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.
The Law in Context Series

Editors: William Twining (University College London), Christopher McCrudden (Queen's University Belfast) and Bronwen Morgan (University of Bristol).

Since 1970 the Law in Context series has been at the forefront of the movement to broaden the study of law. It has been a vehicle for the publication of innovative scholarly books that treat law and legal phenomena critically in their social, political and economic contexts from a variety of perspectives. The series particularly aims to publish scholarly legal writing that brings fresh perspectives to bear on new and existing areas of law taught in universities. A contextual approach involves treating legal subjects broadly, using materials from other social sciences, and from any other discipline that helps to explain the operation in practice of the subject under discussion. It is hoped that this orientation is at once more stimulating and more realistic than the bare exposition of legal rules. The series includes original books that have a different emphasis from traditional legal textbooks, while maintaining the same high standards of scholarship. They are written primarily for undergraduate and graduate students of law and of other disciplines, but will also appeal to a wider readership. In the past, most books in the series have focused on English law, but recent publications include books on European law, globalisation, transnational legal processes, and comparative law.

Books in the Series
Ali: Modern Challenges to Islamic Law
Anderson, Schum & Twining: Analysis of Evidence
Ashworth: Sentencing and Criminal Justice
Barton & Douglas: Law and Parenthood
Bell: French Legal Cultures
Bercusson: European Labour Law
Birkinshaw: European Public Law
Birkinshaw: Freedom of Information: The Law, the Practice and the Ideal
Brownsword & Goodwin: Law and the Technologies of the Twenty-First Century: Text and Materials
Cane: Atiyah’s Accidents, Compensation and the Law
Clarke & Kohler: Property Law: Commentary and Materials
Collins: The Law of Contract
Collins, Ewing & McColgan: Labour Law
Cowan: Housing Law and Policy
Cranston: Legal Foundations of the Welfare State
Darian-Smith: Laws and Societies in Global Contexts: Contemporary Approaches
Dauvergne: Making People Illegal: What Globalisation Means for Immigration and Law
Davies: Perspectives on Labour Law
De Sousa Santos: Toward a New Legal Common Sense
Diduck: Law's Families
Estella: Legal Foundations of EU Economic Governance
Fortin: Children's Rights and the Developing Law
Glover-Thomas: Reconstructing Mental Health Law and Policy
Gobert & Punch: Rethinking Corporate Crime
Goldman: Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority
Haack: Evidence Matters: Science, Proof, and Truth in the Law
Harlow & Rawlings: Law and Administration
Harris: An Introduction to Law
Harris, Campbell & Halson: Remedies in Contract and Tort
Harvey: Seeking Asylum in the UK: Problems and Prospects
Hervey & McHale: European Union Health Law: Themes and Implications
Hervey & McHale: Health Law and the European Union
Holder & Lee: Environmental Protection, Law and Policy: Text and Materials
Jackson & Summers: The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions
Kostakopoulou: The Future Governance of Citizenship
Lewis: Choice and the Legal Order: Rising above Politics
Likosky: Transnational Legal Processes: Globalisation and Power Disparities
Likosky: Law, Infrastructure and Human Rights
Maughan & Webb: Lawyering Skills and the Legal Process
McGlynn: Families and the European Union: Law, Politics and Pluralism
Moffat: Trusts Law: Text and Materials
Monti: EC Competition Law
Morgan: Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law
Morgan & Yeung: An Introduction to Law and Regulation: Text and Materials
Nicola & Davies: EU Law Stories: Contextual and Critical Histories of European Jurisprudence
Norrie: Crime, Reason and History
O'Dair: Legal Ethics: Text and Materials
Oliver: Common Values and the Public–Private Divide
Oliver & Drewry: The Law and Parliament
Picciotto: International Business Taxation
Probert: The Changing Legal Regulation of Cohabitation, 1600–2010
Reed: Internet Law: Text and Materials
Richardson: Law, Process and Custody
Roberts & Palmer: Dispute Processes: ADR and the Primary Forms of Decision-Making
Rowbottom: Democracy Distorted: Wealth, Influence and Democratic Politics
Sauter: Public Services in EU Law
Scott & Black: Cranston's Consumers and the Law
Seneviratne: Ombudsmen: Public Services and Administrative Justice
Seppänen: Ideological Conflict and the Rule of Law in Contemporary China
Siems: Comparative Law
Stapleton: Product Liability
Stewart: Gender, Law and Justice in a Global Market
Tamanaha: Law as a Means to an End: Threat to the Rule of Law
Turpin & Tomkins: British Government and the Constitution: Text and Materials
Twining: Globalisation and Legal Theory
Twining: Rethinking Evidence: Exploratory Essays
Twining: General Jurisprudence: Understanding Law from a Global Perspective
Twining: Human Rights, Southern Voices: Francis Deng, Abdullahi An-Na‘im, Yash Ghai and Upendra Baxi
Twining & Miers: How to Do Things with Rules
Ward: A Critical Introduction to European Law
Ward: Law, Text, Terror
Ward: Shakespeare and Legal Imagination
Wells & Quick: Lacey, Wells and Quick: Reconstructing Criminal Law
Zander: Cases and Materials on the English Legal System
Zander: The Law-Making Process

International Journal of Law in Context: A Global Forum for Interdisciplinary Legal Studies

The International Journal of Law in Context is the companion journal to the Law in Context book series and provides a forum for interdisciplinary legal studies and offers intellectual space for ground-breaking critical research. It publishes contextual work about law and its relationship with other disciplines including but not limited to science, literature, humanities, philosophy, sociology, psychology, ethics, history and geography. More information about the journal and how to submit an article can be found at http://journals.cambridge.org/ijc
The National versus the Foreigner in South America

200 Years of Migration and Citizenship Law

DIEGO ACOSTA
University of Bristol
Contents

Preface xi
List of Acronyms xv
Political Map of South America xvii

1 South America’s Central Role in Migration and Citizenship Law 1

PART I: THE NINETEENTH AND TWENTIETH CENTURIES 29
2 Open Borders in the Nineteenth Century: Constructing the National, the Citizen and the Foreigner 31
3 The Construction of the Hispano-American Legal Figure in the Nineteenth Century 60
4 The Legal Construction of the Foreigner as Undesirable in Twentieth-Century South America 86

PART II: CONSOLIDATION AND TRANSITION INTO THE TWENTY-FIRST CENTURY 113
5 The Construction of the Irregular Immigrant: The Principle of Non-Criminalisation of Undocumented Migration 120
6 The Right to Migrate as a Fundamental Right? The Construction of the Foreigner through Equal Treatment 148
7 Open Borders and the Construction of a South American Citizen 173
8 Conclusion: Constructing and Deconstructing the Foreigner – An Innovative and Exceptional Approach? 199

Afterword 215
Bibliography 217
## Contents

1. Legislation: South American Countries 239
2. Legislation: Countries in Latin America outside South America 252
3. Legislation: Countries outside Latin America 256
4. Bilateral Agreements 257
5. Regional Organisations of the Americas 262
6. Agreements, Pan-American Conferences 266
7. Other Regional Agreements in the Americas 267
8. United Nations Instruments 269
9. Other International Instruments 270
10. Case Law 272
11. Index 275
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. 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

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, Brasília, 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 Mármore, 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, Delína Lawson, Miguel Yaksic, Cristián Doña Reveco, Patricia Roa and Rodrigo Sandoval. In Colombia: William Mejía, Marco Velásquez, René Urueña and Beatriz Sánchez Mójica. In Ecuador: Michel Levi, Gisconda Herrera and Marco Navas. In Peru: Guido Mendoza, Luis Tello, Esther Anaya Vera and Ana Neyra. In Uruguay: Ana Santestevan, Victoria Prieto and Martin 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
Preface

Stumpf, Catherine Tinker, Iris Goldner, Peter Spiro, Jaya Ramji-Nogales, David FitzGerald, Elspeth Guild, Kees Groenendijk, Violeta Moreno Lax, Jennifer Gordon, Maria Lorena Cook, and especially Dimitry Kochenov.

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
# Acronyms

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACHPR</td>
<td>African Charter on Human and People's Rights</td>
</tr>
<tr>
<td>ACHR</td>
<td>American Convention on Human Rights</td>
</tr>
<tr>
<td>AMF</td>
<td>Andean Migration Forum</td>
</tr>
<tr>
<td>CAN</td>
<td>Andean Community</td>
</tr>
<tr>
<td>CAT</td>
<td>Committee Against Torture</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
</tr>
<tr>
<td>CELAC</td>
<td>Community of Latin American and Caribbean States</td>
</tr>
<tr>
<td>CEPAL</td>
<td>Economic Commission for Latin America</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
</tr>
<tr>
<td>CMW</td>
<td>Committee on the Protection of the Rights of All Migrant Workers and Members of their Families</td>
</tr>
<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child</td>
</tr>
<tr>
<td>CRPD</td>
<td>Convention on the Rights of Persons with Disabilities</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>HR Committee</td>
<td>United Nations Human Rights Committee</td>
</tr>
<tr>
<td>IACHR</td>
<td>Inter-American Commission on Human Rights</td>
</tr>
<tr>
<td>IACHR</td>
<td>Inter-American Court of Human Rights</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ICMW</td>
<td>International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families</td>
</tr>
<tr>
<td>ICPPED</td>
<td>International Convention for the Protection of All Persons from Enforced Disappearance</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organization</td>
</tr>
<tr>
<td>IOM</td>
<td>International Organization for Migration</td>
</tr>
<tr>
<td>IPPDH</td>
<td>Instituto de Políticas Públicas y Derechos Humanos del MERCOSUR (MERCOSUR Institute for Public Policies and Human Rights)</td>
</tr>
<tr>
<td>Acronyms</td>
<td>Description</td>
</tr>
<tr>
<td>----------</td>
<td>-------------</td>
</tr>
<tr>
<td>LAFTA</td>
<td>Latin American Free Trade Association (ALALC Treaty in its Spanish acronym)</td>
</tr>
<tr>
<td>LAIA</td>
<td>Latin-American Integration Association (ALADI in its Spanish acronym)</td>
</tr>
<tr>
<td>MEP</td>
<td>Member of the European Parliament</td>
</tr>
<tr>
<td>MERCOSUR</td>
<td>Common Market of the South</td>
</tr>
<tr>
<td>MIGPROSP</td>
<td>Prospects for International Migration Governance</td>
</tr>
<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
</tr>
<tr>
<td>OAS</td>
<td>Organization of American States</td>
</tr>
<tr>
<td>SACM</td>
<td>South American Conference on Migration</td>
</tr>
<tr>
<td>TCN</td>
<td>Third-Country National</td>
</tr>
<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
</tr>
<tr>
<td>UNASUR</td>
<td>Union of South American Nations</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
</tbody>
</table>