

Acquisition and Loss of Nationality  
Policies and Trends in 15 European States

Volume 2: Country Analyses

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# Acquisition and Loss of Nationality

## Policies and Trends in 15 European States

Volume 2: Country Analyses

edited by  
*Rainer Bauböck*  
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## 12 Portugal

*Maria Ioannis Baganha and Constança Urbano de Sousa<sup>1</sup>*

### 12.1 Introduction

The Nationality Law in force until 2006<sup>2</sup> foresees a mixed system for acquisition of nationality at birth, placing greater emphasis on a *ius sanguinis* concept of nationhood to the detriment of an imperial tradition of *ius soli*. It therefore goes against the Portuguese tradition of favouring *ius soli*, dating back to the seventeenth century and continued by the 1959 Act, which foresaw automatic and *ex lege* acquisition of Portuguese nationality by the children of a Portuguese or foreign father (or Portuguese or foreign mother, when the father was stateless, of unknown nationality or unknown) born in Portuguese territory.

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

Naturalisation depends on a discretionary decision made by the Portuguese Minister of Home Affairs. Applicants, who meet the respective legal requirements for naturalisation, do not have a subjective right. Even if a foreign national meets the requirements for naturalisation, the Government may, merely based on one's own interests, deny him or her the right to Portuguese nationality.

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.'<sup>3</sup> The fact that a Portuguese citizen lives abroad in no way undermines these rights. His or her descendants are Portuguese at birth, if they declare



that they wish to be Portuguese or if the birth is registered in the Portuguese register of births. In addition, a foreign spouse has the right to opt for Portuguese nationality, should he or she have been married for at least three years, but there are legal bases for the Portuguese State to oppose it. 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. For local elections they must be registered on the electoral lists. They also enjoy special representation in Parliament by electing four members.<sup>4</sup>

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

Nationals of Lusophone countries living in Portugal enjoy a quasi-citizenship status with wide-ranging rights as far as political participation and access to public office are concerned, from which other foreign citizens are excluded. Art. 15 (3) of the Constitution sets out that 'Citizens of Lusophone countries may, provided there is reciprocity, be granted rights not otherwise conferred on aliens, except the right to become President of the Republic, President of the Parliament, Prime-Minister, President of the Supreme Courts, and to serve in the armed forces and the diplomatic service.' Currently, the terms of reciprocity have been met by Brazil. 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 said 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. However, this movement towards a concept of citizenship that is disengaged from nationality goes beyond the special status of Brazilians or the inherent status of EU citizens (which implies the right to vote and stand for election in local and European Parliament elections). According to art. 15 (4) of the Constitution, any alien who resides in Portugal has the right to vote and be elected in local government elec-

tions, provided that there is reciprocity, i.e., that a Portuguese national can also vote or be eligible in the alien's country of nationality.

## 12.2 Historical development of Portuguese nationality law

### 12.2.1 *The roots of Portuguese nationality law: the 1603 Ordinations of King Philip*

The 1603 Ordination ordered by King Philip (compilation of legislation) led to the first legal arrangements on nationality (Title LV of the Second Book). Only acquisition of nationality at birth was regulated, establishing a mixed system giving prevalence to *ius soli*. Children with a Portuguese father (*ius sanguinis a pater*<sup>5</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 the father (or mother, if the child was illegitimate) was in the King's or Crown's service.

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

With the rise of liberalism, arrangements on nationality were enshrined in the monarchical constitutions of the nineteenth century.

### 12.2.2 *Nationality law in the monarchical constitutionalism of the nineteenth century*

The 1822 Constitution signed on 23 September marked the beginning of Portuguese constitutionalism and stayed in force until June 1823, when the counter-revolutionary movement for restoring absolute monarchy decreed its obsolescence (Canotilho 2003: 128). In 1836, following the liberal revolution in September, the 1822 Constitution was restored.

Regarding acquisition of nationality at birth the 1822 Constitution keeps the mixed system inherited from the Ordinations of King Philip, although it 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. In comparison to the previous legislation 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 met one condition: that they took up residence in Portugal.<sup>6</sup> At the same time, the scope of *ius soli* was reduced, since

children born to a foreign father in Portugal were only considered Portuguese if they met two conditions: namely that they lived in Portugal and upon reaching the age of majority declared that they wanted to be Portuguese (art. 21 (V)). The fact 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) grants Portuguese nationality to freed slaves. This could be considered as acquisition at birth, since, legally speaking, the slave was only 'born' and became a person, when freed (Ramos 1992: 22).

Regarding the acquisition of nationality after birth, art. 21 (VI) of the 1822 Constitution foresaw discretionary naturalisation. Naturalisation could only be granted to foreign adults living on Portuguese soil. In addition to these requirements, foreigners (unless they were children of a Portuguese father who had lost Portuguese nationality) had to meet one of the following conditions: being married to a Portuguese woman; or having acquired a trading, farming or industrial establishment in Portugal; or having performed relevant services to the nation.

Art. 23 foresaw two grounds for loss of Portuguese nationality: naturalisation in another country and the acceptance, without government permission, of employment, honour or pension from a foreign government.

The 1826 Constitutional Charter, in force for two short periods (1826 to 1828 and 1834 to 1836), was restored in 1842 and remained in force until the republic was declared in 1910. It kept the mixed system of acquisition of nationality at birth, though it placed greater emphasis on *ius soli*, since it considered all those born on Portuguese soil to be Portuguese.<sup>7</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. *Ius sanguinis* was only sufficient criterion if the father was abroad on the Crown's service. In such cases, the acquisition of Portuguese nationality was not subject to any conditions.

The only way foreseen in the Charter to acquire nationality after birth was naturalisation, with art. 7 (2) referring to ordinary law to set the conditions for conferment. The Decree of 22 October 1836 foresaw three requirements for a foreign citizen to be naturalised: age of maturity; two years' residence<sup>8</sup> (unless descended from a Portuguese) and the ability to acquire means of subsistence (art. 1). Unlike the 1822 Constitution, the Charter does not mention the acquisition of nationality by foundlings (encompassed by the broad scope of *ius soli*) and freed slaves.

Concerning the loss of nationality, art. 8 foresaw, in addition to the causes listed in the 1822 Constitution, in loss 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* clearly dominated nationality 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 the other nationality. Like the 1822 Constitution, the 1838 Constitution also granted Portuguese nationality to foundlings<sup>9</sup> and to freed slaves. Lastly, art. 6 (VI) foresaw naturalisation as a means of acquiring Portuguese nationality after birth, referring to the ordinary law for the relevant requirements.<sup>10</sup>

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

### 12.2.3 *The 1867 Civil Code: mixed system with prevalence of ius soli*

The 1867 Civil Code adopted a mixed system of acquisition of nationality at birth, with prevalence being given to *ius soli*, although it was of less influence than in the Charter (Ramos 1992: 30). This solution was imposed by the principle of constitutionality which was the determining criterion set out in the 1826 Constitutional Charter in force at the time (Ramos 1994: 117).

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 is not in Portugal on his country's service) were Portuguese, unless they declare that they were not.<sup>11</sup> This possibility of opting for the father's nationality by expression of intent by the person in question (if over the age of majority) or by the legal agent (if under age) reduced the weight of *ius soli* (Ferreira 1870: 40; Gonçalves 1929: 518), compared to the Constitutional Charter (which did not foresee such a possibility). Lastly, all

those who were born on Portuguese soil to unknown parents or parents of unknown nationality were also deemed Portuguese.

The Civil Code also embodied *ius sanguinis a pater*: children born abroad to a Portuguese on the Crown's service were considered 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>12</sup> would only acquire Portuguese nationality at birth should they take up residence in Portugal or declared (personally if an adult or via their legal agent if under-age) that they wanted to be Portuguese (art. 18 (3)).<sup>13</sup> In this case, acquisition of Portuguese nationality via *ius sanguinis* depended upon a tacit choice (taking up residence in Portugal) or an expression of intent, and took effect from birth (Gonçalves 1929: 523).

The Civil Code foresaw two cases of acquiring nationality after birth, specifically *ex lege* acquisition of Portuguese nationality by a foreign woman who marries a Portuguese man and naturalisation via a discretionary Government act,<sup>14</sup> provided the foreign national met the following legal requirements set out in art. 19:<sup>15</sup> specifically, 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>16</sup> 4) having a clean criminal record proved by a police record from the country of origin and in Portugal; 5) having performed all military duties in the country of origin.

Art. 22 of the Civil Code foresaw four ways of losing nationality. In all of these cases, the same provision foresaw its reacquisition, which meant that the legislator of 1867 did not foresee loss of nationality as definitive (Ramos 1992: 35). The first cause of loss of Portuguese nationality was naturalisation in another country. 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. Those who had lost their Portuguese nationality through naturalisation in a foreign country could reacquire it by taking up residence in Portugal and expressing their wish to reacquire it. This was *ex lege* reacquisition, although it was subject to these two legal requirements. The second *ipso jure* cause of loss of nationality was accepting, without the government's permission, public office, pension or honour from a foreign government. Unlike the previous case, the Civil Code only foresaw reacquisition via a discretionary Government act, which shows the legislator's particular contempt for this form of loss of nationality. The third cause for loss of nationality was expulsion by judicial decision. This was merely a temporary loss, in that it was only valid whilst the conviction had effect. Once the sentence had been served, the person in question automatically and *ex lege* reacquired Portuguese nationality. Lastly, the Civil Code brought in a

new form of *ex lege* loss of nationality: the marriage of a Portuguese woman to a foreign man (unless she did not acquire the nationality of her husband as a result of the marriage, in which case she would keep her Portuguese nationality). The woman would reacquire Portuguese nationality should the marriage be dissolved, provided she took up residence on Portuguese soil and made an expression of intent.

#### 12.2.4 Law 2098 of 29 July 1959: mixed system with prevalence of *ius soli*

As for the acquisition of nationality at birth, the 1959 Act kept the traditional mixed system, with greater emphasis on *ius soli* (Proença 1960: 21; Ramos 1996: 601). In fact, according to art. I of the 1959 Act, Portuguese nationality 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 nationality),<sup>17</sup> the child of a stateless or unknown father or of unknown nationality, and the child of a foreign father (or a foreign mother, should the father be stateless, unknown or of unknown nationality) if the parent was not in Portugal in his or her country's service.<sup>18</sup> For the purpose of acquiring Portuguese nationality via *ius soli*, foundlings were presumed to have been born in Portugal.

*Ius sanguinis* only determined *ex lege* granting of Portuguese nationality to the children born abroad to a Portuguese father or mother<sup>19</sup> if the parent was abroad in the service of the Portuguese state (art. II). This was the only case in which *ius sanguinis* independently and automatically determined acquisition of nationality at birth. Apart from this case, *ius sanguinis* was only relevant for acquiring nationality at birth by declaration, which was a non-automatic mode of acquiring nationality, because, in addition to depending on the fulfilment of legal requirements it could be prevented by Government opposition (a new feature of the 1959 Act). The legal requirements were linked to will (declared or presumed) of those in question. Or, to be more precise, children born abroad to a Portuguese parent not in the service of the Portuguese state could only acquire Portuguese nationality 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 made official by a declaration of residence at the Central Registry Office (art. 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 nationality from being granted. So obtaining Portuguese nationality in these cases was no longer considered an absolute right.<sup>20</sup>

A foreign woman who married a Portuguese man would acquire her husband's Portuguese nationality *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 nationality (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, and foresaw naturalisation as a way of acquiring Portuguese nationality after birth, 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>21</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. Lastly, 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. 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.

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

- Portuguese nationality was lost when a Portuguese citizen voluntarily acquired a foreign nationality. The aim was to avoid dual nationality. Acquiring a foreign nationality through naturalisation imposed by the State of residence did not lead to the automatic loss of Portuguese nationality, but could lead to it on the basis of a Government decision (art. XIX).
- Accepting public office or performing military service in a foreign state could also lead to losing Portuguese nationality (*ex lege*), if the Portuguese citizen did not hold the nationality of the other state in question as well, and did not leave office or service by the deadline set by the Portuguese Government. 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).

- The marriage of a Portuguese woman to a foreigner automatically led to her losing her Portuguese nationality, unless she did not acquire her husband's nationality as a result of the marriage or declared, prior to the wedding, that she wished to keep her Portuguese nationality. Furthermore, she would not lose her Portuguese nationality if she rejected her husband's nationality, provided that the national law of her husband's country allowed it (art. LX).
- Citizens born on Portuguese soil who declared that they no longer want to be Portuguese lose their Portuguese nationality provided they held another nationality. 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*. This was a case of voluntary loss of Portuguese nationality, since it depended on an expression of intent made by the person in question or by his legal agent if the person was under-age (art. XVIII (d)).
- Those on whom Portuguese nationality had been conferred, or who had acquired it by an expression of intent made by their legal agent, also lose Portuguese nationality if they declare that they did not wish to be Portuguese and proved that they held another nationality. As in the previous case, this was voluntary loss of nationality, which was only admissible if the person in question held two nationalities. In this case, however, 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)).

In all of the above cases (except (2)), the legislator 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 nationality if the person in question held another nationality, and would therefore not become stateless.

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

Based on the assumption that the loss of Portuguese nationality was open to remedy, the 1959 Act, like its predecessor, foresaw ways in which nationality could be reacquired. Those who had lost their Portuguese nationality for having acquired a foreign nationality through naturalisation, could reacquire it provided they met the following two pre-



mises: they took up residence in Portugal and expressed their intent to reacquire Portuguese nationality. These requirements applied to Portuguese women who had lost Portuguese nationality through having married a foreigner, allowing them to reacquire Portuguese nationality following dissolution or annulment of their marriage. Moreover, those persons who had lost Portuguese nationality 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 nationality by Government decision, could reacquire it. Unlike the above situations, this required a discretionary act by the Government.

#### 12.2.5 *Decree Law 308-A/75 of 24 June 1974: the effects of de-colonisation on Portuguese nationality*

The process of de-colonisation 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 solve the impact of the creation of these new states on Portuguese nationality. (This item of legislation was repealed by Law 113/88, of 29 December 1988.) The Decree Law governed the issue of losing or retaining Portuguese nationality by those people who had been born or were living in the Portuguese overseas territories that had gained independence.

It was assumed that these persons would acquire the nationality of the new state. The Decree Law thus merely stipulated that Portuguese nationality would be retained by those persons who had not been born overseas but were living there (art. 1), in addition to 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 that enabled them to keep Portuguese nationality would lose it *ex lege* (art. 4).

This legislation raised many doubts as to how it should be interpreted and implemented and has generated many case laws, right up to the present day. It has also been criticised by legal thinkers, in particular, because it led to the *ex lege* loss of Portuguese nationality 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 nationality of the new state (Ramos 1976: 340; Jalles 1984: 188; Santos 1993: 443).

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

In 1981, a new law (Law 37/81) was adopted in Portugal. As this law will be analysed in detail in Chapter 3, in this chapter we shall from a historical perspective only focus on the differences vis-à-vis earlier legislation, and the amendments made in 1994 and 2004.

In many ways, the 1981 Law breaks away from earlier legislation, although it did retain some principles, such as avoiding statelessness and the individual's will in determining nationality. The breaks must be understood in the context of the 1976 Constitution, which came in the wake of the revolution of 25 April 1974 that restored democracy to Portugal. Although the Constitution only considered those foreseen in law and international conventions as being Portuguese (art. 4), it contains a series of rules and principles that restrict the legislator's sphere of action with regard to acquisition and loss of nationality.

The first break with the previous legislation (which foresaw prevalence of *ius soli*) concerns acquisition of nationality at birth. This was changed to a mixed system, in which greater importance is attached to the role of *ius sanguinis* and *ius soli* is restricted. The acquisition of nationality by the children of Portuguese born abroad (that is, through *ius sanguinis*) no longer depends on criteria linked to residence in Portugal. A mere expression of intent or 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 nationality 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 acquisition of nationality at birth. Thus, *ius sanguinis a mater* is made fully equal with *ius sanguinis a pater*, and all cases of parentage are treated in the same way. In addition, achievement of the principle of equality (art. 13) and banning discrimination between spouses (art. 36) required changes to the Nationality Act in order to bring an end to the effects of marriage on women's acquisition or loss of nationality. The new Na-

tionality 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 nationality, but became just one of the grounds for voluntary acquisition of Portuguese nationality. The 1981 Act thus enshrined the principle of nationality being separate from marriage (Ramos 1996: 622).

A third break from previous legislation is linked to the arrangements for loss of nationality, 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 (art. 26 (1) and 30 (4) of the Constitution). This curtailed any automatic loss of nationality (*ex lege*), imposed by a decision from the administrative authorities or the involuntary loss of Portuguese nationality (Miranda 1998: 120). Loss of nationality could no longer be used by the state as a means of punishing the 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 nationality in order to avoid statelessness (Ramos 1994: 129).

The 1981 Act also introduced complete tolerance towards dual nationality. On the one hand, acquisition of Portuguese nationality no longer relied in any way on renouncing one's foreign nationality. On the other, acquisition of a foreign nationality no longer resulted in the loss of Portuguese nationality, 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 nationality as a basic right required that appeals on matters pertaining to Nationality Law be lodged with the courts (Ramos 1992: 214). Under the terms of the 1959 Act, appeals concerning the acquisition, loss or reacquisition of nationality 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 instance for appealing against any and all acts pertaining to the acquisition, loss or reacquisition of Portuguese nationality – that is to say, a jurisdictional body.

#### 12.2.6.1 *Law 25/94 amending Law 37/81: restricting foreigners' access to Portuguese nationality*

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. The aim was to make it more dif-

difficult for foreigners to obtain nationality at birth (via *ius soli*) and after birth (particularly through marriage or naturalisation).

Firstly, the grounds for the child born to foreign parents in Portugal became more restrictive making it difficult for immigrants' children to obtain Portuguese nationality. On the one hand, the law required not only that the parents have Portugal as their habitual place of residence but that they also hold a residence permit. This aimed at not only excluding the children of illegal immigrants from obtaining nationality, but also those who were in Portugal legally, but on the basis of a different permit, such as a work permit or permit of stay<sup>22</sup> (which since 2001 covers a large percentage of foreigners living in Portugal). Furthermore, Law 25/94 introduced a distinction between those foreigners from Lusophone countries and others keeping the minimum period of residence at six years for the former, but increasing it to ten years for the latter.

In addition, the arrangements for acquiring Portuguese nationality through marriage to a Portuguese citizen were amended. Firstly, the legislator required a minimum period of three years of marriage for the spouse of a Portuguese citizen to acquire Portuguese nationality. 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 nationality through marriage. Since this proof was difficult to obtain the 1994 legislator transferred the burden of proof making it the foreign applicant's duty to prove the link, which became one of the premises for acquiring nationality.

#### 12.2.6.2 *Framework Law 1/2004: the reacquisition of Portuguese nationality*

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

### 12.3 Recent developments and current institutional arrangements

The acquisition, loss and reacquisition of Portuguese nationality is regulated by Law 37/81 of 3 October, as amended by Law 25/94 of 19 August and by Framework Law 1/2004 of 15 January (1981 Nationality

Act). This Act is supplemented by Decree Law 322/82 of 12 August, amended by Decree Law 253/94 of 20 October and Decree Law 37/97 of 31 January (Nationality Regulation).

### *12.3.1 Main general modes of acquisition and loss of citizenship*

#### *12.3.1.1 Political analysis*

Following the Revolution of 25 April 1974, the Portuguese Colonial Empire collapsed. Clarifying which of the ex-colonies' nationals and residents could keep Portuguese nationality was made more urgent given that the 1959 Nationality Act, which was then in force, stated that all those born on Portuguese territory had the right to Portuguese nationality and to move to the Portuguese mainland.

Decree Law 308-A/75 of 24 June established which of those born or residing in the ex-colonies would retain or lose Portuguese nationality. Once the problem that arose with de-colonisation and retaining Portuguese nationality had been resolved, the 1959 Nationality Act remained in force until 1981 despite the fact that, to a certain extent, it contradicted the 1976 Constitution.

Law 37/81 of 3 October aimed not only at achieving consistency between the Nationality Act and the Constitution,<sup>23</sup> at introducing the principles of non-discrimination<sup>24</sup> and of a fundamental right to nationality,<sup>25</sup> but also at profoundly reforming the acquisition of nationality at birth. Breaking with a centuries-old tradition the new law gave prevalence to *ius sanguinis* over *ius soli* (which alone no longer conferred Portuguese nationality).<sup>26</sup>

If the need to make the Nationality Act consistent with the 1976 Constitution warranted consensus amongst the political parties with parliamentary representation, the same cannot be said regarding the prevalence of *ius sanguinis* over *ius soli*; regarding access to Portuguese nationality for emigrants and their descendants; or regarding the reacquisition of nationality by those who had surrendered it voluntarily.

The relegation of *ius soli* as a criterion for the acquisition of nationality at birth and the greater importance attached to *ius sanguinis* are the result of the political and historical context at that time. Portugal's decrease in size and its return to being a European state after the decolonisation process in the 1970s, as well as the wish to move closer to European tradition in this domain, led the legislator 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 nationality for the children of emigrants and a substantial human resource for the state (Miranda 1998: 108; Ramos 1994: 117; Jalles 1984: 178).

The Government, at the time a centre-right coalition (the Democratic Alliance), upheld the principle of *ius sanguinis*.<sup>27</sup> 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*.<sup>28</sup> 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.

Clearly what was on the political agenda at the time was emigration. Whilst immigration had grown at an annual rate of 13 per cent between 1975 and 1980 (Baganha & Marques 2001: 15), it was not a subject that interested the majority of Portuguese politicians. They did not appear to be interested in the impact on nationality that the prevalence of *ius sanguinis* over *ius soli* could have on the descendants of immigrants who had settled in Portugal. It was this new perception of Portugal as a small European territory and 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 that had as a key objective to facilitate the right to Portuguese nationality of emigrants and their descendants spread around the world.

After debate and general approval the bills on nationality submitted by the Government, the PS and the independent Social Democratic party (ASDI) were forwarded to the Commission for Constitutional Affairs where a new text was agreed upon which endeavoured to organise the three documents. In this way Law 37/81 of 3 October was approved by all political parties represented in Parliament.<sup>29</sup> However, the legislators' concern in facilitating the acquisition of Portuguese nationality by all members of the communities of Portuguese descent across the world, went even further. It allowed for dual nationality and reacquisition of nationality by all those who had lost it through previous legislation, or as a result of voluntary acquisition of a foreign nationality or due to marriage.

In 1994, the Nationality Act underwent a first amendment with Parliament's approval of Law 25/94 of 19 August, based on a proposal submitted by the Social Democratic majority Government. This proposal should be examined in the light of this Government's overall political activity that proposed more restrictive policies regarding foreigners, as is clearly evident in the 1993 Immigration Act (Decree Law 59/93 of 3 March) that was much more restrictive than the previous one, both in terms of foreigners entering and staying in Portugal. It was now a case of completing the legal framework regarding foreigners not of Portuguese descent by restricting their right to nationality. These

amendments were supported by the main political powers with parliamentary representation.

Whilst in the 1981 Nationality Act debate, the legislator's concern and the political agenda was how to facilitate a right to Portuguese nationality for Portuguese emigrants across the world, what concerned the Government in 1994 was how to stem the growing number of immigrants acquiring Portuguese nationality as well as various scandals related to fictitious marriages. The debate centred entirely on restrictions that should be placed on foreigners' rights to nationality. 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, whilst all the parties to the left of the Socialist Party (PS), voted against.<sup>30</sup>

Based on a proposal by the majority centre-right Government the 1981 Nationality Act was amended once again in 2004<sup>31</sup> with regard to nationality reacquisition. This Government bill and the one presented by the PS on the same issue were both approved, whilst the projects presented by the Left Block (BE) and the Greens, aimed at making more profound changes to the Nationality Act, were rejected.

Profiting from its overall majority in Parliament the Government approved the Framework Law 1/2004 of 15 January, which changed the provisions for nationality reacquisition for women who had previously lost the right to Portuguese nationality due to marriage, and those who had lost it when they voluntarily acquired a foreign nationality. The objective was to facilitate reacquisition of nationality for emigrants who had lost Portuguese nationality automatically as result of previous legislation and also to redress the negative impact which Law 2098 of 1959 had had on Portuguese communities abroad, since it went against the real wishes of emigrants who continued to feel part of Portugal without actually being Portuguese nationals and without being able to pass their nationality on to their children.

Neither the original version of the Nationality Act of 1981, nor the new wording of 1994, nor the minor changes in 2004, raised heated debates or political divisions. Quite the opposite: from 1981 until today this Act has reflected a broad and consensual understanding amongst the main political powers about who is, and who should be, Portuguese.

According to the Nationality Act, the following acquire nationality at birth *ex lege*:

- The child of a Portuguese (mother or father) who was born on Portuguese territory or on territory under Portuguese administration (art. 1 (a));<sup>32</sup>

- The child of Portuguese descent (mother or father) who was born abroad, if the parent was serving the Portuguese State (art. 1 (a) *in fine*);
- A person born on Portuguese territory who does not have any other nationality (art. 1 (d)).<sup>33</sup>

In all of these cases of extraterritorial *ius sanguinis* and acquisition by foundlings and stateless children, the persons concerned are of Portuguese origin, under the simple terms of the law, as long as the following is stated in the births register: the Portuguese nationality of either of the parents (or no mention of foreign nationality of the parents); when born abroad, a statement that the mother or father were serving the Portuguese state on the date of birth; or a statement that no other nationality is held (art. 1 of the Nationality Regulation).

The Nationality Act also provides arrangements for voluntary acquisition at birth (by option/ by declaration and/or registration):

- if the child of a Portuguese mother or father born abroad 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 (b));<sup>34</sup>
- if the child of foreigners born in Portugal meets at the time of birth the following three requirements (art. 1 (c)): (1) the parents have lived in Portugal with a valid residence permit<sup>35</sup> for at least six or ten years, depending, respectively, on whether they come from a country where the official language is Portuguese or from another country, (2) the parent is not in Portugal serving his or her own state, and (3) they make a declaration that they wish to be Portuguese.

Different from *ex lege* acquisition, in these two cases the acquisition is voluntary since it always depends on the applicant's expression of intent. But once this statement has been made, and when the other legal requirements have been met, the acquisition of nationality 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)

In the first case, acquisition is through *ius sanguinis*, but this is not enough on its own to determine the conferment of Portuguese nationality. If the birth is abroad, it is not enough for the child to have a Portuguese father or mother in order to obtain Portuguese nationality at birth, rather 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. 6 of the Nationality Regulation). The Portuguese nationality of a child of a Portuguese born abroad is proven by registration of that declaration or by the registration of birth at the Portuguese registry (art. 21 (2) of the Nationality Act).

In the second case, nationality acquisition is through *ius soli*, despite the fact that this alone is not enough to confer nationality on children born in Portugal to foreign parents. This is because acquisition depends not only on the wishes of the individual – as is the case with *ius sanguinis* – but also on the parents' situation (they cannot be in Portugal serving their State), the length of time the parents have resided in Portugal, as well as their residence status (not all residence statuses are valid, for example, a work permit or permit of stay are not eligible).

Despite the fact that nationality acquisition is voluntary in both of these cases, it is a form of acquisition at birth. On the one hand, the requirements for acquisition have to be verified at birth. On the other hand, if Portuguese nationality is established after birth, and as a consequence the declaration is made later, the acquisition has a retroactive effect (*ex tunc*), without affecting the validity of legal relationships already established on the basis of another nationality (art. 11 of the Nationality Act). However, the provisions for nationality acquisition are only considered relevant if the descent of the child is established before he or she comes of age (art. 14 of the Nationality Act).

Acquisition of nationality 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 three ways of acquiring nationality after birth: *ex lege* in case of adoption, by declaration based on a legal entitlement in case of filial and spousal transfer of nationality and by discretionary naturalisation. Acquisition of nationality 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 discretionary Government act (for acquisition through naturalisation).

– Acquisition through filial or spousal transfer: There are two cases in which the Nationality Act provides for the right of foreigners to voluntarily acquire Portuguese nationality by declaration in order to assure the national unit of the family:

- filial transfer of nationality: Minors or disabled children with a mother or father who acquires Portuguese nationality (for example, by naturalisation) can acquire Portuguese nationality by declaration (art. 2).<sup>36</sup>
- spousal transfer of nationality: A foreigner who has been married for more than three years to a Portuguese national can acquire Portuguese nationality by declaration made by virtue of marriage (art. 3 (1)).

In neither of these cases, is the acquisition of nationality automatic, as this is subject to other conditions: that the Public Prosecutor does not oppose, or should he have opposed acquisition, that the Court of Appeal or the Supreme Court of Justice consider such opposition to be unfounded (arts. 9 and 10).

Since 1994 applicants (a foreigner married to a Portuguese national or whose father or mother acquired Portuguese nationality) have had to prove a true link to the national community by documentary evidence, testimony or by another legally permitted means (art. 22 (1) (a) of the Nationality Regulation).

- Acquisition by adoption. ‘A child fully adopted by a Portuguese national acquires Portuguese nationality’ (art. 5). 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. 13 of the Nationality Regulation). However, as in previous cases, this acquisition is not automatic in the case of adoption, for it also depends on non-opposition by the Public Prosecution Service, or on a Court decision that such opposition is unfounded.<sup>37</sup>
- 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 Home Office (art. 7 (1) of the Nationality Act and art. 15 (1) of the Nationality Regulation). Yet, the foreigner’s intent is not enough, for legal requirements which allow the Government to confer Portuguese nationality by naturalisation also have to be met. According to art. 6 (1) of the Nationality Act, the Government can only grant Portuguese nationality by naturalisation if the following requirements are met: The person in question must:
  - be of age or emancipated according to Portuguese law;<sup>38</sup>
  - have resided in Portugal or in another territory under Portuguese administration, with a valid residence permit for a period of six or ten years depending on whether he or she comes from a country where the official language is Portuguese or from another country;
  - have sufficient knowledge of the Portuguese language;
  - demonstrate proof of true integration in the national community;
  - be of good repute;
  - have a means of subsistence.

Foreigners who have held Portuguese nationality, who are descendants of Portuguese, are members of communities of Portuguese origin, or

who have provided some form of service to the Portuguese State are exempt from fulfilling some of the legal naturalisation requirements, specifically those related to residence (period of residence and residence permit), knowledge of the Portuguese language and integration in the Portuguese community (art. 6 (2)).

Whilst legal requirements have to be checked, naturalisation is a discretionary concession whereby the Government grants Portuguese nationality to a foreigner through a decree of the Minister of Home Affairs. The Government is free to exercise this discretionary power and a foreigner does not have a subjective right to naturalisation even if he or she fulfils the legal requirements, as naturalisation can be denied for reasons of convenience (Ramos 1992: 163).

Naturalisation is subject to registration at the Civil Registry Office (art. 18 (1) (c) of the Nationality Act) and only becomes valid as from this date (art. 12 of the Nationality Act).

The legal arrangements for loss of nationality are influenced by the 1976 Constitution which states that nationality is a fundamental right of an individual (art. 26 (1)) and forbids the loss of nationality 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 their nationality arbitrarily influenced the legislators regarding the laws governing loss of nationality. Loss of nationality has to be defined in law and cannot be determined by the acts of public authorities (Ramos 1994: 114; Ferreira 1987: 8). Loss of Portuguese nationality is also not possible if the citizen in question becomes stateless (Jalles 1984: 172).

Unlike its predecessor, the 1981 Nationality Act is underpinned throughout by these principles, as it does not foresee any *ex lege* loss of Portuguese nationality or due to state intervention. Art. 8 of the Nationality Act only foresees loss of nationality when it is the individual's own free will and as long as he or she has another nationality. In other words, in Portugal, the state cannot impose loss of nationality even as a result of the acquisition of another state's nationality (as was the case in Portugal until this law came into force). Neither is the mere wish to renounce nationality sufficient. In order to avoid situations of statelessness the applicant must hold the nationality of another state.

Nullity of a registration of birth (in cases of *ex lege* acquisition at birth) or the registry of nationality acquisition after birth based on falsehood (arts. 89 and 91 of the Civil Registry Code) are not treated in the same light as loss of nationality. It is this registration that proves Portuguese nationality. If the registration is based on a false declaration (for example, the child was not of a Portuguese citizen, but, as a result of an error or false documents was registered as being the child of a Portuguese citizen and, therefore, Portuguese), the Public Prosecutor

can appeal at any time to the Lisbon Court of Appeal to declare its nullity and order its cancellation (art. 25 of the Nationality Act). Since the declaration of nullity of the registration upon which nationality was granted has retroactive effects one does not classify this in legal terms as a loss of nationality, but rather as non-acquisition of nationality. As the person in question never held Portuguese nationality, one cannot legally refer to loss of nationality.

These cases are extremely rare and normally refer to Decree Law 308-A/75 that 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 when, due to an administrative error, certain people saw their nationality registration recorded as valid whereas, according to the law, they had lost it. In these cases, when the citizen in question cannot be blamed for false registration, the Courts consider the declaration of nullity as invalid because it amounts to an abuse of the law.<sup>39</sup>

This is not the case when false registration is due to a citizen's own actions, for 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).<sup>40</sup>

Those who have lost Portuguese nationality as a result of renouncing it by means of a declaration made when they were not legally autonomous can reacquire it by declaration when they come of age (and, are therefore legally autonomous to exercise this right). Reacquisition is not automatic with the declaration but depends on it not being legally contested within a period of one year, based on the principles we have previously discussed. If it is contested, then a court must declare it unfounded (art. 4 of the Nationality Act).

The other two situations are linked to the legal arrangements for loss of nationality, which were in force until 1981.

Art. 30 of the Nationality Act, as amended by Framework Law 1/2004 of 15 January allows women who lost Portuguese nationality due to marriage to reacquire it by means of a declaration. Reacquisition of nationality has become easier in that it is no longer subject to non-opposition by the Public Prosecutor and the interested party need not prove integration into the Portuguese community. Furthermore, reacquisition is effective retroactively from the date of loss of nationality that allows children who were born after this date to acquire Portuguese nationality of origin by declaration.

Art. 31 of the Nationality Act, as amended by the Framework Law 1/2004, allows for the reacquisition of Portuguese Nationality by all those who lost it when they acquired another nationality. So long as

there is no definitive registration of loss of nationality, reacquisition is *ex lege* but allows the applicant to oppose it by declaring that he or she does not want to be Portuguese. Only when there is definitive registration of loss of nationality is an expression of intent required stating the wish to reacquire nationality. The reacquisition of nationality in these cases is no longer subject to non-opposition by the Public Prosecutor and becomes effective from the date of acquisition of the foreign nationality (and therefore from the date of loss of Portuguese nationality), without affecting the validity of previously established legal implications based on another nationality. The intention was to consider as of Portuguese origin the children of emigrants who were born after the loss of Portuguese nationality resulting from the 1959 Law. Without this retroactive effect, they would have to be considered foreigners, with their only chance of becoming Portuguese being by means of naturalisation or marriage to a Portuguese citizen. This new arrangement allows for children who were born after the automatic loss of Portuguese nationality by their parent, to acquire nationality of origin if they state that they want to be Portuguese or if they register their birth at the Portuguese Civil Registry, in accordance with the terms of art. 1 (1) (b) of the Nationality Act.

#### 12.3.1.2 *Statistical development of acquisitions*

Statistical information on nationality acquisition only started to be published in 1994 and even then only partially. In fact in 1994, 1995 and 1998, only the total number of acquisitions by means of naturalisation was published. These statistics are only broken down into naturalisation and other modes of acquisition, which is insufficient for a more profound analysis of this topic to be carried out.

Bearing in mind these limitations and also by using an unpublished work covering information on the acquisition of nationality through marriage and naturalisation (Oliveira & Inácio 1999), we can partially rebuild the series of nationality acquisitions between 1985 and 2003. From what was said, one can deduce that the aforementioned series (Table 12.1) is a conservative estimate for the period between 1985 and 1994 and for the years 1995 and 1998.

Table 12.1 indicates that the total annual number of nationality acquisitions is generally low, never above 2,000 during the period examined. Over five-year periods we can see that the annual average was 740 nationality acquisitions between 1985 and 1989; 1,314 between 1990 and 1994; and 1,173 between 1999 and 2003.

In other words, there seems to have been a substantial increase in the number of nationality acquisitions from the 1980s to the 1990s. According to Oliveira and Inácio (1999), this increase was largely due to the acquisition of Portuguese nationality by Chinese citizens during

**Table 12.1: Acquisition of nationality in Portugal 1985-2003**

	<i>Total</i>	<i>Naturalisation</i>	<i>Other</i>
<b>1985</b>	875	42	833
<b>1986</b>	476	17	459
<b>1987</b>	76	25	51
<b>1988</b>	861	21	840
<b>1989</b>	1,412	37	1,375
<b>1990</b>	846	65	781
<b>1991</b>	1,139	61	1,078
<b>1992</b>	1,706	78	1,628
<b>1993</b>	1,177	115	1,062
<b>1994</b>	1,704	81	1,623
<b>1995</b>	1,413		
<b>1996</b>	1,154	532	622
<b>1997</b>	1,364	661	363
<b>1998</b>	519	519	
<b>1999</b>	946	286	660
<b>2000</b>	721	126	594
<b>2001</b>	1,082	295	787
<b>2002</b>	1,369	225	1,144
<b>2003</b>	1,747	552	1,195
<b>total</b>	20,587		

Source: 1985-1994: Oliveira 1995-2003: National Institute for Statistics (INE)

the transition period for the handing over of Macao to China. It is worth noting that the average annual number of nationality acquisitions drops slightly from 1999 to 2003 in comparison to the average for 1990-1994.

Table 12.1 also indicates that the series is erratic and difficult to analyse, although during the last three years for which we have information, there seems to be an upward trend. This growth, as is shown on Table 12.2, results mainly from nationality acquisition by other means (a category that is mainly composed of nationality acquisitions by marriage to a national).

As can also be seen in Table 12.2, nationals of countries where the official language is Portuguese (ex-colonies in Africa and Brazil) are the largest group to seek nationality acquisition, as well as being the largest immigrant communities in Portugal.

Also worth noting is the high level of nationality acquisitions by Venezuelan citizens. In this case, the claim to Portuguese nationality can be explained by the large number of Portuguese descendants living in that country as well as the serious social and economic crisis that the country is going through, which probably makes Portuguese nationality acquisition more appealing.

Although the foreign population in Portugal has been growing continuously since 1985, nationality acquisition has not grown at the same

Table 12.2: Acquisition of Portuguese nationality by naturalisation, other modes and by previous nationality

Former nationality	1994*		1995*		1996		1997		1998**		1999		2000		2001		2002		2003	
	Nat.		Nat.		Nat.	Other	Nat.	Other	Nat.	Other	Nat.	Other	Nat.	Other	Nat.	Other	Nat.	Other	Nat.	Other
Angola	55	76	40	17	45	11	56	37	25	17	25	36	22	60	22	60	68	76		
Cape Verde	129	169	70	10	86	7	159	75	42	36	33	80	53	218	148	80	218	144	226	
Guinea Bissau	44	43	23	4	16	—	67	24	13	16	11	37	18	25	48	21	48	21	17	
Mozambique	29	30	15	4	21	5	56	23	14	5	5	11	13	1	26	25	31			
São Tomé	21	18	10	—	12	—	28	8	7	5	2	14	6	10	24	29	29			
<b>Total (ex-colonies in Africa)</b>	<b>278</b>	<b>336</b>	<b>158</b>	<b>35</b>	<b>180</b>	<b>23</b>	<b>366</b>	<b>167</b>	<b>101</b>	<b>79</b>	<b>76</b>	<b>153</b>	<b>111</b>	<b>376</b>	<b>287</b>	<b>379</b>				
EU	27	45	21	23	18	29	13	14	28	1	24	—	27	2	43	9	53			
Others Europe	19	24	11	8	15	3	6	2	9	—	7	2	12	1	15	5	25			
Canada	39	76	49	20	54	38	4	27	43	11	44	5	49	22	43	29	39			
USA	67	164	64	56	86	117	7	32	59	4	60	8	82	22	86	29	65			
Brazil	176	235	120	121	204	92	46	22	164	22	153	33	250	43	302	114	229			
Venezuela	266	431	77	334	68	363		9	210	1	185	1	161	17	204	28	283			
Other/stateless	99	102	32	25	36	38	77	23	46	8	46	7	53	7	75	51	122			
<b>Total</b>	<b>971</b>	<b>1,413</b>	<b>532</b>	<b>622</b>	<b>661</b>	<b>703</b>	<b>519</b>	<b>286</b>	<b>660</b>	<b>126</b>	<b>595</b>	<b>787</b>	<b>225</b>	<b>1,144</b>	<b>552</b>	<b>1,195</b>				

Source: INE

\* No information about other modes of acquisition

\*\* No reference to Venezuela

**Table 12.3: Acquisitions of Portuguese nationality as a percentage of the foreign resident population**

<i>Year</i>	<i>Percentage</i>
1985	1.10%
1986	0.55%
1987	0.08%
1988	0.91%
1989	1.40%
1990	0.79%
1991	1.00%
1992	1.38%
1993	0.86%
1994	1.08%
1995	0.84%
1996	0.67%
1997	0.78%
1998	0.29%
1999	0.49%
2000	0.35%
2001	0.48%
2002	0.57%
2003	0.70%

Sources: Table 12.1 and Foreigners and Borders Service (SEF)

rate. In fact, as can be seen in Table 12.3, nationality acquisitions as a percentage of the foreign population residing legally have been falling since 1997.

As mentioned, the figures on nationality acquisition are incomplete, making analysis difficult. We can however, reach two conclusions: (1) For the period examined, the percentage of foreigners that acquired Portuguese nationality never surpassed 1.5 per cent of the total foreign population residing legally in Portugal. For the majority of years the rate was below 1 per cent; (2) The figures are erratic not allowing for generalisations regarding behavioural trends, although the last three years show an upward trend.

### *12.3.2 The quasi-citizenship status of the nationals of countries having Portuguese as the official language*

#### *12.3.2.1 Political analysis*

Decolonisation did not have a great impact on the Nationality Act, in the sense that it did not lead to a different mode of nationality acquisition for the citizens of these countries. As is the case with other foreigners, they can acquire nationality in the regular ways provided for by the law, although some aspects of acquisition were made easier.



Thus, the period of residence required for nationality acquisition by *ius soli* or naturalisation is shorter (six years) than that required of foreigners who do not come from a Lusophone country (ten years).

In terms of citizenship, however, decolonisation had an enormous impact as 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 that previously had only been given 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 enshrined in art. 15 (3) of the Constitution, which has its origins in the 1971 Convention between Portugal and Brazil.

Lusophone citizenship differs 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 access to public offices which are not predominantly of a technical nature. On the other hand, and contrary to European citizenship, Lusophone citizenship, as it exists today in relation to Brazilians, does not provide any right to entry and permanent residence in Portuguese territory nor to diplomatic protection in another country.

On 7 September 1971, the Convention on Equal Rights and Obligations between Portuguese and Brazilians was signed with regards to the special bonds between Portugal and Brazil and the large community of Portuguese settlers in Brazil. This Convention created a true Luso-Brazilian citizenship status, giving Brazilian nationals with a Portuguese residence permit broad political rights. They were denied access, though, 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.

In order to make provisions for this Convention, 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 exception of access to higher positions in the government of the country including its autonomous regions, service in the armed forces and the diplomatic corps. In view of the decolonisation process and the ties with African countries that had achieved their independence, the Constitutional Legislator chose not to restrict the quasi-citizenship status to Brazilians, but made it available to all the nationals of the new states (although only Brazil met the reciprocity condition).

In 1988, Brazil went a step further in strengthening Luso-Brazilian citizenship: art. 12 of the new Brazilian Constitution provides the Por-

tuguese with permanent residence in Brazil and the same rights as a Brazilian if there is reciprocity for Brazilians in Portugal. The only exceptions are, for holding the positions of President and Vice-President of the Republic, Speaker of the Federal Parliament, President of the Federal Senate, judge of the Supreme Federal Court, positions in the diplomatic corps and officers in the armed forces.

In response to demands by Brazilians who enjoyed fewer rights in Portugal than those that the 1988 Brazilian Constitution provided for the Portuguese, the 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 that 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 re-wording of art. 15 (3) of the Constitution was a decisive step in creating the citizenship of the Community of Lusophone countries with 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 the Portuguese living in their countries. In particular, they can vote at local and national levels as well as be elected as Members of Parliament without having to acquire Portuguese nationality. They also have access to certain professions such as to that of judge or police officer, amongst others, which entail exercising public authority. In other words they enjoy the same political rights without having to acquire Portuguese nationality. 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 a residence permit in Portugal which are conferred by the Home Office upon application by the interested party: the status of equal rights and obligations and the status of equal political rights.

The status of equal rights and obligations allows Brazilians to enjoy the same rights as a Portuguese citizen, especially to hold positions in the civil service that are not predominantly technical (for example 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 and 16 of Decree Law 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.

The equal political rights status allows a Brazilian to exercise full political rights, specifically voting and standing for election in local, regional and legislative elections (art. 19 of Decree Law 154/2003) with the exception of voting and standing in presidential elections (Costa 2000: 197). 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).

The equal rights status does not imply loss of nationality of origin and is dependent on the acquisition of a residence permit, as Brazilian citizens, just like any other foreign nationals, do not have the right to enter and remain on Portuguese territory. Moreover, they are subject to the immigration laws that allow the State to control and limit the entry and stay of foreigners. But once legally resident in Portugal they can apply for this quasi-citizenship status, holding it for as long as they hold a residence permit. This status becomes extinct if the Brazilian citizen loses nationality or no longer holds a 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. In other words, the residence requirement for nationals of Lusophone countries to exercise political rights is shorter than for citizens of all other countries. Therefore, according to art. 2 (1) (c) of the Framework 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 the Framework Law 1/2001). At present Brazilian citizens (even without equal political rights status) and Cape-Verdians enjoy these rights.

Unlike other foreigners (even those who have active and passive electoral capacity in elections for local authorities), the nationals of Lusophone states can also participate in local referenda (art. 35 of the Framework Law 4/2000).

The move towards a concept of citizenship that is disengaged from nationality goes beyond the privileged status of nationals of Lusophone countries or inherent status of EU citizen (which implies the right to vote or stand for election in local and European Parliament elections).

Any alien who resides in Portugal has the right to vote and stand for local elections if the reciprocity condition has been 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 the Framework 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 that give the same entitlements to Portuguese nationals.

Other foreigners who have held a residence permit in Portugal for more than five years can be elected to local government bodies as long as they are nationals of countries where reciprocity conditions are met and where eligibility is conferred on the Portuguese that reside there (art. 5 (1) (d), Framework Law 1/2001).

### 12.3.2.2 *Statistical evolution of the stock of quasi-citizens*

Foreign citizens resident in Portugal who have the right to vote in local elections, on a reciprocal basis, are the aliens from Brazil, Cape Verde, Argentina, Chile, Estonia, Israel, Norway, Peru, Uruguay and Venezuela. Those from Brazil, Cape Verde, Peru and Uruguay can also be elected in local elections. Of the nationalities mentioned above, only Brazil and Cape Verde have numerically significant populations residing in Portugal. The statistical evolution of the stock of legal residents from these two nationalities is as follows:

**Table 12.4: Brazilians with equal rights, equal political rights, or both statuses**

<i>Year</i>	<i>Equal rights and obligations status</i>	<i>Equal political rights status</i>	<i>Both equal rights and obligations and equal political rights status</i>	<i>Total</i>
<b>1993</b>	349	32	34	415
<b>1994</b>	1,289	64	93	1,446
<b>1995</b>	582	41	65	688
<b>1996</b>	413	44	52	509
<b>1997</b>	568	48	79	695
<b>1998</b>	321	45	48	414
<b>1999</b>	737	54	185	976
<b>2000</b>	779	27	122	928
<b>2001</b>	751	3	81	835
<b>2002</b>	625	59	29	713
<b>2003</b>	455	2	47	504
<b>2004</b>	475	10	38	523

Source: SEF, unpublished data

**Table 12.5: Stock of quasi-citizens in Portugal 1985-2003**

<i>Year</i>	<i>Total of foreign residents</i>	<i>Cape Verde</i>	<i>Brazil</i>	<i>Total quasi-citizens</i>	<i>Quasi-citizens in % of total</i>
<b>1985</b>	79,594	24,959	6,804	31,763	40%
<b>1990</b>	107,767	28,796	11,413	40,209	37%
<b>1995</b>	168,316	38,746	19,901	58,647	35%
<b>2000</b>	207,607	47,216	22,411	69,627	34%
<b>2003</b>	250,697	53,858	26,561	80,419	32%

Source: SEF, Statistics, several years

The nationals from Cape Verde and Brazil represent a sizable share of the total foreign resident population. In fact, during the period considered they represented more than one third of the resident foreign population. This share has however systematically decreased since 1985, essentially due to the fact that the annual growth rates of the residents from Cape Verde are below the annual growth rates of the total resident foreign population.

### 12.3.3 *Institutional arrangements*

#### 12.3.3.1 *The legislative process*

Since 1976 the legislative process on acquisition, loss and reacquisition of Portuguese nationality increased Parliament's exclusive competence, as it took on the form of a Framework Law (art. 166(2) of the Constitution).

Framework 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 into force. They are laws of increased importance (art. 112 (3) of the Constitution) as they are always Parliament's exclusive domain, they have to be voted on article-by-article in the plenary (not the committee) and 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). Regarding the legislative proceedings there are no specifics on this matter. Members of parliamentary groups or the Government can submit proposals or bills on the nationality law.

#### 12.3.3.2 *The process of implementation*

In Portugal, only central authorities are competent to implement nationality law. Firstly, all acts related to acquisition and loss of nationality are subject to registration, which is centralised at the Central Registry Office (in Lisbon). Secondly, the authorities play a decisive role in acquisition after birth. Acquisition by filial and spousal transfer or by

adoption can be prevented by legal proceedings taken by the Public Prosecutor in the Lisbon Court of Appeal. The acquisition of nationality by naturalisation depends on a discretionary decision by the Home Office.

The role of embassies and consulates is merely instrumental as they solely receive declarations for acquisition and forward them to the Central Registry in Lisbon (art. 17 of the Nationality Act).

The effectiveness of all activity related to granting, acquisition and loss of nationality depends on its registration.

Declarations required for granting the Portuguese nationality by *ius sanguinis* are subject to registration when the birth registry abroad is not transcribed into the Portuguese civil registry. The same goes for acquisition by *ius soli* (descendants of foreigners born in Portugal), nationality acquisition after birth (marriage and filial transfer), as well as naturalisation and the declaration of loss of nationality (art. 18 (1) of the Nationality Act). All these declarations should be present at the Central Register of Nationality under the authority of the Central Registry Office (art. 16 of the Nationality Act). Acquisition of nationality after birth by expression of intent (spousal and filial transfer) or through naturalisation, as well as the loss and reacquisition of nationality are proved by this register (art. 22 (1) of the Nationality Act). This registration is made upon request by the parties concerned (art. 18 (2) of the Nationality Act) and is attached to their birth record (art. 19 of the Nationality Act and art. 35 of the Nationality Regulation). Only after this registration has been made can the person in question claim their right to Portuguese nationality (or, otherwise, that he or she has ceased to be Portuguese).

The acquisition of nationality at birth for the descendants of Portuguese born in Portugal or abroad (if their father or mother are serving the Portuguese State or if their birth was registered at the Portuguese civil registry), of those born in Portugal without a nationality (or foundlings), as well as of those that were fully adopted by Portuguese nationals, is proven by the birth record at the civil registry (art. 21 and 22 (2) of the Nationality Act and art. 1 and 13 of the Nationality Regulation).

Registration therefore plays a key role within the system of nationality law: on the one hand it allows the Portuguese State to know who their nationals are, and on the other hand it allows those concerned to prove their Portuguese nationality (Ramos 1992: 206; Reis 1990: 48).

The Registrar of the Central Registry Office has broad-ranging powers in the domain of nationality. Firstly, he or she must issue an opinion on any nationality-related issues, specifically if they have been submitted by the consulates, in the case of doubt regarding the Portuguese nationality of those that they wish to enrol or register at the con-

sulate (art. 23 of the Nationality Act). Secondly, he or she can issue Portuguese nationality certificates upon application, although the validity of these can always be refuted when no nationality registration exists (art. 24). Thirdly, the Registrar of the Central Registry Office must inform the Public Prosecutor of any facts that could lead to opposition to the acquisition of nationality after birth, by declaration or adoption (art. 22 (3) of the Nationality Regulation). Finally, it is his or her responsibility to declare the legal non-existence of a nationality registration when the signature of the employee who should have signed it is missing, to cancel it and to rectify any irregularities in the registration, as long as they are not based on doubts about the registered nationality (art. 36 (2) of the Nationality Regulations).

The registration of nationality or of the facts that determine conferment of nationality of origin must follow the rule of law, and is only valid if the legal requirements for acquisition of Portuguese nationality are met. If these requirements are not met, registration can be declared null and void by the Lisbon Court of Appeal and will be cancelled as a result. This is not legally a case of loss of nationality but rather a case of non-acquisition as the nullity declaration has retroactive effect and therefore, legally, the person in question never actually acquired Portuguese nationality (as the legal requirements for acquisition were never met).

The acquisition of nationality after birth, by marriage, filial transfer or adoption is not automatic although it is a right of those who fulfil the legal requirements. This is because the state can prevent it by taking legal proceedings (Ramos 1986: 287).

The legal procedures of opposition aim at preventing persons deemed 'undesirable' or without any link to Portugal from acquiring Portuguese nationality, in the case where the foreigner has the right to this acquisition. According to art. 9 of the Nationality Act, opposition can only take place when there are indications of the existence of the following grounds:

- The applicant's failure to prove any real link to the national community;<sup>41</sup>
- Committing a crime which carries a prison sentence of over three years according to Portuguese Law;
- The performance of public<sup>42</sup> duties or non-compulsory military service for another state.

Opposition to acquisition of Portuguese nationality is a special legal proceeding that may be initiated by the Public Prosecutor within a year of the fact on which the nationality acquisition after birth was based. Once a year has lapsed without opposition from the Public Prosecutor, the right to opposition expires and acquisition becomes definitive. The

Lisbon Court of Appeal is responsible for declaring or rejecting an opposition (art. 10 (1) of the Nationality Act and art. 23 of the Nationality Regulations).

In almost all cases, the opposition proceedings are intended to prevent the acquisition of Portuguese nationality by a foreigner married to a Portuguese and are based on the lack of integration into the national community. Since 1994 it is not sufficient for a foreigner to have been married to a Portuguese for three years and to declare that he or she wishes to be Portuguese. The interested foreigner has 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 (which is not a necessary condition), social habits, economic or professional integration, and interest in the country's history or present.<sup>43</sup>

These are just some of the criteria used by the courts to prove a link with the Portuguese community although there is no fixed formula for such determination. Sometimes it is sufficient for the applicant to have Portuguese children and to demonstrate that they want to learn Portuguese, without demand for actual knowledge of the Portuguese language or residence in Portugal.<sup>44</sup> On other occasions, case law adopts a restrictive approach, not considering sufficient the fact 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 is a demand for proof – although what proof is not disclosed – of a feeling of psychological and sociological belonging to the national community<sup>45</sup> or a demonstration that the person in question participates in Portuguese culture; as if they were members of the Portuguese community deciding against the application to nationality in case of any doubt regarding the link.<sup>46</sup>

Nationality acquisition by virtue of naturalisation depends on a discretionary decision by the Portuguese Minister for Home Affairs. Applicants who meet the requirements for naturalisation do not have a subjective right.<sup>47</sup> Even when a foreigner meets the requirements the Government is free to decide whether to grant naturalisation or not, merely based on its own interest (Ramos 1992: 167). This discretionary decision itself cannot be contested through the courts. A negative decision can only be subject to a judicial appeal limited to verification of the legal requirements foreseen by the law.

The naturalisation proceedings are of an administrative nature and begin with an application by the foreigner to the Portuguese Minister of Home Affairs.

A foreigner can be exempted from the legal residence requirement and the Portuguese language skill requirements and from the need to prove a link with the national community, if he or she has already held



Portuguese nationality, is considered to be of Portuguese descent, is a member of a community of Portuguese ancestry or has carried out relevant services for the Portuguese state.

The proceedings end with a decision by the Minister of Home Affairs to grant or refuse the application. The granting of naturalisation is published in the Official Journal (*Diário da República*), 2nd series (art. 19 of the Nationality Regulation) and only takes effect when registered at the Conservatory for Central Registrations.

The enforcement of the Nationality Act can lead to doubts and litigation and is subject to the principles of the rule of law. For this reason, the Nationality Act has a system of judicial appeal against any act concerning the acquisition and loss of the nationality. Both the interested person and the Public Prosecutor have the right to appeal the decisions made by authorities in matters of nationality. It is the competence of the Lisbon Court of Appeal (civil jurisdiction, 2nd instance) to hear appeals on any acts related to Portuguese nationality (art. 26 of the Nationality Act and art. 38 (3) of the Nationality Regulation).

Exclusive competence for the civil courts in nationality litigation was introduced by the 1981 Law that removed all competences previously held by the administrative courts.<sup>48</sup> Attributing all competences to the Lisbon Court of Appeal on any matter related to the acquisition or loss of nationality is an attempt to ensure consistency in the interpretation and enforcement of the Nationality Act (Ramos 1992: 215). Its decisions can be appealed in the Supreme Court of Justice.

An appeal can be made at any time (it is not subject to any deadline) by the applicants themselves or by the Public Prosecutor (art. 25 of the Nationality Law and art. 38 (2) of the Nationality Regulation). For example, a ground for appeal could be the decision by the Registrar at the Central Registry Office to refuse to register nationality acquisition after birth while the applicant is entitled to it (because he or she has met all the requirements and the Public Prosecutor has not opposed it or opposition was ruled unfounded by the Court of Appeal).

## 12.4 Conclusions

The Nationality Act considers children born abroad of Portuguese parents as being of Portuguese origin if they declare their wish to be Portuguese, but does not consider children born in Portugal to foreigners as being of Portuguese origin unless the aforementioned requirements are met. This clearly demonstrates the lawmakers' choice of mixed criteria, in which *ius sanguinis* predominates (Ramos 1992: 141) and represents a departure from *ius soli*, which up until the 1980s dominated the Portuguese nationality law.

Making the acquisition of nationality by children who are born to foreigners in Portugal subject to a period of residence formalised by a residence permit (and no other permit of stay or work permit) further restricts the *ius soli* principle. This may have been acceptable in the 1980s when Portugal was still predominantly a country of emigration, but today, with the huge increase in the number of immigrants that settle in our country, it appears to be inappropriate. This is because it does not take into account how well integrated a foreigner is, which is not determined by whether he or she is in Portugal legally or what kind of permit his or her parent holds. Instead, it is based on formal, administrative requirements. This could be considered unfair and contrary to the principle of effective nationality since it makes nationality acquisition dependent on facts that are wholly detached from a person's desire to become Portuguese which is reflected by his integration into the Portuguese community. It is not uncommon that immigrants who are in illegal situations (because they do not hold any form of residence permit) or who do not hold a residence permit, have children who were born and grew up in Portugal, learned Portuguese as their mother tongue, feel that Portugal is their country and want to be Portuguese, yet nationality is refused to them because their parents do not have a residence permit.

The integration of immigrants in our country and the need to avoid the negative impact on social cohesion that such a restrictive regime of nationality acquisition can have on foreigners who are born in Portugal suggests that in granting nationality greater importance should be attached to the *ius soli* criteria.

In the case of acquisition of nationality after birth by virtue of marriage to a Portuguese national the state's right of refusal if the foreigner cannot prove a link to the Portuguese community can result, in specific cases, in disregard of the principle of one family, one nationality. This is due to the fact that the law does not define specific criteria that allows for proof of this link, resulting in disparities between the relevant courts as far as grounds for opposition are concerned, and result in an undesirable situation of legal uncertainty. Sometimes it is considered sufficient that the foreigner is married to a Portuguese, has Portuguese children and makes an effort to learn Portuguese, in order to prove the link with the national community, with no demand for proof that the person in question lives and works in Portugal. On other occasions, residence in Portugal, professional integration, and the existence of Portuguese children, reasonable knowledge of the Portuguese language and even knowledge of the political and historical reality are not enough for establishing this link. Rather a feeling of psychological or sociological belonging to the national community is demanded, making it practically impossible (given the lack of means of proof) for the

foreigner to prove this and implying the refusal of Portuguese nationality. The double standard of Portuguese case law and the lack of an objective legal framework that allows for proof of a person's link to the national community is a source of legal uncertainty that is incompatible with the principle of preserving family unity in matters of nationality.

Given that access to nationality by the state where a foreigner resides is an important means of integration in the society that receives him or her, it should be facilitated for all those that have a link to the Portuguese community. One of these means is naturalisation. Yet in Portugal this method of integration has always been under-valued and is seen as a mere discretionary right of Government (and not as a foreigner's right). Portugal has opted, instead, to ensure the principle of general legal equality of immigrants with Portuguese nationals, enshrined in art. 15 (1) of the Constitution.<sup>49</sup> According to this constitutional provision 'Aliens and stateless persons temporarily or habitually resident in Portugal shall enjoy the same rights and be subject to the same duties as Portuguese citizens.'<sup>50</sup>

As foreseen by our legislation, naturalisation is an administrative act that allows for the exercising of discretionary powers by the administration. Such a procedure is unsuitable given the social reality of the country, which has become a country of immigration. In fact, there has been a significant increase in the number of foreigners who have settled in Portugal with their private and family lives centred here. Despite the broad scope of the constitutional principle of equality between foreigners and the Portuguese, the majority of foreigners who live in Portugal continue to be deprived of important citizenship rights (either because the reciprocity condition has not been met or because certain rights are reserved exclusively to nationals by the constitution and the law), which excludes them from the community in which they live. Within this context naturalisation should be an important means of integration in the society that receives the immigrant. Therefore, we can question the suitability of the naturalisation arrangements – that provide the Government with a large margin of discretionary power in granting nationality – in view of a new social reality characterised by increasing multi-culturalism. In order to promote the integration of immigrants and social cohesion, it would be more suitable to establish a subjective right to naturalisation for the resident foreigner, as long as certain legal requirements are met, with the administration exercising a restricted power rather than a discretionary one.

In July 2005, the Socialist government introduced a proposal in Parliament for a new Nationality Law, which was approved in February 2006. When it comes into force (after approval by the President of the Republic and publication in the *Official Journal*), this law will introduce

profound changes in the Portuguese Nationality Law by extending the *ius soli* criteria and liberalising naturalisation. The main changes are:

- introduction of *ex lege* acquisition of Portuguese nationality for the third generation of immigrants born in Portugal (double *ius soli*);
- improvement of *ius soli* acquisition of nationality by declaration: access to nationality at birth for all persons born and living in Portugal if, at the moment of birth, one of the parents has legally resided in Portugal for five years (irrespective of the legal title);
- a subjective right to naturalisation after birth for minor children born in Portugal (irrespective of their legal residence status), if one of their parents has been a legal resident for the last five years or if the minor has concluded the first four years of mandatory schooling;
- introduction of a subjective right to naturalisation for immigrants after six years of legal residence in Portugal under the further conditions of knowledge of the Portuguese language and a clean criminal record. Naturalisation no longer requires proof of means of subsistence or other proofs of integration apart from language skills;
- discretionary naturalisation of illegal immigrants born in Portugal who have lived there for more than ten years;
- acquisition of nationality by the non-married partner of a Portuguese national;
- the new law no longer differentiates between nationals of Lusophone countries and others (the same period of residence is required);
- transfer of the competence on naturalisation from the Ministry of Home Affairs (and the Aliens and Borders Service) to the Ministry of Justice.

This greater emphasis on *ius soli* and the conception of nationality as a right of those with a strong link to the Portuguese community are positions defended by all the parties represented in Parliament. Hence, a large majority of Parliament approved the new Nationality Law, which will recover the very old tradition of *ius soli*.

**Chronological table of major reforms in Portuguese nationality law since 1945**

Date	Document	Content of change
29 July 1959	Nationality Act (Law 2098) (Lei da Nacionalidade)	Mixed system with predominance of <i>ius soli</i> . Broad regulation of loss of nationality, especially i.a. <i>ex lege loss by voluntary acquisition of another nationality</i> .
1976	Portuguese Constitution (Constituição da República Portuguesa)	Recognises nationality as a human right and stipulates a restrictive rule on loss of nationality (rules out loss on political grounds or as an effect of criminal conviction).
24 June 1975	Decree Law 308/75 (abrogated by Law 113/88 of 29 December 1988)	Regulates the impact, of the decolonisation and the building of new states, on the Portuguese nationality.
3 October 1981	Nationality Act (Law 37/81) (Lei da Nacionalidade)	Mixed system of acquisition at birth with predominance of <i>ius sanguinis</i> .
19 August 1994	Law 25/94 (amended the Law 37/81)	Introduced restrictions in the acquisition of nationality by <i>ius soli</i> and in the rules for acquisition after birth (spousal transfer and naturalisation).
15 January 2004	Organic Law 1/2004 (amended the Law 37/81)	Establishes a more favourable regime for the reacquisition of nationality by those expatriated Portuguese who lost their nationality before 1981 due to a marriage with an alien or voluntary naturalisation.
17 April 2006	Organic Law 2/2006	Double <i>ius soli</i> for third generation; <i>ius soli</i> for second generation if one parent has 5 years residence; naturalisation of foreigners born in Portugal who have resided (legally or illegally) in the country for the last ten years; general entitlement to naturalisation after 6 years if clean criminal record and Portuguese language skills; no more naturalisation privileges for Lusophone citizens.

**Notes**

<sup>1</sup> Translated by Gary Mullender.

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

- 3 One of these duties is to perform military service, for which special arrangements are in force for emigrants. According to art. 38 (3) of Law 174/99 (Military Service Act), expatriates who have permanent residence abroad are not obliged to perform military service.
- 4 According to art. 12 (4) and 13 (3) of Law 174/99 (Parliamentary Elections Act), expatriates who are registered as voters are divided into two constituencies: one that covers European states and the other that represents all non-European countries. Each constituency elects two members for the Parliament.
- 5 *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 Portuguese republic enshrined the principle of spousal equality and equality of children born in and outside wedlock (art. 36 of the Constitution).
- 6 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.
- 7 This prevalence to *ius soli* is due to the influence of the Brazilian constitution, which was its source of inspiration (Ramos 1992: 63).
- 8 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).
- 9 This was not a concession to *ius soli*, but a measure to prevent statelessness.
- 10 The 1836 Decree was applicable.
- 11 Should the statement declining Portuguese nationality have been made by the minor's legal agent, he can withdraw it when he comes of age (art. 18 (2)).
- 12 The Civil Code kept the traditional limitation of *ius sanguinis a mater* to illegitimate children.
- 13 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*.
- 14 The Minister of Justice was the competent authority for granting or refusing naturalisation.
- 15 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 citizens of Portuguese descent 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).
- 16 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).
- 17 In these cases, acquisition occurs via the conjunction of *ius soli* and *ius sanguinis*.
- 18 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).
- 19 Under the 1867 Civil Code, only extraterritorial *ius sanguinis a pater* was relevant.
- 20 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.

- 21 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.
- 22 Different from residence permits, a permit of stay (*autorização de permanência*) excludes the holder from voting or applying for naturalisation in Portugal.
- 23 All political parties represented in Parliament agreed on the need to make the Nationality Act compatible with the new Constitution.
- 24 The 1981 Act eradicated any form of discrimination between men and women or children born in or out of wedlock.
- 25 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.
- 26 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. In Parliamentary Debates, Diary of the Assembly of the Republic 80. 1981: 3178).
- 27 Parliamentary Debates, Diary of the Assembly of the Republic 80. 1981: 3162f.
- 28 Parliamentary Debates, Diary of the Assembly of the Republic 80. 1981: 3184.
- 29 With the exception of art. 8, 29 and 30 that received negative votes from the Portuguese Communist Party (PCP), the Portuguese Democratic Movement/Democratic Electoral Commission (MDP/CDE) and from the Portuguese Democratic Union.
- 30 Parliamentary Debates, Diary of the Assembly of the Republic 80, 1994: 2618.
- 31 The Government was supported by a centre-right majority based on a coalition of the PSD with the CDS-PP.
- 32 Acquisition of Portuguese nationality through the joint effect of *ius soli* and *ius sanguinis* (*territorial ius sanguinis*).
- 33 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).
- 34 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 the descent is established when the child is a minor (art. 14 of the Nationality Act).
- 35 Prior to 1994, only habitual residence was required, with or without a residence permit.
- 36 This declaration should be made by the child or, when disabled, by the legal guardian (art. 10 (1) of the Nationality Rules).
- 37 There are no known judicial decisions of opposition to the acquisition of Portuguese nationality by a foreigner adopted by a Portuguese.
- 38 Emancipation before the age of majority can be achieved through marriage.
- 39 See the 29 January 2004 Court of Appeal sentence. All rulings mentioned are published on [www.dgsi.pt](http://www.dgsi.pt).

- 40 See the Supreme Court of Justice ruling of 18 December 2003.
- 41 Prior to Law 25/94 a basis for opposition was 'the obvious lack of any real link to the national community'. It was the Public Prosecutor's responsibility to prove this.
- 42 Portuguese case-law adopts a restricted interpretation of the concept of 'exercise of public duties', only considering relevant the duties that imply a relationship of political trust, which could lead to grounds for doubts that the foreigner who wants to acquire Portuguese nationality will be loyal to the Portuguese state (ruling by the Supreme Court of Justice of 25 February 1986). In addition, holding public office of a political nature is not sufficient grounds either, the Public Prosecutor has to prove that because of these duties the foreigner in question is undesirable. In this sense, the ruling by the Supreme Court of Justice of 11 April 1998 considered that the fact that a foreign applicant for nationality was Minister of Construction and Housing in Angola for a short period of time was not sufficient ground for opposition. This is because the grounds for opposition do not have to be seen as preventive but merely as indications of 'undesirability', with the responsibility of proving the undesirability resting with the Public Prosecutor.
- 43 See, amongst many others, the ruling by the Lisbon Court of Appeal dated 17 October 2002, as well as the ruling by the Supreme Court of Justice dated 11 February 2004.
- 44 In this sense, the ruling by the Lisbon Court of Appeal dated 16 October 2003.
- 45 See the ruling by the Lisbon Court of Appeal dated 2 February 1999 and 17 December 1998.
- 46 See the ruling by the Supreme Court of Justice dated 7 January 2004.
- 47 In this sense, the ruling by the Supreme Court of Justice dated 26 February 2004.
- 48 In terms of the 1959 law, the first instance of appeal was administrative (and not judicial), leaving decisions on nationality to the Ministry of Justice. Its decisions could be appealed in the Supreme Administrative Court.
- 49 The principle of equality however is not absolute, since art. 15 (2) of the Constitution provides exceptions and allows the law to establish others: 'Paragraph 1 (equality principle) does not apply to political rights, to the performance of public functions that are not predominantly technical or to rights and duties that, under this Constitution or the law, are restricted to Portuguese citizens.' Nevertheless, the CPR itself has introduced exceptions to these exclusions by granting the citizens of Lusophone countries with permanent residence in Portugal all political rights, on a reciprocal basis, with the exception of holding the office of President, Speaker of the Parliament, Prime-Minister, President of the Supreme Courts, serving in the armed forces and diplomatic corps (art. 15 (3) of the CPR) and granting all foreign citizens resident in Portugal the right to vote and be elected in local elections, on a reciprocal basis (art. 15 (4) of the CPR).
- 50 Translation taken from the English version of the Portuguese constitution published on the site of the Assembleia da República, [www.parlamento.pt](http://www.parlamento.pt).

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