SPANISH CONSTITUTIONAL AND LEGAL REGULATION OF CITIZENSHIP AND IMMIGRANTS' PUBLIC PARTICIPATION

The Case for Local Suffrage and Naturalization Reform

ABSTRACT

Following European Union guidelines, Spain has embraced integration as a mainstream goal of its migration policies. Political participation is a prerequisite for the genuine integration of foreign groups and ultimately, for the creation of flexible procedures of naturalization. In Spain, only EU citizens and Norwegians are currently entitled to vote in local elections, and naturalization is unevenly granted to immigrants according to their country of origin. A better balance must be found to create a fairer, more consistent system of public participation and naturalization in order to promote genuine integration.

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The social integration of immigrants has become one of the main objectives of recent legislation and public policies on migration in the European Union.[1] This is particularly true for Spain, one of the EU member states that has received the most immigrants in recent years. Indeed, immigration in Spain is today an indisputable and irreversible fact: in 2008, without counting undocumented foreigners, more than 9% of the Spanish population was made up of legally resident foreign nationals[2] (a total of 4,192,000 individuals). In some autonomous communities (regions), the percentage is considerably higher: indeed, five of the 17 regions accounted for more than 60% of the foreign population.

In this context of rapidly growing immigration, the debate on the mechanisms of immigrants' political participation has increased in intensity, as has the recognition of the need for measures to ensure their long-term integration. This goal is shared by all major actors in the political and social spectrum.[3] The debate is also growing in intensity due to the fact that the recently re-elected Socialist government is considering a reform of the immigration model and its legislation. In this article, we offer a preliminary description of the various factors that affect the debate on immigrants' public participation. Firstly, we analyze the constitutional limits imposed on aliens in terms of access to voting rights and naturalization. Secondly, we discuss the conditions and procedures required for naturalization, and finally, we bring together the two strands of our analysis in order to draw conclusions.

Constitutional constraints on the political participation of third-country nationals

Article 13.2 of the Spanish Constitution reads as follows:

> **Art. 13 SpC.**
> 2. Only Spanish citizens shall have the rights recognized in Section 23 except in 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.[4]

The Constitution introduces a dual level of political participation for foreign nationals: on the one hand, it recognizes the right of foreigners to vote in local elections, but on the other it denies this right in regional and national elections. This seems quite natural if we bear in mind that in 1978, when the Spanish Constitution was drafted and passed by Parliament, emigration of Spanish nationals, not immigration of foreigners, was the rule; therefore, the political participation of foreigners was considered instrumental in ensuring the political participation of Spanish citizens

abroad. The few immigrants present in Spain in the late 1970s were mainly South American refugees and retirees from Western Europe. In the case of the former, the possibility of acquiring Spanish nationality relatively quickly (after two years of legal residence) meant that an acceptable degree of political participation and social integration could be achieved quite easily. Some of the countries of origin of the foreigners in the second group (Western European retirees) would eventually sign bilateral agreements recognizing the right of their respective populations to vote (Sweden, for example). However, for most of these countries, European Community membership acted as a disincentive to sign new bilateral agreements on this issue, as European citizenship was incorporated into the 1992 Maastricht Treaty, and the right to vote in local elections was established for EU citizens resident in EU countries other than their own. In fact, to admit local suffrage of EU citizens, a Decision by the Constitutional Court (*Declaration 1/1991 of the Constitutional Court*) and a minor reform of the Constitution were necessary. Thus, the Constitution recognizes the right of aliens to vote in municipal elections because this does not affect national sovereignty. However, this right is subject to certain conditions, the most important one being the need to ensure reciprocity (foreign citizens from a particular country are allowed to vote in Spain if Spanish citizens in that country are allowed to exercise the same right).

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Reciprocity, then, emerges as the main practical obstacle to the universal recognition of the right of immigrants to vote in municipal elections. At the time of writing this article, reciprocity is guaranteed by international treaties: bilateral agreements (such as the current Agreement with Norway, or the old agreements with Holland, Denmark or Sweden), and multilateral ones (such as the European Convention on the Participation of Foreigners in Public Life at Local Level, signed at Strasbourg on February 5, 1992). In practice, the criterion of reciprocity is interpreted quite narrowly by the government: for instance, other bilateral treaties with Argentina, Chile, and Uruguay are not considered directly applicable because they refer to future treaties that have not yet been ratified. Contesting this interpretation, some authors call for the full applicability of those treaties and advocate appealing to the courts (Santaolaya 2007). In fact, only nationals from Norway and the EU member states – as a result of their EU citizenship – are accorded the right to vote in municipal elections.

The fact is that in everyday life, the condition of reciprocity establishes a difference in treatment at the very outset that, while not strictly discriminatory, can work against integration since it grants recognition as political actors only to some nationalities, and generates dual asymmetries: nationals-aliens, and aliens-aliens. In practice, these asymmetries affect certain nationalities more than others, reducing their capacity to influence the political agenda or to participate in the decision-making process (Moya 2006, Solanes 2006). Article 13 of the Spanish Constitution and its interpretation by the Constitutional Court have created a political *impasse*, given that the main parties have no intention of reforming the Constitution on this specific point even though constitutional reform is underway.[5] At the same time, Spanish legislation has not been clear enough as to the proper interpretation of the constitutional concept of "reciprocity;" this is a matter that will have to be dealt with at some point, and with a certain degree of creativity, in order to introduce some flexibility in the system.[6] In fact, on February 21, 2006, following numerous failed attempts, the Plenary of the Congress of Deputies unanimously approved a *Draft Bill to promote the legal reforms necessary to recognize the right of aliens to vote in municipal elections*, with the unanimous support of all political groups involved.[7] The proposal seemed to introduce a principle of consensus around the option for the bilateral treaty as the main instrument to extend the vote to aliens. Two years and one national election later, the proposal has not prospered and no noticeable progress has been made.

Naturalization and regulation of citizenship

Even though in strictly legal terms the acquisition of nationality puts an end to immigrant status, in practice naturalization procedures are playing an increasingly significant role in the integration of immigrants in Spain, and represent the back door for certain migrant groups who wish to obtain political representation. To explain why this is so, we will start by briefly examining the main procedures and conditions for naturalization.

First of all, nationality *of origin*[8] is transmitted in Spain by *jus sanguinis*, so children born to Spanish parents are recognized by law as Spanish citizens, independently of their place of birth. Second, in addition to the conditions detailed in each procedure, it is always necessary to show evidence of good behaviour (that is, no criminal record in Spain or in the country of origin) and a satisfactory degree of integration in Spanish society (article 22.4 Sp. Cc.). Third, the most significant procedures of naturalization[9] are: a) *naturalization by birth*, when a child is born on Spanish soil to foreign parents, and those parents automatically

Table 1
Number of naturalizations by procedure/requirements in 2005

Residence 2 years		Residence 10 years		Birth		Marriage		Other		Unknown	Total	
Number	%	Number	%	Number	%	Number	%	Number	%	Number	Number	%
28,507	66.87	5,237	12.28	2,636	6.18	5,597	13.13	653	1.53	199	**42,829**	**100.00**

Source: Anuario de Inmigración en España 2005, Ministry of Labour and Social Affairs.

transmit their nationality; later, either after one year of residence in Spain, if applied for by the parents, or one year after the age of majority if the applicant is the child, Spanish nationality can be granted, pursuant to article 17 Sp. Cc.; b) *naturalization by continued residence*, obtained by any foreign citizen after two, five or ten years of continued legal residence (article 21.2 Sp. Cc.); the length varies depending on the nationality of the applicant (Latin Americans, Filipinos, Sephardim, Guinean, Andorran and Portuguese can obtain it in two years – we will call it the two-year track), or their status (three years for persons under foster care, five years for asylees and refugees), but the general rule is that it can be applied for after ten years of residence; c) *naturalization by marriage*, applied for by the spouse (including recently admitted same-sex marriages) or the widow provided that and the couple is/was not divorced or separated (article 22.2 Sp. Cc.). The relative importance of each procedure in terms of the percentage of the total number of naturalizations is shown in Table 1.

The first conclusion that can be drawn from the existence of the different procedures and conditions imposed by the present legislation on naturalization is that they are causing a clear division among the main immigrant groups in Spain. Latin Americans are at a huge advantage compared with the rest. Moroccans, for example, need more than ten years to obtain nationality, compared with only two years in the case of Latin Americans. So Latin Americans naturalize earlier and in greater numbers: in 2005 the two-year track accounted for more than 66% of naturalizations, the majority of which were Latin Americans (a total of 31,727). This is so even though Latin Americans did not arrive in large numbers until the late 1990s, whereas the first flows of Moroccans arrived in Spain during the 1980s and 1990s: in fact, if we compare rates of naturalization according to nationality we find that approximately 1% of Moroccans are naturalized, compared with rates of 2% to 6% among Latin Americans, depending on their country of origin.[10] This effect is also encouraged by the conclusion of dual nationality agreements with some Latin American countries which entitle their nationals to retain their nationality even if they acquire Spanish citizenship.

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A further analysis of naturalization data from a chronological perspective shows a substantial, intensified increase in recent years in the number of naturalizations (more than 62,000 in 2006[11]). This increase is unlikely to fall in the following years. Given the nature and composition of immigration to Spain, it is crystal clear that in the coming years the rate of naturalizations will intensify: in fact, it is estimated that there will be about 100,000 naturalizations per year by 2010-2011.

All of these arguments draw attention to the need to reform current naturalization procedures.[12] This reform will have to be addressed sooner or later by legislators as part of a far more sophisticated and consistent model of social integration for immigrants in which political participation is based on a more equitable treatment of all immigrant groups.

Conclusion

One of the main arguments used today by advocates of the political inclusion and integration of immigrants is the need to *empower* this group. The extent and quality of democracy in a given country can be called into question if a substantial part of its population is excluded from the political process.[13]

At present in Spain, the reciprocity condition allows only EU citizens and Norwegians to vote. Any further steps in this direction without reforming of the Constitution risk deepening the divide between different groups of foreign nationals, those who vote and those (the majority) who cannot. The only way to take this step is on a temporary basis, during a transition period before the reform of the Constitution is undertaken.

This lack of political representation is aggravated by the present legislation on naturalization, which introduces new asymmetries between the different national groups. Of the three main groups of foreign populations in Spain, Latin Americans can use the naturalization system to circumvent legislation on immigration. Romanians have no need to do

this, because they already enjoy full political and public participation as new EU-citizens, but Moroccans (and other third-country nationals) are bound by a procedure that requires more than ten years of legal residence. So it comes as no surprise to learn that the perception that various immigrant groups have of the legislation on nationality differs greatly, and that Moroccans should view it as a highly discriminatory process which leads to unequal political weight and representation, and indirectly, to dissatisfaction with the system of integration. In addition, the current naturalization system is a major pull-factor for immigration to Spain, at least for those groups who benefit from this system (that is, Latin Americans).

Facing all these difficulties, underrepresented foreigners have to transmit their political demands through alternative or indirect mechanisms such as associations, councils, and non-elected representatives, which may well lack a true democratic and representative basis,[14] and which often acquire an exaggerated importance. But at a time when Spain has more than 4 million aliens on its territory, with 856,000 of them being permanent residents (38.4% of all third-country residents in 2008), there is a clear need to address the inconsistencies of our immigration model and to advance towards a real and deeper integration by adopting new mechanisms of political participation. In our view, the first step involves the reform of naturalization.

However, the general elections of March 2008 in Spain voted the Socialist Government back into office, in a completely new economic climate. Parliament and the government will have to deal with economic crisis at home and abroad (*subprime* banking crisis, rising oil prices, recession in the building sector, and so on). At present it seems that the government's response to this new scenario will involve a reconsideration of its previous proactive approach and the introduction of tougher immigration policies and border controls (and, probably, the removal of proposals for foreign citizens' voting rights from the political agenda). At the same time, however, 4 million residents will press for more policies to favour their integration. Even if conducted with a view to toughening conditions for those benefiting from the fast-track procedure, reforms of naturalization procedures may introduce a more egalitarian rationale into the naturalization system, and may unintentionally become the first step towards a more cogent integration system for the long term. Instead, however, the Socialist Party in Congress seems to favour only a limited extension of immigrants' suffrage to certain nationalities, something that could prove counterproductive if it is not accompanied by a reform of the naturalization process.

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Notes

[1] According to article 63 of the Treaty of the European Community (TEC), the European Union is responsible for coordinating and setting common integration policies. The European Commission has published a set of good practices in the *Handbook on Integration for Policy-Makers and Practitioners*, European Commission, at: <www.europa.eu.int/comm/justice_home/doc_centre/immigration/integration/doc/handbook_en.pdf> (2nd edition).

[2] Within these four million people, a distinction should be made between the 2,230,000 resident third-country nationals and the 1,962,000 EU citizens. Since Romania's entry into the EU in 2007, some 664,880 Romanians who previously figured as non-EU citizens have been considered EU citizens; this is significant because the Romanians form by far the largest group of legal residents in Spain. These figures are dated March 31, 2008 and are taken from the data published by the Secretary of State for Immigration and Emigration every three months. (Available at <http://extranjeros.mtas.es>).

[3] Since 1991, Spain has embraced integration as one of the cornerstones of its immigration policy, in accordance with the European Union guidelines. A Decision of the Spanish Congress in 1991 established the social integration of immigrants as a political goal. This decision was supported by the Royal Decree on Immigration passed in 1996. Four years later, the *Immigration Act 2000* had as its full title *The Act of Aliens' Rights and Freedoms and their Social Integration*; however, beyond the title and the preamble, the Act did not provide a definition of integration. The Act was the starting point of several long-term integration plans devised by the Spanish government and the autonomous communities (regions).

[4] The phrase in bold highlights the changes brought to article 13.2 of the Spanish Constitution in order to adapt it to the Treaty of the European Union, signed in Maastricht in 1992, in accordance with Decree 1/1992 of the Constitutional Court.

[5] It has not been introduced in the package of reforms currently under preparation (see the report made by the *State Council* on the issue, at <www.consejo-estado.es/>).

[6] The Spanish Legislator has the last word in the ratification of any international treaty, articles 93 and 94 Sp. Const.

[7] See *Diari Oficial del Congrés dels Diputats* (Official Diary of the Congress of Deputies) from February 3, 2006, Series D, No. 327, p. 2 and 3. Received 309 votes in favour, 0 abstentions, 0 votes against.

[8] The Spanish Constitution distinguishes between Spanish citizens *of origin* and *by acquisition* (naturalization), the former being constitutionally protected from losing citizenship. Subjected to the constitutional provisions, naturalization in Spain is regulated by the Civil Code, as amended in this topic by the *Nationality Act 2002* (*Law 36/2002*, October 8, 2002).

[9] There are other less frequent procedures of naturalization which are, statistically speaking, irrelevant: naturalization by discretion of the Ministry of Justice ("carta de naturaleza", art. 21.1 Sp. Cc.); by virtue of the continuous use of Spanish nationality during ten years ("posesión de estado" art. 18 Sp. Cc.); by presumption for those born in Spain to foreign parents when their national legislation denies the child the parents' nationality, in order to avoid statelessness (art. 20.b); naturalization by people whose filiations are determined after attainment of majority, or who take Spanish nationality after the age of majority (art 20.c Sp. Cc).

[10] Considering naturalization in relation to the total number of legal residents according to nationality, we find that in 2005, there were 493,114 immigrants from Morocco but only 5,555 obtained naturalization (about 1%); there were 82,412 Argentinean nationals resident in Spain, of

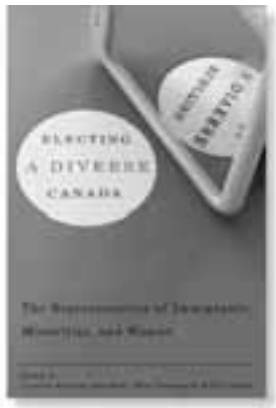
whom 2,293 were naturalized (2.6%). The figures for other Latin American nationalities were as follows: Ecuadorians 357,065 resident, 10,031 naturalized (about 3%); Colombians 204,348 resident, 7,334 naturalized (3.5%); Peruvians 82,533 resident, 3,645 naturalized (4.3%); and Dominican Republic 50,765 resident, 2,322 naturalized (4.6%). The highest rate was found in the Cubans: 36,142 resident, and 2,506 naturalized (7%).

[11] In the 1980s and 1990s, when the number of immigrants was still under half a million, the rate of naturalizations tended to increase slowly, from 5,623 in 1980 to 7,079 in 1990. However, in the next decade the trend changed, and figures more than doubled in 2000, with 11,999 naturalizations and 16,743 in 2001. Between 2001 and 2008, the immigration population leapt from one to four million, the figures for naturalization also rose substantially each year: in 2002 the number of naturalizations was 21,810; in 2003 it was 25,556; in 2004 it was 38,335; in 2005 it reached 42,829; and in 2006 it exceeded 62,339 (this last figure includes only naturalization by residence, which usually amounts to 80% of all naturalizations). The data sources are the National Institute of Statistics (INE) at <www.ine.es> and the Ministries of Interior, Justice and Social Affairs at <http://extranjeros.mtin.es/es/general/DatosEstadisticos_index.html>.

[12] Most EU countries have quite a poor record regarding access to nationality, and Spain is no exception: the general rule in Spain is ten years' residence, and children born in Spain are not automatically Spanish citizens. On this issue, see the conclusions of the *Immigrants' Integration Policies in Europe Index* (MIPEX) at <www.integrationindex.eu/>.

[13] The theoretical and constitutional foundation of the recognition of foreigners' right to vote is highly controversial: some political theories reject this recognition, while others defend the need to include the foreign population in some way or another within the electorate (Habermas 1998).

[14] Even if this is the case, participation through those instruments – associationism, assemblies, demonstrations – is in the hands of all kinds of aliens only after the fundamental Decision 236/2007 by the Constitutional Court, which included illegal aliens among the legitimate subjects to defend these rights. The three instruments can be reduced to a single one – associationism – which is undoubtedly playing a powerful role in the integration of immigrants, although a second generation of associations, still in its early days, is beginning to emerge.



Electing a Diverse Canada

The Representation of Immigrants, Minorities, and Women

Edited by Caroline Andrew, John Biles, Myer Siemiatycki, and Erin Tolley

Electing a Diverse Canada presents the most extensive analysis to date of the electoral representation of immigrants, minorities, and women in Canada. Covering eleven cities as well as Canada's Parliament, it breaks new ground by assessing the representation of diverse identity groups across multiple levels of government.

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