Recent Modifications in the Regulation of Spanish Nationality[1]

M. T. Echezarreta Ferrer
Lecturer in Private International Law
University of Malaga

CONTENTS

I. INTRODUCTION

1. This essay deals chiefly with Act 36/2002, of 8 October,[2] amending articles 20 and 22 to 26 of the Civil Code (*Código Civil, Cc*).[3] It examines the successive

---

[1] Many of the legal documents quoted from in this essay can be viewed on the following websites: *http://www.boe.es* (*Boletin Oficial del Estado*); *http://www.congreso.es/*(*Congreso de los Diputados*) *http://www.mju.es/*(*Ministerio de Justicia*); *http://www.mir.es/*(*Ministerio de Interior*) *http://www.mir.es/*(Website of the *Administración General del Estado*); *http://www.extranjeria.info/inicio/index.htm* (website of the Zaragoza association of lawyers dealing with issues affecting aliens).

[2] *BOE* n. 242 of 09/10/2002. Entry into force on 9 January 2003.

[3] Since 1998, various protocols have been signed, some modifying treaties on dual nationality: the additional protocol between the Kingdom of Spain and the Republic of Honduras amending the Treaty on Dual Nationality of 15 June 1966, done "ad referendum" at Tegucigalpa on 13 November 1999. *BOE* n. 289 of 03/12/2002; Exchange of Notes of 10 November and 8 December 1993 constituting an Agreement between the Kingdom of Spain and the Republic of Honduras on the amendment of the Agreement on Dual Nationality of 15 June 1966. *BOE* n. 289 of 03/12/2002.

Provisional application of the additional protocol between the Kingdom of Spain and the Dominican Republic amending the Agreement on Dual Nationality of 15 March 1968, done

proposals for the reform of the regulation of Spanish nationality and focuses on the new features the recent law has introduced, in addition to a personal view of its achievements compared to the previous situation and future implications.

2. This is the sixth reform of legislation on Spanish nationality since the drafting of the original Royal Decree of 24 July 1889.[4] The original wording of 1889 was followed by laws such as those of 15 July 1954,[5] 14/1975 of 2 May,[6] 51/1982 of 13 July,[7] 18/1990 of 17 December,[8] 15/1993 of 23 December[9] and 29/1995 of 2 November[10] and, most recently, Act 36/2002 of 8 October.[11]

---

at Santo Domingo on 2 October 2002. *BOE* n. 273 of 14/11/2002; Additional Protocol between the Kingdom of Spain and the Republic of Colombia amending the Agreement on Dual Nationality of 27 June 1979, done "ad referendum" at Bogotá on 14 September 1998. *BOE* n. 264 of 04/11/2002; Additional Protocol between the Kingdom of Spain and the Republic of Bolivia amending the Agreement on Dual Nationality of 12 October 1961, done at Madrid on 18 October 2000. *BOE* n. 46 of 22/02/2002 and 70 of 22/03/2002; Additional Protocol between the Kingdom of Spain and the Republic of Peru amending the Agreement on Dual Nationality of 16 May 1959, done "ad referendum" at Madrid on 8 November 2000. *BOE* n. 282 of 24/11/2001; Additional Protocol between the Kingdom of Spain and the Republic of Paraguay amending the Agreement on Dual Nationality of 25 June 1959, done "ad referendum" at Asunción on 26 June 1999. *BOE* n. 89 of 13/04/2001; Second Additional Protocol to the Agreement on Nationality of 28 July 1961 between Spain and Guatemala, amended by the Protocol of 10 February 1995, done "ad referendum" at Guatemala on 19 November 1999. *BOE* n. 88 of 12/04/2001 and *BOE* n. 119 of 18/05/2001; Provisional Application of the Additional Protocol between the Kingdom of Spain and the Argentine Republic amending the Agreement on Nationality of 14 April 1969, done at Buenos Aires on 6 March 2001. *BOE* n. 88 of 12/04/2001; Protocol amending the Agreement on Dual Nationality between the Republic of Ecuador and the Kingdom of Spain of 4 March 1964, done at Quito on 25 August 1995. *BOE* n. 196 of 16/08/2000; Additional Protocol between the Kingdom of Spain and the Republic of Nicaragua amending the Agreement on Dual Nationality of 25 July 1961, done at Managua on 12 November 1997. *BOE* n. 24 of 28/01/1999; Additional Protocol between the Kingdom of Spain and the Republic of Costa Rica amending the Agreement on Dual Nationality of 8 June 1964, done "ad referendum" in Madrid on 23 October 1997. *BOE* n. 271 of 12/11/1998; Second Additional Protocol to the Agreement on Nationality of 28 July 1961, between Spain and Guatemala, amended by the Protocol dated 10 February 1995, done "ad referendum" at Guatemala on 19 November 1999. *BOE* n. 88 of 12/04/2001 and *BOE* n. 119 of 18/05/2001; Protocol amending article 3 of the Agreement on Nationality between Spain and Guatemala, signed at Guatemala on 10 February 1995. *BOE* n. 158 of 01/07/1996.

[4] Gazette of 25 July 1889.

[5] *BOE* of 16 July. See Decree of 2 April 1955. *BOE* n. 143 of 23 May 1955.

[6] *BOE* n. 107, of 5 May. See Circular *DGRN* of 22 May 1975, *BOE* of 24 May 1975, *Anuario DGRN*, 1975, pp. 343–349.

[7] *BOE* n. 181, of 30 July. See *Instrucción de la DGRN* of 16 May 1983 on Spanish nationality (*BOE* n. 120, of 20 May).

[8] *BOE* n. 302, of 18 December. See *Instrucción* of 20 March 1991 on nationality (*BOE* n. 73, of 26 March; correction of errors in *BOE* n. 74, of 27 March).

[9] *BOE* n. 307, of 24 December.

[10] *BOE* n. 264, of 4 November 1995.

[11] *BOE* n. 242 of 09/10/2002. Entry into force on 9 January 2003.

3. The aim of the recent amendment was to improve article 42 of the Spanish Constitution, which entrusts the State with the task of safeguarding the economic and social rights of Spanish workers abroad, by adding the duty to gear state policy to encouraging their return. However, facilitating the preservation and transmission of Spanish nationality is undoubtedly, as is explained in the statement of the purpose of the law, a more than effective manner of complying with this duty and this is indeed the main objective of the law in question.

It should be pointed out, owing to its repercussions on the subsequent analysis of the reform, that article 42 *does not draw a distinction* between Spanish emigrants born in Spain and those born elsewhere, nor does it distinguish between emigrants of Spanish origin and those of Spanish descent. These discriminations are however used by the maker of Act 36/2002 to create a different regulatory framework for the transmission of Spanish nationality to children and grandchildren, which tinges the reform with unconstitutionality. In addition to the core issue, it has also been necessary to make the necessary legal retouches to allow for the latest reforms introduced by the law on administrative procedure, the penal code and the law on military service.

4. Indeed, the major challenge of the 21st century is to find an interdisciplinary approach to migratory flows, a complex phenomenon that is conditioning the large-scale social revolution of our time. However, the new law merely aims to alleviate some of the problems emigration posed in past periods by attempting to swell the census rolls of Spanish citizens with people who would be Spaniards had their parents or grandparents not been forced to seek a future elsewhere. The Ministry of Foreign Affairs puts the number of people who will benefit from this measure at around one million twenty-five thousand, of whom some eight hundred and fifty thousand live in Latin America. The rest are mainly based in Europe.

5. Following the announcement of the reform, groups of emigrants, together with their children and grandchildren residing in various parts of the world, joined forces with great organizational success thanks to the Internet, demanding justice with respect to their access to Spanish nationality. However, the fact that the regulatory profile varies according to degree of connection with Spain established in Act 36/2002 – an aspect of the law that has been challenged – has dashed the hopes aroused by the reform at a time of serious economic crisis in some of the countries of residence of the possible beneficiaries. On the other hand, other groups of foreign nationals, victims of the migration phenomenon, have been totally overlooked by the reform, as the opposition's amendments proposing integration measures were rejected. As a result, ten days before the latest reform was due to enter into force, the Socialist Party in Congress presented a new proposal for modifying the regulation of nationality on 19 February.

6. Since the law entered into force, considerable parliamentary activity has been witnessed, culminating in the aforementioned reform proposal. The government has received many oral and written enquiries concerning the number of applications for Spanish nationality from children and grandchildren of Spaniards and on the application of the recent protocols to the agreements on dual nationality. Other questions concern issues relating to aliens, such as the denial of requests for exemption from

visa requirements and, as the case may be, from the requirement of a community residence permit; these applications are filed by citizens of Galician origin who fulfil the requirements for acquisition of Spanish nationality. All this leads us to point out that the debate on nationality, far from ending with the law dealt with in this essay, is currently extremely topical.

II. BACKGROUND TO REFORM ACT 36/2002 ON SPANISH NATIONALITY

7. The background to the recent reform can be traced back to 1996, when a series of reform initiatives began to be presented by the various parliamentary groups but died down in view of the dissolution of the Parliament (*Cortes Generales*) in 2000. The reform was later taken up with a further three bills presented by the Socialist Parliamentary Group on 20 February 2001,[12] by the Popular Parliamentary Group[13] and by the United Left Parliamentary Group[14] on 12 March and 15 October 2001 respectively. The Committee for Justice and Home Affairs finally decided to present a single text on 13 May 2002.[15] Its passage through parliament was very fast: it passed through Congress with a few modifications and the full text was approved by the Senate, which rejected the 54 amendments proposed.

8. Let us first examine the proposals of the opposition groups that were rejected before going on to analyze the measures that were approved in the following paragraph.[16] The proposals can be summed up as follows:

A) Greater emphasis on *ius soli* (having been born in Spain) when attributing Spanish nationality, together with a further link such as having one foreign parent residing in Spain.
B) Reduction of the time period for naturalization: 1. From ten to five years in general. 2. From five to two years for stateless persons and European Union nationals.
C) Abolition of the renunciation of previous foreign nationality upon acquiring Spanish nationality.
D) Abolition of residence requirements for all those who regain Spanish nationality.

Doctrine has also proposed various modifications, some substantial and others merely technical, which would amount to a deep reform of the whole nationality system. These include removing the nationality system from the Civil Code and regulating

---

[12] *BOCG, Congreso de los Diputados*, VII *Legislatura*, Serie B, n. 115–1, of 9 March 2001.
[13] *BOCG, Congreso de los Diputados*, VII *Legislatura*, Serie B, n. 122–1, of 16 March 2001.
[14] *BOCG, Congreso de los Diputados*, VII *Legislatura*, Serie B, n. 168–1, of 26 October 2001.
[15] Bill modifying the Civil Code in respect of nationality of 9 May 2002, submitted by the Committee for Justice and Home Affairs (*BOCG, Congreso de los Diputados*, VII *Legislatura*, Serie B, n. 241–1, of 16 May 2002).
[16] An in-depth treatment of the background to the reform can be found in A. Álvarez Rodriguez, "Principios inspiradores . . .", quoted from pp. 48 and ff.

it by means of a special law that has often been called for[17] in order to put an end to the patchiness of the latest reforms.

Most of the rejected proposals outline measures to integrate the foreign immigrant population by shortening the minimum periods of residence established for the acquisition of Spanish nationality. I will merely remark – since this is not the purpose of this essay – that the intended integration is not always achieved by obtaining a Spanish nationality document: rather, it should begin much earlier, through the law on aliens. If emphasis is placed on the progressive achievement of the principle of equality while they are aliens, access to nationality will not be necessary and the possible harmful effects with respect to their original nationality will thus be avoided. In short, we will avoid turning them into foreigners in the own country – an unjust situation that was endured by our Spanish ancestors and which we are still attempting to remedy, more than seven decades later.

9. We might point out, as an initial judgement, that there is little new in the new law. It revives in some cases and prolongs in others circumstances already envisaged in previous texts. Indeed, the current reform of article 20[18] was introduced in the interim provision of Act 18/1990 although given the time limits, it is currently not valid.[19] And the current articles 24 and 26 resuscitate the possibility of dual nationality as a result of emigration which was provided for in Act 51/1982 and buried when Act 18/1990 entered into force.[20] In addition, the current article 24.3[21] envisages the reincarnation of the old *Cc* article 26 according to the wording established in the Act of 15 July 1954.[22]

---

[17] See A. Lara Aguado's passionate criticism of Act 32/2002 "Nacionalidad e integridad social" (A propósito de la Ley 36/2002, de 8 de octubre), in *La Ley*, n. 5694, of 10 January, pp. 1 and ff.; E. Sagarra Trias "Modificación de la regulación de la nacionalidad española en el Código Civil", *http://www.extranjeria.info/inicio/index.htm.*

[18] "Art. 20.1 The following persons shall be entitled to choose Spanish nationality . . . b) Those whose father or mother is of Spanish origin and was born in Spain"

[19] "Interim provision of Act 18/1990, of 17 December: Persons whose mother or father is of Spanish origin and was born in Spain may apply for Spanish nationality within three years from the entry into force of this Act. In order to exercise this right the person in question must reside legally in Spain at the time the application is submitted. However, he or she may be exempted from this requirement under article 26.1.a) of the Civil Code for the recovery of nationality". The period was extended by Act 29/1995, of 2 November, until 7 January 1997.

[20] See the studies on Act 51/1982 in J. C. Fernández Rozas, *Derecho de la nacionalidad*, Madrid, 1982; J. M. Espinar Vicente, *Derecho internacional privado. La Nacionalidad*, Granada, 1988. A. Álvarez Rodriguez, "Nacionalidad y emigración", Madrid , *La Ley*, 1990; J. Gil Rodriguez, *La nacionalidad española y los cambios legislativos*, Madrid, Colex, 1993. Several authors, *Comentarios a las reformas de nacionalidad y tutela*, Madrid 1986, Tecnos, pp. 17–173.

[21] "Art. 24.3 Persons born and residing abroad who possess Spanish nationality through a Spanish father or mother who were also born abroad, when the laws of their country of residence attribute to them the citizenship of that country, shall lose Spanish nationality if they do not state their wish to keep it to the Registrar within a period of three years from reaching legal age or becoming emancipated."

[22] "Art. 26. Persons born and residing abroad who possess Spanish nationality through a

III. MAIN MODIFICATIONS

10. The improvement that Act 36/2002 is intended to make to the Spanish Constitution involves the following modifications:

A) Relating to the right of option

As for right of option, the circumstances for acquisition of nationality by this means are extended to persons with at least one parent of Spanish origin born in Spain; no time limit [art. 20.1 b)] or age limit (paragraph 3 of art. 20) is established for such persons, nor is the place of birth of the beneficiary taken into account. As we have seen, this circumstance was envisaged in the previous legislation though it expired on 7 January 1997.[23] The novelty mainly lies in the abolishment of the periods of preclusion and the requirement of residing in Spain.

Therefore, in order for the father or mother to be entitled to transmit their Spanish nationality, they must be of Spanish origin and born in Spain. It is not sufficient simply for a parent to be Spanish.

11. Two circumstances discriminate Spaniards for the purpose of transmission of nationality: a) whether or not this is their nationality of origin and b) place of birth.

a) With respect to the first distinction (nationality of origin), it should be pointed out that it was following the first post-constitutional reform brought about by the 1982 Act that it acquired its current nature based on the framework established in article 11 of the Spanish Constitution:

> "1. Spanish nationality is acquired, retained and lost in accordance with the provisions of the law.
> 2. No person *of Spanish origin* may be deprived of his nationality.
> 3. The State may negotiate dual-nationality treaties with Latin American countries or with those which have had or which have special links with Spain. In these countries, Spaniards may become naturalized without losing their *nationality of origin*, even if said countries do not recognize a reciprocal right in their own citizens".

The same Constitution goes on to discriminate Spaniards in art. 60 when it states:

> "Art. 60. 1. The guardian of the King during his minority shall be the person designated in the will of the late King, provided that he is of age and *Spanish by birth.* (. . .)".[24]

Spanish father or mother also born abroad, although the laws of their country of residence attribute them citizenship of that country, shall not lose their Spanish nationality if they expressly state their wish to keep it to the Spanish diplomatic agent or consul, or, failing that, in a duly authenticated document addressed to the Spanish Ministry of Foreign Affairs."

[23] See *supra* note (21).

[24] *Art. 14. Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other condition or personal or social*

12. The prevalence of the person of Spanish origin as the holder of rights with respect to nationality vis-à-vis his descendents can be found not only in the new right of option introduced in art. 20.1 b) of Act 36/2002, but also in the acquisition of citizenship through residence provided in art. 22.2. f) and in the loss of art. 25 and recovery of art. 26. These discriminations which, in our opinion, fall outside the constitutional framework established in the Spanish Constitution, reflect a covert mistrust of changes of nationality that springs from a general caution about foreign nationals.[25]

13. The distinction between persons of Spanish origin and Spanish descent raised the issue of possible unconstitutionality – incompatibility with art. 14 of the *CE* – and it was stated that the distinction is limited to the right to nationality, that is, to the specific framework enshrined in art. 11 *CE*. Beyond the right to nationality, any inequality in the entitlement to or exercise of the rights springing from the notion of nationality of origin would amount to a discrimination contrary to article 14 of the Constitution.[26] Various opinions have been expressed about the unconstitutionality of the new provisions introduced by Act 38/2002, of which arts. 20.1.b) and 22.2. f) lay down nationality of origin as a requirement for a right of transmission that is not found in the permitted framework of the *CE*. It has been stated that a difference in treatment could only be justified if a rational, objective and reasonable difference could be found between persons of Spanish origin and persons who acquired Spanish nationality and if the introduction of such a difference were necessary to achieve a higher good than that which is harmed by constraining the rights of naturalized persons – that is, if the means chosen were proportional to the end sought.[27]

14. Furthermore, even the discriminations permitted by art. 11.2 *CE*, such as the penalization of deprival of Spanish nationality when it is not the nationality of origin, as laid down in the repealed art. 25.1 of the *Cc*, have disappeared as this penalization was abolished by *LO* 10/1995, of 23 November, reforming the Penal Code.[28]

15. Finally, continuing with our interpretation of the law according to the Constitution, art. 42 *CE*, which provides the basis for the reform introduced by Act 32/2002 – as is expressly declared in the statement of purpose[29] – does not distinguish between persons of Spanish origin and persons of Spanish descent:

---

circumstance. M. Fernández Fernández, "El principio de igualdad y su incidencia en el nuevo Derecho español de la nacionalidad" *REDI*, vol. XXXV, 1983, pp. 432 and ff.

[25] Attention was also drawn to these discriminations in connection with the 1982 law by J. C. Fernández Rozas, "La reforma del Derecho español de la nacionalidad", in *Cursos de Derecho internacional de Vitoria Gasteiz*, 1983, Universidad del País Vasco, Servicio de Publicaciones, 1984, p. 437; E. Pérez Vera, "La Constitución de 1978 y el Derecho internacional privado. Normas en materia de nacionalidad y extranjería", *RDP*, 1982, p. 8 and ff.

[26] J. D. González Campos, "Comentario al art. 17 del Código Civil", in *Comentarios a las reformas . . . cit.*, p. 21.

[27] A. Lara Aguado, "Nacionalidad e integración . . ." *op. cit.*, p. 5.

[28] *BOE* n. 54, of 2 March 1996.

[29] See subparagraph 2.

"Art. 42. The State shall be especially concerned with safeguarding the economic and social rights of Spanish workers abroad, and shall direct its policy towards securing their return".

Therefore, it is difficult to find a constitutional basis for differentiating between emigrants according to their class of Spanish citizenship or, as we shall see, on the grounds of their place of birth. We assume that cases of Spanish nationals who were born in Spain during the years of mass emigration and who are not of Spanish origin or birth are few and far between; the lawmaker could therefore have omitted the reference to nationality of origin without serious repercussions on the intended aim and would thus have avoided the unconstitutional overtones that sully the reform.

16. a) The requirement of having at least one Spanish parent born in Spain in order for the right of transmission of Spanish nationality to be established has had major social repercussions,[30] as it has excluded thousands of grandchildren of Spanish emigrants whose children were born in exile. The requirement of having at least one parent born in Spain laid down in art. 20.1 b) is clearly designed to discriminate between persons of Spanish origin on the grounds of their place of birth. A paradoxical situation could arise among emigrant families: the offspring of the children born to the emigrant couple in Spain could opt to choose Spanish nationality without having to reside in Spain and without having to go through the procedure for aliens (circumstance provided for in art. 20.1 b); however the brother and sisters born in the country of destination will not enjoy the same right to transmit Spanish nationality to their children, who belong to the category of persons entitled to apply for nationality after one year's residence in Spain, as laid down in art. 22.2. f), which we shall examine.

A different case is that of a woman born in Russia in 1954, who opted to claim Spanish nationality in 1993 on the grounds that her father was of Spanish origin and born in Spain, as established in the third interim provision of Act 18/1990, of 17 December. Her claim was not recognized as she was refused exemption from the requirement of residing in Spain laid down by article 26, then in force. This Russian citizen could have submitted a fresh claim, this time without the need to reside in Spain or request exemption from the residence requirement, following the entry into force of Act 29/1995, of 2 December, until 7 January 1997, the date this right expired. However, she submitted her application on 30 September 1998, and it was again rejected.[31] She could now submit a claim for the third time with full guarantees of success as her circumstances are provided for in art. 20.1 b) of the law now in force.

---

[30] On the inappropriateness of drawing a distinction between persons of Spanish origin according to their place of birth see J. M. Espinar Vicente, *La nacionalidad y la extranjería en el sistema jurídico español*, Madrid, 1994, pp. 102–103.

[31] Resolution of the *DGRN* of 27 September 1999. See A. Marin , "La adquisición de la nacionalidad española por opción en la reciente doctrina registral" in *Boletin de Información del Ministerio de Justicia*, n. 1925, 15 September, pp. 28–62.

17. However, such is not the case of the 50,000 direct descendants of the thousands of Civil War exiles who have formed an association to demand they be recognized as Spanish citizens.[32] The *Morados* group, made up of children and grandchildren of Spanish refugees, demanded that the Ombudsman, Enrique Múgica, lodge an appeal with the Constitutional Court against the reform of the current law as it denies Spanish passports to children of Spanish citizens who are descendants of exiles born outside Spain; they likewise called for an "integrated policy" of financial assistance for exiles who are still living and the right to vote for the children and grandchildren of those Spaniards.[33]

The Ombudsman dismissed the group's claim, arguing that the Constitution grants the Legislature the powers to decide who is entitled to Spanish nationality, and that the fact that Congress has passed a reform establishing that only the children of persons of Spanish origin (born in Spain) may acquire Spanish nationality does not contradict the Constitution. However, let us not forget that art. 11 does not extend to the rights of the descendants of Spanish nationals.

The new proposal for a reform submitted by the Socialist party in February 2003 attempts to remedy this inequality regarding the right to pass on Spanish nationality depending on whether a parent or grandparent (persons of Spanish origin) was born in Spain or abroad by eliminating the requirement of having been born in Spain established in art. 20.1 b).

B) Relating to acquisition through residence

As regards acquisition of nationality through residence:

18. Persons not born in Spain having at least one grandparent of Spanish origin (art. 22.2. f) may acquire Spanish nationality by residing in Spain for one year.[34] The previous wording only included persons not born in Spain having at least one parent of Spanish origin. The reform extends to grandchildren – persons having a parent who is of Spanish origin but was not born in Spain, as mentioned in the previous

---

[32] *http://www.nodo50.org/despage/Eventos/reconocidos.htm.*

[33] According to the document submitted by *Morados'* coordinator general, the Mexican Alvar Acevedo, to Enrique Múgica's office, the recent reform of the Civil Code in respect of acquisition of nationality is a "major injustice to Spanish people living overseas" and, in particular, to the descendents of the thousands of Republicans who fled to the Americas during the Civil War and postwar. That is, the thousands of grandchildren of those exiles will never possess their ancestors' citizenship, as the vast majority of those 50,000 members of *Morados* are children of Spaniards who were born abroad during the first years of their parents' forced exile. According to *Morados*, the question lies in the fact that, whereas the economic emigrants were able to register their children as Spanish citizens with the consulates in Latin America, the political exiles were denied this right, and their descendants were accordingly forced to adopt the nationality of the host country.

[34] Even if the subject had been born in Spain, his or her circumstances would be classified under subparagraph a) of the same precept with the same right to Spanish nationality through residence.

paragraph, and persons with foreign parents but grandparents of Spanish origin. For the purpose of the law, the term *born* clearly refers to place of birth as opposed to biological descent. It therefore includes adopted persons, who generally have difficulties establishing their place of birth owing to the confidential nature of adoption files.[35]

19. The lawmaker assumes that these subjects have a weaker link with Spanish culture owing to involuntary circumstances such as their father, mother or grandparents of Spanish origin being born outside Spain. In this connection we should bear in mind, first, that the grandparents of these people fled the country and therefore could not choose where their children were born and, second, that the legislation of their countries of destination exerted a certain pressure as regards transmission of nationality and, third, that Spanish legislation of the time encouraged the loss of Spanish nationality for these persons.

Act 36/2002 requires these subjects to reside in Spain for a year; and art. 22.3 establishes that this residence must be legal,[36] continued and take place immediately prior to submission of the application for citizenship. Furthermore, according to the legislation of the Register Office the subject must prove his or ber good civic conduct and a sufficient degree of integration in Spanish society (art. 22.4).

20. These subjects' access to Spanish nationality is easier if they are minors and, in addition, if their parents recover Spanish nationality, as they would therefore come under the patria potestas of a Spanish national and enjoy the right of option laid down in art. 20.1 b) *Cc*. This brings us to another discrimination – in this case on the grounds of the subject's age, as a 15-year old minor may exercise a right of option without having to reside in Spain, whereas an 18-year old lacks this right.

---

[35] A. Lara Aguado, "Nacionalidad e integración . . .", *op. cit.* p. 7.

[36] See arts. 25 and 27 of *LO* 4 and 8/2000 on the rights and freedoms of aliens and art. 8 of *RD* 864/2001, of 20 July (*BOE* of 21 July and 6 October). Exceptions in art. 49.2 g): In exceptional circumstances the authorities may grant exemption from the requirement of a visa according to paragraph 5 of article 51 of these Regulations, provided the applicant is not acting in bad faith and meets one of the following requirements:. . . . g) Persons of Spanish origin who have lost their Spanish nationality. Regarding access to the labour market, see art. 41 j) of *LO* 4 and 8/2000 establishing that work permits shall not be required of "persons of Spanish origin who have lost their Spanish nationality. See a recent review of this issue by S. Álvarez González, "La concesión de la nacionalidad española por residencia a los estudiantes extranjeros" in *Derecho Registral Internacional. Homenaje a la memoria del profesor Rafael Arroyo Montero*, Madrid, 2003, pp. 363 and ff. The proposed amendments to the draft Organic Law on specific measures on public safety, domestic violence and social integration of aliens attempt to remedy the problems of the children and grandchildren of persons of Spanish origin being classified as aliens by allowing them to enter Spain merely with documents proving their identity and kinship and entitling them to reside permanently in Spain automatically, without having to go through the procedure of periods of temporary residence (*BOCG* of 13 May 2003, n. 136–8).

C) Relating to loss of nationality

21. Loss of nationality due to changed circumstances has also undergone some modifications which, as we have seen, directly influence the volume of cases of dual nationality, which are growing as a result of the mechanisms of "declaration of conservation" of the original Spanish nationality and through the elimination of the need to renounce the foreign nationality in certain cases.

1. *Exception to loss of Spanish nationality through the "declaration of conservation"*

The general rule governing loss of Spanish nationality is laid down in art. 24.1 *ab initio*:

> "Art. 24. 1. Emancipated persons habitually residing abroad who voluntarily acquire another nationality or use exclusively the foreign nationality they had before emancipation shall lose Spanish nationality. This loss shall take place three years from acquisition of the foreign nationality or from emancipation".

22. The exception to this general rule is laid down in the same art. 24, which goes on to establish that the Spanish nationality of origin can be kept if the subject makes an *express declaration* to this effect before the Registrar within three years from the acquisition of the foreign nationality or from emancipation:

a) Emancipated Spanish nationals habitually residing abroad who voluntarily acquire another nationality or use exclusively the foreign nationality they were attributed before emancipation.

From the date of their reaching legal age or becoming emancipated:

b) Spanish nationals born and residing abroad who possess Spanish nationality through a Spanish mother or father, also born abroad, when the laws of the country of residence attribute them the nationality of that country (art. 24.3). According to the second additional provision of the reform law, this cause of loss shall only be applied to those who reach legal age or become emancipated after the present Act enters into force.

If they fail to file a declaration of conservation, they will lose their Spanish nationality once the aforementioned period expires. This precaution aims to prevent the artificial perpetuation of generations of Spaniards having little connection with Spain and no particular interest in keeping their Spanish nationality.

2. *Exception to loss of foreign nationality through non-renunciation*

23. The new law preserves the requirement that subjects who acquire Spanish nationality renounce their foreign nationality, despite the proposals that such a requirement be abolished due to legal ineffectiveness, as it is the foreign law that establishes the causes for loss of the foreign nationality, not the Spanish

Civil Code. Until now, renunciation was symbolic and constituted a commitment made by the individual not to use any other nationality other than Spanish nationality.[37]

However, great importance is attached to this in the 2002 reform with respect to keeping the acquired Spanish nationality. According to art. 25, Spanish citizens who are not of Spanish origin shall lose their Spanish nationality: a) If, during a period of three years, they use exclusively the nationality which they had renounced upon acquiring Spanish nationality.

24. However, there are exceptions to this rule which entail acceptance of dual nationality by the Spanish legislation. Such is the case of:

a) Nationals of Latin American countries, Andorra, the Philippines, Equatorial Guinea or Portugal who acquire Spanish nationality (art. 23.b) in relation to art. 24.1 *in fine*).
b) Aliens who recover lost Spanish nationality (art. 26).[38]

25. In neither of these cases is the subject required to renounce his or her previous nationality, and may therefore have dual nationality. This same rule extends to foreign nationals aiming to recover their Spanish nationality by ancestry that has been lost due to the circumstances described in art. 24 or 25, except that in the second case (art. 25) they must first obtain an authorization, which is granted at the government's discretion (art. 26.2). Therefore, a person who has lost his Spanish nationality through continuing to use the foreign nationality he renounced [art. 25.1 a)] may recover Spanish nationality without having to renounce the foreign nationality provided he or she is granted authorization by the government, and cannot be classified according to the circumstances of loss specified in art. 25.1 a).

26. However, subjects who acquire Spanish nationality by losing the foreign nationality they possessed may recover this lost nationality in the future if the laws of that country so permit, keeping their Spanish nationality if they file the relevant declaration with the Registrar pursuant to art. 24.1 *Cc*. Although we do not believe that this was intended, we understand that this provision may become a means of acquiring

---

[37] According to art. 23 *Cc*, which has not been modified: Anyone acquiring Spanish nationality through right of option, letter of naturalization or residence must comply with the following requirements: a) the person aged over fourteen and capable of making a statement must swear or promise loyalty to the King and obedience to the Constitution and laws; b) the same person must renounce his or her previous nationality. Nationals of the countries mentioned in paragraph 1 of article 24 are exempted from this requirement; c) The acquisition must be entered in the Spanish Register Office.

[38] In the case of emigrants or children of emigrants, following the reform of 1995 which abolished the requirement of residing in Spain, such persons need only submit a declaration of recovery and enter the recovery in the Register Office. Other foreign nationals wishing to recover Spanish nationality are required to reside legally in Spain, though they may be exempted from this requirement by the Ministry of Justice owing to personal circumstances. P. Juárez Pérez, "Modificación del artículo 26 del Código Civil por la ley 29/1995, de 2 de noviembre". Note in *REDI*, vol. XLVIII, (1996), 1, pp. 506–509.

dual nationality for immigrants who acquire Spanish nationality and subsequently recover their lost foreign nationality. No doubt the strict application by the *DGRN* of art. 25.1 a) will disallow such an interpretation.

27. Finally, we may come across another case of dual nationality: Spaniards who acquire the nationality of Latin American countries, Andorra, the Philippines, Equatorial Guinea and Portugal. Such cases are exceptions to the general rule of loss of original Spanish nationality. These subjects will only lose their Spanish nationality if they expressly renounce it.[39]

D) Other modifications deriving from Act 36/2002

28. Other modifications introduced by the law include the elimination of the following concepts:

a) The entitlement of persons with asylum to apply for Spanish nationality through residence has disappeared from art. 22.1, as a result of the recognition of such persons as having refugee status in Act 9/1994, of 19 May[40] modifying Act 5/1984, of 26 March, regulating right of asylum and refugee status.
b) Loss of nationality by persons not of Spanish origin through a final judgment has been eliminated from art. 25.1 in consonance with the elimination of that penalty as a result of *LO* 10/1995, of 23 November, passing the new Penal Code.[41]
c) We should also mention the removal from art. 26.2 of the *Cc* of the requirement of government authorization in order for persons who lost their Spanish nationality without completing military service or substitute community to recover it, following the abolishment of this obligation as from 31 December 2001 pursuant to Act 17/1999, of 18 May, on the regulation of armed forces personnel in relation to Royal Decree 247/2001, of 9 March.[42]

---

[39] In this connection it is interesting to examine the precautions taken in the recent protocols to dual nationality agreements *infra* note 3.

[40] *BOE* n. 122 and 131 of 23 May and 2 June and *RD* 203/1995, of 10 February, approving the enabling rules (*BOE* n. 52 of 2 March).

[41] *BOE* n. 281, of 24 November.

[42] This modification regarding military service has affected other international treaties to which Spain is a party, such as: Convention on military service with Costa Rica, of 21 March 1930 (adopted by a law of 13 February 1935); Convention on military service with Bolivia, de 28 May 1930 (adopted by a law of 13 February 1935); Convention on military service with Argentina, of 18 October 1948 (ratified by an instrument of 24 February 1984); Convention on military service with France, of 9 April 1969 (ratified by an instrument of 25 August 1969); Convention on military service with Italy, of 10 June 1974 (ratified by an instrument of 4 September 1977); Convention of the Council of Europe on the reduction of cases of multiple nationality and military obligations in cases of multiple nationality, done at Strasbourg on 6 May 1963 (ratified by an instrument of 22 June 1987); Protocol of 24 November 1977 amending the Convention of 6 May 1963 on the reduction of cases of multiple nationality and military obligations in cases of multiple nationality, ratified by an instrument of 17 August 1989.

29. Finally, Act 36/2002 incorporates a first additional provision defining administrative silence in certain nationality cases as follows:

> "A decision on an application for nationality through residence and for exemption from the requirement of legal residence in order to recover Spanish nationality shall be reached within a year at most from the date the application is received by the relevant authority. If no express decision is issued after this period it shall be understood to have been dismissed in accordance with the second additional provision of the Register Office Law".

We will end this brief commentary with a doubt as to the scope of the provision in Act 26/2002 repealing the second interim provision of Act 29/1995, which establishes that:

> "Spanish women who have lost their Spanish nationality through marriage before the entry into force of Act 14/1975, shall be able to recover it pursuant to article 26 of the Civil Code, in the case of emigrants and children of emigrants".

30. It is logical to think that interim provisions are dependent on the laws that give rise to them and that if Act 29/1995 has been repealed we might initially think that the same applies to its interim provision. However, if this is the case, we are dealing with a situation of inequality and injustice deriving from an unconstitutional regulation the redressal of which we do not believe to be opposed to the provisions of Act 36/2002, and such an opposition appears essential for the repealing provision of the aforementioned law to be effective. Therefore, we believe there are legal grounds for ensuring that the second interim provision of Act 29/1995 remains in force, even though its future interpretation will depend on the legal agent – once again, another magnificent opportunity to remedy one of the problems dating from the pre-Constitutional era has been wasted.

III. CONCLUSIONS

In conclusion, while we cannot regard the new law as entirely positive, we must recognize the appropriateness of some of the measures adopted. These measures, while remedying some of the problems of Spanish emigrants, have also created marked discriminatory divisions in many families whose members are not entitled to the same right to pass on Spanish nationality. These discriminations are based on factors of dubious constitutionality such as "Spanish origin" and place of birth.

The cost of legislative reform should be optimized, though in this case many issues have been left unsolved. One of these, which we believe to be particularly interesting, is how the regional authorities deal with the integration of groups of immigrants from the joint perspective of alien law and nationality; this calls for a more unhurried and coherent debate in coordination with the legislation of their countries of origin. Such a study should take into account the legal repercussions that access to Spanish nationality has for groups of immigrants as a measure of integration from the perspective of the laws of their countries of origin. Now that Spain is no longer

a country of emigrants, we cannot allow immigrants to turn up on Spanish soil in the same unfair conditions endured by the Spaniards who were forced to leave/flee Spain and which we are still attempting to alleviate. We do not believe that the integration of foreign nationals should necessarily involve the acquisition of Spanish nationality as is often heard in parliamentary and doctrinal debates. This could cause immigrants to lose many rights, such as their nationality of origin, the right to pass on to their children the nationality that defines their identity and also the loss of the rights inherent in nationality, such as the right to vote. We believe that being forced to work in another country – a situation that stems from necessity rather than choice – should not deprive them of the possibility of remaining bound to their origins and identity with sufficient authority. It follows that integration should involve a scrupulous treatment of the human rights of all people regardless of their nationality, setting up proper channels of intercultural exchange to ensure peaceful coexistence without the need to impose Spanish nationality if this makes the subject a foreigner in his own country – a situation that is even harder, if such a thiug is possible, than being a foreigner in his country of destination.

Finally, this new period that has been ushered in by the new bill that has been presented should also help incorporate into that same law questions of provenance relating to nationality which are currently dealt with in diverse legal texts and in the rules of the Registrar, from which some of the incoherencies stemming from the changing rules of the Civil Code are derived.