



THE OTHER ELECTORATE

**COMPARATIVE ANALYSIS
ON DIASPORA VOTER REGISTRATION,
VOTING AND ADVANCE VOTING**

By

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Our Vision:

Credible, Peaceful, Free and Fair Electoral Processes in
Kenya and the African Region

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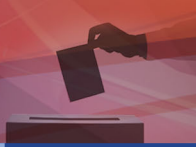
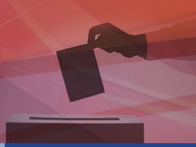


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ACKNOWLEDGEMENTS

The Elections' Observation Group (ELOG) deeply appreciates the financial and technical support offered by the Swedish International Development Assistance (SIDA) towards the realization and completion of this comparative assessment.

We deeply thank Marcus A. Ageng'a who was the consultant for carrying out this assessment and compiling this valuable report. We also acknowledge and appreciate the support of Norman Magaya, and Mugambi Muhavi for their valuable input in this report. Special gratitude is also extended to Kenya Diaspora Alliance (KDA) and in a special way, Global Chair of KDA, Hon. (Dr.) Shem Ochuodho for critical review and insights offered towards the production of this report.

Lastly, we thank and acknowledge the support and cooperation received from ELOG's Steering Committee and from ELOG technical committee during the validation of this document.

Brian Weke

Chairperson – ELOG Steering Committee

FOREWORD

Since its formation in 2010, the Elections' Observation Group (ELOG) has steadily established itself as a professional, inclusive and objective citizen observation platform.

ELOG has achieved a number of milestones starting from the observation of the 2010 Kenyan Constitutional Referendum, the 2013 General Elections and a number of electoral processes in the intervening period. Over the period, ELOG has continued to improve its performance through employment of latest observation techniques/strategies and technologies to inform its judgment on the electoral processes. One such strategy that has been embedded into the ELOG work ethic has been the conduct of research and surveys into topical election related issues. Findings from these activities not only inform ELOG's own plans for intervention but also other stakeholders in the electoral process.

This survey report comes at a time when IEBC is putting in place plans to conduct Mass Voter Registration exercise for citizens both within and without the country. According to IEBC's Election Operations Plan (2015-2017), voter registration for citizens in the Diaspora will be conducted in March, 2017. Consequently, this assessment report seeks to contribute to these processes by not only starting a conversation on the same but also providing practical as well as pragmatic recommendations on how promote the rights of the Diaspora to vote and to participate in the political processes in Kenya.

ELOG continues to work towards supporting credible, free, fair and peaceful electoral processes in Kenya and the African region.

Mulle Musau
National Coordinator, ELOG

EXECUTIVE SUMMARY

This assessment set out to undertake a comparative analysis on Diaspora voter registration and voting and a desktop comparative analysis on advance voting in order to provide a detailed documentation/report on the best practices on Diaspora voter registration, voting and advance voting strategies and to develop practical recommendations to strengthen the current IEBC policy on Diaspora voter registration and voting. Regarding advance voting, this research was able to look at best practices in a number of jurisdictions both regionally and internationally. It examined forms of early voting namely, early in person voting and early by mail voting. Similarly, a comprehensive analysis was made regarding Diaspora registration and voting by looking at how regional and international jurisdictions carry it out. The study was able to highlight the main methods of Diaspora voting and made recommendations for Kenya.

Finally, the study made a number of practical recommendations meant to inform the realization of the rights to Diaspora as outlined in Constitution of Kenya and subsequent directions given by the Courts. In particular, the study recommends the review of IEBC policy on Diaspora registration and voting, examination and adoption of other forms of Diaspora voting apart from In Person Voting, need for prudent and coordinated plan for Diaspora registration and voting, need for review and adoption of other forms of Diaspora registration methods.

LIST OF ABBREVIATIONS

ACHPR/CHARTER	African Charter on Human and Peoples Rights
AHRLR	African Human Rights Law Reports
AU	African Union
BCLR	Butterworths Constitutional Law Reports (South Africa)
CC	Constitutional Court (South Africa)
EA	Electoral Act
EMBs	Election Management Bodies
IIDEA	International Institute for Democracy and Electoral Assistance
IFES	International Foundation for Electoral Systems
IED	Institute for Education in Democracy
ICERD	Covenant on Elimination of all forms of Racial Discrimination
CEDAW	Convention on Elimination of all Forms of Discrimination against Women
CRPWD	Convention on the Rights of people with Disabilities
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
IEBC	Independent Electoral and Boundaries Commission
OAU	Organization of African Unity
UDHR	Universal Declaration of Human Rights

CHAPTER ONE

INTRODUCTION

1.1. Background to the Study

The IED/ELOG Voters List Assessment (VLA) report on the principal register of voters used on 4th March 2013 general elections made significant recommendations on diaspora franchise. One of the recommendations was the development of a comprehensive policy to guide diaspora voter registration and voting. The development of the policy must be informed by diaspora demographic data. So far IEBC has developed a policy on diaspora voter registration and voting.

Also, according to the IEBC operational plan, diaspora voter registration and compilation of a register for diaspora voters for the 2017 general elections will take place in March 2017. The operational strategy of IEBC's on diaspora voter registration and voting as provided in the diaspora policy is not very clear and need to be strengthened.

On the other hand, the Institute for Education in Democracy (IED) reports on the conduct of the 2013 general elections recommended the introduction of advance voting. This is intended to enhance the franchise of individuals who are on duty on the voting day or those who for one reason or the other are not able to cast their vote on the elections day. These include but not limited to the security officers, the IEBC officials, observers, Political Party Agents as well as Independent candidate agents, those who are hospitalised and diplomats. Therefore this research is intended to provide data and information on how other countries have been able to enhance the franchise of their citizens in other countries as well as advance voting. The analysis is expected to strengthen the current draft policy on diaspora registration and voting. It is also intended to inform discussions around the introduction of advance voting in Kenya.

Globalization and the spread of democracy throughout the world, coupled with increased migration have acted in concert to spur interest among populations living in the Diasporas to exercise their voting rights. Citizens residing in foreign



lands have variously lobbied their respective countries to establish mechanisms for their effective participation in the electoral processes. Over the last 45 years, the number of Persons living outside their country of birth has more than doubled from an estimated 75 million in 1960 to nearly 215 million (UN, 2009) representing 3% of the world population. About 30 million Africans are living outside their home country.

It is estimated that 3 million Kenyan citizens live abroad and this number is continuously on the rise. A quick survey by the Ministry of Foreign Affairs indicates that most of the groups reside in the USA (47%), United Kingdom (35%), South Africa (5.34%), Uganda (3.03%), Germany (1.13%) and rest (8%)¹ (See Annex 1 attached). They comprise those in employment, diplomats, professional groups, businesses, and students. Their voice has gained greater ascendance and recognition particularly due to their significant contributions to their home economies. In Kenya, it is estimated that remittances from this enclave of the population account for 3% of the country's foreign direct earnings.¹ Indeed, Kenyan citizens residing outside Kenya are anxious to know whether the Constitution of Kenya that was promulgated in August, 2010 and the Elections Act, 2011 that was passed by the Kenyan Parliament will provide for them to vote in the upcoming General elections.

The Constitution of Kenya, 2010 has granted Kenyans residing outside Kenya their voting rights, which affirms Kenya's place among the ranks of progressive nations of the world that accord each and every one of their citizens, regardless of where they are on this planet, the right to participate in the election of their leaders. Perhaps more importantly Diaspora is keen to see if the Supreme Court ruling of May 2015 securing their right to vote will be honoured.

1.2 Justification for Elections

Elections are the most visible feature of democracy because they link the people to the government and bring about political control by the people.² Although not in themselves a guarantee for democracy as Khabele rightly observes, elections

¹ IEBC, Policy on Diaspora Registration and Voting,

² This point was emphasized by the Supreme Court of Canada in the reported case of *Haig v Canada* 105 DLR (4th) 577 (SCC) 613 where the main issue before the Court was whether prisoners could be allowed to vote in elections. In its judgment, the Court discussed the concept of elections in depth and stated, among other things, that the right to vote is the hallmark of democracy since it enables individuals to determine how they want to be governed.

are usually considered as one of the key pillars of a working democracy.³ Some of the functions of elections in the democratization process⁴ include the legitimization of the political system, succession of governments and leaders, linking political institutions with the voters and peaceful settlement of conflicts.⁵ Elections, therefore, play a crucial role in the democratization process in the world, particularly, in Africa.⁶

The Constitution of Kenya 2010 provides electoral laws that govern suffrage rights at the County and National levels. It is against this background that the Elections Act, 2011 makes an attempt to actualize the provisions of the Constitution 2010 since the Act provides for the participation of voters outside Kenya in the electoral process. First, the Elections Act 2011 provides for the registration of voters outside Kenya,⁷ under the same section, assurance is provided that registered voters shall be included in the Principal Register of Voters⁸. Further, Section 10 (1) allows persons entered in the register of voters to vote.

The objectives of this research are enumerated below:

- a. To undertake a desktop comparative analysis on Diaspora voter registration and voting;
- b. To undertake a desktop comparative analysis on advance voting;
- c. To provide a detailed documentation/report on the best practices on diaspora voter registration, voting and advance voting strategies;
- d. Develop practical recommendations to strengthen the current IEBC policy on Diaspora voter registration, voting and advance voting.

³ M Khabele 'Election and conflict' Election update 2004 South Africa The Electoral Institute of Southern Africa 19 (2004) 9. Besides elections, other pillars of democracy include political parties, the rule of law, constitutional limits on government and individual civil liberties.

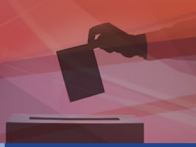
⁴ This study adopts the definition of democratization given by Barry and others as 'the process by which states move towards more democratic forms of political system'. The democratization process leads to democracy. Democracy denotes a political system where there is meaningful and extensive competition among individuals and organized groups, a highly inclusive level of political participation and protection of human rights. See A Barry et al Politics: An introduction (2002) 171.

⁵ Khabele (n.3 above). She discusses the functions of elections in society.

⁶ There are 53 states in Africa, which have different electoral systems and processes. This study is, however, limited to the electoral commissions of Kenya and South Africa and thus it might not cover some aspects of independence of electoral bodies in other African countries. Information on the African states available at <http://www.africanunion.org/root/au/memberstates/map.htm> (accessed on 26 June 2015).

⁷ Elections Act 2011, Article 4 Section (1), subsection (e), though the law doesn't define who 'resides out of Kenya'.

⁸ Ibid, section 4(2) of the Act



1.3 Significance of the Study

This research is pertinent in so far as it intends to inform the compliance of the requirement of the Constitution of Kenya for the enactment of legislation to provide for external voting, because Kenya has citizens out in the Diaspora. It looked at the main challenge of lack of a universal guideline on external voting, and advance voting for Kenya to benchmark on as different countries tend to set different criteria.

The study therefore explores how the right to vote and advance voting, including voter registration for Kenyans in Diaspora, can be realized while bearing in mind an appropriate form for diaspora and the lessons that can be learnt from the best practices in selected countries, through a comparative study. Similarly, the study seeks to look at advance voting and how the same can be implemented in Kenya.

1.4 Research Methodology

The study obtained its data from both primary and secondary sources. The relevant primary sources included the Constitution of Kenya, relevant Statutory Authority relevant to Electoral laws in Kenya, Rules and General Regulations on Electoral Laws in Kenya, Procedural laws; Case laws and Judicial Precedents were also assessed.

The secondary sources, including textbooks, journal articles, conference papers, Internet information and academic lectures were also reviewed during this study. Judicial comments on the viability of Electoral laws in the form of *Obiter Dicta* were also accessed to formulate a basis for furthering the analysis. This was analyzed and interpreted in order to arrive at a conclusion on the situation in practice and the best practices that ought to be adopted.

Furthermore, this study incorporated quantitative and qualitative techniques of research. Qualitative technique formed the primary method, to the empirical issues under inquiry being undertaken while descriptive techniques, highlighted the position of the Kenyan laws and international best standards established in legal practice. The study also incorporated prescriptive aspects, suggesting possible interpretative and legal reforms needed to create norms that are universally accepted and meeting the standards of free and fair polls, and which augment

the Constitutional principles on Representation of the People, and universal right to suffrage.

1.5 Literature Review

Prior to the enactment of the 2010 Constitution of Kenya, most laws that regulated Electoral processes in Kenya were either inept or deliberately devoid of the main objective on free and fair elections. With the advent of the 2010 Constitution of Kenya⁹, several legislations have been enacted to deal thoroughly with electoral processes in Kenya¹⁰.

These laws include but not limited to the Election Act, 2011, Political Parties Act, 2011, Campaign Financing Act, 2014 and others. These laws were based on the Report of The Krieglger Commission¹¹ on the outcome of the 2007 elections that gave recommendations on legal and institutional reforms that needed to be put in place, most of which have been successful. On the international level, universal standards relating to elections and electoral processes are found in the UDHR, ICCPR, ICERD, CEDAW, CRPWD¹² and other related human rights instruments. And as such, Laws, policies, institutional frameworks of EMBs must conform to the said standards.

Francis Aywa, a renowned electoral expert, reckons that electoral transparency was one of the weakest aspects of Kenya's electoral processes before 1992. This challenge continues to haunt Kenya's electoral landscape despite the advent of, at least on paper, a revamped electoral management body and its systems. A section of stakeholders have maintained that IEBC to date has failed to be wholly transparent and accountable with regard to 2013 general elections, in violation of the law and the international standards intimated above¹³.

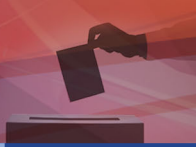
⁹ See <http://kenyalaw.org/kl/index.php?id=3409> accessed on 12 June 2015

¹⁰ Elections Act No. 24 2011, The Political Parties Act 2011 and the Rules and Regulations, The Independent Electoral and Boundaries Commission Act 2011 and the County Government Act 2012.

¹¹ See Government of Kenya [GOK], Report of the Independent Review Commission, 2009: See also at <http://www.kas.de/kenia/en/publications/16094/> Accessed on 26th July 2015.

¹² Dynamics of Democracy, Strategies for Future elections

¹³ Election Management Bodies in East Africa, A comparative study of the contribution of Electoral Commissions to the strengthening of Democracy: A review by Afrimap and OSIEA



A publication on enfranchisement of Diaspora voters by International IDEA (Institute for Democracy and Electoral Assistance) in partnership with IFE (Institution Federal Electoral)¹⁴ and the Federal Electoral Institute of Mexico¹⁵ has analysed what out-of-country voting entails including the legal and logistical aspects. It highlights that the decision to enfranchise those in the diaspora goes beyond a mere legal justification and the concept of universal suffrage. The text further intimates the role politics plays in arriving at such a decision to enfranchise those in the diaspora. Having said this, this particular literature basically buttresses the need for both legal as well as political goodwill in realization of the same.

Furthermore, the publication for International Foundation for Electoral Systems (IFES) in their White Paper series, entitled, *Out-of-country voting: A Brief Overview*¹⁶ tackles the important feature of the challenges that are to be expected in realizing the implementation of diaspora voting.

Another paper by Erben *et al*, states that many will demand the enfranchisement of those in the diaspora but mostly based on political considerations and without full understanding of the cost and complexity of conducting an out-of-country voting operation. The paper further goes ahead to highlight some complexities and risks of out-of-country voting of which are worthy of analysis in this study. This is a clear indication that realization of these rights needs to look at it holistically.

¹⁶ Erben P., Goldsmith B. and Shujaat A. „Out-of-country Voting: A Brief Overview“ (2012) IFES White Paper Series. <http://www.eods.eu/library/IFES.Out-of-Country%20Voting,%20A%20Brief%20Overview.pdf> 20.12.14

¹⁴ Reynolds Andrew et al. Electoral System Design: The New International IDEA Handbook (2005). The International IDEA Handbook Series seeks to present comparative analysis, information and insights on a range of democratic institutions and processes. Handbooks are aimed primarily at policy makers, politicians, civil society actors and practitioners in the field. They are also of interest to academia, the democracy assistance community and other bodies. http://www.idea.int/publications/esd/upload/Idea_ESD_full.pdf 20.12.14

¹⁵ Ellis Andrew et al. Voting from Abroad. The International IDEA Handbook (2007). http://www.idea.int/publications/voting_from_abroad/

CHAPTER TWO

THE CONCEPT OF DIASPORA REGISTRATION, VOTING AND ADVANCE VOTING AND THEIR JUSTIFICATION

2.1 Introduction

The purpose of this chapter is to analyze the concept of Diaspora registration and voting and its justification. In order to meet this objective, the chapter has been divided into three major sections. The first section looks at the history of the concept of Diaspora voting from Roman Emperor Augustus¹⁷ to the Constitution of Kenya 2010¹⁸ and the 2011 Elections Act. The second section discusses the right to vote for Kenyans in Diaspora and answers the question as to whether Diaspora registration and voting is a right or a privilege. It further looks at the theoretical justification of the Diaspora registration, voting and advance voting, international and regional legislative frameworks and further engages on the twin issues of universal suffrage and democratic right to internal self determination. The last section of this chapter makes an apt conclusion about the model of out - of country voting.

2.2 History of the Concept of Diaspora Voting

On the history of the concept of Diaspora voting¹⁹ one has to note that it is a much older concept than trans-nationalism, though its use and meaning have undergone dramatic changes in recent times. Originally, the concept referred only to the historic experience of particular ethnic groups, specifically Jews, Armenians, Greeks and Chinese.²⁰

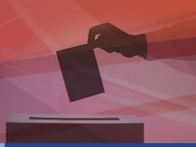
Throughout history, the case for external voter registration and voting has been presented as a question of principle, based on the universality of the right to vote. It is however enabled by legislation. Although reasons for the enactment of external voting provisions have existed, almost all have been the result of political impetus.

¹⁷ Sundberg Andy, 'The History And Politics Of Diaspora Voting In Home Country Elections,' [Based on information from Andrew Ellis and others sources in: "Voting from Abroad": The International IDEA Handbook, 2007].

¹⁸ Constitution of Kenya, n11 above

¹⁹ See https://www.overseasvotefoundation.org/files/The_History_and_Politics_of_Diaspora_Voting.pdf accessed on 30 September, 2016.

²⁰ Rainer Bauböck, 'Ties Across Borders: The Growing Salience Of Transnationalism And Diaspora Politics,' [IMISCOE Policy Brief No. 13, October 2008] at pg. 2



The first use of external voting appears to have been put in place by the *Roman Emperor Augustus*, who is said to have invented a new kind of suffrage under which the members of the local senate in 28 newly established colonies cast votes for candidates for the city offices of Rome and sent them under seal to Rome for the day of the elections - an act which was undoubtedly based on political rather than democratic motives. The reasons for introducing external voting also differ according to the historical and political contexts. Thus, in several countries the introduction of the right to vote for overseas citizens was an acknowledgement of their active participation in World War I or World War II.²¹

In more recent times, the earliest known use of external voting took place in 1862, when *Wisconsin* became the first of a number of US states which enacted provisions to allow absentee voting by soldiers fighting in the Union army during the Civil War. (The franchise was defined at State level in the USA.) Political contention was from the beginning a major factor: Republicans backed external voting legislation as they believed that soldiers were likely to support Republican President Abraham Lincoln, while Democrats sympathetic to peace moves and the cause of the Confederacy opposed it. A guarantee that US service personnel could register for a postal vote was passed in 1942, although this was reduced in 1944 to a recommendation to states (which are the registration authorities) to enable registration. The overseas postal vote was gradually extended to cover non-military personnel serving abroad (in 1955) and all US citizens abroad (in 1968). The United States provides an example of those rare cases where external voting was finally enacted in response to the demands of citizens residing overseas and the registration provision became mandatory for states in 1975.²²

Outside the military context, *New Zealand* introduced absentee voting for seafarers in 1890²³, and *Australia* adopted it in 1902, although under operating arrangements which made its use outside Australia practically impossible. New Zealand gave the vote to all military personnel, not just those over the then voting age of 21, during the period of the war. Many more people were enlisted into armed forces during World War I (1914–8) than in previous conflicts.

²¹ Shirer L. William, 'The Rise and Fall of the Third Reich-A History of Nazi Germany,' [Simon & Schuster Paperbacks, 1990]

²² See <http://travel.state.gov/content/passports/english/abroad/legal-matters/benefits/voting.html> accessed on 22nd October, 2016.

²³ See at http://www.idea.int/publications/voting_from_abroad/upload/chap2.pdf accessed on 31st July 2016

In the United Kingdom (UK), the political demand for a voice for those doing the fighting led in 1918 to the introduction of absentee voting for military personnel, conducted by proxy.²⁴ Postal voting for military personnel, merchant seamen and others working overseas on matters of national importance took place in the UK in 1945, with a three - week delay between domestic polling and counting to allow for ballot papers to be returned. In the UK in the 1980s, the then Conservative government saw advantage in the general enfranchisement of British citizens living overseas and enacted it, believing that many expatriates would be their supporters, but were disappointed by the very low take - up of overseas registration.

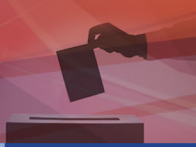
Even an extension of the maximum period of overseas residence from five years to 25 years did not bring the party the political benefits they anticipated. However, communities of expatriates do often seek involvement in their country of origin, whether migrant workers seeking to retain links with their home, members of long-term diaspora communities opposed to a current or former regime, or expatriates remitting payments to relatives.

Canada provides more early examples of the influence of political factors in the introduction and form of external voting.²⁵ Postal voting for military electors on active service was agreed at federal level in 1915: the Unionist government believed that Canadians on active military service would be likely supporters. Before the federal election, which followed in 1917, the Military franchise was extended. In addition, the military voter could choose the electoral district where the vote would be counted - failing which the political party chosen by the voter could do so after the results of the civilian voting in - country were known! Another Canadian example of the influence of political factors was seen in the province of British Columbia, which enabled military personnel overseas to vote in 1916 in referenda on women's suffrage and on the introduction of the prohibition of alcohol.

While the referendum on the vote for women passed easily, the result of the referendum on prohibition was very close, and the votes of overseas soldiers were critical to the rejection of the proposition. Following allegations of malpractice by the supporters of prohibition, a legislative commission of inquiry recommended that

²⁴ Ibid

²⁵ See generally, <http://www.elections.ca/Voting-by-mail> accessed on 31st July 2016



most of the overseas votes be disallowed. This recommendation was subsequently passed into law, changing the result of the referendum, and prohibition was then enacted. Canada introduced proxy voting on behalf of prisoners of war by their closest relatives for the 1945 general election, and extended postal voting to military families in 1955.

France introduced external voting in 1924 to cater to a different constituency: French administrators posted to the occupied Rhineland were enabled to vote by post. World War II (1939–45) produced further momentum for external voting by active servicemen. In addition to postal voting by military personnel, France introduced proxy voting for servicemen by 1946: by 1951, postal votes and/or proxy votes were available for voters in a range of specified categories, including those on government or military service or professional business away from their home. The fear of fraud in the operation of external voting provisions has sometimes been well - founded. France abolished postal voting in 1975 because of the incidence of fraud. French provisions for proxy voting before 1982 allowed proxies to be registered in any electoral district - which led in legislative elections to competition to register proxies in marginal electoral districts. Since 1982, proxies may only be registered in electoral districts with which the elector has a connection according to a list specified in the electoral law.²⁶

In common with many other aspects of electoral administrative tradition, external voting provisions often passed from the legislation of a colonial power to the legislation of a newly independent State. The existence and form of external voting in *Malaysia* followed its use in colonial Malaya, which had in turn derived it in the 1950s from the British legislation then in force. Postal votes were available for overseas service personnel, for overseas public servants and overseas students, and for their spouses. However, not all British colonies had introduced external voting before independence, and indeed some of the remaining British overseas territories and former colonies still do not have it.²⁷

Several *French colonies* retained the French proxy voting system at independence. France introduced personal voting in embassies and consulates in 1975 for presidential elections and referenda - an executive administrative initiative,

²⁶ See n20 above

²⁷ IDEA Voting from Abroad International Handbook

because only one version of the ballot paper is required - and a number of former French colonies, for example *Gabon and Guinea (Conakry)*, now have similar systems.²⁸

India enacted the core of its election legislation in 1950 and 1951, creating a model which was widely studied in other countries gaining independence. India at first specifically excluded proxy voting, and enfranchised its service personnel through postal voting. However, service personnel are now entitled to vote either by post or by proxy, and electors in government service outside India are entitled to vote by post.²⁹

Indonesia legislated in 1953 for its first democratic general elections.³⁰ While some described the resulting law as over - complex and a search for democratic perfection, the principle of enfranchisement of all citizens, in particular migrant workers and students, led to the introduction of external voting in Indonesian embassies abroad - a mechanism that persisted through the elections of the years of authoritarianism and remained in use in the democratic era. A similar wide qualification was introduced by Colombia in 1961.

In Spain, the introduction of external voting in 1978 had a symbolic character insofar as its inclusion in the democratic Constitution meant the *ex post facto* acknowledgement of the republican emigration after the Civil War.

In Argentina (1993) it reflected the government's political/pragmatic intention to maintain or strengthen the ties between emigrants and the mother country.³¹ In *Austria* the introduction of external voting (in 1990) followed a resolution of the Constitutional Court. While *Swiss* citizens had been able to travel back to Switzerland to vote for some years, the argument that Swiss sovereignty precluded foreigners from voting in Switzerland and therefore prevented the Swiss from seeking agreement for external voting was only finally overcome in 1989.³²

The importance of political factors in the adoption and design of external voting provisions was accentuated during the democratic transitions of the 1990s. The

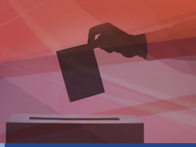
²⁸ Ibid

²⁹ See http://eci.nic.in/archive/handbook/returning-officer/rch10/rch10_1.htm accessed on 31st July 2016

³⁰ See http://www.jstor.org/stable/3023928?seq=1#page_scan_tab_contents accessed on 31st July 2016

³¹ See http://www.electionresources.org/ar/index_en.html accessed on 31st July 2016

³² See <https://www.ch.ch/en/voting-rights/> accessed on 1st August 2016



inclusion of citizens abroad was often seen as a key element in the process of nation-building, for example, in Namibia in 1989 and South Africa in 1994.³³

Diaspora communities may be active in seeking a post-transition role, and may be particularly influential when they play a role in the domestic politics of major donor countries. However, such pressure is not always successful. The elections which took place in *Palestine* in 1996³⁴ were held under the terms of the Oslo Agreement of 1993 and the Israeli - Palestinian Interim Agreement of 1995. Under these agreements, the right of return of displaced Palestinians and their families was left for consideration in final status negotiations. Although there was considerable pressure within the Palestinian diaspora for voting rights, no external voting provisions were introduced.

The international community frequently plays a leading or significant role in mediating transitions and even in implementing transitional elections. Transition agreements may therefore contain important and sometimes controversial external voting provisions. The General Framework Agreement for Peace signed at Dayton in 1995 led to the most complex use of external voting thus far attempted in the 1996 elections in *Bosnia and Herzegovina*.³⁵ The issue at stake was the extent to which the 'ethnic cleansing' that had taken place during the conflict would be recognized in the elections. Would people who had been displaced or become refugees be able, both as a question of principle and in practice, to vote in the locality which they had left, or in a locality where they now were or where they intended to make a future home? The agreement provided for both options. While the Organization for Security and Co-operation in Europe (OSCE) sought to implement the terms of the agreement, the political forces in Bosnia - many of which had been the major participants in the war - sought to encourage some versions of external voting, and to discourage others.

Political parties and actors can be the key players in introducing external voting. A provision in *Honduras* that had long been stalled was activated by a Party which saw political advantage in doing so.³⁶ Such communities can themselves

³³ See https://www.overseasvotefoundation.org/files/The_History_and_Politics_of_Diaspora_Voting.pdf accessed on 5th August 2016

³⁴ IDEA International Handbook

³⁵ IDEA International Handbook

³⁶ Ibid

be influential in lobbying for the introduction of external voting - as the *Dominican Republic* example shows.³⁷

External voting provisions have not always proved to be sustainable. In the *Cook Islands*, the undesirable effects of political party competition to fly voters overseas back for the poll led to the introduction of a separate electoral district for Cook Islanders resident overseas. Although Cook Islands elections have remained competitive, political support for the overseas seat declined and it was abolished for the 2004 election.³⁸

In a transitional context, the question of who implements external voting can be politically highly sensitive. The International Organization for Migration (IOM) organized external voting for Bosnia and Herzegovina in a variety of countries for several elections. When external voting for the 2004 elections in *Afghanistan* was being planned, Pakistan offered to organize the polling stations itself-politically a highly controversial proposal, which was not in the event accepted. The same arrangement may, however, be entirely acceptable in other circumstances.³⁹ The electoral authority of the US territory of *Guam* organizes polling for the many citizens of the *Federated States of Micronesia* based in Guam, an arrangement which finds all-round support.⁴⁰

In 2010, Kenyans enacted a new Constitution and under Article 38 it provides for the right of every citizen to be registered as a voter and the right to vote.⁴¹ The push for Diaspora rights started in Kenya way before the enactment of the Constitution of Kenya, 2010. One of the first Hansard recorded on push for Diaspora voting was in 2001 when Hon Mohamed Shidiye and Hon Shem Ochuodho co-sponsored the 'Dual Citizenship' motion in Parliament, which KANU/NDP Cooperation roundly defeated – despite a spirited effort by the opposition, then led by DP/FORD-K/SDP/FORD-P/SAFINA, later to be NAK/NARC. It, however, triggered a conversation finally sealed in the Constitution of Kenya, 2010 by providing for dual citizenship.

The next recorded wave for push for Diaspora rights was in 2010 itself for Diaspora to vote in the 2010 referendum. After Memoranda submitted by KDA and affiliates

³⁷ Ibid

³⁸ See n14 above

³⁹ Ibid

⁴⁰ IDEA International Handbook

⁴¹ Constitution of Kenya [2010], see at <http://www.kenyalaw.org>

to all major Kenyan leaders (Former President, Prime Minister, VP, Speaker of Parliament, Chairpersons of Political Parties, MPs, Chairs of ECK/IIEC, Minister of Justice, etc), some members of KDA led by Prof Barack Abonyo of Florida and Okiya Omtatah went to Court. Lost in the High Court, but some progressive directives were given to IIEC to ensure Diaspora vote in all subsequent general elections and referenda.

2.3 Right to Register and to Vote for Kenyans in Diaspora

Article 38 (2) of the Constitution, provides that every citizen has the right to free, fair, and regular elections based on universal suffrage and the free expression of the will of the electors. Under sub-article 3 of the same Article, provides every adult citizen the right without unreasonable restrictions to be registered as a voter to participate in voting and to be a candidate for election. Article 81 (a) of the Constitution of Kenya reiterates the freedom of citizens to exercise their political rights as enshrined in Article 38; and sub-article (d) of Article 81 provides for universal suffrage based on the aspiration for fair representation and equality of vote. The total effect of this legal framework is to accord every citizen of Kenya resident or non- resident the right to exercise their political rights including voting.

Diaspora voter registration and voting is therefore a right recognized in the aforementioned Constitutional provisions. If voting can be defined as the exercise of choice by citizens in a given political setup, about how their political economy should be run or the outer expression of representative governance, then there is no doubt that the above scenarios constituted the exclusion of the majority from democratic participation. The right to vote, and therefore, to be registered for the same, is essentially a civil and a political entitlement. It is the right to express a political thought arising from and accruing to a person as a reflection of civil duty.

Even though the right to vote, as universal suffrage, has been constitutionalized in Kenya as already indicated above, a fundamental question regarding this can be formulated as such: if every Kenyan citizen has a right to vote, should that right be revoked simply because that citizen now resides in another country? Surely a universal right should be extended to every citizen without discrimination⁴². If

⁴² The Vienna Declaration on 1993 re-underlined universality as one of the characteristics of human rights and in this gathering, the world nations committed themselves to this principle.

citizens in the diaspora still continue to engage in the socio-economic well-being of their country, they should enjoy all rights enjoyed by to the country's citizens.⁴³

Indeed, *New Vision Kenya (NVK Mageuzi) and Others vs IEBC* matters canvassed first in the High Court before Justice Majanja, then in the Appeal Court with a ruling issued in June 2014 and ultimately by the Supreme Court in May 2015 has confirmed the Constitutional right of the diaspora to vote.⁴⁴

While some of the diaspora⁴⁵ do not directly pay tax to the State,⁴⁶ remittances sent to relatives at home (which get taxed through value-added tax when these relatives purchase commodities) still contribute massively to the economies of such countries. Remittances are indeed a major source of foreign exchange. In 2011 in Ghana, for example, Ghanaians in the diaspora remitted more than US\$ 14.5 million to their relatives at home.⁴⁷ In Kenya, the diaspora contributes more than 5% of the gross domestic product (GDP),⁴⁸ while in 2007, Sierra Leoneans abroad remitted over US\$ 148 million.⁴⁹

2.3.1 Justification of the Concept of Diaspora Registration and Voting

2.3.1.1 Theoretical Justification of the concept of Diaspora

The meaning of the term diaspora has been debated extensively since its popularity in academic and policy discourse began to boom in the late 1960s. Scholars have debated whether or not the term should refer to specific historical groups – especially but not only the Jews-or whether it applies more widely. At one extreme, some scholars have argued that the term should only refer to 'victim'

⁴³ See http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1264:the-right-to-vote-where-do-citizens-in-the-diaspora-stand-part-1&catid=91:rights-in-focus&Itemid=296 accessed on 1st August 2016

⁴⁴ They demanded that they be allowed to vote and seek elective office as provided by the Constitution. Among other things, they also sought an order requiring IEBC to provide voter registration as well as satisfactory voter mechanisms for Kenyans living outside the country. A five-judge bench ordered IEBC to put in place infrastructure for comprehensive registration of Kenyans in the diaspora as voters. IEBC is expected to ensure that the progressive registration of voters over time begins before 2017 because of the Supreme Court ruling. Because a significant majority of Kenyans living in the Diaspora are illegal immigrants and may not freely present themselves for registration at the foreign missions or registration centres, this is likely to cause a lot of problems and hurdles in the realization of suffrage rights for the Diaspora.

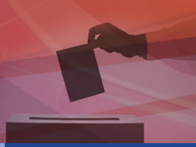
⁴⁵ There are Diaspora who pay direct and indirect tax one way or other, including those who own businesses and properties in Kenya, UN, AU, COMESA and Diplomatic Diaspora Staff also pay Tax through direct salary Deductions, ("Direct Assessment"), as well as Diaspora who although reside outside, are paid in Kenya. Etc

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⁴⁷ Ayitey, G., 'Opinion: What Ghana can teach the rest of Africa about democracy', CNN, 6 December 2012, See <http://edition.cnn.com>. Accessed on 1st August 2016

⁴⁸ 'Diaspora voting in 2013 a Mirage', Ole-Shitemi, 14 December 2012, See <http://oleshitemi.wordpress.com> . Accessed on 1st August 2016

⁴⁹ 'Diaspora voting rights', Sierra Leone Policy Watch (SLPW), 2012, See <http://slpw.org>. Accessed on 1st August 2015



groups dispersed through coercion, who maintain an antagonistic relationship with their host societies⁵⁰. At the other extreme, many researchers use the term very loosely to refer to any group residing outside its place of origin⁵¹.

The current consensus on the concept seems to be that the essential features of a Diaspora group are: dispersion to two or more locations; ongoing orientation towards a 'homeland'; and group's boundary maintenance over time⁵². This fairly accommodating definition of the term Diaspora remains true to archetypical cases such as the Jews, and also permits its use in relation to specific non-traditional emigrant groups as part of discussions about globalization and transnationalism⁵³. It is also specific enough to avoid the conceptual inflation to which scholars generally attribute a diminishment in the term's analytical value.

With this in mind, this study approaches "Diaspora" as an umbrella term for the many extra-territorial groups that, through processes of interacting with their origin state, are in various stages of formation. These include temporary or transnational migrants who spread their time between their source state and elsewhere and fall more or less arbitrarily into one or other policy category of the origin state. They also include longer-term but still first-generation emigrants settled in another country, and descendants of emigrants who-in certain places at certain times-identify as *diasporic* or even as members of a fully-fledged diaspora "community".

This approach emphasizes that Diasporas are not homogenous entities any more than States are unitary actors. However, just as it is meaningful to draw a ring around a heterogeneous set of territorially-based institutions and practices and call it "the state", it is meaningful to draw a ring around the heterogeneous set of extra-territorial individuals and groups impacted by that state, calling it "the diaspora". These analytical units are useful because they lead to interesting questions.⁵⁴

⁵⁰ Safran, W. Diasporas in Modern Societies: Myths of Homeland and Return. *Diaspora*, 1991] 1 (1):83- 99; See also Cohen, R. Rethinking "Babylon": Iconoclastic Conceptions of the Diasporic Experience. *New Community*, 1995, 21 (1)] 5-18, and Cohen R., *Diasporas and the Nation-State: From Victims to Challengers*. [*International Affairs*, 1996, 72 (3)]:507-20.

⁵¹ Tölölyan, K. *Diasporama*. [*Diaspora*, 1994 3] (2):235.

⁵² Brubaker, R. The 'diaspora' diaspora, [*Ethnic and Racial Studies*, 2005] 28 (1):1-19.

⁵³ Hugo, G. An Australian Diaspora? [*International Migration*, 2006] 44 (1):105-133.

⁵⁴ *Ibid*

2.3.1.2 Universal Suffrage

Legal framework should ensure that all eligible citizens are guaranteed the right to universal and equal suffrage as well as the right to contest elections without any discrimination.⁵⁵ "Suffrage as conferred by the constitutional provision is not a natural right of the citizens, but a political right intended to enable them to participate in the process of government to assure it derives its powers from the consent of the governed⁵⁶". Both international and domestic laws protect and guarantee its effective exercise by the people so that their sovereign will can be manifested.

The Universal Declaration of Human Rights (UDHR) under article 21 (1) provides that everyone has the right to take part in the governance of his or her country, directly or through freely chosen representatives. Sub article 2 provides further that everyone has the right of equal access to public service in his country. Sub article 3 states that the will of the people shall be the basis of the authority of government; this will, shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

Article 25 of the International Covenant on Civil and Political Rights⁵⁷ (ICCPR) prescribes that "every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 without unreasonable restrictions; a. To take part in the conduct of public affairs, directly or through freely chosen representatives; b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; c. To have access, on general terms of equality, to public service in his country."⁵⁸

⁵⁵ See <http://www.idea.int/publications/ies/upload/5.%20The%20right%20to%20elect%20and%20to%20be%20elected.pdf> accessed on 2nd August 2016

⁵⁶ *Pungutan v. Abubakar L-33541*, 20 June 1972), 143 SCRA p.1

⁵⁷ International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49; Access from <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed on 31st July 2016

⁵⁸ Which could make a case for why Diaspora too need to have elected representatives, whether as Member of National Assembly, Senators, Governors, etc

Universal suffrage therefore defines the electorate. This element concerns who, among the “everyone” that should have the right to participate in elections, with a premise that it should be defined in terms as inclusive as possible.⁵⁹ It is implicitly understood that a relationship of some sort between the individual and the country in question can be required, in addition to the usual requirement for a minimum age. The reference to equal suffrage is related to equality among the electorate in the actual voting.⁶⁰ At the outset, equal suffrage translates into the maxim “one person, one vote”. That is to say, voters should have an equal number of votes at their disposal when carrying out the act of voting. Also, each vote should count more or less the same, with implications for the delineation of electoral district boundaries. Gerrymandering, that is, opportune changing of electoral boundaries in bad faith is inadmissible under the principle of equal suffrage.

⁵⁹ See <http://www1.umn.edu/humanrts/edumat/studyguides/votingrights.html> accessed on 31st July 2016

⁶⁰ Ibid

CHAPTER THREE

REALIZATION OF THE RIGHT TO REGISTER AND VOTE FOR KENYANS IN DIASPORA

3.1 Introduction

Having provided a firm foundation of the concept of Diaspora voter registration and voting in the preceding chapters, this chapter looks at the modalities on how the right to vote for Kenyans⁶¹ in Diaspora can be realized. To be able to do this, three vital areas of concern, i.e. registration of voters in Diaspora, forms of Diaspora voting and the various prospects and challenges facing Diaspora voting will be discussed.

3.2 Registration of Voters in Diaspora

3.2.1 Eligibility for Diaspora Voting

The link between voter registration and the legitimacy of an election is critical in any democratic processes. Most countries that allow external voting by their citizens leaving abroad impose extra requirements in addition to the provisions in the electoral laws⁶² such as, a minimum period of previous residence, an intention to return to the country or limitation to certain groups such as diplomats, public officials, their families and those registered with the diplomatic missions⁶³.

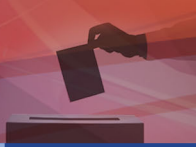
3.2.2 Eligibility for Diaspora Registration

To register for external voting, most countries require overseas citizens to present their valid passport, accomplish the prescribed registration form in several copies and submit the accomplished form with several photocopies of their passport and photos. It is important for all categories of external voters to fill in their address of ordinary residence or last address of permanent residence in the home country to determine the electoral area for which the applicant's vote will be counted. Other information on citizens residing abroad captured include, surname and other names, Sex, date of Birth, and remarks.

⁶¹ See Petition No. 25 of 2014

⁶² See <http://www.kenyalaw.org>

⁶³ IDEA International Handbook



Article 38 (3) (a) of the Constitution of Kenya⁶⁴, for example, provides that every adult citizen has a right, without unreasonable restrictions, to be registered as a voter. The following would suffice to be the legal requirements for registration as a voter residing outside the country: An eligible voter must be registered with the Kenyan Foreign Missions in the country of residence⁶⁵; Has attained the age of eighteen years as evidenced by a Valid Kenyan Passport⁶⁶; Has not registered elsewhere as a voter in any other register in Kenya; Is not declared to be of unsound mind; and Has not been convicted of an election offence during the preceding five years.

The IEBC is expected to prescribe conditions and/or restriction on the eligibility of a citizen residing outside to participate in the electoral process in line with the provisions of Article 82 (1) (e), as read with Article 24 of the Constitution of Kenya.

3.2.3 Data of Persons in Diaspora

It is expected that the Kenya's consulate in the host country stores a data base of Kenyan citizens living or working in that country. This would be the entry point on the call for registration of eligible voters. Note that there is need to have a compilation of registration data similar to the local guidelines⁶⁷ where the appointed voter registration office will submit registration data to the Commission's headquarters⁶⁸ within the stipulated timelines to ensure progressive development of the register of voters residing outside the country.

Secure transportation of the data should also be organized between the Commission and Foreign Affairs Office. Various commentators have argued that using the Foreign Affairs consulate loyal to the government of the day would ultimately compromise the notion of free and fair elections considering the strict lines of loyalty. The common reply has been that the IEBC is an independent body not subject to any person or authority. Further, data will be transmitted between point of registration and the Commission ICT and operations office through appropriate media. The Commission ICT and operations office will consolidate

⁶⁴ See n. 38 above

⁶⁵ This raises a problem for many Diaspora citizens fail to register with Embassies.

⁶⁶ Some people have argued that the Elections Act, 2011 (Article 37) introduces this requirement which is unconstitutional. They argue that the constitution says either passport OR ID!

⁶⁷ See n77 above

⁶⁸ See <http://www.iebc.or.ke/> accessed on 31st July 2016

all the data, verify accuracy, edit, match and provide feedback to the various points.

3.2.4 Monitoring of Registration of Diaspora Voters

Monitoring of registration of diaspora voters is both a pre and post registration process. Pre-registration process because it will involve mapping of potential voters to establish where, when and timelines, meaning that citizens of Kenya residing outside the country who meet the requirements will be required to present themselves to the registration desk in the gazetted polling areas during the prescribed period of registration and identify themselves using a valid Kenyan Passport. It will also involve voter education, and owing to the dispersed nature of sites, voter education will maximize use of technology and printed materials to conduct voter education. Furthermore it would be extremely important to audit the Diaspora voter register, after registration in order to ascertain the integrity of the resultant register of voters from the Diaspora.

3.2.5 Right to Vote versus Cost

IEBC has indicated that the cost of diaspora voting is five times more expensive than in country voting.⁶⁹ It was therefore not possible to disaggregate the costs of external voting from the total election costs. According to the IEBC it is clear that its external travel budget and the costs of paying others to supervise elections abroad are very high.⁷⁰ Both developed and developing countries consider external voting as very expensive compared to internal voting. The budget proposal for external voting in Kenya points to this challenge as well. In estimates,⁷¹ the funds necessary to carry out the provisions of external voting is approximately⁷² US\$1,500,000.00.

3.3 Forms of Diaspora Voting

3.3.1 In Person Voting

In the case of personal voting, the voter casts their votes only in the designated voting areas within the country of residence.⁷³ For many countries the embassy, consulate and other foreign services establishments provide such a facility. Under

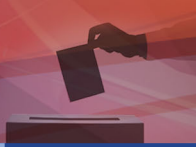
⁶⁹ <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved>, accessed on September, 2016

⁷⁰ Ibid

⁷¹ Ibid

⁷² It would be vital to see and interrogate this budget. At face value, it appears to be excessively too high. It is necessary to review the budget especially the cost drivers and the other items building up to that figure. Partnerships may reduce even this figure.

⁷³ IDEA International Handbook



this arrangement the voter must personally present himself or herself to cast their vote. This is the most widely used approach in external voting. It is normally conducted in diplomatic missions and comes with a high degree of transparency.

3.3.2 Proxy Voting

Under this approach the elector appoints a proxy to vote on his/her behalf.⁷⁴ The normal requirement is for a specific application to be made in writing by the elector appointing the proxy and signed by the elector. The elector must also state the reasons for application and provide the name and address of the appointed proxy. The proxy then votes on behalf of the registered voter. The voters register must then be marked to ensure that it reflects voting has occurred. This system has the advantage that it does not rely on the transmission of material to the voter or the establishment of mobile or special polling stations. However, it is also prone to abuse and can render the credibility of the polling process in Kenya incredible. The main advantage of voting by proxy is that it entails no additional expenses over and above what is incurred by the country on national elections.

However, the principle of electoral equality is not sufficiently guaranteed and in a young democracy such as Kenya, chances of electoral fraud⁷⁵ are open in the use and application of Kenyan electoral laws even in diaspora voting. Part 6 of the Elections Act, 2011 deals with election offences and illegal practices. This has however changed, as there is now an Election Offences Act, 2016.

There are offences relating to the register of voters⁷⁶, offences relating to multiple registration as a voter⁷⁷, offences relating to voting⁷⁸, offences by members and staff of the Commission⁷⁹, offences relating to maintenance of secrecy at elections⁸⁰, the offence of personation⁸¹, treating⁸², undue influence⁸³, bribery⁸⁴, use

⁷⁴ Ibid

⁷⁵ See <http://citizentv.co.ke/news/postal-voting-proposed-for-kenyans-abroad/> accessed on 31st July 2016

⁷⁶ This is provided for at Section 56 of the Act, unfortunately, the side note to the section still reads “offences relating to register of voters and voters card” long after the instrument of the voter’s card was abolished and the attendant offences repealed by Act No. 12 of 2012. It is also curious that whereas the offences relating to voters cards that had hitherto been provided for at paragraphs (b), (c), (d), (e) and (f) of Section 1 of this Section of the Act were repealed as aforesaid, it is still an offence at paragraph (h) of the same provision to aid, abet, counsel or procure the commission of or to attempt to commit the offences in the repealed paragraphs. This is an inconsistency in the Act that needs to be remedied for purposes of good order. [How about the new Offences Act?]

⁷⁷ Section 57 of the Act

⁷⁸ Section 58 of the Act

⁷⁹ Section 59 of the Act

⁸⁰ Section 60 of the Act

⁸¹ Section 61 of the Act

⁸² Section 62 of the Act

⁸³ Section 63 of the Act

of force or violence during election period⁸⁵, and use of national security organs⁸⁶. There are also other offences relating to elections⁸⁷, and use of public resources⁸⁸. Illegal practices under the Act include certain prohibited expenditure⁸⁹, failure by employers to allow employees reasonable period for voting⁹⁰, and the act of political parties knowingly nominating candidates who do not meet constitutional requirements⁹¹.

These offences are essentially triable before magistrate's courts. Members of the commission and officers designated by the commission have power to order the arrest of any person who commits an offence under the Elections Act.⁹² A further innovation of the Act, and perhaps intended to avoid a scenario where institutions pass the buck in the event of failure to enforce provisions of the law, the Act vests in the Commission the power to prosecute any offences under the Act⁹³.

This power of the Commission to prosecute criminal offences under the Act would appear to be in tandem with the provisions of Article 157(12) of the Constitution which provides that parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions. In what appears to be an internal inconsistency in the Act, the Act in a different provision provides that the power of the Commission to prosecute offences under the Act and under the Electoral Code of Conduct through its designated officers is, subject to the Criminal Procedure Code, Chapter 75 of the Laws of Kenya.⁹⁴ This subjection of the exercise of this power to prosecute to the Criminal Procedure Code presupposes that such prosecutors must be formally appointed by the Director of Public Prosecutions and be subject to express directions of the Director of Public Prosecutions.⁹⁵

⁸⁷ Section 67 of the Act

⁸⁸ Section 68 of the Act

⁸⁹ Section 69 of the Act

⁹⁰ Section 70 of the Act

⁹¹ Section 72 of the Act

⁸⁴ Section 64 of the Act

⁸⁵ Section 65 of the Act

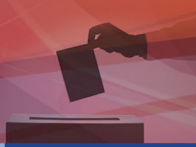
⁸⁶ Section 66 of the Act

⁹² Section 107(1) of the Act

⁹³ Section 107(2) of the Act

⁹⁴ Section 110(6) of the Elections Act.

⁹⁵ See Section 85 of the Criminal Procedure Code



There was a further controversial power of the Commission to impose sanctions against any person who commits an offence under the Act pending the hearing and determination of the offence.⁹⁶ The Commission, through its members of designated officers, has an even further power to impound or order the impounding of any state resources that are used in election campaigns.⁹⁷

3.3.3 Remote Electronic Voting

Under this approach the voter may use the Internet, telephone, fax or any other electronic communication method to cast their vote.⁹⁸ This type of electronic voting is referred to as e-voting and may become more common in future in the light of the fast changing electronic technology. This approach to voting may also be more appealing to the young voters.⁹⁹ Electronic voting has no delays, is available worldwide and facilitates easy counting of votes.

However, the security aspects are hard to guarantee; and moreover the system is not yet fully developed. In Estonia, electronic voting gained popularity in 2001 and held its general elections over the internet. It is important to indicate that this form of voting builds on Estonian ID Card which is a regular and mandatory national ID document as well as a smart card. Internet voting is available during early voting as well as during the E Day.

In an Opinion Poll conducted by Ipsos Synovate in 2014, 2 out of 5 Kenyans said they would prefer to vote through mobile/smart phone. This represented about 37% of those interviewed. This shows that a section of Kenyans are open to some form of electronic voting, an option that needs to be explored further.

3.3.4 Postal Voting

Under postal voting, the voter fills out the ballot paper at a location of their choice and subsequently transmits the vote through the ordinary post to Kenya.¹⁰⁰ In certain instances, the voter may be required to be accompanied by a witness to authenticate the credibility of the voting process. Normally the elector is

⁹⁶ Section 107(2) of the Act. This further power of the Commission is controversial in the sense that on the face of it, it appears to violate fair trial standards as well as rules of natural justice in general administrative law.

⁹⁷ Article 88(4)(e) of the Constitution of Kenya 2010

⁹⁸ See <http://www.capitalfm.co.ke/news/2015/05/kenyan-diaspora-to-wait-longer-to-fully-participate-in-polls/> accessed on 29 September, 2016

⁹⁹ Ibid

¹⁰⁰ DEA International Handbook

required to state the reason for the request to vote in this manner and to make a declaration that their action is without fraud.

A common problem which relates to postal voting is one of fraud.¹⁰¹ The mail ballot system has several other disadvantages which include the need to close the external voting early enough - this can cause difficulties where the electoral law allows late changes to the candidate or party line-up. Another major disadvantage is that the elector does not undergo scrutiny by party poll officials and agents at the polling station. Another risk is that the ballot paper may be intercepted and completed by someone else.

Despite the foregoing disadvantages, this system has the advantage of being able to send the ballot paper outside the electoral area and to capture more electors. On its part, postal voting comes with lower financial and organizational costs and most of the eligible voters can be easily reached. The success of this approach is however dependent on a speedy and reliable postal service which is a challenge in Kenya.¹⁰²

3.4 Prospects and Challenges of Diaspora Voter Registration and Voting

There lacks universal external electoral standards and as such countries implementing provisions for external voting rely on existing knowledge and benchmarking standards with countries that have already had such an experience.

Countries that have implemented external voting have reported organizational and political challenges across board. For instance five countries which reportedly have provisions for external voting have not yet implemented them and these include Ghana, Angola.¹⁰³ Other countries like Mozambique have taken considerable time in implementation of the provisions;¹⁰⁴ yet others like Botswana are reconsidering the provision due to what the country considers poor value for investments as a result of poor turnout and high costs associated with organization.¹⁰⁵ Countries like India, United Kingdom and Ireland with very large citizenry residing outside the country and thus likely to influence the outcome of

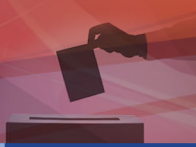
¹⁰¹ See n91 above

¹⁰² <http://posta.co.ke/page.asp?pageid=35> accessed on 31st July 2015

¹⁰³ See n116 above

¹⁰⁴ Ibid

¹⁰⁵ Ibid



an election have disallowed external voting rights.¹⁰⁶ Notable challenges that may hinder implementation of external voting in Kenya include;

i. Cost of External Voting

Both developed and developing countries consider external voting as very expensive exercise compared to internal voting processes. The budget proposal for external voting in Kenya points to this challenge as well.

ii. Independence of Electoral Commission vis a vis Foreign Affairs Office Role

The Constitution has conferred independence to the Electoral Commission in regard to execution of electoral mandates. On the other hand, external voting takes place in countries not bound by Kenyan Constitution therefore requiring host country agreements. The task of negotiating host country agreements lies with the Ministry of Foreign Affairs (MOFA). The Ministry is an executive arm and there have been fears of possible undue government influence in the process. Moreover, the MOFA could in the alternative simply facilitate dialogue between EMB's, and leave IEBC to do the rest and this could be negotiated in the presence of IEBC. This is normal practice for example in Bilateral Air Service Agreements where the airlines and other aviation stakeholders are present.

iii. Ascertaining the number of Kenyans residing abroad

Implementing external voting in practice is a complicated process due to the fact that the number of electors cannot be ascertained and their exact location and distance established¹⁰⁷. There is lack of official census statistics on the breakdown of Kenyans living abroad and hence the actual number of Kenyans residing in foreign lands could be higher than reported for various reasons.

First there is lack of official census statistics on the breakdown of Kenyans living in the Diasporas. Secondly, there is reluctance by some Kenyans to register with their Embassies for various reasons, the most common one being that they are living in those countries illegally; and that registration would reveal their irregular status.¹⁰⁸ This makes it difficult to ascertain the actual number and distribution of

¹⁰⁶ Ibid

¹⁰⁷ The numbers can be established from the Host Country Census data and the Diaspora Organizations number. What is required is the good will and networking among stakeholders.

¹⁰⁸ There are other valid reasons not to register with the Diplomatic Mission including that the Missions do not offer any services to the Diaspora, one is a political refugee, an economic refugee and that one does not support the government in power thus its representative, the Diplomatic Mission, etc

their population across the globe for planning purposes. However, this can be done if there is a will. Involving PPPs in Diaspora Mapping spearheaded by IEBC may help greatly.

Logistical and Administrative Issues for External voting

It is essential that the electoral laws of the country and other practices including security and piracy are observed to lend credence to the process. Care must also be observed in order to minimize potential administrative problems which could be misconstrued as attempts by the Government or the Electoral Management Body¹⁰⁹ to inject fraud in the process. Additionally, mechanisms for resolving disputes and complaints should be established.

iv. Time Zone Differences

It is important that while voting time is defined in the legal framework, time zones create significant differences in different parts of the world and therefore creating logistical and administrative challenges.

v. Methods of Voting

As already indicated above, there are several internationally acknowledged methods of Diaspora voting like, personal voting, postal voting, electronic voting and voting by proxy. While the law in Kenya allows for personal voting only, discussions have been advanced seeking for alternative methods of Diaspora voting.

3.3.5 Conclusion.

External voting adds complexity to the process but is a necessary part of extending the franchise to all eligible electors. 'Today we have come to assume that democracy must guarantee virtually every adult citizen the right to vote'.¹¹⁰ Although flexibility is important in order to meet the challenges, all decisions must be made in compliance with the law. External voting properly administered and implemented will facilitate the democratic process and, in the case of refugee populations, encourage unity and reconciliation. Indeed, it might be necessary to amend the Elections Act and Regulations to accommodate and facilitate Diaspora voting.

¹⁰⁹ Judy Thompson, 'The Implementation of External Voting,' in 'Voting from Abroad-The International IDEA Handbook' [IDEA, 2007].

¹¹⁰ Ibid

CHAPTER FOUR**COMPARATIVE STUDY OF EARLY (ADVANCE) VOTING
INTERNATIONALLY AND REGIONALLY****4.1 Introduction**

This chapter seeks to present comparative analysis of early or advance voting practices from a number of jurisdictions. Early voting also known as pre-polling or advance voting is increasingly becoming a 'silent revolution' in electoral processes across the globe. It refers to the process by which electors can vote prior to the scheduled elections day at precincts like polling stations throughout a jurisdiction. Providing facilities for early voting will allow those voters who cannot attend a voting station on the general voting day to vote on a special day, or series of days, prior to voting day. Early voting is increasing becoming a popular method of voting and is gaining ground and popularity amongst several jurisdictions as will be shown below.

The goal of early voting for many early voting advocates is to attract marginal voters who want to vote but who might not make it to the polls on Election Day. Therefore, the voting method at early voting sites is made as quick and simple as is possible within the constraints of conducting a free and fair election.

The major difference between early voting and Election Day voting is that during early voting voters may cast their ballots at any of the early voting locations in the county, while on Election Day voters must vote at the polling place for the precinct in which they are registered. The early voting ballots are the same as those used on Election Day, and the early voting forms and methods are similar to Election Day forms and procedures.

4.2 Methods of Early Voting

In all jurisdictions with early voting systems, there are two main basic forms of early voting, namely, Early In-Person Voting (EIP) and Early By-Mail Voting¹¹¹. In some jurisdictions, both forms are applicable while in others, only one form is applicable.

¹¹¹ Teresa James, "Early Voting in Person: Effects on Underrepresented Voters, Voter Turnout and Election Administration", in *Issues In Election Administration*, 2010.

Early In Person Voting as voting in which any voter may appear at the office of the election authority or other designated Early Voting center during designated times before Election Day, requests an early ballot or absentee ballot, and immediately cast the ballot in the presence of election officials. This form of voting is, of course, only available to voters who are already registered, except in states that permit Same Day Registration (SDR) or Election Day Registration.

Early By Mail Voting is where the voter requests, or is automatically sent, the relevant ballots and other voting materials, which are then returned by the voter to the electoral management body. Ballots are sent out, usually within a stipulated time before the election date, after a voter's pamphlet has been distributed. To vote by mail, an individual marks the ballot for their choice of the candidates (or writes in their name), places the ballot in a secrecy envelope, seals it, places it in the provided mailing envelope, seals it and signs and dates the back of the mailing envelope. This envelope is then either stamped and mailed at any mailbox, or dropped off (postage free) at a local ballot collection center. In all the jurisdictions where early by mail voting occurs, there is a cut off period within which the ballots must be mailed determined by legislation.

4.3 Arguments for Early/Advance Voting

Proponents say that early voting will increase voter turnout and make voting more accessible and convenient to under-represented groups, such as elderly, disabled, and the sick, and to people who find it difficult to get to a central election office because of distance, lack of transportation, or non-traditional work schedules;

Others say that it is advantageous in areas that frequently experience bad weather conditions on Election Day and that early voting will decrease the potential for fraudulent voting or voter intimidation by substituting *in-person* voting at early voting sites for most mail absentee voting. They believe that early voting helps give governments more credibility by providing a service and more options to voters, thereby helping to overcome the feeling that "government doesn't belong to me" through voter outreach efforts to parallel voter registration outreach efforts.

Opponents of Early Voting say that early voting does not increase turnout in any significant manner, but simply shifts it from Election Day to early voting days. They hold the opinion that it deprives large numbers of voters of the ability to make fully informed decisions by encouraging them to vote before the campaigns have

ended and before all the information about the candidates and issues has been presented.

Others argue that it promotes ill-considered impulse voting without that it drives up campaign costs and that it is extremely costly, both in taxpayer money and in administrative complexity; and that a multitude of voting sites and times introduce new and improved opportunities for election fraud and political manipulation. They believe that the common experience of voting at the polls on Election Day provides a feeling of political cohesion that is an important element in the democratic electoral process. However, it is important to indicate that euphoria and mob voting can also compromise democracy.

4.4 Frameworks for Early Voting

Critical issues for early voting would be better defined in electoral laws and legislations. These would include:

- a) the period for early voting;
- b) any qualifications required of early voters;
- c) methods of defining locations at which early voting may take place;
- d) voting secrecy and count frameworks, especially for mail voting;
- e) information required from early voters voting outside their electoral district of registration.

Other issues, such as the hours early voting offices are open during the early voting period and the numbers of early voting offices used, would be more practicably left to the EMB to determine according to need and specific contexts.

4.5 Eligibility to Claim an Early Vote

Some systems make early voting facilities available to any voter who wishes to use them. However, as there are additional costs involved with early voting, legal frameworks may include special qualifications for voters using these facilities. In its most restrictive form, voters who qualify for an early vote would be limited to those whose official duties preclude them from voting on voting day, such as voting operations staff, security forces or others officially engaged in election activity throughout the hours of normal voting.

In less restrictive systems, a broader range of qualifications dealing with voters who may not be able to attend their voting stations during normal voting hours would be available. These qualifications could include, for example:

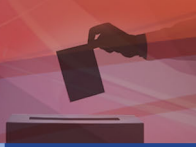
- a) on voting day, being more than a specified distance from the normal voting station (or stations) at which they would be eligible to vote--further qualifications as to the reasons for this absence (such as work duties) may be required;
- b) being employed in specific occupations (such as emergency services, security services or elections) that would not allow taking leave to vote on voting day;
- c) having religious beliefs that would not allow attending a voting station on the designated voting day;
- d) being a patient in a hospital or other institution, or being pregnant, or being too ill or infirm to attend a voting station on voting day;
- e) being engaged in caring for a pregnant, infirm or ill person throughout voting day.

Additional qualifications may also exist, where early voting is in person, on the locations at which a voter may lodge an early vote. This may be restricted to the electoral district in which the voter is registered, or some other electoral administration area. Where voters can lodge an early vote in person outside their district of registration, this in effect becomes an early absentee vote, bringing with it the same control requirements as absentee voting.

Where early voting is by mail, there may be restrictions on the location from which a voter can request an early vote. This may be limited to the electoral management office in the voter's district of registration. Conversely, voters may be issued mail votes from any electoral management office. This latter method, while promoting accessibility, requires sophisticated control systems.

4.6 Period for Early Voting

Periods designated for early voting can also vary widely. In restrictive jurisdictions, where relatively small numbers of voters will be eligible for an early vote, a single early voting day may be designated. Normally early voting periods would be in the range of five to fifteen days before voting day.



Some considerations determining an effective period for early voting include the following:

- a) Ensuring that there is sufficient time for printing and distribution of all materials prior to the commencement of the early voting period. Where ballots fully printed with candidate or party details are used, it is critical that there is sufficient time between close of nominations and commencement of early voting for ballots to be printed and distributed. Early voting, particularly mail voting, would generally not be suitable for systems where later changes can be made to parties or candidates standing for election.
- b) The early voting period, especially if mail methods are used, is sufficient for voting material to be despatched to and returned from voters in all parts of the area under election. Where early voting is by mail, the period for receipt of ballots returned by mail could be: on or before the closing time for normal voting stations on voting day and extended beyond voting day, to allow a period for mail ballots completed up until the close of normal voting to be returned through the mail.

Setting the deadline for return of mail ballots on or before the general voting day will not cause any delay to the finalisation of election results, but may limit accessibility, especially in countries with extensive remote areas with infrequent mail services. In other jurisdictions, the view, on principle, is taken that any mail vote actually cast and handed to the mail services for return by the time of closing of normal voting stations should be given a reasonable chance to be included in counts. Depending on the mail service environment, a period of up to two weeks after normal voting day could be allowed for return of these votes. While this may enhance accessibility, it can result in additional control costs and delays in finalising election results.

4.7 Controls on Accountable Voting Materials

Where early voting facilities are available for a number of days, control or accountability of ballot materials becomes critical. Major issues that must be considered include:

- a) Security of election materials. All completed ballots, whether completed in person or returned by mail, must be maintained in ballot boxes under security until the commencement of counting. Where early ballots are

contained in envelopes with voter details, systems that protect the secrecy of voting and maintain the security of ballot material need to be devised for checking these voter details. All election materials, such as unused ballots and ballot envelopes, should be stored under security both during and after operating hours.

- b) Maintaining periodic reconciliations of accountable voting materials, at the very least at the end of each day's early voting operations. For mail voting, more frequent checks are advisable. It can be useful to collate applications for mail votes in standard batches of fifty or one hundred, issue mail ballot materials according to these batches, and reconcile ballots and other mail voting materials (e.g., ballot return envelopes) at the conclusion of processing of each batch.

4.8 Early Voting in Regional Jurisdictions

4.8.1 Botswana

Section 61 (4) of the Electoral Act of Botswana stipulates that polling officers and police officers entitled to vote are unable to vote, in respect of the polling station in which they have been registered, the electoral commission is required to fix a date, place and days not earlier than 15 days before the election day. The law further requires the EMB to appoint presiding and returning officers and inform the candidates of the date fixed.

Botswana's law dictates that the presiding officer, after the close of the polling, place all the ballot papers containing the votes of each constituency in a separate packet and close that packet in a manner that is to prevent any form of electoral fraud; transmits them in safe custody to the returning officer of the constituency in which the elections were conducted. The returning officer is then required to retain the documents so received in safe custody until the Election Day polling activities are over.

4.8.2 Ghana

Ghana's Electoral Laws permits proxy voting where voters apply for this in advance, and the proxy is identified and registered at the polling station. The law prescribes that these names be entered in a separate list designated as proxy voters.

Special voting is allowed for registered members of the security services and electoral officers in Ghana's electoral laws. Section 21 (1) stipulates that a person who because of his or her duties on a polling day will be unable to be present at the polling station in which he or she registered, may apply to the Returning officer of the constituency in which he or she registered, to be entered as a special voter. This special request is required to be done not later than 7 days before the polling day.

The law further prescribes that a person whose name is entered on special voters list is entitled to vote at a polling station specified by the Commission and on a day which is not more than 7 days before the polling day. As in the case with Botswana's practice, the presiding officer is required to have the ballot boxes kept in safe custody after the poll has closed and the boxes sealed and have the ballot boxes opened at the time of counting of the votes cast on the polling day.

Section 23 (1) of the electoral laws provides for voting by proxy where a registered voter who because of ill-health or absence from his constituency will be unable to present himself or herself to vote at polling station, may, no less than 14 days before polling in the constituency where he or she is registered, apply to the returning officer to have his or her name entered in the proxy list. Once the returning officer is satisfied that the proxy is qualified to be registered as a voter and that the applicant is a registered voter, enters the names and particulars of the applicant and the proxy on the proxy list and assigns him or her a polling station to vote.

4.8.3 South Africa

Section 33 of South African's Electoral Laws Amendment Act (2013) accords for special votes where a person cannot vote at a polling station, in a constituency where he or she is registered due to:

- a. physical infirmity, disability or pregnancy;
- b. Absence from the voting district while serving as an officer of the elections.
- c. On duty as a member of the security services in connection with the elections.

The person is expected to apply for and cast special vote prior to the Election Day due to his or her intended absence from his or her voting district. Section 47 (2) (c) of the Act and Regulations 25 on Casting and Counting of Special votes are very elaborate on the procedures on how special votes are to be cast and counted. Once special votes have been cast, the Commission is expected to place special votes in safe custody until the end of polling on the polling day. Thereafter, the special votes will be counted together with the rest of the votes cast on the polling day.

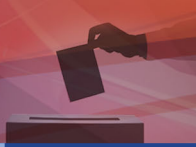
4.9 Early Voting in International Jurisdictions

4.9.1 Early Voting in Australia

In Australia, voting is a compulsory activity and this is why the Australian Electoral Commission (AEC) has put in place elaborate structures and systems to ensure that electors are able to discharge this civic responsibility. The law provides that you can vote early either in person or by post if on Election Day you:

- a) are outside the electorate where you are enrolled to vote
- b) are more than 8km from a polling place
- c) are travelling
- d) are unable to leave your workplace to vote
- e) are seriously ill, infirm or due to give birth shortly (or caring for someone who is)
- f) are a patient in hospital and can't vote at the hospital
- g) have religious beliefs that prevent you from attending a polling place
- h) are in prison serving a sentence of less than three years or otherwise detained and
- i) have a reasonable fear for your safety.

A registered voter can vote in person at an early voting centre or any Australian Electoral Commission (AEC) divisional office in the weeks leading to an election. Lists of early voting centres are made available during the federal election. After an election is announced, one can apply for a postal vote online, or completes a postal vote application form.



4.9.2 Early Voting in United Kingdom (UK)

In the UK, votes can be cast either in person at a polling station, by post or by proxy. Voters can apply to receive a postal ballot either for specific elections or on a permanent basis until further notice without having to give a reason (except in Northern Ireland, where voters have to give a specific reason explaining why they cannot physically attend their allocated polling station). Applications for postal ballots close at 5pm 11 working days before polling day - this is also the earliest time the returning officer can dispatch postal ballot packs. Postal ballots can be sent anywhere within and outside the United Kingdom, although if they are not sent to a voter's registered address, a reason must be provided to the Electoral Registration Officer as to why the postal ballot is to be sent to an alternative address.

Voters return their postal ballots together with postal voting statements filled in with their date of birth and signature either by post or by hand directly to the returning officer, or by hand to the presiding officer on polling day at a polling station situated within the constituency/ward printed on the postal ballot return envelope. However, for the postal ballot to be counted, the returning officer (or the presiding officer if returned at a polling station) must receive the ballot paper by the close of poll (usually 10pm on polling day).

The law also allows for voting by proxy. Any person who is *eligible* to vote (he/she does not necessarily have to be on the Electoral Register already) can be appointed by another voter as his/her proxy, but for the proxy to be able to vote in an election the proxy application must be received by the Electoral Registration Officer at the voter's local authority by 5pm 6 working days before polling day. The proxy can either vote in person, or can apply for a postal proxy vote (though a postal proxy vote application has an even earlier deadline - any such request must be received by the Electoral Registration Officer by 5pm 11 working days before polling day at the latest).

A voter who has become ill or disabled after 5pm six working days before polling day can make an emergency application to vote by proxy as long as the application is received by the Electoral Registration Officer by 5pm on polling day. Unless a close relative, a person can only vote as a proxy on behalf of a maximum of 2 other voters in any single election in each constituency/ward. When applying

to vote by proxy for more than one particular election, the application must be accompanied by a relevant attestation and must be justified based on one of the following reasons: blindness; other disability; employment; on an education course; registered as a service, overseas or anonymous elector.

If only applying to vote by proxy for one particular election, the elector only needs to explain why he/she cannot vote in person, but does not need an attestation. If it is only possible to get to the polling station from the registered address by air or by sea, the elector can apply for a permanent proxy vote without an attestation. In Northern Ireland, voters can only appoint another person to be their proxy if they can provide a specific reason explaining why they cannot physically attend their allocated polling station.

5. Conclusion

The goal of all early voting programs is to improve voting accessibility and turnout, but different programs emphasize different elements of the voting process. The change that has the greatest effect appears to be the removal of all restrictions for in-person early voting, because the requirement for satisfying some specific reason for voting early seems the single biggest impediment to voters who want to vote before Election Day.

The provision of well-publicized convenient satellite early voting sites and extended hours for early voting also seem to have considerable effect. However, the relative effects of not requiring an application, of not identifying individual ballots, and of widespread publicity are difficult to determine. Certainly all contribute to early voter usage, but it is not clear how much each of these elements contribute or exactly how they interact. At this writing, although a number of States have examined the Texas model and some have used it as a starting point, no State has followed its example of *mandatory* satellite early voting, even in large urban jurisdictions. In those States where early voting is permissive, it has not been widely implemented, perhaps because it is new or perhaps because it may be needed only in certain specific circumstances.

CHAPTER FIVE**COMPARATIVE STUDY OF DIASPORA VOTING REGIONALLY
AND INTERNATIONALLY****5.1 Introduction**

This chapter presents a comparative overview of external voting practices worldwide. It is based on a number of countries and related. This overview attempts to map out the different practices in external voting, and to describe and group some of them

Examination of the types of countries that have external voting also shows that they are very different in the level of socio-economic development: they include both Organization for Economic Co-operation and Development (OECD)¹¹² member countries and countries from the less developed regions¹¹³ of the world. While there is no obvious correlation between external voting provisions and socio-economic or political features, these factors remain important in the debates and decision making related to external voting provisions¹¹⁴ and practices, and are often reflected in the challenges or complexities faced.

The countries also differ in the length of time for which their democracies have been established, their roots, and the stability and consolidation of their institutions and democratic practices. They include well-established democracies¹¹⁵ along with the emerging¹¹⁶, and even some countries that can only doubtfully be classified as democratic.

Following sections of this work focus on three main issues: the types of election to which external voting applies; the entitlement to external voting; and the voting methods for voting from abroad.

¹¹² See <http://www.oecd.org/> accessed on 21st October, 2016

¹¹³ See <http://www.oecd.org/site/govrdpc/50138839.pdf> accessed on 21st October, 2016

¹¹⁴ See n123 above

¹¹⁵ See <http://www.un.org/partnerships/situating.html> accessed on 1st August 2015

¹¹⁶ Ibid

5.2 Regional Comparison of Diaspora Voting

5.2.1 Diaspora Voting in Botswana

External voting in Botswana was introduced fairly recently, as part of a package of constitutional and electoral reforms in 1997¹¹⁷. The Constitutional Amendment Act of 1997, section 4, subsection (a) reduced the voting age from 21 to 18 years, while the Electoral Act section 5(3) amendment of 1997 permitted citizens resident outside the country to vote externally.¹¹⁸ Other major reforms made at the same time included the establishment of the Independent Electoral Commission (IEC)¹¹⁹ and the introduction of a limit to the term of office of the president to two terms of five years each. These substantive electoral reforms were the first of their kind since Botswana attained its independence from the United Kingdom (UK) in 1966. Previously, there had been occasional minor amendments to the electoral law, for instance, relating to the procedure for the counting of ballot papers, the type of ballot paper/discs, or adjustments to the campaign spending limits for candidates and political parties. The reforms of 1997 took two forms. Because they involved changing some clauses of the constitution, those relating to the voting age and the establishment of the IEC were preceded by a national referendum¹²⁰, while those relating to the amendment of the electoral law were discussed and changed by the parliament without recourse to public consultation. However, all the final decisions were made by the parliament and acceded to by the president, thus becoming law.

These reforms were the result both of a long period of advocacy, mainly by the opposition parties¹²¹ and some sections of the civil society organizations, and of the rapid political changes of a similar nature taking place in Southern Africa during the late 1990s. In particular, changes made in Namibia in 1989, in Zambia in 1991, and in Malawi, Mozambique and South Africa in 1994 all introduced the concept of the independent electoral commission, made 18 years the voting age, introduced a limited term for the presidency, and introduced external voting, all as measures to extend democratic rights to wider sections of the population. As a long-established democracy in the region, Botswana would have appeared backward in the context of these changes taking place around it.¹²²

¹¹⁷ European Commission, *Compendium on International Standards for Elections*, [2nd edn, 2000]

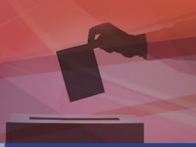
¹¹⁸ *Ibid*

¹¹⁹ IDEA International Handbook

¹²⁰ IDEA International Handbook

¹²¹ *Ibid*

¹²² *Ibid*



However, the government was selective in aligning itself with the electoral reforms taking place in the region at the time. For example, the government and the ruling party did not agree with two other proposals, on the funding of political parties and change of the First Past The Post (FPTP) electoral system¹²³ to the list proportional representation (PR) system which the opposition parties were advocating and which was being adopted by Namibia, Mozambique and South Africa at the time. The external voting provisions permit all Botswana citizens aged 18 years or above residing abroad to vote every five years.

External voters may vote only for members of Parliament, not for local councilors. (Presidential elections are indirect in Botswana: the president is elected by Parliament.) External voting was introduced mainly because of the concerns raised by the opposition parties. It was felt that citizens outside Botswana were being denied their democratic right to vote for their own government. With the voting age being reduced to 18 years as opposed to 21, the external voting-age population was increased, hence a need to involve them in voting.

Botswana, for example, is considering abolishing its external voting provisions as a result of the low turnout rates among external electors and high costs associated with the arrangements. External voting for legislative elections was introduced in 1997 and was employed in the 1999 and 2004 elections but turnout has not been impressive, despite increasing the number of countries in which external voting is available as well as the number of polling stations. This has opened an ongoing debate about whether external voting should be abolished given the high cost per voter, particularly when compared to in-country elections.¹²⁴

5.2.3 Diaspora Voting in South Africa

South Africa belongs to this group but has very particular features: it introduced external voting for its diaspora overseas for its historic elections of 1994 in very comprehensive terms, but since then has been restricting external voting in a systematic way.¹²⁵ For the general elections of April 2004 it restricted external voting to members of the diplomatic corps and voters who were already registered in the country and would be abroad only temporarily. Interestingly, the law¹²⁶ does

¹²³ Ibid

¹²⁴ Ibid

¹²⁵ IDEA International Handbook on Voting from Abroad

¹²⁶ Ibid

not specify what temporary absence from South Africa involves, but it does give the parameters of when and how to register and apply for an external vote.¹²⁷

5.3 International Comparison of Diaspora Voting

5.3.1 Diaspora Voting in Mexico

For its first application of voting from abroad in 2006, Mexico allowed only those citizens who were provided with a voting card issued (free) by the electoral authority, but only within the country, to vote externally.¹²⁸ Some countries require external electors to show a valid visa before they are allowed to vote. Mexico's newly launched external voting programme for its July 2006 elections saw an unexpectedly low registration rate considering the large number of Mexicans living in the United States.

One example of unfortunate arrangements is that of Mexico's attempt at external voting in 2006 which required would-be voters to obtain a photographic voting card which was available only by going in person to Mexico.¹²⁹ While it is estimated that 4.2 million of the 11 million Mexicans abroad had a valid photographic voting card, only 40,665 of these ended up registering to vote. Mexico has decided to provide a more level playing field between the participating political parties by simply not allowing any sort of campaign activity abroad, which has meant that the information made available to voters is not so dependent on the wherewithal of the parties to conduct international campaigns alongside their national campaigns.¹³⁰

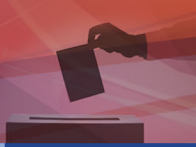
Furthermore, election and campaign information is not always readily available, thus putting the onus on the voter to inform himself or herself which may be more or less difficult depending on the circumstances. Even where large-scale media and advertisement campaigns are run—as was done within the USA, targeting the Mexican population, for the 2006 Mexican presidential elections—registration and turnout may still suffer.

¹²⁷ Ibid

¹²⁸ Ibid

¹²⁹ Ibid

¹³⁰ Ibid



5.3.2 Diaspora Voting in Japan and Croatia

Under the Japanese election system, there are two types of electoral rolls. One is a voters list, and the other is an overseas voters list. The election management committee of each city, town, and village, that is to say, basic municipality closest to residents prepares both of them. Voters list is commonly used for all national and local elections. Once a voter is registered on the list, the registration remains permanently valid until he/she is removed from the list owing to his/her death, loss of nationality, or the lapse of four months after his/her removal to another municipality. On the other hand, overseas voters list is used only for national elections. In 1889, the election system was established in Japan, and the voters list has been prepared since then. At first, the list had been prepared once a year, at a fixed time, by each municipal election management committee, empowered to register ex-officio voters.

The current Public Office Election Law was enacted in 1950. Since then, besides a basic voters list prepared once a year, an additional voters list based on each voter's application had also been prepared before each election. This voters list, however, still had some problems as follows: - In 1945, the right to vote was given to women and the age for the right to vote was lowered to 20 years. As a result, the number of voters has doubled and it has become more difficult for each municipal election management committee to manage voters list; As the economy grows, internal population movement has intensified, people have concentrated in big cities, and their social life has pluralized and become more complex. As a result, it has become more difficult for each municipal election management committee to grasp the voters' addresses accurately; In preparing an additional voters list, applications for registration by voters has concentrated before each election, and each election management committee had to prepare the voters list for a very short time period. As a result, possibility of mis-registration and double registration has risen; In preparing a basic voters list once a year, mis-copy could happen, and each election management committee had to repeat the same survey every year, including voters with no status change.¹³¹

¹³¹ Guy S. Goodwin-Gill, *Free and Fair Elections*, [Expanded edn, Inter-parliamentary Union, 2006]

Considering these situations, permanent voter's list system was adopted in 1966.¹³² This system was a model for current voters list, but the procedure for registration was based on applications by voters. In 1969, about forty years ago, the current voter's list system was established.¹³³ The registration system of the voters list has improved along with the maintenance of the Basic Residential Registers.¹³⁴ That is to say, according to the Basic Residential Registers Law, the address of each Japanese citizen shall be registered on the Basic Residential Registers when he/she determines his/her address.

In preparing a voters list, information on the Basic Residential Registers is utilized. A municipal election management committee is empowered to register ex-officio a Japanese over 20 years of age who has a residence within the area of the municipality concerned and whose name has been on record in the Basic Residential Registers of the municipality for more than three months successively from the day when the Resident Card is made, or, as for a person who has newly moved into the municipality, from the day when he/she notifies the moving-in address to the municipality. Besides, Public Office Election Law¹³⁵ stipulates following provisions on the voters list: - The benchmark day for the registration is periodically designated four times per year, and specially designated by each election management committee before each election;

After registration, the election management committee of each municipality is required to make available for purposes of public inspection of the voters' names, addresses and the dates of birth registered on the list; When a voter has an objection in regard to his/her own registration or that of others, he/she may lodge an objection with the municipal election management committee concerned during the period of public inspection. This permanent voter's list system has enabled each election management committee to grasp effectively and rightly residents who have the right to vote, and secure the justice of elections.

Japanese citizens who live overseas are allowed to vote only for national elections. This system was established in 1998. Voters who would like to vote need to register for the overseas voters list, which is a list for voters who have addresses outside

¹³² Ibid

¹³³ Ibid

¹³⁴ Ibid

¹³⁵ IDEA International Handbook

of Japan. A Japanese citizen over 20 years old who lives within the area over which the consulate controlling his/her address exercises jurisdiction may apply for registration on overseas voters. A voter is registered to the overseas voters list based on his/her own application. This is different from the voters list, on which a voter is registered ex-officio by each municipal election management committee. Currently, about 110,000 in about 1,120,000 overseas Japanese are registered to the overseas voters list.¹³⁶

On Diaspora voting in Croatia, Tihana B.B.¹³⁷ summarizes it as follows; Croatia's Diaspora Constituency has become politically controversial. The challenge ahead lies in balancing several competing factors: - One is that as citizens of Croatia, Diaspora voters have a legitimate claim to a vote in Croatian elections. As a community, they made substantial sacrifices in the wars that led to Croatia's independence. As a result, they have a recent and strong link to Croatia; Two, their citizenship is based on their ethnicity, not on their current or former residence, as many have never lived in what is Croatia today; Three, unlike any of the ten constituencies in Croatia, Diaspora voters have consistently elected candidates from only one political party (the HDZ). This has helped to ensure the victory of the HDZ in past elections; Four, Croatian Diaspora voters are concentrated in neighboring Bosnia and Herzegovina, where they are one of three major ethnic groups that enjoy special constitutional status.

Their continuing political link to Croatia is a factor in persistently tense Bosnian politics. The Diaspora vote is unlikely to be resolved without addressing underlying issues such as entitlement to citizenship and voters' list update. However, solutions not requiring constitutional amendments are possible: for example, further reduction in the number of seats allocated to the Diaspora, as has been done in the past. The president of Croatia, most parliamentary parties, Croatian civil society and relevant international groups have all recommended some level of change, so serious discussion and reforms should not be delayed. Whatever the solution may be, it is imperative that all stakeholders participate and that the issue does not disappear from the public agenda until the next election.

¹³⁶ Ibid

¹³⁷ Tihana Barlutac-Blunc, 'New Borders and Anomalies in the Balkans: Croatia's Diaspora Constituency,' (National Endowment for Democracy, Special Report, 2007) 1

5.4 Conclusion

Kathleen (2010)¹³⁸ has concluded that one of the most consistent demands that diaspora populations make to their countries of origin is the right to vote and to retain their original citizenship even if they adopt the citizenship of the country in which they have settled. In pursuing these demands, they have had considerable success. About 115 countries allow non-resident citizens to vote, and 11 countries reserve seats in their legislatures for the diaspora. Migrants return home to participate in elections (Israel and Turkey), vote at overseas embassies (Indonesia and Algeria), vote by mail (Spain, Italy, Portugal) or vote via the Internet (France).

More and more countries are allowing their expatriates to participate in the electoral process. Some recognize dual citizenship or do not actively seek to strip citizens of their status if they acquire citizenship in another country. At the same time, non-resident voting rights remain controversial. India refuses to permit non-residents to vote, although it gives them other privileges. Armenia accepted the idea of non-resident voting and then reversed its decision.

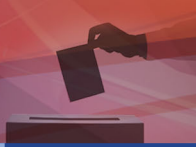
The Philippines requires overseas Filipinos who wish to vote to sign a statement that they will be returning to reside in the country within three years. Some argue that the diaspora may unduly influence electoral results, whose consequences they do not have to bear, and that their preferences differ from those of resident citizens. This has indeed been shown to be true, for example, in Croatia and Armenia.

In some cases, including Mexico and Iraq, far fewer voters than eligible have turned out for elections, despite intensive campaigns to get out the vote. Diasporas have learned from others' experiences: as Ghanaian diaspora members lobbied the Ghana government for the right to vote abroad and for dual citizenship, the Diaspora Vote Committee (DVC) drew on Filipino and Senegalese laws and experience.¹³⁹ Citizens of Ecuador were among the earliest diaspora populations to advocate for non-resident voting rights and dual citizenship, starting with a petition in 1967¹⁴⁰. It took 28 years and many disappointments before the

¹³⁸ Kathleen Newland, *Voice After Exit: Diaspora Advocacy*, [Migration Policy Institute, November 2010]

¹³⁹ World Bank, *Concept Note: Mobilizing the African Diaspora for Development*, 20.

¹⁴⁰ Perhaps it should be noted that KDA leadership started lobbying for dual citizenship in 2001 through a motion in parliament co-sponsored by Hon Mohammed Shidiye and Hon/Dr Ochuodho. Like in the Ecuadorean case, there were many initial disappointments, but in the end dual citizenship was provided for in 2010 (10 years later) largely due to concerted campaign by KDA and affiliates, including Kenya Community Abroad (KCA) and NVK-Mageuzi.



Ecuadorian legislature finally approved dual nationality, with voting rights for expatriates, in 1995.

Emigrants from Colombia achieved success more quickly, as their initial appeal for dual citizenship and voting rights occurred just as constitutional reform was getting under way in Colombia. An amended constitution, approved in 1991, included the desired political rights for Colombians abroad. Not coincidentally, the overseas voting procedures finally agreed to in Ecuador bore a close resemblance to those adopted by Colombia. Members of the Dominican diaspora, particularly in the United States, have also been advocating for overseas voting since the 1970s. Organized into hometown associations and political clubs, they lobbied members of the Dominican Congress and contributed money to the campaigns of candidates who supported their objectives.¹⁴¹

The Dominican government set up a commission after the presidential elections of 2000 to study the options for voting by Dominicans abroad, with the goal of making it possible for emigrants to vote in the 2004 presidential election. After a series of discussions and consultations in the country and abroad, the Commission set up procedures for voting abroad. Diaspora voter participation in that election was 66.8 percent — very high when compared with the less than 25 percent participation rates of the Iraqi and Mexican Diasporas in the United States.¹⁴²

Hungary's far-flung diaspora was quick to ask for voting rights after the end of Communist rule, but encountered marked ambivalence from its new political class. A 2004 referendum on providing dual citizenship to ethnic Hungarians in neighbouring countries failed when low turnout invalidated the bare majority in favour. Despite a strong media campaign sponsored by the World Congress of Hungarians and the major centre-right political parties, voter apathy and concern about the impact of non-resident voting on economic and political stability in the neighbourhood combined to derail the process. A number of countries with minority populations in neighbouring countries, or substantial immigration from them, have shown reluctance to adopt dual nationality and, in some cases, non-resident voting.¹⁴³

¹⁴¹ Adrian D. Pantoja, "Transnational Ties and Immigrant Political Incorporation: The Case of Dominicans in Washington Heights, New York," *International Migration* 43, no. 4 (2005): 123–46, 128.

¹⁴² Michael Jones-Correa, "Under Two Flags: Dual Nationality in Latin America and Its Consequences for Naturalization in the United States," *International Migration Review* 35, no. 4 (2001): 997–1029, 1002–3.

¹⁴³ Mayra A. Waterbury, "From Irredentism to Diaspora Politics: States and Transborder Ethnic Groups in Eastern Europe" (Working paper no. 6, George Mason Univ., Global Migration and Transnational Politics, July 2009).

India, for example, accepts dual nationality with a group of high-income countries including the United States and the United Kingdom, but not with its impoverished neighbours. It makes no provision for non-resident voting, however, despite diaspora enthusiasm for it. Diaspora members feel that they deserve political representation in part because their remittances are so important to their countries of origin, often keeping the national accounts afloat. Michael Jones-Correa, writing about Latin America, argues that “immigrants have been able to translate their economic muscle into political leverage, winning concessions from political parties and legislatures in their countries of origin, regularizing their status as citizens, allowing dual nationality, ownership of land and easy access when returning, among other things.”¹⁴⁴ There remain important exceptions to that generalization in other parts of the world, however leaving aside those countries of origin where no one votes.

¹⁴⁴ Michael Jones-Correa, “Under Two Flags: Dual Nationality in Latin America and Its Consequences for Naturalization in the United States,” 997–1029, 1001.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion.

This study at the very onset set out to examine the role of Kenya's electoral system in securing Diaspora voting for Kenyans living abroad, and whether they have a right to vote, which should be actualized through a particular criterion that advocates for a specific form of out of country voting.

It is against this background that the issue of Diaspora voting for Kenyans living abroad has been addressed through various chapters. This work thus historically traced the concept of diaspora voting from the Roman Emperor Augustus up to the enactment of the Constitution of Kenya 2010 and the epoch Supreme Court ruling in 2015. That throughout history the case for external voting has been presented as a question of principle based on the universality of the right to vote. That ultimately the right to vote is a manifestation and a creature of the right of a people to internal self-determination.

The work has recognized the need to develop a statutory legislation on diaspora registration and voting together with a policy framework and guidelines by the IEBC, which should consider adopting other methods of diaspora voting and advance voting methods for democracy to really flourish in Kenya. Indeed, Kenya can learn from other countries, which have implemented Diaspora voting and draw lessons from them.

6.2 Recommendations on Diaspora Voter Registration, Voting and Advance Voting for Kenya

6.2.1 In Person Voting as a Main Method of Diaspora Voting

In Person Voting is the main method of Diaspora Voting in a number of countries while other countries adopt a number of these methods simultaneously. As already exposed above, other methods of voting like postal and proxy voting would be cheaper. If the resources are availed by IEBC, the management of this kind of voting will be rather similar to the management of in-country voting,

where a sample is chosen for collection of first-hand evidence and the process is observed, from the opening to the close of voting to the reconciliation and sealing of the ballot material.

Where there are no adequate resources, then there is need for IEBC to partner with other countries' EMBs to aid Kenya in management of voting for Kenyans in diaspora. The election observers like ELOG should also recruit observers living in diaspora train and subsequently deploy them during voter registration, voter education as well as the E-day observation. Furthermore, the political parties should also identify party agents living in diaspora and subsequently train and deploy them to enhance the credibility of the processes. .

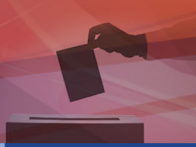
6.2.2 Need for Prudent Planning and Execution of the Diaspora Registration and Voting

This report recommends the need to come up with a proper plan and execution of the diaspora voting concept. IEBC's Policy on Voter Regulation and Voting for Citizens Residing outside Kenya needs to be reviewed and guidelines and legislation that encompasses the procedures for external voting enacted. Under these procedures, there is need to have timelines, costing and budgeting, logistics, and the security of election materials, voter registration, external voting and secrecy of the ballot, and they should also explore contracting out external voting.

6.2.3 Need for Re-Evaluation of Voter Registration Mechanism

It is thus recommended that there is a need to re-evaluate diaspora voter registration systems and mechanisms. IEBC should consider putting in place electronic and mobile registration processes to avoid the logistical nightmares that would come as a result of the logistical and financial nightmares that the ordinary in person voting entails.

The question of whether or not Kenyans are willing to register with their embassies and consulates overseas should not be the sole determining factor on how and where IEBC should locate polling stations. This report accordingly advises IEBC that the only meaningful way to reach out to and register Diaspora is through a PPPP (public, private people's partnership) mechanism that includes Diaspora organizations across the world, like KDA. Even with that, only a technology-



anchored solution (especially mobile, online/electronic, and social media-based) will ensure catchment and participation of a significant Diaspora population.

6.2.4 Need to Explore Other Supplementary Methods of Diaspora Voting and Advance Voting

Despite making a critical contribution to democratization in Kenya, external voting has not been used extensively since the enactment of the Constitution of Kenya 2010 and also the decision rendered in Petition No. 25 of 2014¹⁴⁵—partly because it is perceived as straining financial, security and human resources, but also because of the complexities of negotiating with governments which may be potentially eligible electors, particularly when those electors are refugees or undocumented migrant workers.¹⁴⁶

IEBC should consider Electronic voting (E-Voting) to be able to address the cost and logistical challenges while voting. M-Vote (M-Kura mobile voting), I-Vote (Online Voting) should be considered and used as alternative/complimentary to the traditional in person voting

6.2.5 Need for Extensive Civic and Voter Education

It is recommended that there is need by the IEBC to make sure they carry out extensive information dissemination, i.e. *campaigning, voter information and civic education*. Brett Lacy notes¹⁴⁷ that host government cooperation support and facilitation of the dissemination of information, including campaign materials as well as voter and civic education, is critical to the success of any external voting programme. In the Eritrean referendum of 1991, for example, Sudan's cooperation and initiative were essential to the education of voters in refugee camps.

Host governments can help in information campaigns of all types by making available local and national forms of electronic and print media, including television and radio, for the purposes of the electoral process. When external voting is being conducted in refugee camps, voter information and education

¹⁴⁵ Ibid

¹⁴⁶ KDA has proposed that for purposes of 2017 elections, we can only deal with documented migrants. The undocumented ones is an issue that can only be addressed beyond 2017.

¹⁴⁷ IDEA Handbook, n159 above, 137

should be tied to existing communication systems, particularly those linked to refugee priorities such as food and shelter¹⁴⁸.

External voting also poses questions about whether external electors will have less, equal or greater access to information than their counterparts at home. For example, Bosnian refugees in 1996 had access to the international press and other sources of information, while electors within Bosnia and Herzegovina had access to more limited media. Administrators of external voting programmes must consider whether differences in access to information might influence the overall integrity of the process or the outcome of the election. These differences become particularly important where one group of electors is limited by its access to government-controlled or otherwise unbalanced media.

6.2.6 Need for clear roles between IEBC, Foreign Ministry and Diaspora Associations

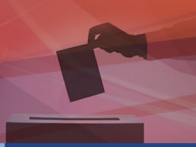
As has been discussed in chapter three, and as provided for under article 88 of the Constitution, its only IEBC that is empowered by law to manage the electoral process as well as elections in and out of the country and not any arm of executive and as such, the Ministry of Foreign Affairs cannot purport to open voting stations as well as registering voters living in the Diaspora. Furthermore, IEBC needs to foster a working relationship with diaspora organizations in host countries.

6.2.7 One Page Online Form

This report recommends to the IEBC that it develops one page online form of not more than 10 questions similar to what Germany, Austria and Switzerland have, to help the commission to identify and map out basic information about diaspora. For mapping purposes, the less information sought would be better for effective and active participation by citizens in the diaspora. Where there is a need for more information, such information can be solicited at the time of registration.

This one page online form should ask information relating to a person's name, place of birth (passport or national ID), residence (town / City) and any other minor non personal/ optional information that the commission might deem necessary. This information will help the commission identify the diaspora and their distribution so as to be able to proper plan for their registration, voter education and voting.

⁴ Countries like Switzerland don't allow aliens to vote; Canada allows them to vote, but no campaigning. In the same vein, there are countries like Germany which do not allow dual citizens and may need to be treated as special cases with regard to Kenyan dual citizens.



6.3 Recommendations on Advance Voting in Kenya

It should be noted that as we speak, Kenya's electoral laws do not provide for any form of advance voting. However, it is important to note that a number of Kenyans who for reason of ill-health, nature of jobs, distance from the polling station and other reasons are still disenfranchised as they cannot have alternative ways to vote. Kenya should consider putting in place a system and infrastructure that enables all eligible voters willing to vote in spite of their foreseen absence from their polling stations.

This report recommends the following measures in any such attempt.

6.3.1 Begin Early Voting within a full two weeks before Elections Day

A decision must be made about the sufficient period during which to commence early voting. Best practice dictates that effective minimum duration for generating the benefits of early voting should be within two weeks before an Election Day in a general election. Considerations for effective early voting period should take into account the printing and distribution of polling materials, the completion of sufficient voter education and campaign period.

Early voting by mail should also consider the sufficient period for the voting materials to be mailed to and back by the voters in the various parts of the electoral area. It is equally imperative for the EMB to ensure that stakeholders, political parties and candidates are involved in determining suitable early voting period.

6.3.2 Provide Weekend Early Voting, including the last Weekend before Election Day

In order to maximize on the benefits of early voting, it is important that the EMB considers early voting to be conducted over the weekend, including the last weekend before the Election Day. This will effectively help maintain a more manageable and even distribution of voters over the course of the day. Weekends have been found to offer voters peak early voting periods.

Legislation, regulations and policies of early voting that make weekend voting equally accessible as weekday voting will help ensure that a number of electors benefit from the exercise. As in the case now, not only is early voting not permitted by Kenya's electoral system and laws, voting are prescribed to take place on a Tuesday, which is a weekday.

6.3.3 Set Consistent Number of Minimum Daily Hours for Each Day of Early Voting Period

Once a decision has been taken for early voting, IEBC should consider setting consistent number of minimum daily hours for each day designated as early voting period so that a maximum number of electors can have the discretion on what convenient times to go and cast their ballots.

It is equally important that extended hours outside the standard business hours is provided as this will allow a number of electors who due to the nature of their jobs or work schedule are unable to vote within the business hours, to make use of the extended hours and cast their votes.

6.3.4 Distribute Early Voting Places Fairly and Equitably

For early voting to be effective in the electoral process, the Commission should consider putting in place a system and structure that will ensure that polling stations designated as early voting places are distributed fairly and equitably. Thus, the number of voting population registered as advance voters or special voters, the distribution of such electors, the nature of their job and lifestyle should be considered during the planning stages for the distribution of the early voting places.

6.3.6 Educate the Electorate About Advance Voting

It is important that the IEBC considers providing sufficient advance notice and adequate public education about advance voting. This education should focus on the value add of the process, those that it targets, when and how is it done and also measures that have been put in place by the EMB to arrest in any electoral malpractice that would occur.

The goal of this public education is to give voters the specific information they need to determine when and where they can readily vote. It is important also that laws explicitly provide for some appropriate and effective public education for early voting which should take into account voter education period.

BIBLIOGRAPHY

BOOKS AND OTHER PUBLICATIONS

- Adrian D. Pantoja, "Transnational Ties and Immigrant Political Incorporation: The Case of Dominicans in Washington Heights, New York," *International Migration* 43, no. 4 (2005): 123–46, 128.
- Ayitey, G., 'Opinion: What Ghana can teach the rest of Africa about democracy', CNN, 6 December 2012, See <http://edition.cnn.com>. Accessed on 1st August 2015
- Brubaker, R. The 'diaspora' diaspora, [Ethnic and Racial Studies, 2005] 28 (1):1-19.
- Cohen, R. Rethinking "Babylon": Iconoclastic Conceptions of the Diasporic Experience. *New Community*, 1995, 21 (1) 5-18;
- Cohen R., *Diasporas and the Nation-State: From Victims to Challengers*. [International Affairs, 1996, 72 (3)]:507-20.
- 'Diaspora voting in 2013 a Mirage', Ole-Shitemi, 14 December 2012, see <http://oleshitemi.wordpress.com>. Accessed on 1st August 2015
- 'Diaspora voting rights', Sierra Leone Policy Watch (SLPW), 2012, See <http://slpw.org>. Accessed on 1st August 2015
- Dufoix, S. *Diasporas*. [Berkeley, CA and London: University of California Press, 2008]
- European Commission, *Compendium on International Standards for Elections*, [2ndEd. 2000]
- Eyal Benvenisti, 'Domestic Politics and International Resources: International Law' in Michael Byers, (Ed.), n10 above at109
- Guy S. Goodwin-Gill, *Free and Fair Elections*, [Expanded Ed. Inter-parliamentary Union, 2006]
- Hugo, G. An Australian Diaspora? [International Migration, 2006] 44 (1):105-133.
- Judy Thompson, 'The Implementation of External Voting,' in 'Voting from Abroad-The International IDEA Handbook' [IDEA, 2007].
- Kathleen Newland, *Voice After Exit: Diaspora Advocacy*, [Migration Policy Institute, November 2010]
- Mayra A. Waterbury, "From Irredentism to Diaspora Politics: States and Transborder Ethnic Groups in Eastern Europe" (Working paper no. 6, George Mason Univ., Global Migration and Transnational Politics, July 2009).
- Michael Jones-Correa, "Under Two Flags: Dual Nationality in Latin America and Its Consequences for Naturalization in the United States," *International Migration Review* 35, no. 4 (2001): 997–1029, 1002–3.
- Michael Jones-Correa, "Under Two Flags: Dual Nationality in Latin America and Its Consequences for Naturalization in the United States," 997–1029, 1001.
- M Khabele 'Election and conflict' *Election update 2004 South Africa* The Electoral Institute of Southern Africa 19 (2004)
- Rainer Bauböck, 'Ties Across Borders: The Growing Salience Of Transnationalism And Diaspora Politics,' [IMISCOE Policy Brief No. 13, October 2008]
- Safran, W. *Diasporas in Modern Societies: Myths of Homeland and Return*. *Diaspora*, 1991] 1 (1):83-99;
- Shirer L. William, 'The Rise and Fall of the Third Reich-A History of Nazi Germany,' [Simon & Schuster Paperbacks, 1990]
- Snel, E., G. Engbersen, and A. Leerkes. *Transnational Involvement and Social Integration*, [Global Networks, 2006, 6] (3):285-308.
- Sundberg Andy, 'The History And Politics Of Diaspora Voting In Home Country Elections,' [Based on information from Andrew Ellis and others sources in: "Voting from Abroad": *The International IDEA Handbook*, 2007].
- Tihana Barlutac-Blunc, 'New Borders and Anomalies in the Balkans: Croatia's Diaspora Constituency,' (National Endowment for Democracy, Special Report, 2007) 1
- Töölöyan, K. *Diasporama*. [Diaspora, 1994 3] (2):235.
- Vertovec, S. *The Political Importance of Diasporas*. [Centre on Migration, Policy and Society, 2005, University of Oxford]
- Vollan K. 'Observation of External Voting,' in 'Voting From Abroad,' [IDEA/IFE Voting Handbook, 2007]

- Waldinger, R. Foreword. In S. Dufoix, *Diasporas*. Berkeley, CA; London: University of California Press, 2008] xi-xvii.
- World Bank, *Concept Note: Mobilizing the African Diaspora for Development*, 20.
- IED, *Dynamics of Democracy: strategy for future elections, 2014*
- IED *from Pillar to post, an electoral stakeholder's recipe, 2015*

STATUTES

- Constitution of Kenya 2010
- Criminal Procedure Code Cap 75 of the Laws of Kenya
- Elections Act No. 24 2011, LOK
- The Political Parties Act 2011 and the Rules and Regulations, LOK
- The Independent Electoral and Boundaries Commission Act 2011, LOK
- The County Government Act 2012.LOK
- Election Offences Act 2016
- [We need also to include the JSPC Report, Election Amendment Act, IEBC Operations Manual, Diaspora Policy/ies, etc]

CASES

- Independent Electoral Boundaries Commission v New Vision & 4 Others, Supreme Court of Kenya [SCK] Petition No. 25 of 2014.
- *Pungutan v. Abubakar* L-33541, 20 June 1972), 143 SCRA p.1
- [There are more to include here, e.g. the Justice Kantai ruling of 2010]
- **Websites**
- <http://www.un.org/en/members/>
- <http://www.oecd.org/>
- <http://www.oecd.org/site/govrdpc/50138839.pdf>
- <http://www.un.org/partnerships/situating.html>
- <http://posta.co.ke/page.asp?pageid=35>
- <http://www.capitalfm.co.ke/news/2015/05/kenyan-diaspora-to-wait-longer-to-fully-participate-in-polls/>
- <http://citizentv.co.ke/news/postal-voting-proposed-for-kenyans-abroad/>
- <http://www.iebc.or.ke/index.php/component/content/article/99-news-archives/august-2015/444-clarification-on-pac-enquiry>
- <http://www.iebc.or.ke/>
- <http://eisa.org.za/PDF/eh21.pdf>
- <http://www.unpo.org/downloads/THE%20IMPLEMENTATION%20OF%20THE%20RIGHT%20TO%20SELF.pdf>
- <http://www.kenyalaw.org>
- <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
- <http://www1.umn.edu/humanrts/edumat/studyguides/votingrights.html>
- https://www.law.cornell.edu/wex/self_determination_international_law
- <http://www.un.org/en/documents/charter/>
- <http://www.history.com/topics/world-war-ii>
- <http://www.idea.int/publications/ies/upload/5.%20The%20right%20to%20elect%20and%20to%20be%20elected.pdf>
- http://eci.nic.in/archive/handbook/returning-officer/rch10/rch10_1.htm
- http://www.jstor.org/stable/3023928?seq=1#page_scan_tab_contents
- http://www.electionresources.org/ar/index_en.html
- <https://www.ch.ch/en/voting-rights/>
- https://www.overseasvotefoundation.org/files/The_History_and_Politics_of_Diaspora_Voting.pdf
- http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1264:the-right-to-vote-where-do-citizens-in-the-diaspora-stand-part-1&catid=91:rights-in-focus&Itemid=296
- <http://travel.state.gov/content/passports/english/abroad/legal-matters/benefits/voting.html>
- http://www.idea.int/publications/voting_from_abroad/upload/chap2.pdf
- <http://www.elections.ca/Voting-by-mail>