



Africa Criminal Justice Reform
 Organisation pour la Réforme de la Justice Pénale en Afrique
 Organização para a Reforma da Justiça Criminal em África

The right of prisoners to vote in Africa

An update

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Introduction

Broadly speaking, universal suffrage refers to the rights conferred on adult citizens of a country to vote, however, there are always restrictions to a greater or lesser degree on who can vote in every democratic political system.¹ Children are usually excluded as are people certified to be of unsound mind. In the twentieth century universal suffrage was slowly extended to include previously excluded groups of people (i.e. black/Africans as well as women). The debate regarding the extension of the right to vote to other marginalized groups in society, such as people with mental disabilities and prisoners, is on-going. For example, US senator Bernie Sanders recently proposed extending the right to vote to all prisoners resulting in fierce criticism across the political spectrum.² Proponents of the extension of voting rights to prisoners rely on international, regional as well as domestic human rights standards recognising political participation as a fundamental human right.³ International legal instruments, such as the International Covenant on Civil and Political Rights (ICCPR), provide for the right and opportunity of all citizens to participate in public affairs and to vote.⁴ Similarly, the African Charter on Human and Peoples' Rights makes provision for citizens to freely participate in the government of their country as provided for in law.⁵

In Africa, the right of prisoners to vote has been argued before courts in Botswana, Ghana, Kenya, Nigeria and South Africa. These decisions are dealt with below. In Mozambique, the

courts have not yet dealt with the issue, but a request has been placed before the Ombudsman and the National Human Rights Commission to express an opinion on the matter.⁶ In the course of 2019, 21 African countries will hold elections as listed below and it is important to monitor developments with regard to prisoners and elections.

Country	Type of Election	Election Date
Guinea	National Assembly	3 February 2019
Nigeria	General Election	23 February 2019
Senegal	Presidential Election	24 February 2019
Guinea-Bissau	General Election	10 March 2019
Comoros	Presidential Election	24 March 2019
Algeria	Presidential Election	17 April 2019
Egypt	Constitutional Referendum	19 to 22 April 2019
Benin	Parliamentary Election	28 April 2019
Chad	National Assembly and Local Election	May 2019
South Africa	National and Provincial Election	8 May 2019
Malawi	General Election	21 May 2019
Madagascar	General Election	27 May 2019
Mali	General Assembly	22 June 2019

Country	Type of Election	Election Date
Mauritania	Presidential Election	22 June 2019
Algeria	Presidential Election	4 July 2019
Ghana	District and Referendum on Metropolitan, Municipal and District Chief Executive Election	September 2019
Cameroon	National Assembly, Senate Election	October 2019
Botswana	General Election	October 2019
Tunisia	Parliamentary Election Presidential Election	6 October 2019 10 and 24 November 2019
Mozambique	General Election	15 October 2019
Namibia	General Election	November 2019

South Africa

The South African Constitution guarantees the right to vote to every adult citizen.⁷ In its first democratic elections in 1994 prisoners were permitted to vote. Since the 1994 elections were of such historical significance, excluding prisoners from voting held significant security threats and there were indeed some prison unrest in the run-up to the 1994 elections.⁸

Prior to the 1999 general elections, the Constitutional Court ruled in *August and Another vs Electoral Commission and Others* regarding the right of prisoners to vote.⁹ At the time, neither the 1996 Constitution nor the Electoral Act of 1998 barred prisoners from voting. In the *August* case, the applicants sought confirmation from the Court that prisoners did indeed have the right to vote in the election.¹⁰ The applicants challenged the duty of the Independent Electoral Commission (IEC) to facilitate the registration of prisoners to vote who were unable to register to vote due to their imprisonment.¹¹ The Commission had refused to undertake this responsibility unless ordered to do so by the Constitutional Court, since prisoners were considered to be ‘authors of their own misfortunes’¹² and numerous logistical arrangements would have to be undertaken to register them. The Court relied on the provision of the Constitution that South Africa is, amongst others, founded on the value of universal adult suffrage¹³ and ruled that logistical arrangements should not disenfranchise prisoners simply because they are imprisoned.

The Court consequently ordered the IEC to facilitate the registration of prisoners to vote in the 1999 elections.¹⁴

An amendment to the Electoral Law Act in 2003 intended to deprive sentenced prisoners serving sentences without the option of a fine from voting in the 2004 election.¹⁵ Unsentenced prisoners, however, would still be able to vote. The National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and two sentenced prisoners filed an urgent application to declare the amendment unconstitutional and invalid given that this amendment clearly posed a limitation on prisoners’ right to vote.¹⁶ According to the government the justification for this limitation hinged on three issues. Firstly, the need to limit the category of prisoners for whom special arrangements should be made. Secondly, it was averred that law abiding citizens who are not in a position to vote are more deserving of special logistical arrangements. Thirdly, the government pointed to the high crime rate, arguing that by allowing prisoners to vote, the wrong message would be sent to the public, i.e. that government is soft on crime.¹⁷ The Constitutional Court dismissed the two logistical arguments as they did not warrant the disenfranchisement of prisoners. On sending the ‘wrong message’ to citizens, the Court recognized the need for government to unequivocally rebuke crime. However, the Court pointed out that the government’s main argument was centred on logistical reasons and not on the high crime rates.¹⁸ Moreover, the Court noted: “It could hardly be suggested that the government is entitled to disenfranchise prisoners in order to enhance its image; nor could it reasonably be argued that the government is entitled to deprive convicted prisoners of valuable rights that they retain in order to correct a public misconception as to its true attitude to crime and criminals.”¹⁹ The Court therefore ruled in favour of NICRO, declaring the amendment of the Electoral Law Act unconstitutional and invalid.²⁰

The success of the *NICRO* case was a breakthrough in the promotion of the right to vote for prisoners. Subsequently there have been no further challenges to prisoners’ right to vote in South Africa. Courts from elsewhere have also drawn on the *August* and *NICRO* cases to ensure the participation of prisoners in elections.²¹ Yet, while prisoners can vote in national and provincial elections, they currently do not vote in local government elections.

Ghana

The right of prisoners to vote was placed before the Ghanaian Supreme Court in 2010.²² The combined cases of *Ahumah Ocansey* and the local NGO *Centre for Human Rights and Civil Liberties* challenged the refusal of the Electoral Commission of Ghana to allow remand detainees who had been in custody for more than six months to vote in elections. The case was based on the Ghanaian Constitution stipulating that ‘All citizens have the right to vote, except those below the age of eighteen years, and persons of unsound mind’.²³ Moreover, the Electoral Law states that “persons who are detained in legal custody shall not be treated as residents for purposes of voter registration and voting”.²⁴

The respondents’ argument was that prisons did not qualify as registration and voting divisions and that the limitation on the right of prisoners to vote is necessary as prisoners have violated the laws of the land and should not have a right to vote.²⁵ The applicants argued that there is no legitimate reason for prisons not to be considered as places of residence and that voting and citizenship are mutually-reinforcing concepts and the denial to vote resulted in the denial of citizenship.²⁶ The Court concluded that the Constitution guarantees the right to vote for all citizens and even if they are deprived of liberty, prisoners do not lose other fundamental and constitutional rights.²⁷ The Court argued that ‘rights may only be limited if the infringement of the right achieves a constitutionally valid purpose, and the means chosen are reasonably and demonstrably justifiable’.²⁸ In this case, the Court did not find any justifiable reason for the limitation of prisoners’ rights and therefore ruled in favour of *Ahumah Ocansey* and the *Centre for Human Rights and Civil Liberties*.²⁹ This led to the registration of and voting by prisoners for the first time in the Presidential and Parliamentary elections of 2016.

Kenya

Kenya’s Independence Constitution of 1963 was replaced by the 2010 Constitution as a result of a national referendum held in the country.³⁰ In the build-up to the adoption of the 2010 Constitution, the High Court was petitioned on behalf of prisoners in Shimo la Tewa Prison in Mombasa.³¹ The petition argued that section 32(2) and section 43 of the 1963 Constitution exclude prisoners from voting in elections, but does not explicitly exclude prisoners from voting in referenda.

The nub of the case was whether elections and referenda are the same thing.³²

The Interim Independent Electoral Commission argued that re-opening the registration process to accommodate prisoners would result in time constraints which would jeopardize the review process.³³ However, the Court deduced that because the purpose of the upcoming referenda was to reconstitute the Constitution, there is no reason why prisoners over the age of 18 years who are mentally fit and have not committed any electoral offence should not be allowed to vote in referenda.³⁴ The Court held that Section 43 of the 1963 Constitution does not disqualify prisoners from voting in referenda as they are distinct from presidential and parliamentary elections.³⁵ It further ordered that the Interim Independent Electoral Commission ensures the registration of prisoners to vote within 21 days.³⁶

The 2010 Constitution completely removed the ban on the right of prisoners to vote in any elections (including presidential and parliamentary elections).³⁷ In the 2013 presidential elections, delays on the part of the Independent Electoral and Boundaries Commission resulted in the exclusion of prisoners in the registration process.³⁸ However, in the 2017 elections, arrangements were made to register all prisoners with Kenyan citizenship over the age of 18 years and in possession of identity documents. Prisoners voted for the first time in the Presidential and Parliamentary elections, but did not vote in local elections due to the fact that prisoners were registered in prison and not within their normal residences.³⁹

Mozambique

In February 2019 a group of civil society organizations submitted a request to the Mozambican Ombudsman and the National Human Rights Commission to request that prisoners be allowed to vote in the upcoming October 2019 elections.⁴⁰ This request was premised on the argument that denying prisoners the right to vote is in direct violation of the Universal Declaration of Human Rights and the ICCPR. While Mozambique’s Constitution⁴¹ and Electoral Law⁴² do not place restrictions on the right of prisoners to vote, prisoners have not been provided with the opportunity to exercise this right.⁴³ The Ombudsman is currently preparing a response to the civil society organizations that submitted the petition. If approved, this will be a breakthrough in the advancement of prisoners’ rights in Mozambique.

Botswana

As a result of not being afforded the opportunity to register to vote in the elections, a case was brought before the Botswana High Court in 2009 by a prisoner serving a ten-year sentence for robbery and burglary.⁴⁴ The prisoner sought judgement on whether the provisions of the Electoral Act⁴⁵ excluding prisoners serving sentences of longer than six months from voting in parliamentary elections is incompatible with the Botswana Constitution.⁴⁶ The Court noted that the Electoral Act is re-enforced by the Constitution which recognises the right to vote.⁴⁷ However, the Constitution clearly states that people in lawful custody on the date of the election are disqualified from voting.⁴⁸ The applicant averred that he was discriminated against as a result of this disenfranchisement and his constitutional rights to equal protection under the law and his freedom of expression, assembly and association had been violated.⁴⁹ The Court dismissed the claim as the applicant could not prove that he had been discriminated against based on these sections of the Constitution. In the view of the Court, it was difficult to imply that his disenfranchisement is tantamount to a violation of the right to freedom of expression, assembly and association.⁵⁰ Unlike the *August* decision, the Botswana Constitution does not recognize a general right to political participation for all citizens. Instead, the Constitution makes clear reference to the disqualification of those in lawful custody from voting in elections.⁵¹ In this case, the applicant was serving a sentence longer than six months. The Court ruled against the applicant and since the ruling in 2009, there has not been other notable cases as neither the Constitution nor the Electoral Act has been amended to favour the enfranchisement of prisoners.⁵²

Nigeria

In 2014 a Federal High Court in Benin (Edo State) made the ruling that Nigerian prisoners have the right to vote.⁵³ This was the result of an application brought by five prisoners representing all prisoners in Nigeria. The applicants challenged the Court on three counts.⁵⁴ Firstly, they have a right to be registered as voters by the Independent National Electoral Commission (INEC).⁵⁵ Secondly, they have a right to vote in all elections in the country.⁵⁶ Thirdly, the failure of INEC to facilitate registration and voting arrangements for Nigerian prisoners is an infringement on their rights as citizens.⁵⁷

The High Court ruled that the INEC does not have the mandate to deny the applicants the right to vote as this is “unconstitutional, illegal, irregular, unlawful, null and void and of no effect whatsoever”.⁵⁸ In 2019 an Appeal Court ruled in favour of the same five prisoners seeking an order directing INEC to include all prisoners on the voters’ roll.⁵⁹ The INEC subsequently made arrangements with the Nigeria Prisons Service to enable the country’s 72 000 prisoners to vote in the February 2019 general elections.⁶⁰

Conclusion

This fact-sheet provided a brief description on the right of prisoners to vote in Africa. It is evident that there have been substantive advances and breakthroughs in the promotion of this right in Africa with prisoners in Ghana, Kenya, Nigeria and South Africa being able to vote. However, other countries on the continent have still not granted this right to prisoners. The recent petition brought by civil society organizations in Mozambique is a positive step in advancing this enfranchisement but more needs to be done by many other countries that are lagging behind.

Notable is that when prisoners can vote, the principle appears to be that they remain excluded from participation in local government elections. Three arguments appear to support this. The first is that prisons are not places of normal residence,⁶¹ therefore prisoners have little interest in what happens in their local areas as they do not relate with the socio-economic and political issues of the area. Secondly, should they be able to vote in local government elections, this can have a disproportionate impact on the results, especially if it is a large prison. Thirdly, the administration of prisoners is in general the responsibility of national government and local government therefore has little influence over the issues that affect prisoners. The issues affecting prisoners (e.g. conditions of detention and treatment) do not fall within the competency of local government.

The right to vote for prisoners has not been placed before the African Commission on Human and Peoples’ Rights or the African Court and it is perhaps high time that these fora be approached on the issue.

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¹ Beckman, L. (2008) “Who Should Vote? Conceptualizing Universal Suffrage in Studies of Democracy, *Democratisation*, Vol. 15, No.1, p. 30.

² “75% of Americans disagree with Bernie Sanders' plan to let every US prisoner vote”, *Business Insider*, 30 April 2019, <https://www.businessinsider.com/majority-oppose-bernie-sanders-inmate-prisoner-voting-plan-insider-poll-2019-4?IR=T> Accessed 7 May 2019.

³ Abebe, A.K. (2013) “In pursuit of universal suffrage: the right of prisoners in Africa to vote” *The Comparative and International Law Journal of Southern Africa*. Vol. 46, No. 3, p. 410.

⁴ Article 25 (a)(b), International Covenant on Civil and Political Rights (ICCPR).

⁵ Article 13(1), African Charter on Human and Peoples’ Rights.

⁶ ACJR (2019) *Mozambique civil society campaigns for prisoners' right to vote*, <https://acjr.org.za/news/mozambique-civil-society-campaigns-for-prisoners-right-to-vote> Accessed: 6 April 2019.

⁷ Section 19(3), Constitution of the Republic of South Africa, 1996 states that: Every adult citizen has the right – To vote in elections for any legislative body established in terms of the Constitution, and to do so in secret.

⁸ Muntingh, L and Sloth-Nielsen, J. (2009), “The Ballot as a Bulwark: Prisoners’ Right to Vote in South Africa”. In *Criminal*

disenfranchisement in an international perspective. Ewald, A. and Rottinghaus, B. (Eds). Cambridge University Press. p. 230.

⁹ *August and Another v Electoral Commission and Others*, (1999).

¹⁰ Muntingh, L and Sloth-Nielsen, J. (2009) p.232.

¹¹ Paragraph 1, *August and Another v Electoral Commission and Others*, (1999).

¹² Abebe, A.K. (2013) p.427.

¹³ Section 1(d). Constitution of the Republic of South Africa, 1996.

¹⁴ Paragraph 38, *August and Another v Electoral Commission and Others*, (1999).

¹⁵ De Vos, P. (2004) “South African prisoner’s right to vote” Bellville: Community Law Centre, CSPRI Research Paper No.3A. p.3.

¹⁶ Paragraph 2, *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* (2004).

¹⁷ Muntingh, L and Sloth-Nielsen, J. (2009) p.236.

¹⁸ Muntingh, L and Sloth-Nielsen, J. (2009) p.236.

¹⁹ Paragraph 56, *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others*, (2004).

²⁰ Paragraph 80, *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others*, (2004).

²¹ Paragraph 71, *Ahumah Ocansey v The Electoral Commission, and Centre for Human Rights and Civil Liberties (CHRCIL) v Attorney General and the Electoral Commission*, Supreme Court of Ghana (2010).

²² *Ahumah Ocansey v The Electoral Commission and Another*, (2010).

²³ Section 42, Republic of Ghana Constitution.

²⁴ Section 7(5), Republic of Ghana Electoral Law.

²⁵ Abebe, A.K. (2013). “In pursuit of universal suffrage: the right of prisoners in Africa to vote” *The Comparative and International Law Journal of Southern Africa*, Vol. 46, No. 3, p.434.

²⁶ Paragraphs 14, 15 and 24, *Ahumah Ocansey v The Electoral Commission and Another*.

²⁷ Paragraphs 73 and 80, *Ahumah Ocansey v The Electoral Commission and Another*.

²⁸ Paragraph 78, *Ahumah Ocansey v The Electoral Commission and Another*.

²⁹ Paragraph 80, *Ahumah Ocansey v The Electoral Commission and Another*.

³⁰ Kenya Constitution, 2010, <http://www.president.go.ke/the-constitution/> Accessed 29 April 2019.

³¹ *Priscilla Nyokabi Kanyua v Attorney General & another* (2010).

³² Abebe, A.K. (2013), p.436.

³³ *Priscilla Nyokabi Kanyua v Attorney General & another* (2010), p.4.

³⁴ *Priscilla Nyokabi Kanyua v Attorney General & another* (2010), p.24.

³⁵ Abebe, AK. (2013), p.436.

³⁶ *Priscilla Nyokabi Kanyua v Attorney General & another* (2010), p.25.

³⁷ Abebe, A.K. (2013), p.437.

³⁸ "In Kenya this month, prisoners voted for president for the first time ever" *PRI's The World*, 22 August 2017 <https://www.pri.org/stories/2017-08-22/kenya-month-prisoners-voted-president-first-time-ever> Accessed: 8 April 2019.

³⁹ Prisoners vote for the first time in Kenya's elections, *Capital News*, 8 August 2017 <https://www.capitalfm.co.ke/news/2017/08/prisoners-vote-first-time-kenyas-elections/> Accessed: 7 April 2019.

⁴⁰ ACJR (2019), Mozambique civil society campaigns for prisoners' right to vote. <https://acjr.org.za/news/mozambique-civil-society-campaigns-for-prisoners-right-to-vote> Accessed: 6 April 2019.

⁴¹ Articles 61(3) and 73, Republic of Mozambique Constitution.

⁴² Law no. 12/2014, Law no. 11/2014 and Law no. 7/2018, Republic of Mozambique Electoral Law.

⁴³ ACJR (2019) Mozambique civil society campaigns for prisoners' right to vote. <https://acjr.org.za/news/mozambique-civil-society-campaigns-for-prisoners-right-to-vote> Accessed: 6 April 2019.

⁴⁴ *Thomas Sibanda v The Attorney General of Botswana & Secretary of the Independent Electoral Commission*, case no MAHLB-00347-09, High Court of Botswana (2009).

⁴⁵ Section 6(1)(b) and Section 6(2), Republic of Botswana Electoral Act.

⁴⁶ "Court turns down prisoner's request to be allowed to vote" *Sunday Standard*, 19 September 2009, <http://www.sundaystandard.info/court-turns-down-prisoner%E2%80%99s-request-be-allowed-vote> Accessed: 6 April 2019.

⁴⁷ Section 67(5), Republic of Botswana Constitution.

⁴⁸ Section 67(5), Republic of Botswana Constitution.

⁴⁹ Sections 3, 12, 13 and 15, Republic of Botswana Constitution.

⁵⁰ Abebe, A.K. (2013). p.439.

⁵¹ Section 67, Republic of Botswana Constitution.

⁵² "Court turns down prisoner's request to be allowed to vote" *Sunday Standard*, 19 September 2009. <http://www.sundaystandard.info/court-turns-down-prisoner%E2%80%99s-request-be-allowed-vote> Accessed: 6 April 2019.

⁵³ "Nigeria Court backs prisoners' vote" *BBC News*, 19 December 2014, <https://www.bbc.com/news/world-africa-30552146> Accessed: 8 March 2019.

⁵⁴ "Court grants prisoners right to vote" *The Nation*, 18 December 2014, <https://thenationonlineng.net/court-grants-prisoners-right-vote/> Accessed: 8 April 2019.

⁵⁵ Section 25, Republic of Nigeria Constitution, as amended in 2011; Section 12 (1) of the Electoral Act 2010.

⁵⁶ Section 77 (2), Republic of Nigeria Constitution and Section 12 (1) of the Electoral Act, 2010.

⁵⁷ Section 14(1)(2)(a)(b), Section 17(2)(a), Section 24(b), (c), Section 39. Republic of Nigeria Constitution.

⁵⁸ "Nigeria court backs prisoners' vote" *BBC News*, 19 December 2014, <https://www.bbc.com/news/world-africa-30552146> Accessed: 8 March 2019.

⁵⁹ "Nigeria Prisoners to Vote in 2019 Elections" *All Africa*. 23 February 2018, <https://allafrica.com/stories/201802230794.html>. Accessed: 8 April 2019.

⁶⁰ "Nigeria Prisoners to Vote in 2019 Elections" *All Africa*. 23 February 2018, <https://allafrica.com/stories/201802230794.html>. Accessed: 8 April 2019.

⁶¹ Muntingh, L and Sloth-Nielsen, J. (2009), p. 222.