

# The Management of Difference

Reflections on policies concerning immigration  
and the control of foreigners in Portugal and Brazil

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## Resumo

O artigo propõe uma reflexão antropológica sobre as legislações portuguesas de controle da imigração e concessão de nacionalidade, comparadas às leis brasileiras que dispõem sobre o ingresso, permanência e saída de estrangeiros no território nacional brasileiro e o instituto da naturalização. A intenção é usar um exemplo particular europeu de “manejo da diferença” e compará-lo ao atual contexto legislativo brasileiro (incluindo o projeto lei 5655, em discussão no Congresso Nacional Brasileiro), tentando identificar semelhanças ou distinções significativas. Mesmo tratando de contextos muito diferentes, considero que a comparação detalhada dessas legislações pode trazer alguma contribuição para entender os processos contemporâneos de administração da migração internacional e da produção da ilegalidade e invisibilidade dos imigrantes.

**Palavras-chave:** Legislações de imigração, Relações Brasil/Portugal, identidade nacional, antropologia jurídica

## Abstract

This article conducts an anthropological reflection on Portuguese legislation concerning immigration control and the concession of nationality, and compares it with Brazilian laws governing the entrance, stay and departure of foreigners, and also the naturalization process in that country. The objective is to use a particular European example of “difference management” and compare it to the current Brazilian legislative context (including proposed law 5655, which is being deliberated by the Brazilian national congress), in an attempt to identify significant similarities or distinctions. Although their contexts are quite different, I believe that the detailed comparison of these bodies of law contributes to understanding contemporary processes for

managing international migration and the production of illegality and invisibility of immigrants.

**Keywords:** Immigration legislation, Brazilian-Portuguese relations, national identity, legal anthropology

# The Management of Difference

Reflections on policies concerning immigration and the control of foreigners in Portugal and Brazil.

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This paper compares two ways of considering foreigners expressed in legislation designed to control foreigners in Portugal and Brazil. The comparison is important precisely because of the ambiguous construction of differences and similarities between the two countries (Feldman-Bianco 2001), which were involved in a long colonial history that even included inversions of the colonial pact (Mota and Novaes 1986). Because the two countries exhibit distinct strategies for dealing with diversity, they can contribute to an analysis of the consequences of certain legislative perspectives.

This ambiguity has been revealed in these two bodies of law about foreigners that offer a reflection on alterity and reveal how the distinction between Brazilians and Portuguese is expressed in the rules produced by each state. First, I will compare the character of the sets of laws: we will see that the Portuguese legislation about immigration and nationality implies a negation of difference, while it simultaneously defends a generic idea of “Portugueseness” (within this set of objectives, Brazilians are considered to be a special case, because of the ambiguity referred to above). To the contrary, Brazilian legislation is configured less as a set and more as a line with lots of deviations. The basic perspective of the law is an attempt to immobilize difference, which is always seen as a threat and not as a consideration about Brazilianness. The threat is mainly seen as political, given that the legislation was designed towards the end of the cold war, by a dictatorial government strongly allied to a U.S. perspective.

The substantial legislative activity in Portugal, concerning the entrance, departure and permanence of foreigners, is a clear indication of how the intensity of the flows has challenged convictions about nationality and distilled feelings of apprehension and resistance. In a quite peculiar political context,

that of integration to Europe, Portugal saw itself converted into a country of immigration. Within a span of 24 years (between its entrance into the European community and today) 4.5% of the population has become composed of immigrants. During this period, it never failed to be a country of emigration, although only the intensity of the flow of foreigners was codified in a series of laws. In the past 10 years alone the law governing the entrance, departure and stay of foreigners underwent two changes, until it was substituted by another in 2007.

A law was passed in 1981, followed by a period of stability until 1998, when a period of unprecedented legislative agitation began: the law was substituted in 1998, and was then substantially changed again in 2001 and 2003 and finally substituted in 2007.<sup>1</sup> Laws governing Portuguese nationality<sup>2</sup> underwent four changes since 1981, the most recent in April 17, 2006. Brazil has no law governing nationality, given that the concept is inscribed in the country's constitution (any change would require a constitutional amendment). Such a change was made to deal with the unavoidable fact of Brazilian emigration and thus the children of Brazilians who are born abroad.<sup>3</sup>

The Brazilian case appears to be the opposite of the Portuguese one. Brazil has the same law since 1981, even if it has been considerably repaired, altered and corrected. This process results in a line with bifurcations and not in a set: a single law, changed by other laws, regulated by decrees and orders. The process of alteration of the law has been conducted reactively, mainly in consideration of human rights, which was a concern that did not exist at the time when the law was created (as is customary in dictatorial governments). Pressure from organized civil society groups has also produced

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1 "Curiously, the legislative changes that interest us in this article began in the same period for both countries. 1981 is the year in which Portuguese Decree Law 264-B/81 was promulgated, regulating the entrance, permanence and departure of foreigners in Portuguese territory, while Law n<sup>o</sup> 37/81 changed the rules of Portuguese nationality. 1981 is also the year in which Brazil promulgated the decree that regulates law 6815, of August 19, 1980, which regulates the statute for foreigners. We are thus considering a very similar period of time, although the direction taken by each country was quite different. Portuguese Decree Law (264-B/81) was revoked, and replaced by Decree Law 244/98 of August 8, 1998. In 2001, Decree Law 4/2001 was published, on January 10, which introduced changes in Decree Law 224/98. In 2003, Decree Law 34/2003 (later regulated by Regulatory Decree 6/2004 of April 26) changed Decree Law 224/98 and its subsequent changes under Decree Law 4/2001. Decree Law n<sup>o</sup> 23/2007, of July 4, in turn would substitute Decree Law 224/98 (and the successive changes made to it).

2 This was altered in 1981, changing the statute of nationality of *jus solis* to *jus sanguinis*.

3 Constitutional amendment 54/07, which restituted Brazilian nationality to the children of Brazilians born abroad.

transformations, to the point of indicating a need for a new immigration law, a new Statute for Migrants. So much so that new legislation is being discussed and a proposed law is being deliberated by the congress.<sup>4</sup>

The Brazilian legislation that we will address is the Foreigners Statute, law nº 6.815, of August 19, 1980<sup>5</sup> and proposed law 5655 of 2009.<sup>6</sup>

## The Portuguese Set

During this period, the Portuguese legislation is characterized by the “positive discrimination” (Baganha 2001) given to immigrants from African countries where Portuguese is the official language (PALOP) and to Brazilians. The positive discrimination was announced in Decree Law 244/98 of Aug. 8, which governed the entrance, stay, departure and deportation of immigrants in Portugal. According to this decree, and its article 85, PALOP and Brazilian immigrants would have the right to authorization of permanent residence after six years of legal stay in Portugal, while other immigrants could only solicit this right after ten years of residence in the country. Decree Law 4/2001, of January 10, introduced changes in Decree Law 224/98, and required six

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4 This paper will also address this proposal. For now it is sufficient to say that its main characteristic is to include Brazilian emigrants in the equation, in addition to addressing some issues considered to be essential to human rights. We will see that in the Brazilian case the requirements of the immigrants have not influenced the core of a reflection about nationality, while the requirements of emigrants currently have more impact.

5 This law was republished by determination of Article 11, of law nº 6.964, of Dec. 9, 1981 and then, came decree nº 86.715, of Dec. 10, 1981, which regulated the law with some changes in its original publication. This law had portions later rewritten by law nº 6.964 of Dec. 9, 1981, and by laws nº 9.076, of July 10, 1995; law nº 12.134, of Dec. 18, 2009; law nº 8.422, of May 13, 1992, law nº 7.180; of Dec. 20, 1983. The decree that it also regulates was changed by subsequent decrees: nº 87, of April 15, 1991; nº 740, of February 3, 1993; no. 840 of June 22, 1993; nº 1.455, of April 13, 1995 and nº 5.978 of Dec. 4, 2006. The Ministry of Labor and Employment’s executive orders that follow are what interest us in this article. : ORDER Nº 802, OF MAY 14, 2009, ORDER Nº 45, OF MARCH 29, 2007, EXECUTIVE ORDER Nº 21, OF SEPT. 9, 2006, EXECUTIVE ORDER Nº 01, OF AUG. 9, 2004, EXECUTIVE ORDER Nº 606, OF DEC. 2, 1991. We can also add Law 9474/97 which created the National Committee for Refugees (CONARE), which is responsible for taking decisions in relation to refugees. In addition, adding to the bifurcations there is also a series of normative, administrative and recommended resolutions drafted by the Ministry of Labor and Employment that also concern emigration. There are also bilateral agreements for the legalization of immigrants (Brazil-Bolivia) and a series of four amnesty programs (1980, 1988, 1998 and 2009).

6 Concerning nationality, the distinction between the concepts of nationality that inform the Portuguese and Brazilian laws should be highlighted. The Portuguese idea of nationality has always been related to its 20th century colonial project. In the Brazilian case, the idea of nationality that informs the production of legislation of foreigners was produced in a cold war context (of persecution of internal and external immigrants) and of an accentuated jingoism.

consecutive years of residence in Portugal to allow a request for authorization of definitive residence in the case of members of the CPLP (Community of Portuguese Language Countries) and 10 years, in the case of the others (Machado 2000).

In Decree Law 4/2001, article 85 was maintained in its previous form, which meant that Portuguese speakers would continue to be privileged, but less so. The 2001 law offered positive discrimination for immigrants from the former colonial empire. Decree Law 34/2003<sup>7</sup> which came to change Decree Law 224/98 and its subsequent changes with Decree Law 4/2001, rewrote article 85, but continued to favor immigrants from countries where Portuguese is the official language: they would now need five years of legal stay to request authorization for definitive residence, while others would need eight years.

The specificity of Brazilians in the Portuguese legislation is due to the existence of specific treaties between Brazil and Portugal, which benefit these migrants in relation to the others (Costa 2006). Brazil and Portugal signed the “Statute of Equality of Rights and Responsibilities,” which is regulated in Portugal by Decree Law 154/2003, which “seeks to concretize the procedural regime of attribution and registration of the statute of equality to Brazilian citizens resident in Portugal.”<sup>8</sup> The decree is highlighted by the following passage in article 16:

“under the statute of equality, the Brazilian citizen, in the terms of the law and in conditions of reciprocity, is recognized to have rights that are not conferred to foreigners, except concerning access to the positions of President of the Republic and President of the Supreme Courts and to service in the Armed Forces and in the diplomatic career.”

Here we see the special condition of Brazilian immigrants in Portugal (and of the Portuguese in Brazil), who are officially covered by the signing of this treaty, which substitutes the previous “Convention on the Equality of Rights and Responsibilities between Brazilians and Portuguese,” celebrated in Brasilia, on Sept. 7, 1971. We perceive that the type of relationship between the nation states from which emigrants leave and those that take them in, strongly influences the conduct of the receiving state towards these people.

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7 Later regulated by DR – regulatory decree – 6/2004 of April 26.

8 The O Sabiá newspaper, July 2003 edition.

In the case of Brazil and Portugal, it is evident that the dense history between the two countries is reason for special care for Brazilians in Portugal, and vice versa. This type of historic and systematic relationship has consequences that strongly influence the construction of hierarchies of alterities in the countries that produce these relations. In July 11, 2003, for example, the “Lula accord” was signed, which is a protocol between the Brazilian and Portuguese states that calls for the legalization of Brazilian immigrants by means of an extraordinary process aimed *especially* at Brazilians.

The agreement was later extended to other immigrants in Portugal, because it became clear that the government could not give special treatment only to a specific population. For this reason, a new process of extraordinary legalization took place in 2004, under the auspices of regulatory decree n.º 6/2004 of April 26, which once again came to regulate the entrance, departure, stay and deportation of foreigners in Portugal, altered under Decree Law 34/2003. The legislative revision continues to be explicitly “Lusophone”, as it emphasizes differences that “make sense” from a Portuguese perspective. The introduction of the measure establishes:

“From the start, it involves an important innovation by determining that in the appreciation of some types of visas, knowledge of the Portuguese language must be considered, and can, in cases of quotas for the number of visas, be a preferential factor. This introduction of the knowledge of Portuguese as a factor of preference in the issuing of visas intends to reinforce relationships with nationals of the State that are culturally close to Portugal, as is the manifest case of those that are part of the Community of Portuguese Language Countries, and also of immigrants of other countries that have had contact with the Portuguese language and culture.”

Law n.º 23/2007, of July 4, which substituted Decree Law 224/98 (and successive alterations to it) changed this state of affairs: there are no more specific privileges for “Portuguese speakers” in terms of the time required for requesting acquisition of more permanent residence status. This law created three residence statuses for immigrants: temporary, permanent and long term residence, in a route that begins with the most unstable (temporary) and leads to the most stable (long term). Permanent residence is achieved after five years of temporary residence, regardless of the nationality of the immigrant. But this does not mean that a certain “spirit of assimilation” does

not continue to be important: one of the criteria to gain permanent residence is knowledge of basic Portuguese, while to achieve long term residence one must be fluent in Portuguese.

Until 2004 there was a clear trend by the part of Portuguese legislators to proceed to a posterior recognition of those people who are found within the country in a situation considered to be “illegal.” The legislation of 2007, however, refuses to conduct “extraordinary regularization.” An analysis of the law makes it clear that the route to legalization was articulated by a Portuguese concept of alterity, which is deeply colonial. Legalization is more easily granted according to the adaptation of the individuals to colonial hierarchies. We can conclude that the laws were assembled against an obvious background: Portuguese identity, considered under a colonial perspective. The new legislation perhaps indicates very evident changes in what is called “Portuguese identity,” by shifting, in some way, from a colonial perspective, not to erase it, but only to expand it in order to subordinate the most salient differences (those that are not related with the former empire) to the same logic of assimilation.

The new law does not give special treatment to “ontological” “lusophones”, or that is, those who are born in countries where the official language is Portuguese. Under the previous legislation, these subjects could seek a kind of regularization that was more definitive and faster to acquire than that of other migrants. Now, all have the same rights to more stable legalization, as long as they understand Portuguese. The condition for the requirement of more stable legalization (in the new law it is called “permanent” and “long term”) is knowledge of the language. This would be a form of assimilation by *praxis*, in contrast to that which is ontological (where certain nationalities are given special treatment). The assimilation that is imagined is that established by will and strength of spirit. There are orders regulating the learning of Portuguese and the form of evaluation that is expected.

We see that there is, therefore, a radicalization of a principle, instead of a general change of perspectives. Faced with a large mass of “illegals” seeking to gain more permanent status (those that are difficult to reverse), the State chose a spiritual form of assimilation: only those that make themselves Portuguese are more acceptable. This is a case of a colonial spirit advancing beyond the colonial history: as if a type of conquest at the level of identity remains until today. We can say that these are laws of assimilation, because



they are based on a constant refusal of alterities that cannot be domesticated.<sup>9</sup> The choice of hierarchies is clearly a choice for assimilation, giving more facilities and visibilities to those who are not so different. The possibility to use colonial hierarchies in the structure of the new legislation is, as contradictory as it appears, a radicalization of this colonial spirit, which is profoundly adverse to difference. This is because the opposition to difference is expressed in the desire for a spiritual “Portuguesation,” which is technically expressed in the need to gain command of the language to achieve more stable levels of legalization.

Under the 2001 and 2003 laws, temporary permanence status would be suspended if when the period of validity terminated the person requesting permanence did not have a work contract. The immigrant depended on a condition to remain visible, which was still not that of assimilation through praxis. It was solely and only an economic condition: if the immigrant was not a worker, he or she could not be visible. Under the previous legislation, the ontological condition of those from Portuguese speaking countries was framed by an exclusive economic condition, or that is, it was only important to be from a Portuguese speaking country in the explicit category of worker, which was a way to maintain the status of subalternity that was attributed under the colonial hierarchies. The radicalization in direction of the “Portuguese spirit,” by assimilation by praxis, in turn, leaves the condition of worker on a secondary plane in relation to access to the statutes of visibility: the contract is required only at the time of the first request and there are visas that allow exercising independent activity.

From this perspective of assimilation, time takes on new configurations and a prolonged absence produces the loss of the legal status. Why does unjustified absence produce a loss of stability? We see that the legal status becomes more stable to the degree that the subjects “become Portuguese” and, therefore, *less different*, in a context of repulsion to difference. The index used in the establishment of the legislation to measure “Portuguesation” is time and the willingness to learn the language. Thus, the length of time present in the territory is a factor of “Portuguesation.”

The case of the other legislation, the nationality law, serves as a contrast

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9 Obviously, this is a phenomenon that involves most, if not all of the European legislation about immigration, it is not unique to the Portuguese.

to the reflection above. Originating in 1981 (as mentioned in the first part of the text), it has undergone four alterations, the last on April 17, 2006. This law regulates who has the right to Portuguese nationality. The foreigners who achieve naturalization come to be “ontologically” Portuguese and cannot lose their nationality, unless they want to. That is, between long term residence and naturalization there is a difference of quality and not of degree.

This nationality legislation is broadly conditioned by indicators of substance/time: it grants nationality to those born to at least one foreign parent, if this parent was born in Portugal, regardless of the legal situation or status of this parent. The nationality law guarantees that “illegals” will not remain so for generations: the grandchild of someone who is “illegal” today would necessarily be Portuguese, if they all remain in Portugal. It also guarantees nationality to those born to immigrant parents with legal status for 5 years and to all those who were born in Portugal and did not have another nationality. A child of a foreigner born in Portugal, whose father had been living in the country for 10 years could also be naturalized. A child of an immigrant, born in Portugal, and who has concluded elementary school could also request naturalization. These rules for granting nationalities are substantive, because they presume that, given enough time, it is possible to achieve a definitive nationality status. From this point, it is no longer necessary to construct “Portugueseness”, because it can no longer be lost: the immigrant is complete with shared substances that he or she no longer runs the risk of “losing them.”

### **The bifurcated line**

The Brazilian legislation<sup>10</sup> is silent in relation to some basic human rights. The question of family reunion, for example, is not contemplated by the current law. But it was regulated with peripheral devices, such as the issue of executive orders and regulations to the law, in an exemplary case of the patchwork character of the legislation: executive order n<sup>o</sup> 606 issued by the CNIg<sup>11</sup> (signed by the Minister of Justice), of December 2, 1991, for example,

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10 In terms of the Brazilian legislation, it is important to highlight that we have only begun a systematic analysis of this material, which is why the analysis is less exhaustive than that of the Portuguese law.

11 Conselho Nacional de Imigração [National Immigration Council].

considers the question of the possibility for a family reunion. The law's most evidently non-humanist characteristics have thus been patched and repaired. This is the case of the "anomaly" principle of Decree no 86.715, of December 10, 1981, which regulates law 6.815, of August 19, 1980 (which defines the status of a foreigner), that which concerned the health requirements required of a foreigner to enter the country. According to article 52:

Art. 52 – In compliance with that established by § 3º of article 23, sole paragraph of article 33 and article 34, foreigners who have the following conditions will be prohibited from entering national territory, even if their consular visa is in order:

I – a mental illness of any nature and degree;

II – hereditary or family diseases;

III – disease or injuries that definitively prevent them from exercising the profession which they practice;

IV – physical disability, grave mutilation, blood diseases or those of the circulatory, respiratory, digestive, genitourinary, locomotive and nervous systems that cause incapacity greater than 40%;

V – Chronic alcoholism and addiction;

VI – malignant tumors;

VII – disability;

VIII – transmittable diseases: - tuberculosis - leprosy - trachoma - syphilis - leishmaniasis - blastomycosis - trypanosomiasis - and others, at the criteria of the health authorities.

This article gave a radical hygienist character to the legislation, which is clearly distant from any consideration about human rights.

What the decree says is that no one with any "physical disability" can enter the country, because of their threat to public health. Yet someone with special needs is not a risk to public health. Therefore, in reality, the law merely has a hygienic, authoritarian and biased intention. This development was only corrected in 1991 (it was in force for 10 years) when article 52 was revoked during the government of President Fernando Collor de Mello, by decree 87 of April 15, which eliminated these demands and others related to "health."

As seen, the laws continued as a patchwork text, given the political pressure and inconsistencies that became evident. Moreover, unlike the various

Portuguese laws, the Brazilian text did not express a concern with defining (by contrast) what is a “national.” We see that the set of Portuguese laws about immigration is a narrative about “Portugueseness”, a search for a definition of something felt as a threat from the immigrant “invasion.” But we can say a symbolic concern remains, with the future of Portugal due to the impacts caused by the flow of immigrants. The legislators always have a ghost in their mind: the ghost that surrounds “Portuguese identity.”

The Brazilian legislation, which does not form a whole, but a bifurcated line, does not dialog with any ghost of identity: it deals with the ghost of cold war communism. With a shift in time and of the fears involved, the main concern of the Brazilian legislation is to avoid having political agitators enter the country, “that the cultural and social “peace” be disturbed” and that immigrants organize political associations. We see this in article 107 of Law nº 6.815, of Aug. 19, 1980 and its “cold war” political character.

“ART. 107. The foreigner admitted to the national territory cannot exercise activity of a political nature, meddle, or directly or indirectly interfere in the public affairs of Brazil, and is particularly prohibited from: (Renumbered by Law nº 6.964, of Dec. 9, 1981)

I - organizing, creating or maintaining an association or any entity of a political nature, even if only for the purpose of promotion or publicity, exclusively among compatriots, of ideas, programs or norms of actions of political parties of the country of origin;

II - exercising individual action, in conjunction with compatriots or not, in order to obtain, through coercion or constraint of any kind, adhesion to ideas, programs, or norms of action of political parties or faction of any country;

III - organizing marches, processions, rallies, and meetings of any kind, or participating in them, for the purposes referred to in items I and II of this article.

Sole paragraph. The contents in the first paragraph of this article do not apply to Portuguese who are beneficiaries of the Statute of Equality, who have been recognized to benefit from political rights.”

We see here a curious junction that made this legislation especially comparable to the set of Portuguese laws: it seeks to impede political manifestations contrary to that order established by the military dictatorship (in 1981 the dictatorship was undergoing a difficult period during the government of General Figueiredo). But curiously, it exempted the Portuguese from this

danger. Because of a series of specific considerations between Brazilians and Portuguese in the legislation of the two countries, we see a very dense interlacing of privileges, reflections and distinctions. But in the case of article 107, which is still in force, the Portuguese even have the right to be communists. The work of Mansur Silva (2006) about the anti-Salazarist movement in Brazil in the second half of the 20th century - and considering that the sole leftist paper published in the country in the late sixties was produced by Anti-Salazarists (most of whom were communists) - reveals how the interlacing between Brazil and Portugal operated in the hands of Brazilian legislators of the 1980s.

Here we can make two reflections: one that considers the relationship between Brazil and Portugal, which was so close that, “between us,” even critical political expressions could be made. This passage is clearly ambiguous and appears to express a concern that is essentially related to the military period. But for some mysterious reason, the same article is carried over in the new proposed Foreigner’s Statute in a revised form. Proposed law 5655 of 2009 (sent to Congress in July 2009) would establish in article 8:

A foreigner admitted to national territory cannot exercise activity in political parties, and is prohibited from organizing, creating or maintaining an association or any entity of a political character, except for Portuguese natives who have political rights in Brazil, as established by the Treaty for Friendship, Cooperation and Consultation.

Proposed Law 5655 maintains the police nature of the previous law, as well as the “ambiguous” exception in relation to the Portuguese. While this proposed law has the declared intention to be more respectful of human rights (as it is in various passages) it is not clear why the right to political activity is not recognized as a human right.

We can see that there is no concern at all in thinking *about* Portuguese and Brazilians, whether in the current law or even in the law proposed to substitute it. They are *accepted* as similar and protected by reciprocal agreement. It is an issue that requires no discussion. We recall that Brazil took in both the anti-Salazaristas as well as those who escaped from Portugal after the revolution of the Carnations (which left Portugal under communist rule for some time), and which took in many of the Portuguese who had escaped from the African colonies of Mozambique, Angola, Guiné-Bissau, São Tomé e

Príncipe and Cape-Verde.<sup>12</sup>

The Brazilian law of 1980 is extremely beneficent to the Portuguese, the only nationality that receives specific treatment in various passages of the law. Article 5 of decree 86715 of December 10, 1981 (which regulates law 6815 of August 19, 1980), for example, specifies:

Art . 5º - A visa will not be granted to the foreigner:

I – younger than 18 years of age, unaccompanied by a legal guardian or without their express authorization;

II – who is considered harmful to the public order or to national interests;

III – who was previously deported from the country, unless the expulsion was revoked;

IV – condemned or charged in other countries for pre-meditated crime, subject to extradition according to Brazilian law; or

V – who does not meet the health conditions established by the Ministry of Health.

In article 26, paragraph 3, the law opens an exception for the Portuguese:

§ 3º - Except in the interest of national security and the conditions of health indicated in item V of article 5º, the demands of a special character foreseen in the norms for selecting immigrants, do not apply to the Portuguese, nor does that established in the following article.

One can perceive the special treatment given to Portuguese immigrants in this passage, which was later revoked by Decree n. 740 of February 3, 1993. This decree also revoked another privilege of the Portuguese, which allowed that temporary visas be transformed into permanent ones. Or that is, Portuguese natives who only had tourist visas could gain permanent visas. The citizens of other nationalities could only request the conversion of a temporary visa into a permanent one if they were scientists, professors, technicians or professionals with a work contract or religious ministers (art. 69 of Decree-Law 86715). This enormous privilege that allowed a Portuguese tourist to request a permanent visa was revoked by decree 740 of 1993.

It must not be a coincidence that a specific decree was published to

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<sup>12</sup> Countries that became formally independent after the revolution (the liberation wars were underway since 1960).

cancel some Portuguese privileges during a time of diplomatic conflicts involving Brazilian immigration to Portugal (see Feldman-Bianco 2001). The reciprocity principle probably influenced these transformations during the government of President Itamar Franco.

Between 1980 and 2010, two new elements arose in Brazilian geostrategic policy: Mercosur and the Community of Portuguese Speaking Countries (CPLP). The first had a stronger influence than the second, which operated more in the field of language, although some effective actions were taken. The Brazilian legislation, given its format as a bifurcated line, has been dealing with these realities, expressed in agreements concerning cross-border migration, for example. But the current law does not contemplate this new phenomenon (with the exception of the bifurcations such as Resolution Norm 80/2008, which made it easier for South American workers to attain a work visa). Thus, Proposed Law 6566/2009 had already inscribed in its rules these new realities: for immigrants from Mercosul it decreased the number of years of residence in Brazil needed to request ordinary naturalization from 10 to 5.

Of course a critical reading could easily say that this is a bitter privilege: after all, today, 4 years of constant residence are enough to request naturalization for *any* immigrant. The new proposed law, in the sense of the aspirations of immigrants becoming Brazilians, is a large step back. It appears incongruent that legislation based on “human rights” be more restrictive than one based on “national security”; yet it is. In this case, immigrants from countries that are not part of Mercosur face difficulties under the proposed law:

Art. 87. Conditions needed for ordinary naturalization:

I – to have civil capacity, according to Brazilian law;

II – be registered as permanent in Brazil;

III – have uninterrupted residence in national territory, for a minimum period of ten years, immediately preceding the request for naturalization;

IV – ability to read and write the Portuguese language, considered as conditions of the applicant for naturalization;

V – have legal means of subsistence for themselves and their family;

VI – have good social behavior, to be determined through an inquiry; and

VII – not be responding for any criminal charges, or have been convicted for

any pre-meditated crime, in Brazil or abroad.

§ 10 The period of residence established in item III of the paragraph above can be reduced to five years, if the foreigner meets the following conditions:

I – has a Brazilian child or spouse;

II – is the child of a Brazilian;

III – provides relevant services to Brazil, at the criteria of the Ministry of Justice;

IV – has a notable professional, scientific or artistic ability, at the criteria of the Ministry of Justice;

V – is the owner in Brazil of a company that has at least 100 Brazilian employees; or

VI – is a native of a member state of Mercosur or an associate State.

§ 20 For the purposes of this article, residence is considered uninterrupted if the total of the periods of absence of the foreigner in national territory does not exceed six hundred alternating days or three hundred and sixty-five consecutive days, except in case of unforeseeable circumstance or force majeure properly proven.

§ 30 Ordinary naturalization will be granted to natives of Portuguese-speaking countries that reside in Brazil for at least one year and who meet the conditions established in items I and VI above.

§ 40 The period of residence foreseen in this article can be reduced through an act of the President of the Republic.

I mention articles 87 of Proposed Law 5655 to demonstrate another important exception, in addition to that granted to natives of Mercosur. Natives of Portuguese-speaking countries are required to have only one year of residence to request ordinary naturalization. We see the clear construction of an hierarchy: the Portuguese have special rights, followed by members of Portuguese-speaking countries, followed by those from Mercosur, and finally, others. This hierarchy is completely absent in the current law, which only gives specific privileges to the Portuguese.

On the other hand, Proposed Law 5655 maintains some of the security concerns of the current law by demanding “good social behavior,” to be determined through an “inquiry.” This is quite vague and can allow any type of interpretation: what is good social behavior? What kind of inquiry should be conducted to verify this? The current legislation, at least because it is



explicitly security oriented, specifies much better how to conduct an inquiry. Regulatory decree 86715/81 determines:

Art. 125 - [...]

§ 3º - The agency, the Federal Police Department, upon processing the request:

I - will send the fingerprint chart of the applicant for naturalization to the National Institute of Identification, requesting the issue of his police record;

II - will investigate his or her behavior;

III - will issue an opinion about the expedience of naturalization;

IV - will certify if the applicant can read and write the Portuguese language, considered a condition;

V - will annex the inquiry report to the process in a specific formula.

The current law determines that the Federal Police will investigate the person requesting naturalization, but at least specifies the procedure, while the proposed law speaks of an “inquiry,” without specifying the process or much less what “good social behavior” effectively means to say. I want to demonstrate that the current law and those proposed regulations continue interlaced with the national security concerns from the time of the Cold War.

In general terms, we can say that because of its security concerns the current legislation is “immobilizing”: it fears the immigrant and seeks his immobilization. Article 101 of law 6815/81 affirms:

The foreigner admitted under the form of article 18, or article 37, § 2º, to perform a determined professional activity, with establishment in a determined region, cannot, within the period established at the time of granting or transformation of the visa, move residence or professional activity, or conduct it outside of that region, except in exceptional cases, through previous authorization from the Ministry of Justice, with consultation to the Ministry of Labor, when necessary. (Renumbered by Law nº 6.964, of Dec. 9, 1981)

It appears that precisely because of their mobility, that there is a concern for fixing immigrants in a location and job, beyond which they cannot escape oversight. This “principle of immobility” is spread throughout the legislation as in : the many required documents, the need to regularly appear at the Federal Police, the prohibition against moving the place of residence or

even impediments to changing jobs. By crossing the lines that form a plane (the surface of the State), the immigrant tangles the rules and is immediately seen as a potential “polluter”: of health, or politics, as a threat. As such, the immigrant must be immobilized between the rigid lines that the State imposes on him.

The proposed law, which seeks to substitute the current law, guided by the humanistic concern that inspired it (according to its drafters) returns the right to mobility to the immigrant. Immigrants will no longer be required to remain immobile (if it is approved without changes). This is an advance, but “traces” remain of the principle of immobility that guide the current law: immigrants remain barred from changing jobs, and under the watch of the federal police (in the form of inquiries) and excess documentation.

### **Immobilization versus Assimilation.**

As a form of conclusion I will compare the principles that guide the set of Portuguese laws and the bifurcated line of the Brazilian legislation, and will then attempt to present an analysis of the place of Brazilians in the Portuguese legislation and of Portuguese in the Brazilian laws.

We can see that the Brazilian legislation has a constant concern with criminal records (and originally with perfect health). The foreigner is seen as a danger to security and as a physical deformity that affects the health of the national body. We see that the anti-communist paranoia affected the way that foreigners were seen: as if they were foreign bodies in relation to the body of the Brazilian nation, with only one exception: the Portuguese. In this sense, it is as if there was some previous sharing of substance with the Portuguese, which makes them non-foreign bodies.

The Brazilian legislation, as a result of the security paranoia, is a form of immobilization of immigrants: it attempts to place them under watch. The idea of vigilance is inscribed in the text of the law as a part of the naturalization process. This tendency towards immobilization continues to operate, as if it has contaminated the thinking about immigration in Brazil, because the proposed law being deliberated by the Congress maintains much of this attempt at immobilization. Previously, immobilization was a “first degree” issue, it was a given for the condition for legalization. In the new proposal, it moves to the background, yet emerges surreptitiously: the emergence of the

paranoia for immobilization takes place in an economic strategy, because the immigrant must have a work contract, and moreover, he must have the same work contract to remain legal.

Nevertheless, the current law makes an exception for the Portuguese, who do not need to remain immobile. In the proposed law, however, even they come to be immobilized in more flexible regimes of legalization, but they are not free in economic terms and can also not change their work contracts. But this limitation is circumvented by the greater facility in achieving naturalization: they have greater freedom of movement than other immigrants. In this sense, the mobility is strongly related with the “fear” that is inscribed in the Brazilian law, a fruit of the political regime prior to the current democracy. Only those considered more as “friends” [or brothers in the case of the Portuguese] have the right to greater movement. The regime of immobilization, in the new transformations of the legislative thinking about immigration, is guided by economic mechanisms.

Brazilian laws are not supported by an exaggerated concern with national identity, which is the main characteristic of the Portuguese legislation. Probably because of the still small number of immigrants in relation to the Brazilian population, this paranoia does not appear: the new legislative movements about this issue are much more concerned with Brazilian emigration and the return of emigrants than with immigrants. This process is the reverse of that found in Portugal, which has already undergone a moment of legislating about their emigrants, as demonstrated by Feldman-Bianco (1992). With the waves of immigration in Portugal since the 1990s, the question of national identity gained prominence, and the laws passed through distinct indicators to protect this concept of nation: in principle giving preference to those who were formerly dominated, understood in a framework of imperial thinking, while also following an economic perspective. Since 2007, immigration has been considered from the perspective of a spiritual “Portugueseness”, to which any immigrant *must* submit to have the opportunity for legalization.

The practical consequence of this passage from an “ontological” imperial thinking, based on the nationalities of the formerly dominated, to a universal colonial thinking, based on the plans of the immigrant to become Portuguese, is that the legislation is much more advanced in some factors than the Brazilian legislation (current and proposed), because it does not

demand the continuity of the labor contract, in fact it does not even require a labor contract for an immigrant to maintain his or her legal status. The “spiritual” concern for becoming Portuguese freed the Portuguese legislation from the fear of immigrant mobility. On the other hand, this “spiritual” turn leads the immigrants to a dead end, the only way to integrate is to purchase the package of Portugueseness: it is not possible to be an immigrant and not-Portuguese at the same time, which also leads the Portuguese policy to a dead end. Although it is officially multicultural, Portugal, has constructed a unicultural body of law.

We have seen how the laws about immigration in Portugal have followed a route that is opposed to difference, giving space to the visibility of subjects in an “irregular situation” only to the degree to which they assimilate. For those that remain obstinately different, the policies construct a stabilization of invisibility. Previously, there were processes that tried to give visibility to those who were at the margin of “illegality,” always mediated by gradualist notions of assimilation. The most recent laws are presented as a radicalization of the principle of assimilation, denying broad policies of visibility and only allowing those who prove to be “assimilated” to become legal.

The point towards which both bodies of law converge is precisely to the ambiguity with which Brazilians and Portuguese are treated: these national categories, in the two ways of thinking (the Portuguese and the Brazilian) have a shifting status that is difficult to define in concrete terms. They are always subject to rhetorical discourses of sameness and difference,<sup>13</sup> depending on the situation. Brazilians in the Portuguese laws and Portuguese in the Brazilian laws are like destabilizers of the national reflections, because they do not have a certain place. They are always indicated as exceptions to this or that rule. For this reason, an analysis of these ambiguities can help to understand the general character of these bodies of law.

We see, therefore, that the two universes of rules (the Portuguese set and Brazil’s bifurcated line) react to distinct and opposite questions: in the Portuguese situation, the demands of the emigrants lose strength in relation to the concerns provoked by the immigrants, while in Brazil, the concerns of the emigrants (see Feldman-Bianco 2011) appear to be considered more than

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13 For a discussion about similarities and differences between Brazilians and Portuguese, see Feldman-Bianco 2001.

any consideration about the immigrants, who are still seen from a perspective of “national security.”

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