

# CHAPTER 3

CHAPTER 3

# 3. The legal framework and an overview of electoral legislation

Dieter Nohlen and Florian Grotz\*

## 1. External voting: a challenge for democracies in the 21st century?

Historically, external voting is quite a recent phenomenon. Even in some long-established democracies citizens who were resident in other countries were not granted the right to vote until the 1980s (in the Federal Republic of Germany (FRG) and the United Kingdom (UK)) or the 1990s (Japan). Currently, 115 countries have legal provisions allowing their citizens to vote while abroad (see chapter 1 and annex A) but, in spite of this relatively high number, there has been almost no international debate about external voting until recently.

External voting is nonetheless now on the political agenda in many countries. Its sudden relevance in different regions of the world clearly derives from the worldwide political changes of the 1990s. First, as a result of the rapid increase in the number of democracies after the break-up of the communist bloc, the design of democratic electoral rules has received more attention. Second, external voting becomes more significant in the face of increasing migration.

Against this background, a considerable problem emerges: how can people living outside their country of origin have their political rights assured? The answer to this question that is most often heard is that in our 'globalized' world the principle of universal suffrage can only be fully achieved if citizens living abroad are entitled to vote in the national elections of their home country. This argument is mainly based on different international declarations in which universal, equal, free and secret suffrage is recognized as an inalienable part of human rights (for example, the 1948 Universal Declaration of Human Rights, article 21; the 1948 American Declaration of Human Rights and Duties, article 20; and the 1969 American Convention on Human Rights,

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article 23). These documents do not mention external voting as an integral part of universal suffrage. The 1990 International Convention on the Protection of the Rights of All Migrant Workers, however, explicitly states that:

Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation.

The States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights (International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UN document A/RES/45/158, 18 December 1990, article 41).

The notion of external voting as part of universal suffrage is neither self-evident nor unproblematic. The concept goes against one of the classic requirements for voting rights—residency inside the state territory. Furthermore, the implementation of external voting involves major technical and administrative problems that might interfere with other crucial features of the franchise, in particular the principle of free elections.

Nevertheless, the idea of external voting is currently highly attractive. Even in new democracies with little experience of free elections and problems with electoral administration, external voting has either already been introduced or is on the way to being implemented. One notable case is that of Mexico, where free elections were established only recently.

Although this is such a topical issue, the related debates remain at an intuitive level. Political elites are not generally familiar with the normative arguments in favour of or against external voting. Nor do they consider the potential problems arising out of such an extension of voting rights. As a result, there is great demand for expertise on external voting and on the options for its institutionalization, but there is not yet agreement on the basic concepts. Terms such as ‘political community’ and ‘citizenship’ are used differently in different contexts; their interrelationship remains unspecified.

Little comparative research has been carried out on the subject of external voting. Some articles on the topic can be found in the legal literature for certain countries, but there are almost none in the social sciences field (see annex C). There is a general absence of systematic information on the relevant legal provisions of individual countries. Furthermore, a set of criteria is needed by which the functioning of some of the institutional arrangements associated with external voting can be evaluated. This is all the more important because a number of countries have already scheduled external voting for future elections but have still no regulations in place for implementing it.

The aim of this chapter is to introduce the issue of external voting in a systematic–comparative manner. This is done in three steps. Section 2 examines the exact meaning of external voting and provides a systematic overview of the legal framework of external

voting. It discusses three different dimensions of the legal provisions for external voting and outlines the basic institutional alternatives with regard to these dimensions. (Chapters 4 and 5 provide more detail.) Section 3 presents three main structural problems which are typical for external voting and should therefore be considered in political debates about its introduction. These are: (a) the problem of the political representation of citizens living abroad; (b) the problems of organizing free and fair elections, the transparency of external voting procedures, and the freedom and fairness of party competition, and (c) the problem of judicial review of elections held abroad. Finally, section 4 provides a summary and concludes that: external voting can only reasonably be introduced if the specific context of each country is taken into account. Similarly, the legal and administrative provisions that are decided upon should depend on the most important contextual factors. This chapter presents some recommendations which deserve special attention when the introduction of or reforms to external voting are being considered.

## 2. The concept and provisions of external voting: basic features and institutional choices

### 2.1. The concept of external voting

According to the definition used in this Handbook, external voting is understood as ‘provisions and procedures which enable some or all electors of a country who are temporarily or permanently outside the country to exercise their voting rights from outside the territory of the country’.

External voting must be distinguished from two other types of voting which are easily confused with it. The first is the *franchise for foreigners* in a host country, which is applied for instance within the European Union at municipal level, allowing people who are not citizens of the host country to vote in certain elections in that country. This is in effect the opposite of external voting, and is not covered by this Handbook. The second is where some countries’ electoral laws allow citizens who are resident abroad to vote at home after entering their homeland. This provision—long applied in Italy—is applied nowadays in some new democracies in Eastern Europe, such as Albania or Slovakia. However, the right of overseas citizens to vote back home is not the same thing as external voting. The main point is *where* the overseas elector is when his or her vote is cast. Since these elections are held exclusively *inside* the state territory, this cannot be regarded as an instance of external voting.

### 2.2. Legal sources for external voting

There are three major types of source that contain the legal provisions for external voting:

- constitutions;
- electoral laws; and
- administrative regulations.

In reality, external voting is seldom provided for explicitly in constitutions. Notable exceptions include Portugal (article 172 of the constitution) and Spain (article 68/5 of the constitution). Most countries enable external voting through general provisions in their electoral laws. Additional regulations on its implementation are also often set out by legislatures or electoral commissions.

### **2.3. Entitlement to an external vote and requirements for registration as an external elector**

The right to vote externally may be limited to certain types of election.

The institutional arrangements for external voting will depend first of all on who can be registered as an external elector. Various options are possible:

- all citizens living outside the state territory may be allowed to vote in national elections;
- certain legal limitations may determine which citizens can be registered as external electors;
- citizens living abroad may have the right to vote if a specified minimum number of them register with diplomatic missions in the foreign country; and
- the right to an external vote may be limited in time.

The entitlement to an external vote is discussed in chapter 4.

### **2.4. The procedures for external voting**

There are three basic options for the procedure for external voting:

- postal voting;
- voting in diplomatic missions or military bases, or other designated places; and
- voting by proxy.

Chapter 5 looks at these in more detail. In future, electronic voting will increasingly be another option; this is discussed in chapter 10.

It may be disputed whether voting by proxy can strictly speaking be treated as a case of external voting, since the act of voting actually takes place *in* the state territory. Similarly, consulates or military bases are usually the sovereign territory of the state in question. However, voting by proxy and voting in diplomatic missions or military bases are included here as types of external voting because the electors concerned need not enter their home country in order to vote, but may do so from their place of residence.

These alternatives should be examined in the context of the fundamental principle of

the free, equal, secret and secure ballot. Proxy voting may be rather problematic from the perspective of democratic theory because there is no guarantee that the vote cast by the proxy—and thus possibly even the result of the election—reflects the will of the original voter. A proxy could use this procedure to obtain an additional vote and thus infringe the principle of equal suffrage. Voting in diplomatic missions may deny some external electors the right to vote if they cannot travel to the polling stations. Voting by mail may not be as transparent as voting in a diplomatic mission in the presence of state officials—and voting in a diplomatic mission depends on the perceived impartiality and integrity of those state officials. There is thus no ‘best procedure’ for external voting. Much will depend on the context, such as the infrastructure of those foreign countries where external voting is to be held. The decision on suitability will depend on the costs and practical aspects of the different procedures for external voting, which are discussed in chapter 5.

### **2.5. The assignment of external votes to electoral districts**

The last institutional aspect of external voting is the assignment of external electors to electoral districts. The institutional provisions for the assignment of external votes are politically important because they define how external votes are translated into parliamentary seats. In other words, these regulations will largely decide the extent to which external voters can influence domestic politics.

The main point of reference in the systematic classification of assignment provisions is the structure of electoral districts. Two basic options may be distinguished:

- There are extraterritorial electoral districts for external electors.
- External votes are assigned to existing electoral districts inside the country, for example, in the electoral district in which the external elector was last registered.

Each alternative has its own logic. Whereas the first stresses the special extraterritorial character of external votes, the second stresses the relation of overseas citizens to the state territory, and thus reflects the classic legal requirement of residency. The impact the external vote can have on domestic politics is different for each alternative. The political influence of external voters depends not only on the choice between the fundamental alternatives, but also on the ‘institutional fine-tuning’ within these models. Where there is an extraterritorial electoral district or districts, the political significance of external voters is basically determined by the representation attached to those districts in the institutional framework. This is especially true where electoral laws establish a fixed number of extraterritorial seats, often assigned to the world regions where citizens of the country live. The classic example is Portugal, where two parliamentary seats are reserved for citizens living abroad, one for European countries and one for the rest (see the case study). This institutional arrangement was adopted by several former Portuguese colonies in Africa (Angola, Cape Verde (see the case study) and Guinea-

Bissau). Croatia introduced a different extraterritorial model in 1999. The new electoral law also established separate electoral districts for Croats living abroad. The number of external seats, however, is not settled a priori but is calculated by dividing the total number of external votes by the number of votes cast nationwide to arrive at the Hare quota.<sup>1</sup> In other words, in Croatia the number of external seats depends on the relation between the actual number of external voters and the number of in-country valid votes. In comparison with the 'Portuguese model', this institutional framework is more sensitive to the actual levels of electoral participation and political competition.

In fact few countries have extraterritorial electoral districts for their overseas citizens. In most cases, external votes are assigned to domestic electoral districts and are included in the seat allocation of the respective electoral district. It is clearly more difficult to appraise the political significance of external voters in these cases than in arrangements with a fixed number of extraterritorial seats. Furthermore, institutional variations are also important in this model. There is a difference between those electoral systems with one nationwide electoral district and those with sub-national electoral districts. All else being equal, the political influence of external electors tends to be greater where sub-national districts are used, because external votes can be concentrated in some electoral districts and can even make up a plurality within those districts, although nationwide their share in the total number of voters may be insignificant. The actual effect will once more depend on the concrete institutional provisions. If overseas electors are assigned to electoral districts according to their former place of residence, as happens in the majority of cases (e.g. in Canada, Estonia and the UK), a regional concentration of external votes is unlikely. The political weight of external votes becomes more significant if they are assigned to the electoral district or districts of the capital, as in Indonesia (see the case study), Kazakhstan, Latvia and Poland. This solution is administratively simpler: the votes can be collected in the Ministry of Foreign Affairs and directly transferred into the domestic electoral district(s). Politically, however, this option may attract criticism because external votes could produce an election result in the capital electoral district which differs from the result that would have happened without the external votes, even in countries with a relatively small number of citizens living abroad. In such cases the legitimacy of external voting—and perhaps of democratic elections as such—may be questioned by domestic public opinion.

Against this background, the regulation of the 1999 Russian electoral law is a useful example. First, it assigns external electors to domestic single-member electoral districts according to their former place of residence; second, it provides for a maximum quota of citizens abroad (10 per cent of the registered electors residing in the respective electoral districts). Thus it reduces the risk of election results being externally determined. Belarus, on the other hand, offers an unusual and highly dubious arrangement. It assigns external votes to those electoral districts where the number of registered electors is lower than the average. In reality, this provision allows the ruling elite to allocate the external votes arbitrarily according to their own political advantage. Such a practice, in the absence of strict normative criteria, will clearly not enhance the transparency and legitimacy of the electoral process.

### 3. Three structural problems of external voting

Specific provisions for voter registration, voting procedures, and ways of assigning external votes to electoral districts can be combined in many ways. Two points have to be made in relation to this potentially vast array of institutional arrangements: first, some individual countries have developed highly specific provisions; and, second, political decision makers must choose the ‘right design’ of external voting from an almost endless variety of institutional possibilities. At this point one question becomes most significant. Which *criteria* should be considered before deciding in favour of or against external voting or a certain form of external voting?

To answer this question we now look at three challenges of external voting which are essential elements when shaping the legal framework, and the normative criteria which may relate to them. The challenges are:

- political representation of citizens who are not resident or not present in their country of citizenship;
- organization of elections outside the national borders, which introduces organizational problems, questions of the transparency of voting procedures, the issue of equality of party competition and transparency in electoral fraud; and
- the resolution of disputes if the results of elections held on foreign ground, outside the judicial territory, are contested.

#### 3.1. External voting: the problem of representation

The arguments in favour of external voting are related to the democratic principle of universal suffrage. The basic idea is that every citizen has the right to participate in every direct election to representative state organs because the formal–judicial equality of all citizens is guaranteed by the law or the constitution.

One normative criterion underlies this argument—political rights are human rights, the right to vote being one of them. This perspective regards universal suffrage exclusively as an individual right. There are also, however, two functional dimensions: (a) the contribution the popular vote makes to the creation of state institutions; and (b) the importance of electoral participation to the legitimacy of the elected institutions.

It follows that it is desirable to guarantee the right to vote even where special circumstances, such as illness, disability, and so on, make it difficult for the citizen to vote. Temporary and perhaps involuntary residence abroad is considered another special circumstance.

Residency in the country or even in the electoral district has been one of the classic conditions of universal suffrage written into national constitutions and electoral laws, as well as into some international declarations of human rights. According to the 1969 American Convention on Human Rights (article 23, 2), for example, residency is one of

the conditions which may limit the exercise of political rights. Yet in the current debate about external voting the requirement of residency has seemingly become irrelevant. (On the concepts of residency and citizenship as requirements for the entitlement to vote, see also chapter 4.)

A difficult problem arises in cases of long-standing residency abroad. Should these citizens living outside a country keep their right to influence the composition of the representative organs whose decisions are only binding on citizens residing *inside* the state territory? From the point of view of the theory of political representation, it may be argued that only those individuals who bear the consequences of their electoral decisions should be entitled to vote.

This problem of representation is particularly important in countries which have a considerable number of citizens living abroad (e.g. El Salvador, Mexico or Russia). In these contexts external votes are likely to become significant or even crucial for the overall election result (on the case of Mexico, see also chapter 8 and the case study). Since the political consequences of national elections concern mainly the citizens living in the country, the participation of external voters might be considered illegitimate by the domestic public. A classic example of such a case is provided by the Cook Islands, where more citizens live outside than inside the country. Before 1981 all Cook Islanders, regardless of residency, had the right to participate in national elections *inside* the state territory. Under this legal framework, citizens living abroad actually determined the overall result of the 1978 election to the legislature, as Albert Henry's Cook Island Party had flown in a decisive number of voters from New Zealand. Following an appeal to the courts on the ground that this was unconstitutional, these votes were disqualified by the court. Furthermore, the parliament changed the electoral law so that from then on only one single-member electoral district was reserved for citizens abroad. The influence of overseas citizens has been limited ever since, and the single overseas electoral district was abolished in 2004 (see the case study).

Similar problems of representation can arise in states that are territorially larger, especially if the pattern of political support among external voters differs significantly from that among domestic voters. In these cases overseas citizens would become a powerful factor in domestic politics if they were granted the right to vote. Political forces which would benefit would then be likely to deem external voting to be legitimate, while those who would suffer would be likely to take the opposite view. Under these circumstances, the legitimacy of the political system may be brought into question by the introduction of external voting. This was the case in Croatia during the Yugoslavian wars of the 1990s. In this period, the government of President Franjo Tudjman took advantage of the nationalistic leanings of the Croats residing abroad. The government parties passed an electoral law providing for 12 'external seats' out of 127 in the parliament. As expected, in the 1995 election all those 12 seats went to Tudjman's Hrvatska Demokratska Zajednica (Croat Democratic Union, HDZ). The institutional structure of external voting helped the incumbent government to win a majority, and there were vehement complaints from both lawyers and public opinion. In the new electoral law of 1999, worked out jointly by the government and the opposition, the fixed number of extraterritorial seats disappeared. Instead, a new allocation

procedure made the number of external seats dependent on the ratio of the number of external valid votes to the total number of domestic valid votes. This institutional reform of external seats has contributed to increase the legitimacy of elections in Croatia.

In markedly turbulent contexts, a thorough and profound analysis of the political effects of external voting is especially necessary. The question has to be answered whether the introduction of external voting will increase the legitimacy of a democratic system or undermine it by being perceived as an instrument of specific political interests. In any event, the institutional form of external voting—if it is appropriate at all—needs to be developed with the involvement of major stakeholders in the electoral process, and thus to reflect the specific context. There is no ‘one size fits all’ approach.

### **3.2. External voting: the challenge of electoral organization**

Apart from the formal and legal difficulties described above, the acceptance of external voting poses a serious problem of electoral organization. Elections held beyond a country’s borders usually imply organizational problems, greater personal and financial cost, and greater logistical effort per voter than in-country elections (see in particular chapter 5). In the light of these practical difficulties, a crucial problem is how to guarantee the maintenance of the principles of universal, equal and secret suffrage, maintain the equality of electoral competition, and prevent offences against the electoral law.

Countries which have external voting must come to terms with the fact that the freedom and security of the votes of their citizens cast abroad may not be guaranteed to the same extent as those cast inside the country. Electoral management bodies cannot fulfil their functions autonomously in foreign host countries. They have to collaborate with the institutions of the host country (see chapter 6) and possibly also with branches of the executive of the home country (typically the foreign ministry and ministry of the interior). How is registration abroad to be organized? How are double registration and double voting based on different documents to be prevented? What about the political rights of persons living illegally in the host country?

Ensuring that electoral procedures are free of influence by party interests may be a problem for countries which face challenges in organizing legitimate elections at home, especially if they have a great number of citizens not only living abroad but also concentrated in one single country. The electoral campaign may take place among external electors with no effective control by the administrative bodies of the home country. The possibility of interference by political actors which are not subject to the legislation of the home country aggravates the danger of the equality of electoral party competition being violated.

The introduction of external voting where a high percentage of the population resides abroad poses particular challenges in new democracies. In Mexico, a country in which electoral fraud had been the order of the day over decades, the electoral management body—the Federal Electoral Institute (Instituto Federal Electoral, IFE)—has made huge

and effective efforts since the early 1990s to achieve a high degree of transparency in the organization of elections. Deficiencies in the organization of external voting could pose dangers to the reputation that the IFE has built up as an effective and independent body.

### ***3.3. External voting and electoral dispute resolution***

The practicalities of electoral dispute resolution may involve organizational problems similar to those that can be seen in the practical aspects of organizing external voting. When irregularities are alleged, documents may not be readily available. There may be physical problems in holding hearings and summoning witnesses. As a result, the quality of judicial decisions may be more contentious and their implementation more difficult.

### ***3.4. A preliminary summary of the structural problems***

The degree of fairness, transparency and electoral justice of external voting bears on the whole electoral process, especially if the results abroad deviate greatly from the in-country results. In debating proposals to introduce or maintain external voting, issues of electoral justice—the transparency of electoral registration, the equality of electoral competition, the legal conduct of the act of voting, and the control mechanisms to ensure all of these—are essential in informing the process of decision. When citizens living abroad are claiming the right to vote, denying it may result in some loss of legitimacy. But it is equally important to bear in mind that an external voting process which is perceived as biased in favour of particular political interests or as chaotic may cause electoral events to lose legitimacy in the eyes of the domestic public.

## **4. Conclusions**

Institutional reforms never involve one single objective, but rather several objectives simultaneously. For external voting, these objectives are:

- the realization of the principle of universal suffrage, associated with the other principles of democratic voting rights;
- the maintenance of the rule of law;
- a real increase in political participation (which justifies the political effort involved in and the financial costs of external voting);
- the enhancement of the legitimacy of the democratic system; and
- an effective contribution to democratic consolidation.

At this stage other questions also arise: should external voting be extended to both representative organs and referendums or should it be restricted to one single type of electoral event, such as a direct election to the presidency? In the case of external voting for legislatures, is it convenient to establish a fixed threshold of representation for citizens living abroad or should such a threshold be arranged according to the actual

electoral participation by external voters (perhaps by specifying minimum and maximum numbers of ‘external seats’)?

**Table 3.1: Overview of the arguments for and against the introduction of external voting**

|   | <b>For</b>  | <b>Against</b>  |
|---|---|---|
| <b>Theoretical arguments</b>                  | Full implementation of the <i>universal suffrage</i> as a part of human rights              | <i>Residency</i> as a central criterion of suffrage and of political representation           |
|   | Increased <i>political participation</i>  | Problematic <i>transparency</i> of external election process                                  |
|   |   | Problematic <i>dispute resolution</i> of external voting                                      |
| <b>Historical and empirical circumstances</b> | Small number of permanent external electors in relation to domestic electors                | Large number of permanent external electors in relation to domestic electors                  |
|   | Equal distribution of political preferences of external electors                            | Uniform ideological orientation of external electors  |
|   | Democracies with long experience of elections and a well-established electoral organization | New democracies with problems of electoral administration and/or a history of electoral fraud |

Three major conclusions may be drawn when considering reforms relating to external voting.

1. *The introduction of external voting is likely to give rise to political controversy.* There are solid theoretical arguments both in favour of and against external voting. On the one hand, the recognition of the principle of universal suffrage is regarded as a civil right, which can be realized by the widening of political participation. On the other hand, external voting implies the electoral participation of individuals who may not be directly affected by whatever effects the result brings about.

The historical trend clearly points towards the understanding of the right to vote as an individual right of every citizen, regardless of his or her place of residence. But a move to adopt or extend external voting by a particular country needs to ensure that all stakeholders are involved in the decision-making process, and that consequent trade-offs or drawbacks—for example, restrictions on electoral freedom such as inequalities in the political rights enjoyed by different people—are considered and are thus less likely to give rise to subsequent questioning of the constitutionality or legitimacy of the electoral process.

It is also good practice for the decision-making process to take into account not merely

the substance of reform proposals, but also the perception of the proposals by the electorate and by the media. As with other areas of reform of electoral process, law and regulation, the success of change may depend not only on the substance of what is agreed but on the extent and effectiveness of civic and voter education activities to explain changes to the electorate both inside and outside the country.

As with any electoral reform proposal, external voting will be particularly controversial if the votes cast externally affect the result decisively and determine the winner. Such election results will be highly controversial among the relevant political actors.

2. The debate on external voting should not be allowed to overshadow consideration of *the political inclusion of foreign citizens in their country of residence*. A move has been made towards this principle through the introduction in many European Union member states of voting rights for citizens of other member states. A more widespread introduction of the right to vote in the country of residence would enable individuals with foreign nationality to take part in decisions that affect their personal interest and thus create a context of responsibility—although such a move could also generate political controversy, especially if foreign citizens were thought likely to give support disproportionately to one political group and if their votes were decisive in determining the result.

3. *There is no ideal institutional design for external voting*. Once a decision is made in favour of introducing external voting, the resulting legal provisions must be designed to suit the particular context of the country. Above all, attention must be paid to minimizing the possible trade-offs and unintended negative side effects.

#### Notes

1 The Hare Quota, used in proportional representation (PR) systems, is the total valid vote divided by the number of seats to be filled in the electoral district.



# Colombia: representation of emigrants in the Congress

Nydia Restrepo de Acosta

The first Colombian electoral legislation (Law no. 39) was issued in 1961. It established that Colombians with permanent residence abroad could vote in presidential elections. Agreement on this provision was promoted by the exodus caused by political instability and the dictatorial regime (1953–7). The provision was first applied in the 1962 election, when there were 3,227 registered electors outside Colombia. In 1986, when the existing Electoral Code was decreed, article 116 confirmed the possibility of voting abroad in presidential elections.

Although this was not expressly contemplated in the electoral legislation, in November 1990 Colombian residents abroad were called on to participate in the election of members of a Constituent National Assembly, which prepared a new text of the constitution. Article 171 of the new constitution (1991) established that not only Colombian permanent residents abroad, but also those who were temporarily out of the country could vote. It also allowed residents abroad to vote in elections to the Senate, which took place for the first time in 1994.

Article 176 of the constitution also created a special electoral district in the Chamber of Representatives in order to ensure the participation of ethnic groups, political minorities and Colombians resident abroad. However, this did not come into effect until 2001, when Law no. 649 established that the special electoral district would have a total of five seats, one of which would be for a representative of Colombians residing abroad, two for black communities, one for indigenous communities and one for political minorities. This provision was first applied in 2002. It is important to note that this election was controversial as a result of a ruling by the Constitutional Court which gave electors in-country the option of voting in the election for the external voters' seat. The result of this ruling was that only 3,000 of the 9,000 votes in favour of the winning candidate were actually cast by Colombians living abroad. Subsequently, in December 2005, the international electoral district was specifically regulated by a decree which established that only votes cast by Colombian citizens abroad would be counted to determine who would be the special representative of Colombians abroad in the lower chamber. It was applied in March 2006, in the most recent legislative election.

Although the electoral legislation does not refer specifically to the participation of Colombians abroad in the mechanisms of direct democracy, this has happened twice: (a) in the election of members for the Constituent National Assembly of 1991; and (b) in the referendum on corruption and bad political practices, promoted by the president and held in 2003, in which a wide-ranging constitutional reform was submitted to the people of Colombia, and 41,398 citizens abroad voted.

On 28 August 2006 the National Electoral Council handed the Senate a draft a proposal for reform of the Electoral Code. It suggests adding one paragraph that lists all types of election for which external voting is allowed. Although external voting arrangements for presidential elections are contained in the Electoral Code. The paragraph in the constitution, dispositions for legislative elections are only contained in the constitution; and it would also include all direct democracy practices at national level.

### **Electoral registration and the conduct of elections**

Regarding the procedure and requirements for the registration of electors abroad, the national government issues a decree before every election enabling the premises of Colombian embassies and consulates to be used as polling stations for external voters. Later, the National Registry of the Civil State (NRCS, Registraduría Nacional del Estado Civil), which is the authority that organizes and runs elections both in-country and out-of-country, sends a resolution by which it fixes the period when identity documents can be issued abroad, at least 15 days ahead of election day. (There are two electoral management bodies, the National Electoral Council (NEC), which is responsible for guaranteeing the impartiality and transparency of the electoral processes and general scrutiny, and for resolving challenges presented by the candidates, their proxies or electoral witnesses, according to the relevant articles of the Electoral Code; and the NRCS, whose president is designated by the NEC, and which is in charge of the electoral registers and the organization of elections.) The NRCS also determines at what places this is to be done and appoints polling station staff. It is possible to register as an elector simply by presenting a certificate of citizenship or a valid passport, but to actually vote it is compulsory to have the latter, which is issued by the NRCS.

The Directorate of the Electoral Census of the NRCS compares the certificates of the citizens who are registered as electors abroad with those who are registered in-country. If an elector is found to be registered twice, the first registration is annulled. On election day, the electoral register is posted in a public place next to the election precinct, a copy is given to the polling site managing committee, and a third copy is given to the embassy or consulate.

The senior diplomat at the embassy or consulate designates as polling station staff four Colombian citizens who are resident locally—two incumbents and two substitutes—who must belong to different political parties which have representation in the Congress, in such a way that no one political grouping is dominant. The list of polling station staff is established 15 days before election day and is posted in a visible place at the embassy or consulate ten days before the election.

Candidates for the external voters' seat in the special electoral district must present

a registration form at the appropriate Colombian embassy or consulate at their place of residence and have to comply with the following requirements: they must be over 25 years of age on the date of the election; they must demonstrate to the electoral authorities that they have resided abroad for a minimum of five continuous years; and they must be endorsed by a political party or a political movement which is properly recognized by the NEC, or a social movement or a significant group of citizens.

The representative in the Chamber of Representatives who is chosen for this special electoral district is subject to the general rules on congressmen's incapacities and conflicts of interest, and must reside on the national territory while he or she holds the position.

The voting abroad, like the voting in-country, is by means of universal, direct, equal and secret suffrage. Article 258 of the constitution obliges the electoral authorities to offer the tools that guarantee electors the exercise of their right to vote by means of a printed paper ballot or electronic device. (In 2004 a bill was approved assigning to the electoral authorities the responsibility of implementing electronic registration and voting, both in Colombia and abroad, within five years, that is, not later than 2009. This provision is being considered as part of a bill to reform the Electoral Code which is currently before the Congress at the initiative of the NEC.)

Currently, to organize elections abroad, the National Registry of the Civil State provides the necessary elements in the 'election package', which consists of ballot papers and electoral certificates (voting proof or written evidence showing that the voter has actually voted), the electoral register, special envelopes, the forms for registering the results and the ballot boxes. This package is sent ten days ahead of election day, thus guaranteeing that it will be received at its destination two days before election day.

The scrutiny of the votes cast abroad is the responsibility of the National Electoral Council, which is the authority in charge of the scrutiny of all national voting, declaring the results of the election and issuing the relevant credentials (certificates given to the candidates chosen).

In matters of access to the mass media, election propaganda and the financing of political parties abroad, there are no specific stipulations: the electoral campaigns and election propaganda are governed by the provisions of the constitution in the terms of the political reform of 2003, and by the Basic Statute on the Parties and Political Movements (Law no. 130 of 1994). The norms established by this law and the constitution are interpreted and applied to the activities of candidates abroad. The campaign can only start six months before election day, and there is a time limit on election propaganda of three months before election day.

The electoral campaigns of the political parties and movements, as well as the significant groups of citizens that candidates represent, are financed out of state resources in proportion to the number of valid votes obtained by each list, according to a formula previously determined by the National Electoral Council. The NEC also establishes the limits on campaign expenditure, and verifies that the resources the parties and political movements receive are legal, and that they observe the established ceiling on campaign expenditure; to ensure this, the political parties and movements must publish this information within one month of election day. There are quite severe sanctions for violations of the ceiling on campaign expenditure, including the loss of rights to reimbursement of expenses, and loss of the seat won by the candidate. In the latter case,

when the parties register lists for multi-member electoral districts, if a single member of a list exceeds the ceiling on expenditure, the party loses all the seats it has obtained in that electoral district.

The implementation of voting abroad does present difficulties of a technical, administrative and operational nature. Because of distance, lack of technology and the short time that passes between the closing of the electoral registers and the actual election, the main difficulty lies in carrying out the electoral census abroad in order to confirm the list of people who are entitled to vote; however, in the elections of 2002 it was possible, for the first time, to set up a daily exchange of information with the diplomatic missions by email. This helped to integrate the Electoral Roll of Resident Colombian Citizens Abroad rapidly and smoothly, as well as assisting comparison with the National File of Identification, and the subsequent deletion of duplicate names to avoid the issuing of duplicate ballot papers.

On polling day itself, technical problems related to data transmission do appear, preventing electoral material from being sent and distributed in one delivery. Thanks to technological advances, however, these problems are on the verge of being overcome.

### **Cost**

In the Senate elections of 2002, 365 polling stations abroad were set up. The production of election packages cost 22,600 US dollars (USD); their shipment and set up costs in the 66 countries where voting took place came to 161,930 USD, making an approximate total of 184,530 USD, or approximately 2 USD per registered elector. This funding originates from the election budget of the National Registry of the Civil State.

### **Turnout**

In 1998, in elections to the Senate, external voters cast 17,049 votes. In 2002, that number increased to 40,688. In the March 2006 legislative elections, participation by external voters was expected to increase considerably, since as of 2005 the electoral census included many more external electors, but participation remained almost the same as in 2002, with turnout at roughly 15 per cent of external electors (see the tables).

Turnout is usually higher in presidential elections than in legislative elections. In the presidential elections of May 2002, participation by external voters represented over 64 per cent of the 165,631 registered external electors. In the May 2006 presidential election, 38 per cent of registered external electors voted. Usually a higher number of potential external voters register for presidential elections than for other elections. The main reasons for this are that external electors, as opposed to in-country electors, have to register for each and every election, and interest in presidential elections is normally higher than interest in legislative elections.

**Table 1: Participation of Colombians abroad in the 2002 elections**

| <b>Election</b>   | <b>No. of registered external electors</b> | <b>No. of polling stations installed</b> | <b>Total no. of votes</b> | <b>No. of valid votes</b> | <b>Turnout (%)</b> |
|---|--|--|---------------------------|---------------------------|--------------------|
| Presidential<br>(1 round, May)                                      | 165,631                                    | 534                                      | 106,931                   | 106,375                   | 64.56              |
| Senate (10 March)   | 94,296                                     | 365                                      | 40,688                    | 38,918                    | 43.149             |
| Special representative in the Chamber of Representatives (10 March) | 94,296                                     | 365                                      | 39,983                    | 37,672                    | 42.402             |

Source: Calculated from data of the National Registry of the Civil State (Registraduría Nacional del Estado Civil de Colombia), <<http://www.registraduria.gov.co/elecciones2002/e/vsenadoi.htm?1>>.

**Table 2: Participation of Colombians abroad in the 2006 elections**

| <b>Election</b>  | <b>No. of registered external electors</b> | <b>Total no. of votes</b> | <b>No. of valid votes</b> | <b>Turnout (%)</b> |
|--|--|---------------------------|---------------------------|--------------------|
| Presidential (28 May)  | 319,045                                    | 121,155                   | 120,540                   | 37.97              |
| Senate (March)   | 273,385                                    | 42,588                    | 38,767                    | 15.57              |
| Special representative in the Chamber of Representatives (March) | 273,385                                    | 41,165                    | 37,176                    | 15.05              |

Source: Calculated from data of the National Registry of the Civil State (Registraduría Nacional del Estado Civil de Colombia), <<http://www.registraduria.gov.co/elecciones2002/e/vsenadoi.htm?1>>.

# Portugal: extended voting rights and decreasing participation

Marina Costa Lobo

Portugal has held free elections since the fall of the dictatorship in 1974, and since that time the voting rights of Portuguese citizens living abroad have been substantially expanded. External voting rights were granted from the outset, but only for elections to the national parliament. Following Portugal's entry into the European Community in 1986, external voting rights were granted for Portuguese citizens abroad to vote for the national lists for the European Parliament elections.

More recently, 1997 marked a major change in the process of external voting in Portugal. The constitution was revised for the fourth time, and one of the specific topics for reform was the rules governing elections. Only minor changes were introduced, but in this constitutional package, agreed by the two major parties, the centre-left Socialist Party (Partido Socialista, PS) and the centre-right Social Democratic Party (Partido Social Democrata, PSD), Portuguese citizens resident abroad became eligible to vote in both presidential elections and national referendums as well as legislative elections. This had been promoted in particular by the PSD in the constitutional negotiations. (The experience of legislative elections since 1976 had shown that the PSD has consistently had a majority of votes among external voters, which helps to explain why that party lobbied for an extension of emigrants' voting rights.)

These changes equalized the electoral rights of Portuguese citizens inside and outside Portugal for all national-level elections, although external voting was not extended to local elections. Portuguese citizens with external voting rights were first able to exercise their right to vote for the president of the republic in 2001. Ironically, the extension of voting rights has coincided with a marked decrease in external voting participation as measured by turnout in legislative elections.

In legislative elections, the electoral system that has been adopted is the proportional representation (PR) d'Hondt system, with closed lists presented in multi-member districts. Portuguese citizens living abroad are grouped into two electoral districts, each electing two members of parliament (MPs). One electoral district covers all European countries, the other the rest of the world ('outside Europe'). The principle of proportionality is therefore not fully observed in the external voting for legislative

elections. This is because in 1976 there were fears that the large Portuguese emigrant community would elect a high proportion of MPs, which was considered unfair given that they do not live in Portugal.

### **Eligibility for an external vote**

External voting can only be exercised if citizens register, although (unlike for citizens residing in Portuguese territory) registration is not mandatory (article 3, no. 3, Law no. 13/99, 22 March 1999). Registration can be done at any time up to 60 days before an election. Those whose 18th birthday falls between registration and election day can, however, register up to 55 days before the election.

For external voting, registration occurs mostly at consulates. If there is no consulate in a particular country, then registration normally occurs at the embassy or another designated registration centre. There are around 200 registration centres abroad, some of which cover more than one country. There are also a few countries where there is more than one registration centre because of the large number of Portuguese citizens in those countries.

Eligibility criteria vary according to the type of election. For legislative elections, the criteria are the same as those for internal electors (voters have to be 18 years or older). For European Parliament elections, until recently only Portuguese citizens resident abroad who were living in another European Union (EU) country could vote, thus excluding all those Portuguese citizens who lived outside the EU. However, this has recently been changed: Organic Law no. 1/2005 of January 2005 allows all electors resident abroad to vote in elections to the European Parliament. The eligibility criteria for external voting in presidential elections have changed since voting rights were extended. All those who were registered to vote in legislative elections by 31 December 1996 can also vote in presidential elections. The criteria for voting eligibility of all other Portuguese nationals residing abroad were to be defined by ordinary law, which should 'take into account the existence of effective ties to the national community' (Constitution of the Republic, article 121, no. 2). However, because these criteria had not been defined when the next presidential election occurred, in 2001, all those registered to vote for legislative elections both before and after 1996 were eligible to vote in those elections. Recently, the criteria for establishing 'effective ties' have been adopted: citizens must (a) have lived in an EU country or in a Portuguese-speaking country for not more than 15 years; (b) have lived in any other country for not more than ten years; or (c) have been to Portugal and stayed there at least 30 days in the previous five years, and be able to prove that they can speak Portuguese (Law no. 5/2005 of 8 September 2005).

Finally, Law no. 5/2005 also states that the eligibility criteria for Portuguese citizens residing abroad for voting in referendums are identical to the criteria applied for such citizens in presidential elections. However, this should be interpreted with caution: Portuguese citizens resident abroad have never actually been called to vote on any referendum, and it is not quite clear whether these rules would indeed apply in any future national referendum (see also below).

## External voting procedure

Here as well there are differences between types of election. Decree-Law no. 95-C/76 of 30 January 1976 sets out the procedural aspects of external voting in legislative elections. In these elections, as well as in European Parliament elections, the external voting right is exercised by post. However, Organic Law no. 1/2005 changed voting procedures for European Parliament elections: voting is now done in person at the designated polling sites.

For elections to the national parliament and the European Parliament (from 1987 to 2004), the Ministry of Internal Administration in Portugal sends a ballot paper with two envelopes to all citizens registered in electoral registers abroad around two to three weeks before polling day. The voter fills in his or her ballot paper, folds it and inserts it in one of the envelopes which he or she then seals and places in the other envelope together with a photocopy of his or her elector's card. All must be sent back to the designated reception point in Portugal and can be posted up until (and including) the day of the election. Ten days following the election, the external ballot papers are opened and counted. In legislative elections, the four parliamentary seats reserved for external voters are then allocated. In European Parliament elections, the external votes are added to the internal national totals (Decree-Law no. 95C/76).

In presidential elections and referendums, Portuguese residents abroad have to vote in person. In these cases, external voting takes place over a period of three days up to and including election day. Registered electors can go to the voting centre closest to their place of residence to cast their vote, which is then opened and counted.

## Registration and turnout patterns in different types of election

Table 1 shows the number of registered external electors and the turnout in each legislative election since 1976. The number of electors grew until 1999, since when it has fallen a little. This may be due to an effort to 'clean' the electoral registers of those who had died or moved—a process that also occurred for the national register in the late 1990s. The drop in turnout is remarkable—from 86.7 per cent in 1976 to 25.2 per cent in 2005. While electoral participation in Portugal has declined substantially, participation by external electors has dropped even more. (It should be noted that there are different patterns of turnout in Europe and outside Europe, with turnout being higher in Europe.)

**Table 1: External voting in Portuguese legislative elections**

| Election year | No. of registered electors | No. of votes cast | Turnout (%) |
|---------------|----------------------------|-------------------|-------------|
| 1976          | 105,709                    | 91,740            | 86.7        |
| 1979          | 132,273                    | 88,379            | 66.8        |
| 1980          | 175,577                    | 108,096           | 61.6        |
| 1983          | 159,188                    | 83,984            | 45.3        |
| 1985          | 190,818                    | 57,531            | 30.1        |

| <b>Election year</b> | <b>No. of registered electors</b> | <b>No. of votes cast</b> | <b>Turnout (%)</b> |
|----------------------|-----------------------------------|--------------------------|--------------------|
| 1987                 | 187,581                           | 49,849                   | 26.5               |
| 1991                 | 187,598                           | 61,128                   | 32.6               |
| 1995                 | 183,351                           | 43,040                   | 23.5               |
| 1999                 | 192,329                           | 45,852                   | 23.8               |
| 2002                 | 162,412                           | 39,711                   | 24.4               |
| 2005                 | 146,354                           | 36,938                   | 25.2               |

Source: National Electoral Commission (Comissão Nacional de Eleições, CNE), <<http://www.cne.pt>>.

In European Parliament elections, the electoral system is identical to that for legislative elections, with the important exception that there is only one electoral district. The external vote is simply added to the national vote. Table 2 shows external voting in these elections. Turnout has been very low from the outset.

**Table 2: External voting in European Parliament elections in Portugal**

| <b>Election year</b> | <b>No. of registered electors</b> | <b>No. of votes cast</b> | <b>Turnout (%)</b> |
|----------------------|-----------------------------------|--------------------------|--------------------|
| 1987                 | 71,880                            | 14,572                   | 20.3               |
| 1989                 | 54,526                            | 19,360                   | 35.5               |
| 1994                 | 84,643                            | 20,722                   | 24.5               |
| 1999                 | 84,073                            | 16,079                   | 19.1               |
| 2004                 | 70,504                            | 13,269                   | 18.8               |

Source: National Electoral Commission (Comissão Nacional de Eleições, CNE), <<http://www.cne.pt>>.

The same procedure is also used for presidential elections, which are held using the Two-Round System. Again, there is one electoral district that comprises all electors, both internal and external. External votes are added to internal votes. In the first presidential election where external voting was allowed, participation was extremely low, even by Portugal's external voting standards. In the most recent presidential election, in January 2005, the size of the electoral register and turnout increased slightly but the participation of Portuguese citizens living abroad was still low.

**Table 3: External voting in presidential elections in Portugal**

| <b>Election year</b> | <b>No. of registered electors</b> | <b>No. of votes cast</b> | <b>Turnout (%)</b> |
|----------------------|-----------------------------------|--------------------------|--------------------|
| 2001                 | 185,223                           | 15,431                   | <i>8.33</i>        |
| 2005                 | 187,109                           | 18,840                   | <i>10.07</i>       |

Source: Technical Secretariat for Electoral Processes Matters (Secretariado Técnico dos Assuntos para o Processo Eleitoral, STAPE), <<http://www.stape.pt>>.

## Referendums

There were no provisions for referendums in the 1976 constitution. Only with the third revision of the constitution in 1989 was a national referendum allowed under specific circumstances, but the possibility of external voting was not foreseen. The constitutional revision of 1997 introduced a number of modifications to the referendum law. It allows Portuguese nationals resident abroad to vote in referendums, provided they are correctly registered, whenever the referendum deals with issues that concern them specifically. This last provision is ambiguous and lends itself to significant political argument about whether in any given referendum Portuguese citizens resident abroad may or may not vote. In practice, there have been two referendums in Portugal: one in 1998 on abortion and another in 1999 on the issue of regionalization. In both instances, following Constitutional Court rulings (Ruling 288/98 and Ruling 532/98), external voting was not allowed.