In Barcelona, 27 February 2015

LEGAL REPORT
ON THE STATUS OF STATELESS

1. INTRODUCTION

This legal work is based on the following hypothesis: is it possible to recognise the status of stateless with regard to a person recognised as a national by a State? In other words, **how can a person with nationality become stateless?**

The premise that this work is based on is atypical, as statelessness is in general thought of as a problem that all States and nations must address and deal with, with the sole aim of reducing cases until they are non-existent. The United Nations High Commissioner for Refugees (UNHCR) estimates that there are around 10 million stateless persons across the world[1].

But what is meant by stateless? Both international and national legislation will provide a response to this question. For this purpose, it is important to mark out the applicable regulatory framework for cases of statelessness, not just to find the definition thereof, but to become aware of the procedure that is followed for the recognition of said legal status.

Taking into consideration statelessness as the antithesis of nationality, it is necessary to first understand its definition and, since this work departs from a very specific premise, the study focus will be aimed at addressing the causes for which Spanish nationality can be lost and not so much on studying the instances of acquisition thereof.

[1] United Nations High Commissioner for Refugees (UNHCR), Global Trends 2013, Madrid, 2014, pg. 5.

Where is the will of the subject ???

We must also address loss of nationality, given that, in the legal system, there is no circumstance that permits rejection or a declaration declining it. Indeed, the Civil Code, as we will see later, only envisages the option of renouncing it in favour of another nationality.

AUTHORITARIAN STATE

Finally, the conclusion of this study will aim to, as well as summarising and underlining the key ideas, make a hypothetical judgment on the success or failure that would be expected vis-a-vis a person who wishes to waive their nationality outside of the cases provided for by Spanish legislation or, at any rate, with regard to the possibilities that the legal system offers to attain said objective.

2. REGULATORY FRAMEWORK. APPLICABLE LEGISLATION IN THE SPANISH STATE

Before commencing the study, it is necessary to set out the applicable regulatory framework of the Spanish State for cases of statelessness that have occurred. The aforementioned framework is made up of a series of national and international regulations, transposed into our legal system and, therefore, equally applicable.

A chronological list of the applicable regulations is set out below:

1. Royal Decree of 24 July 1889, text of the Civil Code edition, with respect to the provisions of Articles 9 and 17 to 28.
2. **Convention relating to the Status of Stateless Persons**, adopted in New York, United States on 28 September 1954.
   - This legislative text was ratified by Spain by means of an instrument of accession of 24 April 1997 (entry into force on 10 September 1997).
3. The **Spanish Constitution** of 1978, with respect to the provisions of Article 13.4 thereof.
4. **Organic Law 4/2000,** of 11 January, on the rights and freedoms of foreigners in Spain and their social integration, with respect to the provisions of Article 34.1 thereof.
5. Royal Decree 865/2001 of 20 July, which approves the **Regulations on the recognition of the status of stateless.**

With respect to nationality, we must also take into account the contents of the Civil Register Law, of 8 June 1957, and of the Civil Registry Regulations. However, given the content sought to be provided in this work, the provisions of these regulations shall not be analysed.

We shall also take into consideration the Convention on the Reduction of Statelessness, adopted in New York, United States, on 30 August 1961, which has still not been ratified by the Spanish State.

3. NATIONALITY

3.1. Introduction: concept

From a historical perspective, Spanish nationality arises as a result of the liberation of the colonies subject to Spanish control and of the treaties ratified with these new Nations, the objective of which was to distinguish the persons that would be considered citizens and would enjoy the protection of this State, during the second half of the 19th and 20th centuries[2]. These agreements were taken on by the colonies of all the continents (America and Africa).

No unanimous agreement exists to define the concept of nationality. However, the commonly accepted definition is that nationality is **the link that connects a person to a certain State.**

Considered in this way, nationality brings with it a public-legal aspect and another private-legal aspect. The first of these is critical for the exercise of political rights, and in light of the second, nationality, according to Professor Díez Picazo, quoting his counterpart De Castro, is conceived as the quality produced in a person due to belonging to a national community organised in the form of a State. It is a civil status of the person that exerts an influence on his/her legal capacity. The rights and duties held by all Spanish people are set out in the Spanish Constitution. They are specifically covered in Heading I of the Spanish Constitution entitled "Fundamental rights and duties", without prejudice to the provisions of other legislation[3].

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[2] Peña Bernaldo de Quirós, Manuel, *Comentarios al Código civil [Commentaries on the Civil Code]. Vol I.3: Articles 17 to 41 of the Civil Code,* 2nd edition, Madrid 2004.

[3] In this way, for example, Spanish people have the right, as well as personal rights (right to life, intimacy, liberty, etc.) to work and freely choose profession or occupation, to enter into marriage, to private property and inheritance, etc., and as duties, to contribute to public spending with respect to the economic capacity of the individual and also to work.

It follows on from this that in Article 9 of the Civil Code, section one thereof, it is pointed out that the **personal law** of individuals shall be determined by their **nationality**.

Nationality, therefore, understood as the link between Nation state and person, is of such importance that the Universal Declaration of Human Rights[4], in Article 15.1 thereof, contains the following provision: *Everyone has the **right to a nationality,*** and adds in point 2 that *No one shall be **arbitrarily** deprived of his nationality nor denied the right to change his nationality,* thus recognising the legal and practical importance for the enjoyment of human rights. However, the UDHR does not specify what state must grant it or recognise it and under what circumstances.

It also follows from this that in the Spanish Constitution, Article 11.2 stipulates that ***no person of Spanish origin may be deprived of their nationality.***

This constitutional provision is intimately linked to the precepts in the Civil Code regarding nationality (Articles 17 to 28), especially the content of Articles 24 and 25 concerning loss of nationality, whether by people of Spanish origin, or by people with Spanish nationality but not of Spanish origin.

A simple outline shall be set out below of the provisions contained in our legislation on the acquisition of Spanish nationality, but centring the study, in any case, on the loss and waiver thereof by a national of Spanish origin, with reference to the hypothesis on which this study is based.

3.2. Acquisition of Spanish nationality

Spanish nationality can be acquired either by acquisition by virtue of origin or by derivative acquisition. However, the doctrine prudently makes the distinction between whether nationality is obtained automatically, i.e., without a prior declaration of will of the person concerned, or if it is not automatic, i.e., to acquire it, a declaration of express will is required.

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[4] Universal Declaration of Human rights, adopted and proclaimed by the Ruling of the General Assembly 217 A (iii), of 10 December 1948.

At birth, there is a Kidnapping of the subject by the State, which envols the native in the legal system of the nation-state, which declares itself master and sovereing of a certain territory forcing you to form part of a community linked to the fatherland

3.2.1. Automatic acquisition

This circumstance is provided for in Articles 17.1 and 19.1 of the Civil Code, referring to acquisition by natural descent, by birth on Spanish territory or by adoption.

Within the logic of the nation-state is the concept of birth which presents itself as the source of holding rights

It must be pointed out that the provision made by the Civil Code of acquisition by birth on Spanish territory (Art. 17.1 CC), provides for the case (part c) of the Article) of acquisition of nationality for persons born in Spain to foreign parents where both lack nationality **(stateless)**, or **where the legislation for said parents does not attribute any nationality to the child.**

This precept, therefore, pursues the elimination of cases of statelessness.

3.2.2. Non-automatic acquisition

Non-automatic acquisition of nationality is covered in the other cases governed by the Civil Code and, in some of them, a prior declaration of will of the person concerned is mandatory.

We thus find the case of acquisition by option (Art. 20.1 CC), acquisition by possession of the state (Art. 18 CC), and by this it must be understood that it is acquired by continued possession and use of Spanish nationality for ten years; by naturalisation papers (Art. 21.1 CC) in the case of exceptionality referring to acquisition by a measure of "grace" by the Ministry of Justice[5]; and by residence on Spanish territory (Art. 21.2 CC).

3.3 Loss of Spanish nationality

Even taking into account the constitutional provision according to which no person of Spanish origin can be deprived of nationality, the Civil Code governs two cases, according to which nationality can be lost in a *voluntary manner* (Art. 24 CC) or as a *penalty* (Art. 25 CC), this last case only being possible for Spanish persons who are not of Spanish origin.

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[5] When we talk about a measure of grace we refer to a benefit, gift and favour that is given without particular merit, i.e. a free concession.

Application of sovereignty, of the powers of the sovereign to decide on exceptions. Sovereign powers suspend the law whenever it suits them[5]

3.3.1. Voluntary loss of Spanish nationality

Voluntary loss of nationality, governed by Article 24 of the Civil Code, can affect both persons of Spanish origin (birth, adoption, natural descent, etc.), and persons not of Spanish origin who have acquired nationality (possession of the state, residence on national territory, etc.), and it is based on three scenarios:

a) Loss of nationality by virtue of acquisition of another: possibility that occurs when the person with Spanish nationality voluntarily acquires another nationality, the person concerned being an emancipated person[6] who regularly resides abroad and provided that three years have elapsed since acquisition or emancipation.
A possibility exists of maintaining Spanish nationality if the subject declares their will to retain it.

b) Loss by exclusive use of foreign nationality attributed before emancipation: in this case we are also dealing with the emancipated subject who regularly lives abroad, who exclusively uses the other nationality, three years having elapsed since emancipation.

c) **Loss by waiver** of Spanish nationality: in this case we are again dealing with emancipated persons, who generally live abroad and who **expressly waive Spanish nationality, due to holding another nationality.**

3.3.2. Loss of nationality as a penalty

The case provided for in Article 25 of the Civil Code is directed at Spanish persons who are not of Spanish origin, but who have obtained nationality, and who, for three years, have exclusively used the nationality which they had declared to have waived when they acquired Spanish nationality or when they voluntarily entered military service or hold a political role in a foreign State, in breach of the express prohibition of the Spanish government.

[6] When the law talks about emancipated persons, it is with reference to the legal fact of those persons who, having reached fourteen years of age, are granted the power to govern themselves and their property by themselves, as a person of legal age would do.

It also considers the aforementioned precept that nationality will be lost when a final sentence is passed that declares the nullity thereof, due to the applicant having become involved in falsification, concealment or fraud in the acquisition of nationality.

Having analysed what nationality entails, we shall now move on the following point dedicated to statelessness.

4. STATELESSNESS

4.1. Introduction

During the period between the First and Second World Wars, the States and nations, taking into account the problems posed by refugees and stateless persons, attempted to establish international agreements aimed at providing a response to these two problems, but without making any distinction between the two conditions[7]. With that noticeable objective, the Hague Convention of 1930 was the first international attempt to ensure that all persons had a nationality, but what was provided for in said attempt did not reach expectations.

ALL WARS ARE DEFENDED WITH THE FLAG OF NATIONALISM

It was not until the Second World War had ended that the question of displaced persons, refugees and stateless persons came onto the international agenda. In the context of a Europe devastated by war, with thousands of refugees and exiled persons, a committee was set up in the United Nations to draw up an agreement to revise and reinforce the existing international instruments on refugees and stateless persons. The Convention relating to the Status of Stateless Persons was thus drawn up, approved on 28 September 1954 in New York, a text which would be ratified by a number of States, but not by the majority of them and, subsequently, the Convention on the Reduction of Statelessness, adopted in New York, United States, on 30 August 1961.

? the long succession of brutal wars was precisely for the aims of expansion of territory by the states or for the aim of becoming independent from an opressive State. (fascism / nazism...)

It was from then on that protection for stateless persons was not now conceived from the perspective of the interest of the States or nations, but rather from the perspective of the

[7] It must be taken into account that the words refugee and stateless are not synonymous. Refugees, those persons displaced from their territory due to armed conflicts or due to being a persecuted population, are at the same time stateless persons, but not all stateless persons are refugees, as it is not a *condicio sine qua non* that an armed conflict exists to lose or to not have nationality.

interest of individuals. It is for this reason that in the introduction of the aforementioned legislation, an express reference is made to the contents of the UDHR, wherein *everyone is entitled to a nationality.*

Thus, the consideration of statelessness as an international problem and as a matter of duty of humanity is a modern one. Persecution and flight, in contexts of armed conflict, and the closure of borders to non-nationals, are two causes that determined the importance of the aforesaid problem[8].

A first reading of the Agreements of 1954 and 1961 provides us with the understanding that the aforesaid texts do not grant or recognise the *right* to choose the one nationality of the country of one's residence or domicile (Article 12 of the Agreement), but rather *they impose* the adoption of a nationality.

> Thus, for example, a foreigner fleeing his country of origin due to armed conflicts or persecution, whose nationality is not recognised, will be *obliged* to adopt the nationality derived from the recognition of his status of stateless.

It must be borne in mind that, to date, the Convention relating to the Status of Stateless Persons is the only legal text of international law that governs statelessness, adopting measures so that persons declared as stateless do not live in a state of helplessness.

4.2. The concept of stateless

In order to know what it means to be *stateless* we must turn to the provisions of Article 1.1 of the Convention relating to the Status of Stateless Persons, according to which, the term *stateless person* shall refer to ***a person who is not considered as a national by any State under the operation of its law.***

Contrary to this, and with regard to the prohibition mentioned in Article 1.2, section ii), of the Convention, this status shall not be recognised for,

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[8] Castro y Bravo, Federico de, *Los proyectos de convenios para suprimir o reducir la apatridia [Draft Agreements to abolish or reduce statelessness],* Estudios Jurídicos del profesor Federico de Casto, 1997, Volume I, pgs. 845-854.

> Persons for whom the competent authorities of the country **where they have fixed their residence recognise the rights and obligations inherent in the possession of the nationality of such country.**

An express prohibition is made here for the recognition of said Status when the State where the person regularly resides, different to the State where such recognition is requested, recognises the rights and obligations, as if the person were a national of its country.

Therefore, that Convention shall not be applicable when a State already exists that recognises as one of its nationals a foreigner for whom the same rights and obligations are recognised as for any other national.

In our legal system, the definition given by the Spanish State in Royal Decree 865/2001 of 20 July, which approves the Regulations of recognition of the status of stateless, is identical to the definition of the Convention, although it does add the expression and ***declares to lack nationality.***

The provision given by the Spanish legal system aims that the mere declaration by the foreigner of lacking nationality is sufficient for him to be recognised the status of stateless and he is not required to provide documentary or testifying proof[9]. We will return to this point later and we will investigate it in a little more depth.

4.3. Effects resulting from statelessness

As expressed in the introduction of this section, being stateless brings with it some negative effects, in that the lack of nationality or the non-recognition of this by a State or nation is viewed as being of detriment to the person, and it is for this reason that the human right to have nationality is recognised in the UDHR.

In this manner, if being stateless is synonymous with not having nationality, the legal, political or social links that bind the person to the State or nation are non-existent.

[9] The Supreme Court ruling of 20 November 2007 (appeal number 10.503/2.003) renders unfounded the First Instance Ruling theory, according to which "whosoever requests such status must prove that he fulfils such requisite".

This implies, therefore, not being documented (either with a national identification document or passport) and, as a result, and in the light of legislation of some countries, can even result in police custody and potential expulsion from the national territory, as is the case with Spain.

In Spain, every citizen must be documented, but if we look at the case of foreigners, pursuant to the Aliens Law, not being documented or the non-accreditation of the permit or authorisation that permits the foreigner to reside in, work in or visit the country, constitutes an administrative offence, which brings with it many penalties, the most regularly applied being the financial penalty (fine) which oscillates between €501 and €10,000 or expulsion from the territory, subsequent to optional admission to a Foreigners' Internment Centre[10].

It is not just arrest or expulsion from the territory that is a consequence of statelessness. The fact of not "belonging" to any country also implies not exercising certain rights, such as the right to vote, or not being able to access certain social benefits, such as health or education.

> We must remember at this point that in the context of cutbacks, the Autonomous Government of Catalonia approved Instruction 10/2012, pursuant to which, in order for a foreigner to be entitled to the public health service, he is required to provide evidence of being registered in Catalan territory for a minimum of three months, as well as presenting his passport and not having the status of being insured with or a beneficiary of the National Health System; prior to the approval of the Instruction, with the mere fact of being registered he already had access to the public health network.

Although it is true that the right to nationality should never go beyond certain human rights, such as the right to health or education, what we see in practice, at least on Spanish territory, is that precisely the fact, not of being stateless, which would be the most serious case, but rather the simple fact of not having a residence permit, brings with it a series of very serious consequences for people, such as not being able to attend the doctor.

However, being *de facto* stateless is not the same as holding the recognised status of stateless. Precisely what the Convention is aiming for is that stateless persons who are stateless in

[10] Articles 53 and 55 of Organic Law 4/2000 on Immigration Matters.

practice are recognised the aforementioned status in order that they can thus enjoy a series of rights derived from such recognition and which shall be the focus of study in the following section.

5. PROCEDURE FOR THE RECOGNITION OF THE STATUS OF STATELESS

The Law on Immigration Matters stipulates, in Article 34.1 thereof, the recognition of the condition of stateless by the Minister of the Interior upon foreigners lacking nationality and meeting the requisites provided for in the Convention of 1954.

It must be pointed out here, that the execution of this regulatory provision, as well as the adhesion of Spain to the aforementioned Convention, required the establishment of a procedure to be able to determine the status of stateless. For this reason, the Regulations of recognition of the status of stateless, which govern the procedure to achieve such status, was approved by means of Royal Decree 865/2001 of 20 July.

Thus, the procedural regulatory framework is based on the Regulations of recognition of the status of stateless and on the Law on Immigration Matters. The procedure is to be followed by the channels of the administrative order, with the formalities required by Article 70 of Law 30/1992 of 26 November on the Legal System of the public administrations and of the common administrative procedure, in accordance with the provisions of Article 3 of the Regulations. Access to the contentious-administrative legal channel shall occur when an appeal is brought against a ruling wherein the decision-making body refuses the concession of such status.

5.1. Initiation of the procedure. Time periods

The procedure for the recognition of the condition of stateless can be initiated by operation of law; in such case, it will be the Office of Asylum and Refuge that initiates the procedure, or at the request of the party, i.e., the foreigner, who, in any case, must declare that he lacks nationality (Article 2.1 of the Regulations).

In connection with this point, the already-referenced ruling of the Supreme Court of 20 November 2007 must be mentioned, pursuant to which, with the current draft of the Law on Immigration Matters,

"(1) there is now no requirement of the foreigner, as in the original draft, of accreditation that the country of his nationality does not recognise nationality for him, inasmuch as the precept now expressly refers to foreigners who simply "declare" that they lack nationality; and, (2), furthermore, we have a mandatory system, pointing out the precept that the Minister of the Interior "will recognise" the condition of stateless persons and will "issue" them the condition provided for in the Convention relating to the Status of Stateless Persons."

If it is the foreigner who initiates the procedure, he must do it within a maximum period of one month from the time of entry onto Spanish territory. However, if the foreigner is on national territory, enjoying a period of legal stay, he may initiate it before the aforesaid period expires (Article 4 of the Regulations).

5.2. The investigation phase of the procedure and the proposal for a ruling

The investigation phase of the procedure is the task of the Office of Asylum and Refuge, which, once completed the evidence and arguments stage, draws up a favourable or unfavourable proposal for the Minister of the Interior, who must issue a ruling within the maximum period of three months (Article 11 of the Regulations and Article 34.1 of the Law on Immigration Matters).

Until the case is resolved, the foreigner shall have a temporary residence authorisation (Article 5 of the Regulations).

In the event that the ruling is negative and the Status of stateless is therefore not recognised, the foreigner may appeal the decision, firstly by means of administrative channels and, secondly, if that appeal is rejected, via the courts, whereby legal assistance shall be required.

5.4. Effects of the recognition of the Status of stateless

The first item granted by the Regulations once the Status is recognised is the issuing of an identity document by the competent authority (Art. 13.2 of the Regulations). With this, the stateless person will enjoy the same rights and have the same obligations as nationals, and will therefore be able to reside and carry out working, business and company activities in accordance with the provisions of the Immigration Matters regulations (Article 13.1 and 2 of the Regulations).

The stateless person shall also be entitled to bring together their family members, but only those referred to by the Law on Immigration Matters in Article 17.1 thereof.

With the granting of the status of stateless, the State will provide the travel document, the validity of which will be 2 years and which will permit the foreigner to leave the territory, in accordance with the provisions of Article 13.2 of the Regulations and Article 28 of the Convention.

6. CONCLUSION: APPLICATION OF THE HYPOTHESIS IN ACCORDANCE WITH THE LEGISLATION AND THE PROCEDURE ANALYSED

The hypothesis on which this report is based consists of achieving the recognition of the condition of stateless for a person who is recognised as a national by a State.

In accordance with Spanish legislation, the only way or option to waive nationality is by declaring the wish to opt for another, i.e., by bringing together the legally stipulated requisites, a Spanish person may waive this nationality because he/she is going to acquire another (Article 24 of the CC).

Given this regulatory context, it appears impossible or unfeasible that a person can be considered stateless while possessing a nationality.

An illustrative example can be provided here: case C-135/08 *Janko Rottmann vs. Freistaat Bayern,* heard by the Court of Justice of the European Union and on which a judgment was issued on 2 March 2010, puts forward the following situation: acquisition of the condition of stateless and of the consequent loss of citizenship of the Union by an Austrian national who fraudulently obtained German nationality.

Although the matter studied by the CJEU poses a series of questions on the competence of the States in terms of nationality, it serves as an example to illustrate certain cases in which a new nationality is aimed to be acquired fraudulently, and, once this has been acquired, the original nationality is lost as a result, but, on discovering the fraudulent manner of the acquisition, the country revokes this new nationality, the party concerned remaining in a situation of statelessness.

In this case, the Court had to legally analyse, whether, even with German nationality having been lost by fraud, Austrian nationality could be regranted, thus removing the condition of stateless.

It must be taken into account that what is under consideration in this case is whether loss of nationality, due to fraudulent activity, is a proportional penalty, in other words, whether acquiring a new nationality as the result of a fraudulent act is as serious as losing it and becoming stateless.

The CJEU's response to this point is that it does not oppose a Member State from revoking a Union citizen the nationality of said Member State acquired by means of naturalisation, when the citizen has obtained it fraudulently (section 59 of the ruling), but it requires in all cases that **the decision to revoke respects the principle of proportionality.** The Court extends this obligation to both the State of naturalisation –Germany-, and to the Members State of the nationality of origin –Austria- (section 62 of the ruling). The understanding then is that if the State of naturalisation takes into account this principle at the time of revoking nationality, causing a situation of statelessness, Austria will also have to keep in mind that, in view of events, and not wishing to abandon one of its citizens, it is to regrant nationality.

The thoughts of the CJEU lead us to see and understand that loss of nationality is truly such a crucial matter that, even with the existence of a fraudulent action resulting in the revocation of a new nationality, the citizen could not remain without a nationality, but rather, in every case, the original nationality should be reattributed to him, in the interest of proportionality between the crime committed and the effects brought about by statelessness.

It identifies birth with nationality

Lastly, it seems obligatory to conclude that difficulties exist in relinquishing an unwanted and unrequested nationality, since the concept of State or nation and, above all, the idea of "belonging" to a territory appear to be conceived in such a way that cases of statelessness are aimed to be kept as low as possible, in the interests of not abandoning citizens who perhaps wish to form part of a territory or perhaps not, but consciously avoiding the option that each citizen has the choice of deciding which State he/she wishes to be part of.

Montserrat Fernández Creus

Lawyer

But it is now a matter of choosing what nation-state you wish to be part of (as the desire is to form part of the common community that ones chooses), but rather the question is on what ideological parameters does the concept of nation-state have to be founded in order for this context to exist.