, depending on the classification given to Migration Law, the phenomenon of migration can be seen from a perspective which—not always—fits to the necessities of migrants, but to the necessities of the host States.

Before presenting these differences,—and in order to better understand why they exist—, it is important to first define in this second chapter what migration is and the characteristics of the people who are considered to be migrants. These initial explanations will be followed by a common basic distinction made between forced migrants and voluntary migrants. Special attention must be paid to this distinction, since the structure and the comprehension of this work depend on it. Lastly, this explanation will be followed by an in depth analysis of the legal nature of Migration Law under Brazilian and EU law, with references to some aspects of German law.

Law, wherever it is developed or applied, possesses certain features. These features give law its very nature, or essence. We presume for the initial discussion that law is not the only normative domain in our culture, and we affirm that “morality, religion, social conventions, etiquette, and so on, also guide human conduct in many ways which are similar to law” (Marmor and Sarch 2015, p. 1). It is for this reason, that in order to understand how different legal orders understand what migration is, the “understanding of the nature of law consists in an explanation of how law differs from these similar normative domains, how it interacts with them, and whether its intelligibility depends on other normative orders, like morality or social conventions”. The analysis of the nature of the law starts in this chapter and continues in Chap. 3, where the historical basis of this analysis will be established.

## 2.1 Defining Migration

According to Clarke, the term migration identifies the movement of people and populations between States and continents (Clarke 2011, p. 1). The United Nations (UN) has defined migration together with the definition of “international migrants”: according to the UN, international migrants are “any person who changes his or her country of usual residence” (United Nations Statistics Division 1998, p. 9).

Furthermore, Massey and Taylor (2004, p. 383) agree that, in order to define a “move”, it is necessary to fix a line, so that it can be crossed. According to the authors, where this line should be crossed is a matter of social and political construction (and, according to our perspective, it is also a matter of legal construction).<sup>1</sup> Massey and Taylor do not consider international migration as the simple crossing of international boundaries, as this crossing depends on the actor (who is crossing,) and also on the intention of the actor.

Indeed, if a person crosses the border into another country and does not have the intention of living there, this person can be considered, for instance, a tourist. This definition presented by the authors can be connected to the definition of the term *foreigner*. Being a foreigner means that a particular person does not have a specific nationality (Lopes 2009, p. 31). According to Carmen Tiburcio, this means that all those who *do not*<sup>2</sup> have a specific nationality (in Tiburcio’s explanation, the Brazilian nationality) are to be considered as foreigners within the respective country (Tiburcio 2001, p. 1).<sup>3</sup> In this sense, according to Garcia, it seems to be correct to affirm that the differentiation between a national and a non-national of a particular country represents the grounds for the establishment of the rights of foreigners/immigrants, but it does not mean that this differentiation represents a discrimination against foreigners/immigrants (Garcia 2015, p. 154).

On the other hand, migrants are those who move from one country to another, either if one refers both for immigration or emigration. Immigrants are, therefore, foreigners, but not all foreigners are automatically considered migrants or immigrants. Taking once again the example presented above, tourists fall under the category “foreigners”, but are not immigrants, since they have their permanent residence in a country which is not the one they are currently in. Whether or not they are considered as an immigrant, the fact is, that affixing the title “foreigner” to an individual has clear negative connotations. The intention of the expression is to exclude those people from the native people. This exclusion, which can at times also

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<sup>1</sup>The social, political and legal constructions of migration are also analyzed and discussed by Bast (2011). According to the author, the legal migration management concurs with various perspectives, including cultural and economic ones.

<sup>2</sup>The same excluding explanation works for the definition of foreigner under German Law as well, see: Renner (1998, p. 73), as well as § 2 (1) of the German Residence Act, and Hailbronner and Herzog-Schmidt (2016, p. 11).

<sup>3</sup>Following Tiburcio’s definition, see: Cahali (2011, p. 26).

convey a feeling of hate, is, to some extent, being explored by jurists<sup>4</sup> but mainly by social scientists.<sup>5</sup>

According to Kälin and Künzli, movements of populations might be voluntary or forced ones and they might occur inside a country's territory or across the borders of a country. Considering this description, both authors affirm that four different groups of people—because of different characteristics—need protection from both Human Rights and Migration Law:

- (1) Menschen, die sich frei entscheiden, ihren Wohnort aus ökonomischen, familiären oder anderen Gründen zu verlassen, und sich an einem anderen Ort im eigenen Land niederlassen;
- (2) Migrantinnen und Migranten, die aus den gleichen Gründen in ein anderes Land ziehen;
- (3) Binnenvertriebene, d. h. Menschen, die zum Verlassen ihres Wohnortes gezwungen werden und in einem andern Teil des eigenen Landes Zuflucht suchen [...]; und
- (4) Flüchtlinge, die gezwungen sind, im Ausland Schutz vor Verfolgung oder Vertreibung zu finden (Kälin and Künzli 2008, p. 577).<sup>6</sup>

Thomas Straubhaar dedicates his work *On the Economics of International Labor Migration* to the international migration of a labor force and he defines it as a spatial, social and non-forced movement of people from one country to another (as well as from one social system to another). According to Straubhaar (1988, p. 47), these migrants leave their countries for economic reasons and they intend to stay abroad for more than 12 months.

This 12-month period is considered for the sake of having an accurate measure of global bilateral flows (Skeldon 2013, p. 2), and it is the same period of time the UN uses to define the long-term migrant. As stated by the UN in the Recommendations on Statistics of International Migration Revision (1998, p. 10), the long-term migrant is:

A person who moves to a country other than that of his or her usual residence for a period of at least a year (12 months), so that the country of destination effectively becomes his or her new country of usual residence. From the perspective of the country of departure the person

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<sup>4</sup>Foreignness in migration law has been discussed and conceptualized by approaching securitization, irregular migration and international crime matters, see: Rubio-Marín (2014, p. 2). See also: Dauvergne (2008) and Pallida (2011). About criminalization of immigrants, see also: Fan (2014).

<sup>5</sup>Bill Ong Hing presents a multi-stepped approach towards immigrants and goes beyond this abovementioned negative approach, in which the immigrant is firstly labeled a problem through demonization. Afterwards, the immigrant is dehumanized, until at last his or her actions can be criminalized, see Hing (1998, p. 81). Based on Norbert Elias's studies, Rosalina Campos uses the sociology of migration to explain the rejection of the *outsiders*. Campos presents different grades of foreignness, which depend on the power relations between the host society and the group of foreigners, see: Campos (2011). See also: Booth (1997).

<sup>6</sup>A free translation of this extract into English has been made by the author: (1) persons who freely choose to leave their place of residence for economic, family or other reasons, and settle in another region, in another place, in their own country; (2) migrants who, for the same reasons stated above, move to another country; (3) internally displaced people, i.e., people who are compelled to leave their place/region of residence and seek refuge in another part of their own country [...]; and (4) refugees, who are forced to find protection abroad because they suffer from persecution or expulsion.

will be a long-term emigrant and from that of the country of arrival the person will be a long-term immigrant.

The UN continues its explanation and defines the short-term migrant as:

A person who moves to a country other than that of his or her usual residence for a period of at least 3 months but less than a year (12 months) except in cases where the movement to that country is for purposes of recreation, holiday, visits to friends and relatives, business, medical treatment or religious pilgrimage. For purposes of international migration statistics, the country of usual residence of short-term migrants is considered to be the country of destination during the period they spend in it.

These time and circumstance limitations defined by the UN might be suitable for the situation of many migrants. However, there are some situations which might be not included in the UN's definition. One could think about, for example, an international student from China who decides to spend 6–12 months in a German University. This student cannot be considered either a long-term migrant (because he or she is still within the 12-month period), or even a short-term migrant (as he or she does not fulfill the purposes indicated by the UN). Nevertheless, this student will have to satisfy all obligations as an immigrant in Germany, obtaining the specific visa, making his or her resident registration at the city he or she lives in, for example, opening a bank account and acquiring health insurance.

Therefore, both the UN's time and circumstance metrics contained within the definitions should be considered as purely illustrative ones, used solely for the sake of helping the UN to provide international migrations statistics.<sup>7</sup> In fact, international migration is otherwise *conventionally* “defined as a form of human mobility that fulfills a space-based (that is, crossing state borders) and a time-based (usually, one year of residency) condition” (Recchi 2015, p. 149). After all, migrants are human beings moved by passion, by natural, economic and social circumstances and, therefore, it is difficult for researchers to identify whom should be given the status of a long-term or a short-term migrant. Arbitrary distinctions do not always help when defining and studying migration, especially because human mobility can be both positively and negatively-oriented, as Sirkeci and Cohen (2016, pp. 382–383) brilliantly state:

Migration, when approached and defined in rational terms ignores the conflictive decision-making that frames mobility, the dynamic nature of human movements and overlooks the nature of mobility (including the length of a sojourn) which can be for shorter periods and circular and reproduced and repeated over time. Emphasising rational decision-making builds a rosy and hopeful story and assumes that human mobility is always positively-oriented. In other words, a traditional approach to migration argues that movers are in search of ‘a better life’ seeking to improve their economic status, advance their studies, nurture intellectual needs and gain freedoms. Stated briefly, people move towards (and want to move towards) better opportunities. Much contemporary mobility follows a rather less positive

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<sup>7</sup>Hanlon and Vicino (2014, p. 5) draw attention to the fact that “in many cases the official statistics on migration do not include people who have entered a foreign country without the required legal documentation”. That means that many official statistics might not have registered the so-called illegal or irregular migrants.



model, where it [...] is often driven by conflict. People move away from difficulties, challenges, conflicts, oppression and restraints that range from the small and immediate to the large and long term.

Although all the definitions presented above indicate different perspectives, it is not difficult to understand that international migration has to do with movements of people and that migration “is only one specific, politically [and legal] shaped subset of all the possible manifestations of human mobility” (Recchi 2015, p. 149). Also, international migration “is often seen as the main process leading to the redistribution of population” and has become a key component for population growth in some regions of the world (Zlotnik 2004, p. 33).

Therefore, in this context, even though migration also occurs within the territory of one country, this work is specifically devoted to the issues of international migration. For this reason, the term “migration” in this work is to be understood and used in the sense of “international migration”.<sup>8</sup>

Migration is a complex phenomenon that comprises political, legal and economic aspects. Besides, the term migration also implies multiple options (e.g., one-directional and multiple, temporary or long-term, voluntary or forced, free or unfree) (Harzig and Hoerder 2009, p. 3). Whether it represents an economic and social problem or an economic advantage, both the host country and the country of origin can consider the phenomenon of migration from several perspectives (Veloso Leão 2013, p. 97). For this reason, different countries have different attitudes towards migration and develop different migration policies.

Therefore, countries of destination, and countries of origin, of migrants adopt laws and regulations that are often intended not only for protecting immigrants, but also for limiting and regulating their lives in the host country. These limitations are usually much more stringent and stricter than, for example, those regulating international investment law or international trade law, such as those related to the sale of certain goods in a specific region or country.

In this context, according to Massey and Taylor (2004, p. 377), “the flows of goods, capital, commodities, and information are accompanied by a rising volume of immigration”. Therefore, at the same time, emigration is “rooted in structural transformations that follow countries’ incorporation into the global market economy”. In this regard, both authors identify that there is a contradiction, that connects massive economic power and control of migration: “today’s core economic powers all seek to impose controls and limitations on the movement of people.” Massey and Taylor complete their arguments by stating that the deregulation and globalization of all markets, except for the labor market, are characteristics of today’s global economy. Whether this scheme will survive in the next years, and how this apparent contradiction will be resolved is one of the biggest questions of this century (Massey and Taylor 2004, p. 378).

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<sup>8</sup>Throughout this work, the term “migration”, combined with the expression “movement of people” will be the two most used words to refer to human mobility.