

# A Critical Review on the Determinants of a Free, Fair and Credible Election

Daniel Chigudu

University of South Africa, Pretoria, Republic of South Africa

There is no specific and standard definition of what free, fair and credible democratic elections mean under international law. The international law by implications only tries to lay down a guide and qualities of what a free and fair democratic election should and what it should not be. Both emerging and established democracies present frequent deviations from the ideals of a free, fair and credible election. Confidence in the electoral process has therefore become a key concern for political scientists and electoral administrators prompting this critical review. This article is mainly theoretical in perspective using the primary and secondary data in its context. Findings indicate allegations of administrative restrictions being selectively applied to losers coupled with election rigging by winners. This confirms that the quest for measuring and determining the credibility of an electoral outcome or “freeness and fairness” of an electoral process needs a collaborative approach. A model is used to explain the complexity of defining free and fair elections while emphasis is placed on aligning domestic law to international laws.

*Keywords:* credible, domestic law, free and fair election, international law

## Introduction

An election is a decision-making process by which a population chooses an individual to hold a formal office. It is also the usual mechanism by which modern representative democracy fills offices in the legislature, executive and sometimes in the judiciary and for regional and local government. The due process of law must be adhered to in order to avoid irregularities and chaos. The systematic process of election will guard against unnecessary tensions and conflicts which could lead to undesirable consequences, hence, the concept of free and fair democratic elections. This concept has become important within the spheres of international law. Elections are generally governed by domestic laws because the United Nations Charter is based on the concept of sovereignty and the principle of non-interference into domestic affairs of an independent country. The international community developed and recognized certain standards that are serving as the yardstick of measuring the freeness and fairness of an election under the international law. Autheman (2004) argues that, one of the challenges for emerging and established democracies is to master the election process. International law provides that elections should allow free expression of the will of the people as a standard of effectiveness. However, the ways and means by which progress towards that standard can be measured remain variable. Goodwill-Gill (2006) observes that, “terms like ‘free’, ‘fair’, have no easily verifiable content, often being used subjectively, in an appeal to those assumed to share basic values and outlooks” (p. 93). In practice, it may be

easier to identify what is not a credible, free, fair or genuine election. This can be done through focusing on evidence of external influence like ballot stuffing, gerrymandering, vote-buying or intimidation of the electorate.

### **An Overview of Free and Fair Elections**

The general normative interest in the electoral process is safeguarding the right to vote so that people appear to value the right to participate beyond the specific outcomes of elections as viewed by Benz (2007), Guth and Weck-Hannemann (1997). The procedural utility they derive from participation in elections is an enhanced sense of personal well-being from the “feeling of being involved and having political influence” and “inclusion, identity, and self-determination” (Benz, 2007, p. 212). These feelings fulfill innate needs for autonomy, competence and relatedness. That probably accounts for the determination of some voters to participate in elections despite the risk of threat or physical attack. Notwithstanding the courage of some voters, “Public opinion research suggests that the experience of intimidation deters some from voting in the near term and over the long term” (Bratton, 2008, p. 626).

The general normative interest in electoral intimidation and violence is independent of both the purposes sought by its perpetrators and its effectiveness. These behaviours are morally repugnant whether their purpose is simply retributive or instrumentally rational. Electoral violence and intimidation constitute what liberal societies would otherwise deem to be criminal behaviour. Policy making about electoral violence and intimidation begins with moral outrage but moves to consideration of the economics of crime: “the cost imposed on society by the criminal act; the benefit to the criminal of committing the act; the cost of resources used to maintain the expected punishment” (Winter, 2008, p. 13). So powerful are the normative interests implicated in wide-spread electoral violence by the authorities that some voters may ignore patriotic pride and willingly endorse international investigation to expose the political pathology (Gettleman, 2009, A6). Elections are generally governed by domestic or municipal laws because the United Nations Charter is based on the concept of sovereignty and the principle of non-interference into domestic affairs of an independent country. This concept has also been emphasised by various regional organizations, for example, the European Union, African Union, Organisation of American States, Arab League and Asian-Pacific Organisation among others. Although, international law does not interfere or dictate to States on what their electoral legislations should be, States are under international obligation to comply with international standards as enshrined under various treaty obligations, for instance, International Convention on Civil and Political Rights 1966 (ICCPR), African Charter on Human and Peoples’ Rights 1981 (ACHPR) and European Convention on Human Rights 1950 Protocol 1 (ECHR).

The Harare Commonwealth Declaration of 1991 proclaims the “Individual’s inalienable right to participate by means of free and democratic political process in framing the society in which he or she lives”. In Africa, it is one thing for African countries to ratify or accede to a treaty or convention which recognises and protects democracy. It is another thing to comply with the provisions of instruments like the Southern African Development Community (SADC) Principles and Guidelines Governing Democratic Elections. It is for this reason that, elections in some African States have remained undemocratic and not credible. Elections held in 2007 and 2008 in Nigeria and Zimbabwe were declared to be the worst elections conducted in the history of Nigeria and Zimbabwe respectively and possibly in Africa. Failure to protect and guarantee human rights and genuine voting rights as enshrined in international law has posed the greatest threats to democracy, peace and

development of the economy of the African countries. This has been evident in countries like: Zimbabwe, Somalia, Guinea Bissau, Algeria, Congo, Rwanda, Burundi, Egypt and Nigeria. It is necessary to re-state that holding elections are principally internal affairs of each and every country, however, the states' international obligations under various treaties must be observed in order to preserve and protect human rights and democracy. Notwithstanding the aforesaid situations, the elections held in Ghana and South Africa in 2009 were highly commended as credible, free and fair and in compliance with international law and standard. These two elections were perceived to have been a real departure from the pattern of elections in Africa as they were conducted substantially in accordance with international standards and practices.

### **International Observer Missions**

In the last 50 years, particularly since the Cold War, the challenges of democratisation and the role of elections in that process have been a central focus of international affairs. There is now broad consensus that genuine elections are essential for establishing the legitimate authority of governments and allowing citizens to hold their governments accountable. Moreover, the empirical record reveals an uneven pattern of global democratic development, with many countries making only marginal progress (Chase-Dun, 2003, p. 49). At the same time, the practice of international election observation has grown, with a proliferation of observation organizations and the gradual emergence of a professional community of election observers. As Kelly (2009) points out, by 2004 over 80% of elections in non-established democracies were subject to international observation. While these groups generally use compatible approaches, many refer to international standards based on a number of international legal principles in their work. But, there remains no single set of internationally accepted standards for assessing elections. Not surprisingly, the growth in international observation has employed varying methods and assessment criteria with varying levels of professionalism. Several elections in the 1990s and early 2000s provide stark examples of the impact of the variances in observation methods on election assessments. In a number of cases, multiple missions observed the same election and reached different conclusions about the process. In addition, Koelble and Lipuma (2008) argue that, some host countries that expected troubled elections began forum shopping—inviting only those observer groups they perceived to be sympathetic to their interests. In some contexts, most notably in both Africa and the Commonwealth of Independent States (CIS) of the former Soviet Union, observer missions have been charged with having double standards or lacking integrity. These situations breed confusion about the meaning of “free and fair” and whether observer groups use clear and consistent reference points in their missions. Recognizing these problems, major international observation organizations began a series of consultations aimed at defining professional guidelines, culminating in the October 2005 endorsement of the Declaration of Principles for International Election Observation and the Code of Conduct for Election Observers at the United Nations. The Declaration includes an agreed-upon definition of international election observation, and provides broad guidelines for credible election observation missions, such as the size, duration and scope of missions. It also delineates key conditions required for meaningful observation missions, including host country guarantees of access to key persons and electoral information. Hyde (2007) notes that, some of the endorsing organisations, particularly inter-governmental member states, were hesitant to address issues regarding electoral standards or assessment criteria since such references raise sensitive questions about democratic legitimacy and matters of sovereignty. Others simply doubted the feasibility of defining what constitutes a democratic election, freedom of movement and freedom for observers to issue public statements. As a result endorsers limited their focus on

general principles for observation. International law does not give any right to observe an election. It does not require any state to submit its electoral process to a system of international *validation* neither is it the case, however, that national elections are still exclusively a matter for the domain of domestic jurisdiction (Goodwill-Gill, 2006).

### The Principle of Transparency

Transparency is a key word in any discussion of democratic elections, yet the basis for claims that election processes must be transparent is not often explored. It may be argued that transparency is only implied in other election related rights. Merloe (2010) argues that, it is not possible to imagine how citizens could take part in government and public affairs as provided, for example in Article 21 of the Universal Declaration and Article 25 of the ICCPR, unless the processes surrounding government and public affairs are open to public knowledge and scrutiny. More specifically, it is not possible to know whether the right to be elected and the right to vote are being ensured by governments unless electoral processes are “transparent”. The principle of transparency in democratic elections is not predicated solely on such deductions, though they lead to the proposition that the transparency principle is identifiable in the penumbra of electoral related rights found in treaty obligations and other state commitments concerning genuine elections. The basis for the requirement for transparency in electoral processes is the freedom to seek, receive and impart information, which is integral to the right to freedom of expression in the context of elections. While a person or a political party could theoretically seek to be elected and not to seek to impart any information to the electors, and while a citizen could theoretically go to polls without ever seeking or receiving information about the electoral competitors, such propositions are ludicrous.

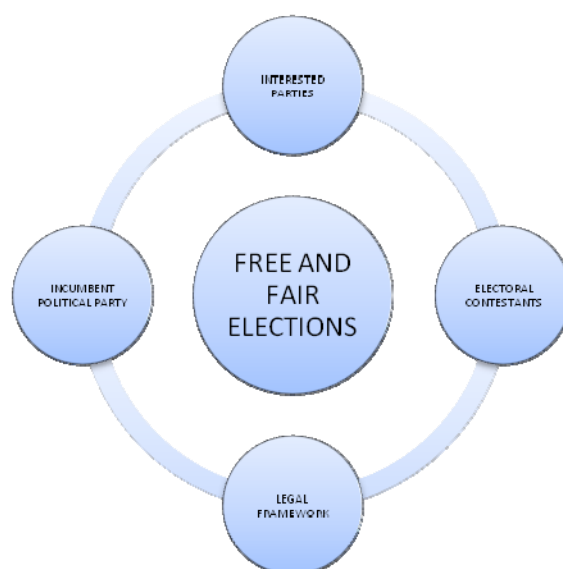


Figure 1. Determinants of a free, fair and credible election: A conceptual framework.

Source: Chigudu, 2012, p. 27.

### Determinants of a Free, Fair and Credible Election

Free, fair and credible election has become a sing-song for both advanced and new democracies. But how to determine the freeness and fairness of elections has been left to either observers, political parties or

supranational bodies like the Southern African Development Community, Economic Community for West African States, European Union, African Union or United Nations. Chigudu (2012) argues that there are four major determinants of a credible, free and fair election. These four major determinants are shown in figure 1 and discussed below.

The four factors (small balls) vacillate around the free and fair big “ball” without anyone of them getting closer to it. They pull each other apart as each tries to define the freeness, fairness and credibility of an election after polling. These four determinants are interconnected by political “covalent bonds”. If the political covalent bond breaks between any two of the determinants, conflict escalates into violence. Between the free and fair election big ball and the small balls, there are political repulsive forces that keep the determinants revolving around the big ball.

### **Determinant 1: Incumbent Political Party**

This refers to a ruling party. Any ruling party will try to hold on to the reins of power into perpetuity by whatever means possible. For some reason, any resultant loss of power by that party through the ballot is seen as a consequence of electoral fraud by the contesting or opposition party. The abuse of incumbency is the use of State facilities and resources by an incumbent government for purposes of prosecuting its electoral agenda. There is little doubt that possession of a presidential office gives the ruling party certain advantages that its challengers are unable to match. When an incumbent president seeks re-election, he/she often has many special advantages and privileges by virtue of being Head of State. In developing countries and developed countries it is common for opposition political parties to claim that the ruling party is misusing State resources for political party gains. In Africa, opposition parties have complained that they are effectively competing against the State when they participate in elections. It is interesting to note that, while some African countries have legislation to control State funding of political parties, there are not many examples of specific laws regulating party use of State resources.

This appears to be an area where more research and advocacy is required. Given the importance of the incumbency factor in elections, some countries have attempted to create a clear legal framework regulating the use of State resources by political parties. In Zambia, the Electoral Act No. 12 of 2006 and the Electoral Code of Conduct of 2006 prohibit any person from using State resources for political party campaigns except the president and vice-president. Although the law permits the incumbent president and vice-president to enjoy certain facilities, there is some discontent among the opposition political parties who view the ruling party as taking advantage of these privileges in ways that directly support partisan purposes and disadvantage the opposition. In Malawi, section 193(4) of the constitution prohibits the use of State resources for campaigning for a particular political party. But despite this prohibition, during the 19 May 2009 election, observers claimed that incumbent Bingu Wa Mutharika used State resources for campaign purpose. The European Union Observer Mission reported that, the Malawian president travelled throughout the country during the campaign using a range of State-owned resources for campaigning including a helicopter, vehicles for his campaign team, supporters and security services. In South Africa, the funding of Political Parties Act regulates State funding, but mentions nothing of how the incumbent uses State resources. The Zimbabwe Political Parties Act is also silent about the use of State apparatus for political mileage.

In Ghana, the Institute of Economic Affairs (IEA), a public policy think-tank, slammed the New Patriotic Party (NPP) for abuse of incumbency in the 2008 elections as the then ruling party (Ghana News Agency, 14

August 2011). The Institute of Economic Affairs of Ghana (IEA, 2011, internet) reported that, “Abuse of incumbency is a very real threat to Ghanaian elections and legislation may be required to regulate the ruling party’s utilization of State assets and State resources in an election year”. The IEA serves as a non-profit, independent, non-governmental and politically non-partisan think-tank with a view to broadening public policy and strengthening the pillars of democracy in Ghana and the African continent. It also advised that political control of the security services during elections, which tend to be abused for political advantage, ought to be reviewed. The IEA called for the creation of a playing field for all political parties through the equal access to resources and to programmes organized by the media. The issue of incumbency advantage is not confined to emerging democracies. Established democracies such as the United States have attempted to address the issue in their electoral laws.

The Federal Election Commission (FEC) administers and enforces the Federal Election Campaign Act, the Finance Law Act, the Presidential Election Campaign Fund Act, and the Bipartisan Reform Act of 2002, pieces of legislations, which attempt to address among other issues, the expenditure of presidential candidates during an election. The laws provide for stringent guidelines for presidential candidates to disclose their campaign expenditure and put a cap on campaign expenditure. However, the laws do not provide specific guidelines on incumbent expenditure. The laws are more specific on the use of Air Force One, the plane which the US President uses for travelling. Despite these provisions, it appears the sitting presidents have used federal resources during their re-election campaigns as was the case with former presidents Bill Clinton in 1996 and George W. Bush in 2004. The media reported that Bush enjoyed presidential privileges during the campaign period ranging from a huge staff team and White House facilities. Here is a clear case for research with a view to establishing how regulation can ensure the playing field is level and that abuse of taxpayers’ money for party political purposes is avoided.

### **Determinant 2: Interested Parties**

These are individuals or organizations that support directly or indirectly incumbent political parties or opposition parties. Any party that emerges from an election as a winner but is not their favorite is accused of having stolen the vote or won through some electoral machinations. Interest groups are organizations seeking to advance a particular sectional interest or cause, while not seeking to form a government or part of a government. Where the electoral system is organized to represent geographically defined constituencies, the interest group system is organized to represent economic, professional, ideological, religious, racial, gender and issue constituencies (Wilson, 1995). According to Wilson (1995), interest groups serve as a check on majoritarianism. They help counter the tendency of democratic governance to allow the faint preferences of the majority to prevail over the intense feelings of the minorities. Interest groups seek special benefits for their members. The cost of these benefits is dispersed over all taxpayers, thereby concentrating benefits to the few while making the many pay for them. This process has the potential of leading to what is termed organizational sclerosis, when the burden of so many special benefits to interest groups lowers the general standard of living in society.

The term is often used interchangeably with pressure group and is being supplanted by non-governmental organizations. Interest groups may occasionally contest elections as a tactic to influence political parties, but they usually rely on a variety of campaigning and lobbying methods to influence government policy. In the United States, interest groups pay particular attention to influencing Congress, sometimes producing so called iron triangles comprising interest groups, congressional subcommittees, and bureaucratic agencies. In Britain,

where power is more concentrated in the executive branch, interest groups generally place a greater emphasis on influencing ministers and civil servants. Interest groups use various forms of advocacy to influence public opinion and policy. They have played and continue to play an important part in the development of political and social systems. Their motives for action may be based on a shared political, faith, moral or commercial position. Some groups have developed into important political institutions or social movements while others have been accused of manipulating the democratic system for narrow commercial gain. The institution on which interest groups focus their attention is an indicator of where power lies in a particular political system. While many interest groups are not allied with specific political parties, they do have policy points of view, which frequently coincide with those of particular political parties. Interest groups should be empowered to be able to undertake oversight responsibility in the electoral process (Ossome, 2011). Although situations differ from country to country, the space created for interest groups to function is very limited. The importance of interest groups in a democracy can hardly be emphasized. They assist governments to be anchored on the needs and aspirations of the electorate.

### **Determinant 3: Legal Framework**

Every country has some electoral laws drawn out of that country's supreme law of the land. The electoral process is therefore conducted in terms of these sovereign statutes and guided by international electoral standards through a body to which the member country will be a signatory. For instance, the Organization for Security and Co-operation in Europe (OSCE), the Office for Democratic Institutions and Human Rights (ODIHR), the international Institute for Democracy and Electoral Assistance (IDEA), and the SADC 2004 Election Guidelines among others. Before the polls are conducted, every contesting party is usually satisfied that electoral laws and guidelines are reasonable and that the electoral playing field is level. If it is convinced that the ground is uneven, it is not obligated to participate but to vouch for the requisite electoral conditions. Only then can it participate. But, when the election result is not favorable opposition parties cry foul and allege that electoral laws and guidelines were designed to benefit the winner or to disadvantage the loser. Even where it appears there was strict adherence to the legal framework one or two parties may never accept the election. One of the chief questions when trying to gauge the credibility 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 and blurred. While it is important to go beyond polling day and the vote count, the analysis should exclude the very broad determinants of political competition that speak only more indirectly to elections and voting. For example, to 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, the rule of thumb is not to pronounce upon the inherent fairness of an electoral system or regulation, but rather to assess whether the rules, as written, are applied fairly and without partisan bias. Goodwin-Gill (1994) contends that, while states may undertake to achieve a particular outcome, the means by which the result is facilitated often vary in the context of international law. In light of this, the standard of achievement remains international in scope while the method of implementation does not remain necessarily so.

The organization and administration of electoral processes is complex and detailed. The level of detail specified at different levels of the legal framework vary from country to country depending on contextual factors, such as systems of law and the levels of trust in the election management body's ability to make fair and consistent decisions and policies. In order to promote consistency, equity and common understanding of

electoral frameworks the electoral process requires a clear, simple and relatively comprehensive legal definition. For confidence in the electoral processes it is also important that all parts of the electoral legal framework are freely and publicly available and that changes are discussed and shared with key stakeholders. Normally the legal framework is based on international treaties and agreements, detailed in the law and backed by constitutional authority. Defining key electoral issues in the constitution may provide a workable means of entrenching electoral norms against manipulation by the ruling party. These norms often include: the independence, composition, term of office, powers and functions of the election management body; electoral systems; suffrage rights and/or qualifications; political party and/or candidacy rights; the intervals or maximum intervals at which elections must be held; and electoral dispute settlement mechanisms.

A balance needs to be struck between providing for certainty and consistency in the legal framework, and allowing the election management body the flexibility to respond effectively to changing electoral circumstances.

#### **Determinant 4: Electoral Contestants**

A party that competes with a ruling party is a contesting party. Contesting parties enter the election arena with scepticism and mistrust about the ruling party. They argue that the incumbent uses State apparatus to its advantage at the expense of the opposition. As such, a win by the incumbent will be perceived to be a product of some clandestine activities orchestrated to outwit the contestants.

### **Discussion**

Free, fair and credible elections are a result of perceptions by voters based on the four determinants highlighted above. There is no one superior determinant that gives credibility to an election result. It is the summation of views or perceptions that may give a more informed position about the election status. 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 clumsy, and would defeat the very purpose of a free and fair 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, we would not bother to ensure everyone's right to vote, to be a candidate, to speak freely or to vote without undue interference. 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 plausible alternatives to the "wins", 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 instance, the same party held the premiership and a majority of seats in the cabinet almost without interruption, for 44 years between 1932 and 1976. The same individual held the position of premier this period without interruption for 23 years. In Canada, the Liberal Party has been in office for three-quarters of the time since 1896. Fundamentally, an assessment of electoral fairness based on political 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 favor of them. As noted by Huntington (1991), multiparty elections mean the demise of dictatorships and in many Sub-Saharan African States the first years of the 1990s were heralded as the beginning of a complete political renewal (Ayittey, 1992; Hyden &



Bratton, 1992). According to Lindberg (2006), the behavior of opposition parties is analyzed in two respects. Firstly, when does the opposition choose to participate in, or alternatively boycott elections? Secondly, when do opposition parties accept or reject election results?

Empirically this translates into two variables:

(a) Opposition Participation

The participation by opposition parties in free and fair elections may seem a given, just as a boycott may be expected when a ruling regime sets up an orchestrated facade of elections. But opposition parties may participate even when elections stand no chance of being free and fair or legitimate. They do this in order to press authoritarian rulers for further concessions and can also stage boycotts in legitimate elections in hopes of discrediting a ruling regime when they stand no chance of winning. Opposition participation is measured with three values: the “near total boycotts” when one of the main opposition parties contest elections; “partial boycotts” when some contest; and “all contest” when all major political parties participate.

(b) Losers Acceptance

Given that opposition parties participate, when do they accept election result? Losing parties may initially challenge the results in order to gain political advantage, for example from the international community, which can be a strategy for losers seeking to undermine their rivals. Challenging official results can therefore not be taken at face value as substantiating allegations of irregularities. In fact, the relationship between credible elections and the losing parties’ acceptance of defeat remains an empirically open question. Losers’ acceptance is measured on the basis of three values: “no” when none of the main losing parties accepted the outcome, “not initially/some” when either some or all losing parties rejected the results at first but within three months accepted it, or, if some but not all losing parties did not accept the results, and “yes, all immediately” when all losing parties conceded defeat immediately after the results were announced.

### **Assessment of Election Credibility**

For Birch (2005) it is worth noting that elections are a process that voters are more likely to be competent to assess than most government procedures, given widespread participation and the attentiveness this is likely to breed. Heavy press coverage of elections and possible violations of electoral integrity make it even more likely that ordinary citizens will be tuned into the election as a process. Voters are thus better placed to evaluate electoral practices and other aspects of procedural fairness on which survey researchers regularly quiz them on. Birch further argues that, given the importance of electoral behavior in political science, it is odd that the traditional survey indicators do not include perceptions of the legitimacy and procedural fairness of the electoral process itself. Freeness and fairness of elections can be accounted for by groups who have no vested interest in who or what party wins an election (Kan, 2005). The UN has been successful at impartiality in cases ranging from Cambodia to Southern Africa. Super powers that have a vested interest in the election need to abide by the results of the election and not to interfere in the electoral process. Ireland and the United Kingdom have been exemplary prior to the elections in Northern Island although this may not have been the case in Iran, Syria, Saudi Arabia and Turkey.

The criteria for assessment (Kan, 2005) should include transparency, freedom of choice, impartiality and quality. The ruling authority must be seen to be using state apparatus for governance and not solely for electoral purpose. The use of the police and the military to quash opposition meetings or critical media tarnishes transparency and freedom of choice. The Colombian government was notorious for such practices in the 1980s.

The result was wide-spread voter dissatisfaction. Coercion and violence diminishes voters' perception that the election is meaningful. Election management bodies must be neutral. They must execute their mandate impartially and objectively and without political interference. Thus, all political parties and candidates are equal and treated without discrimination by a neutral administration. The perception of a partisan administration can destroy public trust and confidence in the system and of the political parties participating in the elections (ACE, 2013).

## Conclusions

Voters whose preferred party or candidate loses an election doubt the integrity of the contest. They often have many tangible reasons to be suspicious. Even if losers can be convinced that the electoral procedures were fair they would still hold some residual negative attitudes. Cleaning up elections will not be enough to win the full support of voters aligned to the losing side. While these findings do not allow the researcher to entirely discount the potential impact of voting on perceptions of electoral fairness, they provide strong evidence to support the main determinants of a free, fair and credible election in this discourse. The rights and obligations of opposition parties need to be defined and traditions of mutual respect between opposition and ruling parties established. Finally, there is need for the recognition that the opposition is a necessary part of government and a need for the opposition to become a credible alternative to the government.

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