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The nationality of the foreign adoptee son of a brazilian adopter: Jurisprudential analysis

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ABSTRACT
The silence of the Constitution of the Federative Republic of Brazil, of 1988, about the nationality of foreign adoptees by Brazilian parents has become the object of judicial interpretation, demanding considerations about which perception should be adopted with regard to the subject. In the first chapter, the concept of nationality and the guiding criteria for its attribution are presented – jus soli and jus sanguinis, which are discussed with emphasis. In addition, the forms of recognition of naturalization recognized by the Constitution of the Republic of 1988 are revisited and, more notably, the legal consequences that radiate from it, specifically with regard to distinctions between native Brazilians, naturalized Brazilians and between these and foreigners. A brief analysis of the requirements for the adoption of a foreign child, verifying the legislation, and the doctrinal divergence regarding the nationality of the adoptee are presented in the second chapter. The third and last chapter focuses on the current position of the Brazilian Judiciary on the recognition of the original Brazilian nationality of foreign children who are adopted by Brazilian parents. This academic essay addresses a delicate topic, little explored by academics and jurisprudence. In addition, the assertions mentioned do not dare to enter into a conclusion per se, but allow reflections in the light of the Principle of the Dignity of the Human Person, guiding the so-called "Citizen Constitution" and the fundamental principle of nationality, which establishes the legal-political bond that unites the people to the State, allowing, of course, an incursion into other future studies.

Keywords: Brazilian Nationality, International Adoption, Judicial interpretation.

1 INTRODUCTION

The present Course Conclusion Paper, entitled "The Nationality of the Foreign Adopter Son of a Brazilian Adopter: Jurisprudential Analysis", has as its central objective to analyze, in the light of the decisions handed down by the Brazilian courts and the understandings of the indoctrinators, whether the nationality of the born Brazilian adopter is extended to foreign adopted children.

In particular, there is no distinction regarding filiation between biological children or children born by adoption, as provided for in Article 227, paragraph 6 of the Constitution of the Federative Republic of Brazil, of 1988. Thus, it is questioned, then: is the foreign adoptive by a Brazilian father or mother considered a born Brazilian or will he only be Brazilian if he becomes naturalized?

To answer, the following hypothesis is raised: the foreign adoptive may be considered Brazilian born, provided that he has been registered in a competent Brazilian office or will reside in Brazil and chooses, at any time, after reaching the age of majority, for Brazilian nationality, in accordance with article 12, item I, subparagraph "c", of the CRFB/88, as defended by Cristiano Chaves Farias and Nelson Rosenvald, scholars of Family Law, since there should be no distinction between adopted and born children, as provided for in article 227, paragraph 6 of CRFB/88.

On the other hand, it should be pointed out that for Valério de Oliveira Mazzuoli, a reference in the studies of International Law, the adoptive is a foreigner and may become a naturalized Brazilian, if he enters with the naturalization process, because there is no extension of nationality to the foreign infant, arguing that article 227, paragraph 6 of the CRFB/88 only refers to civil effects.

At the same time, there is a judicial precedent, from 2008, issued by the 2nd Panel of the Federal Regional Court of the Second Region, the subject of analysis of the present work, in the records of Civil Appeal No. 200651020040465, whose agreement established the understanding that the nationality of the born Brazilian is an expression of the sovereignty of the State. In the same sense, it is possible to locate the decision rendered by the Federal Regional Court of the Third Region, in the case file no. 2000.61.00.015230-5, Civil Appeal No. 759974.

At first, an investigation will be made on the legal concept of Brazilian nationality, its legal reflexes in relation to the rights of the Brazilian born, naturalized and foreign. Then, the present work aims to understand, in a succinct way, the process of international adoption of foreign infants by Brazilian parents and will bring the doctrinal divergence on the nationality of those. Finally, it will be verified the jurisprudential understanding that prevails over the definition of the nationality of foreigners in the case of Brazilian parents.

The methodology chosen was the inductive and comparative scientific method, since it starts from the jurisprudences that already had as its object the theme to arrive at the nationality of the foreign adoptee and makes a comparative analysis between the doctrines of Family Law and Private International Law. To this end, the types of jurisprudential and bibliographic procedure will be used.

In the end, it should be pointed out that the scientific and social relevance of the theme is pertinent due to the gap in the CRFB/88, since there is no specific provision to answer whether foreign adoptees can be considered Brazilians born or if they should go through a naturalization process.

2 BRAZILIAN NATIONALITY

Nationality is the link that unites citizens to a State, a Fundamental Right, which raises obligations and prerogatives, since the legal obligation to nationals remains, even outside the territorial limits of their country of origin, which accompanies it regardless of where they are.

Reality different from the foreigner, that to him there is no right linked to nationality or any type of obligation, except those contracted during his stay in a country other than the one that maintains his origin (AGRA, 2018, p. 350).

José Afonso da Silva (2005, p. 319), defines nationality as "the legal-political bond of internal Public Law, which makes the person one of the component elements of the personal dimension of the State". Thus, nationality is both an "important criterion to define the ownership of many rights", as well as a "dangerous source of exclusion and prejudice", as perceived by Virgílio Afonso da Silva (2021, p. 285)

In this context, it is observed that there are three distinct legal classifications: that of the national, who can be born or naturalized, that of the citizen and that of the foreigner. This section will examine the relevant questions of nationality.

2.1 METHODS OF ACQUIRING NATIONALITY

Nationality can be primary or secondary. The first, also called "originary," is the result of "natural fact," which is birth. The secondary, at his pace, is the one that is acquired by "voluntary fact" after birth. (SILVA, 2005, p. 320). In Brazil, this "voluntary fact", which gives rise to secondary nationality, occurs through a legal procedure and is the only criterion for the acquisition of Brazilian nationality from foreigners, after complying with the legal requirements. (AGRA, 2018, p. 352). Thus, there are two national types: the "born" and the "naturalized."

The criteria for acquiring nationality are twofold: jus sanguinis, hereditary, and jus soli, territorial. According to the hereditary criterion, "it is national who has ancestors who had the nationality of the country." Already by the criterion linked to the soil "is a national of a country who was born in the territory of that country". (Smith, 2021, p. 286).

It is interesting to note that countries that have carried out large emigrations usually opt for jus sanguinis, while those that have been colonized opt for jus soli, as Walber de Moura Agra (2018, p. 352) explains.

Brazil has adopted, as a rule, the jus soli criterion, since the Political Constitution of the Empire of Brazil, of 1824, which in its article 6 already said that "they are Brazilian citizens": "those who in Brazil have been born, whether naïve, or freed...", until the current Constitution, as extracted from the first part of paragraph "a", item I, of article 12, of the CRFB/88, which states that Brazilians are born "those born in the Federative Republic of Brazil".

Walber de Moura Agra (2018, p. 352), explains that the choice of this criterion was due to the fact that the country has received a large contingent of immigrants, and the government has an interest in nationalizing the foreigners who lived here, considering, therefore, as nationals all foreigners

residing on Brazilian soil, as long as they do not reject the condition of becoming nationals. Like (almost) every rule, there are exceptions to jus soli. There are three.

The first, present in the final part of article 12, item I, subparagraph "a", provides that the original nationality will not be the one who, despite being born in Brazil, is the son of a foreigner in the service of his country. Although, if one of his parents is Brazilian, although the other is on an official mission of his country, he will be considered born (AGRA, 2018, p. 353).

The second, contained in article 12, item I, subparagraph "b", adopts the jus sanguinis criterion to attribute the original nationality to "born abroad, of a Brazilian father or Brazilian mother, provided that any of them is in the service of the Federative Republic of Brazil;".

Finally, the third exception is set forth in paragraph "c" of the same article, which concerns those born abroad to a Brazilian father or mother, provided that they have been registered in a competent office or will reside in Brazil and opt, after reaching the age of majority, for Brazilian nationality. In this exception there are, therefore, two requirements: to be the son of a Brazilian and to have been registered in a competent division or to come to reside in Brazil, after reaching the age of majority, since the option for Brazilian nationality has a very personal character.

It should be pointed out that the competence to carry out the naturalization procedure lies with the Federal Court, as provided for in article 109, item X of the CRFB/88.

It is interesting to note the cases of the polypatrid, those who have assigned more than one nationality, a fact noted by the Brazilian Constitution of 1988, in its article 12, paragraph 4, item II, paragraph "a" to provide that the recognition of original nationality by foreign law is not a reason for loss of Brazilian nationality.

2.2 NATURALIZATION: FORMS OF RECOGNITION

In addition to the original attribution, Brazilian nationality can also be obtained through the naturalization process. To this end, the Brazilian constitutional system has provided for two forms: the ordinary and the extraordinary. As previously raised, the acquisition of nationality takes place through application, that is, a true "voluntary fact", for those who fall under the strict conditions disciplined or in the Constitution, of 1988, or in law.

Ordinary naturalization is regulated in Law No. 13,445, of 2017, the Migration Law. To this end, four conditions are required, as provided for in article 65: to present civil capacity, in accordance with the requirements of Brazilian legislation; have continuous residence in Brazil for a period of four years; communicate in Portuguese, considering the conditions of naturalization; has no criminal conviction or is rehabilitated under the law.

It should be pointed out that the period of four years can be reduced to one year in the event that the migrant has a child or Brazilian spouse/partner; has provided relevant service in Brazil or is

recommended for its professional, scientific or artistic capacity, in accordance with article 66 of said law.

Extraordinary naturalization is regulated in the Constitution of the Federative Republic of Brazil, of 1988, in its article 12, II, "b". The general rule is that foreigners of any nationality who reside in Brazil for more than fifteen uninterrupted years and without criminal conviction, can apply for Brazilian nationality. For countries whose official language is Portuguese, residency for only one uninterrupted year, moral integrity and requirement are required formulated with the fulfilment of the requirements, as provided for in point (a) of the same article.

The Brazilian Constitution, of 1988, brings an interesting provision for the Portuguese who reside permanently in Brazil, contained in paragraph 1, also of article 12, which says: "if there is reciprocity in favor of Brazilians, the rights inherent to the Brazilian shall be attributed, except in the cases provided for in this Constitution." There is reciprocity, disciplined by the Treaty of Porto Seguro, signed on April 22, 2000, incorporated into the Brazilian legal system in September 2001. Virgílio Afonso da Silva (2021, p. 287) clarifies that the Portuguese who fall under the cited device have the same rights as the Brazilians, without having to acquire nationality. Moreover, the Brazilian Constitution of 1988 did not extend this special treatment to migrants from other countries who adopt the Portuguese language.

2.3 DISTINCTIONS BETWEEN BORN AND NATURALIZED BRAZILIANS

The Brazilian Constitution of 1988, in its article 12, paragraph 2, establishes that no law can establish a distinction between born and naturalized Brazilians. However, the same device reserves the exhaustive hypotheses of distinctions between them. There are many differences in treatment.

Paragraph 3, of the same article, establishes an exhaustive list of positions that are private to native Brazilians. It is interesting to note that the first restriction of impediment is to occupy the Presidency of the Republic, following the natural substitutes in case of death or impediment of the Chief Executive. In addition to this, also the position of Vice-President; President of the Chamber of Deputies and the Federal Senate; Justices of the Supreme Court.

In addition, there is also an impediment to the positions of the diplomatic career; officers of the Armed Forces and Minister of State for Defense, because they "represent sensitive sectors of national life, ensuring foreign relations and the security of the homeland" (AGRA, 2018, p. 356).

In accordance with the Constitution of the Federative Republic of Brazil, of 1988, the six citizens who make up the Council of the Republic must be native Brazilians (see article 89, item VII).

Moreover, only the naturalized Brazilian may be extradited if he has committed a common crime before naturalization, and at any time, in the case of involvement in illicit trafficking of narcotics and related drugs, is what Article 5, item LI, of the Constitution of the Federative Republic of Brazil,

of 1988, says. In addition, most of the ownership of a journalistic company and of sound and sound and image broadcasting is private to Brazilians born or naturalized for more than ten years, which is still a distinction, since it requires the naturalized a time lapse, according to article 222 of the CRFB/88.

There are severe doctrinal criticisms of these distinctions. Virgílio Afonso da Silva (2021, p. 288-289) calls it "nationalist rancidity" and says that "it is not about distinctions between Brazilians and foreigners, but between two types of Brazilians." Still, for the author, these distinctions between Brazilians "are not based on consistent reasons and imply an unjustified discrimination between two classes of nationals."

2.4 DISTINCTIONS BETWEEN BRAZILIANS AND FOREIGNERS

In spite of the differences between born and naturalized Brazilians, it is now important to point out, in this section, the rights, positions and activities that cannot be performed by foreigners.

The first restriction covers Political Rights, as it does in most countries. According to article 14, paragraph 3, item I, of CRFB/88, the first of the eligibility conditions is Brazilian nationality. Thus, only Brazilians (born or naturalized) can run for federal, state and municipal legislative and executive mandates. In addition, foreigners do not enjoy the right to vote, see the first part of paragraph 2 of article 14, which says "foreigners may not enlist as voters...".

With regard to the execution of activities, foreigners are forbidden to research and mine mineral resources and the use of hydraulic energy potentials, as established in paragraph 1 of article 176 of CRFB/88. In addition, the ownership of a journalistic company and of sound broadcasting and of sounds and images is private to Brazilians, along the lines of article 222, also of CRFB/88.

It is interesting to note that the original wording of article 37, I, of CRFB/88, also prevented foreigners from exercising positions, jobs and public functions. Mutatis Mutandis, Constitutional Amendment No. 11 of 1996 created an exception for universities and scientific and technological research institutions, which could hire foreign professors (see art. 207, § 1).

Subsequently, through Constitutional Amendment No. 19, of 1998, there was a change in the original wording of article 37, I, with the objective of allowing foreigners access to positions, jobs and public functions, "in the form of the law". This law has not yet been drafted.

Silva (2021, pp. 289-290) points out that the Migration Law, Law 13,445/2017, in spite of presenting contours and values linked to fundamental rights, has "a facet of control", given that it is concerned "explicitly with the protection of rights and access to public goods and services by foreigners". Based on the prohibitions to naturalized Brazilians and the impediments of rights, positions and activities to foreigners, the constitutionalist criticizes the idea that the Brazilian State and the Brazilian population are truly receptive to those who come from abroad.

3 ADOPTION OF ALIEN AND NATIONALITY OF THE MINOR

Adoption is a solemn act of family integration, kinship constituted by the will of the parties, which introduces a new member into a substitute family through a socio-affective bond planned and based on the dignity of those involved, according to the best interest and full protection of the adoptive, with the seal of the Judiciary.

The CRFB/88, in its article 227, § 6, enshrined the isonomic protection conferred on both natural and adoptive children, and ruled out any discriminatory treatment between them. In this way, the legal procedure of adoption in everything equates the adoptive parents with the natural parents, extending to the adopted children the same inherent rights of the natural child.

In the Brazilian legal system, adoption can be national or international. The first is regulated in articles 39 to 50 of the Statute of Children and Adolescents (ECA), Law 8,069, of 1990. The second, at its own pace, regulates the adoption of a person or couple residing or domiciled outside Brazil and is regulated in articles 51 to 52-D, of the same legal diploma.

3.1 REQUIREMENTS FOR THE ADOPTION OF A FOREIGN INFANT UNDER THE HAGUE CONVENTION

In principle, it is important to clarify that the qualification of adoption as international occurs not by virtue of the nationality of those involved, but rather by reason of their residence, as enshrined in the ECA, in its article 51 c/c Article 2 of the Hague Convention of May 29, 1993.

As an example, if a couple residing in Brazil adopts a child residing in Mexico, there will be international adoption, regardless of the nationality of the parents and the child. Likewise, there will be international adoption if Brazilians living abroad adopt a Brazilian child residing in Brazil (MAZZUOLI, 2017, p. 411).

Paragraph 5 of article 227 of CRFB/88 provides that the procedure for the adoption of foreigners and by foreigners shall be assisted by the Government, in the manner, that is, cases and conditions that the law establishes.

In Brazil, state intervention occurs both through the mandatory intervention of the Public Prosecutor's Office, as well as the necessary assessment of the Judiciary that in the delivery of the sentence, concomitantly, operates the extinction of the pre-existing family power and constitutes the kinship of filiation between the child and his adoptive parents, in addition to establishing the paternal responsibility of the adoptive parents in respect of the child.

With regard to intercountry adoption, the Hague Convention lays down the requirements to be observed by the authorities of the infant's State of origin and the host country. In all cases, the State of origin shall ensure that the procedure has not been induced by payment or compensation of any kind.

Article 4 of the Hague Convention sets out the requirements to be observed by the authorities of origin of the infant, such as: determining that the child is adoptable; verify that the intercountry adoption is in the best interests of the minor; ensure the guidance and consent of the persons, institutions and authorities involved; as well as, if applicable, the minor involved, observing the age and maturity of the minor.

At the same time, Article 5 of that legal instrument provides that the competent authorities of the host State must observe whether the prospective adoptive parents are duly fit and qualified to adopt; ensure that adoptive parents are guided; verify that the child is allowed to enter and reside permanently in the host country.

With regard to the provisions of the Brazilian legal system, the tenth paragraph of article 50 of the ECA, as amended by Law No. 13,509 of 2017, provides that the referral of the Brazilian minor to international adoption will only take place after verifying the absence of suitors qualified for the adoption of the minor in the country, through consultation in the National Adoption System, and with manifest interest of the enrolled child or adolescent.

3.2 ASPECTS OF NATIONALITY IN RELATION TO THE FOREIGN INFANT ADOPTED BY BRAZILIANS

At first, it should be noted that there are no doubts about the maintenance of the original nationality of the Brazilian minor who starts to reside abroad, even as a child of foreign parents, and may even acquire another nationality, depending on the legal system of the host country. That's because, Among the causes of the loss of nationality, explained in paragraph 4 of article 12 of the Constitution of 1988, there is no provision for adoption for residence abroad.

However, there is disagreement among legal scholars regarding the nationality of the foreign adoptee who takes up residence in Brazil.

On the one hand, Cristiano Chaves de Farias and Nelson Rosenvald, exponents of Family Law, believe that in the extension of the condition of born Brazilian. Ipsis verbis:

> It is convenient to remember, moreover, that the adoption of a foreigner by a Brazilian grants the adoptee the condition of a born Brazilian, because no discriminatory treatment is admitted, according to the constitutional norm (FARIAS, 2015, p. 943).

The renowned authors maintain that the adopted child enjoys the condition of a born Brazilian, due to the Brazilian Constitution of 1988, recognizing to him all the inherent rights of the biological, because "the adoptive is not a second-class child and cannot suffer discrimination in relation to the others", and that "the filiatory legal relationship determined by the adoption has the same qualifications and rights recognized to the children arising from the biological link". (FARIAS, 2015, p. 907).

However, the guidelines of article 12, item I, item "c", of the CRFB/88, establish that the child born abroad to a Brazilian father or mother is considered born by an act of will of his parents, with the condition of registering him in a competent Brazilian office, or by an act of his own will, when opting for Brazilian nationality, after reaching the age of majority, provided that he/she resides in Brazil.

In addition, Article 1,596 of the Civil Code of 2002 states that children born by adoption shall have the same "rights and qualifications" as children born of biological birth, and prohibits any discriminatory designations relating to filiation.

Thus, therefore, following the thought of the civilists, the adoptive born abroad could become a born Brazilian both by act of will of the Brazilian parents, as by act of own will.

At the same time, the internationalist Valério de Oliveira Mazzuoli understands the maintenance of the foreign nationality of the adoptive by Brazilian parents, concluding that the Constituent Assembly, of 1988, presents an exhaustive list in its chapter that deals with nationality. In his words, ipsis verbis:

> [...] The foreign child adopted by a Brazilian does not acquire, ipso jure, Brazilian nationality due to the adoption. This means that the effects of the adoption do not affect the nationality of the adopted child, who continues to have the nationality of origin. (MAZZUOLI, 2017, p. 412)

According to the author, attributing the extension of "born Brazilian" could culminate in the existence of a state made up of foreigners "whose sovereign government could come to be in the hands of subjects from other countries." (MAZZUOLI, 2017, p. 412).

Corroborates with the understanding of the internationalist the provision contained in article 52-C of the ECA, which guaranteed to minors adopted by Brazilians a provisional certificate of naturalization, to be provided by the Central State Authority that has processed the application for qualification of the adoptive parents, which will communicate the fact to the Federal Central Authority and determine the issuance of the Certificate of Provisional Naturalization.

In addition, the 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption does not extend the original nationality of the adoptive parents to the adoptive infant. In verbis:

> Article 26. [...]
> 2. If the adoption has the effect of breaking the pre-existing bond of filiation, the child shall enjoy, in the receiving State and in any other Contracting State in which the adoption is recognized, rights equivalent to those resulting from an adoption having such effect in each of those States. (The Hague, 1993).

Finally, Mazzuoli (2017, p. 413) points out that it remains for adoptives, who are nationals of a foreign country, the path of acquiring naturalization and concludes the reasoning that the foreign

adopted child will be a national of his State of origin (if so allowed), not being able to opt for Brazilian nationality.

4 POSITION OF THE JUDICIARY REGARDING THE RECOGNITION (OR NOT) OF BRAZILIAN NATIONALITY IN CASES OF INTERNATIONAL ADOPTION

The Civil Appeal No. 2006.51.02.004046-5 had as its object the application for recognition of the original Brazilian nationality, filed by Johana Teresa Lima Machado. The author, born in Chile, was adopted by a Brazilian couple and, at the time of filing the lawsuit, had already lived in Brazil for more than 20 (twenty) years.

The representative of the Federal Public Prosecutor's Office, the body responsible for defending the interests of the incapacitated and for ensuring the regular application of the law, opined that the request should be granted under the aegis of the principle of non-distinction between biological and adoptive children, inscribed in article 227, paragraph 6, of the CRFB/88, recognizing as met the requirements necessary to obtain Brazilian nationality, provided for in article 12, I, subparagraph "c", also of CRFB/88.

Although, in the first degree, the Court of the 2nd Federal Court of Niterói issued a judgment understanding the dismissal of the request, reasoning that the bond that linked the Brazilian parents to the plaintiff did not authorize the acquisition of the intended nationality, since it was filiation by adoption.

Subsequently, on appeal, the 6th Panel of the Federal Regional Court of the 2nd Region decided, unanimously, to dismiss the request, following the vote of the Reporting Judge Frederico Gueiros, as shown in the summary of the judgment, ipsis verbis:

> OPTION OF BRAZILIAN NATIONALITY - ART. 12, I, ITEM "C", OF CF/88 - CHILEAN, ADOPTED DAUGHTER OF A BRAZILIAN FATHER - ART. 227, § 6, of CRFB/88 - CIVIL EQUIVALENCE - DISMISSAL.
> 1. Nationality is an expression of the sovereignty of the State, subject to rigid norms, not preponderating the will of the individual or his interests.
> 2. Article 12, I, paragraph "c" of CRFB/88 establishes that Brazilians are born, those born to a Brazilian father or mother, on foreign soil, which has been proven that it is not the case of the Applicant, who is linked to Brazilian parents by the bond of adoption.
> 3. Article 227, § 6, of the CRFB/88, as well as the infraconstitutional legislation (the Civil Code and the Statute of the Child and Adolescent), guarantee the treatment without discrimination to adopted children, equating them to biological ones, for civil and succession purposes. In casu, care is taken of a public right linked to the sovereignty of the State, which the Magna Carta deals with in a particularly restrictive way.
> 4. The doctrine and jurisprudence are unanimous in recognizing that the adoptive bond, in Brazil, does not produce effects on the nationality of the adopter. If such a position were admitted, we would be allowing the enjoyment of exclusive rights of native Brazilians, such as never being extradited for any crimes committed abroad, or to occupy positions such as that of President of the Republic, violating extremely rigid constitutional clauses.
> 5. APPEAL DISMISSED.
> (BRAZIL, Federal Regional Court (2. Region). Civil Appeal 2006.51.02.004046-5. Rapporteur: Des. Frederick Gueiros. Rio de Janeiro. 07. Feb.2008).

In the vote, the Reporting Judge maintained that article 227, paragraph 6, of CRFB/88, as well as infraconstitutional legislation (CC/02 and ECA) equates adopted children to biological ones only for civil and succession purposes.

In addition, it understood that the criteria on nationality is a public right linked to the sovereignty of the State, that the Constitution treats nationality restrictively, in which the jus sanguinis criterion arises exclusively from a biological bond and not from adoption, not preponderating, therefore, the will of the individual.

For the Judge, admitting the merits of the authorial request "could provoke the existence of a State composed of foreigners, whose sovereign government could be in the hands of subjects from other countries."

In the same sense, that is, by the non-recognition of the original Brazilian nationality, it is possible to locate the decision handed down on June 12, 2000, by the 3rd Panel of the Federal Regional Court of the 3rd Region, in the case file no. 2000.61.00.015230-5, AC 759974, whose rapporteur was Judge Baptista Pereira, who rejected the claim of Che Chang Hsu, Paraguayan, born in China, and adopted by Brazilian.

In this context, the Federal Courts of the 2nd and 3rd Region adopt a simplistic, rigid and restrictive position, based on the silence of the Brazilian Constitution of 1988, to consider it as a prohibition to the possibility of including adopted children among native Brazilians, being indifferent to the will of the individual and thus establishing an inequality between natural and adoptive children.

5 FINAL CONSIDERATIONS

Nationality, a juridical-political bond that establishes ties between individuals and the State, linked to the national constitutional regime of a country, besides being a fundamental right, is also an indispensable condition for the guarantee of the Dignity of the Human Person.

In the case of Brazil, the theme is outlined in Chapter III of Title II - Of Fundamental Rights and Guarantees, of the Constitution of the Federative Republic of Brazil, of 1988. However, faced with the unpredictability of all the possibilities of clash between the fundamental precepts and the foundations of the State, not disregarding its own sovereignty, the Constituent Assembly of 1988 was silent with regard to nationality in cases of international adoption.

The constitutional text, in the hypotheses of subparagraphs "b" and "c" of article 12, seems to privilege jus sanguinis as a singular source of attribution of nationality to those born abroad, which, at first, would prevent a foreign adoptee by a Brazilian father or Brazilian mother from being recognized as a born Brazilian.

The fact is that the gap in the Brazilian Constitution of 1988 is likely to lead to the emergence of new stateless persons, since adoption leads to the breaking of biological ties and the consummation of affective ties, due to a clash between criteria for the attribution of nationality of each State.

From the analysis of the judgments under comment in the present scientific work, it is possible to conclude that, until a given moment, a conservative stance of the Brazilian judiciary prevails on the subject, which is a fertile field for discrimination and even exclusion of the foreign adoptive. On the occasion, it should be pointed out that the Supreme Court has not yet expressed itself on the subject.

Thus, the prevalence of the restrictive position goes against the size of the so-called "Citizen Constitution", a reference for other States due to the vast fundamental rights identified in it. In addition, recognizing nationality as a fundamental right at home and a human right at the international level requires a proactive stance by the State, not only in the edition of norms, but also in the interpretation of existing ones, thus avoiding the increase of stateless persons.

It is necessary to take into account that with the constitutionalization of Family Law, family relations began to be guided by constitutional principles, such as the Dignity of the Human Person, not losing sight of the fact that the purpose of the law is not to crystallize and make immutable fundamental rights, but to remain in contact with them, evolving with them and adapting to them.

With regard to adoption, the constitutional text itself, in its article 227, paragraph 6, establishes that children born by adoption enjoy the same rights and qualities as children born, prohibiting any discriminatory stance regarding filiation. However, the design of the norm, which privileges the protection of the family, does not make any reservation as to the rights that are or are not extended, and is therefore not limited only to civil rights.

Therefore, extending Brazilian nationality to foreign adoptives by Brazilian parents, especially children, does not go beyond the limits of acquisition of nationality outlined by the Constitution.

Thus, in order to protect the fundamental right to nationality and avoid the emergence of stateless persons, the interpreter must understand the Constitution as a whole, observing the Principle of Unity and Harmonization, the Principle of the Dignity of the Human Person and the Principle of Equality among Children, which leads us to equate the hypotheses of recognition of Brazilian nationality to those who are registered in a competent Brazilian office or will reside in the Federative Republic of Brazil and choose, at any time, after reaching the age of majority, for Brazilian nationality, as recommended in article 12, item I, item "c", of the CRFB/88.

For all the above, for Brazil to advance in the theme, given the relevance of the theme, it is necessary to change the current understanding of the Brazilian judiciary, in order to safeguard the equalization of rights between adopted and natural children, covering the right to nationality as a born Brazilian, despite the constitutional gap on the effects of international adoption.

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