

# Compulsory Military Enlistment and Double Nationality: A Brazilian-Chinese Study Case

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## Abstract

Double nationality is a phenomenon arising from a diversity of nationalities attribution criteria. Such occurrence is not a novelty for international law, and has been addressed by a number of bilateral and multilateral transnational regulations, but is still an issue for many children whose families come from different legal and cultural backgrounds, resulting still more complicated in each time more globalized world economy. One specific hardship, often disregarded by the international legal literature, is the question of compulsory military enlistment and service, which may become detrimental to fruition of the essential human right to a nationality. This article aims to ascertain the subject from the perspective of two relatively very different legal orders, namely those of Brazil (Federative Republic of Brazil), and China (People's Republic of China), based on an actual legal dispute in Brazilian courts, applying the case study methodology, under comparative law scientific lenses.

## Keywords

Nationality, Military, Enlistment, Brazil, China

## 1. Introduction

Double nationality is a phenomenon arising from a diversity of nationality attribution criteria between two or more different countries, in a way that, if child is born in a country that adopts the concept of *ius soli*, from parents whose national law adopts the concept of *ius sanguinis*, it will have two original nationalities, one from the country in which territory it was born, and that of its parents (Dollinger & Tiburcio, 2016: p. 155).

In his elegant construct, Erik Jayme (1995) explains that, as a part of the regime of international mobility of persons, the criteria of citizenship attachment

depend on the legislation of each individual State, so that a person can acquire more than one nationality provided that each relevant State adopts different conditions for nationality transmission. There are, essentially, two principles guiding nationality acquisition, that by which a person shall have the same nationality of its parents (*ius sanguinis*), and that by which the child will bear the citizenship of its birthplace (*ius solis*).

This German renowned professor (he, himself, born in Montreal, Canada), underlines that, in Europe many States became immigration countries, and for them the question arising is if the second generations, i.e., the children of immigrants, should be allowed or not to retain their parents transmitted nationalities cumulatively with the nationality of domicile, pointing favourably in most cases for the resulting double citizenship, whereas for emigration countries, the problem is to know if their citizens' children born abroad must or not retain their nationality, or, at least, have the facilitated possibility of claiming it, if they so choose to do.

During his 1995 presentation at the Hague Academy of International Law, Jayme discerns two main problems arising from a duplicity (or multiplicity) of nationalities for the same person. The first situation is that of a double national who is in one of its "home countries", when the solution tends to be in favour of choosing the *forum* nationality, in other words, the double national will be treated as a common citizen of the country he or she is in, regardless of his or her other foreign citizenship.

The second situation, a little more complicated, is that of a person who is foreign to one given country, but that holds more than one nationality. In such cases, the prevailing solution is to choose the nationality of a country where the person effectively resides, or that of closer ties and cultural identity. This was the solution adopted by the International Court of Justice (ICJ), in the notorious NOTTEBOHM case ruling, of 1955 (ICJ, 1955).

This aforementioned situation points to problem of concern for this essay, relatively to the effects of compulsory military enlistment, with or without actual engagement in military service, in one of the countries of nationality, in regards to the acquisition, maintenance or loss of other to which a person may be also entitled.

Some international regulations already envisioned the potential conflict of interests arising thereof, being the most comprehensive, in terms of signatory Member-States, the 1930 *Convention on Certain Questions Relating to the Conflict of Nationality Law*, adopted under the auspices of now defunct **League of Nations** (later substituted by the United Nations Organization), but still very much in force for the original parts, having been adopted by other nations even after the UN was installed.

The convention has Additional Protocols, and one of them is specifically designated to address the issue of military service, under the name of *Protocol relating to Military Obligations in Certain Cases of Double Nationality*, also of 1930. The Protocol, however, has even less adhering States, leaving much room

for unilateral regulation by each individual country, not always consistent with the internationally guaranteed right to nationality, as prescribed by the 1948 *Universal Declaration of Human Rights*.

One particular example of contemporary legal controversy on the matter was identified in recent case law before a Brazilian Federal Justice Court, opposing Brazilian nationality law, and consequential military obligations vis-à-vis Chinese nationality law.

The case will be the object of review in this article, through case study methodology, but under specific comparative techniques private to the science of comparative law. Even if the case is of public record, personal details of the plaintiff will be suppressed inasmuch as it does not hinder the legal and factual analysis necessary for fruitful academic research.

Considering this article is prone for publishing in an international legal journal, legal case study methodology adopted will be that of [Susan Reinhart \(2007\)](#), worldwide known, with comparative law approach by [Leontin-Jean Constantinesco \(1998\)](#).

## 2. Nationality Prerogatives

Understanding the reflexes of a person's engagement in military activities for some country, on his or her nationality demands a previous and brief meta-juridical explanation of military service, that can happen in different ways, including by compulsory enlistment in those countries that adopt such rule.

Most historians agree that, as by-product of the French Revolution (1789) ([Tilly, 1995](#)), the rule of a State monopoly on the legitimate use of force entailed the enactment of compulsory military service obligations as a source of legitimacy for the armed services. Under the French definition of citizenship, that would be later adopted by most Western European countries, and their former American colonies, one person's citizenship rights (to vote and be voted, equal protection under the law, privacy and property, etc.), could not be separated of an equal number of duties to the State, of which temporary military service is one of the most importance ([Hippler, 2002](#)).

The "revolutionary" new form of political organization, the *National State*, would be based on the common cultural and territorial inheritance of its people, from whom all powers and prerogatives would be temporarily delegated to governing bodies in charge of protecting and developing the *nation*. In this new world there would be no more place for the mercenary armies often hired by monarchs, or to nobility-based defence apparatuses. New armies would be formed by the nation's youth, who would devote part of their lives to the country, as a token of allegiance, not just as bilateral work arrangement. Under this light, military service to the country would be both an honour (previously reserved only to a few entrusted of the crown), and a liberation from middle age vassalage system.

Obviously, in a very short time the new "popular" governments realized that

an army comprised entirely of conscripted, underpaid and poorly trained men could not assure the country's security, requiring the formation of a more permanent, professionalized core cadre of combatants, who could train and quickly mobilize volunteer and drafted soldiers. But the idea of a military force manned (literally, at the time), by the nation's children remained, and only the citizens of such country could access this permanent cadre of volunteer commissioned and non-commissioned officials (Kestnbaum, 2000).

### 3. Compulsory Military Service

Hence, the notion of military service (initially compulsory), and nationality, established a symbolic nexus of "unbreakable" allegiance in most Western countries, by which a person, having taken part in its own nation's military forces, would experience some sort of supreme and perpetual bond, one that could not be duplicated towards another country should the same person acquire a second nationality (Itsik, 2020; Haken, 2020).

Another side of this same coin is the eased attribution of a country's nationality to those foreigners who voluntarily engage in its military components, when it is possible, as is the case for the most famed French Foreign Legion (Altas-serre, 2013).

The concept would later be translated into a distinction commonly made by most domestic legislations, between born citizens and naturalized citizens, allowing for some restrictions to the latter, such as achieving some key political positions, security related public offices, and even some more sensitive economic or commercial activities.

Many countries will impose the loss of their nationality by citizens who obtain a second one by the way of naturalization, while others, in the same direction, condition the effective award of a naturalization decree to the presentation, by the interested individual, of formal renunciation from previous the original nationality.

However, when two or more nationalities benefit a person by birth, given the disparity of the countries criteria, it is harder for the attributing State to place the same restrictions, even though international practice can identify some rare examples of legislations establishing different classes of "homeland born", and "born abroad" citizens, as it seems to be the case with the United Kingdom and its former colonial overseas territories (Blake, 1982).

To try and prevent inherent issues arising from double nationality, some solutions have been concerted along the years. One of them was the enactment (or at least the attempt), of multilateral solutions such as the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, and its additional protocol on military service, still under the guise of now defunct *League of Nations*; and the 1963 Strasbourg Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality (Kovacs, 2014).

An alternate strategy, that seems to be common between countries that historically became reciprocal origins and recipients of each other's citizens, was the adoption of bilateral treaties specifically providing for exemption of military service (or enlistment) in one of them, if such obligation was fulfilled at the other (Spiro, 2010).

A third, and more extreme way to prevent such conflicts, is the absolute ban of dual nationality, regardless of its acquisition mode (Piattoeva, 2015), as was the case subject of our investigation on this paper, being the People's Republic of China one of the most common examples of this strategy (Suryadinata, 2015).

Deeper understanding of PRC's legislation falls short for many reasons, being the language barrier perhaps the hardest one for Western researchers to overcome. In the field of law, there are argumentatively more legal literature texts when it comes to commerce (Liu, 2008), than in other fields of the legal industry. In such a context, Chinese nationality law texts proved especially difficult to locate, being the exception Song's (2008) brief essay, and field research through the academic community resulted just as limited, indicating this may be a taboo area of expertise.

This article admits its limitation on that part, hoping it may inspire other researchers to bridge the gap, and, meanwhile, resorts to indirect documentation sources, such as the most didactical subsidies from Brazil's Federal University of Minas Gerais book, by professor Fabricio Polido (Polido & Ramos, 2015).

Bearing the previous disclaimer in mind, it can be summarized that, since the founding of the PRC, three basic principles were set out: 1) A person whose parents have Chinese nationality or one of whose parents has Chinese nationality shall have Chinese nationality at birth; 2) Chinese living overseas may change nationality on their own freewill; and, 3) Overseas Chinese who renounce their Chinese nationalities at some point of their lives may restore it.

After a series of nationality questions with neighboring countries, a Chinese Nationality Law of 1980 fixed the principle that China does not recognize dual nationalities, which is explicitly reflected in the relevant provisions therein, aiming to avoid as much as possible the occurrence of dual nationalities, as Song (2008) explains:

- 1) Avoid the occurrence of dual nationalities due to the grant of original nationality at birth,
- 2) Avoid the occurrence of dual nationalities of Chinese nationals settling overseas,
- 3) Avoid the occurrence of dual nationalities due to the renouncement of Chinese nationality,
- 4) Avoid the occurrence of dual nationalities due to the acquisition of Chinese nationalities,
- 5) Avoid the occurrence of dual nationalities due to the restoration of Chinese nationalities.

The reasoning must be associated with a pattern of thinking which is not always clear for Western scholars, enunciated by Leite (2015), as the centrality of family's importance in traditional China, that makes individual rights a more secondary consideration in comparison to collective communities, and to the State, with its *raison d'Etat*. In other terms, persons' right to nationality tends to be interpreted more in accordance with security—and nowadays, taxation—governmental concerns, than in light of individual preferences that, often times, will pend towards securing multiple nationalities (Yang, 2010).

One must be careful not to interpret the abovementioned remark as a form of criticism, but as a clinical observation of social reality. Only a macromparison may shed light on the reach of equivalent legal institutes of different juridical orders (Constantinesco, 1998). This effort must take into account fundamental values and principles adopted by the historical period, culture, political structures, language, geography and even religious beliefs in each country. Fruitful approaches of distinct legal systems will only be possible when both sides are willing to absorb those mutual concerns that led to more restrictive or more liberal legislative choices, at a given time.

It is worth noticing, however, that despite general repudiation of dual nationalities, still has some exceptions, also in the words of Song (2008):

Except for the principle of not recognizing dual nationalities, the Nationality Law of China adopted in 1980 still adheres to the principle of underlying *jus sanguinis* with *jus soli* as its supplement in granting original nationality:

- 1) Any person born in China whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality.
- 2) Any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality; but a person whose parents are both Chinese nationals and have both settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth shall not have Chinese nationality.

In Brazil, on the other hand, the theme of nationality has traditionally been a matter of Constitutional Law, since the country's independence from Portugal, and even at its first Imperial Constitution, of 1824<sup>1</sup>, where it is considered a cornerstone of individual civil rights (Bueno, 2003).

Additionally, as an immigrant receiving American continent nation, foreign newcomers were not dissuaded to keep their original nationalities.

<sup>1</sup>A circumstance often unknown by most foreign law researchers is that Brazil, after declaring independence from Portugal, adopted a monarchic government that lasted from 1822 to 1889. First Brazilian emperor was Portugal king's son, prince *Dom Pedro I*, later replaced by his firstborn, *Dom Pedro II*, who renounced after republican government was instituted. The wife of *Dom Pedro I*, empress *Maria Leopoldine*, was a former archduchess of the Austro-Hungarian Empire, daughter to Francis II, the last Holy Roman Emperor, later Francis I, of Austria. Her connections and influence in European courts are believed to have played a major role in Brazil's international recognition at that period, and political-institutional choices that ensued.

The same imperial constitution established Brazil's standard system of territorial birth, or *jus solis*, as criterion for nationality attribution. That young and independent country still struggled with national unification, and foresaw the eased integration of recently arrived immigrants as a way to consolidate its population. But the new Constitution also adopted traces of *jus sanguinis*, by granting Brazilian nationality 1) for the children of Brazilian parents born abroad, provided these came back to reside in Brazilian territory; or 2) the children of Brazilian born abroad from parents on official government business, with no other conditions (Posenato, 2003).

Main lines were kept until today, with a relevant innovation provided by 2007 Constitutional Amendment number 54, to the Federal Constitution of 1988, which expressly permitted, for the first time in Brazilian constitutional history, that Brazilians would not be deprived of their nationalities in cases where: 1) another nationality was attained by birthright originating from a foreign law (*jus sanguinis*); and 2) another nationality was attained by the way of "volunteer" foreign naturalization, if that was essential for fruition of civil rights in that country (e.g., a person who couldn't otherwise work or live in that territory). A statement by then Justice Minister justified the decision (Dollinger & Tiburcio, 2016):

This disposition aims to protect from the loss of nationality the countless Brazilians whom, along the last decades, have chosen emigrate to other countries escaping the apparently never-ending economic crises we live in, looking for better standards of living. It happens, however, that these Brazilians, often the least favored who go and try their lucky abroad, seldom intend to unbind from their motherland and almost invariably end returning to Brazil, perhaps with some economies. They find themselves, nevertheless, in a difficult position when constrained by foreign law to naturalize in the countries where they lived, wish to return to Brazil and find out they lost Brazilian nationality.

As we may verify, it seems Brazil and China have diametrically opposite nationality attributions principles and rules.

The first has a rule of territorial birth nationality (*jus solis*), it wishes to maintain even for its citizens who decide to live abroad; and the latter adopts the rule of ascendance nationality (*jus sanguinis*), it fears to maintain for those who decide not to remain intimately connected with their cultural background.

Such differences marked the outcome of our case study, in which a *jus solis* born individual claimed rights pertaining alleged *jus sanguinis* prerogatives.

#### 4. Brazil's Military Enlistment Obligation Regime

Military Compulsory Service has been the rule in Brazil, for historical reasons, and a constant provision of the nations' subsequent Constitutions, beginning with the first 1824 Constitution of the Brazilian Empire, that borrowed French Revolution ideas such as "*the ideal of a nation in arms*" (Kuhlmann, 2001). Prac-

tice, however, fell short during the first years of independence.

This Situation suffered a steep change when the largest military conflagration in South America broke out, the *War of Triple Alliance*, also known as *the Paraguayan War* in Brazil, from 1864 to 1870, when the country's southern border was attacked by a small, yet very efficient, Paraguayan standing army, taking by surprise a reduced number of professional officers. Brazilian armed forces (army and navy), were consolidated during the course of this conflict, mostly under the leadership of a famed Brazilian strategist, the Duke of Caxias, later replaced by the French born Count d'Eu, husband to Dom Pedro II's daughter, crown princess Isabel de Bragança (Fausto & Fausto, 1994).

Lessons learned in the war gave way to a first 1874 recruitment and drafting law, replaced in 1908 by a new bill, under the new republican constitution of 1891. Subsequent amendments and regulations were enacted in 1918, 1920, 1934, 1946, and 1964. On the present, compulsory military service is still regulated by the 1964 Federal Law number 4.375, and by article 143 of the 1988 Federal Constitution (Leal, 2008), *verba legis*<sup>2</sup>:

Military service is compulsory as set forth by law.

Paragraph 1. It is within the competence of the Armed Forces, according to the law, to assign an alternative service to those who, in times of peace, after being enlisted, claim imperative of conscience, which shall be understood as originating in religious creed and philosophical or political belief, for exemption from essentially military activities.

Paragraph 2. Women and clergymen are exempt from compulsory military service in times of peace, but are subject to other duties assigned to them by law.

Recruitment process has four distinct phases, preceded by mandatory enlistment, currently done most through on-line systems, of all Brazilian males on the year they shall complete 18 years old. Enlistment is made before a military selection committee (*junta do serviço militar—JSM*), when the citizen initially receives his military enlistment certificate (*certificado de alistamento militar—CAM*). The certificate shall receive an indication of a return date to be informed if he has been exempted right away (most often due to excess of candidates), or if the youngster will proceed to the next phase (approximately 40% of the initial class amount). Those will be subjected to a selection commission (*comissão de seleção—CS*).

Selection commission will then perform medical and psychological examinations, and choices will be made in accordance with the parameters fixed by each of the military branches (navy, army, air force). At this point, average numbers are that only 1 out of 12 is selected, and selectees may voice their wish to engage voluntarily (Leal, 2008). Candidates with higher educational levels, or who were

<sup>2</sup>Official translation to English made by Brazil's Federal Senate. Available at: [https://www2.senado.leg.br/bdsf/bitstream/handle/id/243334/Constitution\\_2013.pdf?sequence=11&isAllowed=y](https://www2.senado.leg.br/bdsf/bitstream/handle/id/243334/Constitution_2013.pdf?sequence=11&isAllowed=y). Access in: 04 Dec. 2021.

already approved to enrol in graduate university courses may be directed to reserve officers training centres (*órgão de formação de oficiais da reserva*—OFOR). Candidates who have been approved for medicine, dentistry, veterinary or pharmacy courses are deferred for summons, as specialist officers, after they graduate.

Those selected are then designated to an actual military organization, where a second medical and dentistry examination is made, followed by a personal interview of the candidate. Another batch of selectees is dispensed. At the final stages, approximately 90% of all selected candidates are made by volunteers, who shall serve in the military for a minimum of 12 months, but may choose to remain as enlisted personnel for until 8 years. Males are considered to be on the armed forces reserve until 45 years old (regardless if they actually were drafted for military service), or until 60 if they served or were commissioned as reserve officers.

Refusal to enlist is sanctioned with suspension of political rights by article 15, of the 1988 Federal Constitution, and, besides preventing a person from voting or running for electoral mandates, it impedes application to any public offices or functions, enrolment in higher education institutions (colleges and universities), and causes a number of other embarrassments, including the prohibition from obtaining Brazilian travel documents. However, the Constitution provides for the possibility of enlisting for an alternate service to the compulsory military service, what must be made after the selectee receives his military enlistment certificate (CAM), by presenting a “conscience objection” claim, and, instead of undergoing selection for military units, the candidate will be submitted to a civilian, strictly non-combatant service for until 18 months, preferably in civil defence or emergency organizations (Rodrigues, 2010).

Nonetheless, Brazil is a signatory member of the 1930 *Convention on Certain Questions Relating to the Conflict of Nationality Law*, and of its respective *Protocol relating to Military Obligations in Certain Cases of Double Nationality*<sup>3</sup>. Article 1 of the Protocol defines:

#### Article 1

A person possessing two or more nationalities who habitually resides in one of the countries whose nationality he possesses, and who is in fact most closely connected with that country, shall be exempt from all military obligations in the other country or countries.

This exemption may involve the loss of the nationality of the other country or countries.

...

<sup>3</sup>Other member countries that fully ratified or acceded to the Protocol are: USA, United Kingdom, Belgium, Burma (Myanmar), Australia, South Africa, India, Colombia, Cuba, Netherlands, Sweden and Salvador (El Salvador), Austria, Cyprus, Fiji, Kiribati, Lesotho, Malawi, Malta, Mauritania, Mauritius, Niger, Nigeria, Swaziland, Zimbabwe. Canada, Chile, Denmark, Egypt, France, Germany, Greece, Ireland, Luxembourg, Mexico, Peru, Portugal, Spain and Uruguay signed, but did not ratify the treaty. League of Nations, *Protocol Relating to Military Obligations in Certain Cases of Double Nationality*, 12 April 1935, League of Nations, Treaty Series, vol. 178, p. 227, No. 4117, available at: <https://www.refworld.org/docid/3ae6b38c10.html> [accessed 6 December 2021]

As such, Brazil shall not draft its nationals living abroad when they turn 18, and expects dual nationals in Brazil will not be drafted.

Other bilateral treaties were celebrated between Brazil and some of those countries with the largest concentration of potential double nationals, as is the case of 1958 Agreement regarding Military Service between Brazil and Italy ([Brazil Chamber of Deputies, 1965](#)), provided in Articles 2 and 3 that:

Article II

Those persons to whom this agreement applies will be considered as having fulfilled military obligations posed by Brazilian laws, in case they have fulfilled their obligations or performed equivalent service to the armed forces of Italy if they present, as proof of this fact, a duly authenticated certificate, emitted, upon request, by competent authorities of Italy.

Article II

Those persons to whom this agreement applies will be considered as having fulfilled military obligations posed by Italian laws, in case they have fulfilled their obligations or performed equivalent service to the armed forces of Brazil if they present, as proof of this fact, a duly authenticated certificate, emitted, upon request, by competent authorities of Brazil.

This bilateral agreement carries the advantage of having no mention of nationality loss as a consequence of military service exemption, and is an interesting example, considering Italy too (like China), adopts the basic rule of *jus sanguinis* ([Barel, 2003](#)).

Brazilian law had provisions that a national who engaged on the military service of a foreign nation could be subject to nationality loss (Ministry of Foreign Affairs instruction n. 295, of 22 Feb. 1929). A subsequent review, by Law-Decree n. 389, of 25 Apr. 1938 changed it slightly, by stating that nationality loss would be imposed if a Brazilian, without permission from the country's President, accepted any commission or gainful employment offered by a foreign government, or in the case of volunteer enlistment in a foreign armed force. Brazilian literature on the subject agrees that these prohibitions were made void by the Federal Constitution of 1988, which completely regulated the subject, without mentioning such hypothesis ([Dollinger & Tiburcio, 2016](#)).

## 5. Case Study: *Ex Parte v. Federal Police Superintendent in Sao Paulo*

The case that gives opportunity to this article was selected from a systematic review conducted by author on judicial decisions reflecting themes of International Law. Specifics of the case will be striped of personal data and details, to preserve the identity of plaintiff.

It was filed before the 24<sup>th</sup> Federal District Court of Sao Paulo, in the form of a writ of *mandamus* moved by one 19 years Brazilian national male, born in this territory and regularly registered in the competent civil registry service (like any other Brazilian), son of father and mother, both allegedly nationals of the

People's Republic of China.

He claimed that was denied renewal of his passport after completing 18 years old due to his refusal to present copies of personal military enlistment certificate, or a substitute military service exemption certificate.

The plaintiff reasoned that, as child of two nationals of the People's Republic of China born abroad, he would be entitled to claim a dual Chinese nationality, but such would be hindered if any notice of his enlistment in Brazil ever came to Chinese authorities knowledge, who would then disregard him as “motherland's traitor”, or even as a spy, subject to being arrested on sight, soon as he laid feet on RPC's territory.

Claimant stated that he had voiced his “conscience objection”, directly to the Federal Police Superintendent in Sao Paulo, but was not listened and, as a result, sought judicial relief from military compulsory enlistment, and an injunction to compel migrations office issuance of a Brazilian passport, short of military records presentation. Once served of summons, Brazil's Office of the Attorney-General (*Advocacia-Geral da Uniao*—AGU) demurred all claims.

OAG's counterclaim objected that military enlistment is an obligation equally imposed on all Brazilian male citizens, and that actual military service could be substituted by alternate, non-combatant civic activities (article 143, paragraph 1<sup>st</sup>, of Brazil's Constitution). Also, that Brazilian Federal Law n. 8.239, of 1991, determines that “*Initial military service is mandatory to all Brazilians, as in accordance to law*” (article 3<sup>rd</sup>), while, paragraph 1<sup>st</sup>, establishes:

Joint-Chiefs of Staff for the Armed Forces shall, in accordance with law and coordination with military branches, institute alternate service to those whom, in peace times, after enlistment, oppose an imperative of conscience due to religious, philosophical or political beliefs, to be exempted from strictly military activities.

Meanwhile, purely refusing enlistment, and subjecting to alternate service implicated the consequences foreseen in article 4<sup>th</sup>, paragraphs 1<sup>st</sup> and 2<sup>nd</sup> of that law:

Paragraph 1<sup>st</sup>: Refusal or incomplete fulfilment of alternate service, under any pretext, by personal responsibility of draftee shall implicate non-issuance of corresponding certificate, for two years after the pre-established service term.

Paragraph 2<sup>nd</sup>: Once surpassed the abovementioned period, certificate will only be issued after formal decree, by the competent authority, of defaulting's political rights suspension, who may, at any moment, rectify his situation upon fulfilment of pending obligations.

Besides that, OAG pointed out that plaintiff had failed to prove, by the means legally permitted in private international law, the existence and validity of any actual Chinese statute indicating he would be labelled as a “traitor” or “spy” simply because of enlisting. On the other hand, it was a matter of public record that, in accordance with article 5<sup>th</sup>, of the Nationality Law of the People's Repub-

lic of China (中华人民共和国国籍法)<sup>4</sup>, available at the English website of that country's National People's Congress, the claimant did not have birth right to Chinese nationality, since his parents, who were longstanding legal residents in Brazil, had "settled abroad", and he "acquired foreign [Brazilian] nationality at birth".

After debates, the Federal Judge dismissed the claim, refusing to grant either relief from the enlistment obligations, and the injunction to compel passport issuance for the plaintiff, thus pronouncing:

In case is a writ of mandamus by which petitioner aims recognition of his right to issuance/renewal of passport, being waved of presenting documents proving his acquittance of mandatory military service. According to article 20th, of Federal Decree n. 5.978, of 2006, it is a condition, in order to obtain ordinary passport, among others, proof of mandatory military service discharge.

By its turn, Military Service Law n. 4.375, of 1964, so provides: *article 74. No Brazilian, between January 1st of the year he completes 19 (nineteen) years old, and December 31st of the year he completes 45 (forty five) years old is entitled, without making proof of being up to date with military obligations: 1) obtain a passport or extension of its validity; 2) join as employee or associate in any institution, company, or Corporation that receives any sort of public funding, or whose existence depends upon authorization from municipal, state or federal governments; 3) to sign any contract with a municipal, state or federal government; 4) take exams or enroll in any educational institution; 5) obtain a labour license, or register to exercise any profession or industry; 6) apply for any public office; 7) perform under any title, even without payment, public role or official commission; 8) receive any prize or favour from a municipal, state or federal government; art 75. It shall be proof of a Brazilian being discharged of his military obligations: 1) the enlistment certificate, while valid; 2) the reservist's certificate; 3) the certificate of exemption; 4) the certificate of dismissal from incorporation.*

Within the briefs, the petitioner argued that if he enlisted for compulsory military service, he would be deprived from the possibility of acquiring Chinese nationality. In such aspect, it denotes, in the first place, that he is a Brazilian citizen, his only nationality thus far, a fact that unfailingly subjects him to Brazilian laws, as much to exercise his citizenship, as to obtain documents, whatever these may be.

Averment of a possible obstacle for Chinese citizenship is nothing but a mere supposition, since the plaintiff did not prove it, by documents or other legal demonstration means, short of any basement. On the contrary, the

<sup>4</sup>Article 5. Any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. But a person whose parents are both Chinese nationals and have both settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth shall not have Chinese nationality.

Government brought up dispositions of China's nationality law demonstrating that the mere fact of being a son to Chinese parents does not grant him the right to Chinese nationality, in accordance with article its 5th, collated at page 53, and translated by the Federal Attorney at page 46.

Therefore, being the Military Service an obligation to all Brazilian men, by textual disposition of article 143 of the Federal Constitution, and article 2nd, of Law n. 4.275, of 1964, and proof of its discharge is an essential requisite for passport issuance, the plaintiff's ambition rests totally absent of grounds, the reason why the injunction must be denied. OPERATIVE PART OF THE SENTENCE: That said, I judge the claim UNFOUNDED, and REJECT the writ, extinguishing the lawsuit with judgment of merits, in accordance with article 487, I, of the Code of Civil procedure.

The claimant did not appeal the sentence, and it became *res judicata* on 28 Aug. 2017.

This case made extensive use of private international law tools, especially the question of proof of contents and validity foreign law: the plaintiff failed to prove he would be considered a "traitor" by Chinese law, whereas the Office of the Attorney-General proved Chinese law would not grant him nationality. Proof of foreign law's generally accepted criteria includes: 1) the complete text of that invoked statute; 2) validity of that statute at the moment of discussion; and 3) the interpretation of that law by respective State's superior courts. Evidence of said elements may be preformed by ample means, with exception only of those evidence procedures dependent solely on the parties will, *v.g.* confession, oaths, etc. (Zuccherino, 2008).

Another unusual feature in this case was the availability, and acceptance by the court, of an English version of statute that was originally (and officially) crafted in Chinese, provided it could be check on-line at an official website maintained by China's parliament (National People's Congress of the People's Republic of China), underlining the importance of providing access to any nation's basic laws in a widespread *lingua franca*.

An issue of national statute was also present in the judge's reasoning. Regulation of the personal statute was classically disputed in private international law, divided into two main elements of connection: the laws of nationality and the laws of domicile (Ramos, 2021). Even though rule in Brazil is the prevalence of laws of domicile—which in this case would probably lead to an equal result, since plaintiff lived in Brazil—the indication that, at that moment, claimant exhibited one and only nationality, suggests an alternate outcome could be presented if, through any means, the claimant had been able to acquire a Chinese passport, even if transitory, as a minor child, for example.

It is, nonetheless, a rare episode of application of foreign law involving Chinese law before a Brazilian federal court, and perhaps a unique sample of such a discussion in the matter of public law, instead of more common digressions about commerce or tax laws, occasionally surfaced during international trade

cases that appear to Brazilian federal judges.

As an endnote, regardless of this individual case outcome, the claim reveals a potential (and legitimate) demand from the ever-growing Chinese community in Brazil, a sociological reality that must be addressed by legislators, both in China and Brazil. There is a fact, giving occasion for a value, which needs to be contemplated in normative production, as theorizes famed Brazilian legal philosopher Miguel Reale Junior (1994).

## 6. Brazil and China Relations History

Formal relations between Brazil and the People's Republic of China were established in 1974, when Brazil's embassy was inaugurated in Beijing, and its Chinese counterpart was installed in Brasilia. Brazil also has consulate-generals in Shanghai, Guangdong and Hong Kong, while China counts with consulate-generals in Rio de Janeiro, Sao Paulo and Recife (Becard, 2008).

Bilateral relations are marked by great dynamism, and since 2009 China is Brazil's main international trade partner, as well as one of its most important financing sources. Dialogue goes way beyond bilateral relations, as they cooperate in global fora such as the G20, BRICS, WTO, and BASIC (an India, China, Brazil and South Africa arrangement for environmental issues).

Both countries established a strategic partnership in 1993, upgraded to the level of global strategic partnership in 2012. Amid these cooperation efforts, a large-scale cooperation in the realm of space exploration dubbed China-Brazil Earth Resources Satellite Program (CBERS), has already resulted in six satellite launches (Brazil Ministry of Foreign Relations, 2019).

Official accounts indicate first Chinese immigrants to Brazil arrived in 1810, when Portugal's king brought around 200 settlers from Macao (then a Portuguese possession as well), to start tea farming in Rio de Janeiro.

A 2009 study estimated the Chinese community in Brazil included around 190 thousand immigrants and their children already born in Brazil (Jye et al., 2009). More recent calculations indicate numbers increased do approximately 300 thousand (Lu, 2020).

In terms of private international law instruments, Brazil and China have signed a number of mutual legal assistance treaties, such as the 2009 *Mutual Judicial Assistance Treaty in Civil and Commercial Matters*, the 2007 *Mutual Legal Assistance Treaty in Criminal Matters*, the 2004 *Extradition Treaty*, and the 2019 Treaty on the *Transfer of Convicted Persons* (pending ratification), among many others.

In the military realm, Brazil and China have signed a 2011 *Agreement for Cooperation on Defense Matters*, followed by a 2014 *Additional Protocol* to the 2011 Agreement, in the areas of Remote Sensing, Telecommunications and Information Technology. In 1984, both nations signed an *Agreement for Cooperation on Pacific Use of Nuclear Energy*.

Chinese presidents (General Secretaries of the PRC Communist Party) have

visited Brazil in 1990 (Yang Shangkun), 1993 and 2001 (Jiang Zemin), 2004 and 2010 (Hu Jintao), 2014 and 2019 (Xi Jinping). Brazilian presidents visited China 1988 (Jose Sarney), 1995 (Fernando Henrique Cardoso), 2004, 2008 and 2009 (Luiz Inacio da Silva), 2011 (Dilma Russef), 2017 (Michel Temer), and 2019 (Jair Bolsonaro).

Many other high-level visits were made by Brazilian Vice-Presidents, Supreme Court Justices, and Ministers of Foreign Relations, reciprocated by Chinese Prime-Ministers, Ministers of Foreign Affairs, and Supreme People's Tribunal Magistrates (Brazil Ministry of Foreign Relations, 2019).

It is therefore fair to say relations between both countries have reached a level of maturity and trust incompatible with antiquate considerations about possible threats posed by double nationals in their respective territories.

## 7. Conclusion

Literature and collected data indicate the phenomenon of double or multiple nationalities is increasing in a globalized world, favoured by eased communications and transportation, and stimulated by the movement of persons for economic, commercial and even educational reasons around the world.

Ethnicity and culture still have weight in each country's principles for nationality attribution, but these factors pose complex reflexes to families and individuals who may end up in difficult situations, oftentimes being deprived of basic civil rights, or placed under unjustified suspicion by legal systems that were not always updated as quickly as societies changed, especially during the first two decades of 21<sup>st</sup> Century.

One particular issue connected with questions about dual or multiple nationalities is the effect of national legislations regarding military service and compulsory military enlistment, including possible loss of nationality caused by performance of activities in the armed forces of another country.

The problem isn't all new, and attempts to mitigate negative consequences thereof were made by the international community, such as the 1930 Hague *Protocol relating to Military Obligations in Certain Cases of Double Nationality*, but the low level of adhesion to it led to the multiplication of unilateral States regulations, oftentimes conditioned by circumstantial factors, and mutually contradictory.

An alternate way to try and curb the problem was the enactment of bilateral arrangements between countries that acknowledge the presence of large contingents of potential double nationals within their respective territories, especially when each of them adopts a different criterion for nationality attribution, namely those formed mostly by immigrants, tending to use as general rule *jus solis*, and those from where substantial population cohorts have left sometime in history, which tends to adopt *jus sanguinis*.

The article indicated the 1958 *Agreement regarding Military Service between Brazil and Italy* as a good model for the abovementioned alternative.

Brazil and China share a fair amount of potential double nationals who could benefit from the signature of an equivalent bilateral treaty, taking into account that Brazil is a member State to the *Protocol relating to Military Obligations in Certain Cases of Double Nationality*, but China is not, possibly because of concerns with the situation that could emerge in relation to persons from other States that are also members of the Protocol, but keep a quarrelsome attitude towards the PRC.

On the other hand, Brazil not only has close relations with China, but is also situated in a completely different and distant geographical context, making it unrealistic, to say the least, any perspective of armed conflict.

In this aspect, actual caselaw from a Brazilian court shows that a bilateral agreement with China for the exemption of possible double nationals is legally and sociologically justifiable.

### Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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