


CONNECTING ELEMENTS: THE LEGITIMACY OF CHANGING NATIONALITY IN AN INTERNATIONAL PANORAMA

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Fabiola Pinheiro Langbeck de Lima¹ and Jennifer Layle Oliveira Diniz²

ABSTRACT

The present study aims to demonstrate whether any change in nationality has legitimacy for international law or if it constitutes an exposed fraud to the guiding law. To achieve the proposed objective, it is intended to highlight, initially, the relationship between international law and the connecting elements, to analyze the legal institute of nationality, the reasons for changing nationality in the enforcement of fundamental rights and, finally, to demonstrate the legitimacy and possible fraud of nationality in an international panorama. To achieve the proposed objective, a bibliographic research was carried out, carried out through the review of theoretical materials related to the theme, as well as the analysis of journals and articles available on the internet, addressing the topic qualitatively, during the month of September 2024. The proposed objective was achieved by understanding the theme in the brief highlight between the relationship between the connecting elements and Private International Law. Then, an analysis of the legal institute of nationality was presented. Soon after, the reasons for changing nationality in the realization of fundamental rights were exposed and, finally, the legitimacy and possible fraud of nationality in the international panorama were demonstrated.

Keywords: Connecting Elements. Nationality. Legitimacy.

¹ Graduated in Law from Nilton Lins University

Graduated in Computer Science from the Lutheran University of Brazil - ULBRA

Postgraduate degree in Criminal Law and Criminal Procedure from the Federal University of Amazonas - UFAM

E-mail: fa.langbeck@gmail.com

² Graduated in Law from Nilton Lins University

Post-Graduate in Tax Law from Universidade Nova Imigrante

Postgraduate degree in Public Law from the University of the State of Amazonas

E-mail: jenniferldiniz@hotmail.com

INTRODUCTION

Renewal originates in the Latin *renovatio*, associated with the act or effect of renewing, making new, re-establishing. Law, as a social phenomenon, is in constant renewal, following the evolution of society, of which it is a product. This characteristic of continuous adaptation seeks to respond to new issues that arise and resolve conflicts that emerge daily, demanding innovative and fair solutions. The Greek philosopher Heraclitus already stated that "everything flows", highlighting the inevitability of change in all aspects of life, including Law, which must adapt to the ever-changing reality.

Private International Law (PIR), in turn, works as a true bridge between the conflicts of different jurisdictions and their respective solutions. Through its connecting elements, such as nationality and domicile, the DIPr carries out the complex work of directing the way for the application of substantive law, especially in cases where borders, created by human beings themselves to organize their relationships, become a barrier to the resolution of disputes. In this sense, the work of Hugo Grotius, considered the "father of International Law", already pointed out the importance of a common law that could be applied between nations (Grotius, 2004).

However, the individuals themselves end up generating new challenges for their creations. The legislative evolution in different countries is marked by particularities that sometimes generate conflicts or doubts regarding its applicability in the international scenario. With the advancement of technology and the intensification of human relations, regardless of the location or origin of those involved, it has become essential to regulate these interactions to avoid divergences in the legal systems of different nations.

In this context, in order to resolve disputes, the connecting elements in private international law arise, which consist of rules capable of determining which is the most appropriate criterion to define the norm applicable to a specific case. The specialized doctrine points out several connecting elements, highlighting territoriality, domicile and nationality. This research will focus the analysis on this last element. Thus, the question of the present study is brought to the fore: Is the change of nationality for the realization of fundamental rights legitimate for international law?

In view of the above question, this study aims to demonstrate whether any change in nationality has legitimacy for international law or if it constitutes a fraud to the guiding law. To achieve the proposed objective, it is intended to highlight, initially, the relationship between international law and the connecting elements, to analyze the legal institute of

nationality, the reasons for changing nationality in the enforcement of fundamental rights and, finally, to demonstrate the legitimacy and possible fraud of nationality in an international panorama.

The methodology used in this study was based on the technique of bibliographic research, with a qualitative approach. Information from the reading of books, academic articles, periodicals and consultations with databases available on the internet were analyzed, with the aim of achieving a comprehensive understanding of the subject. In order to deepen the topic, the contents of the discipline CommunitylawandOrganizations Master's Degree in International Law at MUST University were reviewed , in addition to the study of scientific works, during the month of September 2024.

DEVELOPMENT

For a better understanding of the theme, the development was divided into three parts. First, the relationship between the connecting elements and Private International Law is briefly highlighted. Next, an analysis of the legal institute of nationality is presented. Soon after, the reasons for changing nationality in the realization of fundamental rights are outlined and, finally, the legitimacy and possible fraud of nationality in the international panorama are demonstrated.

THE RELATIONSHIP OF CONNECTING FACTORS IN PRIVATE INTERNATIONAL LAW

Although Private International Law (DPI) gained this formal name in the nineteenth century, its roots are much older. Its significant evolution occurred between the fifteenth and eighteenth centuries, a period in which interactions between different locations intensified due to the growth of trade and cultural exchanges, especially with the beginning of the era of the Great Navigations. In this context, the DIPr still dealt mainly with interlocal conflicts, that is, between different regions or territories under the same sovereignty, being much simpler and more restricted in terms of volume and complexity.

Globalization, which began to take shape from the end of the fifteenth century with the process of commercial expansion, which began mainly with the maritime expeditions of Portugal and Spain, brought profound changes. This historical period, marked by a growing economic and cultural interconnection, required new legal solutions. The creation of international trade routes, as well as the emergence of colonies and exchanges between

nations, increased the complexity of transnational litigation and forced an adaptation of the DIPr to deal with issues that crossed borders.

With the intensification of global interconnection in the following centuries, problems related to the legal regulation of transnational situations became increasingly evident. The need arose to respect not only the norms of foreign states, but also emerging international treaties and institutes. Thus, the DIPr began to focus its study on three major challenges for the resolution of conflicts involving more than one sovereign State: the determination of the applicable law, international jurisdiction and the recognition of foreign decisions.

To solve the first of these challenges, the choice of the substantive law to be applied, the so-called connecting elements were developed. These elements act as bridges linking a transnational situation to the appropriate legal norm. The three main connecting elements are: territory (*Lex rei sitae*), domicile (*Lex domicilli*) and nationality (*Lex patriae*). In the following topic, we will address in greater detail the last of them, nationality, discussing its standardization, who should define it and its relevance as a fundamental right.

Portela (2018) understands connecting elements as the primordial fact of national law, which must be applied in a conflict of laws involving a certain object, which may be, for example, the realization of a fundamental right, such as domicile, nationality or exercise of religious freedom. On the other hand, Silva et al (2017, p. 12) describe the institutes *in vogue* as "the support for private international law to determine compliance with norms in the real case. Aiming to indicate which legislation will be applied to resolve conflicts, where there is a connection of more than one legal system."

To this end, it is seen that the connecting elements are fundamental principles of private international law, and they are responsible for determining which legislation should be applied in situations involving more than one jurisdiction, that is, when there is some foreign element in the legal relationship. These connecting rules have the power to resolve conflicts of laws in different countries, establishing which right should be applied in the specific case.

THE ELEMENT OF NATIONALITY

Nationality is a legal-political bond that connects a person to a State, determining to whom they owe allegiance and what rights and duties are conferred on them in the context of the domestic and international legal order. It is a central element in the definition of an individual's legal identity, and its regulation is the exclusive competence of the States.

According to Article 1 of the 1930 Hague Convention on Conflicts of Laws in Matters of Nationality, it is established that each State is responsible for defining, according to its own legislation, who its citizens are. Such legislation will be accepted by other States, provided that it is in accordance with international conventions, international custom and generally recognized principles of law in the field of nationality (UN, 2014).

The legal relevance of nationality is not limited to the relationship between the individual and the State to which he or she belongs, but also acquires an international dimension. In matters of international law, nationality is fundamental for the determination of legal competence, the application of treaties and diplomatic protection. In addition, nationality is an essential human right, as recognized in the Universal Declaration of Human Rights, as well as in legislative guidelines at the international level.

The enshrinement of this right in the Universal Declaration of Human Rights reinforces its importance not only as a matter of political identity, but also as a right inherent to human dignity. Statelessness, that is, the condition of a person without nationality, puts at risk the guarantee of other fundamental rights, making nationality a pillar for the full exercise of citizenship.

In this sense, Pontes de Miranda (1987) argues:

Nor is there any rule in Private International Law on nationality laws; nor are the laws on nationality laws of Private Law. Therefore, they would lack either of the two characteristics of the rules of Private International Law: a) they are legal rules about legal rules, laws about laws, law about law; b) such legal rules, such laws, such right, are Private Law. The laws on the acquisition and loss of nationality belong to substantial law (substantive law and formal law), and not to any branch of law, whether private international or international administrative (1987, p. 344).

In this bias, it is worth noting that the Brazilian legal system also recognizes nationality as a fundamental right. The Federal Constitution of 1988 establishes the rules for obtaining and losing nationality, complemented by infra-constitutional legislation, such as Law 13.445/2017 (Migration Law). This normative framework reflects the importance of nationality in Brazil as a right that not only defines belonging to the State, but also ensures fundamental civil and political rights, such as voting and eligibility, ensuring the full participation of citizens in the public and legal life of the country.

At the international level, obtaining a new nationality usually requires compliance with certain requirements established by States, which vary according to the legislation of each country. However, there are widely accepted principles that guide the naturalization process, highlighting the need for the individual's demonstration of will. The desire to

acquire a new nationality is a central factor, as it reflects the conscious desire for legal and political attachment to a new state.

In addition to this subjective requirement, States usually require compliance with objective criteria, such as a minimum period of residence in the country, mastery of the local language, cultural integration and respect for fundamental laws and values. In many cases, the individual is also required to renounce his or her previous nationality, although the recognition of dual nationality is allowed in several countries. At the international level, instruments such as the 1997 European Convention on Nationality promote the standardization of criteria for the acquisition and loss of nationality, seeking to ensure that nationality is granted fairly, without discrimination and with respect for human rights. The will of the individual, therefore, becomes the starting point for the legal transition of his political identity, and is seen as essential for the effectiveness of the bond between the person and the State in the global scenario.

THE CHANGE OF NATIONALITY FOR THE REALIZATION OF FUNDAMENTAL RIGHTS

In view of the relevant concepts mentioned, it is clear that, in many countries, the rights recognized as fundamental at the international level, such as freedom of opinion and expression, rights to life, liberty and dignity, are not properly protected or promoted, neither at the constitutional level nor in ordinary legislation. This results in often inhumane living conditions for its citizens, leading them to seek refuge in other countries. The systematic violation of fundamental rights is one of the main causes that force individuals to leave their countries of origin in search of safety and better living conditions.

In addition to human rights violations, other factors also drive migration. Among the most common are the emergence of armed conflicts and economic destabilization, which can cause a significant drop in the supply of jobs and aggravate poverty. A recent example is the war in Syria, which began in 2011, initially as a peaceful uprising against the authoritarian regime, but which quickly escalated into a complex and devastating armed conflict. Millions of Syrians have been forced to flee the country, seeking shelter mainly in Europe and neighboring countries such as Lebanon and Turkey (Furtado *et al*, 2014). This is a clear example of how armed conflict can destabilize a region and force the population to seek refuge in other countries, often leading to the need for a new nationality.

After arriving in a new state, migrants tend to develop a sense of belonging, as they become part of local society and establish social, cultural, and economic ties. To

consolidate this link, the acquisition of the nationality of the new country becomes essential, especially with regard to obtaining the full exercise of rights, such as the full exercise of political rights, both voting and eligibility. The change of nationality, therefore, has a fundamental role in guaranteeing the rights inherent to all human beings, which must be protected by the State where the individual resides and develops his social relations.

In this context, the right to human dignity, which is at the heart of fundamental rights, stands out as an essential prerequisite for equal opportunities. The link with the nationality of the new State not only facilitates access to civil and political rights, but also promotes social inclusion and the full integration of the individual into the new society, contributing to their stability and well-being.

THE LEGITIMACY AND FRAUD OF NATIONALITY IN AN INTERNATIONAL PANORAMA

We must consider the existence of cases in which individuals seek to change the element of nationality for reasons other than those previously exposed, using this element as one of the methods to choose the substantive right to be applied in a given situation. This behavior has profound implications, as it allows people, in order to avoid sanctions in their country of origin after committing unlawful acts, or to obtain undue advantages and benefits, to resort to the application of the substantive law of another country, where these advantages are more easily accessible. Such use of nationality aims exclusively at personal benefits, without a legitimate justification, such as the search for protection of fundamental rights. Kao (2011) states:

Evasion of law or fraudulent creation of points of contact refers to the parties to an international legal (civil and commercial) that artificially take advantage of a conflict rule and purposely create a connecting factor in order to evade the application of the domestic law that should be applied, and therefore, apply the foreign law that is most advantageous to themselves (Kao, 2011).

In the context described, when the individual resides in a country that respects his fundamental rights and does not face imminent risks to life or other justifiable reasons for migration, his behavior deviates from the principles of justice and equality. By forging a new connection with another state, the individual violates the integrity of the nationality system and compromises legal certainty. In addition, fraud in the change of nationality contributes to the creation of a hostile environment for real refugees and immigrants, who already face prejudice and social barriers in the countries in which they seek to settle. This type of abuse

can intensify mistrust and make it even more difficult for people who genuinely need protection and a new nationality to exercise their fundamental rights to integrate.

In this line of intellect, it is of paramount importance to differentiate those who seek to change nationality to ensure the protection of a fundamental right, from those who use nationality as a means of avoiding legal responsibilities or obtaining benefits improperly. This is because treating both cases in the same way would not only be unfair, but also a setback in the defense of human rights and fundamental guarantees. Thus, it is evident that the Universal Declaration of Human Rights (UDHR) distinctly establishes that "no one shall be arbitrarily deprived of his nationality, nor of the right to change it" (Brasil, 2020). Therefore, this principle reinforces the importance of ensuring the right to change nationality as a legitimate tool to protect rights, while condemning fraudulent changes.

It should also be noted that the legislation of the States has an essential role in the prevention of these frauds, providing legal mechanisms to reverse changes of nationality obtained illicitly. An example of this are laws that allow the revocation of naturalization in cases of fraud. In the national scenario, from the perspective of Brazil, the Federal Constitution embodies in its article 12, § 4, item I (Brazil, 1988) the cancellation of naturalization by means of a judicial sentence in case of fraud in the process of obtaining nationality. Thus, the provisions are essential to guarantee legal certainty, preserving the legitimacy of the use of nationality and avoiding the violation of the principles of justice that underpin international law.

In this scenario, a possible change of nationality is in line with the idea presented by Campos (2023), according to which "the right to nationality is deeply linked to human dignity, ensuring the inclusion of the individual in the legal system of a State and the enjoyment of its protection". Therefore, the acquisition of a new nationality by an individual can be a way to safeguard their legitimate rights.

Additionally, many countries adopt international and national legislation to combat nationality-related fraud, ensuring that the naturalization process is transparent and fair. The European Convention on Nationality, for example, also establishes criteria to prevent abuse and fraud in the process of acquiring nationality, promoting cooperation between States to identify and punish irregular practices. Such measures are necessary to ensure that the right to nationality continues to serve as an instrument for the protection of human rights and the realization of the dignity of the human person, without becoming a means for fraud or abuse.

FINAL CONSIDERATIONS

The reflections developed throughout this work make it clear that the change of nationality to ensure the realization of fundamental rights is a legitimate measure, and in no way compares to frauds that seek to manipulate legal instruments to obtain undue benefits. Nationality must be a means of ensuring the dignity of the human person and its alteration, when motivated by the need to guarantee rights and a dignified life, is in full consonance with the principles of justice and equity that underpin international law. In contrast, fraud involving the change of nationality, aimed at escaping legal responsibilities or acquiring illicit advantages, undermines the integrity of the legal system and undermines trust in the institutions responsible for the protection of human rights.

This study, by clearly differentiating between legitimate situations of change of nationality and fraudulent abuses, highlights the importance of continuously improving control and protection mechanisms, both nationally and internationally. The distinction between these scenarios not only preserves legal certainty, but also ensures that human rights are effectively protected in all circumstances.

Thus, the present study aimed to demonstrate whether any change in nationality has legitimacy for international law or if it constitutes an exposed fraud to the guiding law. In this sense, the proposed objective was achieved by understanding the theme in the brief highlight between the relationship between the connecting elements and Private International Law. Then, an analysis of the legal institute of nationality was presented. Soon after, the reasons for changing nationality in the realization of fundamental rights were exposed and, finally, the legitimacy and possible fraud of nationality in the international panorama were demonstrated.

Even with the various aspects addressed, it was not the objective of this study to exhaust all possibilities of legitimacy for changes in connecting elements. The possibilities are varied, and there is no better strategy than the other, not even a single one that is ideal to the detriment of the others. Hence the importance of knowledge and study of the subject by the jurist and an analysis from his perspective and local reality. It was also not intended to address all aspects of the change of nationality, these being extensive topics that may vary according to the reality of each country.

Only those aspects that I considered most relevant in my study were addressed in view of the analysis carried out. However, the theme has great richness, and it can still be explored in countless ways. In general, the present study constitutes a source of initial

information about this complex theme, providing the reader with a basic understanding of the theme and stimulating the continuity of the research according to the need and interest of the same.

REFERENCES

1. Brasil. (1988). Constituição da República Federativa do Brasil de 1988. Disponível em: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Acesso em: 24 set 2024.
2. Campos, E. F. O. (2023). A legitimidade da mudança de nacionalidade como forma de resguardar direitos fundamentais. Disponível em: <https://jus.com.br/artigos/102504/a-legitimidade-da-mudanca-de-nacionalidade-como-forma-deresguardar-direitos-fundamentais>. Acesso em: 15 set 2024.
3. Furtado, G., Roder, H., & Aguilar, S. (2014). A guerra civil síria, o Oriente Médio e o sistema internacional. *Série Conflitos Internacionais*, 1(6), dez. Disponível em: <https://www.marilia.unesp.br/Home/Extensao/observatoriodeconflitosinternacionais/a-guerra-civil-siria-final.pdf>. Acesso em: 24 set 2024.
4. Grotius, H. (2004). *O direito da guerra e da paz: de jure belli ac pacis*. Rio Grande do Sul: IJIU/UNIJUI.
5. Kao, T. C. (2023). Do problema da “fraude à lei” no direito internacional privado. Disponível em: https://www.safp.gov.mo/safppt/download/WCM_011801. Acesso em: 24 set 2024.
6. Organização das Nações Unidas (ONU). (2014). Nacionalidade e Apatridia: Manual para parlamentares n. 22. Disponível em: <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=553f52ff4#:~:text=%E2%80%9C Cabe%20a%20cada%20Estado%20determinar,reconhecidos%20em%20mat%C3%A9ria%20de%20nacionalidade%E2%80%9D>. Acesso em: 15 set 2024.
7. Pontes de Miranda, F. C. (1987). *Comentários à Constituição de 1967* (Tomo IV, 3ª ed., p. 344). Rio de Janeiro: Ed. Forense.
8. Portela, P. H. G. (2011). *Direito Internacional Público e Privado* (3ª ed.). Salvador: JusPodivm.
9. Prodanov, C. C., & Freitas, E. C. (2013). *Metodologia do trabalho científico: métodos e técnicas da pesquisa e do trabalho acadêmico*. Novo Hamburgo: Universidade Feevale.
10. Silva, W. F. G. da, et al. (2017). Elementos de conexão do direito internacional privado. Disponível em: <https://jus.com.br/artigos/61289/elementos-de-conexao-do-direito-internacional-privado>. Acesso em: 15 set 2024.
11. UNICEF. (1948). Declaração Universal dos Direitos Humanos. Disponível em: <https://www.unicef.org/brazil/declaracao-universal-dos-direitos-humanos>. Acesso em: 15 set 2024.