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Regional Free Movement of People in South America. A Model from Africa and the rest of the World?

This essay explores the regional regulation of mobility in South America. Regional free movement agreements have indeed become a central subject of discussion and academic analysis. Indeed, the expansion of human rights law coupled with the explosion of regional processes of integration are the two most important phenomena that have limited the State´s capacity to restrict the entry of foreigners and their rights. It should come as no surprise that regional agreements facilitating mobility have proliferated, and now involve around 120 countries, either at a bilateral or multilateral level. For one thing, most global migration is regional, in either Africa, Asia or Southern and Central America. However, the academic analysis on the subject has only concentrated on the EU's case to the expense of other free movement regimes involving South-South migration.

The present paper discusses the regulation of free movement of regional migrants in South America. It presents the various mechanisms available as well as their peculiarities when compared to the EU's case. It also delves into their inconsistencies, shortcomings and challenges for the future. South America can be a useful model to continue deepening free movement regimes in Africa and other parts of the world. It is also important to establish a direct dialogue between South America and Africa since their peculiarities and idiosyncrasies (e.g. a large percentage of the population working in the informal sector) mean that they might have more to learn from each other, in terms of free movement regimes, than from experiences in the EU.

Regional Law: Slowly Taking Steps Towards Free Movement of People

Free movement of people and the equal treatment of South American, or more precisely Hispano-American nationals, to the exclusion of Brazil and the Dutch, French and British territories in the region, constituted a clear aspiration since independence in the early 19th century. Indeed, various international agreements and national laws guaranteed aspects such as preferential access to nationality, recognition of diplomas or even consular protection abroad. In other words, whereas regional mobility was scarce, or perhaps because of this aspect, the Hispano-American regional citizen emerged as a third legal figure in between the national and the foreigner already in the 19th century. The same as with extra-continental migrants, this openness slowly faded away during the 20th century although in a less obvious and speedy fashion.

From the 1960s onwards, three crucial developments must be highlighted. First, the almost complete disappearance of the previous European immigration flows. Second, the surge in the number of South Americans emigrating due to political instability and economic crises, notably to the US and, later, Europe, but also to other countries in the region. Third, as a consequence of the previous two, the increasing weight of regional migrants in the total number of non-nationals in any given country, many of whom found themselves in an undocumented situation. Indeed, according to the Organization of American States, there would be approximately 5.1 million migrants in South America out of the 406 million total residents, or only a 1.25% of the total population, well below the global average of 3% (OECD and OAS 2015). The weight of regional migration in such total number would be of 63%. Paraguay and Argentina would have the largest percentage of regional migrants as a total of their non-national populations with 90 and 80% respectively. Brazil would have the lowest with 30% (Ramírez Gallegos 2016).

Against this backdrop, the adoption of the 2002 MERCOSUR Residence Agreement can be better understood. Still, it was the result of a particular historical conjunction. Fernando Enrique Cardoso, Brazilian president at the time, had encouraged the deepening of the regional social agenda. Brazil held MERCOSUR's presidency (1 July 2002-1 January 2003) and Cardoso was willing to end his second and last term as Brazil's President leaving his personal stamp with a measure advancing integration. In line with this, Brazil proposed on 30 August 2002 a project for a migratory amnesty for MERCOSUR nationals. This would have represented an exceptional regularization procedure taking place during six months and addressed to all undocumented regional migrants in the four Member States at the time: Argentina, Brazil, Paraguay and Uruguay. Based on its own experience, having already conducted numerous regularization procedures since the 1950s, Argentina was unconvinced about the merits of the proposal and its long-term solving capacity. Thus, it offered a counterproposal, namely to establish a permanent, rather than temporary, mechanism so that MERCOSUR nationals will always have access to a regular status (Alfonso 2012: 48).

In fact, the agreement's main objective, as unmistakably declared in its preamble, is to solve the situation of intra-regional migrants in an irregular situation. The deepening of the integration process and the implementation of a policy of free circulation of people only come second.[1] In other words, unlike in Europe, the driving force was undocumented migration and

[1] Acuerdo sobre Residencia para los Nacionales de los Estados parte del MERCOSUR, Brasilia, 6 December 2002. It entered into force on 28 July 2009.

not the establishing of an internal market. This difference is crucial to understand the structure of the agreement itself. Indeed, this treaty has transformed the migration regime for South Americans. It provides that any national of a MERCOSUR or associate Member State[2] may reside and work for a period of two years in another one, with the sole condition of being a national of one of the State parties and having a clean criminal record. It also provides a number of rights including the right to work and equal treatment in working conditions, family reunion or access to education for children. In contrast to the free movement regime in the EU, where there is a requirement for resources or employment to be shown after three months, these do not represent a *condition sine qua non* for movement in South America. Considering the large degree of labour market informality in South America, which affects up to 47% of all non-agricultural workers (ILO 2013), such condition would render the agreement meaningless for large segments of the population. After two years, the permit may be transformed into a permanent one and, for that purpose, the individual needs to prove sufficient resources to maintain herself and any family members in the territory of the host state.

Analyses on the agreement´s results are still scarce and incomplete. According to the most important report, between 2004 and 2013, almost two million South Americans would have obtained a temporary residence permit in one of the nine countries implementing the agreement with Argentina, Chile and Brazil leading their granting (IOM 2014). This should not necessarily imply however an increase in regional flows as a result of the agreement. More research would be necessary to support such conclusion for various reasons. First, the data shows temporary permits granted since 2004 when the agreement was not yet in force. Second, a large number of those having obtained permits under the agreement were already residing in the host country before it came into force. Third, the data is incomplete for many countries.

With regard to the agreement´s implementation, several problems were highlighted for certain countries in the report (IOM 2014). They include lack of administrative resources to deal with applications, introduction of additional requirements not contemplated in the agreement, or lack of information generally available to those who could benefit from it. Moreover, the agreement is not implemented in the same manner in each country. Chile for example, does not apply it to Colombians, Ecuadorians or Peruvians. Argentina, by contrast, extends it to all other 11 countries in South America, including Guyana, Suriname and

[2] MERCOSUR includes Argentina, Bolivia, Brazil, Paraguay, Uruguay and Venezuela. However, Venezuela still needs to incorporate the Residence agreement into its legislation before it enters into force in such country. The Associate States which benefit from the agreement include Chile, Colombia, Peru and Ecuador. As of 11 July 2013 Guyana and Suriname are also Associate States but they have not adopted the Residence Agreement.

Venezuela even if these three countries have not yet implemented it. Finally, Uruguay directly grants permanent residence to those applying for a permit, rather than first offering a two-year temporary one.

The MERCOSUR Residence Agreement is not the only instrument currently in force in the region. In fact, the Andean Community (CAN)[3] has been dealing with mobility, mainly of workers, since the 1970s through the adoption of various instruments, the most important of which is its 2003 Decision 545[4]. In brief, CAN´s *corpus iuris* provides rights of entry for short stays, certain community socio-labor rights and, finally, consular protection abroad. CAN Decisions are capable of direct applicability and effect in the four Member States without the need of adopting any national law. The effects of these Decisions in practice have been mixed, notably during the first few years after their adoption. However, by 2015 all four Member States had transposed most of the *acquis* into their national law thus facilitating its application and the individuals´ access to rights (Comisión Andina de Juristas 2015).

[3] The Andean Community is a regional organization composed of Bolivia, Colombia, Ecuador and Peru. Chile and Venezuela were members until 1976 and 2006 respectively.

[4] Decision 545, Instrumento Andino de Migración Laboral, Recinto Quirama, Departamento de Antioquia, Colombia, 25 June 2003.