

What are the media preconditions for an election to qualify as being "free and fair"?

Discussion document compiled for SANEF

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24 February 2002

Executive summary:

Would South Africa's first democratic election in 1994 have been "free and fair" if the SABC had have remained under Government control, or if the print media had still be constrained by Emergency regulations? What if only one of these had been changed, and the other was still in place? Would that make a difference? What about the recent elections in Zambia, where public media (Print and Broadcast) was so clearly pro-Government?

How important media is as a factor in whether an election is indeed "Free and Fair" is a more complex matter than meets the eye. It is, however, a critical judgement call that deserves some considered discussion. This document is intended to help meet this need.

The argument that follows below states that media components of a "free and fair" election can be broken down into six elements.

These are: a legal dispensation that enables media freedom, de facto media freedom on the ground, independent media regulation, general pluralism of media voices, active journalistic professional bodies, and an audience that enjoys access to the media and freedom of expression, as well as displaying some respect towards the democratic role of media.

These conditions impact in different ways on an election - some of them are more relevant to the "free" dimension, and others pertain to what constitutes "fair".

An election might meet all these six media conditions, but still be unfair in other aspects (eg. funding of political parties, bribery or violence against voters, vote-rigging, etc.). In other words, the six media components should be seen as necessary, although not sufficient, conditions for an election to be declared "free and fair".

By the same token, however, it is hard to imagine how an election can pass the "free and fair" test if it fails fundamentally to meet these media conditions. This is not to say all the conditions have to be perfectly met. An election might perhaps still be certified as substantively "free and fair" without *all* six components being present, or being present in a fully-fledged manner. However, it is important to monitor the extent to which the situation of the six, taken as a whole, impact upon the democratic event which is an election.

A. Introduction

It is a truism to say that the media should play an indispensable role in the proper functioning of a democracy. This role is not limited to elections, but should endure between them. During such times, the media's function usually focuses on:

- a 'watchdog' role through which the governed can hold the government accountable;
- an enabling role, facilitating public involvement in policy matters and political agendas (thereby building a "public sphere");
- an educating and informing role, that develops and maintains a democratic culture (thereby sustaining civil society's role in political democracy)

During times of elections - which are seen by many as the hallmarks of a democratic political system - the media are expected to undertake very specific roles. These include:

- scrutinising candidates/parties,
- exposing irregularities,
- informing, educating and involving audiences in the interests of public participation in 'free and fair' elections.

These roles can be done through the following activities:

- by educating the voters about the electoral system and how to exercise democratic rights and responsibilities,
- by reporting on the development of the election campaign,
- by providing a platform for the political parties to communicate their message to the electorate, and vice versa,
- by providing a forum for the parties to debate with each other and with the public,
- by monitoring vote counting,
- by reporting results.

To do all this, the media as an industry and social institution depends on the presence of six factors:

- a legal dispensation that enables media freedom,
- de facto media freedom on the ground,
- independent media regulation,
- general pluralism of media voices,
- active journalistic professional bodies, and
- an audience that enjoys access to the media and freedom of expression, as well as has some respect towards the democratic role of media.

B. The six requirements in depth:

B. 1. Media freedom:

Various international tribunals and organisations such as the United Nations Special Rapporteur on Freedom of Expression insist on media freedom as one of the cornerstones of a free and fair election. The key dimensions of media freedom in times of election include:

- Freedom from censorship
- Freedom from arbitrary attack or interference: journalists not to be intimidated or

harassed.

- Free access to necessary information: journalists should have freedom of movement, access to meetings and a right to public information held by the State.

This emphasis on media freedom includes freedom from both the state and other forms of structural pressures such as owners, sources and advertisers. However, because an election is to do with State power, the major concern has – understandably – been to ensure the neutrality of the State vis-a-vis the ruling party (or parties) in government, as regards the fairness of the poll.

In turn, the freedom to engage in a fair competition for political power dovetails to a large extent with whether there is a legal dispensation to enable media freedom; in other words, with whether there are laws to protect citizens (including the media) from Government interference in free expression. At national levels, constitutions tend to aid the role of the media in elections by making provisions for legal rights to freedom of expression (Bill of Rights), and rights to information (Information Act) for the public and media workers.

These provisions tend to cover the following principles:

- the role of the media in democracy.
- freedom of political debate is a fundamental right - individuals (and constitutionally legitimate organisations) cannot be banned as they were in Apartheid South Africa.
- Governments' obligations to protect the rights and safety of citizens, including by extension media personnel and institutions.
- a civil (or even criminal) right of reply, correction or retraction in response to false statements about individuals (especially as carried in the media.)

There may be limits to the legal freedom if the media reproduce unlawful statements. An assessment is needed as to whether such laws being infringed are congruent with, or in contradiction to, democratic practice.

Ideally, credible research is needed to take stock of the legal environment for media freedom and electoral regulations for media. On this basis, there can be a proper assessment of whether this precondition is adequately fulfilled.

B.2. De facto media freedom on the ground.

The freedom of the media as regards pressures from a country's private citizens and from political parties is discussed below under point 6. Here the focus is on the real-politik use of state power to compromise freedom of expression during elections. The point is that the existence of a free legal regime needs to be complemented by freedom of expression in practice. A “free and fair election” in conditions where the media and individuals suffer ongoing informal sanction and repression is probably impossible.

The illegal use of state power, or even the selective application of laws which amounts to victimisation, not to mention state-sponsored violence and vigilantism against the media, are all extremely problematic from the point of view of media's electoral role.

In considering media freedom as freedom from government control, it should be noted that not all state-controlled media is necessarily state-owned media (just as the converse also holds true). Thus, it is important to examine the practice of media entities that may be owned by public trusts, or by coalitions of ruling elites (as in Mexico or Malaysia), to gauge to what extent media which is purportedly independent media is in fact under the thumb of the ruling grouping.

Also needing to be taken into account, is freedom from the interests of other states. If a country's media has to dance to the tune of imperialistic donors or foreign forces and owners, this can severely compromise its democratic role. For instance, the election that brought Salvador Allende to power in Chile saw seriously destabilizing media coverage sponsored by American corporations and the CIA. That in turn contributed to delegitimizing his victory and making possible a climate where Augusto Pinochet could stage a coup against democracy.

Election observers need to make an empirical assessment about the state 'on the ground' of media freedom and media freedom from state power, in order to judge whether this condition is met in a given poll.

B.3. Fairness: Public media and an independent communications regulatory authority:

Media funded by the taxpayers of a country, or set up in their name, have a special responsibility for fairness in an election. For countries with fairly tight state control over the media, ensuring pluralism within the public media sector is especially important. This is because often it is only public media that has the capacity in terms of reach, language mix and non-commercial responsibility to reach all sections of the electorate. A public broadcaster cannot fulfil its broader public interest duties in an election if it owes a narrow loyalty to the ruling party of the day.

Laws in the shape of a 'Broadcasting Act' are usually designed to ensure that public broadcasters fulfil their mandate of broadcasting (TV/Radio) in the public interest. This means broadcasting impartially, without discrimination on the basis of political opinion and without hindering persons in their right to impart and receive ideas.

In the case of the publicly-owned or funded print media, laws or charters typically exist to ensure that such publications are run on the basis of journalistic principles and ethics that are free from any outside party political interference. These principles are supposed to dictate the coverage of all newsworthy events, regardless of the source of such news. Anything less than this should, according to the law, not be acceptable from a publicly owned medium - whether broadcast or print.

Such regulations usually depend largely upon the presence of a clear transparent and democratic regulatory framework for at least the broadcast industry. Tied to this is the role of making sure that there is pluralism and diversity in broadcast media, in that the regulator ideally needs to license a range of broadcast media holdings (eg. public, commercial, community). The regulator also has a role in ensuring certain standards of fairness in the content of **all** such media, even if there are different criteria for the different categories. The argument here is that because airwave frequencies are a limited public resource, there is a

public justification in requiring certain responsibilities of all broadcasters - notwithstanding variations within the various categories.

Regulatory authorities are expected to be independent of both government and commerce in their licensing activities. It is true that such authorities often function within given policy guidelines of the government of the day. But from a democratic point of view, such guidelines may not to be partisan and neither should the actual practice by a regulatory body favour one party's supporters rather than another.

During an election period, regulators are expected to ensure that there is equitable (fair) treatment of political parties by all broadcasting licensees. It is in this context that various UN and International election observer missions have consistently insisted that all political parties should basically have equitable access to State television and radio in terms of both the timing and length of broadcasts. Often, the time allocated is based on a party's previous share of the popular vote, with a certain minimum for new-comers. In cases of an absence of a previous democratic election, and or the presence of political parties, it is customary that equal access be accorded to all parties.

Equitable treatment does not mean equal treatment, but it means fairness over a series of programmes, and consistency in treatment of different political parties. Licensees are expected to follow a Code of Conduct for Broadcasting services as set up by the regulator. South Africa's ICASA for instance includes provisions for right of reply by parties in its code. The fairness of such Codes needs to be assessed, as should be the implementation thereof. It is necessary to monitor whether the regulator takes action on infringements, such as intervening in cases of "hate speech" and or incitement to violence by broadcast media representing, say, different political or ethnic groups or parties.

For these reasons, it is important for election observers to make an assessment of the regulatory regime in a country, including the existence, character and operation of a licensing authority. This should cover how the set up has impacted on the question of who is allowed to broadcast, on what kinds of broadcasting content restrictions or directives are in operation and on what regulations and actual practice pertain to public media (both print and broadcast).

B.4. Freedom: A pluralism of voices in the media

The importance of expression in the media being free *from* government interference should not direct attention away from "freedom *for*" such things as diversity, and equality of access to a wide range of media content. Hence, pluralism in media ownership and public access is seen as another key characteristic of media's contribution to "free and fair" elections. The underlying principle is that the public need to be exposed to the widest variety of sources of information during an election in order for electoral choices to be real. Media pluralism is often interpreted to mean that the media should be owned by a variety of different interests, resulting in a 'market place of ideas'.

The Universal Declaration of Human Rights (Article 19: the right to freedom of expression and Article 21: the right to take part in secret elections) and the International Covenant on Civil and Political Rights (Articles 19 and 25) have both got provisions that impose an obligation on

governments to work towards the diversity and pluralism of the media during election times. Various human rights treaties such as the African Charter on Human and Peoples' Rights contain similar provisions. Recent jurisprudence, from Zimbabwe, Ghana, Sri Lanka, Zambia and Belize has underlined the danger of monopolies towards freedom of expression and that publicly-funded media have an obligation to convey viewpoints of political opponents of the government, and not just those of the incumbents of office.

As noted above, it is a serious point to assess whether there is an independent broadcast regulator that allows for both a fair licensing process and for a range of ownership forms. If a country's broadcasting set-up excludes stations owned by communities or private business, this is a serious reduction of pluralism even if the public-corporation licensee is found to operate on a non-partisan public-service basis. South Africa's first democratic elections had an independent board to oversee the public broadcaster, but the SABC was still in effect the sole significant broadcast outlet during that poll. As a result, the democratic quotient was far lower in the election as compared to the second South African election when the public also enjoyed access to private and public broadcasters.

The question of "who owns the media" clearly has an enormous bearing on the way in which they will cover elections. Privately owned media – especially print (which unlike private broadcasting usually has no regulatory conditions of political impartiality) – may serve the political interests of their proprietors. In some countries the political parties themselves may directly own significant media outlets. It is unrealistic to expect such media to operate as if they were non-partisan. Nor, in fact, is it intrinsically necessary for democracy that they should do so. The question is how the balance of all these media outlets operates within the broader media landscape. Is there, taking into account the reach and frequency of the various media, real pluralism for the majority of voters?

In rural Africa, radio is usually the only accessible mass medium; in other cases the means for circulating information are quite sophisticated and are sometimes used to side-step the officially controlled media. For example, there is the Internet, and specialist journals and publications. Both the big picture and the specifics need to be assessed as to the practical extent of diversity in media content for voters. Language access is also a factor to be taken into account here.

In assessing the state of media pluralism, media can be distinguished in terms of the following categories, each of which has a different role to play in elections:

- explicitly government media whose purpose is to be government's voice (and which ideally ought to be suspended during elections);
- public media, which is supposed to non-partisan (and which ought to abide by this mandate);
- private broadcasters;
- private print media
- community media
- media directly owned by political parties

The question for observers here is what the total mix amounts to. Pluralism is less an issue of within each sub-sector (excepting that of the public media), than whether it exists in the total

spectrum, and whether the majority of citizens have access to this range.

B.5. Fairness: Professional bodies;

Professional and impartial campaign coverage is not something that can be fully imposed by law and or regulatory authorities, whatever legal powers they may be endowed with. The laws may ensure fair treatment of political parties, but they do not explain either the nature of TV's coverage or the overall perspective within which elections are treated. Nor do they help to zero in on questions dealing with the ideological backing of the media, which perspectives are more pronounced than others, whether the public has access to voter education and a real choice of political information and opinion, etc.

The key to this is the role of the professional bodies within the journalistic profession. Ideally, representatives of these bodies should have been involved in drafting the regulations governing media's conduct during elections. These bodies could include:

- Journalists' or broadcasters' associations
- Journalists' or broadcasters' trade unions
- Voluntary media councils
- Training institutions
- Voluntary media freedom groups may also fall into a similar category in some instances
- Independent electoral commissions (including members of the media and other representatives)

In a number of cases these bodies have developed codes of conduct that are specific to election issues – as in the case of the 'Tanzanian Media Council' before the 2000 elections, and or 'The Zimbabwe Election Support Network' before the 2000 parliamentary elections. Once a code has been adopted, this gives a basis for action to be taken through any complaints or disciplinary mechanism that exists within the professional body.

In South Africa in 1996, a code of conduct was developed – at SABC radio journalists' initiative - jointly between the media and political parties. This affirmed the importance of educating supporters of parties about media. It promoted free access for the media and provided for mechanisms to communicate and deal with problems. It also committed the media to ethical and professional coverage (see Sandison, 1996).

Arguably, even though some partisanship (in the private media) is expected and legitimate, media practices and media content during elections should to some extent aspire to the tradition of public service interest. This emphasizes the need to inform and educate over and above that of persuading. The professional bodies involved have to see to it that there is critical and sufficient exploration of issues crucial to the public and not simply a case of the media following the agenda of the political parties. In general, the media as a whole should make concerted efforts well before the election to ensure that they observe professional ethics of fairness, accuracy, etc. and inform and educate the electorate about the election process and candidates in general.

Observers should take note of the role of journalist associations in the development of journalistic practice that is conducive to “free and fair elections”. A passive picture here is not a positive indicator.

B.6. Freedom: The audience:

The audience for, and the readership of, different media varies enormously. Questions concerning the requirements for the media's involvement in 'free and fair' elections need to take into account considerations of audience size, the public's access to media, and the audience's freedom of expression and choice. There are questions here related to economics and geography, which impact on how much the media makes a difference to an election.

There is also another aspect that affects how media freedom operates in regard to civil society (as distinct from the State). On the whole, the functioning of the media and the audience during elections is determined by the political social context in which the media operates. Countries with recent histories of authoritarian rule will likely incur a legacy on the citizenry's access to civil and political liberties and their political culture. Citizens may not have a tradition of feeling free to speak out, even though they now have the opportunity. Alternatively, citizens may be unaccustomed to media's role, and try to use force against journalists for one reason or another. This cannot but impact on the media's role as an arena for public discourse. With an absence of a multiplicity of voices, the public's freedom of expression and choice will be limited.

Therefore, there is a relationship between a democratic context and a media that plays an optimum role in democracy. Without a culture of democracy, and one that therefore includes some civil understanding about the democratic role of media, the other media preconditions for a “free and fair election” as cited above, may be reduced to token features.

Observers thus need to take into account media matters without being so media-centric that they ignore the political social context that interacts with media. On the contrary, analysis is needed on how this context impinges on the democratic role of the media, and the implications of this for an election.

C. Conclusion

The discussion above has very direct implications for whether a given election can be adjudicated as “free and fair”. Such an overall judgement has to be made on a basis that is holistic and well-considered. Media preconditions on their own are clearly not all there is to deriving such an overall conclusion about a poll: many other preconditions have to be taken into account. Yet, although the media requirements are thus not *sufficient* basis upon which an ultimate verdict can be reached, they should still be seen as *necessary* components of any such final assessment. In this regard, the following provisos can be made about the six media preconditions set out in this document:

C.1. Must a condition be fully present to contribute towards a “free and fair” verdict?

In the real world of elections, any single one of the media preconditions may in practice be far from ideal. The question, therefore, is the extent to which it is nonetheless still

substantively present. This requires a judgement call about whether, for example, particular incidents where a particular media condition is negated, render that condition effectively non-existent more generally. For instance, one or two incidents of intimidation of journalists - as unfortunate as these are - do not necessarily intimidate or inhibit the bulk of the media, and therefore do not necessarily disqualify an election from being “free or fair” as far as media freedom goes. But at some point a line is crossed and observers need to be clear in their minds as to when this is.

C.2. Must all conditions be present?

For the media to perform its public interest roles for a 'free and fair' election, ideally requires that *all* of the above conditions should be present (even if in varying degrees). We should avoid a formalistic mathematical scoring in this regard (6 out of 6), or even (4 out of 6). But, more profoundly, it should be clear that the six elements identified in this document are part of a package. They are complementary and mutually reinforcing.

Consequently, the substantive absence of just one element can often seriously compromise the effectiveness of all the rest. For example, there is not much value in having pro-democratic laws and regulations if - on the ground - these are ignored or violated with impunity by the State. Likewise, media freedom for marginal private media is undermined if the biggest medium is controlled by the government instead of playing an impartial public-service role.

A judgement therefore ought not to simplistically add up the six conditions (e.g. to see what percentage are met), but rather to see what the entire mix means for the bottom line of freedom and fairness in the election. It is important in so doing, however, to take cognisance of all six before reaching a conclusion.

C. 3. How long must the conditions be present?

During times of elections, political activity tends to increase enormously. All attention is turned to the outcome of the election race. But in spite of this increased activity, the period in question is a very short one, and by concentrating on the campaign, one risks ignoring the period preceding the campaign, a period which may be equally, or more significant. It is possible to argue that the long-term social, political and economic characteristics of the media need to be taken into account when assessing the role of the media in contributing to, or countering, the freedom and fairness of an election.

As regards the six conditions, listed above, most should be in place well before election time and well into the polling. It is thus highly problematic to monitor during the election campaigns without bearing in mind the longer-term media environment.

C.4. How are the six conditions to be measured?

The practical realities of election monitoring mean that observers are called upon to make swift judgements often with imperfect information.

The disadvantages of this necessity can be ameliorated by doing advance research on the

media situation even before the observation period begins.

It also means setting up clear and credible methodologies to allow for impartial monitoring of the media preconditions during the poll period itself, as well as that in which the results are announced and the political outcomes take effect.

In addition, observers can – and should – draw on a range of researchers and monitoring groups, including those of political parties, broadcast regulatory bodies and electoral commissions – but bearing in mind that all research findings are derived from particular paradigms and interests.

At the end of the day, the observers have to assess their own data plus such findings and make their own substantiated conclusions about what is valid, and what it all amounts to.

C.5. Summing up:

This document has argued that there are six preconditions if the media is to help constitute an election as being "free and fair". These are: a legal dispensation that enables media freedom, de facto media freedom on the ground, independent media regulation, general pluralism of media voices, active journalistic professional bodies, and an audience that enjoys access to the media and freedom of expression, as well as displaying some respect towards the democratic role of media.

The media exist in specific political, economic, social and cultural contexts. These contexts shape the media, and the media shape these contexts. Consequently, the presence of all the above media requirements / conditions for a "free and fair" election will to a large extent depend on the democratic context (scale of political pluralism) in which the media operates.

Having said that, it is evident that the guiding principle is that without media playing a democratic role, democratic elections are simply not possible. On the contrary, it may be that media are not simply restrained from advancing democracy, but actively utilised to counter it.

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