

ELECTORAL COMPETITION IN BOTSWANA

Is the Playing Field Level?

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ABSTRACT

The central thesis of this article is that the electoral process in Botswana belies the oft-cited claim that the country is a haven of democracy. Botswana has held ten successive elections since 1965, yet the same party, the Botswana Democratic Party (BDP), has been returned to power without fail. At a glance, and taking these elections into consideration, Botswana would appear to be an extraordinary country in the African context – one where democracy is in the process of consolidation. Far from it. A closer assessment shows that Botswana's electoral competition is deceptive and that there is a deficit of competitive elections, a key requisite for the consolidation of democracy. The article examines the factors that contribute to the flawed electoral competition and concludes that the country's electoral process does not satisfy international standards of free and fair elections.

INTRODUCTION

Since the term democracy was first used, in the fifth century BC (Holden 1993), unending convoluted debates about its definition have preoccupied scholars, practitioners and students of politics. What is evident from the literature is that there is no one satisfactory or acceptable definition of democracy. This remains a puzzle, if not a paradox, as there has been no unanimity in defining it (Morlino 2012; Economist Intelligence Unit – EIU 2010).

This article makes no attempt to enter that minefield. Although the definition of democracy remains vague and disputed (Morlino 2012; EIU 2010), political

scientists have attempted to proffer what they consider a 'minimal' definition of democracy, outlining certain observable topographies as crucial for a country to be regarded as a democracy (Morlino 2012). These elements are: universal suffrage, competitive and regular free and fair elections, more than one serious political party and various and alternative sources of information (Diamond & Morlino 2005; Morlino 2012, p 32).

Despite the lack of a clear definition, what is evident is that democracy 'has become the only game in town and is no longer challenged as such' (Morlino 2012, p 25). This echoes the concept of democracy as the rule or government 'of the people, by the people, for the people' (Oyugi & Gitonga 1987). It is worth noting, in summary, the words of Shivji (1989):

It is clear ... that the conception of democratic government here is largely based on the liberal democratic view of the Hobbesian individual participating in the affairs of his/her government through periodic elections to choose representatives who then constitute the government and a legislative body at the level of the state.

Thus, in modern political science discourse and practice, elections are considered the very tool by which individuals participate in the constitution of their government. In sub-Saharan Africa, the EIU (2010, 27) observed, although 'elections have become a normal occurrence', 'only in five countries in the region [were] the elections judged to be free and fair'. Botswana, which is the focus of this article, is among those five countries. The other four were Cape Verde, Ghana, Mauritius and South Africa.

Yet the EIU regards Botswana as one of eight countries considered to be 'flawed democracies', with Mauritius the only 'full democracy' in sub-Saharan Africa. This presents something of a paradox as these two positions are diametrically opposed, especially when expressed by the same source. On the one hand the EIU has adjudged elections in Botswana to be free and fair; on the other, it regards Botswana as a flawed democracy.

Although democracy is not measured solely by whether elections are free and fair, our position is that the freeness and fairness of elections is one of the necessary conditions for assessing the existence or absence of democracy. This article examines the factors that make Botswana's electoral competition flawed. It is these factors that the ruling Botswana Democratic Party (BDP) has used as *a self-preservation or protectionist tool*.

The article seeks to dispel the oft-cited view that Botswana is a paragon or the epitome of democracy in Africa and, to some extent, beyond.

THE LEGAL CONTEXT OF ELECTIONS IN BOTSWANA

Botswana, according to its Constitution (s 1) is a sovereign republic. This means that ascent to political office is determined solely by the will of the people through chosen representatives and is based on the equal opportunity principle, which, in turn, demands free competition.

The Constitution and the Electoral Act are the primary legislative bases for conducting elections in the country. The Constitution (s 67) provides for the franchise and lays down conditions for the exercise of the right to vote. Apart from the broad requirement that the Independent Electoral Commission is responsible for ensuring that elections are conducted freely and fairly (s 65A (12) (c)), the Constitution lays down no conditions for the elections being 'free and fair'.

The Electoral Act, which is the legislative vehicle for the administration of the constitutional right to vote, *inter alia* re-emphasises the conditions for the exercise of the right to vote and outlines the procedure for the administration of elections. Like the Constitution it does not contain the phrase 'free and fair', although, as noted below, some of the requirements it lays down suggest that elections must be free and fair.

Similarly, international instruments and other policy documents specifically require elections to be free and fair, without necessarily defining the concept. The Universal Declaration of Human Rights (UDHR, Article 21) declares:

Everyone has the right to take part in the government of his country directly or through *freely* chosen representatives ... The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent *free* voting procedures.

As the declaration was a statement of intent and general policy among members of the international community it did not, at least at the time it was adopted, have the necessary legal force. However, its principles have now been incorporated in various legal instruments and treaties which have binding force, and it is now generally accepted that it is binding as a matter of customary international law (Akehurst 1984).

The two most important instruments are the International Covenant on Civil and Political Rights (ICCPR 1966), which adopts Article 21 of the UDHR at Article 25, and The African Charter on Human and Peoples' Rights (1981), which adopts Article 21 of the UDHR at Article 13. Botswana is a party to both these treaties and is thus legally bound to ensure that the obligations they impose are

observed and implemented. Thus, although there is no express requirement in the country's domestic legal instruments for free and fair elections, Botswana is still bound to observe free and fair elections on the basis of its treaty obligations.

REQUIREMENTS FOR A FREE AND FAIR ELECTION

Although free and fair elections are desirable, no one has come up with a foolproof definition of what they actually entail.

Elklit & Svensson (1997), while admitting the difficulty, or impossibility, of establishing precise guidelines, opine nonetheless that some analytical distinctions are possible. For them, the fulfilment of the most common criteria (eg, greater political competition and participation) is a matter of degree. Elklit & Reynolds (2005) believe one of the foremost issues to grapple with in any attempt to measure or establish the freeness and fairness of an election is the location of the boundary when it comes to identifying relevant issues such as questions of access to the public media, delimitation of boundaries, party funding and candidate selection, among others. We are not attempting to be comprehensive in our analysis but will seek to establish what we believe are the important elements in achieving a free and fair election.

The concept of an election alone presupposes the exercise of a voluntary and free choice without compulsion or other forms of influence denigrated by law. Fairness, on the other hand, seems to import the notion of equality of opportunity and the equalisation of the 'battleground', so to speak, in such a way that none of the contestants is unduly advantaged at the expense of others. In addition, it must eschew the possibility of loss of confidence in the electoral system.

In other words, the concept of fairness is both subjective and objective. It is subjective in the sense that it depends in part on the degree of confidence of the individual in the system, determined on the basis of his or her personal observations and on the appraisal of the entire exercise. The question is: are individuals who observe the system and participate in the process as voters satisfied that the result has not been manipulated and that it represents a true picture of the people's preferences?

The concept is objective in that it depends on the appraisal of a variety of factors which are generally believed to be the basic minimum requirements for a free and fair election, some of which are required by law, others by practices that have evolved over many years. It does not depend on individual preferences as such. The question here is: does the electoral process satisfy the general minimum expected standards for a free and fair election? To this end, it has been somewhat difficult for writers on the subject to coin a definition of a free and fair election, instead they sketch what are believed to be the main elements of the

concept (Tshosa 1994; Elklit & Svensson 1997; Nsereko 2002; Elklit & Reynolds 2005; Dingake 2011). What does emerge, though, is that fairness is the sum total of several factors that need to be in place in the period before, during and after elections.

What, then, are those elements? As a start, the Inter-Parliamentary Union's Declaration on Criteria for Free and Fair Elections (Article 1) provides: 'In any State the authority of the government can only derive from the will of the people as expressed in genuine, free and fair elections held at regular intervals on the basis of universal, equal and secret suffrage.'

The Preamble to the Declaration reaffirms the principles laid down in the UDHR and the ICCPR. However, it has gone beyond these two covenants in that it determines, in some fashion, the conditions for free and fair elections. Firstly, it declares that the elections must be genuine. Obviously an election which is, to all intents and purposes, a sham does not pass the test in the definition. This would be an election, for example, where there is only one candidate and the other potential candidates have been disbarred or otherwise disqualified on the basis of considerations set out by the incumbent, or generally where the circumstances are such as to suggest that there will only be one result: victory in favour of a particular candidate.

In such a situation the only purpose of an election is the legitimisation in power of a candidate whose victory is a certainty. In sum, a genuine election is one that must offer the possibility of a change of government, however remote the chance may be. Secondly, elections must be held at regular intervals. These intervals can only be regular if they are predetermined in terms of a law that binds everybody, and should not be called willy-nilly or at the convenience of the incumbent, or where a winner then outlaws elections completely.

In saying this we are mindful of certain legal provisions that exist in many countries where elections may be called earlier than the expected date if certain conditions pertain, for example, where Parliament is dissolved, where legislators 'cross' the floor, where the president resigns or dies, and so on. These are developments that are spelt out in law and have been publicised *a priori* and should therefore not necessarily be considered to be a ploy to manipulate the political landscape.

Thirdly, an election must be based on universal and equal suffrage. The voting criteria must apply to all equally and any disqualification must be based on considerations of law and no other. All citizens residing under the government's sphere of influence must be entitled to vote. Disqualifications based on colour, sex or other discriminatory grounds would obviously not pass muster. Again, in this we are mindful of disqualifications based on law, for example, the minimum

voting age, restrictions on non-nationals or prisoners (*Sibanda v Attorney General* 2009) and other disqualifications based on the law.

Fourthly, voting must be done by secret ballot in order to ensure maximum freedom for the exercise of a choice and eliminate pressure, intimidation and other forms of influence. One author presents the scenario of 'queue-voting' in the 1988 general elections in Kenya, where voters were required to queue publicly behind their preferred candidate (Nzomo 1996, p 588). This was not consistent with a free election and showed a blatant disregard for the principle of the secret ballot, which is universally upheld as a fundamental requirement of democratic elections.

In addition to these criteria, one critical requirement for elections to be free and fair is that they are organised, managed and run by a body that is independent and impartial. The reasons are obvious. The notion of 'independence' requires that in the discharge of its responsibilities the body must not be subject to the direction or control of any external force, especially interested parties.

It must only be subject to the demands and dictates of the legal framework that establishes it and the parameters set for its operations. It must not be subject to the directions of outside forces, especially the executive. It must be subject only to the law and, ultimately, to the general public.

The notion of 'impartiality' requires that the body that runs elections must not only be fair but must be seen to be fair. It has a somewhat legal undertone where the fulfilment of the condition does not depend on what, in fact, has happened but on what perceptions arise from the process. It is rooted in public confidence.

Appearances are pivotal to an assessment of the existence or otherwise of impartiality. The election management body is not only the organiser of elections it has statutory responsibilities to fulfil, among them determining the eligibility of voters and of candidates.

Crucially, it is a referee in the sense that it determines compliance with the rules, processes, procedures and the legal requirements for elections. It has the responsibility for counting the vote and determining the outcome.

Fairness on its part is, therefore, a *sine qua non* not only for its existence but for its responsibilities, functions and operations. These requirements are accepted and used internationally.

THE SITUATION IN BOTSWANA

In line with its independence Constitution Botswana has held ten successive multiparty elections since the pre-independence elections in 1965, confirming that it is a sovereign republic in which elections are core to assuming political office.

All ten elections have been won by the ruling BDP. The last elections were held in 2009 and the next are expected in October 2014. It is indisputable that

elections are central to the functioning of a liberal democracy. In relation to Botswana, the holding of successive elections has led scholars to describe the country as the embodiment of democracy, especially in comparison to what has happened elsewhere in Africa.

Some scholars regard Botswana as 'an African Miracle' (Samatar 1999), while others, like Doorenspleet (2003, p 171), contend that it is 'the democratic exception on the continent and can be considered the "senior" democracy in Africa'. Sebudubudu & Osei-Hwedie (2006, p 35) observe that 'Botswana's multiparty democracy has been portrayed by various scholars as a shining example of a living democracy in Africa'. Sebudubudu & Molutsi (2008, p 47) state that Botswana is seen as 'a deviant democracy in Africa'.

Most of the literature on Botswana is complimentary – for most analysts the country is a source of admiration. However, some scholars have questioned Botswana's democratic credentials (see Good 1996, 1997; Taylor 2003 and, more recently, Botlhomilwe, Sebudubudu & Maripe 2011; Sebudubudu & Botlhomilwe 2012). These dissenting views are in the minority, as the dominant view is that Botswana is the repository of democracy.

Even recent surveys suggest that citizens of Botswana are satisfied with the extent of democracy prevailing in the country. Unpublished results of a survey conducted by Afrobarometer in June/July 2012 suggest that 71% of those interviewed were satisfied with Botswana's democracy. A similar survey, conducted in 2008, put satisfaction at 82%.

Of the respondents in the 2012 survey 47% suggested that Botswana was a democracy with minor problems, 15% said it was a democracy with major problems, while 32% indicated that it was a full democracy.

In 2008, 35% had believed the country was a democracy with minor problems, 6% said it was a democracy with major problems while 56% suggested that it was a full democracy and 2% indicated that was not a democracy.

The praise of commentators and the positive survey results have led to a sense of complacency, which has resulted in Botswana declining to open itself up to the African Peer Review Mechanism and other forms of democratic audit of its systems. Fombad & Sebudubudu (2007, p 125) observe that:

Perhaps the greatest problem that appears to be emerging today [in Botswana] is what can be referred to as good governance isolationism and complacency. This stems from a misconceived feeling of self-contentment about consistently being regarded as the least corrupt country in Africa, *a shining example of democracy and good governance* on the continent, and receiving similar flattering descriptions. This probably explains why, while most countries are making efforts to

upgrade their anti-corruption arsenals and adopt new and better tools to promote transparency and good governance, Botswana is quite content to refuse to reform its existing legislation and institutions.

(Emphasis ours)

This sense of complacency extends to the country's electoral competition. Assessed with a critical eye Botswana is far from satisfying international standards for free and fair elections as several factors render its conduct of electoral processes flawed. Among these are: the makeup of the electoral authority, an electoral system that marginalises the opposition, a weak culture of fairness in funding and a lack of equitable access to the media.

The makeup of the electoral authority

In most developing countries elections are organised by independent electoral management bodies – Botswana is no different. However, Botswana's Independent Electoral Commission (IEC) does not have full authority over election matters, for example, it does not determine the date of the elections. Instead, a Writ of Elections for parliamentary elections is issued by the president and one for local elections by the minister of local government.

This makes the president and minister, both of whom are politicians, players and referees in a game in whose outcome they have a clear interest, thus compromising the principle of fairness. It should be highlighted here that the accolades Botswana has received predate the establishment of the IEC, which came into existence in 1997 and has conducted only three of the ten elections that have been held in the country.

Prior to that elections were conducted first by the permanent secretary to the president and later by the supervisor of elections, both of whom were senior civil servants based in the Office of the President. Clearly, it could not be said that the elections were conducted by an independent and impartial body. Questions then do arise as to the genuineness of the accolades showered upon the system in Botswana over time.

The establishment of the IEC, although seen as a response to the criticisms levelled at the fact that elections were run from the Office of the President, has not totally pacified all existing doubts about the independence of the electoral management body. Fombad & Sebudubudu (2007, p 109), for instance, note that:

The IEC is established by 65A(1) of the Constitution, which simply provides that 'there shall be an Independent Electoral Commission'. The Constitution does not expressly guarantee the

institutional independence of the IEC nor does it give any guidance on the attributes that make it independent. It would appear that the drafters of the provision assumed that referring to the institution as 'independent' would guarantee its institutional independence. The failure to guarantee expressly the institutional independence of the IEC is anomalous in that the same Constitution expressly guarantees the independence of other democracy-supporting institutions such as the Delimitation Commission and the Judicial Service Commission. Nagging doubts about the IEC'S independence are reinforced by the fact that it is placed under the Ministry of Presidential Affairs and Public Administration in the Office of the President.

The IEC, which comprises seven members, is appointed by the Judicial Service Commission (JSC). The Head, who is designated as the chairperson, must be a judge of the High Court. One other member must be a legal practitioner and the five remaining members are selected from a list of persons who are fit, proper and impartial and are recommended by the All Party Conference, a meeting of all registered political parties convened from time to time by the Minister of Presidential Affairs and Public Administration (s 65A(3)).

Space does not permit a full discussion of the makeup of the Judicial Service Commission and its impact on the independence and/or impartiality of the IEC. Suffice it to say that it is perceived in some corners not to be independent as it is composed mainly of executive appointees. The All Party Conference is an inadequate guarantor of independence as its convocation depends purely on the exercise of ministerial discretion. The minister may not convene it at all and, indeed, for several years has not done so.

In the absence of a constitutional provision spelling out what happens when the minister has not convened the conference, the government has effectively exercised some residual powers, the source of which is uncertain, in appointing commissioners. This does not augur well for a system that aspires to be described as free and fair.

The commissioners do not serve on a full-time basis and are not salaried officers. The day-to-day affairs of the commission are run by a secretary, who is a high-ranking public official and is assisted in his or her duties by other senior officials who are also public servants. The fact that the secretary of the IEC is appointed by the president, not the commission itself, is another blight on Botswana's electoral process that has made some question the independence of the IEC and has cast a shadow on the credibility of the process.

The IEC maintains that it is an independent institution. Tsie (2003), who is a commissioner, observes that it has 'unlimited independence'. Others see

it differently. Sebudubudu (2007, 2008) doubts its independence. Interestingly, Tsie (2008) concurred with the assertion that the independence of the IEC was suspect owing to the interference in its activities of the permanent secretary to the president.

Another complaint is that the senior officials of the IEC, being civil servants, are subject to the disciplinary machinery of the executive, an interested party in the running of elections, and may, therefore, not claim any independence given the provision in section 27 of the Public Service Act on insubordination and failure to obey lawful instructions of the employer. This, too, compromises the fairness of the electoral process, as it is irrefutable that the independence of an electoral authority is of paramount importance for an outcome to be acceptable to all.

An electoral system that marginalises the opposition

It is evident from the literature that 'electoral outcomes are largely determined by the electoral system' (Osei-Hwedie & Sebudubudu 2005, p 30). Botswana has maintained the first-past-the-post (FPTP) electoral system since its first election in 1965, and the ruling BDP has resisted opposition calls for reform it. It is not difficult to find an answer for the BDP's reluctance to change the system to one that is more accommodating.

FPTP has largely benefited the ruling party as it marginalises opposition parties by awarding a simple majority winner a high percentage of seats, even if it receives a reduced popular vote. By doing so, 'the electoral system over-represents the governing BDP, [and] under-represents the fragmented opposition ...' (Elklit & Reynolds 2002, p 104). For instance, in 2009 the ruling BDP won 54% of the popular vote and 79% of the seats in Parliament.

An uneven playing field

The notion of fair contest pervades all competitions. It is even required in the worst form of contest – war. From time immemorial no war was legal unless it had been declared. In business, there are rules about fair competition, mostly embodied in competition laws; in sport rules are embodied in various sports codes; and in virtually every vocation or discipline there are rules that outlaw 'unfair competition'.

In politics, too, where elections are the epitome of the tussle for leadership, the requirement of fair competition is one that may not be and is not contested. It is required that elections be conducted on an even playing field. Levitsky & Way (2010, p 57), who submit that 'a level playing field should be treated as the defining feature of democracy', define an uneven playing field as 'one in which

incumbent abuse of the state generates such disparities in access to resources, media, or state institutions that opposition parties' ability to organize and compete for national office is seriously impaired'.

Recognising that incumbency carries with it certain advantages that are intrinsically attached to the office itself, the two scholars argue that in certain situations those advantages, which they define as routine incumbent advantages, may affect the quality of democracy but do not necessarily undermine democracy itself.

However, there is another set of advantages, which, in the authors' view, compromises democracy itself. They describe the existence of these factors as the uneven playing field, where, in large measure, there is skewed access to resources and the media.

To distinguish an uneven playing field from routine incumbent advantages, we set a high threshold. We consider a playing field uneven where: 1) state institutions are widely abused for partisan ends; 2) the incumbent party is systematically favoured at the expense of the opposition; and 3) the opposition's ability to organize and compete in elections is seriously handicapped ... The playing field may be uneven in a variety of ways, but three are of particular importance: resource disparities; unequal access to the media; and unequal access to the law.

Levitsky & Way 2010, p 58

Using this formulation of an uneven playing field we now consider the position in Botswana to determine the fairness or otherwise of elections in that country.

Resource disparities

Ideally, one of the hallmarks of fair contest is that no candidate, or political party, is advantaged, materially or otherwise, at the expense of others. The contestants must start from the same line and with nobody a foot ahead of the others. For this reason, some countries (including a worst-case Zimbabwe) have introduced funding of political parties in order, as far as possible, to minimise the disadvantages that arise because of uneven 'starting' points, which are not conducive to a free and fair election.

As the National Democratic Institute for International Affairs (1998, p 6) notes,

political parties must be supported by financial and other resources. Such resources include funds to operate the basic infrastructure of

political party institutions, as well as a wide variety of resources that support the ability of parties to communicate with the population.

Likewise, Ware (1998, p 242), recognising the crucial role of political parties in a democracy, observes succinctly that

well financed parties can provide linkage with mass electorates; a wholly publicly-funded system would prevent the distortion of party priorities in the direction of fund raising, and even partly publicly funded systems might reduce the inequalities in resources between parties and candidates.

Countries where funding exists for political parties have also simultaneously introduced mechanisms for regulating election expenditure in a bid to avoid a 'purchased', as opposed to a genuine, election result.

In a battlefield as vast as Botswana in terms of geographical expanse, reaching out to constituents or voters is a significant issue. Candidates can only do so if they have the resources, and the more resources they have, the more they are able to reach out to as many voters as possible to sell their policies and, by extension, win votes.

In Botswana, which has no system of funding political parties, one of the factors that has a negative impact on electoral competition is a lack of resources, and the government has resisted providing such resources despite the growing view that it is necessary for it to do so.

The reason is not hard to find. The BDP, which exercises the power of patronage, has never had problems attracting funding from private entities. In a small market such as Botswana, where the government is the dominant player that every business entity wants to have as a customer, private entities would want to fund the party in order to remain in government's good books and continue to do business with government.

They will not ruin that opportunity by refusing to fund the BDP, and many do, indeed, fund it, giving it an initial advantage.

It is worth noting that the Electoral Act actually does regulate election expenses. Part VIII of the Act (ss 80-89) makes various provisions for expenditure on elections. Section 87 demands that within 90 days after the announcement of results all candidates make a return of all election expenses to the secretary of the commission.

In terms of the Electoral Act (S 80), the term election expenses means:

In relation to a candidate at an election, all moneys expended or expenses incurred on account of or in respect of the conduct or

management of that election by the candidate or on his behalf or in his interest and for the purposes of this subsection, money shall be deemed to have been expended or expenses incurred in respect of the conduct or management of an election if expended or incurred after the issue of a writ in relation to that election.

This definition is so broad and elastic that it can be manipulated by candidates and political parties. For instance, a party could finance a candidate's campaign activities, or incur some financial expenditure on behalf of its candidate, and such monies would not be regarded as an expense in terms of the Electoral Act. In this sense, the Electoral Act could easily be circumvented. Section 81 puts a cap on those expenses at P50 000, which is very difficult to enforce. In fact, Part VIII in its entirety is difficult to enforce as, once the election is over, the secretary is more concerned about election petitions than about the receipt of returns from candidates. Thus the whole intention of the Act is not being realised, compromising the fairness of elections.

This view was shared by the first chairperson of the IEC, who believes that although elections in Botswana are free, the absence of funding for political parties compromises their fairness. He thus supports the proposal that there be funding for political parties (Mosojane 2011). Levitsky & Way (2010) take the same view, as do De Jager and Meintjes (2013).

Three examples illustrate this point.

- The treasurer of the BDP, who owns a chain of motor vehicle businesses which has the government as one of its major customers, routinely makes available to the ruling party a fleet of vehicles in excess of the number of constituencies.
- Prior to the 2009 elections a private educational college donated a consignment of T-shirts to the sitting minister of education for use during the election campaign. The minister of education is responsible for the supervision of all educational institutions in the country.
- Lastly, and in an open admission of the skewed access to resources, the BDP's secretary-general was recently reported to have responded to complaints that members of the BDP who had businesses were awarded government tenders from which they sponsor the party by saying: 'I always hear people complaining of how the BDP members win tenders but they seem to forget that we are in the ruling party. How do you expect us to rule when we don't have money? You should just live with it and accept that we are ruling'. (*The Voice*, June 2013).

Access to the law and state institutions

Levitsky & Way (2010) and De Jager & Meintjes (2013) posit that a skewed playing field exists when incumbents control critical state institutions whose role is to protect citizens against abuse and violations perpetrated by state agents. Such institutions include the judiciary, electoral authorities and other nominally independent institutions and the control usually arises from skewed appointment procedures like cadre deployment and packing.

These institutions are critical, as they may be called upon to arbitrate in the event of disputes arising during the electoral process. In Botswana, in the absence of a constitutional or specialised electoral court, the responsibility falls on the High Court (s 69 of the Constitution; Part X, ss 116-140 of the Electoral Act). It is therefore essential that these institutions remain impartial and be seen to be impartial.

The fairness or otherwise of the IEC has been dealt with above. Until recently the impartiality or otherwise of the judiciary was not hotly contested, but its role came under scrutiny when, in 2010, the president rejected three recommendations made by the Judicial Service Commission for appointments to the bench. No reasons were given for the rejection. This generated wide speculation about the powers of the president and the outlook of people who would, in his view, be suitable for appointment.

The Law Society of Botswana has questioned the legality of the rejection of the JSC's recommendations and has gone further, questioning the way in which judicial appointments are made. With the enactment of the Public Service Act of 2008, which allowed civil servants to unionise and bargain collectively for their terms and conditions of service, government has been at loggerheads with the unions, with the latter openly accusing the bench of being pro-government and the former accusing opposition politicians of having an influence over the unions. All these issues have a ripple effect on the perceptions of fairness on the part of the judiciary.

Lack of equitable access to the media

It is indisputable that the existence of various sources of information is critical to ensuring a free and fair election. If we agree, as we should, that a genuine election is that which results from voters having a free choice and having assessed all contestants fairly, we should agree that the medium of communication used to convey the contestants' policies is very important.

Apart from channels candidates create for themselves, generally the candidates, being individuals or parties, must enjoy equal access to the media, whether those are government or private. The private media in Botswana comprise

several print newspapers, three radio stations, one television station and social networks like Twitter, Face Book and LinkedIn. The government media comprise the *Daily News*, two channels of Radio Botswana and Botswana Television (BTV), all of which are publicly funded.

While the private stations operate on the basis of licence conditions set by the National Broadcasting Board, BTV and the two public radio stations do not operate under such licence and have resisted calls for them to be governed by licence conditions. It can be said immediately that no complaints of unequal coverage or denial of coverage have been made against the private media. However, complaints have been made against the government media concerning what has been termed biased reporting in that the government and, by extension, the BDP, has been accorded more coverage than the opposition parties.

As a government department under the direction and control of a minister who is himself/herself a politician, the control of programme content is within the minister's portfolio, and the minister is able to, and often does, exercise such control in favour of the government of the day. Government has repeatedly rebuffed calls to transform BTV and the two radio stations into public broadcasters, with independent boards to manage them.

Its refusal must be viewed in the light of the advantages it derives from the current position, to the exclusion of other parties, which advantages will be lost if the government media were to be transformed into public media. Two examples illustrate this point: government, through its functionaries, is able to control the editorial content of programmes and effectively prevent bulletins it considers critical from being aired.

Where such bulletins are aired, government may take disciplinary measures against the responsible officer. Recently the Head of News and Current Affairs at BTV was suspended for allowing a programme to be aired which portrayed the president in a bad light (*Sunday Standard*, July 2013, p1). Secondly, during the 'famous' public sector strike in 2011 BTV allowed the government more space than it did union representatives. The broadcast of the events surrounding the strike was carefully contrived to highlight the government position, thus weakening that of the unions, which, incidentally, had the backing of opposition parties.

In the case of the private media, especially the print media, apart from the *Daily News*, there is a semblance of equal access in that they are able to report on all parties and allow opinions from all perspectives. However, given the fact that the population of Botswana is limited – just over two million people according to the 2011 census – and is dominated by the state, newspapers depend for their survival on advertisements, especially those from the government. This results in a form of control, as government, although it does not directly control editorial content, is able to influence reportage by holding sway over where it places its advertisements.

In one case, government specifically withheld advertising from a particular newspaper group because it objected to the reporting on a particular issue. This move was, however, declared illegal and set aside by the High Court (*Media Publishing (Pty) Ltd v The Attorney General and Another* 2001).

The finding that the move was illegal seems to have been determined by the reasons given for withholding the advertisements. One wonders what the position would have been had the reason not been stated. For government cannot, and the judgement accepted this, be compelled to place advertisement in any particular newspaper. These examples demonstrate the extent to which the incumbent party may influence access to the media in a way that disadvantages its competitors.

The position in Botswana comes under close examination by Levitsky & Way (2010), and the authors, using pertinent examples, demonstrate the subtle but significant disadvantages suffered by the opposition. Cook & Sarkin (2010, p 475) have also, in a general sense, attempted to deconstruct the 'miracle' and cite the US State Department's Report of 2007, which expressed concern about the BDP candidates' 'preferential access to state-owned television during much of the campaign'. It is indisputable that this compromises the evenness of the playing field and leads to unfair competition.

CONCLUSION

This article dispels the oft-cited claim that Botswana is a paragon or the epitome of democracy in Africa and, to some extent, beyond. The myth seems to be based on the absence of fraud and repression in elections, which are the most visible and crude indicators of unfair competition. It seems, too, that the fact that there has been no illegal usurpation of power in the country, that general elections have been held regularly and that the opposition has never denounced the results, may have led many to believe in the existence of a level playing field in Botswana.

However, as the article has shown, there is much to say about the electoral process in Botswana which the international community may not know about. Scholars, such as Good, Levitsky & Way, Cook & Sarkin, De Jager & Meintjes and Taylor now demonstrate a changing pattern in international perceptions of the electoral process. Using the concept of the uneven playing field, and other factors, we have attempted to show how the environment in Botswana favours the incumbent party.

We have argued that these factors are a major blight on electoral competition in Botswana – thus making elections flawed and, consequently, failing to meet acceptable international standards of ensuring free and fair elections. It is inconceivable that Botswana has remained a democracy despite these challenges, which are an affront to free and fair electoral competition in that country.

The article, therefore, concludes that the ruling BDP has used these factors as a *self-preservationist or protectionist tool* to enable it to continue to dominate the political landscape. There is certainly a need for reform of the system, which the opposition has been calling for and which government, for obvious reasons, is yet to embrace. It is hoped that the drive for reform will continue and that it will be embraced in an attempt to demonstrate that the country truly deserves the accolades it receives.

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