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REPORT ON CITIZENSHIP LAW: BRAZIL

Patrícia Jerónimo

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European University Institute, Florence
Robert Schuman Centre for Advanced Studies
EUDO Citizenship Observatory

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Brazil***

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Report on Citizenship Law

Brazil

Patrícia Jerónimo

1. Introduction

In Brazil, like in most Latin American countries, the criteria for attribution, acquisition¹ and loss of Brazilian citizenship are set in the Constitution. The formal constitutionality of citizenship criteria is a long standing and undisputed legal tradition going back to the very first constitution of Brazil as an independent country, the Imperial Constitution of 1824. The constitutional enunciation of citizenship criteria has always been perceived as exhaustive (Melo 1949: 7) and its provisions have often been read literally, but it never dispensed with regulation by ordinary legislation nor with judicial and executive interpretation. Some major changes have actually been introduced by such infra-constitutional means, which raised and continues to raise questions as to their compliance with the Constitution and therefore as to their validity. Some legislative and judicial developments were eventually incorporated in the constitutional text, but a recent major change to the Brazilian legal tradition in this field – the introduction by executive ordinance of renunciation as a mode of loss of Brazilian citizenship² – is yet to be expressly enshrined in the Constitution.

The main constitutional criteria for attribution and loss of Brazilian citizenship were kept remarkably stable over the years, under different constitutional texts and very different political regimes. Since citizenship is understood as a matter of public not private law (Melo 1949: 5-6; Ri 2010: 14-15, 26-27), its regulation has traditionally been designed to serve the state's interests (populating the territory, integrating immigrants, securing the undivided loyalty of the citizenry, etc.) and paid little attention to individuals' will. That is why, to this day, Brazil imposes its citizenship on every child who is born in its territory (*ius soli*), with the single exception of children of foreign parents in the service of their country (diplomatic exception). Furthermore, while it is true that all constitutions have allowed for the attribution of Brazilian citizenship to children born abroad to a Brazilian father or mother (*ius sanguinis*) who so wished, the mere expression of the wish to be recognised as a Brazilian citizen was, until recently³, not enough to produce that effect, since most constitutions required

¹ Brazilian legal scholars distinguish between *attribution* of citizenship by birth and *acquisition* of citizenship by naturalisation (Fraga 1995: 55). The terms will be used accordingly throughout this report.

² Justice Minister's Ordinance (*Portaria do Ministro da Justiça*) no. 172, of 4 August 1995.

³ The 1934 and 1937 Constitutions recognised as Brazilian citizens by birth the children born abroad to a Brazilian father or mother if, when becoming of age, they opted for Brazilian citizenship. The possibility of securing the attribution of Brazilian citizenship by birth to children born abroad to a Brazilian father or mother by the mere effect of registration in the competent Brazilian registry was recognised by the 1967

residence in Brazil (*ius domicilii*). Neglect for individuals' will has also been the norm in the regulation of the loss of Brazilian citizenship, given that the acquisition of another citizenship by naturalisation led automatically to the loss of the individual's Brazilian citizenship, with no regard to his or her wish to keep it. That is no longer the case today, since Ordinance no. 172 of 1995 determined that the loss of Brazilian citizenship following naturalisation in a foreign country can only occur when that is the express wish of the (former) Brazilian citizen.

These recent legal developments suggest that Brazil wants to keep up with the times and international human rights standards by treating citizenship as an individual right, paying due respect to the wishes of individuals in matters of attribution and loss of citizenship, and accepting dual citizenship. Further changes are ahead with a new Immigration Act⁴, which will abrogate the 1949 Nationality Act and the 1980 Immigration Act still in force and set new rules for the acquisition of Brazilian citizenship by naturalisation.

One final remark on terminology. Editorial constraints require the use of the term *citizenship* when *nationality* would be a more appropriate term to refer to the legal ties existing between the Brazilian state and its citizenry. Unlike other legal systems where citizenship and nationality are taken as synonymous and used interchangeably, in Brazil, legislators, judges and legal scholars have, for many decades now⁵, agreed on a clear separation between the two concepts. Nationality (*nacionalidade*) is defined as the legal bond that ties the individual to a given state, whereas citizenship (*cidadania*) is deemed to represent access to political rights, such as the right to vote and to be elected (Dolinger 2003: 157). While the two statuses tend to coincide in practice, there are important exceptions: it is possible to be a national without being a citizen, e.g. due to loss or suspension of one's political rights, and it is possible to be a citizen without being a national, as is the case with Portuguese who are entitled to exercise political rights in Brazil (Dolinger 2003: 157; Ribeiro 2014: 104). Brazilian authors are adamant about the distinction between the two concepts (Tiburcio and Barroso 2013: 245-252; Monteiro 1968: 322-333; Melo 1949: 1-2). The current Constitution reflects the distinction by using both terms side by side in some of its provisions⁶, but the terminological consistency throughout the constitutional text leaves much to be desired,

Constitution, under much academic controversy, and by the 1988 Constitution, until the 1994 constitutional amendment. The 2007 constitutional amendment reintroduced that possibility, under strong pressure from the Brazilian diaspora (Sant'Anna and Rosso 2011: 453-467), thereby considerably expanding the scope of *ius sanguinis* and placing it almost on a par with *ius soli*.

⁴ Presently awaiting approval by the House of Representatives (*Câmara dos Deputados*).

⁵ The first two Brazilian constitutions (1824 and 1891) were not very precise or consistent in the use of the terms national, natural and citizen, which led to criticism in the literature. After the 1934 Constitution, the differentiation between these three terms became part of the law, so that the 'courts, ordinary legislation and the Constitutions have all employed these terms distinctly ever since' (Tiburcio 1992: 270).

⁶ E.g. Article 5-LXXI refers to the 'prerogatives inherent to *nationality*, sovereignty and *citizenship*'; Article 22-XIII establishes that the Union has exclusive competence to legislate on '*nationality*, *citizenship* and naturalisation'; Article 62 § 1-I (a) forbids the adoption by the President of the Republic of provisional measures on matters of '*nationality*, *citizenship*, political rights, political parties and electoral law'; Article 68 § 1-II forbids the delegation of competences to legislate on matters of '*nationality*, *citizenship*, individual, political and electoral rights. Most of these provisions are, however, clearly redundant in their combined use of the terms nationality and naturalisation (Article 22-XIII) and of the terms citizenship and political rights [Articles 62 § 1-I (a) and 68 § 1-II].

with the interposition of the term Brazilian (*brasileiro*)⁷, the use of vague expressions such as ‘exercise of citizenship’ (*exercício de cidadania*)⁸ and some disputable uses of the term citizen (*cidadão*)⁹; furthermore, the chapter of the Constitution entitled ‘Nationality’ (*Da Nacionalidade*) includes not only the criteria for attribution, acquisition and loss of Brazilian nationality but also a list of political rights which are exclusive to Brazilians by birth (*brasileiros natos*) and even a provision on Portuguese as the official language of the Federal Republic of Brazil.

2. Historical Background

2.1. Territory and membership criteria at the time of independence

Brazil was a Portuguese colony from 1500 until 1822, when D. Pedro, a member of the Portuguese imperial family, proclaimed the independence of the territory and the separation of the Kingdom of Brazil from the United Kingdom of Portugal, Brazil and the Algarves, which had been instituted in 1815. At the time of independence, the nationals of Brazil were subjects (*súditos*) of the United Kingdom of Portugal, Brazil and the Algarves. Access to the status was regulated by the Philippine Ordinances (*Ordenações Filipinas*), of 1603, which were kept in force after independence by Law of 20 October 1823. Title LV of Book 2 of the Philippine Ordinances combined *ius soli* and *ius sanguinis* (*a patre*), with a slight preference for the former. Nationals of the kingdom were those born in the kingdom to a father who was a natural of the kingdom, irrespective of whether the mother was a foreigner or a natural, and those born abroad to a natural sent abroad in the service of the kingdom. Those born in the kingdom to a foreign father and to a mother who was a natural of the kingdom were not considered to be nationals of the kingdom except if the foreign father had his domicile and assets in the kingdom and had lived there for more than ten consecutive years. Those born abroad to nationals who left the kingdom at their own will and took residence abroad were not considered nationals of the kingdom. No man born abroad was to be considered a natural of the kingdom, even if he resided and held property in the kingdom and was married to a woman who was a natural of the kingdom. The same rules applied to children born out of wedlock with reference to the status of the mother as foreigner or natural of the kingdom.

The Political Constitution of the Empire of Brazil, of 24 March 1824, revoked these rules by establishing the conditions for the acquisition of the status of Brazilian

⁷ According to Dolinger (2003: 158-159), when the Constitution uses the term ‘Brazilian’ it means only citizens, not nationals, but that is hardly corroborated by a systematic interpretation of the constitutional text, if we consider that the term ‘Brazilian’ is used to set the ‘nationality criteria’ in Article 12.

⁸ Article 5-LXXVII uses the expression ‘exercise of citizenship’ when it establishes that *habeas corpus* and *habeas data* procedures as well as other acts deemed necessary to the exercise of citizenship are free of charge; Article 205 reads that education is to be promoted with the purpose of preparing individuals for the exercise of citizenship.

⁹ Article 5-LXXIII uses the term citizen when establishing that ‘any citizen has standing in an *actio popularis* to annul acts which are detrimental to public assets, administrative morality, the environment and the historical and cultural heritage’; Article 58 § 2-V reads that the Parliamentary Commissions in both Houses of the National Congress are competent *inter alia* to request statements by any authority or citizen. It is doubtful that the constituent legislator intended to apply these provisions only to nationals in the full enjoyment of their political rights and not to all Brazilian nationals. Furthermore, Article 89-VII uses the clearly redundant expression ‘Brazilian citizen by birth’ (*cidadão brasileiro nato*) when regulating the composition of the Council of the Republic (*Conselho da República*).

citizen (*cidadão brasileiro*). The interest in encouraging (mostly European) immigration, fostering a sense of national belonging among the population and rewarding support for Brazil's independence determined the Constituent Assembly's options in this regard (Tiburcio 1992: 269; Melo 1949: 4-5). Under Article 6 of the 1824 Constitution, Brazilian citizens were: I) those born in Brazil, either free (*ingênuos*) or freed (*libertos*), even if the father was a foreigner, unless the father resided in Brazil in the service of his nation; II) those born abroad to a Brazilian father or, if born out of wedlock, to a Brazilian mother, provided that they came to establish their domicile in the Empire; III) those born abroad to a Brazilian father in the service of the Empire, irrespective of whether they established their domicile in Brazil; IV) those born in Portugal or its possessions who, being resident in Brazil at the time of the proclamation of independence, had adhered to it either expressly or tacitly by continuing to reside in the country; and V) the foreigners naturalised as Brazilians, irrespective of their religion.

The 1824 Constitution combined *ius soli* and *ius sanguinis* criteria, giving rise to a protracted academic debate about the terms under which the two systems were to coexist, but there was little doubt about the primacy of the territorial factor, given that Article 6-III was premised on an 'extraterritorial fiction', not on strict *ius sanguinis*, and Article 6-II required domicile in Brazilian territory (Ri 2010: 11-12; Posenato 2002: 218). The 1824 Constitution allowed the access to Brazilian citizenship by origin (*cidadania originária*) and by naturalisation (*cidadania derivada*), but the fact that it did not expressly distinguish the two categories led to doubts as to whether those mentioned in Article 6-IV were to be considered as citizens by origin or as naturalised citizens. The matter was far from irrelevant as some political rights in the 1824 Constitution were expressly denied to 'naturalised foreigners' (*estrangeiros naturalizados*)¹⁰. Many authors, such as Rodas (1990: 21-22), view Article 6-IV as a form of 'tacit naturalisation', similar to the controversial 'great naturalisation' that would take place in 1889 and 1891. However, according to Mendes (2009: 57), the recognition as Brazilian citizens of those born in Portugal or its possessions who had been resident in Brazil at the time of independence did not represent an act of collective naturalisation but an 'original admission' (*admissão originária*) to Brazilian citizenship. The Lusitanian (*lusitanos*) residing in the country at the time of independence were treated as 'adoptive citizens' (*cidadãos adotivos*). They were not naturalised because they had never been foreigners in Brazil (Mendes 2009: 57).

Pursuant to Article 6-V of the 1824 Constitution, which prescribed that ordinary legislation would determine the precise qualities required to obtain a 'naturalisation letter' (*carta de naturalização*), the General Assembly adopted Law of 23 October 1832, on the naturalisation of foreigners. The Government was thereby authorized to grant a naturalisation letter, upon request, to any foreigner who proved to be older than 21 years of age; to enjoy civil rights in his country of origin (except if the loss of rights was due to political reasons); to have declared at the town hall of his place of residence his religious principles, his homeland and his intentions to set his domicile in Brazil; to

¹⁰ Naturalised foreigners were not eligible as members of the House of Representatives (*Câmara de Deputados*) (Article 95-II). The Additional Act of 1834, which amended the 1824 Constitution, prescribed that only Brazilian citizens, not naturalised citizens, were eligible for the position of Regent to govern the Empire during the minority of the successor to the throne (Article 27 of Law no. 16, of 12 August 1834).

have resided in Brazil for four consecutive years after making said declaration¹¹; and to own land or part of an industrial establishment in Brazil, to have a useful profession or to live honestly from his work (Article 1). Save for the town hall declaration requirement, all other requirements were waived in case of marriage to a Brazilian woman, adoption of a Brazilian child, contribution to Brazilian industry, science and culture, etc. (Article 2). The child of a naturalised citizen born before the naturalisation of his father and older than 21 years of age would obtain the naturalisation letter merely by declaring, at the town hall of his place of residence, his wish to become a Brazilian citizen and by proving to have honest means of subsistence (Article 3). If an applicant died after fulfilling all the naturalisation requirements, the naturalisation letter would benefit his foreign widow (Article 8). Naturalised citizens had to swear an oath of allegiance and obedience to the Constitution and the laws of the country for the naturalisation letter to produce its effects (Article 9).

In order to avoid clashes of legislations arising from the use of *ius soli* in Brazil and of *ius sanguinis* in all European nations (Posenato 2002: 217), Decree no. 1.096, of 10 September 1860, was adopted to regulate the civil and political rights of the children born in Brazil to foreign parents not in the service of their nation and of the foreign women who married Brazilian men and Brazilian women who married foreign men. Per Article 1, the law which regulated the civil aspects of the lives of children born in Brazil to foreign parents could be the foreign law of the parents' country of origin, until the children became of age. Upon reaching majority the individuals born in Brazil to foreign parents would be treated as Brazilian citizens with all the rights and obligations entailed. Per Article 2, married women followed their husband's citizenship; however, if widowed, the Brazilian women would regain Brazilian citizenship if they declared their intention to establish their domicile in the Empire.

The 1824 Constitution did not include a provision on the loss of Brazilian citizenship, but only on the loss of the rights of the Brazilian citizen (Article 7) and on the suspension of the exercise of political rights (Article 8). Per Article 7, the rights of the Brazilian citizen were lost in case of naturalisation in a foreign country; acceptance of employment, pension or decoration by any foreign government without the Emperor's permission; or banishment by judicial decision. Per Article 8, the exercise of political rights was suspended in case of physical or moral incapacity; or in case of judicial conviction in a prison sentence or in exile, for the duration of their effects.

2.2. The Great Naturalisation of 1889 and the Republican Constitution of 1891

On November 15, 1889, the Republic was instituted and the Brazilian provinces, bound by federative ties, became the United States of Brazil. A Provisional Government was instated to rule the country for the time necessary to elect a Constituent Congress and to approve a new constitution. Shortly after being instated, the Provisional Government adopted Decree no. 58-A, of 14 December 1889, by virtue of which all foreigners already residing in Brazil on November 15, 1889, were considered Brazilian citizens, unless declaration to the contrary made before the municipal authorities within six months after the publication of the Decree (Article 1); likewise, all foreigners who took

¹¹ Except if, having been domiciled in Brazil for more than four years at the time of the promulgation of the Law of 23 October 1832, he requested the naturalisation letter within the period of one year. Later, Decree no. 291, of 30 August 1843, shortened this residence requirement to two years.

residence in Brazil during the two years after the publication of the Decree were considered Brazilian, unless declaration to the contrary made before the municipal authorities (Article 2). Per Article 3 of Decree no. 58-A, the foreigners thereby naturalised as Brazilians enjoyed all civil and political rights of born citizens, being entitled to access all public offices except that of Chief of State (*Chefe de Estado*).

The collective naturalisation operated by Decree no. 58-A became known as the ‘Great Naturalisation’ (*A Grande Naturalização*). The fact that it simply assumed the agreement of the interested parties in becoming Brazilian citizens made the policy very controversial and led to protests by some of the states with larger emigrant communities in Brazil, such as Portugal, Italy, and Spain. The ‘Great Naturalisation’ was criticized for lacking a legal basis, violating widely accepted principles of International Law, restricting individual freedom, and hindering the interests of foreigners residing in Brazil (Ri 2010: 29; Tiburcio 1992: 272). The Brazilian authorities extended the deadline given to foreigners who wished to oppose the naturalisation¹², but refused to revoke the Decree. Not only that, but Article 1 of Decree no. 58-A was actually incorporated into the text of the First Republican Constitution.

The Constitution of the Republic of the United States of Brazil, of 24 February 1891, included a separate title on Brazilian citizens (*Dos cidadãos brasileiros*), where it set the criteria for acquiring the status and listed the rights enjoyed by Brazilian citizens and foreign residents. Similarly to its predecessor, the 1891 Constitution also listed in the same provision both the cases of attribution of citizenship by origin and the cases of naturalisation¹³. Article 69 of the 1891 Constitution did not innovate vis-à-vis the 1824 Constitution in matters of attribution of citizenship (*brasileiros natos*), except that it made no reference to the free or freed condition of individuals born in Brazil (no. 1) and that it eliminated the clause regarding those born in Portugal or its possessions who had been resident in Brazil at the time of independence. In contrast, the 1891 Constitution was quite innovative regarding acquisition of Brazilian citizenship by naturalisation, since it did not merely refer to ordinary legislation, as the 1824 Constitution had done, but established two specific categories of naturalisation, besides the general category of ‘those otherwise naturalised’ (Article 69-6). The two new categories were both forms of ‘tacit naturalisation’ (*naturalização tácita*), based on the lack of opposition on the part of its intended beneficiaries. Article 69-4 incorporated Article 1 of Decree no. 58-A by recognising as Brazilian citizens the foreigners who, having been¹⁴ in Brazil on November 15, 1889¹⁵, did not declare, within six months after the entry into force of the Constitution, their wish to keep their citizenship of origin. Article 69-5 recognised as

¹² The period of six months to oppose the naturalisation as Brazilian citizen was later extended until December 31, 1890 by Decree no. 479 of 13 June 1890. With the adoption of the Republican Constitution, in 1891, the deadline was further extended by Article 69-IV for another six months from the date of the entry into force of the 1891 Constitution.

¹³ Which led to discussions as to whether the children born abroad to a Brazilian parent who came to reside in Brazil were to be considered Brazilian by birth or by naturalisation. The solution that prevailed was to consider them as Brazilians by birth (Melo 1949: 18-19).

¹⁴ By requiring only the presence in Brazil at the time of the institution of the Republic, and not the residence as required by Decree no. 58-A, the 1891 Constitution broadened even further the universe of individuals who would be naturalised (Ri 2010: 20).

¹⁵ In both the republican and the imperial constitutions the presence in Brazil at key political moments of the history of the country – the proclamation of independence (Article 6-IV of the 1824 Constitution) and the institution of the Republic (Article 69-IV of the 1891 Constitution) – was deemed relevant for the access to Brazilian citizenship. As if, suggests Ri (2010: 19), the presence in the territory at those points in time made the individuals not only witnesses of the country’s history but also interested and necessary participants in the building of the nation.

Brazilian citizens foreigners who owned land in Brazil, were married to a Brazilian citizen or had Brazilian children, and resided in Brazil, unless they expressed their wish to keep their citizenship of origin.

Given that the 1891 Constitution admitted other forms of naturalisation, the National Congress adopted Decree no. 904, of 12 November 1902, which abrogated the Law of 23 October 1832. One of the major innovations of this Decree was the introduction of the ‘declaratory title of Brazilian citizen’ (*título declaratório de cidadão brasileiro*). For the rest, the Decree kept with the goal of facilitating immigrant integration by making naturalisation considerably easy. Article 1 of Decree no. 904 reproduced the text of Article 69 of the 1891 Constitution, with a few changes in wording, the most relevant of which was the replacement of the neutral form ‘married to a Brazilian citizen’ by the gender specific ‘married to a Brazilian woman’. For naturalisation under the terms set by the Decree, the applicant had to submit a request to the federal government and make the necessary statements regarding his parents, place of origin, civil status, profession, children if legitimate, and domicile, besides providing documentary evidence of his identity, legal majority, residence in Brazil for at least two years¹⁶, and good moral and civic conduct attested by an official document (Article 5). Article 13 of the Decree added that naturalisation would not be allowed to foreigners who, in Brazil or abroad, had been indicted or convicted for crimes of murder, theft, burglary, bankruptcy, falsehood, smuggling, embezzlement, currency counterfeiting and pimping.

Article 2 of Decree no. 904, in line with what was already prescribed in the 1891 Constitution, established that naturalised citizens enjoyed all civil and political rights and could perform any public functions, with the exception of the offices of: 1) President and Vice-President of the Republic; 2) senator, before six years as a Brazilian citizen, and member (*deputado*) of the House of Representatives, before four years as a Brazilian citizen. Article 3 of Decree no. 904 added that naturalisation did not subtract the naturalised Brazilians from the obligations incurred vis-à-vis their country of origin before denationalisation (*desnacionalização*).

Regarding the loss of Brazilian citizenship, the 1891 Constitution was as silent as its predecessor. Article 71 purported to establish the only cases in which the rights of Brazilian citizens could be suspended or lost. The rights were suspended in case of physical or moral incapacity and in case of a criminal conviction for the duration of its effects (Article 71 § 1). They were lost in case of naturalisation in a foreign country or of acceptance of employment or pension from a foreign government without authorisation from the federal executive power (Article 71 § 2). In spite of the wording of Article 71, the 1891 Constitution actually established two other causes for loss of rights, specifically political rights, of Brazilian citizens in Article 72 § 29. A Brazilian citizen would lose all his political rights if he invoked religious motives for not performing duties imposed on all citizens or if he accepted foreign decorations or nobility titles. Article 71 § 3 referred to federal legislation the definition of the conditions for reacquisition of the rights of Brazilian citizen.

¹⁶ The residence requirement was dispensed with in case of foreigners who: 1) were married to a Brazilian woman; 2) owned land in Brazil; 3) were shareholders in any industrial complex or were the inventors or the introducers of an industry of a kind useful to the country; 4) were recommended by their talents and letters or by their professional aptitude in any field of industry; 5) were children of naturalised foreigners and were born abroad before the father’s naturalisation (Article 6).

2.3. The authoritarian streak until 1988

In October 1930, a military coup marked the end of the ‘Old Republic’ (*República Velha*) and the ascension to power of Getúlio Vargas, who went on to govern the country, with a brief intermission (1945-1951), until his death in 1954. Decree no. 19.398, of 11 November 1930, instituted a new provisional government (headed by Vargas) to exercise discretionary executive and legislative powers until the election of a Constituent Assembly and its establishment of the ‘constitutional reorganisation of the country’. The 1891 Constitution continued to be in force with the changes and restrictions derived from the Decree, which meant that it was stripped of practically all of its effects (Ri 2010: 19). Decree no. 19.398 suspended all constitutional safeguards, except for *habeas corpus*, which continued to be available for those charged with common crimes (*crimes comuns*). However, the citizenship criteria in the 1891 Constitution were left untouched. Article 12 of Decree no. 19.398 prescribed that the new federal constitution should keep the federal republican form and could not restrict the rights of Brazilian citizens and the individual freedoms enshrined in the 1891 Constitution.

The Constitution of the Republic of the United States of Brazil, of 16 July 1934, set its citizenship criteria in a chapter dedicated to political rights (*Dos direitos políticos*). Article 106 of the 1934 Constitution was so close to its 1891 counterpart that it even incorporated some of its provisions directly, by recognising as Brazilian those who had already¹⁷ acquired Brazilian citizenship per Article 69-IV and V of the 1891 Constitution [Article 106 (c)]. Like its predecessors, Article 106 of the 1934 Constitution recognised as Brazilian those born in Brazil, even if to a foreign father, provided that the father did not reside in Brazil in the service of his country’s government [(a)], and the children born abroad to a Brazilian father or mother, if the parents were abroad in public service [(b) first part]. The only innovation brought by the 1934 Constitution was that it also recognised as Brazilian the children born abroad to a Brazilian father or mother who, when becoming of age, opted for Brazilian citizenship [Article 106 (b) second part]. This was an important innovation, as it strengthened *ius sanguinis*, by eliminating the domicile requirement, and gave relevance to individuals’ will in attributing citizenship by origin (Posenato 2002: 224-225).

Another aspect in which the 1934 Constitution innovated was the express provision for loss of Brazilian citizenship. Per Article 107, the loss of Brazilian citizenship would occur when a Brazilian: (a) acquired another citizenship by voluntary naturalisation¹⁸; (b) accepted pension, employment or paid commission from a foreign government without permission from the President of the Republic; or (c) had his naturalisation cancelled for involvement in social or political activity harmful to the national interest, if proved in a judicial procedure with respect for all procedural safeguards.

¹⁷ This phrasing was interpreted as meaning that, to be recognised as Brazilians under Article 106 (c) of the 1934 Constitution, the requirements for tacit naturalisation under Article 69-V of the 1891 Constitution (ownership of land in Brazil, marriage to a Brazilian, Brazilian children) had to be fulfilled before 16 June 1934, when the new Constitution was promulgated (Ri 2010: 29).

¹⁸ Over time, there were discussions in the literature as to whether this reference to ‘voluntary naturalisation’ could be deemed to cover also cases of option for a foreign citizenship, but the understanding that eventually prevailed was that this provision (and similar provisions in subsequent constitutional texts) only applied to naturalisations *stricto sensu* (Araujo 1987: 58).

Besides the loss of Brazilian citizenship, the 1934 Constitution also prescribed for the loss and suspension of political rights, in a manner not very different from its predecessors. Per Article 110, political rights were suspended in case of: (a) absolute civil incapacity (*incapacidade civil absoluta*); or (b) criminal conviction, for the duration of its effects. Per Article 111, political rights were lost in case of: (a) loss of Brazilian citizenship under Article 107; (b) waiver of burden or service imposed by law on Brazilians, when obtained on the grounds of religious, philosophical or political beliefs; or (c) acceptance of nobility title or foreign decoration, when these involved a restriction of rights or duties vis-à-vis the Republic.

Article 17-I of the 1934 Constitution forbade the Union, the states, the federal district and the municipalities to establish distinctions between Brazilians by birth (*brasileiros natos*). The distinction between Brazilians by birth and Brazilians by naturalisation, on the other hand, was clearly stressed by the 1934 Constitution to the detriment of the latter, not only in the enjoyment of political rights but also of social and economic rights. Only Brazilians by birth were eligible as President of the Republic (Article 52 § 5), and for the House of Representatives (Article 24) and the Senate (Article 89). Only Brazilians by birth could be appointed as Ministers of State (*Ministros de Estado*) (Article 59), Supreme Court judges (*Ministros da Corte Suprema*) (Article 74), federal judges (Article 80), and as General District Attorney (*Procurador Geral da República*) (Article 95 § 1). Furthermore, only Brazilians by birth were entitled to be responsible for the administrative and intellectual supervision of media companies (Article 131). Only priests who were Brazilian by birth were entitled to provide religious assistance in military expeditions (Article 113-6). The ship owners, commanders and at least two thirds of a ship's crew had to be Brazilian by birth and only Brazilians by birth were entitled to pilot ports, rivers and lakes (Article 132)¹⁹. Per Article 133, only Brazilians by birth and naturalised Brazilians who had rendered military service for Brazil were entitled to exercise a liberal profession²⁰ and only Brazilians by birth were allowed to revalidate professional diplomas issued by foreign educational institutions.

The 1934 Constitution was short lived and was soon replaced by the Constitution of the United States of Brazil, of 10 November 1937, the *Estado Novo* Constitution, with marked authoritarian and nationalistic features. However, the citizenship criteria set by the 1934 Constitution were barely touched by Article 115 of the 1937 Constitution, save for minor changes in phrasing. The same was true for Article 116, which ruled on the loss of Brazilian citizenship²¹, and for Articles 118 and 119, which established the cases in which political rights were to be suspended or lost²².

¹⁹ Article 21 of the transitional provisions (*disposições transitórias*) annexed to the 1934 Constitution clarified that this prohibition did not apply to naturalised Brazilians who were exercising these professions at the time of the adoption of the Constitution.

²⁰ Except for those who were legitimately exercising liberal professions at the time of the adoption of the Constitution and the cases of international reciprocity allowed by law (Article 133).

²¹ Article 116 of the 1937 Constitution did not, however, consider acceptance of a pension from a foreign government to be a grounds for loss of citizenship and it did not include the mention to the need to guarantee 'all procedural safeguards' in cases of revocation of naturalisation, referring instead simply to the requirement of an 'adequate procedure'.

²² Article 118 referred only to civil incapacity, and not to absolute civil incapacity. Article 119 adopted a clearer phrasing for its paragraphs (b) and (c) by establishing as grounds for loss of Brazilian citizenship the *refusal*, on grounds of religious, political or philosophical conviction, to perform an incumbency, service or obligation imposed by law on Brazilians; and the acceptance of nobility title or foreign decoration when it involved restriction to rights granted by the Constitution or was incompatible with obligations imposed by law.

The 1937 Constitution was also similar to its predecessor in forbidding the establishment of distinctions between Brazilians by birth [Article 32 (a)] and in distinguishing between Brazilians by birth and Brazilians by naturalisation for the purposes of the enjoyment of political, social and economic rights. Most of the individual rights listed in the 1937 Constitution were suspended in 1942, when Decree no. 10.358, of 31 August 1942, declared a state of war (*estado de guerra*) in the country, following the declaration of war against Germany and Italy, in 22 August 1942.

In the meantime, a new legal diploma had been adopted by the government to regulate Brazilian citizenship – Decree Law no. 389, of 25 April 1938, which significantly hindered the move towards *ius sanguinis* made by the 1934 and 1937 Constitutions, and which was therefore of dubious validity. Article 1 recognised as Brazilian those born abroad to a Brazilian father or mother not in the service of the Brazilian government who opted for Brazilian citizenship, but set a deadline of one year after civil majority for the exercise of the right of option [Article 1 (b)] and made this right dependent on the establishment of residence in Brazil (Article 1 § 1). Decree Law no. 389 also innovated vis-à-vis the Constitutional norm by specifying that those born aboard Brazilian aircraft, warships and merchant ships, at high sea or passing through foreign territorial waters were considered Brazilian citizens [Article 1 (c)] and by adding the reference to those who ‘acquired’²³ Brazilian citizenship per Article 6-II of the 1824 Constitution, i.e. those born abroad to a Brazilian father or to a Brazilian mother who had established their domicile in Brazil [Article 1 (d)]. Article 1 § 3 also specified that children born in Brazil to a foreign mother in the service of her country were not Brazilian citizens, even if the father was a Brazilian citizen. The general naturalisation requirements were: I) civil capacity; II) continued residence for at least ten years immediately prior to the naturalisation request; III) knowledge of the Portuguese language; IV) exercise of a profession or possession of enough resources for oneself and one’s family; V) good moral and civil behaviour; VI) no criminal conviction or indictment; and VII) no endorsement of ideologies contrary to the political and social institutions in place in Brazil (Article 10). The residence requirement could be reduced, at the government’s discretion, in case of family members of Brazilian citizens and of foreigners with relevant contributions to the Brazilian state (Article 11). Naturalisation required renunciation of the applicant’s previous citizenship, per Article 9. Granting naturalisation was a ‘gracious act’ (*ato gracioso*) on the part of the government and could therefore be denied even to those who met all the legal requirements. It could be revoked by the government in case of exercise of political or social activity deemed detrimental to the national interest (Article 24). The naturalisation would furthermore be considered renounced if the naturalised citizen returned to his or her previous country of citizenship for a residence of more than two years or if he or she resided outside of Brazil for five consecutive years, except if proved that the naturalised citizen intended to return to Brazil and was abroad for relevant health reasons, due to important business with Brazilian companies, in representation of a Brazilian scientific, religious or philanthropic institution, or in the service of the Brazilian government (Article 27). Brazilian citizens by birth or by naturalisation who lost Brazilian citizenship were allowed to reacquire it by means of ‘express naturalisation’ (*naturalização expressa*), per Article 2 § 1.

²³ Article 7 of Decree Law no. 389 expressly excluded these Brazilians from the category of Brazilians by birth.

Shortly after the end of World War II, on November 29, 1945, Getúlio Vargas resigned the office of President of the Republic. A new Constituent Assembly was elected, including, for the first time in Brazilian history, black and communist representatives (Mendes 2009: 59), and adopted the Constitution of the United States of Brazil, of 18 September 1946. The 1946 Constitution was purported to be a return to the constitutional safeguards of the 1934 Constitution, but, in what regards citizenship criteria, it actually made access to Brazilian citizenship by birth more difficult than before, by reintroducing the residence requirement and establishing a time limit for the attribution of Brazilian citizenship by birth to the children born abroad to a Brazilian father or mother not in the service of the Brazilian state, in line with what had been established, without constitutional mandate, by Article 1 (a) and § 1 of Decree Law no. 389, of 25 April 1938.

Similarly to all its predecessors, Article 129 of the 1946 Constitution recognised as Brazilian those born in Brazil, even if to foreign parents, provided that the parents did not reside in Brazil in the service of their country's government (I), and the children born abroad to a Brazilian father or mother, if the parents were abroad in the service of Brazil (II, first part). However, if the Brazilian parents were not abroad in the service of Brazil, their children would only keep²⁴ their Brazilian citizenship provided that they came to reside in Brazil and, after becoming of age, opted for Brazilian citizenship within a period of four years (Article 129-II, second part).

In Article 129-II, second part, the 1946 Constitution combined the requirements imposed by its predecessors – repatriation (1824 and 1891 Constitutions) and express declaration of the wish to retain Brazilian citizenship (1934 and 1937 Constitutions) – and added an age limit requirement. Some authors argued for a liberal interpretation of this age limit, taking as reference the civil (21 years) and not the political (18 years) age of majority, in order to extend the period of time during which it was possible to opt for Brazilian citizenship (Tiburcio 1992: 271), while others claimed that the age of majority for political purposes should prevail, since citizenship was a matter of public law (Melo 1949: 15)²⁵. As pointed out by the Federal Supreme Court, until the end of the deadline for option, individuals were considered, for all purposes, Brazilian by birth under the terminating condition (*condição resolutive*) of not opting in time for Brazilian citizenship²⁶. However, once the deadline was elapsed without option, the individuals did not lose their Brazilian citizenship, but only their right to definitively become Brazilian citizens by birth (Araujo 1987: 58). The option for Brazilian citizenship until

²⁴ With the use of the verb to keep (*conservar*), the 1946 Constitution put an end to the still ongoing debate as to whether the children born abroad to a Brazilian father or mother were to be considered citizens by birth or by naturalisation. Since the fulfilment of the residence and option requirements was necessary to keep the Brazilian citizenship, it became clear that those covered by Article 129-II, second part, were Brazilian citizens by birth and that, after the option, the effects were produced from the moment of birth (Melo 1949: 19). Still, the ordinary legislator felt the need to make it even clearer by establishing in Article 5 of the Law no. 818, of 18 September 1949, that Brazilians by birth (*brasileiros natos*) are those mentioned in Article 129-I and II of the 1946 Constitution.

²⁵ Although Article 129-II, second part, of the 1946 Constitution was clearly inspired by Decree Law no. 389, of 25 April 1938, and this diploma made express reference to civil majority, the question continued to be disputed, both in academia and in judicial practice, for many decades (Monteiro 1968: 327), until the four year time limit was eventually eliminated by the 1988 Constitution. Referring to a similar provision in the 1967 Constitution, the Federal Supreme Court, in a 2005 decision, simply assumed that the age of majority intended here was 21 years, as this was the most favourable interpretation. See judgment of the Federal Supreme Court, of 22 March 2005, Extraordinary Appeal no. 418.096-1. The age of civil majority continued to be 21 years until the 2002 Civil Code reduced it to 18 years.

²⁶ See judgment of the Federal Supreme Court, of 25 September 2003, Interlocutory Injunction no. 70.

four years after reaching majority was a condition *sine qua non*, which could not be dispensed with even if the child had not acquired the citizenship of his or her place of birth and would therefore become stateless (Melo 1949: 15). Questions arose as to whether the residence in Brazil had to be established before the child became of age or not. Melo (1949: 14) argued persuasively that the child's residence in Brazil did not have to be established before he or she became of age, since the option could be made until four years after that date. According to Melo, in view of the silence of the 1946 Constitution on the duration of the required residence, the ordinary legislator was not allowed to subject the exercise of the right of option to proof of a fixed period of residence in the country. On the other hand, the close succession of constitutional texts with different citizenship criteria for children born abroad to Brazilian parents led to doubts as to whether those who had not opted for Brazilian citizenship after reaching majority and before the entry into force of the 1946 Constitution could still opt if the period of four years had not yet elapsed. Melo (1949: 16) answered in the affirmative, arguing that the 1946 Constitution set a new legal order of immediate application, which should benefit all those who fell under the hypothesis of the second part of Article 129-II²⁷.

In what regards the acquisition of Brazilian citizenship by naturalisation, the 1946 Constitution kept the reference to the 'tacit naturalisations' operated under the 1891 Constitution (Article 129-III), and made a general reference to modes of naturalisation to be prescribed by ordinary legislation (Article 129-IV). The 1946 Constitution innovated, however, by introducing a 'Lusitanian privilege' with no precedent in Brazilian constitutionalism, save for the 'original admission' to Brazilian citizenship by the 1824 Constitution of those born in Portuguese territory and resident in Brazil at the time of the proclamation of Brazilian independence. Per Article 129-IV of the 1946 Constitution, the only legal requirements for naturalisation of Portuguese citizens would be proof of continued residence in the country for the period of one year, moral integrity (*idoneidade moral*) and physical health. As pointed out by Mendes (2009: 59), in this way, the preference for the Portuguese immigrant, which was already clear in the Brazilian immigration policy, became a constitutional rule. Similar provisions were included both in the authoritarian constitution of 1967 and in the democratic constitution of 1988, although the latter extended the privilege to all foreigners originating from Portuguese speaking countries.

The loss of Brazilian citizenship was regulated by Article 130 of the 1946 Constitution in terms very similar to those of its counterpart in the 1934 Constitution. The same was true for the suspension and loss of political rights (Article 135). Contrary to its predecessors, however, the 1946 Constitution expressly admitted the possibility of

²⁷ Another interesting question was, according to Melo (1949: 16-18), that of knowing if those who had acquired Brazilian citizenship under Article 69-2 of the 1891 Constitution (children of Brazilian parents born abroad who established residence in Brazil) had lost it afterwards since the subsequent constitutions required the option for recognition as a Brazilian citizen. The author argued that, although Brazilians were only those indicated in the constitutional texts, there seemed to have been no intention to exclude from Brazilian citizenship those who had acquired it under Article 69-2 of the 1891 Constitution. In Melo's opinion, such individuals should be recognised as Brazilians, but only if, besides having set residence in Brazil, they had acted as Brazilians (e.g. declared their Brazilian citizenship on the registration of their children, registered as electors, rendered military service, etc.), thereby expressing unequivocally their option for Brazilian citizenship. Since the 1946 Constitution did not establish a special procedure for the option, such 'precise statements of Brazilian citizenship' should be accepted as admissible forms of option.

reacquiring Brazilian citizenship, and not just political rights, under terms to be prescribed by ordinary legislation (Article 137).

The 1946 Constitution was also innovative in forbidding the Union, the states, the federal district and the municipalities to create distinctions between Brazilians in general, and not just between Brazilians by birth (Article 31-I). In its own provisions, however, the 1946 Constitution was not more generous vis-à-vis naturalised Brazilians than its predecessors. By using a reference to Article 129-I and II after the word ‘Brazilian’, several constitutional provisions reserved the conferral of political, social and economic rights to Brazilian citizens by birth, in terms quite similar to those of the 1934 Constitution. One novelty was the provision in Article 143, under which foreigners who had a spouse or a child under their care who was a Brazilian by birth could not be expelled from national territory even if considered to be harmful to public order.

Under the 1946 Constitution, a new legislative act was adopted to regulate the acquisition, loss and reacquisition of citizenship and the loss of political rights – Law no. 818, of 18 September 1949, which is still in force today, in spite of the many changes introduced by successive legislative and constitutional reforms²⁸. Article 1 of Law no. 818 reproduced Article 129 of the 1946 Constitution, with minor differences in wording, but Article 2 introduced a new mode of attribution of Brazilian citizenship by birth, designed to cover those born in Brazil to a foreign parent residing in Brazil in the service of his or her government and to a Brazilian parent. Under Article 2 of Law no. 818, such an individual would be entitled to opt for Brazilian citizenship under the conditions set by Article 129-II of the 1946 Constitution, that is, provided that he or she came to reside in Brazil and, after becoming of age, made the option within a period of four years. Given the understanding that the Constitution is exhaustive in the establishment of the modes of attribution of citizenship by birth, Article 2 was deemed by many to be unconstitutional and of no validity (Tiburcio and Barroso 2013: 259; Dolinger 2003: 175-180)²⁹. Law no. 818 also included a separate section under the heading ‘Brazilian citizenship by judicial decree’ (*Da nacionalidade brasileira declarada judicialmente*), but this was not a new mode of citizenship acquisition, since Article 6 applied only to those who had acquired Brazilian citizenship by ‘tacit naturalisation’ until the promulgation of the 1934 Constitution, and who were thereby entitled to request, at any time, before the judge of their domicile, the declaratory title (*título declaratório*) of Brazilian citizenship³⁰.

The general naturalisation regime was set by Law no. 818 in three separate sections entitled ‘Naturalisation’ (*Da Naturalização*), Articles 7 to 18, ‘Effects of Naturalisation’ (*Dos efeitos da naturalização*), Articles 19 to 21, and ‘Nullity of the naturalisation decree’ (*Da nulidade do decreto de naturalização*), Article 35. The power to grant naturalisation was, under Article 7, an exclusive prerogative of the President of the Republic. Article 7, single paragraph (*parágrafo único*), allowed for the issuance of

²⁸ For this reason, the provisions regarding the birth registration of children born abroad to a Brazilian father or mother, the loss and the reacquisition of Brazilian citizenship will only be analysed in detail in the section of this report dedicated to the current citizenship regime.

²⁹ Some authors, however, defended the validity of Article 2 of Law no. 818. Barroso (1987: 51-53), for instance, argued that the provision was in line with the basic principles of Brazilian citizenship law, since it applied to individuals who were ‘doubly Brazilian’, by blood and by birth in the territory.

³⁰ This provision has lost, in the meantime, any practical relevance, as the 1988 Constitution no longer makes reference to the ‘tacit naturalisations’ of the 1891 Constitution and the potential beneficiaries of the provision are all long dead.

collective naturalisation decrees, provided that the text was perfectly clear about the identity of each of the beneficiaries. Per Article 8, the requirements for naturalisation were: I) civil capacity under Brazilian law; II) continued residence in Brazilian territory for a minimum period of five years immediately prior to the naturalisation request; III) capacity to read and write in Portuguese, considering the applicant's conditions; IV) exercise of a profession or possession of sufficient assets to provide for the applicant's own maintenance and that of his or her family; V) good behaviour (*bom procedimento*); VI) absence of any indictment or conviction in Brazil for a crime punishable with a penalty higher than one year of imprisonment; and VII) physical health. Some of these requirements were waived for specific categories of applicants, including the Portuguese³¹, the foreign women married to Brazilian men³², and foreigners residing in Brazil for more than one year³³. Furthermore, the residence requirement would be reduced to one, two or three years for other categories specified in Article 9 of Law no. 818³⁴. Per Article 8 § 3, the children of naturalised Brazilians who resided in Brazil and who had been born before their father or mother's naturalisation, were allowed to request the naturalisation as Brazilians, after reaching 18 years of age, and their request was to be given priority over all other naturalisation requests³⁵.

Per Articles 15 and 16 of Law no. 818, the naturalisation certificate (*certificado de naturalização*) was to be delivered to the applicant in a solemn ceremony during which the applicant was required to demonstrate his or her capacity to read and write in Portuguese, by reading excerpts from the Federal Constitution³⁶, to expressly declare the renunciation of his or her previous nationality, and to commit to fulfilling well the

³¹ The Portuguese applicants did not have to meet the professional and financial independence requirements of Article 8-IV and, in what concerned Article 8-II and III, were only required to prove uninterrupted residence in Brazil for the period of one year and an adequate use of Portuguese language (Article 8 § 1).

³² Category added to Article 8 § 1 by the Law no. 3.192 of 4 July 1957. Foreign women married to Brazilian men benefited from the same waivers as Portuguese citizens. Per Article 11 of Law no. 818, foreign women married for more than five years to acting Brazilian diplomats were dispensed from meeting the residence requirement altogether and were only required to meet the language and the health requirements of Article 8. Law no. 3.696, of 18 December 1959, extended the scope of Article 11 to cover also foreign women married to Brazilian men who were abroad in the exercise of a permanent public function.

³³ Per Article 8 § 2, no foreigner residing in Brazil for more than one year was to be demanded proof of physical health.

³⁴ To one year in case the applicant was the child of a Brazilian citizen; to two years in case the applicant had a Brazilian child or spouse and in case the applicant had been employed in a Brazilian diplomatic or consular post and had rendered 20 years of good services; to three years in case the applicant was commendable for his or her professional, scientific or artistic capacity, in case the applicant was a farmer or specialized worker in any industrial sector, in case the applicant had rendered or could render relevant services to Brazil, and in case the applicant owned land or shares in agricultural or industrial companies in Brazil.

³⁵ Furthermore, those who were still dependent on their parents for survival did not need to meet the professional and financial requirements of Article 8-IV of Law no. 818. The position of these children was further strengthened by Law no. 4.404, of 14 September 1964, which was briefly in force in the period immediately after the military coup of 1964 and before the adoption of the 1967 Constitution. Under Article 1 of Law no. 4.404, the foreign children residing in the country, whose parents were Brazilian by naturalisation and domiciled in Brazil, were to be considered as Brazilian citizens for all purposes. Article 2 made use of the same ambiguous phrasing that later appeared in the 1967 Constitution when prescribing that, in order to 'keep' (*preservar*) their Brazilian citizenship, those interested had to opt for it within four years after becoming of age. Law no. 4.404 was abrogated by Law no. 5.145, of 20 October 1966.

³⁶ Portuguese citizens who naturalised as Brazilian were only required to prove the adequate use of the Portuguese language and not to read excerpts from the Brazilian Constitution (Article 16 § 1).

duties of a Brazilian citizen. The naturalisation would only produce effects after delivery of the certificate and would confer upon the naturalised citizen the enjoyment of all civil and political rights not reserved to citizens by birth in the Constitution (Article 19). Naturalisation did not extend to the naturalised citizen's spouse or children (Article 20). Per Article 35, the naturalisation decree would be null if proved that the documents submitted with the application were false (*falsidade ideológica ou material*).

Following the military coup of 1964, which instituted a military dictatorship in the country, the 1946 Constitution suffered successive amendments and was eventually replaced by the Constitution of the Federal Republic of Brazil of 1967, a text which was so extensively altered by a 1969 constitutional reform that some commentators refer to the 1967 and the 1969 versions as two separate constitutions. The citizenship criteria were, however, not touched by the 1969 reform, apart from minor changes in wording and the renumbering of the Articles. The 1967 Constitution was the first to incorporate an explicit classification of the two categories under which one could become a Brazilian, by listing separately the modes of attribution of Brazilian citizenship by birth (Article 140-I) and of acquisition of Brazilian citizenship by naturalisation (Article 140-II).

Under Article 140-I, Brazilians by birth were, as usual, those born in Brazil, irrespective of the citizenship of the parents, unless the parents were in Brazil in the service of their country (a), and the children born abroad to a Brazilian father or mother, provided that any of the parents were abroad in the service of Brazil (b). Article 140-I (c) seemed to recognise as Brazilian by birth the children born to a Brazilian father or mother not in the service of the Brazilian state who met one of two alternative requirements: registration in the competent Brazilian services abroad or residence in Brazil before becoming of age followed by option for Brazilian citizenship within four years after that date. The wording of the 1967 Constitution was not, however, 'grammatically clear' (Tiburcio 1992: 271), which led some authors, such as Monteiro (1968: 326), to interpret the provision as treating the registration in a Brazilian consulate as optional, but the residence in Brazil and the option for Brazilian citizenship as mandatory requirements for the recognition as Brazilians by birth. A different interpretation, it was argued, would be inadmissible, since it would mean an almost unrestricted adoption of *ius sanguinis*, at odds with the Brazilian legal tradition (Dolinger 2003: 168-169; Barroso 1987: 46-50). The 1969 reform put the commas right and the interpretation which eventually prevailed in the case law of the federal courts was that the children registered at a Brazilian consulate were Brazilian citizens since birth without having to reside in Brazil and make the option for Brazilian citizenship (Tiburcio 1992: 271; Dolinger 2003: 169)³⁷.

Article 140-II kept with the, by then, tradition of referring to those naturalised under the 'tacit naturalisation' clauses of the 1891 Constitution (a) and included, like its predecessor, a 'Lusitanian privilege' clause, under which the only requirements to be imposed by ordinary legislation on Portuguese applicants were residence in Brazil for one year uninterrupted, moral integrity and physical health [(b) 3]. The 1967 Constitution innovated, however, by specifying two categories of naturalisation to be regulated by ordinary legislation [Article 140-II (b)] in addition to the general naturalisation regime. The first category covered those born abroad who had been admitted in Brazil during the first five years of their lives and were definitively settled in national territory. In a quite ambiguous and misleading phrasing, Article 140-II (b) 1

³⁷ See, e.g., judgment of the Federal Supreme Court, of 6 April 1973, Extraordinary Appeal no. 75.313.

added that, in order to keep (*preservar*) Brazilian citizenship, individuals in those circumstances would have to express their interest unequivocally (*manifestar-se por ela, inequivocamente*) within two years after becoming of age. The second category covered those born abroad who, having established residence in Brazil before becoming of age, obtained a college degree from a national university and requested Brazilian citizenship until one year after graduation [Article 140-II (b) 2]. These two new modes of acquisition of Brazilian citizenship were explained as forms of rewarding the full integration of such individuals in Brazilian society, as an expression of *jus allectionis* (Monteiro 1968: 329). Dolinger (2003: 163) refers to these two hypotheses as forms of ‘constitutional naturalisation’, since Article 140-II (b) 1 and 2 left the President of the Republic no margin of discretion to refuse naturalisation to individuals who met the constitutional requirements. The naturalisation was ‘automatic’ (Dolinger 2003: 182).

The loss of Brazilian citizenship was regulated by Article 141 of the 1967 Constitution in the same terms as the previous constitutions³⁸. The 1969 constitutional reform added, however, a single paragraph (*parágrafo único*) to prescribe that the acquisition of citizenship obtained through fraud would be annulled by the President of the Republic. The suspension and loss of political rights was also regulated by Article 144 of the 1967 Constitution in similar terms to those of its predecessors, save for the use of the expression ‘citizenship right’ (*direito de cidadania*), instead of just ‘right’, when prescribing that the acceptance of nobility title or foreign decoration which led to a restriction of a citizenship right or of an obligation vis-à-vis the Brazilian state would result in loss of Brazilian citizenship [Article 144-II (c)]. The 1967 Constitution innovated by specifying in which cases the suspension or loss of political rights would be decreed by the President of the Republic and in which cases it would be decreed by a judicial decision³⁹. It also added that the defendant would always be granted ample opportunities for his or her defence (Article 144 § 2). As for the possibility of reacquiring Brazilian citizenship or political rights, the 1967 Constitution was silent. The 1969 constitutional reform, however, added a provision referring to ordinary legislation the definition of the conditions under which political rights could be reacquired (Fraga 1995: 57).

Article 140 § 1 of the 1967 Constitution reserved for Brazilian citizens by birth access to the positions of President and Vice-President of the Republic, Minister of State, Federal Supreme Court and Federal Appellate Court judges, Senator, Member of the House of Representatives (*deputado federal*), state or territory Governor and Vice-Governor. This list was, however, not exhaustive, as other positions were reserved for Brazilians by birth throughout the constitutional text, such as those of General District

³⁸ One of the grounds for loss continued to be the acceptance of commission, employment or pension from a foreign government without prior authorisation of the President of the Republic. Araujo (1987: 58-59) noted that this provision was interpreted restrictively and applied only in cases of proved existence of a conflict of loyalties; furthermore, the practice of the Ministry of Justice in the 1980s was often to convert the procedures for loss of citizenship into procedures for the authorisation of the commission, employment or pension.

³⁹ The suspension or loss of political rights would be decreed by the President of the Republic in case of loss of Brazilian citizenship following naturalisation abroad or acceptance of commission, employment or pension from foreign government; of refusal, based on political, philosophical or religious convictions, to render service or fulfil obligation imposed on Brazilians in general; and of acceptance of nobility title or foreign decoration which led to a restriction of a citizenship right or of an obligation vis-à-vis the Brazilian state. In all other cases, the suspension or loss of political rights would be decreed by judicial decision (Article 144 § 2). The 1969 constitutional reform added to the list of cases in which the loss of political rights was to be decreed by the President of the Republic the case of annulment of the naturalisation acquired by fraudulent means [Article 149 § 1 (a)].

Attorney (Article 138) and judge in the High Labour Court [Article 133 § 1 (a)]. Furthermore, some key economic activities continued to be reserved for Brazilian citizens by birth. Anyway, Article 140 § 2 prescribed that, besides the restrictions established by the Constitution, no other restriction would be imposed on Brazilian citizens based on the conditions of their birth⁴⁰, a provision in line with the general prohibition to create any distinctions between Brazilians, imposed on the Union, the states, the federal district and the municipal authorities by Article 9-I.

For the time that the 1967 Constitution was in force, Law no. 818, of 18 September 1949⁴¹, continued to regulate the acquisition, loss and reacquisition of citizenship, as well as the loss of political rights. However, in 1980, the adoption of a new Immigration Act – Law no. 6.815, of 19 August 1980, which defined the legal situation of foreigners in Brazil and created the National Council for Immigration – instituted a new regime for naturalisation, thereby replacing the corresponding provisions in Law no. 818. The detailed analysis of the regime introduced in 1980, and still in force, will be made in the section of this report dedicated to the current citizenship regime. At this point, it is enough to mention that, while the general naturalisation requirements were kept more or less the same (the residence requirement was even lowered to four years), Law no. 6.815 was hardly ‘foreign-friendly’, as evidenced by the prohibition that foreigners participate in activities of a political nature, including the organisation of parades or demonstrations (Article 107), and by the explicit *caveat* in Article 121, which stipulated that the fulfilment of all the legal requirements for naturalisation did not give any foreigner a right to be naturalised as a Brazilian. Furthermore, under the military regime, the federal courts made a very broad interpretation of the legal requirement that applicants proved good behaviour (*bom procedimento*) (Article 112-VI of Law no. 6.815), considering as contrary to that requirement any form of disrespect for the laws in force in the country, including e.g. the involvement in activities of a political nature by being the head of a student association⁴².

By the year 1980, Brazil was already in the democratisation course that would eventually reinstate the multiparty system and put an end to the military regime, with the election of a civilian, Tancredo Neves, as President of the Republic, in 1985. In November 1986, general elections took place for both houses of the National Congress, which then acted as Constituent Assembly until September 2 1988, when the text of the current Constitution of the Federal Republic of Brazil – the ‘Citizen Constitution’ (*Constituição Cidadã*) – was finally approved.

⁴⁰ The 1969 constitutional reform eliminated this provision and added to the list of offices reserved to Brazilian citizens by birth those of judge in the High Military Court, the High Electoral Court, the High Labour Court and the Union Court of Auditors, of General District Attorney, Ambassador and members of the diplomatic corps, Navy, Army and Aviation Officers.

⁴¹ With the changes that had been introduced by Law no. 3.192, of 4 July 1957, and by Law no. 5.145, of 20 October 1966, as well as the changes which were later introduced by Law no. 6.014, of 27 December 1973.

⁴² See the Federal Appellate Court decision of 18 November 1982, Writ of Mandamus (*Mandado de Segurança*) no. 97.596.

3. Current citizenship regime

The ground rules for the attribution, acquisition and loss of Brazilian citizenship are set by Article 12 of the 1988 Constitution. The text of Article 12 has, so far, been subject to two constitutional amendments, in 1994 and in 2007. Both amendments involved Article 12-I (c), which rules on the attribution of Brazilian citizenship by birth to children born abroad to a Brazilian father or mother not in the service of the Brazilian state. The original version of Article 12-I (c) adopted a solution similar to that of the 1967 Constitution, with the difference that it did not establish a time limit for the exercise of the right of option. Brazilian by birth were, therefore, both those who came to reside in Brazil before reaching majority and opted for Brazilian citizenship, at any time after becoming of age, and those who simply registered in the competent Brazilian services, irrespective of whether they ever came to reside in Brazil. The imbalance between the two modes of attribution of Brazilian citizenship was criticised in the literature as illogical⁴³ and contrary to the international law requirement of effective ties between the state and its citizens, as it allowed for the attribution of Brazilian citizenship to individuals who might never visit Brazil or even learn the language of the country (Salomão 2008: 62). These criticisms led to Constitutional Amendment no. 3, of 1994, which eliminated the attribution of Brazilian citizenship by the mere effect of registration at a Brazilian consulate. With the wording given to Article 12-I (c) in 1994, children born abroad to a Brazilian father or mother would only be recognised as Brazilian citizens if they came to reside in Brazil and opted, at any time, for Brazilian citizenship. For about 200,000 children of Brazilian parents born in countries which adopt *ius sanguinis* as their single criterion for attribution of citizenship by birth, like Switzerland and Japan, this meant they were left stateless (Saliba 2008: 80). Constitutional Amendment no. 3 was met with outcry among the Brazilian diaspora and led to a massive mobilisation of civil society on behalf of the Brazilian children made stateless (*'brasileirinhos apátridas'*), even though the government was quick to state that such children would not be stateless, since they would be considered Brazilian until they reached majority and, after that, their condition as Brazilians by birth would be suspended until they exercised their right of option (Saliba 2008: 80). Calls for the return to the original phrasing of Article 12-I (c) eventually led to Constitutional Amendment no. 54, of 2007, which combined what some authors (Saliba 2008: 80) consider to be the most favourable features of the 1988 and the 1994 versions of the Article, by reintroducing the registration at a Brazilian consulate as a mode of attribution of Brazilian citizenship and by allowing that the residence in Brazil be established after majority. Constitutional Amendment no. 54 added a provision (Article 95) to the Transitory Constitutional Provisions Act, annex to the 1988 Constitution, prescribing that those born abroad to a Brazilian father or to a Brazilian mother between 7 June 1994 and 20 September 2007, may be registered in a competent Brazilian diplomatic or consular post or in a registration office, if they come to reside in Brazil. The purpose of this provision was clearly to retroact the effects of the new regime to cover the children born in the period during which registration abroad stopped being enough to attribute Brazilian citizenship under Article 12-I (c). However, questions arose as to whether the simple reference to registration in a Brazilian registration office for those who come to reside in Brazil, with no minimum age limit and no mention of

⁴³ In the first hypothesis, the registration at a Brazilian consulate was enough whereas, in the second hypothesis, it was not only necessary that the individual came to reside in Brazil and made a provisional registration (*registro provisório*) but also that he or she submitted to a judicial procedure before the federal courts in order to opt for Brazilian citizenship (Saliba 2008: 79-80; Dolinger 2003: 169-170).

‘option’, means that those born in this particular timeframe are exempt from the judicial procedure for the exercise of the right of option, a possibility which would be contrary to the principle of equality (Salomão 2008: 62-63).

Constitutional Amendment no. 3, of 1994, also introduced changes to Article 12-II (b), by lowering the residence requirement for naturalisation in that category from 30 to 15 years; to Article 12 § 1, by recognising to Portuguese with permanent residence in the country the rights of Brazilian citizens (and not, as in the original wording, of Brazilian citizens by birth); and to Article 12 § 4 II, by indicating two cases in which the acquisition of another citizenship does not result in loss of Brazilian citizenship.

The constitutional criteria are complemented by two main legislative acts. The Nationality Act – Law no. 818, of 18 September 1949 – is still relevant for its rules on registration upon arrival in Brazil and on loss and reacquisition of citizenship. The Immigration Act – Law no. 6.815, of 19 August 1980⁴⁴ – regulates naturalisation. As mentioned in the beginning of this report, the Justice Minister’s Ordinance no. 172, of 4 August 1995, is also crucial for understanding the current regime in what regards the loss of Brazilian citizenship.

3.1. Modes of attribution and acquisition of Brazilian citizenship

Birth in the territory, with diplomatic exception: Continuing a firm constitutional tradition, Article 12-I (a) of the 1988 Constitution recognises as Brazilians by birth those who are born in the Federal Republic of Brazil, even if born to foreign parents, provided that the foreign parents are not in Brazil in the service of their country. The common understanding of this *ius soli* provision is that it is very wide and applies even when the birth in Brazilian territory is merely fortuitous, e.g. during a tourist trip, or is due to the fact that, in a border region, the nearest hospital is on the Brazilian side of the border. The reference to the Federal Republic of Brazil as place of birth has traditionally been understood as covering not only what is materially located within Brazilian borders, ‘from Amapá to Chui’, but also Brazilian territorial waters, Brazilian military aircraft and ships wherever they may be found, and Brazilian commercial aircraft and ships if the birth occurs at high sea; *a contrario sensu*, those born in foreign military aircraft, even if flying over Brazilian territory, or in foreign military ships navigating Brazilian territorial waters or anchored in a Brazilian harbour, are not considered to be born in Brazilian territory and are therefore not Brazilian by birth (Monteiro 1968: 325). The High Court of Justice (*Superior Tribunal de Justiça*) has denied recognition to births registered in border regions when there is not enough proof that the birth occurred within Brazilian borders⁴⁵.

The diplomatic exception in Article 12-I (a) reflects a general principle of international law according to which states should not impose their citizenship on the children of foreign diplomats born in their territory (Tiburcio 2001: 21). The term ‘service’ has, nevertheless, always been interpreted broadly, to cover not only diplomatic and consular functions, but also other official missions (Ri 2010: 26). The expression ‘in the service of their own country’, on the other hand, has been given a literal interpretation, with the consequence that if the parents are in Brazil in the service

⁴⁴ With the changes introduced by Law no. 6.964, of 9 December 1981, and with the regulation by Decree no. 86.715, of 10 December 1981.

⁴⁵ See, e.g., judgment of the High Court of Justice, of 12 August 2010, Special Appeal no. 898.174.

of a third country, not their own, the child will be Brazilian by birth (Monteiro 1968: 325; Melo 1949: 9-10)⁴⁶. It is also commonly agreed that what is relevant is that the service to a foreign country is contemporary with the birth in Brazil, even if the residence in Brazil started for reasons other than the service to a foreign country (Melo 1949: 9). Over the years, the use of the plural – ‘foreign parents’ – has been interpreted as a mere ‘way of expression’⁴⁷ on the part of the constituent legislator (Monteiro 1968: 326), meaning that the diplomatic exception would apply even if only one of the parents was a foreigner in the service of his or her country (Melo 1949: 9; Dolinger 2003: 167, 176-177). This interpretation proved problematic as it meant that a child could be born in Brazil to a Brazilian parent and still not be Brazilian by birth if the other parent was a foreigner and, at the time of birth, was in Brazil in the service of his or her country. It was to address this paradoxical situation that Law no. 818, of 18 September 1949, attempted to institute, without constitutional mandate, a special regime for children in such circumstances to be entitled to opt for Brazilian citizenship after becoming of age. The point is still a matter of contention in the literature, but it seems that Article 12-I (a) is increasingly given a literal interpretation, so that a child born in Brazil is considered Brazilian by birth unless both parents are foreigners and at least one of the parents is in Brazil in the service of his or her country⁴⁸ (Tiburcio and Barroso 2013: 258-259).

Birth abroad to a Brazilian father or mother in the service of Brazil: Reciprocating the diplomatic exception of Article 12-I (a) (Melo 1949: 10), Article 12-I (b) recognises as Brazilians by birth those born abroad to a Brazilian father or to a Brazilian mother, provided that any of them is abroad in the service of the Federal Republic of Brazil. Most of the comments made about the diplomatic exception of Article 12-I (a) apply here. Although this provision is based on an ‘extraterritorial fiction’ according to which the Brazilian diplomatic missions are considered to be part of national territory, the term ‘service’ was always interpreted broadly to cover more than mere diplomatic functions (Ri 2010: 11-12)⁴⁹. Also, the expression ‘in the service

⁴⁶ A similarly literal interpretation led Melo (1949: 9) to conclude, *a propos* the corresponding provision in the 1946 Constitution, that if the service to a foreign government was rendered by a Brazilian citizen the child was to be considered Brazilian by birth, since the Constitution only mentioned ‘foreign parents’ in the service to their foreign countries. Given that the Constitution used and continues to use the expression ‘in the service of their country’, this remark by Melo seems to be only relevant for cases of dual citizenship, in which a Brazilian citizen is in Brazil in the service of his or her other country of citizenship.

⁴⁷ It is worth noting, however, that the constituent legislator is quite precise in Article 12-I (b), which mirrors the diplomatic exception of Article 12-I (a), when referring to children born abroad ‘to a Brazilian father or to a Brazilian mother’. Dolinger (2003: 167), however, considers that the difference in phrasing between the two provisions of Article 12 is not enough to sustain a literal interpretation of Article 12-I (a), since the possibility of having both parents in Brazil in the service of their foreign country is extremely unlikely.

⁴⁸ That is e.g. the interpretation adopted by the 2010 edition of the Consular Services Handbook, according to which ‘when one of the parents is foreigner and resides in Brazil in the service of his or her government and the other parent is Brazilian, the child born in Brazil is Brazilian per Article 12-I (a) of the Constitution’ (Tiburcio and Barroso 2013: 258).

⁴⁹ Melo (1949: 11) elaborates on this by arguing that the expression covers all and any activity performed in a foreign country, as long as by influence of the Brazilian state or as its representative. It covers, for instance, the case of illustrious Brazilians who are abroad at the invitation of foreign governments to act as arbiters in disputes. If they are forced to travel to those countries or other foreign regions due to their functions as arbiters, their children must be considered Brazilian if by chance they are born abroad during those travels. Similarly, children of Brazilian sportsmen, born abroad when the parents are representing Brazil in athletic competitions or as members of official sports organisations, must be considered Brazilian. The expression also covers the exercise of representative assignments and travels abroad as

of the Federal Republic' is interpreted broadly to cover the services rendered not only to the federal government, but also to the federate states, municipalities, local authorities (Monteiro 1968: 326; Melo 1949: 11) and companies of which the government is the dominant stockholder (Dolinger 2003: 167). The wording of Article 12-I (b) makes it clear that it is enough that one of the parents is Brazilian and in the service of Brazil. For Article 12-I (b) to apply, the birth must occur at a time when the Brazilian father or the Brazilian mother is in the service of the Brazilian state. It is irrelevant whether the Brazilian parent was already domiciled abroad for personal reasons before the start of the exercise of public functions, the same way that it does not matter if he or she ceases to exercise such functions at a later date (Melo 1949: 12)⁵⁰. The child's date of birth is also the date of reference to determine whether the father or the mother are Brazilian citizens. Even if the Brazilian parent loses his or her Brazilian citizenship later, that fact does not hinder the attribution of Brazilian citizenship by birth under Article 12-I (b), which effects are *ope legis*, i.e. by direct effect of the law, from the moment of birth. It is irrelevant whether the parents are Brazilian by birth or by naturalisation. However, the naturalisation of the parent(s) must pre-date the child's birth, since it will not retroact to that date if granted later (Dolinger 2003: 179-180). If the child is born abroad to a foreign mother whose Brazilian husband, abroad in the service of Brazil, successfully contests the paternity, the child is not registered as Brazilian and any registration made in the interim will be cancelled, unless of course it is proved that the real father is also a Brazilian in the service of Brazil (Melo 1949: 12-13). Likewise, if a Brazilian in the service of Brazil has a child with a foreigner and later recognises the child as his own, the child is Brazilian by birth under Article 12-I (b), and since the moment of birth, as the recognition is a merely declaratory act (Melo 1949: 13).

Birth abroad to a Brazilian father or mother combined with registration at the competent Brazilian services: As noted above, following Constitutional Amendment no. 54, of 2007, Article 12-I (c), first part, recognises as Brazilians by birth those born abroad to a Brazilian father or to a Brazilian mother provided that they are registered in the competent Brazilian services (*repartição brasileira competente*). This reference to 'competent Brazilian services' is commonly agreed to mean a Brazilian consulate. Individuals thereby registered who, at a later date, set residence in Brazil are entitled to request before the courts of their domicile the inscription of their birth registration in the Civil Registry Records (*Ofício do Registro Civil*), per Article 32 § 2 of Law no. 6.015, of 31 December 1973. They do not need to opt for Brazilian citizenship. The citizenship of the Brazilian father or mother is determined at the time of the child's birth and its loss at a later date, whatever the circumstances, does not affect the Brazilian citizenship of the child (Monteiro 1968: 326).

Birth abroad to a Brazilian father or mother combined with residence in Brazil and option for Brazilian citizenship: Article 12-I (c), second part, recognises as Brazilians by birth those born abroad to a Brazilian father or to a Brazilian mother and not registered in the competent Brazilian services, provided that they come to reside in Brazil and opt for Brazilian citizenship, at any time after reaching majority. This mode of attribution of Brazilian citizenship is often referred to as 'potestative citizenship'

holder of office or public position, including e.g. a courtesy visit to a foreign country by the President of the Republic or other office holder.

⁵⁰ Melo (1949: 12) added that even the child born abroad after the death of his or her Brazilian father is to be considered Brazilian if the father died abroad in the service of Brazil, since it is the public service rendered to Brazil by the father at the moment of his death that explains why the child is born abroad. A similar comment can be made for cases when the Brazilian mother is abroad in the service of Brazil and dies during child-birth.

(*nacionalidade potestativa*), since the right to opt for Brazilian citizenship is a particularly strong kind of ‘subjective right’, which cannot be opposed or subjected to conditions by the Brazilian authorities⁵¹. However, Article 12-I (c) only allows the exercise of this right after its holder reaches majority, i.e. 18 years of age, a restriction made explicit by Constitutional Amendment no. 54, but which the Federal Supreme Court had already imposed for years with the argument that, being a strictly personal act, the option can only be exercised by individuals with full capacity to express their will⁵². Article 12-I (c) does not set a deadline for the exercise of the right of option, which may happen at any time. According to the Federal Supreme Court, this means that, after majority, until individuals exercise their right of option, their silence works as a ‘suspensive condition’ (*condição suspensiva*) to the attribution of Brazilian citizenship⁵³. Before majority, if they reside in Brazil, such individuals are considered Brazilians by birth for all legal purposes, provided that they obtain a ‘provisional registration’ (*registro provisório*) under the terms set by Article 32 § 2 of Law no. 6.015, of 31 December 1973⁵⁴, which means that they have to request the court of their domicile the inscription of their birth registration in the Civil Registry Records (*Ofício do Registro Civil*). The federal courts consider this registration as a ‘provisional option’ for Brazilian citizenship (*opção provisória de nacionalidade*), to be ratified after majority, and therefore hold that only federal courts are competent to order the inscription⁵⁵.

The exercise of the right of option must follow a specific judicial procedure before a federal judge (Article 109-X of the 1988 Constitution). It is the court, in a voluntary jurisdiction procedure, which, after ascertaining that the requirements (Brazilian parent at time of birth, residence in Brazil and majority) are met, homologates the option and determines its transcription into the Civil Registry. The court’s decision in first instance is appealable to the Federal Regional Court. Therefore, before the option procedure is completed, the individual cannot be considered as a Brazilian by birth for all legal purposes⁵⁶. One implication of this is that, if there is an extradition procedure pending against an individual who is still waiting for the judicial homologation of his or her option, the extradition procedure is suspended⁵⁷. Once the homologation is final, its effects retroact to the individual’s date of birth. The judicial homologation is therefore not equivalent to the naturalisation decree for extradition purposes, as the Federal Supreme Court has had occasion to clarify⁵⁸. Whereas, under

⁵¹ For instance, Brazilian authorities are not at liberty to establish that the exercise of the right of option is conditional on the renunciation to any other citizenship. See judgment of the Second Region Federal Regional Court, of 30 October 2002, Habeas Data Appeal no. 307.690.

⁵² See, e.g., judgment of the Federal Supreme Court, of 22 March 2005, Extraordinary Appeal no. 418.096-1. It is worth noting that the 1988 version of Article 12-I (c) also prescribed that the right of option could only be exercised after majority. The mention was eliminated by Constitutional Amendment no. 3, of 1994.

⁵³ ‘Under the 1988 Constitution, the *status* of the individual is changed between majority and the option: the option – free from the previous deadline – stops having a terminating effect to gain, from the time of majority, the effect of a suspensive condition of Brazilian citizenship, without prejudice – as is characteristic of suspensive conditions – of generating retroactive affects, once the condition is met’. See judgment of the Federal Supreme Court, of 25 September 2003, Interlocutory Injunction no. 70.

⁵⁴ See judgment of the Federal Supreme Court, of 23 August 2005, Extraordinary Appeal no. 415.957-1.

⁵⁵ See, e.g., judgment of the High Court of Justice, of 11 November 2003, Special Appeal no. 235.492.

⁵⁶ See, e.g., judgment of the Federal Supreme Court, of 25 September 2003, Interlocutory Injunction no. 70.

⁵⁷ See, e.g., judgment of the Federal Supreme Court, of 25 September 2003, Interlocutory Injunction no. 70.

⁵⁸ See, e.g., judgment of the Federal Supreme Court, of 31 August 2000, Extradition no. 778.

Article 5-LI of the 1988 Constitution, a naturalised Brazilian may be extradited for crimes committed before the issuance of the naturalisation decree, a Brazilian by birth cannot be extradited even if the crimes that motivate the extradition request occurred before he or she exercised his or her right to opt for Brazilian citizenship.

The citizenship of the Brazilian father or mother is determined at the time of the child's birth and its loss at a later date, whatever the circumstances, does not affect the right of the child to opt for Brazilian citizenship under Article 12-I (c). On the other hand, the adoption of a foreign child by Brazilian citizens does not grant the adopted child a right to opt for Brazilian citizenship under this provision, as pointed out by the federal courts⁵⁹. A child adopted by Brazilian parents may only acquire Brazilian citizenship by naturalisation (Dolinger 2003: 180).

'Constitutional naturalisation' based on residence for more than 15 years: Per Article 12-II (b) of the 1988 Constitution, the foreigners who are resident in the Federal Republic of Brazil for more than 15 consecutive years and who have no criminal convictions are considered naturalised Brazilians, irrespective of their original citizenship, provided that they request naturalisation. This provision grants foreigners who meet these requirements a subjective right to naturalisation, which cannot be opposed by the Brazilian authorities. Contrary to what happens with the ordinary naturalisation regime, naturalisation under Article 12-II (b) is not granted as a discretionary act of the government (Tiburcio 1992: 272-273; Dolinger 2003: 181-182). One practical implication of this is that the governmental act which formally recognises the naturalisation is merely declaratory and its effects retroact to the date when the request for naturalisation is submitted. Therefore, as held by the Federal Supreme Court, the mere submission of a naturalisation request under Article 12-II (b), by an individual who has resided in Brazil for 15 years and has no criminal convictions, is enough to entitle him or her to occupy a position won in a public tender reserved for Brazilian citizens⁶⁰.

The 1988 Constitution did not incorporate the two forms of 'constitutional naturalisation' established by its predecessor for foreign children settled in Brazil before the age of five and for foreigners settled in Brazil before reaching majority and who had graduated from a Brazilian university. Those who did not exercise their right to naturalisation under Article 140-II (b) 1 and 2 of the 1967 Constitution until the adoption of the 1988 Constitution no longer enjoy a potestative right to naturalisation and are therefore dependent on the discretionary power of the state in assessing their naturalisation requests (Dolinger 2003: 182). Nevertheless, for those who arrive in Brazil before the age of five and are definitively settled in the territory, the Law no. 6.815, of 19 of August 1980, continues to establish a special naturalisation regime, as will be discussed below.

Naturalisation for Lusophone applicants: Article 12-II (a) of the 1988 Constitution refers to the legislator the definition of the ordinary naturalisation regime, but sets clear limits as to what the legislator is allowed to require from applicants originating from Portuguese speaking countries, i.e. Angola, Cape Verde, Guinea Bissau, Mozambique, Portugal, S. Tomé and Príncipe, and Timor-Leste. Lusophone applicants are only required to prove uninterrupted residence in Brazil for the period of one year and moral integrity. The 1988 Constitution continued with the 'tradition'

⁵⁹ See, e.g., judgment of the Second Region Federal Regional Court, of 20 September 2010, Civil Appeal no. 2008.50.01.002744-6.

⁶⁰ See judgment of the Federal Supreme Court, of 29 June 2005, Extraordinary Appeal no. 264.848-5.

(Ribeiro 2014: 103) to privilege Portuguese immigrants in the access to Brazilian citizenship, but expanded this privilege to include also the citizens of other Lusophone countries with which Brazil has strong historical, cultural and political ties⁶¹. In spite of this privileged treatment, however, Lusophone foreigners do not enjoy a subjective right to naturalisation. They are subject to the ordinary naturalisation regime, set by Law no. 6.815, of 19 August 1980, and therefore may be denied naturalisation by the Brazilian government even if they meet the requirements of one year residence and moral integrity (Article 121).

Naturalisation based on family ties with Brazilian citizen: The child (natural or adopted), the spouse or companion⁶², the father and the mother of a Brazilian citizen who apply for naturalisation may see the general four year residence requirement reduced to as much as one year, per Article 113-I and II of Law no. 6.815, of 19 August 1980. The use of the verb ‘may’ in the main section (*caput*) of Article 113 indicates that the government is not bound to reduce the residence requirement to one year for all applicants in this category. The government is at liberty to impose the four year residence requirement or to reduce it to a period of time longer than the one year threshold set by Article 113 single paragraph (*parágrafo único*). However, if the applicant is married for more than five years with a Brazilian diplomat in active service, the residence requirement is necessarily waived and replaced by the mere requirement of a thirty day stay in Brazil (Article 114-I). This provision only mentions the waiver of the residence requirement, but other waivers are instituted by Decree no. 86.715, of 10 December 1981. First of all, as spouses of Brazilian citizens, applicants under Article 114-I of Law no. 6.964 are exempt from proving that they exercise a profession or have enough resources to provide for themselves or their families [Article 119 § 2 (c) of Decree no. 86.715]. Furthermore, if residing abroad, they may replace the registration as permanent residents in Brazil for document issued by the Brazilian consular services and may submit a physical and mental health certificate from a doctor certified by the Brazilian consular authorities [Article 124-III (c) and (d) of Decree no. 86.715]. The information available on the website of the Brazilian Ministry of Justice, under the category of ‘special naturalisation for marriage with member of the diplomatic corps or person in the service of the Brazilian state abroad’, suggests, however, an even broader scope for the waiver applied to applicants under Article 114-I of Law no. 6.815. It seems that applicants under this category are exempt from all Article 112 requirements, including that of being able to read and write in Portuguese (Article 112-IV), since they only have to submit their wedding certificate and a copy of their passport with their naturalisation request⁶³. It is not very clear whether in these cases, the government retains its discretionary power to refuse naturalisation or not.

Outside of this particular category, all children, spouses or companions and parents of Brazilian citizens have to meet the general requirements to become naturalised Brazilians: civil capacity according to Brazilian law (Article 112-I); registration as permanent residents in Brazil (Article 112-II); capacity to read and write in Portuguese, given their circumstances (Article 112-IV); exercise of a profession or

⁶¹ Translated, in 1996, in the creation of the international organisation Community of the Portuguese Speaking Countries (CPLP).

⁶² If in a duly certified stable union (*união estável*). Information available on the website of the Brazilian Ministry of Justice <<http://www.justica.gov.br/central-de-atendimento/estrangeiros/nacionalidade>> 16.01.2016.

⁶³ See <<http://www.justica.gov.br/central-de-atendimento/estrangeiros/nacionalidade>> 16.01.2016.

possession of enough resources to provide for themselves and their families⁶⁴ (Article 112-V); good behaviour (Article 112-VI); inexistence of denunciation, indictment or conviction, in Brazil or abroad, for intentional crime punishable with a minimum prison sentence exceeding one year (Article 112-VII); and good health⁶⁵ (Article 112-VIII). For these applicants it is clear that they may be refused naturalisation, at the discretion of the government, even if they meet all the legal requirements (Article 121).

Naturalisation based on work or relevant contributions to Brazil: Applicants who, in the opinion of the Minister of Justice, have rendered or are likely to render relevant services to Brazil may see the general residence requirement reduced to as much as one year, per Article 113-III of Law no. 6.815. Likewise, those who are recommended for their professional, scientific or artistic skills may see the general residence requirement reduced to as much as two years (Article 113-IV) and those who own real estate in Brazil or are industrialists or stockholders in corporations working mainly in the agricultural and industrial sectors may see the general residence requirement reduced to as much as three years (Article 113-V). As noted a propos the naturalisation of children, spouses or parents of Brazilian citizens, the government is not strictly bound to reduce the residence requirement, nor to reduce it to the minimum threshold set by each of the provisions. However, if the applicant is employed in a Brazilian diplomatic mission or consular service and has worked there for more than ten consecutive years the residence requirement is necessarily waived and replaced by the mere requirement of a thirty day stay in Brazil (Article 114-II). The situation of such workers is similar to that of the spouses of Brazilian diplomats. The website of the Brazilian Ministry of Justice also refers to the naturalisation of these applicants as ‘special naturalisation’, *in casu* ‘for being or having been⁶⁶ employed in Brazilian diplomatic or consular mission’. These applicants are, however, required not only to prove their employment for ten years and the thirty day stay in Brazil, but also to submit a statement from the competent authority recommending the naturalisation⁶⁷. Again, it is questionable whether the government retains its discretionary power to refuse naturalisation in such cases. As for the other categories of foreigners who have made or may make contributions to Brazil’s economy, arts, science, etc., the general requirements of Article 112 apply and so does the government’s power of discretion to refuse naturalisation even when all the legal requirements are met (Article 121).

Provisional naturalisation for foreigners who arrive in Brazil before the age of five: A foreigner admitted in Brazil during the first five years of his or her life and definitively settled in national territory is entitled to submit, while underage, through his or her legal representative, a request to the Minister of Justice, for the issuance of a

⁶⁴ Per Article 119 § 2 of Decree no. 86.715, this requirement is deemed satisfied if the applicant: (a) receives a pension; (b) being a student, until 25 years of age, lives in the dependency of a parent, brother or sister or of a tutor; or (c) is married to a Brazilian or is provided for by parents or descendants who possess enough resources to satisfy the legal obligation of alimony.

⁶⁵ Per Article 112 § 1, foreigners who have resided in the country for more than one year are not required proof of good health. Decree no. 86.715 sets a different rule, however, raising to two years the duration of the residence in the country necessary for the waiver of the physical and mental health certification requirement (Article 119 § 2).

⁶⁶ The administrative practice seems to be to include not only those currently employed but also those who are no longer employed in Brazilian diplomatic or consular missions. The wording of Law no. 6.815 and of Decree no. 86.715 (Article 124-II) suggests, however, that only those currently in the service of a Brazilian diplomatic or consular mission are eligible for the ‘special naturalisation’ under Article 114-II.

⁶⁷ See <<http://www.justica.gov.br/central-de-atendimento/estrangeiros/nacionalidade>> 16.01.2016. The requirement of a recommendation letter from the Ministry of Foreign Relations is set by Article 124-II of Decree no. 86.715.

provisional naturalisation certificate (*certificado provisório de naturalização*) (Article 116). With the request, the applicant is required to submit proof of the date of entry in Brazilian territory, proof of permanent residence in Brazil, birth certificate, and proof of prior citizenship⁶⁸ (Article 121 of Decree no. 86.715). Once granted, the naturalisation will become final if the holder of the provisional naturalisation certificate, until two years after reaching majority, expressly confirms the intention to continue to be a Brazilian, in a request to the Minister of Justice (Article 116, single paragraph, of Law no. 6.815)⁶⁹. The wording of Article 116 suggests that the government has discretion when deciding on the issuance of the provisional naturalisation certificate, but not so on the conversion of the provisional naturalisation into a definitive naturalisation.

Residual category of ordinary naturalisation: Outside of the special categories just listed, all other foreigners have to meet the general naturalisation requirements of Article 112 of Law no. 6.815: I) civil capacity according to Brazilian law; II) registration as permanent residents in Brazil; III) continued residence in Brazilian territory for a minimum of four years immediately prior to the naturalisation request⁷⁰; IV) capacity to read and write in Portuguese, given individual circumstances; V) exercise of a profession or possession of enough resources to provide for themselves and their families⁷¹; VI) good behaviour; and VII) inexistence of denunciation, indictment or conviction, in Brazil or abroad, for intentional crime punishable with a minimum prison sentence exceeding one year.

The general procedure, common to all categories of applicants, is initiated by a request submitted to the Minister of Justice and lodged with the competent organ of the Ministry of Justice in the federal district, federate states and territories, which will enquire about the past life of the applicant and issue an opinion as to the convenience of the naturalisation (Article 117)⁷². The director of the organ may determine, if necessary, further enquiries and may decide to quash the request if the applicant does not meet the requirements of Article 112 or 116. The director's decision may be reconsidered, upon request, but if the quash of the request is maintained, the applicant may appeal to the Minister of Justice, within 30 days (Article 118, single paragraph). Throughout the naturalisation procedure, any member of the people (*qualquer do povo*) may oppose the naturalisation, as long as he or she justifies his or her position (Article 120). As noted before, the satisfaction of the legal requirements does not entitle the foreigner to a right of naturalisation (Article 121). The 'naturalisation ordinance' (*portaria de naturalização*) is published in the Official Journal (*Diário Oficial*). The Ministry of Justice issues a naturalisation certificate which is delivered to the naturalised Brazilian (Article 119) by the federal judge of his or her place of residence in a public audience

⁶⁸ Article 121 of Decree no. 86.715 required, furthermore, the presentation of the applicant's criminal record, if he or she was older than 18 years of age. With the reduction of the age of majority to 18, by the 2002 Civil Code, this requirement no longer applies as all applicants will be aged less than 18.

⁶⁹ See <<http://www.justica.gov.br/central-de-atendimento/estrangeiros/nacionalidade>> 16.01.2016.

⁷⁰ Per Article 119 § 3 of Decree no. 86.715, the satisfaction of this requirement is not hindered by travels abroad, provided that they are motivated by relevant reasons, in the opinion of the Minister of Justice, and that the total sum of their duration does not exceed 18 months.

⁷¹ As noted above, per Article 119 § 2 of Decree no. 86.715, this requirement is deemed satisfied if the applicant: (a) receives a pension; (b) being a student, until 25 years of age, lives in the dependency of a parent, brother or sister or of a tutor; or (c) is provided for by parent or descendants who possess enough resources to satisfy the legal obligation of alimony.

⁷² Exceptions to this rule are the submissions of applications for provisional naturalisation certificates, which are lodged directly with the Federal Department of Justice (Article 125 § 1 of Decree no. 86.715), and of applications for 'special naturalisations' under Article 114-I and II of Law no. 6.815, which may be lodged with the Brazilian consular authorities abroad (Article 125 § 2 of Decree no. 86.715).

during which the newly naturalised Brazilian is required to prove his or her proficiency in Portuguese, by reading excerpts of the Brazilian Constitution⁷³; to expressly renounce to his or her previous citizenship; and to promise to fulfil well his or her obligations as a Brazilian citizen (Article 129 of Decree no. 86.715, of 10 December 1981). The naturalisation only produces effects after the delivery of the certificate (Article 122 of Law no. 6.815)⁷⁴ and will be of no effect if the certificate is not requested by the naturalised Brazilian within twelve months after the publication in the Official Journal, except in case of duly attested force majeure (Article 119 § 3).

The naturalisation does not result in the acquisition of Brazilian citizenship by the spouse and children of the naturalised Brazilian, nor authorises their entry and settlement in Brazil without fulfilling the legal requirements for immigration (Article 123). The naturalisation does not extinguish the civil or criminal responsibility to which the individual was previously subject in any other country (Article 124).

If, at any time, there is proof that the fulfilment of any of the requirements in Article 112, 113 and 114 is false (*falsidade ideológica ou material*), the act of naturalisation is declared null without prejudice to the applicant's criminal liability (Article 112 § 2). The nullity statement is issued in the course of an administrative procedure in which the respondent will have 15 days for his or her defence (Article 112 § 3). This does not constitute a mode of loss of Brazilian citizenship, since the nullity declaration has retroactive effects and therefore the Brazilian citizenship is considered to never having been acquired.

3.2. Modes of loss of Brazilian citizenship

The 1988 Constitution limited to two the instances in which the loss of Brazilian citizenship may be declared: the cancellation of the naturalisation decree, by court order, on the grounds of activity detrimental to the national interest (Article 12 § 4-I), and the acquisition of another citizenship by voluntary naturalisation (Article 12 § 4-II)⁷⁵. These criteria have a long tradition in Brazilian constitutionalism, having been present in all Constitutions since 1934. In its original wording, Article 12 § 4-II reflected Brazil's traditional aversion to dual citizenship, a principled position based on the premise that an individual should owe allegiance to only one country (Tiburcio 1992: 274; Monteiro 1968: 332). The voluntary acquisition of another citizenship was always understood as a sign of preference on the part of the Brazilian citizen for another

⁷³ This requirement is waived in case of Portuguese citizens, per Article 129 § 1 of Decree no. 86.715. Given the equivalence established by Article 12-II (a) of the 1988 Constitution between Portuguese citizens and foreigners origination from other Lusophone countries for naturalisation purposes, this waiver should be extended to Angolan, Cape Verdean, Guinean Bissau, Mozambican, S. Tomé and Príncipe and East-Timorese citizens.

⁷⁴ The Federal Supreme Court has had the opportunity to stress this point by holding that the acquisition of the status of naturalised Brazilian only takes place after the delivery, by a federal judge, of the respective naturalisation certificate. See judgment of the Federal Supreme Court of 27 March 2008, Extradition no. 1.074-3.

⁷⁵ On a side note, it is worth mentioning that Article 15 of the 1988 Constitution forbids the cassation of political rights and only allows the loss or suspension of such rights in cases of: I) cancellation of naturalisation by a non-appealable judicial decision; II) absolute civil incapacity; III) non-appealable criminal conviction, for the duration of its effects; IV) refusal to comply with obligation imposed on all or to alternative service, for political, philosophical or religious reasons; or V) administrative improbity, i.e. corruption.

country (Tiburcio 1992: 274) and of renunciation to his or her citizenship of origin (Monteiro 1968: 331). This old tradition was, however, practically abandoned⁷⁶ with Constitutional Amendment no. 3, of 1994, which changed the wording of Article 12 § 4-II to allow for significant exceptions to the general rule, as will be discussed below. The aversion to dual citizenship remains, nevertheless, in the regulation of the acquisition of Brazilian citizenship by naturalisation, since the newly naturalised Brazilians are required to renounce their previous citizenship when accepting their naturalisation certificates, per Article 129-II of Decree no. 86.715, of 10 December 1981⁷⁷. Besides, the case law of the Federal Supreme Court denotes some discomfort with dual citizenship, particularly in extradition cases, as evidenced by the recourse to the *Nottebohm* doctrine of preference for the ‘prevailing citizenship’, i.e. the real and effective citizenship, based on strong factual ties between the individual and one of the states of which he or she is a citizen⁷⁸.

Although the 1988 Constitution does not state it explicitly, as some of its predecessors did, there seems to be no doubt that the only instances of loss of Brazilian citizenship are those identified in the constitutional text. In a judgment of 2003, the Federal Supreme Court held that the loss of Brazilian citizenship ‘can only occur in the hypotheses exhaustively listed in the Constitution’ and that, therefore, ‘it is not licit, for the Brazilian state, either by means of simple legislation or international treaty, to innovate on the topic, whether to widen, restrict or modify the cases which allow for the deprivation – always exceptional – of the status of Brazilian citizen’⁷⁹. However, as will be discussed below, a significant restriction to the cases listed in the Constitution was introduced by a mere ministerial ordinance in 1995, following Constitutional Amendment no. 3, of 1994.

Cancellation of naturalisation by court order: Under Article 12 § 4-I of the 1988 Constitution, the federal courts may deprive naturalised Brazilians – not Brazilians by birth – of their Brazilian citizenship by cancelling their naturalisation on the grounds of activities contrary to the national interest. The reference to ‘activities contrary to the national interest’ has been interpreted as covering activities detrimental to national security or designed to overthrow the government (Tiburcio 1992: 273). A judicial procedure is always required. Articles 24 to 34 of Law no. 818, of 18 September 1949, set the rules for the judicial procedure. The procedure is initiated at the request of the Minister of Justice or following a denunciation to the competent police authorities by any person (*representação de qualquer pessoa*), with the express mention of the activity deemed harmful to the national interest. The defendant is allowed time to submit written allegations, request enquiries and indicate witnesses. He or she may appeal the decision which decrees the cancellation of the naturalisation, but the appeal does not have suspensive effects. Monteiro (1968: 332) noted, however, that since the judicial decision is constitutive it does not touch the validity of the acts practiced by the naturalised Brazilian until the cancellation becomes final (*transitada em julgado*). Since

⁷⁶ As observed by the Federal Supreme Court in its judgment of 26 August 2004, Habeas Corpus no. 83.450-7.

⁷⁷ This provision has remained in force in spite of several reforms to Decree no. 86.715, the latest of which is from 2014. In 2004, a newly naturalised Brazilian appealed to the First Region Federal Regional Court against the demand that she renounced her Italian citizenship and surrendered her Italian documents at the time of the delivery of her naturalisation certificate. The Court declined to enter the merits of the case with the argument that the action had not been brought in due time. See judgment of the First Region Federal Regional Court, of 15 February 2004, Writ of Mandamus no. 2001.01.00.017875-9/PI.

⁷⁸ See, e.g., judgment of the Federal Supreme Court, of 26 August 2004, Habeas Corpus no. 83.450-7.

⁷⁹ See judgment of the Federal Supreme Court, of 26 June 2003, Habeas Corpus no. 83.113-3.

the cancellation is a penalty, its effects are purely personal and do not hinder the Brazilian citizenship of the defendant's spouse and children. This mode of loss of Brazilian citizenship was always criticised, since its introduction in the 1934 Constitution, for its political nature and for causing statelessness (Posenato 2002: 225). It was furthermore considered odious for implying that the naturalised citizens were never fully trusted by the Brazilian state (Araujo 1987: 60-62). Research conducted in Brazil in the 1990s indicated that this mode of deprivation of Brazilian citizenship had so far hardly ever been used (Tiburcio 1992: 273).

Express renunciation of Brazilian citizenship following naturalisation abroad: The 1988 Constitution does not use the word 'renunciation'⁸⁰, but that is the actual meaning that Brazilian authorities have been giving to Article 12 § 4-II, since 1995. As mentioned earlier, Constitutional Amendment no. 3, of 1994, changed the phrasing of Article 12 § 4-II to explicitly list two exceptions to the general rule according to which the acquisition of another citizenship leads to the loss of Brazilian citizenship. The first exception was already implied by the reference to 'voluntary naturalisation' in the original wording of the Article and corresponds to the cases of attribution of another citizenship by birth in a foreign legal system [Article 12 § 4-II (a)]⁸¹. The novelty was the second exception, which covers cases in which naturalisation is imposed⁸² by the legislation of a foreign country as a condition for the individual's permanence in the territory or for the exercise of civil rights [Article 12 § 4-II (b)]. This latter provision proved difficult to apply in practice, as it required from the Brazilian authorities an almost encyclopaedic knowledge of foreign legal systems. This much was admitted by the Minister of Justice in Ordinance no. 172, of 4 August 1995, which ruled that the wish on the part of a Brazilian citizen to change citizenship and cut ties with Brazil must be expressly declared for the naturalisation in another country to result in the loss of Brazilian citizenship⁸³. Since then, the mere acquisition of a foreign citizenship by naturalisation no longer suffices to declare the loss of Brazilian citizenship under Article 12 § 4-II of the Constitution. It is now necessary for the interested party to submit a 'loss of citizenship' request to the Minister of Justice, accompanied by copy of

⁸⁰ As noted by Dolinger (2003: 193), the absence of a reference to 'renunciation' in the Constitution led Brazil to denounce the Pan American Convention of 1906 and the Convention with the United States of 1908, which were deemed unconstitutional for admitting the loss of Brazilian citizenship by renunciation. The use of the term renunciation in those international agreements referred however to 'tacit renunciation' and not to express renunciation. Under the 1988 Constitution, the federal courts have already held explicitly that individuals may renounce their Brazilian citizenship. See judgement of the Second Region Federal Regional Court, of 16 June 2009, Civil Appeal no. 2005.50.02.000411-9.

⁸¹ Fraga (1995: 55) criticized the terminological inaccuracy of listing this hypothesis as a case of acquisition of a foreign citizenship, since it is a case of *attribution* of citizenship by birth. The author concluded that the provision is simply unnecessary as it adds nothing to Brazilian law.

⁸² Fraga (1995: 55-56) also criticized the inaccuracy of the term 'imposition', since naturalisation presupposes an act of will of the part of the Brazilian citizen. The term 'demand' (*exigência*) would be more suited. In an interpretation which was soon to be superseded by the Justice Minister's Ordinance no. 172, the author argued that Article 12 § 4-II (b) would only apply in cases where a Brazilian citizen proved to have been denied a right by the fact of being a foreigner. Mere abstract claims of a need to naturalise in order to access civil rights would not be enough.

⁸³ The Ordinance was issued in a case involving a Brazilian who had acquired US citizenship by naturalisation in order to, among other things, become entitled to pursue a career as Federal District Attorney. The text of the Ordinance noted that Article 12 § 4-II (b) was 'an innovation imbued with liberal spirit' and that its introduction had been designed to protect the large number of Brazilian citizens who in recent decades had emigrated in search of better living conditions and who hardly ever wanted to cut ties with Brazil, to where many eventually return. It also noted that modern law no longer sees dual citizenship with concern, as illustrated by the legislation of countries like Portugal, Italy and Germany.

the naturalisation certificate, authenticated by the Brazilian consular authorities and officially translated⁸⁴.

3.3. Reacquisition of Brazilian citizenship

The 1988 Constitution is silent on the topic of reacquisition of Brazilian citizenship, but it is undisputed that the relevant provisions of Law no. 818, of 18 September 1949, continue to apply (Fraga 1995: 58). Reacquisition of Brazilian citizenship is only available for those who lost it as a result of the acquisition of another citizenship by voluntary naturalisation, not for those whose naturalisation decree was cancelled by court order, and requires that the applicant be domiciled in Brazil (Article 36). The reacquisition request is addressed to the President of the Republic and is assessed by the Ministry of Justice (Article 36 § 1). The reacquisition will not be granted if it is proved that the former Brazilian acquired another citizenship in order to escape obligations to which he or she would be bound as a Brazilian citizen (Article 36 § 2). It is open for discussion whether the act by which the President of the Republic decides to grant or not the reacquisition of Brazilian citizenship is discretionary or legally bound. Frota (2004: 63) argues in favour of the latter view, at least for cases of former Brazilian citizens who were born in Brazil and who would be stateless if they were not granted the reacquisition of Brazilian citizenship. The grounds for this view is provided by Article 20-2 of the American Convention on Human Rights of 1969 – ratified by Brazil in 1992 – which prescribes that ‘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’.

In the wake of Ordinance no. 172, of 4 August 1995, the Brazilian authorities agreed to institute a special procedure to allow for those who had lost Brazilian citizenship under the previous regime to request the revocation of the Decree of Loss of Citizenship (*revogação do decreto de perda de nacionalidade*). The request is addressed to the Minister of Justice and may be lodged either at the Ministry of Justice in Brazil or at any diplomatic or consular mission abroad. The request must indicate the motive for acquisition of a foreign citizenship and express the commitment to fulfil the obligations inherent to all Brazilian citizens⁸⁵. Although the template for the request which is available from the Brazilian consulate’s website explicitly refers to Article 36 of Law no. 818, the domicile requirement does not apply in such cases.

The reacquisition decree is constitutive and therefore does not have retroactive effects (Dolinger 2003: 193). Less clear has been whether the successful applicant reacquires the citizenship status as it was lost or not. According to Fraga (1995: 58-59), the reacquisition of Brazilian citizenship under Article 36 of Law no. 818 is a form of ‘facilitated naturalisation’ and does not entitle former Brazilians by birth to reacquire the status as Brazilians by birth. After successful reacquisition of Brazilian citizenship, these individuals are treated as naturalised Brazilians and will therefore not have access to the rights which the Constitution reserves for Brazilian citizens by birth. According to Dolinger (2003: 193) and Araujo (1987: 63-64), if an individual was a Brazilian by birth, he or she will be returned to his or her original status as Brazilian by birth. The Federal Supreme Court has endorsed this latter view by stating explicitly that the

⁸⁴ See <<http://www.justica.gov.br/central-de-atendimento/estrangeiros/nacionalidade>> 16.01.2016.

⁸⁵ Information available from the website of the General Consulate of Brazil in Lisbon <http://www.consulado-brasil.pt/nac_revog.htm> 16.01.2016.

reacquisition of Brazilian citizenship by a former Brazilian citizen by birth returns the individual to that status and not to the status of naturalised Brazilian⁸⁶.

3.4. Rights of citizens by birth and by naturalisation

As a general principle, Brazilians by naturalisation are to be treated in the same way as Brazilian citizens by birth. The 1988 Constitution continues the old tradition of forbidding the ordinary legislator to establish any distinction between the two categories of Brazilian citizens outside of the cases prescribed in the constitutional text (Article 12 § 2), but it improved the status of naturalised Brazilians by shortening the list of rights which are out of their reach. Per Article 12 § 3, only Brazilians by birth are entitled to be elected/appointed as President and Vice-President of the Republic, President of the House of Representatives, President of the Federal Senate, judge of the Federal Supreme Court, member of the diplomatic corps, official of the Armed Forces, and Defence Minister⁸⁷. Article 89-VII adds to this list by prescribing that the Council of the Republic, the higher advisory body to the President of the Republic, is composed of *inter alia* six Brazilian citizens by birth to be nominated by the President of the Republic, the Federal Senate and the House of Representatives. Contrary to what happened in the past, naturalised Brazilians are now allowed to own, manage and be directors of programming in media companies, even if only after having been naturalised for ten years (Article 222). Ordinary legal acts adopted under the previous constitutional regime, which e.g. restricted to Brazilians by birth the right to register Brazilian vessels, became invalid with the promulgation of the 1988 Constitution (Tiburcio 1992: 273).

In spite of the favourable mood towards naturalised Brazilians, the 1988 Constitution introduced a new difference in treatment vis-à-vis Brazilians by birth when setting the rules for extradition. Per Article 5-LI, Brazilians by birth cannot be extradited under any circumstances, whereas naturalised Brazilians may be extradited for any crime committed before naturalisation⁸⁸ and, after that date, in case of proved involvement in drug trafficking, in the manner prescribed by law. The Federal Supreme Court has had the opportunity to stress that the prohibition to extradite Brazilians by birth is absolute and is not lessened by the fact that the individual at stake is also a citizen by birth of the state requesting the extradition⁸⁹. The Court has also consistently stressed that, differently from what happens with the extradition of foreigners, the extradition of a naturalised Brazilian under Article 5-LI requires indisputable proof of his or her involvement in drug trafficking. Mere suspicion does not suffice, no matter how serious⁹⁰. Article 5-LI *in fine* requires, therefore, a specific procedure, to be regulated by ordinary legislation, designed to allow the Federal Supreme Court to

⁸⁶ See judgment of the Federal Supreme Court, of 18 June 1986, Extradition no. 441-7.

⁸⁷ Access to the office of Defence Minister was reserved to Brazilians by birth by Constitutional Amendment no. 23 of 1999.

⁸⁸ In this case, it can be argued, with Tiburcio (2001: 9), that the naturalisation was never valid, as it was granted on the basis of false statements on the part of the applicant regarding his or her prior involvement in the commission of extraditable crimes.

⁸⁹ See, e.g., judgment of the Federal Supreme Court, of 26 June of 2003, Habeas Corpus no. 83.113-3.

⁹⁰ See, e.g., judgment of the Federal Supreme Court, of 19 June of 2008, Extradition no. 1.082-4.

examine the merits of the *persecutio criminis* initiated before the authorities of the requesting state⁹¹.

In its original wording, Article 12 § 1 prescribed that, under conditions of reciprocity, the Portuguese with permanent residence in the country enjoyed the rights inherent to Brazilian citizens by birth, save for the cases indicated in the Constitution. This was clearly an overstatement which went way beyond the equality status that had been defined by the Convention on Equality of Rights and Obligations between Brazilians and Portuguese, signed by Portugal and Brazil in Brasília, on September 7, 1971⁹² (Dolinger 2003: 184). It was also contradictory, as it included the *caveat* ‘save for the cases indicated in the Constitution’ when no restriction is established in the Constitution against Brazilians by birth (Dolinger 2003: 184). Article 12 § 1 was therefore interpreted in the Brazilian literature as granting Portuguese citizens a treatment equivalent to that of naturalised Brazilians (Tiburcio 1992: 267-268). Constitutional Amendment no. 3, of 1994, set the matter right by replacing the reference to ‘Brazilians by birth’ by the simple reference to ‘Brazilians’. Portuguese citizens with permanent residence in Brazil who successfully apply to the ‘equality status’ regulated in the Convention (now Treaty) between Brazil and Portugal enjoy an exceptional quasi-citizenship status (*quase nacionalidade*) as acknowledged by the Federal Supreme Court on several occasions⁹³. The Federal Supreme Court has insisted, however, that the rule in Article 12 § 1 of the 1988 Constitution does not operate automatically, since it is dependent on the acquiescence of the Brazilian state and also on the request of the Portuguese citizen, who is furthermore required to meet the conditions set in the Convention on Equality of Rights and Obligations between Brazilians and Portuguese⁹⁴.

4. Current political debates and reforms

Although welcomed by the Brazilian diaspora, Constitutional Amendment no. 54 of 2007 is not without critics and many call for a new constitutional reform to change Article 12-I (c) of the Constitution. Some do so with the argument that the new wording of Article 12-I (c), while understandable as a means to avoid statelessness, creates a very unbalanced and inconsistent set of rules for the attribution of Brazilian citizenship to children born abroad to a Brazilian father or mother. The very different weight given to the registration at a Brazilian consulate abroad and to the court mandated registration in the Civil Registry in Brazil is inexplicable. Saliba (2008: 81) argues, therefore, for a new constitutional amendment that puts both registrations on a par for purposes of attribution of Brazilian citizenship by birth and eliminates the cumbersome requirement of the exercise of the right of option by means of a specific judicial procedure. The author also criticises the inconsistency of blocking the exercise of the right of option before individuals reach majority, with the excuse that the option is a strictly personal act, while allowing the registration of a child by his or her parents at a Brazilian

⁹¹ See judgment of the Federal Supreme Court, of 19 June of 2008, Extradition no. 1.082-4.

⁹² *Convenção sobre Igualdade de Direitos e Deveres entre Brasileiros e Portugueses*, signed in Brasília on 7 September 1971 and ratified in Brazil by Decree no. 70.391, of 12 April 1972. This Convention was in the meantime replaced by the Treaty of Friendship, Cooperation and Consultation between the Portuguese Republic and the Federal Republic of Brazil (*Tratado de Amizade, Cooperação e Consulta entre a República Portuguesa e a República Federativa do Brasil*), signed in Porto Seguro, on April 22, 2000, and ratified in Brazil by Decree no. 3.927, of 19 September 2001.

⁹³ See, e.g., judgment of the Federal Supreme Court, of 5 August of 2004, Extradition no. 890-1.

⁹⁴ See, e.g., judgment of the Federal Supreme Court, of 5 August of 2004, Extradition no. 890-1.

consulate abroad to produce the same important personal effects on the child's status. Other authors, on the other hand, are still not persuaded that the elimination of a time limit for the exercise of the right of option and the corresponding status of 'suspended citizenship' is the best solution. In the name of legal certainty, Dolinger (2003: 171-172), for example, argues for a wording of Article 12-I (c) which not only would set a time limit of four years for the exercise of the right of option, but would also require the establishment of domicile in Brazil before the age of majority.

In recent years, a thorough reform of Brazil's immigration law has been under discussion, with a proposal for a new Immigration Act to replace the one currently in force, which was adopted in 1980 when the country was still under military rule. An expert committee was appointed by the Ministry of Justice to prepare a first draft of the bill. Between July 2013 and May 2014, the draft was discussed in work sessions opened to the participation of international organisations and civil society. It was officially presented in August 2014 by the Minister of Justice, José Eduardo Cardozo, who took the opportunity to announce another bill designed to facilitate the acquisition of Brazilian citizenship by stateless individuals residing in Brazil⁹⁵. A reference to a 'simplified naturalisation mechanism' to be defined by regulation for the protection of stateless persons is already included in the bill of the new Immigration Act, which was presented to the Federal Senate in August 2015 and is now awaiting approval by the House of Representatives⁹⁶. The spirit of the bill is clearly that of aligning Brazil's immigration law and policies with international human rights standards, as evidenced by the principles and guarantees listed in Article 3. Its liberal spirit is also clear in the section concerning citizenship. It makes ordinary naturalisation easier, by requiring only civil capacity, a four year residence in Brazil (with the usual waivers) and capacity to communicate in Portuguese (Articles 64 to 66), and widens the scope of the provisional naturalisation by allowing its issuance to migrant children who set residence in Brazil before the age of ten (Article 70). The risk of generating statelessness will have to be taken into consideration when deciding whether a naturalised Brazilian is to be deprived of his or her citizenship under Article 12 § 4-I of the Constitution (Article 75). The loss of citizenship due to the cancellation of the naturalisation decree will no longer constitute an impediment to the reacquisition of Brazilian citizenship (Article 76). There is no mention to the discretionary power of the government to appreciate naturalisation requests.

Irrespective of whether this bill proves successful or not, the humanist and liberal spirit of its norms is, to a large extent, already present in Brazilian citizenship law, given the weight accorded to individual's will in the regulation of the attribution and loss of Brazilian citizenship, the care shown in avoiding statelessness, and the growing acceptance of the inevitability of dual citizenship. Recent developments may be explained by Brazil's international commitments in the field of human rights and by the democratic nature of the regime since 1988, but it is worth noting that some of the most significant moves towards making access to Brazilian citizenship easier were made under undemocratic regimes. As pointed out earlier in this report, the ground rules on citizenship attribution and loss were kept remarkably stable over the years, which

⁹⁵ Information available at <<http://www.brasil.gov.br/cidadania-e-justica/2014/08/nova-lei-de-migracoes-devera-substituir-estatuto-do-estrangeiro>> 16.01.2016.

⁹⁶ Bill no. 2516, of 2015, of the Federal Senate, which institutes the Immigration Law (*Lei de Migração*), introduces changes to Decree Law no. 2.848, of 1940, and abrogates Laws no. 818, of 1949, and 6.815, of 1980. The text of the Bill is available at <http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=7F07E1F34F78828D48FD4921135501CF.proposicoesWeb1?codteor=1370312&filename=Avulso+-PL+2516/2015> 16.01.2016.

suggests a certain degree of independence of the citizenship criteria vis-à-vis the nature of the political regime. Today, Brazilian citizenship law is clearly an eclectic system which combines *ius soli* and *ius sanguinis* almost on a par. The primacy of the territorial factor in Brazilian citizenship law has waned as the scope of *ius sanguinis* broadened to be only dependent on the wishes of the Brazilian parents abroad to pass on their citizenship to their children or not.

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