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978-1-108-42556-8 — The National versus the Foreigner in South America
Diego Acosta
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The National versus the Foreigner in South America

Since the turn of the century, South American governments and regional organisations have adopted the world's most open discourse on migration and citizenship. At a time when restrictive choices were becoming increasingly predominant around the world, South American policy makers presented their discourse as being both an innovative and exceptional 'new paradigm' and part of a morally superior, avant-garde path in policy making. This book provides a critical examination of the South American legal framework through a historical and comparative analysis. Diego Acosta uses this analysis to assess whether the laws are truly innovative and exceptional, as well as evaluating their feasibility, strengths and weaknesses. By analysing the legal construction of the national and the foreigner in ten South American countries during the last two centuries, he demonstrates how different citizenship and migration laws have functioned, as well as showing why states have opted for certain regulation choices and the consequences of these choices for state and nation building in the continent. An invaluable insight for anyone interested in global migration and citizenship discussions.

Diego Acosta is a Reader in European and Migration Law at the University of Bristol.

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The National versus the Foreigner in South America

200 Years of Migration and Citizenship Law

DIEGO ACOSTA
University of Bristol

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Preface

In the summer of 2009 I presented my work on the European Union (EU) Returns Directive in Santiago de Chile (IPSA Conference), Rio de Janeiro (ISA-ABRI Conference) and in Bogotá (Universidad de los Andes and Universidad Libre). The EU Returns Directive establishes the procedure for returning migrants in an irregular situation to their countries of origin. While preparing my presentation, I thought it would be a good idea to include one slide on how all South American governments, as well as Latin American ones more generally, had vigorously criticised the adoption of this Directive. That slide, I thought, would be a good way to connect with my audiences (large or small) as well as to highlight the outcry that this piece of law had caused throughout the region. While presenting in Rio de Janeiro, my PhD supervisor at the time, Professor Elspeth Guild, found the slide intriguing. It was, she said, worth exploring how the Returns Directive was a terrible exercise in public relations, given the EU has a special partnership with the whole region, which fiercely opposed a law that affected their emigrants' rights. In November 2009, I published a policy brief on the topic with the Centre for European Policy Studies (CEPS), a think tank based in Brussels.[1] A few months later, I received a request from that same think tank to produce a small report on how Argentina, Brazil and Chile regulated irregular migration. This would have been part of a larger project that the EU Fundamental Rights Agency was developing in order to better understand how other regions were dealing with undocumented migration. Whilst I had already lived, worked and studied in Brazil and Colombia, this was to be my first navigation through South American migration law – what I found truly captured my attention. Having read all the critiques of the EU, I expected to find much more open legal regimes and a much more generous approach towards irregular migrants and their rights. If you criticise something, I thought, surely it means you are doing things much better. As always, reality proved to be much more complex. Whilst with great interest I examined the 2004 Argentinean migration law, the 2002 MERCOSUR Residence Agreement and some regularisation procedures that had taken place in the three countries, I could not be but shocked to find that the Brazilian and Chilean migration laws were still the

[1] D. Acosta, *Latin American Reactions to the Adoption of the Returns Directive*, Brussels: CEPS, 2009.

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same ones that had been adopted in 1980 and 1975, respectively, during their last military dictatorships. These laws included numerous examples of legally sanctioned restriction, exclusion and discrimination towards non-nationals. It was at this point that I realised the importance of starting to thoroughly analyse the region's legal regime. The book you hold in your hands is the result of that journey from 2009 to 2018.

There are numerous institutions to which I would like to extend my gratitude for having supported me throughout this research. I have conducted one-month research visits to Fundação Getulio Vargas in Rio de Janeiro, Universidad di Tella in Buenos Aires and Universidad Javeriana in Bogotá. I am especially thankful for the hospitable environment in all three institutions, in particular to Paula Wojcikiewicz Almeida, Alejandro Chehtman and Roberto Vidal, respectively, for their warm welcome. Preliminary results of this work have been presented at numerous universities and other institutions in Bogotá, Buenos Aires, Brasilia, Lima, Montevideo, Quito, Rio de Janeiro and Santiago de Chile. The list of colleagues to mention in each of these places is enormous but I would like to especially mention the following. In Argentina: Pablo Ceriani, Ana Paula Penchaszadeh, Diego Beltrand, Lelio Mármora, Leiza Brumat, Adriana Alfonso, and Fr. Mario Miguel Santillo and Juan Artola, who unfortunately passed away in 2016 and 2018 respectively. In Brazil: Paulo Sergio de Almeida, Duval Fernandes, Lieselot Vanduynslager, Helion Póvoa Neto and José Sacchetta. In Chile: Tomás Pascual, Jorge Leyton, Delfina Lawson, Miguel Yaksic, Cristián Doña Reveco, Patricia Roa and Rodrigo Sandoval. In Colombia: William Mejia, Marco Velásquez, René Urueña and Beatriz Sánchez Mójica. In Ecuador: Michel Levi, Gioconda Herrera and Marco Navas. In Peru: Guido Mendoza, Luis Tello, Esther Anaya Vera and Ana Neyra. In Uruguay: Ana Santestevan, Victoria Prieto and Martín Koolhaas.

I must also recognise the generous support from the University of Bristol Law School, which offered me a one-year research period during the academic year 2015–2016 in order to initiate this book. I would like to thank several colleagues at the University, in particular, Matthew Brown, Jon Fox, Chris Bertram, Phil Syrpis, Tonia Novitz, Clair Gammage, Malcolm Evans, Steven Greer, Achilles Skordas, Chris Willmore, Janine Sargoni, Matias Rodríguez Burr and Florian Scheding, who have all provided comments on various drafts or helped me in other ways.

During my research year, I had the honour to be a Fernand Braudel Fellow at the EUI in Florence (September–December 2015) and an Emile Nöel Fellow at NYU in New York (January–June 2016). At the EUI, I would like to thank Bruno de Witte, Philippe Fargues, Philippe de Bruycker, Anna Triandafyllidou and Ruth Rubio Marín. At NYU, a special thanks go to Gráinne de Búrca, Wojciech Sadurski, Adam Cox and Samuel Issacharoff.

Many others have commented on or discussed my work in the numerous places where I have presented it around the world, or supported my research for this project in various other ways. They include José Moya, Alex Aleinikoff, François Crépeau, Damian Chalmers, David Abraham, Ana Margheritis, Juliet

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This project has benefited from the research support from Laura Sánchez Carboneras and Claudia Gimeno Fernández, as well as from excellent copy editing and comments by Victoria Finn. Part of the research leading to these results received funding from the European Research Council under the European Union's Seventh Framework Programme (FP/2007–2013) / ERC Grant Agreement no. 340430 for the project Prospects for International Migration Governance (MIGPROSP) awarded to Professor Andrew Geddes, in which I participate as co-investigator. I would like to thank Andrew for his continuous support of my work, as well as all of my colleagues in the project, particularly Marcia Vera Espinoza and Jason Freeman. Special thanks go also to all the excellent team at CUP, which has made the editing process of the book a very easy task.

Finally, and perhaps most importantly, there are four colleagues with whom I have discussed at length numerous aspects of this research and whose comments have been key in shaping some of the ideas in my work. They are Rainer Bauböck, Jacopo Martire, Feline Freier and Jacques Ramírez. I extend my greatest appreciation to the four of you.

The research for this book has been conducted in numerous places throughout South America, Europe and the USA. It has been a most enjoyable journey for me and I have been fortunate to have visited numerous research institutions and libraries, among which I would like to especially mention the Biblioteca Hispánica in Madrid, which seems to have always miraculously had any manuscript that I could not find elsewhere. The resulting present volume would not have been possible without the support of my wife, mother and sister. This book is dedicated to the memory of my father, el Profesor Rafael Acosta, born in Sativa Sur, Boyacá, Colombia, in 1943.

Diego Acosta Arcarazo
January 2018, Bristol

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Acronyms

ACHPR	African Charter on Human and People's Rights
ACHR	American Convention on Human Rights
AMF	Andean Migration Forum
CAN	Andean Community
CAT	Committee Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CELAC	Community of Latin American and Caribbean States
CEPAL	Economic Commission for Latin America
CJEU	Court of Justice of the European Union
CMW	Committee on the Protection of the Rights of All Migrant Workers and Members of their Families
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECtHR	European Court of Human Rights
EU	European Union
HR Comittee	United Nations Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
ILO	International Labour Organization
IOM	International Organization for Migration
IPPDH	Instituto de Políticas Públicas y Derechos Humanos del MERCOSUR (MERCOSUR Institute for Public Policies and Human Rights)

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LAFTA	Latin American Free Trade Association (ALALC Treaty in its Spanish acronym)
LAIA	Latin-American Integration Association (ALADI in its Spanish acronym)
MEP	Member of the European Parliament
MERCOSUR	Common Market of the South
MIGPROSP	Prospects for International Migration Governance
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organisation
OAS	Organization of American States
SACM	South American Conference on Migration
TCN	Third-Country National
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNASUR	Union of South American Nations
UN	United Nations

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Political Map of South America
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