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Political Inequality of Law

A Comparative Study of Migrant Electoral Rights in Mercosur Countries

Abstract: In 1991, Argentina, Brazil, Uruguay, and Paraguay signed the Asunción Treaty, whose purpose was to set up a common economic market, Mercosur (an acronym meaning Mercado Común del Sur, or Southern Cone Common Market). Mercosurean migrants receive special treatment in the bloc. They enjoy broad legal protection and benefits in comparison to other aliens and have been incorporated into labor, civil, and social rights regimes. However, some political rights, electoral rights in particular, have not been improved. I examine political inequality before the law in a critical analysis of electoral legislation in the original four Mercosur states, focusing on migrants' rights to vote and to be candidates in local, regional, and national elections. The main findings of this study are that (a) electoral laws consistently discriminate against migrants, (b) each country has its own legal framework for discrimination, and (c) these discriminatory laws constitute gaps in the social and economic protections provided by Mercosur.

In 1991, Argentina, Brazil, Uruguay, and Paraguay signed the Asunción Treaty, the purpose of which was to establish a common economic market, Mercosur (Mercado Común del Sur, or Southern Cone Common Market).¹ Later, Chile (1996), Bolivia (1997), Peru (2003), Ecuador (2004), Colombia (2004), and Venezuela (2004) joined as associate states, creating the extended Mercosur.² Comprising more than 300 million people, in economic, geographic, and demographic terms, it is the largest subregional agreement in South America.

As was the case of the European Union (EU), the formation of Mercosur fa-

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cilitated population displacements and created a new migrant group that has been legally and politically redefined. In the original four Southern Common Market countries—Argentina, Brazil, Uruguay, and Paraguay—migrants have new economic, social, and civic rights. In comparison with the pre-Mercosur era, mobility rights are enhanced via the simplification of border transit and legal residence procedures (Modolo 2010). Yet, to date, Mercosur has not created a new reality of *electoral* rights for Mercosurean migrants. Compared to native citizens, migrants have unequal electoral rights—the right to vote and the right to run for office, in particular. Political inequality—defined as structured unequal influence over government decisions—affects both Mercosurean and non-Mercosurean resident aliens through the application of discriminatory national laws.

In this article, I take a comparative law approach to critically analyze laws in the four original Mercosur member states, focusing in particular on migrants' rights to vote and to run as candidates in local, regional, and national elections. I address two main questions: (1) What electoral rights do migrants have? and (2) Under what legal conditions are they allowed to vote and run for election?

A comparative law approach identifies similarities and differences among legal frameworks and is a necessary starting point for the coordination, harmonization, and, eventually, unification of regulatory regimes (Orucu 2007: 55). It is a helpful tool to strengthen bloc integration. Indeed, according to the Asunción Treaty, its first article establishes the commitment by the member states to make the necessary adjustments to their laws in pertinent areas in order to lessen or eliminate disparities between countries.

Regional Integration and Immigration

The aim of the Asunción Treaty is to develop a common market in the subregion of South America in which states agreed on an intergovernmental—as opposed to an EU-like supranational—integration mechanism. Today, Mercosur is halfway between a free trade area and a customs union (see Balassa [1961] for a typology of steps toward regional integration and law convergence). Though imperfect, in some noneconomic areas, there have been important regional advances such as social security, education (Solanas 2007) <<please supply reference>>, and population mobility (Modolo 2010). In order to promote regional mobility, “Residence Agreements”—which were signed in December 2002 and came into force in July 2009—state the requirements for obtaining a legal residence visa via a simple procedure. For example, nationals of the Mercosur member countries and two Mercosur associated countries (Chile and Bolivia) can now apply for a special two-year temporary residence that can subsequently become permanent. These agreements develop a common migration policy that provides regional migrants the same civil, social, cultural, and economic rights and liberties as native citizens. Taking into account the actual migratory pattern in the bloc, this policy benefits a large number of people.

Table 1

Total Foreign Population in Original Four Mercosur Member Countries

Country	Total population	Total foreign population	Percent foreign population
Argentina	36,260,130	1,531,940	4.20
Brazil	169,799,170	683,830	0.40
Paraguay	5,163,198	169,011	3.27
Uruguay	3,146,200	92,378	2.93

Source: IMILA, 2010. <<insert CEPAL/CELADE from references? please clarify source and give document being cited>>

Table 2

Migrant Stocks by Country of Residence in Original Four Mercosur Member Countries

Country of origin	Country of current residence			
	Argentina	Brazil	Paraguay	Uruguay
Argentina	—	27,531	61,247	26,256
Brazil	34,712	—	80,156	13,521
Paraguay	325,046	28,822	—	1,512
Uruguay	117,564	24,740	3,155	—

Source: IMILA, 2010.

Today less than 5 percent of the total population in Argentina, Brazil, Paraguay, and Uruguay are international migrants³ (Table 1). Migration between these neighboring countries has a long history (Martínez Pizarro and Stang, 2006: 65 <<references cite pp. 77–106). As a result of the dramatic decrease in overseas migration between 1870 and 1950, in recent decades that migration became more pronounced and increased in visibility. This steadily decreasing European population (mainly Italian, Spanish, Portuguese, French, and German) consists mainly of people over sixty years old.

Meanwhile the immigrant Mercosurean population has increased in Argentina, Brazil, Uruguay, and Paraguay. Table 2 shows their migrant populations where Mercosurean migrants account for half and a third of the total foreign population in Uruguay and Argentina, respectively. Most foreigners in Paraguay are from

the other three Mercosur member countries. Brazil is the only country where the overseas population is still the majority. Brazilian migrants are mainly from Portugal (213,203), Japan (70,932), Italy (55,032), Spain (43,604), and Germany (19,556).

Political Inequality in Legal Status

Mercosurean migrants receive special treatment in the bloc. They enjoy broad legal protection and benefits in comparison to other aliens and have been incorporated into the labor, civil, and social rights regimes. However, the rights of migrants differ from those of the local population in critical areas, electoral rights in particular. The right to vote and to run for office, which are basics of democracy and an important way to influence political decisions, are not formally extended to Mercosur and non-Mercosur migrants. Migration is not just a consequence of inequality in an uneven world, it is also a cause of inequalities (Gibney 2009: 1).

Legal status is essential to exercise electoral rights, and these rights are mainly given to citizens. Although citizens and nationals are generally used as synonyms, the first concept has a narrower meaning and refers to rights and duties that can be exercised only under certain conditions.⁴ Countries vary greatly on the conditions required to obtain citizenship; in some cases, it is impossible for a migrant to become a citizen. Some migrants are not willing to become citizens for various reasons, such as loss of original national identity. Hammar (1990) defines this growing group of residents who are migrants without citizenship status in the host country and who do not enjoy full citizenship rights as “quasi citizens” or “denizens.” These noncitizens “experience the state as a pervasive and frightening power that shapes their lives and regulates their every move—and never asks for their opinion” (Walzer 1983: 59). This generates a split between societal and political communities in many cases (Rubio-Marin 2000: 235).

Migrants' Electoral Rights in Regional Integration Processes

The expansion of rights can emerge from local, national, or regional institutions (Earnest 2008). The European Union is an important example of how a regional integration process bestows electoral rights on migrants. EU institutions impose citizenship rules “from above” and constrain the electoral policies of member states (Martiniello 2000). Citizenship of the EU was established by the Maastricht Treaty in 1992, and it confers on nationals of the member states the right to vote and run for office in European and municipal elections in the member state of residence (Article 19). This treaty formalized local electoral rights for the so-called communitarian migrants. However, the conditions of the third-country nationals continue under each sovereign country. How the law functions differs across the EU countries. According to the Migrant Integration Policy Index (MIPEX), Ireland grants electoral rights to non-EU residents, Portugal and Spain grant those rights

to some non-EU residents, while France, Italy, and Greece grant no electoral rights at all (Migration Policy Group 2007).

The critical difference between Mercosur and the EU is that, in Mercosur, there is no regional law that regulates the right to vote or run for office in public elections: each country has its own electoral regime. Complicating matters is that within each country, migrants' electoral rights can vary by government jurisdiction: national, provincial, and local. Usually, national legislation—mainly national constitutions or national electoral codes—regulates electoral rights at every level of government (as is the case in Brazil, Paraguay, and Uruguay). But the case of Argentina is much more complex. This federal country gives provinces—an intermediate level of government—significant autonomy in regulating electoral rights in their jurisdictions. What is not governed by national laws is governed by provincial legislation. As a consequence, Argentina has a variety of resident alien voting regimes that differ not only from the other four states but also from other jurisdictions within its federal system. In contrast, even though Brazil and Uruguay are *de jure* federal states, they have not delegated the creation of provisions concerning migrants' electoral rights, as Argentina did. This is an important obstacle in the elaboration of a regional law regarding this matter. Taking into account that Argentina is divided into a federal district (Ciudad Autónoma de Buenos Aires) and twenty-three provinces, there are twenty-five different legal frameworks concerning electoral rights.⁵

The Legal Framework for Migrants' Electoral Rights in Comparative Perspective

I now describe in detail the legal framework for migrants' electoral rights in comparative perspective.⁶

The Right to Vote

At the national level, foreign migrants in Brazil and Paraguay are explicitly denied the right to vote. The Brazilian national constitution (1988) clearly states that only citizens have the right to vote (Article 14). Denial of the right to vote in Paraguay is found in its national constitution (1992), as well, where only citizens are allowed to vote in national elections (Article 120). In contrast, the Argentinean national constitution (1853 and amendments) is silent on the matter of foreign voting rights and thus it is necessary to trace electoral rights in other pieces of national legislation. According to the National Electoral Code (Law no. 19945), only eighteen-year-old citizens are able to vote in national elections (president, vice president, national deputies, and senators). On the other hand, in Uruguay, foreign residents have active electoral rights enshrined in national law. Yet, even there it is limited. According to the national constitution (1967 and amendments), migrants are able to participate in elections as voters, but not in constitutional reform plebiscites. They have to fulfill some requirements: good conduct; have a family in Uruguay;

have property or capital, or a profession; and must have resided in Uruguay for more than fifteen years (Article 78). They also have to enroll themselves in the National Civic Registry (Registro Cívico Nacional), which is common to Uruguayan citizens as well.

At the intermediate level, Brazil and Paraguay deny electoral rights to foreign residents. Uruguay allows migrants to vote if they fulfill the same requirements to vote in national elections.⁷ So they are able to participate in departmental elections to choose a mayor and board members, and state elections to choose governor and state legislators. The case of Argentina is quite complex due to the autonomy given at the intermediate level of government to rule on some electoral rights in their jurisdictions. Some provinces empower them to vote in provincial elections, while others do not. The Province of Buenos Aires has one of the most generous legal frameworks regarding foreign electoral rights. The provincial constitution (1994), Law no. 5109 "Election of the Province of Buenos Aires" and Law no. 11700 "Foreigners" cover this topic. Foreigners have the right to vote in provincial elections: governor, vice-governor, provincial senators, and provincial deputies.⁸ Voting is not compulsory (as it is for citizens), but voluntary. To participate in these elections, it is necessary to be enrolled in a special provincial register. In addition to this voluntary enrollment, other requirements must be fulfilled in order to vote: they must be able to read and write in the national language and have two years of residence in the province of Buenos Aires. In the case of the province of Santa Fe, foreigners with permanent or temporary residence are not able to vote for provincial public offices. The Santa Fe constitution states that active electoral rights are granted only to citizens. The situation is the same in the province of Formosa, where according to its provincial constitution, only citizens are allowed to vote in provincial elections (Article 188).

At the local level, the scenario is much more positive for migrants. Uruguay and Paraguay guarantee migrants voting rights in general terms, while in Brazil it is restricted to Portuguese citizens. Uruguay applies the same rules as in national elections. The Paraguayan national constitution allows foreigners with a legal permanent residence to vote in local elections (Article 120).⁹ The National Electoral Code (Law no. 886) supplements this matter. To vote in local elections, noncitizens have to enroll in a special register ("Registro Cívico de Extranjeros"). Permanent residents have a legal duty to do so.

While the Brazilian national constitution (1988) clearly stated that only citizens have the right to vote (Article 14), one exception was introduced by a June 1994 constitutional amendment: "The rights inherent to Brazilians shall be attributed to Portuguese citizens with permanent residence in Brazil, if there is reciprocity in favor of Brazilians, except in the cases stated in this Constitution." Later, in April 2000, a "Treaty of friendship, cooperation, and consultation" was signed between Brazil and Portugal putting into practice this "Equality Status" (*Estatuto de Igualdade*), which guarantees political rights among others. Any Portuguese citizen regularly residing in Brazil is able to vote without losing his/her original citizenship.

Table 3

Right of Migrants to Vote in the Original Four Mercosur Countries

Level of government	Country			
	Argentina	Brazil	Uruguay	Paraguay
National	No	No	Yes	No
Provincial	Yes	No	Yes	No
Local	Yes	Yes	Yes	Yes

He/she has to apply to the Ministry of Justice, and fulfils the following conditions: to be a resident of Brazil for three years, to be able to read and write Portuguese, and to enjoy political rights in Portugal. Up to now, reciprocity has been restricted to local elections (Costa 2006). This exception, although reduced to one nationality, is significant since there are more than 200,000 Portuguese in Brazil (Census 2000/IMILA 2010). These countries are bound by a colonial past that explains this special treatment regarding electoral rights, among others benefits.

The scenario in Argentina is much more complex and varies among provinces. Some Argentinean provinces deny active electoral rights to migrants. For instance, while foreign residents have the right to vote in municipal elections in the province of Buenos Aires (provincial constitution, Article 191) and the province of Santa Fe (provincial constitution, Article 29), in the province of Formosa they do not have electoral rights at all, where according to its provincial constitution, only citizens are allowed to vote in municipal elections (Article 188). As at the other levels of government, there are special requirements for migrants to vote. For example, in the province of Santa Fe, foreigners are required to have continuous residence in the municipality for two years, and have to enroll in a special register and fulfill at least one of the following conditions: to work in a liberal profession, be a taxpayer, be married to an Argentinean, or have one or more Argentinean children. In the province of Buenos Aires, the same conditions apply as for provincial elections.

Table 3 summarizes the electoral rights of migrants for each country by level of government.

Right to Run for Office

Every country has the sovereignty to determine who is a citizen. These classifications are quite important, since unequal treatment is given to natives or naturalized citizens to run for some offices.

The four Mercosur member countries apply the principles of *ius solis* and *ius sanguinis* as general rules to acquire citizenship through naturalization. The Argentinean constitution differentiates among “native,” “by option,” and “naturalized” citizens. Through the *ius solis* principle, a “native” citizen is a person born on the

Argentinean territory. Through, the *ius sanguinis* principle, a “by option” citizen is a person born abroad of an Argentinean mother or father. On the other hand, through a much more complex procedure (e.g., years of residence and good conduct), a person can acquire the nationality and become a “naturalized” citizen. Two kinds of citizens are found in Brazil, according to the national constitution: “natives” and “naturalized.” The first group is composed of people born in Brazil (*ius solis*), and people born abroad of a Brazilian father or mother (*ius sanguinis*). In the latter case, they have to be registered with a proper Brazilian authority abroad, or once they decide to live in Brazil opt for nationality. To become a “naturalized” citizen, it is necessary to fulfill some requirements such as years of legal residence, moral integrity, and no criminal record. Paraguay differentiates between “natural” and “naturalized” citizens. The first is any person born in Paraguay (*ius solis*), or any person born abroad of a Paraguayan father or mother (*ius sanguinis*), who decides to live in the country. To become “naturalized” citizens, foreigners have to fulfill some formal requirements, such as years of residence, good conduct, a job, and so on. The Uruguayan constitution classifies citizens as “natural” or “legal” (Article 74). A “natural” citizen is a person born in Uruguay (*ius solis*), and a person born abroad of a Uruguayan mother or father (*ius sanguinis*) who must be enrolled in a special registry. “Legal citizen” is someone who acquires nationality following a bureaucratic procedure (good conduct, years of residence).

Political inequality for migrants is greater in terms of their right to run for elective office. In all original four Mercosur countries, at the national and intermediate levels, foreign residents, either temporary or permanent migrants, are not allowed to be candidates. As with other electoral rights, there are complex rules and regulations with significant heterogeneity across countries at the local level. In the national constitution of Uruguay, due to its recent creation, no references are made about electoral rights at the lowest level of government. The requirements for being a mayor or councilman are stated in Law no. 18.567 (September 2009). According to its Article 10, citizenship is required to become a municipal authority.

In Argentina, there are many regimes concerning local public offices. For instance, the provinces of Buenos Aires and Santa Fe allowed foreign residents to run for councilman. In the first case, migrants have to meet the requirements to be electors, and also have five years of legal residence in the municipality. However, the provincial constitution points out that “foreign Councilmen shall not exceed one-third of the total number of members of the City Council.” In the second case, to be elected councilman, foreigners must be over age twenty-five (citizens are required to be over twenty years old), and have four years of immediate <<continuous?>> residence in the municipality (citizens are required two years <<for citizens two years are required?>>). In Buenos Aires, for the office of mayor, it is necessary to be a citizen, and nonnative citizens must also meet other requirements to be a councilman. But in Santa Fe, only citizens can run for mayor. The province of Formosa presents a much more restrictive regime, because both mayor and councilmen must be citizens.

Table 4

Right of Migrants to Run for Elective Office in the Original Four Mercosur Countries

Level of government	Country			
	Argentina	Brazil	Uruguay	Paraguay
National	No	No	No	No
Provincial	No	No	No	No
Local	Yes	Yes	No	Yes

In Brazil, resident aliens are not granted the right to run for elective office, except Portuguese citizens with permanent residence and the same requirements to be electors as described above (Costa 2006). On the contrary, Paraguay gives much more favorable treatment to resident aliens in general. The requirements for being a local authority are found in the recently enacted Municipal Organic Law (no. 3966/2010). This national rule must be applied by every municipality in Paraguay. To become a mayor or councilman, it is necessary to be a Paraguayan citizen or foreigner with legal permanent residence (Article 23) and citizens and permanent migrants are treated equally <<edit ok?>>. The former law (Law 1294/1987) contained a discriminatory restriction: to run for mayor, Paraguayan citizenship was required. To run for councilman, seven years of residence in the municipality was required for noncitizens.

Table 4 summarizes the rights of migrants to run for elective office for each country by level of government.

Discussion

Territorial displacement is an important feature of Latin America's subregional landscape. Mercosurean migrants are an increasing presence and enjoy broad legal protection and benefits such as social security, work conditions, health, and education, among others. Although they have received many civic, social, economic, and cultural rights, electoral rights are a different matter. This article, featuring a comparative analysis of law, traces the legal framework for migrants to vote and to run for office in the four original Mercosur member countries: Argentina, Brazil, Paraguay, and Uruguay.

The comparative law approach reveals some strange patterns in migrant electoral rights to vote and to run for office. Argentina has the most complex web of laws regarding electoral rights: although national law rules national elections, intermediate-level elections are regulated mainly through each provincial law, resulting in twenty-five different legal scenarios and thus great variation in political inequality across levels of government and districts. Uruguay is an unusual case:

it is the only country where migrants are able to vote at all levels of government, yet it is also the only country where the right to run for office is totally denied to migrants. Another curious case is Brazil, which grants equal rights at the local level to Portuguese nationals.

While a full explanation as to the causes of Mercosur migrants' legal political inequality is beyond the bounds of this article, the debate over whether the government should grant suffrage to foreigners is a good place to start. Political inequality of this type is sometimes cloaked in national security terms: migrants and other noncitizens could remain loyal to, and identified with, other countries, presenting competing loyalties and a challenge to the social order (Huntington 2004).

Others take a more inclusive view. The case for granting political rights to resident aliens is mainly associated with basic principles of democracy (Hayduk 2006). According to Sen (1999), democracy, as well as being an end in itself, plays an instrumental role in giving people a voice and a constructive role in shaping values and norms. In this perspective, the emergence of inclusive electoral regimes that allow foreign residents to have a voice and take part in the electoral arena is desirable. This expansion of rights can emerge from local, national, or regional institutions.

It is also desirable <<desired? advantageous? hoped?>> that one of the Asunción Treaty objectives of harmonization of laws could be met if Mercosur gives equal rights to any person living on its territory to take part in public matters, independently of citizenship. Perhaps a first step could be to grant political rights to Mercosurean migrants, as the EU did for communitarian migrants, with an eye toward expanding those rights to all foreign residents. Political inequality of this type would be eliminated in order to implement an inclusive democracy where foreign residents participate in collective decisions that affect their lives.

Notes

1. In this article, these four countries are defined as Mercosur member states, in order to distinguish between them and later incorporated associate states.

2. In 2006, Venezuela applied to become a Mercosur member state. Its has not been accepted yet.

3. In 1914, the nonnative population represented one-third of the total population in Argentina. In this article, all statistical data are taken from population censuses (Argentina, 2001; Brazil, 2000; Paraguay, 2002; and Uruguay, 1996), gathered by the IMILA Project (CEPAL/CELADE), www.cepal.org/migracion/imila/.

4. These conditions vary according to time and country. For a long time, women's electoral rights were nonexistent; some countries grant citizenship to people over twenty-one years old, and others to people over eighteen years old.

5. National government, federal district, and the twenty-three provinces.

6. Facilitating the comparison, the four countries share similar governance structures. At the national level, each government has a bicameral legislative system. National executive power is in charge <<in the hands?>> of a president, who is both the chief of state and head of government. At the intermediate government level, in Brazil, Paraguay, Uruguay, and the federal district and some provinces in Argentina, most legislatures are unicameral

and executive power is exercised by a governor (or departmental mayor). In every country at the lowest government jurisdiction, there is a unicameral legislature and the executive <<the executive department?>> is run by a mayor.

7. Brazil is divided into twenty-six states (*estados*) and Paraguay is divided into seventeen departments (*departamentos*). Uruguay is divided into nineteen departments (*departamentos*).

8. This article takes into account only the major elective authorities. There are other elective authorities, such as school counselors.

9. In 2008, there were 5,357 migrants with legal permanent residence. From Mercosur countries: 1,201 from Brazil, 209 from Argentina, and 36 from Uruguay.

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