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# REPORT ON CITIZENSHIP LAW: PORTUGAL

AUTHORED BY  
ANA RITA GIL AND  
NUNO PIÇARRA

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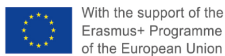
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# Report on Citizenship Law

## Portugal

*Ana Rita Gil and Nuno Piçarra<sup>1</sup>*

### 1. Introduction

The current Portuguese citizenship legislation<sup>2</sup> has two distinct objectives: first, to keep and increase the links between Portugal and its expatriates, and second, to respond to the reality of Portugal as an immigration country and, therefore, to be inclusive regarding those who choose the country as a place to live.

Portugal had a tradition of favouring *ius soli* which dated back to the seventeenth century and was continued by the 1959 Act. The 1981 Act, approved in the context of a large Portuguese emigration, ended this tradition and introduced the prevalence of the *ius sanguinis* principle. In 2006, this Act was profoundly amended by a reform which broadened the modes for the acquisition of Portuguese citizenship. This reform has maintained and, in some aspects, has even reinforced the *ius sanguinis* principle, taking in consideration the large community of Portuguese descendants who reside abroad. At the same time, it also created new ways to acquire citizenship through *ius soli*, taking in consideration the inclusion of the immigrants of second and third generations. These objectives were strengthened in 2018, with a new reform introduced by Organic Law 2/2018. The inclusion objective is favoured by the complete acceptance of dual citizenship, which has been in force since 1981.

The current citizenship policy foresees a mixed system for the acquisition of citizenship at birth. However, this still gives prevalence to the *ius sanguinis* principle despite the creation and expansion of new forms of citizenship acquisition through *ius soli*. In fact, the descendants of Portuguese citizens who live abroad are Portuguese at birth (they just have to declare their wish to be Portuguese or to register the birth in the Portuguese register of births). By contrast, the *ius soli* principle is not considered to be an autonomous criterion for acquiring Portuguese citizenship. Additional conditions, besides birth in Portuguese territory, are always required, such as the residence of one of the parents in the Portuguese territory for a certain period of time.

Since the reform of 2006, naturalisation can be achieved in two distinct ways. In some circumstances, it depends on a discretionary decision made by the Minister of Justice. In other situations, if applicants meet the legal requirements, they have a real subjective right to

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<sup>1</sup> The authors used parts of the chapter on Portuguese nationality by Constança Urbano de Sousa and Maria Baganha published in Bauböck (2006). This report was updated in November 2019.

<sup>2</sup> Law 37/81 of 3 October, as amended by Law 25/94 of 19 August, by Organic Law 1/2004 of 15 January and by Organic Law 2/2006 of 17 April 2006.

naturalisation. Such a right is also recognised for minors. In some circumstances, naturalisation is allowed even if residence in Portuguese territory is not legal.

The Portuguese Constitution uses the term ‘citizenship’, instead of ‘nationality’. However, the Portuguese statutory act is called the ‘Nationality Act’. This is despite the criticisms of several scholars regarding the disparity between the statutory terminology and the Constitution (Silva 2004: 96). The term ‘citizenship’ is considered to be more neutral from cultural and historical points of view (Silva 2004:19), since the term ‘nationality’ recalls the nationalist philosophy of the New State period, which the post-revolutionary Constitution of 1976 aimed to avoid. Some legal scholars also argue that the term ‘nationality’ is less concise (Miranda 2004:99), since it describes belonging to a nation, and not to a state. The term ‘citizenship’, therefore, would give more relevance to public participation in a democratic state. Furthermore, the exact meaning of these two concepts is not the same. Nationality is a broader concept than citizenship, as the legal person and some property (such as ships and aircrafts) can possess a nationality, but citizenship can only be possessed by people. From a different point of view, however, the citizenship concept can be broader than the concept of nationality. In Portugal there are some statuses of quasi-citizenship by which citizenship rights are given to people who do not have Portuguese nationality. This is the case of nationals of Lusophone countries living in Portugal who enjoy wide-ranging rights as far as political participation and access to public office are concerned. The movement towards a concept of citizenship which is disengaged from nationality goes beyond this special status. Any alien who resides in Portugal has the right to vote and be elected in local government elections, according to art. 15(4) of the Constitution, provided that there is reciprocity so that Portuguese citizens can enjoy equivalent voting rights in the alien’s country of citizenship. Normally, however, the two terms are used synonymously. In this report we will use the term citizenship, as this is a more accurate term in a juridical context, when referring to the status of full membership in a democratic state.

## 2. Historical background

### 2.1 The roots of Portuguese citizenship law: the 1603 Ordinations of King Philip

The 1603 Ordination or compilation of legislation, ordered by King Philip, led to the first legal arrangements for citizenship in Portugal (Title LV of the Second Book). Only the acquisition of citizenship at birth was regulated, and this established a mixed system which gave prevalence to *ius soli*. Children with Portuguese fathers (*ius sanguinis a pater*<sup>3</sup>) were only Portuguese if they were born in Portugal (both *ius soli* and *ius sanguinis*); if they were born abroad they were not Portuguese unless their father (or mother, if the child was illegitimate) was in the king’s or the crown’s service.

On the other hand, pure *ius soli* was not present. Legitimate children born in Portugal to a foreign father were only Portuguese if the father had been living in Portugal for at least ten years and had property there (Ramos 1992: 7-13; Gonçalves 1929: 511).

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<sup>3</sup> *Ius sanguinis a mater* was only relevant if the child was illegitimate. Discrimination against nationality being passed on by the mother influenced Portuguese law until 1976, when the III Portuguese Republic enshrined the principle of spousal equality and equality of children born in and outside wedlock (art. 36 of the Constitution).

## 2.2. Citizenship law in the monarchical constitutionalism of the nineteenth century

The 1822 Constitution, signed on 23 September, marked the beginning of Portuguese constitutionalism. Regarding acquisition of citizenship at birth, the 1822 Constitution kept the mixed system inherited from the Ordinations of King Philip but also gave a predominant role to *ius sanguinis a pater* (Ramos 1992: 15). Thus, according to art. 21(I) and (II), children born in Portugal to a Portuguese father (or a Portuguese mother if they were illegitimate) were considered Portuguese. A more important role was given to *ius sanguinis*, since the children of a Portuguese father (or the illegitimate children of a Portuguese mother) who were born outside Portugal were considered Portuguese, provided they took up residence in Portugal.<sup>4</sup> The scope of *ius soli* was reduced, since children born to a foreign father in Portugal were only considered Portuguese if they lived in Portugal and, upon reaching the age of majority, declared that they wanted to be Portuguese (art. 21(V)). That art. 21(III) considered children of unknown parents found in Portugal to be Portuguese was not a concession to *ius soli*, but rather a measure against statelessness (Ramos 1992: 21). Lastly, art. 21(V) granted Portuguese citizenship to freed slaves.<sup>5</sup>

Regarding the acquisition of citizenship after birth, art. 21(VI) of the 1822 Constitution foresaw the need for discretionary naturalisation. Naturalisation could only be granted to foreign adults living on Portuguese soil if they were married to a Portuguese woman, if they had acquired a trading, farming or industrial establishment in Portugal, or if they had performed relevant services to the nation.

Art. 23 foresaw two grounds for the loss of Portuguese citizenship: naturalisation in another country or the acceptance, without government permission, of employment, honours or pensions from a foreign government.

The 1826 Constitutional Charter, in force for two short periods (1826-1828 and 1834-1836), was restored in 1842 and remained in force until the republic was declared in 1910. It kept the mixed system of acquisition of citizenship at birth, however, it placed a greater emphasis on *ius soli* since it considered all those born on Portuguese soil to be Portuguese.<sup>6</sup>

*Ius sanguinis* continued to be subject to residence in Portugal. The child of a Portuguese father (or the illegitimate child of a Portuguese mother) was only Portuguese if the father lived in Portugal, except if the father was abroad on the crown's service.

The only way foreseen in the Charter to acquire citizenship after birth was naturalisation, with art. 7(2) referring to an ordinary law to set the conditions for conferment. The Decree of 22 October 1836 foresaw three requirements for the naturalisation of foreign citizens: being at the age of maturity, having completed two years' residence<sup>7</sup> (unless descended from a Portuguese), and having the ability to acquire means of subsistence (art. 1).

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<sup>4</sup> Residence in Portugal was not required if the father (but not the mother) was abroad on the crown's service, in which case *ius sanguinis* was fully applicable.

<sup>5</sup> This could be considered acquisition at birth since, legally speaking, the slave was only 'born' and became a person, when freed (Ramos 1992: 22).

<sup>6</sup> This prevalence of *ius soli* is due to the influence of the Brazilian constitution, which was its source of inspiration (Ramos 1992: 63).

<sup>7</sup> The period of residence could be shortened or dispensed with should the foreign citizen meet one of the following conditions: being married to a Portuguese woman; being politically pursued for his defence of the representative system; having built or improved a road in Portugal; having made a considerable capital investment in banking, commerce or industry; having established himself as an industrialist or trader; having performed relevant services; or having performed acts which benefited Portuguese citizens (art. 4).

Art. 8 included, in addition to the causes listed in the 1822 Constitution, loss of citizenship as a consequence of banishment.

The 1838 Constitution stayed in force until 1842 when the 1826 Constitutional Charter was restored. During this period, *ius sanguinis* dominated citizenship law. Art. 6(I) of the 1838 Constitution stated that the child of a Portuguese father was Portuguese, whether the child was born in Portugal or not (*ius sanguinis a pater*). Two new features were brought in concerning *ius sanguinis a mater*: on the one hand, an illegitimate child born to a Portuguese mother was Portuguese if born in Portugal; if the child was born abroad it was only Portuguese if it took up residence in Portugal. On the other hand, *ius sanguinis a mater* became relevant for legitimate children, since the child born to a Portuguese mother and a foreign father would be Portuguese if he or she was born in Portugal and did not declare a preference for other citizenship.

Regarding the loss of citizenship, art. 7, like art. 8 of the 1826 Constitutional Charter, set out three causes: a criminal conviction which meant the loss of citizenship, naturalisation in a foreign country, or acceptance, without government permission, of an honour or reward from a foreign government.

### 2.3. The 1867 Civil Code: mixed system with the prevalence of *ius soli*

The 1867 Civil Code adopted a mixed system of acquisition of citizenship at birth, with prevalence being given to *ius soli*, although it was of less influence than in the Charter (Ramos 1992: 30). Art. 18 stated that children born on Portuguese soil to a Portuguese father (or illegitimately to a Portuguese mother) were Portuguese. In addition, children born in Portugal to a foreign father (who was not in Portugal in his country's service) were Portuguese, unless they declared that they were not.<sup>8</sup> This possibility of opting for the father's citizenship by expression of intent<sup>9</sup> reduced the weight of *ius soli* (Ferreira 1870: 40; Gonçalves 1929: 518), in comparison with the Constitutional Charter (which did not allow such a possibility). Lastly, all those who were born on Portuguese soil to unknown parents or parents of unknown citizenship were also deemed Portuguese.

The Civil Code also included *ius sanguinis a pater*: children born abroad to a Portuguese on the crown's service were considered to be Portuguese (art. 18(5)). *Ius sanguinis* was still conditional in other cases, since children born abroad to a Portuguese father (or illegitimately to a Portuguese mother)<sup>10</sup> would only acquire Portuguese citizenship at birth should they take up residence in Portugal or declare that they wanted to be Portuguese (art. 18(3)).<sup>11</sup>

The Civil Code provided for two ways to acquire citizenship after birth, specifically *ex lege* acquisition of Portuguese citizenship by a foreign woman who married a Portuguese man and naturalisation via a discretionary government act,<sup>12</sup> provided that the foreign national met the following legal requirements set out in art. 19:<sup>13</sup>

<sup>8</sup> Should the statement declining Portuguese nationality have been made by the minor's legal agent, he or she can withdraw it when he or she comes of age (art. 18(2)).

<sup>9</sup> By the person in question (if over the age of majority) or by the legal agent (if under age).

<sup>10</sup> The Civil Code kept the traditional limitation of *ius sanguinis a mater* to illegitimate children.

<sup>11</sup> The possibility of making this declaration instead of meeting the residence condition (not foreseen in the 1826 Charter), however, places greater emphasis on *ius sanguinis*.

<sup>12</sup> The Minister of Justice was the competent authority for granting or refusing naturalisation.

<sup>13</sup> Prior to the amendments made in 1910, the only requirements of foreign citizens were that they had reached the age of maturity; had means of subsistence and had lived on Portuguese soil for at least one year. Foreign

- 1) having reached the age of maturity;
- 2) having a means of subsistence;
- 3) having lived on Portuguese soil for at least three years;<sup>14</sup>
- 4) having a clean criminal record proved by a police records from both the country of origin and from Portugal;
- 5) having performed all military duties in the country of origin.

Art. 22 of the Civil Code foresaw four ways of losing citizenship. In all of these cases, the same provision provided for its reacquisition, which meant that the legislators of 1867 did not consider the loss of citizenship to be definitive (Ramos 1992: 35). The first cause of loss of Portuguese citizenship was naturalisation in another country.<sup>15</sup> The person in question could reacquire it by taking up residence in Portugal and expressing his or her wish to reacquire it. This *ex lege* reacquisition was subject to these two legal requirements. The second *ipso jure* cause of loss of citizenship was accepting, without the government's permission, public office, pension or honour from a foreign government. Unlike the former case, in the latter, the reacquisition was via a discretionary government act. The third cause for loss of citizenship was expulsion by judicial decision. This was merely a temporary loss, in that it was only valid while the conviction was in effect. Once the sentence had been served, the person in question automatically and *ex lege* reacquired Portuguese citizenship. Lastly, the Civil Code brought in a new form of *ex lege* loss of citizenship: the marriage of a Portuguese woman to a foreign man (unless she did not acquire the citizenship of her husband as a result of the marriage). The woman would reacquire Portuguese citizenship should the marriage be dissolved, provided she took up residence on Portuguese soil and made an expression of intent.

#### **2.4. Law 2098 of 29 July 1959: mixed system with the prevalence of *ius soli***

Regarding the acquisition of citizenship at birth, the 1959 Act kept the traditional mixed system but put greater emphasis on *ius soli* (Proença 1960: 21; Ramos 1996: 601). According to art. I of the 1959 Act, Portuguese citizenship was acquired *ex lege* and automatically by those born on Portuguese territory (*ius soli*), specifically by the child of a Portuguese father (or Portuguese mother, should the father be stateless, unknown or of unknown citizenship),<sup>16</sup> the child of a stateless or unknown father or of unknown citizenship, and the child of a foreign father (or a foreign mother, should the father be stateless, unknown or of unknown citizenship) if the parent was not in Portugal in his or her country's service.<sup>17</sup> For the purpose of acquiring Portuguese citizenship via *ius soli*, foundlings were presumed to have been born in Portugal. *Ius sanguinis* only determined *ex lege* granting of Portuguese citizenship to the children born abroad to a Portuguese father or mother<sup>18</sup> if the parent was abroad in the service of the Portuguese state

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citizens of Portuguese descendant did not necessarily have to fulfil these requirements provided they took up residence in Portugal. This provision aimed to facilitate access for Brazilian nationals. (Ferreira 1870: 43).

<sup>14</sup> The period of residence was not required of a descendant of Portuguese citizens who had taken up residence in Portugal. Foreign citizens married to Portuguese women and those who had performed notable services for the nation could also be exempted from this condition (art. 19-2).

<sup>15</sup> The effects of loss of nationality did not encompass the wife and children, who would only lose their nationality should they declare that they wanted to follow the nationality of their husband or father.

<sup>16</sup> In these cases, acquisition occurs via the conjunction of *ius soli* and *ius sanguinis*.

<sup>17</sup> Such a reference in the birth register excludes the presumption that Portuguese nationality has been acquired on the basis of having been born in Portugal (art. 2 of the 1960 Nationality Regulation).

<sup>18</sup> Under the 1867 Civil Code, only extraterritorial *ius sanguinis a pater* was relevant.



(art. II). This was the only case in which *ius sanguinis* independently and automatically determined the acquisition of citizenship at birth. Apart from this case, *ius sanguinis* was only relevant for acquiring citizenship at birth by declaration, which was a non-automatic way to acquire citizenship. Children born abroad to a Portuguese parent not in the service of the Portuguese state could only acquire Portuguese citizenship if they a) declared that they wished to be Portuguese, b) registered in the Portuguese Register of Births, and c) voluntarily took up residence in Portuguese territory and made this official with a declaration of residence at the Central Registry Office (arts. IV and V of the 1959 Act). However, even if they met these requirements, the government had the right to oppose and thus prevent Portuguese citizenship from being granted (a new feature of the 1959 Act). Obtaining Portuguese citizenship in these cases was therefore no longer considered to be an absolute right.<sup>19</sup>

A foreign woman who married a Portuguese man would acquire her husband's Portuguese citizenship *ex lege*, unless she declared that she did not want to be Portuguese and could prove that her own country's legislation would not strip her of her original citizenship (art. X of the 1959 Act).

As to discretionary naturalisation, the 1959 Act contained the same arrangements as the 1867 Civil Code, as amended by the 1910 Decree, although it made it subject to more conditions, such as decent moral and social behaviour and knowledge of the Portuguese language. In addition, it continued to be a discretionary act of the government.<sup>20</sup> In order to make naturalisation easier for those foreigners with a true link to the Portuguese community, art. XIII waived the residency and language requirements for the descendants of Portuguese citizens. These requirements could also be waived by the government for foreign citizens who married Portuguese women, or those who had performed or been called on to perform notable service for the Portuguese state. Finally, art. XVII gave the government extraordinary powers to grant naturalisation, with no further requirements, to those foreigners who came from communities with Portuguese ancestors and who wished to become part of the Portuguese community.<sup>21</sup>

Art. XVIII (a) and (c) of the 1959 Act provided five grounds for the loss of Portuguese citizenship. Only the first three led to an automatic loss of citizenship without the need for the person concerned to declare his or her intent, while the last two were tantamount to renunciation which required an expression of intent from the person concerned.

1. Portuguese citizenship was lost when a Portuguese citizen voluntarily acquired foreign citizenship. The aim was to avoid dual citizenship. Acquiring foreign citizenship through naturalisation imposed by the state of residence did not lead to the automatic loss of Portuguese citizenship, but could lead to it on the basis of a government decision (art. XIX).
2. Accepting public office or performing military service in a foreign state could also lead to losing Portuguese citizenship (*ex lege*), if the Portuguese citizen did not hold the

<sup>19</sup> The government's right of opposition (which did not exist in earlier legislation) did not apply to *ius soli* acquisition, which was *ex lege* and automatic.

<sup>20</sup> Thus, through a decree from the Portuguese Minister for Home Affairs, the government could grant nationality through naturalisation to foreign applicants who met all the following requirements, set out in art. XII: 1) being of age; 2) being able to make a living; 3) having a record of decent moral and social behaviour; 4) having complied with the laws on military recruitment in their country of origin; 5) having an adequate knowledge of the Portuguese language; 6) having lived on Portuguese soil for at least three years.

<sup>21</sup> The foreign citizens who were to benefit mainly from this arrangement were those from countries like Brazil, which was historically linked to Portugal as a former colony.

citizenship of the other state in question as well, and did not leave office or service by the deadline set by the Portuguese government.<sup>22</sup>

3. The marriage of a Portuguese woman to a foreigner automatically led to her loss of her Portuguese citizenship, unless she did not acquire her husband's citizenship as a result of the marriage or declared prior to the wedding that she wished to keep her Portuguese citizenship. Furthermore, she would not lose her Portuguese citizenship if she rejected her husband's citizenship, provided that the national law of her husband's country allowed it (art. LX).
4. Citizens born on Portuguese soil who declared that they no longer wanted to be Portuguese lost their Portuguese citizenship provided they held another citizenship.<sup>23</sup>
5. Those on whom Portuguese citizenship had been conferred, or who had acquired it by an expression of intent made by their legal agent, also lost Portuguese citizenship if they declared that they did not wish to be Portuguese and proved that they held another citizenship.<sup>24</sup>

In all of the above cases (except (2)), the legislation not only considered the wishes of the person in question, but also the general interest in avoiding statelessness since renunciation only led to the loss of Portuguese citizenship if the person in question held another citizenship, and therefore would not become stateless.

Following a decision taken by the cabinet, the government could furthermore decree the loss of Portuguese citizenship in the following three situations: 1) when a Portuguese with dual citizenship behaves only like a foreigner; 2) when such a person has been convicted for a crime against external security; or 3) has engaged in illicit activities to the benefit of a foreign country or its agents and against the interests of the Portuguese state (art. XX).

Based on the assumption that the loss of Portuguese citizenship was open to remedy, the 1959 Act, like its predecessor, provided ways in which citizenship could be reacquired. Those who had lost their Portuguese citizenship for having acquired a foreign citizenship through naturalisation could reacquire it provided they met the following two criteria: they took up residence in Portugal and they expressed their intent to reacquire Portuguese citizenship. These requirements applied to Portuguese women who had lost Portuguese citizenship through having married a foreigner, allowing them to reacquire Portuguese citizenship following dissolution or annulment of their marriage. Moreover, those persons who had lost Portuguese citizenship because of a renunciation made before they came of age, by their legal agent, could reacquire it when they came of age, should they be residing in Portugal and express this intent. In both cases, meeting these requirements implied *ex lege* reacquisition (without the authorities' involvement), and thus represented a true right for the persons concerned (art. XXII). In addition, the government could decide that citizens who had lost Portuguese citizenship by government decision, could reacquire it. Unlike the above situations, this required a discretionary act by the government.

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<sup>22</sup> The 1959 Act brought far-reaching changes compared to the 1867 Civil Code, which considered not only holding public office in a foreign state, but also accepting any honour, pension or reward from a foreign state as grounds for losing Portuguese nationality. In view of the development of international relations this precept was considered to be too severe, which was why the 1959 Act removed it (Proença 1960: 105).

<sup>23</sup> This provision was aimed above all at children born to foreign parents and who had acquired Portuguese nationality through *ius soli*, as well as their parents' foreign nationality through the effects of *ius sanguinis*.

<sup>24</sup> In this case the legislator focused more on the Portuguese born abroad who had acquired Portuguese nationality through *ius sanguinis* on the basis of a declaration made by their legal agent (art. XVIII(e)).

## **2.5. Decree-Law 308-A/75 of 24 June 1974: the effects of decolonisation on Portuguese citizenship**

The process of decolonisation which was triggered by the Portuguese Revolution (25 April 1974) led to the creation of five new African countries: Cape Verde, Guinea Bissau, São Tomé e Príncipe, Angola and Mozambique.

Decree-Law 308/75 of 24 June 1975 sought to resolve the impact the creation of these new states had on Portuguese citizenship.<sup>25</sup> The Decree-Law governed the issue of losing or retaining Portuguese citizenship by those who had been born or were living in the Portuguese overseas territories which had gained independence.

It was assumed that these persons would acquire the citizenship of the new state. The Decree-Law thus merely stipulated that Portuguese citizenship would be retained by those persons who had not been born overseas but were living there (art. 1). In addition were those who, despite having been born in the territory of the colonies, had maintained a special connection with mainland Portugal by having been long-term residents there (art. 2). All those not covered by one of the situations which enabled them to keep Portuguese citizenship would lose it *ex lege* (art. 4).

This legislation raised many questions about its interpretation and implementation. It has generated and continues to generate much case law. It has also been criticised by legal scholars because it led to the *ex lege* loss of Portuguese citizenship by thousands who had been born or had settled in the newly-independent overseas territories without considering their wishes and their effective links to Portugal. Furthermore, it fostered statelessness, whenever those concerned did not acquire the citizenship of the new state (Ramos 1976: 340; Jalles 1984: 188; Santos 1993: 443).

## **2.6. Law 37/81 of 3 October 1981: mixed system giving prevalence to *ius sanguinis***

The 1959 Nationality Act remained in force until 1981 despite the fact that, to a certain extent, it contradicted the 1976 Constitution. In 1981, a new Nationality Act was approved in Portugal - Law 37/81 of 3 October, which aimed not only at achieving consistency between the Nationality Act and the Constitution,<sup>26</sup> at introducing the principles of non-discrimination<sup>27</sup> and of a fundamental right to citizenship,<sup>28</sup> but also at profoundly reforming the acquisition of citizenship at birth. However, it did retain some principles, such as avoiding statelessness and the individual's will in determining citizenship.

These reforms were the result of the political and historical contexts of their time. Portugal's decrease in size after the decolonisation process of the 1970s, as well as the wish to

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<sup>25</sup> This item of legislation was repealed by Law 113/88, of 29 December 1988.

<sup>26</sup> All political parties represented in parliament agreed on the need to make the Nationality Act compatible with the new Constitution.

<sup>27</sup> The 1981 Act eradicated any form of discrimination between men and women or children born in or out of wedlock.

<sup>28</sup> The concept of nationality as a fundamental right clearly influences the 1981 Nationality Act. On the one hand, it reinforces the role of individual intent when determining nationality, in that nationality acquisition of Portuguese children born abroad (*ius sanguinis*), children of foreigners born in Portugal (*ius soli*) as well as after birth (filial and spousal transfer) now depend on a declaration of intent by the person in question (Ramos 1992: 119). On the other hand, as explained above, it decisively influences the legal provisions for the loss of nationality, which now depend on a declaration of intent by the person concerned.

move closer to European traditions in this area, led the legislators of 1981 to reduce the role of *ius soli*. Furthermore, the strong flow of emigrants out of Portugal through the 1960s required greater importance to be given to *ius sanguinis* as a means of preserving Portuguese citizenship for the children of emigrants and as a substantial human resource for the state (Miranda 2004: 113; Ramos 1994: 117; Jalles 1984: 178). However, if the need to make the Nationality Act consistent with the 1976 Constitution warranted consensus among the political parties with parliamentary representation, the same cannot be said regarding the prevalence of *ius sanguinis* over *ius soli*; regarding access to Portuguese citizenship for emigrants and their descendants; or regarding the reacquisition of citizenship by those who had surrendered it voluntarily.<sup>29</sup> It was a new perception of Portugal as a small European territory with an emigrant population estimated at more than four million people that led the main political forces, both those in power and in the opposition, to pass a law which had as a key objective the facilitation of the right to Portuguese citizenship for emigrants and their descendants spread around the world.<sup>30</sup>

The first break with the previous legislation (which encouraged the prevalence of *ius soli*) concerns acquisition of citizenship at birth. This was changed to a mixed system, in which greater importance was attached to the role of *ius sanguinis* and *ius soli* was restricted. The acquisition of citizenship by the children of Portuguese born abroad (that is, through *ius sanguinis*) no longer depended on criteria linked to residence in Portugal. A mere expression of intent or the registration of the birth in the Portuguese civil register became sufficient. In addition, since *ius soli* was no longer considered an autonomous criterion, major changes were made concerning the children of foreigners born in Portugal. In order to prove that the birth in Portugal was not merely by chance, acquisition of citizenship through *ius soli* became dependent on an expression of intent and the parents having lived in Portugal for a period of not less than 6 years (Ramos 1996: 610).

Secondly, the 1976 Constitution enshrined the principle of non-discrimination towards children born out of wedlock (art. 36 (4)) and imposed an end to discrimination between women and men and legitimate and illegitimate children (Ramos 1994: 115; Ferreira 1987: 8). The 1981 Act implemented these provisions regarding the acquisition of citizenship at birth. Thus, *ius sanguinis a mater* was made fully equal with *ius sanguinis a pater*, and all cases of parentage were treated in the same way. In addition, the achievement of the principle of equality (art. 13) and the banning of the discrimination between the sexes (art. 36) required changes to the Nationality Act in order to bring an end to the influence of marriage on women's acquisition or loss of citizenship. The new Nationality Act provided for equality between men and women in acquisition after birth as a result of marriage. Marriage to a Portuguese man or woman no longer resulted in acquisition of citizenship, but instead became just one of the grounds for the voluntary acquisition of Portuguese citizenship. The 1981 Act thus enshrined the principle of citizenship being separate from marriage (Ramos 1996: 622).

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<sup>29</sup> The government, at the time a centre-right coalition (the Democratic Alliance), upheld the principle of *ius sanguinis* (*Parliamentary Debates*, Diary of the Assembly of the Republic 80. 1981: 3162). The Socialist Party (PS), whilst in agreement with the new law that favoured access to nationality for emigrants and their descendants, that is to say the principle of *ius sanguinis*, also defended the continuation of *ius soli* (*Parliamentary Debates*, Diary of the Assembly of the Republic 80. 1981: 3184). The nationality problems resulting from decolonisation and postcolonial immigration and the lack of access to Portuguese nationality by an increasing number of children born in Portugal of Lusophone African origins did not appear to warrant the intervention of any other members of parliament.

<sup>30</sup> The reason for this change was defended by the centre-right majority in the following way: [At the end of the Empire, Portugal was] 'a small territory with strong migratory phenomena' (speech by Fernando Condesso from the PSD, a party that was part of the majority that supported the Government. (*Parliamentary Debates*, Diary of the Assembly of the Republic 80. 1981: 3178).

A third break from previous legislation was linked to the arrangements for loss of citizenship, which became exclusively voluntary. This was grounded in the principle of regarding the right to citizenship as an individual's basic right and brought an end to the loss of citizenship for political reasons or as a punishment (arts. 26(1) and 30(4) of the Constitution). This curtailed any automatic loss of citizenship (*ex lege*), imposed by a decision from the administrative authorities or the involuntary loss of Portuguese citizenship (Miranda 2004: 123). Loss of citizenship could no longer be used by the state as a means of punishing an individual for not having a link to the Portuguese community or for not having been loyal to the state. Instead, it became the exclusive domain of the individual's will, in addition to requiring a situation of dual citizenship in order to avoid statelessness (Ramos 1994: 129).

The 1981 Act also introduced complete tolerance towards dual citizenship. It allowed for dual citizenship and reacquisition of citizenship by all those who had lost it through previous legislation, or as a result of voluntary acquisition of a foreign citizenship or due to marriage. On the one hand, acquisition of Portuguese citizenship no longer relied in any way on renouncing one's foreign citizenship. On the other, acquisition of a foreign citizenship no longer resulted in the loss of Portuguese citizenship, as was the case under previous legislation.

Lastly, the 1981 Act brought about profound changes concerning the right of appeal. The principle of effective jurisdictional protection of people's rights (art. 20 of the Constitution) and the nature of citizenship as a basic right required that appeals on matters pertaining to Citizenship Law be lodged with the courts (Ramos 1992: 214). Under the terms of the 1959 Act, appeals concerning the acquisition, loss or reacquisition of citizenship could be lodged with the Minister of Justice – an administrative authority – whose decisions could be appealed in the Supreme Administrative Court. The 1981 Act made the Lisbon Court of Appeal the agent for appealing against any and all acts pertaining to the acquisition, loss or reacquisition of Portuguese citizenship – that is to say, a jurisdictional body.

## **2.7. Law 25/94 amending Law 37/81: restricting foreigners' access to Portuguese citizenship**

Immigration to Portugal, particularly illegal immigration, increased significantly in the 1990s, leading to the first amendment of the 1981 Act by Law 25/94 of 19 August 1994. What concerned the government in 1994 was how to stem the growing number of immigrants who were acquiring Portuguese citizenship. There was also concern about various scandals related to fictitious marriages. The debate centred entirely on which restrictions should be placed on foreigners' rights to citizenship. Once the government's proposal had been cleansed of a few spurious attempts at xenophobia, the main political parties – the governing Social Democratic Party (PSD), the Centre Social Democratic-Popular Party (CDS-PP) and the Socialist Party (PS) voted in favour, while all the parties to the left of the Socialist Party (PS), voted against.<sup>31</sup> The aim of the new amendment was to make it more difficult for foreigners to obtain citizenship at birth (via *ius soli*) and after birth (particularly through marriage or naturalisation).

The grounds for citizenship for a child born to foreign parents in Portugal became more restrictive. The law required not only that the parents had Portugal as their habitual place of residence, but also that they held a residence permit. The aim of this was not only to exclude the children of illegal immigrants from obtaining citizenship, but also to exclude those who

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<sup>31</sup> *Parliamentary Debates*, Diary of the Assembly of the Republic 80, 1994: 2618.

were in Portugal legally, but on the basis of a different permit, such as a work permit or permit of stay<sup>32</sup> (which covered a large percentage of foreigners living in Portugal).

Furthermore, Law 25/94 introduced a distinction between foreigners from Lusophone countries and others. It kept the minimum period of residence at six years for the former, but increased it to ten years for the latter.

In addition, the arrangements for acquiring Portuguese citizenship through marriage to a Portuguese citizen were amended. The law required a minimum period of three years of marriage for the spouse of a Portuguese citizen to acquire Portuguese citizenship. Furthermore, the opposition by the state could now be founded on the applicant's failure to prove an effective link to the Portuguese community. Prior to 1994, the Public Prosecutor had to prove the applicant's obvious lack of integration into the Portuguese community in order to successfully oppose the acquisition of citizenship through marriage. Since this proof was difficult to obtain, the legislation of 1994 transferred the burden of proof by making it the foreign applicant's duty to prove the link. This then became one of the premises for acquiring citizenship.

## **2.8. Organic Law 1/2004: the reacquisition of Portuguese nationality**

In order to eradicate the negative effects of earlier legislation on emigrant communities, Organic Law 1/2004 of 15 January introduced two major changes to the reacquisition arrangements. First, it removed the possibility for reacquisition to be opposed and established *ex lege* acquisition whenever the loss of nationality had not been registered. Second, reacquisition was made retroactive to the date of loss, thus allowing the children of emigrants born abroad to acquire Portuguese nationality via *ius sanguinis*.

## **2.9. Organic Law 2/2006: a democratically inclusive reform**

The election of a new Socialist Party government in 2005 introduced another change in the citizenship policy. The approval of Organic Law 2/2006 of 17th April deeply changed the Nationality Act. This reform was considered by some scholars as the most generous and the most open-minded since the entry into force of Law 37/81 (Canas 2007: 521). Its main objective was to increase the number of ways in which Portuguese citizenship could be acquired. This objective was justified for several reasons. Demographics were causing concern, as a decrease in the Portuguese population endangered economic stability, the social security system, and the continuity of the Portuguese community. Political issues also provided justification, specifically the desire to increase the relevance of the Portuguese in the international community (Canas 2007: 511). Finally, social concerns required an adjustment of the Nationality Act to manage the internal shift of Portugal from a country of emigration to one of immigration. Given these reasons, the adoption of more inclusive arrangements was imperative, especially with regard to the integration of the immigrants of the second and third generations, whose citizenship did not correspond to an effective link to the country. Their effective relationship with Portugal had not been converted into legal citizenship.<sup>33</sup>

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<sup>32</sup> Different from residence permits, a permit of stay (*autorização de permanência*) excluded the holder from voting or applying for naturalisation in Portugal.

<sup>33</sup> This was the main reason invoked by the government for the amendment of the Nationality Act. See, Minister of the Presidency, *Parliamentary Debates*, Diary of the Assembly of the Republic 54, 2005: 2457.

Thus, this reform has made naturalisation more appealing since the applicants became entitled to acquire citizenship once they meet the respective requirements. Also, these requirements were greatly changed by the reform. Some of them were eliminated (such as the link to the Portuguese community and the existence of sufficient means of subsistence); others were clarified, withdrawing some discretion from the authorities (such as the requirement of decent moral and social behaviour, which was replaced by the absence of conviction for a crime which carries a prison sentence of three years or more according to Portuguese law); and, finally, others were simplified (such as the residency requirement, which was reduced from ten to six years). These reforms caused an increase in the number of foreigners eligible to obtain citizenship through naturalisation.

Juridical reasons also demanded several changes to Law 37/81. First, the law needed amending in order to fully integrate the European Convention on Nationality,<sup>34</sup> especially its art. 5(1), which forbids discrimination on grounds of national origin, and art. 6 (3)(e) and(f), which considers the acquisition of citizenship by those who were born in and legally reside in a certain territory. Finally, the wording of several articles needed to be clarified. The references to territories under Portuguese administration had to be removed.<sup>35</sup> Furthermore, the former version used the term ‘valid residence permit’ as a requirement for some modes of acquisition of citizenship. This concept needed to be clarified, as it implied a permanent link with immigration law. This caused some constitutional problems<sup>36</sup> and raised some doubts about the type of the permit required<sup>37</sup> and its application to the citizens of the European Union.<sup>38</sup>

The government<sup>39</sup> and the main political parties – Left Block (BE),<sup>40</sup> the Greens,<sup>41</sup> Portuguese Communist Party (PCP),<sup>42</sup> Social Democratic Party (PSD)<sup>43</sup> and Centre Social Democratic-Popular Party (CDS-PP)<sup>44</sup> – all presented different proposals for amending Law 37/81. They all agreed that the *ius soli* principle should be favoured, especially for immigrants of the third generation, and that a subjective right to naturalisation with clear requirements should be created. The result was an act with inclusive criteria which profoundly amended Law 37/81. Organic Law 2/2006 of 17th April was approved with the votes of the governing party (Socialist Party - PS), Social Democratic Party (PSD), Portuguese Communist Party (PCP), and

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<sup>34</sup> Portugal signed the European Convention on Nationality in 6 November 1997. It was approved by the parliament through the Resolution of the Assembly of the Republic n. 19/2000, and ratified by the Decree of the President of the Republic n. 7/2000. It was published in the Official Journal I-A, no. 55, of 6 March 2000. The Convention entered in force in Portugal on 1 February 2002.

<sup>35</sup> Since the transfer of the administration of Macau to the People’s Republic of China in December 1999, there are no more such territories.

<sup>36</sup> According to the Portuguese Constitution, the acquisition of Portuguese citizenship is a subject under the exclusive competence of the parliament and the statutory discipline must take the form of an ‘Organic Law’. The Constitution does not demand such requirements for immigration legislation. The full respect of the parliamentary reserve demands that the nuclear aspects of the citizenship regime be fully regulated by an Organic Law of the Parliament. Thus, a requirement for the acquisition of citizenship should not be dependent on immigration law, which can be a governmental act.

<sup>37</sup> According to the immigration law in force, there are two types of residence permit (temporary and permanent). From this arose a doubt about whether both types were relevant for the acquisition of citizenship (Silva 2004:123).

<sup>38</sup> These citizens do not need a ‘valid residence permit’ in order to reside in Portugal.

<sup>39</sup> Bill n. 32/X/1.

<sup>40</sup> Bill n. 18/X/1.

<sup>41</sup> Bill n. 31/X/1.

<sup>42</sup> Bill n. 40/X/1.

<sup>43</sup> Bill n. 170/X/1.

<sup>44</sup> Bill n. 173/X/1.

the abstention of Centre Social Democratic-Popular Party (CDS-PP)<sup>45</sup> and Left Block (BE).<sup>46</sup> There was not a single dissenting vote. This was an unprecedented majority (80 per cent). However, neither the original version of the Nationality Act of 1981, nor the several amendments raised heated debates or political divisions. Quite the opposite: from 1981 until the present, the Act of 1981 has reflected a broad and consensual understanding among the main political forces about who is, as well as who should be, Portuguese.<sup>47</sup>

As a result of this legislative reform the total numbers of acquisitions of Portuguese citizenship rose dramatically, as we can see below in Figure 1. For example, in 2005 acquisitions in 2005 were slightly more than 3.000, whereas three years later, they already amounted to more than 24.000.<sup>48</sup>

This extraordinary development was not due to a significant immigration flow as the foreign population with legal status actually decreased in 2005. Instead, it was a direct consequence of this legislative reform that favoured the residence-based mode of citizenship acquisition. After the adoption of the 2006 reform, the Nationality Law was amended several times, with the same aim of broadening the opportunities for the acquisition of the Portuguese nationality.

The Organic Law n. 1/2013, of 29 July was aimed at providing naturalization, with the exemption of some requirements, to descendants of Portuguese Sephardic Jews. Two years later, the Organic Law 8/2015, of 22 June introduced new amendments. Their aim was to establish measures aimed at protecting the community against potentially dangerous members, in the context of the security measures adopted in almost Members States of the European Union after the rise of terrorist attacks in Europe. Involvement in activities related to the practice of terrorism became an exclusionary clause for naturalization-based acquisitions and a ground for opposition to voluntary acquisition by marriage or civil partnership.

In the following month, the Parliament approved the Organic Law 9/2015 of 29<sup>th</sup> July. This law introduced a new category of persons that could acquire Portuguese nationality by birth: the grandchildren of Portuguese citizens. Its aim was, thus, to reinforce the ties with the Portuguese communities in the exterior. The changes introduced by this law also apply to grandchildren of Portuguese citizens who were born abroad on a date prior to its entry in force.

Finally, Organic Law n. 2/2018, of 5<sup>th</sup> July represented the most important amendment after the 2006 reform. The amendment involved four important topics, in addition to some minor changes. First, the most important change concerned the *ex lege* acquisition at birth in the form a moderate version of *ius soli*. Second, naturalization has been facilitated. Third, some provisions were introduced, aiming at protecting unaccompanied minors entering the territory. As in other EU Members States, Portugal has faced an increasing number of unaccompanied children arriving at the borders, especially since 2016. According to the Portuguese law, these children shall be protected under the National System for Protection of Children and Youngsters in Danger and be accommodated in legally recognized institutions. A subjective right to their naturalization was recognised. Finally, new provisions aimed at protecting the principle of legal certainty were adopted, following some cases that entailed annulation of several nationality acquisitions.

<sup>45</sup> This party did not agree with the elimination of some naturalisation requirements, as we shall address further.

<sup>46</sup> This party wanted the consecration of an unconditional *ius soli* principle.

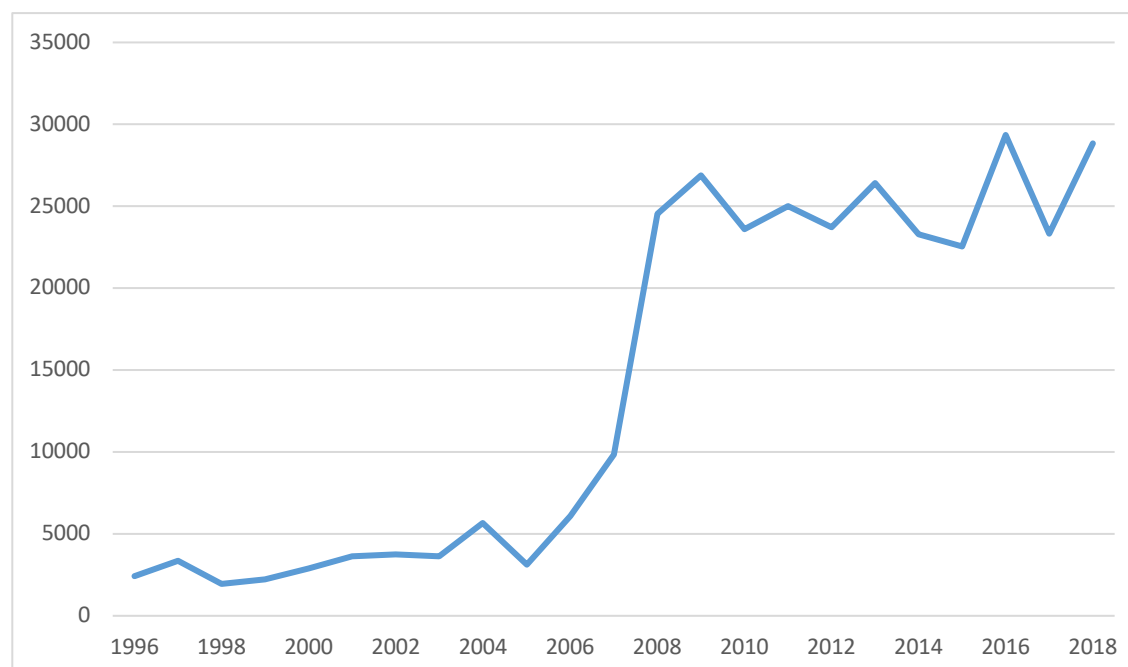
<sup>47</sup> For a more detailed analysis on the political debate that took place in the political arena, see Carvalhais 2010: p. 18.

<sup>48</sup> [https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Atos\\_registos\\_centrais.aspx](https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Atos_registos_centrais.aspx)



As a result of all the above-mentioned amendments, the acquisition of the Portuguese nationality has increased substantially in the recent years (Figure 1).

Figure 1. Acquisition of citizenship after birth, Portugal, 1996-2018



Sources: Ministry of Justice, Directorate General of the Justice Politics (data 1996-2007)<sup>49</sup> and National Statistics Institute (data 2008-2018)<sup>50</sup>.

### 3. The current citizenship law

#### 3.1. Main modes of acquisition and loss of citizenship

The general objective of the 2006 reform was to broaden the criteria for the acquisition of Portuguese citizenship and to facilitate the respective process of application. Yet, the current citizenship regime can still be described as a mixed system of acquisition at birth, with a predominance of *ius sanguinis*. In fact, the general principle that the descendants of Portuguese citizens are considered to Portuguese citizens is still applied today (Canas 2007: 520). Nevertheless, Organic Law 2/2006 reinforced the *ius soli* principle.

#### *Automatic acquisition of citizenship at birth*

According to the Nationality Act, the following persons acquire citizenship at birth *ex lege* through *ius sanguinis*:

<sup>49</sup> [https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Atos\\_registos\\_centrais.aspx](https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Atos_registos_centrais.aspx)

<sup>50</sup>

[https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine\\_indicadores&indOcorrCod=0008368&xlang=pt&contexto=bd&selTab=tab2](https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine_indicadores&indOcorrCod=0008368&xlang=pt&contexto=bd&selTab=tab2)

- (a) The child of a Portuguese (mother or father) who was born on Portuguese territory (art. 1(1)(a));<sup>51</sup>
- (b) The child of a Portuguese (mother or father) who was born abroad, if the parent was serving the Portuguese state (art. 1(1)(b)).

The law also provides for the *ex lege* acquisition of citizenship at birth through *ius soli*. First, this applies in the traditional case of those who were born on Portuguese territory and who do not have any other citizenship (art. 1(1)(g)).<sup>52</sup> Second, the 2006 reform introduced a new mode of *ex lege* acquisition of citizenship at birth which gives relevance to the *ius soli* principle. It concerns the immigrants of the third generation (double *ius soli*) (art. 1(1)(e)). It is an automatic (*ex lege*) acquisition and only requires that one of the parents was born in Portuguese territory and that such parent resided there at the time of the child's birth, regardless of holding a legal permit. This arrangement is also applicable if such a parent was born in Portugal and resides in Portugal at the service of their own state (for example as a diplomat) (Ramos 2007: 201). Silva considered the former version (which did not foresee this possibility) was unconstitutional, since it disrespects the fundamental right to citizenship and the principle of equality (as it granted exactly the same protection to immigrants of both second and third generations) (2004:107). This new arrangement is applicable to the individuals who were born in Portuguese territory before the entry into force of such arrangement. Finally, all persons born in Portuguese territory acquire *ex lege* Portuguese nationality provided that at the time of birth one of the parents has been legally resident for at least two years (art. 1(1) (f)). However, contrarily to the previous point, this regime is not applicable to children born to parents who were in Portugal at the service of their own State.

In all of these cases the persons concerned are of Portuguese origin, under the simple terms of the law, as long as the following conditions are stated in the birth registration: the Portuguese citizenship of either of the parents (or no mention of foreign citizenship of the parents - art. 3(a) of the Nationality Regulation); when born abroad, a statement that the mother or father were serving the Portuguese state on the date of birth (art. 7 of the Nationality Regulation); or a statement that no other citizenship is held (art. 3(c) of the Nationality Regulation).

Regarding immigrants of the third generation, since 2006 children born in Portugal to a person also born in Portugal automatically acquire Portuguese nationality at birth. The ancestor has to prove that he or she was born in Portugal through his or her birth registry and that he or she resides in Portugal (art. 4(3) of the Nationality Regulation). Unless they declare otherwise, persons born in Portugal are of Portuguese origin, under the simple terms of the law and independently of an express declaration of intent, provided that one of their parents has resided in the territory for two years. Previously, the Nationality Law only allowed voluntary acquisition at birth through *ius soli*, provided that one of the parents had lived legally in Portugal for at least five years. The new solution not only decreased the necessary parent's residence period but also changed the very nature of the nationality acquisition: from now on, these second-generation immigrants are of Portuguese origin, under the simple terms of the law and independently of an express declaration of intent.

This amendment aimed at responding to immigrants' groups and associations' claims, who have been advocating for the consecration of a pure *ius soli* solution in the Portuguese legal

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<sup>51</sup> Acquisition of Portuguese nationality through the joint effect of *ius soli* and *ius sanguinis* (territorial *ius sanguinis*).

<sup>52</sup> As explained above, the primary purpose is to prevent statelessness rather than to introduce *ius soli*, since *ius soli* is only applied to prevent the person in question from being left without a nationality (Ramos 1992: 132; Jalles 1984: 179).

order. The *ius soli* criterion alone is still not enough to confer citizenship on children born in Portugal to foreign parents. Acquisition still depends on the parents' situation (they cannot be in Portugal serving their state), the length of time the parents have resided in Portugal, and their residence status. Proposals for a consecration of a pure *ius soli* principle continue to be presented to the Parliament. However, the majority parliamentarians have been dismissing these initiatives, due to concerns with EU citizenship, with respect of the principle of effective nationality and also due to the prevention of illegal immigration.

### ***Voluntary acquisition of citizenship at birth***

The Nationality Act also provides arrangements for the voluntary acquisition of citizenship at birth (by option, by declaration, and/or by registration). These arrangements are different from *ex lege* acquisition in that the acquisition of citizenship is voluntary, as it always requires the applicant's expression of intent. Once this statement is made, and when the other legal requirements have been met, the acquisition of citizenship works automatically in accordance with the law and cannot be prevented by the state as is the case with acquisition after birth by declaration (Ramos 2001: 219). Despite being voluntary in these cases, the acquisition of citizenship is actually a form of acquisition at birth. Therefore, the requirements for acquisition must be verified at birth. There are two different procedures.

First, in acquisition through *ius sanguinis*, the child of a Portuguese mother or father born abroad who declares (in person or through a legal agent) that he or she wants to be Portuguese or that the birth is registered at the Portuguese registry office (art. 1(1)(c) of the Nationality Act) is considered Portuguese.<sup>53</sup> This citizenship acquisition is through *ius sanguinis*, but this is not enough on its own to determine the conferment of Portuguese citizenship. The applicant must declare in person or through a legal agent that he or she wishes to be Portuguese. An explicit declaration registered at the Central Registry Office or a tacit declaration resulting from registration of the birth at the consulate at the place of birth or at the Registry Office is sufficient (art. 8 of the Nationality Regulation).

In 2015 this possibility was expanded to grandchildren of Portuguese citizens. According to the current art. 1(1)(d), individuals who have born abroad but have at least one second degree ascendant with Portuguese nationality, who have not lost that nationality, may acquire Portuguese nationality. Some requirements are applicable: they must declare that they want to be Portuguese, have effective ties to the national community and must register the birth in the Portuguese Civil Registry. According to art. 1(3), the Government acknowledges the relevance of such ties, namely by proving a sufficient knowledge of the Portuguese language and the existence regular contacts with the Portuguese territory. Finally, acquisition is precluded if the applicant was condemned for having committed a crime punishable by imprisonment of a maximum of 3 years or more, according to Portuguese law.

### ***Acquisition after birth***

Acquisition of citizenship after birth only takes effect when the respective legal requirements have been met, in other words, *ex nunc* (art. 12 of the Nationality Act). The Act foresees five ways of acquiring citizenship after birth: *ex lege* in case of adoption, by declaration based on a legal entitlement in case of filial, spousal and partner transfer of citizenship and by

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<sup>53</sup> This declaration can be made at any time, specifically if the person is of age. However, the child of a Portuguese parent can only acquire nationality if descent is established when the child is a minor (Art. 14 of the Nationality Act).

naturalisation. Acquisition of citizenship after birth does not occur automatically in any of these cases. It depends on non-opposition from the state (for acquisition after birth through adoption or personal wish) or a government act (for acquisition through naturalisation).

### ***Acquisition by adoption***

‘The adopted by Portuguese national acquires the Portuguese nationality’ (art. 5 of the Nationality Act). This is an *ex lege* acquisition, with no need for an expression of intent: all that is required is that the registration of the birth of the child in question clearly states that he or she was adopted by a Portuguese national (art. 17 of the Nationality Regulation).

### ***Filial transfer of citizenship***

Minors or disabled children with a mother or father who acquires Portuguese citizenship (for example, by naturalisation) can acquire Portuguese citizenship by declaration (art. 2 of the Nationality Act).<sup>54</sup>

### ***Spousal transfer of citizenship***

A foreigner who has been married for more than three years to a Portuguese national can acquire Portuguese citizenship by declaration made by virtue of marriage (art. 3(1) of the Nationality Act).<sup>55</sup>

### ***Partner transfer of citizenship***

A new mode for acquiring citizenship, added by the 2006 reform,<sup>56</sup> allows for the acquisition of Portuguese citizenship by an unmarried partner who has lived with a Portuguese citizen for more than three years (art. 3(3) of the Nationality Act). This is a voluntary type of acquisition of citizenship, but it requires more than a simple expression of intent. The partnership must be recognised by a civil court of law through a special procedure. Such a requirement aims to avoid the possibility of fraud. This arrangement was proposed during the legislative process of Organic Law 1/2004, but was not adopted. The 2006 reform took into consideration the general Portuguese movement towards the recognition of partnerships of unmarried couples (Ramos 2007: 204). This mode of acquisition of citizenship is applied to both heterosexual and homosexual partnerships.

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<sup>54</sup> This declaration is made by the child through the legal guardian (art. 13 of the Nationality Regulation).

<sup>55</sup> The 2006 reform has maintained the three years requirement despite the fact of some parties, as the Portuguese Communist Party (PCP) claimed to exclude it (*Parliamentary Debates*, Diary of the Assembly of the Republic 54, 2005: 2467). Silva also argued that the law should not give prevalence to the principle of effective citizenship over the principle of the family unity (2004: 126).

<sup>56</sup> This was inspired by proposals of Left Block (BE), Portuguese Communist Party (PCP) and the Greens.

### ***Opposition to acquisition after birth by adoption, filial, marriage or partnership transfer***

The acquisition of citizenship after birth by adoption, filial, marriage or partnership transfer is not automatic, but it is a right of those who fulfil the legal requirements. This means that state can prevent the acquisition of citizenship by taking a procedure of opposition through the Public Prosecutor. This procedure aims to prevent persons deemed ‘undesirable’ or without any link to Portugal from acquiring Portuguese citizenship. Acquisition then depends on non-opposition by the Public Prosecution Service, or on a court decision stating that opposition to the application is unfounded.

According to art. 9 of the Nationality Act, opposition can only take place when there are indications that the following grounds may exist:

- (1) The nonexistence of an effective link to the national community;<sup>57</sup> - this ground is not applicable in case of marriage or civil partnership when there are the couple has children with Portuguese nationality (art. 9 (2)).
- (2) The conviction, with a final judgment, with a penalty of imprisonment of 3 years or more;<sup>58</sup>
- (3) The performance of public duties with a predominantly non-technical character or non-compulsory military service for another state.<sup>59</sup>
- (4) The existence of a danger or threat to national security or defence through his or her involvement in activities related to the practice of terrorism in accordance with its respective law.

Opposition to the acquisition of Portuguese citizenship is a special legal procedure which may be initiated by the Public Prosecutor within a year of the date on which the declaration or adoption occurred. Once a year has lapsed without opposition from the Public Prosecutor, the right to opposition expires, and the acquisition becomes definite (art. 10 of the Nationality Act). Opposition to citizenship proceedings takes place in the administrative courts through a special administrative procedure (art. 60 of the Nationality Regulation). All of the public authorities are required to communicate to the Public Prosecutor any facts which might constitute one of the opposition grounds. In almost all of the cases, the opposition proceedings are intended to prevent the acquisition of Portuguese citizenship by a foreigner married to a Portuguese and are based on the grounds of the lack of integration into the national community.

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<sup>57</sup> Prior to Law 25/94 a basis for opposition was ‘the obvious lack of any real link to the national community’.

<sup>58</sup> The 2006 reform amended this requirement demanding an actual conviction, in order to fully respect the constitutional principle of the innocence presumption. The Centre Social Democratic-Popular Party (CDS-PP) has proposed that the acquisition procedure should be suspended during the existence of a criminal procedure in which the applicant was a suspect (*Parliamentary Debates*, Diary of the Assembly of the Republic 54, 2005: 2460). Nevertheless, this arrangement was not welcomed by the government, as it could potentially raise some doubts regarding the constitutional principle of the innocence presumption (Minister of the Presidency, *Parliamentary Debates*, Diary of the Assembly of the Republic 54, 2005: 2460). However, in the decision of 14 October 2010, the South Central Administrative Court considered that, in such cases, the decision on whether the opposition was valid should be suspended until the Criminal Court decided the criminal proceeding.

<sup>59</sup> It was the 2006 reform which clarified that the exercise of public functions in another state should only comprise the exercise of predominantly non-technical functions. This amendment aimed to adapt the legal regime to the Portuguese judicial case-law, which adopts a restricted interpretation of the ‘exercise of public duties’. It only considers relevant the duties that imply a relationship of political trust, which might lead to grounds for doubts that the foreigner who wants to acquire Portuguese nationality will be loyal to the Portuguese state (decision by the Supreme Court of Justice of 25 February 1986). See also the recent decision of the South Central Administrative Court of 14 October 2010.

From 1994, the applicants had to provide proof that they had an effective link to the Portuguese community by documentary evidence, by testimony or by other legally permitted means (art. 22(1)(a) of the former Nationality Regulation). The applicant had to prove a feeling of belonging to the Portuguese community, demonstrated by real efforts, such as knowledge of the Portuguese language and local habits, friendships with Portuguese, residence in Portugal, social habits, economic or professional integration, and interest in the country's history or present.<sup>60</sup> These were just some of the criteria used by the courts to prove a link with the Portuguese community, although there was no fixed formula for such determination.<sup>61</sup> The lack of an objective legal framework allowing for proof of a person's link to the national community was a source of legal uncertainty which was incompatible with the principle of preserving family unity in matters of citizenship.

If the applicant failed to prove his or her link to the Portuguese community, then the opposition procedure would proceed. In 2006 the reform amended the opposition mechanism. Currently, it is the Public Prosecutor who must prove the case against the applicant.<sup>62</sup> This will certainly encourage a more restrained use of the opposition mechanism (Ramos 2007: 213). Nevertheless, the Nationality Regulation stipulates that those who require the acquisition of citizenship shall declare the existence of their effective link to the Portuguese community (art. 57(1) of the Nationality Regulation). This does not mean that they have to prove it. The burden of proof relies on the Public Prosecutor, that must show the nonexistence of the effective ties to the Portuguese community.

Despite this reform, the opposition mechanism is still an obstacle to the acquisition of citizenship. This is hard to understand when the principle of the family unity is considered. Such a mechanism does not apply to naturalisation procedures, which represent a new balance between the *status familiae* and the legal residence in the territory, while favouring the latter (Ramos 2007: 232). Nevertheless, in a decision of 13 November 2008, the South Central Administrative Court stressed that the relevant aspect for assessing an effective link to the Portuguese community should be the existence of family ties.<sup>63</sup> The court adopted a reasoning which took into consideration the importance of the principle of family unity. It then verified that if the facts argued by the Public Prosecutor were serious enough they could override this principle.<sup>64</sup>

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<sup>60</sup> See, amongst many others, the decision by the Lisbon Court of Appeal of 17 October 2002 and the decision by the Supreme Court of Justice of 11 February 2004.

<sup>61</sup> Sometimes it was sufficient for the applicant to have Portuguese children and to demonstrate that they wanted to learn Portuguese, without a demand for proof of an actual knowledge of the Portuguese language or residence in Portugal (In this sense, the decision by the Lisbon Court of Appeal dated 16 October 2003). On other occasions, case law has adopted a restrictive approach, which does not consider sufficient the facts that the foreigner is married to a Portuguese citizen, has Portuguese children, lives and works in Portugal, speaks Portuguese, has knowledge of Portuguese history, etc. Instead there was a demand for proof of a feeling of psychological and sociological belonging to the national community (See the decisions by the Lisbon Court of Appeal of 2 February 1999 and 17 December 1998), or a demonstration that the person in question participates in Portuguese culture.

<sup>62</sup> The Centre Social Democratic-Popular Party (CDS-PP) has strongly opposed this change. It argued that it would be impossible for the state to establish such proof, and that it should be the applicant who proves his or her status in the Portuguese community (*Parliamentary Debates*, Diary of the Assembly of the Republic 54, 2005: 2460).

<sup>63</sup> Decision of 13 November 2008.

<sup>64</sup> In the case concerned, the exercise of public functions in China was not considered enough to preclude the family unity principle.

## *Naturalisation*

The final means of acquisition after birth considered by the law is naturalisation. Naturalisation depends, above all, on an expression of intent, since naturalisation can only be conferred following an application to the Portuguese Ministry of Justice (art. 7(1) of the Nationality Act and art. 18(1) of the Nationality Regulation). Yet, the foreigner's intent is not enough: legal requirements which allow the government to confer Portuguese citizenship by naturalisation also must be met.

The nature and requirements of the naturalisation mechanism were thoroughly revised in 2006. Until then, naturalisation was a type of citizenship acquisition that was completely dependant on a discretionary decision by the government.<sup>65</sup> The law included several requirements but meeting them was not enough to grant naturalisation. The government always had the last word and could deny naturalisation for reasons of convenience (Ramos 1992: 163). This situation was criticised by Portuguese legal scholars, who claimed that Portuguese law had created a single arrangement for two different realities: naturalisation *stricto sensu*, as a political act (and therefore, discretionary) and the right of foreigners to obtain Portuguese citizenship based on their residence in national territory (Silva 2004: 124). The former corresponded to a sovereign prerogative, which was dictated by politics. The latter corresponded, to a certain extent, to a fundamental right granted in the Portuguese Constitution. The 2006 Organic Law finally differentiated these two situations. It maintains the existence of discretionary naturalisation but, at the same time, creates a subjective right to naturalisation in certain circumstances. In these situations, if the applicant meets the necessary requirements, the government does not have discretionary power. Its activity is linked to the law and, therefore, is submitted to judicial review. This new arrangement dramatically changes the nature of the naturalisation principle and reinforces the construction of a fundamental right to citizenship (Ramos 2007: 207).

The concrete requirements for the acquisition of citizenship through naturalisation were also amended in 2006 and in the following revisions of 2015 and 2018. To have a subjective right to naturalisation, the individual must meet the following requirements (art. 6(1) of the Nationality Act):

- (1) to be of legal adult age or emancipated according to the Portuguese law;<sup>66</sup>
- (2) to have legally resided in Portugal for a period of five years;
- (3) to have sufficient knowledge of the Portuguese language;<sup>67</sup> According to art. 6 (9), the knowledge of the Portuguese language is presumed to exist for applicants who are nationals and nationals of Portuguese-speaking countries.

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<sup>65</sup> In this sense, the decision by the Supreme Court of Justice of 26 February 2004.

<sup>66</sup> Emancipation before the age of majority can be achieved through marriage.

<sup>67</sup> Required knowledge of the Portuguese language means the minimal skills indispensable for interacting with the Portuguese community. It corresponds to the A2 level of the Common European Framework of Reference for Languages. If the applicant is a person with serious health issues, disability or aged above 60 years old, who does not know how to read or write, the Portuguese language test shall be adapted to be appropriate to his or her capacity to show his knowledge of the language (art. 25(6) of the Nationality Regulation). In case of children who have not completed the first cycle of basic education in a school with the Portuguese official curricula, the Portuguese language knowledge may be proven by declaration issued by a Portuguese language education institution. The High Commissioner for Migration provides free Portuguese language courses.

- (4) not have been convicted, in a final judgment, with imprisonment of 3 years or more.<sup>68/69</sup>
- (5) to not represent a danger or threat to national security or defence by his or her involvement in activities related to the practice of terrorism under the respective law.

The Portuguese Administrative Courts have already stressed that all these requirements must be met for the recognition of a subjective right to naturalisation. Thus, the Administration does not have discretion to grant naturalisation to an individual who does not meet one of the requirements.<sup>70</sup>

The law which was in force until 2006 included additional requirements. The applicant had to prove that, besides residing in Portugal and speaking Portuguese, he or she also had a link to the Portuguese community, the legitimacy of which was to be assessed by the public administration. This gave too much discretion to the public administration, since it could still deny the naturalisation of an immigrant who had resided in Portugal for a long time and who had excellent language skills. The current law considers residency and knowledge of the Portuguese language as sufficient indicators of effective links with the national community.

The previous version also demanded that the applicant have sufficient means of subsistence. This requirement was eliminated. Its removal happened because there were some doubts about the interpretation of art. 13(2) of the Portuguese Constitution, which forbids discrimination based on economic grounds.<sup>71</sup> Furthermore, naturalisation no longer requires the capacity of applicants to rule their own persons, because such a requirement could provoke discrimination in cases of immigrants who have serious disabilities (Silva 2004: 132).

If the creation of a subjective right warranted consensus among the political parties with parliamentary representation, the same cannot be said about the amendment of the naturalisation requirements. The Centre Social Democratic-Popular Party (CDS-PP) argued that the eliminated requirements should be essential for acquiring citizenship.<sup>72</sup>

Due to this reform, the number of naturalisations rose dramatically in recent years. In 2008, the number of applications rose from 8,970 to 34,568. During the following years, they decreased only slightly (32,415 applications in 2010 and 28,643 in 2011).<sup>73</sup> In the latter years, acquisitions by naturalisation have remained the main mode of nationality acquisition after birth, with an average of 20,000 per year.

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<sup>68</sup> Evidence shall be made by presenting a criminal record certificates issued: by the competent Portuguese services or by the competent authorities of the country of birth, of the country of nationality and of the countries of residence, provided that the applicant was resident there after reaching the age of criminal liability (art. 6 (10)).

<sup>69</sup> The previous version demanded that the applicant have decent moral and social behaviour. This gave too much scope to arbitrary decisions. The new version replaced a vague concept with clearly determined criteria (Ramos 2007: 208).

<sup>70</sup> South Central Administrative Court, decision of 25 July 2010.

<sup>71</sup> Nevertheless, the Constitutional Court considered that this requirement did not offend the fundamental law. Decision of 2 November 2005.

<sup>72</sup> The CDS-PP argued that naturalisation was supposed to be the last step for the full integration into the Portuguese society. Therefore, there should be several integration steps preceding the naturalisation process, such as legal residence, insertion into the labour market, social security protection among other circumstances. In particular, having sufficient means of subsistence was an important requirement, as one could not demand less for the acquisition of the nationality than what was demanded for the acquisition of a residence permit (*Parliamentary Debates*, Diary of the Assembly of the Republic 54, 2005: 2474).

<sup>73</sup> Source: SEF, several statistics.



The 2006 reform added another category of individuals who have a subjective right to naturalisation. The minors who were born in national territory and who meet the following conditions have a right to citizenship if (art. 6(2)):

- (1) they have sufficient knowledge of the Portuguese language;
- (2) they were not been convicted, in a final judgment, with imprisonment of 3 years or more.
- (3) They do to not represent a danger or threat to national security or defence by his or her involvement in activities related to the practice of terrorism under the respective law.
- (4) they are in one of the following situations:
  - (a) one of the parents is resident in Portugal, regardless of any residence permit, for at least five years immediately preceding the application;
  - b) The minor has completed at least one cycle of basic education or secondary education in Portugal

This last possibility is a new way to assess the existence of a link with Portugal which was previously ignored by Portuguese law. It gives considerable relevance to the socialisation of the minor in the country. But the major grounding for such a subjective right remains birth in Portuguese territory. Indeed, socialisation (implied by the educational or residence requirements), works only as a complementary requirement. Therefore, this mode of acquisition can be qualified as *ius soli* after birth.

The same can be said regarding another naturalisation right, introduced in 2018. According to art. 6(5), the Government grants nationality, by naturalization, exempting the requirement on legal residence, to individuals who cumulatively satisfy the following requirements:

- a) were born in Portuguese territory;
- b) are children of a foreigner who resided here, regardless of legal permit, at the time of their birth;
- c) reside here, regardless of title, for at least five years.

In addition, persons need to comply with the above-mentioned requirements on language knowledge, clean criminal record and absence to threat to public order. This is another recognition of the *ius soli* principle. Since their parents were not legally resident at the time of the birth, these individuals have not acquired nationality by birth.

Art. 6(3) sets forth a subjective right to naturalisation for children and youngsters who are accommodated in legally recognized institutions aimed at protecting children and youngsters in danger. The Public Prosecutor's Office is responsible for initiating the procedure, and for guaranteeing that the child's rights are protected throughout all procedures. This was a clear recognition of the State duty to protect children, enshrined not only in the Convention on the Rights of the Child but also on the Portuguese Constitution.

A subjective right to naturalisation, based in the *ius soli* principles is now granted to some foreigners irrespective of legal residence. This clause was expanded in the 2018 reform. According to Article 6 (5), such right is granted to foreigners who were born in the Portuguese territory provided that (1) one of their parents were residing in Portugal, at the time of the birth, irrespective of legal residence and (2) the applicant has resided in Portugal for five years.

Some categories of foreigners are exempted from fulfilling some naturalisation requirements. First, those who have held Portuguese citizenship and have never acquired any other citizenship are exempted from fulfilling the requirements regarding the period of residence and the knowledge of Portuguese language (art. 6(4)).

The 2006 reform has retained discretionary naturalisation in some circumstances. In these situations, even if the individuals concerned meet the requirements, the government may still deny their naturalisation.

The former version favoured the discretionary naturalisation of Portuguese descendants. Art. 6(6) allows other possibilities for discretionary naturalisation, regarding foreigners who have held Portuguese citizenship, who are descendants of Portuguese citizens, members of communities of Portuguese origin, or who have provided or will provide notable services for the Portuguese state or to the Portuguese community.<sup>74</sup> These individuals are exempted from fulfilling the requirements regarding the period of residence and knowledge of the Portuguese language.

The Government may also grant nationality by naturalization, exempting the requirements on legal residence and Portuguese knowledge to descendants of Portuguese Sephardic Jews. Applicants must prove the belonging to a Sephardic community of Portuguese origin, namely through surnames, family language, direct or collateral descent (art. 6(7)). In all these latter cases, it is notorious that the Law's aim was to strengthen and reinforce the ties with the Portuguese communities and descendants, which is a Constitutional goal.

As for the 2018 reform, it introduced a new ground for discretionary naturalisation, this time for the purpose of respecting the principle of unity of nationality in the family. According to art. 6(8), naturalization may be awarded to individuals who are ascendants of Portuguese-born citizens, and who have resided in Portugal, regardless of holding a legal title, for at least five years before the request, provided that the ancestry was established at the time of the birth of the Portuguese citizen.

### ***Legal residence as a requirement for acquisition of the Portuguese citizenship***

Art. 15 of the Nationality Act establishes the concept of legal residence, which must be applied to all the norms using this expression. The individuals who have regular residence as recognised by the Portuguese authorities, through any title foreseen by the Immigration or Asylum Act or by international convention (visas, permits, and others) are considered to be legally resident in Portugal.<sup>75</sup> Asylum applicants may remain in Portuguese territory until their asylum procedure is decided. The ABS issues a declaration stating that the individual has applied for asylum. This is enough to prove that such individuals may remain in Portuguese territory (arts. 11 and 14 of the Asylum Act).<sup>76</sup>

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<sup>74</sup> The 2006 reform reinforced the possibility of granting naturalisation in some situations known by the general public, as the naturalisation of the athletes, sportsmen and sportswomen, whose services could not be considered to be relevant services to the state, but can be considered to be relevant services to the national community (Canas 2007: 524). The Administrative Courts have already confirmed that the Government enjoys a margin of appreciation when evaluating whether an individual had provided notable services for the Portuguese state or to the Portuguese community, for the purposes of granting naturalisation under Article 6, n.6. See decision of 21 January 2010 of the South Central Administrative Court.

<sup>75</sup> The 2006 reform version kept a link with the Immigration Law, as it was not desirable to create a rigid concept of residence, completely divorced from that law (Canas 2007: 526). Ramos argues that this dependence upon the immigration law weakens the character of fundamental right to the citizenship (2007: 217).

<sup>76</sup> Law 27/2008 of 30 July.

For the purpose of counting legal residence periods, the sum of all legal residence periods in the national territory, followed or interpolated, shall be considered, provided that they have elapsed within a maximum of 15 years (art. 15(3)).

The influence of the parents' legal situation on the acquisition of citizenship of children has been debated by Portuguese legal scholars. According to the pure principles of justice, the legal situation of the parents should not influence the acquisition of citizenship by the children, but only their own acquisition of citizenship. The position of the parents could cause discrimination based on ancestry between the children of legal immigrants and children of irregular immigrants. This is forbidden by the constitutional principle of equality (Silva 2004: 113). Nevertheless, one cannot totally separate the parents' behaviour and the children's destiny: when children are born, their only link with the community is established through their parents (Silva 2004: 113). Ignorance of the parents' legal situation can also create constitutional problems. According to Portuguese law and the Constitution, it is not possible to deport an alien who is the parent of a Portuguese minor.<sup>77</sup> Allowing children to obtain Portuguese citizenship irrespective of their parents' legal situation implies the impossibility of deporting their parents, even if they remain in an illegal situation. Nevertheless, the law does, in some cases, grant Portuguese citizenship to children of irregular immigrants. This can occur in cases of acquisition at birth (regarding the immigrants of the second<sup>78</sup> and third generations), and in cases of naturalisation (of the minors who have completed the first cycle of compulsory education in Portugal). The Immigration Law is used to deal with the expulsion of parents in those situations.<sup>79</sup>

### ***Loss of citizenship***

The legal arrangements for the loss of citizenship are influenced by the 1976 Constitution which states that citizenship is the fundamental right of an individual (art. 26(1)) and forbids the loss of citizenship for political reasons (art. 26(4)) or as a consequence of serving a prison sentence (art. 30(4)). These constitutional principles and the general principle that no one can be deprived of his or her citizenship arbitrarily have influenced the laws governing loss of citizenship.

Loss of citizenship must be defined by law and cannot be determined by an act of the public authorities (Ramos 1994: 114; Ferreira 1987: 8). Loss of Portuguese citizenship is also not possible if the citizen in question becomes stateless (Jalles 1984: 172). The 1981 Nationality Act is underpinned throughout by these principles. It does not allow any *ex lege* loss of Portuguese citizenship or loss of citizenship due to state intervention. Art. 8 of the Nationality Act only allows for the loss of citizenship through the individual's own free will and only so long as he or she has another citizenship. The state therefore cannot impose a loss of citizenship even as a result of the acquisition of another state's citizenship. Neither is the mere wish to renounce citizenship sufficient. In order to avoid situations of statelessness, the applicant must hold the citizenship of another state.

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<sup>77</sup> This rule is justified by two constitutional principles: the protection of family unity (arts. 36 and 67 of the Portuguese Constitution) and the prohibition on deporting national citizens (art. 33(1) of the Portuguese Constitution). The deporting measure would violate one or another of the rules, depending on whether the infant would follow his or her parent abroad or not.

<sup>78</sup> It allows the acquisition of citizenship to those who were born in Portugal even if only one of the parents is in a regular situation.

<sup>79</sup> Current immigration law (Law 23/2007 of 4 July), forbids the expulsion of immigrants who have effective custody of minor children of Portuguese nationality and who were residing in Portugal (art. 135) and foresees their regularisation (art. 122 n.1 (l)).

Nullity of a registration of birth (in cases of *ex lege* acquisition at birth) or the registry of citizenship acquisition after birth based on falsehood (arts. 87 and 88 of the Civil Registry Code) are not treated as loss of citizenship. Since the declaration of nullity of the registration upon which citizenship was granted has retroactive effects, one can not classify this as a loss of citizenship, but rather as non-acquisition of citizenship.<sup>80</sup>

The legal regime on nullity of the nationality acquisition was also reviewed in 2018. According to the new Article 12-A, the act that determines the attribution, acquisition or loss of Portuguese nationality based on false or certifying documents of untrue or non-existent facts, or false statements, is null and void. However, this shall not apply in cases where the declaration of invalidity results in statelessness of the person. This new clause constitutes a measure for prevention of statelessness. However, it may raise the concern of being abusively used.

The 2018 amendment has also introduced Article 12-B, which sets for cases where the nationality is “consolidated” in the legal order. In cases where the act or fact that has resulted in the acquisition of the Portuguese nationality is contested, if the holder acted in good faith for ten years, believing that he or she was indeed, a Portuguese citizen, retains the nationality.

This solution was enacted in order to protect the legitimate expectations of *bona fide* holders of Portuguese nationality (Gil: 2018).

### ***Reacquisition of citizenship***

Those who have lost Portuguese citizenship as a result of renouncing it by means of a declaration made when they were not legally autonomous can reacquire it by a declaration when they come of age (art. 4 of the Nationality Act). Reacquisition is not automatic with the declaration but depends on it not being legally contested within a period of one year.

Two more reacquisition situations are linked to the legal arrangements for loss of citizenship which were in force until 1981.

Art. 30 of the Nationality Act allows women who have lost Portuguese citizenship due to marriage to reacquire it by means of a declaration. This reacquisition of citizenship is not subject to non-opposition by the Public Prosecutor. Furthermore, reacquisition is effective retroactively from the date of loss of citizenship, which allows children who were born after this date to acquire Portuguese citizenship of origin by declaration.

Art. 31 of the Nationality Act allows the reacquisition of Portuguese citizenship by all those who lost it when they acquired another citizenship. So long as there is no definitive registration of loss of citizenship, reacquisition is *ex lege* but allows the applicant to oppose it by declaring that he or she does not want to be Portuguese. An expression of intent stating the wish to reacquire citizenship is required only when there is definitive registration of loss of citizenship. The reacquisition of citizenship in these cases is not subject to opposition by the Public Prosecutor and becomes effective from the date of acquisition of the foreign citizenship

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<sup>80</sup> These cases are extremely rare and normally refer to Decree-Law 308-A/75 which determines the *ex lege* loss of Portuguese nationality to citizens from Portuguese ex-colonies who did not fulfil the requirements to hold Portuguese nationality. Given the difficulties in enforcing this law, there were cases where, due to an administrative error, certain people saw their nationality registration recorded as valid even when, according to the law, they had lost it. In these cases, the citizen in question cannot be blamed for false registration, and the Courts consider the declaration of nullity as invalid because it amounts to an abuse of the law (See the Court of Appeal sentence of 29 January 2004). This is not the case when false registration is due to a citizen’s own action: in such cases the declaration of nullity and cancellation of the registration operates retroactively and withdraws Portuguese nationality from the person in question (legally, it is as if nationality had never been acquired). See the Supreme Court of Justice decision of 18 December 2003.

(and therefore from the date of loss of Portuguese citizenship), without affecting the validity of previously established legal implications based on another citizenship. The intention was to consider of Portuguese origin the children of emigrants who were born after the loss of Portuguese citizenship resulting from the 1959 Law. This new arrangement allows for children who were born after the automatic loss of Portuguese citizenship by their parents, to acquire citizenship of origin if they state that they want to be Portuguese or if they register their birth with the Portuguese Civil Registry, in accordance with the terms of art. 1(1)(c) of the Nationality Act.

### **3.2. Specific rules and status**

#### ***Dual citizenship***

Portugal has not signed any international conventions which prevent dual citizenship. The 1981 Nationality Act shook off the principle that a person should only have the citizenship of one country and that the acquisition of a foreign citizenship should lead to the loss of Portuguese citizenship (Ramos 1994: 136). Furthermore, access to Portuguese citizenship is never subject to the loss of any foreign citizenship which the person in question might hold, which means that the two citizenships may co-exist. The Nationality Act merely sets out rules to resolve conflicts when dual citizenship occurs. Thus, should a person hold both foreign and Portuguese citizenship, only the latter is taken into consideration by Portuguese law (art. 27 of the Nationality Act).

#### ***Citizenship rights of those who were born as citizens and those who acquire citizenship after birth***

People who have acquired Portuguese citizenship after birth enjoy the same status as those who acquired it at birth, except for eligibility to become the President of the Republic. Art. 122 of the Constitution sets out that only citizens of Portuguese origin, i.e., who acquired Portuguese citizenship at birth, are eligible to become President of the Republic. However, those who acquired citizenship after birth enjoy more favourable arrangements as far as military duties are concerned, in that they are excused from national service should they acquire Portuguese citizenship upon their eighteenth birthday or later (art. 38(3)(a) of Law 174/99 of 21 September).

#### ***Expatriates and former Portuguese citizens***

Reinforcing the ties between the country and the Portuguese citizens residing abroad was considered to be an important aspect of the new citizenship legislation.

Art. 14 of the Constitution sets out that ‘Portuguese citizens who temporarily or habitually reside abroad shall enjoy the protection of the state in the exercise of their rights, and shall be subject to such duties as are not incompatible with their absence from the country’. Birth or prior residence in the country is not a condition for granting voting rights to expatriates. If Portuguese residents abroad are registered with the consulate for electoral purposes, or are in Portuguese territory, they can vote and stand for parliamentary and presidential elections.<sup>81</sup> To

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<sup>81</sup> However, according to art. 121(2) of the Portuguese Constitution, the law which allows the right to vote to Portuguese citizens who reside abroad pays due regard to the existence of ties that effectively link them to the Portuguese community.

vote in local elections, they must be registered on the electoral lists. They also enjoy special representation in parliament by electing four members.<sup>82</sup>

Some scholars claimed that the new law should temper the *ius sanguinis* criterion, arguing that it would result in the recognition of a truly ethnic privilege derived from descent (Silva 2004: 108), as the children of expatriates would have the same political rights as the other Portuguese citizens, regardless of having a link to the country. Despite this concern, however, the 2006 reform has reinforced the *ius sanguinis* principle, which was further expanded in 2018. The new version foresees that grandchildren of Portuguese citizens may acquire Portuguese citizenship by birth, provided that they have a sufficient connection to the Portuguese community. The right of grandchildren to acquire Portuguese citizenship was firstly foreseen, by the 1006 reform, as a ground for a subjective right to naturalisation. The Social-Democratic Party (PSD) suggested this arrangement to address the fact that in communities of Portuguese expatriates, there were people who had maintained strong links with Portugal but could not accede to Portuguese citizenship solely because their parents had never asked for such citizenship for themselves. It also invoked the national interest, since many of the potential applicants had relevant positions in the societies where they lived, so this arrangement could contribute to create an image of a modern Portugal.<sup>83</sup> This is an innovation in Portuguese law. Until now, the *ius sanguinis* principle was only relevant regarding the descendants of first degree. By contrast, the majority of the legal norms introduced by the 2006 reform, this one considered the large community of Portuguese expatriates who, despite the immigration phenomena, still represent a Portuguese reality.

If it is true that the children of first generation emigrants often maintain genuine ties with the country of origin of their parents and frequently learn their mother tongue at home, this is rarely the case among subsequent generations, who do not have an effective link with the country of origin of their grandparents. It is also hard to understand why the law requires that the applicant be born abroad. The applicant can not rely on this legal arrangement if he was born in Portugal, even if he has Portuguese grandparents. This is a paradox, because the *ius soli* principle should favour the acquisition of Portuguese citizenship in these circumstances (Ramos 2007: 210).<sup>84</sup>

The Nationality Act provides other arrangements for the community of descendants of Portuguese expatriates. Art. 6(6) provides for the discretionary naturalisation of foreigners who are descendants of Portuguese citizens and members of communities of Portuguese origin. Art. 6 (7), as already mentioned, also foresees such a solution for the descendants of Portuguese Sephardic Jews. Such individuals are exempted from residence and language requirements, but do not have a subjective right to naturalisation.

The law also provides special arrangements for former Portuguese citizens. Those who have held Portuguese citizenship and have never acquired any other citizenship have a subjective right to naturalisation and are exempted from fulfilling the requirements regarding the period of residence and knowledge of Portuguese language (art. 6(4) of the Nationality Act). This is a mode of reacquisition of citizenship which makes naturalisation more appealing. The

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<sup>82</sup> According to art. 12(4) and 13(3) of Law 14/79 of 16 May (Parliamentary Elections Act), expatriates who are registered as voters are divided into two constituencies: one which covers European states and another which represents all non-European countries. Each of these constituencies elects two members for parliament.

<sup>83</sup> *Parliamentary Debates*, Diary of the Assembly of the Republic 54, 2005: 2479. The PSD went even further. It claimed that the grandchildren of expatriates who were born abroad should acquire Portuguese citizenship by birth providing that one makes a declaration (*Parliamentary Debates*, Diary of the Assembly of the Republic 54, 2005: 2459). The new legislation has not included this proposal.

<sup>84</sup> In such cases, in order to have a subjective right to naturalisation, he or she must meet the general requirements of art. 6 (1) of the Nationality Act.

simple fact of having once been Portuguese is enough to prove a link with the Portuguese community. This clause also aims to avoid situations of statelessness (Ramos 2007: 209). To benefit from this mode of reacquisition, the applicant must not have acquired another citizenship. If the individual has lost Portuguese citizenship and has acquired foreign citizenship, then the government may grant a discretionary naturalisation (art. 6(6)).<sup>85</sup>

### ***Quasi-citizenship status of nationals of countries which have Portuguese as their official language***

Decolonisation had an enormous impact in citizenship legislation. It contributed to the creation of a privileged status for nationals of Lusophone countries, characterised by the conferral of a series of rights regarding political participation which had previously been given only to Portuguese nationals. A common language and history among Lusophone countries was the determining factor for maintaining mutual privileged ties, which was also established as a fundamental principle in Portuguese Foreign Policy (art. 7(3) of the Constitution). These ties led to the creation of a Lusophone status of citizenship, which has its origins in the 1971 Convention on Equal Rights and Obligations between Portugal and Brazil.<sup>86</sup> Art. 15(3) of the 1976 Portuguese Constitution gave citizens of Lusophone countries, through international agreement and reciprocity, rights that other foreigners did not have, with the only exception being access to higher positions in the government of the country. In response to demands by Brazilians, a treaty of friendship on equal rights was signed in 2000, strengthening the Luso-Brazilian citizenship status created by the 1971 Convention. Furthermore, the 2001 constitutional review reworded art.15(3) allowing the law to confer on citizens of Lusophone states with permanent residence in Portugal, broad citizenship rights which are not conferred on other foreigners, as long as reciprocity conditions are met. The only exceptions are access to ‘positions of President of the Republic, Speaker of the Portuguese National Parliament, Prime Minister, President of the Supreme Courts and service in the Armed Forces and Diplomatic Corps’.

The rewording of art. 15(3) of the Constitution was a decisive step in creating the citizenship of the Community of Lusophone Countries and gave a very broad range of political rights. The citizens of these countries who live in Portugal can achieve the same citizenship status as the Portuguese, as long as the same is provided for Portuguese citizens living in their countries. In particular, they can vote at local and national levels and be elected as members of parliament without having to acquire Portuguese citizenship. They also have access to certain professions such as to that of judge or police officer, among others, which entail exercising public authority.

As the reciprocity clause is only in place in relation to Brazil, currently only Brazilians enjoy this quasi-citizenship status. Decree-law 154/2003 and the Treaty of Friendship create two legal statuses for Brazilians with residence permits in Portugal which are conferred by the Home Office upon application: the status of equal rights and obligations<sup>87</sup> and the status of

<sup>85</sup> In this last example the applicant is still exempted from fulfilling the residence and language requirements, but does not have a subjective right to naturalisation.

<sup>86</sup> This created a true Luso-Brazilian citizenship status, giving Brazilian nationals with Portuguese residence permits broad political rights. They were denied access, however, to the following positions: President of the Republic, Member of Parliament, Member of the Government, judge of the Supreme Court, diplomatic representative and officer in the armed forces.

<sup>87</sup> The status of equal rights and obligations allows Brazilians to enjoy the same rights as Portuguese citizens, especially to hold positions in the civil service which are not predominantly technical (for example, as a judge or a policeman). A Brazilian with this status is only prevented from having the right to diplomatic protection and from holding political positions, serving in the armed forces or diplomatic corps (arts. 15-16 of Decree-Law

equal political rights.<sup>88</sup> These statuses are dependent on the acquisition of a residence permit, as Brazilian citizens, as with any other foreign nationals, do not have the right to enter and remain on Portuguese territory. Once they are legally resident in Portugal, Brazilians can apply for this quasi-citizenship status which they can then hold for as long as they have a residence permit. This status becomes extinct if the Brazilian citizen loses citizenship or no longer holds residence permit (due to expulsion or because it was withdrawn from him or her).

Citizens of Lusophone countries who do not have an equal political rights status and who reside in Portugal have the right to vote and stand in local elections if there is reciprocity. These political rights are also conferred on other foreigners, but the period of residence required by law before being able to exercise them is longer.<sup>89</sup> Unlike other foreigners, the nationals of Lusophone states can also participate in local referenda (art. 35 of Organic Law 4/2000).

Lusophone citizenship is different from European citizenship. On the one hand, it allows for various political rights to be exercised, not only at a local but also at a national level, as well as providing access to public offices which are not predominantly of a technical nature. On the other hand, and contrary to European citizenship, Lusophone citizenship does not provide any right to entry and permanent residence in Portuguese territory or to diplomatic protection in another country.

The move towards a concept of citizenship which is disengaged from nationality goes beyond the privileged status of nationals of Lusophone countries or inherent status of EU citizens. Any alien who resides in Portugal has the right to vote and stand for local elections if the reciprocity condition is met (art. 15(4) of the Constitution). The right to vote in local elections is conferred on them if they have held legal residence for more than three years (art. 2(1)(d) of Organic Law 1/2001) and they are eligible if they have resided legally in Portugal for more than five years, as long as they are nationals from countries which give the same entitlements to Portuguese nationals.<sup>90</sup>

Despite the character of quasi-citizens of Lusophone individuals, the 2006 reform of the Nationality Act has eliminated the special treatment that these citizens formerly had regarding the acquisition of Portuguese citizenship. The objective of such an adjustment was to fully respect the European Convention on Nationality, which forbids the discrimination on grounds of national origin.<sup>91</sup> This reform was not completely well received. The Social-Democratic

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154/2003). Brazilians who only have a general status of equal rights and obligations (without equal political rights) may vote and stand for elections in local elections in accordance with art. 15 (4) of the Constitution.

<sup>88</sup> Brazilian citizens, who have been living in Portugal for over three years and have the status of equal political rights, enjoy practically the same rights as the Portuguese (with the abovementioned exceptions), without losing their Brazilian citizenship and without needing to acquire Portuguese citizenship. In particular, they have access to non-technical posts in the civil service; can be elected to parliament, as mayor, or serve as government ministers. This status enables Brazilian citizens to fully exercise their political rights, and notably to vote and stand for election in local, regional and general elections, with the exception of noting or standing for election in presidential elections. This status is only conferred on Brazilians who have previously or simultaneously acquired the status of equal rights and obligations (art. 2(1) of Decree-Law 154/2003) and as long as they have lived in Portugal with a residence permit for at least three years (art. 17 of the 2000 Treaty of Friendship and art. 5(2) of Decree-Law 154/2003).

<sup>89</sup> According to art. 2(1)(c) of Organic Law 1/2001 (the law that governs the election of members of local authorities) the nationals of Lusophone states who have lived in Portugal for more than two years can vote in local elections. In order to stand for local government they must have resided in Portugal for more than four years (art. 5(1) of Organic Law 1/2001). At present Brazilian citizens (even those without equal political rights status) and Cape-Verdians enjoy these rights.

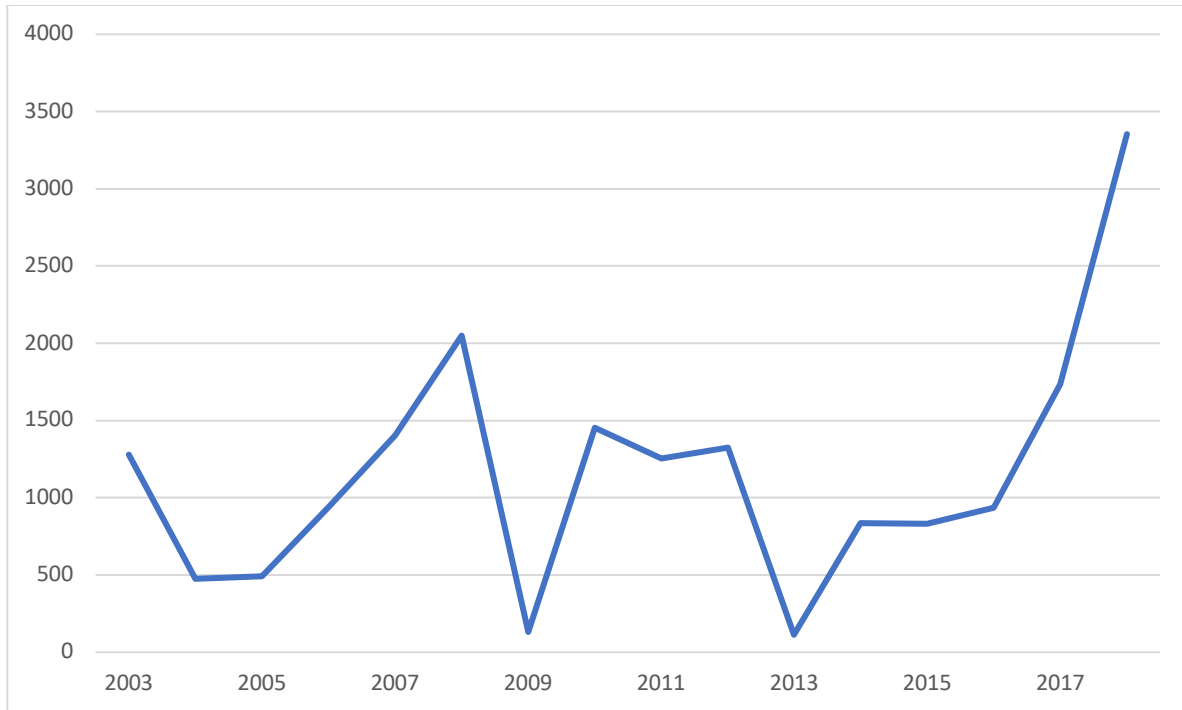
<sup>90</sup> Presently, the citizens outside the European Union who have the right to vote, according to reciprocity criteria are the citizens from Argentina, Chile, Colombia, Iceland, Norway, Peru, Uruguay and Venezuela and New Zealand.

<sup>91</sup> Minister of the Presidency, *Parliamentary Debates*, Diary of the Assembly of the Republic 54, 2005: 2460.



Party (PSD) claimed that the law should maintain the privileged regime and even extend it to the citizens of the European Union, since the Portuguese Constitution encouraged a more favourable treatment of both the citizens of the Portuguese speaking countries and the citizens of the European Union (art. 15).<sup>92</sup>

Figure 2: Attribution of equality status to Brazilian citizens (1996-2018)



Source: *Aliens and Borders Service*<sup>93</sup>

As we can see in Table 1, nationals from Cape Verde and Brazil represent a sizable share of the total foreign resident population. During the period considered, they represented more than one third of the resident foreign population. However, this share has consistently decreased since 1985. This is because the annual growth rate of the population of residents from Cape Verde is below the annual growth rates of the total resident foreign population.

<sup>92</sup> *Parliamentary Debates*, Diary of the Assembly of the Republic 54, 2005: 2471.

<sup>93</sup> <https://sefstat.sef.pt/forms/relatorios.aspx>

Table 1: Number of quasi-citizens in Portugal 1985-2018

<i>Year</i>	<i>Total of foreigners residents</i>	<i>Cape Verde</i>	<i>Brazil</i>	<i>Total of quasi-citizens</i>	<i>Quasi-citizens in % total</i>
1985	79,594	24,959	6,804	31,763	40%
1990	107,767	28,796	11,413	40,209	37%
1995	168,316	38,746	19,901	58,647	35%
2000	207,607	47,216	22,411	69,627	34%
2003	250,697	53,858	26,561	80,419	32%
2007	435,736	63,925	66,354	130,279	30%
2008	440,277	51,353	106,961	158,314	36%
2009	454,191	48,845	116,220	165,065	36%
2010	445.262	43.979	119.363	163.342	37%
2011	436.822	43.920	111.445	155.365	36%
2012	417.042	42.857	105.622	148.479	36%
2013	401.320	42.401	92.120	134.521	34%
2014	395.195	40.912	87.493	128.405	32%
2015	388.731	38.674	82.590	121.264	31%
2016	397.731	36.578	81.251	117.829	30%
2017	421.711	34.986	85.426	120.412	29%
2018	480.300	34.663	105.423	140.086	29%

*Source: ABS, Statistics Report, several years*

### 3.3. Procedural and institutional arrangements

#### *The legislative process*

The legislation for the acquisition, loss and reacquisition of Portuguese citizenship belongs to the parliament's exclusive competence and takes the form of an organic law (art. 166(2) of the Constitution).

Organic laws are general parliamentary laws that, as is the case for other laws, require a general vote, a vote on each individual article, and a final overall vote, as well as promulgation by the President of the Republic in order to enter them into force. They are laws of increased importance (art. 112(3) of the Constitution) and the articles must be voted on individually in the plenary (not the committee) stage. The final vote must be passed by an overall majority of the sitting members of parliament (and not just by those who are in the chamber at the time of the vote) (Canotilho 2003: 750).

Members of parliamentary groups or the government can submit proposals or bills on citizenship law.

The implementation of citizenship laws requires another legislative act. It is currently a government act, Decree-law 237-A/2006 of 14 December, which establishes the conditions of Nationality Regulation<sup>94</sup>.

### ***Institutional arrangements***

In Portugal, only the central authorities are competent to implement citizenship law. The 2006 reform transferred the competence on naturalisation from the Ministry of Home Affairs (and the Aliens and Borders Service) to the Ministry of Justice. As Isabel Carvalhais points out, ‘the passage from the Ministry of Internal Affairs to the Ministry of Justice holds an important political meaning. Frequently pro-immigrants’ rights organisations have called attention to the fact that keeping matters on the acquisition of nationality by foreigners under the Ministry of Internal Affairs, more specifically under the control of the ABS, which is a police force, was a negative sign that revealed how the state was still looking at potentially new citizens not as potential nationals but as aliens, thus as external matters to be treated by the instruments of national security. Instead, acquisitions of nationality should be under the umbrella of the Ministry of Justice, as this is after all the ruling ministry for any other Portuguese citizen who might have issues about his or her nationality’.<sup>95</sup>

The Registrar of the Central Registry Office has broad-ranging powers in the domain of citizenship. First, he or she must issue an opinion on any issues related to citizenship if these have been submitted by the consulates, in the case of doubt regarding the Portuguese citizenship of those who wish to be enrolled or registered at the consulate (art. 23 of the Nationality Act). Second, the Registrar can issue Portuguese citizenship certificates upon application (art. 24). Third, the Registrar of the Central Registry Office must inform the Public Prosecutor about any issues which could lead to opposition to the acquisition of citizenship after birth, by declaration or adoption (art. 57(7) of the Nationality Regulation).

The Nationality Act allows for a system of judicial appeal against any act concerning the acquisition and loss of citizenship. Both the interested person and the Public Prosecutor have the right to appeal the decisions taken by authorities in matters of citizenship before the administrative courts (with no deadline) (art. 26 of the Nationality Act and art. 61 of the Nationality Regulation).

### ***The procedures and registry***

The effectiveness of all activities related to the granting, acquisition and loss of citizenship depends on registration. Furthermore, if the acquisition of nationality by birth has effect from the time of the birth (art. 11 of the Nationality Act), the other forms of acquiring citizenship only have effect from the date of the registration (art. 12 of the Nationality Act).

All acts related to the acquisition and loss of citizenship are subject to registration on the Central Register of Citizenship, which is managed by the Central Registry Office (art.16 of the Nationality Act). Declarations required for granting Portuguese citizenship by *ius sanguinis* are subject to registration when the birth is abroad. The same goes for acquisition after birth

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<sup>94</sup> This act was already amended several times. Last version corresponds to the amendments made by Decree-Law n. 71/2017, of 2<sup>nd</sup> June.

<sup>95</sup> Carvalhais 2010: 16.

(marriage, partner and filial transfer), as well as naturalisation and the declaration of loss of citizenship (art. 18(1) of the Nationality Act and 46 of the Nationality Regulation).

Those interested can make their declarations at the extension of the Central Registry Office (at the National Immigrant Support Centre), at the Conservatories of Civil Registry and at Portuguese consular services. All of these declarations are then dispatched to the Central Registry Office (art. 32(1) of the Nationality Regulation). The new system also allows applicants to send their declarations (by mail or e-mail<sup>96</sup>) directly to the Central Registry Office (art. 32(2) of the Nationality Regulation).

The Central Registry Office has the powers of investigation, decision and registration of such declarations. By contrast, the registration of naturalisation is automatic once the naturalisation has been granted by the Minister of Justice. Thus, the Nationality Regulation rules on two different procedures: the registry procedure and the naturalisation procedure.

With regard to the registration procedure, the declarations are preliminarily rejected if they do not meet the formalities required or if the documents proving the necessary facts are not presented (art. 32(3) of the Nationality Regulation). The applicant is notified of the rejection and has the right to be heard within 20 days. After analysing the process, the conservator must decide the outcome within 60 days. If he or she concludes that the registration is to be refused, the applicant has the right to be heard within 30 days. After those 30 days, and after analysing the applicant's answer, the conservator issues a decision to authorise the registration or not (art. 41 of the Nationality Regulation).

The naturalisation procedure is set out by art. 27 of the Nationality Regulation. It is initiated through an application addressed to the Minister of Justice (art. 18 of the Nationality Regulation). All the documents proving that the requirements for naturalisation have been met must be provided with the application.<sup>97</sup> The Conservator of the Central Registry then analyses the application within 30 days and will refuse it preliminarily if it is incomplete or if the required documents are not included. In such a case, the applicant is notified and has the right to be heard within 20 days. The Central Registry Office will then request information from other public authorities, which is to be sent within 30 days. After this information is received, and within 45 days, the Central Registry Office issues an opinion on the viability of the application. If the opinion is negative, the applicant is notified and has the right to be heard within 20 days. After this period of time, and after taking into consideration the defence of the applicant, the Central Registry Office sends the application to the Ministry of Justice. The naturalisation procedure ends with a decision of the Minister of Justice who grants or refuses the application. Once the application has been sent to the Minister of Justice, no deadline is stipulated for his decision.

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<sup>96</sup> This method is dependent on the approval of an act (*Portaria*) of the Ministry of Justice, which has not yet occurred.

<sup>97</sup> Proof of having sufficient knowledge of the Portuguese language is documented through a certificate: (1) of a public or private/cooperative (officially recognised) educational institution; (2) of Portuguese language as foreign language, issued after being approved by an evaluation centre recognised by the Minister of Education (art. 25 of the Nationality Regulation). For those who did not attend an educational establishment or do not possess a certificate of Portuguese as foreign language, the government has created a system of diagnostic tests. These correspond to the model jointly approved by the Ministry of Justice and the Ministry of Education (Portaria n. 60/2011 of 2 February) and are done in one of the referred educational institutions (these tests used to be done before public officers). The certificate of approval on the diagnostic test is issued by the consular services when the applicant resides abroad. Statelessness is proven through documents issued by the authorities of the countries with which the applicant had relevant links, as the country of origin, or the country of the last nationality or of the nationality of his or her ancestors (art. 36 of the Nationality Regulation).

The granting of naturalisation is registered by the Central Registry Office automatically (art. 27 (13) of the Nationality Regulation).<sup>98</sup>

The registration fee for the procedures regarding the acquisition of citizenship after birth is 250 Euros for adults and 200 Euros for minors. The fee for registering the loss of citizenship is also 150 Euros.<sup>99</sup> Applicants who can prove economic deprivation can be exempted from paying the registration fees.<sup>100</sup>

These procedures respect the principle of due process, as the applicant has the right to respond to negative decisions that might affect him or her. All the principles of the Portuguese administrative procedures code are in force. These include, for example, access to information, assistance and representation and the right to receive a statement of reasons if a negative decision has been taken (art. 41(4) of the Nationality Regulation).<sup>101</sup> Furthermore, the registration of citizenship or of the facts that determine conferment of citizenship of origin is only valid if the legal requirements for acquisition of Portuguese citizenship are met. If these requirements are not met, registration can be declared null and void (art. 55 of the Nationality Regulation and art. 87 of the Civil Registry Code).

The citizenship acquisition procedure by option, by adoption or by naturalisation is suspended for five years if the applicant has been sentenced to more than one year in prison (art. 13(1) of the Nationality Act).<sup>102</sup> This suspension also applies to the deadline established for the opposition of the Public Prosecutor. The acts adopted in violation of these arrangements are null and void (art. 13(3)).<sup>103</sup>

The new Nationality Regulation has also created mechanisms to simplify procedures. For example, the applicant is exempted from presenting certificates of acts of national civil registry and of Portuguese criminal records, as well as documents proving a legal stay within the Portuguese territory, as the Public Administration can have direct access to this information (art. 37 of the Nationality Regulation). In particular situations, the Ministry of Justice can allow for an exemption for documents which should be presented for the naturalisation procedure as long as there are no doubts regarding the facts concerned (art. 26 of the Nationality Regulation). This possibility is useful, for example, when the immigrants are from countries where registries

<sup>98</sup> It is no longer published in the Official Journal (*Diário da República*), as it was before the 2006 reform.

<sup>99</sup> Art. 18 of Decree-Law 322-A/2001, of 14 December, as last amended by Decree-Law n. 157/2019, of 22 October (Registration and Notary Regulation). In naturalisation procedures the costs can be higher when the applicant takes a Portuguese language diagnostic test, whose fee is established as 65 Euros (art. 4(4) of *Portaria* n.º 176/2014, 15 December and *Aviso* n.º 16726-A/2019 of 18 October).

<sup>100</sup> Art. 10 (3) of the Registration and Notary Regulation.

<sup>101</sup> Respectively arts. 61, 52 and 124 of the Administrative Procedures Code.

<sup>102</sup> This legal arrangement aims at a harmonisation with immigration law, which provides in art. 80 that a permanent residence permit can be granted to foreign citizens who, during the last five years of residency in Portuguese territory, have not been convicted for crimes punished with a penalty or penalties that, individually or cumulatively, exceed one year in prison. If such a conviction precludes the acquisition of a permanent residence permit, then, a fortiori, it should also preclude the acquisition of nationality (Canas 2007: 529).

<sup>103</sup> This arrangement is useful, as naturalisation is now a subjective right once its requirements are met. Under the previous law it could be unnecessary, since naturalisation was a discretionary power, so the Minister could freely appreciate such situations. However, its application to filial transfer and adoption is doubtful, since these situations concern minors and involve the principle of the family unity. Some authors also argue that the five-year suspension period is too long and postpones the acquisition of nationality for too long (Ramos 2007: 216).

had been destroyed due to wars or revolutions.<sup>104</sup> Nevertheless, there are still many problems for obtaining documents from the authorities of the countries of origin-<sup>105</sup>

Due to these procedural arrangements, the waiting time for the acquisition procedures was substantially reduced, from an average of two years to six months (regarding adults) and three months (regarding minors).<sup>106</sup>

Art. 40 of the Nationality Regulation allows the possibility of creating extensions of reception centres of the Central Registry Office along with other public authorities. One of them has already been created in the National Immigrant Support Centre. Art. 40 also provides for the negotiation of protocols between the Directorate General of Registry and Notaries and other entities, such as private associations, for the purpose of providing information on the applications for acquisition and loss of citizenship and transmission of the respective statements to the Central Registry Office. The purpose of this norm is to involve the recognised associations of immigrants, which are closer to their communities in Portugal.<sup>107</sup>

Regarding the Portuguese language test required for naturalisation, a system managed by the Minister of Education has been created, which includes an Internet site<sup>108</sup> where potential citizens can find information about the places and dates where the language test will take place, to register for the test and to consult the results.

### ***The proof of holding Portuguese citizenship***

The acquisition of citizenship at birth for the descendants of Portuguese born in Portugal or abroad (if their father or mother are serving the Portuguese state), of those born in Portugal without a citizenship (or foundlings), and of those who were born in Portugal to foreign citizens who were residing legally in Portugal for two years is proven by the evidence of the birth record at the civil registry (art. 21(1) of the Nationality Act). Acquisition of citizenship at birth for the descendants of Portuguese born abroad, if their birth was registered at the Portuguese civil registry, is proven by the birth record at the civil registry or by the registry of the declaration required for the acquisition (art. 21(3)). The acquisition of citizenship for immigrants of the third generation is also proven by a birth record in the civil registry, which mentions that one of the parents was born and resides in Portugal (art. 21(4)).

Acquisition of citizenship after birth by expression of intent (spousal and filial transfer) or through naturalisation, as well as the loss and reacquisition of citizenship are proved by the register (art. 22(1) of the Nationality Act). This registration is no longer made upon the request of the parties concerned. It is instead made by an entry or by registering an attachment to their birth records (art. 19 of the Nationality Act and art. 48 of the Nationality Regulation). Registration therefore plays a key role within the system of citizenship law. It allows the Portuguese state to know who their nationals are, and it allows those concerned to prove their possession of Portuguese citizenship (Ramos 1992: 206; Reis 1990: 48).

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<sup>104</sup> State Secretary of the Ministry of Justice, meeting of the Consultative Council for Immigration Affairs of 31 October 2006, ACIME. With regard to the impossibility of providing a registration of birth, the Nationality Regulation allows the mechanism of birth inscription, which is made during the nationality procedure itself (art. 9 of the Nationality Regulation).

<sup>105</sup> Healey 2011: 97.

<sup>106</sup> Healey 2011: 97.

<sup>107</sup> State Secretary of the Ministry of Justice, meeting of the Consultative Council for Immigration Affairs of 31 October 2006, ACIME.

<sup>108</sup> <http://www.provalinguaportuguesa.gov.pt>.

#### 4. Current political debates and reform plans

Since the entry into force of the new legislation, concerns about access to citizenship and citizenship rights were again discussed by the political parties in 2008. First, at the end of 2008 the Centre Social Democratic-Popular Party (CDS-PP) presented a new bill to amend the Nationality Act.<sup>109</sup> Its main objective was to add two more requirements for naturalisation (namely, knowledge about fundamental values of the Portuguese society and sufficient means of subsistence). The CDS-PP also proposed that the crimes precluding the acquisition of nationality after birth should comprise those which carried a prison sentence of one year or more (instead of the current three years).<sup>110</sup> Furthermore, the party proposed the suspension of the acquisition procedure during a pending criminal procedure in which the applicant was a suspect, regardless of the penalty foreseen by the law. This bill was not approved by the parliament.<sup>111</sup>

Second, the Social Democratic Party (PSD) presented a bill concerning the citizenship rights of expatriates.<sup>112</sup> One of the suggestions was to allow the acquisition of Portuguese citizenship by the grandchildren of expatriates through a simple expression of intent. The other political parties claimed that this arrangement was already possible through naturalisation. Allowing such an acquisition through a declaration would open access to Portuguese citizenship to those who had no effective link to Portugal.<sup>113</sup> It would also widen the political, educational and cultural rights of expatriates. This bill was also not approved.

Also in 2008, another debate took place in the political arena concerning the citizenship rights of expatriates. The President of the Republic exercised his right of veto regarding an amendment to the electoral law of the parliament.<sup>114</sup> This amendment would have imposed a vote in person for Portuguese voters residing abroad, who previously could vote by correspondence. The president decided not to promulgate this law, since it would violate national imperatives for reinforcing the ties between the country and its citizens residing abroad, erode the citizenship rights of the expatriates, and promote the abstention from civic participation of the Portuguese community.<sup>115</sup>

In a study published in 2011 by the Observatory on Immigration, Claire Healey raised some questions that might characterise the future debates on the citizenship policy. She stresses that Portugal must develop naturalisation campaigns and attract foreigners for acquiring the Portuguese citizenship, especially the nationals of other European member states, whose naturalisation rate is still very low. Moreover, she suggests some topics of reflexion, such as the reinforcement of the *ius soli* principle for the second generation of immigrants, the automatic transfer of citizenship to spouses and minor children and the creation of a subjective right to naturalisation by those who reside in Portugal for over ten years, even if illegally.

Nevertheless, it seems that the debates that take place in the political arena still focus mainly on reinforcing ties with the communities of Portuguese expatriates. Regarding the

<sup>109</sup> Bill n. 592/X (4.<sup>a</sup>), 2 October 2008.

<sup>110</sup> The objective was to adjust the Nationality Act in accordance with the immigration law. According to the latter, if the applicant has been convicted for a crime which carries a prison sentence of one year or more, then he or she can not acquire a permanent residence permit (art. 80(1)(b) of Law 23/2007 of 4 July).

<sup>111</sup> *Parliamentary Debates*, Diary of the Assembly of the Republic 25, 2008: 35. For more details, see Carvalhais 2010: 21.

<sup>112</sup> Bill n. 482/X (3.<sup>a</sup>) (Framework Law of the Portuguese Citizenship abroad).

<sup>113</sup> *Parliamentary Debates*, Diary of the Assembly of the Republic 70, 2008: 41.

<sup>114</sup> Decree n. 261/X of the Assembly of the Republic.

<sup>115</sup> Message of the President of the Republic, Diary of the Assembly of the Republic – II Series A 65, 2009: 2

acquisition by foreigners residing in Portugal, the current system has been broadly considered as highly favourable. Hence, several years after the law came into force, there are no plans for new amendments to the Nationality Law. Associations promoting the rights of immigrants no longer concentrate on the law, but on the deficiencies in its implementation.<sup>116</sup>

## 5. Conclusions

The main trend of the 2006 reform has been a new balance between the *ius soli* and the *ius sanguinis* principles. In contrast to the 1981 reform, which took place in a typical emigration scenario, this reform is aimed at adjusting the citizenship legislation to the progressive transformation of Portugal into a country of immigration. This was a profound reform, showing a commitment to the integration of foreigners in Portuguese society. The 2018 reform continues to seek the goal of this integration, as showed by enlarging the *ius soli* criterion. This commitment is shown, first of all, by the reinforcing of the *ius soli* principle, which is clear in the following aspects:

- (1) the possibility for third generation immigrants to automatically acquire citizenship;
- (2) the reduction of the period of residence in Portugal by the parents of second generation immigrants;
- (3) the creation of the naturalisation of minors;
- (4) the possibility of granting naturalisation to immigrants born in Portugal and who reside illegally within Portuguese territory.

Nevertheless, the reform did not imply the return to the system in force until 1981. Birth on Portuguese soil still does not imply in itself the acquisition of Portuguese citizenship. This was a responsible option because of the implications that such an arrangement would have for the other Member States. The *ius sanguinis* principle is still prevalent. Despite being the most profound reforms since 1981, neither the 2006 reform, nor the 2018 reform has not changed the spirit and the identity of the Nationality Act. That is perhaps why this Act was not replaced by a new one, but simply amended (Ramos 2007: 199).

Major progress in the new legislation concerns naturalisation. On one hand, its nature has been changed. With the 2006 reform, it was converted into a subjective right. Furthermore, the correspondent requirements were deeply reformed, favouring their accomplishment by the individuals concerned. Some of them were banished; others were clarified, withdrawing some discretion from the authorities. These reforms reinforced the fundamental right to citizenship, which was, until now, only guaranteed by laws regarding the loss of citizenship and the prevention of stateless (Ramos 2007: 225).

In some circumstances the law does not demand a legal stay in Portuguese territory to grant Portuguese citizenship. It only takes into account how well integrated the foreign applicants are in the society, irrespective of their legal situation. This happens in three situations:

- (a) automatically, and by birth, if they are third generation immigrants;

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<sup>116</sup> Carvalhais 2010: p. 28.



- (b) through a subjective right to naturalisation, e.g., if they are minors who have completed the first cycle of compulsory education in Portugal;
- (c) for individuals who were born in the Portuguese territory, from foreign parents and who have resided there, for at the least five years prior to the application.

These new arrangements respect the principle of effective citizenship, as they aim at favouring those who are deeply integrated into the Portuguese community and have a genuine and effective link to the country (Gil (2010): 730).

The new legislation shows us that the Portuguese law is committed to the democratic inclusion of those who have chosen Portugal as a place to live. That is why it was stated that ‘Portugal jumped up from the “medium” to the “liberal” category’ and such regime was qualified as ‘one of the most liberal citizenship policies of the EU-15’ (Howard 2009: 87). Also, the Migrant Integration Policy Index of 2011 and 2014 considered the Portuguese citizenship law as the most inclusive citizenship policy amongst 31 European and North America citizenship laws. This index qualified the Portuguese legal regime on nationality acquisition with 86 points out of 100<sup>117</sup>.

The Nationality Act no longer distinguishes between the citizens of the Portuguese speaking countries and other categories of aliens. The objective was to fully respect the European Convention on Nationality. However, this arrangement was a step back on reinforcing the ties between the Portuguese speaking countries, which have been institutionalized through the creation of a Community of Portuguese-Speaking Countries and of a constitutional basis for the respective quasi-citizenship. ‘Granting quasi-citizens almost full citizenship rights while making it difficult for them to naturalise would contribute to sustaining exclusionary ethno-cultural concepts of national community’ (Bauböck, Ersboll, Groenendijk & Waldrauch 2006: 36). We believe that at least the naturalisation of the quasi-citizens should be favoured, for example by requiring shorter periods of residence. This arrangement could also be justified with the overall demographic pattern of immigration, as the immigration from the Portuguese-Speaking countries corresponds to the large majority of the total immigration.<sup>118</sup> The immigration from these countries commonly turns into permanent immigration in Portugal (Silva, 2004: 111). This scenario does not seem to violate the European Convention on Nationality.<sup>119</sup> Thus, a non-arbitrary distinction is allowed, and there are sufficient grounds to permit more favourable conditions for the citizens of the Portuguese speaking countries.

However, in other aspects the new legislation did not go as far as it could.

First, Portuguese law still does not have a special clause for the easier naturalisation of recognised refugees, as acknowledged by the Geneva Convention and by the European Convention on Nationality. The same can be said regarding the stateless persons.<sup>120</sup> As these individuals cannot claim the protection of a state of origin, they have stronger claims to the nationality of their host state than other migrants.<sup>121</sup> However, the Central Registry Office has been using a flexible interpretation of who can be considered as a “stateless person”, for the

<sup>117</sup> <http://www.mipex.eu/portugal>

<sup>118</sup> The communities of immigrants from Brazil, Cape Verde, Angola and Guinea-Bissau corresponded to 43 per cent of the total immigrants legally residing in Portugal in 2007 (*Serviço de Estrangeiros e Fronteiras* 2007: 21).

<sup>119</sup> Art. 5(1) stipulates: ‘The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin’.

<sup>120</sup> Except those who were born in Portuguese territory (who acquire Portuguese citizenship at birth - art. 1(1)(f) of the Nationality Act) and those who have held Portuguese citizenship and have never acquired any other citizenship (who are exempted from fulfilling some requirements for naturalisation - art. 6(3) of the Nationality Act).

<sup>121</sup> Access to citizenship in practice is not facilitated, as statelessness has to be proved. However, in difficult cases, the documentary evidence is exempted (art.26 of the Nationality Regulation).

purposes of acquisition by birth of those who are born in Portugal and not have another nationality (art. 1(1)(g)). Children who are born in Portugal and cannot register their birth and, thus, acquire citizenship of their own country, due to war or conflict, are considered as “de facto” stateless persons. This solution has been applied to children of refugees, as for example children born to Syrian parents.

Second, the acquisition of citizenship after birth is still dependent on the non-exercise of public opposition. This is a mechanism designed to stop the introduction of undesirable persons into the Portuguese society. It was used quite frequently in the past. It is difficult to justify the use of this mechanism in situations where the principle of family unity is at play. Such a mechanism does not exist in naturalisation procedures where mere residence in Portuguese territory seems to be enough to acquire citizenship. The only way to use this mechanism fairly is by balancing it with the principle of the family unity. The former has to be serious enough to preclude the prevalence of the latter. However, the 2018 reform clarified that the Public Prosecutor has the burden of proof as regards the nonexistence to effective links to the Portuguese society.

Finally, having reduced the legal residence requirements and considering sufficient a legal residence based in any type of legal title, the periods spent in other Member States do not count towards the overall residence requirement. Furthermore, the law does not provide special arrangements for third country nationals who are long-term residents.<sup>122</sup> Hence, exercising the right of free movement under the European Community Law can create disadvantages concerning the acquisition of Portuguese nationality.

Nonetheless all these shortcomings, the debate over the Nationality Law has been focusing, in the last years, on the Migrants’ and Anti-Racism’s Associations’ claims for the consecration of a pure *ius soli*. Several of these associations argue that the Portuguese nationality law is still discriminatory, by making the citizenship a privilege to those that do not have migrant origin. The 2018 reform aimed at responding to some of these claims: as seen, it has consecrated a new way of acquisition at birth that corresponds to a moderate version of *ius soli*: all persons born in Portuguese territory acquire *ex lege* Portuguese nationality provided that at the time of birth one of the parents has been legally resident for at least two years. Second, it was facilitated naturalization, by lowering the residence requirement to five years and by allowing for those who were born and resided in Portugal for the past five years to accede it.

However, the debate continues. In late 2019, several parties from the left-wing presented new proposals to amend the Nationality Law. In general terms, the all claim, again, for the consecration of a *ius soli* solution. In the case of the Communist Party, an acquisition based in such criterion would be dependent on the residence, irrespective of legal title, of at least one of the parents in the Portuguese territory at the time of the birth.

One other topic that has been permanently discussed by some of the above-mentioned associations has been the “clean criminal record” requirement, foreseen in art. 6 for naturalisation purposes. According to some arguments, this requirement would be unconstitutional, as it would represent an automatic deprivation of rights due to a criminal conviction. This is a serious controversial topic, as the Constitution does prohibit the so-called “criminal convictions’ automatic effect” (art. 30(4)). In this respect, a recent ruling of the Constitutional Court considered unconstitutional the interpretation according to which a foreigner loses the right to acquire the Portuguese nationality by naturalization for having been

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<sup>122</sup> See the Council Directive concerning the status of third country nationals who are long-term residents (EC 2003/109, 25 November 2003).

of having sentenced of 3 years of imprisonment, even though it has been decided not to transcribe the conviction into the criminal record<sup>123</sup>.

Perhaps we will assist to further developments again soon. As we write these last words, the new proposals are being discussed in the Parliament. If the trend that has characterised the last two years is to be maintained, then the Nationality Law will not stabilize any time soon.

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<sup>123</sup> Ruling n. 497/2019, of 26th September.

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