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bmdc@servidor.unam.mx

Universidad Nacional Autónoma de México  
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Nohlen Florian Grotz, Dieter

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## EXTERNAL VOTING: LEGAL FRAMEWORK AND OVERVIEW OF ELECTORAL LEGISLATION\*

Dieter NOHLEN

Florian GROTZ\*\*

**RESUMEN:** En un orden mundial con una migración creciente, el voto en el extranjero ha cobrado especial relevancia. ¿Cómo es posible que gente que vive fuera de su país de origen vea protegidos y respetados sus derechos políticos? Algunos han propuesto que el derecho a votar en las elecciones nacionales debe ser reconocido a los ciudadanos que viven fuera de su país de origen. Sin embargo, de acuerdo con los autores del presente ensayo, la noción de "voto en el extranjero" no puede aceptarse como obvia ni deja de ofrecer ciertos problemas. Después de afirmar esto, los autores discuten una serie de temas en torno al voto en el extranjero: el problema de la representación política de los ciudadanos que viven fuera de su país; el problema de la revisión judicial de las elecciones realizadas en un territorio extranjero; y el problema de la transparencia de los procedimientos relativos al voto en el extranjero. Finalmente, los autores concluyen que no puede encontrarse una solución general a estos problemas, sino que las respuestas deben emerger del contexto propio de cada país.

**ABSTRACT:** In a world order characterized by increasing migration, external voting has become highly significant. How can people living outside their country of origin have their political rights assured? Some have simply proposed that citizens living abroad ought to be entitled to vote in national elections. However, according to the authors of this essay, the notion of external voting as part of universal suffrage is neither self-evident nor unproblematic. After stating this, the article discusses a series of issues around external voting: the problem of political representation of citizens living abroad; the problem of judicial review of elections held on a foreign territory; and the problem of transparency of external voting procedures. In the end the authors conclude that no general solution applicable to all can be found. The answers to these problems have to emerge from the specific context of each country.

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\*\* Doctor y profesor de ciencia política, y doctor en ciencia política e investigador, respectivamente, en el Instituto de Ciencia Política de la Universidad de Heidelberg, Alemania.

SUMARIO: I. *External Voting: A Challenge for Democracies in the 21st Century?* II. *The Concept of External Voting and its Historical Evolution.* III. *Systematic Overview of Legislative Provisions for External Voting: Basic Features and Institutional Choices.* IV. *Three Structural Problems of External Voting.* V. *Conclusions: Towards Contextualized Solutions of External Voting.* VI. *References and Further Reading.*

#### I. EXTERNAL VOTING: A CHALLENGE FOR DEMOCRACIES IN THE 21st CENTURY?

Historically, external voting is quite a recent phenomenon. Even in long-established democracies citizens with foreign residency were not granted the right to vote until the 1980s (Federal Republic of Germany, Great Britain) or 1990s (Canada, Japan). At present, about 60 states have legal provisions allowing their citizens to vote while being abroad. In spite of this relatively high number of countries, almost no international discussion about external voting existed until recently.

It is quite remarkable hence that external voting is on the political agenda in many countries nowadays. The sudden inter-regional relevance of external voting clearly derives from the world-wide political changes in the 1990s. First, as a result of the rapid sprouting of democracies after the break-down of the Communist Bloc, the "design" of democratic electoral rules has received more attention. Second, external voting becomes highly significant in the face of an increasing migration.

In the light of this background a considerable problem emerges: How can people living outside their country of origin have their political rights assured? The most often heard answer to this question is: In our "globalized" world the principle of universal suffrage can only be fully achieved if citizens living abroad are entitled to vote in national elections. This argument is mainly based on different internatio-

nal declarations in which universal, equal and secret suffrage is recognized as an inalienable part of the Human Rights.<sup>1</sup> Yet, these documents do not mention external voting as an integral part of universal suffrage. Only the International Convention on the Protection of the Rights of All Migrant Workers explicitly states in Art. 41 that "migrant workers... shall have the right... to vote and to be elected at elections of [their] State [of origin]".

The notion of external voting as part of universal suffrage is neither self-evident nor unproblematic. This conception goes against one of the classic requirements for active and passive voting rights, namely the residency inside the state territory. Furthermore, the implementation of external voting poses heavy technical-administrative problems that might interfere with other crucial features of universal franchise, mainly the principle of free elections.

Nevertheless, the idea of external voting is highly attractive nowadays. Even in new democracies with little experience in free elections and problems with electoral administration, external voting has either been already introduced or is on the way to be implemented.

Despite being such a topical issue, the corresponding debates remain at an intuitive level: Political elites are not generally familiar with the normative arguments in favor of or against external voting. Nor do they consider potential problems arising out of such extension of voting rights. As a result, there is an enormous demand for scientific expertise on external voting and on options for its institutionalization, which has not been fully satisfied so far.

Since the issue of external voting has been rather neglected for many years, little comparative research has been carried out on the subject: Although some articles on this topic can be found in juridical publications for certain countries, there are almost none in the field of social sciences.

<sup>1</sup> See Annex 1.

Consequently, there is a general absence of systematic information on the relevant legal provisions of the individual countries. Furthermore, a set of evaluative criteria is needed with which the functioning of certain institutional arrangements of external voting can be assessed. This is all the more important because a considerable number of countries have already scheduled external voting forthcoming elections, but have still no regulations for its implementation.<sup>2</sup>

The aim of this article is to introduce the issue of external voting in a systematic-comparative manner. This is done in four steps:

- First we will try to work out the exact meaning of external voting and to look at its current extension throughout the world as well as its historical evolution.
- Then we will provide a systematic overview of the legal framework of external voting. We will show three different dimensions of legal provisions for external voting and then outline the basic institutional alternatives with regard to these dimensions.
- In a third step we will elaborate three main structural problems which are typical for external voting and should therefore be considered in political debates about its introduction. These are (1.) the problem of political representation of citizens living abroad, (2.) the problem of judicial review of elections held on a foreign territory and (3.) the problem of transparency of external voting procedures.
- Finally, we will summarize our considerations and arrive at the following conclusion: The introduction of external voting can only be decided reasonably if the specific context of each country is taken into account. Likewise, the legal provisions should be bound to the most important contextual factors. In this sense we will present some recommendations

<sup>2</sup> *E. g.* Cambodia, Mozambique.

which deserve special attention when considering reforms of external voting.

## II. THE CONCEPT OF EXTERNAL VOTING AND ITS HISTORICAL EVOLUTION

### 1. *The Concept of External Voting*

First of all, let us consider what we mean by "external voting". According to the definition of this handbook, external voting is understood as "a voting procedure conducted in a territory of a foreign country for citizens living outside their country of origin". In order to clear up this definition, external voting must be distinguished from two other voting procedures which often lead to confusion.

The first of these two special procedures is the *franchise for foreigners* in their host country, applied for instance within the European Union at municipal level. Its main feature is that it allows people without citizenship in the respective country to vote in elections held in the territory of the elected representative organ. In fact, external voting works in the exact opposite direction: What we find here is a congruence between citizenship and national representative organs, in which the voting procedure takes place outside the state territory.

This last aspect is also the most significant criterion to distinguish external voting from the second special voting procedure. The right of overseas citizens to vote does not suffice in order to speak of "external voting". The main point is *where* the overseas elector casts his or her vote. Some electoral laws explicitly state that citizens can only vote after entering their homeland. This provision—traditionally applied in Italy for a long time—is applied nowadays in some new democracies of Eastern Europe (such as Albania, Bulgaria or Slovakia). Since these elections are held exclusively *inside* the state territory, these countries cannot be regarded as cases of external voting.

To summarize these conceptual considerations: We only speak of *external voting*, if:

- The *citizens do not have residency in their country of origin.*
- The act of voting is carried out *in the territory of a foreign country.*

When these two equally relevant criteria are fulfilled simultaneously certain organizational and political problems may arise. These problems can be solved to a certain extent with the help of specific institutional arrangements. Later on we will present an overview of those institutional provisions and those structural problems which are typical of external voting. But let's look first at the present world-wide extension of external voting and its historical evolution.

## *2. The Current Extension of External Voting and its Historical Evolution*

By and large, three are types of sources containing the legal provisions for external voting:

- Constitutions.
- Electoral laws.
- Administrative implementation regulations.

In reality, external voting is seldom stated explicitly in the constitution. Notable exceptions are Portugal (Art. 172) and Spain (Art. 68/5). Rather, the norm for most countries is to include the general provisions for external voting in their electoral laws. Frequently, also, additional implementation regulations are laid out by parliaments or electoral commissions.

Table 1 shows the countries where external voting is currently a general principle, i. e. where all citizens residing overseas are entitled to vote outside the state territory. Those countries where external voting is confined to state representatives, such as diplomats or members of the Armed Forces (Ireland, Lesotho, or Malta) have been excluded, be-

cause they only concern a special group of people for whom the typical problems of external voting do not apply.<sup>3</sup>

As shown by the table, not all independent countries have introduced external voting yet. In Western Europe, the rare cases without provisions for external voting are Greece, Ireland and Malta. As to the rest of the world, countries applying external voting are spread throughout the continents (Caribbean states excepted).

However, the tacitly assumed identification of the backward democratic development of some of these countries outside the Western hemisphere with the lack of external voting provisions should be rejected. There is no actual correlation between the level of democratization and the introduction of external voting, on the contrary: In post-communist Eastern Europe, for example, some of the countries where democracy is most consolidated have not introduced external voting, namely the Czech Republic and Hungary. By the same token, external voting is applied in several countries with authoritarian or illiberal regimes (Belarus, Peru, Kazakhstan, and Uzbekistan, among others).

This brief political-geographical overview suggests that the introduction of external voting can be explained by national peculiarities rather than by the waves of democratization of the 20th century. This thesis finds further evidence in the historical evolution of external voting.

If we have a look at the Western Industrialized Countries, we find no obvious general historical patterns in the extension of external voting. To give just a few examples: *Australia* granted its overseas citizens the right to vote already in 1901. In *Canada* national debates on external voting began almost at the same time (1917), but the legislation allowing external voting was not passed until 1993. Even *Great Britain* as the "mother of Western democracy" introduced external voting as late as 1985-at a time when this option had been in existence in *Colombia* for more than 20 years (1961).

<sup>3</sup> See III, 1, page 1124 and ss. below.

Table 1. Countries with Legislative Provisions for External Voting

Western Europe	Eastern Europe	Africa	America	Asia/Oceania
Austria	Belarus	Algeria	Argentina	Armenia
Belgium	Bosnia	Angola	Canada	Australia
Denmark	Estonia	Botswana	Brazil	Cambodia
Finland	Latvia	Cape Verde	Colombia	Cook Islands
France	Lithuania	Chad	Peru	Georgia
Germany	Macedonia	Egypt	Venezuela	India
Italy	Moldova	Eritrea	United States	Japan
Luxembourg	Poland	Guinea		Kazakhstan
Netherlands	Romania	Guinea-Bissau		New Zealand
Norway	Russia	Liberia		Syria
Portugal		Mozambique		Tajikistan
Spain		Namibia		Thailand
Sweden		Niger		Turkey
Switzerland		São Tomé		Uzbekistan
United Kingdom		Senegal		Vanuatu
		South Africa		

NOTE: The table includes only those countries which provide external voting for *all* citizens.

The reasons for the introduction of external voting differ also according to the historical-political context. Thus, *France* granted the right to vote to overseas citizens in 1944 in return for their active participation in World War II. In *Spain*, the introduction of external voting acquired a symbolic character insofar as its inclusion in the democratic Constitution meant the ex post acknowledgement of the republican emigration following the Civil War. In *Argentina* (1993) it reflected the political-pragmatic intention of the government of maintaining or strengthening the ties between the emigrants and the mother-country. In *Austria* the introduction of external voting (1990) followed a resolution of the Constitutional Court. The *United States* are one of those unusual cases where external voting was finally enacted on demand of the citizens residing overseas (1975).

This succinct historical information may suffice to emphasize once more the main aspects of our reflection:

- From a historical point of view, external voting is a rather heterogeneous phenomenon. Its extension along the different regions and continents was not the result of various "waves" over the 20th century.
- In most cases the moment and reasons for the introduction of external voting were highly dependent on national peculiarities.
- The introduction of external voting was often not a single act of decision and implementation, but a process lasting for years or even decades.

These conclusions also suggest that the introduction of external voting is not only a matter of general political debate but poses also concrete problems in its implementation which have to be solved beforehand. We will return to this idea later on.

Next we will have a closer look at the specific legislative framework of external voting. It goes without saying that not all the regulations of the countries in table 1 can be outlined in detail. Rather, we intend to provide a comprehensive over-

view of the most important systematic alternatives and the corresponding subtypes of external voting provisions.

### III. SYSTEMATIC OVERVIEW OF LEGISLATIVE PROVISIONS FOR EXTERNAL VOTING: BASIC FEATURES AND INSTITUTIONAL CHOICES

The legislative framework of external voting can be analyzed with regard to three different dimensions:

- The *formal-legal dimension*, which deals with the questions of if and under which conditions overseas citizens are granted the right to vote.
- The *political-procedural dimension*, which concerns the organization and implementation of the voting procedure in a foreign country.
- The *political-institutional dimension*, which focuses on the question of how external votes are translated into parliamentary seats and how they contribute to the overall (domestic) electoral result.

In the following overview we proceed according to these three dimensions of external voting:

- Firstly, we will deal with the different requirements for the registration as external voter (*formal-legal dimension*).
- Secondly, we will outline the main alternatives of external voting procedures (*political-procedural dimension*).
- Finally, we will classify the basic options of electoral assignment of external votes (*political-institutional dimension*).

#### 1. *Requirements for the Registration as External Voter*

A first distinction between institutional arrangements for external voting appears when asking: Who can be registered as external voter? Two main options are possible:

- All the citizens outside the state territory are allowed to vote in national elections.
- There are certain legal limitations for citizens to be registered as external voters.

Let's first have a look at the *legal limitations of external voting rights*, among which three main types can be distinguished:

1. *Limitation to certain professional groups.* A prominent group in this respect are diplomats and members of the Armed Forces stationed overseas. In some countries these are the only citizens entitled to external voting.<sup>4</sup> These countries have not been included in Table 1 for an obvious reason: Since consulates and military bases mostly belong to the sovereign territory of the state in question, this voting act cannot be considered an instance of external voting in a strict sense. The situation is different when external voting is restricted to professional groups who do not represent the State. Such limitation of external voting was the subject of a debate held in West Germany in the 1960s and 1970s. It was argued that external voting should be granted only to the "most affected professional groups" such as journalists, development aid workers and representatives of German companies. Yet, the suggestion was eventually dropped because it meant a serious violation of the constitutional principle of electoral equality.<sup>5</sup>
2. *Limitation according to a minimum number of citizens in a foreign country.* the Senegalese Electoral Law, for example, states that citizens living abroad will have the right to vote if at least 500 of them register with diplomatic missions in the foreign country. The underlying reason for this second kind of limitation responds to a pragmatic sense: The high financial and administrative costs

<sup>4</sup> E. g. in Lesotho and Ireland.

<sup>5</sup> See Schreiber 1985.

of the implementation of external voting in extremely small overseas communities bear no proportion with the low increase in electoral participation which its introduction may bring about. However, such restrictions might violate the principle of electoral equality among overseas residents. The scope of this potential danger depends on the actual quota of external voter and of the political-geographical distribution of overseas citizens.

3. *A third, more frequent kind of limitation relates to the type of elections.* In some presidential systems of Africa and Asia, citizens living abroad have the right to vote for a president but are excluded from parliamentary elections.<sup>6</sup> Similarly, Estonia grants its overseas citizens the right to vote in parliamentary elections, but not in referendums. The main reason for such differentiation lies in the character of the respective electoral decisions: Due to the distance to their mother-country, citizens living abroad are allowed to influence domestic politics only to a limited extent and are granted consequently only selective rights in national elections and referendums.

With regard to the countries which provide *external voting for all citizens and all types of elections*, we also find manifold registration provisions. One distinction regards citizens with permanent foreign residency versus temporarily absent voters. In turn, the permanent residency abroad offers two subtypes:

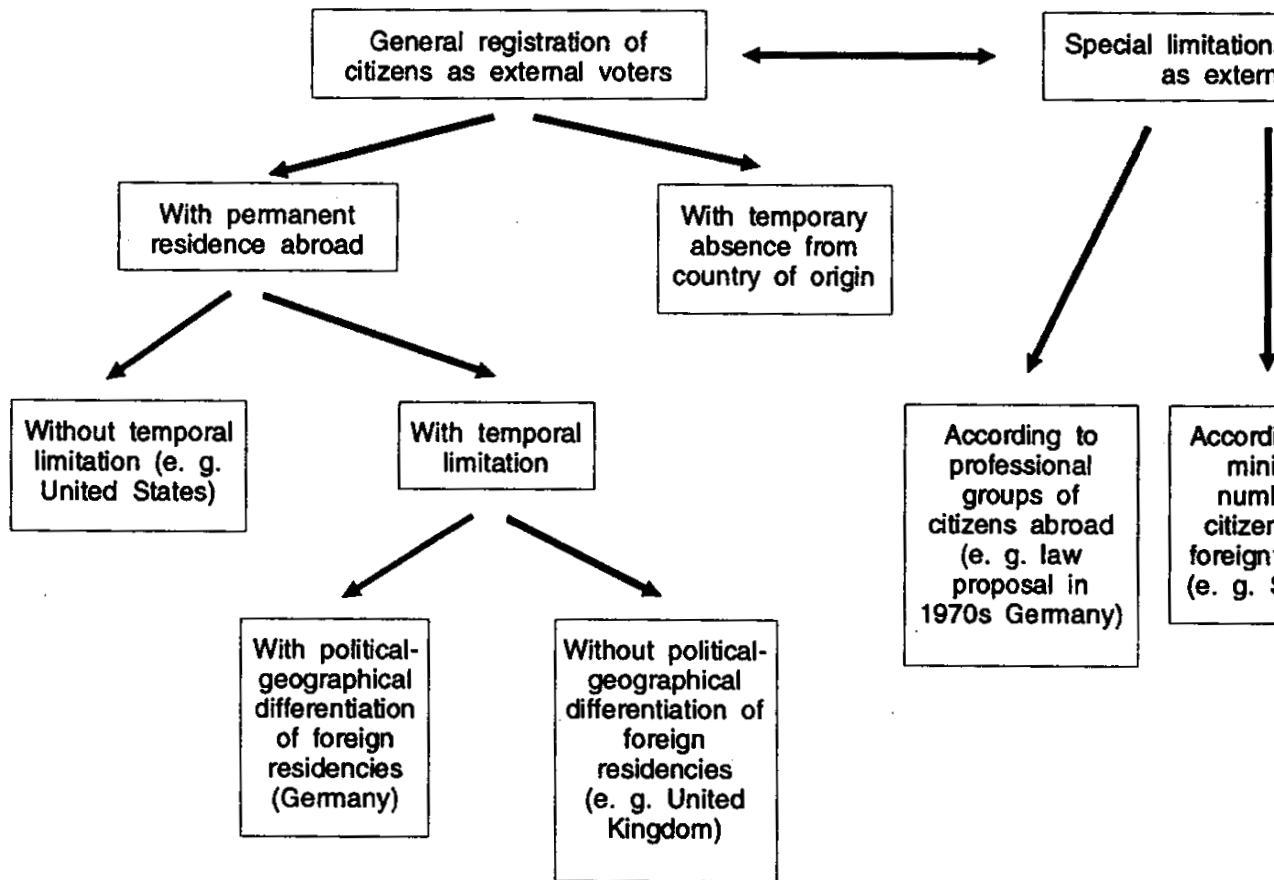
- *Either* the registration as overseas voter has no temporary limitation (like in the United States).
- *Or* there is a limited period of absence, at the end of which the right to external vote disappears automatically.<sup>7</sup>

The second alternative is based on the following reason: The longer the citizens stay away from their mother-country,

<sup>6</sup> *E. g.* in Chad, São Tomé, and Syria.

<sup>7</sup> *E. g.* in the United Kingdom.

### Schedule 1. Requirements for the Registration as External Voter



tive of democratic theory, however, this technically simple voting procedure may prove to be rather problematic: Voting by proxy is a kind of indirect election which cannot guarantee that the final political decision responds to the will of the original voter. The proxy may use this procedure to obtain an additional vote and thus infringe the principle of equal suffrage, the electoral authorities being unable to intervene.

In contrast to proxy voting, the other procedures cannot violate the principle of electoral equality, since it is always the person him/herself who votes, whether by mail or in an embassy. Yet, pros and cons are also found in both voting procedures. The main advantage of *voting in diplomatic missions* is a high transparent electoral process supervised by the diplomatic staff. Yet, in some countries, getting to the nearest consulate may constitute a problem for citizens living abroad. This is especially true for those states which have few diplomatic missions in those foreign countries with poor infrastructural conditions. In such cases external voting implies high financial and administrative costs, whereas the contribution of overseas citizens to electoral participation is relatively low.

As to *voting by mail*, the theoretical evaluation is just the opposite. On the one hand, it is obviously easier to organize postal voting than to establish polling stations in all diplomatic missions world-wide. On the other hand, the transparency of voting by mail is not so high as when the ballot is directly cast in a consulate under the observation of state officials.

Hence, there is no "best procedure" of external voting. Only voting by proxy is clearly more problematic than the other two forms, in the sense that it may threaten the principle of electoral equality. But as concerns the other two, whether voting in diplomatic missions is more or less suitable than postal vote will depend to a large extent on contextual conditions, such as the infrastructure of those foreign countries where external voting is to be held.

## Schedule 2: Procedure of External Voting: Basic Institutional Choices

Procedure of External Voting	Tentative Advantages	Tentative Disadvantages
Voting in Diplomatic Missions	High transparency of voting procedure	High financial and organizational costs
Postal Voting	Low financial and organizational costs	Problematic transparency of voting procedure
Proxy Voting	Almost no additional expenses	Principle of electoral equality not sufficiently guaranteed

### 3. Electoral Assignment of External Votes

The last institutional aspect of external voting refers to the assignment of external votes. So far, our considerations on the registration provisions for external voters and the different procedures of external voting have focused on the formal-legal consistency and organizational practicability of the different regulations. But the institutional provisions we are going to discuss now have also political importance, because they define how external votes are translated into parliamentary seats. In other words, these regulations will largely influence the extent to which external voters may influence domestic politics.

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

- There are *extraterritorial electoral districts* for external voters.
- External votes are assigned to constituencies *inside the country*.

Each alternative has its own logic: Whereas the first option stresses the special extraterritorial character of external votes, the second option underlines the relation of overseas citizens to the state territory, and thus grants pre-eminence to the classical legal requirement of residency.

Likewise, the effects of external voters on domestic politics are different for each alternative. In countries with extraterritorial constituencies the political weight of external votes is determined to a great extent by the institutional structure. On the other hand, if external votes are assigned to domestic electoral districts, the number of external voters, their political preferences and the constituency to which they are ascribed will play a determinant role for the electoral outcome.

Of course, the political influence of external voters does not only depend on the choice among the fundamental alternatives, but also on the "institutional fine-tuning" within these models. With regard to *extraterritorial districts* the political significance of external votes is basically determined by the institutional framework. This is especially true for those electoral laws which establish a fixed number extraterritorial seats, often assigned to the world regions where citizens of this country live. The classic example is Portugal, where two parliamentary seats are reserved for citizens living abroad (one for European countries, one for the rest). This institutional arrangement was adopted by several former Portuguese colonies in Africa (Angola, Cape Verde and Guinea-Bissau). Croatia has introduced a different extraterritorial model in 1999. The new electoral law has 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 nationwide Hare quota. 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 inland valid votes. In comparison with the "Portuguese model" this

institutional framework is more sensitive to contextual factors of electoral participation and political competition.

Yet, few are the countries with extraterritorial constituencies for their overseas citizens. In most cases, external votes are assigned to domestic electoral districts and are included in the seat allocation of their respective constituency. 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. We differentiate here between those electoral systems with one nationwide constituency and those with sub-national constituencies. *Ceteris paribus* the political influence of external electors tends to be greater in the latter arrangement, because external votes can be concentrated in some constituencies and make a plurality within these districts, although their nationwide number may be insignificant. The realization of this scenario depends once more on the concrete institutional provisions. If overseas electors are assigned to constituencies according to their former place of residence, as it happens in most cases,<sup>9</sup> 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 of the capital, as in Kazakhstan, Latvia or Poland. This solution has one administrative advantage, namely, the votes can be collected in the Ministry of Foreign Affairs and be directly transferred into one single domestic constituency. Politically, however, this option is not very favorable, because external votes might turn the electoral result of the capital district upside down, even in countries with a relatively small number of citizens abroad. In such cases the legitimacy of external voting—and moreover, of democratic elections as such—will probably be questioned by the domestic public opinion.

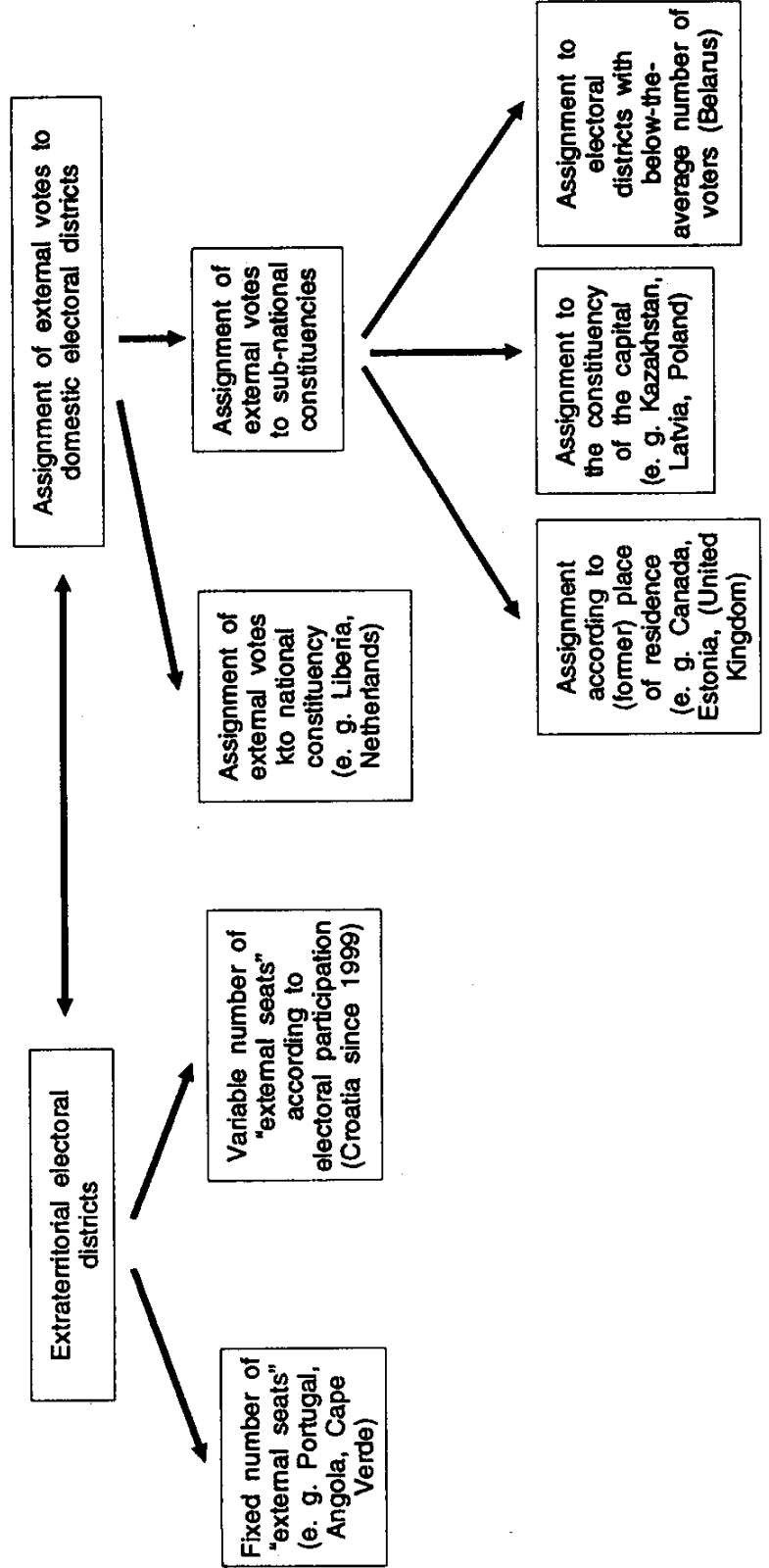
<sup>9</sup> *E. g.* in Canada, Estonia or the United Kingdom.

Against this background, the regulation of the 1999 Russian Electoral Law seems fairly reasonable: First, it assigns external voters to domestic single-member constituencies according to their former place of residence; second, it provides for a maximum quota of citizens abroad (10% of the registered voters residing in the respective districts). Thus, it reduces the risk of "external determination" of the electoral results. Belarus, on the other hand, offers an unusual and highly dubious arrangement. This country provides for an assignment of external votes to those constituencies where the number of registered voters is lower than the average. At first glance, the compensation of numerical differences of the voting population in single-member constituencies suggests a positive assessment of this regulation. Its democratic character is however only superficial. In reality, this abstractly formulated provision permits the ruling elite an arbitrary allocation of external votes according to political opportunities. Such an assignment of external votes without strict normative criteria is obviously not suitable to enhance the transparency and legitimacy of external voting.

#### IV. THREE STRUCTURAL PROBLEMS OF EXTERNAL VOTING

Our argumentation so far shows a wide spectrum of options for external voting at the three levels of electoral legislation discussed. In turn, the specific provisions of electoral registration, voting procedures, and assignment modes admit almost every possible combination. Two remarks are to be made in relation to this vast array of institutional arrangements: on the first place, it proves that individual countries have sometimes developed highly specific provisions; secondly, it indicates that political decision-makers must choose "the right design" of external voting among a nearly endless variety of institutional possibilities. At this point one question becomes most significant: *Which criteria* should be considered in order to decide in favor or against (a certain form of) external voting? In order to answer this

Schedule 3. Electoral Assignment of External Votes: Basic Institutional Choices



question we concern ourselves now with three characteristic problems of external voting, which shall be a reminder when shaping the legal framework of external voting for specific contexts. They are:

1. The problem of political representation of citizens without national place of residence.
2. The problem of judicial review of elections held on a foreign territory.
3. The problem of transparency of voting procedures abroad.

1. *External Voting and Residency: The Problem of Representation*

The arguments in favor 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 Constitution.

Two normative criteria underlie this argument:

- First, political rights as *part of the Human Rights*, the right to vote being in turn one of these rights. Yet, this perspective regards universal suffrage exclusively as an individual right and deprives it thereby of its functional dimension, namely, to contribute to the creation of State Institutions. These institutions shall be shaped according to their political suitability, rather than to general abstract criteria.
- Second, the idea of the *largest possible electoral participation*, that is, the target of increasing the legitimacy of the elected organs.

It follows then that the possibility to vote should be guaranteed also in cases where special circumstances prevent the

citizen from voting, such as illness, disability, etcétera. The temporary and perhaps involuntary residency abroad is considered another special circumstance.

The residency in the country or even in the constituency has been one of the classic conditions of universal suffrage written into the different international declarations of Human Rights. Yet, in the current debate of external voting the requirement of residency has seemingly become irrelevant.

Now, a difficult problem arises in cases of long-standing residency abroad: Should citizens living outside the country keep their right to judge about the composition of representative organs whose decisions are only binding for citizens residing *inside* the state territory? From the point of view of the theories of political representation, the following may be argued: Only those citizens who bear the consequences of their electoral decisions should be entitled to vote.

This problem of representation is particularly important in those countries with a considerable number of citizens living abroad.<sup>10</sup> In these contexts external votes are likely to become crucial for the overall electoral result. 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 perfect scenario for this case are 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 parliamentary elections, as the Albert Henry's Cook Island Party had flown the decisive number of voters from New Zealand into the country. Due to a constitutional appeal, however, these votes were disregarded by the court. Furthermore, the parliament changed the electoral law so that from then on only

<sup>10</sup> E. g. Mexico, El Salvador or Russia.

one single-member constituency was reserved for citizens abroad. Thus, the influence of overseas citizens has been limited ever since then.<sup>11</sup>

Similar problems of representation can arise in larger territorial states, especially when the political orientation of external voters significantly deviates from the domestic distribution of party preferences. In these cases overseas citizens would become a powerful factor in domestic politics if they were granted the right to vote. Given the "asymmetric" structure of external party preferences, only certain political forces will deem external voting legitimate. Under these circumstances, the introduction of external voting will carry no beneficial effects insofar as the legitimacy of the political system may be called into question.

This was exactly the case in Croatia during the Yugoslavia war. In this period, the semiauthoritarian government of Franjo Tudjman took advantage of the nationalistic leaning of the Croats residing abroad. Thus, the government parties passed an electoral law providing for 12 "external seats" out of 127 parliamentarians. As expected, in the 1995 elections the whole of those seats went to Tudjman's Croat Democratic Community (HDZ). Hence, the institutional structure of external voting turned into a majority-forming factor for the incumbent government. The complaints of both lawyers and the critical public opinion were remarkably loud. In the new Electoral Law of 1999, elaborated jointly by government *and* opposition, the fixed number of extraterritorial seats disappeared. In its place, a new allocation procedure made the number of external seats dependent on the relation between the number of external valid votes and the total number of domestic valid votes.<sup>12</sup> This institutional reform of external seats has contributed to an increased legitimacy of elections in Croatia.

<sup>11</sup> See Chai 1988, 61 ff.

<sup>12</sup> See III, 3, page 1130 and 1131 above.

Finally, in markedly turbulent contexts, a deep analysis of the political effects of external voting is especially necessary. It should be examined whether the introduction of external voting acts indeed in favor of the legitimation of a democratic system or on the contrary undermines it by becoming an instrument for specific political interests. In such problematic cases the introduction of external voting may no be adequate.

In the face of the aforesaid problems, the institutional form external voting must also be adapted to the specific context. As for the assignment of external votes, it might be advisable for states with numerous overseas residents to provide for extraterritorial seats (as in the Cook Islands) and to set the number of these external representatives in a reasonable relation to the domestic electoral body (as in the case of Croatia).

## *2. External Voting and Public Law: The Problem of Judicial Review*

One further problem relates to the legal status of external voting. Whereas elections *within* the national territory are always held under the guidance of constitutional organs, this is not the case when voting takes place in an extraterritorial context, *i. e.* under the formal-legal conditions of a different state. A crucial problem in this respect is how to prevent offenses against the electoral law and how to implement an effective judicial review.

The situation becomes easier when the two states concerned work jointly in the elaboration of their electoral legislation. However, even in this case countries with external voting must come to terms with the fact that the freedom and security of their citizens' voting abroad cannot be guaranteed to the same extent as inside the country.<sup>13</sup> This be-

<sup>13</sup> See Kilic 1986: 212.

comes a problem especially for those states which have not only a great number of citizens living abroad, but these are moreover concentrated in one single country. Under such circumstances, an electoral campaign may take place among external voters in this state, and such possibility—combined with the existence of radical political forces—may damage the democratic voting act.

In those situations, postal voting might prove more adequate than voting in diplomatic representations. In any case, before introducing external voting, each state should settle whether the constitutional character of the electoral act outside its territory can be guaranteed. Otherwise, precisely those countries with a large number of external voters might see their national elections—and the whole democratic system—lose legitimacy in the eyes of the domestic public.

### *3. External Voting and Transparency: The Problem of Electoral Organization*

Apart from the formal-legal difficulties described above, the acceptance of external voting poses a serious problem of electoral organization. Elections held beyond the territorial borders usually imply greater personal, financial and logistic costs (in relation to the percentages of voters) than inland elections.

Particularly when the institutional procedures of external voting are still relatively young, mistakes may sneak into the electoral process—whether in the registration, in the voting act itself or in vote counting—far more easily than in elections held within the state territory. In other words, electoral fraud in external voting, punctual and systematic alike, tends to be considerably more likely than in domestic elections. Furthermore, not just the actual manipulations are relevant, but also how these manipulations are perceived by a large part of the inland public opinion. Therefore, the introduction of external voting in young democracies with a high

percentage of population residing abroad might carry negative effects upon their development towards the consolidation of democracy.

A good illustration of this hypothesis is Mexico, a country in which electoral fraud has been the order of the day over decades. Considering such a historical background it is easy to comprehend the huge and efficient efforts undertaken by the Mexican government since the early 1990s to achieve a high transparency in the organization of elections. However, if the over 3 million adult Mexicans living in the USA were granted the right to vote, deficits in the organization of external voting would inevitably arise. The country would thus face the danger that the previous advancements toward a "sensitive" legitimization of national elections might be destroyed by the introduction of external voting.

External voting should therefore be accepted only if the given historical context can guarantee the transparency of the electoral registration, of the voting act and of the assignment of external votes to the respective constituencies. Hence, the most adequate regulations are those which establish effective control mechanisms both in electoral registration and for the voting procedure. In this context voting in diplomatic representations might be more adequate than postal voting. Even more important is the logistic intercommunication of the different diplomatic missions, that is, the administrative conjunction of the foreign polling stations with the domestic institutions responsible for electoral organization.

#### V. CONCLUSIONS: TOWARDS CONTEXTUALIZED SOLUTIONS OF EXTERNAL VOTING

At the end of this chapter we would like to synthesize the main points of our argumentation. Both the empirical-comparative analysis of external voting and the systematic exposition of the corresponding legal provisions have highlighted

two aspects which are of great importance for a sensible assessment of the problem in question:

1. *The Introduction of External Voting gives Rise to Political Controversy*

Already at the theoretical level solid arguments can be found both in favor and against external voting. On the one hand, the recognition of the principle of universal suffrage is regarded as a civil right which aims to widening political participation. On the other hand, external voting simultaneously implies the electoral participation of individuals who are not touched by whatever effects the electoral result bring about.

The historical tendency clearly points toward the understanding of universal suffrage as an individual right of every citizen regardless of his or her place of residence. Yet, the set of historical-political problems of each country needs be considered when recognizing the principle of external voting. It is to these problems that normative arguments must be oriented. Hence, the question of suitability gains relevance insofar as trade-offs which may damage the legitimacy of elections must be avoided. Thus, restrictions of electoral freedom or the questioning of the constitutionality of the electoral process would be instances of these undesired, negative, side effects which are especially crucial in new democracies. This can be exemplified by looking at the way in which the mass-media tackle the topic of electoral manipulations in external voting. By reason of such manipulations the confidence in the democratic electoral process, so new in some countries, might be destroyed. Furthermore, a low turnout of registered external voters can also have delegitimizing effects, and given the difficult implementation of external voting, its suitability may again be called into question.

An even more serious problem arises when external voting, instead of contributing to represent the interests of ci-

tizens abroad, helps those voters to affect decisively the election result, that is, to determine the electoral victor. In this case the main theoretical argument against external voting (namely, that only those citizens who are fully touched by the consequences of their decisions should be entitled to judge on the composition of representative organs) acquires a special significance. Such electoral results will be highly controversial among the relevant political actors.

The convenience of recognizing the principle of universal suffrage in external voting depends ultimately on the circumstances, that is, on its suitability. In most cases external voting will prove to be suitable, yet a few countries may prove otherwise. For the sake of these countries, where the extension of national elections beyond the country's borders would have truly harmful consequences on the consolidation of democracy, the introduction of external voting must be examined seriously.

Furthermore, external voting should not overshadow a deep reflection upon the political inclusion of foreign citizens in their country of residence. What is meant by this is that in coherence with the distinction between nationality and citizenship, the possibility of a citizenship for the state of residence should be introduced. The right to vote in the country of residence would enable individuals with foreign nationality to take part in decisions regarding affairs of their personal interest, and thus create a context of responsibility, so significant in terms of representation theory.

## *2. There is no Ideal Institutional Design of External Voting*

Even if the legislator has generally opted for the introduction of external voting, the corresponding legal provisions must be adjusted to the particular context of the country. Above all, attention must be paid to keeping the possible trade-offs and unintentional negative side effects as low as possible. In the debate of external voting it should always be

taken into consideration that for the intended institutional reforms not only one single objective should be realized, but rather several objectives simultaneously. Among these normative criteria are:

- Realization of the principle of universal suffrage.
- Maintenance of the rule of law.
- Real increase in political participation which justifies the political and economic efforts of external voting.
- Enhancement of the legitimacy of the democratic system.
- Effective contribution to democratic consolidation.

At this stage the following question arises: Should external voting be extended to both representative organs and referendums or should it be restricted to one single organ? In the case of external voting for plurinominal organs (parliaments) there is a further crucial question: Is it convenient to establish a fixed threshold of representation for citizens living abroad or should such threshold be arranged according to the actual electoral participation (with specifying minimum and maximum numbers of "external seats")?

Generally, it is advisable to opt for solutions which enable overseas citizens to be represented in the main state institutions and to participate in domestic politics, thereby avoiding the risk that their behavior may determine the electoral outcome. A tip of the scales in favor of external voters would create an unsustainable situation for most new democracies. Taking objectivity as a premise, the institutional regulations presented above will be more or less suitable for the individual case. Therefore, the institutional advice has always to consider the historical-political context of the country in question.

Schedule 4: Overview of Arguments Pro and Contra the Introduction of External Voting

	PRO External Voting	CONTRA External Voting
Theoretical Arguments	<p>Perfectionalization of <i>universal suffrage</i> as part of human rights</p> <p>Increase of <i>political participation</i></p>	<p><i>Residency</i> as a central criterion of suffrage and of political representation</p> <p>Problematic <i>judicial review</i> of external elections</p> <p>Problematic transparency of external election process</p>
Historical-Empirical Arguments  (Contextual Conditions)	<p>Small number of permanent external voters in relation to domestic voters</p> <p>Equal distribution of political preferences of external voters</p> <p>Democracies with long experience of elections and a well-established electoral organization</p>	<p>Big number of permanent external voters in relation to domestic voters</p> <p>Uniform ideological orientation of external voters</p> <p>New democracies with problems of electoral administration and/or a history of electoral fraud</p>

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