Revisiting
Free and Fair Elections

An International Round Table on Election Standards
organized by the Inter-Parliamentary Union,
Geneva, November 2004

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(Ed. Michael D. Boda)

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Foreword

The Inter-Parliamentary Union (IPU) has played a pioneering role not only in defining standards for elections, but also in stimulating discussion on how best to measure their success or failure. It has done so through the Declaration on Criteria for Free and Fair Elections, adopted in 1994, and also through a study entitled *Free and Fair Elections: International Law and Practice*, which was published that same year under the authorship of Guy Goodwin-Gill. The Declaration and study offered a particularly unique contribution to the electoral enterprise, providing an understanding of the underpinning principles of an ideal election. They were also an important step towards demonstrating how to achieve that ideal in tangible terms.

Since then, an unprecedented number of elections have been conducted around the globe. Without question, election administrators, observers and analysts have learned much in the last decade. Yet there is still no widely-accepted and practical vehicle for evaluating the extent to which an election meets the standard of "free and fair".

In November 2004, on the tenth anniversary of its landmark contributions in this field, the IPU assembled at its Headquarters in Geneva a round table of experts to examine this topic. This event was an opportunity to revisit the issues first addressed in 1994 in the light of recent experience and the developments that had since occurred.

A consensus emerged among the participants at the round table that the Declaration itself should not be altered, as it was still valid. Much of the discussion focused instead on the significant theoretical and practical influence that the *Free and Fair Elections* study had had over the past decade. This publication contains the papers presented at the round table. They offer a wide range of approaches to the evaluation of electoral quality, and reflect the salient points of the intense and thought provoking debates which took place. The discussions also underlined a number of issues that have gained importance

in recent years, including the representation of women and e-voting. Such topics will be covered in greater detail in the near future, when an updated version of *Free and Fair Elections* will be issued.

I would like to express my gratitude to the conveners of the round table, Guy Goodwin-Gill and Michael Boda, the experts who provided papers, the respondents whose task it was to open the debate, and the other individual and institutional participants in this event. I am also grateful to the Ford Foundation for its generous and continued financial support for our Free and Fair Elections Project.

Anders B. Johnsson
Secretary General
Inter-Parliamentary Union

Revisiting the "Free and Fair" Question

Michael D. Boda

There is much current interest in assessing whether national elections conform to international standards, especially in emerging democracies in the Balkans, the former Soviet Bloc, Africa, Asia, but more recently in established democracies such as the United States. The conduct of many national elections is now routinely evaluated by observation missions from bodies such as the United Nations, the European Union, and the OSCE (Organization for Security and Cooperation in Europe), whose pronouncements on whether an election is 'free and fair' carry much weight in determining an electoral event's legitimacy.

In 1994, Guy Goodwin-Gill broke new ground by publishing the now seminal work, *Free and Fair Elections: International Law and Practice* (Geneva: Inter-Parliamentary Union). In doing so, he offered a productive approach to developing a definition for 'free and fair', assigning a central role to international legal mechanisms in reaching a better understanding of what this term means. Cognizant of the ongoing debate regarding the place of sovereignty, Goodwin-Gill (1994: 10, 12) noted that 'the precise relationship of self-determination and "election rights" will remain controversial'. He argued convincingly instead that 'attention should be paid to those specific obligations in the matter of elections already assumed by States, and to the equally accepted political human rights that may reasonably be linked thereto'. It was in light of this important contribution to the body of knowledge in this field that in November 2004, the Inter-Parliamentary Union, with generous funding from the Ford Foundation, convened a group of experts—scholars and practitioners with legal, social scientific, and policy expertise on election standards—to evaluate how the understanding of this measurement has advanced in the intervening years and to offer comment on how the free and fair 'project' might be improved upon in the years to come.

An example from just one more recent election observation effort provides particular insight into the progress so far. Michael Dynes (2002), a reporter for *The Times,* noted following

Zimbabwe's election day in March 2002 that while South African election observers were openly shocked by 'the scale and brazenness of the violence carried out by Mr. Mugabe's roaming bands of thugs against opposition supporters', they were still at odds over whether to declare the electoral process 'sufficiently' free and fair or not free and fair at all. Indeed, a consensus has not yet emerged on a definition for freeness and fairness. Scholars and practitioners agree that a concrete and widely-accepted definition has not yet been found. Reflecting on this problem, Yonhyok Choe and Staffan Darnolf (2000: 228) state, for example, that 'there is no common perception on what free and fair elections are and what requirements are necessary for launching [them].' International, regional, and other institutions have also begun to recognize the lack of clarity in their declarations on freeness and fairness. As the OSCE conducted an exercise to consider this issue in 2002, it rehashed the development of election-related international standards, pointing to the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966) as important markers. At the same time, though, it acknowledged the turtle's pace of developing actual criteria for judging 'democratic' elections. 'The need for such criteria is clear,' their report states (OSCE, 2002 : 3).

Evolution of an electoral baseline

Early references to a modern form of the term 'free and fair' can be identified in the classics of democratic theory where the quality of electoral processes is listed as just one variable that constitutes 'democracy'.[1] Robert Dahl (1956: 67-71), for example, did so in his 1956 work, *A Preface to Democratic Theory*. He provides eight different definitional characteristics of an electoral process and how its success can be measured.[2] Butler, Penniman, and Ranney (1981: 3) offer another example from the 1980s in *Democracy at the Polls*. Aware of the ongoing disagreement over the definition of 'democracy' and having 'no intention of plunging into this Serbonian bog where far greater minds have floundered', the editors offer six conditions of conducting an election as their minimalist definition of democracy. Yet none of these works provides a meaningful understanding of 'free and fair'. The type of specialization sought after here—that which focuses specifically on how 'free and fair' is to be measured—has more pragmatic roots. The work of institutions involved in election observation gives more guidance.

The United Nations has been engaged in this field since its inception, with the Universal Declaration of Human Rights (1948, art 21.3) declaring that 'the will of the people shall be the basis of the authority of government' and an observation of the Korean elections, two 'firsts' for that institution occurring in 1948. One of the earliest references to 'free and fair' in this literature came in a report on the 1956 plebiscite (UNGA Doc A/3169, 1956: I.7) conducted to determine whether the inhabitants of Togoland would join the independent Gold Coast or, instead, end its status as a territory under British Administration and continue on as a United Nations Trust Territory until its political future could be determined.[3] While it is interesting to examine the early foundations of this term, a review of the literature as a whole shows that there was no fundamental refinement of the concept of 'free and fair' until the last couple of decades.

Round Table papers

With this in mind, the round table organisers proposed analysing three of the more recent methodologies by which electoral events have been measured in recent years. In addition, one author was tasked with producing a paper that offered insight on the connection between democracy, more generally, and the measurement of 'free and fair' elections as one component of democracy. Four substantive sessions were held over the course of two days. During each, election practitioners were assigned to comment critically on the papers presented by leading election scholars. The papers and comments were then discussed among the presenters, respondents, and the institutional participants[4] in attendance.

Richard S. Katz

Democratic Principles and Judging "Free and Fair"

Three of the four papers offered during the round table addressed the more specific problem of assessing the quality of an electoral process, reflecting on the questions that Guy Goodwin-Gill evaluated initially in his 1994 edition of *Free and Fair Elections*. In a first paper, however, Richard Katz considers two prior questions, while evaluating the more general linkage between democratic principles and a determination of free and fair. Indeed, his discussion offers considerable insight into the difficulties experienced in achieving a consensus with regard to this kind of measurement.

In a first question, Katz evaluates whether democracy can be defined with such clarity that a 'free and fair' measurement can be offered based on a uniform set of standards. In making his case, he draws our attention to the many variants of democracy established over the centuries, arguing that any definition of 'free and fair' is dependent on the democratic values that emerge from these different traditions, along with the 'political space' and 'the structure and nature of social and other divisions in the society in question'. He finds that in instances where election-related improprieties are clear (e.g., the stuffing of ballot boxes or opposition candidates being barred from participation), a determination of 'free and fair' is more easily attained. Problems arise, however, when different conceptions of democracy are combined with the nuances of the electoral process (e.g., arguing the benefits of differing electoral systems). The result is an uphill climb in outlining a 'free and fair' electoral result.

A second question relates to how and to what extent individual standards for 'freeness' (the unrestricted activity of electoral participants) and 'fairness' (all participants having the same opportunity to succeed) are compatible. Katz concludes that democratic legitimacy requires elections be both free and fair, but that many circumstances arise in which the two are incompatible. A balance must be struck between them, and this depends, particularly, on local conditions. He argues that few, if any, decisions made to strike this equilibrium are politically neutral.

Louis Massicotte

Judging Elections by their Outcome ?

A paper by Louis Massicotte evaluates a first approach to measuring free and fair which, while not predominant in the literature, is pervasive among many involved in international electoral work. Perhaps one of the more straightforward assertions following this analytical path is offered by International IDEA (2004). The organization states, 'In order for democratic culture to grow and for decision-making to reflect the differences of the population, political institutions need to be representative and enhance the participation of all citizens. The challenge of democracy is therefore to make the political institutions a true microcosm of the diverse identities and interests of the population'.[5]

Massicotte considers judgments based on electoral *outcomes*, questioning whether a decision on what is 'free and fair' can be related to what results from an electoral competition and arguing instead that what fundamentally matters is whether the winners have won under a fair electoral framework. He considers these issues through two windows, the first being less controversial than the second. Through the first, he notes that, to his knowledge, no one has seriously argued that elections should be deemed free and fair based on the extent to which a specific party has won. Still, he raises concerns that the likelihood of an electoral process being found acceptable is greater when the 'ins' are defeated. He argues that this kind of judgment is a misstep. Through a second window, Massicotte looks at the thorny issue of socio-demographic and political party outcomes. As for whether elections should lead to legislatures that are a microcosmic representation of subgroups including gender, ethnic groups, occupations and the like, he argues that there is no consensus on the matter. With regard to legislatures being a reflection of political parties, he professes that despite being an advocate of electoral systems of proportional representation (PR), PR remains only one possible electoral system among others. Fundamentally, then, Massicotte argues that 'we should never forget that elections are instruments for *choice*, that the electorate remains free to produce outcomes with which we, in our wisdom, might disagree.'

Jorgen Elklit and Andrew Reynolds

Judging Elections and Election Management Quality by Process

A second analytical framework evidenced in the literature measures free and fair through judging by process. A paper presented by Jorgen Elklit and written with Andrew Reynolds pursues an approach which draws on a theme articulated by Max Weber, one that focuses on an institutional rationality at a *formal* level, a kind of rationality based on easily-recognized, standardized methods of administration. The peer review process among scholars for accepting or rejecting papers for publication, the opinions of appellate court judges, or physicians' diagnoses might be offered as examples of this kind of standardized practice. Arthur Stinchcombe (1990 : 298) suggests one condition of an area of social life being rationalized as such is that it must be operationalized in a precise way that it can ultimately be reproduced by others

according to a given standard of practice. This approach has been pursued vigorously in the literature of election administration over the last decade, as evidenced in Dundas (1993), Choe (1997), Alves et al. (1998), Choe and Darnolf (2000), Lopez-Pintor (2000), and Elklit and Reynolds (2000 and 2001).

Within this tradition, Elklit and Reynolds focus on how institutional factors can contribute to the quality of the electoral process and, therefore, to the transition and eventual consolidation of democracies. In doing so, they assemble a more operational and empirically-oriented approach than has been offered by most other authors, one by which election administrators are able to assess the quality of their work by comparing it to that of others. They propose a framework for analysis based on the constituent parts of an electoral process and assign performance indicators in each of eleven components. Various methods for measuring these indicators are offered, ranging from panel experts analysing the legislative framework to data secured from voter registration files. A weighting system is then applied, depending on whether the country involved is an established or fledgling democracy. Ultimately, they score two established democracies and four fledging as examples, arguing that the framework and case studies provide a useful starting point for future attempts at gauging electoral performance in various democracies.

Michael D. Boda

Judging Elections by Public International Law: A Tentative Framework

In a final paper, Michael Boda, in collaboration with Guy Goodwin-Gill, considers a third approach to evaluating the quality of electoral events, in this instance judging by international law. Noting that a fundamental entrenchment of this kind of analysis was not found until into the 1990s, they also find that few analysts have thus far assigned a genuinely central role to international legal mechanisms in developing a standard measurement for freeness and fairness.

Boda's paper offers insights on current thinking with regard to this third approach, considering some of the legal foundations that underpin it. Following this, however, it constructs a preliminary analytical framework by which an empirical connection might be forged between electoral obligations found

in various mechanisms of international law and the electoral 'markers' contained within the constituent parts of electoral events. The 'right to vote' is offered as one example of an obligation. To exemplify how an empirical connection is to be established within this framework, the paper provides an indicator within voter registration (the change in error rate within the United Kingdom's electoral roll), demonstrating how it, when combined with other indicators, may be used as evidence of whether that electoral component is moving toward or away from the stated obligation.

The paper demonstrates, first, that much has changed with regard to this approach in recent years, arguing the necessity for evaluating how newly-established sources of international law have expanded our understanding of election standards over the last decade, and for the enhancement of the tentative analytical framework presented in the paper for use among election observers around the globe.

Conclusion : Frank discussion

From the outset, the round table's organizers aimed to conduct an event that would foster frank discussion and an exchange of views that might not ordinarily arise in a context where both practitioners and scholars are assembled. Their goal was not to solicit a final judgment on how measuring electoral quality might be pursued in the coming decade. Instead, it was to establish a venue in which a smorgasbord of ideas could be offered, with an aim to enrich the current state of knowledge in the field of election standards in hopes of building upon it in the months and years ahead.

To facilitate this kind of discussion, a few strategies were pursued. First, presenters and respondents were invited as individuals and encouraged to articulate their own views—thereby shedding some of the inhibitions that can arise when one is tied to an institution. This is not to say that institutional participants were not an integral part of the discussion, however. Indeed, they often provided a balance in evaluating the ideas that came forward, questioning some that might be deemed unworkable among practitioners involved in measuring electoral quality while encouraging others that they saw as innovative. Second, organizers worked carefully to assemble a mix of participants that would

facilitate a 'cross-fertilization' of ideas between election theorists and practitioners and between the various regions of the globe. In each case, a scholar was tasked with writing the paper while practitioners were assigned to comment on the argument offered.

The chapters that follow provide evidence of this approach, with each author being tasked with reaching their own conclusions. In each instance, they have been able to digest the criticisms and suggestions voiced during the two days of substantive talks, with the aim of addressing some of the principal concerns that were raised. Purposefully, the publication leaves the more general conclusions that might be derived from these pages to the Inter-Parliamentary Union and others involved in analyzing elections as we begin to reconsider questions relating to freeness and fairness in the months and years ahead.

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Notes :

[1] See Schumpeter (1954) ; Dahl, (1956) ; Sartori (1965) ; Pateman (1970) ; Dahl (1971) ; and Butler (1981). While not referring to the contemporary definition, the term, and forms it, are found in references as far back to the Thirteenth Century. See e.g., : 'There shall be no disturbance of free elections (Anno. 3, Ed. I, Cap V)' (1275).

[2] Dahl does not specifically mention the term 'free and fair' in this work. Yet his 1971 class study *Polyarchy*, which does, points us back to his 1956 work for a substantive definition ; see Dahl (1971 : 3).

[3] The Report found that the plebiscite had been 'held in an atmosphere of absolute freedom, impartiality and fairness' : UN Doc A/3169 (1956 : I.7) ; see also UNGA Res 944(X) (1955 : I.4) and UNGA Res 1044 (XI), 13 December 1956).

[4] Institutions with representatives in attendance included : Inter-Parliamentary Union, ACEEEO, Carter Center, Council of Europe, IFES, International IDEA, OSCE/ODIHR

[5] Additional examples of this kind of analysis are found in : Diamond (2004) and Wright (2005).

Democratic Principles and Judging "Free and Fair" *

Richard S. Katz

Guy Goodwin-Gill's (1994) *Free and Fair Elections: International Law and Practice* was a path-breaking inquiry into a crucial question. The book was significant in two respects. On the one hand, it was a renewal of the attempt (e.g., Mackenzie, 1958) to distill from the practices of the established democracies those standards that are essential to free and fair elections. On the other hand, Goodwin-Gill grounded his analysis specifically in international law, suggesting that the international community would be entitled to take an interest in the adherence of individual states to the standards.

As with all path-breaking studies, experience has shown that *Free and Fair Elections* provides only partial answers to some of its questions, and indeed raises additional questions whose importance only became apparent later. Other participants addressed some of these. I address two questions here. The first is whether democracy has a sufficiently clear and unambiguous definition that 'free and fair elections' can be assessed on the basis of a uniform set of standards, or whether, alternatively, there are still many competing understandings of 'democracy', each with its own twist on the meaning of 'free and fair'. The second is whether, or more properly to what extent and how, the two standards of 'free'-ness and 'fair'-ness are compatible.

Democracy and elections

Democracy is a messy concept, and there has been endless academic debate concerning its true meaning. The definition of democracy is not just a philosophical question, however, but also a question with profound implications in the world of practical politics. Different conceptions of democracy justify different institutional arrangements and different standards for evaluating their performance – and ultimately differing distributions of authority. Who wins may be determined by the rules and practices in place, and those, in turn, depend at least in part on which understanding of democracy is privileged.

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* This paper was presented initially in November 2004 as part of the proceedings of *Free and Fair Elections, Ten Years On: An International Round Table on Election Standards.* The author wishes to thank those who offered comment on its contents, particularly David Beetham who acted as respondent.

Although in his title Goodwin-Gill only mentions 'free and fair' as criteria, legitimate elections must also be effective. But effective in doing what? Answering this question requires that five big questions be addressed.

Scope of Democracy

Most commonly, democracy is equated with the choice of government through competitive elections. In Joseph Schumpeter's (1962: 269) words, for example, democracy 'is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote'. In this view, a democracy is neither more nor less than a political system in which political leaders are chosen in reasonably free competition among political parties.

In contrast to this, there is a tradition that identifies politics, and thus democracy as a form of politics, with (in Abbie Hoffman's words) 'the way you live your life'. In this view, one would not talk about a democratic government, but rather about a democratic society, because to restrict attention to the method through which political decision makers are chosen is totally to strip democracy of its core meaning.

Choice of government or choice of representatives

The second big question is whether an election is properly understood as the choice of a government or as a choice of representatives. One key point, reflected in the grammar of the preceding sentence, is that a government is singular, whereas there may be many representatives. On one hand, this means that some standards that are appropriate for governments might better be applied to the parliament as a whole rather than to the individual parties that make it up. On the other hand, because choice of a government implies choice against some alternative, some forms of inclusiveness that might be appropriate for parliaments would be inappropriate for governments.

A second key point is that governments are expected to be able to act both effectively (when the government makes a decision, something happens) and coherently (the government's decisions, at least while one government remains in office, are complementary rather than contradictory). Representative assemblies, however,

often are expected to be expressive rather than effective and to reflect diversity rather than coherence.

Parties or candidates

Third, are elections contests among parties or among candidates, or posed more realistically, are voters choosing among parties, each of which has particular individuals as its standard bearers, or rather are they choosing among individual candidates, each (or most) of whom are associated with political parties? Parliamentary democracy and proportional representation (PR) electoral systems in modern states are predicated not only on the idea that parties are cohesive units but also on the idea that it is those cohesive units for which electors vote and which therefore have a democratic mandate from the voters. At the same time, many constitutions emphasize the personal responsibility of individual members of parliament, either to their own constituents or to their own consciences.

The mirror image of the question of whether parties or candidates are the objects of voter choice is the question of responsibility. Adapting the language of cabinet government, are parties to be held collectively responsible, with each candidate of a party expected and expecting to share in the blame for missteps taken by the party or its leaders even if s/he personally opposed those steps, or is each candidate to be individually responsible to his/her own constituents independently of their views of the party as a whole? As with collective and individual responsibility of cabinet ministers, the answer clearly is both, but in what mix?

Self-protection or direction

Fourth, is the objective of democracy to allow the citizens to protect themselves by reactively punishing rulers of whose policies, or results, they disapprove or is it to allow the citizens to rule themselves, by affirmatively deciding the policies to be pursued?

One major strain in democratic theory suggests that the people should decide what is to be done: that democracy means the will of the people is to be put into effect. There is, of course, great disagreement concerning how one can either define or identify the 'will of the people', ranging in numerical terms from the unanimity of Rousseau's *volonté generale* to simple majority rule. Nonetheless, in this view government is seen as an instrument of the people, taking positive direction from them.

Theories that stress democracy as a means of self-protection begin with recognition that although effective government is necessary to the protection of individual rights, it may also be among the most serious threats to those rights. As Macpherson (1977: 34) wrote describing what he called 'protective democracy', it follows from 'the grand governing principle of human nature [that] every government would be rapacious unless it were made in its own interest not to be so'. While we might argue about the degree to which liberal civil rights (free speech, free press, free assembly) or a free market economy are prerequisites for the inauguration or sustainability of democracy, they clearly are not sufficient conditions, and hence a liberal free market economy is *not* a synonym for liberal democracy, let alone democracy *tout court*. For those who take the 'democracy as self-protection' view, one point of adding democracy to the phrase 'liberal democracy' would be a recognition that ordinary people need some protection against the natural rapaciousness of their leaders.

Even if governments are the unproblematic agents of 'the people', however, that does not guarantee that they will be benevolent. Assuming that the will of the people can be expressed by less than unanimous consent, what is to protect the rights of the minority from being trampled by the majority?

David Beetham, in response to the round table presentation of this paper, argued that this dichotomy is overblown: that any democratic system would prohibit the majority from denying fundamental political rights to a minority, and recognizing that the existence of an identifiable minority that is permanently excluded from executive office would also be unacceptable. In simple, black and white terms, he is correct, of course. The problem arises when the exploitation of the minority is not so stark: they are not barred from competing, but severely handicapped; they are not expropriated, but more heavily taxed or less adequately served; they are not permanently excluded from office because of race or gender, but always lose. In these cases, it is not adequate to point to obvious democratic norms, and yet it is also not obvious why those who are permanently on the short end of the will of the people would unproblematically accept the legitimacy of democracy defined simply as government in accord with the will of the people.

When this problem is highlighted, the emphasis in the phrase 'liberal democracy' shifts; instead of democracy (in particular

elections) being a means of enforcing liberalism, liberalism becomes a rationale for limiting the simple translation of the will of the people into government action – which in terms of the simple will of the people definition would mean it becomes a rationale for limiting democracy itself. The classic example here is the Madisonian concern with majority faction, and the set of institutional prescriptions to which that concern leads.

Role of citizens

The fifth big question concerns the primary role of citizens in the context of an election campaign. Are they primarily to be judges among the contestants or are they to be active participants and partisans ?

In one view, democracy simply means popular choice among alternatives that, while perhaps constructed in response to the perceived or expressed needs, interest, or desires of the citizens, are formulated by political (generally meaning party) elites. Provided the range of options from which the choice is made is sufficiently broad, this view sees electoral judgment, without other substantial participation, as adequate to effective democracy.

The alternative view sees active involvement in the actual doing of politics as an essential element of democratic governance. In part, the contention is that only active involvement by the citizens in the formulation of party programs, the selection of candidates, etc., will ensure that the range of choices offered will reflect popular rather than elite interests and concerns; in part, the contention is that comment and criticism of party programs from civil society (e.g., interest organizations, NGOs, etc.) is necessary if the citizens are to be adequately informed before they make their judgment. More fundamentally, however, it is informed by the idea that democracy means self-government and not just government in the public's interest.

Varieties of democracy

In *Democracy and Elections* (Katz, 1997), I identified a large number of models of democracy – with profoundly different institutional prescriptions – derived from attention to four fundamental democratic values, with an implicit fifth value, equality (a concept as complex as democracy itself), assumed without detailed analysis. The first two of the values considered explicitly were popular sovereignty (the idea that the 'will of the people' should determine government

personnel and policy) and liberalism (the idea that groups need not just formal rights but practical power to protect themselves from abuses by their governors).[1] In addition to these two values, I considered participation (the idea that participation in self-government is an essential prerequisite for full human development), and community (the idea that democracy both reflects and fosters a single *demos* that both has, and perceives itself to have, a commonality of interest).

The reason why I suggest many varieties of democracy, and indeed the reason why I introduce an intermediate step between defining democracy and evaluating institutions, is that the institutional prescription appropriate to each of the democratic values depends not only on the value itself, but on the structure of the 'political space'[2] and the structure and nature of social and other divisions in the society in question as well. Combining some categories in the original analysis (and omitting a few others as of little relevance here), the significant varieties of democracy are summarized in Table 1. Each should be regarded as an ideal type, based on stylized assumptions, but, like all ideal types, they serve as points of reference for assessing the real world.

Free and fair: Alternative standards

What are the implications of these differing models for democracy for the standards by which the freeness and fairness of elections should be judged? Some standards are universal: ballots must be counted honestly; voters must be able to cast their ballots free of intimidation or fear of reprisal; rules must be enforced in a neutral fashion; there must be a mechanism for the non-arbitrary resolution of disputes.[3] While no real election is likely to be perfect with regard to these standards, there is not likely to be any question either as to their importance or as to which 'end of the scale' is good. For many of the other criteria discussed by Goodwin-Gill, however, both the importance of the criterion and in at least some cases even the 'direction' (is more or less better?) depends on the conception of democracy about which one is thinking.

Proportionality of representation

One of the 'essential considerations' that Goodwin-Gill (1994: 28) cites is that an 'election primarily must guarantee representation at the national level of the country's political forces, and reproduce in

Parliament as faithful an image as possible of their relative strength.' If the primary purpose of an election is to produce a representative assembly the members of which will be able to form coalitions that might be justified as being equivalent to the coalitions the people might form if Athenian style government by an assembly of the citizens were possible (e.g., legislative popular sovereignty), then proportionality and the multiparty system that PR is said to facilitate are quite important. Similarly, if legislative seats are seen as public goods that must be allocated proportionately among the pillars of society (e.g., veto-group liberalism), a proportional electoral system is again important.

If emphasis is instead placed on the other 'essential consideration' that Goodwin-Gill cites, the designation of 'a cohesive government responsible for conducting a national policy', then proportionality is at best of secondary importance, and from the perspective of several models of democracy likely to be positively pernicious. On the one hand, if proportionality facilitates a multiparty system, then it is clearly undesirable from the perspective of theories (e.g., binary or Downsian popular sovereignty) that derive their power from the assumption of two party competition. If multiparty politics limits the heterogeneity of individual party coalitions, then it would be undesirable from the perspective of pluralist liberalism as well. On the other hand, from the perspective of binary or Downsian popular sovereignty, what counts is that the 'right party' (the one with a majority of the popular votes) be in effective control of the government, which means that the tendency of non-proportional electoral systems to exaggerate the support of the winning party in the translation of votes into parliamentary seats would be an asset rather than a liability. Likewise, from the liberal perspective, if the point of elections is to allow the voters to reward and punish governments, the magnification of vote swings in their translation into seat swings would simply be increasing the power of the electoral weapon.

Stability and coherence of government

Governments issuing from parliaments elected by PR and coalition governments on average have significantly shorter lives than single party governments issuing from parliaments elected by First Past the Post (FPTP) systems. Is this a problem?

From the perspective of theories that assume elections are about choosing governments, the failure of the government chosen to last

Table 1: Models of democracy

Model of Democracy	Assumptions	Institutional Prescription
Binary Popular Sovereignty	1. All issues cluster into two complexes, so that choice is between this' and 'that'. 2. The choice of the majority is 'the will of the people'.	1. A two-party system, with each party representing one of the two complexes of opinion. 2. An electoral system (FPTP) that will support two-party politics and provide reasonable assurance that the party with the most votes will control the government.
Downsian Popular Sovereignty	1. All issues can be summarized in terms of a single dimension. 2. The first preference of the median voter along the assumed single dimension of politics (the Condorcet choice) is 'the will of the people'.	1. A two-party system, with each party free opportunistically to alter its policy position along the issue dimension. 2. An electoral system (FPTP) that will support two-party politics and provide reasonable assurance that the party with the most votes will control the government.
Legislative Popular Sovereignty	1. The issue space is multidimensional. 2. While there is no Condorcet choice, the 'will of the people' can be approximated through the formation of a parliamentary coalition representing a majority.	1. A multiparty system, with each party representing a different combination of policy positions. 2. An electoral system (PR) that will accurately reproduce in parliament the distribution of opinions found in the electorate.
Majoritarian Liberalism	1. Society is basically homogeneous, with no politically relevant and stable subgroups. 2. Majority rule is adequate to protect against elite tyranny, and majority tyranny is not a concern.	1. A two-party system, with each party representing an alternative team of leaders prepared to assume the direction of government. 2. An electoral system (FPTP) that will support two-party politics, and provide citizens with an effective opportunity both to dismiss the party an power and to dismiss individual politicians who are perceived to be abusing their positions.

Pluralist Liberalism	1. Society is made up of stable, but cross-cutting, groups. 2. The problem of majority tyranny can be mitigated through multiple veto points, privileging different combinations of political resources. That at least one of these veto-points is majoritarian is adequate protection against elite tyranny.	1. A party system in which each party (or at least one party in any potential coalition of parties) is to a significant degree dependent on the support of *every* significant group in society. 2. An electoral system (e.g., FPTP) that encourages parties to build broad coalitions rather than to mobilize a narrow constituency. 3. An institutional system that makes it difficult for a majority to gain control of all of the institutions of government (e.g.., separation of powers, federalism, etc.)
Veto-Group Liberalism	1. Society is divided (pillarized) into stable and non-overlapping groups. 2. Majority tyranny can be avoided only by giving *each* politically relevant group unilateral veto power.	1. A party system in which *each* segment of society is represented by at least one party, but preferably by exactly one party. 2. An electoral or other device to make the leadership of each segment responsible to the members of that segment. 3. An institutional system (e.g., government by grand coalition) that will afford *each* segment of society veto power over decisions that it perceives to be excessively threatening.
Participationist and Communitarian Democracy	1. Full human development requires taking active responsibility in government. 2. Active involvement in the collective enterprise of governing will foster the development of community.	1. Structures that afford maximum opportunities for direct citizen involvement in decision-making. 2. Institutional arrangements that move decisions to the most local (i.e., smallest) units possible. 3. Structures that maximise 'political talk'.

its full term is a clear failure. But this clearly is reflective of the logic only of two-party popular sovereignty (or of presidentialism). With legislative popular sovereignty, the purpose of an election is to choose representatives who will choose the government; and because those representatives, unlike the voters, are in more or less continuous session, they can change the coalition in power without challenging the underlying democratic legitimacy of the system.

If elections are to give the people through their representatives the ability to limit their government, stability may be evidence of failure rather than success. While the ideal of many 19th century liberals that annual elections would be desirable to allow the voters to '[divest] of their power all unfit representatives before they have had time to produce any lasting mischief', (Bentham, 1962 : 561) has been generally rejected on practical grounds, the idea that a government should never be too securely in office is the essence of majoritarian liberal democracy, and only slightly less central to pluralist liberalism.

Universality of suffrage and voter turnout

Clearly the first thing to be said about universal suffrage is that no one either believes in it or practices it. All countries have minimum age requirements. Many require citizenship or at least a lengthy period of residence. Some citizens may be disqualified on account of mental incompetence or criminal convictions. In Kuwait and Saudi Arabia, women do not have the right to vote. *

The Kuwaiti example is illustrative of an important point. The prototypical democracy of Athens was 'democratic' only with respect to a quite narrowly defined segment of the population. Exclusions of women, members of various ethnic groups or religions, or people without extremely long residence or property in the area have a long history in the established democracies. That we now regard these as illegitimate does not alter the fact that both their imposition *and* their elimination reflect cultural biases concerning the proper nature of a political community. That the international community may regard itself as justified in imposing these modern values on cultures that we regard as less advanced does not make them less the product of culture.[4]

* Editor's note : In May 2005, the Kuwaiti parliament approved constitutional amendments to give women full political rights.

Beyond this, there may be other reasons why less than universal suffrage may be democratically acceptable. If elections are part of a process of rational decision-making rather than mere expressions of opinion, for example, one might legitimately limit the participation of the incompetent. At the trivial (except in numerical terms) level, this is the justification for denying the vote to children. The problem with more substantive competency requirements (or toleration of competency related conditions that impose a substantial burden on some individuals) when applied to adults, however, is that the 'incompetent' may constitute an interest of their own, or be a significant part of some interest. Particularly from the liberal perspective, indeed, the 'incompetent' may represent an interest that is particularly in need of protection.

Low turnout often is interpreted as either indicative or causative of low legitimacy of the outcome. Nonetheless, some efforts to increase turnout may be a cure that is worse than the disease. On the one hand, lessening the barriers to voting (easing registration procedures, allowing postal voting, etc.) may also facilitate fraud. On the other hand, they may exaggerate rather than mitigate biases in the composition of the active electorate. (On both these problems, see Katz, 2004.)

Is high turnout necessarily to be regarded as good? From the perspective of participationist or communitarian models, true citizenship is an achieved status : 'Citizens are neighbors bound together neither by blood nor by contract but by their common concerns and common participation in the search for common solutions to common conflicts.' (Barber, 1984 : 219) While participation in an election may help to integrate individuals into a political community, the votes of excessive numbers of individuals who are not committed to the community may instead undermine the democratic legitimacy of the election in the eyes of those who do feel such a commitment.

Constituency delimitation and equality of votes

One of the great mantras of the late 20th century became 'one-person, one-vote, one-value'. The first part (one-person, one-vote) is unproblematic in theory, although sometimes more difficult to realize in practice. The second part (one-vote, one-value), however, is not at all straight-forward unless the electoral system is PR with large districts. The greatest problems, however, arise in the context of single-member districts.

It is often assumed that having each district with as near to the same population (whether of residents, or citizens, or voters) as possible is both a necessary and a sufficient condition for equality of influence. This equality, however, may be illusory. This is illustrated in Figure 1, which shows a hypothetical territory with 15,000 voters divided into 15 perfectly square and exactly equipopulous districts. If the numbers in each square are the votes received by one of two parties competing, then with exactly 7500 votes to its opponent's 7500, that party will win seven of the 15 seats. If it loses 60 votes in each district, it will win only two seats with a total of 6600 votes, while if it gains 60 votes in each district it will win ten seats with 8400 votes overall. But, by subtraction, this means that while 6600 votes win this party only two seats, they win its opponent five, and while 8400 votes win it ten seats, they win its opponent 12.

Figure 1:

15 Equal-population districts with the votes for one of two parties.

900	900	450
550	550	550
550	550	350
450	350	350
450	350	200

This example was deliberately constructed to preclude appeal to the claim of gerrymandering, and in a sense it is immune to that charge. At the same time, however, it must be recognized that this immunity stems entirely from the privileging of simple shape as an essentially aesthetic judgment. Strange shapes (perhaps following a coastline or a river valley or an ancient tribal boundary) might produce districts that are more fair, either in the sense of including a more homogeneous constituency or in the sense of being less biased in favor of one party or another. For the purposes of this paper, the key point is the frequent use of the word 'or' in the preceding sentence; that is, there are many different ways in which fair districting can be understood, and the imposition of presumably neutral standards like compactness does not obviate the problem. And, for precisely this

reason, strict adherence to a standard of equal population may simply make partisan gerrymandering easier.

Patronage and the buying of votes

There is general agreement that the buying of votes, whether for cash, promises of favours, or threats of reprisals is unacceptable, but there is little systematic consideration of the broader implications of this position. The basic objection, of course, is that concentrated economic power should not be converted into electoral power, which should instead be based on numbers. Further reflection, however, raises two problems.

The first problem is whether this form of 'retail' corruption is actually worse than what might be described as 'wholesale' corruption: corporate threats to relocate a major source of employment out of a community or party promises to provide benefits for groups that support them. Of course, it can be argued that the wholesale forms of corruption involve the exchange of votes for public goods whereas the reward for the retail vote-seller is purely private, but whether this distinction can be maintained in cases of policies that benefit only a narrowly defined set of voters is questionable. But if the distinction cannot be maintained, the result is to give those in control of government or corporate wealth an avenue of influence denied to those without those assets.

The second problem concerns the purpose of voting. While the communitarian model of democracy assumes that there is a single common interest that is separate from and above the simple sum of the citizen's private interests, liberal models are based on the fundamental primacy of private interests, and while popular sovereignty theories talk about the popular will in the singular, they define it as the aggregation of individual wills.[5] But if it is assumed not only that citizens will vote so as to advance their private interests, but also that they should vote on this basis, why should they be barred from acting on the view that their individual votes will advance their private interest more effectively if regarded as private goods to be sold on the private market? Moreover, given the experience of machine politicians, particularly in the United States but not only there, in integrating new citizens into the political community through Christmas turkeys, jobs, or outright bribes (see Riordon, 1963), one might question the assumption that patronage and vote buying undermine democracy.

Regulation of parties

Even when they do not accept the full equation of democracy with 'party government' (Katz, 1987), political scientists and political practitioners alike generally accept E. E. Schattschneider's (1942 : 1) dictum that 'political parties created democracy and that modern democracy is unthinkable save in terms of the parties'. This means, on the one hand, that free and fair elections require the presence of political parties – a requirement that may be interpreted as imposing an affirmative mandate to assure that there are parties – and, on the other hand, that some restrictions on parties may be justified. While there are many aspects of this problem, I will mention only two : registration of parties and regulation of their internal organization (internal democracy). A third aspect, political finance, is raised later.

Registration of parties **:** Laws setting conditions under which political parties will be recognized and will be given privileges like assured ballot access, public subsidies, or representation in parliamentary committees all can be justified as necessary to make elections manageable. An excessive number of choices is likely to so fragment the vote that the result will not be meaningful ; similarly, excessive fragmentation in parliament is likely to make the maintenance of stable majorities impossible.

An official party registry facilitates timely and definitive resolution of conflicts concerning the use of a party name and the right of individuals to identify themselves as candidates of the party. At the same time, however, one effect of such regulations is almost inevitably to stack the deck in favor of the existing parties : requiring new would-be parties to undertake extensive organizing efforts at a time when politics is likely to be less salient ; freeing existing parties from the need to expend resources to collect petition signatures or otherwise to demonstrate support in advance of the election in order to secure a place on the ballot ; giving established parties resources and a position in parliament that are denied to independents or newcomers. The problem is to strike the proper balance between unfettered entry into the electoral arena and meaningfully structured competition.

Where that balance lies depends on the conception of democracy with which one begins. In particular, while the model of legislative popular sovereignty would incline the balance toward easy qualification of parties, the models of binary or Downsian democracy would incline it very much the other way. Similarly, the pluralist or

majoritarian models of liberal democracy suggest raising the bar for the entry of new parties in the interest of encouraging diverse interests to coalesce within broader umbrella parties while veto group liberalism would be more lenient, at least for parties claiming to represent interests that do not already have 'their own' party.

Internal party democracy: Does democracy require (or indeed is democracy even furthered) by requiring that parties be democratic with regard to their internal (policy formulation, candidate selection, etc.) procedures ? Although it is appealing to assume that the answer to this question must be 'yes', and although there have been moves in this direction within the regulatory systems of some democracies, the answer in fact is far from clear.

If democracy implies active citizen participation and parties provide one of the venues for that participation, then internal democracy is important. Similarly, if democratic elections are about choices of representatives and among candidates, internal democracy may allow groups of citizens to determine the individuals who will represent them and the policy preferences that they will represent. On the other hand, there is a significant body of democratic theory that takes the opposite position—arguing, in Giovanni Sartori's (1965 : 124) words, that 'democracy on a large scale is not the sum of many little democracies'. Anthony Downs (1957 : 25), for example, argues against an inclusive definition of party, or internal party democracy, because whatever policies emerge 'are likely to form a hodgepodge of compromises'. In this case, even if the representational function of elections might be enhanced, the clarity of choice offered to the voters would be sacrificed. And indeed in the Downsian model, the aim of democracy is furthered by competition between parties that are motivated solely by the private interest of their leaders, who generate popular policies simply as a means of winning votes. It is the personal *disinterest* in policy of the party leaders that leads them to converge toward the first preference of the median voter—which is the policy package that has the best claim to the title 'will of the people'. But since individual party members would not share in the personal rewards of office, the presumption is that they are motivated by policy. Thus, even if internal democracy did not produce the 'hodgepodge of compromise' that Downs feared, it would produce proposals near to the median preference of each party's members, and therefore not at the median of the electorate as a whole. In other words, democracy within the parties would prevent the democratic

outcome that is supposed to be furthered by competition between the parties.

While the Downsian ideal of convergence requires a two-party system, the requirement in multiparty systems is that the leaders of the parties be willing and able to compromise with one another to form coalitions. Particularly because internal party democracy is likely to empower activists, who tend to be stronger if not necessarily more extreme in their preferences, rather than either base party members or party supporters in general, it is likely to make compromise less rather than more easy—and indeed in Lijphart's original work on what he called in English consociational democracy (Lijphart, 1968) (*kartel democratie* in Dutch), elite autonomy from their followers was advanced as one of the secrets to maintaining liberal democracy in a deeply divided society. From this perspective as well, the claim that internal party democracy will further democracy at the system level is at least suspect.

Are free and fair compatible ?

The previous section was concerned with the ways in which the standards of free and fair are dependent on the understanding of democracy adopted. In this section, I address a related question—the degree to which freeness (understood to mean the lack of restrictions on those contesting elections or otherwise participating in electoral politics) and fairness (understood as the metaphorical 'level playing field') are compatible.

Limitations of party campaign practices

The idea that certain forms of campaign practice must be banned because they risk offending groups or inflaming passions, or that certain ideologies or individuals must be banned as being anti-democratic may seem appealing at first glance but is problematic on closer inspection. In Rousseau's (1947 : 91) democratic theory, for example, the first question that 'should always be proposed, and never on any account omitted' was whether the present form of government should be continued—in other words, democracy requires that the continuation of democracy always be regarded as an open question. To say, for example, that the people of a liberal democracy may not choose to be governed instead by a theocracy delegitimizes democracy in its own terms; consent is meaningless if there is no way in which lack of consent can be expressed.

Enforcement of good taste, civility, or truthfulness in campaign activity all necessarily involve not just the protection but also the constriction of democracy. While incitement to genocide, for example, clearly cannot be protected,[6] it also must be recognized that the definitions of good taste, civility, or truth often are politically contentious, so that to impose definitions is to bias the discussion. Again, a balance is required rather than simply an attempt to impose civility, respect for authority, or truthfulness through legislation.

Funding of politics

The conflict between freedom of speech and other democratic values like community also arises with regard to regulation of party finance. First, there is a conflict between the ideals of equality and majority rule (which might suggest, among other things, strong limits on the size of allowable contributions from individual citizens and perhaps a total ban on political spending by anyone/anything except individuals), on the one hand, and the ideals of freedom of speech and the liberal pluralist notion that various groups, endowed with different mixes of resources (numbers for some groups; wealth for others; access to or ownership of strategic communications media for still others) should be allowed to protect and advance their interests as best they can.

Second, there is a conflict between the ideal of politics as a labor intensive activity in which large numbers of citizens take part on a regular basis (again suggesting strict limits on party finance) and the reality that electoral politics has become a capital and expertise intensive activity, in which citizens often can take part more effectively by pooling their financial resources so as to hire experts. In particular, this calls into question the idea that direct spending should be protected as an expression of the right of free speech whereas contributions can be regulated (e.g., *Buckley v. Valeo* 424 U.S. 1), as giving a right to those who are rich enough to take effective action on their own that is denied to those who must pool their resources in order to be effective.

Third, there is a conflict between the idea that the effects of regulations concerning party fund-raising, and especially concerning the provision of public resources or privileges, ought to be in rough proportion to current popular support, and recognition that those who want to challenge the status quo often depend on a very few large donors or access to public resources in order to build public support in

the first place. Moreover, where access to public resources is afforded to parties simply by virtue of their qualification for the ballot, there is a risk of candidacies motivated by desire for the resources rather than desire to influence policy. If access is not equal however, this generally means giving the established or larger parties access to public resources in greater amounts and on more favorable terms than is given to new parties. In other words, apparent equity based on demonstrated support can be extremely conservative in its effect.

Fourth, there is the conflict between the fear that enforcement powers will be used by those in power to repress, harass, or hamper their opponents and the recognition that regulations without an effective enforcement mechanism are unlikely to be effective and may bring the entire notion of fairness through regulation into disrepute. While this problem may be mitigated through the use of non-political election management agencies, it still must be recognized that 'non-political' often is in the eyes of the beholder, and indeed that the very notion of 'non-political' administration has historically reflected a profoundly bourgeois conservative bias.

Access to media

In large societies, freedom of speech without access to the media of mass communications is worth very little. Goodwin-Gill (1994 : 24, 67), for example, cites the final document of the CSCE 1990 Copenhagen Conference that 'no legal or administrative obstacle [should stand] in the way of unimpeded access to the media on a non-discriminatory basis for all political groupings and individuals wishing to participate in the electoral process'. The problems are, first, that like the 'universal' in universal suffrage, no one means 'unimpeded' to be taken literally, and second, that as with public financial support the standard of 'non-discriminatory' is fraught with ambiguity. These problems are manifested in a number of more specific questions.

The first concerns the allocation of time, particularly on state owned media. This reproduces the problems cited above with regard to financial subventions : Who is eligible ? Is the allocation made equally to all qualified parties (with the danger of inspiring frivolous candidacies or spurious multiplication of parties) or proportionately based on strength (with the bias against new-comers that this implies) ? Further, who will pay for the production costs (public payment implying a restriction on the right of the well-endowed to produce the most effective message, with private payment

advantaging those who can afford to pay for more professional presentation) and (in part in response to the first problem) should form or content restrictions be imposed (e.g., allowing only a studio-based 'talking head') ?

The second concerns the reporting of news. Reporting always involves choices : which stories to cover ; how to frame them ; etc. News reporting is important in a free and fair election because it gives the voters the information they need to make informed choices. But this is just another way of saying that news is expected to affect voters' choices. The problem is to reconcile freedom of the press with fairness, given that fairness and balance are inherently subjective. Can there be an objective standard of fairness in reporting ?

Because this problem appears to have particular purchase with regard to public media, where the danger of journalistic bias being imposed as a political choice by and in favor of those currently in power is apparent, there has been a tendency to try to impose more objective standards in these cases. Frequently, these take the form of stopwatch-based equality of coverage. Although not specifically related to elections, the length to which this kind of requirement can be taken is illustrated by Italian television's coverage of government crises in the 1960s :

> No politician's voice was ever heard, nor were his words quoted directly. Instead, party leaders appearing for consultation with the president of the republic were each shown from the same camera angle and for the same amount of time; upon his exit, each was shown in turn speaking at a microphone, but without sound. While this went on, a disembodied voice...read a carefully written and approved summary of what he had said... Italian politicians on television [resembled] fish in an aquarium – 'their mouths move, but no sound emerges' (Porter, 1977 : 261-2).

The more one tries to impose the appearance of fairness, the more one impinges on freedom, or effectiveness, or both.

On the other hand, although it may be more legitimate to impose on the freedom of journalists who are, at least indirectly, in the employ of the government, the problem of unfairness facilitated by insistence on journalistic freedom may be far greater with regard to privately owned media. A current example would be the plans of the Sinclair Broadcasting Group in the United States in 2004 to air a

documentary film of questionable veracity that was highly critical of John Kerry in the days immediately before the presidential election, while labeling it as 'news'. On a grander scale, one could point to Italian Prime Minister Silvio Berlusconi's ownership of much of the Italian private television industry. When control of the media is both concentrated and in politically interested hands, only the self restraint of the owners can assure even an approximation of fairness in the absence of regulation that must be recognized as an infringement of freedom of speech. Ultimately, one can have one or the other, but not both.

Conclusion

If the analysis above is of any value, it is to highlight three facts that must be central to any attempt to assess the freeness and fairness of elections. The first is that if all one wants to do is identify electoral events or practices that are grossly inadequate, the task is easy. If ballot boxes are stuffed, or voters are credibly threatened with death, or opposition candidates are barred from campaigning, or government coffers are opened to fund the campaign of only one party, a precise legal code is not required for the legitimacy of the outcome to be rejected.

The second conclusion is that once one allows the possibility of degrees of freeness and fairness, the task becomes very complicated. Most obviously, the problems of establishing thresholds of acceptability and measures that can be used to assess the placement of actual electoral events relative to those thresholds are far from trivial, and are only complicated by recognition that the reports of election observers may have a significant bearing on the likelihood of post-election violence and on the likelihood that a transition to stable democracy will be continued. Is a flawed election better or worse than no election at all ? Beyond these problems, however, what this paper has shown is that even the standards by which acceptability might be judged depend on the understanding of democracy that one employs.

The third conclusion is closely related, and equally troubling. It is that while democratic legitimacy requires that elections be both free and fair, there are a wide range of conditions and circumstances under which freeness and fairness are incompatible. As a result, a balance must be struck between the two desiderata. While the particular balance that is appropriate will depend to a certain extent on local conditions (limitations of freedom in the name of limiting

concentrated economic power or media control are more justified where there is more concentration in the first place), they cannot determine the one most appropriate tradeoff, because there is no one most appropriate tradeoff.

Few, if any, decisions of these types are politically neutral. Some interests or parties are advantaged and others disadvantaged—at least relative to other decisions that might equally plausibly have been proposed. Since there can be no unproblematic standard by which freeness or fairness can be assessed, this means that to propose reforms, even in the name of fairness or neutrality, is likely to be perceived by some participants as taking sides in the substance of political competition. Certainly there are some practices that are unacceptable by any reasonable standard of democratic propriety, and those should be opposed. Beyond that, however, those who advocate standards for the evaluation of electoral practices would be well advised to recognize that such proposals are not above politics, but are of politics.

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Notes :

[1] Although there are some apparent similarities between what I have identified as popular sovereignty models of democracy and Lijphart's (1999) model of majoritarian democracy (in particular in the former's identification of the popular will with the will of the majority – itself identified in my popular sovereignty models as the Condorcet choice, assuming that there is one), there are also substantial differences. Likewise, although there are similarities between my liberal models of democracy and Lijphart's consensual model (indeed, I regard Lijphart's (1968) earlier model of consociational democracy to be one of the liberal models), these two categories are far from identical.

[2] I use the phrase 'political space' as a short-hand to refer to the number of issues in play, their nature (i.e., whether the options may best be characterized as dichotomous, polychotomous, or continuous), their dimensionality, and the degree to which attitudes concerning different issues may be expected to cluster.

[3] While not including all of the criteria that they consider, this list is adapted from Elklit and Reynolds (2005 : Table 1).

[4] This example was chosen deliberately to be provocative. In substantive terms, I agree with the point that David Beetham raised in reply, that the exclusion of women simply is wrong. On the other hand, like all questions of right and wrong, the virtue of including women is not amenable to an empirical answer. As with the teaching of evolution as the only scientific theory of the origin of species (with 'theory' here implying no more doubt than it does with regard to the 'theory' of gravity), overwhelming consensus on the part of experts may have little probative value with those who, for 'cultural' reasons, do not accept the basic premise. But it is precisely in those circumstances in which there is disagreement about culturally specific values that the problem of defining "free and fair" is most important.

[5] An exception is what I described (Katz, 1997) as 'collectivist popular sovereignty' theories.

[6] For example, Georges Ruggiu pleaded guilty to incitement before the International Criminal Tribunal for Rwanda. See Carver (2000).

Judging Elections by their Outcome ?*

Louis Massicotte

The year 2004 marked the tenth anniversary of the adoption of the Declaration on Criteria for Free and Fair Elections by the Inter-Parliamentary Council in Paris. Of the Inter-Parliamentary Union's 129 Member Parliaments, 112 were represented, and all of them reportedly concurred with the Declaration's contents. The Council's work had been facilitated by a study commissioned by the IPU and prepared by Professor Guy Goodwin-Gill under the title of *Free and Fair Elections: International Law and Practice*.[1]

Achieving unanimity on such a topic as determining 'free and fair' was a major achievement, and one that could hardly have been imagined before the early 1990s in a body as inclusive as the IPU. Undoubtedly, the downfall of communism in Europe, the end of the Cold War and the rush to hold competitive elections in countries where they had, until then, been unknown had much to do with this success. A general consensus emerged around the idea that for elections to be taken seriously, they had to be competitive. The time was ripe for specifying the conditions that had to be fulfilled for a competitive election to be considered free and fair.

In evaluating the Declaration, we find that the standards enumerated for free and fair elections were heavily procedural. They included the right to vote, the right to vote in secret, the right to be a candidate and to establish or join a political party, and the right to express political opinions without interference. States were urged to take the necessary legislative steps to guarantee these rights, notably to ensure that voters were able to cast their ballots freely, without fear or intimidation.

This approach is wholly indifferent to the actual outcome of elections. Whether the winners have won under a fair electoral framework matters immensely. Whether that framework has been duly implemented also matters a great deal. But *who* actually won is not supposed to matter.

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* This paper was presented during the proceedings of *Free and Fair Elections*, *Ten Years On : An International Round Table on Election Standards* held in Geneva in November 2004. The author thanks Rafael Lopez-Pintor for his thoughtful comments offered as commentator during the session.

Looking at the specifics of election law that were singled out as criteria for free and fair elections, we also find much prudence. The Declaration focused on features that met with universal (or almost universal) agreement. Based on international instruments, Butler et al. (1981) had listed five of them : universal suffrage (one person, one vote) ; equality of voting power (one vote-one value), voting in secret, no intimidation of voters, and elections that designate effective rulers, not members of a sham body. The Declaration also mentioned the importance of a neutral or balanced election management body, a factor emphasized by Rafael Lopez Pintor during our discussion in Geneva. 'Sexier' considerations—such as which electoral system should be implemented, whether voting should be made compulsory, how political parties should be financed, or to what extent political spending should be controlled—were left for political scientists and politicians to debate among themselves, with little consensus emerging after decades of discussion.

In fact, there was much wisdom in pursuing this approach. Even if we were to focus on the so-called advanced democracies, none of the five minimal criteria offered here were universally accepted until the mid-twentieth century. Women were deprived of the vote in a few major European countries until the end of World War II and were enfranchised in Switzerland only in 1971. Rural areas were heavily over-represented in North American and Australian legislatures until the 1960s. Voting in secret was practically unknown until the 1870s and was introduced in France only in 1913. Responsible government, which suggests that in countries with parliamentary systems the legislature should be not only a law-making body but a confidence chamber, came to Sweden in 1917 and Germany in 1918, for example.

In addition, few of these minimalist criteria are absolute. Even in the most mature democracies, many remain disenfranchised. Non-citizens are excluded in the vast majority of democracies, even if their numbers may amount to a sizable segment of the population (9% in Germany, some 17% in Switzerland) and thus become the target of right-wing demagogues during election campaigns, without the possibility to retaliate at the polls. Prison inmates, the mentally handicapped and people convicted of corrupt or illegal practices at elections also spring to the mind (Massicotte et al., 2003 : 15-39). Today, rural and remote areas still tend to be over-represented, although slightly, in Canadian legislatures.

These criteria were devised in a highly empirical manner, and for good reasons. Western countries were then beginning to offer assistance to developing countries conditional on holding some kind of free and fair election; and the United Nations was engaged in monitoring electoral processes for their freeness and fairness in order to end civil wars. The obvious question was this: What do you mean by free and fair elections ? The answer was not easily identified because election legislation differs widely, even in democratic countries. As an example, if Western States had decided to include an electoral system based on proportional representation among the criteria for free and fair elections, one could immediately point to the USA, Britain, Canada and France as being delinquent. If a stringent regulation of political party financing and of election spending became a criterion, the evidence would be even more incriminating. The USA and Germany, for example, still do not cap election spending, and business contributions to campaigns are outlawed in a just few countries while accepted in most.

This is why, I argue, the approach pursued by the Declaration was minimalist and prudent. Implicitly, it was grounded on a very simple principle : Do not preach to other countries what you do not practice yourself. Focus on a few of the basics that meet with near-universal agreement among countries which are acknowledged to hold free and fair elections. Having just these may not amount to perfection, but their very introduction would constitute a tremendous advance in countries deprived of anything that could approximate free and fair elections. Doing otherwise would invite accusations of hypocrisy from those who are asked to hold free and fair elections. It is useful to keep this in mind in evaluating what would occur if we started to judge elections according to their outcome.

At this point, let us try to determine what kinds of outcomes might be required for an election to be called truly free and fair. One can imagine *political* (or partisan) *outcomes*: whether the 'correct' political parties come out on top, or whether the opposition gains a victory. One can also think of *representational outcomes*: whether the elected legislature truly reflects the socio-demographics of the electorate or the exact strength of the various parties in the electorate. An examination of these two sets of outcomes follows in turn.

Political outcomes

To my knowledge, no one to date has seriously argued that elections should be considered free and fair based on whether a specific political party has won. This should come as no surprise. We all have every right, in our own inner thoughts, to wish the victory of socialist, free enterprise, nationalist or religious political parties, whatever our own inclinations lead us to prefer, but the idea that our personal wishes should be erected as an international standard, determining whether the election is free and fair, is grotesque and would defeat the very purpose of a free election. An election is a choice between competing options, options which are all assumed at the very least to be worthy of public discussion. Electoral procedures purport to guarantee that this choice is freely expressed. If the victory of a specific party were determined in advance to be the only acceptable outcome, why would we bother to ensure everyone's right to vote, to be a candidate, to speak freely or to vote without undue interference?

A more modest but, in my view, equally puzzling position would be to assert: An election is deemed free and fair insofar as the opposition wins. I agree with Rafael Lopez Pintor that there is some utility in thinking of a winning opposition as a sign of democracy. As the opposition was not in a position to twist the regulations or the implementation of these rules to their advantage but nevertheless won, it is reasonable to infer that the election was probably free and fair. Further, the fact that the same party has proven successful in multiple elections over a period of forty years certainly invites careful analysis as to how those elections were conducted.

Yet, the suggestion that elections can be deemed free and fair only if the opposition wins is highly dubious. While opposition parties should be enabled to criticize and offer a plausible alternative to the 'ins', they are not entitled to power just because they exist. The people are entitled to change their government at the point of their choosing, but they certainly are under no obligation to do so. In Sweden, for example, the same party held the premiership and a majority of seats in the cabinet, almost without interruption, for 44 years between 1932 and 1976, while the same individual held the position of premier, this time without interruption, for 23 years. In Canada, the Liberal Party has been in office for three-quarters of the time since 1896.

Fundamentally, then, an assessment of electoral fairness based on political or partisan outcomes should be avoided. The determination of such criteria will lead to endless debate and, if adopted, will not likely gain wide acceptance outside the specific parties or ideological groupings in favour of them.

Representational outcomes

Socio-demographic outcomes

This leads us to a more widely advocated kind of standard based on outcome. Elections could be deemed free and fair to the extent that rulers reflect the socio-demographic characteristics of the electorate. This is what Birch (1971 : 16-18, 53-60) called 'microcosmic representation' and described in this manner: 'According to this usage, a representative is a person whose characteristics reflect those of a larger class of persons to which he belongs, and of which he is in some sense a typical member' (Birch, 1975 : 56). In this light, legislatures should be representative samples of the population that elected them.

Though gender has emerged over the last twenty years as the most frequently advocated criterion of that nature, the list of socio-demographic features which could qualify for inclusion is endless : race, ethnic origin, language, religion, age, occupation, place of residence, sexual orientation, marital status, and so on. As far as I know, no parliament today can be said to reflect fully the socio-demographic make-up of the population it serves. On a continuing basis, the IPU has informed us of the various degrees to which women are underrepresented in Member Parliaments. But the young and seniors, manual workers, and the ill-educated are commonly and routinely underrepresented as well. Some minorities are successful in overcoming underrepresentation thanks to their spatial concentration in the electorate, which increases the likelihood that some of them will be returned to parliament. This is the case of ethnic minorities, language groups and, to a lesser extent, religious groups. The increasing tendency for gays and lesbians to live in small enclaves has led to the election of a few of them in legislatures, especially in countries with smaller single-member districts. Though residence in the constituency is not a legal requirement in the vast majority of countries, most members actually do reside in the constituency they represent. Yet microcosmic representation is an ideal that few if any countries can be said to have fulfilled.

Moreover, achieving the ideal of microcosmic representation is made problematic in practice by constitutional structures which concentrate executive power in a single individual, be it a directly-elected president or, in a Westminster-type parliamentary system, an indirectly-elected Prime Minister. No single individual by definition may embody the complex socio-demographic make-up of the country. The best that can be achieved in such a setting is the occasional election of a minority person who happens to be preferred even among the majority. Examples of this abound: Canadian Prime Ministers have often come from Quebec over the last 30 years, Britain has had Scottish and Welsh Prime Ministers, and Paris and Berlin now have openly gay mayors. This has not been the result of any legal requirement, but a political dynamic; a specific minority individual happened to be preferred at the time. A legal requirement mandating the election of a specific type of person as president or prime minister based solely on his or her personal characteristics would be nearly impossible to enforce in a real-world context. The assertions of supporters of microcosmic representation can be achieved only in the composition of legislatures (and of cabinets).

Two questions should be clearly distinguished here. First, is it desirable that legislatures become more representative of the socio-demographic fabric of the country than they now are? Second, and more to the point, should the microcosmic representation of genders, ethnic groups, occupations and the like, be erected as a standard for determining whether an election is free and fair?

I believe it is desirable that elected members of parliament reflect more closely the demographic make-up of their countries, especially with regard to gender. I also concur with Lopez Pintor's comment that a representation of ethno-cultural or religious minorities may be indicative of a democratic quality, insofar as it expresses the accommodation of significant political cleavages in a society. However, judging from the existing legal arrangements prevailing in democracies, there is no consensus as to whether a full microcosmic representation is desirable. Some political parties have adopted policies of affirmative action in the selection of candidates with the purpose of increasing the representation of women in legislatures. Some countries offer incentives to political parties that do so, or even require a minimum proportion of women among the candidates sponsored by parties. Yet, judging from the outcome of

elections so far, no country has gone as far as requiring that the composition of the legislature faithfully mirrors its full socio-demographic fabric.

The implications of this are clear. Countries where elections are deemed not to be free and fair on the basis of specific standards that mandate a microcosmic representation, even if the election had been otherwise conducted in a free and fair manner, would immediately react, pointing out that the principal standard by which they had been judged is not routinely followed elsewhere.

Accurate representation of parties in the legislature

Another possibility is requiring that the composition of parties in the legislature faithfully reflect the strength of the various parties in the electorate. Among all existing electoral systems, only proportional representation satisfies this ideal. Given this logic, elections held under plurality and majority systems, as well as those held under mixed systems that do not produce proportional outcomes (like superposition or parallel systems now existing in countries like Japan and Russia) would not be considered free and fair.

In his study, Goodwin-Gill (1994 : 28) had this to say on the issue :

> State practice confirms the variety of available choices, and no system can be considered, from an international law perspective, to be more valid than any other, provided it bears a reasonable relationship, in law and in practice, to the internationally prescribed objective. The IPU has noted the need, among others, to strike a balance between two essential considerations : that a legislative election above all must make it possible to designate a cohesive government responsible for conducting a national policy; and that the election primarily must guarantee representation at the national level of the country's political forces, and reproduce in Parliament as faithful an image as possible of their relative strength. The IPU has also stressed the importance of a reasonable link between the electors and the elected, reflecting those elements of proportionality which also characterize the governing principles of international law.[2]

Has the time come to revise this opinion and to erect proportional representation as a standard for an election to be considered free and fair ?

Like their opponents, supporters of proportional representation have often held that their own preferred system was the only acceptable electoral system. Before World War I, French constitutional law professor Joseph Barthélemy (1912 : 626) asserted confidently that one day proportional representation would become, like universal suffrage, a universal feature meeting universal approval. While a century later, this perspective has seen some advances, proportional representation remains only one possible electoral system among others. It works to the satisfaction of most in some settings, while in others the outcomes have been found wanting and have led to a return to majoritarian formulas. In a survey published in 1997, we found that among countries having a working elected parliament, 59 used the plurality rule, 25 had a majority system (either two-ballot or alternative voting), 56 were using proportional representation and 25 had a mixed system (Blais and Massicotte, 1997). The tally may have changed somewhat since then, but certainly not to the extent that proportional representation has become universally accepted.

There is some tendency for established democracies to opt for proportional representation. Focusing on countries that were rated 1 or 2 by Freedom House at that time, we found 26 with the plurality rule, 6 with majority systems, 34 with proportional representation and 10 with mixed systems (not all of which yielded proportional outcomes). Yet even among democracies, we can hardly speak of a consensus that proportional representation is the only system that fulfils the democratic ideal. If the size of respective populations were taken into account, countries that do not use proportional representation systems, such as the United States, India, the United Kingdom and France, could conceivably outnumber proportional representation countries.

Even among proportional representation countries, some hardly comply with the professed ideal. Most of the technical literature on proportional representation systems indeed purports to explain why distortions still persist between votes and seats in proportional representation countries. In many of these countries, thresholds of exclusion openly bar parties whose support does not reach a specific level : 0.67% in the Netherlands, but as much as 10% in Turkey (Blais and Massicotte, 2002 : 51-3). In the Russian Federation during the 1995 election, a 5% threshold in this highly fragmented electorate barred as many as 49% of the voters from getting any of

the seats filled in the Duma. Low district magnitudes and the use of the highest average method for distributing seats may combine so as to exclude a sizable segment of the electorate and boost the performance of larger parties. The most ardent supporters of proportional representation speak of a 'phoney majority' whenever a party has a majority of seats, but not of the popular vote. On that standard, among the five German Land single-party majority governments (all elected under a mixed-member proportional system) existing at the end of 2004, four rested on phoney majorities, one of them having captured a mere 43% of the vote. In some proportional representation countries, manufactured majorities of that kind have been recorded. During the 2003 election in Belgium, only five of the nine parties that secured seats in the House of Representatives were returned in the order they were preferred by the electorate, which means for example that one party ranking sixth in the popular vote ranked third in terms of seats. In Malta, under a single transferable vote system, one of the parties lost the 1981 election despite having secured more than 50% of the popular vote.

There is no doubt that proportional representation systems tend to reduce distortions, and such an outcome may be viewed as desirable. You could not expect any other view from an academic who supports the introduction of a mixed member proportional system in his own country ! Yet it appears that distortions can be virtually eliminated only if the whole country becomes a single electoral district or if we have a corrective tier at the national level. Even in countries that have taken these steps, explicit thresholds often bar the parties that do not reach a minimum level of support. In each of the three countries (the Netherlands, Israel and Slovakia) where the working of proportional representation is untrammelled by the existence of electoral districts, a threshold has been deemed indispensable.

From a practical point of view, it seems impossible to erect as an international standard, a specific electoral formula which exists in a minority of countries and which has not yet been adopted even by a majority of acknowledged democracies. The case weakens further when one realizes that in practice proportional representation countries tend to qualify the very principle of their own legislation through various devices whose impact is not always minor. Proportional representation may be viewed as fairer and, in

many countries, as the most desirable option under the circumstances. Other systems still have their supporters, however, so the debate continues. It seems premature at this stage to seek to erect proportional representation as a standard.

Richard Katz has suggested that whenever a party or presidential candidate wins the election with a smaller number of votes than its main challenger—as occurred in the U.S. presidential election of 2000—the election should not be deemed to be free and fair. This approach would not rule out plurality or majority systems as such. Rather, it would address a type of outcome, which may also occur in a proportional representation system, that many see as perverse. The idea is attractive, as such 'wrong-winner' outcomes indeed challenge the very logic of majoritarian systems, not to speak of common understandings of democracy. Yet, the idea raises some concerns. What if such outcomes happen to be accepted, even by those who lost? Apart from the 1981 election in Malta, no such outcome has led to public disturbances. Losers tend grudgingly to accept their defeat because 'these are the rules of the game', and because they expect the same system to reward them later as it did in the past. In the US presidential election of 2000, Bush's victory resulted from his ability to carry most of the smaller states, which are entitled to a little bonus in the Electoral College because the number of votes for each state is determined not only by its number of Representatives (which is proportional to population), but also by its number of Senators (which is the same for every state, thus inflating the relative weight of the smaller states). This arrangement may look odd to many, yet it has been defended as a logical consequence of federalism and no serious attempt to reform the electoral college has taken place following that anomalous outcome.

Conclusion

There is no perfect electoral system. Since the beginnings of democracy, countries have been deliberating on the merits and weaknesses of various approaches. In some areas, we have reached, through a lengthy process of trial and error, something that approaches a consensus. The 1994 Declaration on Criteria for Free and Fair Elections embodies them. On other issues, at this time, the jury is still out. I argue that we should build on the features that have survived the test of experience and have emerged as universally-acknowledged standards. With regard to others, it seems preferable at this stage to let the debate go on in the IPU membership.

This will not ease the work for some reformers. They will be obliged to convince their fellow citizens that their ideas are better, instead of appealing to some lofty standards devised inside international organizations in the friendly company of like-minded people. Once their views have nearly gained consensus, it will become easier to include them among the criteria for democratic elections. The alternative is to establish standards that do not meet with universal agreement, or worse, that are supported by only a minority of countries. Such standards, I predict, would have minimal impact in view of the number of countries which do not put them into practice. Nothing diminishes an international organization's moral authority more than forcing on a reluctant government views that do not meet with the approval of a strong majority of the organization's own members.

Finally, we should never forget that elections are instruments of *choice*, that the electorate remains free to produce outcomes with which, in our wisdom, we might disagree. Prescribing specific outcomes in the end smacks of arrogance. It may be excusable when it comes from well-meaning activists for specific causes. Yet, coming from responsible international organizations, this kind of approach could simply backfire and diminish their credibility, for it would defeat the very purpose of conducting competitive elections that, in the end, allow the people to choose their rulers *freely*. Freedom implies the right to arrive at outcomes of which the powers-that-be—wherever they sit—may not approve.

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Notes:

[1] The text of the Declaration can be found on pages x-xiv.

[2] In a footnote, the author notes that the word 'proportionality' here differs from and is not intended to be a substitute for electoral systems based on proportional representation.

Judging Elections and Election Management Quality by Process *

Jørgen Elklit and Andrew Reynolds

At the heart of democratization attempts lie competitive elections, often held during times of societal stress and under imperfect logistical conditions characterized for example by administrative unreadiness. The claim here, as argued in greater length elsewhere (Elklit and Reynolds, 2002), is

- that the relationship between the institutionalization of electoral politics—in particular the administration of the electoral process—and the emergence of democracy in the developing world and elsewhere is a much under-studied part within the fields of governance and democracy studies; and
- that a focused analysis and assessment of the quality of the various elements in the electoral process will provide those interested in electoral quality in general and election management quality in particular with a useful instrument, which has so far been lacking in the tool kit of electoral assessment.

It is difficult not to agree with those who claim that assessments of elections must focus on the entire electoral process, as the component parts of that process all have at least some bearing on the entire outcome of the election, i.e., not only the results as such, but also whether or not the entire electoral process is seen as legitimate and binding by voters and other political players.

The quality of an election can thus be conceptualized as the degree to which political actors at all levels and from different political strands see the electoral process as legitimate and binding. However, the operationalization of this theoretical concept is not easy, even though the IPU publication of the landmark study *Free and Fair Elections: International Law and Practice* by Guy Goodwin-Gill (1994) has contributed substantially to the understanding and structuring of the field.

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* This paper was presented by Jørgen Elklit during *Free and Fair Elections, Ten Years On: An International Round Table on Election Standards*, held in November, 2004. The authors are grateful for the helpful comments received from our two respondents at that time, Horacio Boneo and Ron Gould. We also appreciate the comments offered at an Australian Electoral Commission workshop in June 2004 and by an anonymous referee and Peter Burnell, editor of *Democratization*. Substantial parts of this article have appeared in a previous article by Elklit and Reynolds published in *Democratization in 2005*.

One important result of more than a decade of global diffusion of multiparty politics and support for the holding of democratic elections is that it has eventually been realized that the quality of election administration has a direct and important impact on the way in which elections and their outcomes are regarded, not only by international observers and monitors and their organizations, but also—and more importantly—by domestic political actors such as voters, parties and party leaders, media, and domestic observers. However, these groups do not necessarily see things the same way; indeed, their differential perceptions are useful as they allow us to gauge, at least partly, the reasons why different groups arrive at variant assessments of the same electoral process.

Focus here is on how institutional factors and institutional choices, and the ensuing administrative and political behaviour, contribute to the quality of the entire electoral process and therefore also to the transition and the eventual consolidation of democracies. This inevitably leaves aside a whole array of other issues, which also influence the way in which elections are perceived and contribute to the way in which democracy gradually becomes 'the only game in town', *if* that happens.

Elections play a crucial role in that development because they are a necessary condition for having some kind of democratic regime. That is why we focus specifically on the way in which elections are conducted and formulate our questions so that they will enable us to gauge the effectiveness and positive contribution of institutional choices related to electoral process management and the impact of the various stages of the implementation process. Following from this, our main claim is:

- that individual experiences in a number of fields related to the electoral process have a direct bearing on how the sense of political efficacy develops in individual citizens; and
- that this is an important factor behind the development of democratic legitimacy as well as a principled commitment to democracy, i.e., progression towards democratic consolidation (even during the transition phase).

Assessing and observing elections

While an assessment of the quality of national elections (i.e., freeness, fairness, and administrative efficacy) requires a fitting methodology, a clear void exists in the academic and policy literature that focuses on this problem. The field is ripe for the development of a systematic method

that pursues this goal, one that can be applied in the context of both developed and developing world cases, whether during first or subsequent electoral events.

Below, we go beyond previous work in the field of elections and election administration assessment by suggesting a more operational and empirically-oriented approach. We introduce and describe the elements and the scoring methodology of our assessment framework, explaining its rationale and offering the model to election practitioners as well as to election observers and academics interested in these issues. To illustrate its workings we have also scored six multiparty elections : two in established democracies (Australia and Denmark 2001) and four in fledgling democracies (South Africa 1994 and 2004, East Timor 2001, and Zimbabwe 2002), so two of our cases are in the same country over time. This degree of specificity is indicative of the route this field of study must take if it is to contribute substantially to the empirically based assessment and analysis of elections and election management. We want to stress that the intention is not only to develop an instrument for academic analysis. Our claim is that the same instrument will allow useful specific comparisons of developments from one election to the next in the same country and also, although requiring more care, between countries.

We strongly hope that the presentation of this framework and this approach will engender more debate and analysis, which will in return facilitate the model's use as a practical tool for both non-governmental and governmental election observation missions and as a research tool to better understand the issues that determine electoral quality and legitimacy. We are mindful that the model will also allow election managers and administrators to assess the quality of their own work on a comparative basis.

The work has its seeds in our own previous work (Elklit and Reynolds, 2001 ; 2002) which was further developed during a workshop organized by the Australian Electoral Commission in Canberra in June 2004. It is only quite recently that students of democratization have begun to acknowledge that governance issues must also encompass issues related to the conduct of elections in both consolidated and emerging democracies. Those analyses generally agree on conceptualizing electoral governance as a set of closely linked activities, sometimes categorized under the older headings of rule making, rule application, and rule adjudication (Mozaffar and Schedler, 2002 ; Kjær, 2004 :

157-71; Elklit and Reynolds, 2002; López-Pintor, 2000; Elklit, 1999; Norris, 2004; Mozafar, 2002).

Mozaffar and Schedler (2002: 5) claim that because elections in established democracies tend to be routine events, usually producing results within a narrow but fully-acceptable margin of error, systematic analysis of electoral governance has not attracted much scholarly interest. There will always be some margin of error as it is difficult to envisage any large-scale operation such as a national election not being *occasionally* infected by defective ballots, incomplete voter registers, inaccuracies in counting and impersonation, etc. Humans make mistakes, but if these errors are random and do not accumulate to influence the outcome of the election, electoral credibility survives, which is exactly why these credible routines themselves tend to obscure how important electoral governance is. Electoral governance issues only attract critical attention when something goes seriously wrong, or when an electoral issue is taken up as part of a more general election-related controversy (Mozafar and Schedler, 2002: 6; Schedler, 2002).

It seems self-evident that good electoral governance contributes to the democratic legitimacy of competitive elections, but it is not easy to determine exactly how electoral governance in itself affects political democratization and the development of democratic legitimacy. The claim that electoral quality has a bearing on political legitimacy matters is intuitive, but it is more difficult to offer convincing theoretical arguments and empirical evidence. Indeed, previous attempts at conceptualizing electoral manipulation have aimed at measuring violations of democratic norms during the electoral process, and thus have focused on electoral manipulation as an indicator, not a cause, of illegitimacy (Elklit and Svensson, 1997/2002; Goodwin-Gill, 1994).

Obviously, attempts to hypothesize about the causes of political legitimacy (or illegitimacy) require the inclusion of a number of variables (including different forms of electoral manipulation), which are difficult to operationalize and to measure empirically in such a way that clear conclusions can be established. In spite of these difficulties, one might still be able to use empirical observations as indicators of high or low levels of political legitimacy. Interestingly enough, a number of studies on elections and electoral issues in Latin America do touch on these questions, even though often more indirectly. A recent example analyses the differential turnout rates across Guatemala and tries to identify reasons for the biases (Lehoucq and Wall, 2004).

We emphasize the intimate linkage between the entire electoral process and democratization, but one can go beyond an analysis which is focused on that context. Post-conflict elections must also be judged on their contribution to bringing conflict to closure. Post-conflict elections in cases such as Bosnia and Herzegovina, Mozambique, Angola, Afghanistan and Iraq are obvious examples. However, the framework presented below does not include a special category of 'post-conflict war-torn societies' alongside 'fledgling' and 'established' democracies because we want, in this context, to focus on our main objective, which is the presentation and discussion of the basic framework. Still, there is reason to believe that the addition of a new category, akin to Lyons's (2004) analysis of the role of election administration in some of the more complicated post-conflict elections, could prove very valuable. At the IPU round table, Ron Gould also argued that the use of only two categories would most probably appear to be insufficient, and that one or more in-between categories would need to be established.

Why the need for such a measurement tool?

The lack of a robust and comprehensive framework of analysis has left a space which has so far been filled by two equally-unsatisfactory outcomes: Either election observers make judgments on the basis of impressionistic and incomplete evidence focused on the conduct of the vote and count on election day, or observation missions (often from abroad and with their own government's lead) call an election in a politicized way, detached from any relation to the truth of the process itself. A case in point here is the pronouncement by the official South African observation mission that the 2002 Zimbabwe presidential elections were free and fair.

The greatest failing of election assessment to date has been the tendency to see election quality in bimodal terms. The election is either good or it is bad; or, when a fudge is required, it is 'substantially free and fair'. We claim that the quality of elections across cases and across time can be seen as existing on a continuum, even though it makes sense to approach this fuzzy concept as one of multidimensionality (Elklit and Svensson, 1997/2002). Election management within a country can be strong in some areas and weak in others. The playing field that regulates the campaign can vary subtly in both de jure and de facto ways, and elections clearly can improve as well as decline quality-wise on a number of dimensions over time. One needs to look at both process and outcome to gauge the full picture of election quality.

It would be too simplistic to apply a rigid methodology which gave, for example, Sweden a 92, the United States a 78, and the Congo a 59 and see such scores as perfect indicators of the nuances of all that goes into allowing for good electoral processes. At the same time, however, there are clear clusters of electoral elements which we can assess, and one is able to offer an overall assessment of election quality which is more rooted in the evidence than previous impressionistic offerings.

There is also the important question of whether an election's failings are great enough to affect the final result. Is an election during which only 1% of the votes are lost or manipulated and the winner wins by ½% any worse than an election during which 30% of the votes were irregularly cast or treated but the winner wins by 35% ? Should election quality primarily be assessed on the basis of the electoral process or the electoral outcome—or both ?

We do not offer a foolproof method for categorizing election quality, but rather lay out a framework which is more comprehensive and meaningful than anything that has come before. Using a consistent and over-arching assessment model allows not only for cross-country comparisons but also for comparisons of elections within a single country over time. We believe the framework will identify patterns of success and failure in the fairness of elections and be able to spotlight the weak areas of election administration that a government might reasonably focus its subsequent quality improvement efforts on.

We are also aiming to develop a logically-sound methodology, one that lends itself in the context of election management to an uncomplicated application, straightforward mapping, and easily-determined quantification. The use of the framework in very different environments is a strong argument for not applying complex statistical methods, which may not be appropriate in all cases. This form of modesty is also warranted when the phenomenon under scrutiny is characterized by a considerable number of constantly changing variables, many of which are difficult to measure in a precise, valid, and reliable way.

We expect the model to be refined by the expertise of academics and practitioners both for its scope and scoring methodology. We think it is useful to take an election that one is familiar with and for which one has access to relevant data, and then to score the case using our methodology. Eyeballing the results alongside the examples we offer here will give a good feel for the strength, or not, of the framework.

It looks as if established democracies might tend to lose points on areas of election management such as transparency, voter education, campaign regulation, and appeals processes. Our guess is that effective provisions covering these areas have atrophied as public trust in the system has grown over time. The framework therefore identifies a potential Achilles heel in elections, even within stable democracies. A thorough assessment of both voter registration and complaint procedures in Florida prior to the 2000 US presidential election (and in a number of other US states in 2004) would most likely have identified the issues which marred the two electoral processes.

In fledgling democracies, the niceties of election law may be quite robust, at least in the first competitive election, but the playing field of electoral competition is often deeply skewed in favour of dominant parties and elites. This is something that becomes even more problematic over time. Our framework attempts to capture both sides of the equation, the de jure and de facto rules that shape elections, the written laws and the practical realities, the freeness of the vote and the fairness of the campaign, as well as the chance to win and the ability to lose.

Introducing the framework

One of the chief questions when trying to gauge the freeness and fairness of an electoral process is where to draw the boundary when it comes to deciding what issues are relevant to the question. The boundary lines are murky. While we feel it is important to go beyond polling day and the vote count, we exclude from our analysis the very broad determinants of political competition that speak only more indirectly to elections and voting. For example, we include questions of access to public media and boundary delimitation while excluding more general issues of party funding and candidate selection.

When it comes to the electoral indicators, our rule of thumb is not to pronounce upon the inherent fairness of an electoral system or regulation (if it is generally perceived to be a legitimate democratic option), but rather to assess whether the rules, as written, are applied fairly and without partisan bias. Kenya, to take just one example, would not lose points because it uses a majoritarian rather than a proportional electoral system but because its majoritarian single member districts are so massively malapportioned, in a manner which gives rise to partisan bias.

There will probably be criticisms of our framework, just as there are valid criticisms of any assessment method that combines elements of objective and subjective assessments and weightings of various elements. Through our pilot studies, however, we find our method defensible on grounds of providing results that are prima facie intuitive and reasonable. The expert panels which we envisage would use the framework should be knowledgeable, detached, and diverse, and we believe that the data indicators identified give us the best purchase on the questions we seek to answer. Of course country experts may assign different scores within the 54 survey questions, and we encourage them to do so; this merely indicates the framework's sensitivity to a continuum of indicators.

After settling on relevant areas of election regulation and administration the issue becomes : Which questions must one ask to gain a clear view of the workings of the given area, and what data will serve as good indicators of electoral performance? In our model we have eleven steps ranging from the initial legal framework to the closing post-election procedures. We incorporate the areas an Election Management Body (EMB) usually has responsibility over: districting, voter education, registration, the regulation and design of the ballot, polling and counting along with some broader areas such as campaign regulation, complaints procedures, and the implementation of electoral results.

Each step includes three to ten questions, the answers to which will gauge the quality of election administration and conduct for that step. In sum, there are 54 questions that act as our indicators. Some of them may be criticized for not providing sufficient discrimination between cases, and one may therefore argue that they should be excluded. Still, at least some of them will help clarify that some components of election administration are performed more or less in an identical fashion—an important point to be made. Some steps are analysed primarily through reference to data such as specific voter education efforts, while others are by necessity scored more on the basis of expert judgments (i.e., the perceived legitimacy of the EMB, even though this variable can also, at least in some cases, be gauged from survey data). These answers will to some degree be based on data, but more likely on expert readings and assessments of events and the domestic political climate. However, we also believe that the scoring on the performance indicators can be done, at least tentatively, by election observers (i.e., typically the long-term observers).

Table 1: Election assessment steps and performance indicators

Step	Performance indicators	How to measure
1. Legal framework	1.1. Is a consolidated legal foundation easily available? 1.2. Is a comprehensive electoral time table available? 1.3. Were the elections held without extra-legislative delay? 1.4. Can the electoral legislation be implemented? 1.5. Is the electoral framework broadly perceived to be legitimate?	Expert panel assessment
2. Electoral management	2.1. What is the perceived degree of legitimacy/acceptance of the Electoral Management Body (EMB) by parties and voters? 2.2. What is the perceived degree of the EMB's impartiality? 2.3. What is the perceived quality of the EMB's delivery of service in these elections? 2.4. What is the perceived degree of the EMB's transparency?	Polling evidence for perceptions Expert panel assessment for de jure and de facto analysis of EMB impartiality Survey of stake-holders for EMB quality and transparency
3. Constituency and polling district demarcation	3.1. Is the constituency structure reasonable and broadly accepted? 3.2. Is information about constituencies and lower level districts (demarcation, sizes, seats) easily available? 3.3. Are fair and effective systems for boundary limitation and seat allocation in place and used according to the rules?	Expert panel assessment Stakeholder surveys
4. Voter education	4.1. What percentage of voters in need of voter education is exposed to voter education which facilitates their effective participation? 4.2. Have at-risk groups been recognized and their identified needs addressed? 4.3. What percentage of ballots cast is valid? 4.4. In terms of voting age population, what percentage of those eligible to vote for the first time in this election actually voted?	'In need' is here operationalized as first time voters. 'At-risk' are historically margin-alized groups. Voter education outreach assessed through surveys Other data from register, polling, and election results
5. Voter registration	5.1. What proportion of the voting age population is registered to vote? 5.2. Is the register free from serious bias based on gender, age, ethnic or religious affiliation, or region? 5.3. Are qualified people able to be registered with a minimum of inconvenience? 5.4. Are there appropriate mechanisms for ensuring that the information in the register is accurate? 5.5. Are there appropriate mechanisms for ensuring that the public can have confidence in the register? 5.6. Are the criteria for registration fair and reasonable and compliant with accepted international standards?	Data from register Expert panel analysis

Step	Performance indicators	How to measure
6. Access to and design of ballot paper. Party and candidate nomination and registration	6.1. Are parties allowed, and can parties and candidates that fulfil the requirements of registration be registered without bias? 6.2. Are independent candidates allowed and registered if they fulfil legal requirements? 6.3. Is the method of voting or the design of the ballot paper non-discriminatory?	Expert panel assessment
7. Campaign regulation	7.1. If there is a system to provide access to state-owned media, is it implemented equitably? 7.2. If a system for allocation of public funds to political parties is in place, is it implemented? 7.3. Is there an independent mechanism for identifying bias in the state media and is identified bias subject to swift correction? 7.4. Are state resources by and large used properly by the political parties and candidates?	Expert panel assessment
8. Polling	8.1. What is turnout as a percentage of total registration? 8.2. What is turnout as a percentage of the voting age population? 8.3. Is there a low level of serious election-related violence? 8.4. In how many polling stations did polling happen according to rules and regulations? 8.5. Are there systems in place to preclude and/or rectify fraudulent voting? 8.6. Is polling accessible, secure, and secret? 8.7. If there is substantial desire for election observation, is the desire satisfied? 8.8. If there is substantial desire for political party election observation, is the desire satisfied? 8.9. Are there systems in place to preclude vote buying? 8.10. Is the level of intimidation sufficiently low that voters can express their free will?	Data from elections results and observer reports Expert panel assessments based on data
9. Counting and tabulating the vote	9.1. Is the count conducted with integrity and accuracy? 9.2. Is the tabulation transparent and an accurate reflection of the polling booth count? 9.3. Are results easily available to interested members of the general public? 9.4. Does counting take place with no undue delay? 9.5. Are parties and candidates allowed to observe the count?	Expert panel assessments based on data from observer reports

Step	Performance indicators	How to measure
10. Resolving election related complaints. Verification of final result and certification	10.1. Are serious complaints accepted for adjudication? 10.2. Is there an appropriate dispute resolution mechanism which operates in an impartial and non-partisan manner? 10.3. Are court disputes settled without undue delay? 10.4. Do election observation organizations confirm that the elections were without serious problems? 10.5. If legislation prescribes a timeframe for the constitution of parliament, is this timeframe met? 10.6. Is a person with a reasonable case able to pursue that case without unreasonable personal or financial risk? 10.7. Are seats taken only by those properly elected?	Expert panel assessments Reports Legislation Expert panel assessments
11. Post-election procedures	11.1. Are properly documented election statistics easily available without serious delay? 11.2. Are EMBs audited and the results publicly available? 11.3. Is there capacity for election review?	Expert panel assessments

For consistency each question is answered with reference to a four point scale (very good [3], good [2], not satisfactory [1] very poor [0]). Assigning a score from this scale is, of course, ultimately a subjective call, but we can offer guidelines in some areas (and will do so when the manual is eventually presented) when it comes to the use of indicative data. For example, when it comes to scoring questions of turnout (questions 8.1 and 8.2) one might make the score dependent on the cases' deviation from the peer group average. A turnout of 80% in the Congo might be considered wonderful when compared to peer group cases, while a turnout of 80% might be considered not quite as stellar in Australia.

This model is akin to methodologies used for comparative measures of democracy, human rights, and corruption by bodies such as Polity, Freedom House, and Transparency International. It shares the qualities of these indices as well as their problems (Munck and Verkuilen, 2004), which we will not elaborate on here.[1] Each scoring system depends on both objective data indicators and subjective expert assessments and they are all, as David Beetham says, democracy assessment comparisons based on 'league tables of human rights and democracy' (Beetham, 2004: 2-3; Munck and Verkuilen, 2004).

In our pilot cases, the original, relatively-simple scoring system proved inadequate to capture the differing pressures pertaining to

established versus fledgling democracies. Weightings are therefore used to reflect step importance relative to each of the two types of polity. Our rule of thumb was to ask: If this element fails, will that cause the catastrophic breakdown of the electoral process?

This assessment enabled us to assign 'essential', 'important', or 'desirable' status to each step, as indicated in Table 2, where one also notes that assignments are not identical for the two types of polities. To take an example: The standard of election management per se is in our opinion essential in fledgling democracies because of the nature of the problems surrounding the entire electoral process, while election management in established democracies has become more *business as usual*. It is still important (as the Florida 2000 case made so abundantly clear), but failure does not have the same implications for stability as within democratizing post-conflict polities. Voter education is another example of an element to which different importance should probably be attached in established and fledgling democracies.

Table 2: Weighting systems for established and fledgling democracies

	Essential (weight factor: 3)	*Important (weight factor: 2)*	*Desirable (weight factor: 1)*
Established democracies	1. Legal framework 6. Access to ballot 8. Polling 9. Counting the vote	2. Election management 3. Constituency demarcation 5. Voter registration 10. Resolving disputes	4. Voter education 7. Campaign Regulation 11. Post-election procedures
Fledgling democracies	1. Legal framework 2. Election management 6. Access to ballot 8. Polling 9. Counting the vote 10. Resolving disputes	4. Voter education 5. Voter registration	3. Constituency demarcation 7. Campaign regulation 11. Post-election procedures

Pilot cases

We have opted for including quite different pilot cases in order to assess how the instrument performs in systems with high-quality election management traditions, in transitional systems with elections run by the international community, in transitional systems where it is possible to compare two or more elections, and a polity

generally believed to have a dismal election management system. Unless otherwise indicated, we are dealing with parliamentary elections to the lower (or sole) house.

The cases to represent established democracies with well-functioning EMBs are Australia and Denmark, both of which happened to have ordinary parliamentary elections in the second half of 2001. As an example of a parliamentary election in a fledgling democracy conducted by the international community (in this case, the United Nations) we chose East Timor, which also had its election in the second half of 2001. South Africa is another fledgling democracy, but with its own strong election administration (Padmanabhan, 2002). South Africa provides an opportunity to assess performance over a decade and on three different occasions; we have settled for the elections in 1994 and 2004 to allow for over-time comparison. At the other end of the scale, we expect to find Zimbabwe. We have chosen the presidential elections of early 2002 (and not the parliamentary elections of 2000) to work on the basis of the more recent elections. However, there are so many similarities between the 2000 and 2002 elections in Zimbabwe that we believe the scoring of the 2002 presidential election will also, to a very high degree, reflect the situation as it was in 2000.

Even though we have also considered the inclusion of other pilot cases from sub-Saharan Africa—such as Zambia 2001 (Burnell, 2002; Kamemba, 2002), Ghana 2000 (Smith, 2002), or Lesotho 2002 (Southall, 2003; Elklit, 2002) in order allow more regional comparisons—we have decided to leave that for another, later analysis. The principal aim here is to present the instrument and invite comments on the method and framework.

Scoring (by a select group of experts and experienced observers well versed in election matters in relation to the specific cases) and computation of the index values for the six pilot cases was done in the following way:

1. The first step was to allocate a score (0: very poor; 1: not satisfactory; 2: good; 3: very good) to each indicator for the election in question. In binary situations, 0 and 3 were used. The tentative scores are all found in Table 3. They are all subject to correction at this point, but have been provided by evaluators with good factual knowledge and an understanding of the various

systems. Each score is supposed to strike a balance between the expectations in a given polity and internationally recognized norms and standards.[2]

2. The sum of scores for each of the eleven sets of indicators (e.g., 7.1-7.4) is then standardized relative to the value ten to make the index insensitive to the number of indicators used for each step and for ease of comparison across steps. This procedure also has the advantage of softening the importance of decisions about scoring of border-line cases, of which there are a number (i.e., "Is this a 1 or a 0?").
3. This standardized value is then multiplied by three, if the step is considered 'essential', two if 'important', and left as it is (i.e., multiplied by one), if it is only 'desirable', as categorized in Table 2 above. This procedure caters to the various areas being of different importance in established and emerging democracies.
4. Because of this, the maximum values differ—240 for established democracies and 270 for fledgling democracies. A transformation to a maximum value of 100 (i.e., a further standardization) is conducted in order to have values that are as comparable as possible.

The result is a scoring system in which it makes sense to compare polities in relation to their level of democratization. Indeed, this was one of our ambitions in constructing the framework.

For the purposes of transparency, professional exchange, and improvement of our methodology, Table 3 gives the detailed scorings for the six pilot cases. Commentators with special insight may disagree on the inclusion or the particular focus of one or more of the 54 individual items and they may also disagree on the individual scores tentatively allocated. We are happy to be corrected if incorrect or arguable scores have been allocated in any of the cases. The weighting of the various areas in established as well as fledgling democracies is also not above criticism, and it may eventually appear in a different form than what one now sees in Table 2.

Despite our willingness to consider all objections or suggestions for improvement very seriously, we are comfortable with the resulting scores and their assessment of the level of electoral quality in the polities and elections included here.

Table 3: Performance indicator scores for six pilot case elections

Performance indicator	Australia 2001	Denmark 2001	East Timor 2001	South Africa 1994	South Africa 2004	Zimbabwe 2002
1. Legal framework:						
1.1. Consolidated legal foundation?	2	3	3	3	2	1
1.2. Comprehensive electoral time table?	3	3	3	3	3	1
1.3 Elections held without extra-legislative delay?	3	3	3	3	3	3
1.4. Can electoral legislation be implemented?	3	3	2	2	2	1
1.5 Electoral framework generally considered legitimate?	3	3	3	2	3	1
Intermediate step scores	9.3	10.0	9.3	8.7	8.7	4.7
2. Electoral management:						
2.1. Perceived degree of EMB legitimacy?	3	3	3	3	3	1
2.2. Perceived degree of EMB impartiality?	3	3	3	3	2	0
2.3. Perceived degree of quality in EMB service delivery?	3	3	2	1	3	1
2.4. Perceived degree of EMB transparency?	1	2	3	2	2	0
Intermediate step scores	8.3	9.2	9.2	7.5	8.3	1.7
3. Constituency and polling district demarcation:						
3.1. Constituency structure reasonable and broadly accepted?	3	3	3	2	2	2
3.2. Constituency and lower level district information easily available?	3	3	2	2	3	2
3.3. Fair system for boundary delimitation and seat allocation in place?	3	3	3	3	3	2
Intermediate step scores	10.0	10.0	8.9	7.8	8.9	6.7
4. Voter education:						
4.1. Voter education provided to voters in need?	2	2	1	2	1	1
4.2. At-risk groups with needs identified and needs addressed?	2	2	2	2	2	1
4.3. Percentage of ballots valid?	1	3	2	3	3	2
4.4. Turnout among first time voters, in terms of voting age population (VAP)	2	2	3	2	1	2
Intermediate step scores	5.8	7.5	6.7	7.5	5.8	5.0
5. Voter registration:						
5.1. Registration rate among VAP?	3	3	3	3	2	1
5.2. Register free from serious bias?	3	3	3	3	2	0
5.3. Level of registration inconvenience?	3	3	0	3	3	2
5.4. Mechanisms for ensuring accuracy of registers?	3	3	2	1	2	0
5.5. Mechanisms for ensuring public confidence in register?	2	3	2	1	2	0
5.6. Fair registration criteria, compliant with international standards?	3	3	3	2	3	1
Intermediate step scores	9.4	10.0	7.2	7.2	7.8	2.2

Performance indicator	Australia 2001	Denmark 2001	East Timor 2001	South Africa 1994	South Africa 2004	Zimbabwe 2002
6. Access to and design of ballot paper. Party and candidate nomination and registration:						
6.1. Parties allowed, and can register without bias?	3	3	3	3	3	3
6.2. Independent candidates allowed?	3	3	3	0	0	3
6.3. Method of voting or ballot design non-discriminatory?	3	3	3	3	3	3
Intermediate step scores	10.0	10.0	10.0	6.7	6.7	10.0
7. Campaign regulation:						
7.1. Systems to provide access to state-owned media employed equitably?	3	3	3	3	2	0
7.2. If a system of public funding of parties exists, is it implemented?	3	3	3	3	3	3
7.3. Independent mechanism for identifying bias in state media, and correction of such bias?	2	2	3	2	2	0
7.4. State resources used properly by parties?	2	3	3	2	2	0
Intermediate step scores	8.3	9.2	10.0	8.3	7.5	2.5
8. Polling:						
8.1. Turnout as per cent of registration?	3	3	3	3	2	2
8.2. Turnout as per cent of VAP?	3	3	2	3	2	2
8.3. Low level of election-related violence?	3	3	3	1	2	0
8.4. Polling according to rules and regulations?	3	3	3	3	3	2
8.5. Systems for rectification of fraudulent voting?	1	2	3	2	2	1
8.6. Polling accessible, secure, and secret?	3	3	3	2	3	1
8.7. If desire for election observation, is it satisfied?	3	3	3	3	3	0
8.8. If there is desire for party election observation, is it satisfied?	3	3	3	3	2	1
8.9. Anti-vote-buying systems in place?	3	3	2	3	3	2
8.10. Level of intimidation?	3	3	3	1	2	0
Intermediate step scores	9.3	9.7	9.3	7.7	8.0	3.7
9. Counting and tabulating the vote:						
9.1 Count conducted with integrity and accuracy?	3	3	3	1	3	1
9.2. Tabulation transparent and accurate?	3	3	3	2	3	0
9.3. Results easily available?	3	3	3	2	3	1
9.4. Counting with no undue delay?	3	3	3	2	3	3
9.5. Are parties and candidates allowed to observe the count?	3	3	2	3	3	1
Intermediate step scores	10.0	10.0	9.3	6.7	10.0	4.0

Performance indicator	Australia 2001	Denmark 2001	East Timor 2001	South Africa 1994	South Africa 2004	Zimbabwe 2002
10. Resolving election related disputes. Verification of final results and certification:						
10.1. Serious complaints accepted for adjudication?	3	3	3	3	3	3
10.2. Appropriate dispute resolution mechanism?	3	3	3	3	3	0
10.3. Disputes settled with no undue delay?	3	3	3	3	3	0
10.4. Election observation confirmation if no serious problems?	3	3	3	2	3	0
10.5. Is timeframe for constitution of parliament (if any) met?	3	3	3	3	3	3
10.6. Can persons with reasonable cases pursue them without personal or financial risks?	2	3	3	2	2	0
10.7. Are seats taken only by people properly elected?	3	3	3	3	3	3
Intermediate step scores	9.5	10.0	10.0	9.0	9.5	4.3
11. Post-election procedures:						
11.1. Election statistics available with no serious delay?	3	3	3	2	3	1
11.2. Are EMBs audited and results made publicly known?	3	3	1	3	3	1
11.3. Is there capacity for election review?	3	3	2	3	3	1
Intermediate step scores	10.0	10.0	6.7	8.9	10.0	3.3
Weighted and standardized scores	**89**	**93**	**83**	**72**	**77**	**41**

The legitimacy and broad acceptance of any election depends on the quality of the election management process, but only to a certain degree. A fairly clean, well-managed election may produce results completely unacceptable to losers in one country, while a deeply-flawed election may be accepted in another. There are a host of political, strategic and other factors that come into elite legitimization of an election, which go well beyond the process itself.

Therefore, it is not sensible to establish a certain total aggregate score as the dividing line between legitimate and illegitimate elections, where the latter then would be rejected. As argued by Horacio Boneo at the IPU round table, two cases could both score 75 out of a 100 and have problems in quite different areas. It makes more sense to sensitize the scoring methodology to give primacy to the most important electoral process components in

both established and fledgling democracies, but even so local realities will impact greatly on the perception of how good an election (and the administration thereof) actually is (or was).

The final weighted and standardized scores offered in Table 3 do not constitute the final word in our analysis. They are included for purposes of transparency and as a further indicator of election and election administration quality both over time and across nations. The intermediate standardized scores for each of the eleven steps are also included for the purpose of more focused comparisons.

The aggregate scores make sense intuitively. Yet in our view (which was shared by participants at the round table), the individual (and intermediate) scores are considerably more interesting. They offer particular insight in comparing elections in a specified country, point out areas where improvements in election administration are particularly needed, and help observers assess an election's influence on political legitimacy and democratization.

As argued by Eric Rudenshiold of IFES during the IPU round table, the analysis becomes particularly 'tricky' when a democracy's status changes from 'fledgling' to 'established' and assessment scores must be altered. One possibility is to introduce a system with finer categorizations (containing three or more categories) in the context of developing the overall analytical framework. Such changes will obviously complicate the 'over-time' comparisons, with the consequence being that category weightings within a country may change as time progresses.

Conclusion

The framework functions well and offers a useful starting point for future attempts of identifying levels of electoral governance performance in all kinds of democracies. It provides a tool that enables us to assess electoral processes in a more systematic way than has previously been possible, allowing for comparisons of electoral quality within and across regions and across time. In itself, the implementation of this approach should prove useful. At the same time, however, its implementation may also advance our understanding of what fosters the development and stability of democratic legitimacy.

We invite general comments on the framework presented here, along with more specific evaluations that may contribute to a greater understanding of our analysis of the six elections and the assessments and scorings documented in Table 3. A subsequent step is to invite interested colleagues, election practitioners, and others to join in on our efforts to evaluate an even broader coverage of countries and elections than are offered in this paper. This kind of cooperation is necessary to ensuring the success of such a project, one that solicits country- and case-specific expertise and insight.

We foresee the formation of 'assessment teams' (also 'expert teams') for individual countries, consisting of two to three international and two to three domestic assessors coming together in a specified country to discuss their case(s) and its performance in relation to the various indicators. The basic guidance in this work will come from a general (first) manual to be developed within the project providing the cues for the decisions (in line with some of the indications in Table 1 above, but obviously more detailed and building on established international standards, when such standards exist, a point strongly underlined by Ron Gould at the IPU round table). This should allow the various expert teams to work towards a common goal. At the same time, however, we foresee the analyses going beyond the simple scoring mechanisms outline above. Behind each score, we will expect an indication in clear language of the reasons for the level suggested. This documentation should be available in writing and accessible to interested individuals via a home page on the Internet.

Based on our initial contacts in a number of countries, we have become convinced that considerable enthusiasm exists for gaining access to this kind of instrument. While interest is evident in academic circles, we expect election administrators to express an even greater desire to participate, given their genuine interest in designating areas where improvement is needed, whether in established or in fledgling democracies. Perhaps of greatest importance, we expect that election observers and their various organizations can also make use of such an instrument, providing a better means for assessing a given election and facilitating meaningful comparisons between elections.

Once this work has developed further, a more definitive manual will be produced for use in assessing any election where domestic

and/or international observer organizations and political actors, etc., express interest in systematically judging an electoral event across systems, within and across regions, and over time.

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Notes :

[1] Munck and Verkuilen (2004) demonstrate the various problems of conceptualizing and measuring democracy one finds in the different indices of democracy currently available. A comparison with their stringent approach and useful analyses of previous attempts of indexation is somewhat discouraging because it is not (yet?) possible to live up to the high and very reasonable standards to which they subscribe. However, the framework suggested is only a first attempt to deal with some specific issues and the outcome should in any case be assessed on whatever merits it has.

[2] As reflected in publications such as *Principles for Election Management, Monitoring, and Observation in the SADC Region* (Johannesburg: Electoral Institute for Southern Africa, 2004) and *International Electoral Standards. Guidelines for reviewing the legal framework of elections* (Stockholm: International IDEA, 2002).

Judging Elections by Public International Law: A Tentative Framework*

Michael D. Boda

Ten years have passed since the publication of *Free and Fair Elections: International Law and Practice* (Goodwin-Gill, 1994). The approach outlined in that publication constitutes what has been identified during this round table as a third option to judging elections, one that describes mechanisms of international law as a yardstick for measuring freeness and fairness in electoral events, providing a standard removed from individual cases and injecting clearer principles on which to judge an electoral result outside a political context. The book's release acted as a catalyst for placing greater emphasis on the role of public international law in the field of election observation. As will become clear, however, the fundamentals of this methodology have not been adopted by all, nor has a linkage between the principles of international law and the operational practicalities of election administration been well established.

This paper offers insight into the current state of this paradigm for considering election quality. Initially, it will reflect on the principles which guided the evaluation in *Free and Fair Elections*, assessing some of the theoretical underpinnings found in that book. Yet, it will also offer an analysis that builds upon that work, offering a potential path by which practitioners may, over time, be able to reduce the gap still evidenced between *principles* and *practice*. The theoretical concepts and analytical framework to be presented here represent a 'starting line' for future exploration on this topic. More than outlining a proven approach for election observers, the following pages offer a research agenda, aimed at guiding future analytical endeavours that fall within the lines of this approach.

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Origins of 'Judging by Law'

The origins of a 'judging by law' method are found in the literature as far back as the 1950s when W.J.M. Mackenzie (1964 : 147) wrote about an outside standard for judging electoral processes. This 'law of civil liberty' calls for, among other things, freedom of speech and the press, freedom to meet publicly and to organize peacefully, and freedom from fear of incarceration and financial loss, except when courts act within the confines of established law. Mackenzie argues that if these propositions are widely accepted, then this standard can be used to judge the electoral process. Further support for this kind of measurement is found during the late 1970s and into the 1980s in the work of the Washington, DC-based International Human Rights Law Group. A report written by Larry Garber (1984 : i ; 5-6; 17-18; 32-8) sets forth an agenda for creating uniform criteria for assessing electoral events, arguing in particular for innovation in election observation.

Despite these advances, however, a fundamental entrenchment of this kind of approach was not identified until into the 1990s. Throughout much of the last century, State sovereignty had been all but unquestioned, mitigating the potential for meaningful international norms to emerge. In recent years, though, the rigidity of the boundary between that which is domestic and what is considered part of the international realm has diminished for two reasons, as Robert Pastor (1999 : 124-5) describes : due, first, to new technology and increased global trade and investment and, second, to the end of the Cold War and spread of democracy. The comments of Pastor and others (e.g., Charney, 1993 : 529; Held, 1995 : 99-120) are representative of a late twentieth century view that argues that the world has moved beyond strict sovereignty to where international norms guided by international law are emerging with growing influence.

With these developments, contemporary analysts have begun to use international law as a baseline for norms in the context of elections (e.g., Pastor, 1999: 126 ; Lopez-Pintor, 2000 : 102-9; Beetham et al., 2002, 96-101). Still, only a few have thus far assigned a *genuinely* central role to public international law in developing a standard measurement for freeness and fairness in electoral processes. Goodwin-Gill (1994) has offered perhaps the most comprehensive legal argument in this light, asserting that international legal mechanisms,

buttressed by international practices of election administration, should be the premier guiding principle for determining what is free and fair.

Legal foundations

With this background, we begin by considering some of the legal foundations that have been offered in support of this approach to evaluating election quality. Aware of the ongoing debate regarding the place of sovereignty, Goodwin-Gill (1994: 10,12) states in *Free and Fair Elections* that 'the precise relationship of self-determination and "election rights" will remain controversial'. So he argues instead that 'attention should be paid to those specific obligations in the matter of elections already assumed by States, and to the equally accepted political human rights that may reasonably be linked thereto'. Traditionally, these obligations have been constructed from a variety of sources, with the Statute of the International Court of Justice (1945) extending some guidance on how these sources should be employed. Article 38 provides that, in any dispute before it, the Court should apply, first, international conventions, general or particular, that establish rules expressly recognized by the contesting States; second, international custom as evidence of a general practice accepted as law; third, general principles of law recognized by all nations; and fourth, judicial decisions and teaching of the most highly-qualified publicists, as a subsidiary means of determining rules. These may include decisions of both international courts and tribunals and of municipal courts on matters of international law, and equity in the general sense of fairness, good faith, and moral justice.

Within this framework, the Universal Declaration of Human Rights (UDHR, 1948), adopted by the United Nations General Assembly, provides the basic foundation for 'election rights' in Article 21. It asserts everyone's right to participate in government either directly or through 'freely chosen' representatives and to 'equal access to public services across a country'. The article also emphasizes that the 'will of the people' shall be the basis of government authority, expressed through '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'. As

a resolution of the General Assembly, the UDHR itself is not binding on States. The increasing authority of its provisions, however, derives from customary international law and from States' acceptance over time. This is evidenced by the overwhelming support it received by members when adopted and the place it holds in the history of the United Nations. In addition, the legal standing of the principles declared received added impetus with the adoption of the International Covenant on Civil and Political Rights (1966), a multilateral treaty to which 153 States are now a party. The election-related entitlements, drawing upon those contained in the UDHR, thereupon became formally binding on the States parties. The Covenant not only fortifies these formal rights in Article 25, but it specifies certain political and campaign rights that further shape our expectations for electoral processes.[1]

These and other universal and regional legal instruments (e.g., African Charter, 1981; American Convention, 1969; European Convention, 1950) lay a normative foundation for what is to be expected in a free and fair electoral process. At the same time, however, as expressed clearly in Article 38 of the Statute of the International Court of Justice, they are not the only sources that contribute to this normative milieu. Indeed, international practice as evidenced in declarations lacking treaty status put forward by international organizations contribute greatly to the customs that shape general practice (e.g., Declaration on Criteria for Free and Fair Elections, 1994; International IDEA, 1997). Further, the activities of institutions that complete election-related tasks, whether domestically or internationally focused, also play a role in determining 'best practice' norms that, over time, may shape and be captured in international law mechanisms.[2]

Obligations of result, obligations of conduct

Some analytical assistance, suggests Goodwin-Gill, can be found in the characterization of international obligations as *obligations of result* and *obligations of conduct*. An understanding of the interrelationship between different types of obligation can help meet the criticism that international treaties, such as the International Covenant on Civil and Political Rights, provide too little guidance regarding implementation frameworks. Even if there is no obligation per se to incorporate the provisions of

treaties or of general international law into domestic legislation, this is not the end of the matter. In laying down obligations at large, treaties 'often expressly acknowledge the State's full freedom in its choice of means for implementation' and this flexibility is 'especially common in standard-setting and human rights treaties, where full freedom of choice may be implied from the terms of the treaty itself, or a preference be shown for legislative measures' (Goodwin-Gill, 1985 : 112-13).

As Goodwin-Gill (2004 : 77-8) recalls in a recent paper, while the International Law Commission's articles on State responsibility no longer employ the distinction between obligations of result and obligations of conduct, it may still serve a useful analytical purpose and assist in determining when a breach has occurred. An obligation of conduct can be understood as an *obligation de s'efforcer* – to endeavour or to strive to realize a certain goal ; and an obligation of result as, in effect, a guarantee of the outcome.

From the perspective of State responsibility, in the one case, the fact that the result is not achieved is both necessary and sufficient ; in the other, what matters is the violation of the best effort obligation, not the end result. The result/conduct analysis (the word 'distinction' implies disjuncture, rather than the systematic interdependence of many obligations) is particularly helpful in the human rights field, where both process and results are relevant. In determining whether elections are free and fair, legal standards are engaged as much by express prohibitions (discrimination) and required results (access and secret ballot), as by processes of review and accountability.

In *Free and Fair Elections*, Goodwin-Gill (1994 : 7) notes that while States may undertake to achieve a particular outcome, the means by which that result is facilitated often vary in the context of international law. In this light, the standard of achievement remains international in scope while the method of implementation does not remain necessarily so. At the same time, however, he also emphasizes that approaches to administering elections can be 'significantly *structured* by the specific reference in the key human rights instrument to underlying principles of non-discrimination, universal and equal suffrage and secret ballot'. These more specific obligations can confine and structure the State in the exercise of its powers (see Diagram 1, Box A). During the

round table proceedings, respondent Johann Kriegler (2004 : 3) raised some concerns with regard to how international principles might be implemented, arguing that 'these principles [should] remain unchanged but both in their interpretation and in their application to the particular set of circumstances there would have to be sensitivity to local nuances'. In fact, we are not suggesting otherwise in this argument; obligations of conduct still leave States to 'principally, if not exclusively' consider how 'in their particular political, cultural and historical context, the objectives can best be achieved' (Goodwin-Gill, 1994 : 83).

Constructing an analytical framework

Given this understanding of the variety of international obligations, how might one move beyond what many view as the 'simplicity' of international obligations toward any kind of actual measurement of freeness and fairness ? In his initial effort to forge an empirical connection between principles of international law and the operational components of an election, Goodwin-Gill (1994 : 27) was an early proponent of parsing the electoral process into a series of 'markers' against which those obligations are to be considered. In arguing this, his work dissects the electoral process into ten different parts, including : election law and system; constituency delimitation; election management; the right to vote; voter registration; civic education and voter information; candidates and political parties, including financing; election campaigns; balloting, monitoring and results; and complaints and dispute resolution. Yet perhaps the most frequently heard criticism of his work has been that this anatomization has not gone far enough in fashioning a genuine and realistic connection between the principles of international law and those designated markers. *Free and Fair Elections* offers a step in this direction, but it has not provided election observers with a realistic analytical framework for judging the quality of an electoral event (Choe and Darnolf, 2000 : 228; OSCE, 2002, 3).[3] In recognizing this criticism, this paper begins the process of determining how a better empirical connection between electoral principles and electoral components might be established. Using Goodwin-Gill (1994) as a foundation, it draws on the author's 2002 study on this topic (Boda, 2002) in beginning to envision how a more effective framework might be constructed.

Over the years, Goodwin-Gill's partitioning of the electoral process has been refined in a variety of important works on election standards and observation (e.g., Dundas, 1993; Gould et al., 1995; Choe, 1997; Alves et al., 1999; Choe and Darnolf, 2000; Lopez-Pintor, 2000; Elklit and Reynolds, 2000; Elklit and Reynolds, 2001), but analysts have not, until recently, suggested that we look inside those component parts, deconstructing them to determine whether key administrative tasks might offer some new insight. Elklit and Reynolds (2000 : 8) offer a significant contribution to the literature in arguing just this, stating, 'To systematically analyze an electoral process it is important that each element is precisely operationalized and the election management system's performance measured'. In describing the electoral cycle in terms of twelve different constituent parts (see Diagram 1, Box B), they make recommendations on how each part provides key indicators that offer insight into the current state of a given component in any electoral process. Under voter education, for example, they offer two indicators for consideration, the 'percent of ballots spoilt or invalid' and the 'resources per capita spent (related to literacy rates and previous voting experience)' (Elklit and Reynolds, 2000 : 10-11). Their work takes a first step in helping us understand what will be required to determine electoral freeness and fairness in suggesting a variety of practical indicators linked to the constituent parts of an election.

I agree with Elklit and Reynolds, along with others who have pursued this approach. But while placing a microscope on the electoral cycle facilitates our understanding of the process, it is the empirical change to an individual part *in relation to* an obligation outlined in international law that should act as an indicator of whether that component of the electoral process is moving toward or away from an ideal free and fair election. The primary difference between this evaluation and that offered by Elklit and Reynolds is found in the argument that indicators developed inside each of these electoral 'markers' should be compared against an external standard found in international law. The Norwegian Helsinki Committee (2000) reminds readers of the importance of this outside measure, noting that 'while it is often tempting to gauge what we observe by using our own country's system as reference, [it is] important to work out terms of reference that give common ground to all involved parties by covering the universal principles underlying the notions of free and fair elections and democracy, without being biased'.

Examples for consideration

Clearly, it is one thing to discuss an analytical framework and quite another to institute one that proves useful among those who must judge an *actual* electoral process. This final section lays down the groundwork required for establishing such a tool, based on examples drawn from the electoral process in the United Kingdom and described in Boda (2002). I evaluate by reference to two key obligations—one obligation of result and one obligation of conduct—that emerge in international law as fundamental to freeness and fairness in any electoral event, in each instance aiming to provide the foundations of an approach that could lead over time to a more general mechanism and methodology for measuring success or failure in an electoral cycle.

Obligation of result : 'Right to Vote'

First to be evaluated, the 'right to vote' can be considered an obligation of result, so far as it prescribes a clear goal, but provides no specific guidance on how it is to be achieved. Still, it stands as a fundamental component of the baseline for electoral success (see Diagram 2, Box A). The freeness and fairness of an electoral event is, in part, dependent on the extent to which citizens gain access to their ballot. International law asserts this obligation in the International Covenant on Civil and Political Rights (1966 : Art. 25): 'Every citizen shall have the right and the opportunity...without unreasonable restrictions... to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage.....'

In Europe, the same obligation has been reinforced in the preamble of the European Convention on Human Rights and later in its First Protocol, when combined with jurisprudence. The original Convention states a 'profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world', designating an 'effective political democracy' as a principal method for maintaining these freedoms (European Convention, 1950 : preamble). But this text is found in the preamble, not in the main body of the text, so its significance has traditionally been diminished. The First Protocol of the European Convention (1952 : Art. 3) expands further on this commitment, while still placing limitations on inter-state obligations : 'The High Contracting Parties undertake to hold free elections at reasonable

intervals by secret ballot, under conditions that will ensure the free expression of the opinion of the people in the choice of the legislature'.

Subsequent jurisprudence offered a much stronger foundation for an *individual's* right to vote in the European context. In 1987, the European Court of Human Rights gave the text a far higher status in *Mathieu-Morfin and Clerfayt v. Belgium* (1988 : para 46-51), determining that it 'enshrines' a 'characteristic principle of democracy', and, thus, influences how we should interpret Article 3 in Protocol 1. The Court went on to argue that because almost every other substantive clause in the Convention and Protocols 1, 4, 6, and 7 focus on the individual, Article 3 in Protocol 1 should be interpreted in the same light. 'The view taken by the Commission has evolved,' it declared. 'From the idea of an "institutional" right to the holding of free elections, the European Commission has moved to the concept of "universal suffrage" and then, as a consequence, to the concept of subjective rights of participation—the "right to vote" and the "right to stand for election to the legislature." The Court approves this latter concept'.

Given this obligation, then, how might we determine whether or not it is being fulfilled ? A variety of operational indicators could be developed and evaluated in order to determine whether the electoral process is actually progressing in the direction of the ideal described in international law. In this instance, we will offer just one example indicator, the electoral roll's accuracy (see Diagram 2, Box B), as just one measure among many that could be considered within this component of the electoral process.

In the United Kingdom, the ability to exercise one's vote is premised on the existence of a comprehensive and inclusive electoral list, and a vote cannot be cast unless an elector's name is on it. Over the years, the voter roll has proven problematic as a component part of election administration and the voting system in this country. As early as 1910, voting qualifications were described as '"a maze" with seven distinct franchises (the property, freemen, university, occupation, household, service and lodger franchises)'. Lodgers, who were quite mobile, found it particularly difficult to exercise their right to be included on the list (Pinto-Duschinsky, 1991 : 12).

The Representation of the People Act (1918 : sch 1, para 6) took steps to diminish concerns related to the process by introducing a door-to-door registration effort. The legislation laid the foundation for a system that has remained in place until today. It called for unprecedented action, moving the responsibility for registration from the individual to the State. Based on 'residency', the list has been generated annually on a qualification date by an Electoral Registration Officer (ERO), most often the county-level official who also fulfils the role of Acting Returning Officer (Leonard and Mortimore, 2001 : 13).

Despite these efforts, however, problems related to the electoral roll have not disappeared, with its accuracy diminishing over the years. A 1950 study found the registration list to be only 4% inaccurate (as of the qualification date, 4% of adults were not listed in relation to their actual place of residency) (Gray et al., 1950). A 1982 report stated that this number had increased to 6.5% on the qualification day of 10 October 1980 (Todd and Butcher, 1982 : 1). By 1991, the inaccuracy rate on qualification day was determined at 9%, meaning that between 2.8 and 3.4 million eligible voters were, potentially, excluded from the voting process (Smith, 1993; Pinto-Duschinsky and Pinto-Duschinsky, 1987 : 3). By 1998, the Home Affairs Committee of the House of Commons (1998 : vol 1, para 32-3) was estimating the number of electors excluded from the roll in 1997 to be as high as 5.5 million.

It is argued that this is the kind of indicator that can provide insight on whether the United Kingdom's electoral process has been moving toward or away from the obligation for freeness and fairness outlined above. The trend described with regard to the voter list's accuracy would be taken as evidence of the state of this component of the electoral process—voter registration—in relation to the obligation of result—the right to vote. It helps us shape a picture of the road this component has traversed in the last five decades in relation to this international obligation. Still, it is important to keep in mind that the example indicator stands only as one illustrative gauge. A variety of additional indicators, along with accompanying data, would need to be identified within this constituent element before a stronger conclusion could be derived as to whether the overall electoral process has moved toward or away from the obligation under consideration. A more comprehensive study might include indicators such as election

turnout figures, the percent of polling stations operating, or the number of locations where elections are necessarily re-run to be evaluated alongside the electoral roll's accuracy.

Obligation of conduct: 'Secret Ballot'

The secret ballot is a second hallmark among the characteristics that allow us to judge an electoral event as 'free and fair' (see Diagram 3, Box A). In this instance, international law may appear to lay down an objectively achievable result, but in fact it is rather more specific with regard to the approach which States must pursue administratively, thus emphasizing the obligations of conduct essential to achieving the goal of a 'secret ballot'.

Initially described in the Universal Declaration of Human Rights (1948 : art 21.3) as just one avenue for voting among many 'free voting procedures', the secret ballot has since been given a unique and elevated status, with the International Covenant on Civil and Political Rights (1966 : art 25.b) describing it as a guarantor of the free expression of the will of the people. Over the years, the secret ballot has seen further reinforcement through customary law, illustrated in resolutions of the United Nations General Assembly[4] and in a number of State constitutions, such as those in France, Ireland, and Senegal.[5]

Again, the question is to evaluate how it might be determined that a voting system in a given context is moving in the direction of the ideal outlined in international law. In the previous section, the voter roll's accuracy was offered as an example indicator. In this instance, the balloting process is selected for these purposes. Three models for balloting are placed along an ordinal scale of secrecy (see Diagram 4, Box A). At the lowest end of the scale stands a voting model that is most public. The model contains an approach to voting in which electors are required to designate their choice for a candidate through a public process with complete transparency (Model #1). In the middle is a model in which electors are no longer required to voice their selection publicly. Still, certain vulnerabilities to the absolute secrecy of that vote remain. In some cases, the country's election legislation introduces voter verification methods that facilitate subsequent checks on elements of fraud and corruption. In other instances, procedures introduced by election administrators may lead to a balloting process that leaves a variety of opportunities

for individuals, other than the person casting the ballot, to gain knowledge of a voter's choice (Model #2). At the other end of the scale is a model for balloting that allows for complete secrecy. An elector's selection is made without anyone else knowing what it is and without any of the vulnerabilities considered in the middle model. Indeed, this is the ideal that is asserted as an obligation in international law (Model #3).

The United Kingdom has seen movement along this scale during the evolution of its system of balloting over the last century (see Diagram 4.0, Box B). Until 1872, voting in Britain was very much a public spectacle, with candidate nomination and voting occurring *viva voce* in front of the hustings[6] (Seymour, 1970 : 205-6) and votes being recorded in a 'poll book' accessible to any citizen after election day (Vincent, 1967). It is evident that the 'hustings-style' voting should be identified with Model #1. The choice of an elector in this milieu was completely transparent, leaving him susceptible to influence by other voters (Seymour, 1970 : 434).

The approach changed, however, with the enactment of the 1872 Ballot Act. The Act established a voting scheme that remains in place today, one that falls within the confines of Model #2. Of interest to this study are the details of the scheme in which the secret ballot is now used. Upon entering the polling station, a voter's name is identified on the Electoral Register and crossed off. His or her voter number is then read aloud. The polling clerk writes that number on a counterfoil that has printed on it a pre-assigned number. A ballot attached to the counterfoil has printed on the back the same pre-assigned number. It is detached, stamped with an official mark, and issued to the voter (Ballot Act, 1872 : sec 2; Representation of the People Act, 1983: sched 1, para 19-20). The voter then proceeds to a private voting area to make a selection. Once completed, the voter places the ballot into the ballot box. When the polls have closed, the Presiding Officer at the polling station sends the ballot boxes to a central station for counting, after which all ballots are placed into parcels and sealed by the Returning Officer. The counterfoils are sealed directly into parcels at the polling station. Ultimately, the used ballots, counterfoils, and the electoral register are sent on to the Clerk of the Crown, where they are stored for a year's time at a 'secure place' in London (Representation of the People Act, 1983 : sch 1, para 32-59; Electoral Reform and Liberty, 1997 : 6, app 1).

This basic description of the secret ballot system provides enough insight to determine that the counterfoil system brought with it an increased level of secrecy to the balloting process. However, it is also clear that the United Kingdom did not adopt, and has not yet adopted, a balloting system within the range of the fully secret ballot, Model #3, remaining instead within the range of Model #2. A systemic vulnerability remains within the counterfoil method that precludes absolute secrecy in casting a ballot. A vote can be traced after the fact by matching the number on a ballot to that on the counterfoil and then identifying the voter via his or her voter number written on each counterfoil. While access to the ballots and counterfoils is prohibited by law without the approval of an Election Court judge (Ballot Act, 1872 : sec 40; Representation of the People Act, 1983 : sch 1, para 56.1.b.ii), the system has raised concerns at various points over the last century (e.g., Lloyd, 1968 : 131; O'Brien, 1957 : 34; Wright and Greengrass, 1987 : 54; Electoral Reform and Liberty, 1997 : 22, app 4).

In subsequent years, while the country's system of balloting has certainly not relapsed to a position within Model #1, a number of innovations in the process have led to a diminished level of secrecy within Model #2. A 1999 Home Office Working Party called for the Government to encourage local authorities to test new methods of voting as part of a strategy to increase voter participation (Home Office, 1999 : para 3.1.1, para 10-12). The Representation of the People Act (2000) followed, providing the authority to pursue a series of pilot schemes along these lines.

All-postal balloting was among the pilots approved for testing alternative forms of balloting (see Model #2a).[7] With this innovation, a ballot can be cast almost anywhere. It is delivered to an elector through the postal system and, once marked, is most often returned in the same manner. Upon arrival at the electoral office, the envelope containing the ballot is opened and sorted. The ballot is counted in tandem with a 'declaration of identity' that, like the counterfoil, contains the number of the ballot paper, but unlike the counterfoil, also lists the voter's actual name (e.g., Oxford County Council, 2002). Two kinds of vulnerabilities to secrecy are introduced to the system in this context. Secrecy can be breached, first, against a voter's will through any of the increased number of access points inherent in the process[8] and, second, due to a voter's connivance, represented by vote selling or allowing someone else to vote other

than in allowable circumstances. Without the mechanisms and oversight of officials available within the confines of a polling station, this type of activity simply cannot be controlled.

Internet voting and counting (Model #2b) was another pilot scheme approved for testing in some constituencies during the May 2002 Local Elections (United Kingdom Electoral Commission, 2002 : 2). The case of Swindon can be used to demonstrate. After submitting a vote via a website (Swindon, 2002 ; Electoral Reform, 2002), an elector's data was transmitted directly to the offices of VoterHere, a computer company located in Bellevue, Washington in the United States where the information was organized, counted, and placed in a format consistent with the counting efforts to result from the other forms of balloting underway back in Swindon (Interview, 2002).

As in the case of postal voting, a deterioration in the level of secrecy is evidenced in balloting. Indeed, very similar concerns arise in this context. Secrecy can be breached with this innovation due to the same increase in access points. A vote can be cast anywhere an Internet connection exists, whether in an individual's living space or a public internet cafe. Privacy during voting cannot be assured to electors as it can be in a polling place. Further, limited assurances can be offered as to whether a ballot's secrecy can be maintained from the time it is cast on a terminal until it is counted at the central counting location. The company involved provides a basic promise of secrecy at the level which is currently maintained by credit card companies and banks, but significant uncertainty remains regarding the elasticity of that guarantee (the fact that the data is circulated outside the legal boundary of both the constituency and country is indicative).[9] Also, without the controls placed on the process in polling stations, the ballot's secrecy can be undermined through the corruption of vote selling and other means.

Just as with the obligation of the right to vote, we are not yet able to come to a firm conclusion on the direction this electoral process is moving vis-à-vis the secret ballot, a fundamental principle of freeness and fairness in any electoral process. The trend described here, however, does provide an important example of how this might be determined. We have gained a sense that, at least with regard to this indicator, ground has been lost over the last few decades in relation to this specific principle. Still, other indicators should necessarily be pursued before a stronger determination is offered. These might

include an analysis of polling station arrangements, legislation as it relates the rights of voters to secure, cast, and deposit a ballot into the ballot box, to name just two indicators.

Conclusion

During the round table discussion, the respondents offered helpful comments with regard to how to build upon the tentative approach described here. Both Johann Kriegler and Michel Laflandre expressed concern regarding what could result in assembling an analytical approach which relies solely on an inductive catalogue of indicators with the aim of coming to a determination of whether an electoral process has passed a free and fair threshold. First, Laflandre (2004 : 5) suggested that certain component parts of the electoral process could not be guided by principles of international law with precision, referring to both the financing of political parties and the rules overseeing access to the media during electoral campaigns. Second, Laflandre (ibid : 5) and Kriegler (2004 : 3) both focused on a need to account for the differences between the cases being considered, making a distinction especially between developing democracies and those that are more established. And, finally, the respondents were quick to emphasize that while such an analysis based on the principles of international law can lead to greater certainty in understanding the implementation of the constituent parts of an election, they also argued that—when all is said and done—such an approach can never be the 'be-all and end-all' of an analysis. Kriegler (ibid : 6) put it this way :

> Not only does one end up unable to see the wood for the trees but, seeking objectivity, one loses sight of the normative inspiration of the exercise. An electoral evaluation is surely much more than a two-dimensional audit of the various steps taken by an administration in preparing for and conducting an election. What is to be determined is much more value-laden, much more normative and much more context-dependent.

Inherent in the concerns expressed in these arguments is a query that came up regularly during the two days of discussion in Geneva. How do we strike a balance between, on the one hand, pursuing avenues for measuring election quality that ultimately pretend to offer an objective and clinical answer on whether an effort to conduct an election has succeeded or failed and, on the other hand,

an approach that offers no answers as to whether an electoral process was appropriately administered, giving in to the assertion that we simply will never agree on what constitutes a well-run election? These concerns must not be taken lightly and should be considered carefully in the development of any analytical framework that evaluates freeness and fairness.

This paper has provided just a glimpse into a third approach to judging electoral events—judging by international law. At the outset, it offered a brief overview of the legal foundations that have traditionally underpinned this third option, reviewing some of the legal principles that have guided our understanding of what constitutes freeness and fairness. Still, public international law has evolved significantly since Goodwin-Gill's (1994) project was completed. In light of this, the development of a catalogue and a through analysis of the international principles that provide a broad understanding of the guidance that international law provides for electoral processes should be pursued as a necessary next step in the literature.[10] Which international conventions, customary international law, general principles of law, judicial decisions, and expert opinion should be included in our understanding of freeness and fairness ? A review of the literature to date will lead quickly to the conclusion that while public commitments to international legal principles can be abundant, an analysis of the corpus of international law has not been conducted recently in order to identify election-related principles.

The latter portion of the paper marked the beginning of a process of thinking through how an analytical framework that tangibly links principles of international law to the constituent parts of an electoral process might be constructed. The emphasis there was on identifying key operational indicators that provide evidence of how a given part of the electoral process is moving *in relation to* a legal obligation. The examples provided were designed merely to inject a sense of how this might ultimately be achieved. Clearly, the analytical framework must be extended from here, with the aim of providing a mechanism that facilitates better election observation in the years and decades ahead. A variety of questions remain, however: How do we select the indicators in each constituent part for comparison against the legal principles of freeness and fairness that arise in international law? Should we

continue to speak in terms of a 'free and fair' electoral process or instead pursue a disaggregated analysis, one with a methodology which analyses only the constituent parts of an election ? How might we overcome the tension sometimes evidenced between legal principles (for example, the secret ballot versus the right to vote) ? Is a 'directional' measurement for a given constituent part adequate or should a quantitative measurement be assigned ?

During a recent meeting of the OSCE focusing on election standards, the Inter-Parliamentary Union called upon OSCE member States to re-evaluate the manner by which election observations are conducted. This was not a criticism of that body,[11] but instead a finding that has arisen from evaluating how election observations have been conducted to date around the world. The IPU argued that 'a new, more rigorous approach might involve pursuing a more social scientific methodology that works toward removing any sense of *advocacy* from the process, leaving only an *analytical* component to make judgments on electoral processes' (Boda, 2004). Without question, an election is an extremely complex process that necessitates an evaluation that goes beyond a two-dimensional framework. This said, it has become clear over the last five decades that far too many dimensions have been considered and that not enough progress has been made in terms of arriving at a consensus on what constitutes freeness and fairness. It is true that election scholars and practitioners have not yet uncovered *the norm* against which an election can be judged. I argue, however, that while avoiding the pursuit of what one of our respondents called a 'sterile laboratory exercise', a better framework can be derived in soliciting *a norm* from international legal mechanisms and assembling a working framework that will facilitate the practical work of election observers. This paper constitutes an initial step in this regard. The 'heavy lifting' begins now.

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Notes :

[1] For examples, see Articles 18 through 22 in International Covenant on Civil and Political Rights (1966); Franck (1992 : 61-63).

[2] These institutions are described in Garber (1984 : 2-4) and Lopez-Pintor (2000 : 89-100).

[3] In 1998, the IPU published *Codes of Conduct,* in which Goodwin-Gill reviewed some practical attempts to translate principles into action.

[4] e.g., UNGA Res 54/173 (2000 : preamble); UNGA Res 55/96 (2001 : para 1,d,ii).

[5] See Constitution de la République Francaise (1958 : art 3); Constitution of Ireland (1937: art 16.1.4); Constitution du Sénégal (1963, art 2).

[6] a temporary platform erected in advance of the election.

[7] While the approach was first used in 1918 to facilitate absentee voting (Rallings and Thrasher, 1999, 124-7), the 2001 General Election was the first in which postal ballots were made available to all eligible voters upon request. Representation of the People (England and Wales) Regulations (2001); Representation of the People (Scotland) Regulations (2001); Different arrangements apply in Northern Ireland per United Kingdom Electoral Commission (2001: 2).

[8] Minimizing breaches will be difficult, given the increasing complexities and tasks involved in conducting an electoral process. See Bolton (2001 : conclusions); Wigan (2001 : para 18).

[9] See Security Management (1999) and Insurance Advocate (2001) for consideration of credit card fraud; Risks related to online balloting are considered in Freeman (2000); Patsuris (2000); James (2001); and Dugger (1988).

[10] The OSCE has offered an initial summation of the international legal standards which apply to its member states, OSCE (2003).

[11] The OSCE is known as a leader in the conduct of election observation, offering a model on how election observation *should* be conducted.

Diagram 1
International Law As a Norm for Free & Fair Electoral Practice

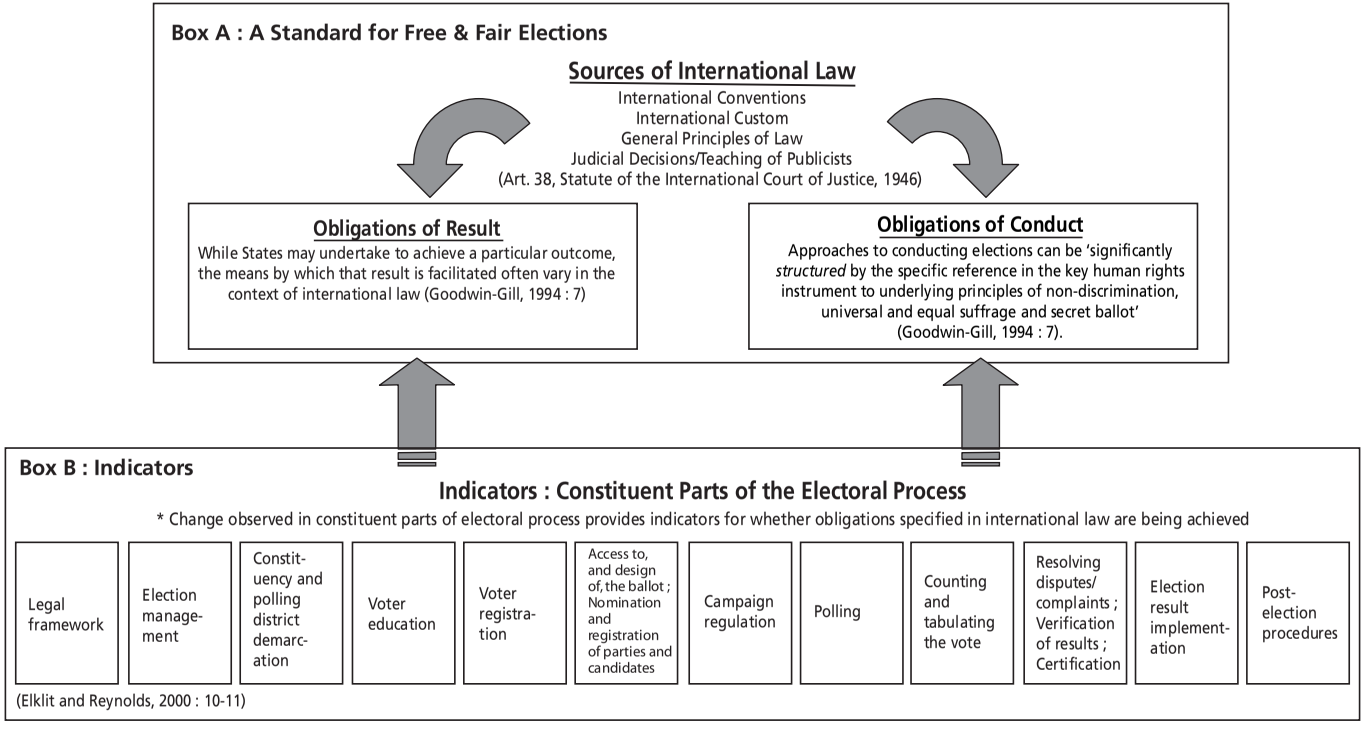


Diagram 2

International Law As Norm for Free & Fair Electoral Practice
Obligation of Result : 'Right to Vote'

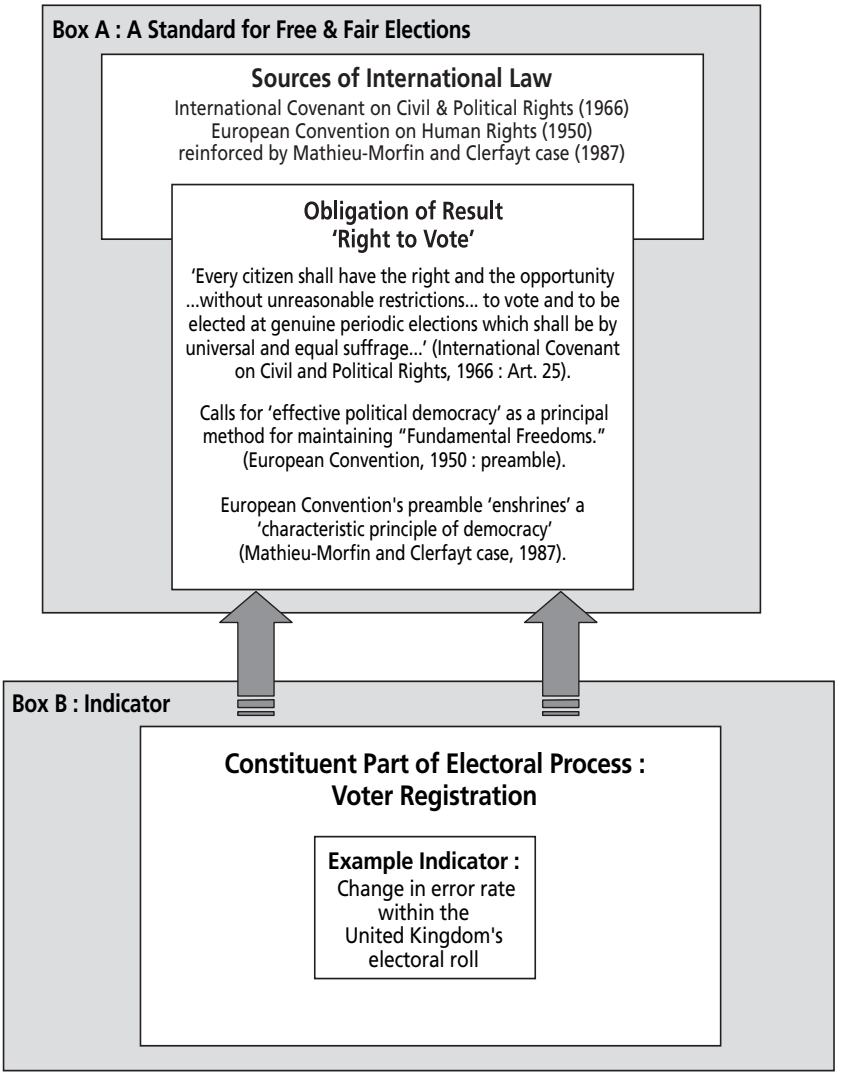


Diagram 3

International Law As Norm for Free & Fair Electoral Practice
Obligation of Conduct : 'Secret Ballot'

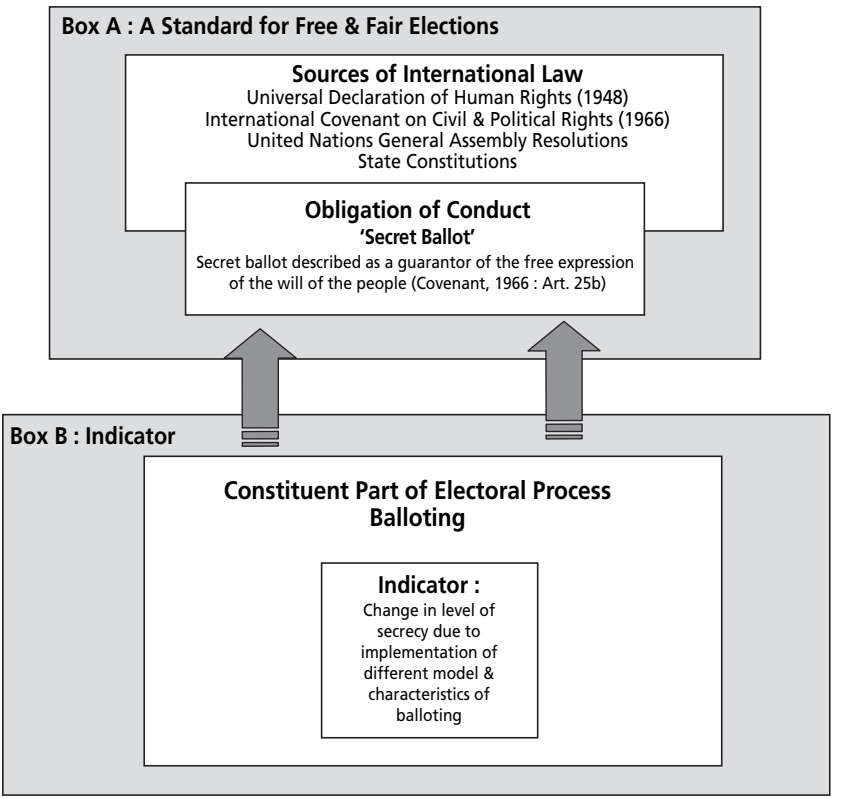
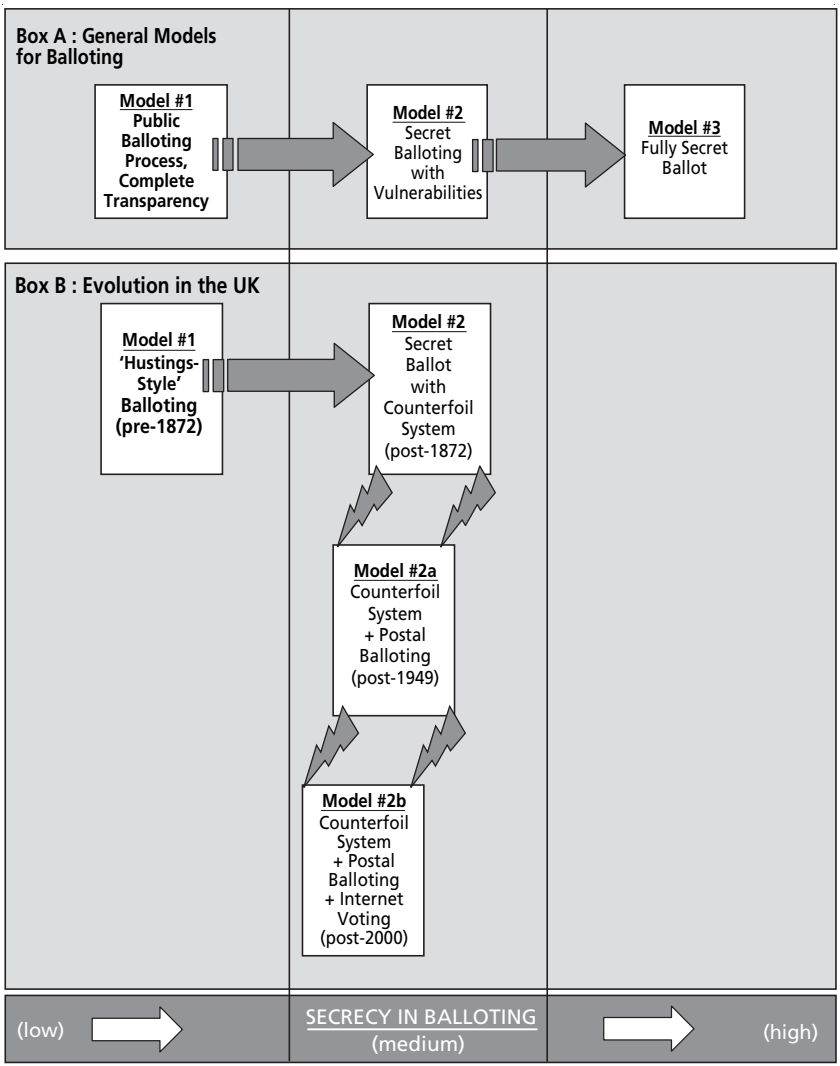


Diagram 4
Obligation of Conduct: 'Secret Ballot'



Annexes

List of participants in the round table

Individual participants

Guy Goodwin-Gill (Convenor), University of Oxford, All Souls College, United Kingdom

Michael Boda (Convenor), University of Oxford, Wolfson College, United Kingdom; Johns Hopkins University, United States

David Beetham, Professor Emeritus of Politics, University of Leeds, United Kingdom

Horacio Boneo, former Director of the United Nations Electoral Assistance Division, Argentina

Jørgen Elklit, Aarhus Universitet, Denmark

Ron Gould, Electoral Consultant, Canada

Richard Katz, Johns Hopkins University, United States

Johann Kriegler, Judge, Constitutional Court, South Africa

Michel Laflandre, Senior official, Senate, France

Rafael Lopez-Pintor, Universidad Autónoma de Madrid, Spain

Louis Massicotte, Université de Montréal, Canada

Hannah Roberts, Coordinator of the Long Term Observers in the Former Yugoslav Republic of Macedonia, Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR)

Institutional participants

Stina Larserud, Associate Programme Officer, Electoral System Design, Electoral Processes, International IDEA

Serguei Kouznetsov, Elections and Referendums Division, Council of Europe/Venice Commission

Attila Peteri, Legal Expert, Association of Central and Eastern European Election Officials (ACEEEO)

Eric Rudenshiold, Director of the Applied Research Center for Democracy and Elections, International Foundation for Election Systems

Inter-Parliamentary Union

Anders B. Johnsson, Secretary General

Martin Chungong, Director, Division for the Promotion of Democracy

Andy Richardson, Information Specialist

Declaration on Criteria for Free and Fair Elections

Unanimously adopted by the Inter-Parliamentary Council at its 154th session (Paris, 26 March 1994)

The Inter-Parliamentary Council,

Reaffirming the significance of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights which establish that the authority to govern shall be based on the will of the people as expressed in periodic and genuine elections,

Acknowledging and endorsing the fundamental principles relating to periodic free and fair elections that have been recognized by States in universal and regional human rights instruments, including the right of everyone to take part in the government of his or her country directly or indirectly through freely chosen representatives, to vote in such elections by secret ballot, to have an equal opportunity to become a candidate for election, and to put forward his or her political views, individually or in association with others,

Conscious of the fact that each State has the sovereign right, in accordance with the will of its people, freely to choose and develop its own political, social, economic and cultural systems without interference by other States in strict conformity with the United Nations Charter,

Wishing to promote the establishment of democratic, pluralist systems of representative government throughout the world,

Recognizing that the establishment and strengthening of democratic processes and institutions is the common responsibility of governments, the electorate and organized political forces, that periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of human rights and fundamental freedoms,

Welcoming the expanding role of the United Nations, the Inter-Parliamentary Union, regional organizations and parliamentary

assemblies, and international and national non-governmental organizations in providing electoral assistance at the request of governments,

Therefore adopts the following Declaration on Free and fair Elections, and **urges** Governments and Parliaments throughout the world to be guided by the principles and standards set out therein :

1. Free and Fair Elections

In any State the authority of the government can only derive from the will of the people as expressed in genuine, free and fair elections held at regular intervals on the basis of universal, equal and secret suffrage.

2. Voting and Elections Rights

(1) Every adult citizen has the right to vote in elections, on a non-discriminatory basis.

(2) Every adult citizen has the right to access to an effective, impartial and non-discriminatory procedure for the registration of voters.

(3) No eligible citizen shall be denied the right to vote or disqualified from registration as a voter, otherwise than in accordance with objectively verifiable criteria prescribed by law, and provided that such measures are consistent with the State's obligations under international law.

(4) Every individual who is denied the right to vote or to be registered as a voter shall be entitled to appeal to a jurisdiction competent to review such decisions and to correct errors promptly and effectively.

(5) Every voter has the right to equal and effective access to a polling station in order to exercise his or her right to vote.

(6) Every voter is entitled to exercise his or her right equally with others and to have his or her vote accorded equivalent weight to that of others.

(7) The right to vote in secret is absolute and shall not be restricted in any manner whatsoever.

3. Candidature, Party and Campaign Rights and Responsibilities

(1) Everyone has the right to take part in the government of their country and shall have an equal opportunity to become a candidate for election. The criteria for participation in government shall be determined in accordance with national constitutions and laws and shall not be inconsistent with the State's international obligations.

(2) Everyone has the right to join, or together with others to establish, a political party or organization for the purpose of competing in an election.

(3) Everyone individually and together with others has the right :

- To express political opinions without interference;
- To seek, receive and impart information and to make an informed choice;
- To move freely within the country in order to campaign for election;
- To campaign on an equal basis with other political parties, including the party forming the existing government.

(4) Every candidate for election and every political party shall have an equal opportunity of access to the media, particularly the mass communications media, in order to put forward their political views.

(5) The right of candidates to security with respect to their lives and property shall be recognized and protected.

(6) Every individual and every political party has the right to the protection of the law and to a remedy for violation of political and electoral rights.

(7) The above rights may only be subject to such restrictions of an exceptional nature which are in accordance with law and reasonably necessary in a democratic society in the interests of national security or public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others and provided they are consistent with States' obligations under international law.

Permissible restrictions on candidature, the creation and activity of political parties and campaign rights shall not be applied so as to violate the principle of non-discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(8) Every individual or political party whose candidature, party or campaign rights are denied or restricted shall be entitled to appeal to a jurisdiction competent to review such decisions and to correct errors promptly and effectively.

(9) Candidature, party and campaign rights carry responsibilities to the community. In particular, no candidate or political party shall engage in violence.

(10) Every candidate and political party competing in an election shall respect the rights and freedoms of others.

(11) Every candidate and political party competing in an election shall accept the outcome of a free and fair election.

4. The Rights and Responsibilities of States

(1) States should take the necessary legislative steps and other measures, in accordance with their constitutional processes, to guarantee the rights and institutional framework for periodic and genuine, free and fair elections, in accordance with their obligations under international law. In particular, States should:

- Establish an effective, impartial and non-discriminatory procedure for the registration of voters;
- Establish clear criteria for the registration of voters, such as age, citizenship and residence, and ensure that such provisions are applied without distinction of any kind;
- Provide for the formation and free functioning of political parties, possibly regulate the funding of political parties and electoral campaigns, ensure the separation of party and State, and establish the conditions for competition in legislative elections on an equitable basis;
- Initiate or facilitate national programmes of civic education, to ensure that the population are familiar with election procedures and issues;

(2) In addition, States should take the necessary policy and institutional steps to ensure the progressive achievement and consolidation of democratic goals, including through the establishment of a neutral, impartial or balanced mechanism for the management of elections. In so doing, they should, among other matters :

- Ensure that those responsible for the various aspects of the election are trained and act impartially, and that coherent voting procedures are established and made known to the voting public;
- Ensure the registration of voters, updating of electoral rolls and balloting procedures, with the assistance of national and international observers as appropriate;
- Encourage parties, candidates and the media to accept and adopt a Code of Conduct to govern the election campaign and the polling period;
- Ensure the integrity of the ballot through appropriate measures to prevent multiple voting or voting by those not entitled thereto;
- Ensure the integrity of the process for counting votes.

(3) States shall respect and ensure the human rights of all individuals within their territory and subject to their jurisdiction. In time of elections, the State and its organs should therefore ensure :

- That freedom of movement, assembly, association and expression are respected, particularly in the context of political rallies and meetings;
- That parties and candidates are free to communicate their views to the electorate, and that they enjoy equality of access to State and public-service media;
- That the necessary steps are taken to guarantee non-partisan coverage in State and public-service media.

(4) In order that elections shall be fair, States should take the necessary measures to ensure that parties and candidates enjoy reasonable opportunities to present their electoral platform.

(5) States should take all necessary and appropriate measures to ensure that the principle of the secret ballot is respected,

and that voters are able to cast their ballots freely, without fear or intimidation.

(6) Furthermore, State authorities should ensure that the ballot is conducted so as to avoid fraud or other illegality, that the security and the integrity of the process is maintained, and that ballot counting is undertaken by trained personnel, subject to monitoring and/or impartial verification.

(7) States should take all necessary and appropriate measures to ensure the transparency of the entire electoral process including, for example, through the presence of party agents and duly accredited observers.

(8) States should take the necessary measures to ensure that parties, candidates and supporters enjoy equal security, and that State authorities take the necessary steps to prevent electoral violence.

(9) States should ensure that violations of human rights and complaints relating to the electoral process are determined promptly within the timeframe of the electoral process and effectively by an independent and impartial authority, such as an electoral commission or the courts.

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