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Extending Voting Rights to Foreigners: Reinforcing Equality or Reinventing Citizenship?

I. FRAMING THE ISSUE

The question of granting the right to vote to individuals that reside in a given country without citizenship, i.e. foreigners, or more specifically immigrants, constitutes an issue that, although not exactly new,¹ has certainly raised a growing attention in the last years, and stirred a certain controversy among the opinions of the general public, political elites, legal scholars, and political scientists, as a consequence of the intensification of the migratory cycles, of the interest of democratic states in deepening the social integration of immigrants, and, finally, of the gradual assumption of new conceptions of democracy based on progressively higher standards.

In most countries, political participation, through the quintessential rights of passive and active suffrage, is still restricted to citizens.² Revolutionary at the time of its proclamation, the idea that sovereignty resides essentially in the nation and that it is exercised through representatives legitimately chosen by its citizens, has been translated into a concept of democracy based on the idea of a nation which, in consequence, limits the right to take part in the electoral processes to only citizens, depriving aliens who don't enjoy that status (immigrants, refugees, diplomatic representatives) of such a right, despite being, in many cases, legal residents of the country. Hence, the distinction between citizens and aliens has been the *magna divisio* that throughout the XIX century,

¹ See, for a historical perspective, Benito Aláez Corral: «Nacionalidad y ciudadanía: Una aproximación histórico-funcional», *Revista Electrónica de Historia Constitucional* No. 6 (2005), available on-line at hc.rediris.es/06/articulos/html/Numero06.html?id=02 (visited 20.09.2009).

² Pablo Santolaya Machetti & Miguel Revenga Sánchez: *Nacionalidad, extranjería y derecho de sufragio*, Centro de Estudios Políticos y Constitucionales, Madrid, 2007, p. 12.

and the XX century up until the birth of the concept of «European citizenship», has separated the population of a State into two different categories.³

However, the increase in the migratory flows verified in the last decade has introduced an element of distortion in an equation which, up to that moment, seemed to be reasonably balanced. Indeed, the receiving countries of immigration –most of them developed countries, with stable democratic regimes and a widely supported identification with the highest standards in human rights– have witnessed how as the absolute number of immigrants has increased, the gap between the number of inhabitants of the country and the number of its citizens has widened. These countries, to put it simply, have seen how the identity between «the governors» and «the governed», which represents the basis of modern democracy, was once again disrupted. This happens to be a very relevant problem, as García Soriano has underlined:⁴

«Not recognizing the right to political participation of a large percentage of individuals in full possession of their civil rights questions the legitimacy of power. Hardly anyone might consider as lawful, and in consequence respectable, a legal and political system which rules his daily life, but denies his possibility of taking part in its composition and in determining its guidelines.»

Additionally, and though it may seem common place to mention, several factors have contributed to the gradual erosion of the traditional principle of state sovereignty, which at this moment seems to survive more at the theoretical rather than practical level. Among these, the globalization of economy, the rapid improvement in communication technologies, modernization of transportation, and now, from a legal perspective, the ever growing demand for full and universal respect for human rights, a phenomenon that has become an effective limit to the not-so-long-ago sacred principle of the freedom of the States in handling their internal affairs. Finally, it must be noted that the slow erosion of the States' powers, which have both increased by transferring competencies to the many international organizations in which they are integrated, and decreased by implementing decentralization policies implying the transfer of powers to regions, cities or any other kind of sub-state entities.

After providing some data on the rise of the migratory phenomenon and evaluating the current situation of public policies toward the integration and inclusion of immigrants, this paper will focus on how the right to vote (both in its active and passive dimensions) is actually regulated in the different electoral modalities (local, regional, parliamentary and, wherever it exists, presidential

³ Ángel G. Chueca Sancho & Pascual Aguelo Navarro: «El derecho de voto de los extranjeros en España en perspectiva europea», *Documentos CIDOB Migraciones* No. 19 (2009), p. 8.

⁴ María Vicenta García Soriano: «Sobre la viabilidad de la participación política de los extranjeros en las elecciones municipales», *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol* No. 60/61 (2007), p. 259-272, at p. 261.

elections, as well as referenda) in different countries around us, as well as to what extent and under what conditions, the right to vote has been made accessible to immigrants. Only after this analysis has been carried out will it be possible to reach conclusions regarding this issue and to put forward some *de lege ferenda* proposals. In doing so, we will take the Spanish case as a reference, while also expanding the focus of our analysis to cover other relevant cases.

2. THE DIMENSIONS AND ORIGINS OF MIGRATORY FLOWS: THE SPANISH CASE

In recent years all the European countries have suffered a sensible increase in the migratory flows, although Spain –traditionally, a country of emigrants– has been the place where that increase has been shown in more dramatic manner.⁵

The increase in foreign population has not taken place in the same manner in the different European countries, nor have these countries seen the immigration uniformly distributed. The geographic origin of the immigration and its causes has been different as well: although most immigrants crossed the European borders with the intention of earning a decent living, for many of them –specially those coming from sub-Saharan Africa–, immigration has all too become the only way to escape from extreme poverty and war.

In concrete terms, the number of registered foreigners in Spain has been growing in a vertiginous and sustained manner during the last decade, amounting nowadays to 5.708.940 persons, almost twice the number recorded just seven years earlier.⁶

Data regarding the geographical origin of foreigners arriving to Spain reveals that roughly 41.1% are already European citizens (we are referring, of course, to the enlarged EU, including the 12 new member States incorporated between 2004 and 2007), while those coming from South and Central America constitute 30.1%; Africans amount to 18.4%; Asians to 5.4%; non EU Europeans to 4.0%; and North Americans a mere 0.9%.⁷ With regard to specific nationalities,⁸ Romania (829.715), the UK (387.226), Germany (195.579), Italy (183.999) and Bulgaria (169.195) are the most represented European countries

⁵ For an overview of how this fluxes increased during the first half of the present decade, see Héctor Cebolla Boado & Amparo González Ferrer: *La inmigración en España (2000-2007) De la gestión de flujos a la integración de los inmigrantes*, Centro de Estudios Políticos y Constitucionales, Madrid, 2008.

⁶ To be more precise, the official figures of registered immigrants in Spain are: for 2004, 3.034.326; for 2005: 3.730.610; for 2006: 4.144.166; for 2007: 4.482.568; for 2008: 5.268.762, for 2009: 5.648.671, and for the year 2010, the already referred figure, which represents a 1,1% increase in relation with the previous year, and a porcentaje over the total population of the country of 12,2%. See Instituto Nacional de Estadística: *Nota de Prensa: Avance del Padrón municipal a 1 de enero de 2010. Datos provisionales*, INE, Madrid, 2010, p. 3

⁷ See Instituto Nacional de Estadística: *Nota de Prensa...*, cit., p. 5

⁸ See Instituto Nacional de Estadística: *Nota de Prensa...*, cit., p. 5

among immigrants in Spain, while Morocco (746.760), Ecuador (395.069), Colombia (289.296) and Bolivia (210.624) have to be specially taken into consideration among non-European countries. From Asiatic countries, the highest number of immigrants comes from China (156.607); from Central American and the Caribbean countries, the Dominican Republic (90.195); and among the non EU-European countries, Ukraine (82.373).

With these figures in mind, it seems fair to assume that the largest group of foreign residents in Spain consists of EU citizens only because the European Union has substantially expanded its borders throughout the last decade, incorporating countries that constitute a large majority of the migratory flows such as Romania and Bulgaria. Were it not for this border expansion, the massive increase in Latin American immigration may have been the largest group of immigrants in Spain, since, in recent years, Spain has become a major magnet for Spanish-speaking immigrants wishing to settle anywhere in Europe. Therefore, the panorama of earlier decades, dominated by expatriates, especially elderly and mostly affluent ones, from Northern Europe with a special presence of British, German, Dutch and Scandinavians should be considered a thing of the past. According to the «Strategic Plan of Citizenship and Integration 2007-2010», while in 1992 half of the foreigners living in Spain came from any of the UE-15 countries, nowadays this group represents less than one fourth of the total number of legal immigrants. It was in 2002 when the number of immigrants with EU passports was matched by Latin Americans, a number which has not stopped increasing since.

With regard to the Arab-Muslim immigration, and as reported by the census data of 2010, the most numerous group are still Moroccans, who represent a 13.1% of the total foreign population and count among the fastest growing groups (with a 4.0% increase compared to the previous year), while the Algerians, Nigerians and Senegalese present far more modest figures. Unlike what happens with immigrants from other regions of the world, excluding Asians, those from Arab countries are predominantly male. Another defining feature of the immigration from Arab countries is the presence of a strong religious bond, which is maintained in spite of being in a different country with a majority of Christians, a fact not so intensely perceived in the case of immigrants from Latin America. As far as Asian immigrants are concerned, their profile is a bit different from the rest of immigrants, since they usually come with their families and set up their businesses with prospects for a long-term stay. As it has been said, China is the most represented nationality and the one with the highest growth rates, followed far behind by Pakistanis, Filipinos, Indians and Japanese.

3. SOCIO-POLITICAL CONSEQUENCES OF THE INCREASE OF MIGRATORY FLOWS

The increase of migratory flows has caused a diversification of the ethnic composition and, as a result, of the social structure of the receiving country, an implication of undeniable political relevance.

In spite of the fact that immigration in Spain hasn't been a recent phenomenon –the time when several countries in Latin-America lived under harsh dictatorships and Spain became one of the destinations chosen by those who could, or were obliged to, escape from them is not too far away– the truth is that this phenomenon has been intensified in a dramatic way throughout the last years. As the «Strategic Plan for Citizenship and Integration (2007-2010)» correctly points out,⁹ in the past decade Spain has turned from being a country of emigrants to becoming a country of immigrants, and also from being a relatively homogeneous society to becoming a highly diverse one, hosting many different cultures, customs, languages and religions. The society as a whole, and public institutions as well, have reacted slowly in general and have confronted this new scenario with rather limited insightfulness. Only in recent years when the problem has turned into a serious one due to its magnitude and unregulated growth do they appear to be taking measures to control this new phenomenon.

In this process, the incorporation of Spain to the European Economic Community in 1986 attained an special relevance, since it facilitated the gradual arrival of workers –specialized or not– from different countries all around the EEC, generating for the very first time the well-known «call effect». In those moments, the most urgent priorities for Spain were that these newly arrived workers didn't take the jobs from Spanish nationals, or created security problems, reasons enough to warrant the necessity of new pieces of legislation which allowed for the expulsion of *undesirables* foreigners.¹⁰

However, as integration deepened, the many benefits that for both parties provides immigration became more apparent, among them the improvement of fertility rates, a more active population, economic growth, and a substantial increase in the collection of taxes for the Treasury, somehow matched by the corresponding increase in public spending, in the case of the receiving country; and the positive economic impact caused by money transfers to the countries of origin of the emigration flows. Without forgetting, of course, the potential of conflict entailed by the modification of social structures in both countries, the emergence of new ethnic minorities, or the tensions introduced in the sustainability of the Welfare State.

⁹ See Ministerio de Trabajo y Asuntos Sociales: *Plan Estratégico de Ciudadanía e Integración (2007-2010)*, MTAS, Madrid, 2007 (Available on-line at http://www.mtin.es/es/sec_emi/Integralmigrantes/PlanEstrategico/index.htm. Last retrieved on 20.09.2010. There are abridged versions in English and Arabic, as well as in Spanish).

¹⁰ Xavier Rius Sant: *El libro de la inmigración en España. Historia, legislación, política y debate social desde el franquismo hasta nuestros días*, Almuzara, Córdoba, 2007, p. 21.

One of the major changes that have occurred in recent years is that the desire to return to the country of origin that most immigrants once harboured has been gradually disappearing as a consequence of changes in the origin and the motivation to migrate, and by the substantial advances in integration mechanisms. Now, most immigrants not only want to stay permanently in the country they have settled in, but are yearning to bring their families with them, as well. Consequently, most immigrants aspire to enjoy, in its fullest form, not only the standard of living of the receiving country, but also of the rights that this country grants to its nationals.

It seems beyond any doubt that as far as civil, economic, and social rights are concerned, citizens and aliens should be (and to a very large extent, they actually are) in the same position before the law.¹¹ Conversely, it is still a source of controversy whether political rights, traditionally awarded only to citizens, should also be extended to foreigners that are permanently and legally settled in a host country as a result of immigration, and under what conditions, and/or in exchange for what sort of compensations they should be presented, and if they should be presented in an equal manner or by establishing different parameters and restrictions according to the national origin of the foreigners.

4. VOTING RIGHTS FOR ALIENS: THE INTERNATIONAL LEGAL FRAMEWORK

Once considered the problem through a mostly sociological approach, we should now provide a legal approach to it, from the perspective of national, but also comparative and international Law.¹²

Regarding this matter, it must be pointed out from the very beginning that comparative Law shows, as so does the Spanish case, a clear linkage between the legal condition of citizen and the possibility of enjoying the right of active and/or passive suffrage, as well as its exercise at any electoral level. Thus, only in very exceptional cases, and in limited environments, do foreigners enjoy the right to vote.

4.1 International law norms concerning the issue of voting rights for foreigners

As Hervé Andrés has pointed out¹³ «the general principles of equality of rights and non-discrimination, enshrined in several international instruments and

¹¹ For a global analysis of this issue, see Rainer Bauböck (ed.): *Migration and Citizenship: Legal Status, Rights and Political Participation*, Amsterdam University Press, Amsterdam, 2007.

¹² See Pablo Santolaya Machetti & María Díaz Crego: *El sufragio de los extranjeros. Un estudio de Derecho comparado*, Centro de Estudios Políticos y Constitucionales, Madrid, 2008.

especially in the Universal Declaration of Human Rights of 1948, could provide a basis for granting voting rights to aliens». At the end of the day, he continues, the Universal Declaration opens with the assertion that «All human beings are born free and equal in dignity and rights». However, «most of these texts set out, first, a universalistic principle, and then set out to establish restrictions on this principle, especially by frequently limiting the exercise of rights only to nationals of the states».

A first set of elements to be taken into consideration is the abundant legal regulations issued by the many organs of the United Nations (UN), the Council of Europe and the European Union (EU), which happen to be the international organizations that more frequently have expressed their concern about this issue.

Regarding the legal norms produced by the UN, we should underline four basic documents:

- The Universal Declaration of Human Rights, adopted by the UN General Assembly (Resolution 217 A [III] of December 1, 1948), in which Article 21.1 refers to the right to political participation stating that «Everyone has the right to take part in the government *of his country*, directly or through freely chosen representatives» [italics have been added], consequently excluding from its protection the foreigners living in a country other than their own.
- The International Covenant on Civil and Political Rights, adopted by the UN General Assembly (Resolution 2200 A [XXI] of December, 16, 1966). It's Article 25 bans any «unreasonable restrictions» to the right «to take part in the conduct of public affairs, directly or through freely chosen representatives», and «to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors» –but only after having identified «every citizen» as the owner of these specific rights, thus exempting States from any legal obligation to grant voting rights to non-citizens.
- The Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in Which They Live, adopted by the UN General Assembly (Resolution 40/144, December, 13, 1985), which very tellingly lacks any reference to the right of suffrage (active and/or passive) of immigrants.
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the UN General Assembly (Resolution 45/158 of December 18, 1990). Amidst several references to other forms of political participation –like the right to form associations and trade unions in the State of employment– the

¹³ Hervé Andrés: «El derecho de voto de los extranjeros en el mundo», *Revista de Derecho Migratorio y Extranjería* No. 18 (2008), pp. 9-43, in pp. 13-14.

Declaration defends the right of migrant workers and members of their families «to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation», and obliges both the State of origin and the State of employment of the migrant, «as appropriate and in accordance with their legislation, [to] facilitate the exercise of these rights». But regarding their right to electoral participation in the latter, the Declaration falls short of providing any guarantee, just stating that «migrant workers may enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights».

The clear conclusion we get from even the most superficial analysis of these three norms is that there is not, in any of them, the slightest criticism of the linkage between citizenship and the right to suffrage and, therefore, about the practise of restricting the right to vote only to citizens.

Regarding the Council of Europe, we must mention three different instruments (the legal nature of which is also different):

- The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), adopted in Rome on November 4, 1950. Though Article 3 of the Protocol No. 1 (adopted in Paris on March 20, 1952), proclaims the right to free elections by committing the High Contracting Parties to «hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature», the norm only identifies the owner of such right by using the term «people», which does not seem likely to include the entire population of a State, but only its citizens. That is why some scholars believe ¹⁴ that we have an institutional guarantee here, rather than a subjective public right. As far as the European Court of Human Rights is concerned, despite having stated that the ownership of this right belongs to citizens, this Court has also deemed that member States should enjoy quite a broad margin of autonomy for ruling in this field. In this sense, we consider there is a relevant coincidence with Article 23.1.b of the American Convention on Human Rights (San José, Costa Rica, November, 7-22, 1969). Moreover, the declaration held in Article 16 CEDH («nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens») allows us to

¹⁴ Javier García Roca: «Comentario al artículo 3 del protocolo 1º. Del compromiso internacional de los Estados de organizar elecciones libres al derecho de sufragio de los ciudadanos», in Javier García Roca & Pablo Santolaya (eds.): *La Europa de los Derechos. El Convenio Europeo de Derechos Humanos*, Centro de Estudios Políticos y Constitucionales, Madrid, 2005, p. 825.

believe that, according to ECHR, the right to (active and/or passive) suffrage of foreigners is not a question of special relevance.

- The Convention on the Participation of Foreigners in Public Life at the Local Level, adopted in Strasburg on February 5, 1992. This is a legal instrument with special relevance¹⁵ since its Article 6.1 states that «[e]ach Party undertakes, subject to the provisions of Article 9, paragraph 1, to grant to every foreign resident the right to vote and to stand for election in local authority elections, provided that he fulfils the same legal requirements as apply to nationals and furthermore has been a lawful and habitual resident in the State concerned for the 5 years preceding the election». ¹⁶ However, However, the Convention allows Contracting States to declare, when depositing its instrument of ratification, acceptance, approval or accession, that they intends «to confine the application of paragraph 1 to the right to vote only». Moreover, this Convention, which came into force on May, 1, 1997, has been ratified only by Albania, Denmark, Finland, Island, Italy, Norway, Holland and Sweden so far, while the text has been signed but not ratified yet by the United Kingdom (1992), Cyprus (1996), the Czech Republic (2000), Slovenia (2006), Lithuania (2008) ¹⁷ –a fact which certainly reveals a not so promising future.

- Diverse non-binding recommendations and decisions emanating from the Council of Europe. Among them, Recommendations 712 (1973), 769 (1975) and 799 (1977) –the three of them ratified through Recommendation 1500 (2001)–; by virtue of which the Assembly of the Council of Europe has repeatedly supported the participation of immigrants in the public life of their country of residence through the recognition of the passive and active right to vote in local elections, if that residence was at least five years long. However, the Assembly itself has emphasized that «in general terms» the active and passive right to suffrage in parliamentary elections ought to be limited to citizens.

With respect to the European Union, Article 19 of the Treaty establishing the European Community –and now Article 22 of the Lisbon Treaty– must be specially highlighted, since it states that «Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State», and that the same

¹⁵ Ángel G. Chueca Sancho & Pascual Aguelo Navarro: «El derecho de voto de los extranjeros en España en perspectiva europea», cit., pp. 23-30.

¹⁶ Take into account that, according to article 6.2: «However, a Contracting State may declare, when depositing its instrument of ratification, acceptance, approval or accession, that it intends to confine the application of paragraph 1 to the right to vote only».

¹⁷ Data provided by the Council of Europe Treaty Office. On line at <http://conventions.coe.int>

should happen in relation to European Parliament Elections. This disposition has its correlation in Articles 39 and 40 of the Charter of Fundamental Rights of the European Union which respectively declare that «every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State» and that «every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State». Always keeping in mind that, obviously enough, European citizenship only belongs to those who previously possess the nationality of one of its Member States (Article 20 of the Lisbon Treaty).¹⁸

It also deserves an especial reference Directive 94/80/CE, of December 19, 1994 (subsequently complemented by Directives 1996/30/CE, of May 13, of September 23, 2003, and 2006/106/CE of November 20) which presents the detailed arrangements whereby citizens of the Union residing in a Member State of which they are not nationals may exercise the right to vote and to stand as candidates in municipal elections. This Directive establishes relevant exceptions to the right to suffrage in those Member States where the proportion of citizens of the Union of voting age who reside in it but are not nationals of it exceeds 20% of the total number of citizens of the Union residing there who are of voting age. The Directive also allows Member States to determine that the functions of Mayor, Deputy Mayor, or member of the governing council of a basic local government unit may be restricted to their own nationals.

Finally, jumping to the Latin American scope, Article 23.I of the American Convention on Human Rights (or «Pacto de San José») prescribes that:

«Every citizen shall enjoy the following rights and opportunities:

¹⁸ However, some European institutions have made some statements questioning the link between citizenship and the right to vote or be elected: The European Commission (COM/2000/0757); the European Economic and Social Committee (*Official Journal of the European Union* No. 208 of September, 3, 2003, pp. 76-81); and especially the European Parliament. The EP has repeatedly recommended Member States to award voting rights for local elections to non-EU citizens with a legal and permanent residence in their territory of at least three years. This has been the cases of Resolutions 2000/2231(INI), 2001/2014 (INI), 2002/2013(INI), 2006/2056(INI) and 2008/2331(INI). In particular, the July 6, 2006 resolution called «on Member States to encourage the political participation of immigrants and discourage their political and social isolation» and «on the Commission to carry out a legal review of existing provisions relating to European civic citizenship in the various Member States as well as of current Member State practices regarding the right of long-term resident immigrants to vote in local and municipal elections», while the April 22, 2009 resolution underlined the importance «of migrant organisations who play unique roles in the integration process by giving migrants opportunities for democratic participation», and called «on the Members States to facilitate systems for the support of civil society in the integration process through enabling migrants' presence in the host society's civil and political life, enabling participation in political parties, trade unions and the opportunity to vote in local elections».

- a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
- b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
- c. to have access, under general conditions of equality, to the public service of his country.»

However, as previously noted, Para. 2 allows for the introduction of restrictions to that right on the basis of, among other conditions, nationality. Once again, and following the steps of the International Covenant on Civil and Political Rights, the term «citizen» is used as a synonym of «national», so in this new geographic scope, foreigners are also deprived of any international guarantee concerning the exercise of the right to active and/or passive suffrage.

4.2 Constitutional norms concerning the issue of voting rights for foreigners

Considering the extension and the intensity with which the internal legislation of the States detaches the right to suffrage from the status of citizen, the following fivefold typology of cases must be considered: ¹⁹

I.– Countries where the exercise of the right to vote by foreigners is accepted in every kind, or at least in most, electoral processes.

It is the case of the United Kingdom, where article 1.1 of the Representation of the People Act (2000) states that a person is entitled to vote as an elector at a parliamentary election in any constituency if on the date of the poll he (a) is registered in the register of parliamentary electors for that constituency; (b) is not subject to any legal incapacity to vote; (c) is either a Commonwealth citizen or a citizen of the Republic of Ireland; and (d) is of voting age (that is, 18 years or over). Of course, being a EU Member State the UK also grants the right to vote in local elections to

¹⁹ Other valuable overviews of this issue are contained in Pablo Santolaya Machetti & Miguel Revenga Sánchez: *Nacionalidad, extranjería y derecho de sufragio*, cit., pp. 35 ff.; David C. Earnest: «Voting Rights for Resident Aliens. A Comparison of 25 Democracies», paper presented at the 2003 Annual Meeting of the Northeast Political Science Association and the International Studies Association-Northeast; and Harald Waldrauch: «Electoral Rights for Foreign Nationals: A Comparative Overview of Regulations in 36 Countries», paper presented at the Conference *The Challenges of Immigration and Integration in the European Union and Australia*, Sydney, 18-20 February 2003; Sylvie Strudel: «Polyrythmie européenne: le droit de suffrage municipal des étrangers au sein de l'Union, une règle électorale entre détournements et retardements», *Revue française de science politique* No. 53/1 (2003), who proposes another insightful classification of cases, however limited to the EU countries; and Ainhoa Uribe: «El inmigrante como sujeto titular del derecho al sufragio en la Unión Europea», forthcoming in *Cuadernos de Derecho Público*.

citizens of the remaining 26 EU countries, so nationals from over 80 countries of the five continents may participate in these electoral processes. In the case of Ireland, setting aside the presidential elections (where the right to vote only is conferred to nationals), British citizens (since 1984) and those of other EU States (since 1992) whose countries of origin observe a reciprocal stance in this issue enjoy the right to vote in the parliamentary elections, while in local elections, all foreigners who legally reside in Ireland and were registered enjoy the right to vote and to be elected since 1999.²⁰

In the case of Portugal, the special treatment to nationals of other countries is restricted to those with which a special historic bond exists – i.e., the citizens from the nations belonging to the *Lusofonia*–, limited to some public offices, and subject to the principle of reciprocity. As Article 15.3 of the Portuguese Constitution states:

«Save for access to appointment to the offices of President of the Republic, President of the Assembly of the Republic, Prime Minister and President of any of the supreme courts, and for service in the armed forces and the diplomatic corps, rights that are not otherwise granted to foreigners are accorded, as laid down by law and under reciprocal terms, to the citizens of Portuguese-speaking states who reside permanently in Portugal.»

Besides, all other foreigners may enjoy the right to active and passive suffrage in the local elections under the condition of reciprocity, and provided they can demonstrate a period of residence of two years in the case of citizens from Portuguese-speaking countries; which is increased in one more year for the rest of citizens; and to four and five years, respectively, when the right of passive suffrage is concerned).

In similar terms, Brazil confers political rights to Portuguese citizens, always under the condition of reciprocity (in local elections, demanding a period of residence of, at least, 5 years). Finally, in the case of Uruguay, although limited to the right to vote (active suffrage), Article 78 of the 1967 Constitution, declares that

«Foreign men and women of good behaviour, with a family constituted in the Republic, who possessing some overdrawn or owned capital, or practising some science, art or industry, have habitual residence in the Republic for no less than 15 years, shall have the right to suffrage, without previously obtaining legal citizenship.»

2.– Countries that grant the right to suffrage to foreigners, only in local elections.

²⁰ It should be noted that, despite the generosity of the Irish regulation, its practical consequences are rather limited: since no EU State but the UK meets the reciprocity requirement of granting Irish citizens the right to vote in parliamentary elections, EU citizens in the Republic of Ireland may only exercise the right to vote in local elections.

In this case, regulations vary from case to case, essentially depending on three different parameters: the scope of voting rights (since in some cases only active suffrage is granted, while in others active and passive suffrage are granted); the country of origin of the foreigner (since some times the right to suffrage is recognized to some foreigners, and not to others, depending on their nationality); and whether or not there exists a requirement of a given period of legal residence.

Of course, this is the system applied in all the Member States of the European Union with respect to EU citizens, following the prescriptions of Article 19 of the Treaty Establishing the European Community. But this is also the system adopted in some of these countries regarding non-EU citizens,²¹ and also in other countries as Chile (active suffrage with legal residence of five years), Colombia (active suffrage in local, and district elections, and in local popular polls, with legal residence in the country), Paraguay (active suffrage with legal residence in the country, and passive suffrage with a seven years residence), Perú (active and passive suffrage in local and district elections with legal residence in the country for two years; foreigners barred from running for mayors), Venezuela (active suffrage in local and state elections, but not in federal ones –for the Presidency or the Assembly of the Republic– with legal residence in the country for ten years), Norway (active and passive suffrage with legal residence in the country for three years, not required to other Nordic countries citizens), and Iceland (active and passive suffrage with legal residence in the country for three years in the case of other Nordic countries citizens, five years in al other cases).

3.– Countries where electoral legislation is a federal competence only as far as national elections are concerned, while at the local level it is a competence of the existing sub-national units (cantons, provinces,

²¹ Some of the countries included in this category are Belgium (since 2004, active suffrage after five years of permanent legal residence and the promise to respect the Constitution and the fundamental rights), Denmark (since 2001, active suffrage only, after three years of permanent residence, except for Icelanders and Norwegians, to whom this requirement does not apply, and who may be elected as well); Estonia (since 2002, active and passive suffrage after three years of residence, living in an specific municipality for five years); Finland (active and passive suffrage after two years of residence; except for Icelanders and Norwegians); Hungary (active suffrage with legal residence in the country); Lithuania (active and passive suffrage, after five years of residence; in the first case, for individuals being eighteen or older; in the second case, for individuals above twenty years old); Luxembourg, the only EU country applying Directive 94/80/CE (since 2003, active suffrage after five years of residence; passive suffrage only for EU citizens, after five years of residence); The Netherlands (active and passive suffrage after five years of residence); Slovakia (since 2001, active and passive suffrage, both in local and regional elections, for legal residents); Slovenia (since 2002, active and passive suffrage, except for the position of mayor, for permanent residents); and Sweden (active and passive suffrage after five years of residence –not required for Icelanders and Norwegians– in both municipal and departmental elections).

states...) and foreigners do enjoy the right to vote only at the local level, and only in some, but not in all of them. This would be the case of countries like Argentina,²² Switzerland,²³ or the United States.

4.– Countries that not only restrict the right of suffrage of foreigners to local elections, but also impose a reciprocity clause to its effective guarantee.

Apart from Spain, a case which we are going to analyze in more detail, this is the situation of other countries such as Bolivia and the Czech Republic, where active suffrage (not the passive one) is granted to foreigners with a certain residence period in the Republic only if they belong to countries which reciprocate in this issue.

And 5.– Countries that limit to their own nationals the right of suffrage in every kind of election.

The most representative case is that of the Federal Republic of Germany, where unlike in the French and Spanish examples, the idea –expressly confirmed by the Constitutional Federal Court in its Sentence *BVerfGE* 83, 37/50, among others– has been adopted that the configuration of the people as the subject of sovereignty which is expressed through the elections, has to be based upon the possession of the German nationality, an absolute requirement to take part in any part of the electoral process. Such sovereignty (with the inherent prerequisite of nationality) is also expressed through local elections, a restriction that has impeded the political participation at this specific level of those who are not German nationals (with no exception other than the one derived from Article 19 of the Treaty Establishing the European Community, and now Article 22 of the Lisbon Treaty).

²² In Argentina, such rights are recognized in the Provinces of Buenos Aires (active suffrage after two years of residence), Santa Fe (active and passive suffrage, except for the position of mayor, for residents in the province), Neuquén (active and passive suffrage, except for the position of mayor, for residents in the province for at least two years), Misiones (active and passive suffrage after three years of residence), Catamarca (active suffrage after four years of residence), and the city of Buenos Aires (active suffrage), as well.

²³ In Switzerland voting rights for foreigners vary from canton to canton, with the majority of them according no voting rights to non-Swiss residents. Only eight cantonal parliaments have already recognised the right to vote at communal and/or cantonal elections, since in 1849 Neuchâtel was the first one to do so at a communal level. It was for more than a century an exception, since only in 1978 Jura followed suit and granted the vote for foreign residents at communal and cantonal elections and the right to be elected in the former. Some cantons have even deferred this decision to the communes, like Appenzell Outer Rhodes (where following a 1996 decision to delegate to each municipality the authority to decide on the subject, only three out of 20 communes have granted voting rights to foreigners) or Basel City. Conversely, the canton of Bern, the second largest in terms of residents, decided on 23 January 2007 with 77 votes to 73 against letting foreigners vote at local level.

Other EU countries that share this principle –and also accept the above mentioned exception– are Austria, Bulgaria, Cyprus, France, Italy (with some formal rather than real or effective peculiarities in the regions of Toscana and Emilia Romagna), Greece, Latvia, Malta, Poland (in spite of the fact that just a mere legal –not a constitutional– reform would allow the exercise of the right of suffrage to foreigners in the local elections), and Romania. Outside the EU, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, the Dominican Republic, Liechtenstein, Russia, Ukraine, Algeria, China, The Philippines, Gambia, Ghana, Equatorial Guinea, India, Mali, Morocco (a country that even bans the exercise of the right of suffrage to individuals having acquired the Moroccan citizenship until five years after the naturalization), Mauritania, Nigeria, Pakistan, Senegal and Puerto Rico –in spite of its particular relationship with the United States– have also ruled out any electoral participation of foreigners.

5. THE RIGHT TO VOTE OF FOREIGNERS IN SPAIN: CONSTITUTIONAL FRAMEWORK AND LEGAL DEVELOPMENT

5.1 The constitutional framework

In Spain, the 1978 Constitution [hereinafter, SC] stated in its Article 13.1 the principle that «Aliens in Spain shall enjoy the public freedoms guaranteed by the present Title [Title I: About fundamental rights and duties] under the terms to be laid down by treaties and the law». But alongside with this, the Basic Norm also introduced a limitation to the powers of the legislative body, pointing out in the following subsection that «only Spaniards shall have the rights recognized in Article 23», which in its two subsections confers to citizens «the right to participate in public affairs, directly or through representatives freely elected in periodic elections by universal suffrage», and «the right to accede under conditions of equality to public functions and positions, in accordance with the requirements laid down by the law», considering as the only possible exception to this «cases which may be established by treaty or by law concerning the right to vote and the right to be elected in municipal elections, and subject to the principle of reciprocity».

Thus, despite the fact that aliens in Spain enjoy a wide range of rights, they appear to be excluded by the Constitution itself from right to electoral participation with respect to the Congress, the Senate and the autonomic legislative bodies, as well as through referenda, all of them means of political participation exclusively accessible to Spanish citizens; while at the same time the possibility of taking part in local elections, the only electoral process available to them, appears conditioned by the principle of reciprocity.

It is likely that by adopting this language, the *fathers* of the 1978 Constitution were more interested in obtaining rights for Spanish emigrants settled in other countries, which at that time was still a significant number, than in securing rights for foreigners settled in Spain. From that perspective, the reciprocity clause would have been intended to operate primarily for the benefit of Spanish nationals abroad, and not as much for aliens in Spanish territory. However, as already indicated, the intensity and direction of migration flows has changed dramatically in recent decades, so the consequences of the constitutional requirement of reciprocity for the recognition of the right to vote has become a major obstacle in its own application to foreigners residing in the country.

With the signature of the Maastricht Treaty, Member States of the EU assumed the commitment that

«Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State.»

At the same time, the Treaty also granted the right of European citizens to participate in European Parliament elections in their State of residence, under certain conditions.

These norms produced two major consequences. On one side, Spain had to amend the already mentioned Article 13.1 of its Constitution –the amendment, adopted on August, 27, 1992, being the first and only occasion in its more than three decades of life in which the Spanish Constitution has been reformed–²⁴ in order to introduce the possibility of foreigners becoming not only voters, but also candidates in local elections. Thereafter Article 13.1 would recognize foreigners «the right of active *and* passive suffrage in the municipal elections». On the other side, the requisite of reciprocity would become satisfied with respect to the nationals of the other EU countries as a direct consequence of the ratification of the Maastricht Treaty, with the peculiarity that, from then on, the incorporation to the Union of any new Member-States, would automatically transform their nationals residing in Spain in owners of this right once Spain ratified the enlargement treaty.

5.2 Legal developments

Fulfilling this constitutional mandate, Organic Act No. 5/1985, of June 19, 1985, on the General Electoral Regime (as amended by Section I of the Organic

²⁴ See Carlos Flores Juberías: «The 1992 Amendment of the Spanish Constitution: A Tale of Two Words», in Gisbert H. Flanz (ed.): *Constitutions of the Countries of the World: Release 97/7*, Oceana, Nueva York, NY, 1997, pp. 1-9.

Act No. 1/1997, of May 30) laid down in its Articles 176.1 and 177.1 the possibility that foreigners residing in Spain took part in local elections if a treaty of reciprocity did exist with the countries they were citizens of:

Article 176.1: «Without prejudice to Chapter I of Part I of this Act [which regulates the causes for the deprivation of the right to vote] foreign persons residing in Spain whose country allows Spanish residents to vote at similar elections by virtue of a treaty or at European Communities elections, shall be entitled to vote as electors at local councils elections. The right to vote at municipal elections also extends to persons residing in Spain who, not having acquired the Spanish nationality:

- a) Are citizens of European Union according to paragraph 2 of subs. 21 of Section 8 of the European Community Treaty;
- b) Satisfy the conditions for franchise required of Spanish nationals and have expressed their wish to exercise their right to vote in Spain.»

Article 177.1: «Without prejudice to Chapter II of Part I of this Act [which regulates the causes for the deprivation of the right of eligibility], the right of eligibility extends to all residents in Spain who, though not having the Spanish nationality:

- a) Are citizens of the European Union under paragraph 2 of Subs. 1 of Section 8 of the European Community Treaty or subjects of countries granting to Spanish citizens the right of eligibility at local council elections by virtue of a treaty;
- b) Satisfy the conditions for eligibility laid down in this Act for Spanish citizens;
- c) Have not been deprived of the right to eligibility in their country of origin.»

This regulation was complemented by imposing onto the Government (Article 176.2) the obligation of keeping the Office of the Voting Register informed of the list of foreign States which nationals residing in Spain should be registered given the fulfillment of the legal conditions regarding this issue.

Consistent with those guidelines, the Organic Act No. 4/2000, of January, 11, 2000, On the Rights and Freedoms of Foreigners in Spain and On their Social Integration (the so-called «Ley de Extranjería») applied this restriction to the political participation of aliens at the local level, excluding them from regional and national elections. Indeed, Article 6.1 of this Organic Act established that:

«Foreign residents in Spain may be in possession of the right to vote in municipal elections, according to the criteria of reciprocity in the terms established by a law or by an international treaty for the Spanish residents in the countries those are citizens of»

Additionally, the legislature complemented these norms with the additional recognition that

«Foreign residents registered in a municipality, shall enjoy all the rights granted for such a concept by the basic legislation of the local regime, so they may be heard in the affairs they are concerned about, according to what the applicable regulations establish.»

As well as with the commitment, assumed by the public institutions of the Spanish State, to facilitate «the exercise of the right of suffrage of foreigners in

the democratic electoral processes in their country or origin» –rights and obligations that are referred, respectively, in Articles 6.2 and 6.4 of this Act.

Therefore, the Spanish Law only grants at this point the right of foreigners to vote and to stand as candidates in local elections and not in the rest of electoral processes, without prejudice of their right to be heard, by other means, regarding affairs they may be concerned about, or of their possession of other important constitutional rights of a political nature as the freedom of speech, assembly, demonstration or association, all granted by the Organic Act No. 4/2000.

5.3 The contribution of the Constitutional Court

The interpretation that the Spanish Constitutional Court has consistently made about the meaning of Articles 13.1 and 2 of the Spanish Constitution regarding the right of suffrage for foreigners has insisted that, in spite of the general rule proclaiming that foreigners are also entitled to the fundamental rights declared and guaranteed in the Supreme Norm, the fundamental right of suffrage proclaimed by Article 23 SC can only be enjoyed by them in the limited way that Article 13.2 SC describes,²⁵ which implies –as it has been pointed out– the total exclusion of foreigners residing in Spain from parliamentary and regional elections (not only with respect to the right to vote, but also the right to stand as a candidates) and, in addition, the condition that their right to participation in local elections depends on the existence of a reciprocity treaty with their country of origin. In the words of the Court:

«It is not in Article 23 where our Constitution sets the subjective limits on the extent of the ownership of fundamental rights by non-nationals. In our Constitution, the provision governing the capacity requirement is not that of Article 23, but the one in Article 13, the first paragraph of which extends to aliens the exercise of all civil liberties recognized in Title I of the SC in the terms to be established by the Treaties and the Law. This extension is exempted by the clause contained in Article 13.2, excluding certain rights recognized in Article 23, which therefore become reserved only to Spanish citizens. But this exclusion does not derive, therefore, from the provisions of Article 23, which by itself does not prohibit that the rights thus conferred may be extended, by law or treaty, to citizens of the European Union.»

The Constitutional Court's approach to the possibility of the right to vote in local elections for foreigners residing in Spain, contained in its Resolution No. 132/1992, of July 1, appears to be based on the idea that, despite the fact that

²⁵ Since this is a fundamental right the specific content of which does necessarily require a legal determination. Unless other rights, the content of which may be clearly defined in the Constitution itself, or modulated by custom, or by legal precedents, the right to political participation requires the active involvement of the legislature in its definition, notwithstanding the need to respect its constitutional content (STC 107/1984).

sovereignty resides in the Spanish People «from which all the powers of the State emanate» (Article 1.2 SC), local government institutions do not exercise nor embody such sovereign powers on behalf of the Spanish People. Therefore, it becomes acceptable to channel and provide legal and political significance to the will of individuals who are aliens to the Spanish People, who may express themselves through their participation in local elections, a space of mere administrative but not political relevance.²⁶ Some other scholars, adopting a more practical and less legalistic approach, have suggested that the reason for focusing attention on local electoral processes is that it is in these specific scenarios where foreign residents invest the very core of their interests and demands. In disagreement with this view, however, Massó Garrote,²⁷ has remembered that the determination of immigration policies count among those issues of national relevance usually addressed at the national legislature, therefore becoming inaccessible to foreign residents despite their understandable interest in such matters.

Whatever the reasons for this, the Constitutional Court has even reminded law-makers that their powers on this issue are strongly constricted by the constitutional text. According to its Decision No. 236/2007, of November 7 (legal reasoning No. 3):

«Our system does not deconstitutionalize the legal status of foreigners, which has its primary source in the entire constitutional text itself. In particular, the ownership and exercise of fundamental rights of foreigners in Spain must be deduced from the precepts that make up Title I, systematically interpreted. Art. 13 SC refers to the

²⁶ «The proclamation inscribed in art. 1.2 of the Constitution is not contradicted, or even affected, by the attribution of passive suffrage in municipal elections to a certain group or category of aliens. Without going into other considerations, now irrelevant, in order to sustain this it will suffice to point out that the allocation to non-citizens of the right to vote in elections to representative bodies could be controversial, in light of that constitutional provision, only if such bodies were those holding powers conferred directly to them by the Constitution or the Statute of Autonomy, and linked to the ownership of sovereignty by the Spanish people [...] it will suffice to underline that this is not the case of municipalities in order to rule out any doubts about the constitutionality, as to this point, of the provision here analyzed.»

The same reasoning was applied by the French Constitutional Council in its Decision No. 92-308 DC, of April, 9, 1992, on the Treaty of the European Union –the so-called *Maastricht I* decision– albeit with a radically different consequence. In the French constitutional system, local councillors are involved in the formation of the Senate, which is an institution directly concerned with the national sovereignty. Therefore, the Constitutional Council explicitly banned the extension of voting rights of citizens of the European Union not having French nationality. This resolution motivated the reform introduced in Article 88.3 of the French Constitution, according to which the right to active and passive suffrage in local elections will only be granted to non-French EU citizens residing in France on the basis of reciprocity, but excluding both the possibility of running for mayors or deputy mayors, and of participating in the elections of senators.

²⁷ Marcos Francisco Massó Garrote: «Aspectos políticos y constitucionales sobre la participación electoral de los extranjeros en el Estado nacional», *Revista de Estudios Políticos* No. 97 (1997), pp. 159-194.

rights and freedoms of Title I, defining a constitutional status for foreigners in Spain. The call addressed to the Law contained in Article 13.1, does not entail a deconstitutionalization of the legal position of foreigners, given the fact that law-makers, even enjoying a wide- scope of freedom to define the “terms” in which those shall enjoy rights and freedoms in Spain, is subject to the limits stemmed from the entire Title I of the Constitution, and specially to the limits contained in the first and second subsections of Article 10 SC.»

That is the way, finally, scholars have understood the question, as in the case of Aja and Moya,²⁸ who have assumed that «the constitutional request for reciprocity has become in the limit that constricts in the hardest way the scope of the right of suffrage of foreigners.»

5.4 The requirement of reciprocity and the ways in which it has been met

Regarding the second of these conditions, reciprocity, it has already been pointed out that, as far as EU citizens are concerned, the application of Article 19 TEC, and now Article 22 of the Lisbon Treaty, enables them to enjoy the right to vote and to stand as candidates in Spanish local elections if they expressly request so, as Article 176 of the Organic Act of the General Electoral Regime clearly reasserts. In the case of non-EU foreigners, however, the constraints imposed on the exercise of the right to vote and to be voted by Article 13.2 SC require not only a more complex reflection, but also the political will to proceed with their implementation and the active involvement of Spanish diplomacy to make it possible.

From a material standpoint, one must start by asking what the exact meaning of reciprocity is, since there is no legal or constitutional provision that helps clarify this issue. A rather reasonable position is that of Santolaya Machetti and Revenga Sánchez²⁹ who have argued that reciprocity should be assessed in relation to the key elements of the legal regulation providing the basis for the exercise of the right to vote, but not on the basis of a comparison between non essential or accessory elements of the different electoral systems. Thus, it should be imperative that the State of origin of foreign residents, first, holds regular elections for local governments by universal and direct suffrage; second, that these are internationally recognized as free and fair elections; and third, that the conditions imposed on Spanish nationals in order to participate either as voters or as candidates are essentially comparable to those required in Spain for

²⁸ Eliseo Aja & D. Moya: «El derecho de sufragio de los extranjeros residentes», in Eliseo Aja, J. Arango & J. Oliver Alonso (eds.): *La inmigración en la encrucijada (Anuario de la Inmigración en España, Edición 2008)*, CIDOB, Barcelona, 2008, p. 73.

²⁹ Pablo Santolaya Machetti & Miguel Revenga Sánchez: *Nacionalidad, extranjería y derecho de sufragio*, cit., p. 15.

nationals of that country. On the contrary, it should not be imperative that reciprocity be extended to all aspects of the electoral process so that electoral systems mirror each other up to the smallest detail. Hence, it should be irrelevant whether a given State provides for the direct election of the mayor or delegates such election in a popularly elected assembly; whether the electoral system applies majority rule or proportionality; or whether preferential votes are accepted or blocked lists are utilized, etc. More complex would be to decide whether the requirement of a certain period of residence in the host country before a foreigner can enjoy the right to vote would be an aspect of the system be taken into consideration, so equivalence between the duration of the required residence periods in one country and the other becomes a condition for the fulfilment of the reciprocity requirement.³⁰

From a formal point of view, it should also be asked what the appropriate legal instruments to guarantee reciprocity are. Again, beyond the choice between treaty or law, there is no explicit provision in the Constitution about this. Hence, two different solutions seem possible: that the existence of reciprocity is unilaterally declared by the legislature once the conditions for it are detected in a country whose law permits that appreciation; or that reciprocity is declared between Spain and another country through an *ad hoc* international instrument (thesis clearly endorsed by Article 176 of the Organic Act on the General Electoral System, which refers the question to the «terms of a treaty»). What does not seem acceptable under the provisions of the Constitution, is a concrete, factual reciprocity, derived from the pure empirical identification of a situation that allows the Spanish Government to declare that the conditions of reciprocity required by the law and the Constitution do in fact exist. However, it should be considered that international practice has not always run through those channels.

In any case, the recourse to an international treaty ought to be articulated by the mechanism referred to in Article 94.1.c) SC, which states that «The giving of the consent of the State to enter any commitment by means of treaty or agreement, shall require prior authorization of the Cortes Generales» –among others– when the treaties or agreements «affect the fundamental rights and duties established under Part I». Since it is fairly clear that such international treaty would affect the fundamental right to political participation regulated

³⁰ In any case, we should never lose sight the utmost relevance of the provisions contained in the respective constitutional texts, since their characterization of the right to vote could very well rule out any possibility of reciprocity. This is was the case until not long ago of Ecuador –the country of origin of a sizeable number of immigrants in Spain– whose constitution forbade any possibility of applying the criterion of reciprocity when in Article 26 stated that «Ecuadorian citizens shall have the right to elect and be elected [...] to oversee the action of the organs of public powers, to revoke the mandate conferred on elected officials, and to discharge public functions and jobs. Foreigners shall not enjoy these rights.» Conversely, Article 63 of the new Ecuadorian Constitution of 2008 grants de right to vote to foreign residents in the case they have been legally residing in the country for at least five years.

under Article 23, contained in the said Part I, the prescription of Article 94.1.c) SC is squarely applicable.

Now, glancing at the international agreements signed up to this moment by the Kingdom of Spain on the basis of Article 13.2 and 94.1.c) of the Spanish Constitution, we may conclude that there are essentially three different situations before us:

1.– The case of Norway. The Agreement with the Kingdom of Norway of February 6, 1990 (*BOE* of June 27, 1991) is the only substantive international Treaty currently in force in Spain that grants expressly the right to active suffrage to foreign citizens in the local elections. It was because of the failed incorporation of Norway into the EU that this Treaty is still in force unlike, for instance, the twin treaties signed before the Maastrich Treaty –and later on abrogated– with The Netherlands, Denmark and Sweden. The only right granted by this Treaty is, however, the right of active suffrage, a limitation due to the fact that it was signed before the reform of the Spanish Constitution on August 27, 1992.³¹

2.– The case of Chile. The Framework Treaty for Cooperation and Friendship with the Republic of Chile was signed on October 19, 1990 (*BOE* of August 22, 1991), stating in its Article 17 that: «It shall be granted to the nationals of both countries the right to vote in the municipal elections of the State where they reside and of which they were not nationals, according to their respective legislations». It is not a treaty specifically conceived for the regulation of the right of suffrage of the respective nationals, but a broader framework regulating the relation between the two countries, containing a simple call addressed to the internal legislations of both, that obviated the need of any posterior treaty between them.

And 3.– The cases of Colombia, Argentina, Uruguay and Venezuela. The Framework Treaties for Cooperation and Friendship signed between the Kingdom of Spain and the Republics of Argentina (June 9, 1989; *BOE* of August 28), Colombia (October 29, 1992; *BOE* of August 1, 1995); Venezuela (June 7, 1990; *BOE* of June 16, 1992); and Uruguay (July 23, 1992; *BOE* of June 2, 1994) followed in all four cases the procedure

³¹ A rather striking fact in connection with this Agreement concerned the way it was subscribed. It was considered sufficient a mere exchange of letters by which the Ambassador of the Kingdom of Norway informed the Spanish Minister of Foreign Affairs that, under Norwegian law Spanish citizens might enjoy the right to vote in municipal elections provided they had legal and continuous residence in Norway for three years and a census registration, and asked for the same treatment to be given to Norwegian citizens living in Spain. The Spanish Minister responded accepting the content of the letter and stating that this should be understood as an international treaty between the two kingdoms, not raising the need to resort to the mechanism provided in Article 94.1 of the Spanish Constitution. Interestingly, this has become the usual way of dealing with this issue, as it will be seen below.

envisaged by of Article 94.1 of the Constitution. All these treaties stated that Spanish citizens and citizens of the mentioned countries should be entitled to vote in the municipal elections of the State where they resided and of which they were not nationals, in the terms established by complementary or special treaties to be signed between these States. However, this possibility remained overlooked for almost two decades, consequently impeding the right to vote of nationals from those countries in the subsequent electoral processes, since it was not until 2008 that the process of signing such agreements was encouraged, and in fact these were finally signed with at least Colombia and Uruguay. At that point, some scholars³² had already suggested that those treaties were in fact authorizing the Spanish Government to unilaterally establish the voting mechanisms that may allow the operation of reciprocity, with the only requisite of making this decision known to the Cortes Generales (ex. Article 94.2 SC) and, therefore, with no need to have an additional treaty signed.

However, it should be noted that the bulk of the international agreements subscribed so far in order to extend the right to vote in local elections to residing foreigners have not taken the form of an international treaty, nor have they been passed according to the prescriptions of Article 94.1.c) SC, which certainly entails a disputable interpretation of Article 13.2 SC. Except in the case of New Zealand, with which a formal treaty was signed and ratified, reciprocity agreements in the form of exchange of notes between ministers and even ambassadors were considered sufficient in all other cases. As of December 2010, such agreements had already been concluded between the Spanish Government and the Governments of Colombia (February 5, 2009), Peru (February 6, 2009), Ecuador (February 25, 2009), Iceland (March 31, 2009), Cape Verde (April 8, 2009), Chile (May 12, 2009), Paraguay (May 13, 2009), New Zealand (June 23, 2009), Bolivia (September 15, 2009), all of them in time for their citizens to be able to participate in the local elections of May 2011.³³ While similar agreements with Argentina, Uruguay, and Trinidad-Tobago, and others with countries like Venezuela, Burkina Faso and Korea, which allow foreign residents to take part in their local elections, were still being negotiated or at an earlier stage of analysis. Hence, the rather informal exchange of diplomatic letters, and not the more formal signature and ratification of an international treaty has become the most usual way of addressing the reciprocity requirement.

³² Pablo Santolaya Machetti & Miguel Revenga Sánchez: *Nacionalidad, extranjería y derecho de sufragio*, cit., p. 62.

³³ These agreements are available at the Central Electoral Commission web page, at www.juntaelectoralcentral.es.

As regards other countries –i. e. those who do not recognize foreign residents the right to vote in municipal elections–, the Spanish Government expressed its willingness to sign agreements of reciprocity also with them, once the required legislative reforms had been implemented.

5.4 A mostly overlooked (but extremely influential) requirement: the registration of foreign voters

Alongside with permanent legal residence and reciprocity, Article 176.1.b) of the Spanish Electoral Law, establishes as a final requirement that foreigners «have expressed their wish to exercise their right to vote in Spain». This is a truly exceptional requirement, since Spain counts among the countries in which census registration is automatic, and has not to be demanded by the concerned citizen. However, this is not the rule for foreigners, who have to demand their registration, before election day, in the so-called *Censo de Electores Residentes Extranjeros*, or CERÉ.

Though this requirement may appear to be a purely formal one, the fact is that its consequences have already proved to be remarkable, as a consequence on the one hand, of the lack of tradition in voter registration and, on the other hand, of the low level of political consciousness of many immigrant communities. The figures are telling: for the 2007 local elections, only 151.388 of the 892.347 foreigners with the right to vote (those coming from the rest of EU countries, plus Norway) did in fact register to vote, a figure which amounts to just 16.9% of them –and which in some specific cases happened to be surprisingly low: 1.2% in the case of Hungarians, 0.9 in the case of Poles, or 0.7% in the case of Czechs. Considering the fact that for the 2011 elections the nationals from nine new non-European countries –plus Iceland– will be entitled to vote for the first time ever, that in most cases the agreements that allowed them to do so were signed only a few months before the elections were called, and that the term for their registration has been short, and called in coincidence with the Christmas season (December 1, 2010-January 15, 2011, it is not hard to predict that the percentage of registered foreigners will drop even more, and that the actual number of foreigners who cast their votes will amount to a much lower figure than expected.³⁴

5.5 The partisan confrontation and the academic debates on the issue

The most extended opinion among those scholars –and this is not a trivial remark– who have publicly advocated their position on the issue is that the current legal framework is obsolete, unfair and unclear, and needs a substantial reform, which could very well start with that of Article 13 of the Constitution itself.

³⁴ For all these data, see the web page of the Spanish Census Bureau in www.ine.es/oficina_censo/presentacion.htm

For Chueca Sancho and Aguelo Navarro,³⁵ it is necessary «to break the iron mold of reciprocity present in our Constitution», since «its nineteenth-century ideological background is certainly far from the integration of foreigners which is preached nowadays, and from the prevailing practice in the Member States of the European Union» –the latter statement being one that, as we have been able to see, does not fit at all with reality–. In the opinion of Sagarra³⁶ the logic of reciprocity is responsible for Spain's not making sufficient progress in the recognition of rights to foreigners, while for Vacas Fernández,³⁷ «if you really take the voting rights of immigrants in Spain seriously, it is inexcusable to reform, again, Article 13.2 of the Constitution, in order to move Spain away from the nineteenth-century where it is kept anchored by the principle of reciprocity, and onto the current development of International Law, where people are no longer mere objects belonging to the population element of the State they are nationals of but, on the contrary, and regardless of State they belong to, they are by themselves rightholders». For Aja and Moya³⁸ it would suffice «the simple removal of the requirement of reciprocity, so that foreigners might vote in municipal elections in accordance with the conditions set by the electoral law». Finally, according to García Soriano,³⁹ it would be necessary and sufficient to «remove the requirement of reciprocity of Article 13.2 SC, leaving any future decision to the treaties and the law, or directly delete the entire number 2», since

«The logic of reciprocity implies that the right to participate in the elections of the municipality where you reside is made depend from your birthplace. It means that the fact of permanently living in Spain is not the determining factor, since it provides no right to be part of the political community: this right is conditioned by a set of agreements that are alien to the situation of individuals who have proved by their stable residence, their desire to be such.»

However, most of these doctrinal positions obviate a relevant fact, and say nothing about a fundamental dimension of the case.

The fact that is often overlooked is that the reform of Article 13, to the extent that would affect the extension of the franchise regulated by Article 23,

³⁵ Ángel G. Chueca Sancho & Pascual Aguelo Navarro: «El derecho de voto de los extranjeros en España en perspectiva europea», cit., p. 40.

³⁶ Eduard Sagarra: «Los derechos políticos de los extranjeros en España: Derecho de sufragio activo y pasivo en las elecciones municipales», in Manuel Balado (dir.): *Inmigración, Estado y Derecho*, Bosch, Barcelona, 2008, pp. 321-344.

³⁷ Félix Vacas Fernández: «El principio de reciprocidad como condición del reconocimiento del Derecho al sufragio de extranjeros en las elecciones municipales en España y sus implicaciones desde el Derecho Internacional», *Revista de Derecho Migratorio y Extranjería* No. 20 (2009), pp. 267-290.

³⁸ Eliseo Aja & D. Moya: «El derecho de sufragio de los extranjeros residentes», cit., p. 79.

³⁹ María Vicenta García Soriano: «Sobre la viabilidad de la participación política de los extranjeros...», cit., p. 267.

would in all likelihood have been verified through the procedure envisaged for the so-called aggravated constitutional reform, with the formal complexity and political risk it entails. So, it might very well be more plausible and effective a decisive action by our diplomacy in order to conclude as many treaties as were necessary in order to extend the right to vote in local elections to as many foreigners as possible, thus, collaterally benefitting Spanish residents in the referred countries.

The fundamental dimension of the case which is often silenced is that the battery of arguments which are regularly provided in support of the extension of voting rights to foreigners in local elections, could very well serve as a basis to favor its extension to other forms of electoral participation, like regional and parliamentary elections, and even to referenda, an idea which seems to have far fewer supporters, and is clearly unconstitutional. A measure that, collaterally, may open the additional question of what the countries of origin of these immigrants ought to do in case Spain –or any other State– granted them the right to vote in elections of a strictly political nature, since neither the alternative of depriving them of their right to vote in the country they are (still) citizens of seems reasonable, nor does it seem acceptable to enjoy and exercise voting rights simultaneously in two different countries –the one they are citizens of, and the one they are settled in–, in a manner not so different than what great landowners were allowed to do in the times when an individual's right to vote could be multiplied depending on how many places his houses, land, or business were located.

As far as the political debate is concerned, it has to be acknowledged that the most active role in this regard has been taken by the parliamentary parties of the left, with the Popular Party –in the opposition– following not without reluctance and mistrust the position of other political forces. On August 16, 2006 the Socialist Party –in the Government since 2004– and the United Left-IP-C-The Greens coalition introduced a non-legislative motion in Congress defending the extension of the right to vote in local elections to legally resident foreigners, urging the executive:

- «1.– To carry out the negotiation and signing of agreements or treaties with the countries with the highest number of residents in Spain, and especially with those having historical, political and cultural relations.
- 2.– To request the opinion of the State Council on the implementation of Article 13.2 SC, particularly on the terms “principle of reciprocity”.
- 3.– To sign and ratify the European Convention on the participation of foreigners in local public life, of February 5, 1992.»

In the same vein, the 37th Federal Congress of the Socialist Party (July 2008) called for the recognition of the right to vote of non-EU citizens who had a permanent, legal residence in Spain, but always subject to reciprocity in their country of origin. Such a stand, in favor of strengthening the mechanisms under Article 13.2 SC, but against its reform, had as its most direct consequence the

current diplomatic offensive aimed at increasing the number of international agreements signed with the countries of origin of Spain's sizeable immigrant population in view of the forthcoming 2011 local elections, facilitated by the appointment in August 2008 of a special envoy to develop the necessary negotiations. But also in the fact that after the creation of the Congressional Subcommittee for the reform the 1985 Electoral Law, whose first meeting took place on October 2, 2008, the Socialist Party publicly declared its willingness to favor the vote of immigrants in municipal elections, but argued that constitutional reform was to stay absolutely out of the agenda.

6. CONCLUSIONS, AND PROPOSALS

Once analyzed the legal framework currently in force, defined by the instruments of International Law, the constitutional provisions, and the legal norms we have referred to, and also according to the number and content of the international agreements on this issue signed so far, we may advance the following conclusions:

1.– At this moment, there are not any binding, general international instruments proclaiming the right of foreigners to the exercise of suffrage in their country of residence, and obliging those host countries to guarantee such a right. Therefore, the question of granting voting rights to foreigners –and, eventually, the scope of this recognition and the conditions of it– remains a question of strict internal Law.

2.– On the contrary, most States have internal legislations in which the exercise of the right of suffrage (both in its active and/or passive dimensions), is absolutely connected to the condition of citizen of that State, in many cases regardless of the national, regional or local scope of the elections in which that right should be exercised. The legal substratum and the set of political beliefs on which such pieces of legislation are sustained, probably are to be placed beyond the date of birth of the Nation-State itself,⁴⁰ and rooted in causes inherently connected to the human psique. But in any case, it is embodied in the idea that sovereignty is linked, without any alternative, to the people –a concept which in turn should be understood as the whole group of nationals of a given State, as only these, and not foreigners, are able to show the necessary *affectio* towards the *res publica*, which justifies their participation in it.

3.– Exceptions to the previous rule, happen to be mostly episodic and incomplete. These basically comprise the cases in which a more permissive electoral legislation granting the right of suffrage to large communities of foreigners, reveals a generosity limited in fact to those who are nationals

⁴⁰ Marcos Francisco Massó Garrote: «Aspectos políticos y constitucionales sobre la participación electoral de los extranjeros en el Estado nacional», cit., p. 159.

of countries that keep historical and/or cultural ties with the State where the *ius suffragii* will be exercised (the Commonwealth, the EU, the Scandinavian community, the Hispanic-American countries, the Lusophony...). Hence, what we have here is a slightly different way of facing the question, where the right to vote is not only granted to those in possession of the legal citizenship of a given State, but also to those belonging to the cultural nation or to the community of nations of which this specific State is a part.

4.— Despite the fact that it is not frequent in Comparative Law, some countries (Spain, among others) have introduced reciprocity clauses in their legislation. Even though the purpose of such clauses is to guarantee equal rights between nationals permanently living abroad and foreigners permanently settled in such country, they may very well produce the paradoxical, if not perverse, effect of largely democratic countries denying the right to vote to individuals residing in them solely because other countries of dubious democratic credentials are denying that same right to the citizens of the others, or even to their own citizens. Setting aside the fact that this situation could very well be translated into a series of inequalities that would be hard to justify, as those produced in the cases in which the right to vote was granted to some foreigners but not to others due to reasons alien to their will and merits, and only linked to their national origin, and to the capacity of the diplomacy of the host State to reach bilateral agreements with the States of which they are nationals. Moreover, such agreements might end up being a mere political instrument at the service of the international policy of the State—or even of the electoral strategy of the party in government—, since it could proceed «to a selective, nationality by nationality, enlargement of the right of suffrage». ⁴¹

From the previous considerations a relevant conclusion emerges: though the evolution of the legal treatment of this issue in the recent decades proves that the ownership of fundamental rights (the rights that protect the most essential attributes of the individual before the State, and provide him with a political substance) has become more and more universal, as a result of the progressive split of the national condition that was usually requested to those who claimed for such rights (as far as, nowadays, not only do we have important international instruments that guarantee a strong transnational protection of that basic statute of the human being, but also many constitutions—at least in the most developed countries— which do not discriminate between nationals and foreigners in order to grant them such essential rights, assuming that those rights belong to the entire *humanitas*), the same evolution has not been projected

⁴¹ Eliseo Aja & D. Moya: «El derecho de sufragio de los extranjeros residentes», cit., p. 73.

but in a limited way over the political right *par excellence*: the right of suffrage. So, although it is rightfully and universally characterized as a fundamental right, it keeps being owned only by nationals. In short –and using the words of Javier de Lucas and María José Añón–, ⁴² the right of suffrage is still «the last frontier of the political citizenship».

At the end of the day, individuals legally residing in a country they are not citizens of, despite being in most cases –obviously, not in all of them– hard workers, honest tax-payers, and law abiding persons, and –above all– despite being in many cases deeply rooted in the communities where they live and work, still lack the possibility of making their voices heard in the forums where everyone’s future is decided.

This situation, truly antithetic with the idea of citizenship (conceived as the condition of those who take part, directly or indirectly but in an effective, free and conscious way in the government of a political community), turns out to be specially hard to accept from the moment that our political, legal and cultural traditions tell us that the right of suffrage, as any other fundamental right, is not only an imperative consequence of human dignity, but its legal assurance is also a part –as it happens with the rest of fundamental rights– of the prerequisites for the existence and justification of a Constitutional State. Consequently, a new group of persons that cannot be called citizens, but subjects, appear; given the fact that they obey the rules that others have agreed upon, with no possibility of taking part in the government of those communities of which they are part, and to the progress of which they are contributing.

The Spanish case perfectly suits these characteristics. Considering the legal situation in the country, it is a fact that no one among the five million and a half foreign residents in Spain enjoys any right of political participation as far as national and regional elections, as well as the different kinds of referenda provided by the Spanish Constitution, are concerned; and only in a very limited way they are able to exercise such right at the local level. This fact should make us wonder to what extent such situation impoverishes the democratic quality of a set of institutions that we want, and must be, representative.

Thus, it seems arguable that the competent institutions of the Spanish State should face, in principle and at least, the following responsibilities:

I.– To generate a solid agreement among all the political forces represented in Parliament –or, at least, among the main parties in Government and in the opposition– on the convenience of implementing the extension and guarantee of the exercise of the right to vote of immigrants –since only with a high level of social, political and parliamentary consensus, and not making the incorporation to the voting register of hundred of thousand of new voters an additional excuse for

⁴² Javier de Lucas, María José Añón *et al.*: «Los derechos de participación como elemento de integración de los inmigrantes», in *Informes 2008*, Fundación BBVA, Bilbao, 2008, p. 46.

political confrontation, will this innovation become an effective and permanent feature of our political life.

2.– In order to do so, to advance in the appropriate negotiations in order to sign the agreements or covenants required by Article 13 of the Spanish Constitution with the countries of origin the main groups of legal foreign residents –in most cases, countries with whom Spain keeps the closest historical, political and cultural relationships.

3.– In the meanwhile, to foster the political participation of residing foreigners who don't enjoy yet the right of suffrage by means of the several and various resources under the control of the central, autonomic and local governments, ⁴³ specially through alternative means of participation such as associations, non-binding councils, etc.

4.– To stimulate the electoral participation of the residing foreigners who already enjoy the right of suffrage in the local level in its double dimension –active and passive–, as well as their insertion in the existing political parties. ⁴⁴

5.– To sign and ratify the Convention on the Participation of Foreigners in Public Life (Strasbourg, February, 5, 1992).

And 6.– To dismiss the reform plans concerning the principles stated on Articles 13.2 and 23.1 of the Spanish Constitution with regard to the parliamentary and regional elections, as well as to referenda, highlighting the essentially different nature of each electoral process, and the full coherence of the Spanish Constitutional frame with the existing standards regarding human rights.

⁴³ Pep Martí Masferrer: *La participación ciudadana en el ámbito local, conceptos, figuras y prácticas*, Mediterrànea, Barcelona, 2003; Ernesto Ganuza Fernández: «La participación ciudadana en el ámbito local europeo», *Revista de Estudios Europeos* No. 38 (2004), pp. 77-91; Ángel Iglesias Alonso et al.: *La participación ciudadana en las grandes ciudades*, Dykinson, Madrid, 2005; Joan Font Fàbregas: *Instrumentos y mecanismos para la participación ciudadana*, Alfa Delta Digital, Valencia, 2006.

⁴⁴ See the proposals made by Marco Martiniello: «Political participation, mobilisation and representation of immigrants and their offspring in Europe», in Rainer Bauböck (ed.): *Migration and Citizenship...*, cit., pp. 83-102, and Rafael Durán Muñoz & Magdalena M^a Martín Martínez: *La integración política de los inmigrantes. La vía de sufragio*, Dykinson, Madrid, 2008. For an assessment of the consequences of such recognition for EU Citizens, their actual level of political integration, and their satisfaction with democracy in their country of residence, see Anna Olsson: «The Representation of Intra-EU Migrants at the Member-State Level: Do Voting Rights Matter?», paper presented at the 10 Biennial International Conference of the European Union Studies Association, Montreal, May 17-19, 2007.