Out-of-Country Voting: The Predicament of the Recognised Refugee

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A Introduction

The effective exercise of the right to vote ‘imposes an obligation upon the state not merely to refrain from interfering with the exercise of the right, but to take positive steps to ensure that it can be exercised.’¹ The State’s positive² obligations include, inter alia, the promulgation of election laws that regulate candidacy and the formation of political parties, facilitate registration and voting processes, and enable access to information regarding the ballot and the candidates.

All states have non-citizen resident populations and, pertinently for this chapter, have non-resident citizens. States must first determine whether their non-resident citizens remain eligible voters; failing that, expatriates will have to exercise their (recognised) right to return to their state and reside there in order for their (dormant) voting rights to be re-established. However, if expatriates remain on the electoral roll, an effective exercise of their right to vote may depend on accessible out-of-country voting procedures (ovc).³ The analytically distinct questions of eligibility and accessibility are often conflated.

Expatriates requiring access to ocv procedures may be (broadly) divided into three categories: first, voluntary migrants (migrant workers and their families); second, conflict forced migrants (persons displaced by conflict from their state of origin, whose access to ocv is appraised in this chapter in relation to transformative or post-conflict electoral processes taking place in their state of origin); third, recognised refugees (for the purposes of this chapter, persons recognised as refugees under the 1951 Convention Relating to the Status of Refugees who hold refugee status in a state of asylum whilst electoral processes are held in their state of origin).⁴ This chapter sheds light on the unique political predicament of recognised refugees qua expatriates.

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1 Richter v Minister for Home Affairs and Others, 2009 (3) SA 615 (CC) (12 March 2009) [53].
3 See R. Bauböck, ‘Towards a Political Theory of Migrant Transnationalism’ (2003), 37 International Migration Review 700, 714 (arguing that, since most states do not grant voting rights to non-citizen residents, the latter are deprived of any opportunity for democratic participation unless they can vote in elections of their states of citizenship).
Section B demonstrates that neither the International Covenant on Civil and Political Rights (ICCPR) nor regional treaties proscribe the imposition of residency requirements in addition to citizenship in order to determine voting eligibility. Nonetheless, most states consider their expatriates to be eligible voters. Whereas OCV procedures used to be rare, and eligible expatriates were expected to travel to the state to cast their ballot in person, today 115 States have in place OCV procedures. ‘Soft law’ instruments, most notably those of the Council of Europe, advocate an expansive approach both to eligibility and to accessibility, whereas judicial bodies are still reluctant to require Contracting States to include expatriates on their electoral rolls, or (when they do so) to facilitate full access to OCV procedures. Notably, signatory States to the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families legally undertake to enable their expatriates to vote in their states of employment.

Section C addresses the accessibility of conflict forced migrants to OCV procedures. It is contended that such access is made available against the backdrop of either post-conflict transformation or peace-building. In such circumstances, elections often play a pivotal role in internationally sponsored agreements. Conflict forced migrants voting in these elections are seen either as being symbolically (re)admitted to the political community of their state of origin, or as actively participating in the (new) formation thereof. International organisations would offer their assistance and cooperation in order to secure the widest possible participation, and to enhance legitimacy and accountability. Indeed, the rationale underlying access of conflict forced migrants to OCV and facilitation of such procedures by states of asylum is an imminent or forthcoming repatriation of conflict forced migrants; oftentimes, the two processes take place in parallel.

Section D considers the predicament of recognised refugees, noting that they may flee states that hold regular elections and have OCV procedures in

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6 P. Spiro, ‘Citizenship and Diaspora: A State Home for Transnational Politics?’ Available at: <http://ssrn.com/abstract=1755231> (noting that, historically ‘[t]he grant of political rights to those who have established residence outside the national territory is anomalous’).
7 Voting from Abroad: The International IDEA Handbook on External Voting (Institute for Democracy and Electoral Assistance, 2007), 1–3 (posing that ‘external voting’ has two main purposes: ensuring the realisation of political rights for citizens living outside their state, and increasing political participation and thereby building trust and confidence in electoral processes and the democratic governments they produce).
8 18 December 1990, 2220 UNTS 3, entered into force 1 July 2003 (Migrant Workers Convention).