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## **Migration, Citizenship And Free Movement In South America: A Rights-Based Analysis Of Regional Initiatives**

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# Migration, Citizenship and free movement in South America: A Rights-based Analysis of Regional Initiatives<sup>1</sup>

## *Introduction*

In December 2010, Council Decision 64/10 of the Southern Common Market (MERCOSUR) approved the formulation of “a plan of action for the gradual formation of a Statute of MERCOSUR Citizenship.”<sup>2</sup> According to article 6 of this decision (henceforth Decision 64/10 or Decision), the plan should be fully implemented by 2021, at which time the regional block’s 30<sup>th</sup> anniversary will be celebrated.

This Decision can be characterized as a step towards a new phase in the regional integration of MERCOSUR countries (and eventually, associate members<sup>3</sup>), especially, in expanding freedom of movement and equitable social integration for their populations. The implementation of the plan can also simultaneously serve as a fundamental base by which to increase the protection of migrants’ rights and enact migration policies that have a comprehensive and integrated focus, rooted in the fundamental principles of human rights.

It could also be stated that this decision is the reasonable consequence of a set of important initiatives adopted by the countries of the region in the field of migration policies, circulation of people, and migrants’ rights, during the last decade. The Mercosur Residence Agreements (Brasilia 2002), might be identified as a key starting point of this process. In addition, as we will examine in this paper, the formative treaty of UNASUR (Union of South American Nations), as well as several declarations made by these countries since then, evidence a shifting trend of migration policies in the region.

Based on these recent policy developments, South American countries have been progressively taking some lead in promoting decisive change in migration policy in recent international forums, as well as at national and regional level. Notwithstanding this new scenario, some of these initiatives – and particularly, the decision 64/10 – might also generate undesirable or contradictory effects: the very proposal for extending rights and liberties can end up limiting them. This refers to the possibility that the “Statute of MERCOSUR Citizenship” might become an exclusionary and restrictive mechanism, jeopardizing the rights of some types of migrants that reside in or try to enter one of the countries in the region.

After examining the decision adopted by MERCOSUR and its antecedents in the region, we will see to what extent these decisions might impact the human rights of migrants: those that move between MERCOSUR countries and those who migrate from other regions. In addition, we will also explore the Decision’s practical implications for

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<sup>1</sup> The paper was translated and revised by Marinka Yossiffon, UNLa. All quotes are unofficial translations, unless otherwise noted.

<sup>2</sup> MERCOSUR/CMC/DEC. N° 64/10, Decision approved December 16th, 2010 in Foz de Iguazú.

<sup>3</sup> The full members of MERCOSUR are Argentina, Brazil, Paraguay, Uruguay, and Venezuela. As of December 2012 the associated countries are: Bolivia, Chile, Colombia, Ecuador, and Peru. Namely, Mercosur full and associate members are all South American countries except Guyana and Surinam.

entering and accessing residence in MERCOSUR countries—especially for migrants that are not nationals of one of the states parties.

Then, we will consider these regional initiatives in light of the changes to legislative and migration policy that have been enacted recently in some regional countries. It is important for us to contemplate to what extent advancing regional free circulation might actually lead to regressive (or contradictory) setbacks for these new immigration laws that seek to increase migrants' rights. We should also consider how, on the contrary, if the broad initiative ends up complementing the positive changes in particular countries, this would contribute to solidifying a new paradigm for migration policy and human rights.

Ultimately, this paper seeks to offer some ideas and reflections, while also posing questions, about a process that is still in its formative years. Precisely for this reason, the objective is to contribute to the discussions and proposals that will be generated over the next few years as a result of the formulation of the Plan of Action for the creation Statute of MERCOSUR Citizenship.

### ***The Plan of Action for the Statute of MERCOSUR Citizenship***

Describing the Plan of Action for the Statute of regional citizenship, article 2 of Decision 64/10 establishes that: “the Statute of *MERCOSUR Citizenship* shall be composed of a group of fundamental rights and benefits for all nationals of the states parties of *MERCOSUR*, and shall be based on the following objectives, among others, appropriately set forth in the Founding Treaties of *MERCOSUR* and subsequent laws: Implementation of a policy of free circulation of people in the region; equal civil, social, cultural and economic rights and liberties for the nationals of all *MERCOSUR* states parties; equal of conditions of accessing work, health, and education.”

In order to forward the general objectives outlined in article 2, the Plan of Action then stipulates that it will be composed of the following elements: 1) circulation of people 2) borders 3) identification 4) documentation and consular cooperation, 5) work and employment, 6) social welfare, 7) education, 8) transportation, 9) communication, 10) consumer protection 11) and political rights. In what follows, we will limit the discussion to those objectives that are relevant to the goals of this paper.

On the issue of circulation and borders, the decision merely mentions facilitating transit and circulation within MERCOSUR territory, simplifying procedures and making the migration control process more flexible. It refers to the gradual harmonization of customs and migration documents (§ 3.1). Regarding employment, it then stipulates “the development of regional plans for facilitating the circulation of laborers” (§ 5.7).

Two observations are useful at this point. First, that at least in this foundational phase, no reference is made to the possible elimination of borders and border controls between the countries that comprise MERCOSUR. Second, it is striking that the text specifies the circulation of “laborers” but not people in general. This omission could result in criteria that limit mobility based on the needs of the receptor state’s labor market. Such a restrictive scenario would not be consonant with some regional and national laws already in force. As we shall see below, some states already have norms that do not

limit the entry or residence for any specific migratory group of nationals of regional countries.

On the subject of work and employment, Decision 64/10 posits revising the MERCOSUR Socio-Occupational Declaration,<sup>4</sup> strengthening the Socio-Occupational Commission; strengthening the employment market observatory; developing employment guidelines; developing regional plans on child labor, work inspection, and (as already noted) facilitating worker circulation (§ 5). The Decision does not explicitly raise equality of labor rights or even mention the right to work at all, nor does it refer to immigration status (or whether authorization of residence is required in order to work). Nevertheless, we should expect that these questions will be addressed in the formulation phase of the Plan of Action.

As regards the right to social security, integrating information registers on pension and employment among the all states parties has been proposed. This would be a way of simplifying procedures, securing information, formulating public policy, and streamlining the award of benefits (§ 6). Issues relevant to migrants' right to social security, such as the unrestricted transfer of remittances are absent. Nevertheless, it is conceivable that the application of other international instruments (such as International Convention on the Protection of the Rights of All Migrant Workers and Their Families, and the Multilateral Agreement about Social Security in MERCOSUR) will facilitate its inclusion in the Plan of Action.

On the subject of education, article 7 mentions "the simplification of administrative formalities for revalidating course work and higher education degrees, reinforcement of the ARCU-SUR system for complete revalidation of upper level classes and the creation of a frame-work agreement on mobility for the establishment of a mobility zone (for students, professors and researchers) and academic exchange" (§ 7). There is no mention of migrants' right to education or equal educative conditions between nationals and migrants. In addition, the Plan refrains from any pronouncement on health care, beyond its generic mention in article. However, this does not preclude the introduction of important elements regarding migrants' right to health into the scope of the Plan of Action.

In reference to the question of political rights, the Decision proposes "evaluating conditions for the progressive advancement of political rights, including the possibility of electing members of the MERCOSUR parliament, according to national legislation regulating their exercise, favoring MERCOSUR State citizens that reside in another state party of which they are not nationals" (§ 11). As can be seen, the Decision undertakes the project of this evaluation without affirming the equality of political rights (at least not on local and regional levels). In any event, the debates that emerge during the formation of the Plan of Action as well as the current laws of some countries will be decisive in transforming this declaration of intentions into policies that tangibly recognize political rights for migrants.

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<sup>4</sup> Approved in Rio de Janeiro December 10, 1998. Article 4.2 states the following: "the state parties promise to adopt measures that tend toward establishing common laws and procedures regarding the circulation of laborers in border zones and to undertake the necessary action toward the goal of bettering employment opportunities and work conditions and the lives of these workers". For a more exhaustive analysis of the declaration see Malm Green (2008) y Ermida Uriarte (2002).

Finally it is important to note that beyond the subjects—rights—mentioned or omitted in this decision, among the most important and noticeable absences is that of: MERCOSUR associate states. It seems odd that the resolution has not broached the possibility of extending the Statute of Citizenship to associate countries of the regional bloc (either through the adhesion of states or other mechanisms). This is especially conspicuous for several reasons:

First, the expanded MERCOSUR—full and associated members—includes practically all the countries that make up the Union of South American Nations (UNASUR). These are the same ones that also participate annually in the South American Conference on Migration (CSM). In both of these zones, as will shortly be seen, many declarations and initiatives have been made about free circulation and the rights of migrants. Second, the associate states have already signed agreements that have been a basis for the adoption of Decision 64/10. Finally, given precisely this context, some countries have already streamlined their internal legislation to the Decision; but they have done so with increased protections for regional nationals (expanded MERCOSUR), and in certain issues, all migrants.

How will the new phase of the regional integration, as reflected by these aspects of Decision 64/10, impact the rights of the migrant population (nationals of states parties or nationals of other countries)? The Decision's proposal for recognizing rights and equality of conditions between nationals and foreigners are limited to those who are "Nationals of a Party State." Attributing rights based on nationality, as would emerge from a statute of regional citizenship, is one of the most complex and interesting—albeit controversial—issues of this initiative. Before getting into the analysis of this issue, it is important to offer a brief description of some previous decisions adopted by the countries of this region.

#### *Migrants' Rights and Free Circulation in South America: Some Antecedents*

MERCOSUR, as other regional integration processes, was born out of an economic commercial union. For this reason, the priority of free movement was originally granted to liberating the circulation of goods and merchandise. The free movement of people was not established as such; instead it emerged tacitly, out of the general, largely economic notion of circulating of factors of production (Corti Varela 2011).<sup>5</sup>

The free movement initiatives designed within MERCOSUR so far reveal important differences compared with the European Union, the regional zone that had gone farthest in this issue until now. Cardesa Salzmann (2011) points out that the normative framework of MERCOSUR departs widely from European integration efforts regulating of the right to freedom of movement. In Europe the movement of people is not linked to exercising economic activity; the only requirement is possession of a valid identity document; the right itself is exercised within a so-called *Area of Freedom, Security, and Justice*. The elimination of border controls within the EU (Cardesa Salzmann 2011)<sup>6</sup> has

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<sup>5</sup> The Treaty of Asunción announces precisely this: "Common Market involves: The free movement of goods, services, and factors of production between countries through, *inter alia*, the elimination of customs duties and non-tariff restrictions on the movement of goods, and any other equivalent measures" [art. 1; official translation].

<sup>6</sup> For a more detailed analysis of the different legal antecedents, proposals, and initiatives that have been designed in MERCOSUR on the issue of free circulation of workers/migrants, in addition to the cited works of Cardesa Salzmann (2011) and Corti Varela (2011), see, Aguirre and others (2009) and Robles (2004). About the historic development and legal scope of the right to free movement in the E.U., see López-Jacoiste (2011).

no correlation so far in MERCOSUR, although the documentation requirements for exercising movement have been eased.

Of the instruments regionally adopted on this subject, the most important—in general and in the context of this paper—is the Residence Agreement approved in Brasilia on December 6, 2002.<sup>7</sup> The Agreement objectives reveal the goal of strengthening the ties that bind the regional community and reaffirming “the desire of the States Parties and Associates of MERCOSUR to strengthen and deepen the process of integration.” It goes on to emphasize “that the implementation of a policy of free movement of people in the region is essential for the realization of these objectives.” In article 1, the Agreement establishes that “[t]he nationals of a Party State that wish to reside in the territory of another Party State may obtain legal residence in the latter [...] by accrediting their nationality.”

This agreement introduced a new category of residence into the legislation of the regional countries, one based specifically on nationality. In this way, the possibility of residing in the territory of a state party was no longer based on—as had formerly been the case—the possession and accreditation of a “traditional” migration criterion (being a worker, student, family member—spouse, child—of a national or resident), instead possessing nationality of one of these signatory countries became sufficient.<sup>8</sup>

Two previously mentioned issues emerge from this. On one hand, this flexibilization of residence criteria was not accompanied by a process that contemplated, even a gradual, elimination of borders between countries. On the other hand, a new criterion for granting rights (the right of residence in this case) based on the nationality of the person was adopted.

These Residence Agreements only entered into effect as international agreements as recently as 2009, when all the states parties ratified them. In this way, despite certain unilateral or bilateral measures adopted previously (we shall soon address this) seven years passed before the agreement reached full force on an international level. As Corti Varela notes, the “main problem of MERCOSUR is that it undertakes the grand objectives of integration by means of a juridical-institutional, essentially intergovernmental, framework without limiting sovereignty. Even the “binding” decisions of MERCOSUR institutions, always adopted by consensus and limited to the economic sphere, encounter serious delays for their “internalization” by national legislation, lacking all legal effectiveness in the interim” (Corti Varela 2011).

In addition to this delay, in some cases the time lapse between legislation and its implementation in practice within the countries must also be considered. Argentina may be exceptional in terms of its speedy and positive application of new legislation, as will be seen in detail when migration legislation is examined. Other country signatories of the Agreement by contrast, even now in 2012, have yet to make decisions and take steps for effectively guaranteeing the exercise of the right of residence by nationals of the other regional countries.

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<sup>7</sup> We refer to Accord 13/02, on the Residence of Nationals of State Parties of MERCOSUR, and to Accord 14/02 on the residence of Nationals of MERCOSUR, Bolivia and Chile.

<sup>8</sup> For an in-depth analysis of the content of these agreements, see Chueca Sancho (2008) and, Asa and Ceriani Cernadas (2005).

Although the full implementation of this agreement has faced some obstacles, it is important to note that it has been recently strengthened through its support by other South American countries. During the last two years, Mercosur associated members Colombia (2012) and Ecuador (2011) signed the Residence Agreement, and Peru ratified it in 2011<sup>9</sup>. In addition, as Venezuela became a new full member of Mercosur (2012), it only has to ratify this treaty. These circumstances contribute to an scenario that either in short or medium term will substantially facilitate circulation of migrants within the region.

Other antecedents to be noted are the initiatives adopted in the context of the Union of South American Nations (UNASUR) and the South American Migration Conference (CSM). The UNASUR<sup>10</sup>—a regional agency created in 2008<sup>11</sup> replacing the South American Community of Nations—formally entered into vigor in 2011.<sup>12</sup> Among the specific objectives defined in the Union’s constitutional treaty, two previously mentioned issues stand out: 1) the focus on the human rights of migrants, and 2) the integration and equalization of rights on the basis of nationality of regional countries.

The treaty mentions “cooperation in issues of migration, with an integral focus, under the unconditional respect for human and labor rights for the regularization of immigration and the harmonization of policies” on one hand (§ 3.k). Also, it proposes “strengthening South American identity through the progressive recognition of the rights of Member State nationals residing in any other Member State, with the goal of achieving South American citizenship” (§ 3.i). In 2009, the UNASUR countries reaffirmed their commitment to advancing the formation of South American citizenship; again, they approached the subject of migration from an integral and comprehensive point of view, based on the “unconditional respect for the human rights of migrants and their families, in accordance with the pronouncements of the Declaration of Cochabamba, in December of 2006.”<sup>13</sup>

In the sphere of the South American Conference on Migration,<sup>14</sup> the states emphasized “the growing process of integration spurred by people and governments in the region and the advances that have been achieved in the process of free circulation and residence, in addition to accumulated historical experience and traditional openness to receiving migrants.”<sup>15</sup> The document accompanying the program of action approved in the 2010<sup>th</sup> meeting of the CSM, affirmed that “free circulation and residence is a basic human right, and has been a principle traditionally adopted by the regional states through their policies of receiving and promoting migration [...] The increase of restrictions on human mobility that can be seen in some countries and regions that are

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