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# EUDO CITIZENSHIP OBSERVATORY

## *ACCESS TO ELECTORAL RIGHTS*

### *SPAIN*

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June 2013



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EUDO Citizenship Observatory

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# Access to Electoral Rights

## Spain

*Ángel Rodríguez*

### 1. Introduction

Four types of elections are regularly held in Spain: to the European Parliament, National and Regional Legislatives and to Local Assemblies. Referendums are rarely held at the national level (only two in the last 35 years), although at the regional level they are compulsory for the amendment of the Statutes of Autonomy of the majority of Autonomous Communities. They are also compulsory for amending certain parts of the Constitution: the titles on Fundamental Principles (Preliminary Title), Fundamental Rights (a section of Title I), or the Crown (Title II).

Articles 13(2) and 23(1) of the Spanish Constitution (hereinafter quoted as CE, *Constitución Española*) establish that ‘only Spaniards’ shall have the right to ‘participate in public affairs’, a broad category in which electoral rights are included. Although granted directly by the Constitution only to Spaniards, both voting and eligibility rights (‘active’ and ‘passive’) can be extended to non-nationals by the law or by a treaty. The Constitution, however, restricts this possibility to municipal elections only.

The present wording of the Constitution in this respect comes from a constitutional amendment passed in 1992, prior to Spain’s ratification of the Treaty of the European Union (TEU), and following an opinion of the Constitutional Court which declared that European Citizens’ electoral rights as established by the TEU were beyond the reading of the Constitution which, at the time, authorised the Parliament to grant foreigners only with ‘active’ (and not ‘passive’) voting rights in local elections. After the amendment, passive voting rights were also included.

In any case, only very recently the question of extending electoral rights to non-nationals has been a topic of significance for public opinion in Spain. The debate on the constitutional reform of 1992 focused on the evolution of the EU as a whole, and the constitutional amendment was passed by a unanimous Parliament without much attention from the public. Although second country nationals residing in Spain have been since then allowed to vote and be elected in local and European elections, the public debate on the impact of their vote is much more recent. The main reason for this surge of public interest is due to the increasing number of second country nationals who have gained seats in local councils, mainly in small and medium towns of residential areas with a significant percentage of EU retirees who have come to live in Mediterranean Spain (known as European ‘gerontoimmigrants’). In addition, the 2011 local elections were the first in which third country nationals of selected nationalities were given voting rights.

The local elections of 2011 were the also first in which national citizens living abroad were not allowed to vote or stand as a candidate. Unlike the vote of second country nationals, the vote of non-residents nationals had been politically relevant in previous local elections in some small towns. In some cases, non-resident national's were key to deciding the outcome of elections due to the large number of emigrants (and of sons or grandsons of emigrants, thanks to the generosity of Spanish law on nationality) who were allowed to vote. This was clearly the reason for the reform of the electoral law passed in 2011, which made it a requirement to reside in Spain in order to have electoral rights in local elections.

However, and although these and other reforms have achieved some degree of popularity in legal literature, the question of electoral rights of nationals living abroad, and of foreigners living in Spain, has not been so far a major issue of political debate in Spain since the restoration of democracy in the late seventies.

## **2. Eligibility: Who has electoral rights under national law?**

### **2.1 Citizen residents**

#### **2.1.1. Age**

According to Article 12 of the Constitution, 'Spaniards come legally of age at eighteen years'. Therefore, that is the age for the full enjoyment of constitutional rights, electoral rights included. Article 2 of the General Electoral Law, passed in 1985 and whose last reform was made in 2011 (*Ley Orgánica del Régimen Electoral General 5/1985*, hereinafter quoted as LOREG) states that 'All Spanish citizens of age' shall have the right to vote. Article 6 LOREG, besides, provides that 'All Spanish citizens of age having the legal capacity to vote are eligible'. Both provisions of the LOREG are applicable to the four types of elections held in Spain, plus referendums. The age of eligibility has remained unchanged since the Constitution was approved.

#### **2.1.2. Mental disabilities**

Mentally disabled persons can be disenfranchised. According to Article 3 LOREG, only a court can order the disenfranchisement. The order must be issued following the general rules on incapacitation as laid down in the Civil Code, and it must expressly state that disenfranchisement is included. The same rule applies to interns in psychiatric institutions.

It is clearly deduced from LOREG provisions that civil incapacitation without disenfranchisement is also permitted. Moreover, recent case law suggests that judges are becoming reluctant to order the disenfranchisement of incapacitated persons whose mental conditions may not impede the normal exercise of their voting rights except in specific moments of crisis, as in the case, for example, of bipolar disorder (this tendency is consistent with the case law of the European Court of Human Rights, see *Alajos Kiss v. Hungary*, ECtHR Judgment of 20 May 2010).

Once it has been ordered by a court, disenfranchisement must be notified by the Civil Register to the Electoral Board in order to annotate in the electoral register that a person has been disenfranchised.

### **2.1.3. Persons convicted of criminal offences:**

Prisoners cannot be disenfranchised. Certainly, Article 3 LOREG states that a final decision of a court in criminal cases may order, as the main or as an accessory penalty, the forfeiture of electoral rights during the term of the conviction. The Criminal Code, however, has regulated that only eligibility rights may be forfeited to a convicted criminal. According to it, the prohibition of standing as a candidate for a period within two to six years is the main punishment to deprive individuals from the exercise of their civic rights (Article 559 of the Criminal Code).

In addition, Article 6(2) LOREG establishes that anyone condemned to deprivation of liberty, for whatever crime, cannot stand as a candidate while in prison. The forfeiture of eligibility rights is, therefore, a compulsory accessory punishment to any person condemned to prison.

In any case, convicted persons will be allowed to run in elections once they have served their prison sentence.

## **2.2 Citizens abroad**

### **2.2.1. Residence in the country**

The Constitution provides that ‘All Spaniards entitled to the full exercise of their political rights shall be electors and may be elected’ to the *Congreso de los Diputados*, the lower chamber of the Spanish Parliament (Art 68.5 CE). Although it might be discussed whether living abroad could be constitutionally accepted as a cause for the deprivation of ‘the full exercise of political rights’, it is nowadays assumed that electoral rights in national legislative elections (at least to the Congress, since there is not a parallel constitutional provision for the Senate) is granted to all citizens by the Constitution, regardless of residence. Further, the law does not require residence in Spain in order to have electoral rights in either chambers of the national parliament, the European Parliament or regional parliaments.

Residence in an Autonomous Community, however, is at present a prerequisite for all Spaniards living in Spain in order to vote or be voted in regional elections in that Community. That exigency comes from the Statutes of Autonomy of the Autonomous Communities, which enfranchise for regional elections only nationals who reside in their territory, unless they live abroad and had within the territory of the Community their last permanent address in Spain. Enfranchisement only of residents in the Community may be considered a general principle, since it is embodied in all Statutes of Autonomy. A government proposal to reform the law in order to enfranchise, for regional elections in the Basque Country, those who left that Autonomous Community due to terrorist threats (and now live elsewhere in Spain) is currently under discussion in parliament.

Contrary to what happens with respect to national, European and regional elections, Spaniards living abroad cannot vote or be elected at the municipal level. A very recent reform (passed in 2011) or Article 2 LOREG has established that living in Spain (although not in a specific municipality) is compulsory either to vote or to run as a candidate in local elections.

In sum, residence in Spain is not compulsory for national or European elections, while it is for local ones. And residence within the territory of an Autonomous Community is compulsory for regional elections except for those living abroad.

### **2.2.2. Citizens temporarily absent**

Although both citizens who, on the Election Day, are temporarily out of the country or residing abroad permanently may have voting rights, each of these categories receive a different legal treatment by the law.

Citizens temporarily absent on the Election Day are allowed to vote in all electoral processes (local elections included), since they are considered ‘residents’. According to Article 70 LOREG, they exercise the right to vote by post, after applying for it to the Electoral Board. The application must be issued at least ten days before Election Day. The Electoral Board will send the official ballots and envelopes to the voter, who will have to cast his vote and send it by special postal mail to the polling station. Postal voting may be also used, in the same terms, by anyone who, for whatever reasons, prefers not to vote personally. On Election Day, the Postal Service will deliver the received votes to the polling station where the absent elector is registered. The votes will be added to the ballot box and counted jointly with the others.

### **2.2.3. Citizens permanently abroad**

According to Article 75 LOREG, citizens living abroad on a permanent basis are registered in the Register of Residents Abroad, a special section of the electoral register. In order to be registered in that section, a person must be registered in a Spanish consulate as a ‘resident’ in a foreign country. In addition, persons who may not have ever lived in Spain, but who have nevertheless obtained Spanish nationality will be also registered in that section. All of them may cast votes and run as candidates in any kind of election, except local ones.

Article 75 LOREG also establishes that they can choose between postal voting and voting personally (between four and two days day before Election Day) in a ballot box in the consulate. In both cases, those votes will not be delivered to polling stations, but counted directly by the Electoral Board of the electoral district and eventually added to the votes cast by residents and citizens temporarily absent in polling stations.

Since residents abroad may have been out of the country for decades (or may never even have lived in Spain, in the case of foreigners who eventually obtain nationality by descent), they are allowed to decide by themselves to which electoral district they want to be ‘ascribed’. Article 36 LOREG only orders that the ascription must be decided ‘with a sufficient and justified cause’ (for example, asking for ascription to the district where relatives or ancestors used to live in the past), but this is subject to the discretion of consular officials. The law only allows changing the ascription of the electoral district one year in advance of the time at which elections are called.

## ***2.3 Foreign residents:***

### **2.3.1. Third country nationals (general)**

Third country national residents, even if they are long-term residents, do not generally enjoy electoral rights. As stated before, Article 13(2) CE allows that the electoral rights of foreigners be granted in local elections ‘by the law’. Therefore, a general provision regulating the enjoyment of such rights to all categories of third country national

meeting the conditions laid down by the law is constitutionally possible. The political option, however, has been the other possibility opened by the Constitution, that is, to grant those rights ‘by treaties’. The result has been a number of bilateral agreements with selected countries whose nationals are at present entitled to vote in local elections, provided that the conditions laid down in each treaty are met. As a result, only nationals of those states with which an electoral agreement has been signed enjoy electoral rights in Spain.

### **2.3.2. Third country nationals of specific states**

The ratification of electoral agreements with selected states started in the late eighties, when a number of them were signed with some European states, allowing their nationals residing in Spain to vote in local elections. The agreements became obsolete after the TEU came into force in 1992 and electoral rights of EU citizens in another member state became, as far as local and EP elections is concerned, a matter of European Law. The only treaty of that group still in force is the one signed in 1990 with Norway, due to the rejection of this country to enter the EU.

After 1992, no additional agreements were signed for fifteen years. In 2007, following a Parliamentary decision on the matter, negotiations with non-EU countries were opened, and two years later Spain signed agreements with Bolivia, Cape Verde, Chile, Colombia, Ecuador, Iceland, New Zealand and Paraguay. These are, at present (plus Norway) the non-EU states whose nationals enjoy electoral rights in local elections. Electoral agreements allow their nationals who live in Spain regularly and on a permanent basis to vote in local elections, but not to stand as a candidate. Five years (three, in the case of Norway) of legal residence is required.

Agreements have been signed on a bilateral basis, that is, they recognize the same rights as Spaniards living in the correspondent State, meeting in this way the constitutional exigency that electoral agreements must be ‘subject to the principle of reciprocity’.

Although there is no constitutional or legal requirement in this direction, the fact that five of the nine states with electoral agreement in force are from Latin America, suggest that cultural and linguistic affinity is, together with the number of nationals living in Spain, an important reason to sign them.

## **3. Electoral rights of EU citizens**

### **3.1 Local elections**

Directive 94/80/EC was not fully implemented until 1997. Articles 176 and 177 LOREG were then amended in order to grant EU citizens the right to vote and to stand as candidates in local elections. Since Article 176 LOREG only establishes that EU citizens must ‘satisfy the conditions for franchise required of Spanish nationals’, it is clear that no derogations or additional conditions, compared to national citizens, are imposed on EU citizens in order to exercise their right to active suffrage. The same provision, however, continues to say that they also must ‘have expressed their wish to exercise their right to vote in Spain’. As a result, the procedure to be registered in the electoral register for EU citizens is voluntary and not automatic (as it is for nationals).



The LOREG does not restrict passive suffrage of EU citizens either. Therefore, those who have been elected for the local council can accede to executive functions in the local government and can also be appointed as a mayor by the city council.

### ***3.2 EP elections for EU citizens residing in the country***

Directive 93/109/EC was transposed in 1994, when Article 210 and 210bis LOREG were amended. Again, the main difference in order to exercise their rights with respect to nationals concerns the registration procedure since EU citizens must expressly state their desire to exercise their voting rights in Spain. Once that desire is declared, voting and eligibility rights are exercised in the same way as nationals.

Both in local and EP elections, however, an indirect restriction to passive suffrage is applicable. The Organic Law on Political Parties (*Ley Orgánica de Partidos Políticos* 6/2002, hereinafter quoted as LOPP), allows foreigners to participate in a political party, but only Spaniards are entitled to create them. Since electoral candidates are presented mainly by political parties, and not independently by the candidates themselves, second (and third) nationals will generally have to enrol in a party created by nationals in order to run as candidates. As an alternative, they can also go to the polls as an ‘electors’ list’, i.e., a list not presented by a political party. Electors’ lists are not allowed to enjoy privileges political parties lists do, as public financial aid in advance or access to public media.

### ***3.3 EP elections for national citizens abroad***

National citizens living abroad enjoy full electoral rights to the European Parliament, as in national or regional legislative elections.

There are no specific provisions in the LOREG concerning the exercise of EP electoral rights for nationals from third countries. General provisions on the exercise of the right to vote when living abroad, as described above (sections 2.2.2 and 2.2.3), fully apply to EP elections.

### ***3.4 Regional and other elections***

Although regional elections are regulated by the electoral laws of each Autonomous Community, regional electoral laws must comply with constitutional requirements. As stated before, Article 13(2) of the Constitution only permits the extension of electoral rights to non-nationals in the case of municipal elections. Therefore, neither EU citizens, nor any other category of person who does not hold Spanish nationality are allowed to vote in regional elections.

Consistent with that constitutional provision, Statutes of Autonomy entitle to the exercise of electoral rights only to those who have the ‘political status’ of citizen in an Autonomous Community, Spanish nationality being a requirement to hold it.

Some new Statutes of Autonomy recently amended, however, have included the mandate for regional public authorities to promote the full participation of EU citizens in regional political life ‘within the framework of the Constitution’. It is commonly accepted that this mandate could be the basis for regional laws enfranchising EU citizens in regional elections only after a reform of Article 13 of the Constitution.

Nowadays, regional political life in which non-nationals are allowed to participate is restricted to soft mechanisms of participation in which suffrage is not involved, like membership of civic associations, petitions, etc.

Although only applicable to Ceuta and Melilla, the two Spanish towns in North Africa, the particular case of Autonomous Cities is also worth mentioning. They enjoy political autonomy but do not hold the constitutional status of an Autonomous Community. Therefore, the election to their autonomous assemblies falls under the LOREG regulations of ‘local’ elections. As a result, second country nationals, as well as third country nationals whose state has signed an electoral treaty with Spain, and who reside in Ceuta or Melilla, enjoy electoral rights in ‘regional’ elections there.

## **4. Exercising electoral rights**

### ***4.1 National and regional elections***

#### **4.1.1. Voter registration**

Citizens with permanent residence in Spain are automatically enrolled in the electoral register. Article 35 LOREG provides that the local government of the municipality where they live, and where they must register as ‘neighbours’, will send their data directly to the Electoral Board once they are eighteen. Therefore, the electoral registration procedure for resident citizens is automatic. Normally, each voter receives at home, well in advance of the time at which an election is called, an official communication with the address of the polling station where he or she has to cast his or her votes. The procedure is the same for any kind of election or referendum.

Since the reform of 2011, Article 36 LOREG establishes that citizens residing permanently abroad, either in other EU states or in third states, are also automatically included in a special section of the electoral register by the Spanish Consulate where they are registered. Before that reform, they had to apply for being included in this special section.

There is no registration procedure for second or third country nationals since they are not allowed to vote in national or regional elections.

#### **4.1.2. Casting the vote**

Citizens residing in Spain cast their votes in a polling station close to their domicile, within the district where they are registered. Normally, schools or other facilities in public buildings are used as polling stations. Each elector must cast his vote in person, although handicapped people may be assisted by a person with his confidence. Visually impaired people may cast their vote with Braille ballots. No proxy voting or e-voting system is permitted.

Resident citizens who foresee that they will not be able to go to the polling station on Election Day, or who simply prefer not to do it, can vote by post. This procedure may be also used by those who are absent from Spain temporarily but does not hold the status of permanent residents abroad. On request, they will receive the ballots from the Electoral Board and send them by post to the polling station. At the end of Election Day, votes received by post will be added to the ballot box and, together with the other votes, counted manually.

Citizens living abroad on a permanent basis, that is, those registered as such in a Spanish consulate, may choose between two voting procedures. They may either vote in person in the consulate or, on request, do it by postal voting. In both cases, their votes will be sent to, and counted by, the Electoral Board of the electoral district where they are ascribed in Spain and eventually added to those votes cast by resident citizens.

#### **4.1.3. Running as candidate**

Every Spanish citizen who enjoys voting rights in national or regional elections also enjoy eligibility rights in such elections, provided that no cause of ineligibility (as regulated by Article 6 LOREG or by similar provisions in regional electoral laws) are applicable. Ineligibility may be due to occupying a high public or judicial office, serving a prison sentence or incapacitation due to mental insanity.

According to the LOREG, residence in the electoral district is not a prerequisite to have eligibility rights in national elections, in which even residents abroad may stand as a candidate. On the contrary, regional electoral laws provide that only those who reside in an Autonomous Community, except those living abroad whose last residence in Spain was within the territory of the Community, are allowed to stand as a candidate in regional elections in that Community.

However, it must be emphasised that both national and regional legislative elections are organized in multi-member electoral districts in which a proportional system is applied to lists of candidates presented by political parties. Candidatures are also closed, what means that voters cannot erase names of candidates or change their position in the list. Under these circumstances, the political factor of being included in a list by a political party is almost as crucial as the legal ability to stand as a candidate.

Moreover, Article 169(3) LOREG orders for national elections that whenever a candidature is not sponsored by a political party (that is, when the candidature is presented as an ‘electors’ list’), at least one per cent of the electors of the district must sign supporting it. Twin provisions of the electoral laws of the Autonomous Communities apply the same rule to regional elections.

Citizens living abroad on a permanent basis are allowed to stand as a candidate on an equal basis with resident citizens. On the contrary, and as already mentioned, foreign residents of any kind cannot participate in national or regional elections.

Finally, it must also be noted that Political Parties whose members behave in the way stipulated by Article 9 of the Organic Law on Political Parties (LOPP) may be declared unconstitutional. The conducts regulated by the LOPP includes direct and reiterated support of terrorist groups. Once a political party has been declared unconstitutional, neither the party nor their members may present candidatures in any kind of election. The LOPP was appealed before the Constitutional Court, which declared it consistent with the Constitution (Constitutional Court Decision 48/2003, of 12 March 2003). The European Court on Human Rights has also ruled that the LOPP does not contravene the European Convention on Human Rights (ECtHR Judgment *Herri Batasuna and Batasuna v. Spain*, of 30 June 2009, among others decisions).

#### **4.1.4. Assimilated or special representation of citizens residing abroad**

Citizens residing abroad are represented in national and regional parliaments under an ‘assimilated representation’ scheme, since their votes are cast jointly with those of resident citizens in the particular district to which they have been ascribed (see above, section 2.2.3).

Both the *Partido Socialista Obrero Español* (PSOE) and the *Partido Popular* (PP), the two main Spanish political parties, have recently started negotiations with a view to reforming the law in order to establish a system of special representation for expatriates in national elections. That initiative, which has not yet entered the Parliament for debate, is unlikely to be implemented any time soon.

## **4.2 Local elections**

### **4.2.1. Voter registration:**

As far as citizens are concerned, LOREG electoral registration regulations are the same for national, regional, European and local elections. Therefore, as mentioned above in Section 4.1.1, registration is automatic for residents regardless the type of election.

As a result of the reform of the LOREG in 2011, citizens not residing in Spain on a permanent basis have been disenfranchised for local elections. Up to that reform, they had to apply for registration in the Spanish Consulate of their residence abroad.

Unlike resident citizens, second and third country nationals living in Spain must expressly apply for electoral registration in order to exercise their electoral rights in local elections.

In the case of second country nationals, the application can be made either when they are being registered in the Spanish municipality where he or she has decided to reside (what is compulsory for living permanently in Spain), or, later on, directly to the Electoral Board. Those who registered in the municipality but decided not to register in the electoral register at that moment will receive at home a multilingual communication, in Spanish and other main European languages, from the Electoral Board, shortly after local elections have been called, informing them on how to register if they want to vote or stand as a candidate.

Third country nationals of the selected states with which a bilateral electoral agreement has been signed (see above, section 2.3.2) have also to apply for electoral registration if they want to exercise their electoral rights. The main difference between second country nationals and citizens is that, since the former are allowed to vote only after five years of legal residence, their application to be included in the electoral register cannot be made to the municipality where they registered upon deciding to live permanently in Spain. Instead, they will have to apply for registration to the Electoral Board once they have complied with the five years of legal residence requirement, and will have to produce a certification of inscription from the municipality in order to prove it.

Both in the case of second and third country nationals, the application for electoral registration must be done only the first time the elector intends to be included in the register. Thereafter, the registration will be automatically renewed for later elections.

### **4.2.2. Casting the vote**

Citizens residing in Spain and resident second or third country nationals who enjoy electoral rights cast their votes in the same way in local elections, in a polling station situated in the district where they are registered or, if so required, by postal mail which will be sent to the polling station and counted along with the other votes.

#### **4.2.3. Running as candidate**

As far as resident citizens are concerned, rules for running as a candidate in local elections differ from those applicable to national and regional ones only in minor details (for example, those against who judicial actions have been initiated for owing a sum of money to the local government are not eligible).

Non-resident citizens, lacking voting rights in these elections, cannot stand as candidates either.

Second country national candidates are subject to a slightly different regulation. First of all, and as mentioned above, they will have to either enrol in a Spanish political party or present their candidacy as an ‘electors’ list’, in this case supported by a number of electors as specified by Article 187bis LOREG (which, depending upon the total population of the municipality, may require the support of up to one percent of the inhabitants). The European Commission, on its last report on the application of 94/80/CE Directive, has already expressed its concern about the fact that resident EU citizens cannot found political parties in Spain<sup>1</sup>.

Secondly, second country nationals have to expressly declare that they have not been disenfranchised in their own state for standing as a candidate in local elections there. The Electoral Board, subject to its discretion, may also require an official statement from the state of citizenship confirming the declaration. In order to facilitate that control, potential candidates are also obliged to inform the Electoral Board of their last address in their home state.

Unlike EU citizens, third country nationals are not allowed to stand as a candidate in local elections. All the bilateral electoral agreements signed up to today concern active voting rights only.

#### **4.2.4. Assimilated or special representation of citizens residing abroad**

Up to the time of the last local elections, held in 2011, citizens residing abroad were represented in local elections under an ‘assimilated representation’ scheme, since they were ascribed to a municipality in Spain where their votes were counted jointly with those of residents (and of second country nationals) in order to elect the seats of the local assembly.

As mentioned above, the reform of 2011, which at the same time allowed voting in local elections to third country nationals of selected states (those with a bilateral electoral agreement), disenfranchised Spanish citizens living abroad for those elections.

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<sup>1</sup> See the *Report from the Commission to the European Parliament and the Council on the application of Directive 94/80/EC on the rights to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals*, of 9.3.2012, COM(2012) 99 final, under §5.1. According to the Commission, eight Member States, Spain included, at presently not complying with the Directive due to the restriction imposed to EU citizens in order to found (or, in the same states, to be member of) a political party.

