

Assessing Electoral Fraud in New Democracies: Refining the Vocabulary

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IFES White Paper

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Foreword

Regrettably enough, electoral fraud and electoral malpractice are still things to be concerned about as the two continue to distort electoral processes and electoral integrity in many countries around the world. However, the discussion among electoral practitioners and scholars about issues of electoral integrity, fraud and malpractice has suffered from a regrettable lack of agreement about definitions and interpretations of such phenomena.

It is, therefore, very commendable that IFES has put effort into an attempt to provide definitions and a vocabulary, which in my opinion are clear, consistent and potentially very useful if/when applied not only by scholars, but also by electoral practitioners trying to decrease the prevalence of electoral fraud and electoral malpractice.

Jørgen Elklit, Professor of Political Science, Aarhus University, Denmark

I. Introduction

Electoral fraud has a well-documented history, dating back to the fledgling democracies of the 19th century and their predecessors. Among contemporary democracies – nascent and consolidated alike – fraud provides an unfortunate common ground that transcends culture, religion and geography. As a general area of academic research, the interested reader can find a robust collection of studies assessing or comparing individual cases of election fraud. However, as R. Michael Alvarez, Thad Hall and Susan Hyde observed in a 2008 volume entitled *Election Fraud*, “work to date includes little systematic research on how election fraud can be detected and deterred.”¹ We believe that this is due, in part, to a lack of consensus over what is truly meant by the terms electoral fraud, malpractice and systemic manipulation.² This paper seeks to provide clarity in the search for appropriate definitions that will be able to inform efforts to combat fraud and malpractice, as it is difficult, if not impossible, to fight a problem that is not well-articulated.

Several definitions and terms have been proposed by scholars in recent years. They range from overly restrictive to nearly all-inclusive; our challenge is to alight on a point in between that is precise enough to be useful but not so narrow as to falsely delimit the scope of efforts to combat election-related crimes. And, more importantly, none of these attempts have yet to generate a definition of electoral fraud that is largely acceptable to the broader community.

In this white paper, we will first conduct a brief review of the existing literature by segmenting the definitions offered into two broad categories. Category one encompasses inclusive definitions, which are broad-based and often reference democratic norms or international standards (i.e., *it is fraud if it violates principles of free and fair elections and the rights of citizens to choose their representatives*). Category two includes narrow conceptions that generally take a law-based approach to identifying fraud (i.e., *it is fraud if it violates the domestic laws governing elections in a country*).

There are elements of both approaches that are useful in efforts to eradicate fraud. However, at the extremes, neither approach is a clear winner. Proponents of the broad approach to defining electoral fraud would note that inclusivity will ensure that as many fraud risks as possible are tackled, so as to safeguard the credibility of the electoral process. However, if every possible violation or irregularity is deemed fraud, election managers will find it difficult (if not impossible) to prioritize genuine risks to the electoral process. A very restrictive interpretation of the fraud problem, on the other hand, could result in election managers and other stakeholders overlooking serious threats to the legitimacy of an election until it is too late to salvage.

¹ R. Michael Alvarez, Thad E. Hall, and Susan D. Hyde (2008) *Election Fraud: Detecting and Deterring Electoral Manipulation*, Brookings Institution Press, Washington, D.C.: page 3.

² Systemic manipulation refers to the use of domestic legal provisions and/or electoral rules and procedures that run counter to widely accepted democratic principles and international standards, and that purposefully distort the will of voters. As this paper will focus on tools that practitioners can use to deter, detect and mitigate fraud and malpractice within the context of a specific election event, we are not going to discuss systemic manipulation in depth because the limited tools available to confront this type of wrongdoing are fairly well established. These tools include the use of regional courts (such as the European Court of Human Rights [ECtHR] or the Inter-American Court of Human Rights); application of pressures to reform via diplomatic missions; election observation and monitoring reports; and domestic pressure to reform legal and electoral frameworks.

Second, we propose a framework for understanding election fraud and malpractice that builds on our previous work on this subject³ and takes into account comments from election practitioners and academics made at the 2011 International Political Science Association-European Consortium of Political Research (IPSA-ECPR) Joint Conference in Brazil. This framework seeks to avoid some of the drawbacks of definitions that have been proposed by our colleagues in the election community, discussed more fully below. Through this effort, IFES seeks to bridge the gap between academic research and its practical applications in election contexts around the world.

II. A Brief Review of Relevant Definitions and Frameworks

Practitioners and academics seeking to define and categorize practices that undermine the electoral process have generally used one of two basic approaches, which we have termed *inclusive* and *restrictive*.⁴

The Inclusive Approach

The first approach used by writers to conceptualize and define these issues (variously called fraud, malpractice and manipulation, despite important differences) is to be as broad as possible, no matter the imprecision. Some writers in this category situate their definitions normatively, finding that electoral wrongdoing violates domestic norms or internationally accepted standards for free and fair elections. A hallmark of this approach is that the definitions neither distinguish between nor mention potential actors and they often conflate terms that have precise legal meanings. From a practitioner's perspective, it is worth noting that any consensus definition should be useful in reality. However, this type of approach generally lacks focused definitional attributes that can aid in deterring or mitigating actual fraud or negligence by election professionals. As discussed later in this paper, we propose a nuanced distinction between *fraud*, *malpractice* (including *criminal malpractice*) and *systemic manipulation* that avoids this pitfall.

A range of authors have taken the inclusive approach. In a 2003 paper, Fabrice Lehoucq offers the following basic definition for electoral fraud: "all clandestine efforts to shape election results."⁵ While pleasingly simple at first glance, this definition is problematic. As Skye Christensen notes in a 2011 paper on the use of digital observation techniques, Lehoucq's definition brings into the fraud fold a range of

³ In the first white paper in IFES' electoral fraud series, published in December 2010, the following basic definition was proposed: "deceptive or negligent interference with the electoral process that intends to prevent the outcome from reflecting the will of the people." Rafael Lopez-Pintor (2010) "Assessing Electoral Fraud in New Democracies: A Basic Conceptual Framework," *Electoral Fraud White Paper Series*, International Foundation for Electoral Systems, and Staffan Darnolf (2011) "Assessing Electoral Fraud in New Democracies: A New Strategic Approach," *Electoral Fraud White Paper Series*, International Foundation for Electoral Systems.

⁴ In a 2012 volume entitled *Electoral Malpractice*, Sarah Birch finds that there are four approaches to defining electoral malpractice: "legal, perceptual, 'best practice,' and normative." For the purposes of this white paper, and given the fairly limited number of definitions offered by the community, we have effectively encapsulated the latter three approaches into an "inclusive" approach, as contrasted with the narrow limits afforded by a law-based approach. See Sarah Birch (2012) *Electoral Malpractice*, Oxford University Press, New York: pages 11-12.

⁵ Fabrice Lehoucq (2003) "Electoral Fraud: Causes, Types, and Consequences," *Annual Review of Political Science* 6: page 233.

activities that could actually be part of a healthy electoral process, such as legitimate closed-door strategy sessions of a political campaign.⁶ At the same time, it eliminates from consideration obviously fraudulent activities that might be committed in the open by a brazen incumbent candidate or party, such as carousel voting or ballot stuffing. Theoretically, most acts of fraud would be hidden from public view, so Lehoucq observes that “manifestly fraudulent behaviors” are only publicized by their victims.⁷ However, in IFES’ experience around the world, perpetrators of blatant fraud often make no efforts to hide them. Blatant vote-buying, intimidation and violence may all be part of a strategic public display of power intended to evidence their (or their party’s) control over the political process.

In an effort to refine his first approximation, Lehoucq goes on to note that “voting irregularities” are also within the scope of fraud, because they change the election result.⁸ Although he does not define them, we understand voting irregularities to be a general catch-all term for breaches in the normal or prescribed election procedure that may or may not implicate particular election officials or their responsibilities. If the irregularities do result from incompetence or deliberate wrong-doing, they would in fact be considered malpractice, criminal malpractice or fraud, as we detail in Section III of this paper. In some cases, however, these irregularities may be due to logistical factors outside the control of election administrators (for example, adverse weather conditions forcing polling stations to close). Accordingly, the term is far too broad to use as a way of defining fraudulent activities.

Andreas Schedler, in a frequently-cited 2002 paper entitled “The Menu of Manipulation,” offers the following wide-ranging definition: “Electoral fraud involves the introduction of bias into the administration of elections. It can take place at any stage of the electoral process, from voter registration to the final tally of ballots. It covers such activities as forging voter ID cards, burning ballot boxes or padding the vote totals of favored parties and candidates. Invariably, though, it violates the principle of democratic equality. Fraudulent practices distort the citizenry’s preferences by denying voting rights to some citizens, while amplifying the voice of others.”⁹ He attributes this type of “electoral alchemy” especially to uneasy, authoritarian incumbents. Schedler’s definition is alluring, based on a strong principle of democratic equality, but it fails to narrow the field enough to be workable in reality. There are many institutionalized practices in the electoral process that may create “bias” for one party or candidate over another, such as the various benefits of incumbency, but which are perfectly legal and even unavoidable.¹⁰ An additional issue with this definition is the focus on “administration of elections,” which may imply for some readers that the main actors are election officials at various levels. However, as we note in the next section, an important dimension of the definition must be the range of possible actors, which, in the case of fraud, should include other stakeholders besides election officials (for example, the media, government officials, state institutions, political parties, candidates and voters).

⁶ Skye Christensen (2011) “Mapping Manipulation: Digital Observation of Electoral Fraud,” Thesis Submitted to Uppsala University, Department of Government: page 9.

⁷ Lehoucq, page 235.

⁸ Ibid.

⁹ Andreas Schedler (2002) “The Menu of Manipulation,” *Journal of Democracy* 13(2): page 44-45.

¹⁰ Incumbents are widely regarded as more newsworthy and thus receive more coverage in the media. In addition, ruling parties or incumbents can tailor public works programs to coincide with the electoral calendar, making it somewhat easier to attract campaign contributions.

A 2012 study by Creative Associates comes somewhat closer to arriving at a precise definition, but requires further refining to ensure it is workable in practice. In their publication, Sarah Birch and Jeffrey Carlson use “malpractice” as the overarching category for electoral misconduct, defining it as follows: “electoral crimes and sub-standard practices that result in failures or refusals to act (i.e., inability or denial to provide necessary oversight); acts of deception (i.e., providing false or misleading information), acts of coercion (i.e., intimidating or forcing a voter or other electoral participant to behave in an involuntary manner), and/or acts of destruction (i.e., physical violence toward individuals or institutions).”¹¹

Although this definition provides a comprehensive typology (including deception, coercion and omission), the use of the term “malpractice” as a catch-all obscures important differences in various types of electoral wrongdoing. Malpractice and fraud, as we will address in Section III below, are fundamentally distinct. Fraud is based on wrongful intent, whereas malpractice is a form of negligence.¹² For example, Creative Associates’ definition, stated as “electoral crimes and sub-standard practices that result in failures or refusals to act,” should be segmented by intent and type of actor. If election administrators knowingly and intentionally remove or omit indelible ink from targeted precinct election material kits to allow multiple voting for one party or candidate, then they have likely committed fraud and should be prosecuted accordingly (intent is an operative dimension of fraud, as will be discussed in Section III below). If, however, poorly-trained polling station officials neglect to apply indelible ink to the fingers of voters, as per the requirements of the electoral process, and thereby unknowingly open the process to abuse, they may have only committed malpractice. In our view, this distinction is critical to any discussion of electoral wrongdoing because it allows election administrators and prosecutors to develop targeted deterrence and mitigation processes that enable them to more effectively combat electoral fraud.

As evidenced by this discussion, imprecision is a major shortcoming of the inclusive approach to defining and understanding electoral fraud. Proposed definitions do not always account for the range of actors and how their roles and responsibilities in an electoral process might differ, and frequently include terms that are inappropriate (for example, using the word malpractice to refer to non-professional actors in an election, such as voters or candidates). Ignoring these issues could be perilous for election managers or technical assistance providers who are attempting to identify, prevent or mitigate problems in the electoral process.

The Restrictive Approach

The second category includes approaches that focus only or mostly on the letter of the law (i.e., fraud can be identified by whether it violates existing domestic legal provisions). This enables a context-specific approach to combating various kinds of electoral wrongdoing, and it makes obvious sense for the election management body (EMB) to use a country’s domestic laws as benchmarks in its fraud or malpractice control activities. Some observers note, however, that a solely law-based approach leaves

¹¹ Sarah Birch and Jeffrey Carlson (2012) “Electoral Malpractice Primer: Insights and Priorities,” *Electoral Integrity Framework Project*, Creative Associates International, Washington. D.C.: page 2.

¹² As noted in Section III of this paper, in some cases, severe malpractice can rise to the level of fraud, regardless of intent.

open the possibility that practitioners and international actors will have little recourse for addressing systemic manipulation or problems with potentially large-scale implications for elections in countries with weak legal provisions, or when legal means are purposefully used to manipulate election outcomes.¹³ For example, legislators in some countries use ostensibly legal means to specifically prevent opposition parties from getting on the ballot by implementing unreasonably high threshold requirements (e.g., an extremely high number of signatures from voters or onerous requirements for regional offices). The restrictive approach also fails to account for potentially destabilizing activities or new types of systemic manipulation that might satisfy the domestic legal framework, but which violate the spirit of internationally-accepted political rights.¹⁴ Where appropriate, election administrators and other stakeholders need to have the detection, deterrence and mitigation tools necessary to manage malpractice and systemic manipulation that is not necessarily addressed by existing laws.

The benefit of the law-based approach is that it permits observers to dispense with the thorny issues of cultural, political or contextual relativism. That is, many authors believe that a more inclusive approach, which draws on norms or principles that may not be reflected in domestic law, will not necessarily be meaningful in all countries. As the editors of *Election Fraud* note, “the relative nature of election fraud and the widely variant historical, cultural and institutional contexts in which election fraud has occurred make the development of a clear and consistent definition a complicated, if not impossible, undertaking.”¹⁵ By way of example, they cite allegations of fraud in Mexico’s 2006 presidential election, when political parties canvassed neighborhoods and the outgoing president announced his endorsement of one of the candidates – both unremarkable facets of the electoral process in the United States, but which were highly controversial in the Mexican context.¹⁶ Use of a law-based approach provides a possible solution for this problem, as it is inherently country-specific. Unfortunately, this does not fully circumvent the main weakness of the restrictive approach; namely, that focusing only on the letter of the law might eliminate from consideration practices in countries with legal provisions that are weak or have an intentionally manipulative or distortive effect on the election process. In addition, as the editors of *Election Fraud* note, “a narrow legal definition of election fraud...could lead to incorrect

¹³ From a practical standpoint, a key argument for use of a strictly domestic law-based approach is that it provides a clear avenue for detecting, deterring, and mitigating improper acts committed by election professionals or other stakeholders. Although, as discussed above, a country *could* be held liable to international standards via the use of regional courts or the pressures that can be applied by diplomatic missions and election observation reports, it is not possible to prosecute or hold accountable individuals without a domestic legal standard in place. We do not believe, however, that this limitation automatically implies that the scope of fraud and professional malpractice must be limited exclusively to acts prohibited by the law. By widening the field to include some international standards for credible elections, practitioners will have recourse to identify and mitigate improper influences on the electoral process that are not necessarily outside the scope of current laws. This approach will be especially relevant to tackling the issue of electoral malpractice, which, as described in the next section of this paper, focuses on negligence by election officials.

¹⁴ Article 25 of the International Covenant on Civil and Political Rights (ICCPR) provides for the following rights applicable to the exercise of the vote and the expectation of free and fair elections: “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.”

¹⁵ Alvarez, Hall, and Hyde, page 9.

¹⁶ Ibid, pages 3-4.

policy prescriptions.”¹⁷ It could also give countries the means to sidestep international principles and, in many cases, international obligations that apply to the electoral process.¹⁸ Still, this approach has proven popular in the small community of writers who have contributed to this discussion.

Lehoucq has written extensively on the subject of electoral fraud. Although his definitions tend to be broad (hence their mention in the previous category), he has also offered several modifications that narrow the field. In his 2003 paper, Lehoucq takes several passes at defining electoral fraud. He modifies his first approximation (that fraud is defined as “all clandestine efforts to shape election results”) with the additional clarification that “both blatantly coercive acts and voting irregularities are also fraudulent because they can throw election results,” and that an act is fraudulent if it breaks the law. He finds that this legalistic definition is useful because it segments political activities in an accessible way: they are either acceptable or unacceptable under the law.¹⁹

Lehoucq’s earlier work, a 2002 book entitled *Stuffing the Ballot Box: Fraud, Electoral Reform, and Democratization in Costa Rica*, provides insight into the thinking behind this definition. Lehoucq and his fellow author Ivan Molina define electoral fraud as “activities that can alter the results of the ballot box and that violate electoral laws.” The authors say that this definition allows for changes over time in the range of acts believed to be fraudulent by political parties and other stakeholders, and it “does not assume that any constraint or act that encourages or compels voters to behave against their interests...is fraudulent.”²⁰ The authors then proceed to use a four-fold classification system to assess allegations of acts of fraud: procedural irregularities; more severe infractions that do not necessarily involve fraud; severe acts of fraud; and coercion of voters. The dichotomy is complicated to parse and allows for a considerable grey area between categories, but it does, helpfully, attempt to distinguish between allegations of fraud in a way that accounts for the scale and intent of the action. However, it is unclear whether the statement “activities that can alter the results of ballot box” implies that fraud has only occurred when it impacts the outcome of the overall vote, or whether non-outcome determinative interference with the process would be included. Our definition, detailed below in Section III, attempts to deal with that distinction to ensure that all instances of electoral wrongdoing can be detected, deterred and mitigated.

Regional bodies and individual states have also tackled the issue in the course of producing guidelines for combating fraud. In 2010, the Council of Europe’s European Commission for Democracy through Law, known as the Venice Commission, adopted a report on “Figure Based Management of Possible Election Fraud.” The report noted that “in the broadest sense, a fraud is an intentional deception made for personal gain or to damage another individual. In a general election context, fraud could be any

¹⁷ Ibid, page 236.

¹⁸ For a selection of provisions of international agreements to which most countries have acceded, and that are relevant to the conduct of a credible election, see: Articles 2, 16, 22 and 25 of the International Covenant on Civil and Political Rights (ICCPR), available at <http://www2.ohchr.org/english/law/ccpr.htm>; Articles 8, 10, 20, and 21 of the Universal Declaration of Human Rights, available at <http://www.un.org/en/documents/udhr/>; and Articles 3, 4, 5, 9, 12, 21, and 29 of the Convention on the Rights of Persons with Disabilities (CRPD), available at <http://www2.ohchr.org/english/law/disabilities-convention.htm>.

¹⁹ Lehoucq, page 235.

²⁰ Fabrice Lehoucq and Ivan Molina (2002) *Stuffing the Ballot Box: Fraud, Electoral Reform, and Democratization in Costa Rica*, Cambridge University Press, New York: page 17.

action running contrary to the legal framework that intends to provide undue gains to specific electoral contestants.”²¹ This report also found that “the source of inexperience and/or fraud should be sought first in the legal framework. Ambiguities and/or lacunae in written law are conducive to fraud, although they can be a result of lack of electoral experience, rather than intentions for malfeasance.” A key shortcoming of this definition is that it addresses *actions taken* by an unknown group of actors. However, *failure* to take an action could also constitute fraud.

Another legal approach to the definition question was offered by Hector Davalos and Nguyen Huu Dong at a 2011 Venice Commission conference. They define electoral fraud as “a deliberate violation of dispositions of the Electoral Law in order to change the electoral results to overtake or to harm a candidate.”²² They draw the customary distinction between, on the one hand, fraud, and on the other hand, “mistakes, accidents, insufficiencies, incompetence or infractions to the electoral process,” but admit that in practice this line may be blurred, as it can be difficult to gauge intent. Aside from the general limitations of the restrictive approach, as we have discussed, this definition also fails to distinguish between mistakes or accidents on the one hand, and incompetence and infractions on the other. As we will discuss, in practice, this distinction is necessary in order to maintain an understanding of the expected standard or duty of care for a given electoral professional, and pursue cases in which that standard has not been met.

Despite the drawbacks mentioned in using a legalistic approach to defining election fraud, there are some practical cases in which this usage will be most appropriate. For example, a 2011 publication, “Guidance on Preventing and Detecting Electoral Malpractice,” in the United Kingdom, was written narrowly and specifically to inform the efforts of police forces working on Election Day in coordination with polling officials. The authors of this publication chose to use the term “electoral malpractice,” and noted that this term “is used to cover all breaches of the Representation of the People Act 1983. It is much wider than voting fraud or other offences involving fraudulent activity. For example, the term includes offences such as bribery, treating, and false statements about the personal character of a candidate.”²³ As is discussed below, the use of the term “malpractice” in this context is incorrect, as it conflates intentional acts (i.e., fraud) with breaches of a particular duty of care (i.e., malpractice) that do not rise to the level of fraud. The latter is not an adequate way to represent fraudulent activities of non-professional actors, such as voters. For example, a voter who casts a ballot in multiple locations on Election Day has likely committed fraud, but it would be incorrect to call his or her action “malpractice.”²⁴

²¹ European Commission for Democracy through Law (2010) “Report on Figure Based Management of Possible Election Fraud,” Adopted in Venice in December 2010: page 4.

²² Hector Davalos and Nguyen Huu Dong, “Fraud and Fraud Prevention,” paper presented at the 8th European Conference of Electoral Management Bodies, European Commission for Democracy through Law (Venice Commission), May 2011.

²³ The Electoral Commission of the United Kingdom (2011) “Guidance on Preventing and Detecting Electoral Malpractice,” London: page 3.

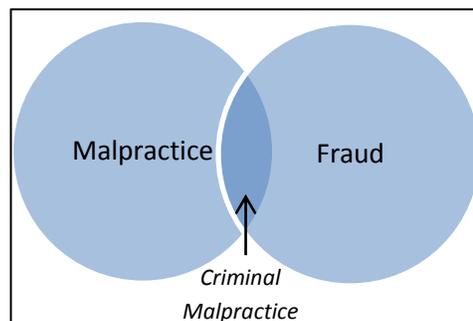
²⁴ Although it is not sufficient for establishing a consensus definition of electoral fraud, a law-based approach is likely adequate for the narrow and well-defined scope of “police election Single Point of Contact Officers (SPOCs), working with Electoral Registration Officers, Returning Officers and Counting Officers” addressed by this publication. The Electoral Commission of the United Kingdom, page 1.

III. IFES' Definition

We have arrived at important distinctions between *electoral fraud*, *electoral malpractice* and *systemic manipulation*²⁵ in an effort to: clarify questions raised; address comments from election practitioners and academics regarding our original definition for electoral fraud; and make reference to the legal usage of the terms by the election community.

This paper focuses specifically on tools that practitioners can use to deter, detect and mitigate fraud and malpractice within a country's established electoral framework. Therefore, we will not discuss systemic manipulation or the tools to confront this manipulation in further detail.²⁶ The remaining distinction between fraud and malpractice is depicted in Figure 1. The overlapping area between these two concepts represents *criminal malpractice* (i.e., malpractice by an official that is so egregious that it rises to the level of fraud despite the lack of intent). These distinctions are useful for providing clarity in discussions and for assisting election stakeholders in developing practical tools to address fraud and malpractice that have adverse effects on the electoral process.

Figure 1. The Electoral Malpractice-Fraud Spectrum



Our proposed working definition for electoral fraud is *deliberate wrong-doing by election officials or other electoral stakeholders, which distorts the individual or collective will of the voters.*

While fraud by this definition refers to deliberate or intentional acts by a range of stakeholders, we have also found that it is necessary to apply a heightened standard specifically to election professionals. These individuals are employed to protect the integrity of the electoral process and should be held accountable for unintentional breaches as well. As we will discuss, when election professionals are negligent, they have committed malpractice, not fraud. The duty of care concept is sufficiently nuanced to distinguish among election workers at different levels and with varying levels of education and training, such that the commissioner of an EMB would have a much different duty of care requirement than a poll-worker appointed on an ad hoc basis.

Duty of care is a concept familiar to many professions, especially those governed by a professional association (such as doctors). It has not been frequently attributed to election professionals, although there does exist a growing body of consensus about what constitutes appropriate professional behavior for election officials. This is often codified in codes of conduct and professional training programs. For

²⁵ In an American courtroom, the actions of responsible officials (including corporate officers and public officials) that run contrary to a duty of care might be characterized as *malfeasance*, *misfeasance* or *nonfeasance*. Despite definitional distinctions between each of these terms, which we will not address here, the burden on a plaintiff or prosecutor in a claim of injury is to prove that the defendant acted contrary to his or her duty of care (as well as to prove that the defendant had a duty of care to which he or she should be held). To avoid confusion in non-U.S. settings, we have chosen to use the term “malpractice,” which is favored by many authors who are writing on the subject of electoral integrity.

²⁶ Systemic manipulation, *supra* note 2.

doctors, the duty of care for a given condition is based on a set of guidelines for treatment. The traditional conception of the standard for doctors in the United States is that he or she use “the average degree of skill, care, and diligence exercised by members of the same profession...in light of the present state of medical and surgical science.”²⁷ Deviations from the duty of care by a doctor due to negligence can often be cause for professional or legal action. It is important to also note that, should a professional commit a *gross* deviation from the required duty of care, it could imply criminal negligence (or criminal malpractice) and lead not only to professional or civil penalties but also to criminal prosecution.

The duty of care provision is also applicable to other professions, and even to non-specialists. In British tort law, the standard for the non-specialist is determined by what might be expected of a “reasonable person,” who is described as one of the “commuters on the Underground” in a 1999 Opinion of the House of Lords.²⁸

For election management professionals, the duty of care refers to the degree of skill, diligence and knowledge commonly possessed and exercised by a competent election management professional in the execution of his or her duties. Key principles that should be incorporated into the standard may be found in legislation establishing EMBs and should be an integral part of the training program provided to election officials. In addition, in some countries election professionals are bound to follow a signed code of conduct or ethics. These documents, and the principles embodied by them, should form the foundation for an expected duty of care.

Accordingly, election commissioners appointed to the EMB based on their relevant experiences and education would be expected to perform their election duties in a manner that contributes to a credible electoral process (and does not undermine it). For example, an EMB official responsible for procurement of indelible ink must perform due diligence on the available options. If she does not, and selects an inferior ink (perhaps based solely on price) that fails on Election Day, she may have breached her relevant duty of care. A poll-worker who disregards his basic training by failing to check voters’ fingers for the presence of ink before issuing a ballot paper might similarly breach the expectations for his position. In each case, the election official should be held to a duty of care that befits the training and qualifications associated with his or her role.

Based on this concept, we define electoral malpractice as *the breach by an election professional of his or her relevant duty of care, resulting from carelessness or neglect.*

Incorporating a duty of care into the definition allows for segmentation of malpractice by level of responsibility; i.e., a senior election management official will have a heightened duty relative to the responsibilities of a temporary poll worker. Some examples of electoral malpractice by senior officials include permitting shortages of indelible ink, not properly training poll workers or allowing foreseeable delays in adjudication of complaints. As discussed above, a *gross* deviation or breach of an election official’s relevant duty of care could result in criminal prosecution and penalties, even in cases when

²⁷ Gillette v. Tucker, 67 Ohio St.106, 65 N.E. 865. See also, Bruni v. Tatsumi, 46 Ohio St.2d 127, 129, 346 N.E.2d 673, 676, 75 O.O.2d 184.

²⁸ Macfarlane and Another v. Tayside Health Board (Scotland) [1999] UKHL 50, November 1999.

intent might be unclear or difficult to prove. For example, a trained presiding officer in a given election who ignores highly visible ballot stuffing by party agents that leads to a distorted election result could be prosecuted for criminal malpractice, even if prosecutors or investigators are unable to clearly prove intent to commit fraud by the presiding officer.

As discussed, *electoral fraud* and *electoral malpractice* each refer to different sets of actors and have different legal characters. As depicted in Figure 1, the overlap between fraud and malpractice refers to a type of malpractice that so grossly deviates from the duty of care that it calls for criminal prosecution. This distinction is included as a variant on the electoral malpractice concept. The respective definitions of each term may be segmented across four dimensions: actors, action, intent (or lack of) and result. In addition, they require different deterrence and mitigation strategies.

Figure 2 details the main differences between electoral fraud and malpractice, and notes where the concept of criminal malpractice would be relevant. The range of possible actors is wider for fraud, as it can include any person or group with a stake in the election result. This may include voters, political parties, state officials with election-related duties, candidates and the media, in addition to election workers. The nature of the action and the presence of intent is most significant: fraud is committed deliberately and with intent to interfere with the electoral process (manifested as either an action or an omission, in the case of an actor with official election responsibilities), while malpractice results from carelessness or neglect. A poll worker who places a stack of pre-filled ballots in the ballot box on Election Day has committed fraud; that same polling worker who forgets to attach security seals to a ballot box may have breached his duty of care and committed malpractice. When developing fraud deterrence and mitigation strategies, this is an important distinction, and one which will shape approaches to ensure the integrity of elections.

Figure 2. Elements and Applications of Electoral Fraud and Malpractice

		Electoral Fraud	Electoral Malpractice
Elements of the definition	Possible actors	Election officials, other public officials, voters, political parties, candidates, media	Election officials (including full-time and ad hoc workers performing official duties related to any stage of the electoral process)
	Action	Actor knowingly interferes with the electoral process	Actor is negligent or careless in carrying out his or her election-related responsibilities
	Intent	The action or omission is committed deliberately	The interference results from carelessness/neglect (<i>gross negligence may rise to the level of criminal malpractice, regardless of whether intent is proven</i>)
	Result	Distorts the will of the people. This may manifest itself as interference with individual votes, or in overall vote counts that impact the result or results of the election. ²⁹	May lead to irregularities in the electoral process, some of which may prevent the election outcome from reflecting the will of the people
Practical applications	Deterrence	<ul style="list-style-type: none"> • Job loss or suspension • Fines • Criminal prosecution 	<ul style="list-style-type: none"> • Job loss or suspension • Fines • <i>In the event of gross negligence (criminal malpractice), criminal prosecution may be pursued</i>
	Mitigation	<ul style="list-style-type: none"> • Introduction of new or amended laws, regulations, or procedures to eliminate flaws or lacunae that allow or facilitate fraud • Amendment of election results • New elections called • Restoration of infringed rights 	<ul style="list-style-type: none"> • General training and/or awareness courses • Training to improve supervisory capabilities of election officials • Improved use and enforcement of codes of conduct • Amendment of election results • New elections called • Restoration of infringed rights

²⁹ Although all forms of fraud or attempted fraud should be prosecuted to the full extent allowed by law (including instances that are non-outcome determinative), when election officials are triaging potential fraudulent incidents on or around Election Day, clearly outcome determinative fraud should be prioritized in order to mitigate the potential impact that it has on the electoral process. In addition, each type of fraud implies different strategies for mitigation. For example, fraud that affects the outcome of the election could result in the amendment of election results or new elections; on the contrary, fraud that only affects a few voters might only result in a sanction and, if possible, the restoration of the infringed rights of those voters.

IV. Where Do We Go From Here?

The purpose of IFES' *White Paper Series on Electoral Fraud* has been to raise attention about the scourge of fraud that is undermining electoral processes in countries around the world, and especially its effects on transitional countries.

We have sought to provide stakeholders with some of the tools they need to detect, deter and mitigate fraud outcomes. A key component of that effort is to ensure that the election community has a clear and practical framework for understanding the issues. In that spirit, we chose to take a step back for this paper, the third in the series, and address lingering concerns about the definition for electoral fraud. We have proposed segmenting the universe of offenses and crimes undermining elections into three main categories: electoral fraud, electoral malpractice and systemic manipulation.

The electoral fraud category highlights the role of intent and the potentially wide array of actors. The malpractice category draws on the idea of a duty of care for election professionals, which is a relatively new application of this concept in the study of elections. As depicted in Figure 1, there is also an area of overlap between fraud and malpractice, which is reserved for extreme instances of malpractice that rise to the level of criminality. As noted earlier, we have not dealt with the third category, systemic manipulation, in great detail here, but it refers to the use of domestic legal provisions and/or electoral rules and procedures that run counter to international public law principles and obligations, and that purposefully distort the will of voters.³⁰

Electoral fraud:

Deliberate wrong-doing by election officials or other electoral stakeholders, which distorts the individual or collective will of the voters

Electoral malpractice:

The breach by an election professional of his or her relevant duty of care, resulting from carelessness or neglect

While fraud and malpractice have been the focus of this paper and this series, *electoral integrity* is a much wider area of practice. IFES' electoral integrity portfolio includes several areas of programming that complement work on electoral fraud and malpractice, including: developing, improving and enforcing political finance regulations; assisting nations in developing appropriate legal structures and effective election complaint adjudication systems; and promoting election security through a mix of conflict analysis, prevention, mitigation and resolution methods throughout the electoral cycle. The overall legitimacy of an election and, by extension, public confidence in democratic governance around the globe, largely depends on the actual and perceived integrity of the electoral process.

While the definitional question is just part of the much greater effort that is required, we believe that the distinctions outlined in this paper will greatly aid practitioners as they create and implement plans to ensure electoral integrity.

³⁰ Systemic manipulation, *supra* note 2.

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Chad Vickery has 17 years of legal and international election administration experience with an emphasis on strengthening democracy and governance in transitioning societies. He has extensive experience in designing and managing election complaint adjudication programs; providing comparative legal analysis, working on elections and rule of law programs throughout South Asia, Southeast Asia, Eurasia and the Middle East. Vickery's specific programmatic experience includes leading projects to ensure development of impartial legal frameworks for elections, increasing professionalism of election management bodies, improving accuracy of voter registration lists, establishing effective election dispute programs and increasing political participation of women and historically disenfranchised groups into the electoral process.

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