Who Would the Citizens of a Hypothetical Catalan State Be?

A Democratic, Nationalist and Liberal Proposal on Citizenship

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Introduction

The purpose of this reflection is to analyse who might be the citizens of a hypothetical Catalan State resulting from a democratic, unilateral, peaceful secession within a context that ensures respect of the fundamental rights of individuals. This reflection basically has two intentions: one more explanatory and the other more propositional. Regarding the first, it will explore a range of controversial issues related to international law on the succession of States in matters of citizenship. This exploration should enable us to delimit the legal power of the new Catalan State in terms of the attribution and maintenance of citizenship. Even though it is common to believe that the competence of the State to attribute and maintain citizenship is exclusive and eminently absolute, it will be shown that international law is not sitting idly. Specifically, in terms of State succession, the principle of effective citizenship and the obligation to avoid statelessness are postulated as limits in opposite directions of that State domestic jurisdiction. The second intention of this reflection is to offer a democratic, nationalist and liberal proposal on the acquisition of citizenship in a hypothetical Catalan State. The proposal will be democratic because it will connect the right to acquire Catalan

citizenship with those persons who had the right to participate and vote in the democratic decision on secession (including the referendum on secession and/or the latest Parliament of Catalonia elections leading to secession). It will be a nationalist and liberal proposal because it will draw inspiration from the doctrinal corpus of liberal nationalism. The proposal will be framed within the existence of a Catalan nation prior to the Catalan State. Therefore, the State will not create the nation but will allow it to properly flourish. Liberalism will frame the limits of Catalan nationalism and require it to be open, plural, inclusive, tolerant and permeable.

Citizenship and Nationality: A Bit of Political Philosophy

I will use the concept of *citizenship* instead of *nationality*.[1] Despite the fact that nationality is the specific concept of international law, I prefer to use it as a more sociocultural concept and the term citizenship as a more institutional and legal concept.[2] When a State is plurinational, the term citizenship is more neutral than the term nationality. An Aranese person may feel uncomfortable being treated as a Catalan national.[3] This same Aranese person might say that his nationality is not Catalan but Aranese. For this reason, it would be more respectful to treat him as a Catalan citizen. For a long time now, the terms nation and State and nationality and citizenship have been confused (often unduly).[4] The concepts of citizenship and nationality are now to be briefly explored in the light of *liberal culturalism*.

Despite the fact that liberal egalitarianism has striven to develop a theory based on the moral equality of people, instead it has established a theory on the moral equality of citizens when accepting States and their territorial boundaries.[5] However, in terms of political morality, States cannot freely dispose of the right to citizenship by providing or depriving their citizens of this right whenever they wish. The rights of citizenship have been a historical struggle in the democratisation and expansion of rights in Western societies. These historical conquests reveal that citizenship entails recognition of and respect for certain civil and political rights of individuals who hold this citizenship. In Western liberal democracies, the right to citizenship is simultaneously a manifestation and a *precondition* of the principle of democracy.

Yet at the same time, numerous liberal theoreticians have recognised that citizenship is not a mere legal status defined by a series of rights and responsibilities, but that it is a source of identity, a symbolic expression of the condition of being a full member of the

[1] This change in terminology is not bereft of problems with regard to international and comparative law. For example, in the USA there is the category of nationals who are not citizens – they are American citizens for the purposes of international law but not for the purposes of the political and personal rights of internal law. This can also cause problems with citizenship in the UK and the Commonwealth, among other places. *Vid*. MIKULKA, V. "First report...", pp. 15-18. BROWNLIE, I., CRAWFORD, J. *Brownlie's Principles of Public International Law*, p. 519.

[2] EU law uses the concept of *EU citizenship* instead of nationality, perhaps for similar reasons.

[3] Article 1 and the Preamble of the Statute 1/2015, passed by the Catalan Parliament, defines Aran as a "national reality" ("realitat nacional"). Article 11 of the Statute of Autonomy of Catalonia uses the expression "Aranese people" ("poble aranès") and considers them an "Occitan reality with its own cultural, historic, geographic and linguistic identity".

[4] The confusion still persists: international law could be called global or world law, the United Nations could be called the Global Organisation of States or the World Organisation of States… The ideal of the nation-state is still quite present in the terminology.

[5] KYMLICKA, W. *Fronteras territoriales*, p. 36.

political community.[6] This is when citizenship and nationality in the cultural sense are merged. Citizenship becomes a source of national identity, and this national identity becomes a feeling of belonging to the same political and cultural community which allows the other members to be recognised as being like us and thus makes it possible to create a *We*. Following this train of thought, citizenship as a source of rights and identity fulfils an integrative function for those who do not feel part of the *We* or whom we do not feel are one of *Us* yet. Rights, identity and integration should help to boost sufficient levels of trust, loyalty, altruism, cooperation and solidarity to develop a welfare State and a deliberative democracy. All of this generates a close connection between citizenship and the principle of equality.

Citizenship and constitutional patriotism should not be the only elements that bind a country together: it is legitimate and wise for the future Catalan State to undertake its nation-building once it has been established. The liberal egalitarian State neither can nor should analogously apply religious neutrality to the national issue. A liberal egalitarian State might or could be secular, but it seems that it cannot and should not be *un-national*. The scholarly literature on liberal culturalism shows that liberalism and nationalism are compatible, but with some limits. Liberal nationalism and liberal multiculturalism are two sides of the same coin: this coin is liberal culturalism. Liberal nationalism should be respectful and tolerant of cultural minorities (be they ethnic or national minorities) when it undertakes nation-building. Liberal multiculturalism specifies that often it is not enough to recognise the individual rights of the members of those cultural minorities: certain group rights should also be recognized, which are not contrary by nature to liberal egalitarianism. In this sense, it would be judicious to be tolerant and permeable to other cultural groups, especially in relation to the Spanish ethnic group or Spanish-speaking ones and the Aranese national minority. For this reason, I have defined this proposal as both nationalist and liberal.[7]

Population and Citizenship in International Law

The classic criterion of *ex factis jus oritur* tells us that the Catalan State would begin to exist when a group of individuals who live in a defined territory are organised under an effective and independent governing apparatus (the "*Generalitat*").[8] So here we find the three essential elements of the State as a subject of international law according to Kelsen: population, territory, and effective and independent government. A government is independent if it is not under the control of the government of another State. A government is effective if it is able to obtain more or less general and permanent obedience to the coercive order established by it.[9]

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[6] KYMLICKA, W. *Multicultural Citizenship,* p. 192.

[7] To further explore the philosophical roots of the reflection in this section, see: ANDERSON, B. *Imagined Communities.* KYMLICKA, W. *Politics in the Vernacular.* KYMLICKA, W. *Multicultural Citizenship.* MARGALIT, A., RAZ, J. "National Self-Determination". MILLER, D. *Citizenship and National Identity*. MILLER, D. *On Nationality.* MOORE, M. *The Ethics of Nationalism.* TAMIR, Y. *Liberal Nationalism.* TORBISCO, N. *Group Rights as Human Rights.* VERGÉS, J. *La nació necessària*. BOSSACOMA, P. *Justícia i legalitat de la secessió*.

[8] The *Generalitat* meaning the "Generality" or the "General" is the government of Catalonia including both the Catalan Parliament and the Catalan Executive.

[9] *Vid*. KELSEN, H. *Principles of International Law*, p. 259. In a similar sense, Article 1 of the 1933 Montevideo Convention on Rights and Duties of States contains the standard criteria of international

The population, as an essential element of the State, is usually defined as the natural persons (human beings) who habitually live in the territory of the State.[10] Thus it would be more precise to name it permanent or habitual population. Even if there is a close and intimate relationship, the population of the State, defined as the habitual residents of the State, is not quite the same as its citizenry. Citizenship is the legal institution which recognises more intense belonging and ties between a natural person and a State. Therefore, one could habitually reside in a State and be part of its population but simultaneously be a citizen of a State where one does not live. Citizenship is not a criteria for statehood, instead it depends *prima facie* on the State legal order.[11] Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws provides that:

> It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.[12]

In cases of State succession (secession is a kind of State succession), the exclusive State jurisdiction on matters of citizenship is more limited than when there are stable territorial borders. The possibility that the laws on citizenship of the States involved in the succession are not compatible with each other and the fact that this can create pervasive conflicts of jurisdiction, both positive (for example, dual citizenship) and negative (statelessness), calls for more intense intervention by international law. According to international law, in the absence of international treaty stipulation the new State would not be obliged to extend its citizenship to all the residents of its territory.[13] During the transitional period in which the newly born State has not yet regulated who its citizens will be, international law seems to presume that the habitual residents of the successor State are citizens of the new State.[14] Beyond the transitional period, the population generally follows the change in sovereignty in matters of citizenship.[15]

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customary law for defining statehood: "The State as a person of international law should possess the following qualifications:
I. A permanent population,
II. A defined territory,
III. Government, and
IV. Capacity to enter into relations with other States."
Vid. CRAWFORD, J. *The Creation of States in International Law*, pp. 45 and forward.

[10] It appears that a minimum population or minimum territory has not been defined. There are two independent States according to international law that are illustrative of this: the Vatican, which measures 0.44 km² in area and has around 800 inhabitants, and Andorra, which measures 468 km² in area and has around 78,000 inhabitants. Figures from their respective websites.

[11] In this sense, Crawford concludes that State existence in international law requires it to have a population, and that is not a rule relating to the citizenship of that population. CRAWFORD, J. *The Creation of States in International Law,* p. 52.

[12] The importance of this provision is demonstrated by the fact that it was almost literally reproduced in Article 3 of the 1997 European Convention on Nationality.

[13] CRAWFORD, J. *The Creation of States in International Law*, pp. 52-53.

[14] Article 5 of the International Law Commission's Draft Articles on the Nationality of Natural Persons in Relation to the Succession of States stipulates this presumption: "Subject to the provisions of the present draft articles, persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession." *Vid*. UN General Assembly Resolution 55/153.

[15] *Vid*. BROWNLIE, I., CRAWFORD, J. *Brownlie's Principles of Public International Law,* p. 433. CRAWFORD, J., BOYLE, A. *Referendum on the Independence of Scotland*, par. 168.

Citizenship guarantees that the State has a certain stable population based on transmission via offspring and place of birth. This transmission, which is usually involuntary, allows intense community ties to be upheld, yet these ties are broad enough to include sufficiently different conceptions of the good and life plans. Furthermore, the general rule of democratic liberalism is that habitual and permanent residence in a State generates a right to acquire citizenship there. In contrast, the opposite rule, in which habitual and permanent residence in another State would be grounds for losing citizenship, is not as reasonable. The loss of citizenship is usually associated with the acquisition of a new citizenship since, as we shall see, international law guarantees that natural persons do not become stateless (that is, they are not to be left without citizenship).

There are several reasons for ensuring that natural persons are not rendered stateless, including the following: (1) in general, the citizens of a State cannot be expelled from the territory of that State; (2) the rights to political participation are often exclusively held by citizens;[16] (3) natural persons are not the main subjects of international law, unlike States and international organisations, and thus a stateless person is largely unprotected or vulnerable when only subject to international law;[17] (4) the State has the right and obligation to protect its citizens from other States. Regarding the last aspect, as the traditional Vattel's doctrine stated, harming the citizen could indirectly offend the State, which is bound to protect its citizens. In this sense, the bond is not exhausted by the mere fact that the citizen is located outside State territory (with the prominent example of diplomatic protection[18]). Moreover, the bond of loyalty tends to be two-way, since if the State is damaged, the citizen generally has the duty to defend it. In short, the bond of citizenship generates strong duties of responsibility, representation and protection.[19] As the Inter-American Court of Human Rights (I/A Court) states:

> Nationality can be deemed to be the political and legal bond that links a person to a given State and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that State.[20]

It is widely thought that the relationship among citizens, among fellow countrymen, always operates as a relationship of magnification or multiplication of moral and legal rights and responsibilities. However, a more detailed exploration shows that the relationship is not univocal. Being a citizen often generates more duties than being a foreigner: compulsory military service even if they are resident abroad, defending the country against external aggression, being a member of an electoral committee, serving on a jury, paying certain taxes even if they are resident abroad, etc. At the same time,

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[16] Political rights are here understood as rights to citizen participation in public affairs basically via suffrage, popular consultations, popular initiatives and perhaps the right to petition and the right to hold public office. The right to create, affiliate with and exit from political parties and unions would be considered more a civil right (a specific expression of the right to freedom of association).

[17] *Vid*. BROWNLIE, I., CRAWFORD, J. *Brownlie's Principles of Public International Law*, pp. 115-121. KELSEN, H. *Principles of International Law*, pp. 247-248.

[18] The definition of diplomatic protection in the International Law Commission's 2006 Draft Articles on Diplomatic Protection is that it "consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility."

[19] BROWNLIE, I., CRAWFORD, J. *Brownlie's Principles of Public International Law,* p. 607.

[20] Advisory Opinion 4/84, 19th January 1984, on the Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, paragraph 35.

the status of citizen often gives more rights to political participation (active and passive suffrage, voting in referendums, popular initiative, right to petition, etc.), economic and social rights (social security and social benefits and services) and rights to hold certain public offices (not only political office but also civil service – national security could be one reason). Regarding the State's duty to protect safety of persons and property, it is required to provide at least the same protection to foreigners as to its own citizens. In addition, the legal protection granted to a foreigner cannot be below a minimum standard of civilisation.[21] Thus, even though the line between the rights of citizens and non-citizens is increasingly blurry, it has not yet disappeared (and seems far from disappearing).[22]

The Principle of Effective Citizenship

Recapitulating, international law stipulates that States have exclusive jurisdiction, *prima facie*, to define who their citizens are. However, this exclusive legal power does not give them absolute freedom; rather, international law imposes limits on it. In particular, in cases of State succession, international law intervenes more intensely given that there are two or more States that might potentially have positive conflicts of jurisdiction (multi-citizenship and the need for effectiveness) and negative conflicts of jurisdiction (statelessness) with regard to specific natural persons. Hence, the phenomenon of succession lowers States' discretion on citizenship matters.[23] There is a triangle of institutions that delimit this exclusive jurisdiction of States, which are in dialectical tension with each other. This triangle of institutions is: (1) the need for an effective bond of citizenship, (2) the obligation to avoid statelessness, and (3) the rising importance of the individual's will as an expression of the gradual development of international human rights law.

The principle of effective citizenship prevents States from granting citizenship indiscriminately without considering the bonds between the State and the individual. This principle, which can be inferred from the practice of most States,[24] has become international customary law in order to avoid problems like abusive diplomatic protection, that is, in order to prevent States from using a title of citizenship that is not real, effective or genuine before another State. To a certain extent, the principle of effective citizenship is an expression of the principles of good faith (positive aspect) and the prohibition of the abuse of rights (negative aspect) as general principles of law. The need for an effective bond of citizenship has been stressed by the International Court of Justice (ICJ) in the Nottebohm case. In this case, the ICJ ruled that:

> International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual

[21] *Vid*. GOODIN, R.E. "What is So Special about Our Fellow Countrymen?", pp. 673-674. KELSEN, H. *Principles of International Law*, p. 243. BROWNLIE, I., CRAWFORD, J. *Brownlie's Principles of Public International Law*, pp. 612-626.
[22] *Vid*. SHAW, J. "Citizenship in an independent Scotland: legal status and political implications", p. 9.
[23] Similarly, SAURA, J. *Nacionalidad y nuevas fronteras en Europa*, p. 19.
[24] BROWNLIE, I., CRAWFORD, J. *Brownlie's Principles of Public International Law*, pp. 513-514. BATCHELOR, C.A. "Statelessness and the Problem of Resolving Nationality Status", p. 157.

> residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.
> (...)
> According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.[25]

Even though each State has the exclusive jurisdiction to define who its citizens are, other States have the capacity to evaluate this decision. If the bond is not genuine, effective and real, the latter can refuse to recognise the attribution or maintenance of *nominal* citizenship.[26] The merely nominal nature of Mr. Nottebohm's Liechtenstein citizenship is to be inferred from the following facts: he was German citizen by birth and still possessed that citizenship when he applied for naturalization in Liechtenstein; he always retained his connections with members of his family who had remained in Germany, where he also maintained business connections; he lived in and had his businesses in Guatemala (at that time, being a German citizen meant being a citizen of an enemy State of Guatemala because of World War II); he acquired the citizenship of Liechtenstein hastily, without a prior habitual residence there, and basically in exchange for money with the goal of securing a citizenship of a neutral State. The Judgement implicitly denies the international validity of a bond of citizenship that is merely pecuniary and with the goal of fraudulently avoiding being considered a German citizen. While international law does not question the internal effects that a pecuniary or fraudulent citizenship of this nature may have, it does allow other States not to recognise citizenships of this kind. As noted above, one of the functions of citizenship in international law is to provide the bond that allows diplomatic protection. Therefore, when a citizenship is not effective but instead merely nominal, the State cannot ensure diplomatic protection since other States are able to deny that bond of citizenship:

> But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection, in the case under consideration. To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seise the Court.
> The naturalization of Nottebohm was an act performed by Liechtenstein in the exercise of its domestic jurisdiction. The question to be decided is whether that act has the international effect here under consideration.
> International practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect, which are not necessarily and automatically binding on other States or which are binding on them only subject to certain conditions: this is the case, for instance, of a judgment given by the competent court of a State which it is sought to invoke in another State.[27]

[25] *Nottebohm Case (second phase), Judgment of April 6th, 1955*: *ICJ Reports 1955*, pp. 22 & 23.
[26] And, vice-versa, based on the principle of effective citizenship, other States can consider certain natural persons as citizens of a State even if the State denies this citizenship.
[27] *Nottebohm Case,* above, pp. 20 & 21.

Amongst the different forms of effective citizenship, the most common for the purposes of State succession tends to be the classic habitual residence, domicile or fixed abode. Yet, these concepts might not be legally viewed but factually. Internal citizenship, called secondary citizenship or "*pertinenza*" as well, has very often been used in the succession of federal or decentralised States.[28] Another usual criterion of effectiveness is based on the person's background. Background or origin can be determined by *jus sanguinis* criteria, based on the citizenship of parents or ancestors, or *jus soli* criteria, based on place of birth.[29] As the first quotation from the Nottebohm case mentions, there can be several forms of effective citizenship – valid in themselves or as complements, depending on the specific case – such as the "centre of interests" (which could be viewed as the place of work and businesses), "family ties" (the location and background of the family and ancestors) and "participation in public life and attachment shown for a given country" (for example, even though a Catalan politician lives outside the borders of Catalonia – let us imagine the case of the Catalan deputies and senators in Madrid – their jobs as representatives of the people of Catalonia would make their effective ties with Catalonia undeniable, and this bond would allow them to acquire Catalan citizenship). Cultural ties (such as knowledge of the language, history and present society) can also be used at least to complement this effectiveness. The ICJ asks the following question:

> At the time of his naturalization does Nottebohm appear to have been more closely attached by his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future to Liechtenstein than to any other State?[30]

It is interesting to ask a similar question in cases of State succession: at the time of succession, will person X have a closer connection to State Y than any other State because of their background, their residence, their interests, their activities, their family ties and their intentions in the near future? Be aware that although the IJC's criteria points towards *effectiveness* in a first place, they also include and stress the importance of *affectivity*. Thus, the bond is not only *effective* in a strict legal sense, but also *affective* in a more political and cultural sense. The I/A Court also hints at this when it says that this is a legal and political bond, and then immediately adds:

> As long as such rules do not conflict with superior norms, it is the State conferring nationality which is best able to judge what conditions to impose to ensure that an effective link exists between the applicant for naturalization and the systems of values and interests of the society with which he seeks to fully associate himself.[31]

[28] For example, the 1919 Peace Treaty between the Allied Powers and Associated Powers and Austria (Saint-Germain-en-Laye) was based on the so called "*pertinenza*". More recently, the successions in the Czechoslovak and Yugoslavian federations have been based, *grosso modo*, on internal or secondary citizenship of the territorial unit that became independent. *Vid*. MIKULKA, V. "Second report..." paragraphs 61 and 75.

[29] See the later section called "Minors and Family: *Jus Sanguinis* and *Jus Soli*".

[30] *Nottebohm Case,* above, p. 24.

[31] Advisory Opinion 4/84, above, paragraph 36.

The Right to a Citizenship and the Obligation to Avoid Statelessness[32]

On occasion, the right to citizenship has been defined as the right to have rights.[33] In this sense, even though citizenship is an exclusive State jurisdiction, there is a relevant moral argument, which can be extended to law, that requires States to avoid statelessness: the lack of *terra nullius* ("land of nobody" or, in international law, lands not subject to the sovereignty of any State) should entail the absence of statelessness. In other words, since States have appropriated almost every corner of the Earth for past, present or future wealth, to be consistent they cannot leave people without a State.[34] And one might wonder: what is the relationship between the land and the people? The following could be one answer. Foreigners – that is, the citizens of other States – can be expelled from the territory of a State. As a corollary, the State has the duty to receive and not expel (nor deport) its own citizens.[35] Therefore, being the citizen of a State *ultima ratio* entails the human right of being able to reside permanently somewhere in the world. In this way, citizenship generates a bond with one land and the fact that there are no *terra nullius* in the world because States have appropriated all of them generates an international obligation for States to avoid statelessness.[36] The obligation to avoid statelessness, even in cases where it is the individual's will, is a kind of benevolent paternalism of international law which seeks to guarantee that there is a State that ultimately receives, represents and protects all natural persons.[37] Furthermore, if States constantly shirked their obligation to avoid statelessness, this would morally compel international law to act in a more interventionist fashion.

Because of the numerous stateless persons left by the multiplication of States after the World Wars, decolonisation and the fall of the communist federations in Eastern Europe, international law has moved towards protecting against statelessness. Of the different instruments and documents, Article 15 of the Universal Declaration of Human Rights (UDHR) is worth noting. Its first section establishes that everyone has the right to a citizenship. However, Article 15.1 of the UDHR does not indicate the criteria to clarify which State is in charge of guaranteeing the right to citizenship. This diminishes the importance and legal force of this provision. Yet, even though there may be doubts

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[32] Note that a natural person may be *de jure* or *de facto* stateless. While the former is not considered as a citizen by any State, the latter tend to have a nominal citizenship, that is, without an effective citizenship (for instance, refugees are often *de facto* stateless persons). *Vid*. BATCHELOR, C.A. "Statelessness and the Problem of Resolving Nationality Status".

[33] Hannah Arendt wrote that "the right to have rights" is tantamount "to the right of every individual to belong to humanity". ARENDT, H. *The Origins of Totalitarianism*, p. 298. More specifically, the right to citizenship as the right to have rights is attributed to Justice Warren. *Vid*. BATCHELOR, C.A. "Statelessness and the Problem of Resolving Nationality Status", p. 159.

[34] "If one were to make a parallelism between a territory and its population – both constitutive elements of statehood – as there is no precedent of a succession of States in which even a small part of the State territory was left by States concerned as "terra nullius", why should such States be allowed to leave some persons concerned stateless as a result of the succession?" MIKULKA, V. "Third report..." p. 44.

[35] BROWNLIE, I., CRAWFORD, J. *Brownlie's Principles of Public International Law,* pp. 510, 519-520.

[36] It should be borne in mind that statelessness can impede voting, owning property, having the right to certain social services and travelling from one country to another. Regarding travel, if a person is found in a foreign State and their citizenship cannot be determined in order to expel or return them to their country, they can remain in a kind of indefinite detention until it is determined which State is responsible for harbouring this person. BATCHELOR, C.A. "Statelessness and the Problem of Resolving Nationality Status", p. 159.

[37] *Vid*. Article 7 of the 1961 Convention on the Reduction of Statelessness and Article 8 of the 1997 European Convention on Nationality.

as to whether the right to citizenship has become general international law, the moral and political relevance of the question cannot be dismissed.[38] The second section of Article 15 of the UDHR states that no one shall be arbitrarily deprived of his citizenship nor denied the right to change it. Given that deprivation of citizenship is a mechanism through which the State can detach itself from the obligation to receive and not expel its citizens, the prohibition of arbitrarily depriving citizenship somehow guarantees that individuals can continue living or return to live in their State. Finally, the right to change citizenship is one way of ensuring the full right to emigrate, with all its consequences. That is, it allows people to establish a new relationship of genuine loyalty to their new State.

Beyond the 1954 Convention relating to the Status of Stateless Persons, the 1961 Convention on the Reduction of Statelessness is the international treaty in charge of developing and shaping Article 15 of the UDHR at a global level. Among other issues, this Convention limits the loss of citizenship in different situations, either through renunciation, deprivation or other circumstances (see Articles 7 and 8). More specifically, with the prime goal of avoiding statelessness caused by State successions, the UN's International Law Commission (ILC) approved the 1999 Draft Articles on Nationality of Natural Persons in relation to the Succession of States. This text was adopted by the UN General Assembly in the form of a resolution in order to inspire States' actions.[39]

Within the Council of Europe, there are several documents aiming to regulate citizenship matters in successions of States: the Declaration on the Consequences of State Succession for the Nationality of Natural Persons (adopted by the Venice Commission in 1996) and the 2006 Convention on the Avoidance of Statelessness in Relation to State Succession. The latter develops and shapes the 1997 European Convention on Nationality. The European Convention on Human Rights (ECHR) does not include the right to a citizenship, unlike Article 20 of the American Convention on Human Rights (ACHR). Despite this, we should note that Article 3 of Protocol 4 (amended according to Protocol 11) of the ECHR forbids the expulsion of citizens and Article 4 of the same Protocol prohibits collective expulsions of foreigners. Moreover, Article 3.2 of the Protocol recognises the right of the citizens to enter the territory of their State. While these latter provisions are protected under the jurisdiction of the European Court of Human Rights (ECtHR), the provisions from the European Conventions of 1997 and 2006 are not.

[38] MIKULKA, V. "Second report..." paragraph 19: "While the concept of the right to a nationality and its usefulness in situations of State succession was generally accepted, it would nevertheless be unwise to draw any substantive conclusions therefrom, having in mind the very preliminary stage of the discussion on this issue. It would be even more unwise to presume the existence of a consensus on the question as to whether this concept or some of its elements belong to the realm of *lex lata*. It would nonetheless be difficult to object to the view that the right to a nationality embodied in article 15 of the Universal Declaration of Human Rights "must be understood to provide at least a moral guidance" for the legislation on citizenship when new States are created or old ones resume their sovereignty." In a similar vein, see, SAURA, J. *Nacionalidad y nuevas fronteras en Europa*, p. 37.

[39] UN General Assembly Resolution 55/153.

The Relevance of Individual's Will: The Right of Option

Having come this far, I must refer to the legal and moral relevance of individual's will when changing or maintaining citizenship as a result of an alteration in the sovereignty over the territory. The natural person's will in citizenship matters can be expressed via the institution of the right of option. The right of option can involve a renunciation, an acquisition, or a renunciation-acquisition of citizenship. Some Spanish authors appeal to a customary rule of international law which attributes the choice to retain the citizenship of the predecessor State to the inhabitants of the successor State.[40] However, both the most authoritative international and the more local academic writing refute the existence of such rule.[41] Specifically, Mikulka, the ILC's Special Rapporteur, denies the existence of a general right of option:

> 4. Option
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> 107. The role of the right of option in the resolution of problems concerning nationality in cases of State succession is closely related to the function that international law attributes to the will of individuals in this field. There is substantial doctrinal support for the conclusion that the successor State is entitled to extend its nationality to those individuals susceptible of acquiring such nationality by virtue of the change of sovereignty, irrespective of the wishes of those individuals. (...)
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> 108. For the majority of authors, the right of option can be deduced only from a treaty. (...)[42]

Most academic writing denies that there is an international right *lex lata* that natural persons can choose their citizenship in a State succession. Therefore, it seems erroneous to claim that as a general rule, according to international law, States cannot impose citizenship in contexts of State succession. A different matter is the effort made at international level to encourage the establishment of the right of option as an optimal institution for solving cases in which the principle of effectiveness points towards contradictory decisions.[43] Based on an evolutionary interpretation of international human rights law, the right to be heard and the right of option are becoming increasingly important, but always observing and respecting the principle of effective citizenship. For example, anyone born in Catalonia who habitually resides in Catalonia and is a Catalan citizen according to the Statute of Autonomy of Catalonia (SAC) could not easily remain a Spanish citizen because this might violate the principle of effective citizenship. That is, a real, effective and genuine bond is needed between State and citizen. International treaties and internal legislations show that citizenship of the new State is quite often imposed following the change of sovereignty. The relevance of the change of territorial sovereignty in determining the change of citizenship is emphasized in a passage from Brownlie's classic handbook recently updated by Crawford:

> Territory, both socially and legally, is not to be regarded as an empty plot: with obvious geographical exceptions, it connotes population, ethnic groupings, loyalty patterns, national aspirations, a part of

[40] LÓPEZ LÓPEZ, A. "Artículo 11. Nacionalidad (excepto apartado 3)", p. 144. RUBIO LLORENTE, F. "Ciudadanos de Cataluña", *LA VANGUÀRDIA*, 23.I.2014. Rubio appeals to a principle of political morality which allows people to renounce citizenship and says that this moral principle seemed validated in the 1997 European Convention on Nationality, which allows people to renounce citizenship as long as they do not become stateless by doing so.

[41] Regarding Catalan doctrine, *vid*. SAURA, J. *Nacionalidad y nuevas fronteras en Europa,* pp. 71-73.

[42] MIKULKA, V. "First report..." paragraphs 107 & 108.

[43] According to Mikulka, the Badinter Commission recommended the establishment of the individual right to choose citizenship in Ruling no. 2 of the Badinter Commission: "4. The Arbitration Committee is therefore of the opinion:(i) (…) (ii) that the Republics must afford the members of those minorities and ethnic groups all the human rights and fundamental freedoms recognized in international law, including, where appropriate, the right of option their nationality."

> humanity or, if one is tolerant of the metaphor, an organism. To regard a population, in the normal case, as related to particular areas of territory, is not to revert to forms of feudalism but to recognize a human and political reality which underlies modern territorial settlements. Sovereignty denotes responsibility, and a change of sovereignty does not give the new sovereign the right to dispose of the population concerned at discretion. The population goes with the territory: on the one hand, it would be unlawful, and a derogation from the grant, for the transferor to try to retain the population as its own nationals (though a right of option is another matter). On the other hand, it would be unlawful for the successor to take any steps which involved attempts to avoid responsibility for conditions on the territory, for example by treating the population as *de facto* stateless.[44]

Several international treaties and, specifically, many peace treaties that put an end to the World Wars established the right of option, usually in the form of a right to renounce the citizenship acquired by the change of sovereignty. However, bear in mind the condition that tended to be placed on it: the natural person who rejected the citizenship of the new State had to transfer their habitual residence within one or two years to the territory of the State whose citizenship they had chosen (for all, see the Treaty of Versailles). In this sense, if it seems convenient to guarantee a general right of option, a common stipulation according to international practice would be that the person who rejects the Catalan citizenship would have to move their habitual residence outside of Catalonia (as long as they have previously been informed of the consequences of this option and are given a reasonable timeframe to move).[45] In this way, the change in residence is meant to guarantee the coherence of the will expressed by the person and the principle of effective citizenship.

Different provisions that have dealt with the right of option might serve as inspiration. Under Article 7.1 of the Draft by the Special Rapporteur Mikulka, States should give consideration to the will expressed by the person when that person is qualified to acquire the citizenship of two or more States involved in the succession. First, the article stipulates that they should but not that they must follow the person's will. This is due to the fact that the Special Rapporteur believes that the majority opinion is that there is only the right of option when an international treaty explicitly provides it (that is, it cannot be deduced directly from general international law). Second, the article only states that the person's will should be taken into account when that person can acquire two or more citizenships. Article 10.3 of Mikulka's Draft considers the possibility that the State might require the person to transfer their residence outside its territory because of their renunciation or voluntary loss of citizenship. The only requirement stipulated by this article is that the State should give the person a reasonable time limit to make the move. The Rapporteur is convinced that there is not enough international practice to deny the possibility of conditioning the right of option on a change of residence.

Article 14.1 of the ILC's Draft provides that the status of persons concerned as habitual residents shall not be affected by the succession of States. Yet, one must carefully examine the commentary on the article. According to it, the issue being addressed by this provision is different from the question of whether such person may or may not retain the right to habitual residence in a State concerned after having acquired the citizenship of another State involved in the succession. More generally, Article 11.1 of the Draft establishes that States shall give consideration to the will of persons concerned whenever those persons are qualified to acquire the citizenship of two or more States concerned.

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[44] BROWNLIE, I., CRAWFORD, J. *Brownlie's Principles of Public International Law,* pp. 435-6.
[45] *Vid*. MIKULKA, V. "Second report...", paragraphs 98-131.

Article 16 of the 1996 Declaration of the Venice Commission stipulates that exercising the right to choose the citizenship of a State involved in the succession shall have no prejudicial consequences for those making that choice, in particular with regard to their right to residence in the successor State. According to the explanatory report, even though conditioning the right of option on a change of residence has often happened in the past, today this condition would be incompatible with international human rights standards. Nonetheless, it would be fair to ask which fundamental right is being violated by requiring the person to transfer their residence as a result of their own decision? Perhaps the obligation to transfer residence is not fully liberal, but it does not seem a clear violation of human rights either. Certain decisions may lead to subsequent tough duties or difficult obligations. And it is more legitimate to generate tough duties or difficult obligations when the previous decisions are taken freely based on purely volitive arguments (in our case, without reasons based on the principle of effective citizenship). In international public law, the person's will has a moderate and relative force since it normally has it inasmuch as the State recognises, accepts or protects it.

Article 20.1 of the 1997 European Convention states that citizens of the predecessor State habitually resident in the territory of the successor State have the right to remain there even if they have not acquired its citizenship. However, this rule does not necessarily mean that the successor State cannot require them to transfer their residence as a result of their voluntary refusal of its citizenship. As the commentary on the articles of the Convention explains, this provision protects those permanent residents in the territory of the successor State who were citizens of the predecessor State and who have not acquired the citizenship of the successor State (including those who have requested this citizenship but have been denied it, those who are still awaiting a decision on their citizenship application, and those who have not applied for citizenship of the successor State). Hence, in the light of the explanatory report, the provision does not seem to apply to those who have rejected the citizenship of the successor State in question.

Article 18.2 of the same 1997 Convention should be now analysed. This article reads that the States involved in the succession shall take account in particular of: (a) the genuine and effective link of the person concerned with the State; (b) the habitual residence of the personal concerned; (c) the will of the person concerned; and (d) the territorial origin of the person concerned. Nevertheless, one thing is taking account of the will of the person, and another is the obligation to follow the criteria expressed by it. In this sense, even though Article 18.2 requires the will expressed by the person to be taken into account, the first criterion that prevails according to the provision is the principle of effective citizenship, and, in second place, the habitual residence. Therefore, the natural person's right of option, according to international law, plays a more complementary role, yet one with rising importance in cases or circumstances in which the principle of effectiveness points to different solutions (such as a person who habitually lives in Catalonia but is originally from a place in Spain outside Catalonia, who still works and has most of their family there). In cases where there is a clash of effective criteria, the individual's will (and to some extent, affectivity as a complement to effectiveness) can play an important role.

It should be emphasised that, according to the commentary, Article 18 needs to be interpreted "in the light of the presumption under international law that the population follows the change of sovereignty over the territory in matters of nationality". Article 18

is entitled "principles" so, as the commentary well stresses, it does not formulate detailed rules directly applicable but establishes principles that, as such, have to be weighed up in view of the particular circumstances of the case. Regarding letter (c), the commentary says that it might entail a right of option or renunciation. Thus, Jaume Saura seems accurate when he concludes that the individual's will is subordinate to effective citizenship and the obligation to avoid statelessness, and consequently individual's will becomes particularly important in cases in which the principle of effective citizenship points in different directions when observing the individual's habitual residence, place of origin, family ties, place of work and source of income, and even their cultural and affective ties.[46]

Since the 1997 Convention regulates matters of citizenship in general and contains only general principles, not specific rules, on citizenship relating to the successions of States, the Council of Europe promoted the 2006 Convention on the Avoidance of Statelessness in relation to State Succession to complement it.[47] Article 7 of the 2006 Convention is entitled "Respect for the expressed will of the person concerned". This article provides that a successor State shall not refuse to grant its citizenship to the persons indicated by the Convention on the grounds that such persons can acquire the citizenship of another State based on an appropriate connection with that State. Therefore, this provision only limits the reasons why a State can refuse to grant citizenship. So, an *a contrario* argument points out that the State can reject the expressed will of the person when they lack an effective and genuine bond. This interpretation is confirmed in the explanatory report, which highlights that Article 7 applies exclusively to situations where a person has an appropriate connection with more than one successor State.[48] That is, the principle of effective citizenship is once again a precondition for respecting the will of the person, and the obligation to avoid statelessness is the other limit of this will.[49]

In the hypothetical case that the general right of option was recognised and a significant number of habitual residents of Catalonia decided to maintain their Spanish citizenship, one could question a newly born Catalan State in which a significant part of its population does not have political rights.[50] Nonetheless, this objection would have at

[46] *Vid*. SAURA, J. *Nacionalidad y nuevas fronteras en Europa.*

[47] The preamble of the 2006 Convention reads: "(n)oting that State succession remains a major source of cases of statelessness; (r)ecognising that the European Convention on Nationality (ETS No. 166), opened for signature in Strasbourg on 6 November 1997, contains only general principles and not specific rules on nationality in case of State succession".

[48] According to the explanatory report, Article 7 "is in particular relevant in cases where different family members might have an appropriate connection with several successor States and where the respect of the expressed will of the person concerned may preserve the family unity."

[49] The explanatory report on the 1997 Convention considers the obligation to avoid statelessness as a limit to the will of the person: "The will of the individual is a relevant factor in the permanence of the legal bond with the State which characterises nationality; therefore, States Parties should include in their internal law provisions to permit the renunciation of their nationality providing their nationals will not become stateless. Renunciation should be interpreted in its widest sense, including in particular an application to renounce followed by approval of the relevant authorities."

[50] RUBIO LLORENTE, F. "Ciudadanos de Cataluña", *La Vanguardia,* 23 of January 2014: "Within this forced framework, it is not thoughtless to imagine that a significant number of Spaniards that live in Catalonia today might wish to keep being so without leaving it, and that they would express this will to the Catalan and Spanish authorities. Since Spanish nationality entails European citizenship and human nature is frail, this option might be tempting for others as well, but it would be enough that those who voted against independence in the referendum were inclined to keep it for the resulting nascent State to

least two possible responses: (1) they would have taken this decision by virtue of an exercise of individual self-determination and that, in theory, would be in line with democratic liberalism; (2) they would have political rights in Spain and, thus, the right to political equality would be respected from a global perspective. In this sense, the fact that a person rejects the citizenship because that is their will does no harm. Having said this, the international obligation to offer appropriate information and enough time for people to express their will or consent in an informed, rational and reflective way must be underlined. Besides, there is the possibility that Catalan citizenship, as a precondition of the right to political participation, might attract numerous people who want their voice and their vote to matter in the constituent and constitutional process of the new Catalan legal order.

Dual Citizenship or the Renunciation of One Citizenship

Ultimately, one may wonder why it is important to have just one citizenship and why we focus on the principle of effective citizenship in a world that is becoming more liquid. The principle of effective citizenship helps to keep the bonds of loyalty between citizens and the State solid. The lack of a genuine bond and the uncontrolled rise of multi-citizenship might run in detriment to the Vattelian bond between citizen and State. If multi-citizenship becomes the general rule, there is the danger that the degree of responsibility and protection might decline because a State can excuse itself by alleging another State's responsibility, and vice-versa. That is, instead of increasing the protection of individuals, multi-citizenship could work as a mechanism to avoid responsibility both in general and in the long term. The old State might consider that the citizen has rejected its protection and trust by voluntarily acquiring another citizenship, and contrarily, the new State could argue that, by not renouncing their previous citizenship, the citizen only wants an eminently nominal new citizenship.

Further reasons reinforce the difficulties and problems of the tendency towards multi-citizenship. It might be somewhat incoherent to have political rights in several States (which could be or become economic rivals or political adversaries). If we focus on real politics, it would be complex to have military responsibilities with different States, and occasionally it might even be clearly contradictory and incompatible. Moreover, from a rather theoretical perspective, it is arguable to uphold that it would run counter to the principle of political equality among citizens. If this principle is analysed from a global perspective, the principle of "one citizen, one vote" would no longer apply, and this would lead to a relative political inequality. In short, different citizen rights and responsibilities take shape through belonging to a State by the bond of citizenship. Today's democratic liberalism is territorial and inextricably linked to more or less intense forms of nationalism. Nationalism, conceived as an emotional expression of the bond of citizenship, serves to sustain and nourish the social and democratic State by generating the values of mutual trust, cooperation and solidarity.

After this prelude, which emphasises the value of solid relationships and fears the loss of ties, bonds or roots which might come with liquid modernity, it seems reasonable that Article 9 of the ILC's Draft stipulates that the successor State may require the

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have a serious malformation: a democracy in which 40% of its inhabitants neither could vote nor had political rights."

renunciation of other citizenships as a condition for acquiring its citizenship. Likewise, Article 10 allows the predecessor State and the successor States to provide the loss of citizenship for those persons who voluntarily acquire the citizenship of another State related to the succession. These two articles are congruent with Article 1, which reads that citizens of the predecessor State affected by a succession of States have the right to the citizenship of (at least) one of the States concerned; Article 4, which requires the States concerned to take all appropriate measures to prevent these citizens from becoming stateless; and the aforementioned Article 11.1, which urges States to give consideration to the will of the persons concerned when granting citizenship.

Article 16 of the 1997 European Convention disallows a State to make the renunciation or loss of another citizenship a condition for the acquisition or retention of its citizenship where such renunciation or loss is not possible or cannot reasonably be required. As shown in the explanatory report on the Convention, this rule is meant to ensure that certain applicants are not forced to meet impossible or unfair requirements. For example, under this rule, a State cannot require a political refugee to return to their country in order to renounce their citizenship. Hence, unless the secession was unilateral, revolutionary and achieved through the use or threat of force, the Catalan State could require the renunciation of Spanish citizenship. If the secession was peaceful, all Spanish citizens living in Catalonia who wanted to acquire or maintain the Catalan citizenship could renounce their Spanish one. Article 8 of the 2006 European Convention specifies the "rules of proof". The second paragraph of this provision prevents a State from requiring people who habitually live in its territory to prove that they have not acquired another citizenship before granting them its citizenship. That is because this requirement could create a diabolical proof (*probatio diabolica*). In the Catalan case, a renunciation of Spanish citizenship could be required because, *prima facie*, it would not constitute a diabolical proof. Furthermore, it would not violate the obligation to avoid statelessness if the prior renunciation was made under the duty to grant the Catalan citizenship immediately with retroactive effect.

Nonetheless, in order to amply fulfil the 1997 and 2006 Conventions, is there a way not to make the acquisition of Catalan citizenship conditional on prior renunciation of Spanish citizenship while also rejecting the possibility of widespread recognition of dual citizenship? A first response would be to pass the ball to the Spanish State: let it be the one not to accept dual Spanish-Catalan citizenship. But this does not seem a sufficiently satisfactory answer. Another pragmatic way would be to distinguish between provisional and permanent citizenship. Provisional citizenship could accept a system of dual citizenship, while permanent citizenship could be more limited.[51] However, because of the need to enact permanent laws on citizenship without undue delays, another option should be sought. Among others, five more or less complementary mechanisms could be taken into consideration:

[51] This might be the strategy of the Advisory Council on the National Transition, which recommends that the provisional system of acquiring citizenship should not be conditional on renunciation of Spanish or any other citizenship. This sparks doubts as to whether the recommendation extends to the regulation of permanent citizenship. VIVER, C. (*et al*). "El procés constituent", p. 30. Yet, when Eritrea seceded from Ethiopia, the Claims Commission ruled a kind of dual citizenship by estoppel. We should bear in mind that as a general rule, citizenship cannot be removed according to the shifting will and political convenience of the moment. *Vid*. BROWNLIE, I., CRAWFORD, J. *Brownlie's Principles of Public International Law*, pp. 520-522.

1. Agreeing upon and implementing a communication and cooperation system between the Catalan and Spanish authorities on this matter.

2. Passing a general rule providing for the loss of Catalan citizenship if there is a voluntarily maintenance of a previous citizenship or the voluntary acquisition of a subsequent citizenship.[52]

3. Establishing the specific loss of Catalan citizenship because of a failure to renounce Spanish citizenship within a reasonable period of time.

4. Stipulating that the acquisition of Catalan citizenship is not effective until the renunciation of the Spanish citizenship is proved with the understanding that this acquisition has taken place previously and with (retroactive) effect to the precise time that the person lost the Spanish citizenship.[53]

5. Requiring a series of sworn statements in which the person pledges to reject Spanish citizenship or that they have already rejected it.[54] The absence of a sworn statement, a false statement or concealment of any relevant information could be grounds for the loss of Catalan citizenship. A misleading statement could lead to the loss of Catalan citizenship retroactively, along with any sanctions deemed appropriate if there was bad faith.

The Regulation of Citizenship through International Treaties

During the 20th century, citizenship has been regulated through international treaties on several occasions. Yet, a crucial distinction must be made: (1) Bilateral or multilateral treaties between the States involved to regulate matters relating to citizenship in a specific succession – such as a hypothetical international treaty between Catalonia and the rest of Spain.[55] These treaties have full legal force in a succession of States; that is, they have legal effects in a specific succession. (2) Multilateral treaties which regulate the phenomenon of citizenship in abstract – such as the aforementioned European Conventions of 1997 and 2006.[56] These Conventions are international treaties, and as such they are sources of international law by virtue of the customary norm *pacta sunt servanda*. However, they face the complex problem that they only bind the predecessor State inasmuch as it becomes the continuator State. Successor States – created either by secession or dissolution – are not bound by the international treaty in question.

[52] In this sense, it is worthy to recall some accepted reasons for the loss of citizenship contained in Article 7.1 of the 1997 Convention: (a) voluntary acquisition of another citizenship; (b) acquisition of the citizenship by means of fraudulent conduct, false information or concealment of any relevant fact; (c) voluntary service in a foreign military force; (d) conduct seriously prejudicial to the vital interests of the State; (e) lack of a genuine link between the State and a citizen habitually residing abroad; etc.

[53] Inspired by Article 9 of the ILC's Draft.

[54] Those sworn statements could be before the acquisition of the Catalan citizenship for cases of naturalisation or after for cases of automatic acquisition.

[55] As an illustration, the Treaty of Versailles regulated issues such as the loss or maintenance of German citizenship in view of the new territorial borders.

[56] The explanatory report on the 2006 Convention recognises: "4. The present Convention builds upon Chapter VI of the European Convention on Nationality by developing more detailed rules to be applied by States in the context of State succession with a view to preventing, or at least as far as possible reducing, cases of statelessness arising from such situations. It goes without saying that, in accordance with Article 34 of the Vienna Convention on the Law of Treaties, the Convention can only create legal obligations for the States which are Parties to it."

International law on succession of States in respect of treaties allows successor States to begin afresh, without previous international conventional obligations.[57]

In this sense, if Spain signed and ratified both European Conventions from 1997 and 2006, only the rest of Spain without Catalonia would be legally bound as the continuator State.[58] This being so, we should ask whether a hypothetical newly born Catalan State should quickly sign and ratify both Conventions or simply internalise them through Catalan legislation. For many reasons noted throughout this text, it might be too hasty to self-impose the principles, criteria and rules of these Conventions. Having said that, self-imposing only the principles could be even more dangerous because in many cases the rules of the Conventions (and their explanatory reports) qualify, nuance or limit their general principles. It does not seem a mere anecdote that by early 2014, only 20 of the 47 states in the Council of Europe had ratified the 1997 Convention and only 6 States had ratified the 2006 Convention. Among those States that had not ratified them, some are so important, similar and/or nearby Catalonia such as the United Kingdom, France, Spain, Andorra, Italy, Greece, Ireland, Switzerland, Belgium and Turkey.[59] A rather precipitous hypothesis could be that States which have current and relatively powerful secessionist movements do not seem inclined to ratify these Conventions.

The Responsibility of the Continuator State and the Spanish Constitutional Regulation of Citizenship

Following the wording of Article 6.1 of the Draft by the Special Rapporteur Mikulka, Article 10.1 of the ILC's Draft stipulates that the predecessor State (referring to the continuator State in the case of a secession) may provide that persons who voluntarily acquire the citizenship of the successor State shall lose its citizenship. As explained in the ILC's commentary, the loss of citizenship because of the voluntary acquisition of another citizenship is a common provision in the legislation of those States which aim to avoid multi-citizenship. In this sense, the ILC declares itself neutral on this policy; therefore, it neither prohibits nor encourages it. We have already seen that a State policy of avoiding multi-citizenship is not only normal but also rational and reasonable.

In a similar spirit but taking it a bit further, Article 6 of the 2006 Convention bans the predecessor State from withdrawing the citizenship of those persons who have not acquired the citizenship of the successor State and who would consequently be rendered stateless. Why do I say that these provisions are in a similar spirit? Because they seek to prevent the predecessor State from detaching itself from those persons who would become stateless as a result of withdrawing their citizenship. In this sense, it is possible to deduce from the Drafts of Mikulka and the ILC a similar norm to the one in the 2006 Convention by means of an *a contrario* and purposeful interpretation (*i.e.* avoiding statelessness in cases of succession for those persons who were previously citizens of the predecessor State). However, while the technique of the 2006 Convention is direct

[57] Some have mentioned a norm of international law which would stipulate that international human rights treaties are binding and/or applicable to successor States without prior ratification or notification of their will to continue. This norm is more a desire (*lex ferenda*) than a legal reality (*lex lata*).
[58] *Vid*. CRAWFORD, J., BOYLE, A. *Referendum on the Independence of Scotland.*
[59] Moreover, it seems relevant to note that Germany and Austria have ratified them, but with many reservations. http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=166

and interferes in the domestic jurisdiction of the State to define its citizenship, the technique outlined in the Drafts is subtler and more appropriate for a norm that aims to embody general international law and promote its gradual development.

Given these provisions and knowing that, according to international law, the legal power to determine citizenship is an eminently exclusive competence of each State, I shall now briefly analyse Spanish law on this matter. I will not only examine how Spanish law could be interpreted in the hypothetical case of Catalan independence but also, based on the virtues and vices of Spanish regulations on citizenship, I shall try to extract several lessons for the future Catalan constitutional regulation.

The regulation of citizenship is concentrated in Articles 11 and 13 of the Spanish Constitution (SC). It should be stressed that these provisions (and the right to citizenship that they establish and develop) are not particularly protected by Article 53.2 SC (preferential and summary protection before the ordinary courts, and the possibility of lodging an individual appeal to the Constitutional Court) nor by Article 81 SC (need to be regulated by organic statute), nor by Article 168 SC (the hardest constitutional amending process). The hypothetical Catalan constituent lawmakers should therefore be warned that citizenship determines the subjective scope of certain fundamental rights and, in particular, the important fundamental right to political participation (especially the right to active or passive suffrage but also the right to propose, support or vote in referendums and popular legislative initiatives). Hence, since citizenship determines the scope of application of the fundamental right to political participation, it does not seem coherent that the former is not legally protected in a very similar way to the latter. Likewise, nor does it make much sense to submit the fundamental rights, including political participation, to the hardest constitutional reform but not extend it to the provisions that regulate citizenship.

The first section of Article 11 SC de-constitutionalises the acquisition, conservation and loss of citizenship, and establishes a legislative reservation on these matters. A more extensive Catalan constitutional regulation should be considered. Beyond that, it is appropriate to establish a legislative reservation to develop the constitutional provisions. In contrast to the SC, it would not be wise to require an organic statute to regulate the fundamental rights while requiring an ordinary statute to regulate citizenship. There is a need for coherence regarding the legal rank to regulate the fundamental right to political participation and citizenship.[60]

[60] That is, it seems incoherent and counterintuitive for citizenship not to be regulated by a sort of organic statute if the Catalan constituent decides to implement this kind of statute to develop the fundamental rights recognised by the Constitution. So, here I would like to advice against establishing organic statutes similar to the Spanish ones (which, unfortunately, have already been mimicked by Article 62.2 Statute of Autonomy of Catalonia). If it is preferred that certain statutes require broad consensus, a truly broad consensus should be chosen, requiring for instance the approval of 3/5 of the Parliament. However, despite the uniqueness, we should bear in mind the difficulty of passing a Catalan electoral statute by 2/3 of the Parliament. What is more, the multi-party system in Catalonia might hinder the approval of statutes that require a qualified majority. Therefore, for the sake of the simplicity and clarity of the system, the general rule should be to pass ordinary statutes by simple majority and leave qualified majorities for constitutional reforms. The approval of organic statutes by a parliamentary absolute majority is an overly low consensus requirement in light of the multiple technical complications they end up generating. For example, ordinary judges, instead of referring to the Constitutional Court a contradiction between an organic statute and an ordinary one, are tempted to rule on the basis of a hierarchical relationship in favour of the organic statute and failing to apply the ordinary one. This seriously disturbs a concentrated system of judicial review of legislation. If the decision to introduce the category of organic statutes is

After this introduction to the Spanish constitutional regulation of citizenship, it is time to engage in a more detailed analysis. Article 11.2 SC states that "no natural-born Spaniard can be deprived of their nationality". Therefore, we could ask whether after the secession of Catalonia, this provision would allow Catalans to keep their Spanish citizenship (and so the citizenship of the European Union [EU]). In order to answer this question properly, we have to contrast the deprivation ("*privación*") of citizenship with the mere loss ("*pérdida*") of citizenship. This comparison will be made in light of the two sections of Article 11 SC: the first refers to loss while the second refers to deprivation. The deprivation of citizenship is a type of loss of citizenship. Thus, one clear case of loss but not deprivation of citizenship would be the voluntary acquisition of another citizenship.[61] If loss and deprivation of citizenship were synonymous, we would run the risk of putting up excessive barriers to natural-born Spaniards' right to emigrate, since numerous States do not tolerate dual citizenship. Instead, the constitutional prohibition against depriving citizenship as contained in Article 11.2 SC refers, for example, to the impossibility of criminally punishing a natural-born Spaniard by depriving them of their Spanish citizenship. Generally speaking, the secession of Catalonia would be a suitable case of loss rather than deprivation of citizenship.[62]

There is an additional reasoning to consider deprivation a kind of loss. When Article 11.1 SC establishes the legislative reservation to regulate the acquisition, conservation and *loss* of Spanish citizenship, why does it not extend this reservation to the *deprivation* of citizenship? One precipitous answer would be that the deprivation of citizenship is prohibited by the SC. However, this answer would be inaccurate because the SC only bans the deprivation of citizenship to "natural-born Spaniards". A second answer may claim that the SC did not want to extend the legislative reservation to the deprivation of citizenship. Under a systematic and holistic interpretation of the SC, this answer seems neither coherent nor reasonable. A third answer could point out that since it is a kind of sanction, the deprivation of citizenship would be within the legislative reservation of Article 25.1 SC. However, even though this answer might be possible, it

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finally taken, there should be an obligation to interpret the ordinary statutes in harmony with the organic ones (what it could be called a relationship of "soft" hierarchy or interpretative hierarchy).

[61] Article 24 of the Spanish Civil Code states: "1. Emancipated persons habitually resident abroad who voluntarily acquire another nationality or who exclusively use their foreign nationality attributed prior to their emancipation shall lose their Spanish nationality. 2. Such loss shall take place after the lapse of three years, counting, respectively, from the acquisition of the foreign nationality or from the emancipation. Nonetheless, those interested can avoid the loss by, within this stipulated deadline, declaring their desire to keep the Spanish nationality to the head of the Civil Registry (…)

In any event, emancipated Spaniards who expressly renounce their Spanish nationality shall lose it if they have another nationality and have their residence abroad."

[62] In this sense, López López states: "According to [Article 11.2], natural-born Spaniards shall not be deprived of their nationality. To understand this properly we must distinguish between loss and deprivation of citizenship, because even though they bear a relationship similar to genus and species (deprivation is one of the causes of the loss of citizenship), the difference between them is precisely what has justified the introduction of this article, which by the way was introduced by the decision of the Constitutional Committee of the Senate. The deprivation of nationality is a State act whereby someone is stripped of their nationality without or against their will. In contrast, the concept of loss encompasses the foregoing plus the cases in which denationalisation is an automatic legal result of a given event or because they have voluntarily acquired another nationality." LÓPEZ LÓPEZ, A. "Artículo 11. Nacionalidad (excepto apartado 3)", p. 142. Following the author, it seems that deprivation would cover, for instance, the punishment by final judgment by virtue of the criminal law involving the loss of nationality and when Spanish citizens would voluntarily joint a military or political office in a foreign country against the Government express prohibition.

seems unlikely and excessively sophisticated. Having reached this point, my answer is the following: if the constituent understood *deprivation* as a kind of *loss*, it was not necessary (nor suitable) to reiterate the legislative reservation for the former. That is, the fact that the regulation of *deprivation* is not explicitly included in the legislative reservation of Article 11.1 SC is a strong indicator for considering it a kind of *loss*.

Even if we avoided this essential distinction between loss and deprivation, the answer would still be negative because Article 11.2 SC would intuitively no longer be applicable to the citizens of the new independent State. Specifically, it would cease to be applicable to citizens of the new State who had voluntarily acquired citizenship there – or who had not rejected it when they could have – and for citizens who had acquired citizenship in the new State in accordance with international law, that is, by fulfilling the principle of effective citizenship. If those people sought the protection of Article 11.2 SC to keep Spanish citizenship, this might be considered an abuse of rights, not only detrimental to the Spanish State but to the Catalan State as well. This interpretation of Article 11.2 SC would require recognising the dual citizenship of the majority of Spanish citizens living in Catalonia, preventing the Catalan State from following an effective policy of single citizenship. And ultimately, it could run counter to international law so far as there would be no effective, real and genuine bond with Spain. That is, Spanish constitutional law neither could nor should be interpreted counter to the principle of effective citizenship as an expression of general international law.[63] We have already observed that international practice in State succession shows that citizenship follows the change in sovereignty. Yet, the residents of Catalonia who have not acquired Catalan citizenship, or who have validly rejected it, could indeed be protected from statelessness through the constitutional right of Article 11.2 SC; and hence, could maintain their Spanish citizenship.

The International Obligation of Cooperation: Bilateral v. Unilateral Secession

The obligation of cooperation can be divided into the international obligations of mutual information and negotiation. The obligation of information could take the shape of the obligation of States involved in a succession to share with each other the laws of citizenship and any general and specific decisions deemed pertinent. There are international offices in place to convey this pertinent information on citizenship in order to facilitate cooperation among the States involved in a succession.[64] Since international law indicates that the regulation of citizenship is a domestic jurisdiction of the State but

[63] As noted in the commentary on Article 4 of the ILC's Draft: "Accordingly, when there is more than one successor State, not everyone has the obligation to attribute its nationality to every single person concerned. Similarly, the predecessor State does not have the obligation to retain all persons concerned as its nationals. Otherwise, the result would be, first, dual or multiple nationality on a large scale and, second, the creation, also on a large scale, of legal bonds of nationality without appropriate connection."

[64] As noted in the explanatory report on the 2006 European Convention: "52. The provision indicates that co-operation shall at least take place with the Council of Europe and with the United Nations High Commissioner for Refugees (UNHCR). Co-operation between these two organisations is already taking place within the framework of a Memorandum of Understanding concluded between the two on joint action in areas of mutual interest. 53. Within the Council of Europe, co-operation on matters relating to nationality, including instances of statelessness, takes place within the European Committee on Legal Co-operation (CDCJ), which acts as the intergovernmental body for co-operation among the member States of the Council of Europe by virtue of Article 23 of the European Convention on Nationality. (...)"

internal law alone has limited capacity to prevent statelessness, the referred international texts promote the obligation of the States involved in a succession to negotiate. Article 19 of the 1997 European Convention establishes the need to regulate matters relating to citizenship by agreement amongst States concerned. The obligation to negotiate seems to be implicitly contained in Article 2 of Mikulka's Draft and Article 4 of the ILC's Draft when they stipulate that the States involved in a succession shall take all the appropriate measures to prevent persons who were previously citizens of the predecessor State from becoming stateless. The commentaries on both articles further clarify that it is not an obligation of result but an obligation of conduct.

Since it is an obligation of conduct instead of an obligation of result, an exit out of the door (negotiated secession) should be distinguished from an exit out of the window (unilateral secession). In the former, the issue of citizenship should be regulated by international treaties. To this end, treaties should be reached which include the right of option and/or the right to dual citizenship for the part of the population that maintains or intends to maintain effective, real and genuine bonds with both Catalonia and Spain. That is, respecting the principle of effective citizenship, the right of option and dual citizenship should be more welcome in the case of bilateral independence. General dual citizenship could even be negotiated for a relatively long period of time, which would allow citizens to exercise the right of option in a safe, unhurried and thoughtful way. It is not irrelevant to recall that Article 11.3 SC broadly regulates the possibility that the Spanish State engage in dual citizenship treaties with the Latin American States and with States which "have had or have a special tie with Spain". Moreover, the article also allows Spaniards to naturalise in those States without losing their original citizenship.[65]

The hypothetical secession of Scotland from the United Kingdom would have been a bilateral secession, that is, one negotiated and agreed upon, unlike the scenario of Catalonia and Spain thus far. The Scottish tactic of "soft" secession aimed to sell Scotland's independence as a minor change: a democratic and consensual reform instead of a revolutionary rupture. This is how the Scottish government's 2013 proposal should be understood when it planned that: (1) British citizens who reside in Scotland and British citizens born in Scotland but living elsewhere would automatically be considered Scottish citizens; and (2) no barriers would be placed on dual citizenship.[66] This proposal required only a minimum connection, while it was also pluralistic in the sense that it allowed a continuation of the bond of citizenship between future Scottish citizens and the former parent State, the United Kingdom. The proposal of dual citizenship seemed realistic bearing in mind that the United Kingdom has traditionally been tolerant of multiple citizenship. Nonetheless, according to the regulation currently in force, British citizens living outside the United Kingdom cannot pass down their British citizenship more than one generation. What is more, with the general goal of responding to the Scottish idea of "soft" secession with a severe conception of the secession, the British government rightly recalled that only those who remained in the

[65] *Vid*. Article 24.1 *in fine* Spanish Civil Code.

[66] SCOTTISH GOVERNMENT. *Scotland's Future: Your Guide to an Independent Scotland*, 2013, p. 495. In the same vein, see Article 18 of the *Scottish Independence Bill*, 2014. It should be borne in mind that Scotland does not have its own citizenship today. That is, there is no internal or secondary Scottish citizenship within the United Kingdom. SHAW, J. "Citizenship in an independent Scotland: legal status and political implications", p. 19.

Union would have the sovereign authority to decide who would remain a British citizen.[67]

Besides, British citizens whose only connection with Scotland is the fact that they were born there (birth that may have been eminently accidental – giving birth on a trip, for example) should have the right to reject Scottish citizenship. On the other hand, the former parent State's tolerance of multiple citizenship does not have to be extended to eminently weak or accidental connections or bonds. As mentioned above, multiple citizenship can weaken the bonds of loyalty, trust and solidarity between the *demos* (citizenry) and the *cracy* (government). However, the United Kingdom and the States around it and within its sphere of influence have remarkable exceptions to the need to be a citizen in order to have rights to political participation. The citizens of the Republic of Ireland can vote in the elections to the Parliament of Westminster and local elections, just as British citizens can vote in the Parliamentary elections and the local Irish elections. Apparently, this extension of the rights to vote beyond the status of citizen can be found among the member States of the Commonwealth.[68]

In contrast to Scotland's approach, if a secession is unilateral and rupturist, it does not seem appropriate to generalise the possibility of holding permanent dual citizenship and the right of option should be more restricted. We have already seen that the bond of citizenship is legal, political and symbolic. This bond should form the basis of a close relationship of trust, loyalty and solidarity among citizens, which may not be expressed with the same intensity if permanent dual citizenship were the general rule. A hypothetical extreme case can be outlined in order to illustrate this claim. Imagine that the unilateral independence of Catalonia leads to a huge political uproar in Spain. The Spanish State then manages to veto Catalonia's hypothetical entry into the European Union and the consideration of Catalans as EU citizens. As a result of this uproar, an ultranationalist movement rises or a military coup d'état is waged against the central government of the Spanish State. This new ultranationalist Spanish government decides to prevent the consolidation of the new Catalan State by force. If there is a norm of international law that prevents States from requiring their citizens who hold dual citizenship to fight against one of their States (in other words, if there is a norm of international law which prevents a State from forcing its citizens to take up arms against their fellow citizens),[69] how could the democratic government of Catalonia require its

[67] *Vid*. SECRETARY OF STATE FOR THE HOME DEPARTMENT. *Scotland analysis: Borders and citizenship,* 2014, pp. 60-62. SHAW, J. "Citizenship in an independent Scotland: Legal status and political implications", pp. 37-38. A careful reflection on the problems that might come with the spread of dual Scottish-British citizenship can be found in: BARBER, N. "After the Vote: the Citizenship Question". Keating deems it somewhat improbable that there would be widespread dual Scottish-British citizenship. Having said that, the author believes that the issue of citizenship would be difficult to resolve given the inherent complexity of British citizenship. KEATING, M. *The independence of Scotland,* p. 87.

[68] *Vid*. Secretary of State for the Home Department. *Scotland analysis: Borders and citizenship,* 2014, p. 68. SHAW, J. "Citizenship in an independent Scotland: Legal status and political implications", pp. 29-31. However, Keating explains that the Irish precedent should be qualified and took cautiously for at least two reasons: (1) after independence, the Irish continued to be part of the Commonwealth until 1949, and even after this date, any Irish who could prove a "substantial connection" maintained certain citizenship rights. (2) The reciprocal capacity to vote in the respective elections can be partially explained by the conflict in Northern Ireland, as a way of bringing the two communities closer together without questioning their respective sovereignties. KEATING, M. *The Independence of Scotland,* p. 88.

[69] *Vid*. KELSEN, H. *Principles of International Law.*

citizens (who would also be Spanish citizens, according to hypothetical Catalan law) to wage war against their compatriots?[70]

Beyond war, if Catalonia's secession was unilateral, the principle of determining by international agreement the different issues and controversies on matters of citizenship would be weaker. In the case of unilateral secession, negotiation and reciprocity lose importance because the spirit of bilateralism was not fulfilled in the earlier stage and the new State wants to exercise unilaterally the political power that it was previously unable to enjoy. In the case of a unilateral secession of Catalonia, citizenship should be regulated in accordance with the principles of moral justice and general international law, but not in accordance with what Spain deems proper. Besides, there will be cases in which moral justice, general international law and the Catalan interest will concur when regulating something that may not be regulated by the principle of bilateralism. In these cases, the obligation to negotiate would be weaker and harder to require.

The Principle of Non-Discrimination and the Objection of Original Discrimination

Article 15 of the ILC's Draft prohibits discrimination "on any ground" in relation to the right to retain or acquire a citizenship or the right of option. This provision is inspired but also rectifies Article 12 of the Draft by the Special Rapporteur Mikulka, which was more nuanced and limited to banning discrimination for ethnic, linguistic, religious or cultural considerations. Article 5 of the 1997 European Convention forbids discrimination on the grounds of sex, religion, race, colour or national or ethnic origin. Article 4 of the 2006 European Convention prohibits discrimination on the basis of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Yet, with the exception of the 1997 Convention, the prohibition of discrimination is circumscribed to persons who had the citizenship of the predecessor State. In other words, only discriminations against persons who were citizens of the parent State prior to the succession are forbidden.[71]

Should the limited scope of these provisions within the citizens of the predecessor State be considered discrimination on the grounds of origin? Or nationality? Or national origin? I think that it could be considered discrimination on the grounds of origin, nationality or national origin if the term *discrimination* is defined as the Dictionary of the Institute of Catalan Studies does: "making a distinction, differentiating, distinguishing, discerning or treating (someone) as an inferior". However, it seems a rational and reasonable discrimination. International law does not aim to lower the number of stateless persons in the world after a succession of States, but it does aim to

[70] A similar problem occurred in Eritrea's independence from Ethiopia. According to the Eritrea-Ethiopia Claims Commission, those qualified to vote in the 1993 referendum on independence earned *de facto* dual citizenship. However, the outbreak of the war in 1998 placed these *dual citizens* "in an unusual and potentially difficult position". *Vid*. CRAWFORD, J. *The Creation of States in International Law*, pp. 54-55.

[71] Article 1 of the ILC's Draft establishes that every individual who, on the date of the succession, has the citizenship of the predecessor State has the right to the citizenship of at least one of the States involved in the succession. Article 4 of the same Draft stipulates that the States concerned shall adopt all the appropriate measures to prevent persons who had the citizenship of the predecessor State from becoming stateless as a result of the succession. The other documents mentioned, with the exception of the 1997 Convention, have similar provisions.

ensure that the number does not rise as a result (and international law thus concentrates on the citizens of the predecessor State). When the I/A Court was asked to deliver an opinion on discrimination in the matter of the acquisition of citizenship through naturalisation, the Court reminded us that "not all differences in legal treatment are discriminatory as such, for not all differences in treatment are in themselves offensive to human dignity". Quoting a judgement of the ECtHR, the I/A Court recalls that the legal practice of a large number of democratic States reveals that a distinction is only discriminatory when it "has no objective and reasonable justification".[72]

In connection with the issue of citizenship as nationality, and especially the new citizenship of a newly born State, the objection of original national discrimination is weak and somewhat counter-intuitive. Nonetheless, I am highlighting this original national distinction made by the three referred documents not because it is irrational or unfair but to attenuate and dilute the principle of non-discrimination in relation to the right to retain or acquire a citizenship or the right of option. It is such a powerful internal contradiction or incoherence that it nuances and in some cases naysays the whole principle of non-discrimination in matters of citizenship in the succession of States. This does not mean that any distinction is just, but that it should serve to spark a powerful critical sense.

Let us imagine that the future Catalan State wanted to establish the possibility of dual Catalan-Spanish citizenship. If the Catalan legal order accepts this dual Catalan-Spanish citizenship, but not dual Catalan-Moroccan citizenship, for example, would it not be discriminating on the grounds of nationality or national origin? If it is stipulated that Moroccans need ten years to acquire Catalan citizenship while EU citizens only need four, would this not be discrimination on the grounds of nationality? These are not utopian questions; they are inspired by Spanish regulations and are easily locatable and plausible in other liberal and democratic States. Precisely, the I/A Court considered that there can be objective and reasonable justifications to require longer or shorter periods of residence from some applicants for naturalization than others depending on the proximity of values and cultural traits:

> Given the above considerations, one example of a non-discriminatory differentiation would be the establishment of less stringent residency requirements for Central Americans, Ibero-Americans and Spaniards than for other foreigners seeking to acquire Costa Rican nationality. It would not appear to be inconsistent with the nature and purpose of the grant of nationality to expedite the naturalization procedures for those who, viewed objectively, share much closer historical, cultural and spiritual bonds with the people of Costa Rica. The existence of these bonds permits the assumption that these individuals will be more easily and more rapidly assimilated within the national community and identify more readily with the traditional beliefs, values and institutions of Costa Rica, which the State has the right and duty to preserve.[73]

A few words should be added on the discriminations on the grounds of language. Why should a State not be able to discriminate on the grounds of language when granting its citizenship? For example, why should the future Catalan State not be allowed to require passive (or even active) knowledge of the Catalan language before attributing the status of citizen of Catalonia on a person? As we shall see, a language test does not seem a suitable way of regulating the succession on citizenship. Yet, this test seems perfectly compatible with democratic liberalism, because States are not nationally neutral, and

[72] Advisory opinion 4/84, above, paragraph 56.
[73] *Ibid*. paragraph 60.

while respecting the principles of liberal nationalism, they can promote their own national culture and language. Once again, it is pertinent to cite the I/A Court's opinion:

> Consistent with its clearly restrictive approach, the proposed amendment also provides for new conditions which must be complied with by those applying for naturalization. Draft Article 15 requires, among other things, proof of the ability to "speak, write and read" the Spanish language; it also prescribes a "comprehensive examination on the history of the country and its values." These conditions can be deemed, prima facie, to fall within the margin of appreciation reserved to the State as far as concerns the enactment and assessment of the requirements designed to ensure the existence of real and effective links upon which to base the acquisition of the new nationality. So viewed, it cannot be said to be unreasonable and unjustified to require proof of the ability to communicate in the language of the country or, although this is less clear, to require the applicant to "speak, write and read" the language. The same can be said of the requirement of a "comprehensive examination on the history of the country and its values." The Court feels compelled to emphasize, however, that in practice, and given the broad discretion with which tests such as those mandated by the draft amendment tend to be administered, there exists the risk that these requirements will become the vehicle for subjective and arbitrary judgments as well as instruments for the effectuation of discriminatory policies which, although not directly apparent on the face of the law, could well be the consequence of its application.[74]

It is now time to make a very brief comment on discrimination on the grounds of political opinion. Can a State not require the people who want to naturalise there to swear an oath to the Constitution of the country? Both theory and experience show that an oath to the Constitution is a common requirement in naturalization procedures. Nevertheless, if we take the oath seriously, assuming that it entails sharing or accepting the constitutional values and principles, it becomes a form of discrimination on the grounds of political opinion.[75] If we assume that the person who wants to naturalise is an anarchist, is not hypocritical and wants to stick to their word, requiring them to swear an oath to the Constitution could be a form of political discrimination.

These considerations on discrimination on the grounds of nationality and language, on the one hand, and discrimination on the grounds of political opinion, on the other, lead to a higher philosophical debate between liberal nationalism and constitutional patriotism which I cannot address in this reflection.[76] Instead of addressing this debate, I would simply like to recall that in the Baltic successions we can find examples of linguistic requirements and constitutional oaths for naturalisation. Some of them may seem excessive, but we should bear in mind that these republics were annexed to the USSR in violation of international law, received an influx of Soviet immigrants who had no desire to integrate, and for decades were deprived of mechanisms to force this integration.[77]

Article 5.2 of the 1997 European Convention establishes that States shall be guided by the principle of non-discrimination between its citizens, whether they are citizens by birth or have acquired its citizenship subsequently. A strict interpretation of this provision would incline us to consider Article 11.2 SC being against the Convention, as it distinguishes between natural-born citizens, who cannot be deprived of their citizenship, and naturalised citizens. Could or should the Catalan Constitution say

[74] *Ibid*. paragraph 63.
[75] The oath of naturalisation "by legal imperative" seems questionable.
[76] *Vid*. VERGÉS, J. *La nació necessària*. BOSSACOMA, P. *Justícia i legalitat de la secessió*.
[77] These naturalisations complemented the citizenship automatically attributed to the former citizens of the Baltic Republics based on the revival of the laws on citizenship prior to the Soviet annexation of 1940. *Vid*. SAURA, J. *Nacionalidad y nuevas fronteras en Europa*, pp. 97-102.

something similar? Imagine a naturalised Catalan citizen who attacks the metro of Barcelona on behalf of an anti-Western Islamic terrorist group. Respecting the principle of non-retroactivity of unfavourable criminal law, it seems acceptable for the Parliament of Catalonia to provide for a terrorist crime of this nature the punishment of depriving the perpetrator of citizenship and expelling them from the country (among other possible penalties). In fact, this punishment seems to be in compliance with Article 7.1.d of the 1997 Convention. It has already been noted that the rules of the Convention would qualify, nuance or limit its general principles.

On the level of political morality, it is not clear that, with certain limitations and in a reasonable way, distinctions between citizens and non-citizens cannot be made regarding social and economic rights. The bond of citizenship is and generates a bond of more intense rights and responsibilities between the State and the person. Some specific examples in which it would seem reasonable to prioritise citizens can be mentioned: (1) the purchase of publicly-subsidised housing (publicly-subsidised rentals might be treated differently than purchases since they are more temporary); (2) social security or assistance for citizens abroad, without making unemployment benefits conditional on residence in the territory of the State; (3) the right to work and especially to hold certain public offices. In short, since the 1997 Convention tends to undervalue the institution of citizenship, we should think carefully about whether we want to follow it. As I outlined above, this could have a negative rebound effect against the social and democratic State.

Before concluding this section, several reflections must be worded. Discriminatory deprivation of citizenship must be distinguished from discriminatory denial of citizenship. As a general rule, depriving a citizen who expresses or manifests a fascist ideology of their citizenship would be intolerable. In contrast, it seems tolerable, as long as it prescribed by law, to deny citizenship to a foreigner (the citizen of another State) who wants to naturalise but admits to being or is proven to be a fascist. Discrimination in a context of individual naturalisation has to be distinguished from discrimination in a context of collective naturalisation (of State succession). While it seems acceptable to deny cases of individual naturalisation on the grounds of language, ideology and a criminal record, this possibility should be extremely exceptional in cases of State succession. For instance, it seems quite clear that the new State arising from a secession cannot deny citizenship to anyone who has a criminal record because this would mean requiring the continuator State to absorb a disproportionate mass of citizens with criminal records or, if it refused to maintain their citizenship, condemning them to statelessness. This condemnation to statelessness could also be considered incompatible with the principles of the presumption of innocence and *non bis in idem*. In conclusion, the massive risk of statelessness and the need for succession to follow the principle of effective citizenship require interpreting the liberty of States to select their citizens in a more limited way than in situations of stable territorial borders.

The Right to Citizenship and the Right to Political Participation in Secessionist-Constituent Decision-Making

Article 7 SAC stipulates that Spanish citizens who have administrative residence in Catalonia benefit from the political status of Catalans or citizens of Catalonia.[78] Under the terminology of international law, this Catalan citizenship provided by Article 7 SAC could be called internal or secondary citizenship. Following the precedents that occurred in the dissolution of the Czechoslovak Republic and the dismemberment of the Yugoslav Federation, this internal Catalan citizenship could become the citizenship of the hypothetical independent Catalan State. The SAC was passed not only by the Catalan Parliament but also by the Spanish Parliament as an organic statute.[79] So, it would be difficult for the Spanish State to deny the recognition of the transformation of this internal or secondary citizenship into the citizenship of the newly born Catalan State. The second advantage of following Article 7 SAC is that administrative residence, unlike civil residence, is determined based on habitual residence and would therefore match the main criterion used by international law – based on the domicile, fixed abode or habitual residence of the citizens of the predecessor State in the territory of the successor State – while also following the usual criterion used in the dismemberment of federal, composite or decentralised States – the criterion based on the internal or secondary citizenship.

However, even though following Article 7 SAC would be a rational and reasonable choice, it does not seem to be the only one. For example, a liberal criterion detached from the legal order of the predecessor State could be used, which would open up the possibility of everyone who habitually resides in the country when independence is declared to acquire Catalan citizenship, regardless of whether or not they were a Spanish citizen (that is, citizen of the predecessor State).[80] From a cosmopolitan liberal viewpoint, those who want to follow a different criterion than the latter seem to have the burden of proof – in theory – of explaining why Spanish citizenship should legally be followed at a time of rupture with the Spanish legal order. Furthermore, despite the fact that in the previous section I defended that the distinction in treatment between citizens of the predecessor State and other residents in the secessionist territory might have an objective and reasonable justification, the possible discrimination entailed in the simple rule stipulating that Spanish citizens living in Catalonia will acquire Catalan citizenship *ex lege* as a result of a secession, I am inclined to develop a more sophisticated theory. Hence, I shall now propose an updated theory which will also attempt to provide a normative explanation of why we should follow the Spanish legality on the matter of citizenship.

From a constitutional standpoint coherent with the philosophical perspective of liberal nationalism, we ought to consider who are the members of the national community that should hold the individual right to political participation in the decision on sovereignty. By virtue of the *test of interest* and the principles of coherence and congruence, the right

[78] Article 7.2 SAC also opens up the status of citizen of Catalonia to Spanish citizens living abroad whose last administrative residence was Catalonia, and to their descendants, if they request it.
[79] *Vid*. Articles 81 and 147.1 SC.
[80] For instance, the 2002 SNP's draft constitutional text for Scotland, prepared by Neil MacCormick, focused on residence as the criterion for attributing Scottish citizenship regardless of whether or not one previously had British citizenship. SHAW, J. "Citizenship in an independent Scotland: legal status and political implications", p. 6.

to vote on secession (both the right to vote on the representatives and the right to vote in the referendum) and the right to become a citizen of the new State must be duly connected and should reflect an open, inclusive, tolerant and pluralist nationalism. In other words, the right to political participation in the revolutionary decision to create a new *demos* should be closely tied to the rights and obligations generated by this new *demos*.[81] Thus this section will defend the thesis that the possibility of becoming a citizen of the new State shall be granted to those persons who has had the right to political participation in the popular consultation on secession and/or in the latest democratic elections that preceded the unilateral decision to secede. For this reason, I define this proposal as democratic.

The ideal rule that should predominate in the issue of the new citizenship stemming from a unilateral liberal and democratic secession process is: whoever has the right to vote in the elections and referendum on secession should be able to become a citizen of the new State. This ideal rule would follow the principle of the test of interest. That is, the ones that should decide are those who are to be subsequently bound by the rights and obligations of the new State. It seems that this ideal rule could be followed in the Catalan case for several reasons: (1) Catalonia has a democratic Parliament and universal suffrage – both active and passive – and equal vote are recognised. (2) In principle, there would be some subjective coherence and congruence between those who hold the right to vote in the referendum or *popular consultation* on secession and those citizens who have active and passive suffrage in the representative elections of secessionist empowerment – or prior to the secession. For this reason, we must be coherent regarding those who are entitled to elect the democratic representatives – the electoral franchise – and those who can vote in the referendum – the *referendary* franchise.[82] (3) Moreover, as I have sketched out, in the case of Catalonia's secession from Spain, it seems that it would not be problematic to transform the Spanish citizenry residing in Catalonia, citizens of Catalonia according to Article 7 SAC, into the citizenry of the hypothetical Catalan State. In this case, there would be a sound confluence of the principle of citizenship (referring to the parent or predecessor State) and the principle of residence (referring to the territory to become independent).

When citizenship in the parent State is ethnically restricted, when there have been colonisation processes, military invasions, genocides, forced displacements or political refugees, and when the parent State is either totalitarian or authoritarian, deviating from this model may be fully justified. In the cases of Estonia and Latvia, the Russian minority had the right to participate in the referendum on secession (because residents could vote), but after the new States were established, they were not automatically considered citizens and their naturalisation was barred.[83] In Catalonia, we should distance ourselves from these precedents because the more or less military occupation is far back in time and the large numbers of Spanish immigrants to Catalonia in the 20th century have generally been satisfactorily integrated and rooted (perhaps, among other

[81] Therefore, not only the favourable decision to create the Catalan State but mainly the right to political participation seems to be what links to the new rights and obligations generated by this new *demos*.
[82] On this point, the *non-referendary popular consultations* and other forms of participation designed to ask the citizens of Catalonia about their political future might generate serious problems of coherence.
[83] *Vid.* TAMIR, Y. *Liberal Nationalism*, p. 159. SAURA, J. *Nacionalidad y nuevas fronteras en Europa*, pp. 97-102. ANGLADA, M. *Quatre vies per a la independència*, pp. 127 & 139-140. Buchanan, for example, believes that the Soviet colonisers of the Baltic Republics and their descendants should not have a voice in the decision on secession. BUCHANAN, A. *Secession*, p. 159.

reasons, because of their low economic capacity).[84] In Catalonia, there have been no forced displacements or political refugees – Catalans forced to leave Spain for ethnic, national, linguistic and/or political reasons – at least since the Spanish democratic transition of 1977 and the SC of 1978. Nor is there a situation similar to a colony in which an aboriginal community that has been grievously mistreated by the colonising power should be favoured.

The voters in the referendum and/or elections on secession would become the founding citizens of the new State, and, in principle, this constituent fact would bind the constitutional and legal regulation on the acquisition and loss of citizenship of the new State. The principle of good faith would negate the possibility of artificially altering the electoral and *referendary* franchise in order to get a democratically fictitious result. One rather technical question that should be borne in mind is the desirability or need to freeze the franchise census at the time of taking the decision to ask the citizenry whether they want to secede in order to prevent it from being manipulated. This question would not only be important to avoid fraud in the decision on secession, but also to determine Catalan citizenship according to the ideal rule advocated in this reflection.

All together seems reminiscent of the popular dilemma of which came first: the chicken or the egg? The democratic proposal presented somehow solves the dilemma by equating or likening the chicken and the egg. What is more, additional related problems would also be solved. The same (or very similar) group of people who could vote for the secession would be able to: (1) elect the constituent assembly, (2) ratify the hypothetical Catalan Constitution by referendum, and, either before or after that, (3) elect the ordinary Parliament that would approve the Catalan statute on citizenship, which it would implement the constitutional provisions on this matter. All this would avoid the scenario in which a person who has decisively participated in one of these votes or elections would be unduly excluded from the others.

In a liberal democracy, it is difficult that the secessionist entity could legitimately deny the participation in the democratic decision on independence to citizens of the parent State residing in the seceding territory. Likewise, it also seems complicated for the newly-democratically-born State to deny citizenship to those persons who have had the right to political participation in the decision to secede. The new State would have the moral burden of proof to deny the right to citizenship to those persons who have held the right to political participation. If the motivation was inappropriate, this would indirectly question the democratic majority which gave rise to the advent of the new State. Assuming that the vote is secret,[85] denying the right to citizenship of persons who may have voted for independence would lead to a sort of nullification of the decision to secede with *ex tunc* (retroactive) effects. Thus, failing to match the new right to citizenship with the right to political participation is questionable not only morally but also somehow strategically. Obviously, it should be discarded the possibility of denying the right to citizenship to persons who did not participate in the referendum or elections because perhaps they thought they were not informed enough to vote well. Somehow, their decision not to participate might have even made independence possible since it was not a vote against it.

[84] There may be some problems of integration and rootedness in some towns or zones where a large number of newcomer population has settled.

[85] Violation of the secrecy of voting would be one of the problems of basing the legitimacy of secession on the fundamental right to petition.

Minors and Family: *Jus Sanguinis* and *Jus Soli*

One doubt raised by the proposal made in the previous section is what should be done with minors who did not have or do not yet have the right to vote. There would be at least three broad options which I shall outline below with the understanding that they must be reflected and developed in further detail: (1) A first option would be to grant the right to citizen to those minors that, if they had been legal adults at the time of the decision on secession, they would have been able to vote. (2) A second option would be to add to the first option minors who are under the charge of or dependent on persons who had the right to political participation in the decision on secession. (3) And a third option would be to grant the right to citizenship to all minors born in Catalonia who are habitual residents of Catalonia and whose parents or guardians are not opposed to it.

Regardless of which option is chosen, bearing in mind that they could be complementary, the classic debate between *jus sanguinis* and *jus soli* should be addressed because this debate is closely connected to the citizenship of minors and to determining the effective criteria to acquire the citizenship by birth.[86] As the Spanish Civil Code shows, *jus sanguinis* and *jus soli* are not antagonistic.[87] In general, it is wrong to consider these two criteria as mutually exclusive, given that, with varying degrees, the majority of legislations combine both of them.[88] The mix of the territorialisation of law, the democratisation of politics, the evolution towards liberal nationalism and the increase in immigration and tourism, amongst other factors, has tempered essentialist postures and forced a mixture of *jus sanguinis* and *jus soli*. Nonetheless, Article 20.2 ACHR establishes that every person has the right to the citizenship of the State in whose territory they were born if they do not have the right to any other citizenship. Article 1 of the 1961 Convention on the Reduction of Statelessness stipulates something similar. It is interesting to highlight how these Conventions turn *jus soli* into an *ultima ratio* mechanism to ensure the right to a citizenship.

International law tries to ensure that minors have the right to a citizenship from the moment they are born. This is the position of Article 24 of the International Covenant on Civil and Political Rights, Article 3 of the Declaration of the Rights of the Child and Article 7.1 of the Convention on the Rights of the Child. Article 13 of the ILC's Draft establishes that a child of a person concerned, born after the date of the succession of States, who has not acquired any citizenship, has the right to the citizenship of the State concerned on whose territory that child was born. This provision is repeated in a similar fashion by Article 1.2 of Mikulka's Draft and Article 10 of the 2006 European Convention.[89] Given the consensus, it would be wise to internalise this provision. The main reason for quickly internalising this norm could be the following: since in many legal orders children's citizenship depends on their parents' citizenship, and in the context of the succession of States the parents' citizenship could be uncertain, such a rule is needed to ensure that children do not become stateless. This rule would solve

[86] That is, if the acquisition of original Catalan citizenship should depend on the citizenship of the parents (*jus sanguinis*) or on the territory where the person was born (*jus soli*).
[87] *Vid*. Article 17 and forward of the Spanish Civil Code.
[88] BROWNLIE, I., CRAWFORD, J. *Brownlie's Principles of Public International Law,* p. 511. BATCHELOR, C.A. "Statelessness and the Problem of Resolving Nationality Status", p. 157.
[89] The difference which can be pointed out in Article 10 of the 2006 Convention is the obligation to grant citizenship to these children, in contrast to their right to acquire it.

minors' temporary statelessness, but it could also be useful in cases in which the parents die during the succession of the legal orders and uncertainty becomes more extended. It would entail the internalisation of the *jus soli* rule as an *ultima ratio* mechanism to avoid the statelessness of children in cases of successions of States.

Beyond minors themselves but closely related to their welfare, in a successions of States it is necessary to be sensitive and to safeguard the unity of the family. To this end, Article 12 of the ILC's Draft stipulates that the States involved in a succession should take all appropriate measures to allow families to remain united or to be reunited. In the commentary, the ILC recognises that it is desirable to allow families to acquire the same citizenship in a succession of States. Yet, the ILC also admits that Article 12 does not require States to guarantee the same citizenship; instead, it limits itself to a more modest goal: to allow the family to remain together or to reunite, even if their members have different citizenships.[90]

Mechanisms for Acquiring Citizenship

In broad terms, there could be two systems to acquire Catalan citizenship as the result of the succession of States: (1) automatic acquisition *ope legis* with the person having the possibility to renounce Catalan citizenship as long as they can demonstrate that they hold – or could hold – another effective, real and genuine citizenship; or (2) acquisition through naturalisation based on the person's will as long as they can demonstrate effective, real and genuine bonds with Catalonia.

Automatic acquisition would be reserved for those persons who had the right to vote in the last elections prior to the democratic secession. This acquisition would happen *ope legis*; that is, by the automatic effect of primary legislation or other high sources of law. The effects of this acquisition would be retroactive to the time when the succession of States is considered to have taken place (*i.e.* when the succession of internal and international responsibilities takes place). Even if these retroactive effects violate the general principle under which legal provisions are applied *pro futuro*, they would fulfil the higher purpose of avoiding statelessness. Such retroactive application is defended by the aforementioned international texts on the succession of States on matters of citizenship. This automatic acquisition would apparently be quick and easy to materialise administratively, given that it would be granted to everyone who had the right to vote in the ballot boxes on secession.[91] It also has the advantage of ensuring that the future Catalan State has a significant mass of citizens in relation to the size of the population that lives in the territory and this could help to avoid or mitigate hypothetical problems of democratic representation and legitimacy.

Regarding the acquisition of citizenship through naturalisation, we have already noted that the person's will is not enough: effective, real and genuine bonds with Catalonia

[90] Having said this, it seems that problems might arise with divorced parents and homosexual families. If the parents are divorced and live in places that end up on either side of the new border, how is the citizenship of minors decided? If one State recognises homosexual marriage and homosexual couples and the other does not, would the State that recognises this kind of union be the one that must ensure family unity, or must all the States involved do so? These are just some of the questions that might arise.

[91] As noted in the previous section, this automatic acquisition could be more complex for minors who could not vote.

must be demonstrated. These bonds could become more flexible when the person is stateless or at the imminent risk of becoming stateless, or when it serves the purpose of family unity. When naturalisation has the function of avoiding statelessness or ensuring family unity, it could have retroactive effects similar to automatic acquisition. Last but not least, this acquisition of citizenship has the advantage that if a person formally expresses their desire to become a Catalan citizen, it happens a kind of symbolic and moral acceptance of the so called social contract (so, there is an express consent of the bond and the political obligations with the new State).[92]

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[92] In the case of the automatic attribution of citizenship, tacit acceptance could merely involve not having expressed rejection of this attribution. However, we should note that automatic acquisition would not be unacceptable even if this rejection were denied because acceptance of the social contract could be tacit or hypothetical. The tacit Lockean acceptance of the social contract occurs when not emigrating. The hypothetical Rawlsian acceptance of the social contract depends on the hypothetical consent given by free, equal, rational and reasonable citizens in an original position and under a veil of ignorance. Therefore, the moral legitimacy of associations of public law (the State being the association of public law *par excellence*) tend to depend on tacit or hypothetical consent, rather than express consent of associations governed by private law.

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