

NATIONALITY AND THE STATUS OF ALIENS IN THE 1988 BRAZILIAN CONSTITUTION

Carmen Tiburcio

Associate Professor, State
University of Rio de Janeiro (UERJ)

I. INTRODUCTION

The purpose of this article is to examine the treatment of nationality and rights of aliens under the new Brazilian Constitution. The article not only analyzes acquisition and loss of nationality and rights of aliens as presently established in the Constitution, but it also shows the historical treatment of the subjects in previous Brazilian Constitutions, as well as in comparative law. The final part of the article compares these provisions of the 1988 Brazilian Constitution with existing international conventions and principles of international law in order to determine to what extent our current Constitution complies with international law.

II. CONCEPT OF AN ALIEN

No definition of "alien" appears in any of the Brazilian Constitutions, Immigration Acts, or any other statutory or regulatory provisions. The doctrine and practice, however, have defined an alien by working backward from the definition of a national. Anyone in Brazil who is not a Brazilian national is considered an alien.¹

Except for Portuguese nationals, who are given special treatment, Brazil has no different categories of aliens; they are all lumped together under the rubric of "those who do not have Brazilian nationality." Portuguese nationals are granted special status because of a treaty between Brazil and Portugal granting reciprocal rights to Brazilians in Portugal.² According to this treaty, Portuguese nationals are

¹ M. Fraga, *O novo Estatuto do Estrangeiro Comentado* 1 (1985); 34 *Enciclopédia Saraiva do Direito* 170; A. Dardeau de Carvalho, *Situação Jurídica do Estrangeiro no Brasil* 9 (1976); J. Afonso da Silva, *Curso de Direito Constitucional Positivo* 293 (5th ed. 1989).

² Convenção sobre a Igualdade de Direitos e Deveres entre Brasileiros e Portugueses, ratified in Brazil by Decree No. 70391 of April 12, 1972, [hereinafter referred to as Braz.-Port. Conv.]. Brazil and Portugal have very strong links. Brazil was discovered by a Portuguese navigator in 1500; from 1500 to 1822, Brazil was a Portuguese colony. In 1822, a member of the Portuguese Imperial Family proclaimed the Brazilian independence, but the country continued under the rule of descendants of the Portuguese monarchs until 1891, when Brazil became a republic. Since 1891, Brazil has had no political ties to

treated as equivalent to naturalized Brazilian citizens and are denied only the ability to hold certain governmental positions that are constitutionally limited to Brazilian born citizens.³ Nationals of other countries may be granted special rights in Brazil by treaty, but these special rights do not affect their status as aliens. They are still aliens and are treated as such; they are merely granted special advantages because of the treaty.⁴

In contradistinction to a country like Great Britain,⁵ Brazil does not have different categories of individuals who receive protection from the State. Brazil does have, however, two classes of nationals: those who acquired their nationality by birth, and those who acquired their nationality through naturalization. The few distinctions between these two classes of nationals is explained below.⁶

III. ACQUISITION OF NATIONALITY

Nationality has been defined as the link between individuals and formal States.⁷ Only the State involved can recognize an individual as its national. The

Portugal, but the colonial past, the common language, common religion, and common cultural traits have resulted in a strong bond between Brazil and Portugal.

Treaties between former colonies and former colonizers providing for special treatment of each others' nationals are common. Treaties with Portugal's former African colonies also provide for special treatment of the nationals of the signatory states, albeit with lesser degrees of equality. Spain has taken a more liberal approach, ratifying several treaties granting binationality to nationals of its former Latin American colonies. See Moura Ramos, *O Novo Direito Português da Nacionalidade in Homenagem ao Prof. Antonio de Arruda Ferrer Correia* 662, n.379 (1986). See also Moura Ramos, *La Double Nationalité D'Après le Droit Portugais*, 59 Boletim da Faculdade de Direito da Universidade de Coimbra 203 (1983). Special treatment also occurs in countries with a common past experience, such as Denmark and Iceland. Const. of the Kingdom of Denmark, art. 87 (1953).

³ Braz.-Port. Conv., art. 4; Const. of 1988, art. 12, para. 1.

⁴ For example, nationals of certain countries pay lower Brazilian taxes because of treaties in effect between Brazil and their own countries.

⁵ After the 1981 British Nationality Act, which went into force on January 1, 1983, "alien" means a person who is not a Commonwealth citizen, a British protected person, nor a citizen of the Republic of Ireland. See I. MacDonald, *Immigration Law and Practice in the UK* 1 (2d ed. 1987).

⁶ Most countries establish a fundamental distinction between native-born and naturalized citizens. The native-born citizen has all rights inherent in the status of a national, while the naturalized citizen frequently is accorded fewer of these rights and benefits. Such discrimination between the two types of nationals is still found at different levels in many countries. The United States and Argentina, for instance, prohibit naturalized citizens from becoming President or Vice-President. US Const. of 1789, art. II, para. 5; Argentine Const. of 1853, art. 76. Mexico establishes a broader distinction. Const. of 1917, arts. 26, 55, 58, 82, 95.

⁷ See Richard Plender, *International Migration Law* 29 (2d ed. 1988); Zeballos, *La Nacionalité* 153 1914; J. F. Rezek, *Le Droit International de la Nationalité*, 198 *Recueil des Cours* 341 (1986). The Harvard Draft Convention on Nationality, Responsibility of State and Territorial Waters, art. 1 (a) (1929), defines nationality as the status of a natural person who is attached to a state by the tie of allegiance. It also defines "tie of allegiance" as a term of general use to denote the sum of the obligations of a natural person to the State on a more permanent basis. Commentaries at 23. This definition has been much criticized, however, for the term "allegiance" is a feudal concept that regards nationality as a territorially

laws of each State determine which persons are its nationals, to the exclusion of all others, regardless of how close the link.⁸

A. NATIONALITY BY BIRTH

Brazilian nationality can be acquired either at birth or through naturalization. Nationality acquired at birth, called original nationality, is primarily acquired on the basis of *ius soli*. Historically, Brazil has sought to encourage immigration, a basic social policy reflected in its approach to nationality. All persons born in Brazil, except those born to foreign diplomatic personnel, automatically acquire Brazilian nationality.⁹ Original Brazilian nationality can also be acquired through the principle of *ius sanguinis*, under which a child acquires the nationality of its father and/or mother, regardless of place of birth.¹⁰ Although the main principles of nationality are governed by the Constitution, the details regarding acquisition, loss and reacquisition of Brazilian nationality are determined by law. Since a national is someone who belongs to a State, it is fitting for the Constitution, the fundamental law of the State, to determine who is to be regarded as a member of the national community that makes up the State.¹¹ In Brazil, nationality has always been defined by the Constitution.¹²

based relationship between individuals and the sovereign and according to which the individual is tied to the king by a bond of allegiance. See also Blackstone, 1 *Commentaries* 366, 375

⁸ The Permanent Court of International Justice (PCIJ) has held that: "... The national status of a person belonging to a state can only be based on the law of that state." The Exchange of Greek and Turkish Populations, ser. B, no. 10, at 19 (1928). The Hague Convention of 1930 on Certain Questions Relating to the Conflict of Nationality Laws, arts. 1 and 2, expresses the rule that it is for each state to determine under its own law who are its nationals, and that any questions as to whether a person possesses the nationality of a particular state shall be determined in accordance with the law of that State. See also arts. 9, 12, 14 and 15 of the Bustamante Code. Havana, 1928.

⁹ This *ius soli* rule is accepted mainly by immigration countries, for it ensures that all children born in the country, even if their parents are aliens, have the nationality of the country of settlement.

¹⁰ The *ius soli* and the *ius sanguinis* principles can be traced to the understanding of the term nationality in common law and Roman law countries. In the former, nationality is a tie established by the territory, while in Roman law countries, nationality is understood more as a personal relationship. Nationality is usually acquired by descent and is defined as a tie between the individual and the community of individuals represented by the State. P. Weis, *Nationality and Statelessness in International Law* 4 (1956).

¹¹ Pontes de Miranda, *Nacionalidade de Origem e Naturalização no Direito Brasileiro* 20 (2d ed. 1936) points out that much of the discussion about the nature of the laws establishing nationality concerns whether they are part of public law or private law. Article 8 of the French Civil Code regulated nationality as part of private law; however, on February 2, 1921, the Court of Cassation took the position that nationality was a matter of public law, involving state sovereignty. A similar division occurred in Brazil. In 1857, Pimenta Bueno, a leading Brazilian doctrinal writer on private law, took the position that nationality laws are part of private law. In 1858, (66 years before the decision of the French Court of Cassation), Teixeira de Freitas, Brazil's preeminent civil law scholar, contended that laws determining nationality were matters of public law. Introduction to the *Consolidação das Leis Cíveis*, note 226 (1858). This distinction is important because in civil law countries it is established that private law can be derogated by the parties while public law cannot, that is, its compliance is mandatory to all.

¹² Const. of 1824, arts. 6 & 7; Const. of 1891, arts. 69 to 71; Const. of 1934, arts. 106 & 107; Const. of

Brazilian doctrine and legislation distinguish among naturals, nationals, and citizens.¹³ Naturality is a territorial concept used to characterize an individual born in a country's territory, but it does not necessarily imply that the individual is a national of his country of birth. Because the criterion of *ius soli* prevails in Brazil, most individuals born in Brazil are both Brazilian naturals and nationals.

Citizenship is a much more specific concept. Citizens are nationals who actually have full political and civil rights.¹⁴ While every citizen is a national, not every national is a citizen. Article 14, para. 3 of the current Constitution sets forth as independent requirements for eligibility for citizenship, Brazilian nationality and the full exercise of political rights. Article 15 of the current Constitution provides for loss of the ability to exercise of political rights in cases of absolute civil incapacity, criminal conviction, refusal to submit to a mandatory legal obligation, or corruption by a government employee. In such cases, the individual remains a Brazilian national, enjoying all the rights and benefits of nationality, but not those of citizenship.¹⁵

As a consequence of the *ius soli* principle, all Brazilian Constitutions have conferred nationality at birth.¹⁶ Brazilian law has always deemed everybody born in Brazil to be a Brazilian national, with the exception of those whose parents are in the service of another country.¹⁷

1937, arts. 115 & 116; Const. of 1946, arts. 129 & 130; Const. of 1967, arts. 140 & 141; Const. of 1969, arts. 145 to 147; and Const. of 1988, art. 12. (Although the 1969 Brazilian Constitution was styled as an amendment of the 1967 Constitution, due to the significant changes in the constitutional text and its renumbering of the entire document, it is more proper to consider it a new Constitution rather than an amendment.)

¹³ Until the Constitution of 1934, the terms "national," "citizen" and "natural of" were used interchangeably in Brazilian legislation. Article 69 of the Constitution of 1891 used the term citizenship for all the above concepts, and Article 71 § 4, when discussing the loss of political rights, equated citizenship with nationality. After the 1934 Constitution, however, the present differentiation in the meaning of these terms became part of our law. The courts, ordinary legislation and the Constitutions have all employed these terms distinctly ever since.

¹⁴ See Universal Declaration of Human Rights, art. 20 (1) (1948); American Convention on Human Rights, art. 23 (1969); American Declaration of the Rights and Duties of Man, art. 38 (1948).

¹⁵ Except for those cases mentioned in our Constitution, all nationals of Brazil have the potential to become citizens of the country. Brazil has no concept of a non-citizen national as does the United States, for instance, where inhabitants of the outlying possessions of American Samoa and Swain's Island are still considered non-citizen nationals. Aleinikoff & Martin, *Immigration Process and Policy* 850 (1985) and the *American Law Institute, Restatement (Third) of Foreign Relations* § 212 (1986). According to Dutch law, persons born in the Dutch possessions have the status of Dutch subjects, as distinct from those born in the Netherlands. Law of February 10, 1910, as amended June 10, 1927, *Staatsbald*, No. 175, art. 1 (1927).

¹⁶ Const. of 1824, art. 6 (I to III); Const. of 1891, art. 69 (I to III); Const. of 1934, arts. 106 (a) and (b); Const. of 1937, art. 115 (a) and (b); Const. of 1946, art. 129 (I and II); Const. of 1967, art. 140 (I) (a), (b) and (c); Const. of 1969, art. 145; and Const. of 1988, art. 12 (I).

¹⁷ Const. of 1988, art. 12 (I) (a). This exception to the *ius soli* rule has received widespread acceptance by international law, as expressed in the 1929 Harvard Draft Convention on Nationality and the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, arts. 5 and 6.

According to the *ius sanguinis* rule, Brazilian nationality has always been granted to those born abroad who have at least one Brazilian parent in the service of the Brazilian government.¹⁸ Since the 1946 Constitution, Brazilian nationality also has been granted to those born abroad whose mother or father is a Brazilian national, provided those born abroad came to Brazil to reside and opt for the Brazilian nationality. The 1946 Constitution required both repatriation and an express declaration of a desire to retain one's Brazilian nationality until the age of 25. The 1988 Constitution, on the other hand, confers Brazilian nationality on the children of a Brazilian mother or father, born abroad, if regularly registered in a Brazilian Consulate abroad. This means that after registration, the child will be Brazilian without having to reside in Brazil or apply for national status.¹⁹

The 1988 Constitution seems to have extended the time limit for children born abroad of a Brazilian mother or father and not registered at the Brazilian Consulate to opt for Brazilian nationality. The constitutional provision determines that this option can be made "at any time," and a recent federal court decision has interpreted this provision literally to allow a person born abroad to opt for Brazilian nationality at any time because the constitutional text imposes no deadline.²⁰ It is not clear whether such a person is a temporary national or an alien prior to exercising his or her option.²¹

A doctrinal debate exists as to whether there is a fourth case of original acquisition of Brazilian nationality in addition to these cases expressly stated in the Constitution. The debate concerns the status of a child born in Brazil to a Brazilian parent and a foreign parent in the service of another country. Some authors say that such a child is Brazilian according to the *ius soli* rule, for this is the main principle of acquisition of nationality. The Brazilian Constitution permits only one exception to the rule of automatic Brazilian nationality at birth in Brazil: a child of parents in the service of another country, both of whom are foreigners. If only one parent is in the service of another country and the other parent is Brazilian, then the child is

¹⁸ See Const. of 1988, art. 12 (I) (b).

¹⁹ Art. 12 (I) (c). This provision of the new Constitution ended a debate that took place among Brazilian jurists. Because the wording of the previous constitution regarding acquisition of nationality was not grammatically clear, some authors, as well as the more recent decisions of the Federal Supreme Court, interpreted it to mean that the child of a Brazilian mother or father, born abroad, registered at the Brazilian consulate, is a Brazilian national since birth therefore having no need to reside in Brazil and make the option. See J. Dolinger, *Direito Internacional Privado* 142-146 (1986).

²⁰ Decision of Judge Neusa Dantas da Silva, 21st Federal Court, No. 89.000/901-7, decided Dec. 12, 1989.

²¹ Read literally, the constitutional text would seem to allow a foreign-born child of a Brazilian parent who has not exercised the option of nationality to be considered a temporary national. But this proves too much, for then there would be no distinction between Brazilian nationals born in Brazil and those born abroad. For this reason, Jacob Dolinger theorizes that so long as one does not opt for Brazilian nationality, such a person will be considered an alien, and not a temporary national, as used to be the case. *Nacionalidade e Direito dos Estrangeiros*. — Comentários à Constituição de 1988 (to be published by Freitas Bastos) — On the other hand, admitting that the individual remains an alien until opting for status as a national would imply that opting for Brazilian nationality is a way of acquiring our nationality, which is a great change in our doctrine. J. A. da Silva, *Curso de Direito Constitucional Positivo* 288 (5th ed. 1989) seems puzzled with the constitutional text and states that the ordinary legislation regarding nationality has to be changed to aid in the application of this provision.

Brazilian, according to a strict reading of the *ius soli* rule.²² Others argue that this exception should be read more broadly. In reality, it is sufficient that one of the parents is a foreigner in the service of another country to be included in the exception of the *ius soli* rule and therefore excluded from status as a Brazilian national. This understanding is based on the practical argument that very seldom both parents of a child born in Brazil are in the service of another State. Moreover, Brazilian nationality is conferred by operation of the *ius sanguinis* rule for foreign-born children of a Brazilian mother or father in the service of the Brazilian government. If we interpret the rule on the basis of reciprocity, it is sufficient that one of the parents is working for a foreign government for the child born in Brazil to be excluded from the *ius soli* rule, even if the other parent is Brazilian.²³ Still another position is that since a child born abroad of a Brazilian mother or father who comes to live in Brazil has the option of choosing Brazilian nationality, so too should a child born in Brazil of a Brazilian mother or father and a foreign parent in the service of a foreign government have the same right.²⁴

B. NATURALIZATION

Brazilian nationality may be acquired later in life through naturalization. After fulfilling certain legal requirements, an individual makes an application to become a naturalized Brazilian.²⁵ The current Constitution permits two types of naturalization. The first is ordinary naturalization, which is accorded as a discretionary act of the Brazilian Government.²⁶ The second is a right of naturalization available to those aliens who have been living Brazilian residents for

²² Pontes de Miranda, 4 *Comentários a Constituição de 1967*, 427 (1967).

²³ I. Penna Marinho, 3 *Tratado Sobre a Nacionalidade* 27, 108 (1957); O. Tenório, 1 *Direito Internacional Privado* 198 (11th ed. 1976); J. Dolinger, *Direito Internacional Privado* 146 (1986).

²⁴ This position is adopted by Article 2 of Law No. 818 of 1949, which permits acquisition of Brazilian nationality by a child born in Brazil, whose mother or father is Brazilian and whose other parent is in the service of a foreign government. H. Valladão, 1 *Direito Internacional Privado* 293 (5th ed. 1980), also shares this viewpoint, interpreting Article 145 (I) (a) of the 1969 Constitution together with the final part of this provision. See also Barroso, *Duas Questões Controvertidas sobre o Direito Brasileiro da Nacionalidade*, in *A Nova Constituição e o Direito Internacional* 43 (J. Dolinger ed. 1987).

²⁵ Currently, international law requires that naturalization be acquired voluntarily. Naturalization cannot be automatic as a result of marriage or long-term residence. Harvard Draft Convention, art. 15 (1929); Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, arts. 10 and 11 (1930). Brazil's first Constitution after proclamation of the Republic granted Brazilian nationality to anyone in the country on November 15, 1889, who did not declare his intent to remain an alien in the following 6 months. It also attributed Brazilian nationality to all persons owning land in the country who were married to Brazilian women or had Brazilian children and did not declare an intent to remain aliens. Const. of 1891, art. 69, para. 4 and 5. These provisions drew strong protests from Spain, Great Britain, and Portugal, countries with many nationals living in Brazil who were deemed to have acquired Brazilian nationality without expressing any desire to do so. Brazil's first Constitution granted Brazilian nationality to all Portuguese living in the country at the time of the independence. Const. of 1824, art. 6, para. 4. Except in these cases, Brazilian legislation has not assigned nationality unilaterally.

²⁶ Law No. 6815 of 1980 establishes the requirements and procedure for naturalization.

more than 30 years uninterruptedly without criminal convictions.²⁷ This naturalization is not granted at the discretion of the State, but is a right of the individual who complies with the constitutional requirements.

Brazil still constitutionally imposes certain disabilities on naturalized citizens.²⁸ Currently, distinctions among citizens by birth and naturalized citizens can only be constitutionally mandated; ordinary legislation has no power to do so.²⁹

IV. LOSS OF NATIONALITY

The 1988 Constitution has limited loss of nationality to just two cases: (1) voluntary acquisition of another nationality, and (2) judicial deprivation for behavior obnoxious to the national interest.³⁰ Voluntary acquisition is understood restrictively to mean only when a Brazilian national acquires another nationality through naturalization. A Brazilian who acquires another nationality by birth will not lose Brazilian nationality because of this acquisition of another nationality. Acquisition of another nationality has to be voluntary. If the nationality was in any way imposed by the foreign State on the individual, its acquisition will not lead to the loss of Brazilian nationality. The courts have the power to deprive naturalized citizen of his Brazilian nationality for behavior that seriously contravene national interests, such as activities detrimental to national security or designed to overthrow the government. Our research uncovered only one instance of withdrawal of nationality for this reason.³¹

²⁷ Const. of 1988, art. 12 (II) (b).

²⁸ While the Republican Constitution of 1891 only denied access to the offices of President and Vice President to naturalized Brazilians, exactly as in the US Constitution. The scope of discrimination against naturalized persons increased steadily until the Constitution of 1969, which created 22 different types of discrimination against naturalized citizens. See Dolinger, *Os Brasileiros Naturalizados no Poder Público*, in *A Nova Constituição e o Direito Internacional* 89 (J. Dolinger ed. 1987). The 1988 Constitution diminished the kinds of discrimination, restricting it to the following: (1) a naturalized citizen cannot be elected President, Vice President, or President of the Chamber of Deputies or Senate; (2) a naturalized citizen cannot become a career diplomat or an officer in the Armed Forces (art. 12, para. 3); (3) a naturalized citizen cannot become a member of the Council of the Republic (art. 89 (VII)); (4) a naturalized citizen cannot become the owner, manager, or director of a publishing or broadcast firm until ten years after naturalization (art. 222); and (5) naturalized citizens can be extradited for crimes relating to drug trafficking or those committed prior to acquisition of Brazilian nationality (art. 5 (LI)). (In reality, the naturalization will be ineffective, for when applying for naturalization, one has to declare that one has never committed any extraditable crime. If the declaration is determined to be false, the naturalization will be deemed null and void.)

²⁹ Const. of 1988, art. 12, para. 2. There are statutes discriminating against naturalized Brazilians, such as Law No. 7652 of Feb. 3, 1988, art. 6, which restricts registration of Brazilian vessels to native-born Brazilians or Brazilian legal entities whose voting stock is at least 60 percent owned and controlled by native-born Brazilians. They are of dubious constitutionality after promulgation of the 1988 Constitution.

³⁰ Art. 12, para. 4. The prior constitution contained four cases in which nationality could be lost. Const. of 1969, art. 146.

³¹ RE No. 26256 of Jan. 12th, 1956, cited by H. Valladão, *supra* note 25, at 320.

Brazilian law tries to avoid dual nationality upon the premise that an individual should owe allegiance to only one country. It assumes that voluntary acquisition of a second nationality later in life shows a preference for the second country. Recently, some countries have started to permit their nationals living abroad to acquire the nationality of their country of residence without losing their original nationality, recognizing that an individual who resides abroad finds nationality of the country of residence a much more a practical alternative than a change of allegiance and loyalty.³²

Brazilians who have lost their nationality are treated as aliens. The procedure for reacquiring Brazilian nationality, however, is much simpler for one who has voluntarily lost Brazilian nationality than it is for ordinary naturalization. The former Brazilian needs only to be domiciled in Brazil and request reacquisition from the President of the Republic.³³

V. STATUTORILY CREATED RIGHTS OF ALIENS

The power to legislate with respect to immigration, and extradition is granted exclusively to the Federal Congress.³⁴ Curiously, it was not until 1969, however, when much of the legislative power was concentrated in the Executive, that comprehensive legislation was first adopted with respect to aliens.

The first legislation dealing with aliens in Brazil was an 1820 decree that prohibited entry into Brazil without a passport.³⁵ The first Brazilian Constitution of 1824 said little about aliens, providing only that anyone could stay or leave the country according to police regulations.³⁶ It contained no provision specifically dealing with aliens, and the chapter of individual rights referred only to citizens.

In 1831, Brazil adopted its first Alien Registration Act. In 1889, after proclamation of the Republic, all aliens in the country on November 15, 1889, were automatically naturalized.³⁷ The obligation to enter the country with a passport was revoked in 1890;³⁸ dispensing with the need for a passport to enter Brazil was made an express provision of the first Republican Constitution of

³² Portugal and Spain, for example, are countries which have changed their legislation to exclude "voluntary acquisition of another nationality" as a reason for loss of nationality. See Moura Ramos, *supra* note 3.

³³ See Law 818 of 49, arts. 36 and 37.

³⁴ Const. of 1988, art. 22 (XV), repeating the provisions of prior constitutions.

³⁵ Decree of December 2, 1820. In reality this decree was not a Brazilian Act in its proper sense. Brazil only became independent from Portugal in September 7, 1822; consequently this Decree was still an act of the colony of Brazil.

³⁶ Const. of 1824, art. 179, para. 6.

³⁷ Decree 58-A of Dec. 14, 1889. See *supra* note 26.

³⁸ Decree No. 212 of Jan. 22, 1890.

1891.³⁹ The 1891 Constitution also extended to resident aliens the individual rights guaranteed by the Constitution, expressly the rights to life, freedom, personal security and property.⁴⁰

The 1934 Constitution established a quota system, limiting the number of nationals of each country to the average that had immigrated in the previous 50 years.⁴¹ It also withdrew the requirement that an alien be a resident in order to enjoy the constitutional guarantee of individual rights.

The quota system was maintained in the 1937 Constitution. Because of the world tensions, national security was considered of foremost importance, and legislation was impregnated with a strong feeling of nationalism and fear of anything alien. In 1938, the Immigration and Colonization Council was created to regulate the immigration of aliens into the country. The quota system was never entirely observed, for many aliens entered the country in numbers that exceeded their quotas. Over quota allowances were made by ordinary legislation. In 1945, legislation was promulgated that contained many detailed regulations concerning aliens in Brazil.⁴²

The quota system was eliminated from the text of the 1946 Constitution, which provided that the entry and settlement of aliens was to be established by law. It also provided for creation of an agency to supervise immigration matters.⁴³ Despite the constitutional mandate, this agency was not created until nine years later, when the National Immigration and Colonization Institute was founded.

Both the 1967 Constitution and the 1969 Constitution maintained the right of aliens to enter the country so long as they complied with the requirements determined by ordinary legislation.⁴⁴ They also reiterated that resident aliens were to be granted the same fundamental rights granted to nationals. Meanwhile, all the important aspects regarding entry and settlement of aliens, as well as the summary of their rights in the country were established by a 1969 Executive Decree known as the Aliens Act.⁴⁵ This Act remained in effect until 1980, when Brazilian Congress enacted a new Immigration Law.⁴⁶ This law, which created the National Council on Immigration to coordinate immigration policies and actions, was much criticized by human rights activists, opposition leaders, and the Catholic Church, for it significantly reduced the right of the alien to stay in the country and the

³⁹ Art. 72 § 11. The passport requirement was reinstated in the 1926 Amendment to the 1891 Constitution.

⁴⁰ Const. of 1891, art. 72.

⁴¹ Const. of 1934, art. 121, para. 6.

⁴² Decree-Law No. 7967 of 1945.

⁴³ Const. of 1946, art. 162.

⁴⁴ Const. of 1967, art. 150, para. 26; Const. of 1969, art. 153, para. 26.

⁴⁵ Decree No. 941 of Oct. 13, 1969. This was the first time Brazil enacted legislation that can properly be called an Aliens Act, for it embodied most of the legislation dealing with aliens.

⁴⁶ Law No. 6815 of Aug. 19, 1980.

available defenses to expulsion. These criticisms resulted in an amendment enacted in 1981, which restored certain legal protections for aliens in the spirit of Brazil's legal tradition.⁴⁷

VI. ENTRY AND RESIDENCE

All sovereign States exercise some degree of control over the migration of aliens into their territory. The question of what limitations are imposed on the power of States to control immigration has been much discussed.

The traditional view is that international law imposes no restrictions upon a State's power to control immigration. This position is most plainly articulated in opinions of the United States Supreme Court, which, in 1892, stated the rule of international law in the following terms:

It is an accepted maxim in international law, that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.⁴⁸

The language used by the Supreme Court in this case leaves no room for doubt that it viewed international law as imposing no limits on the power of States to control immigration into their territory. In 1889, in the famous Chinese Exclusion case, the U.S. Supreme Court reiterated this position, stating "that the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy." In its opinion, the Supreme Court went further establishing a clear connection between the immigration power and national sovereignty in the following terms.

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.⁴⁹

This traditional view is also stated in Article 1 of the 1928 Havana Convention on the Status of Aliens, which determines that the States have the right

⁴⁷ Law No. 6964 of Dec. 9, 1981.

⁴⁸ *Nishimura Ekiu v. US*, 142 U.S. 651, 659 (1892).

⁴⁹ *Chae Chan Ping v. US*, 130 U.S. 581 (1889). But see *Eong Yue Ting v. US*, 149 U.S. 698 (1893), where some Justices argued against what they perceived as an immigration power that conferred too broad a discretion upon the government. Justice Field wrote in dissent: "The existence of the power thus stated is only consistent with the admission that the government is one of unlimited and despotic power so far as aliens domiciled in the country are concerned." This same unrestrained power of the States to control immigration was reaffirmed in *Kleinindienst v. Mandel*, 408 U.S. 753 (1972), in which the Supreme Court observed that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." The same unlimited immigration power was upheld by the British courts. *Musgrove v. Chuo Teeong Toy*, 1891 A.C. 272, 282.

to establish through legislation the general conditions of entry and residence of aliens in their territory.

Recently, international law writers have questioned this notion that a country has unrestricted power to exclude aliens. They argue that under certain circumstances a State has an exceptional duty to admit aliens, such as in the case of a long-term resident who arguably has a "vested right" to be readmitted, or for diplomats, armed forces, and victims of *force majeure*.⁵⁰ Also, the rule establishing *non-refoulement* (that is, they cannot be sent back to the country where they suffer prosecution) for refugees has been cited as a general rule of international law, having effects beyond the applicability of the Refugee Convention.⁵¹ Besides these specific instances, there are others of more general character that impose certain limits on a State's power over immigration, such as rules prohibiting discrimination, inhuman and degrading treatment, and arbitrary treatment, as well as the rule establishing a right to family life.⁵²

A. BRAZILIAN IMMIGRATION CONTROLS

Brazilian control of immigration is a two stage process: first, issuance of a visa, and second, examination at the port of entry. Aliens are screened abroad, normally after requesting visas in their own countries. Before issuing the visa, the Brazilian Consulate checks to see that the petitioner meets all the requirements of the Aliens Act⁵³ and its regulations, especially with respect to age,⁵⁴ foreign criminal convictions, and health. The Consulate also determines whether the alien's presence in Brazil contravenes public policy or national interest. At the port of entry, aliens are re-examined to make sure that no change in circumstances makes it now undesirable to admit them.⁵⁵ Issuance of a visa grants aliens no right to enter the country, for their entry can be denied at the port of entry.⁵⁶

⁵⁰ R. Plender, *International Migration Law* 159 (2d ed. 1988).

⁵¹ G. Goodwin-Bill, *International Law and the Movement of Persons Between States* 137 (1978); G. Goodwin-Bill, *The Refugee in International Law* 69 (1983). In his preface to the first book, the author has written: "The central thesis of this work is the competence is clearly limited and confined by established and emergent rules and standards of international law."

⁵² Oppenheim emphasized some of these points: "Although a State may exercise its right of expulsion according to discretion, it must not abuse its right by proceeding in an arbitrary manner." 1 L. Oppenheim, *International Law* 691 (8th ed. 1955).

⁵³ Law No. 6815 of 1980, as amended by Law No. 6964 of 1981 [hereafter referred to as the Aliens Act].

⁵⁴ No alien under the age of 18 will be granted a visa to enter the country if travelling alone without the company of the one responsible for him or without the proper authorization. Aliens Act, art. 7 (I).

⁵⁵ *Id.*, art. 22.

⁵⁶ The 1988 Constitution repeats a provision already a tradition in Brazilian legislation, allowing aliens to enter and to leave the country freely, so long as the requisites established by ordinary legislation are respected. Art. 5° (XV).

B. TYPES OF VISAS

A general condition of entry into Brazil is that the alien possess a passport and a visa.⁵⁷ Brazilian Consulates presently issues seven types of visas: (1) a transit visa, for a passage through the national territory;⁵⁸ (2) a tourist visa, valid for a three-month stay;⁵⁹ (3) a temporary visa, for a limited stay in the country;⁶⁰ (4) a permanent visa, for an alien who wants to settle in the country permanently;⁶¹ (5) a courtesy visa; (6) an official visa; and (7) a diplomatic visa. These last two type of visas are issued by the Secretary of State to representatives of foreign governments, international organizations, foreign diplomats and their families. Theoretically, a visa can only be applied for abroad. Exceptions to this rule, however, are made for transformation of visas.⁶² Brazilian legislation also requires aliens to register in the country in order to receive their identity card.⁶³

VII. TERMINATION OF PERMISSION TO STAY AND OF RESIDENCE

As a rule, permission to stay in the country may terminate with or without an administrative or judicial decision, but permanent removal of an alien requires a prior administrative or judicial procedure. Permission to stay terminates automatically when the alien's visa expires without renewal. After that date, the alien cannot legally remain in the country.

An alien can be removed involuntarily from Brazil only through deportation, expulsion or extradition proceedings. Deportation and expulsion are administrative proceedings, while extradition is a judicial proceeding. Deportation is the removal of the individual from the country either because of an illegal entry, expiration of the visa, or disobedience of some provision of the Aliens Act, such as working without permission.⁶⁴ Expulsion is the removal of the alien from the territory of the country for reasons other than those necessary for deportation; expulsion requires a

⁵⁷ There is a legislative exception for nationals of bordering countries, who are allowed to enter Brazil with only their identity cards.

⁵⁸ Brazil does not require a visa for those who enter the national territory en route to another country unless they actually make a stopover in Brazil.

⁵⁹ Aliens do not need tourist visas if they are nationals of countries with a reciprocity treaty with Brazil.

⁶⁰ This visa, issued for a variable duration, is used by businessmen, temporary workers, newspapermen, scholars, students, artists and all those who have a mission in Brazil to perform for a limited time.

⁶¹ This visa is normally given to aliens who wish to settle in the country for family reasons or to work in areas where their services are particularly needed.

⁶² Aliens who have received certain types of temporary visas, diplomatic, or official visas are allowed to transform them into temporary or permanent visas from within Brazil. Aliens Act, arts. 37 and 39.

⁶³ The obligation to register is only for those who enter the country as permanent residents, temporary residents or refugees. *Id.*, art. 30.

⁶⁴ *Id.*, art. 57.

prior inquiry prompted by the Secretary of Justice.⁶⁵ In contrast with the United States,⁶⁶ the grounds for expulsion in Brazil are quite general: behavior that contravenes public policy, national security, preservation of political or social order, public morality and tranquility, or the popular economy.⁶⁷ Because Brazilian law has always tried to preserve family unity, an alien with a stable Brazilian family generally cannot be expelled, for it is understood that the family in Brazil has the right to stay together. The Aliens Act presently prevents expulsion of an alien who has been married for more than five years to a Brazilian national,⁶⁸ or who has custody of Brazilian children financially dependent on him.⁶⁹

Any alien has the right to challenge in the courts the validity of any action that could result in his removal from the country through either an expulsion or deportation proceeding.⁷⁰ The legal remedy available is either a writ of security or habeas corpus against the Secretary of Justice or the President of the Republic, depending on the authority who signed the order. The Brazilian Supreme Court has original jurisdiction over these claims.⁷¹

An extradition request is decided exclusively by the Brazilian Supreme Court⁷² and must be based either on an extradition treaty between Brazil and the requesting State or on a promise of reciprocity.⁷³ The Brazilian Supreme Court's decision on the extradition request is final, and no legal remedy is available against it. The existence of family ties in the country plays no role whatsoever regarding extradition.

An alien can leave Brazil voluntarily at any time, (assumes he is not accused of a crime or serving time in prison) a right guaranteed by the Brazilian Constitution⁷⁴ and by the Aliens' Act,⁷⁵ and there is no need for a visa for this

⁶⁵ *Id.*, art. 70.

⁶⁶ In the United States, all possible grounds for expulsion are mentioned in detail. Grounds for expulsion from the United States can be roughly divided into 3 broad categories: violation of immigration law, criminal and subversive activities, and immoral conduct and undesirable traits. Aleinikoff & Martin, *Immigration: Process and Policy* 373 (1985). For example, perpetration of Nazi persecutions or conviction for specific crimes are grounds for expulsion. On the other hand, many countries adopt the system of general grounds for expulsion. See the 1929 Havana Convention on the Status of Aliens, art. 6, and the 1955 European Convention on Establishment, art. 3, which allow each State to expel aliens under the concept of public order.

⁶⁷ Aliens Act, art. 65. There are also other grounds for expulsion, such as fraud in entering the country or refusal to depart after expiration of one's visa has expired. In cases when deportation is not possible, expulsion may be employed for vagrancy or disrespect for any provision of the Aliens Act.

⁶⁸ The requirement of a five-year marriage was made to avoid sham marriages.

⁶⁹ Aliens Act, art. 75.

⁷⁰ Const. of 1988, art. 5 (XXXV).

⁷¹ *Id.*, art. 102 (I) (d).

⁷² *Id.*, art. 102 (I) (g).

⁷³ Aliens Act, art. 76.

⁷⁴ Const. of 1988, art. 5 (XV).

purpose. When leaving, the alien is free to take all his property with him, as guaranteed by the Constitution.⁷⁶

VIII. GENERAL LEGAL GUARANTEES

A. HUMAN RIGHTS AND FUNDAMENTAL RIGHTS OF THE ALIEN

Resident aliens in Brazil enjoy the same rights to life, freedom, security and property as nationals. All fundamental rights granted by the Constitution are guaranteed to all resident aliens as well, such as the right to equality of treatment, right not to be tortured, freedom of expression, right to privacy, right to the free exercise of any work, right of association, right to own property, right of access to justice, right to social assistance, and right to education, among many others.⁷⁷ The fact that the Constitution guarantees these rights only to resident aliens, however, does not mean that non-resident aliens are left unprotected by the Brazilian legal system.⁷⁸ Several times the Supreme Court has extended many of the rights mentioned in the Constitution to all aliens, including tourists and aliens who are not even in the country, such as the right of access to justice, the right to own property, and the right to protection of intellectual property.

The guarantee of fundamental rights to all non-resident aliens has not always been the norm. One of the first cases examined by our Courts after the 1891 Constitution, was a writ of *habeas corpus* on behalf of the Portuguese Imperial Family, banned from Brazil after the proclamation of the Republic. Decided by our Federal Courts in 1903, this case held that the 1891 Constitution guaranteed the rights expressed in article 72 only to resident aliens. Because the Imperial Family was not resident in the country and since the remedy of *habeas corpus* was one of the fundamental rights guaranteed in that provision, the Imperial Family had no right to *habeas corpus*.⁷⁹

Pontes de Miranda argues that the constitutional article that granted fundamental rights was a generic provision, and the subsequent provisions to this article could either extend these rights to non-resident aliens or deny them even to resident aliens. He points out that there are some rights among these provisions that should be granted to any human being.⁸⁰ Other authors reach the same result for a

⁷⁵ Aliens Act, art. 50.

⁷⁶ Const. of 1988, art. 5 (XV).

⁷⁷ Const. of 1988, art. 5.

⁷⁸ Celso Bastos, *Curso de Direito Constitucional* 164 (12th ed. 1990). Celso Bastos points that the Constitution extends all fundamental rights to anyone in the country, reasoning that the authors of the Constitution, when mentioning resident aliens, did not employ the term in its technical sense of being legally domiciled in Brazil, but intended to extend rights to all those physically present in the country.

⁷⁹ *Habeas Corpus* No. 1973, 91 O *Direito* 414, 434 (1903).

⁸⁰ See 4 *Comentários à Constituição de 1967 com a Emenda N/1 de 1969*, 695, 696 (1974). Along the same lines J. Dolinger, *Comentários à Constituição de 1988* (to be published by Freitas Bastos)

different reason. They interpret the text of the Constitution literally as granting rights only to resident aliens, but they conclude that non-resident aliens are also granted these fundamental rights as a consequence of international human rights conventions, duly ratified by Brazil, that grant these rights to every person.⁸¹

B. LEGAL CAPACITY OF ALIENS

In general, Aliens have complete legal capacity in Brazil. The alien enjoys the same legal capacity as a national for the great majority of civil acts.⁸² Nevertheless, Brazilian doctrine distinguishes between capacity to have rights, capacity to exercise rights, and capacity to have and exercise certain legislatively restricted rights.

Capacity to have a right is the ability to be part of a legal relation, such as the right to own property, to sue, or to inherit. These rights are granted to any individual or legal entity, without exception. All aliens in Brazil have this capacity.

Capacity to exercise a right is the capacity to act in his or her own name in the legal arena. For all those domiciled in the country,⁸³ regardless of their nationality, all but the following persons have the capacity to exercise rights: those below 21 years, the mentally insane, deaf mutes who cannot express their will, those judicially declared absent, spendthrifts, and Indians.⁸⁴ These incapacity rules are only for those who are domiciled in Brazil; if an alien is domiciled abroad and needs to exercise a right in Brazil, his capacity to do so is governed by the rules of the country where he is domiciled. Thus, any alien domiciled in Brazil, over 21 years of age and not under the incapacities listed above, may, without any other formality, sign a contract, marry or hire someone.

Finally, someone having both the above legal capacities may be prevented from having certain rights in Brazil because of a specific prohibition in the Constitution or ordinary legislation. Thus the alien may suffer some limitations regarding the acquisition of real property in rural areas,⁸⁵ of Brazilian ships,⁸⁶ or the communications media.⁸⁷

classifies the fundamental rights as *generic*, to be granted to anyone, *specific*, to be granted to Brazilians and resident aliens and *restrictive*, granted only to Brazilians.

⁸¹ J. Afonso da Silva, *Curso de Direito Constitucional Positivo* 173 (5th ed. 1989); Baptista, O *Estrangeiro: Reflexões para a Constituinte*, in *A Nova Constituição e o Direito Internacional* 135, 137 (J. Dolinger ed. 1987).

⁸² Civil Code, art. 3.

⁸³ Introductory Law to the Brazilian Civil Code, art. 7.

⁸⁴ Civil Code, arts. 5 and 6.

⁸⁵ Const. of 1988, art. 140, Law 5709 of 1971; Decree 74965 of 1974.

⁸⁶ Const. of 1988, art. 178 § 2.

⁸⁷ *Id.*, art. 222.

There is a lively debate among Brazilian constitutional scholars as to whether ordinary legislation may add any further distinctions between resident aliens and nationals. Some believe that apart from the distinctions made in constitutional text or allowances made in the constitutional text for enactment of implementing ordinary legislation, no other distinctions are possible. Other authors take the opposite position.⁸⁸ Those who contend that ordinary legislation cannot discriminate against resident aliens without express constitutional authorization base their position on the principle that expressly prohibits discrimination based on origin, one of the objectives of the Federal Republic of Brazil, according to the constitutional text.⁸⁹ Likewise, Article 5 of the present Constitution assures in general terms to Brazilian and resident aliens the rights to life, freedom, equality, security and property, which according to at least one author are the bases for all fundamental rights.⁹⁰ Since aliens are guaranteed the constitutional right to be treated equally,⁹¹ ordinary legislation not expressly authorized by the Constitution, that establishes discriminatory treatment, will be considered unconstitutional.

The same argument can be used with respect to the right to work, guaranteed to both Brazilians and resident aliens.⁹² Some contend that understanding, any legislation establishing limitations on the right of aliens to work is unconstitutional.⁹³ Consequently, proponents of this view consider unconstitutional the statute that conditions the practice of the law by aliens on reciprocity,⁹⁴ all the provisions of the Aliens Act prohibiting the exercise of functions not expressly mentioned in the Constitution,⁹⁵ and all prohibitions to exercise some professions such as public interpreter,⁹⁶ customs dispatcher,⁹⁷ insurance agent⁹⁸ as well as the Labor Laws provision⁹⁹ that requires that two-thirds of all workers be Brazilian nationals.¹⁰⁰

⁸⁸ See J. Dolinger, *Direito Internacional Privado: Parte Geral* 197 (1986), I O. Tenório, *Direito Internacional Privado* 268, 269 (11th ed. 1976 rev. J. Dolinger); 2 W. Campos Batalha, *Direito Internacional Privado* 28, 29 (2d ed. 1977).

⁸⁹ Const. of 1988, art. 36 (IV).

⁹⁰ M. Gonçalves Ferreira Filho, *Comentários à Constituição Brasileira* 586 (5th ed. 1984).

⁹¹ Const. of 1988, art. 5 (I).

⁹² *Id.*, art. 5 (XIII).

⁹³ This position is defended by the author of this article and by I. H. Valladão, I. *Direito Internacional Privado* 424 (5th ed. 1980); Soares, *Os Estrangeiros e as Atividades a eles Vedadas ou Restringidas Proibição Constitucional a Discriminação pela Lei Ordinária de Brasileiros Naturalizados*, in *A Nova Constituição e o Direito Internacional* 118, 123 (J. Dolinger ed. 1987).

⁹⁴ Estatuto da OAB, Law No. 4211 of 1963, arts. 48, 49 and 51.

⁹⁵ Aliens' Act, arts. 106 (VI), (VII), (VIII), and (IX).

⁹⁶ Decree 13609 of 1943.

⁹⁷ Decree Law 4014/1942, art. 19.

⁹⁸ Law 4594/1964 art. 3, a § 1.

This argument has been urged since the beginning of the century when the question was raised whether it was constitutional to expel resident aliens by means of the assimilation provision of the 1891 Constitution,¹⁰¹ and the silence of the constitutional text to admit expulsion. Pedro Lessa, Ruy Barbosa and Germano Hassloscher believed that since the Constitution established completely equal rights between resident aliens and nationals, and since nationals cannot be expelled, resident aliens could not be expelled either without an express authorization in the Constitution.¹⁰²

C. ACCESS TO COURTS

As mentioned above, any alien, resident or not, is guaranteed the right of access to our courts to sue and to be sued. However, the Brazilian Code of Civil Procedure demands the posting of a bond (*cautio judicatum solvi*) for all plaintiffs not domiciled in the country and without assets in Brazil, whether nationals or aliens.¹⁰³ Resident aliens are guaranteed the right to be assisted by lawyers if they cannot afford to pay for one.¹⁰⁴

D. PARTICIPATION IN ECONOMIC LIFE

Aliens admitted to Brazil as permanent residents, temporary residents,¹⁰⁵ and refugees must register within 30 days after arrival.¹⁰⁶ Those registered in the country receive an identity card,¹⁰⁷ a document that must be shown in order to be granted a work permit.¹⁰⁸

The Brazilian Constitution prohibits aliens from engaging in certain activities, such as: owning and operating Brazilian ships;¹⁰⁹ owning

⁹⁹ Art. 354 of the Consolidação das Leis do Trabalho. (The Code of Brazilian Labor Law).

¹⁰⁰ While the 1969 Constitution, art. 165 (XII) expressly admitted proportionality of Brazilian workers, the present Constitution is silent on this point.

¹⁰¹ Const. of 1891, art. 72.

¹⁰² See Dolinger, *Das Limitações ao Poder de Expulsar Estrangeiros*, in *Estudos em Homenagem ao Professor Haroldo Valladão* (Freitas Bastos, 1983).

¹⁰³ Code of Civil Procedure, art. 835.

¹⁰⁴ Const. of 1988, art. 5 (LXXIV); Law No. 1060 of 1950.

¹⁰⁵ Those referred to in Aliens Act, art. 13 (I), (IV) to (VII).

¹⁰⁶ Aliens Act, art. 30.

¹⁰⁷ *Id.*, art. 30.

¹⁰⁸ Decree-Law No. 499 of 1969; Decree-Law No. 670 of 1969, art. 3.

¹⁰⁹ Const. of 1988, art. 178, para. 2.

communications media;¹¹⁰ obtaining concessions for mining, hydraulic and other mineral resources;¹¹¹ and participating in the public service.¹¹²

E. POLITICAL STATUS

Only Brazilians can vote in federal, state or municipal elections,¹¹³ and only nationals may run for public office.¹¹⁴ Aliens are denied such rights on the theory that a non-citizen should not participate in the government of the country. Although international law only grants nationals full political rights,¹¹⁵ but some countries do grant certain political rights to resident aliens in general.¹¹⁶ Portuguese nationals are granted some political rights in consequence of the treaty between Brazil and Portugal. They have to be permanent residents of Brazil for five years and must request permission from the Secretary of Justice.¹¹⁷

IX. INTERNATIONAL LAW AND THE 1988 BRAZILIAN CONSTITUTION

The majority of rules of international law are directed toward the States and, these rules can generally only be put into operation if the States themselves are willing to implement them. Therefore, the existence of international conventions protecting human rights would serve little purpose if the States did not abide by these international documents.

This last section examines the attitude that Brazil has taken towards the international community with respect to nationality and status of aliens in order to show the extent to which the country is committed to the existing international principles in this area. The 1988 Brazilian Constitution has adopted and/or

¹¹⁰ *Id.*, art. 222.

¹¹¹ *Id.*, art. 176, para. 2.

¹¹² *Id.*, art. 37 (I).

¹¹³ *Id.*, art. 14, para. 2.

¹¹⁴ *Id.*, art. 14, para. 3 (I).

¹¹⁵ See Universal Declaration of Human Rights, art. 20 (1) and 20 (2); International Covenant on Civil and Political Rights, art. 25; American Convention on Human Rights, art. 23; American Declaration of the Rights and Duties of Man, arts. XX, XXXII, XXXIV, XXXVIII; Havana Convention Regarding the Status of Aliens, art. 7 (1928).

¹¹⁶ Since 1976, aliens that have been residents for at least three years have been able to take part in local elections in Sweden. Similar legislation has been introduced in Denmark and Norway. See Council of Europe, Human Rights Information Sheet No. 12 (Oct. 1982 — March 1983) at 88, & 7 of Resolution 790 of the Parliamentary Assembly. The same has happened in the Netherlands. See OECD, *The Future of Migration* 24 (1987).

¹¹⁷ Braz.-Port. Conv., art. 7 (1).

confirmed the following principles of international law regarding nationality and rights of aliens:

1. *Acquisition of nationality later in life must be voluntary.* This principle has been reiterated in Article 12 (II) of the 1988 Constitution; naturalization can only be granted in Brazil if requested by the individual.¹¹⁸

2. *Marriage has no influence whatsoever on nationality.* This principle is also expressed in Article 12 of the 1988 Constitution; Brazil does not permit a woman to lose her Brazilian nationality automatically when she marries an alien or, conversely, if she marries a Brazilian, to acquire Brazilian nationality, unless she requests it.¹¹⁹

3. *Nationality is not a permanent link.* This principle is embodied in Article 12, para. 4 of the 1988 Constitution. A national may lose his or her nationality and become an alien.¹²⁰

4. *States may only denationalize individuals if the rules for deprivation of nationality are clearly established by law, without room for arbitrariness.* This principle is contained in Article 12 § 4 of the 1988 Constitution, which permits loss of nationality only in the cases expressly defined in the Constitution.¹²¹

5. *The principle of the Avoidance of Statelessness has been significantly furthered.*¹²² The 1988 Brazilian Constitution has reduced the cases of loss of nationality to half as many as the former Constitution.

6. *Nationals have the right to enter, live, move freely and not to be expelled from the territory of the country.*¹²³ Conversely aliens are not guaranteed the rights of entry, residence and movement; if they are allowed entry, this privilege may be revoked. Article 5 (XV) and (LI) of the 1988 Constitution grants Brazilians the

¹¹⁸ Article 12 is based on the 1929 Harvard Draft Convention on Nationality, art. 15; the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Law, arts. 10 and 11.

¹¹⁹ Based on the Convention on the Elimination of All Forms of Discrimination Against Women, art. 9.1 (1979), specifically and in general all the non-discrimination provisions: art. 2 of the UN Declaration; art. 2.1 of the International Covenant on Civil and Political Rights; art. 1 (1) of the American Convention on Human Rights (1969); art. II of the American Declaration of the Rights and Duties of Man; art. 14 of the European Convention on Human Rights.

¹²⁰ According to the American Convention on Human Rights, (1969), art. 20.3; the American Declaration of the Rights and Duties of Man, art. XIX (1948).

¹²¹ From the Universal Declaration of Human Rights, art. 15 (2) (1948); Convention on the Reduction of Statelessness, art. 9 (1961); American Convention on Human Rights, art. 20.3 (1969).

¹²² Based on art. 15 (2) of the 1948 Universal Declaration of Human Rights; Convention Relating to the Status of Stateless Persons, 1954; Convention on the Reduction of Statelessness, art. 1 and art. 8.1 (1961); the American Convention on Human Rights, art. 20.1 (1969); the Hague Convention Relating to the Conflict of Nationality Laws, arts. 14, 15, 16 and 17 (1930).

¹²³ According to the Universal Declaration of Human Rights, art. 13 (2); American Convention on Human Rights, art. 22.5 (1969); American Declaration of the Rights and Duties of Man, art. VIII (1948); European Convention on Human Rights, Fourth Protocol, art. 3 (1) (1968); the Havana Convention on the Status of Aliens, art. 6 (1928).