The right of political participation of ecuatorian citizens living in Spain

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The civil rights of aliens[2] have experienced a growing recognition in recent years, largely due to the process of internationalization of the rights of persons. The projection of the social and labor rights of immigrants with legal residence and stable work has also evolved, among other reasons, to prevent them from competing with national workers. However, notable progress in the recognition of their political rights has not occurred.

The reasons argued by contemporary society to shield itself from an eventual extension of the rights of political participation to aliens range from the idea that nationalization is an adequate and sufficient instrument to access political rights, that political participation of aliens undermines national sovereignty, to considering this participation as a rupture of national identity and civism, which sees aliens as a threat against the State[3].

Juridical reasons and arguments that show an absence of political will are put forward to defend limiting the political rights of aliens. However, it seems clear that, together with these motives, there are others that reveal the need to broaden the political rights of aliens, as well as the juridical and constitutional possibility of doing so: the contribution of immigrants to national development, the legitimate interest they have in participating in the political decisions that affect them, and the influence that the acknowledgement of these rights would have on the actual integration of immigrants in society.

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2 Some distinctions must be made to facilitate interpretation of the issue. First, we must bear in mind that the meaning of the terms *immigrant and alien* do not coincide. Although current migratory movements are international in nature and the alien status of the persons involved is the primary determinant of their juridical relation, the alien status is a formal juridical category, which denotes the juridical condition of individuals who lack the nationality of reference, in this case, the Spanish nationality.

3 The core of alien policy resides on police issues (security and public order), while the core of immigration policies resides on issues related to economic development and integration to society.

Purpose

To contribute with elements of comparative law and international law to the debate created in Ecuador with the purpose of enshrining in its legislation the vote of aliens in sectoral and local elections, so that, based on the application of the principle of reciprocity provided in the Spanish Constitution to Ecuadorian citizens living in Spain, upon compliance of specific requirements, Spain grants them the right of active and passive vote in municipal elections.

Justification of the subject

R*elevance*. Due to the presence of a significant number of Ecuadorian immigrants in Spain; accordingly, their political participation is necessary to foster their civil and social rights in a more effective way, overcoming obstacles that still subsist, in spite of their constitutional and legal recognition.

Opportunity. Due to the expectations for profound and immediate constitutional reforms in Ecuador, which might include the requirement of reciprocity for alien voting, enshrined in the Spanish Constitution.

Another element that confirms the relevance of addressing this subject is the efforts of the Ibero American community to recognize a sort of Statute of "Ibero American citizenship". Finally, the current related debate taking place in Spanish Courts.

Political equality is a key element to foster integration within differences; giving aliens shared responsibility in the decisions and in the future of society. Focusing on the right to vote, the political participation of Ecuadorian citizens is necessary as a consequence of the demands of the democratic principle itself, in constant evolution since the emergence of national male vote until universal national vote in Spain and, more recently, voting at the local level of national communities.

The fact that some local administrations have already implemented innovative initiatives aimed at implementing, up to a certain point, the right of political and social participation of immigrants (Participation Forums) should also be added to this factor. Such is the case of the elections to the round tables for dialogue and coexistence of districts, fostered by the Mayoralty of Madrid[4].

The fact that persons subject to the same laws are not entitled to participate, even indirectly, in the drafting of those laws, is quite inconsis-

[4] Regulations of organization and operation of the Madrid Forum on Dialogue and Coexistence and the District Groups on Dialogue and Coexistence of Madrid. In B.O.C.M. 144, June 19, 2006.

tent with democratic principles –this argument is applicable both to Ecuadorian and Spanish legislations. Besides being a question of principle, it also has significant practical effects, because as long as immigrants are prevented from participating and have no political representation, they will receive only marginal attention from the authorities.[5]

In the case of Spain, the Constitution of Ecuador will have to contemplate a norm to acknowledge the powers of legal aliens residing in Ecuador to elect and be elected in local or sectoral elections held in the country, in order to meet the requirement of reciprocity mandated by the Spanish Constitution (Art. 13.2).

Political participation of aliens from the point of view of international law, Inter-American law and the Ibero American system

Within the scenario of the creation of the UN, in 1945, the acknowledgement of the exercise of the political rights of aliens (other than the voting rights of citizens that were somehow contemplated) was neglected, not only because international society was not aware of their significance, but also because it implied judging the domestic policies of their members, something that, by definition, was excluded from the scope of the UN. This would also have implied questioning the scope of State sovereignty itself, a concept that allowed no limitations and that, in consequence, could not be discussed in the international agenda at that time.

However, acknowledging that the respect for human rights should be the basis of international coexistence (Article 1.3 of the Charter), gave them powers to devise, within the process of organization and development of these principles and purposes, new theories and new mechanisms of international interrelations where civil and political rights would progressively acquire greater significance and recognition as the basis of the international juridical structure that was in the making.

The timid references included in the Charter of San Francisco regarding the promotion and protection of human rights served, however, for the Economic and Social Council to establish the Human Rights Commission in 1946. This allowed the adoption of the Universal Declaration of Human Rights on December 10, 1948. With the approval of this Declaration, UN Member States were committed to recognize and observe its 30 articles, which list basic civil and political rights, as well as the main economic and cultural rights, which served as the basis for the adoption of related international covenants.

[5] "La participacion politica de los inmigrantes". Eliseo Aja / Laura Diaz Bueso. In Revista Nº 10 La Factoria, October 1999 – January 2000.

The Declaration of Human Rights begins by admitting that the promotion and protection of these rights cannot be left to the individual acknowledgement of the States, but that international consensus is required to provide minimum guarantees –which must be respected by all States– for the consolidation of peace and concord among nations. This mere acknowledgement also implied a different perception of who would be in the future the new subjects of international law.

With the Declaration of Human Rights, individuals become the subject of Public International Law inasmuch as their subjective rights are recognized and they can be enforced by means of mechanisms that will be developed at a later stage, through bodies established as provided in the treaties. Ultimately, the acknowledgement of human rights shifted from the internal constitutional sphere of the States to the international sphere, and respecting and promoting these rights became international obligations; moreover, any breach thereof brings about the international responsibility of the State[6].

In the concrete sphere of the exercise of political rights, the Universal Declaration of Human Rights is still a theoretical and succinct enunciation. Thus, Article 21 of the Declaration provides that:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right of equal access to public service in his country.

3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

These precepts, which now may appear as an obvious and evident guarantee for citizen coexistence, were a significant advance towards the acknowledgement of individual rights insofar as totalitarian regimes had parameters for political participation and the holding of periodical elections that differed widely from the parameters promulgated by western democracies. The acknowledgement of political rights refers basically to the holding of internal elections and the minimum requirements of legality that these elections must meet to guarantee the operation of a democratic order. At this stage there is still no acknowledgement in the international context of the right of aliens to vote, even in incipient terms, because even the Eu-

[6] This affirmation is valid, provided the State Parties to the Covenants acknowledge the powers of the Committee to receive complaints from individuals alleging violation of the rights enshrined in these instruments.

ropean Economic Community was in 1948 only a project in the minds of its ideologists.

An important advance towards the acknowledgement of human rights as individual rights by the State was the adoption of the International Covenant of Civil and Political Rights, adopted by Resolution 2200 A (XXI) on December 16, 1966, which entered into force on March 23, 1976. The Covenant begins by acknowledging that States are responsible for creating the conditions necessary for human beings to fully enjoy civil and political rights, as well as economic, social and cultural rights.

Concerning the political rights of aliens, Articles 2, 3 and 25 of the Covenant compel State Parties to guarantee that all individuals living on their territory and subject to their jurisdiction have all the rights acknowledged therein, with no distinction; to acknowledge gender equality in the exercise and enjoyment of the political and civil rights recognized in the Covenant and, regarding the exercise of political rights, Article 25 provides that:

"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

b) 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;

c) To have access, on general terms of equality, to public service in his country.

It was obvious that the Human Rights Committee, the body in charge of supervising the application of this Covenant, should have clarified the scope and the content of Article 2 in its relation with Article 25 because, initially, one could interpret that the enjoyment of the political rights should be granted not only to the nationals of the State but to all aliens legally residing in it.

In this way, by means of the *General Comments* adopted by the 57th Session of the Committee in 1996, the committee had to clarify that, unlike other rights and freedoms acknowledged in the Covenant that are general for all the inhabitants of a specific State jurisdiction, Article 25 protects the rights of "every citizen" without room for any type of discrimination. States must determine if resident aliens can exercise these political rights in a limited fashion, for

example, having the capacity to vote in local elections or perform specific public functions.[7]

This interpretation is closely linked with general comment No. 15 issued by the Committee in 1986 on the rights of aliens in light of the Convention[8] and with the declaration on the human rights of individuals who are not nationals of the country where they live, adopted by UN General Assembly Resolution No. 40/144 on December 13, 1985, which explicitly states the rights of aliens, and which makes no clear reference to the acknowledgment of political rights.

Regarding this subject, we should highlight, in view of its contents, the International Convention on the Protection of the Rights of All Migrant Workers and their Families, adopted by the UN General Assembly via resolution 45/158 of December 18, 1990. Article 41 of the Convention states that migrant workers and members of their families shall have the right to participate in the public affairs of their State of origin and to vote and to be elected at elections in that State, in accordance with its legislation, and that the States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights.

Concerning the acknowledgment of political rights to aliens in the territory of destination, Article 42, paragraphs 2 and 3 of the Convention provides that "States of employment shall facilitate, in accordance with their national legislation, the consultation or participation of migrant workers and members of their families in decisions concerning the life and administration of local communities. Migrant workers may enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights."[9]

Ecuador is party to this Convention and has included in its Constitution the right of Ecuadorians residing abroad to vote in elections for President and Vice-president of the Republic, the only requirement being to register in the relevant Consulates. Spain, in turn, pursuant to the provisions of its own domestic legislation, has provided all the facilities necessary for the holding of these elections.[10]

The references below reveal that in the sphere of the United Nations, the right to elect and to be elected in

[7] General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public office.

[8] General Comment No. 15 of the Human Rights Committee, approved in the 26th meeting, 04/11/86.

[9] Resolution 45/158, December 18, 1990.

[10] Art. 6.4 LOEXIS whereby "public powers shall facilitate the exercise of the right to vote of aliens in democratic electoral processes in their country of origin".

national, sectoral or local elections is recognized and promoted, without any limitations whatsoever, as an individual human right, the exercise of which corresponds, in principle, solely to nationals of a State. Therefore, States that breach this provision would be violating internationally acknowledged human rights and would be liable for such violation.

In contrast, the concept that aliens may enjoy political rights –always in the scope of the United Nations– is enunciated and linked to nationality and not to residence. Therefore, not acknowledging the right of aliens to participate in elections, even local or sectoral, is not a violation of the international norm, as this acknowledgment is subject to the discretion of the States.

In the inter-American sphere, concerning this issue, we should highlight the Havana Conference of 1928, where the Convention on the Status of Aliens was signed. The convention entered into force on August 29, 1929, and its Article 5 states that "member States (the Convention was signed by 20 American States) must acknowledge to aliens domiciled or in transit in their territory all the individual guarantees they acknowledge to their own nationals, as well as the enjoyment of fundamental civil rights, without prejudice of legal prescriptions relative to the extension and the modalities of these rights and guarantees." Article 7 of this Convention adds that "aliens must not become involved in the political activities *exclusive* of the citizens of the country where they reside; otherwise, they will be subject to the penalties provided in the domestic legislation".[11]

This shows, on the one hand, that the concept of human rights and their universality, as well as the international obligation of States to promote and respect them without any distinction or discrimination, was still incipient, and on the other hand, that the participation of aliens in the political life of American nations was totally excluded.

Article 23 of the American Human Rights Convention or Covenant of San Jose, of November 22, 1969, under the heading "Political Rights", contains a different view regarding these rights. Hence, the acknowledgement of the right of all citizens to participate in the management of the political affairs and to vote and to be elected in authentic periodical elections does not exclude that the law may acknowledge this right to aliens, because paragraph 2 of the same Article states that the exercise of rights may be regulated, exclusively for reasons of age, nationality, residence, language, education, civil or mental capacity, or upon sentence

[11] Convention on the Status of Aliens; American Conference of Havana, February 20, 1928.

by a competent judge in a criminal proceeding. This would imply that specific regulations can be determined regarding the participation of aliens in elections taking place in member countries.

This provision, as we will show below, will allow substantial progress in the acknowledgment of the political rights of aliens in several Latin American constitutions.

At Ibero American level, this issue has not been developed extensively, and it does not seem to be a priority of member States. What has been proposed is a concept of active Ibero American citizenship, but not limited to the enjoyment of civil, social, economic and cultural rights as an indivisible package, which must be promoted with similar emphasis.[12]

Ultimately, and according to Professor Esteban de la Roca, there are no clear rules that promote the exercise of the political rights of aliens, except in the European context, which provides for the obligation of EU member States to acknowledge the exercise of the active and passive political rights of their citizens in local elections, whatever the country of residence. As a result, this subject has shifted more towards the scope of unilateral declarations or, in the best of cases, bilateral agreements that exclude their universalization and limit their scope.[13]

Acknowledging political rights in Latin American Constitutions

The treatment of the right to vote of aliens varies widely in Latin American Constitutions and range from a broad acknowledgment of the right of aliens to participate in national or local elections, as in the case of Uruguay, to total exclusion from political participation, as in the case of Ecuador.

Latin America has still not been able to overcome the traditional views of the Nation-State. Therefore, the process of openness of Latin American societies towards the acknowledgment of the political rights of aliens is not very broad and, on the contrary, the trend is to limit the participation of aliens in election processes.

Thus, Latin American countries that grant the right of active vote to aliens are a minority, while the possibility of participating as candidates in popular elections is even more limited. In some legislations, as in Costa Rica, this limit persists for aliens that have become natura-

[12] Leire Pajin, "Concertacion para una ciudadania iberoamericana activa", Fundacion Carolina, Madrid, November 2005.

[13] Fernando Esteban de la Rosa, "Derechos de Participacion Politica y Empadronamiento de los Extranjeros en España". Document of the Department of International Private Law of the University of Granada (Internet document, no other bibliographical reference).

lized, who must accredit, in addition to the citizenship obtained, that they have resided in the country for twelve consecutive months after having received the naturalization.

The acknowledgment that extended legal residence is an element that generates the right to vote is a widespread feature of Latin American legislations that grant resident aliens the right to vote.

In most Latin American constitutions that grant aliens the right to vote, these rights are limited to the municipal sphere, which are "supposedly less connected with the concept of sovereignty"[14] except in the case of Uruguay, which poses no limits to this right. To exercise this right both as voter and as candidate, aliens must have resided in the country for 15 years, be registered in the Civic Registry, have good conduct, a family established in Uruguay, they must have a working capital, properties in the country, or practice a science, art or industry. Similarly, the Constitution of Uruguay, unlike the others, does not remit to any norm that regulates this provision and it may be directly applicable.

From a similar perspective, the Constitution of Venezuela contains a very liberal provision, in the sense that voting rights in "municipal, parish, and state elections" are expressly granted to aliens that have turned 18 and have resided for more than 10 years in the country and who have no political prohibitions or interdictions.

In the case of Chile, aliens must be residents for more than 5 years and must not have been sentenced to "afflictive" punishments, and unlike nationals, for whom voting is both a right and an obligation, voting will be voluntary. In any case, the constitutional precept will have to be regulated by a subsequent law. Acknowledging the voting rights of aliens residing in Chile has allowed Spain to sign with Chile an agreement acknowledging the right to vote of residents of both countries, which dates back to 1990. However, subsequent regulations to implement this agreement have not been developed yet.

Spain has signed similar agreements with Argentina, in 1988 and with Uruguay in 1992, but neither has entered into force.

The Constitutions of Bolivia and Paraguay have precepts similar to those of the Chilean legislation. They provide that alien citizens may vote in municipal elections under the conditions established by the law. In consequence, legislators will have to develop this constitutional mandate.

[14] Mendez Lago Monica, Los Derechos Politicos de los Inmigrantes; Fundacion Seneca; undated.

In the case of Colombia, this constitutional norm is not as clearly expressed, because Article 100 paragraph 2 of the Colombian Constitution states that "political rights are reserved to nationals, but the law may grant the right to vote in local elections and referendums to aliens residing in Colombia".

Unlike Chile and Bolivia, legislators are not bound to issue norms to develop this provision, according to the literal interpretation of the norm and the resolutions of the plenary of the Constitutional Court of Colombia in the unconstitutionality complaint filed against several provisions of the National Police Code. This constitutional precept did not impose a mandate on the legislator to grant voting rights to aliens, *contrario sensu,* it granted them the initiative to acknowledge them in the development of the clause regarding their general competences. Thus, the acknowledgment of the vote of aliens is a power of the legislator but not an obligation resulting from the fundamental text.[15]

Legislations that limit the political rights of aliens include the Constitutions of Ecuador and Panama. The former, which will be analyzed more in depth below, expressly excludes aliens from the exercise of this right. In this way, when defining the content of political rights, Article 26 of the Political Constitution expressly excludes "aliens, who do not enjoy these rights", as stated in the norm. In the case of Panama, the Constitution provides that political rights and the capacity to hold a public office with powers and jurisdiction are reserved to Panamanian citizens.

The provision contained in the Constitution of Costa Rica is of particular interest, because the right to elect does not depend only on the nationality of the individual; however, an alien that has chosen the Costa Rican nationality must wait twelve months after receiving his naturalization papers to exercise this right. Ultimately, in the case of Costa Rica, the residence status serves as a mechanism that, in the political field, validates the rights issued from the naturalization of aliens in that country.

Political Participation of Aliens in Community Law

Article 19 of the Treaty of the Union provides that:

"*All citizens of the Union residing in a member State of which they are not nationals shall have the right to elect and be elected in municipal elections held in the member State where they reside, in the same conditions as the nationals of said State.*

[15] Ruling of the Plenary of the Constitutional Court of Colombia, July 1, 2003. The analysis of this ruling is interesting, because the magistrates make a comparative analysis of constitutional law of Latin American legislations.

This right shall be exercised without prejudice of the modalities unanimously adopted by the Council, at the proposal of the Commission and after consulting the European Parliament; these modalities may establish exceptions when warranted by specific problems in a member State".

"2. Without prejudice of the provisions of paragraph 4 of Article 190 and the norms adopted for the enforcement thereof, all citizens of the Union residing in a member State of which they are not nationals shall have the right to elect and be elected in the elections to the European Parliament in the member State where they reside, in the same conditions as the national of said State. This right shall be exercised without prejudice of the modalities unanimously adopted by the Council, at the proposal of the Commission and after consultation with the European Parliament; these modalities may establish exceptions when warranted by specific problems of a member State."

The acknowledgment of the right to vote and to be elected in the European Union is the direct consequence of the citizenship of the Union that was agreed to in the Maastricht Agreement. Indeed, the right to vote is granted exclusively to citizens of the Union who, in order to become so, must first be citizens of a member country of the European Union.

The right to vote, as stated in Directive 94/80, which develops and regulates it, is granted in application of the principle of equality and non-discrimination among national and non national citizens and is the corollary of the right of free circulation and residence, besides the fact that its purpose is to improve the integration of the citizens of the Union in receiving countries, as stated by the Directive.

The legislation of the European Union towards extra community alien citizens is more interesting for the purposes of this work, because Directive 94/80 has been incorporated in all European juridical texts and is fully applicable.

In this sense, although it is not in force, the adoption of the agreement on the participation of aliens in local public life, drafted in the framework of the Council of Europe on February 5, 1992, is worth mentioning. Its main principles include acknowledging the right of aliens to participate, under equal conditions as nationals, in municipal elections when they have resided for at least five years in the country before the elections take place.

In Europe, there are several States that grant voting rights to aliens. This right is, in all cases, linked to long-term residence, and in some cases with permanent residence, as in Lithuania, Slovakia and Slovenia. In

other cases, States have strong links with historical processes or ethnic, social, or economic affinities (the case of Nordic countries and of Ireland, with respect to Great Britain), or with historic situations (Portugal, with respect to its former colonies).

It is worth noting that this debate, although not at the top of the agenda of European parliamentary interests, remains and is recurrent in societies with a strong presence of extra community aliens when local elections are held. Such is the case of Spain, where a parliamentary initiative is periodically submitted to devise mechanisms to materialize this right.[16]

During debates held in the Spanish Courts, several arguments have been raised in the sense that the lack of acknowledgment of this right to aliens is making Spanish democracy an amputated, partial and relative democracy.[17]

The right of aliens to vote in Spain

The objective scope of this right is defined in Articles *13.2 CE*[18] –of the Spanish Constitution – and *6.1 of the LOEXIS*[19], entitled "Public Participation"[20], which determine the possibility of extending to aliens the right to participate in municipal elections in Spain. It excludes the right of aliens to vote, in agreement with Article 23 CE,[21] "*except the right to vote and to be elected in municipal elections, when so provided by international treaty*[22] *or law, heeding the criterion of reciprocity*", although the Treaty of Maastricht extends the right to vote to community citizens in the municipal elections of the State where they reside, and meets the conditions of Article 13 (determination by treaty and reciprocity), because the vote is recognized in all EU States.

By virtue of Article 13.2 of the Constitution and the doctrine establis-

[16] Indeed, on February 21, 2006, the Parliamentary Group Izquierda Unida, Iniciativa Per Catalunya, with the support of the PSOE, submitted a new bill to move towards the recognition of the right of citizens living in Spain to vote and to be elected. (File 162/000427, pages 7638 et seq.)

[17] Indeed, in the presentation of the initiative, Parliament member Herrera Torres, when referring to the importance of achieving this recognition says that, "it is necessary, because no society can develop democratically when a significant part thereof is deprived from basic political rights" (...) and, "the fact of not recognizing the right to vote of all persons, of the citizens who live and work with us, would mean that we live in an amputated, partial and relative democracy".

[18] "Only Spaniards enjoy the rights acknowledged in Article 23, except those that, under reciprocity criteria, may be established by treaty or by law regarding the right to vote and to be elected in municipal elections".

[19] Organic Law 4/2000, of January 11 on the Rights and Freedoms of Aliens in Spain and their Social Integration, as drafted in Organic Laws 8/2000, of December 22, 11/2003 of September 29, and 14/2003, of November 20.

[20] "Public Participation (written according to Organic Law 8/2000). 1. Aliens in Spain may have the right to vote in municipal elections on the basis of reciprocity, in the terms established by Laws or Treaties for Spaniards residing in the countries of origin of those aliens".

[21] "Citizens have the right to participate in public affairs, directly or through freely elected representatives in periodical elections by universal vote". "Likewise, they have the right to access public positions and offices in equal conditions, with the requirements stated by the laws".

[22] To this date, except for the reciprocity agreement signed and ratified with Norway, Spain has signed, but not ratified, agreements with several Ibero-American countries: Colombia (182,223) Argentina (74,617), Venezuela (24,540), Uruguay (21,983) and Chile (17,727). This could allow many immigrants to vote in 2007 (the number in parenthesis is the number of people affected by the measure). There is also the intention of speeding up the process to execute similar agreements with the two countries with the largest number of immigrants in Spain: Morocco (503,966) and Ecuador (339,618). However, there is a problem with the latter: the Ecuadorian Constitution prohibits alien voting.

hed by a ruling of the Constitutional Tribunal of Spain in 1984, the right to vote and to be elected in municipal elections is only inherent to aliens when treaties or laws recognize this right. Therefore, extending it to Ecuadorian citizens residing in Spain may happen either via the execution of a bilateral treaty that lays down the conditions for the exercise of the right for Ecuadorians in Spain –*and by Spaniards in Ecuador*– or through the production of a law whereby Spain, unilaterally, recognizes this right and establishes the conditions for the exercise thereof. Below a series of scenarios based on the reciprocity requirement.

Intensity of the Spanish constitutional demand for reciprocity

The constitutional demand for reciprocity has been understood by Spanish legislators and treaty experts as referring to reciprocity *acknowledging the right to vote, more than to the actual exercise of this right*. Therefore, its conventional and legislative development is possible.

Granting political rights to aliens is an issue of domestic public law related to the degree of social integration of aliens sought by each country, and the internationalization thereof, through reciprocity, is difficult to apply and enforce. In the words of J. Rodriguez Drincourt, "*a true immigration and alien policy will hardly be able to fulfill its purpose if it is based on the principle of reciprocity*".[23] A system of acknowledgment of rights based on reciprocity is an obstacle for the concession of rights to immigrants and, in comparative law, the technical difficulties of administration must be taken into account, in view of the confluence of several juridical regimes.

The Ecuadorian Constitution

Once we have established the objective scope of the rights recognized in Spain, we now turn to the public law of Ecuador to continue the analysis of constitutional viability.

Article 13 of the Constitution determines that "*aliens enjoy the same rights as Ecuadorians, with the limitations established in the Constitution and the Laws*". These limitations can be clearly seen in Article 26, which provides that "*Ecuadorian citizens enjoy the right to elect and be elected (…) and to hold public jobs and offices (…) aliens do not enjoy these rights*"; therefore, such limitations are absolute.

This shows that the Political Constitution of Ecuador does not enshrine the right of political participation as a right of the person, which in other cases has not prevented other States from granting electoral rights to aliens, either unilaterally or multi-

[23] Rodriguez Drincourt Alvarez, J. Los derechos politicos de los extranjeros, Madrid, Civitas, 1997.

laterally. In the case of Ecuador, the execution of a bilateral agreement between Ecuador and Spain would be affected, according to this analysis, unless Ecuador's constitution gives voting rights to Spanish nationals residing in its territory, because, according to the juridical structure of Ecuador, secondary norms may not contradict the Constitution.

The greatest obstacle for the acknowledgment of vote is the *demand of reciprocity*. This issue was not settled by the Convention of the Council of Europe of 1992 on the participation of aliens in local public life. Art. 6 recognizes the right to vote and to be elected in local elections, or at least to vote, of all aliens who have resided in the country for 5 years at the time of the elections, but it does not resolve the requirement of reciprocity for States that are not members of the European Council.

For the same reason, a Spanish law could not grant voting rights to all resident immigrants, because it would be unconstitutional: *reciprocity is not only conventional, it would also exist when the laws of two countries, in this case Spain and Ecuador, grant the same right reciprocally to the citizens of the other country; this is legal reciprocity –which is also not the case*.

In the case of Ecuador, the appropriate decision is to resort to the figure of conventional reciprocity, in order to apply the constitutional norm through bilateral agreements, depending on specific internal or international scenarios.

Possible scenarios

Reforming the Spanish Constitution?

If, as we explained at the beginning, current democracy demands the participation of immigrants with stable residence in Spain and the Constitution contains a condition of reciprocity that practically makes voting impossible, the only logical way out, from the Spanish juridical point of view, is reforming the Constitution. All it would take would be to suppress the requirement of reciprocity of Art. 13.2, leaving any future decision to treaties and the law, or else suppress paragraph 2 in its entirety, because ultimately the solution would be the same.

The experience of constitutional democracies is to proceed to reform the Political Charter when it must adapt to new circumstances. In this case it is evident: in 1978 there was no immigration and now there is. For that reason, the 1978 Constitution introduced limits that would be considered antidemocratic today.

The reform of Art. 13 CE should follow the procedure provided by the Constitution itself[24]. The initiative of the reform may come from

the Government, from Parliamentary Groups in Congress, from the Senate or from the Parliaments of the Autonomous Communities, but it cannot be proposed by the people. It is essential to begin this reflection, although for the moment it might be difficult to propose a reform in this sense, in view of the persistent confrontation in Spanish political circles regarding the issue of immigration.

Interpretation of the Council of State regarding the "intensity" in the applicability of the constitutional principle of reciprocity?

A non-bill of law was submitted as early as 2006[25] –by the Socialista and Izquierda Unida parties– urging the Government to:

"Proceed to negotiate and sign agreements or treaties with the countries with the largest number of national legal residents in Spain and, especially, with those with which Spain has the closest historical, political and cultural relations, so as to allow those nationals to vote and to be elected in municipal elections in Spain under Article 13.2 of the Constitution;

To request the Council of State[26] to submit a report on the application of Article 13.2 of the Constitution regarding the participation of aliens residing in Spain in municipal elections, and, particularly, on the interpretation of the term "criteria of reciprocity" referred to in the aforementioned precept;

The signing and ratification of the European agreement of February 5, 1992 on the participation of aliens in local public life".

The goal of this report would be either to suppress this Article –which appeared when Spain was an issuer of immigrants instead of a receiver– or at least, to interpret it in a "flexible way" to facilitate the vote to immigrants without having to modify the Constitution. In this event, later on, the Government would have to pass a law, and new voters would have to be registered in the electoral roster. The non bill of Law asks the Government to negotiate agreements with countries with more legal residents in Spain, "especially" with those with more historical, political and cultural ties or, in the best of cases, to determine if it is possible from the constitutional point of view to allow immigrants –with whose countries none of these agreements have been reached– to vote.

24 Title X: The Constitutional Reform.

25 *Non-bill of Law on the extension of voting rights in municipal elections to legal resident aliens*, submitted by the Socialista and Izquierda Unida Parliamentary Groups – Initiative of Catalunya Verds for debate by the Plenary of the House. July 10, 2006. http://www.izquierda-unida.es/federal/comun/p_vote_activoypasivo.pdf

26 The role of the Council of State is merely consultative, and it is limited to giving founded opinions on the matter of the consultation, or to propose a better solution. In the exercise of this function, the Council must ensure the observance of the Constitution and the other laws (see Organic Law 3/1980, of April 22). In addition, it must strive to maintain the harmony of the system, the rigor of the regulatory technique and the adequate performance of the Administration.

Reform of the Ecuadorian Constitution? The Constituent Assembly and a new Constitutional Article

Under the argument that it is convenient and urgent to enhance the analysis of the possibilities and limitations for the construction of a model of active and inclusive citizenship, where the basis of the social contract and of participation and the capacity to influence common issues is not nationality or naturalization but residence or domicile, the Executive has the capacity to promote, within the process of constitutional reforms it has announced, one reform regarding the inclusion of this criterion, and therefore allow non-national residents –and therefore Spaniards– to vote and to be elected in Ecuadorian elections.

What should be weighed from the political point of view, depending on the different theoretical models available, is the limitation of this participation, either in local or sectoral elections (administrative, more than political). This scenario would allow the immediate execution of a bilateral agreement with Spain for the exercise of the right of Ecuadorian citizens residing in Spain to vote and to be elected, by virtue of the principle of constitutional reciprocity already mentioned.

Exemption of the application of reciprocity in the process of generalization of human rights?

The constitutional treatment of human rights is indissolubly linked to the Social State clause, that is, with the commitment of constituted powers to guarantee a *"material substratum to citizens regardless of their participation in the market, as a condition for the full development of human personality and as a precondition to be able to effectively perform civil and political freedoms*".[27] However, the constitutional basis of the social rights of aliens and immigrants is Art. 13 CE, already mentioned.

To summarize, the doctrine of the Spanish Constitutional Tribunal on this issue is materialized on a tripartite typology of the rights, as they admit unequal treatment between Spaniards and aliens depending on who holds them and who exercises them[28].

[27] MONEREO PEREZ, J.L. Derechos sociales de la ciudadania y ordenamiento laboral, Economic and Social Council, Madrid, 1996, Page 174.

[28] The rights that are inherent to the person or directly linked to the dignity of the person (for example, right to life, to physical and moral integrity, to ideological and religious freedom, to intimacy, to judicial protection), are enjoyed by Spaniards and aliens alike, and legislators cannot constitutionally establish any discrimination whatsoever regarding the regulation of these rights.

On the other hand, there are rights that cannot be compared, such as *Article 23 of the CE, which are political in nature: right to vote*, to access a public office.

Other rights and freedoms, including those of economic and social initiatives, admit unequal treatment among nationals and aliens (or groups of aliens) in the exercise thereof and even in their titularity. Technically, these are called rights of legal configuration, because laws and treaties may establish different treatments, provided they are reasonably based on the fact of the different nationality of the holders of those rights.

We should bear in mind that *doctrine and jurisprudence in Spain is evolving towards reducing the discriminatory powers of nationality*. In other words, we see increasingly more often that many differences traditionally based on nationality are not reasonable.

In other words, the Spanish legislation *intends* to respect the constitutional principles and precepts regarding equal treatment to Spanish citizens and aliens, in a dual sense: on the one hand, the constitutional limitation regarding matching rights as defined by reserving more intense political participation rights to nationals is not exceeded (e.g., Art. 23 compared to Art. 13 CE) and, on the other hand, the constitutional interdiction of unequal treatment for reasons of nationality regarding the rights and fundamental freedoms directly linked to the dignity of the human being is not violated, according to the jurisprudence of the Constitutional Tribunal we have analyzed.[29]

We do not agree with this reasoning, because in the case of immigrants, due to their special vulnerable situation, the relevance of their right to vote and to be elected for their full integration in the receiving society is even more evident. Accordingly, we should also consider in this case that reciprocity is not applicable to bilateral human rights agreements, as based on a civic citizenship, immigrants would have not only civil and social rights, but also essential political rights. Therefore, it is essential to shift the paradigm of nationality to that of residence, regarding the juridical acknowledgment of the rights of non nationals[30], even more so within a clearly marked trend towards extending the enjoyment of human rights to subjects and groups that previously did not enjoy them.

Theoretically, the juridical acknowledgment of the rights of non nationals usually moves on three fundamental planes: there are rights that non nationals have regardless of any circumstance; rights that non nationals have; and, finally, rights that non nationals have if so provided by a treaty or a law. The first are inherent to human dignity itself (individual rights and some social rights); the second have to do with the notion of sovereignty, defense or public office, and in some cases with the welfare activity of the State; and, finally, the third are related to those individual or social rights not included in the abovementioned planes, including political participation rights.

Within this scenario and by virtue of a strictly juridical reasoning,

[29] "La Clausula del Estado Social y los derechos de los inmigrantes", Pilar Charro Baena et.al., Page 260, in *Regulacion de la extranjeria y migracion en España*. 2006.

[30] De Asis, Rafael. La participacion politica de los inmigrantes: hacia una nueva generalizacion de los derechos….

it is perfectly viable to open the acknowledgment of political participation to residents. This implies abandoning the criterion of nationality and replacing it with the criterion of residence: tying the right of citizenship with stable residence at local level, with full political rights at municipal level.

Conclusion

The Universal Declaration of Human Rights and the American Convention on the Rights of Men limit political rights to citizens. According to Professor Esteban de la Rosa, "this has helped to legitimate, via the drafting of agreements, the still widespread situation of denying access of aliens to political rights".[31] In spite of this affirmation, it is also true that the acknowledgment of this right to aliens is evolving, because the International Covenant of Civil and Political Rights already acknowledges them indirectly, a concept that is more developed in the International Convention on the Protection of the Rights of All Migrant Workers and their Families, which already enunciates the power of the state of residence of the alien to regulate this right.

In the case of Latin America, this acknowledgment has been made via the constitution and unilaterally. None of the Latin American Constitutions contains the requirement of reciprocity required by the Spanish Constitution and, in the case of Uruguay, this acknowledgment is fully applied without need of any additional regulatory norm.

In any case, it is important to point out that the political rights recognized to aliens in Latin American legislations have in common the requirement of long-term residence, without which this right cannot be requested. In some cases, as in Costa Rica, aliens must accredit, in addition to nationality, twelve months of uninterrupted residence.

In Europe, the convention on the participation of aliens in local public life, although not currently in effect, is an undeniable development aimed to achieve the extension of this right to all aliens residing in its territory, and in this way to eliminate the juridical status of different groups, because regarding political rights, currently there are four differentiated application systems: political rights reserved to citizens, with full participation; those reserved to community citizens, with participation limited to the municipal level; those reserved to alien citizens with whom certain countries have established agreements to acknowledge the political rights of their nationals; and, finally, a limited number of

[31] De La Rosa, Fernando Esteban, "Derechos de Participacion Politica y Empadronamiento de los Extranjeros en España", e-document with no other bibliographical reference.

rights that are acknowledged to all alien residents in general.

Beyond the electoral interests of the parties, regulating the right to vote of immigrants is a significant element of any integration policy. The political participation of all the people legally residing in a country is, without a doubt, an instrument that facilitates the integration of society. Their participation as voters and candidates in local elections turns them into key actors of their immediate surroundings, promoting their involvement in municipal life and, very probably, generating an attitude of greater consideration in some political leaders.

The intent to extend voting rights beyond the citizens of the European Union is a step forward. However, we should not ignore that the criteria of reciprocity mentioned in Art. 13.2 CE respond to the acknowledgment of the right of persons, because of their nationality or citizenship, not of their legal residence, and that the source of the norm, whether a treaty or a law, seeks subordination to these guiding criteria as the most appropriate juridical criterion. For this reason, replacing the concept of citizenship based on nationality with another concept based on legal permanent residence is essential. As the subject goes beyond the scope of the State (Spain, in this case), it has to be addressed in the broader context of the debate on citizenship.

The report of the Council of State mentioned here will serve to interpret the constitutional articles that allow immigrants to vote. This interpretation is necessary, because there are cases like Ecuador, with a large number of citizens living in Spain, whose constitution does not allow for the election of aliens, and others, like Iceland, who allow aliens to vote, even if there is no reciprocity agreement with their country of origin.

However, on the basis of the brief analysis made, we foresee ambiguous conclusions suggesting –in the best of cases– the elimination of Article 13.2 CE –with huge political difficulties– or ratifying the constitutional reason which states that the criterion of reciprocity must prevail, in greater or lesser intensity, if not by virtue of an *ad hoc* treaty, at least based on the existence of a constitutional norm in the State of origin of the immigrants to allow Spaniards to exercise voting rights.

The *more realistic option* for Ecuadorian citizens to exercise their right to political participation through the right to vote and to be elected in the receiving society –Spain, is evident: the Ecuadorian State and the Constituent Assembly must discuss with political maturity the need for an urgent constitutional change of Article 26 –and its provi-

sions regarding development, based on the mechanisms provided therein –Title XIII, Chapter 3– by virtue of the universal evolution of the juridical acknowledgment of the rights of non nationals, operated in turn via replacing the concept of citizenship based on nationality with another based on permanent legal residence.

This would allow the application of the principle of reciprocity contained in Article 13.2 of the Spanish Constitution, and it would enable the execution of a pertinent bilateral agreement.[31]

Finally, this scenario could be articulated on two elements: initiatives regarding "*Ibero American citizenship*" and a position of values by Ecuador that enhances its dignified political discourse and reaffirms the category of political participation as a fundamental human right, because *"up to what point can the acknowledgment of rights depend on the existence of reciprocity among States?"*[32]

ANNEX
Draft constitutional article

POLITICAL RIGHTS AND DEMOCRATIC PARTICIPATION OF ALIEN CITIZENS IN MUNICIPAL ELECTIONS

–IN THE TITLE CORRESPONDING TO RIGHTS, GUARANTEES–

Rationale

To provide legal elements for constitutional reform that allows aliens to vote in municipal elections –which for their own nature are focused more in the performance of administrative, rather than political competences – so that, based on the application of the principle of reciprocity to Ecuadorian citizens residing abroad, after compliance with certain requirements, their right to vote in municipal elections is acknowledged.

The Rule of Law must reaffirm the civil rights and the juridical guarantees of all persons under a scheme of civic citizenship, which implies advancing in the acknowledgment of the rights of political participation for all residents in local election processes.

Whereas:

It is the duty of the State to defend the rights and fundamental guarantees of its citizens abroad,

Within the range of those rights, the exercise of political rights, particularly the right to vote, in the recei-

[32] Or that this country adapts its Electoral law after the reform in the country of origin of the immigrats is made.
[33] Ramiro Aviles, Miguel A. El derecho al voto de los inmigrantes, una utopia para el siglo XXI. Universidad Carlos III, Madrid. http://www.uv.es/CEFD/12/ramiro.pdf

ving State is fundamental for the full integration of immigrants,

Article 26 of the current Political Constitution of Ecuador expressly prohibits alien voting,

It is a trend of modern legislative systems to include the right of aliens to vote in municipal elections within their constitutional practices,

The broadening of the rights of political participation must involve aliens in Ecuador, taking the distinction between nationality and citizenship as framework of reference,

A definitive distinction between citizenship and nationality, through a constitutional definition would allow interpreting citizenship as the capacity to exercise rights, not only as belonging to a State or territory,

Legislations in foreign countries where most Ecuadorian citizens reside require applying the principle of conventional or legal reciprocity to the right of aliens to vote in municipal elections,

Therefore, to materialize this right, the Ecuadorian constitutional system must be reformed in order to allow the immediate execution of bilateral agreements so that Ecuadorian citizens residing abroad may exercise their right to vote, by virtue of the principle of conventional reciprocity,

To this end, the involvement of citizens in the exercise of democracy must be guaranteed by the Constitution,

Resolves:

Article One: to include the following Article in the text of the new Constitution:

"Under the principle of conventional reciprocity, established by the pertinent bilateral treaty, aliens shall exercise the right to vote in municipal elections."

Article Two: All legal, regulatory and other provisions opposed to this norm are hereby repealed.

Madrid 2008

BIBLIOGRAPHY

Aja Eliseo, Diez Bueso Laura. "La participación política de los inmigrantes", Revista Electrónica La Factoría No. 10.

De la Rosa, Fernando Esteban; "Derechos de Participación Política y Empadronamiento de los Extranjeros"; Internet document –no other bibliographical data.

De Asís, Rafael. *La participación política de los inmigrantes: hacia una nueva generalización de los derechos*. Instituto de Derechos Humanos Bartolomé de Las Casas. Valencia, October 27, 2005. Pages 2-15.

De la Rosa, F. Esteban. *El derecho de sufragio de los extranjeros en España*, in Revista de la Facultad de Derecho de la Universidad de Granada, 3d season, No. 1, 1998, pages 135-171.

Halliday, Fred. "Las Relaciones Internacionales y sus debates". Centro de Investigación para la Paz, Madrid, 2006.

Massó Garrote, M. F. *Los derechos políticos de los extranjeros en el Estado Nacional*. Los derechos de participación política y el derecho de acceso a funciones públicas, Madrid, Colex, 1997.

Méndez Lago Mónica; "Los Derechos Políticos de los Inmigrantes". Fundación Séneca –no other bibliographical data.

Monereo Pérez, J. L. *Derechos sociales de la ciudadanía y ordenamiento laboral*, Economic and Social Council, Madrid, 1996, Page 174.

Ramiro Avilés, Miguel A. El derecho al voto de los inmigrantes, una utopía para el siglo XXI. Universidad Carlos III, Madrid. http://www.uv.es/CEFD/12/ramiro.pdf

Rodríguez Drincourt Álvarez, J. *Los derechos políticos de los extranjeros*, Madrid, Civitas, 1997.

Ruiz de Huidobro de Carlos, José Ma. (ed) et. al. *Regulación legal de la extranjería e inmigración en España*. Universidad Pontificia de Comillas, Top Printer Plus, 2006.

Vallespín, F.. *El futuro de la política*, Taurus, Madrid., 2000.

------ Anuario Estadístico de Inmigración. Ministry of Labor and Social Affairs. 2005.

------ Boletín Estadístico de Extranjería e Inmigración, Ministry of Labor and Social Affairs, No. 12, April 2007.

------ "El Futuro de la Constitución Europea: opciones para España". Elcano reports. January 2007.

------ United Nations Human Rights Website, Office of the High Commissioner for Human Rights; General Comment 15; "The position of aliens under the Covenant".

------ United Nations Human Rights Website, Office of the High Commissioner for Human Rights; General Comment 25; "The right to participate in public affairs, voting rights and the right of equal access to public service".

------ UN Resolutions: 53/144 "Declaration on the right and the duty of individuals, groups and institutions to promote and protect the human rights and universally recognized fundamental freedoms". United Nations Website.

------ Millennium Declaration; Resolution 55/2, United Nations Website.

Nature of the Vote; Political Database of the Americas; Georgetown University, July 2006.

------ Acknowledgment of the Right of Active and Passive Vote of Alien Citizens in Spain; File 162/000427; Parliament Debates. February 2006.

------ European Council Directive 94/80/CE of December 19, 1994.

------ Organization of American States: "El derecho en un nuevo orden interamericano", Internet document. OEA/2000.

------ FORINTER; "Los espacios juridicos y de participacion de los inmigrantes". 2006.

------ American Declaration on the Rights and Duties of Men.

------ Convention on the Status of Aliens; Havana, February 20, 1928.

------ CEPAL. "Migracion Internacional, Derechos Humanos y Desarrollo en America Latina y el Caribe". March 2006.

------ Committee of Ministers of the Council of Europe. *Recommendation 2001/19 and explanatory report on the participation of citizens in local public life*. Documents INAP, 2001.