'THE TRANSIENT FOREIGNER': RESTRICTIONS ON CITIZENSHIP ACQUISITION IN CHILE AND COLOMBIA FOR THOSE SAID TO BE 'PASSING THROUGH'

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Abstract This article explores the constitutional regulation of birthright *ius soli* citizenship in two Latin American countries which restrict access to citizenship for the children of foreigners deemed to be passing through the countries. Access to citizenship is a significant marker of membership, setting the boundaries of inclusion and exclusion within and across States. Choosing the cases of Chile and Colombia, this article uses historical, institutional and comparative analysis in order to excavate the evolving conceptions of citizenship in those two countries, with particular reference to the concepts of the 'transient foreigner' and of 'domicile'. The case studies provide an excellent laboratory within which to examine the evolution of constitutional ideas of citizenship and 'the people'. In Colombia, the outcome of the investigation shows that there is unlikely to be significant long-term change in the citizenship regime towards a more generalised acceptance of unconditional *ius soli*, notwithstanding the substantial shorter-term measures taken to accommodate the children of undocumented migrants from Venezuela and to respond to international pressure. In Chile, combined with other ongoing constitutional work in the citizenship space as part of a wider reform process, there may be a slow journey towards a different constitutional future for so-called 'transient foreigners' and others excluded within the State, but this is currently stalled. Chile has, however, introduced legislation cementing a more limited concept of 'transient foreigner', linking this work on citizenship to the wider domain of migration governance.

Keywords: comparative law, public international law, Latin America, constitutions, citizenship, transient foreigners, Chile, Colombia, migration.

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I. INTRODUCTION

As a legal status, citizenship creates a framework to distinguish between insiders and outsiders within a polity. However, legal status alone gives an incomplete picture if it is not combined with an understanding of the wider context of claims for membership within different States. Controversies about such claims are central to conceptions of justice and equality, which in many States are given a constitutional framing, for example, around the notion of 'the people' as the primary constitutional actor. These issues are also extensively debated by scholars of citizenship, who develop different models about who *ought* to be included within the framework of membership.[1]

Within this context, this article pursues two main aims. The first is to examine problems of access to citizenship for the children of non-citizens in two Latin American countries. The two countries (Chile and Colombia) have been chosen for two reasons. First, they differ from the regional norm for citizenship attribution because they *do not* have a rule of unconditional *ius soli* ascribing citizenship to any person born in the territory regardless of their legal status or that of their parents or the citizenship of their parents. It is important to note that the applicable rules in Chile and Colombia can generate child statelessness in circumstances where children born on the territory to non-citizen parents cannot easily access citizenship on the basis of *ius sanguinis* via their parents. Such families may be at risk of deportation and will likely experience high levels of social exclusion. Constitutional and legislative restrictions on *ius soli* place such children at a disadvantage vis-à-vis their peers because they may struggle to access public goods such as education and healthcare in the State of residence, even if they have citizenship of another country. These risks will be all the greater where the non-citizen parents continue to be denied the status of lawful resident. In that sense, the citizenship issue is intertwined with immigration policy. Immigration provides the second reason for choosing these two countries for comparison. They have both experienced substantial increases in their immigrant populations in the twenty-first century, notably because of issues of conflict and political and economic instability in various parts of Latin America. Their citizenship regimes have been placed under pressure as a result of these developments.

The second aim of this article is to place the current approaches taken by these States to this public policy challenge into a wider historical and socio-political context, by examining the evolution of the current norms and approaches to citizenship acquisition based on birth in the territory, as well as the range of current pressures that are exerted on these States from outside and from

[1] W Kymlicka, 'The Ethics of Membership in Multicultural Societies' (*Raison Publique*, 15 July 2022) <https://raison-publique.fr/3034/>. For a contrasting approach to that of Kymlicka, which focuses specifically on the significance of status citizenship, see R Bauböck, *Democratic Inclusion* (Manchester University Press 2018).

within, which condition the approach of different branches of government to the challenges of citizenship regulation. This, it is to be hoped, will foster a fuller appreciation of the legal rules under examination, and enable some comparative conclusions to be drawn that may inform a better understanding of the function of citizenship laws in Latin America today, as the region evolves politically and economically, as well as contributing to an understanding of citizenship and citizenship law which goes beyond the traditional terrain for academic work on this topic, namely Europe, North America and settler States such as Australia.

The framing for the article's analysis is the concept of 'constitutional citizenship'. According to Zachary Elkins, '[s]ome of the most intriguing clauses in national constitutions are those that define the nation and its members'.[2] The prism of 'constitutional citizenship' can assist with understanding the scope and nature of the membership principle within States, by reference to constitutional norms, including—in appropriate cases—constitutional norms which stem from international law.[3] When citizenship is conceived of within a constitutional law framing, it becomes more than a mere technical issue of sorting individuals into different categories, organised according to the Westphalian system of States legitimated by international law. It links citizenship also to real and imagined stories of peoplehood, which underpin the constitutional identities of individual States and 'peoples'.

Latin American constitutions are amongst the relatively few which provide an extensive constitutional articulation of principles of membership. The majority of constitutions across the globe simply reference citizenship (and/or nationality) and refer to further legislation governing the details. Latin America has also seen waves of constitutional renewal in many States, and this has included the creation of new constitutional courts, some of which have become activist in their work in relation to issues such as human rights or democratic consolidation.[4] From these elements, the conclusion can be drawn that the resolution of issues of controversy about the nature and scope of citizenship in that region often occurs within the framing of constitutional law, whether that is limited to the formal scope of the constitutional text or also encompasses the broader shadow cast by interpretations and applications of that constitutional text by bodies such as courts. Thus, nationality and citizenship in Latin America are a priori issues of constitutional law. This offers fertile territory for both intra-regional comparison and reflections on some of the distinguishing characteristics of that region, when viewed in a global context. In particular, studying citizenship in Latin America from a

[2] Z Elkins, 'When Constitutions Shape National Identity' (2013) 44 LASAForum 9, 9.

[3] J Shaw, *The People in Question: Citizens and Constitutions in Uncertain Times* (Bristol University Press 2020).

[4] G Helmke and J Ríos-Figueroa (eds), *Courts in Latin America* (CUP 2011).

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constitutional perspective highlights the ways in which the interlinked concepts of the national, the citizen and the foreigner offer a rich discursive field when observed closely.

This article combines elements of historical and institutional analysis using a comparative method,[5] in order to illuminate the analysis of domestic and international law, adopting the posture that comparison is a historically grounded and contextually framed process, with functional and interpretative objectives.[6] In terms of the traditional goals of comparative law, such as the identification of legal transplants or mutual learning processes, the article discerns tensions of similarity and difference in relation to both contemporary challenges (of migration and statelessness) and historical conditions of legal development—both States having attained independence as republics from the same European empire, namely Spain, as well as having been influenced, in their foundational moments, by revolutionary changes such as those in the United States (US) and France. That regional framing and the various points of similarity and difference, which are explained in detail in the sections which follow, help to overcome some of the classic objections to the comparative enterprise in the field of constitutional law, namely that national laws are just too 'local' and specific to be susceptible to constructive 'comparison'. In fact, in modern comparative studies of constitutional law, a rich description of context, highlighting in particular power relations within and across States, is embraced as a central component of the overall enterprise, along with an openness to interdisciplinary influences from history and from social sciences, as well as from decolonial studies more generally.[7] These are the premises which animate this study.

The article is structured as follows. In Section II, citizenship regulation in Latin America is explained in more detail, focusing on the categories of national, citizen and foreigner. This provides the immediate context for the two specific cases, which have thus far received little attention from scholars outside the region.[8] Along with a small number of other States,[9] the

[5] H Pihlajamäki, 'Merging Comparative Law and Legal History: Towards an Integrated Discipline' (2018) 66 AmJCompL 733.

[6] V Jackson, 'Comparative Constitutional Law: Methodologies' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 54.

[7] For the counterpoint between mainstream but also evolving methods in comparative law and 'decolonial comparative law', see L Salaymeh and R Michaels, 'Decolonial Comparative Law: A Conceptual Beginning' (2022) 86 RabelsZ 166.

[8] Diego Acosta also highlights the specificity, in the South American context, of these two States, but does not offer a comparison of their cases: D Acosta, 'Unblocking Access to Citizenship in South America: Policy-Makers, Courts and Other Actors', *Globalcit Forum Debate* on 'Unblocking Access to Citizenship in the Global South: Should the Process be Decentralised?' (16 November 2020) <https://globalcit.eu/unblocking-access-to-citizenship-in-the-global-south-should-the-process-be-decentralised/2/>.

[9] On the States which do not have unconditional *ius soli*, see O Vonk, *Nationality Law in the Western Hemisphere: A Study of Grounds for Acquisition and Loss of Citizenship in the Americas and the Caribbean* (Martinus Nijhoff Publishers 2014); and, with respect to Chile, JP Ramaciotti and J Shaw, 'The Implications of Chile's 2021 Immigration Law for Citizenship and Nationality'

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case-study countries provide an interesting deviation from the generalised acceptance of unconditional *ius soli* in western-hemisphere States both north and south of the equator. Section III (Colombia) and Section IV (Chile) set out the details of each case. Both these States have faced pressures from migration and mobility in recent years, as a result of poverty, political upheaval and conflict, and latterly COVID-19.[10] In these two countries, when the issue of citizenship for certain groups of children born in the territory has been raised, the various organs of the State (legislature, executive and judiciary) have dealt with the issue in very different ways. In the search to resolve the issues in a manner that triangulates between domestic imaginaries of 'who we are', international and domestic pressures to avoid child statelessness, and ongoing practices of migration and mobility within the region, the courts and political institutions of the two countries have developed a wide range of different approaches which respond to shorter- and longer-term contingencies and incentives.

Many of the same arguments about inclusion and exclusion in relation to birthright citizenship feature in other western-hemisphere countries, such as the US. In the US, there continue to be political arguments that *ius soli*, notwithstanding its constitutional anchoring in the Fourteenth Amendment after the Civil War, should be abandoned as a citizenship norm, at least for the children of parents who do not have a recognised and regular residence status. Such a restriction is justified using the argument that the norm as currently applied is over-inclusive and creates both 'accidental' Americans and ones who lack a legitimate claim on membership status.[11] At the end of Section II, the best-known case from the western hemisphere which has involved the exclusion of a group constructed as outsiders, brought about through the manipulation of *ius soli* citizenship, will be briefly reflected upon. This is the case of the Dominican Republic (DR) and its approach to the citizenship of those originating in Haiti but resident in the DR. In this case, as in Chile and Colombia, historical references to the mobility of foreigners (their 'transience') as well as to their 'otherness' form an important point of departure for the modern regulation of the boundaries of citizenship. What is notable, as will be seen in Sections III and IV, is that both Chile and Colombia differ sharply from the DR, whilst also retaining differences *inter se* which are highlighted in Section V.

(*Global Citizenship Observatory Blog*, 2 November 2021) <https://globalcit.eu/the-implications-of-chiles-2021-immigration-law-for-citizenship-and-nationality/>.

[10] For a brief overview of the issues, see C Sabatini and J Wallace, 'Migration in Latin America' (*Chatham House Explainer*, 6 October 2021) <https://www.chathamhouse.org/2021/10/migration-latin-america>.

[11] See Shaw (n 3) 104–6. For a review of recent debates, see MS Jones, 'Why Republicans Keep Calling for the End of Birthright Citizenship' (*The Atlantic*, 2 July 2023) <https://www.theatlantic.com/ideas/archive/2023/07/birthright-citizenship-trump-desantis-2024/674583/>.

II. THE NATIONAL, THE CITIZEN AND THE FOREIGNER IN LATIN AMERICA

Latin American constitutions contain certain distinctive elements that are in part a legacy of colonial history and also a product of the interests pursued after the independence of the various States, especially in relation to nation-building. All this can be seen in the evolving relationships between the national, the citizen and the foreigner. In the first place, the liberal values of political participation, freedom of movement and free development of economic activities present in the US Declaration of Independence (1776) and Constitution (1787), the French Declaration of the Rights of Man (1793) and the Spanish Constitution of Cádiz (1812) each had an important influence on Latin American constitutions.[12] Together they introduced elements relating to free movement, open borders and shorter naturalisation periods in the first constitutions and laws of Latin American countries, which resulted in them traditionally being seen as somehow more 'open' to foreigners,[13] a disposition that has re-emerged from time to time across centuries of constitutional and public policy change.

Second, the distinction between nationality and citizenship that was established by the Cádiz Constitution[14] in 1812 has been preserved and is still relevant today. The idea of *nationality* encompasses the definition of who is a *national* (whether based on *ius soli*, *ius sanguinis* or naturalisation), while the idea of *citizenship* refers to those who, along with being nationals, may need to meet additional requirements for them to be able to exercise political rights fully or to fulfil political obligations.[15] Despite the persistence of this distinction in the Latin American context, in this article the term 'citizenship' is mostly used, as this is now the commonly shared term in social science and most legal research to denote a combination of legal membership status along with the rights, duties and privileges of 'the citizen'.[16] The focus is therefore on who is a *national*, but framed in terms of what that means for *citizenship*.

Third, most Latin American constitutions incorporated *ius soli* as the primary means of being recognised as a national at birth, based on birth in the territory. This can be explained not only as an element inherited from the Cádiz Constitution, but also because of the interest in populating the newly independent States with nationals who would distinguish themselves from

[12] DS FitzGerald and D Cook-Martín, *Culling the Masses: The Democratic Origins of Racist Immigration Policy in the Americas* (Harvard University Press 2014) 3.

[13] D Acosta, *Regional Report on Citizenship: The South American and Mexican Cases* (Comparative Report No 2016/01) (EUDO Citizenship Observatory, Robert Schuman Centre for Advanced Studies and Edinburgh University Law School 2016) 4–5 <https://cadmus.eui.eu//handle/1814/43325>.

[14] Constitución política de la Monarquia Española, enacted at Cádiz, 19 March 1812.

[15] FitzGerald and Cook-Martín (n 12) 3.

[16] See, for example, the chapters from different disciplinary perspectives in A Shachar et al (eds), *The Oxford Handbook of Citizenship* (OUP 2017); and the discussion of citizenship and nationality in Shaw (n 3) 13–14.

those born in Spain, in order to strengthen sovereignty.[17] Beyond the constitutional texts, scholars also discern influences on the evolution of citizenship norms stemming from early modern times and exchanges between Spain and Spanish possessions in the Americas, related to local participation practices and the autonomy of municipalities.[18] Historical perspectives such as these show how the embrace or—at other times—suspicion of foreigners has evolved over centuries.[19]

The majority of Latin American countries apply *ius soli* without restrictions, although there are some exceptions. Oliver Vonk identifies five Latin American and Caribbean countries in which *ius soli* is limited: the Bahamas, Colombia, the DR, Haiti and Suriname.[20] While in the first three countries it is necessary to be the child of a national or of foreigners residing in a regular manner in the country, in Haiti it is necessary to be the child of a citizen who has never renounced his or her Haitian citizenship; and in Suriname it is relevant whether or not the child was born within wedlock.[21] Chile should also be considered in this group, since, as will be seen below, it excludes 'the children of transient foreigners' from the acquisition of nationality by *ius soli*. Colombia, which confers citizenship *ius soli* only if one of the parents is domiciled in the country, could be seen as a country giving preference to *ius sanguinis* (ie the inheritance of parental citizenship) rather than *ius soli*, although in practice the difference between *ius soli* and *ius sanguinis* countries is no longer as stark as it used to be. All countries maintain a mix of the two for a variety of policy reasons (especially immigration and emigration), and reasons of constitutional and legal heritage.

Limitations to *ius soli* may result in heightened risks of statelessness, especially in cases where there are difficulties for the child in acquiring the nationality of the parents. In this sense, existing international standards and agreements on the matter become relevant. Two central instruments that enshrine the right to nationality are the Convention on the Rights of the Child (CRC) and the American Convention on Human Rights (ACHR). The right to nationality implies that every child 'shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents'.[22]

[17] NP Appelbaum, AS Macpherson and KA Rosemblatt, 'Introduction: Racial Nations' in NP Appelbaum, AS Macpherson and KA Rosemblatt (eds), *Race and Nation in Modern Latin America* (University of North Carolina Press 2003) 1; T Schwarz, 'Políticas de Inmigración en América Latina: El Extranjero Indeseable en las Normas Nacionales, de la Independencia hasta los Años de 1930' (2012) 36 Procesos 39; Acosta (n 13).

[18] T Herzog, 'Communities Becoming a Nation: Spain and Spanish America in the Wake of Modernity (and Thereafter)' (2007) 11 CitStud 151. For a case study from Central America, see also J Dym, 'Citizen of Which Republic? Foreigners and the Construction of National Citizenship in Central America, 1823–1845' (2007) 64 Americas 477.

[19] D Acosta, *The National Versus the Foreigner in South America: 200 Years of Migration and Citizenship Law* (CUP 2018) 201–6.

[20] Vonk (n 9).

[21] ibid 385.

[22] Convention on the Rights of the Child (CRC) (adopted 20 November 1989, entered into force 2 September 1990) 1557 UNTS 3, art 7.

The ACHR states that 'Every person has the right to a nationality' and 'Every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality'.[23] These provisions, along with the 1961 Convention on the Reduction of Statelessness,[24] generate an obligation on States to grant nationality to every person born in its territory if they would otherwise be stateless. Article 20, and the broad manner in which it has been interpreted by the Inter-American Court of Human Rights (IACtHR) since 1984,[25] is unique in terms of its specificity, going beyond the generalised and unenforceable right to 'a' nationality in Article 15 of the Universal Declaration of Human Rights.[26] The legal guarantee is reinforced by the principle of the best interests of the child, according to which in every action that affects children, their best interests must be a primary consideration.[27] In practice, many States institutionalise these principles by providing for children to acquire the citizenship of the host country if they would otherwise be stateless.[28]

Many of these pitfalls are amply illustrated by one the best-known cases of a State 'manufacturing statelessness'[29] in recent decades, namely the case of Haitians and Dominicans of Haitian descent in the DR.[30] The roots of the statelessness problem are very deep and can be linked to the uncomfortable cohabitation of the island of Hispaniola by Haiti and the DR, which have very different colonial and post-independence histories, different languages, and also, in the case of Haiti, a unique revolutionary history based on a slave revolt.[31] The latter distinguished Haiti from other Latin American States dominated mainly by Creole elites, even after slave emancipation.[32] The DR had, from the outset, a stronger emphasis on *ius sanguinis* compared to *ius soli*, and its constitutional provision on *ius soli* included an exception for

[23] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 20.

[24] Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175 (1961 Convention).

[25] *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Advisory Opinion OC-4, Inter-American Court of Human Rights Series No 4 (19 January 1984) para 33.

[26] UN General Assembly, 'Universal Declaration of Human Rights', UNGA Res 217 (III) A (10 December 1948) UN Doc A/RES/217(III) A. See B von Rütte, *The Human Right to Citizenship: Situating the Right to Citizenship within International and Regional Human Rights Law* (Brill 2022) 150–1.

[27] CRC (n 22) art 3.

[28] This is 'remedial *ius soli*' according to R de Groot and O Vonk, 'Acquisition of Nationality by Birth on a Particular Territory or Establishment of Parentage: Global Trends Regarding *ius sanguinis* and *ius soli*' (2018) 65 NILR 319.

[29] N Jain, 'Manufacturing Statelessness' (2022) 116 AJIL 237.

[30] E Sagas and E Roman, 'Who Belongs: Citizenship and Statelessness in the Dominican Republic' (2017) 9 GeoJL&ModCriticalRacePersp 35; J Blake, 'Haiti, the Dominican Republic, and Race-Based Statelessness in the Americas' (2014) 6 GeoJL&ModCriticalRacePersp 139; Shaw (n 3) 107–9.

[31] K Salt, *The Unfinished Revolution: Haiti, Black Sovereignty and Power in the Nineteenth-Century Atlantic World* (Liverpool University Press 2019).

[32] Acosta (n 19) 61.

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children born to parents who were 'in transit'. Much turns, in this narrative, on what constitutes a person 'in transit'.

For decades there had been undocumented migration primarily for economic reasons from Haiti to the DR, often tacitly encouraged by the latter. Haitians had persistent difficulties in gaining birth documentation in the DR for their children. In the 2005 judgment of the IACtHR in *Yean and Bosico Girls*,[33] the Dominican practice of denying birth registration to the children of Haitians was found to be in violation, inter alia, of Article 20 of the ACHR. Following this judgment, the DR doubled down on its approach. An amendment to the Constitution in 2010 explicitly excluded children residing 'illegally' from the benefit of the Constitution's *ius soli* provisions. Furthermore, in 2013 a judgment of the DR Constitutional Tribunal effectively cancelled, retrospectively, the citizenship of all children of Haitian immigrants who had been born between 1929 and 2010. Because most of them did not have, or could not access, Haitian citizenship, this not only rendered this group of people 'illegals' in their own home, but it also created mass statelessness. Notwithstanding widespread international condemnation of the DR's practices, plus a 2014 judgment of the IACtHR discussing in detail the reasonable interpretation of the concept of 'in transit',[34] which was 'hailed as an important moment for putting issues of arbitrary deprivation of nationality on the international legal and political map',[35] there has been little progress for Dominicans of Haitian descent in the DR in recent years. They continue to struggle both for legal citizenship but also for wider cultural belonging within the State. They are not seen as belonging to the DR, despite long-standing residence in many cases. Their situation demonstrates the weakness of international law and international institutions, as currently conceived, to challenge the practices of States.[36]

Narratives such as that of Haitians in the DR encompass not only a story of citizenship (denied) but also a set of scenarios around migration governance, including the deployment of contested categories around 'illegal migration' and 'illegal migrants'. The following sections focus in detail on the evolving regulation of citizenship in Colombia and Chile, in the context of the specific migration governance challenges that these two States have faced. Based on information gathered by the International Organisation of Migration Global Migration Data Portal, amongst Latin American States Colombia and Chile have seen the largest rises in their immigrant population between 2015 and 2020, with staggering increases of 1,092 per cent and 150 per cent,

[33] *The Girls Yean v Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 130 (8 September 2005).

[34] *Case of Expelled Dominicans and Haitians v Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 282 (28 August 2014).

[35] Jain (n 29) 257.

[36] ibid.

respectively.[37] Other Latin American countries have experienced a more modest increase in their migrant population, ranging from 5 per cent to 11 per cent.[38] As with the DR, this is both a migration governance and a citizenship challenge. The DR conditions access to *ius soli* citizenship by reference to a category of so-called 'foreigners in transit', and more recently to the category of 'illegality', and the Chilean Constitution applies a similarly worded exception in respect of the children of 'transient foreigners' when setting the scope of *ius soli*. Meanwhile, the Colombian Constitution imposes a restrictive condition of 'domicile' for *ius soli* citizenship to apply to the children of non-Colombians. There are overlaps in language between the various constitutional provisions regulating access to *ius soli* citizenship, but also substantial differences in relation to the practices adopted within the various States, conditioned by histories and lived experiences within those States as well as by ideas around the proper scope of social membership. Only a detailed and fully contextualised presentation of these cases can enable an explanation of the differing approaches that the two countries have taken towards the citizenship dimensions of migration challenges in recent years.

III. COLOMBIA

A. *Evolution of the Constitutional and Legal Regulation of Citizenship Acquisition by* ius soli *in Colombia*

After independence from the Spanish Crown was consolidated between 1810 and 1819, Colombian political elites focused on achieving the unity of their territories and strengthening sovereignty. An objective of great importance was to unite the inhabitants of the territories of Venezuela, Nueva Granada and Quito, which at that time formed the Republic of Colombia. This was reflected in the Constitution of Cúcuta of 1821,[39] which defined who was part of the national community. This constitutional text considered three groups of men as Colombians: all free men born in Colombian territory and their descendants; those settled in Colombia before independence and loyal to that cause; and those who were born abroad and naturalised.[40] In these categories, three important things are revealed by the configuration of

[37] Colombia increased its migrant stock from 159,400 in 2015 to 1.9 million in 2020; and Chile from 639,700 in 2015 to 1.6 million in 2020. For data, see Migration Data Portal, 'International Migration Flows' (24 September 2020) <https://www.migrationdataportal.org/themes/international-migration-flows>.

[38] For the figures, see Migration Data Portal <www.migrationdataportal.org>.

[39] *Constitución de la República de Colombia*, Rosario de Cúcuta (Bruno Espinosa, Impresor de Gob. Gral. 1821).

[40] C Escobar, *Report on Citizenship Law: Colombia* (European University Institute, Robert Schuman Centre for Advanced Studies and EUDO Citizenship Observatory 2015); MC Ospina Echeverri and JF Marín Suarez, 'Ciudadanía y elecciones en la Nueva Granada. Las definiciones y su reglamentación, 1821–1853' (2018) 10 Historelo 100.

nationality at that time: first, that women and slaves were not considered nationals; second, that foreigners who respected the independence and sovereignty of the Republic were welcome; and third, that every man born in Colombian territory acquired nationality by *ius soli*.

Throughout this period, as for other recently independent countries in the region, the nation's progress was a priority, reflected in a particular interest in attracting immigrants who would 'improve' the composition of the national population. During the 1820s, the political elites promoted policies to attract migrants from Europe and the US. These groups were seen as likely to help Colombia foster a modern, productive and progressive population. The objectives pursued were to populate the recently independent country in order to consolidate its sovereignty, accelerate processes of economic exploitation, and bring in 'white' people to reduce the presence of indigenous and Afro-descendant populations.[41] These interests were consistent with the initial nationality and citizenship regime. The Constitution of 1821 granted foreigners in Colombia the same protection of their persons and property as citizens. Additionally, naturalisation was open to those who performed productive activities or occupations, renounced their ties with other governments, swore allegiance to the Constitution and had three years of residence in Colombia.[42] The incentives were in place to attract these immigrants and make them stay in the country, so their offspring could also contribute to the development of Colombia. In this context, unconditional *ius soli* also played an essential role in the configuration of Colombian citizenship.

The Constitution of 1832, signed after the collapse of the Republic of Colombia, marked the first separation of Colombia from the Latin American tradition of unconditional *ius soli*.[43] This constitutional framework introduced an element of descent as a requirement to acquire Colombian nationality by *ius soli*. In addition to being born in the national territory, it was necessary to be a descendant of nationals of Granada (the name of the State at that time). Children of foreigners born in Colombia had to establish their residence in the country to be recognised as nationals. Although liberal governments relaxed the residence requirement during the second half of the nineteenth century, the conservative Constitution of 1886 reinforced the limits to *ius soli*,[44] requiring the parents of children born in Colombia to be domiciled in the country in order for their children to acquire Colombian nationality. This requirement remains in the 1991 Colombian Constitution

[41] J Blanco-Blanco, 'Los derechos civiles y políticos en la historia constitucional colombiana' (2009) 3 NovumJus: RevEspSociolJur&Polít 133; E Bassi, 'The "Franklins of Colombia": Immigration Schemes and Hemispheric Solidarity in the Making of a Civilised Colombian Nation' (2018) 50 JLatAmStud 673.

[42] Escobar (n 40); Bassi ibid.

[43] *Constitucion del Estado de la Nueva-Granada*, dada por la Convencion constituyente en el año 1832 [given by the Constituent Convention in the year 1832]; Escobar ibid 2.

[44] For the full text in English, see B Moses, 'Supplement: Constitution of the Republic of Colombia' (1893) 3 AnnalsAmAcadPol&SocSci 1 <http://www.jstor.org/stable/1008944>.

which is still in force. This Constitution was transformative in respect of certain governance matters and the recognition of the multi-ethnic character of the country, but not in relation to the regulation of citizenship.[45]

The limitation of citizenship acquisition by *ius soli* can be explained by the aim of strengthening the links of new nationals with the nation[46] and the failure of the policy of attracting immigrants from Europe and the US; despite all the efforts of successive Colombian governments, the plans to attract massive immigration were unsuccessful. According to the available information, fewer than 10,000 immigrants arrived in Colombia during the 1820s,[47] demonstrating that the open immigration policies did not yield the expected results. The last years of the nineteenth century and the first decades of the twentieth century were characterised by a gradual hardening of migration policies. During the 'Regeneration' period (marked by the domination of conservative authorities after the liberal governments), the ideal of attracting immigrants lost momentum, and a more restrictive approach was adopted, as the priority became to unify the country and to protect religion and the common language.[48] Granting citizenship to the children of foreigners born in the national territory did not align with the ideas of unity and cultural conservation, which explains why the *ius soli* principle was limited to the newborns of foreigners who were already living (domiciled) in the country.

B. *Regulation of* ius soli *in Colombia and the 'Domicile' Requirement*

The 1991 Constitution, currently in force, establishes in Article 96 two scenarios in which someone born in Colombia can acquire Colombian nationality by *ius soli*: first, where a child has at least one Colombian parent, and second, where at least one of the child's parents is domiciled in the country at the time of birth. The concept of domicile is not developed in the Constitution, but Article 77 of the Colombian Civil Code defines it as 'residence accompanied by the intention of permanence'.[49] Article 80 further establishes that the intention of permanence in a place can be presumed by the fact of opening a business or lasting establishment to manage it personally; or by accepting a permanent job of the type that is regularly conferred for a long time; or by 'other similar circumstances'. Article 80 does not develop further what could be understood as similar circumstance, but it

[45] Constitution of the Republic of Colombia (1991); for an English translation of the 1991 constitution, see Constitute Project, 'Colombia 1991 (rev. 2015)' <https://constituteproject.org/constitution/Colombia_2015>; Escobar (n 40) 10; Acosta (n 19) 58.

[46] *Relación de los debates sobre el proyecto que precede en el Consejo Nacional Constituyente, sesión del 14 de mayo de 1886* [Report of the debates on the preceding project in the National Constituent Council, session of 14 May 1886], 82–6. Institutional Repository of Universidad Nacional <https://repositorio.unal.edu.co/handle/unal/2055>.

[47] Bassi (n 41) 697.

[48] Escobar (n 40) 7.

[49] Código Civil (amended by Law No 1453 of 2011) (WIPO Lex) <https://www.wipo.int/wipolex/en/text/229920>.

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could be presumed that any activity that necessarily leads to settling in a determined place could be considered proof of the intention of permanence. Furthermore, Law 43 of 1993, which establishes provisions on the acquisition and loss of Colombian nationality, adopts the same definition of domicile as in the Civil Code.[50] However, as will be developed below, Immigration Law 2,136 of 2021[51] indicates that residence with a vocation of permanence requires having held a residence permit for a period of three years.

Although neither the Constitution nor the law contained a requirement to prove domicile for immigration status, before the approval of Immigration Law 2,136 in 2021, administrative interpretations in fact limited it to those with a specific type of residence permit.[52] Decree 1,514 of 2012, which refers to the issuance of travel documents, considered that the residence requirement is only met if one parent has a residence permit of indefinite or permanent duration.[53] As a result of this interpretation, until 2014, a child born in Colombia would not be recognised as Colombian even if one of their parents had a work permit visa (with a maximum duration of three years). In a case decided in 2015, however, the Colombian Constitutional Court determined that Decree 1,514 should not be applied.[54] Furthermore, the Court considered that the requirement of a residence permit was unconstitutional since the Constitution only requires one of the parents to be domiciled in the country according to the Civil Code's definition of domicile. The Court thus established that foreigners with a temporary visa but the intention of permanence in the territory should be considered residents, and consequently their children should obtain Colombian nationality.[55]

The National Registry of Civil Status of Colombia (in charge of registering births and recognising the nationality of newborns) has also interpreted the residence requirement in a restrictive way.[56] A circular from the Registry in

[50] Colombia: Ley No 43 de 1993 por medio de la cual se establecen las normas relativas a la adquisición, renuncia, pérdida y recuperación de la nacionalidad colombiana (1 February 1993) <https://www.refworld.org/docid/3dbd1ec44.html>.

[51] Immigration Law No 2,136/2021, Congress of the Republic of Colombia: 'Through which definitions, principles and guidelines are established for the regulation and orientation of the Colombian State's comprehensive immigration policy' <https://dapre.presidencia.gov.co/normativa/normativa/LEY%202136%20DEL%204%20DE%20AGOSTO%20DE%202021.pdf>.

[52] C Moreno, G Pelacani and JM Amaya-Castro, *La Apatridia en Colombia: Fragmentos dispersos de una conversación pendiente* (Centro de Estudios En Migración (CEM) 2020).

[53] Decreto 1,514 de 2012 (16 July 2012) por el cual se reglamenta la expedición de documentos de viaje colombianos y se dictan otras disposiciones [which regulates the issuance of Colombian travel documents and dictates other provisions] <https://www.suin-juriscol.gov.co/viewDocument.asp?id=1301334>.

[54] Colombian Constitutional Court, Ruling T-075/15 (2015) <https://www.corteconstitucional.gov.co/relatoria/2015/t-075-15.htm>.

[55] A Castro, 'The Three Branches of Government Coping with Statelessness' (2020) 9 OxMo 134; Moreno, Pelacani and Amaya-Castro (n 52).

[56] A Castro, 'El acceso a la nacionalidad colombiana: nuevas realidades, nuevos retos' in AC Franco (ed), *Venezuela Migra: aspectos sensibles del éxodo en Colombia* (Universidad del Externado 2019) 297.

2015[57] authorised children of foreigners who had various types of temporary visas to be registered as nationals, expanding the criteria of Decree 1,514. However, the circular considered that foreigners in an irregular immigration situation, asylum seekers and those with visas other than those listed in the circular did not meet the residence requirement. A subsequent interpretation by the Registry in 2017[58] maintained these restrictions, meaning that only the holders of certain visas were considered to be domiciled in the country.[59]

C. *Repercussions of* ius soli *Limitations in the Context of the Venezuelan Crisis*

In the context of the political and humanitarian crisis in neighbouring Venezuela and the extensive influx of Venezuelans into Colombia, particularly following the election of President Nicolás Maduro in 2013, the interpretation given by the National Registry of Civil Status produced severe problems of statelessness. This is because children born to Venezuelans in Colombia who are not recognised as Colombians have also struggled to be registered as nationals of Venezuela. For them to be recognised as Venezuelans, documentation is required that can only be issued in the parents' country of origin. These documents are currently extremely difficult and expensive to obtain, and many Venezuelans left their country without them. Furthermore, asylum seekers have not been able to approach Venezuelan diplomatic authorities in Colombia to register their children, as they fear persecution.[60] From January 2019 until summer 2022, Venezuela had no consular representation in Colombia, thus removing even this option.[61] In this situation, children born to Venezuelans in Colombia could not be registered as Venezuelans or Colombians if the parents did not have a visa of the required type. According to official records, in 2019, there were more than 24,000 children born to Venezuelans in Colombia who had not been able to access Colombian nationality due to the visa requirements of the National Registry.[62]

The Colombian State was thus failing to comply with international standards regarding access to nationality and prevention of statelessness, including Article 20 of the ACHR.[63] First, there was a *de facto* statelessness situation. Although those children born in Colombia to Venezuelan parents strictly speaking had the right to be recognised as Venezuelans, in practice, this was not possible for the

[57] Circular 59/2015, National Registry of Civil Status of Colombia <https://www.cancilleria.gov.co/sites/default/files/Normograma/docs/pdf/circular_registraduria_ 0059_2015.pdf>.
[58] Circular 168/2017, National Registry of Civil Status of Colombia <https://www.refworld.org.es/pdfid/5a8324174.pdf>.
[59] Moreno, Pelacani and Amaya-Castro (n 52).
[60] Castro (n 56); ibid.
[61] Castro (n 55). On the restoration of diplomatic ties and the normalisation of relations, see *Deutsche Welle*, 'Venezuela, Colombia Restore Full Diplomatic Ties' *Deutsche Welle* (Bonn, 29 August 2022) <https://www.dw.com/en/venezuela-and-colombia-restore-full-diplomatic-ties-after-three-years/a-62957239>. This followed the election of a left-wing president in Colombia for the first time in its history.
[62] Castro ibid.
[63] ibid; Castro (n 56).

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reasons noted above. Second, the requirement of a specific visa for parents in order to gain nationality for their children in Colombia was a burdensome measure for Venezuelans to comply with. It is costly to pay for a visa in Colombia, so if a person does not have sufficient funds or an employer willing to pay for it, they cannot access it. Finally, it was unfortunate that the Special Permit of Permanence, created in 2017 to regularise the situation of Venezuelans in Colombia, was not recognised as the legal basis for the children of its holders to access Colombian nationality by *ius soli*.[64] This situation contravened international obligations related to the best interests of the child and the right to nationality, which led organisations such as the United Nations (UN) High Commissioner for Refugees (UNHCR) and the UN Children's Fund (UNICEF) to make specific recommendations for change. These organisations advised Colombia to ensure the immediate registration of all children in the national territory, making the interpretation of 'domicile' more flexible and facilitating access to Colombian nationality for the children of Venezuelan parents at risk of statelessness.[65]

D. Response from the Three Branches of Government to the Risk of Statelessness

The critical situation in Colombia for the children of Venezuelan parents prompted various Colombian authorities to take measures. First, through the National Registry of Civil Status, the Government of Colombia issued a Resolution in 2019 establishing a temporary procedure that would initially last two years, enabling the birth registration[66] of all children of Venezuelans born in Colombia since August 2015 (Resolution 8,470).[67] This procedure permitted Colombian nationality acquisition for those children presenting only the proof of nationality of the parents and the child's 'born alive' certificate.[68] In the same

[64] Up to two million persons had left Venezuela for Colombia by 2023; they can take advantage of the Permiso Especial de Permanencia (PEP) (Special Permit of Permanence), first created by Resolution 5,797/2017, Ministry of Foreign Affairs, Diario Oficial No 50.307 (27 July 2017) <https://www.cancilleria.gov.co/sites/default/files/Normograma/docs/resolucion_minrelaciones_5797_2017.htm>.

[65] The UNHCR and UNICEF referred to the situation of children of Venezuelan parents in Colombia in the framework of a judicial procedure before the Constitutional Court of Colombia in July 2019: UNHCR, 'Observaciones de la Oficina del Alto Comisionado de las Naciones Unidas para los Refugiados ante la Corte Constitucional de la República de Colombia en respuesta al Oficio OPTB – 1443/19, Expedientes T-7.206.829 y T-7.245.483 AC' (July 2019) <https://www.refworld.org.es/pdfid/5d4082524.pdf>; and Colombian Constitutional Court, Ruling T-006/20 (2020) <https://www.corteconstitucional.gov.co/Relatoria/2020/T-006-20.htm>.

[66] According to UNICEF data in 2015, 3 per cent of births of children under the age of five years in Colombia were not registered. See UNICEF, 'Birth Registration' <https://data.unicef.org/topic/child-protection/birth-registration/>.

[67] Resolution 8,470/2019, National Registry of Civil Status of Colombia (5 August 2019) <https://www.registraduria.gov.co/IMG/pdf/resolucion_8470.pdf>.

[68] The 'born alive' certificate is a document issued by health institutions after the birth of a child, necessary to register them in the National Registry of Civil Status of Colombia: Registraduría

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year, the legislative branch approved a law establishing a special regime for children born to Venezuelans in Colombia (Law No 1,997).[69] This law determined that residence and the intention to remain in the national territory (that is, domicile) must be presumed in the case of children of Venezuelan parents who are in a regular or irregular migratory situation or are asylum seekers. Although this law enabled these children to acquire Colombian nationality by birth, it was a temporary and exceptional rule, applicable to children born in Colombia since 2015 and only valid for two years from its promulgation.[70] In this way, both the National Registry Resolution and Law No 1,997 temporarily addressed the problem, solving it in the short term, but neither dealt with the historical issues or sought to prevent something similar happening again in the future.

In January 2020, the Constitutional Court of Colombia handed down an important decision regarding access to nationality for two children born in Colombia to Venezuelan parents.[71] This judgment referred to cases that occurred before the adoption of Law 1,997 and Resolution 8,470, but it established an important judicial criterion regarding the fight against statelessness. The Court recognised that the Registry violated the rights to nationality and legal personality and stated that demanding a particular residence permit to prove domicile was against the Constitution.[72] The Court also indicated that the claimants demonstrated their domicile in Colombia under the Civil Code's provisions.[73] The Court analysed not only the constitutional norms and binding international treaties but also other instruments and the positions of international bodies that are part of the 'international *corpus iuris*'.[74] The Court considered non-binding instruments such as advisory opinions from the IACtHR and general comments from the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and the Committee on the Rights of the Child. It is significant that a national court should place such weight on these elements, interpreting human rights broadly and giving priority to the child's best interests.

The Court criticised the National Registry and the Ministry of Foreign Affairs for not applying the 'exception of unconstitutionality', which authorises in

Nacional del Estado Civil, 'Registro de nacimiento' <https://www.registraduria.gov.co/-Registro-de-Nacimiento-.html>.

[69] Law No 1,997/2019, Congress of the Republic of Colombia: 'Through which a special and exceptional regime is established to acquire Colombian nationality by birth, for sons and daughters of Venezuelans in a situation of regular or irregular migration, or refugee seekers, born in Colombian territory, in order to prevent statelessness' <https://dapre.presidencia.gov.co/normativa/normativa/LEY%201997%20DEL%2016%20DE%20SEPTIEMBRE%20DE%202019.pdf>.

[70] Moreno, Pelacani and Amaya-Castro (n 52).

[71] Judgment T-006/20 (n 65). For discussion, see Castro (n 55).

[72] G Pelacani et al, *Estatuto temporal de protección para migrantes venezolanos: reflexiones de una política de regularización migratoria* (Centro de Estudios en Migración 2021).

[73] ibid.

[74] Castro (n 55).

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specific circumstances the non-application of norms where their application would result in a violation of the Constitution.[75] In the analysis of the case, the Court established that domicile could be proved by several means, but that where Venezuelan migrants could not prove domicile, their children should access nationality by adoption (naturalisation). However, the Court did not give clear guidance to the Registry on interpreting the domicile requirement.[76] In other words, despite the Court recognising the children's right to Colombian nationality in the specific case before it, it did not establish unconditional access to nationality by *ius soli* for all Venezuelan children born in Colombia. The conclusion that the children in the particular case had access to Colombian nationality by naturalisation thus did not resolve future cases in which access to nationality by *ius soli* could be denied for the same reasons.

In March 2021, the Constitutional Court delivered a further important ruling, this time regarding the proof of domicile. Sentence T-079[77] reiterates previous decisions and provides specific instructions for administrative bodies. A girl born in Colombia, the daughter of Spanish parents, was not recognised as Colombian because at the time of her birth her father did not have a residence visa but only a temporary work visa. The administrative authorities considered that the father did not meet the requirements for proving domicile in the national territory, and thus did not recognise the girl's Colombian nationality. Although the girl had Spanish nationality and was not at risk of statelessness, the Constitutional Court indicated that her right to access Colombian nationality was violated. As on previous occasions, the Court indicated that it was illegal to establish via administrative means requirements to prove domicile which excluded the alternatives contained in the Civil Code. In particular, the Court found that the presumption of intention to remain in the national territory contemplated in Article 80 was fulfilled, since the father had accepted the type of job which would be 'normally conferred for a long time', which is one of the scenarios in which the Civil Code establishes a presumption of the intention of permanence. The Court also ordered the Ministry of Foreign Affairs and the National Registry of Civil Status to issue administrative acts informing their officials that they must apply the rules of the Civil Code and its various means of proof to demonstrate domicile in Colombia. This case has clear implications for the case of Venezuelan children born in Colombia seeking to demonstrate access to citizenship.

[75] ibid. The *excepción de constitucionalidad* derives from art 4 of the Constitution: 'In all cases of incompatibility between the Constitution and the law or any other legislation or regulation, the constitutional provisions will apply.'

[76] Moreno, Pelacani and Amaya-Castro (n 52).

[77] Colombian Constitutional Court, Sentence T-079/21 (2021) <https://www.corteconstitucional.gov.co/Relatoria/2021/T-079-21.htm>.

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E. The Current Scenario for ius soli Applications

In 2021, the Government of Colombia adopted new measures to prevent situations of statelessness in the country.[78] The temporary procedure previously established by the National Registry of Civil Status under Resolution 8,470 in 2019 to prevent the statelessness of children born to Venezuelans in Colombia was extended. This policy has twice been extended for two additional years and is now in place until August 2025.[79] By August 2023, more than 100,000 children born in Colombia had benefited from this measure.[80] However, the measures adopted by the executive and legislative branches are still exceptional and temporary, which contradicts the interpretation of the Constitutional Court. This can be understood as stemming from a reluctance to create an incentive for people to migrate to the country irregularly if they have the guarantee that their children will acquire Colombian nationality. The Office of the Ombudsman indicated this concern in the context of Case T-006/20 before the Constitutional Court.[81] At the same time, the transitory nature of these measures could indicate resistance to relaxing the restrictions on *ius soli* in Colombia, potentially as a result of the concern to protect and limit access to the country's community of citizens in the long term.

Immigration Law 2,136[82] perpetuated and gave legal status to the Registry's restrictive interpretation of the domicile requirement established in the Constitution. This law was approved on 4 August 2021 and, among other things, established guidelines regarding the requirements for entering the country and granting visas, strengthened measures against human trafficking, and promoted the support of the community of Colombians abroad.[83] Regarding access to nationality, Article 56 of the Law indicates that Colombian nationality is acquired under Article 96 of the Constitution. Subsequently, Article 59 establishes that 'the residence with the vocation of permanence of a foreigner in Colombia is constituted having been the holder for three (3) continuous and uninterrupted years of the visa that proves both their migratory regularity in the country and the intention to remain in the national territory'. Additionally, it delegated to regulatory bodies the task of defining which visas establish residence with a vocation of permanence.

[78] Estatuto Temporal de Protección para Migrantes Venezolanos (ETPV), established by the Ministerial Decree 216/2021: Ministerio de Relaciones Exteriores, Decreto 216 de 2021 (1 March 2021) <https://www.leyex.info/documents/leyes/6b60e592e5e6d83f1d5f0e949008cec9.htm>.

[79] See the government announcement 'La medida "Primero la niñez" continuará su vigencia y aplicabilidad, después del 21 de agosto de 2023' (Colombian Foreign Affairs Ministry, 18 August 2023) <https://www.cancilleria.gov.co/newsroom/news/medida-primero-ninez-continuara-su-vigencia-aplicabilidad-despues-21-agosto-2023>. [80] ibid. [81] Judgment T-006/20 (n 65).

[82] Immigration Law 2,136 (n 51).

[83] See *Semana*, 'Así es la nueva política migratoria que regirá en el país' (*Semana*, 11 August 2021) <https://www.semana.com/nacion/articulo/asi-es-la-nueva-politica-migratoria-que-regira-en-el-pais/202153/>.

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Most recently, the 2023 Law No 2,332 on acquisition, loss and recovery of Colombian nationality[84] also confers Colombian nationality by *ius soli* to the children of foreigners who were domiciled in Colombia at the time of their birth, having held a residence visa for three uninterrupted years. It thus confirms the domicile requirement. The law indicates exceptions to this requirement in the case of people whose nationality is not recognised by any State and in the case of foreigners who are covered by special mechanisms of immigration flexibility under the Immigration Law.

These provisions reinforce the restrictive interpretation of the National Registry of Civil Status that domicile (intention of permanence in the country) can only be proven through certain residence visas, and also add a time requirement of three years.[85] This has the potential to deepen the statelessness problem in Colombia, rather than solving the difficulties that have arisen from the conditional *ius soli* established in the Constitution.

The limitations on unconditional *ius soli*, influenced by historical perceptions of the concept of 'the foreigner', can also be seen as a precaution against possible increases in immigration in the future. They may further be linked to the concern to limit access to asylum by the Venezuelan population. Similar to its approach to the prevention of statelessness, the Colombian government has opted to address the consequences of the Venezuelan crisis with extraordinary protection mechanisms limited in time, instead of permanent measures. The Temporary Protection Statute for Venezuelan Migrants (Estatuto Temporal de Protección para Migrantes Venezolanos; ETPV)[86] has been praised as one of the most favourable policies for the Venezuelan population in Latin America, granting Venezuelan immigrants regular status in Colombia for up to ten years. However, at the same time, it reduces the pressure on the refugee system of the Colombian State. Pelacani et al have argued that the Colombian authorities have an undeclared intention that Venezuelan refugee applicants renounce their application through this mechanism in order to access the ETPV.[87]

It remains to be seen how these provisions will evolve following the normalisation of relations between Colombia and Venezuela after the 2022 Colombian Presidential election. The close historic and cultural ties between the two countries have been emphasised in the context of revived diplomatic relations by the Colombian ambassador: 'We are brothers and an imaginary line cannot separate us'.[88] This refers, of course, to the fact that the two countries were once part of one country and also the fact that there has historically been extensive migration in *both* directions across the border, in response to economic and political conditions.[89] To put it another way,

[84] Law No 2,332/2023 through which requirements and necessary procedures are established for the acquisition, loss and recovery of Colombian nationality <https://dapre.presidencia.gov.co/normativa/normativa/LEY%202332%20DEL%2025%20DE%20SEPTIEMBRE%20DE%202023.pdf>
[85] Moreno, Pelacani and Amaya-Castro (n 52).
[86] ETPV (n 78).
[87] Pelacani et al (n 72).
[88] As cited in *Deutsche Welle* (n 61).
[89] Escobar (n 40); Acosta (n 19).

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constitutional imaginaries can and do evolve as important dimensions of how citizenship provisions are applied both in theory and in practice.

IV. CHILE

A. *Evolution of* ius soli *Regulation at the Constitutional Level in Chile*

The 1823 Chilean Constitution, signed during the first years of Chilean independence, established the basis of the country's nationality and citizenship system for the next 200 years.[90] The nationality acquisition system was based mainly on *ius soli* and territorial principles, recognising as nationals those born in Chilean territory; those born abroad to a Chilean father or mother once they had settled in Chile; foreigners residing in the country, married to a Chilean woman, domiciled in accordance with the law and exercising a profession; and those who received nationality by the grace of the legislative power (Article 6). It is notable that the version of *ius soli* in this constitution was absolute, without limitations regarding the situation of the child's parents at the time of birth.

As in other countries in the region, this system revealed the interest of political elites in consolidating a nation-State where inhabitants would coexist, fostering social and economic development. After Chilean independence, during the republican period, immigration was strongly linked to an idea that Europeans would bring civilisation to counteract the 'barbarism' of the indigenous peoples. The authorities understood this barbarism as lack of intelligence, immorality, indiscipline, laziness and violence.[91] Additionally, the political elites perceived a need to populate the territory and increase the number of national inhabitants. These groups pursued an ideal of agricultural production through the population of rural areas, identifying immigration as a tool to reach that objective.[92] This ideal was reflected at the constitutional level, where *ius soli* was central to the citizenship system, facilitating the expansion of the number of national inhabitants. This strengthened national sovereignty and an economy controlled by Chileans and immigrants whose offspring acquired Chilean nationality by *ius soli*.

[90] *Constitucion politica del Estado de Chile*, enacted 29 December 1823, Santiago de Chile (Imprenta Nacional 1823). This built upon the consolidated constitutional text after the independence of Chile in 1810, which was the Constitution of 1822 which was only in force for a year. G Echeverría, *Report on Citizenship Law: Chile* (European University Institute, Robert Schuman Centre for Advanced Studies and EUDO Citizenship Observatory 2016).

[91] A Mascareño, 'Para una política reflexiva de inmigración en Chile: Una aproximación sociológica' in I Aninat and R Vergara (eds), *Inmigración en Chile. Una mirada multidimensional* (Centro de Estudios Públicos (CEP), Fondo de Cultura Económica 2019).

[92] C Norambuena, 'Revisión Histórica de los Movimientos Migratorios en Chile' in L Parentini (ed), *Historiadores Chilenos frente al Bicentenario* (Cuaderno Bicentenario, Presidencia de la República. Universidad Finis Terrae, Andrés Bello y Silva Henríquez, 2008).

Between 1823 and 1833, Chile suffered from political instability, with several constitutions existing during that period. The 1833 Constitution (the 'Portales Constitution') finally brought greater stability and remained in force until 1925.[93] It maintained the categories for nationality acquisition of the 1823 Constitution but slightly modified the naturalisation requirements for resident foreigners. They were required to live in Chile for ten years unless they were married and had children in Chile (in which case only six years were required) or married to a Chilean woman (which lowered the requirement to three years). These incentives were functional to the objectives of the Chilean authorities, who sought to repopulate the south of the country with a 'white' population.[94] At the same time, it is possible to observe a continuity in the aim of ensuring that these inhabitants generated ties and a strong bond with the country, to protect the economic interests and the sovereignty of the nation.

The 1925 Constitution, which was in force until 1980, introduced two limitations to the *ius soli* principle.[95] First, the children of foreigners who were in Chile at the service of their respective governments would not be considered Chilean. Second, the children of 'transient foreigners' would not acquire Chilean nationality. However, both could opt for Chilean nationality by renouncing their previous nationality, following a procedure established by law. This constitution laid the foundations for the current regulation of *ius soli* in Chile. Although a new constitution was issued for Chile in 1980, during the military dictatorship of Augusto Pinochet, this new constitution did not modify the regulations related to *ius soli*.[96]

B. *Current Regulation of Nationality Acquisition in Chile and Restrictions to* ius soli

Although the 1980 Constitution is still in force, the rules on *ius soli* were changed by a reform of the Constitution in 2005.[97] This modified the rules of access to Chilean nationality significantly, moving from a regime firmly based on *ius soli* to a mixed one, which also adopts the principle of *ius sanguinis*.[98] Under these rules, four groups of people can obtain Chilean nationality: those

[93] CW Tooke (trans), *Political Constitution of the Republic of Chile, Promulgated May 25, 1833, with Amendments Down to May 1, 1899* (Press of the Herald 1899).

[94] Echeverría (n 90).

[95] Political Constitution of the Republic of Chile, 1925; for an English-language version, see the Constitute Project, 'Chile 1925' <https://www.constituteproject.org/constitution/Chile_1925>.

[96] Political Constitution of the Republic of Chile, 1980; for an English-language version, with amendments consolidated, see the Constitute Project, 'Chile 1980 (rev. 2021)' <https://constituteproject.org/constitution/Chile_2021>.

[97] Spanish text of the Constitution of 1980 as codified in 2005 and as amended to Law No 20,414 of 2010 [5] (2010) ch II: 'Nationality and Citizenship', HeinOnline World Constitutions <https://heinonline.org/HOL/P?h=hein.cow/zzcl0002&i=5>.

[98] T Ribera, 'La nacionalidad chilena luego de la Reforma Constitucional de 2005, la Jurisprudencia y la Práctica Administrativa' in Asociación Chilena de Derecho Constitucional

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born in the national territory (with certain exceptions); children of a Chilean father or mother born abroad; foreigners who become Chilean through naturalisation; and those who obtain nationality by grace.

Access to Chilean nationality by *ius soli* includes two exceptions established in Article 10 of the current Chilean Constitution. The first exception refers to the children of foreigners who are in Chile providing services for their government, which has been maintained since the 1925 Constitution. The purpose of this provision was to relax the strict application of the principle of *ius soli* established in the 1833 Constitution so as not to impose Chilean nationality on the children of these foreigners automatically.[99] The second exception, also in force since 1925, refers to the children of 'transient foreigners'. This concept was not defined at a constitutional or legal level until 2021, so it has been subject to administrative and judicial interpretations. This has led to problems of statelessness for children born in Chile to irregular migrants.

As in the 1925 Constitution, those born in Chile falling within these exceptions are not considered Chilean automatically, but they have a right to opt for Chilean nationality once they reach the age of majority. Decree 5,142 establishes that this option can be exercised through a declaration made before competent authorities within a year of the person turning 18 years.[100] The right no longer requires the renunciation of any previous nationality (as was the case under the 1925 Constitution), which allows *de facto* dual nationality.[101]

C. *Statelessness Issues under Limited* ius soli *and the Response of Civil Society, the Judiciary and the Executive Branch in Chile*

The lack of definition of the concept of 'transient foreigner' at the constitutional or legal level led administrative authorities to apply interpretations which in turn gave rise to statelessness problems.[102] Until the promulgation of the Immigration Law in 2021,[103] the term 'transient foreigner' was not legally defined. Initially, it was assumed that this category included tourists or crew members of means of transport (ships, aircraft, etc). However, in 1995 the Ministry of the Interior, through an administrative order,[104] established that foreigners who did not have a residence permit in Chile would be considered

(ed), *Derechos Fundamentales. Libro homenaje a Francisco Cumplido Cereceda* (Editorial Jurídica de Chile 2012); Echeverría (n 90).

[99] Ribera ibid.

[100] Decree No 5,142 (13 October 1960) establishes the consolidated text of the provisions on naturalisation of foreigners. Available at: <https://www.bcn.cl/leychile/navegar?idNorma=19444>.

[101] Ribera (n 98).

[102] Open Society Foundations, *Born in the Americas: The Promise and Practice of Nationality Laws in Brazil, Chile, and Colombia* (Justice Initiative 2017).

[103] Law No 21,325 on Immigration and Foreign Affairs, 1 April 2021 (Immigration Law) <https://www.bcn.cl/leychile/navegar?idNorma=1158549>.

[104] Ministry of the Interior Memorandum No 6241 of 25 October 1995.

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transient foreigners. This included not only tourists and transient visitors but also migrants in an irregular situation. The consequence of this was that their children would not be recognised as Chilean. As a result, the children of irregular migrants born in Chile began to be registered by the Civil Registry with a note that classified them as 'child of a transient foreigner' (or 'HET'[105]). This generated problems of statelessness when the children of foreigners were not recognised as Chilean and were also unable to obtain the nationality of their parents' country of origin.

For migrant parents, it can be extremely difficult to register their child as a national of their country of origin if they cannot prove their nationality because they reside in remote areas or do not want to contact the administration of their home country. In general, the consulates of the country of origin require a birth certificate of the minor to register them as a national, together with evidence of the parents' nationality. However, in remote areas, such registration is often impracticable due to the long distances people must travel to reach consulates and the lack of economic resources to carry out these journeys.[106]

In 2014, the Chilean government changed its interpretation of 'transient foreigner', recognising that a severe problem of statelessness was developing —by October of that year, the Civil Registry had registered 2,843 people as HETs. Additionally, during the period 2012–2014, the Supreme Court had repeatedly ruled against the 1995 administrative interpretation of the Government, ordering that the children of migrants in an irregular situation born in Chile be recognised as Chilean. This prompted the Government to change the criteria, so the Civil Registry would no longer register the children of irregular migrants as HETs.[107] It also granted those registered under that category in the past the option to establish retroactively their right to be recognised as Chileans through two alternative paths. The first consisted of a nationality claim before the Supreme Court, as provided for in Article 12 of the Constitution. However, this request took at least a year to be processed and involved several formal requirements, such as being represented by a lawyer and filing the action in the country's capital, which represented a serious impediment, especially for those living in rural or remote areas. The second alternative was to request the Immigration and Foreign Affairs Department to correct the birth certificate. This option involved fewer formalities but still presented obstacles for those living in remote areas.[108]

[105] Abbreviation for child of transient foreigner in Spanish (*hijo de extranjero transeúnte*).

[106] D Lawson and M Rodriguez, 'Addressing the Risk of Statelessness in Chile: From Strategic Litigation to #Chilereconoce' (2017) Statelessness Working Paper Series No. 2017/03; Open Society Foundations (n 102).

[107] Immigration and Foreign Affairs Department, Memorandum No 27,601 (14 August 2014); see also Lawson and Rodriguez ibid.

[108] Open Society Foundations (n 102).

The role of civil society organisations was central to the societal process of addressing the problems of statelessness in Chile. In 2015, two legal clinics (at Alberto Hurtado University and Diego Portales University) and the non-governmental organisation (NGO) the Jesuit Service for Migrants filed a collective action before the Supreme Court representing 167 children registered as HETs.[109] These were children who lived in remote locations in the north of Chile in the Tarapacá region (Huara, Pozo Almonte, Pica and Colchane) who had not been registered under the nationality of their parents and were thus in a situation of statelessness. Insufficient economic resources to travel, lack of information, and the impossibility of obtaining documentation had prevented these children from being registered at the consulate of their parents' country of origin or having their birth certificate corrected to be recognised as Chileans.[110]

This collective judicial procedure had direct results and also positive indirect impacts. During the judicial process before the Supreme Court, the Civil Registry corrected the registration of the 167 children. In addition, the Registry announced that it would carry out a digital campaign to inform and encourage other affected persons to claim their Chilean nationality. At that time (January 2016), there were still 2,503 people registered as HETs; addresses or current whereabouts were known for only 724 of those people.[111] In 2016, the 'Chile Recognises' (*#ChileReconoce*) plan was launched, which promoted access to Chilean nationality for children registered as HETs and implemented measures promoted by the UNHCR *#IBelong* campaign.[112] Additionally, Chile acceded to both the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness in April 2018.[113] Despite these steps forward, additional efforts were still required to solve the problems associated with children registered as HETs. By September 2016, 1,722 people had accessed Chilean nationality by correcting their birth registration. However, more than 2,000 people were still registered as HET at that point.[114] As Middleton IV and Flores point out, legislative and regulatory changes are not enough to prevent these situations of statelessness.[115] It is also necessary to address cases in which bureaucrats, due to lack of information or a negative perception of immigration, hinder access to nationality for children born to foreign parents.

[109] Supreme Court of Chile Case No 24089/2015. [110] Lawson and Rodriguez (n 106).
[111] ibid.
[112] RT Middleton IV and T Flores, 'Towards a Model of Reducing Statelessness: An Analysis of the Efficacy of Chile's Statelessness Reduction Plan, *#Chilereconoce*' (2020) 19 SCIO: Rev de Filos 101.
[113] Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117; 1961 Convention (n 24).
[114] Lawson and Rodriguez (n 106). [115] Middleton IV and Flores (n 112).

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D. The Concept of 'Transient Foreigner' and the Prevention of Statelessness in the New Chilean Immigration Law

In April 2021, a new Chilean Immigration Law was enacted and published.[116] It entered into force in February 2022, when the necessary administrative and implementing regulations were approved. The Chilean Congress discussed this law extensively over a period of seven years, between its presentation to the parliament as a draft by the Government and its approval. It went through multiple amendment processes.

The Immigration Law 'lifts' the concept of 'transient foreigner' to the legislative level and establishes criteria for preventing statelessness, whilst at the same time shifting attention towards the challenge of migration governance, which is on a greater scale than the issues relating to HETs. The law defines a transient foreigner as someone who is (i) passing through the national territory, (ii) without the intention of settling in it, and (iii) entering with a transitory stay permit (Articles 1 and 47). The following categories are included as transitory stay permits: those who enter the country for recreation, health, business, sports or other similar purposes; crew of cargo or transportation vehicles; persons covered by international treaties ratified by Chile and currently in force; and foreigners living in border areas.

The three cumulative elements that the law establishes for someone to be considered a transient foreigner exclude irregular migrants who are actually residing in Chile on a continuing basis, because they cannot be considered to be passing through with no intention of staying, even if they entered with a transitory permit which has since expired. The concept of transient foreigner contained in Article 10 of the Constitution thus now has a legislative basis, which will make it difficult for future administrative interpretations to exclude access to Chilean nationality for children born to irregular migrants in Chile.[117]

Additionally, the Immigration Law refers to the prevention of statelessness. Article 173 establishes that a transient foreigner's child must be recognised as Chilean by birth if they would otherwise be stateless. This is the first time that Chile has had such a significant statelessness prevention provision. Furthermore, Article 155 states that the Undersecretary of the Interior must determine the statelessness situation of foreigners who request it, based on a report prepared by the Council for the Determination of Statelessness. This Council was also created by the new Immigration Law.[118] It will be made up of three members, representatives of the National Immigration Service, the Ministry of the Interior and the Ministry of Foreign Affairs.

The provisions introduced by the new Immigration Law reinforce the advances previously made in the administrative and judicial spheres.

[116] Immigration Law (n 103).
[117] Ramaciotti and Shaw (n 9).
[118] Immigration Law (n 103) art 155.

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Although the legal text does not explicitly rule out the possibility that in the future, the children of migrants in an irregular situation could be considered HETs, it leaves very little room for it to happen. Returning to the old interpretation of transient foreigner would go against the legislators' intention and would disregard the criteria established by the Supreme Court in several rulings that changed the administrative criteria in 2014. Despite this progress, there are still risks of statelessness in Chile. According to data from the Civil Registry, in August 2023, there were 1,719 children registered as HET.[119] However, it is difficult to know how many of them are stateless and remain in the country.

The actions taken by the State of Chile regarding the prevention of statelessness since 2014 are quite substantial, although there are still pending challenges. The new definition of transient foreigner excludes immigrants in an irregular situation living in the country from this category, thus removing this as a route to statelessness for the second generation born in Chile. Chile acceded to both the statelessness conventions in 2018, which strengthened its commitment to international human rights standards and, in particular, prevention and action in cases of statelessness. It also carried out a campaign promoted by the Department of Immigration and Foreign Affairs and the Civil Registry, in coordination with the UNHCR, which raised awareness among those registered as HET and facilitated their access to Chilean nationality. However, it is necessary to identify children still registered as HETs, why that is so, and whether they are stateless. In this regard, local government officials play a critical role in implementing national legislation and policies, especially in remote areas where there may be less information and families may have more limited resources.

E. Ongoing Processes of Constitutional Change

A constitutional renewal process has been taking place in Chile since 2019. While a new constitution was proposed by an elected Constitutional Convention, in September 2022 the proposal was rejected in a ratification referendum. The proposal was rejected by 62 per cent of voters, with a turnout rate of 85 per cent.[120] Currently, a new constitutional process is underway, in which 51 councillors were elected to draft the new constitutional text for Chile, which will be the subject of a further referendum in December 2023.[121]

[119] Information obtained through a request for public information made to the Civil Registry Service, by virtue of Law 20,285 on Access to Public Information and held on file by the authors.
[120] Chilean Electoral Service, *Constitutional Referendum 2022* <https://plebiscitoconstitucional.servel.cl>.
[121] Chilean Electoral Service, *Elección Consejo Constitucional 2023* <https://www.servel.cl/eleccion-de-consejo-constitucional-2/resultados-preliminares-eleccion-consejo-constitucional-2023/>.

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The rejected proposal for a new Constitution for Chile aimed to expand access to nationality by eliminating the concept of transient foreigner. Article 114 established that Chileans are those who are born in the territory of Chile regardless of nationality or immigration status, except for the children of foreigners who are in Chile in the service of their government who, however, may still opt for Chilean nationality.

This norm was initially proposed and approved by the Commission on Constitutional Principles, Democracy, Nationality and Citizenship and later confirmed by the Plenary of the Constitutional Convention. Although the article obtained the necessary votes without setbacks, some commission members promoted the exclusion of the children of transient foreigners from the application of *ius soli*. This proposal, however, did not obtain enough votes within the Constitutional Convention, so the concept of transient foreigner was left out of the final text.[122]

Civil society also played an important role in shaping this norm. NGOs made presentations before the commission, such as the Jesuit Service for Migrants.[123] The UNHCR was also involved in the process,[124] proposing the removal of restrictions on the acquisition of nationality by *ius soli,* specifically those related to the children of transient foreigners, as well as promoting the prevention of statelessness and the enshrining of the right to a nationality.

Given that the constitutional revision process in Chile is ongoing, there may be further changes in the regulation of access to Chilean nationality and the regulation of transient foreigners. However, it is difficult to conceive that the changes will in fact reinforce the prevention of statelessness and access to nationality for children of foreigners born in Chile, since the political party with the largest number of councillors elected in the Constitutional Assembly is the Republican Party,[125] which based an important part of its campaign on proposals aimed at strongly restricting migration and deporting all irregular foreigners.[126]

At present, therefore, Chile stands at a crossroads with respect to the issue of migration governance and in relation to the challenges which it faces as a result of being an increasingly popular destination for immigrants from a wide range of Latin American countries.

[122] Constitutional Convention of Chile, First Report of the Commission on Constitutional Principles, Democracy, Nationality and Citizenship, to its Blocks II and III, 78th ordinary Session of the Constitutional Convention (1 April 2022).

[123] Jesuit Service of Migrants, Presentation before the Commission on Constitutional Principles, Democracy, Nationality and Citizenship (29 November 2021).

[124] UNHCR, Presentation before the Commission on Constitutional Principles, Democracy, Nationality and Citizenship (23 December 2021).

[125] See V Buschschlüter, 'Chile Constitution: Far-Right Party Biggest in New Assembly' (*BBC News*, 8 May 2023) <https://www.bbc.com/news/world-latin-america-65524068>.

[126] See Prensa Republicano, 'Republicanos presentan plan "Cero Ilegales" enfocado en control migratorio' (Partido Republicano, 17 April 2023) <https://partidorepublicanodechile.cl/republicanos-presentan-plan-cero-ilegales-enfocado-en-control-migratorio/>.

V. ANALYSIS

This article has been centred around a review of two regional outliers within a region which is itself an outlier from a global perspective on citizenship regimes, in so far as most national regimes across the world place a greater weight on *ius sanguinis* than *ius soli* in relation to the acquisition of citizenship at birth. The citizenship and migration governance regimes of the two chosen States have been constructed on the basis of a combination of historical conditions and geopolitical circumstances. These include struggles for independence from the Spanish Crown, the emancipation of slaves, challenges in relation to socio-economic inclusion of indigenous persons and the descendants of slaves, problems of political instability and violence, and regional challenges of mobility also driven by political instability and often extreme poverty. The citizenship regimes of Chile and Colombia reflect both regional generalities and the specificities of those States' histories and geopolitical situations. What they clearly have in common is an engagement with notions of transience and impermanence in relation to foreigners.

It could be argued that the very concept of 'transient foreigners' harks back to an idea of restless settler colonialism, in which new arrivals seek the best place to settle, but meanwhile may wish to avoid creating unnecessary attachments to temporary resting places through which they pass on their transit (eg through *ius soli* citizenship for newborn babies). However, in present-day terms, being transient could mean either having the resources to move on and/or to return to a home elsewhere (eg a tourist, a temporary worker, a person employed in international transport, a diplomat) or alternatively not having the resources to prove permanence or the right to stay (eg a refugee or displaced person who is forced to keep moving because there is nowhere which permits that person to stay and make a home). In those contexts, it is evident that the notion of 'transient foreigner' and its associated ideas can also become intertwined with practices of racial and ethnic 'othering'. This is most marked in the case of the DR discussed briefly in Section II, but shades of these issues can also be seen elsewhere in the region, including in the case-study countries of Colombia and Chile. While the concept of 'social membership' is most often used in citizenship studies to highlight situations in which host societies owe duties to provide reasonable access to status citizenship (typically through naturalisation) to those who are settled within a given territory, it is also a useful reference point, along with norms governing the prevention and elimination of statelessness, for assessing approaches to citizenship in countries which historically have maintained inclusive territorially based birthright regimes for most children born in the country. This is the backdrop against which the two case-study countries can be assessed.

As is the case in the rest of the Latin American region, Colombia and Chile have each developed a number of distinctive elements regarding who is considered a citizen. After independence from Spanish imperial domination,

in both countries there was an interest in attracting foreigners from Europe and the US, especially during the nineteenth century. This interest was based on the idea that these foreigners would contribute to populating the territory, with the aim of consolidating sovereignty, accelerating processes of economic exploitation and the racist goal of bringing in 'white' people to reduce the presence of the indigenous population and counteract their 'barbarism'. This aim to increase the national population through immigration explains the Latin American tradition of applying the principle of *ius soli* extensively and often without limitations. Latin America has not shrugged off this principle, although in other settler colonial contexts such as Australia and New Zealand, it has almost disappeared since independence.

However, Colombia and Chile remain among the few countries in Latin America where the acquisition of nationality by *ius soli* is limited, in both cases by reference to constitutional provisions.[127] The first constitution after independence did not restrict *ius soli* in either country. In Chile, the 1925 Constitution prevented the conferral of Chilean nationality on a 'child of a transient foreigner'. In the case of Colombia, *ius soli* was limited for the first time in the 1832 Constitution, which established that the children of foreigners had to establish their residence in the country to be recognised as nationals. Currently, the Colombian constitution requires at least one parent to have been domiciled in the country at the time of birth for the children of non-citizens to acquire nationality by *ius soli*.

The concepts of 'transient foreigner' and 'domicile'—intriguing constitutional clauses on citizenship, to echo the quotation from Zachary Elkins cited in the introduction to this article[128] —have been subject to restrictive administrative interpretation in both Chile and Colombia. In the administrative context, a variety of embedded assumptions about new arrivals (or those deemed to be new) may come into play when the constitution is subjected to implementation by diverse national authorities, against the backdrop of historically determined conceptions of 'the people'. The fact that in Chile the children of undocumented migrants were registered as children of transient foreigners, or that in Colombia the children of Venezuelans who were undocumented or holders of certain visas were unable to register their children as Colombians, generated serious problems of statelessness and raised questions about these countries' relations with their neighbours.[129]

Faced with these problems, the role of the courts was extremely important in counteracting the problems of statelessness. The Supreme Court in Chile and the Constitutional Court of Colombia both issued judgments prioritising the right to nationality over the pressures and practices of the respective administrations aimed at restricting immigration or limiting access to nationality. The Colombian Court has an established reputation for activism,

[127] Acosta (n 13).
[128] See Elkins (n 2).
[129] Lawson and Rodriguez (n 106); Castro (n 55).

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but the progressive jurisprudence of the Chilean Court may be seen as somewhat surprising, although perhaps emblematic of an 'incipient activism'.[130] Furthermore, national and international NGOs and certain international organisations have also played important roles in promoting policies of enhanced access to nationality, including generating public denunciation of harsh policies and providing legal support in court for affected groups. Advocates of a more inclusive approach could also draw from the practice of the IACtHR.

Given the problems generated by the restriction of *ius soli*, both the Chilean and Colombian governments have taken measures to remedy and prevent future cases of statelessness and to extend, however modestly, the national concept of social membership and its implications at the time of birth. Whatever the limitations of these measures, it remains the case that the reactions of these countries are far removed from the actions of the DR, in which citizenship was intentionally and retroactively stripped from the children of Haitians deemed to be residing irregularly in the country, generating a massive problem of statelessness. Both Chile and Colombia took important steps to address existing cases of statelessness, and to prevent new ones from arising.

However, the roads of Colombia and Chile differ in terms of their temporality and key characteristics. While both countries adopted legislation on immigration in 2021, they used the new legislative opportunity in quite different ways when it came to the issue of citizenship. In the case of Chile, the government established mechanisms permitting the children of foreigners previously registered as the child of a transient foreigner to access Chilean nationality. In addition, the 2021 immigration law sought to prevent administrative interpretations that would produce new cases of statelessness in the future and limited the concept of transient foreigner, making it very difficult for undocumented foreigners residing in the country to be included within it by future interpretations.[131] The Colombian government, on the other hand, took measures to prevent statelessness but through special and time-limited procedures.[132] Colombia's approach was to provide a limited but adequate response, which makes no changes to its citizenship regime or underlying constitutional settlement. Also, it does not, thus far, effectively recognise Venezuelans exiting their country as refugees. In other words, the understanding of access to nationality by *ius soli* has not been permanently changed. There is no intention to apply *ius soli* more broadly in the long term, which was demonstrated and consolidated with the new immigration law approved in 2021 and the 2023 law on nationality. There is a drive to limit who is part of the citizenry, expanding it only in an extraordinary and limited way. Unlike Colombia, Chile extended access to nationality by *ius*

[130] J Couso and L Hilbink, 'From Quietism to Incipient Activism: The Institutional and Ideological Roots of Rights Adjudication in Chile' in Helmke and Ríos-Figueroa (n 4) 99–127.
[131] Ramaciotti and Shaw (n 9). [132] Moreno, Pelacani and Amaya-Castro (n 52).

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soli to all children of foreigners born in Chile, except those whose situations truly correspond to 'passing through the country', and where there is no risk that denying nationality will cause statelessness. This expansive trend would have been consolidated if the proposal for a new constitution in Chile had been approved, which would have eliminated the concept of 'child of transient foreigner'. Chile is not under the same pressures as Colombia in relation to issues of migration and mobility from a single neighbouring State, and presents a different constellation of institutional interests. Nonetheless, elements of its institutional practice over the years have demonstrated its own internal discomfort with some aspects of this issue as it has faced increasing levels of immigration from a variety of sources.

VI. CONCLUSIONS

While definitions of citizenship as a social membership concept remain contested, as regards the boundaries of membership, citizenship constantly evolves as regards both social membership and effective legal status. Citizenship regimes can, do and have changed over time, to reflect broader societal and political changes, such as the shift from a restricted franchise for elections to the (more or less) universal franchise. Constitutions provide a relatively stable backdrop for these processes of change, but those processes are influenced and guided by the actions of a variety of public authorities and actors, as well as by the actions of NGOs, social movements and individual citizens and non-citizens themselves. Inclusion/exclusion is a continuing narrative, but it will attach itself to different institutional frameworks within which citizenship is contested over time.

Detailed country case studies provide illuminating insights into these processes. Although the differences presented in the analysis section may not have a major impact in the short term, they do speak clearly to the ideas that are hidden behind the concept of citizenship, especially when viewed in a constitutional context. While the limitations to *ius soli* presented by Chile and Colombia are 'inherited' from previous constitutions from a century or two ago, the ways in which the constitutional concepts are currently applied by administrative, legislative and judicial authorities show the differing perspectives of these authorities on the question of who is included as part of 'the people'. As Diego Acosta has noted,[133] this is just as true as regards the impact of these actors in relation to the practical outcomes of naturalisation policies as it is as regards the scope of birthright citizenship. Meanwhile, in most of Latin America, constitutionalised birthright *ius soli* citizenship remains unconditional, so it is inevitable that it is within *other* institutional frameworks that issues about inclusion and exclusion will be negotiated amongst different societal actors.

[133] See Acosta (n 8).

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Colombia and Chile can thus still be treated as special cases, but at the same time they offer excellent laboratories to understand the interplay of institutional actors against the backdrop of a constitutional framework, as well as to explore how ideas of constitutionalism and ideas of citizenship interact in the context of evolving notions of 'the people'. In Colombia, the outcome of the analysis, in constitutional terms, seems to be a conclusion that little in relation to the constitutional foundations of citizenship is likely to change in the longer term; in Chile, combined with other, ongoing, constitutional work in the citizenship space around issues of indigeneity,[134] the analysis reveals a slow but hesitant journey towards a different constitutional future.

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[134] See JP Ramaciotti and J Shaw, 'Constitutional Citizenship and Indigeneity: The Case of Latin America' (2023) CompConstStud, doi: 10.4337/ccs.2023.0005, forthcoming.