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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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<sup>9</sup> Colombia, Ecuador and Peru became Mercosur associated member states in 2004.

<sup>10</sup> For a more detailed description on the institutional development of the Union of South American Nations, see Álvarez Valdés (2009).

<sup>11</sup> *Tratado constitutivo de la Unión de Naciones Sudamericanas* (UNASUR), signed in Brasilia on May 23, 2008.

<sup>12</sup> The treaty came into force when the minimum number of required ratifications was reached on March 11th, 2011. In August of this year, it was ratified by Paraguay, the only state party that had yet to do so.

<sup>13</sup> The presidential declaration of Quito, adopted in the Ordinary Meeting of the Council of Heads of State and Government of the Union of South American Nations (UNASUR), Quito, Ecuador, on August 10th, 2009, § 25.

<sup>14</sup> The CSM, begun in 2000, occurs annually with the participation of all South American states. The complete texts of the declarations adopted in the meetings of the CSM can be found at <http://www.csmigraciones.info/>.

<sup>15</sup> Declaration of the VIII South American Conference on Migration, Montevideo, September 19, 2008.



developed receptors of migration, is not consistent with the principle of free circulation of people.”<sup>16</sup>

Finally, both the CSM and the UNASUR reveal the need for reinforcing mutual cooperation and coordination between the zones, in order to define areas of agreement and create a common regional focus. This will facilitate the circulation of people with a view towards constructing South American citizenship.<sup>17</sup>

### ***South American Citizenship and Migrants' Rights in Light of the Legislation and Reality of the Region: Risks, Contradictions, Hypotheses and Opportunities***

A characteristic element of the recent initiative to create a Statute of MERCOSUR Citizenship, as well as the Resident Agreement, is that the rights recognized are attributed on the basis of possessing nationality of one of the states parties.

The idea of citizenship is a central component of the current debate about migrants as rights bearers. Ferrajoli states that nowadays, taking human rights seriously means having the courage to disentangle rights from the two-fold nature of citizenship: as community (i.e. ‘belonging’ to a specific state community) and as governmental (legitimizing rights and assigning duties). “Decoupling them [rights] from citizenship means recognizing their supra-statal character—in the two-fold sense of a double constitutional and international guarantee—and therefore enforcing them not only within a state, but outside of and against it as well, putting an end to the great apartheid that excludes a large part of the human race from enjoying them, in contradiction of their declared universality” (Ferrajoli 1999: 117).

One factor that has influenced the denial of fundamental rights to migrant people or caused a differentiation between their rights and rights of state or regional nationals in the country where they live, is the common usage of the concept of citizenship as related to so-called ‘citizens’ rights’.

The meaning and scope granted to the term citizenship has been discussed from different perspectives, especially in a context of increased global migration and the subsequent multiculturalism that characterizes diverse contemporary societies. The challenge is centered on the symbiosis of two elements: on one hand, the supposed synonymy between citizenship and nationality (Aguelo y Chueca Sancho 2009) and on the other, the exclusive attribution of human, supposedly universal, rights to people of a specific nationality.

The impact of these restrictions, and ultimately of the discussion about the scope and definition of the concept of citizenship, is not minor. The balance between universality of rights and the particularity of belonging to a defined citizenship is at stake. (Mezzadra, 2005: 98). Therefore, potential harm is no accident: migrants considered as

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<sup>16</sup> The Document was approved in the South American Conference on Migration X, Cochabamba, October 25th and 26th, 2010.

<sup>17</sup> Declaration of the South American Conference on Migration IX, Quito, September 22, 2009, § 17; The presidential declaration of Quito, UNASUR, § 25.

non-citizens are therefore susceptible to being treated as non-persons, i.e. as human beings without rights (Dal Lago 2000: 129).

In the context of the European Union, it has been repeatedly highlighted the negative impact on migrants' rights that was caused by this restrictive notion of citizenship (De Lucas 2003; Balibar 2003 and 2009; Bigo and Guild 2006). In this regard, it is important to point out that this model has been particularly and strongly condemned by South American countries (Ceriani Cernadas 2009). These reactions of the regional countries, including Mercosur bodies, have to be taken into account when it comes to examine initiatives such as the Decision 64/10, particularly in terms of policy coherence.

Considering this debate on citizenship and migrants' rights, the analysis that follows on the current situation in the region is centered, on one hand, on the issue of free movement, more precisely on the right to migrate (and one of its central components, the right to enter and stay within a territory). On the other, it addresses the attribution of social and political rights based in nationality. In particular, these issues are examined in line with the immigration laws of some South American countries, as well as the regional declarations above described. Secondly, as a consequence of the previous point, it introduces a set of hypotheses about possible medium and long terms scenarios that exist for the region, especially the implications based on content to be included in the Plan of Action—that is, how the Statute of MERCOSUR Citizenship will be configured.

#### *Laws, Declarations and Proposals: Ambiguous Paths*

The increasingly progressive South American posture on immigration policy has characterized the region in recent years. This position not only challenges the prevailing tendencies of other regions, but also seeks to reverse its own past, that contained incredibly restrictive, exclusionary, and often-repressive immigration laws.<sup>18</sup>

This substantial change has manifested, as we have seen, in the declarations that states have made over the last few years on this issue, in many different regional forums. At the same time, a few MERCOSUR states in particular have adopted migration laws that make these changes tangible, especially Argentina and Uruguay, two of the four states parties of MERCOSUR. As we shall see below, the most relevant changes address two aforementioned issues: circulation and rights.

With regard to circulation, both laws explicitly recognize the human right to migrate. Argentine law (25.871, of 2004) stipulates in article 4 that: "The right to migrate is an essential and inalienable right and the Republic of Argentina guarantees it on the basis of the principles of equality and universality." Similarly, article 1 of Uruguayan Law 18.250, of 2008 sets out that "The State of Uruguay recognizes the inalienable right for migrants and their families to migrate irrespective of their immigration status..."<sup>19</sup>.

It is especially interesting to reflect on how the right to migrate, recognized as universal and without discrimination for any reason (such as nationality) can coexist with a regional framework in which free circulation is exclusively granted to people of a

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<sup>18</sup> For a more detailed analysis, see Ceriani Cernadas (2011), Mondol and Zurbriggen (coords., 2010), and the MERCOSUR Human Rights Public Policy Observatory (2009).

<sup>19</sup> It is important to also note the new constitution of Ecuador (of July 24th, 2008), which in article 40 establishes that: "The right to migrate of people is recognized. No human being shall be identified or considered as illegal because of his/her migratory status."

certain nationality. If, some future progressive development and regional integration process were to eliminate border controls between states parties, it would be wise to ask whether, based on some countries' legislation, this would not result in extending the right of free movement to all inhabitants of the territory regardless of nationality.

Nevertheless, this latter is not the scenario, which at least till now, is being designed. The limited scope of migration based decisively on nationality (especially in Argentina), indicates that this right does lack practical elements of equality and universality even though they are enunciated in the legislation. Consequently, migrants that are nationals of non-member states unassociated with MERCOSUR, meet a number of obstacles in trying to exercise two fundamental elements of their right to migrate: entry and remaining regularly in the territory (CELS-FIDH 2011).

These limitations also challenge the strength of regionally adopted positions. It forces us to examine what focus public policies should have on the phenomenon of international migration. In this way, following the declarations of the CSM on the necessary coherence in this area, it is important to also take into account the well-founded criticisms made towards the Europe Union member states about the necessity of adopting comprehensive policies that include, among other things, addressing the structural causes of migration.<sup>20</sup>

In light of this, the question lies in whether northern hemisphere receiving countries of migrants understand these structural elements of migration. From here emerges, on one hand, the assumption of responsibility by economically developed countries for their part of responsibility in generating these causes. On the other, the obligation to adjust migration policies to this reality; doing so involves not only destination countries, but also those receiving countries in other latitudes—i.e. many South American countries. Consequentially, the conditions of entry and permanence within a territory should be revised on the basis of principles determined by both present legislation (as in the case of Argentina, Ecuador, and Uruguay), and policy postures adopted on a regional level.

The even more complicated question arising from the examination of Decision 64/10 and other regional initiatives in light of certain regional postures, and especially the already cited migration laws, is that of the distribution of human rights, on one hand to all migrants, and on the other, only to those from other states parties.

Again, the examples of the Argentinean and Uruguayan laws are apt for illustrating the situation. Regarding the social rights of migrants, the Argentinean law establishes: *“article 6: In all its jurisdictions, the state ensures equal access for migrants and their families under the equal conditions of protection, aid, and rights as are enjoyed by state nationals, especially around social services, public goods, health, education and justice.”* And Article 7 *“In no case of irregular immigration shall a foreigner be denied admission as a student in an educative facility, whether public or private, national, provincial, or municipal, of primary, secondary, tertiary or university level. The authorities of these educational facilities must provide orientation and guidance about*

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<sup>20</sup> In the South American Conference on Migration VIII (Montevideo, 2008), the states emphasized “the importance that developed countries adopt necessary policies for avoiding international economic asymmetries, multi-million subsidies that distort competition, a lack of market access for the products of developing countries all increase the causes of migration which are: structural poverty, social exclusion and inequality of opportunities.”

*procedures for the correction of irregular migration status.”* Article 8 reiterates this broad guarantee for the right to health.

With the same criteria, the migration law of Uruguay stipulates, “*Article 8 - migrants and their families shall enjoy the rights of health, employment, social security, housing and education on equal footing with nationals. These rights shall have the same protections and safeguards in both cases. Article 9 – irregular migration [status] shall in no case prevent foreigners from having free access to justice and health care facilities. The authorities of these facilities shall implement the necessary services for providing migrants with information facilitating their regularization in the country.*” Article 11 provides the same level of protection for the right to education.

Both laws recognize the full equality of social rights between nationals and migrants, emphasizing particularly the fact that irregular migration cannot be an obstacle to the exercise of these rights under equal conditions. This is, obviously, a tremendous change. And in these clauses there is no distinction made among migrants as to whether they are MERCOSUR nationals or not. The determinant character of these rights is not nationality, but rather personhood, in accordance with the basic principles of human rights.

For this reason, regardless of the questions of circulation and residence (and its eventual future definition at regional level), the dilemma here is whether a MERCOSUR citizenship can generate a conflict or contradiction with regulations that limit some of these rights (health and education) on the basis of nationality. Any eventual conflict can be reasonably resolved by applying principles of international human rights law (such as the *pro persona* principle) in order to avoid justifying less protective treatment than is guaranteed by national legislation by invoking a more restrictive regional framework. Nevertheless, this does not prevent two complex and delicate situations:

First, the fact that this contradiction occurs is the result of a conflict that can generate numerous practices that presume infringing rights on the basis of nationality. Second, it does not avert the fact that when faced with changes on the national level, some governments will modify their internal laws with the object of “adjusting them” to stricter standards currently applied on a regional level.<sup>21</sup> It is true that in this case responses can be made from a human rights focus: for instance, the principle of non-regression, but certainly, and more realistically, the more regressive measures in human rights issues are today’s stock in trade in many different countries and regions.

Moreover, it is worth mentioning that in the cases of Brazil and Paraguay, even when these laws are more or less, obsolete and difficult to implement,<sup>22</sup> it is still the case that within the scope of this paper, no differentiation should occur between the nationalities of different migrants when it comes to recognizing rights.

Finally, with regard to political rights, we are also faced with a situation that is, in some sense, similar to that of social rights. The laws currently in force in MERCOSUR

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<sup>21</sup> Without going any further, this is what has transpired in some European countries that have modified their immigration laws in order to introduce the more restrictive changes accepted by the European Union. This is the case of the increased periods of immigration detention in certain countries whose excuse is the adoption of the Directive on Return.

<sup>22</sup> On this see Ceriani Cernadas (2011) and UNICEF-Universidad Nacional de Lanús (2010).

countries about the recognition of political rights (active and passive suffrage by foreigners) vary country by country. More precisely, it even varies by jurisdiction within each country according to whether the rights being exercised are national, provincial, or municipal. While in some countries, after a specified number of years of residence, foreigners have equal conditions for the exercise of political rights; in others, they are limited to rights on a local level or only to active suffrage and denied the possibility of holding office.<sup>23</sup>

It is relevant that in all these cases, these rights are recognized for foreign nationals (on the local or national level), and that such recognition does not differ by nationality. In the region there is no precedent by which political rights are only granted to MERCOSUR or South American nationals. For this reason, the possible eventual consecration of these rights in an exclusive way—for those that enjoy “MERCOSUR citizenship”—can generate conflicting and contradictory laws. Worse still it can generate regressive and exclusionary measures (in terms of political participation) that in no way benefit migrant integration, democratic quality, or strengthen the rule of law.

### *Medium and Long Term Hypotheses*

By examining some laws currently in force in MERCOSUR countries, we have described how the contrast between these laws and the content of Decision 64/10 can result in a complex scenario that jeopardizes the equality of rights between state and foreign nationals. In some situations these laws end up discriminating between categories of migrants according to nationality. Now we will describe some different hypotheses about situations that this can generate, especially in the medium and long terms.

We have seen that two tendencies can exist: one that deepens the equality of rights, including free circulation and the other, on the contrary, that anchors equality in nationality, as an exclusionary criterion. Given this, we can ask which of these tendencies will take root in the next few years (or decades). Other variables can be added to this question, such as changes in the migration flows in the region or the occurrence of a serious economic crisis.

In the first case, given an eventual scenario of increase of immigration from other regions (for example, from African or Asian countries, and even other Latin American countries), what consequences could arise generating a model that prioritizes some nationalities in recognizing rights and allowing their nationals easier opportunities for entering the territory and obtaining residence permits? Under this scenario, how can cultural diversity be fomented and integration policies designed knowing that not all inhabitants have equal rights?

It may also be the case, as happens in various EU member states that some “extra-MERCOSUR” migrants have a certain legal status that allows them to access a broader range of rights than people of other countries of origin. For example, one can imagine an agreement between MERCOSUR and Central American countries or Mexico that reciprocally recognizes certain rights that are not extended to people of other nationalities. Or, without going further, if a Citizenship Statute were enacted under the characteristics defined by Decision 64/10, then a situation would arise in which the

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<sup>23</sup> For a more detailed analysis, see Ceriani Cernadas (2009b).

nationals of States affiliated with MERCOSUR would enjoy privileged status in Argentina because of their regional citizenship. As in EU countries, we would be facing a situation of citizenship stratified on the basis of the nationality of every individual in the society.

Currently the number of migrants within the region that are not originally from MERCOSUR countries is not noticeably high. Moreover, it can be said that measures (on the national and regional level) favoring the circulation of the nationals of MERCOSUR states parties have been a greatly relevant, necessary, progressive, and realistic response: among other effects, they allowed the regularization of hundreds of thousands of people.<sup>24</sup> The great majority of the people that move within the region or migrate to one of its countries are part of intra-regional flows and therefore it is reasonable (and desirable) that this migration not be impeded, either during migration process or afterwards upon the exercise of rights in the destination country.

Similarly, it can be argued that, unlike Europe, in South America intra-regional migration responds largely to the causes and the conditions of migration that are produced from this region (and others, such as Sub-Saharan Africa) towards Europe. While free movement within the Schengen Space occurs between countries and societies that have similar standards of living,<sup>25</sup> in South America there are tremendous asymmetries, such as high rates of exclusion, unemployment, and poverty in different countries. Therefore, facilitating migration between these regional countries is praiseworthy. Beyond the compatibility of objectives of regional integration (political, economic, social etc.), this surely contributes to establishing an interesting and progressive paradigm, given that migration occurs for primarily socio-economic reasons—or better said, because of the absence of fundamental rights in the origin country.

Now, following the hypothesis postulated, the advances in migration within the region do not preclude challenging the fallacies or contradictions about the treatment of migrants that arrive from *other* regions. Whether their number increases in the future or not, in many countries, extra-regional migration has increased considerably alongside diversity in countries of origin. One example is the presence of migrants from Asian or African countries (like China and Senegal) or Caribbean countries (Cuba, Haiti, the Dominican Republic) is increasingly incontrovertible fact for countries like Argentina and Brazil.

In the second hypothesis—political changes in regional countries—the possibility of an eventual regressive change of migration laws approved in the last decade must be explored. Or what occurs in times of crisis? Do countries resort to regressive measures, or even exclusionary, discriminatory or even repressive ones as can currently witnessed in the EU? Or else, can the region create a model focused on equality of rights, in which

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<sup>24</sup> The most important case is Argentina, which, through the change in its migration law, recognized the right of nationals of MERCOSUR countries and affiliate countries to reside in the country for two years, after which time they would be granted definitive residence (article 23, subsection I, of law 25.871). Similarly, in 2006 the implementation of the Documentation Normalization Program (“Patria Grande”) was inaugurated, it is directed towards foreign nationals residing irregularly in Argentina.

<sup>25</sup> Of course, this statement is relative. In fact, the incorporation of the Bulgaria and Romania into the E.U. generated much debate. But in support of what was said about the difference between free circulation in different regions, we should note the obstacles many European member states placed on people from these two countries to impede their full access to the rights granted by virtue of E.U. citizenship.

citizenship as well as social and economic problems in the society are not linked to the nationality of the peoples making up the community? It is worth noting, as De Lucas states, that times of crisis require the greatest defense of rights for the most vulnerable parts of the population, such as the migrants. These situations necessitate that public policies can be relied on to ensure the satisfaction of basic needs for all people and not just for “citizens” (De Lucas 2010).

Regional countries already have long histories of xenophobia and rejection of migrant populations, especially in times of economic, social, and political crisis.<sup>26</sup> Therefore, the kinds of mechanisms adopted by the countries and the region as a whole for regulating entrance and permanence (and particularly, the reinforcement of permanence in terms of rights) are vital for promoting intercultural integration that prevents these kinds of discriminatory attitudes.

Similarly, even if the Statute of Citizenship were to be adopted with the extreme measures included in decision 64/10, it is important to examine under which criteria it will be possible for migrants from other countries to enter and reside in a state party. Would an employment contract be sufficient? If so, as current regional practices indicate, we are faced with a situation that is different from the so-called instrumental logic of the European context. As De Lucas explains, instrumentality of migration policies is characterized by reducing immigration to a question of statistics (i.e. the percentage of laborers needed in conjunction by the employment market) except when there is an issue of public order, a security threat or risk of identity. This view barter the universal rights of migrants according to the worth of their contributions to the host society (for example as laborers). It imposes obstacles on access to and renewal of legal residence, a high level of administrative discretion (and arbitrariness) and, in general, a scheme of rights based in inequality and vulnerability (De Lucas 2003).

With regard to the impact that exclusionary logic can have in establishing differentiated sets of human rights, a small observation must be made about an issue that, at least in the long term, can reduce negative consequences. This refers to the principle of *Ius Soli* in force in all the countries of the region, by which the children of migrants born in the territory acquire nationality of that country. This, can facilitate the integration of migrant families, the exercise of rights in conditions of equality, and even, access to residence and, eventually, to free movement in the region.<sup>27</sup>

Of course, this does not to impede exclusionary measures that prevent entrance into the territory, order expulsion, or impose requirements like acquiring residence before starting a family in the country. It also does not prevent the inequality of rights from more seriously affecting the living conditions of migrant peoples who are unable to regularize their immigration status. The serious privation of rights and social exclusion can have a determinant impact on living conditions and development, especially of children. These effects are very hard to reverse, even if the children are born in the territory of the country and acquire the nationality of their birth country.

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<sup>26</sup> On Argentina, see Giustiniani (2004).

<sup>27</sup> Unlike MERCOSUR countries, the criteria and legal framework that determines access to the nationality of a country through birth or residence are not the same in all European countries. About this, Vink and de Groot (2010) differentiate among six distinct trends and criteria for the attribution of nationality in western European countries: *Ius Sanguinis*, *Ius Soli*, multiple nationality, criteria of language or integration, prevention of apartheid, and the increasing importance of E.U. citizenship.

We return then to the central questions of this paper on the problems of presuming the synonymy of nationality and citizenship and attributing fundamental rights based on selective and exclusionary citizenship. In these final thoughts we will offer some last comments about the possible scenarios for the region as a consequence of the formation and future implementation of a MERCOSUR Statute.

One final, more immediate question regards expanding the MERCOSUR Citizenship Statute to MERCOSUR Associated states, so that it would encompass practically the entire continent of South America. Decision 64/10 fails to mention this, and we will have to await the first steps that are taken in formulating the Plan of Action. In any case, it is important that all the regional countries would be simultaneously incorporated in the process of regional integration. This would also reinforce the coherence and efficacy of the proposals made under UNASUR. This issue is distinct from all the issues noted about questions of citizenship, nationality, and the mechanisms for granting rights.

### ***Final Remarks***

South America has experienced many changes over the last years, especially when compared to the situation merely a decade ago. Improvements in the economy, especially in living standards for large segments of the population (despite the still high rates of poverty and exclusion) are an example of the positive change that has occurred in the region.

In the same way, the strengthening of integration initiatives in the region, especially in social or political issues must also be noted. The creation of UNASUR and the adoption of many agreements on social issues in the scope of MERCOSUR speak to this. In this context, the Residence Agreements (2002) and the decision to form a Plan of Action for the Statute of MERCOSUR Citizenship (2010) can be considered very positive, and in the first case, already have had a remarkable impact on the migrant population.

It might be considered legitimate or even desirable to adopt initiatives that strengthen the objectives of regional integration for which it is vital to facilitate the free movement and residence for migrants in any regional country. Having said that, these encouraging changes, processes, and decisions cannot be designed and implemented at the expense of denying other people's human rights. Nor can they occur in contradiction of the principles and laws that these same states have incorporated into their legislation and openly and emphatically defended in regional and global forums on migration.

In this paper, we have seen that some these regional initiatives refer exclusively to nationals of MERCOSUR member states, when proposing the status of regional citizenship which would be accompanied with free circulation and equal (social and political) rights with the nationals of destination countries. Perhaps, in reproducing the European model of migration regulation adopted twenty years ago (which increasingly proves itself not only ineffective, but also entirely disconnected from some fundamental principles of human rights) we can see that the relationship between reality and the configuration of exclusionary citizenship may not have been sufficiently understood.



This observation is particularly keen and relevant if we address the question of political coherence behind the rhetoric, retracing the criticisms made by South American countries to their European counterparts. The governments of South America specifically considered this issue. In effect, in the CSM IX (Quito, 2009), the states parties affirmed their “desire to guarantee migrants to our region the enjoyment of the same rights that we pursue for our own citizens in transit and destination countries to exterior regions, for the sake of the principles of coherence, equality, and non-discrimination.”

Therefore one can conclude that the creation of “citizenships” of distinct categories and unequal rights only negligibly contributes to the objectives of integration, social inclusion, and equality that they propose. At the European Union level there is a vast literature that evidence this assertion.<sup>28</sup> Therefore, it is surprising that in South America a strikingly similar proposal had been done, while the EU model of citizenship is increasingly challenged and a different paradigm has been offered. In no other region has the criticism of the E.U. case been both so timely and emphatic as in South America.

The restrictive formulation of certain aspects of the Decision 64/10, so crucial to the movement of people, collides with the progressive tendencies implemented regionally over the last years in the area of immigration. The recognition of the human right to migrate and the equality of rights regardless of nationality and migratory status, already present in some countries, is a fundamental milestone. This trend must not only be preserved, but also strengthened and broadened.

In the same way, the principles and postures publicly defended by regional countries are a robust index for the possibility of developing a new paradigm of the focus for international migration: a truly integral and comprehensive approach (including causes and consequences of migration) placing migrants at the center of the policy. This paradigm should be based on the principles and standards of human rights, especially of universality and equality of all people.

The state of affairs introduced by Decision 64/10, especially the process that has begun as a result (the Plan of Action) are a unique opportunity to solve this dilemma: strengthening and consolidation of a new paradigm on issues of migration policy, or else, a reproducing the exclusionary restrictive system that approves rights differentiated by people’s nationality. Over the next few years, by means of the development and later implementation of a Statute of MERCOSUR Citizenship and the Residence Agreement, the universality of human rights can result up in two different scenarios: on the one hand, once again, it could be curtailed by boundaries (both literal and ideological); on the other, we can aspire to its effective materialization through a new paradigm on migration policies.

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<sup>28</sup> For example, Balibar 2003, Bigo and Guild 2004, Dal Lago 2000, De Lucas 2010 and Mezzadra 2005.

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