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COUNTRY REPORT: SPAIN

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Report on Spain

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Spain

Ruth Rubio Marín and Irene Sobrino

1 Introduction

As a country with an emigration tradition, the main mode of automatic acquisition of nationality in Spain is *ius sanguinis*, even though the system also contains *ius soli* elements. Spain embraces an unqualified *ius sanguinis* in favour of those born of a Spanish mother or father who become nationals regardless of whether they are born in Spain or outside of Spain (art. 17.1. of the Civil Code, henceforth CC). Automatic access to nationality is also guaranteed for those born in Spain, but only if at least one of the parents was also born in Spain (double *ius soli*) (art. 17.1 b) CC) or if the person would otherwise become stateless (either because both parents are stateless or because none of their citizenships is passed on to the child via *ius sanguinis*) (art. 17.1.c) CC). Finally, automatic acquisition of Spanish nationality through filial transfer is also provided for in the case of adoption, for those persons younger than eighteen years adopted by a Spaniard, from the moment of adoption (art. 19.1 CC).

With regard to the modes of non-automatic acquisition, the Spanish system distinguishes between four modes: by option; by discretionary naturalisation (called *carta de naturaleza*); residence-based acquisition and by ‘possession of status.’ Acquisition by option only requires the target person to express his or her will. It provides for people who have a special link to Spain including: those who are or have been subject to the *patria potestas* of a Spaniard (art. 20.1.a) CC) (for instance, the children of a naturalised immigrant); those whose (natural or adopted) father or mother was a Spaniard at birth, born in Spain (art. 20.1 b) CC) (for instance, the children of Spanish emigrants who lost the Spanish nationality); those for whom descent from a Spaniard or birth in Spain is established after they turn eighteen years of age (20.1.c) CC in connection to art. 17.2) and finally, those cases of adoption where the adopted person is eighteen or older (20.1.c) CC in connection to art. 19.2).

Non-automatic acquisition through naturalisation includes acquisition by discretionary conferral (called *carta de naturaleza*) and other forms of entitlement based conferrals. The latter can be either purely residence based, or hinge on both residence and other criteria. Typically, in Spanish, all of these are labelled as acquisition by residence. Regarding the acquisition by discretionary conferral the Spanish legal order simply allows for this possibility when extraordinary circumstances concur. No definition is given as to what ‘extraordinary circumstances’ means. The target person has to apply for it and he or she may be successful or not depending on the full discretion of the Government (art. 21.1 CC).

What is commonly identified as acquisition by residence refers to a mode of acquisition that entitles the applicant to Spanish nationality conferred by the Department of Justice upon application (art. 21.2 CC). If the requirements are fulfilled, the target person is indeed entitled to nationalisation, but the government may deny nationality if the public order or national interests so dictate. The legal system provides for a general residence requirement of ten years of uninterrupted, legal and prior residence and also provides for shorter residence requirements for specific groups (art. 22 CC). These include: refugees (five years); nationals of Latin American countries, Andorra, Philippines, Equatorial Guinea, Portugal or Sephardic Jews (two years) and finally a set of categories in which only one year of residence is required. The latter include: those born in Spain; those who had a right to acquisition by option but did not exercise it in due time; those who have been subject for at least two

consecutive years to guardianship of a Spanish citizen or institution; those who at the time of application have been married for at least one year to a Spaniard; the widow or widower of a Spaniard if they were not separated at the time of the death of their spouse, and those born outside of Spain whose father or mother, grandfather or grandmother were Spaniards by birth.

Common requirements for acquisition by option, discretionary naturalisation and residence based acquisition include: an oath of loyalty to the King and obedience to the Constitution and the laws; renunciation of prior nationality and registration in the Civil Registry (art. 23 of the CC). Moreover, residence based acquisition by entitlement requires proof of good civic conduct and sufficient integration into Spanish society. Some nationals are exempt from the renunciation requirement. They form the class of nationals for whom dual citizenship is legally accepted. This class includes nationals from Latin American countries, Andorra, Philippines, Equatorial Guinea, and Portugal (art. 23.b and 24.1).

Finally the Spanish legal order provides for the possibility of acquisition based on possession of status for people who in good faith have enjoyed and used the Spanish nationality for at least ten years under a title which they thought was legitimate (art. 18 CC). As for the loss of Spanish nationality, the Spanish Constitution of 1978 (art. 11.2) determines that Spaniards ‘by origin’ cannot be deprived of their nationality.¹ Therefore, when regulating the modes of loss, the Spanish Civil Code distinguishes between two main modes. One refers to voluntary loss and the other one to involuntary loss. The latter does not apply to those who are Spanish by origin.

There are four possibilities for voluntary loss (art. 24 CC). First, for those who are emancipated,² live in a foreign country on a regular basis and have voluntarily acquired another nationality, except when the second nationality is one of a Latin American country or that of Andorra, the Philippines, Equatorial Guinea or Portugal. Loss can be prevented through declaration at the Civil Registry. Secondly, Spanish nationality can be lost by those emancipated Spaniards who live abroad on a regular basis and make exclusive use of another nationality which was attributed to them when they were minors. Here again the loss can be prevented through declaration of the wish to retain the Spanish nationality at the Civil Registry. Third, Spanish nationality can be voluntarily relinquished by those emancipated persons living abroad regularly as long as they have another nationality. Finally, the Spanish legal order provides for the loss of Spanish nationality for those who were born and live abroad and are descendants of Spaniards who were also born abroad as long as the country of residence recognises them as nationals and unless within three years of coming of age or becoming emancipated they do not declare their intent to retain their Spanish nationality at the Civil Registry.

Involuntary loss (art. 25 CC), on the other hand, occurs in three instances. Firstly, if naturalised nationals make exclusive use for three years of the nationality they relinquished when acquiring the Spanish nationality. Secondly, if a naturalised alien voluntarily joins the military or takes up political office in a foreign country in contravention to the express prohibition by government. Thirdly and finally, when it is legally proven that a person acquired nationality through falsity or fraud.

¹ Traditionally, Spanish citizenship law has distinguished between ‘nationality by origin’ (*nacionalidad originaria*) and ‘derivative nationality’ (*nacionalidad derivativa*). Whereas the former used to refer, and still does for the most part, to instances of automatic acquisition and acquisition at birth, the latter was usually reserved for non-automatic and acquisition after birth. Currently the Spanish legal system still refers to these two modes of acquisition although it provides for instances in which ‘nationality by origin’ is not acquired at the moment of birth and requires application.

² Typically, emancipation comes either upon achieving majority, at eighteen, when a minor marries, with consent of those exercising *patria potestas*, or with judicial authorisation, see art. 314 of the CC.

As for the reacquisition of nationality (art. 26 CC) the main condition, other than the expression of will, is that the person be a legal resident in Spain. Emigrants and their descendants are exempt from this requirement, and the Ministry of Justice can exempt others from it in the case of exceptional circumstances. As for those who lost the Spanish nationality, involuntarily reacquisition is subject to the discretion of government.

Whereas this is the general regime, Spain has traditionally considered nationals of some countries as forming part of a joint cultural community and acknowledges a certain historical debt towards other communities. Certain expressions of these considerations are still to be found in Spanish nationality law. The two main ones include the shortening of the time of residence required in order to naturalise and the toleration of dual nationality. As for the former, whereas the general residence requirement for naturalisation through residence is ten years, two years is enough for nationals from Latin American countries, Andorra, the Philippines, Equatorial Guinea, and Portugal and for Sephardic Jews. As far as the toleration of dual nationality is concerned, since the 1950s Spain has had a tradition of signing bilateral agreements with several Latin American countries recognising the system of dormant/active nationality. Since 1990, it has modified the Civil Code to exempt nationals from Latin American countries, Andorra, the Philippines, Equatorial Guinea and Portugal from the requirement of giving up their prior nationality when acquiring the Spanish nationality (art. 23 b CC in relation to art. 24.1 CC).

The Constitution entrusts the regulation of nationality exclusively to the central state (art. 149.1.2 of the Constitution). Spain has never passed legislation exclusively focused on nationality and has ruled on nationality through the Civil Code, which only dedicates a few articles to it. A crucial role in this is played by the General Directorate of Registries and Notaries (*Dirección General de los Registros y del Notariado*), an administrative body which falls under the Justice department and deals with civil status and nationality. This body has been in charge of producing administrative guidelines which have been essential for interpreting the vague legislation. This body is also in charge of deciding on acquisition and loss of nationality. Its decisions can be appealed either to a civil court or to an administrative court. Both the administrative decisions by the General Directorate and the judicial decisions, especially those by the Supreme Court have also become a rich, yet dispersed, and not always consistent, source of interpretation of the nationality law.

As a brief note on terminology, it is necessary to point out that the Spanish term used to refer to the concept of ‘nationality’, understood as the legal bond between an individual and the state, is ‘*nacionalidad*’. The Spanish term for citizenship, referring to the full entitlement of political rights is ‘*ciudadanía*’. From the legal viewpoint, the concept of citizenship therefore is more restricted than nationality. However, in some cases, ‘citizenship’ is used in the legal texts in a less accurate way as it is actually referring to the wider conceptual sphere of ‘nationality’ (e.g. articles 11.3, 13.4, and 41 of the Spanish Constitution; article 22.2 of the Spanish Civil Code). From a political or sociological viewpoint, the term ‘*nacionalidad*’ can also be understood as the different historical-cultural reality integrated within the Spanish national community. In fact, the Spanish Constitution acknowledges the national plural character of the country using the term ‘*nacionalidades*’ (article 2 of the Spanish Constitution) (Santolaya 2008: 11-14; Carrascosa 2007: 17-23).

2 Historical Background

2.1 Spanish nationality law: the Civil Code of 1889

The regulations on Spanish nationality in their contemporary form date back to the origins of its constitutionalism in the early nineteenth century (Fernández Rozas 1987). Indeed, it became a common trend for the several constitutions that Spain enacted in that period, starting with Spain's first constitution of 1812, to briefly address the question of the acquisition of Spanish nationality and the rights and duties of foreigners in Spain.³ All of these constitutions regulated the matter briefly, delegating the responsibility of expanding the regulatory framework into laws that, for the most part, were never enacted. The first legislative attempt to define the main traits of Spanish nationality in a more comprehensive manner occurred in 1889 when the Civil Code was passed. Until today the Civil Code has remained the locus of Spain's nationality regulations. Given that the code can only contain a few provisions dedicated to nationality, precedents set by the administrative body responsible for deciding on the conferral or denial of nationality, the judicial decisions overseeing such decisions as well as administrative regulations have been essential in supplementing the legislation.

Data on migration flows which was first collected in the early 1880s (although by then large scale migration had been occurring for many years) show that at the end of the nineteenth century, recorded emigration flows were going in two main directions: one, of temporary migration to Algeria (at the time a French colony in need of European workers) and another one to Latin America, mostly to Argentina, Brazil and Uruguay. After its independence, Cuba became the second destination for Spanish emigrants after Argentina.

The 1889 Civil Code devoted twelve articles to the nationality issue. The brevity of this regulation allowed for a large degree of judicial discretion in its application. The rules were criticised by legal scholars who complained about their deficient technical value, especially when compared to other systems in force at the time (Fernández Rozas 1987: 70). Nonetheless, this regulation has remained the backbone of Spanish legislation on nationality until our days.

The main characteristics of the nationality system embodied in the 1889 Civil Code have been described as 'a strong component of *ius sanguinis*, a relatively generous application of *ius solis* and a rather naive application of the principle of naturalization by residence' (Moreno Fuentes 2001: 124). To these one could also add the prevalence of the principle of legal unity of the family (Fernández Rozas 1987: 72).

Regarding *ius sanguinis*, which has remained stable until today, the Civil Code provided that persons born from a Spanish father or mother would be Spanish even if they were born outside of Spain (art. 17.2 of the 1889 Civil Code). This ensured that Spaniards who, at the end of the century, were emigrating mostly to Latin America (especially Argentina and Uruguay) could pass on their nationality to their descendants. This allowed Spain to maintain links with its emigrants and their descendants. Moreover, since during the 1860s and 1870s Spain had signed agreements with many of these countries implicitly accepting dual nationality, there were a large number of cases of dual nationals among the expatriates.⁴ However, to avoid the perpetuation of generations of Spanish nationals living

³ All of the following Spanish constitutions made some reference to Spain's nationality regime: the Constitution of 1812; that of 1837 which inspired the regime that would then be reproduced by the Constitutions of 1845, 1869 and 1876 ultimately influencing the 1889 Civil Code legislation.

⁴ In the first third of the nineteenth century the American colonies of Spain gained independence with the exception of Cuba and Puerto Rico who gained independence in 1898. In the 1850s and 1860s Spain signed treaties of peace, cooperation and recognition with its former American colonies which laid down the

abroad without any connection to Spain, a concern that was partly triggered by the participation of the descendants of Spanish emigrants or criollos in the struggles for independence of the American colonies (Moreno Fuentes 2001: 124), art.26 of the Civil Code required all Spanish emigrants who wanted to maintain their Spanish nationality in those countries who, by virtue of their residence considered them to be their nationals, to register themselves as well as their spouses and descendants at the Spanish embassy or consulate.

Women and men were treated equally under art. 17.2 of the Civil Code and thus could both pass their nationality on to their children. However, according to art. 22 of the Civil Code, a Spanish woman who married a foreigner would automatically assume his nationality to ensure the legal unity of the family. She would only be able to recover Spanish nationality if the marriage was dissolved. Similarly, a foreign woman automatically became naturalised when she married a Spanish man. This meant that although in theory, and through the application of *ius sanguinis*, women could pass on their nationality to their descendants, this was only the case when they were single mothers. As for the children, until they became of age, or emancipated, they would have the nationality of their parents (art. 18 CC), which meant, unless these were children born out of wedlock, their father's.

As for the application of *ius soli*, art. 17 of the Civil Code provided that all those born in Spanish territory would be Spanish. However, art. 18 and 19 toned down this apparently generous *ius soli* regime by requiring the foreign parents of a Spanish-born child, or the child, after reaching the age of majority, to declare a willingness to acquire Spanish nationality and giving up their previous one in order to actually enjoy the benefit of Spanish nationality. Thus, more than strictly *ius soli*, this represented what has been named a *facultas soli* (Moreno Fuentes 2001: 125; Fernández Rozas 1987: 71). Even if conceptualised as a 'privilege' or 'extraordinary benefit' (Castro y Bravo 1952) this still allowed for relatively easy naturalisation of second generations. Nothing was added to address the concerns of the third generation.

As for naturalisation, the Civil Code contemplated naturalisation by discretionary granting (*carta de naturaleza*) (art. 17.3 CC) or acquisition by residence (art. 17.4cc). The requirements for the former were not further specified, other than the mandatory renunciation of prior nationality, swearing loyalty to the Constitution and registering in the Civil Registry (art. 25 CC). As for the latter, the provision simply stated that all those who had become residents of any locality in the monarchy would be Spanish, but added nothing as to how to define residence, the length of residence or the way of certifying it. In 1916, a law was passed introducing the requirement of ten years residence before qualifying for naturalisation, which has remained the general rule. That law already provided for shorter residence requirements in some cases such as when a man married a Spanish woman, or somebody started or developed an industry in Spain, owned an industry or business, or rendered a special service to the country.

As far as the loss of the nationality was concerned, the Civil Code foresaw that the Spanish nationality would be lost through acquiring a foreign nationality, accepting employment in a foreign government or joining the military forces of a foreign country without royal authorisation (art. 20 of the Civil Code). However, nationals who lost their nationality because of naturalisation abroad could recover it, were they to come back to Spain and declare their willingness to do so at the Civil Registry (art. 21). Those who instead lost their nationality for accepting employment in a foreign government or joining the military

preferential treatment to be given to Spanish migrants in those countries in terms of the ability to settle, as well as the possibility of gaining the nationality of the host country without automatically losing their Spanish nationality (Moreno Fuentes 2001: 120).

forces of a foreign country without royal authorisation would not be able to recover Spanish nationality without royal authorisation (art. 23). Finally those who were born in a foreign country from a Spanish father or mother who lost their Spanish nationality as a result of their parents losing theirs could also recover it by expressing their willingness to do so upon coming of age, at the Civil Registry or at the Consulate (art. 24).

2.2 Spanish nationality under the Second Republic (1931-1939): a failed attempt of reform

Spain's Second Republic was proclaimed in 1931. Its values were embodied in the 1931 Constitution which had a short life since the Republican regime was interrupted by the Civil War which broke out in 1936 and lasted until 1939. It was followed by over 40 years of dictatorship under Franco. In terms of migration patterns, the world economic crisis of the late 1920s had a strong impact on Spanish migration patterns (Moreno Fuentes 2001: 121). Many migrants decided to return and those who considered migration as an exit option found fewer countries willing to accept them. The political upheaval as a result of the proclamation of the Republic followed by civil war and then dictatorship stopped work related migration but forced over a million people into exile, mostly to France and Latin American countries.

Taking the most progressive European legislation as a reference (mostly the French nationality statute of August 1927) the reforms introduced by the Constitution of 1931 represented an attempt to radically transform the nationality regime. In spite of its brief life the regulation is worth mentioning because many of the characteristics of today's nationality legislation can be traced back to the Constitution of the Second Republic. Due to the brevity of the Republican period, however, the set of regulations laid down in the 1931 Constitution was, for its part, mostly not developed into comprehensive laws. The interpretation given to it, when applied by government and the courts, was just as progressive and this jurisprudence has also contributed to today's regime.

Among the main objectives of the new nationality rules were to better protect Spanish emigrants abroad (especially in view of the increasingly non-assimilationist policies of receiving countries) (Alvarez Rodriguez 1990:173-189); to increase the Spanish population and to consolidate the idea of a 'community of Hispanic nations' (Moreno Fuentes 2001: 126; Fernández Rozas 1987:73).

One of the ways to achieve this was by making the application of *ius sanguinis* even more generous. Another way was to explicitly regulate dual nationality with countries belonging to the Ibero-American community (Moreno Fuentes 2001: 126).⁵ Thus, the new constitution exempted Spanish expatriates from the requirement of registering at an embassy or consulate to avoid losing their nationality. Henceforth, a Spanish national would lose his or her nationality when acquiring a second one only if that acquisition was fully voluntary and it was not acquisition of the nationality of an Ibero-American country. Children of Spanish nationals abroad would also acquire the Spanish nationality by descent regardless of whether the country of residence granted them its nationality. On the other hand, children born in Spain of foreign parents would have a right to choose unless they were born from unknown parents, in which case they would automatically acquire the Spanish nationality (arts. 23.2 and 23.3 of the 1931 Constitution).

⁵ This idea of an Ibero-American community of nationals in which dual nationality would be tolerated anticipated a policy introduced in the 1950s, when a series of dual nationality agreements were established between Spain and several Latin American countries.

In accordance with the egalitarian spirit of the Republican regime the new law tried to eliminate all kinds of gender discrimination and women who married foreigners would no longer lose their nationality. This fully ensured women's equal chances to pass on their nationality to their children regardless of their marital status. Women would only acquire an option to acquire the nationality of their spouses through marriage (art. 23.4 of the 1931 Constitution)

The procedures for naturalisation by residence were also clarified in the only piece of nationality legislation that was enacted under the 1931 Constitution. While the original ten-year residence requirement was maintained, in the spirit of strengthening the relations with the nations with whom Spain considered to have historical ties, the residence requirement was reduced to only two years if the foreigner came from one of the Hispano-American republics, Portugal, Brazil or the Spanish protectorate in Morocco.

As for the loss of the Spanish nationality, it was foreseen as a consequence of accepting employment in a foreign government, if that entailed exercising public authority or of joining the military forces of a foreign country without state approval (art. 24.1 of the 1931 Constitution). Nationals who voluntarily acquired another nationality would also lose the Spanish nationality (but without this having an automatic impact on their descendants' nationality) (art. 24.2 in the 1931 Constitution). The Constitution provided that on the basis of reciprocity and as determined by law nationals of Portugal, Hispano-America, including Brazil, residing in Spain could naturalise without losing their nationality of origin. The Constitution also mentioned that in those same countries Spanish nationals could acquire a second nationality without losing the Spanish one, as long as those countries allowed for this and regardless of reciprocity (art. 24.2 of the 1931 Constitution).

2.3 Franco's regime and the 1954 and 1975 reforms

In 1938 the Republican constitution was invalidated and the 1889 Civil Code was fully re-established as the main legislative framework governing nationality. After that, a major reform did not take place again until 1954. The main aim of this reform was to introduce clarity to a system which had become complex and full of minor regulations, mostly administrative.⁶

The changes introduced in the Civil Code through the 1954 legislation were consistent with changes in Spain's emigration patterns. The emigration to Latin America was ending and being replaced by temporary migration, mostly by men, to European countries rebuilding their economies after the war. The main destinations now included Germany, Switzerland and the Benelux. There was the assumption that this newer form of migration would be temporary, so the 1954 legislators did not expect it to have any implications for nationality issues. This explains why the focus remained on expatriates in Latin America and on the question of the number of generations that would be allowed to pass on their Spanish nationality while abroad. Reviving the spirit of the old Civil Code, the legislators decided that third generation emigrants had to register at a Spanish embassy or consulate for them to retain their Spanish nationality, to avoid the perpetuation of expatriates without real connection to Spain (art. 26 of Civil Code as amended by the 1954 statute). First and second generations remained exempt from the registration requirement.

The 1954 reform picked up the idea of establishing dual nationality treaties with the countries of the Ibero-American community of nations. Although, as we saw, the idea was

⁶ Statute of 15 July 1954 which was developed by a Decree of 2 April 1955.

originally put forward in the Constitution of the Second Republic, it fit well with Franco's ideology which embraced the narrative of Spain's continuation of the long lost Spanish Empire of glorious times (Moreno Fuentes 2001: 141). In fact, the preamble of the 1954 reform stated that Spain shared a 'spiritual mission' with countries with which 'for well-known reasons that transcend all kinds of contingencies it is inextinguishably linked' (Lete del Rio 1984). Thus, the new art. 22 of the reformed Civil Code provided that Spanish nationals who voluntarily acquired the nationality of another country would automatically lose their Spanish nationality, except when the country belonged to the Ibero-American community of nations or the Philippines, if the relevant bilateral agreements had been signed between Spain and the country in question. Indeed, between the 1950s and 1960s, Spain signed twelve of those agreements giving legal expression to a widely spread *de facto* reality and providing a framework for its regulations.

Another novelty of the 1954 reform was that it rendered slightly more flexible the requirements to access nationality, by introducing for the first time double *ius soli* to ensure that the third generation of foreigners living in Spain would gain automatic access to nationality (art. 17.3 CC). The requirements were strict, however: both parents had to have been born in Spain and reside in Spain at the time the child was born. The idea was to avoid the perpetuation of generations of foreigners living permanently in Spain.

Access to nationality through naturalisation by residence was also made slightly easier in some respects. Although the ten years residence requirement was retained as a general rule, the period was reduced to two years in the case of a foreign man marrying a Spanish woman. Borrowing from the Second Republic legislation, two years was also the rule for nationals of the Ibero-American community and the Philippines. On the other hand, the concept of public order became a tool to exercise greater political scrutiny over the naturalisation process, allowing the Ministry of Justice a tremendous amount of discretion. Art. 20 simply provided that the Spanish nationality could be denied for reasons related to public order.

As for the loss of Spanish nationality, the regulation remained practically unchanged except for the addition of the possibility to lose the Spanish nationality as a punishment for a criminal offence (art. 23.2).

One of the most regrettable aspects of the reform was its return to some of the more regressive aspects of the old Civil Code, including the discrimination against women who, in the name of the legal unity of the family, would again lose their nationality if they could acquire that of their husbands when they married (23.3). Foreign women marrying Spanish men would on the other hand acquire Spanish nationality automatically (art. 21). Only one exception was foreseen, namely, for the sake of avoiding statelessness: women could keep their nationality and pass it on to their children to avoid statelessness (art. 17.2). The blunt discrimination was only tackled in the partial reform to the Civil Code which took place in 1975 and symbolised the late regime's attempt to seem more democratic.⁷ After the 1975 reform, marriage stopped being a sufficient condition for either losing or acquiring Spanish

⁷ Reform of the Civil Code by the Statute of 2 May 1975 specifically concerned the nationality of married women and was developed by the Internal Order of the General Directorate of Registries and Notaries of 22 May 1975.

Around the same time some legal measures were also enacted to guarantee residents of some former Spanish colonies in Africa a right to option for Spanish nationality (Royal Decree 2978/1977 for Equatorial Guinea independent since 1968; Treaty of 4 January 1969 by which Ifni was returned to Morocco and the Royal Decree 2258/ 1976 regarding the end of the Spanish administration over the Sahara). However the many administrative hurdles and the fact that some of these measures were enacted only many years after independence made them relatively useless.

nationality. However, Spanish women could still pass their nationality on, though only when the children were not accorded that of their father.

2.4 Spain's transition to democracy and to a country of net immigration: the 1978 Constitution and the 1982 reform

After Franco's death in 1975, Spain entered upon a new democratic path. The current Constitution, which was approved on 6 December 1978 epitomises the result of this transition. Together with Spain's transition to democracy the relevant framework for our purposes needs to take into account two further phenomena: the return migration that took place during the transitional period and the beginning of the transformation process of Spain into a net recipient of migratory flows.

During 1974-1977 the migratory balance of Spanish nationals shifted for the first time with nearly 300,000 emigrants returning from abroad. This phenomenon of course had a high political profile and left its visible traces in the new Constitution (Moreno Fuentes 2001: 130). At the same time, in spite of Spain's severe economic crisis at the beginning of the 1980s, the new Spain, a main attraction for foreign investment, started generating jobs at the very top and bottom of the occupational scale. Many of these jobs were taken by foreigners. From less than 50,000 in 1975, the number of foreigners rose gradually to about 250,000 in 1995.⁸ Initially, immigrants from Latin America were clearly the majority, but they were soon matched by the rapidly growing number of immigrants from Africa, mostly the Maghreb. People from Asia (China and Philippines) also started to increase their presence. Moreover, from the late 1980s onward, Spain also began to receive large numbers of asylum seekers, due to refugee crises in Eastern Europe, former Yugoslavia and Sub-Saharan Africa.

The 1978 Constitution, breaking with our constitutional tradition, does not purport to offer a more or less comprehensive regulation of nationality. In fact art. 11.1 refers the matter to further legislation providing that the Spanish nationality is acquired, kept and lost according to the laws. The Constitution does however define a set of basic principles. Art. 11.2 states that Spanish nationals 'by origin' cannot be deprived of their nationality, whereas art. 11.3 authorises Spain to sign dual nationality agreements with Ibero-American countries as well as with other countries that have or have had special links with Spain. The same provision recognises that with regards to those countries, Spanish nationals can naturalise without losing their nationality of origin. The existence of a historical community of Ibero-American nations, dating back to the 1931 Second Republic, has thus been preserved in the Spanish Constitution. As mentioned, the return of Spanish emigrants was also taken into account in the drafting of the new Constitution which, in its art. 42 (in the Chapter on Leading Social and Economic Principles) provides that: 'the State shall protect the social and economic rights of Spanish workers abroad, and enact a policy to facilitate their return.' These are the only provisions that make explicit or implicit reference to nationality. However, other clauses, such as the one which prohibits discrimination on the grounds of sex, have naturally had an impact on the matter as well.

The first reform of nationality legislation of the new democratic regime took place in 1982, when the numbers of foreign nationals living in Spain was still rather small and Spain was far from being generally perceived as a country of immigration.⁹ The 1982 reform

⁸ Moreno Fuentes (2001), citing sources of *Anuario de Migraciones* [Yearbook on Migrations], 1997, Madrid: Ministerio de Asuntos Sociales, 1998.

⁹ This reform was enacted by the Statute 51/1982 of 13 July and was developed by the Instruction of the DGRN of 16 May.

retained the basic traits of Spanish nationality legislation,¹⁰ adapting it to the constitutional mandates. For instance, to become consistent with the constitutional prohibition of discrimination on the grounds of sex (art. 14 in the Constitution), the law finally removed all types of discrimination against women regarding both their access and their right to pass on their nationality to their descendants (see art. 17.2 CC as reformed by the 1982 Statute). However, the opportunity was not seized to change the regulation in depth. It was clear that changing Spanish nationality legislation was not perceived as a priority in the new democratic venture, and when the government presented its bill to be discussed in parliament, only the Communist party challenged it in depth yet with little success.¹¹ Indeed, the matter also had a low political profile in public opinion, and the law passed almost unnoticed during the summer of 1982.

One of the main characteristics of the new regulation, other than the removal of all forms of sex discrimination, was the systematic distinction between nationals ‘by origin’ and those with ‘derivative nationality’, a distinction with relevance for the purpose of acquisition and more importantly for the loss of the Spanish nationality (arts. 22.2, 23.4 and 24 CC). The 1978 Constitution had indeed established that Spanish ‘by origin’ could only lose their nationality voluntarily, and the 1982 legislative reform made a strict interpretation of this. The reformed Code still stated that the voluntary acquisition of another nationality could imply the loss of Spanish nationality, but several exceptions made even this rule inapplicable in practice. For one thing, the acquisition of the nationality of one of the Ibero-American community of nations, plus Andorra, Equatorial Guinea or, for that matter, any other country with whom Spain had signed a bilateral agreement of dual nationality would not imply the loss of Spanish nationality. Also, nationals would not lose their Spanish nationality if they stated that the acquisition of another nationality was the result of their emigration to that country (art. 23 of the Civil Code as reformed by the 1982 legislation). The underlying reason behind this new provision was the aim of protecting emigrants living in countries with which Spain did not have bilateral agreements.¹² The other possibilities of loss (loss because of committing certain crimes, for falsity or fraud in the acquisition, for voluntarily joining the military forces or exercise of public office in a foreign nation without governmental authorisation) were only reserved for nationals who were not so ‘by origin’ (art.24 CC).

For the rest, *ius sanguinis* was still maintained as the central mode of acquisition and the registration requirements at the embassy or consulate as requirement for the retention of nationality were now removed. *Ius soli* was rendered slightly more flexible by allowing the double *ius soli* rule to apply even if only one of the foreign parents (and not both) had also been born in Spain and by removing the requirement of residence of the parents in Spanish territory at the time of birth, again mostly as a way of avoiding the perpetuation of foreigners living in Spain (art. 17.4 CC). Other novelties were the inclusion of automatic acquisition of nationality by minors adopted by a Spaniard (art. 18 CC)¹³ whereas in the previous legislation adoption was only an instance of privileged naturalisation by residence (two year residence requirement) and the restriction of access by option.

¹⁰ See Statute 51/1982 of 13 July, modifying arts. 17-26 of the Civil Code.

¹¹ The Communist Party insisted that nationality in Spain should stop being regulated through the few provisions in the Civil Code dedicated to it and, following the example of other European countries, should instead be the object of a special statute dedicated exclusively and in much more depth to its regulation.

¹² Another way to protect emigrants and thereby respect the constitutional mandate to do so, was to foresee, for the first time, that they could recover Spanish nationality, had they lost it, with exemption from the otherwise general requirement of being residents in Spain (art. 24.4 II of the Civil Code).

¹³ The Statute 24/2005, 18th of November has amended the process of registration in cases of international adoption in view of the extraordinary increase of its social importance (articles 16 and 18 of the Statute that regulates the Registry Office June, 8th of June 1957; Alvarez 2008: 202-204).

Some changes were made to the residence-based acquisition mode. The rule, ten years of residence, was once again retained but the affinity based privileged reduction to two years was expanded to cover not only nationals from the Ibero-American community but also from Andorra and Equatorial Guinea. In recognition of its historical debt to Sephardic Jews, expelled from the Spanish Kingdom in 1492, the legislators included the community of Sephardic Jews into the privileged group. For those married to a Spanish national one year of residence would be sufficient, as well as for those born to a Spanish parent who had lost his or her nationality and those born in Spanish territory. While trying to facilitate the incorporation of second generations, the Spanish legislators thus departed from the option of *facultas soli*, or naturalisation by option of second generations.

3 The current citizenship regime

3.1 Main general modes of acquisition and loss of citizenship

Acquisition of nationality

Spain does not have a specific nationality law. The regulation on nationality is still contained in the Civil Code and other procedural norms, mostly in the Statute and Executive Decree on the Civil Registry.¹⁴

Following the tradition that is predictably becoming more and more controversial as Spain turns into a country of immigration (see, for all, Lara Aguado 2003), the Spanish regime still distinguishes between ‘nationality by origin’ (*nacionalidad originaria*) and ‘derivative nationality’ (*nacionalidad derivativa*). Whereas the former used to refer, and still does for the most part, to instances of automatic acquisition or acquisition at birth, the latter was usually reserved for non-automatic and acquisition after birth. Currently the Spanish legal system still refers to these two modes of acquisition, although it contemplates a few instances in which ‘nationality by origin’ is not acquired at the moment of birth and requires application. The major practical implication is that ‘nationals by origin’ enjoy a set of prerogatives from which those who have a ‘derivate nationality’ have been excluded. These prerogatives include: the capacity to be the King’s tutor (according to art. 60.1 in the Spanish Constitution); the right not to be deprived of Spanish nationality against one’s will (according to both art. 11.2 of the Spanish Constitution and art. 25 of the Civil Code) and the possibility to retain Spanish nationality when acquiring the nationality of a certain set of countries with which Spain has special historical and cultural ties (according to art. 11.3 of the Spanish Constitution and art. 24 of the Civil Code).

The main mode of automatic acquisition of nationality in Spain is still *ius sanguinis*, even though the system also contains *ius soli* elements. Spain embraces an unqualified *ius sanguinis* in favour of those born of a Spanish mother or father who will become nationals ‘by origin’ regardless of whether they are born in Spain or outside of Spain (art. 17.1. CC).

Moreover, automatic access to nationality ‘by origin’ is guaranteed to those who are born in Spain but only if at least one of the parents was also born in Spain (double *ius soli*) (art. 17.1 b) CC) or the person would otherwise become stateless (either because both parents are stateless or because none of their citizenships is passed on to the child via *ius sanguinis*) (art. 17.1.c) CC). Automatic acquisition ‘by origin’ through filial transfer of nationality for the case of adoption is also contemplated for those foreigners under eighteen years who are

¹⁴ Statute on the Civil Registry (*Ley del Registro Civil*), of 8 June 1957 and Executive Decree of 14 November 1958.

adopted by a Spaniard, from the moment of adoption (art. 19.1 CC). This was reformed in 1990. Before that, acquisition ‘by origin’ was only recognised if at the time of birth of the adopted person one of the adopting parents was a Spaniard as well.

There have been voices both in the political and in the academic arena claiming the need to embrace further elements of *ius soli* in view of the increasing immigrant population. Thus, the various bills submitted over the last decade before the 2002 reform and again in 2003 by the socialist party include the recognition of Spanish nationality for those born in Spain from foreign parents if at least one of them is a legal permanent resident at the time of birth. United Left’s (Izquierda Unida) proposals did not even require legal residence but only *de facto* permanent residence.

As for non-automatic acquisition Spain has traditionally distinguished, and still does, between two modes: by option and by naturalisation (the latter can be divided into two submodes: discretionary naturalisation (called in Spain ‘*carta de naturaleza*’ and residence-based acquisition). To these, a third mode was added in the 1990 reform and is still present: acquisition by ‘possession of status’.

Acquisition by option is a privileged form of acquisition recognised in favour of people with special links to Spain who only have to express their will in due time and form (through either a declaration or petition) to acquire Spanish nationality (Lete del Río 1994: 27). To this day, there are four types of beneficiaries. The first one refers to those who are or have been subject to the ‘parental authority’ (*patria potestas*) of a Spaniard (art. 20.1.a CC).¹⁵ This provision was reformed in 1990. Before that, it referred to people being subject to either ‘parental authority’ (*patria potestas*) or guardianship. After the reform the latter will only enjoy privileged residence-based entitlement (one year residence). Thus the children of foreigners who naturalise in Spain will acquire a right to Spanish nationality by option for being or having been (if they are of age) under the ‘parental authority’ (*potestas*) of a Spanish citizen. The parent first has to become a Spanish national though, so that his or her descendants can then acquire the option (Marín López 2002: 2859-2882).

The second group entitled to nationality by option are those whose (natural or adopted) father or mother was Spaniard ‘by origin,’ born in Spain (art. 20.1 b CC), without time limit and regardless of their age and place of residence. This possibility was introduced in the latest legal reform on nationality in 2002. It is aimed at allowing the children of those Spanish emigrants who had lost their nationality at the time their children were born to acquire Spanish nationality. This option had already been introduced in the 1990 reform through a transitory provision, but it was only valid for three years after the 1990 statute came into force. At the time, the legislators justified it as a way of ‘solving the last negative consequences of a historical process – the massive emigration of Spaniards – which is unlikely to reoccur’. The provision stipulated that the applicant who exercised his or her right of option should be legally residing in Spain, although this requirement could be waived by government. Then a 1993 reform again opened up this possibility, through a transitional provision, for those exercising it before January 1996, in order to reach those beneficiaries dispersed throughout the world, especially those living in rural areas and for whom accessing information might be more difficult. The 1995 reform extended this option until 7 January 1997. Finally, the 2002 reform incorporated the possibility (to be exercised as of 9 January 2003) without subjecting it to time limits of any sort and removing the requirement of

¹⁵ The Spanish Civil Code provides that non-emancipated children are under the *potestas* of both the mother and the father. This *patria potestas* is exercised jointly by both the father and the mother unless they are separated in which case the person with whom the child lives will, in principle, exercise the *potestas*. See art. 154 and 156 CC.

residence in Spain by the applicant. The legislature specified that in doing so it was fulfilling the mandate of art. 42 in the Constitution, as facilitating the retention and transmission of Spanish nationality was a way of protecting Spanish emigrants. It recognised having accepted in this regard the many claims presented to the ‘Emigration Council’ (*Consejo de la Emigración*) by emigrants over the years.¹⁶ Even as reformed, the provision has been subject to criticism by those who believe that the two restrictions implicit in it are unjustified (Lara Aguado 2003). First, the restriction, among the reference persons, to those who are Spanish ‘by origin’ means that the children of a naturalised immigrant who emigrates, losing his Spanish nationality in the process, would not be able to benefit from this option. Second, the restriction implicit in the requirement that the reference person, the father or the mother, must have been Spaniards born in Spain, which is a way of limiting the possibility of option to the children of the first generation of Spanish emigrants, maybe for no other reason than to accept those whose numbers would be enough to fulfil Spain’s labour needs (Rubio & Escudero 2003: 126).

The third group of persons entitled to nationality by option, since the 1990 reform, are those for whom descent from a Spaniard or birth in Spain as triggering factors have been established after they turned eighteen (20.1.c) CC in connection to art. 17.2). Prior to the reform, acquisition was automatic regardless of the age of the person and this could entail granting Spanish nationality to an adult who might not have had any ties with Spain when the triggering factor (birth in Spain or descent from Spaniard) was established. This was considered excessively intrusive. For similar reasons, the right of option is also recognised in those cases of adoption where the adopted person is eighteen or older ((20.1.c) CC in connection to art. 19.2 CC). Such right was again introduced in the 1990 reform. Before that, adoption only opened the path to acquisition when the adopted person was a minor.

Exercising this option, except in the case of those whose mother or father was Spanish by origin and born in Spain, is subject to a time limit – basically, until the person turns twenty, for those subject to ‘parental authority’ (*patria potestas*) of a Spaniard, except when the person cannot be considered emancipated at the age of eighteen in accordance with the law of his or her nationality, in which case the person can exercise the option during the two years following emancipation. The time frame is also two years after adoption or determination of descent or place of birth.

The procedure is described in arts. 226 to 230 of the Civil Registry Executive Decree. Basically the request has to be formulated at the Civil Registry of either the place of birth or place of residence of the person in question or at a consular or diplomatic office if the person resides abroad. In any event a copy will be sent to the judge in charge of the Registry of the place of birth of the person or the Central Registry if the person was born abroad as it is there that the acquisition of nationality needs to be inscribed. After the relevant documents have been presented the person in question will exercise the option, which will only come into effect fully after he or she relinquishes his or her prior nationality (if necessary), swears loyalty to the king and the constitution (if he or she is fourteen or older) and records it in the Registry. In case the procedure is not successful an appeal can be submitted to the General Directorate of Registries and Notaries (DGRN) and, failing that, the person in question can appeal via the judiciary by addressing the issue to a civil court.

Non-automatic acquisition through naturalisation includes acquisition by discretionary conferral, traditionally called ‘*carta de naturaleza*’, and other forms of entitlement based on

¹⁶ The Emigration Council is a consultative body ascribed to the Ministry of Employment and Social Affairs, General Directorate for the Regulation of Migration: Dirección General de la Ordenación de la Migraciones. For years it has articulated the claims of Spanish expatriates and emigrants and their descendants.

conferrals, either purely residence-based or focusing on both residence and other additional criteria. The Spanish legal school has traditionally placed all of these under the common label of naturalisation by residence even though in some instances the period of residence required is very short.

Regarding acquisition by discretionary conferral, the Spanish legal order allows for this possibility when ‘extraordinary circumstances’ concur in the target person, who has to apply for it and may be successful or not depending on the full discretion of the Government, who can grant it through a Royal Decree (art. 21.1 CC). In practice, the set of interpretations of what those ‘exceptional circumstances’ are has ranged from an interest in spreading the Spanish language, talent for soccer, and belonging to some international brigades during the Spanish civil war (Rubio & Escudero 2003: 126)¹⁷. The survival of this mode has been subject to constant criticism by the legal school, as such broad discretion is said to contradict the spirit of the Constitution (Espinár Vicente 1986: 108). On the other hand, its usefulness in allowing the gaps and deficiencies of the existing legal order to be filled and overcome has also been recognised (Abarca Junco & Pérez Vera 1997: 176).

What is commonly known as residence-based acquisition by the Spanish legal school, which we will call naturalisation by residence, refers to a mode of acquisition that entitles the applicant to ‘derivative’ Spanish nationality conferred by the Department of Justice and requires individual application (art. 21.2 CC). Although the target person is entitled to acquire nationality once he or she fulfils the required legal conditions, the system still allows for some discretion. The relevant provision explicitly states ‘that the Spanish nationality is (also) acquired through residence in Spain, under the conditions specified in the following provision, and is conferred by the Department of Justice which can deny it on justified grounds related to public order or national interest.’ According to the Supreme Court and the legal school, granting nationality is not simply a matter of right. Rather, once the person qualifies according to the law, the state is authorised to check that the necessary requirements have been fulfilled and that in view of the general interest the granting is indeed justified. On the other hand, it is the specific denial of nationality that needs to be justified on specific public order or national interest grounds, not the conferral to which the person is in principle entitled once he or she fulfils the necessary legal requirements (Morín del Casero 2002: 453).¹⁸

As for the conditions that the target person must satisfy, the legal system contemplates a requirement of ten years of continual, uninterrupted, legal and prior residence and then provides for shorter residence requirements for specific groups (art. 22 CC). This general ten year requirement, which, comparatively speaking, makes Spain fall into the category of the more demanding countries in terms of naturalisation requirements, has survived the various reforms up to this day and has been subject to constant criticism. The bills presented by the Socialist and the United Left groups during the last decade have advocated a reduction of the general residence requirement to five years. The United Left has also proposed that the ten-year residence requirement be left only for those instances in which either the legality or the continuous nature of residence cannot be proven.

There are however quite a few groups of applicants who are placed in a faster track. The list has been changing and gradually expanding. Refugees only have a residence

¹⁷ This category was also applied as the normative basis for the conferral of Spanish citizenship on the victims and their relatives (parents and children) of the 11 March 2004 terrorist attacks in Madrid (Royal Decree 453/2004, 18th of March)

¹⁸ See also Supreme Court decision of 1 July 2002.

requirement of five years.¹⁹ Nationals of Latin American countries, Andorra, the Philippines, Equatorial Guinea, Portugal or Sephardic Jews only have a requirement of two years. In the nationality reform proposals discussed during the last decade, both Socialist and the United Left parties suggested that it would be convenient to reduce the five-year requirement for refugees to two and to extend this option in favour of stateless persons as well (see also Rubio & Escudero 2003: 129).

Finally, there is a category for which only one year of residence is required which includes several groups. The requirement applies to those born in Spain which means that although no *ius soli* exists for the second generation, one year of legal residence is sufficient for the children of immigrants born in Spain to apply for derivative nationality (legally represented by their parents) if they do not acquire it otherwise. One year of residence is also sufficient for those who had a right to option subject to a time limit but, for some reason, did not exercise it in due course. Included in this fast track are also those who have been subject to the guardianship of a Spanish citizen or institution for at least two consecutive years. Those who at the time of application have been married for at least one year with a Spaniard are also covered. In the case of a reference person who has naturalised, it is required that he or she be both married and a Spaniard for at least a year before he or she can have his or her spouse apply for Spanish nationality. Not included are partners in civil unions, regardless of their sexual orientation, something which the Socialist proposals have been meaning to amend. The widow or widower of a Spaniard, if at the time of the death of the spouse they were not separated, is also entitled to gain Spanish nationality through the one-year residence track. Finally those born outside of Spain whose father or mother, grandfather or grandmother was Spaniard by origin. Notice that in reality if the mother or father, besides having been Spaniards by origin, were born in Spain, their children would not need to reside in Spain as they could simply access nationality through option.

This provision has been subject to only relatively minor changes since the mid-1980s. The inclusion for the first time of refugees in the faster track residence based acquisition was brought about by the 1990 reform which, in this respect, resurrected a 1982 communist proposal. Minors and non-emancipated persons were also included among those who could gain residence-based nationality when duly legally represented, through the 1990 reform. The requirement that spousal transfer through one-year residence take place only if at the time of application the applicant has been married for at least one year with the national and both are not *de iure* or *de facto* separated was again introduced by the 1990 reform. Previously, having been married, even if the marriage was dissolved at the time of application, was sufficient to qualify. The 1990 legislature changed this to avoid sham marriages. Another vestige of the 1990 nationality reform was the addition of the widow or widower to the fast track list. Finally, the addition of the grandchildren of former Spaniards was a result of the 2002 reform and its attempt to facilitate recovery of the Spanish nationality by former expatriates and its transmission to their descendants. Before that, the provision only referred to the parents, not to the grandparents and hence excluded the third generation.

In the past decade, victims and descendants of victims of the civil war and Franco's political regime who had to go into exile have been mobilising around the possibility of recovering Spanish nationality when it was lost as a result of such exile. The socialist government of Zapatero (himself the grandson of somebody executed during the civil war) seems receptive to this and similar claims. Indeed even before the Socialists came to power in

¹⁹ Probably in fulfilment of art. 34 of the UN Convention of 28 July 1951, which Spain signed in 1978, which refers to the duty of states to facilitate and accelerate the possibility for refugees to acquire their nationality as well as simplifying the procedures as far as possible.

March 2004, they had already echoed this concern in the 2003 socialist reform bill, which includes among those who should have a one-year residence-based entitlement to nationality all direct descendants (however distant) of people who went into exile as a result of the war or Franco's dictatorship up until 1975. These claims have been satisfied through the endorsement of the so-called 'Historical Memory Act' outlined by Statute 52/2007, 26 December 2007, which purports 'to recognise and to extend rights and to establish measures in favour of those who suffered persecution or violence during the Civil War and the Dictatorship'.

There has been some dispute as to the how 'legal and uninterrupted residence' is to be interpreted for the purpose of satisfying the residence requirements. As for 'uninterrupted' residence, a decision by the Supreme Court (decision of 19 September 1998) has been crucial to the interpretation by defining that short trips abroad do not interrupt residence as long as the person keeps his or her life centred in Spain.

More difficult to determine is what 'legal' residence means, other than the obvious exclusion of people who are in the country in contravention of the legal system. There are several possible interpretations. According to the most restrictive one, the requirement needs to be interpreted in the light of immigration legislation, because such legislation distinguishes between three situations (stay, temporary residence, and permanent residence). The claim is that only residence, strictly speaking, qualifies, be it temporary or permanent (see, for instance, Pérez de Vargas 2003: 4075; Palao Moreno 2001: 52; Díez Picazo 2003: 295). This interpretation also used to be frequently embraced by the Supreme Court.²⁰ Part of the doctrine and the DGRN, at times, have sustained that the legal residence concept in the Civil Code is independent from that in the immigration legislation altogether which means that as long as the residence is not in contravention to the legal order (for instance disobeying some expulsion order) it qualifies for naturalisation purposes regardless of the type of permit under which the person lives in Spain (see for all, Díez del Corral 2001: 412-414).²¹ More recently, the Supreme Court has also occasionally embraced this interpretation.²² Finally, some scholars defend an intermediate position: although the concept of residence has to be interpreted in the light of the immigration legislation, once the person has technically speaking achieved the status of legal resident the other periods of time that the person has spent in the country legally can also be taken into account (see, for all, Pretel Serrano 1994). The 2002 reform was a wonderful opportunity for the legislators to finally clarify this question. However, the response was once again ambiguous. The provision was not changed and still makes reference to 'legal residence'. However, in the explanatory introduction to the statute the legislators explicitly mention the need to interpret residence as effective and points to the interpretation offered by the Supreme Court in its decision of 19 November 1998, a decision which makes reference to the person's intent to integrate into the Spanish society. Thus, more and more the belief is that, actual residence (as long as it is legal) and the consolidation of effective ties with Spain is what counts for the purpose of naturalisation (Lara Aguado 2003: 6).

Common requirements for acquisition both through option and naturalisation (whether through discretionary or residence-based entitlement) include: oath of loyalty to the King and obedience to the Constitution and the laws; renunciation of prior nationality and registration

²⁰ See, further, decision of 19 September 1988.

²¹ See also Resolution of the DGRN (Resolución de DGRN) 1 of 27 November 2001 (BIMJ), num. 1910: 412-414.

²² See for instance, Supreme Court, decision of 23 May 2001, allowing a foreign student to count all of the time legally and effectively spent in Spain regardless of the technicalities of the student's permit under the immigration legislation.

in the Civil Registry (art. 23 of the CC). Moreover, residence-based naturalisation requires proof of good civic conduct and sufficient integration into Spanish society. Some of these requirements call for further specification.

Since the 1990 reform, some nationals have been exempted from the requirement to renounce prior nationality. They form the class of nationals for whom dual citizenship is legally accepted. This class includes nationals from Latin American countries, Andorra, the Philippines, Equatorial Guinea and Portugal (art. 23.b and 24.1 CC). In recognition of the stronger ties with the EU it has been proposed that nationals from other EU countries should not be asked to give up their nationality when naturalising in Spain either (Lara Aguado 2003). Aware that such a condition constitutes a hurdle in the process of naturalisation and hence of integration of immigrants the 1993 socialist bill proposed removing this requirement altogether.

‘Good civic conduct’ is an indeterminate concept. To show good civic conduct, the petitioner will be asked to present certificates of proving lack of criminal record or of good conduct issued by both the Spanish authorities and the authorities of the country of origin. Moreover, the DGRN may refer itself to the Department of the Interior to check the conduct of the applicant, especially where it relates to the fulfilment of obligations regarding his or her entrance and residence in Spain. Be that as it may, the Supreme Court has decided that the requirement of good conduct needs to be interpreted in the light of the constitutional order, which means the need to check whether the conduct infringes the norms regarding the exercising of rights and duties in the constitution and other international instruments.²³ As for the relevance of the existence of a criminal record which has been deleted, there is nothing specified, however the case law of the Supreme Court seems to favour the interpretation of the irrelevance of such records unless the seriousness of the criminal conduct is such that a different result should be embraced.²⁴

As for ‘sufficient social integration’ into Spanish society (art. 22.4 CC), the law does not specify what this means either. Art. 220 of the Decree on the Civil Registry (Reglamento del Registro Civil) requires applicants to declare whether they know Castilian or any other Spanish language, and any other circumstance showing adaptation to the Spanish culture and Spanish life style (studies, social service in the community, etc.). The provision also refers to the need to show sufficient means of subsistence in Spain. Ultimately, it is the judge in charge of the Civil Registry who will informally interview the applicant and decide whether in the applicant’s view this requirement has been fulfilled. The religious belief of the applicant cannot be taken into account in making such judgement.²⁵

Procedurally speaking, the person in question will formulate his or her request to the judge in charge of the Civil Registry of his or her domicile who will speak for or against the conferral and send the application to the DGRN, which by delegation from the Department of Justice has to decide within one year of the application. After that the person can appeal the decision in the administrative judicial system (21.2 CC). If the DGRN decides affirmatively, the applicant will have to go to the Civil Registry of his or her domicile within 180 days to ratify the intention to become a Spanish national and swear loyalty to the King and allegiance to the Constitution and the laws.

Since the 1990 reform the Spanish legal system has incorporated the possibility of acquisition by ‘possession of status’ for people who in good faith have possessed and used the

²³ See decision by the Supreme Court of 12 May 1997, 2 June 1998, and 16 March 1999.

²⁴ See decisions of the Supreme Court of 19 December 2002; 5 November 2001; 12 March 2002 and 5 October 2002.

²⁵ See Supreme Court decision of 24 October 2001.

Spanish nationality for ten years (art. 18 CC) on the grounds of a title validly inscribed at the Civil Registry, even if it turns out that the title was not valid after all. This mechanism is a way to avoid sudden and drastic changes in the nationality of a person. Consistent with the idea of reducing the general residence requirement from ten to five years, the 2003 socialist bill proposes to reduce to five years also the residence period required for acquisition by 'possession of status'. Although not necessarily fulfilling the tasks that it was intended to, a retroactive application of this provision has recently been allowing people born in Equatorial Guinea and in the Sahara, during the period that these were Spanish colonies, and who are now living and working in Spain, to regularise their employment situation in the absence of the necessary documentation (Garcia Rubio 1992: 980-991).

The Civil Code contemplates the possibility of recovery of lost nationality. Given that the political debate thus far has mostly centred on the effects of emigration, nationality recovery has actually been a relatively high profile issue. According to art. 26.1 CC the main condition for recovering the Spanish nationality (however it was acquired), other than the expression of will and the registration thereof in the Civil Registry, is that the person be a legal resident in Spain. However, emigrants and their children are clearly given preferential treatment in that they are exempt from the residence requirement. At their discretion and in exceptional circumstances the Department of Justice may grant other exemptions from the residence requirement.

This mode of reacquisition has been subject to changes in all the reforms that have occurred since 1982. Until the 1990 reform, one year of residence immediately prior to the petition was required. Emigrants who could supply proof of their condition could be exempted from this requirement by the Department of Justice. The 1990 reform changed this to require legal residence in Spain at the time of petition only, providing that for emigrants and their children this requirement could be waived by government. Other people would be exempted from the residence requirement only under very exceptional circumstances. The 1995 reform then exempted emigrants from the residence requirement. The legislators at the time justified this by arguing that the exemption procedure was long and burdensome and resulted almost always in the exemption being granted anyway. Finally the 2002 reform also exempted children of emigrants from the residence requirement. Until the 2002 reform it was also necessary for nationals to give up their other nationality, although since the 1990 reform the legislators had already exempted nationals from Latin American countries, Andorra, Philippines, Equatorial Guinea and Portugal from this requirement. The requirement was removed altogether in 2002.

Apart from the loss and possible recovery of nationality due to emigration, the other instance of recovery of lost nationality that deserved some attention was that of Spanish women who lost their nationality through marriage to a foreigner. The 1995 law reforming the Civil Code on the matter of recovery of nationality contained a transitional provision (transitional provision 2) providing that a Spanish woman who had lost her nationality because of marriage to a foreigner before the 1975 statute came into force abolishing this practice, could recover it under the same conditions as emigrants and their descendants (i.e., requirement of legal residence that could be waived by the government, declaration of intention, registration in the Civil Registry and, until the 2002 reform, renunciation of prior nationality).

Finally, one important caveat needs to be added for the case whereby nationality was lost involuntarily. Indeed, under art. 26.2 CC when loss of nationality has occurred involuntarily and has been applied to persons who were not nationals 'by origin' (who are the only ones who can lose the Spanish nationality in this way) then reacquisition is subject to the

discretion of government. This provision is also the result of previous reforms. Prior to the 2002 reform, this additional requirement of discretionary governmental authorisation also applied to those who had lost their Spanish nationality by not having fulfilled their mandatory military or civil service obligations, unless they were 40 years or older (50 years or older, until the 1995 reform). The 1990 reform was the first one that introduced an exemption from the need for governmental authorisation for those who had not performed their military or civil service but were older than 50. After the abolishment of mandatory military service or alternative social civil service in 2001, this restriction no longer made sense.²⁶

Loss of nationality

The Spanish Constitution of 1978 (art. 11.2) determines that Spaniards ‘by origin’ cannot be deprived of their nationality. This is probably the most relevant distinction between nationals ‘by origin’ as opposed to those with ‘derivative’ nationality, and although some scholars have criticised it (Lara Aguado 2003), it is a distinction embedded in the constitution itself. Other than this constitutional distinction, the modes of loss are also regulated in the Spanish Civil Code. There are two main modes of loss of Spanish nationality. One refers to voluntary loss and the other one to involuntary loss. The latter does not apply to those who are Spanish by origin. As far as voluntary loss is concerned there are four possibilities (art. 24 CC), of which none are valid when Spain is at war (art. 24.5 CC). First, loss can occur for those who are emancipated, live abroad on a regular basis and have voluntarily acquired another nationality, except when the second nationality is one of a Latin American country or that of Andorra, the Philippines, Equatorial Guinea or Portugal. The loss in this instance can be prevented by way of submission of a declaration to the Civil Registry (24.1 CC). This provision has been changed in both the 1990 and the 2002 reforms. Before the 1990 reform the provision provided that the nationality would not be lost if the person could prove at the Consular Registry that the acquisition of a foreign nationality was related to emigration. This was a way to protect those who emigrated to a country with which Spain did not have a dual nationality agreement. In the 1990 reform, the possibility of retaining Spanish nationality was removed. Thus, three years after the newly acquired nationality, the Spanish nationality would be lost. Finally, in 2002, the provision was amended again to introduce the option to retain the Spanish nationality by declaring a desire to do so at the Civil Registry, a declaration that must take place within three years of the acquisition of the new nationality.

Secondly, Spanish nationality can be lost voluntarily by those emancipated Spaniards who live abroad on a regular basis and make exclusive use of another nationality which was attributed to them when they were minors. This mode of loss was introduced in the 1990 reform. Here again and since 2002, the loss can be prevented by declaring the wish to retain Spanish nationality at the Civil Registry (24.1 CC).

Third, emancipated nationals who live abroad regularly can freely relinquish their Spanish nationality as long as they have another nationality (24.2 CC). This mode was amended in 1990. Before that, this option was envisaged only for those who enjoyed another nationality since they were minors. After emancipation they were given the option of relinquishing the Spanish nationality. Unlike now, it was not required that they live abroad.

Finally, setting some constraints to the perpetuation of generations of expatriates abroad, since the 2002 reform the Spanish legal order provides for the loss of nationality for

²⁶ It was abolished by the Royal Decrees 247/2001 of 9 March and 342/2001 of 4 April.

those who were born and live abroad, descendants of Spaniards who were also born abroad, as long as the country of residence provides them with its nationality and as long as within three years of becoming of age or becoming emancipated they do not declare the intent to keep their Spanish nationality, at the Civil Registry (art. 24.3 CC).

Involuntary loss (art. 25 CC) can occur in three instances. The first was only introduced in the 2002 reform and only occurs when naturalised nationals make exclusive use for three years of the nationality they renounced when acquiring Spanish nationality (art. 25.1 a). Secondly, involuntary loss can occur when the naturalised alien voluntarily joins the military or takes up a political office in a foreign country in contravention of express prohibition by government (25.1 b), something which is rather interesting at a time in which Spain not only allows but actually promotes the recruitment of foreigners into its professional army (Rubio & Escudero 2003: 126). Finally, loss can occur when through a judicial decision it is determined that the person acquired the nationality through falsity or fraud (25.2 CC). The 2002 reform specified that this loss would not affect third parties acting in good faith. Until 2002, the Civil Code also contemplated the possibility of loss of nationality by naturalised aliens as a result of a criminal conviction. Indeed, until 1995, the criminal code punished those committing a crime against the external security of the state with the loss of nationality. This possibility was first removed from the criminal code in 1995 and so this mode of loss became practically ineffective since then. In 2002 it was removed from the Civil Code altogether.

Statistical developments

To the authors' knowledge, no systematic and comprehensive effort to produce the sort of statistical data that would be relevant for the purpose of assessing the impact of different legislative reforms of nationality legislation on naturalisation rates has ever been undertaken. There are no thorough statistical data in Spain on nationality of origin and mode of acquisition. There is also a general lack of studies analysing naturalisation tendencies. Below we present the data we have nevertheless been able to gather.

One can observe that naturalisation patterns were rather erratic until 1996 when from 8,443 they started increasing systematically, at a rate of approximately 3,000 per year (with the exception of the drop in 2000), reaching 26,556 in 2003 but rarely exceeding a global naturalisation rate of 2 per cent, thus lying in general below the European average (Izquierdo 2004: 30).

Moreover, there are significant differences between the naturalisation rates of immigrants from different continents and countries. So, if we focus on the time span between 1998 and 2003 we can observe that naturalisations of immigrants from Latin America (mostly from Ecuador, Peru, the Dominican Republic and Colombia) and Africa (mostly from Morocco and Algeria and more recently from Senegal and Nigeria) represent about 80 per cent of the total. Europeans (mostly from Great Britain, Germany, France and Portugal and only more recently from Eastern Europe), who remain even today the largest source of foreign residents, have generally shown a very low interest in naturalisation (accounting only for at most 10 per cent of the total number of naturalisations). The differences between that percentage and the higher percentages of previous years (34 per cent in 1985 or 20 per cent in 1986) is thus more closely related to the increase of other sources of migrants and their naturalisation rates than to a significant change in the low disposition to naturalise among Europeans.

Although immigrants from Latin America (currently the second largest source following closely that from European countries) and from African countries (currently the third largest source) have added up to 80 per cent of all naturalisations, there are significant differences between the two. Thus, whereas the naturalisation of immigrants from African countries has ranged between 12 per cent and 32 per cent between 1996 and 2003, that of citizens from Latin America has ranged from 54 to 66 per cent in the same time span.

Although some of the differentiation may be accounted for by demographic variations in the yearly flux of immigrants from different regions, and different intentions regarding permanent settlement (Izquierdo 2004: 30), the different naturalisation regimes that apply to each group may also explain some of the difference.

Table 1: Number of foreigners who have been granted Spanish nationality by year and country of origin since 1985²⁷

	Europe				Africa		America Asia	Australia Oceania	Stateless, Unknown	Total
	Total	EU 15	Eastern Europe	Other Europe						
1985	1,252	1,173	49	30	230	1,775	415	7	30	3,709
1986	1,037	968	28	41	1,694	1,865	480	7	38	5,121
1987	1,247	1,162	26	59	5,051	2,155	575	4	45	9,077
1988	1,211	1,153	39	19	3,440	2,898	652	2	55	8,258
1989	915	843	43	29	2,168	2,234	448	2	35	5,802
1990	1,120	992	73	55	1,852	3,315	743	5	44	7,079
1991	665	570	63	32	586	2,019	511	4	34	3,819
1992	869	776	59	34	771	2,812	780	2	28	5,262
1993	1,386	1,208	114	64	1,315	4,447	1,181	5	77	8,411
1994	1,020	792	175	53	1,227	4,432	1,070	3	50	7,802
1995	730	564	112	54	1,060	4,165	761	3	37	6,756
1996	816	619	150	47	1,030	5,532	1,028	5	22	8,433
1997	1,005	744	210	51	1,471	6,382	1,424	2	27	10,311
1998	1,329	987	284	58	2,150	8,249	1,400	5	44	13,177
1999	1,410	1,041	286	83	2,880	10,368	1,671	3	52	16,384
2000	1,009	697	260	52	2,578	7,146	1,225	1	40	11,999
2001	1,348	866	390	92	3,826	9,846	1,677	3	44	16,744
2002	1,533	938	540	55	4,325	13,883	2,014	5	50	21,810
2003	1,574	832	670	72	8,517	14,418	1,992	5	50	26,556
2004	1,858	1,163	661	34	9,991	24,386	2,061	7	32	38,335
2005	1,607	911	664	32	7,346	31,830	2,010	9	27	42,829
2006	1,659	795	838	26	7,618	50,946	2,078	15	23	62,339
2007	1,796	1,157	607	32	10,31	57,466	2,202	9	25	71,810
In percentage										
1985	34%	32%	1%	1%	6%	48%	11%	0%	1%	100%
1986	20%	19%	1%	1%	33%	36%	9%	0%	1%	100%
1987	14%	13%	0%	1%	56%	24%	6%	0%	0%	100%
1988	15%	14%	0%	0%	42%	35%	8%	0%	1%	100%
1989	16%	15%	1%	0%	37%	39%	8%	0%	1%	100%
1990	16%	14%	1%	1%	26%	47%	10%	0%	1%	100%
1991	17%	15%	2%	1%	15%	53%	13%	0%	1%	100%
1992	17%	15%	1%	1%	15%	53%	15%	0%	1%	100%

²⁷ This table includes numbers of acquisitions by residence (entitlement) and by discretionary naturalisation in exceptional circumstances. Statistics on acquisitions by option (persons whose descent from a national is established after minority; persons born in Spain whose descent from a foreign national born in Spain is determined after minority; persons under patria potestas of a Spanish national; persons aged eighteen and above adopted by a Spanish national; persons with a parent who was born in Spain and was originally a Spanish national) or declaration (reacquisition by Spanish nationals 'by origin') have never been produced. Sources: 1985-1995: National Institute of Statistics (Instituto Nacional de Estadística, www.ine.es); 1996-2007: Secretary of State for Immigration and Emigration (Secretaría de Estado de Inmigración y Emigración, <http://extranjeros.mtin.es>).

1993	16%	14%	1 %	1 %	16%	53%	14%	0%	1 %	100%
1994	13%	10%	2%	1%	16%	57%	14%	0%	1%	100%
1995	11%	8%	2%	1 %	16%	62%	11%	0%	1 %	100%
1996	10%	7%	2%	1 %	12%	66%	12%	0%	0%	100%
1997	10%	7%	2%	0%	14%	62%	14%	0%	0%	100%
1998	10%	7%	2%	0%	16%	63%	11%	0%	0%	100%
1999	9%	6%	2%	1%	18%	63%	10%	0%	0%	100%
2000	8%	6%	2%	0%	21%	60%	10%	0%	0%	100%
2001	8%	5%	2%	1 %	23%	59%	10%	0%	0%	100%
2002	7%	4%	2%	0%	20%	64%	9%	0%	0%	100%
2003	6%	3%	3%	0%	32%	54%	8%	0%	0%	100%
2004	5%	3%	2%	0%	26%	64%	5%	0%	0%	100%
2005	4%	2%	2%	0%	17%	74%	5%	0%	0%	100%
2006	3%	2%	1%	0%	12%	82%	3%	0%	0%	100%
2007	3%	2%	1%	0%	14%	80%	3%	0%	0%	100%

The highest hurdles for naturalisation thus far have been the excessively long period of required residence (ten years) and the need to relinquish one's prior nationality. Naturalisation is, however, facilitated for nationals from Latin America who are granted the privilege of a shorter residence requirement (two years) and do not have to renounce their nationality of origin.

Some data support this interpretation.²⁸ Moroccans are by far the largest group of foreign residents. In 1997, the total resident population of Moroccans was 77,189 and there were 1,056 naturalisations of Moroccans (a ratio of 1.37 per cent). That same year, the three Latin American countries with the largest populations in Spain were, in this order, Argentina (with 18,246 residents), Peru (with 18,023) and the Dominican Republic (with 17,845). The naturalisation ratio for Argentineans was then 7.5 per cent, for Peruvians 6.4 per cent and for Dominicans 7 per cent). Similarly, in the year 2000, there were 161,870 Moroccans living in Spain and only 1,921 were naturalised (1.18 per cent). The three largest groups from Latin American countries were Peruvians (with a naturalisation ratio of 5.4 per cent), Dominicans (6.53 per cent), and Cubans (5.39 per cent).

On the other hand, it seems that over the last few years, the difference in naturalisation rates between Latin Americans and Northern Africans has been decreasing: in 1996, Africans accounted for only 12 per cent of total naturalisations and Americans for 66 per cent, whereas in 2003 the difference has shrunk to 32 per cent and 54 per cent respectively. It is not clear yet whether the main reason behind this has to do with demographics (many of the African immigrants might have satisfied the ten-year residence requirements only more recently) or other changes related to immigrants' settlement projects or attitudes in the receiving society. It seems that during the 2000-2004 Aznar government there was an attempt to favour immigration from Latin America, which was seen as more culturally attuned than that from Africa, and this may have encouraged Africans to opt for naturalisation as a way of ensuring a secure residence. However, precisely because of this we might see an increase in the overall naturalisation of Latin Americans in the coming years, especially resulting from the more recent influx of Colombians and Ecuadorians. This would reflect the shift in Spain's receiving policies (Izquierdo 2004: 30) but also the increasingly polarised perceptions about the culturally defined 'other' when it comes to the assessment of naturalisation requirements that refer to the assimilation of immigrants into Spanish society.

²⁸ Anuario Estadístico de Extranjería [Statistical Yearbook on Aliens], Ministerio de Interior extranjeros.mtas.es/es/general/DatosEstadisticos_index.html.

3.2 Special Categories

Together with the general regime on nationality one should also note the existence of a special regime for nationals of certain countries or cultures with which Spain is said to have either a historical debt, special ties of cultural affinity or a logical combination of the two. The special treatment is limited to two features. One is the shortening of residence time required to naturalise and the other one the existence of a conventional and/or legal regime of dual nationality.

As we saw, Spain's general residence requirement for residence-based naturalisation is ten years. Two years is, however, sufficient for nationals of Latin American countries, Andorra, the Philippines, Equatorial Guinea, Portugal or Sephardic Jews.²⁹ In the nationality reform proposals discussed lately, both the socialist and the United Left parliamentary groups have suggested the convenience of extending this option in favour of nationals of the EU, the descendants of the Moors (who were expelled in similar ways as the Sephardic Jews) and the people from the Sahara for the circumstances under which Spain abandoned the then Spanish province (Lara Aguado 2003: 7). This would thus expand the circle of persons to whom Spain acknowledges a historical debt or with whom it recognises special ties.

As for tolerance of dual nationality (see Aguilar Benitez de Lugo 1996), starting in the 1950s Spain signed a series of dual nationality covenants with many Latin American countries, recognising an affinity in traditions, culture and language.³⁰ Strictly speaking these treaties did not recognise two nationalities but rather created a system of active/dormant nationality which meant that the two nationalities were never active at the same time. In general (although there are slight variations), these treaties provide that the exercising of rights, diplomatic protection, the granting of passports and all other social, civil and employment rights will be ruled by the legal system of the country in which the person resides. The same applies to military obligations. Being a national of one of the countries does not entail automatic acquisition of the Spanish nationality. Rather, the person still has to fulfil all the applicable legal conditions (arts. 22 and 23 of the Civil Code) with the one single exception of Guatemala where the two-year residence requirement is automatically waived.

The 1978 Constitution echoed this tradition. Indeed, art. 11.3 in the Constitution authorises Spain to sign dual nationality agreements with Ibero-American countries as well as with other countries that have or have had special links with Spain. The same provision recognises that with regards to those countries, Spanish nationals can naturalise without losing their nationality of origin.

In spite of the constitutional sanctioning, the practice has been discontinued and practically replaced with a system of legal, as opposed to conventional, dual nationality, starting in 1990 when the Civil Code was amended to allow for dual nationality of nationals from Latin American countries, Andorra, the Philippines, Equatorial Guinea and Portugal to acquire Spanish nationality through residence (art. 23.b and 24.1). Consistent with this, Spanish nationals voluntarily acquiring the nationality of those countries do not lose their Spanish nationality (24.5). Also, from 1990 onwards, those applying for the recovery of

²⁹ According to the instruction of the DGRN of 16 May 1983 one can prove one's condition as a Sephardic Jew through one's family name, family language as well as other indicia, the belonging to the Sephardic Jewish religion being only one of them.

³⁰ These include those signed with Chile (24 May 1958), Peru (16 May 1959), Paraguay (15 June 1959) Nicaragua (15 June 1961), Guatemala (28 July 1961), Bolivia (12 October 1961), Ecuador (4 March 1964), Costa Rica (8 June 1964), Honduras (15 June 1966), Dominican Republic (15 March 1968), Argentina (14 April 1969), Colombia (27 June 1979).

Spanish nationality were exempted from relinquishing their prior nationality if that nationality was from one of those countries. This comparative advantage became moot in 2002 when the renunciation requirement was removed altogether for those applying for the reacquisition of their lost nationality.

3.3 Institutional arrangements

The Spanish Constitution of 1978 breaks with Spain's constitutional history in that it does not purport to set the rules for nationality issues. Art. 11.1 of the Constitution refers the matter to further legislation when it says that 'the Spanish nationality is acquired, kept and lost according to the laws'. Although Spain is a quasi-federal country with seventeen so-called Autonomous Communities, each with legislative powers, the Constitution entrusts the regulation on nationality exclusively to the central state (art. 149.1.2 of the Constitution). The Constitution distinguishes between several types of legislation. Some matters, mainly those of 'constitutional nature' (i.e., legislation on constitutional rights or on the country's political institutions and system) are subject to regulation by organic law (art. 81 of the Constitution). Such legislation requires an absolute majority in Congress, which represents a high degree of political consensus among the parliamentary parties. Because nationality legislation is referred to in art. 11 and has not been included under art. 81 there is a general understanding that it need not be covered by organic laws and in fact it has not been (Pérez Vera 1984: 230-240).

Unlike most of its European counterparts Spain has never had legislation exclusively focused on nationality. Rather, as we have seen, it has consistently ruled on nationality through the Civil Code. Dedicated to many other subject matters the nationality rules in the Civil Code are contained in just eleven of the 1976 provisions in the Code. If one adds to these the five procedural provisions contained in the Legislation on the Civil Registry we have a total of sixteen legal provisions dedicated to this subject matter. Needless to say, administrative regulations and guidelines have been necessary to fill in the legislative gaps (see Carrascosa González & Sánchez Jiménez 2002). This practice has been criticised for not respecting the constitutional mandate that nationality be regulated by law (Fernández Rozas 1987: 90), especially in view of the fact that many of these guidelines (such as those of 1983 after the 1982 legal reform) have been restrictive in nature. The General Directorate of Registers and Notaries (Dirección General de los Registros y del Notariado)³⁶ (DGRN) produces such administrative guidelines.

The DGRN is the main administrative body in charge of deciding on the acquisition and loss of nationality. In those cases where there is virtually no discretion involved (such as acquisition by option) so that what is asked for is technically speaking an act of *ex lege* declaration (and not a decision strictly speaking) the procedure is instantiated in front of the judge in charge of the Civil Registry where the applicant's birth is recorded or his or her place of residence if the applicant was born in Spain, but if the procedure is not successful an appeal may be submitted to the DGRN within 30 days. After that, the judicial path is open to the applicant, and he or she can submit their case to a civil court. In the case of acquisition by residence a decision is taken, within one year of the application, by the DGRN, acting in the name of the Ministry of Justice. Every six months the official bulletin publishes a list with the names of those persons who have acquired nationality by residence. If the application is denied, the person in question can appeal the decision to the administrative judicial order (21.2 CC). The decisions of the DGRN, together with those of the judges who eventually get to revise them, and especially those of the Supreme Court (which, in the Spanish system are the only ones which are granted value of legally binding precedent) have also become a rich

yet diverse, and not always consistent source of interpretation of the nationality law. In view of the increasing foreign population and hence the increasing importance of access to nationality as a source of integration, it seems more and more necessary that there be a piece of legislation specifically dedicated to regulating nationality.

Moreover, one needs to take into account that the judges in charge of the several Civil Registries (49 in Spain, one in each of the main provinces plus a Central Registry in Madrid) as well as consular and diplomatic offices abroad all apply the nationality legislation, so there is space for diverging interpretations. For instance, it is the judge of the Civil Registry of the place of residence of the applicant who will interview the applicant for residence-based naturalisation and thus decide, in principle, whether he or she is of good moral character and is sufficiently integrated into Spanish society. While in the past only a minimum knowledge of Spanish was tested in an informal interview and societal integration was evaluated based on responses to very simple questions (such as whether the applicant has friends in Spain, the kinds of activities that they and their children do, the things they like or dislike about the Spanish culture), the DGRN is now insisting that the judges of the Civil Registries start asking more specifically about Spanish democratic institutions or history.

4 Current Political debates and reform plans

By the middle of the 1980s, the presence of immigrants in Spain started to increase dramatically, confirming the process of the gradual transformation of Spain into a net recipient of migratory flows rather than a country of net emigration. In 1985, the first law systematically regulating all immigration issues was passed, representing the ‘end of a period of laxity in Spanish border control and the beginning of a process of regulating immigrants who were living in Spain without proper legal status’ (Moreno Fuentes 2001: 133). In 1985, Spain also joined the EC becoming the gatekeeper of the EC’s southern border.

In spite of this radical transformation, the Spanish regulation on nationality has not been significantly modified since the mid 1980s. The reforms that it has been subject to (in 1990, 1993, 1995 and, most recently, in 2002) have still prioritised the concerns about former expatriates who lost their nationality (and their descendants) over those of immigrants for whom access to nationality is an opportunity for integration. In 1990, the socialist government of the day led a reform of the Civil Code on nationality matters³¹ and, for the first time, the incorporation of immigrant populations was debated in parliament. However, such debate had little impact on the reforms actually undertaken. The reforms were mostly aimed at solving some of the problems of applicability and interpretation of the Civil Code after the 1982 reform, as the law candidly recognised. Two later reforms, one in 1993 and one in 1995 were very limited and focused exclusively on recovery of the Spanish nationality by expatriates and its transmission to their descendants.³² The most recent reform of the Civil Code by Statute 36/2002, 8 October 2002, was passed both soon after and just before a series of consecutive major reforms of Spanish immigration law triggered by Spain’s changing immigration patterns.³³ It declares that its main purpose is to facilitate the retention, recovery and transmission of Spanish nationality by Spanish emigrants in accordance with the

³¹ Statute 18/1990, of 17 December, modifying the civil code in matters of nationality, which was developed by the Instruction of General Directorate of Registries and Notaries (Dirección General de los Registros y del Notariado, henceforth DGRN) of 20 March 1991.

³² See Statute 15/1993 of 23 December and Statute 29/1995 of 2 November modifying art. 26 of the Civil Code on the recovery of the Spanish nationality.

³³ Organic Statute (Ley Orgánica) 4/2000 of 11 January on rights and freedoms of foreigners, reformed first by Organic Statute 8/2000 of 22 December and most recently by Organic Statute 14/2003 of 20 November.

constitutional imperative expressed in art. 42. Since the mid-1990s, several bills have been discussed in parliament. To those proposed by the conservative party (Popular Party (PP)), the party in government from 1996 to 2004, one must add those put forward by the Socialist Party (PSOE), the main party in the opposition, and by the 'United Left' (Izquierda Unida), a smaller party to the left of PSOE. The last bill presented by the 'Popular Party' (Partido Popular) was the one that, with small modifications, became law. As we shall see, unlike those of the other political parties, the PP bill paid virtually no attention to the question of the integration of immigrants through facilitated acquisition of the Spanish nationality.³⁴

In addition to the fulfilment of the constitutional mandate, Statute 36/2002 justifies the reform that it embodies by the need to satisfy the many requests expressed by numerous descendants of Spanish emigrants. In October of 2000, during a plenary session of congress, a motion was passed on the need to undertake measures to improve the legal and economic situation of Spanish emigrants. The motion was influenced by the findings of a report presented to the Social Policy and Employment Commission in congress on the situation of expatriates as well as that of immigrants and refugees in Spain. The report recommended legislation to facilitate acquisition of nationality by descendants of emigrants and the recovery of nationality by emigrants themselves but also measures to avoid the marginalisation of foreigners. It expressed the concern that relegating foreigners in Spain to the status of second-class citizens would create the objective conditions for virulent racism and xenophobia. Unfortunately, only the first set of recommendations was followed.

In 2003, the Socialist Party presented a new bill which was rejected once again. The bill endorsed measures similar to those the Party has been defending for the last number of years with the integration of immigrants in mind. Moreover, the bill was also sensitive to the requests of a group that has become more and more active in civil society, those who went into exile during the dictatorship, and their descendants, as well as the so-called children of the war ('niños de la Guerra'),³⁵ all of whom have been demanding the reinstatement of Spanish nationality and its extension to their direct descendants, however remote, as a form of reparation.

Some of the most salient requests of the mentioned group on nationality-related measures have been satisfied through the endorsement of the Historical Memory Act at the end of 2007. It is Statute 52/2007, 26 December 2007, which purports 'to recognise and to extend rights and to establish measures in favour of those who suffered persecution or violence during the Civil War and the Dictatorship'. On the one hand, it enables International Brigadiers that participated in the Spanish Civil War from 1936 to 1939 to acquire the

³⁴ See the 'Official Parliamentary Journal' (Boletín Oficial de las Cortes Generales, henceforth BOCG): Bills presented by the 'Federal Parliamentary Group of the United Left' (Grupo Parlamentario Federal de Izquierda Unida) on the amendment of nationality law: BOCG, 'Congress of Members of Parliament' (Congreso de los Diputados), VI Legislatura, Serie B, 7 December 1998, num. 261-1 and later, BOCG, Serie B, 26 October 2002, num. 168-1. Bills presented by the Socialist Group in Congress (Grupo Socialista del Congreso) on the amendment of nationality law: BOCG, 'Congress of Members of Parliament' (Congreso de los Diputados), VI Legislatura, Serie B, 22 February 1999, num. 278-1 and later, BOCG, Serie B, 9 March 2001, num. 115-1. After the 2002 nationality reform was passed, the socialist group presented another bill, namely, BOCG, 'Congress of Members of Parliament' (Congreso de los Diputados), VII Legislatura, Serie B: proposición de Ley, 28 February 2003, num. 305-1. As for the bills presented by the Popular Party Parliamentary Group (Grupo Parlamentario Popular) these were: BOCG, 'Congress of Members of Parliament' (Congreso de los Diputados), VI Legislatura, Serie B, 10 May 1999, num. 303-1 and later, BOCG, Serie B, 16 March 2001, num. 122-1. This last bill was the one approved with only small changes.

³⁵ This is the popular name given to about 3000 children who, between 1937 and 1938, were evacuated from Spain by the Republican government to several countries, mostly to the Soviet Union. The loss of the civil war in 1939, the immediate breakout of the Second World War and the Cold War never allowed these children to return to their families in Spain.

Spanish nationality exonerating them from the Civil Code obligation (article 23.b) to previously renounce their prior nationality (art. 18 of the Historical Memory Act).³⁶ On the other hand, for those individuals whose mother or father was a Spaniard 'by origin' it will be possible to opt for the Spanish nationality within two years of the endorsement of the 2007 Act. Such right is extended to the grandsons and granddaughters of those who lost or had to renounce Spanish nationality as a consequence of exile (Additional provision no.7).

These provisions are contextualised within the broader objective of achieving a legal act that could symbolize a sort of 'social reconciliation', adding to the political reconciliation concretised in the Spanish Constitution of 1978. However, the process that led to its adoption was not free of obstacles at the political level. Even though the Historical Memory Act was not part of the Socialist Party electoral programme for the 2004 general elections, it soon became part of its legislative objectives once in power. Through the parliamentary resolution of 1 June 2004, it established the Inter-ministerial Commission for the Study of the situation of victims of the civil war and Franco's regime, led by the Vice-President of the Government. It took two years for the Council of Ministers to prepare the draft act and another year for the parliament to approve it on 31 October 2007, with the support of all parliamentary groups, except that of the parties *Partido Popular* and *Esquerra Republicana*. Other than the nationality related issues just mentioned, the Act covers a wide range of issues, such as compensation payment to different categories of victims, statement of public recognition to various groups including the declaration of personal reparation, the removal of symbols associated to Franco's system from public spaces, the illegitimacy of the dictatorship's courts and judgements, the exhumation of civil war graves, etc. To my knowledge, this is the last substantive reform on nationality that has been embraced since the Socialist Party came to power in March 2004.

5 Conclusions

In almost every aspect of its nationality regime Spain has always looked to the past. Since the nineteenth century it has relied on brief constitutional references and the Civil Code as a locus of regulation without fully embracing the public law dimension of the subject. With some changes, the substance of this law also portrays Spain's self-image as a net sender and/or receiver of migration. It still very much favours *ius sanguinis* over *ius soli*; it still asks foreigners to reside in Spain for ten years and give up their prior nationality before they can acquire a Spanish one. The transformation of Spain into a net receiver of migration flows has not yet changed Spain's historical view of the matter. The focus has been, at least since the 1978 Constitution was enacted, that of trying to remedy past wrongs. Indeed, up to this day the only politically salient matter has been how to attend to the needs of those who were forced to emigrate because of rough socio-economic conditions of the past and, as a result of that, have lost their Spanish nationality or seen their descendants lose theirs. More recently another wound of the past is crying for justice, namely that of the people who, as a result of the civil war or Franco's dictatorship, had to leave the country with similar consequences for themselves and their descendants in terms of loss of nationality.

Over the past decade the challenges of the present are pressing for a forward looking nationality regime. The increasing presence of immigrants renders the issue of nationality as a key to integration more pertinent than ever. In this regard, certain reforms of the nationality legislation seem most relevant. One would be the expansion of *ius soli* to allow people born in

³⁶ Provision originally proposed by the Parliamentary Group United Left's -Catalonian Initiative Greens, 30th of March, 2007 (Izquierda Unida-Iniciativa per Catalunya Verds).

the country to acquire Spanish nationality, at least if it can be shown that the parents are permanently settled in Spain or to allow them to opt for Spanish nationality once they come of age if they were born in Spain. Another obvious one would be reducing the period of residence required for naturalisation from ten to five years as a rule.

There is one domain in which demands of the past and the present, each valid in its own terms and considered separately, clash when they come to be perceived jointly. It is the privileged treatment that certain nationals are receiving vis-à-vis others. Taking numbers into account, one may divide the immigrant population into two large groups: one, formed by immigrants from Latin America, and one formed mostly by Moroccans as well as other people coming from Africa and Asia. The former is provided with a much easier path to inclusion through nationality. Beyond the rhetoric of cultural affinity one could make the argument that there is a reparations-based claim on the part of Latin American countries due to Spain's history of conquest and exploitation in the new world. On the other hand, the exclusion of the largest non-European foreign population from this faster track to integration, namely Moroccans, is worrisome, not least because of the religious and cultural overtones that such exclusion is doomed to have in our times. Neither the argument concerning cultural ties (much of Spain was under Muslim rule for over seven centuries) nor the argument of historical wrongs can sufficiently justify the differentiation (think of the inclusion of descendants of Sephardic Jews among the privileged group in contrast with the exclusion of the Moors who were also expelled from Spain at the end of the fifteenth century).

Probably the best way out of this conundrum is to bring the two closer by redefining and making the rules for inclusion more flexible altogether, avoiding at the same time any bias in the degree of symbolic recognition. Once again, expanding *ius soli*, shortening the general residence time for naturalisation, and maybe also giving up the rule requiring prior renunciation of nationality altogether would be the best way to advance towards the right balance. Moreover, in the midst of the construction of a European polity, nationals from other European Union Member States (still the largest foreign population in Spain) should not be left out of the fast track option. However, including them while leaving Moroccans out would only sharpen the distinctions that already prevail, fuelling the perception of cultural bias.

Avoiding bias and prejudice is not only going to be essential in shaping forward looking nationality legislation but also in ensuring its fair application. Legal certainty will prove to be essential and will require putting legislation in the place thus far occupied by administrative guidelines and precedents set by the courts and administrative bodies. Also, vague clauses, such as 'general interest', 'public order', 'sufficient social integration' and 'good civic conduct', for the most part loosely and generously interpreted in the past, will require concretisation as the question of the naturalisation of immigrants gains political profile, as it will presumably do over the next decade, unless we let nationality become the new gate for exclusion that it has become in other countries with a longer tradition of immigration.

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