

Michael Krennerich

Free and fair elections?

**STANDARDS, CURIOSITIES,
MANIPULATIONS**

Bibliographical information of the German National Library

The German National Library catalogues
this publication in the German National Bibliography;
detailed bibliographic information can be found
on the internet at: <http://dnb.dnb.de>.

ISBN 978-3-8012-0614-7

Copyright © 2021 by

Verlag J.H.W. Dietz Nachf. GmbH

Dreizehnmorgenweg 24, D-53175 Bonn, Germany

Cover design: Birgit Sell, Köln

Typesetting: Rohtext, Bonn

Printing and processing: CPI books, Leck

All rights reserved

Printed in Germany 2021

Find us on the internet: www.dietz-verlag.de

Contents

Foreword	7
Not all elections are the same	8
What are »free and fair elections«?	21
The organisational and legal framework	31
The right to vote as a civil and human right	36
The right to vote – standards, curiosities and exclusions	38
The right to stand for election – standards, curiosities and exclusions	60
Constituency boundaries, equality of votes and gerrymandering	83
The election campaign	86
The media in the election campaign	99
Party and election campaign financing	105
The publication of electoral polls	110
The ballot and its pitfalls	112
Determination, notification and acceptance of election results	134
Electoral systems and the translation of votes to seats	143
Representation of women in elections	165

FREE AND FAIR ELECTIONS?

The representation of national minorities	176
After the election is before the recall	178
Supplement: Elections during the COVID-19 pandemic	180
Closing remarks	189
Appendix	191

FOREWORD

This study is the result of more than 30 years of involvement with elections – as an election observer, international electoral law expert and university lecturer. It is intended to provide an easily understandable, informative and vivid insight into how national presidential and parliamentary elections are conducted in democracies and autocracies around the world.

To this end, it examines electoral law, election organisation and electoral systems. In addition to introductory electoral theory considerations, the publication contains a wealth of legal and practical overviews and country examples. The electoral regulations in Germany are also not left unmentioned. The basis for this is – going beyond the author’s own experience and studies – the thorough reading of constitutions, electoral laws, websites of electoral authorities, as well as countless reports by election observers and many helpful specialist publications.¹

However, this study is not a textbook in the classical sense. The aim is rather to show in an illustrative way the diversity of electoral regulations and electoral practices worldwide, for the most part before the 2020 COVID-19 pandemic, including a number of curiosities, and some electoral manipulation. If the study is also easy to read, then it has fulfilled its modest purpose.

No book can be produced without support. Many thanks go to Prof. Dr. Petra Bendel, Prof. Dr. Florian Grotz and Dr. Volker Jacoby, Director of the European Centre of Excellence for Civilian Crisis Management, for their careful reading of the manuscript, for countless helpful comments and for many critical questions. I would also like to sincerely thank the Friedrich Ebert Foundation and the DIETZ-Verlag for publishing the study in English. Lots of thanks also to Francis Henry who reliably and quickly translated the book, originally published in German.

1 For the sake of readability, detailed source references have been omitted. In particular, the many election observation reports of international organisations that were evaluated have not been specifically mentioned in footnotes or are only included in some cases. Instead, the appendix contains a comprehensive list of primary and secondary sources on the topic.

NOT ALL ELECTIONS ARE THE SAME

In the early 1970s – for the time being the last peak of authoritarian rule worldwide – the number of democratically elected parliaments and governments was relatively small, being limited to Western industrialised countries and some countries of the »Global South«, such as Costa Rica, Venezuela, Mauritius, India and smaller island states in the Caribbean and South Pacific. An essential characteristic of democratically governed states was that they regularly held competitive multi-party elections. Autocracies¹, on the other hand, did not allow people to vote or held elections in which no parties or only one party ran. At that time, very few authoritarian regimes allowed multi-party elections, without, of course, thereby questioning their claim to power and granting genuine electoral freedom.²

In the course of the »wave(s) of democratisation« which first swept through southern Europe in the mid-1970s, then Latin America and finally – under very different conditions – also Eastern Europe and other regions of the world in the 1990s, multi-party elections were the order of the day from a political point of view. In many places so-called »founding elections« were held, which were the beginning of a still uncertain democratic development.³ Competitive elections served as important (though not the only) proof of a successful transition to democracy.⁴ One or two peaceful changes in government through elections were sometimes prematurely considered to be evidence of a consolidation of democracy. At the same time, elections were an integral and initially priority component of external democracy promotion, which was virtually flourishing. Particularly from the 1990s onwards, a large number of national and international organisations

1 In political science, all non-democratic systems are understood as autocracies, i.e. both authoritarian and totalitarian political systems.

2 On elections in different regions of the world in the 20th century, see Nohlen/Krennrich/Thibaut 1999, Nohlen/Grotz/Hartmann 2003, Nohlen 2005, Nohlen/Stöver 2010.

3 Cf. the corresponding contributions by Richard Rose, Michael Bratton, Mark P. Jones and Stefan White on »Founding Elections« in various world regions in: Rose 2000: 104–116.

4 In the context of the third wave of democratisation, the term »transition« refers to the transition from an authoritarian regime to a political democracy. Studies on political transition processes were concerned with the causes, the course and the prospects of democratization, initially in Southern Europe and Latin America. The term »transformation« is more comprehensive. It gained in importance in the context of the far-reaching political, economic and social changes following the breakdown of the »real-socialist« regimes in Eastern and Central Europe.

engaged in election assistance and observation to assist the respective states in the organisation and conducting of elections. This resulted in electoral law reforms and a professionalisation of election organisation in many countries.

Not everywhere where multi-party elections have taken place in recent decades, however, have the elections met democratic standards, nor has it always been possible to overcome authoritarian structures. Many states that had undergone processes of political opening or democratisation at the end of the 20th century found it initially or continually difficult to shake off their authoritarian legacies and overcome the functional problems that limited the importance of democratic institutions and procedures. While in most (re)democratised countries in Latin America and later also in Eastern (Central) Europe elections once again or for the first time developed into a »democratic routine«⁵, in Africa multi-party elections were institutionalised across the board,⁶ but only in some of the countries did democracies, let alone stable ones, emerge.⁷ The same applies to South, South-East and East Asia.⁸ Often, the power of incumbents could not be subjected to effective democratic and constitutional control. The trend towards democratisation also faltered worldwide in the 2000s. In many places, authoritarian regimes either persisted or re-established themselves after a period of political opening. However, the nature and strategies of authoritarian rule had changed.

Increasingly, »electoral autocracies« had emerged, which imitated democratic processes. They are characterised by universal suffrage and limited political competition. However, the elections are not democratic. Political competition is distorted to a greater or lesser extent in favour of the incumbent, and autocratic rules and practices have an impact on the electoral process. Even if popular autocrats mobilise considerable support during elections and there is no large-scale fraud on election day, an overall view of the electoral process and the broader electoral context usually does not allow the elections to be described as democratic. Hugo Chávez, for example, the late President of Venezuela, who after his third re-election in 2012 asked how commentators in Europe could still speak of a dic-

5 This is the title of an older article by the author on elections in Latin America; Krennerich 1999.

6 See e.g. Bratton/van de Walle 1997, Nohlen/Krennerich/Thibaut 1999, van Ham/Lindberg 2018, Bleck/van de Walle 2019.

7 In addition to the democratic early developers Botswana and Mauritius, these include Capo Verde, Ghana, Namibia, São Tomé and Príncipe, South Africa and, until 2019, Benin and Senegal.

8 Besides Japan and India, South Korea, Mongolia, Taiwan and Timor-Leste are among the countries with the best democratic profile in 2020. The majority of the South Pacific states are also governed democratically.

tatorship in his country, had to live with this flaw. In fact, between 1998 and 2012, the left-wing populist autocrat and the electoral movements supporting him had won around a dozen presidential and parliamentary elections and referendums. However, the arbitrary, authoritarian style of ruling and socio-political polarisation were detrimental to a democratic election process.

Certainly, the more elections in »electoral autocracies« permit competition and avoid open electoral fraud, the more difficult it is to distinguish democratic from non-democratic elections. The litmus test is the extent to which those in power are prepared to allow a fair electoral process and free elections and are willing to recognise non-favourable election results or even an election defeat. For example, do the elections in Turkey allow for democratic electoral competition? Or are they rather an expression of an autocratic strategy to maintain power? For the time being, the former is supported by the opposition's victory in Istanbul's local elections in 2019, which the government only recognised *nolens volens* after a re-run of the elections and in light of the opposition's clear election victory. The latter is underlined by the successful attempts of President Recep Tayyip Erdoğan to influence the national election processes in his favour in recent years, also by undemocratic means.

In less competitive autocracies, however, where despite multi-party elections the opposition hardly exists, the classification of elections is quite easy. Examples include Azerbaijan and the Central Asian autocracies, where political competition only exists at best in a rudimentary form. After the collapse of the Soviet Union and the proclamation of independent republics, the long-term presidents of Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan often won their elections with majorities of over 90% of the votes. Competing candidates for the presidency there are still mere »token candidates«, and the few opposition parties in parliament imitate parliamentary pluralism more than they come up with opposition strategies. The same is true of several autocracies in other regions of the world. Let us take the small, little-noticed Equatorial Guinea as an example: despite the introduction of multi-party elections in 1991, the autocratic president there, Teodoro Obiang Nguema, has ruled with an all-out majority government in the parliament since 1979, making him the world's longest-serving Head of State and Government. He and his party also always win elections with more than 90% of the vote.

Functions of democratic elections

As the core of liberal democracy, elections are attributed various functions that have traditionally been developed on the basis of established democracies in

Western Europe and North America.⁹ The experiences with democratic elections in other regions of the world, however, remained – with few exceptions – understated for a long time. It was only in the course of the wave(s) of democratisation at the end of the 20th century that elections there once again attracted greater attention. After the often only brief experiences with multi-party elections in the context of decolonisation in Africa and Asia and the suspension of competitive elections in many South American dictatorships, the question has now (again) been raised as to what functions democratic elections outside of Western Europe and North America (can) even take on. In order to answer such questions, however, a general understanding of democratic electoral functions was and is necessary.

In this sense, the catalogues of functions originally related to Western democracies cannot simply be disregarded. They serve as important points of reference from which – albeit taking into account the particular political, socio-economic and cultural conditions in each case – the functions of competitive elections can also be meaningfully considered in other regions of the world. This is necessary in order to link elections in the »Global South« to comparative electoral research. For example, surveys by the *Afrobarometer* show that the »demand« for liberal democracy in Africa is certainly high, even if the »supply side« leaves much to be desired.¹⁰ At the same time, elections in Africa are not only, as has been often maintained, »ethnic censuses«, where voters cast their votes according to ethnicity, »typically« accompanied by vote buying and violence.¹¹ Elections are shaped by competing moral visions of voters and politicians.¹² In the states of Africa and other regions of the Global South, there are also serious efforts being undertaken to hold democratic elections which – despite their specific characteristics – are oriented towards the same basic functions as elections in established democracies. Four general functional complexes are of fundamental importance in this context:

1) Functions relating to the transfer of political power and the assignment of ruling and opposition positions: According to a liberal-pluralist understanding of democracy, the *demos* grants a constitutionally formulated »temporary mandate to rule« in democratic elections, and transfers political power to future rulers for

9 Cf. for example Rose/Massawir 1967, Nohlen 1978 and 2014, Harrop/Miller 1984, van der Eijk 1993, Powell 2000, Rosenberger/Seeber 2008, Behnke/Grotz/Hartmann 2017.

10 Cf. for example Gyimah-Boadi 2019.

11 See, for example, Paul Collier's (2008) exaggerated sweeping criticism of elections in Africa. Instead, see Bleck/van de Walle 2019: 15; cf. also Bratton/van de Walle 1997, Lindberg 2006.

12 See, for example, Cheeseman/Lynek/Willis 2021.

a limited period of time. Democratic elections thus have the function of transferring political power and, to this end, provide persons – usually organised in parties or voter initiatives – with the authority to rule in the form of political mandates. This is true even when the function of forming a government, which is often emphasised in this context, is only apparent indirectly.¹³ In democratic elections, however, not only is a mandate given to rule, but the parliament is also elected and the parliamentary opposition established, which, from a normative point of view, is specifically tasked with controlling the political exercise of power and being prepared for a change of government.

2) Closely linked to the transfer of political power is the legitimising function of democratic elections. Elections are used to legitimise the exercise of political power for a limited period of time. In free and fair elections, the electorate confirms or replaces its government or its representatives, thus expressing either consensus (which in a weak sense includes accepting or tolerating) or dissent in respect of the rulers and their policies. The legitimising function of democratic elections refers primarily to the holders of the political mandates granted either directly or indirectly through elections. A democratically elected government is widely regarded as legitimate in office, despite often justified criticism of its style of politics and policy content. From a normative perspective, however, the legitimating power also includes the opposition. The full recognition of the opposition is a particular feature of truly competitive elections. It is no coincidence that the opposition in the United Kingdom is traditionally referred to as »Her Majesty's Loyal Opposition«. Democratic elections legitimise not only elected representatives, but also the principle of political opposition – both *in abstracto* and in its concrete organisational and legal form, which is expressed, inter alia, in the granting of political rights also to the opposition. In this sense, elections can also reinforce or call into question the legitimacy of the political order and its »rules of the game«, depending on whether the procedural rules associated with democratic elections are accepted or rejected. If the elections are democratic, they also reflect a procedural consensus that includes the rights of the political minority. Finally, elections can also strengthen the legitimacy of the political community included in the electoral process.¹⁴ For example, despite all the tensions beforehand, the first general and free elections in the Republic of South Africa in 1994

13 Unlike presidential and semi-presidential systems of government, in parliamentary systems of government national elections decide only on the composition of the parliament, which in turn elects the head of government.

14 Thereby all three essential objects of legitimation of classical political systems theory are named: political office holders, political order, and political community.

temporarily contributed to national unity in the post-apartheid era, even though the desired »Rainbow Nation« did not really emerge there later on.

3) Functions relating to the representation of diverse social groups, views and interests: While »governments of national unity«, which involve the relevant political powers of a country, are rare and usually only occur in post-conflict situations, elected parliaments in particular are supposed to represent social diversity and take this diversity into account appropriately in the parliamentary policy-making and decision-making process.¹⁵ Sufficient political, social and territorial representation in parliament is therefore an important goal of democratic elections, without, however, making it impossible to form stable government majorities in parliament. This is not only a matter of a more or less proportional allocation of seats to political parties – depending on the electoral system – which corresponds to their share of votes in the electorate (which, of course, is deliberately restricted in plurality/majority systems in favour of the formation of government majorities). Equally important is a »balanced gender representation« or an adequate representation of social minorities or different regions in parliament. In view of the high average age of parliamentarians, there are now increasing calls for a stronger representation of young people in parliament, too.¹⁶ If such an adequate representation of different social groups is to be guaranteed, the various conditions under which candidates compete, are nominated and elected must be considered.¹⁷

4) Functions relating to the design of policy content and alternatives: According to a liberal-representative understanding of democracy, the election is strictly speaking not a decision on content but a choice between persons. Elections do not primarily decide on factual problems, but on who will solve the factual problems. In this sense, the democratic electoral process is first and foremost a transfer of trust to persons or parties. Nonetheless, content-related and programmatic preferences come into play in the voting decision. Persons and parties standing for election usually stand for certain political positions, programmes and goals, and represent certain views and interests of the electorate. Insofar as elections represent a competition for political power on the basis of alternative policy programmes (which is not always the case), voters have the opportunity to influence at least the basic orientation of government policies. However, this is

15 See also Behnke/Grotz/Hartmann 2017: 14.

16 In Ecuador, for instance, there is not only a legislated gender quota for candidacies of 50%, but also a legislated candidate quota of 25% for young people (aged between 18 and 29 years), which was introduced by the 2020 electoral reform; see Ortíz Ortíz 2020.

17 See the chapters on representation of women and minorities.

usually a general mandate rather than a specific substantive mandate. At the same time, elections can also have a corrective function which accompanies the government. Since power is only granted for a limited period of time and is regularly subject to review under democratic competition conditions, the rulers – as well as the opposition as their challengers – are required to take the views and interests of the electorate into account appropriately. Political expectations are placed prospectively on elected officeholders in elections, and retrospectively their performance is assessed in elections.¹⁸ The aim is to create a government that listens to public opinion and is committed to it.¹⁹ Thus, democratic elections are about electoral responsibility and accountability. Importantly, accountability refers to the electorate as a whole and not only to the supporters of the government.

From the perspective of a liberal pluralist understanding of democracy, to a large extent the four functions determine the essence of democratic elections. Elections in liberal democracies are already of great importance in this respect in so far as they – in the same way as referendums – represent a form of political participation which in principle involves the entire electorate. In addition, the holding of democratic elections is already by definition linked to other opportunities for political participation in the immediate or broader context of the elections. This includes not only election campaign activities and the active participation in parties and voter initiatives, but also the use of political rights such as freedom of assembly, association and speech. Without such rights, democratic elections are simply not possible. The democratic content of elections is therefore closely linked to the democratic nature of politics and society in a country. This also puts the derogatory talk of pure »electoral democracies« into perspective, since if elections are to be truly democratic, they always require a democratic environment.

However, the normatively derived or ideal-typically developed attributions of functions should not gloss over the political conditions in liberal democracies. It is true that the well-known saying by the Sponti movement »If elections would change anything, they would have been banned long ago« is exaggerated. Nor are democratic elections merely »alibi events« that simulate competition, conceal social antagonisms and provide blanket authority for decision-making irrespective of consensus.²⁰ It is rather the case that elections can make a big difference to who governs and how. Unlike some of his successors, President Nelson Mandela, for example, came as a stroke of luck for the peaceful transition in the Republic of South Africa. Donald Trump, in turn, has been a burden, both for democracy

18 See also Rosenberger/Seeber 2008: 19.

19 See Sartori 1987.

20 Dieter Nohlen (2014: 34), for example, summarised such radical criticism of elections.

in the USA and, polemically speaking, for the rest of the world. There are also differences in the government programmes of many political parties. The political science question »do parties matter?« can often be answered in the affirmative, even if major social problems, from poverty to climate change, are not sufficiently addressed politically.

Thus, even if the fundamental criticism of the alleged meaninglessness of elections is exaggerated and does not ask what the political order would look like (or actually does look like) without a democratic electoral competition, there are many limitations to the democratic significance of elections. These include, for example, encrusted, elitist power structures and the weakness of representation of political parties, authoritarian attitudes and behaviour patterns, parochial political subservient cultures and illiberal governing practices, rampant corruption and deficiencies as regards the rule of law, media oligopolies and the exuberant influence of money on elections, or the remaining power of non-elected actors, such as the military or oligarchs. At the same time, in many places, social conditions, such as extreme poverty and pronounced social inequality, are not conducive to effective political participation of the population in elections.

The extent to which elections fulfil democratic functions largely depends therefore on the extent to which democratic institutions, procedures, courses of action and attitudes develop and are consolidated in young democracies, often under difficult conditions, and to what extent, even in established democracies, the elections help to produce responsible governments and to consolidate any further democratic opportunities for participation in politics and society. The development of a democratic and constitutional culture is usually a lengthy process, especially in socially polarised and ethnically fragmented societies. In countries in which winning elections not only means access to political office, but also the monopolising of the state apparatus, access to the country's economic resources and social supremacy, the stakes are high in elections, and losses are significant in the event of defeat. There, multi-party elections quickly become a zero-sum game at the expense of social and political minorities. Even under such difficult socio-economic and political-cultural conditions, elections can help to resolve conflicts of power and domination peacefully, but they do not necessarily do so. Sometimes they are also »new battlegrounds«²¹ or even intensify power conflicts. The frequently mentioned pacifying function of competitive elections is therefore highly context dependent.

Democracies also have to pass the »stress test« they are currently facing due to the rise of populists. In many places, a confrontational type of majority de-

21 Söderberg/Kovacs 2018: 3.

mocracy²² has emerged, in which – with reference to the »will of the people« or the voter majority – the concerns of political minorities are brusquely pushed aside. Negative campaigning and defamation, as well as disinformation and fake news, now have a significant influence on electoral decisions, even in established democracies. Moreover, obviously the scope for action of democratically elected governments is mostly much smaller than election campaigns would have people believe. The elected left-wing governments in Greece experienced this during the financial crisis there just as painfully as many other states that are heavily indebted or otherwise economically and politically dependent.

Functions of non-democratic elections

»¿Para que sirven las elecciones?« – »What is the purpose of elections?« was the Spanish title of a now somewhat outdated study on elections in non-democratic systems.²³ Elections are more than just decoration, even in autocracies. Autocrats incorporate elections into their governing practices and use them to gain legitimacy in domestic and foreign policy, to co-opt support groups in politics, the economy and society, to divide the opposition or put it in its place. However, they were not and usually are not prepared to relinquish governmental power in elections.

1) Legitimacy through elections: Autocrats do not base their domestic political legitimacy on elections alone, but on other sources of legitimacy as well – such as personal charisma or traditional or religious claims to power.²⁴ Sometimes they can also distinguish themselves as guardians of national unity and security, especially in the face of possible separatist movements, terrorist threats or widespread criminality. They may also be seen as guarantors of the nation's well-being, economic progress or revolutionary achievements. Elections can be part of such legitimacy strategies. They provide resourceful autocrats with the opportunity to impressively underline their claim to leadership. Through elections, they can mobilise the population for their own political goals and demonstrate their support – real or perceived – among the electorate on all sides. The numerous elections under Alexander Lukashenko in Belarus (before 2020) and under the aforementioned Hugo Chávez in Venezuela are good examples of this. Not only a high level of approval of the incumbent, but also a high voter turnout are seen

22 This is how Kai-Olaf Lang (2015) described the political system in Hungary. At the time, he expressly did not yet classify it as an authoritarian regime.

23 Hermet/Rouquié/Linz 1986 (1978).

24 This addresses three classic sources of legitimacy, which Max Weber has already named.