

# Journal of African Elections

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# SOUTHERN SUDAN REFERENDUM ON SELF-DETERMINATION

## *Legal Challenges and Procedural Solutions*<sup>1</sup>

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### ABSTRACT

*This study attempts to analyse the major challenges encountered in the organisation of the Southern Sudan Referendum on Self-Determination and how these challenges were addressed, enabling the referendum to take place in a peaceful environment, with a high degree of transparency and fairness. In doing so it aims to identify a few lessons which, though emerging from the particular experience of the Sudan, can be used as a general paradigm in future similar contexts. The Southern Sudan Referendum Commission had less than four months to prepare, organise and conduct the operations within a broad mandate conferred by the Southern Sudan Referendum Act, many sections of which lacked clarity. The interpretation and application of this law represented, in several instances, a serious challenge to the organisation of the referendum, adding complexity to a process already made difficult by time and operational constraints amplified by the size of the territory and the highly sensitive political environment characterised by mistrust among the partners in the Comprehensive Peace Agreement. The study begins with a brief introduction to the political and legal background of the referendum and of the Southern Sudan Referendum Commission, including its role and structure. It proceeds with an analysis of the legal and regulatory framework, aimed at identifying the main challenges to the process and the solutions found in order to allow the referendum to take place in a timely, peaceful and orderly manner.*

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<sup>1</sup> The study has benefited from the critical views and experience of Hon Paolino Wanawilla Unango, Deputy Minister of Justice of the Republic of South Sudan, Commissioner at the Southern Sudan Referendum Commission and a member of the Joint Legal Committee which drafted the Referendum Act, who generously shared his experience and information about the SSRC's work with me and who unfailingly gave his support to the organisation of the Southern Sudan Referendum on self-determination.

## INTRODUCTION

In January 2011, almost unexpectedly, the referendum on the self-determination of Southern Sudan took place in a peaceful and orderly manner, allowing the people of Southern Sudan to choose their status and consequently the future of the country through the exercise of their right to self-determination as recognised by the Comprehensive Peace Agreement (CPA).

The context in which the referendum was organised was extremely complex and required that attention be paid to different aspects of the process, which had to take into account many factors. The political environment was sensitive and characterised by mistrust between Northern and Southern Sudan exacerbated by non-compliance with the deadlines set in the CPA and the consequent dysfunction of those provisions of the agreement aimed at making unity attractive.

The expectations of the people of Southern Sudan, who had striven for the recognition of their right to self-determination since their independence from the British government, meant they tolerated the non-compliance with the CPA deadlines in order to have the referendum go ahead.

There were logistical and operational challenges relating to the size of the territory and to the absence in Southern Sudan of means of communication and transportation in remote areas, the lack of infrastructure and the high illiteracy rate of the population. The time constraints related to the late enactment of the Southern Sudan Referendum Act (SSRA or 'the Referendum Act' or 'the Act') and the late appointment of the Southern Sudan Referendum Commission (SSRC or 'the commission'). The difficulties were augmented by the ambiguity of some of the provisions of the SSRA.

In spite of all these challenges the referendum, which was considered to be a 'remarkable operational and political achievement' (EUEOM 2011, p 5), took place 'on time and in a calm, peaceful and orderly environment' (EUEOM 2011, p 5), representing the 'genuine expression of the will of the electorate' (Carter Center 14 February 2011).

There are multiple reasons for this remarkable achievement – among them the strong commitment and support of all parties involved: the Referendum Commission, the CPA partners, the international community and the people of Southern Sudan. The SSRC was not left alone in this endeavour. It counted on the strong and effective technical, operational and logistical support provided by the international community, namely the United Nations, the International Federation of Electoral Systems (IFES), the European Union, coordinated by the United Nations Integrated Referendum and Electoral Division (UNIRED),<sup>2</sup>

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2 UN Security Council Resolution 1919 mandates UNMIS to be prepared to play 'a lead role in international efforts to provide assistance, as requested, to support preparations for the referenda in 2011, including in consultation with those member states able and willing to provide support ...'

‘without whom the Referendum would not have taken place on time, and in the efficient manner that it did’ (EUEOM 2011, p 7).

This support did not undermine the SSRC’s ownership of the process. The commission’s independence – vis à vis national and international partners – has contributed to increased trust in the process. Financial support was provided by the CPA’s partners and the international community and the process was also assisted by the Southern Sudan 2011 Taskforce, established by the Government of Southern Sudan (GOSS), which, *inter alia*, assisted in the campaign to raise awareness about the referendum, and by the attitude of Sudanese people, who avoided confrontational situations and allowed the referendum to take place in a peaceful environment.

Moreover, in the process of organising the referendum the tribal divisions and animosities among different political personalities in Southern Sudan were overcome, showing the unity and determination of the Southern Sudanese people to express their will to exercise their right to self-determination.

In order to understand the expectations and implications of the referendum a brief historical overview of the right to self-determination for the people of Southern Sudan, its formulation and interpretation in the CPA, together with a short description of the political context, will be provided in the following pages. The study will then continue with a description of the structure and functions of the SSRC, the Southern Sudan Referendum Bureau (SSRB) and the Taskforce, highlighting the operational challenges the commission encountered in organising the referendum.

Particular attention will be paid to the time constraints, not only in consideration of the short timeframe for the organisation of the process, but also as a factor which might have undermined the legitimacy of the process, with reference to the SSRA provisions legally scheduling some of the referendum activities. This overview will provide the information necessary to an understanding of the difficult circumstances in which the referendum took place. The main legal challenges encountered in the implementation of the Referendum Act will be outlined, together with the solutions (when found) adopted by the SSRC to overcome them and ensure the organisation of a fair, transparent and peaceful process. The study will conclude by drawing lessons learned from the Southern Sudan referendum that may be applied in similar situations.

The CPA, signed on January 2005 between the government of Sudan and the Sudanese People’s Liberation Movement/Army (SPLM/A), ended more than two decades of civil war in the Sudan. Also known as the Naivasha Agreement, it was the culmination of more than three years of negotiations, resulting in a set

of agreements<sup>3</sup> that provided for a new political map of the Sudan, creating, *inter alia*, conditions for power sharing between the two signatories for an interim period of six years, ending on 9 July 2011.

During the interim period the CPA mandated power- and wealth-sharing arrangements aimed at ending decades of the political and economic marginalisation of the South and guaranteeing it representation in a government of national unity (GNU) proportional to its population.

### THE RIGHT TO SELF-DETERMINATION

The CPA established both the GNU and a national legislature in Khartoum, assigning one-third of posts in those institutions to the historically under-represented Southern Sudanese. It also established the GOSS in Juba, financed with half the revenue from Southern oil. Most importantly, the CPA recognised the right of the people of Southern Sudan to self-determination, '*inter alia*, through a referendum to determine their future status'.<sup>4</sup>

The long path to self-determination for Southern Sudan dates back to the struggle for the independence of the Sudan from the colonial power. In 1953 Sudan's first self-governing Parliament was elected and discussions began about federalism as a constitutional solution for the country.

During the conference of 1954 to discuss the future of Sudan in general and the political future of the South in particular, Southern leaders voted for

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3 The process resulted in the following agreements (also referred to as protocols):

Chapter I: The Machakos Protocol, signed in Machakos, Kenya, on 20 July 2002, agreement on broad principles of governance.

Chapter II: The Protocol on Power Sharing, signed in Naivasha, Kenya, on 26 May 2004.

Chapter III: The Agreement on Wealth Sharing, signed in Naivasha, Kenya, on 7 January 2004.

Chapter IV: The Protocol on the Resolution of the Conflict in Abyei Area, signed in Naivasha, Kenya, on 26 May 2004.

Chapter V: The Protocol on the Resolution of the Conflict in Southern Kordofan and Blue Nile States, signed in Naivasha, Kenya, on 26 May 2004.

Chapter VI: The Agreement on Security Arrangements, signed in Naivasha, Kenya, on 25 September 2003.

Annexure I: The Permanent Ceasefire and Security Arrangements Implementation Modalities and Appendices, signed in Naivasha, Kenya, on 30 October 2004.

Annexure II: The Implementation Modalities and Global Implementation Matrix and Appendices, signed in Naivasha, Kenya, on 31 December 2004, which includes, *inter alia*, The Implementation Modalities of the Machakos and Power Sharing Protocols.

The final, Comprehensive Peace Agreement signed on 9 January 2005, marking the commencement of the interim period.

4 Article 1.3 of the Machakos Protocol reads as follows:

'... the people of South Sudan have the right to self-determination, *inter alia*, through a referendum to determine their future status'. In this Protocol the parties agreed on a broad framework, setting forth the principles of governance, the transitional process and the structures of government as well as on the right to self-determination for the people of South Sudan, and on state and religion.



independence from Egypt on condition that the independent country adopted a federal system, with an autonomous state in the South. In case of failure to do so, they believed, the South should have the right to self-determination, including the option of complete independence from the North (Johnson 2004, p 27).

Northern parties in the parliament in Khartoum, believing the call for federalism to be a tactic to achieve self-determination for the South, refused to adopt a federal system.<sup>5</sup> Faced with the rejection of federalism by a parliamentary committee largely composed of northerners, the South started an insurgency to gain independence from the North. The insurgency, which begun with a military mutiny in Torit in 1955, became a movement for the liberation of Southern Sudan, which would become known as the Southern Sudan Liberation Movement (SSLM).

The rebellion ended with the Addis Ababa Agreement, signed on 27 February 1972 between the central government of the Sudan and the SSLM and granting the Southern Sudan region self-governing powers. According to the agreement the provinces of Western Bahr-el-Ghazal, Equatoria and Upper Nile constituted a self-governing region within Sudan known as Southern Region, with its own legislative and executive organs elected by southerners.<sup>6</sup>

The agreement was embodied in the Self-Government Act in March 1972 and incorporated in the Permanent Constitution of 1973. However, it was unilaterally abrogated in 1983 by then-President Jaafar Nimeiri, who, with his Republican Order Number One, divided the South in three regions, putting an end to the Southern Regional Autonomous Government (Collins 2008, pp 137-145).

The abrogation resulted in a mutiny in the national army led by southerners in Bor and Ayud, which eventually developed into the SPLM/A, which was distinguished from the SSLM in that it did not fight for the independence of the South but for the building of a New Sudan, a federation with a central government that would combat racism and tribalism (Collins 2008, p 143).

In 1997 a number of Southern armed groups, including the Southern Sudan Independent Movement/Army (SSIM/A), which split from the original SPLM/A, signing the Khartoum Peace Agreement<sup>7</sup> with the Government of Sudan, which stipulated in General Principle n 4 that '[t]he people of South Sudan shall exercise the right of self-determination through a referendum'.

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5 For a more exhaustive analysis of the history of the conflict between North and South Sudan see Collins 2008 and Johnson 2004, pp 26-27.

6 For detailed information about the agreement, see Shinn 2004, pp 239-59.

7 Sudan's Khartoum Peace Agreement was signed on 21 April 1997 by central government and a number of Southern armed groups, led by Riak Machar. The demand for self-determination figured in the many subsequent rounds of peace negotiations, but it was not until 1997 that the government formally accepted it, in the Khartoum Peace Agreement, which was never implemented. For more information see Nyama 2000, pp 198-203; Johnson 2004 p 36 and Collins 2008, pp 245-50.

The historical background of the right to self-determination of Southern Sudan, described briefly above, explains why the SPLM/A considered the issue to be one of the 'red lines' during the negotiation of the Machakos Protocol (Johnson 2011, pp 49-50).

The right to self-determination for all people is recognised by the International Covenant on Civil and Political Rights (ICCPR), in line with the principles and purposes of the United Nations (UN) Charter. Its realisation is considered to be an essential condition for the effective guarantee and observance of individual human rights. Self-determination is linked to the core concept of democracy, understood as the right to choose the political status which allows the economic and cultural development of the society, and the right to participate in the decision-making process. There are different degrees of self-determination, ranging from political emancipation within the sovereignty of the state through various forms of internal self-determination, to secession, which is only recognised in exceptional circumstances.<sup>8</sup>

The recognition of 'self-determination' in Article 1.3 of the Machakos protocol raised issues of interpretation relating to the use of the expression *inter alia* with reference to the mechanisms through which such a right could be exercised. Two interpretations are of particular interest. The one mostly favoured by those supporting the unity of Sudan considers the referendum to be the only mechanism through which the right to self-determination can be exercised

According to this interpretation, since external self-determination is an exception to the principle of sovereignty it may be exercised only in accordance with the conditions under which it has been recognised. In terms of this perspective the exercise of the right to self-determination for the people of Southern Sudan, was limited by and linked to the CPA, with the consequence that it would expire at the end of the interim period.

On the other hand, the interpretation supported by those advocating the secession of Southern Sudan regards the referendum as merely one of the mechanisms through which such a right can be exercised. According to this perspective the use of the expression *inter alia* recognises the existence of other means for the exercise of the right to self-determination, not spelt out in the agreement, which could have been used if no referendum was held. According to this interpretation a unilateral declaration of independence by Southern

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8 Self-determination is a complex right, entailing both an 'internal' and an 'external' form.

The right can be conceptualized as a sliding scale of different levels of entitlement to political emancipation, constituting various forms of [internal self-determination] up to the apex of the right, the right of [external self-determination], which vests only in exceptional circumstances. Different 'peoples' are entitled to different levels of self-determination.

Joseph, Schultz & Castan 2005, p 149

Sudan would not have been considered to conflict with international law if the referendum had not taken place in the time set forth in the CPA.

*A posteriori* it can be argued that the latter interpretation, while strengthening the position of the supporters of secession, probably inhibited any attempt to jeopardise the referendum process in order to maintain the unity of the Sudan.

What follows is an analysis of the major challenges encountered by the commission in the organisation of the referendum on self-determination and the way these challenges were dealt with to enable the referendum to take place in a peaceful environment and to attain a high degree of transparency and fairness.

### THE TIMEFRAME

In accordance with Article 2.5 of the Machakos protocol, six months before the end of the six-year interim period

there shall be an international monitored referendum, organised jointly by the GOS and by the SPLM/ A for the people of Southern Sudan to: confirm the unity of the Sudan by voting to adopt the system of government established under the Peace Agreement, or to vote for secession.

The same provision is contained in Article 222 of the Interim National Constitution (INC) and in Article 11 of the Interim Constitution of Southern Sudan (ICSS).<sup>9</sup>

The referendum on self-determination represented a milestone for the implementation of the CPA. The Naivasha agreement set ambitious deadlines, including those considered to be essential for the organisation of the referendum itself, many of which were not respected.<sup>10</sup> This augmented mistrust among CPA partners and contributed to the creation of a sensitive political environment.

As stipulated in the CPA the SSRA should have been issued at the end of the third year of the interim period and the SSRC appointed immediately afterwards; voter registration should have started at the beginning of the sixth year of the

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<sup>9</sup> Article 222 of the INC and Article 11 of the ICSS stipulate as follows:

Six months before the end of the six-year interim period, there shall be an internationally monitored referendum, for the people of Southern Sudan organised by the Southern Sudan Referendum Commission in cooperation with the National Government and the Government of Southern Sudan,

(2) The people of Southern Sudan shall either:

(a) confirm unity of the Sudan by voting to sustain the system of government established under the Comprehensive Peace Agreement and this Constitution, or  
(b) vote for secession.

<sup>10</sup> As explained below, both the adoption of the Southern Sudan Referendum Act and the establishment of the Referendum Commission took place later than prescribed in the CPA.

interim period and ended three months before voting (ss 1(a), (b) and (c) of the Implementation Modalities of the Machakos and Power Sharing Protocols).

The same timeline was reflected in the INC and the ISCC.<sup>11</sup> Nevertheless, the SSRA was enacted only at the end of 2009, while the SSRC was appointed at the end of June 2010, sworn in on 6 July 2010, seven months after the National Assembly's passage of the SSRA, and became operational only in September 2010 when an agreement was reached among the commissioners on the appointment of the secretary general. The secretary general was nominated on 2 September and appointed by the presidency on 14 September.

The time factor was one of the major challenges in the organisation of the referendum, generating new challenges or aggravating existing ones. The newly appointed SSRC was left with less than four months to organise its structures and set up its offices, issue the regulatory framework for the implementation of the SSRA, train the staff, conduct the voter registration, procure the relevant referendum material and distribute it to the referendum centres, prepare the timeline for the process, set up *ad hoc* committees as provided by the Referendum Act, conduct voter education and organise a media campaign, to mention only some.

The tight deadlines had not only operational but legal implications, as some of the activities to be implemented by the SSRC were already scheduled in the SSRA, with the consequence that their violation was foreseen as jeopardising the legitimacy of the process. Attempts to affect the legitimisation of the referendum were made throughout the process, in particular, the cases filed before the Constitutional Court against the SSRC focused partially on the disrespect by the commission of the deadlines set out in the SSRA, such as s 32.1, which related to the publication of the final voters' register.

### THE SOUTHERN SUDAN REFERENDUM COMMISSION

The SSRC, established on 30 June 2010, six months after the Referendum Act was enacted and with its headquarters in Khartoum, was composed of nine members, all Sudanese (five from the South, four from the North), including the chairman

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11 Article 220 of the INC stipulates that:

- (1) A Southern Sudan Referendum Act shall be promulgated by the National Legislature at the beginning of the third year of the interim period.
- (2) The Presidency shall, as soon as Southern Sudan Referendum Act is issued, establish the Southern Sudan Referendum Commission.

Similarly, Article 10 of the ICSS states that:

- (1) A Southern Sudan Referendum Act shall be promulgated by the National Legislature at the beginning of the third year of the Interim Period.
- (2) The Presidency of the Republic of the Sudan shall, as soon as the Southern Sudan Referendum Act is promulgated, establish the Southern Sudan Referendum Commission.

and the deputy chairman, who perform their duties on a full-time basis. The commissioners were appointed by the president of the republic with the consent of the first vice-president and the approval of the National Legislative Assembly (SSRA s 10(1)), with their membership set to expire at the end of the interim period (SSRA s 10(3)).

The SSRC was responsible for the overall management of the referendum, including developing all rules, regulations and policies relating to the conduct of the referendum and managing the referendum in 'other locations' – that is, every referendum centre established by the commission outside Southern Sudan, in areas densely populated by the people of Southern Sudan, namely, Northern Sudan, Ethiopia, Kenya, Uganda, Australia, Britain, the USA, Canada and Egypt.

The SSRA Act also provided for the establishment of a Southern Sudan Referendum Bureau (SSRB or 'the bureau') in Juba, comprising four members appointed by the commission acting on recommendations from the deputy chairperson of the commission (who was also chairperson of the bureau). Its main role was to organise operations in the Southern Sudan and to coordinate activities between the SSRC and the high committees, supervising their work in order to ensure the 'fairness and transparency of the referendum process' (s 18 (3)(b)) and to carry out all referendum related activities in the counties.

Furthermore, to support the organisation of the referendum, as mandated by the Act, the government of Southern Sudan established the Southern Sudan 2011 Taskforce. Based in Juba and without being a part of the referendum process itself, the taskforce served as the coordinating body and guiding entity for the preparation of the referendum and the post-referendum period for Southern Sudan, ensuring that concrete action would be taken by relevant institutions at all levels of government in the preparation of the referendum.

The taskforce had the role of facilitating coordination within the government and with external partners over issues of critical importance to the effective management of the referendum and the post-referendum period. It also provided logistical support to the referendum centres and conducted a voter awareness campaign in Southern Sudan.

As anticipated, the political environment of the referendum was highly sensitive and governed by mistrust between partners in the CPA.

There were many attempts to influence the SSRC and to jeopardise its work. One of the examples was discussions about the appointment of the secretary general, which took more than two months. In order to maintain its independence and impartiality the commission found itself having to resist attempts by the CPA partners to interfere. It also had to manage its relations with the international community, providing both technical assistance and funding, to ensure its

ownership of the process and to minimise the criticism, mostly coming from the NCP, of international influence on the commission.<sup>12</sup> In certain instances this led to the adoption of confrontational positions with the international community, which, in some cases, resulted in delays in preparations for the referendum.<sup>13</sup>

Despite provisions in the CPA stipulating the establishment of an '... ad-hoc Commission to monitor and ensure accuracy, legitimacy, and transparency of the Referendum as mentioned in the Machakos Protocol on Self-Determination for the People of Southern Sudan, which shall also include international experts' (Chapter II, Art 2.10.1.5 CPA) the SSRC comprised only Sudanese members supported by international advisers.<sup>14</sup>

The presence of international advisers in the bureau was not as restricted as it was in the commission's headquarters and the SSRB relied extensively on international technical advisers to organise the operations of the referendum, distribute material to referendum centres, communicate with state high committees and sub-committees and provide other logistical support.

The SSRC faced several challenges at its inception. Among these were problems of hiring referendum staff at such short notice, especially in Southern Sudan, where the high illiteracy rate among the older generation amplified this difficulty. Most of the staff lacked electoral expertise and time constraints made it difficult to provide them with adequate training. These challenges generated further delays in setting up operations, making decisions and issuing regulations or other legal opinions. These constraints were overcome by the commitment of most of the staff of the SSRC, supported by the well-coordinated and effective technical assistance provided by the international advisers.

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12 On several occasions the international community has been accused of manipulating, influencing and taking over the work of the commission. In some cases the accusations came from the commission itself. Pressure from the international community at the start of the referendum process highlighted some weaknesses of the commission. One example was the publication of the first timeline of the referendum process before the SSRC announced it in Khartoum.. Following this, the commission changed the timeline several times without sharing the information with its international partners. Eventually confidence between the international community and the commission was restored and the former was seen more as a partner than an antagonist.

13 Emblematic of this attitude of the SSRC was the chairman's resistance to approving the voter registration training manual which was prepared by international advisers with very little consultation with the SSRC.

14 In order to preserve the independence of the commission and to avoid further criticism from the NC, the commission hired only Sudanese staff and allowed only one international adviser to have office space on its premises in Khartoum, while the other international advisers, who had unrestricted access to the premises of the commission and to its staff, were not allowed to have an office in the building.



## THE SOUTHERN SUDAN REFERENDUM ACT AND THE REGULATORY FRAMEWORK

The SSRA, which was enacted on 30 December 2009, provided the basis for the organisation of the referendum. While some of its provisions, such as the date of polling, the referendum question and the role and structure of the SSRC, did not require interpretation some areas lacked clarity, were inconsistent and did not provide sufficient details about important aspects of the referendum (DRI July 2010).

It also conferred on the SSRC the power to regulate many aspects of the referendum and set ambitious deadlines which could not be met and which represented serious challenges to the legitimacy of the process.<sup>15</sup>

The difficulties relating to the interpretation, vagueness and lack of clarity of its provisions derive from the fact that the Referendum Act is the result of lengthy political negotiations between the NCP and the SPLM. Agreement was reached overnight about certain provisions as a political compromise between the parties, without due consideration of their effect on the organisation of the process, a problem, as outlined below, that augmented the challenges faced by the SSRC in the organisation of the referendum.<sup>16</sup>

### *Voter eligibility*

The definition of who is entitled to vote was one of the main challenges in the organisation of the referendum. Lack of clarity in the Act, together with a lack of reliable data deriving from the census conducted in 2008,<sup>17</sup> made it difficult to estimate the number of individuals allowed to register and vote. Moreover, sections 27(3) and 27(4) of the Act differentiated between those eligible voters who could register and vote at any referendum centre in Southern Sudan or 'other locations' (s 27(3)) and those who could only register and vote in Southern Sudan (s 27(4)).

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15 Section 32.1 of the Act required the final referendum register to be published three months before polling, while s34 required the commission to issue details of polling procedures two months before the start of the poll.

16 Some of these provisions related to the establishment of a minimum age of 40 years for members of the staff of high committees, sub-committees and referendum centres (s22 (2) and s23(4)) and provisions relating to the IOM's role in the organisation of the referendum in other locations (s 27 (3) and (4)). The content of these provisions are analysed below.

17 According to the *Statistical Yearbook for Southern Sudan*, 2009, prepared by the Southern Sudan Centre for Census Statistics and Evaluation, the population of South Sudan at the time of the 2008 census was 8 260 490, of which 4 213 041 were above the age of 17. The results of the census have been contested by the Goss as failing to reflect the exact size of the population of Southern Sudan and of Southern Sudanese in Northern Sudan.

The interpretation of these provisions in order accurately to determine the number of potential voters had important operational implications which affected, among other factors, the number of voter registries and ballot papers to be printed, the number of referendum centres to be opened in Southern Sudan and 'other locations' and the number of referendum centre staff.

According to s 25 of the SSRA

[t]he voter shall meet the following conditions:

1. [be] born to parents both or either of whom belongs to any of the indigenous communities residing in Southern Sudan on or before the 1<sup>st</sup> of January 1956, or whose ancestry is traceable to one of the ethnic communities in Southern Sudan,

or,

2. permanently residing without interruption, or whose parents or grandparents are residing permanently, without interruption, in Southern Sudan since the 1<sup>st</sup> of January 1956;
3. have reached 18 years of age;
4. be of sound mind;
5. registered in the Referendum Register.

While in Regulation 8(2) and (3) of the Voter Registration Regulations the SSRC clarified that a person could be registered only if he or she had reached 18 years of age at the time of registration, and confirmed the existence of a general presumption of soundness of mind unless proved otherwise, the definition of Southern Sudanese remained unclear. The Voter Registration Regulations repeated the provisions of the Act without clarifying issues related to the identification of the indigenous communities and of Southern Sudan<sup>18</sup> and the criteria for defining 'residence without interruption'.<sup>19</sup>

18 Aly Verjee, former deputy director of the Carter Center in Sudan, in his paper 'Race Against Time: The Countdown to the Referenda in Southern Sudan and Abyei', correctly argues (p 20) that [t]he SSRC's refusal to compile a list of ethnic groups may well be wise. Defining eligibility on the basis of membership of an ethnic group would have unintended divisive effects in Southern Sudan and its borderlands. In attempting to satisfy the short-term aims of the referendum, it would establish ethnicity as the primary criterion of citizenship, opening the possibility of disputes at every level over the definition of ethnicity.

19 The SSRC, in the *Legal and Procedural questions and Answers* of 6 October 2010, specified that the criterion for residency is not linked to a length of time but to the intention to establish one's centre of interest in a certain place (domicile of origin). This can be proved in court.



The definition of Southern Sudanese in the Act differs from that in Article 9(3) of the ICSS, which defines a person from Southern Sudan as:

- (a) any person whose either parent or grandparent is or was a member of any of the indigenous communities existing in Southern Sudan before or on January 1, 1956; or whose ancestry can be traced through agnatic or male line to any one of the ethnic communities of Southern Sudan; or
- (b) any person who has been permanently residing or whose mother and/or father or any grandparent have been permanently residing in Southern Sudan as of January 1, 1956.

The Act represents a step forward with respect to gender equality as it makes no reference to the ‘agnatic or male line’, recognising the right to register and vote of southerners ‘whose ancestry is traceable to one of the ethnic communities in Southern Sudan’.<sup>20</sup> On the other hand, in both documents the use of the terms ‘ethnic’ and ‘indigenous’ communities creates confusion around the definition of Southern Sudanese. Currently there is no official list of ethnic and indigenous communities, although the initial draft of the ICSS<sup>21</sup> contained a tentative list, an attempt that was aborted in the final draft.<sup>22</sup>

The commission again addressed the lack of clarity about the definition of Southern Sudanese under ss 25(1) and 25(2) three weeks before the beginning of voter registration. In a statement issued on 21 October 2010 the SSRC identified three categories of eligible voters:

1. [Group 1:] Voters who belong to one of the indigenous ethnic communities residing in the Southern Sudan (on or before 1 January 1956).

20 The gender equality perspective was introduced by women who participated in the Joint Legal Committee which drafted the SSRA. Nevertheless, it has been reported that at some referendum centres individuals whose father did not belong to one of the communities of Southern Sudan were not allowed to register, showing how the importance of the agnatic or male line is rooted in the Southern Sudanese communities and related customary law.

21 [www.gossmmission.org/goss/images/agreements/interim\\_constitution\\_southsudan\\_2005.pdf](http://www.gossmmission.org/goss/images/agreements/interim_constitution_southsudan_2005.pdf)

22 Indigenous groups are the original inhabitants of a territory or region, especially before the arrival and intrusion of a foreign and possibly dominating culture. They represent the native ethnic groups, whose members share a cultural identity that has been shaped by their geographical region. Their right to self-determination may be materially affected by later-arriving ethnic groups. An ethnic group is a group of people whose members identify with each other through a common heritage, often consisting of a common language, a common culture (frequently including a shared religion) and an ideology that stresses common ancestry or endogamy (Seidner 1982, pp 2-3).

2. [Group 2:] Voters who trace their ancestry to one of the indigenous ethnic communities in Southern Sudan, but have not resided permanently in the South (without interruption) before or since January 1956.
3. [Group 3:] Voters who do not belong to one of the indigenous ethnic communities in Southern Sudan but they or their parents or grandparents have resided permanently in the South (without interruption) since 1 January 1956.

According to this interpretation of sections 25(1) and (2), which does not differentiate between indigenous and ethnic communities, only voters belonging to group 1 were allowed to register and vote at any referendum centre whether in the South or in 'other locations'. Voters belonging to groups 2 and 3 could only register and vote in Southern Sudan, where they could be identified as Southern Sudanese by their communities of origin.<sup>23</sup>

The commission's interpretation met with the agreement of all parties involved in the referendum process and clarified a very controversial issue. None of the complaints received by the SSRC challenged the interpretation; nor did the Constitutional Court cases filed against the SSRC. Complaints and cases focused on the concrete application of the commission's interpretation, such as the right of Abyei residents to register and vote and, in particular, that of the Ngok Dinka of Abyei.<sup>24</sup>

Chapter IV of the CPA conferred upon the Abyei area<sup>25</sup> a special administrative status under the institution of the presidency of the Sudan, by which residents of the area are dual citizens of both Western Kordofan in Northern Sudan and

23 The fact that the Act does not contain provisions relating to the spouses of Southern Sudanese stresses how the exercise of the right to self-determination is left to the ethnic and indigenous communities of origin in Southern Sudan.

24 Clarification on the participation of Dinka from Abyei in the Southern Sudan Referendum on Self-Determination was also requested by international and local observer organisations.

25 The CPA defines Abyei as 'the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905'. Abyei is further considered a 'bridge between the north and the south, linking the people of Sudan'. The CPA gave the task of defining and demarcating the boundaries of Abyei to the Abyei Boundaries Commission ('ABC'). The ABC's report was, however, contested, and the final delineation of Abyei was concluded in the Final Award of Arbitration in the Permanent Court of Arbitration at The Hague. The award established that Abyei encompasses a specific territory, populated by the Ngok Dinka, which was transferred to the Northern State of Kordofan in 1905. The southern boundary of Abyei is the 1956 border between Bahr el Ghazal and Kordofan. For additional details see Permanent Court of Arbitration 22 July 2009.

Bahr el Ghazal in Southern Sudan, with representation in both state legislatures.<sup>26</sup> The CPA also recognised the right of the residents of Abyei to self-determination through a referendum which was supposed to take place simultaneously with the Southern Sudan referendum. In the Abyei referendum residents of Abyei were supposed to decide either: a) that Abyei retain its special administrative status in the North or b) that Abyei be part of Bahr-el-Ghazal.<sup>27</sup>

It is unclear either from the CPA or from the Act whether residents of Abyei could also participate in the Southern Sudan referendum.

The commission did not issue any specific statement on the participation of the Dinka Ngok of Abyei in the Southern Sudan referendum but, in its answer to complaints and to requests from international observers for clarification, it highlighted that being a resident of Abyei was not a criterion of eligibility for the Referendum of Southern Sudan.<sup>28</sup> For this reason, no referendum centres were established in Abyei. Nevertheless, if Dinka Ngok from Abyei met the eligibility criteria provided for in s 25 of the Referendum Act they could register and vote in the nearest referendum centre in either Northern or Southern Sudan.<sup>29</sup>

### *Proof of voter's identity*

The Referendum Act is not clear about the requirements for proof of identity for the purpose of voter registration (VR).

Section 26 of the Act required written documentation. In cases where the person concerned did not possess an identification document or in cases in which there were doubts about the authenticity of the documentation provided oral testimony was required from the chief of the community to which the person belonged.

Section 28 of the Act is, however, more restrictive, allowing only written documentation as proof of identity.<sup>30</sup>

The SSRC Voter Registration Regulations 2010 (hereinafter 'Voter Registration Regulations'), clarified the above by providing a list of documents considered as

26 CPA, Abyei Protocol Article 1.2.1 'Residents of Abyei will be citizens of both Western Kordofan and Bahr-el-Ghazal, with representations in the legislatures of both'.

27 CPA, Abyei Protocol Article 1.3.

28 The commission explained its position in relation to the eligibility of Ngok Dinka from Abyei in a response to the Carter Center on 5 January 2011.

29 In the Agok Declaration of 2003 (Preamble Part I(A), I(E), 2-7 June) the Ngok Dinka declared that they were included within the polity of Southern Sudan and that they 'are part and parcel of Southern Sudan'.

30 Section 28(2)(a) of the Act stipulates that anyone who 'possesses an identification document or a certificate authenticated by the Administrative Unit in the county or by the concerned local and traditional authorities as the case may be' may register in the referendum registry.

proof of identity (Regulation 10)<sup>31</sup> and allowing the oral testimony of the chief or sultan of the village (referred to below as 'identifiers') both as a proof of identity and as a verification of documents listed in Regulation 10 when the chief of the referendum centre (RC) has doubts about their authenticity.

The list provided in Regulation 10 was not exhaustive and during the voter registration period, following requests from both eligible voters and the chief of the commission, the commission extended the list.

Both the Act and the Voter Registration Regulations are silent about the number of identifiers per referendum centre and about their selection and assignment. During the voter registration period the SSRC received complaints about the integrity and relevance of identifiers in some referendum centres. According to the allegations identifiers did not represent all communities in the area in which the referendum centre was situated. Identifiers were removed and replaced in those centres where allegations about their integrity and absence of links with the community were found to be reasonable.

### *Objections to and appeals against voter registration*

The Act provides for complex procedures in relation to objections (s 30) and appeals (s 31) at the end of the voter registration period in cases of corrections to or cancellations on the voter registry. Section 30(1) of the SSRA confers the right to object upon any 'registered voter in a referendum centre' who wants 'to correct the erroneous information or data regarding his/her registration or object to the registration of another person if s/he is: a) dead, b) left the County to another location for good, c) does not meet the voter's eligibility requirements or, d) does not meet the registration requirements'.

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31 Regulation 10 of the Voter Registration Regulations provides a list of documents that may be used for identification purposes, allowing also the use of expired documents:

- (1) Identification of voters shall be proved by any of the following:
  - (a) Nationality Certificate;
  - (b) Identity Card;
  - (c) Sudanese Passport;
  - (d) Birth Certificate;
  - (e) Driving Licence;
  - (f) Identification document issued by the United Nations High Commissioner for Refugees;
  - (g) Certificate issued by the local government authority or traditional authorities as the case may be;
  - (h) Oral testimony by a concerned county official or dignitary of the concerned community.
- (2) For the purpose of registration any of the aforementioned documents shall be considered as valid proof of identification even if expired.

The Act does not provide remedies for individuals who have been denied registration. The Voter Registration Regulations simplified the objections procedures contained in s 30 and, given the silence of the Act about such remedies, introduced Regulation 17. These procedures, to take place only during the voter registration period, entailed a petition to the consideration committee in the centre involved, thereby expanding the mandate of the consideration committees beyond the provision of the Act, which mandated these committees only to decide on complaints from registered voters during the objection period.

The choice of the commission, although in line with international standards of democratic participation, generated more confusion about and inconsistencies in the objection and appeal procedures because it anticipated the establishment of the consideration committees before the registration period: a requirement which was impossible to meet. The SSRC issued the Voter Registration Regulations on 14 November, one day before registration started and it was impossible to set up consideration committees in time, with the consequence that at many referendum centres voters' rights to legal redress and effective protection were undermined.

Although it appears not to have affected many people, international observer reports recorded the fact that the delay denied some their right to appeal against their exclusion from the process. The failure to appoint the consideration committees in time was one of the complaints raised by those lawyers who brought cases against the Referendum Commission to the Constitutional Court.

### *Requirements for the staff of the referendum centres*

Sections 22(2) and 23(4) of the Act, in specifying the number of members of the state high committees, the sub-committees and the referendum centre committees, sets out that the members must be at least 40 years old, a restriction that created serious operational and legal challenges.

In formulating the Act the legislators failed to foresee the operational implications of this provision and the difficulty of hiring so rapidly professional staff who could meet the age requirements. The problem was particularly challenging in Southern Sudan, where most people over 40 are illiterate. Moreover, the Act was inconsistent in imposing an age restriction only on some members of the SSRC staff – it was not imposed on the staff of the secretariat at the headquarters in Khartoum or at the bureau in Juba.

The commission recruited staff members without obliging them to prove their age and when the appointments were challenged the staff members were dismissed and replaced with others who met the age requirements.

*Registration and voting in 'other locations'*

The Referendum Act allowed Southern Sudanese who met the eligibility criteria set out in s25 in combination with s 27(3) and s 27(4) to register and vote in Northern Sudan and in eight out-of-country voting locations –Australia, Canada, Egypt, Ethiopia, Kenya, Uganda, UK and USA. In doing so it aimed to ensure the broadest possible participation in the exercise of the right to self-determination of the Southern Sudanese diaspora (in the out-of-country locations) and of internally displaced Southern Sudanese (in Northern Sudan).

Section 27(5) of the Act conferred on the International Organisation for Migration (IOM) the responsibility to assist with the organisation of the procedures for registration, polling, sorting, counting and declaration of the results in other locations while, in relation to the out-of-country locations, s 27(6) mandates the chief of the referendum centre to coordinate with 'the IOM, with the participation of the country hosting the refugees and immigrants or expatriates from Southern Sudan in the procedures of registration, polling, sorting, counting and declaration of the results'.

The IOM was not consulted when this provision was drafted nor were the legislators aware of its operational and logistic capacity in the 'other locations'. When it came to the implementation of the Act the organisation had neither the operational nor logistic capacity necessary to carry out these duties in Northern Sudan. In addition, the absence of accurate figures for Southern Sudanese in 'other locations' and the lack of clarity about the eligibility criteria made it difficult to identify eligible voters.

In order to support the organisation of registration and voting in other locations and to release the IOM from some of the pressure it was decided that operations in Northern Sudan would have to be organised by the SSRC with the support of the UN Integrated Referendum and Electoral Division (UNIRENED), while the IOM would assist in organising the referendum in the eight locations abroad.

According to s 27(1) of the Act, high committees had to establish referendum centres in the counties in Southern Sudan. In other locations, as provided for in s27(2), the commission was responsible for establishing such centres

provided that the number of the registered voters in each centre shall be at least 20,000. If the number is less than 20,000 in any location, a polling centre shall be open for them in the capital of the concerned state in Northern Sudan and the countries of emigration.

In the brief time between the publication of the final voters' register and polling day (one day) it would have been operationally impossible for the commission to transfer all polling material from the registration centres to the capitals in cases in which the number of voters for that registration centre did not reach the mandated 20 000 and then to inform voters about changes in the location of the polling station. This would have led to some potential voters being disenfranchised, thereby affecting the turnout, with consequences for the results and for the fairness and transparency of the process.

At the onset the SSRC had no intention of considering any options that differed from those prescribed in the Referendum Act. In its responses to critical operational questions from the international partners the commission confirmed its intention to 'maintain, for operational and logistic reasons, the criteria of establishing referendum centres in Northern Sudan, where there are at least 20 000 estimated voters'. However, because the commission did not have accurate figures about the exact number and concentration of eligible voters in other locations it decided to 'open branch referendum centres for registration purposes'. In doing so, it decided to adopt the principle that allows voters to vote where they are registered.<sup>32</sup>

While procedures for registration and polling were the same in all locations there were different procedures for complaints related to the registration process in the locations abroad where the only remedy voters had at their disposal was to lodge objections with the consideration committees since they had no access to any competent court.<sup>33</sup>

### *Publication of the final voters' register*

Given only four months to organise the referendum it was impossible for the SSRC to abide by the schedule set forth in the Act. One particular provision which represented a challenge was s 32(1), which prescribes that 'following the final revision and receipt of the results of objections, the Commission shall prepare the final referendum register and make it public three months prior to the start of polling'.

The breach of this provision was one of the complaints of those who went to the Constitutional Court to challenge the legitimacy of the entire referendum process.

32 Regulation 7 of the SSRC Regulations on Polling Sorting, Counting and Declaration of Results 2010 stipulates that 'Any registered voter shall vote in person at the same Referendum Centre where he registered'.

33 According to s2 of the Act, competent court '[m]eans the court determined by the President of the National Judiciary or the President of Southern Sudan Supreme Court, as the case may be, to be competent to rule on appeals and contraventions filed in accordance with the provisions of this Act'.



The provision, whose rationale was the need to provide sufficient time for campaigning and for public inspection of the final voters' register, could not be respected in the time available. To comply with it the commission should have sought the approval of the CPA partners to postpone the date of the referendum. Without such agreement application of s32(1) would have jeopardised the exercise of the right to self-determination of people of Southern Sudan, violating the provisions of the CPA, INC and ICSS which recognise that right.

The commission requested the presidency to amend the provision, but received no response.<sup>34</sup> Despite these problems the SSRC succeeded in organising the referendum and allowing enough time for voter registration and for objections to and appeals against the registration process.

### *Voting procedures*

Section 34 of the Act provides that 'at least two months before the beginning of polling the commission should determine the schedule for polling procedure'. Here, too, the commission was unable to meet the deadline, issuing the regulations on polling, sorting, counting and aggregation of results on 29 December 2010, a few days before the commencement of polling, after the training manual for referendum centre staff on polling procedures had been printed and when the training of staff at the referendum centre had already taken place.

This delay created confusion among the staff because the regulations differed from the training manual in areas such as opening and closing times and the procedures for lodging objections during the polling process. Discrepancies were addressed by the SSRC staff and clarified through directives issued by the SSRC to the referendum centres.

Regulation 6 of the SSRC Regulations on Polling, Sorting, Counting and Declaration of Results 2010 defined as eligible to vote 'any person registered in the Final Referendum Register and in possession of his registration card'. Consequently, voters who lost their voter registration cards could not vote. During the poll this restriction was brought to the attention of the commission as disenfranchising voters who had lost their cards but could prove their identity and whose names appeared on the register at the referendum centre at which they claimed to have registered.

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<sup>34</sup> Verjee 2010, p 14, however, reports on a meeting on 29 August when 'the national presidency conceded this reality and agreed to the SSRC's proposal to ignore certain legal requirements of the SSRA, including the requirement to complete registration three months before the vote'. The commission did not mention that meeting or refer to it when discussing the challenges of the process. The three-month deadline for the publication of the final voters' register was always considered to have been one of the biggest challenges to the legitimacy of the process, a fact that has been confirmed in recent interviews with commission members.



In order to address this issue the commission held an extraordinary meeting in Juba and issued a statement containing procedures allowing people who lost their voter registration cards to vote, thus allowing these voters to participate.<sup>35</sup> Neither the contents of this statement nor the delay in issuing it was challenged during the polling period.

### *Threshold*

Section 41(2)(a) of the Act requires that for the referendum to be valid at least 60 per cent of registered voters had to cast their votes. Normally referendum laws require voter turnout to be 50 per cent of registered voters. In the referenda on independence held in Montenegro<sup>36</sup> and East Timor no specific turnout was required for their validity. The European Commission for Democracy through Law, better known as the Venice Commission, the Council of Europe's advisory body on constitutional matters, established in 1990, does not believe it is appropriate to lay down a quorum at all as it may encourage opponents to abstain in order to prevent a quorum being reached.<sup>37</sup>

Where a minimum voter turnout is required the voter registration process becomes as important as the vote, as does the accuracy of the voters' register, which provides the 100 per cent figure against which the turnout is calculated.

The threshold established for the referendum had its rationale in the negotiated nature of the Act. Nevertheless it represented an important challenge, especially because if the threshold had not been met it would have been difficult to justify any further claim for self-determination for Southern Sudan.

The regulations also clarified the interpretation of s 41(3), which, in stipulating that the referendum should be decided in favour of the option that secured a

35 The commission declared that voters who lost their cards, reported the loss to the police and obtained a police report to this effect could be allowed to vote upon verification that the report issued by the police contained both details of the voter identification document and the name/ number of the referendum centre where the voter registered. If the voter's name was found on the referendum register, the voter in question had not already voted, and details contained in the police report corresponded to the relevant entries on the referendum registry the person was allowed to vote. A copy of the police report had to be kept at the referendum centre and a description of the fact that the voter was allowed to vote and the serial number of the voter's card was to be recorded in the referendum centre journal.

36 In the case of Montenegro the European Union required a 55 per cent majority for recognition of the results of the referendum, a requirement regarded by some Montenegrin leaders as 'undemocratic'.

37 In the explanatory memorandum to the Code of Good Practice on Referendums it is recommended that Council of Europe member states make no provision for quorums. The argument is that 'the existence of a turnout quorum (minimum percentage) encourages those who oppose the proposal contained in the referendum question to abstain rather than to vote against it'. 'Encouraging abstention or the imposition of a minority's view cannot be healthy for democracy. On the other hand, an approval quorum (acceptance by a minimum percentage of registered voters) may also be inconclusive. If a text is approved by a majority of voters without the quorum being reached, the majority will feel that they have been deprived of victory without an adequate reason.'

simple majority of 50 per cent plus one of the total number of votes cast, did not mention that this majority should be calculated on the total number of valid votes cast. This generated confusion with reference to the meaning of s 66 of the Act, which stipulated that 'the option approved by the people of Southern Sudan by a majority of fifty percent plus one (50%+1) of valid votes cast in the referendum ... shall be binding to all state institutions as well as all citizens of Southern and Northern Sudan'.

This confusion was clarified by the SSRC in the Regulations of Polling, Sorting, Counting and Declaration of results, in which Regulation 67 stipulated that: 'The Referendum Final Results shall be in favor of the option that secures the simple majority of fifty percent plus one (50% +1) of the total number of valid votes cast for one of the two options.'

### *Sorting, counting, aggregation and declaration of results*

Procedures for sorting, counting and declaring results were detailed in the regulations (for both Southern Sudan and other locations) in accordance with the provisions of the Act.

The regulations also detailed the procedures for aggregation and declaration of results, in line with the provisions of the Act. In Southern Sudan, once the results were declared at the referendum centres they were sent to the county sub-committees and from there to the state high committees. Both committees aggregated the results and sent a copy of their report to the bureau in Juba for verification and insertion into the database.

After the bureau declared the results for Southern Sudan they were sent to the commission in Khartoum for verification and aggregation for the declaration of the preliminary results. In Northern Sudan the aggregation was made by state referendum committees, while in the eight out-of-country voting locations this was done by the country office; in both cases the results were forwarded to the SSRC for verification.

The Act did not provide for procedures for objection during the sorting, counting and aggregation of results. Nevertheless, observers were allowed to assist at all stages of the process (including the uploading of information onto the databases in Juba and Khartoum).<sup>38</sup>

<sup>38</sup> The data centres in Khartoum and Juba provided computers so observers could observe the process of aggregation of results. In cases of discrepancies among the reports received the results were quarantined for further investigation and verification. According to the quarantine report the bureau sent to the commission, of 2 638 referendum centre results a total of 36 were quarantined. Of these 9 showed that clerical errors had been made at the data centre, 25 showed that registration forms had been incorrectly completed and in two cases the results form had been incorrectly completed.

According to s 44 of the Act the final referendum results had to be declared within 30 days of the date polling ended. During this time all appeals had to be decided by the courts.<sup>39</sup>

In order to meet this deadline UNIRED set a capillary field structure to support the aggregation of results in Southern and Northern Sudan, while the IOM was responsible for supporting the aggregation of results in the out-of-country voting locations.

### OBSERVING THE REFERENDUM

The presence and role of international and domestic observers is considered to be essential to the transparency of any democratic participation process. The Act contains ambiguous provisions about the role of observers and does not provide for the role of party agents as observers. The presence of latter is often considered to ensure political confidence in the polling and aggregation process.

Section 61(2) of the Referendum Act gives the commission, in coordination with the bureau, the power to constitute 'observation committees' from:

- a) legal counsellors at the Ministry of Justice, Ministry of Legal Affairs and Constitutional Development of the Government of Southern Sudan as the case may be;
- b) ex-public service employees or persons of the society, who are known for uprightness, truth and honesty;
- c) civil society organisations, press and the media;
- d) local, regional and international observers.

The commission decided not to create observation committees because time constraints would have made it difficult to identify adequate members in categories a) and b) who could participate in such committees in centres in Southern Sudan or in other locations. It also considered that clustering observers in committees would limit their ability to move freely from one referendum centre to another to observe the process.

The Regulations on the Role and Accreditation of Referendum Observers detail the code of conduct for such observers and provide for procedures to accredit them through the establishment of accreditation committees. In line with the Act the regulations do not provide for political party agents to observe the process.

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<sup>39</sup> Section 2 of the Act defines 'court' as 'the National Supreme Court, or the Supreme Court of Southern Sudan'.

During the preparation of the regulations the commission held discussions with its international partners about allowing political party agents to observe the process and drafting regulations for this purpose. At this point the commission decided not to allow agents to observe the process at all, believing that their presence might generate confusion among voters and might be construed as interference in the voting process.

In the end, however, as a result of pressure from political parties, the commission decided to allow party agents to apply for the same accreditation as other domestic observer organisations. This decision, although, on the one hand, contributing to enhancing political confidence in the referendum process, raised doubts about clarity and a disregard for international standards of election observation, which prescribe different treatment for party agents from that accorded to international and local observer organisations.

### MEDIA AND ADVOCACY CAMPAIGN

Chapter 5 of the Act is dedicated to Media Rules and Guarantees, with s 46(1) defining the principles of the referendum media programme by giving 'registered political parties and individuals ... the right to explain, express, disseminate and announce their views on the two referendum options through various media and information channels'. In addition, s 45(4) mandates the SSRC to establish an 'independent and impartial media committee to launch a media campaign for the education and enlightenment of the Sudanese people in general and the Southerners in particular on the referendum procedures'.

The SSRA includes only general principles for the conduct of the referendum campaign, conferring upon the SSRC the power to regulate it.<sup>40</sup> This challenge was increased by the lack of a legal framework for media in Southern Sudan – the national broadcast media legislation in force in Northern Sudan was not applicable in the South.<sup>41</sup>

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40 Section 7 of the SSRA provides that the different levels of governance shall commit to creating a conducive environment for conducting the referendum', *inter alia*, by providing an

- a) appropriate environment and security conditions in order to prepare and organise the free exercise of the right to self-determination.
- b) Freedom of expression for all the people of Sudan in general and the people of Southern Sudan in particular to enable them to dispense their views on the referendum through mass media or any other means.

41 The Press and Publication Act enacted for Northern Sudan in 2009 by the National Legislative Assembly in Khartoum was not applicable in Southern Sudan although the content of South Sudanese newspapers printed in Northern Sudan was subject to the strict control of the National Press and Publication Council.

While s 46 stipulates that during the campaign period ‘any government official or public authority shall treat all groups and individuals equally and with the utmost impartiality’, the Act does not commit all state authorities to strict neutrality in their official capacities and the commission was not in a position to set up mechanisms to ensure the neutrality of the state-held media.

The SSRC appointed the Independent Media Committee, based at the commission’s headquarters in Khartoum,<sup>42</sup> a few days before the launch of the media campaign on 7 November 2010. However, the Media Campaign Regulations were only published on 13 December.

The regulations clarified the ambiguity of the use in the Act of the terms media programme and media campaign, specifying, in Regulation 5(a), that the Independent Media Committee had the power to conduct a ‘public awareness and information campaign to inform Sudanese people in general and people of the Southern Sudan in particular about the referendum and its various processes’. In addition, Regulations 6, 7 and 8 gave the committee the power to accredit advocacy groups for the referendum campaign and Regulation 59(d) authorised it to receive complaints about the ‘breach of fair and accurate reporting of the referendum campaign and any violation of the media code of conduct’. In the latter case there were doubts about whether the committee had the power to redress complaints effectively.

The regulations also contained specific requirements for advocacy groups or individuals and, in line with the Act, did not allow political parties which were not registered according to the provisions of the Political Party Act of 2007 to act as advocates. However, the commission decided to accredit such parties as well.

The campaign was conducted in both Northern and Southern Sudan, with the support of both governments, but with minimal or no respect for impartiality and the fair representation of both sides.

The commission’s information campaign consisted of a few sensitisation events and the production, with the support of UNIRED, of brochures, newspaper advertisements, posters and items such as bracelets, bags, t-shirts and hats. The assistance and support of UNIRED in the information campaign raised concerns among commission members about the ownership of the process and the need to show the commission’s independence at all stages of the referendum.

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42 Initially Regulation 70 of the SSRC Internal Regulations of October 2010 had laid down that the Independent Media Committee should be based in Juba. This changed in the course of implementing the referendum process on the basis that situating the body in Khartoum would help build confidence among those parties which opposed the referendum.

## AUDIT OF THE COMMISSION'S ACCOUNTS

Section 21 of the SSRA provides for the commission's accounts to be audited by the National Audit Chamber (NAC) 'at the end of each fiscal year and at the end of the Referendum for submission to the National Assembly'.

In spite of the provision of s 64 of the Act that '[t]he Government, the Government of Southern Sudan and the International Community shall fund and appropriate the necessary funds into the accounts of the Commission to fund its running costs and the costs of the referendum' the commission received direct funding only from the government of national unity and the government of Southern Sudan, while the international community supported it by means of donations in kind and technical assistance aimed at meeting all necessary requirements for the organisation of a credible and transparent referendum.<sup>43</sup>

It can be argued that s 64 is void for vagueness because it imposes obligations on donors without taking into account their requirements and standards of transparency and accountability and without involving them in the drafting of the provision, therefore the lack of direct funding from the international community cannot be considered a violation of such a provision.

The responsibility for the organisation of the referendum rested with the CPA partners, and the international community, in supporting it, required accountability mechanisms with different standards from those set out in s 21 of the Act. Moreover, this provision raises several questions about the period during which the audit has to take place, the accountability of the commission for expenditure and the accountability of the bureau for the management of funds donated directly by GOSS. The Act also sets no time limit for the audit of the commission's accounts.<sup>44</sup>

In May 2011, after the presidency closed the accounts of the commission, the NAC indicated its intention to begin its audit. In response, the commission asked for adequate time to present all its statements of account, including those for funds donated by GOSS to the bureau in Juba and the headquarters in Khartoum. However, the NAC responded that the audit would be limited to the accounts of the commission in Khartoum.

Funds donated by GOSS to the bureau and the commission are public funds and should be audited by the NAC in accordance with the abovementioned provision of the Act. Questions arise about how, practically, the NAC would be able to carry out such an audit. There seem to be only two possible ways in which it could do so. It must either request the commission's headquarters in Khartoum

43 The UN Development Fund for Women and the UN Development Programme donated small amounts to the SSRC's departments of gender and media for the voter information campaign.

44 Because the commission was only appointed on 30 June 2010 its accounts were to be audited by the NAC only once, at the end of the referendum.

to produce a statement of the bureau's accounts – an option in which it appears not to be interested or it must authorise the Southern Sudan Audit Chamber (SSAC) to conduct the audit. If it takes neither of these steps it is unlikely that the funds of the SSRB will be audited in compliance with the provisions of the Act.

### CONSTITUTIONAL COURT CASES

As indicated above, during the referendum various political parties, groups of lawyers, and tribes filed cases before the Constitutional Court in Khartoum alleging violations of the CPA and of the Interim National Constitution and Referendum Act.

The court heard five cases, dismissing four. One is still pending. The constitutional issues raised and under consideration include, *inter alia*, the timeframe for the conduct of the referendum, the composition of the SSRC and violations of the Referendum Act. The court declined to hear cases related to individual eligibility determinations and corrupt practices, as the appellants had not exhausted the remedies provided in the Referendum Act.

The case accepted by the court was not heard because the absence of Southern members of the court meant it was unable to gather the quorum of seven of its nine judges prescribed by Article 8(1) of the Constitutional Court Act. It is not clear whether the absence of the three judges was politically motivated.<sup>45</sup>

### CONCLUSION

'The time is very short. It will be a complete miracle to conduct the referendum in the short remaining period. However, I still believe that the miracle can happen,' said the chairman of the SSRC, Professor Mohamed Ibrahim Khalil, during his meeting with the first vice-president, and president of GOSS, Salva Kiir Mayadrit, at the end of October 2010.

The miracle happened. On 9 January almost all polling centres opened on time and they closed on 15 January, as prescribed by the Act. There were no particular security incidents and no complaints have been lodged alleging irregularities during the polling period.

On 7 February 2011 the SSRC declared the final results of the referendum on self-determination for the people of Southern Sudan. Of the 3 851 994 who voted 3 792 518, representing 98.8 per cent of Southern Sudanese voters, opted for secession. On the same day the results were accepted and welcomed by President

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<sup>45</sup> In EUEOM 2011, p 19 it is explained that lawyers for the applicants in one of the unresolved cases wrote to the Constitutional Court arguing that the removal of judges was a breach of the CPA because it failed to provide the protection for which the Constitutional Court had been created.



Omar Bashir, speaking on television, as the expression of the will of the people of Southern Sudan.

The referendum has been considered an example of the commitment, professionalism and transparency of all the parties involved – the commission, the international community, the GoNU, the GOSS and the people of the Sudan who participated peacefully. In particular, the parties to the Comprehensive Peace Agreement summoned up the courage and political commitment required to ensure that the process they embarked upon would conclude with the referendum, as stipulated in the agreement (UN SG Panel, 16 January 2011).

The challenges analysed in this study seemed insurmountable just a few weeks before polling began but neither these nor the few irregularities registered affected the integrity, validity and legitimacy of the process, which took place in a peaceful environment and was considered a remarkable operational achievement.

Fundamental to the success of the referendum was certainly the strong commitment of the CPA partners, the international community and the staff of the SSRC and SSRB. But commitment does not always lead to excellent and effective results.

In the case of the Southern Sudan referendum, in spite of the mistrust among the CPA partners and the problems with the agreement, the lack of clarity of the SSRA and the operational and logistical challenges, the following factors can be identified as responsible for the success:

- A solid, clear and uncontested legal basis for the exercise of the right to self-determination for the people of Southern Sudan. The recognition in the CPA of the right to self-determination, in spite of the interpretations related to the alternative modalities for its exercise, was clear and undisputed, as was the referendum question the SSRA copied from the INC and ICSS and the date of the start of the referendum. This clarity obviated misunderstanding about the interpretation of the results of the referendum.
- A well-defined mandate for the SSRC, its balanced composition and the clear division of tasks between the SSRC and the SSRB with respect to their roles.
- The SSRC's ownership of the process and its transparency and independence from both national and international counterparts.
- The clear – although broad – mandate of the Referendum Commission, together with its balanced composition, between Northern and



Southern Sudanese commissioners, contributed to the transparency of the process and the consequent enhancement of trust among the parties.

- The commission also built trust through its efforts to maintain independence from both local and international partners, to ensure the ownership of the process and to inform the public constantly about the main achievements in the organisation of the referendum.
- The establishment of the SSRB in Juba, with a clear mandate, defined by the Act, also contributed to building confidence in the process, especially among Southern Sudanese, who did not perceive the referendum as being driven by Khartoum. Moreover, the presence of the bureau allowed for better operational and logistical planning of the activities for Southern Sudan.
- In spite of an initial lack of communication between the SSRC and the SSRB and some early difficulties the chairman of the SSRC and his deputy – as chairman of the bureau – made a serious effort to respect each other and required the same respectful behaviour from the commissioners and senior staff in both Khartoum and Juba. The positive attitude of the two leaders, who took no decisions and undertook no actions which could jeopardise the conduct of the referendum, improved the relationship between the commission and the bureau, a relationship which has been praised for being professional and respectful.
- Effective coordination and information-sharing mechanisms provided by the international community and the constant constructive dialogue with the SSRC. The international community played an important role in the success of the referendum. It managed to build trust among different parties, to keep the dialogue open with the commission even during the most difficult moments, and to face all crises constructively, without hindering the authority of the commission or the bureau or undermining local ownership of the process. The coordination and information-sharing mechanisms were effective and able to address challenges at operational, technical and political levels, allowing for the constructive participation of all parties involved in the referendum.

- The commitment to the process of national counterparts.
- The peaceful attitude of the Sudanese people. The GoNU and the GOSS contributed to the creation of a peaceful environment for the organisation of the referendum, sending a message of peace to the people of Sudan. The people of Northern Sudan respected the choice of the Southerners and the people of Southern Sudan always respected the Northern nationals, peacefully awaiting the date on which they could exercise their right to self-determination.

The referendum set high standards for democratic participation processes in both the region and the entire world. The lessons learned represent an authoritative precedent to be followed in future similar contexts.

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### **Interview**

The Hon Paolino Wanawilla Unango, Deputy Minister of Justice for the Republic of South Sudan and Commissioner of the South Sudan Referendum Commission.

# MAURITIUS: THE NOT SO PERFECT DEMOCRACY

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## ABSTRACT

*Mauritius has come a long way since independence in 1968, when observers predicted that the 'overcrowded barracoon', as V S Naipaul referred to the island, would fail to achieve peace and economic prosperity. As a result of its success in managing diversity and capitalising on protected markets and guaranteed export prices Mauritius has emerged in recent decades as a democratic and economic model for its peers on the African continent. However, with the onset of globalisation Mauritius is now entering a period of democratic stagnation as islanders confront the rise of ethnic and dynastic politics, the advent of political cronyism and patronage, the marginalisation of minorities, and growing disenchantment with and cynicism about the political class. This article highlights what can be considered the numerous deficiencies and flaws in the highly celebrated Mauritian 'picture perfect model'. Due attention must be given to addressing these if a social, economic and political implosion is to be avoided.*

## INTRODUCTION

It is hard to find any literature or indicators<sup>1</sup> that do not commend Mauritius on its economic performance and political stability. There is no doubt that the island

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1 Economic indicators: Upper-middle-income economy, GDP per capita, US \$8 588 (World Bank indicators 2010); growth rate, 2.1% (World Bank 2010); Index of Economic Freedom, 75, ranked 12<sup>th</sup> worldwide (Heritage Foundation / *Wall Street Journal* 2010); Human Development Index .701, ranked 72<sup>nd</sup> worldwide (UNDP 2010).

Democratic indicators: PR, 1; CL, 2, free (Freedom House 2011); Democracy Index 2010, full democracy (EIU); 83, 1<sup>st</sup> in Africa (Ibrahim Index of African Governance 2010); Corruption Index, 5.4, ranked 39<sup>th</sup> worldwide (Transparency International 2010).

has fared well, despite being small, isolated and resource-poor. Many believe that it is the suave management of diversity and plurality, the setting up of key and independent institutions and the adoption of a ballot (instead of a bullet) culture that moved the island away from the problems that plagued a number of African countries as they became independent.

Mauritius is known for its cosmopolitanism and conviviality, which are marketed as important traits of the islanders and have served well in making the island a popular tourist destination and an investment hub for new businesses.

Situated in the warm waters of the Indian Ocean, east of Southern Africa, the Republic of Mauritius consists of Mauritius, Rodrigues and two smaller atolls (Agalega and Saint Brandon). It also had territorial control of the Chagos Archipelago, but this group of islands was excised by Britain in 1965 prior to independence. Mauritius is still trying to regain sovereignty over the Chagos Archipelago, including Diego Garcia, which has become an important military base for the United States.

Despite its geographical proximity to Africa, Mauritius is not a typical African country. The island has no indigenous population and essentially comprises people of immigrant origin, making it an ethnically diverse, linguistically rich and culturally vibrant society. The fact that the island has no native population and that no single ethnic group can claim a total majority partly explains the 'Mauritian miracle'. This concept is essentially an economic one, but it has been important in maintaining social harmony and political stability on the island.

Mauritius is defined by its Constitution as a secular country, but ethno-religious markers are strongly at play, made visible by the different communities – Hindus (52%), Creoles of African ancestry (27%), Muslims (16%), Chinese (3%) and those of French/ British descent (2%).<sup>2</sup>

The main argument of this article is that there is a much more nuanced reading and interpretation of the Mauritian democratic model than conventional writings and ratings report upon. A number of what can be termed worrying tendencies have been noted in the past decade or so and they already constitute a real danger to Mauritian pluralism, diversity and equity. Therefore, in highlighting the numerous flaws and deficiencies of the present state of democracy on the island one expects to demonstrate that Mauritian exceptionalism is not only a rather overrated notion it has, in fact, been the source of complacency and inaction among the island's political leaders, who continue to pretend that all is fine in paradise.

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2 This ethnic classification dates back to the 1972 Census, which was the last time the Mauritian people were asked to define themselves in ethnic terms.

## PARADIGM SHIFT IN THE MEANING AND UNDERSTANDING OF DEMOCRACY: THE CONSOLIDATION OF DEMOCRACY

Democracy is a contested, multidimensional and dynamic term. Over the decades a long-running debate has pitted what might be called the 'preconditionists' against the 'universalists' (Berman 2010). The former believe that democracy generally emerges from a particular set of conditions and experiences, while the latter claim that it can come about in all sorts of ways and settings.

The universalist approach was given a real boost by the third wave of global democratisation that began in the mid-1970s and laid greater emphasis on the process of democratic transition and less on the structures supposedly associated with successful democracy. This, in turn, inaugurated an era when democracy was promoted as an important feature of Western foreign policy. By the 1990s there were a number of impressive democratic gains, as evidenced by the sheer number of countries which qualified to be called democracies. Unfortunately there now seems have been a reversal of fortunes and the world appears to be entering a democratic recession (Diamond 2008; Puddington 2011).

In light of this, the advent of democracy remains an elusive concept and there is a need to find a less generalist / blanket term, one that offers greater precision in meaning and understanding. What is required is to assess and evaluate democracy more meaningfully and tangibly, using a less supply-side approach (looking at institutions) and a greater demand-side one (looking at citizens). The work of Diamond & Morlino (2005, p xi) offers an interesting take on a more substantive aspect of democracy by emphasising its quality: '... it provides its citizens a high degree of freedom, political equality, and popular control over public policies and policy makers through the legitimate and lawful functioning of stable institutions'. Diamond & Morlino (2005) identify eight dimensions, namely, the rule of law, participation, competition, vertical accountability, horizontal accountability, freedom, equality and responsiveness. The eight categories are interconnected and, at first reading, seem to be rather obvious. However, what is important is the manner in which they are understood and owned by the people – the demand-side democracy mentioned above. Of particular relevance to what one may call a more people oriented democracy are participation, vertical accountability, competition and responsiveness, features that have a certain resonance in countries and societies which believe they have successfully achieved democracy.

### *Participation through accountability and mobilisation*

One of the fundamental features of any democracy is that all its citizens have a formal right to political participation, including the right to vote. Political



participation is further enhanced when the right to vote is coupled with the right to join political parties, shape the public agenda, communicate with and demand accountability from elected representatives and monitor their conduct. In fact, a high level of apathy among citizens in a number of established democracies has been noted, as many of them doubt the efficiency of democratic mechanisms to serve or represent them. However, with the arrival of the recent 'Arab Spring' the power of popular participation is back, with the capacity to uproot even the most entrenched authoritarian regime.

### *Open and varied competition*

Democracies vary in their degree of competitiveness. Usually the most common and celebrated feature of political competition is the holding of regular, free and fair elections. No doubt this is a crucial feature, but a democracy must also be assessed in terms of its electoral model, equality of access to the mass media, financing of political parties and how open and inclusive it is of minorities (women and youth).

### *Responsiveness*

Trust in democracy hinges to a great extent on the responsiveness of government to the expectations, interests, needs and demands of its citizens. Responsiveness depends very much on a proactive and engaged citizenry able to articulate and unite strongly in its demands and expectations.

More recently, the democratic assessment literature has expressed a growing concern about merely relying on a single-point score assigned to a particular country at a particular time and expecting the score to capture accurately all the nuances of democracy and be empirically valid through time. This concern has brought to centre stage the idea of disaggregated data about democracy. In 2008 the Committee on the Evaluation of USAID Democracy Assistance wrote (p 89):

No aggregate democracy index offers a satisfactory scale for purposes of country assessment or for answering general questions pertaining to democracy. Thus, the committee strongly supports USAID's inclination to focus its efforts on a more disaggregated set of indicators as a way of capturing the diverse components of this key concept while overcoming difficulties inherent in measures that attempt to summarize, in a single statistic, a country's level of democracy (à la Freedom House or Polity).



Bratton (2010) makes a further case for the use of disaggregated democracy, which allows for a more bottom-up approach and develops a greater interest in understanding the more tangible attributes of a democratic regime. In fact, the most recent Afrobarometer round (Round 4) has made use of hypothetical democracy vignettes to develop deeper meaning for the term (Little & Logan 2009).

### DEMOCRATIC DEFICIENCIES AND FLAWS IN THE MAURITIAN MODEL

In 2004 a report entitled 'Competitiveness Report: What Orientations for Mauritius', prepared by the National Productivity and Competition Council (NPCC), highlighted the following:

To arrive at a shared vision for Mauritius, it is imperative that everybody should be able to voice his/her opinion without fear on the problems and future perspectives of Mauritius. Does this culture of open and constructive debate exist when the political competition model is based on patronage and clientelism? Or has such an open political culture, so essential for the conduct of a properly functioning democracy, been diminished by a climate of implicit fear that speaking one's mind will result in punitive sanctions of one sort or another?

This statement reflects some of the underlying tensions, limitations and challenges in the practice of democracy on the island and this section attempts to shed some light on certain worrying features of the Mauritian democratic model.

#### *The rise of ethno-religious politics*

Mauritian politics is multifaceted to the point of being paradoxical. At one level it promotes a very broad-based approach to ensuring that all ethnic groups are included in what are termed 'rainbow-nation alliances'. Concurrently it also encourages ethno-religious politics, where appeals are made to groups to support those of their kind (Kadima & Kasenally 2006).

Ethno-religious politics has its roots in pre-independence Mauritius. As the island negotiated its independence a sizeable percentage (44%) of a population essentially made up of people of African and French ancestry voted against it, preferring to remain a British colony, an attitude motivated largely by the fact that they feared the Hindu community would monopolise power.

Originally considered a single group, Indo-Mauritians subsequently began to classify themselves as Muslims, Tamils, or Hindus – with the last distinguishing themselves further by caste. In its early days (especially at the time of independence) ethno-religious politics was seen as a form of consociationalism (Srebrnik 2002; Jahangeer-Chojoo 2010). Unfortunately, in the past four decades ethno-religious politics has transformed itself from a relatively benign to a more insidious process, with grave ramifications for social harmony and diversity on the island.

Elections offer a particularly potent opportunity for ethno-religious strategies, with candidates chosen more for their ethnic coefficient than their intellectual capacity. This is an extremely worrying trend as it tends to favour a breed of politician who is myopic in his or her understanding and practice of the politics of diversity. Another worrying trend is the ascent within the Mauritian political landscape of purely ethnically driven parties that are aggressive and non-consensual in their claims.

Mention was made above of the fear among certain communities of the growing influence of the Hindu community when the island attained independence. Today this fear is a reality as Hindus exercise considerable control and influence in a number of spheres.

Since independence every prime minister save one has been a Hindu of Bihari descent from the Vaish caste. Informally, many in the Hindu community take it as their right that the premier must be one of their own. This ‘right’ was most vociferously claimed in 2003 when, in terms of a pre-electoral agreement, the position was split between a Hindu (Aneerood Jugnauth) and a Franco-Mauritian (Paul Berenger). In fact, 2003 was a watershed year for ethno-religious politics, causing a rift in inter-ethnic relationships and allowing ethnically motivated groups to spring up.

### *Dynastic, ailing and closed political parties*

Genuine political renewal does not seem to be part of the agenda of Mauritian political leaders. In 40 years of independence prime ministers have come from only two families – Ramgoolam or Jugnauth. The current prime minister, Navin Ramgoolam, son of the first prime minister (Sir Seewasgar Ramgoolam), is in his third term and has declared publicly that he is ready to carry on for the next 15 years (*The Independent Daily*, 21 April 2011).

Bunwaree & Kasenally (2005) highlight the well-established internal structure of mainstream political parties as reflected by the committees that deal with matters pertaining to policy conceptualisation and decision-making. Despite political parties’ investment in a decentralised framework the ultimate decisions

on important matters concerning the party essentially lie with the leader and a very small caucus of party members.

This 'autocratic' approach to party leadership is never really contested, as the rank and file of party members are 'encouraged' to 'toe the party line' and avoid 'embarrassing' their leader in any circumstances. In fact, this 'toe or go' philosophy has, over the years, considerably fortified the unequivocal authority of the leader.

Closely linked to autocratic political leadership is the issue of political succession. There is a total absence of succession planning and this state of affairs does not augur well for democracy within political parties. The lack of opportunity to rise to the higher echelons of the party frustrates the more able and worthy candidates, who have to face an old political guard which retains most of the party privileges: renewed nominations and ministerial portfolios (when its party is in power).

### *Stalled electoral reform*

In 2000 the Mauritian government commissioned a South African Constitutional Court judge, Albie Sachs, to look into the issue of electoral and constitutional reform. The terms of reference of the commission were articulated around the need for fairness, representation and accountability within the existing electoral and constitutional framework.

In 2002 the Sachs Report was made public. It made a series of recommendations which included introducing proportional representation, increasing the number of female candidates nominated, creating a structure for funding political parties and enhancing the powers and responsibilities of the electoral commission. In 2002 the government created a select committee to evaluate the recommendations of the report and offer a *modus operandi* for its implementation. Unfortunately, the members of the committee were split over their support for one electoral formula and, at the time of writing, the matter has still not been resolved.

Although there appears to be some consensus among the various political stakeholders, to date no real action has been taken. Mauritian civil society, through a number of initiatives, has pushed for the implementation of certain recommendations of the Sachs Report.

Transparency Mauritius (affiliated to Transparency International) ran a number of information campaigns to persuade political parties and corporate bodies to be more transparent and accountable in their funding and financing and the Institute of Social Development and Peace (ISDP, a Mauritian advocacy think-tank) has been active in persuading political stakeholders to commit to

electoral reform through a series of dialogue sessions.<sup>3</sup> Perhaps the group that has been (and continues to be) most vocal and visible in its demands is Reziztanz Ek Alternativ, which has challenged what it terms the 'unconstitutionality' of the 'best loser system' (BLS).

The BLS is an ethnic quota system that was devised at independence to ensure representation for all ethno-communal groups and was attached to the prevailing first-past-the-post electoral system. It was hailed by some as a means of ensuring the rights of underrepresented communities and therefore maintaining a pluri-ethnic Mauritius, but decried by others on the basis that it has, in fact, institutionalised communalism as it splits Mauritian society into distinct ethnic groups vying for their own self-interest and thus hampering the development of a truly Mauritian nation.

In terms of the system eight seats (in addition to the 62 occupied by elected members) were designated for the communal groups that were mostly underrepresented. Reziztanz EK Alternativ has written officially to the UN Human Rights Commission requesting that it take a stand on the matter and, more recently, has petitioned the Privy Council – the case is due to be heard in October 2011. Meanwhile, the BLS remains an ultra-sensitive issue that no political leader or party dares address for fear of losing the support of the more vocal members of these ethnic groups.

*Misunderstanding the idea of representation: the continued absence of women from politics*

Mauritius continues to be among the poorest performers when it comes to the political representation of women, despite the fact that the island is a signatory to the SADC Gender Protocol and the Convention on the Elimination of all Forms of Discrimination against Women.

The Sachs Report highlighted the fact that the underrepresentation of women in the country constitutes a 'grave democratic deficient'. Bunwaree (2010), in an in-depth analysis of the interplay among gender, governance and politics, sheds important light on the entrenched system of patriarchy as well on other structural and legal failings that perpetuate the underrepresentation of women in politics.

For instance, discussions about using a quota system to correct certain disparities and discrimination have been branded unconstitutional as they are believed to contravene the basic precepts of the Mauritian Constitution, which protects Mauritians against any form of discrimination in terms of creed, colour,

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3 In 2006 the ISDP, with support from EISA and International IDEA, organised a session on the theme, 'Electoral Reform – Moving Towards An Inclusive Democracy'. This was followed, in 2009, by a second session, entitled 'Striving for a New Political Culture in Mauritius'.

sex or race. However, judging by various experiences in Africa and Latin America, the quota system, when applied, has boosted the presence and presentation of women (Ballington 2004; Ballington & Karam 2005).

Another mechanism that has been used extensively by women's movements to ensure greater solidarity and to push for a pro-women agenda is the women's caucus. Indeed, the development of a women's caucus has been strategic not only in getting more women into the legislature but also in extending their influence in a number of realms, among them, acting as a catalyst on key issues, acting as a watchdog on other issues and even becoming spokespeople on issues they wish to champion.

According to Thomas (1994) 'women who are organised in a caucus can serve the same purpose as a critical mass of women, even where women do not make up a significant portion of the legislature'. A number of African countries are leading the way and have developed interesting 'coalitions' headed by women parliamentarians. Mauritius has a lot to learn from these African countries, which are rapidly developing a class of women champions in politics who are increasingly challenging male dominated party structures.

### *Strong executives, weak legislators*

Barkan (2009) emphasises the importance of a developed and powerful legislature, maintaining that there can be no democratic consolidation without one. He attributes a number of functions and responsibilities to legislators, among them, to pass laws that represent the varied and sometimes conflicting interests of society as a whole, to exercise oversight and to engage in constituency service.

Mauritius, unlike many African countries which have adopted presidential systems, has retained the Westminster parliamentary system it inherited at independence. The Constitution guarantees the separation of the powers of the executive, the legislature and the judiciary. It is interesting to note that Mauritius scores .66 on the Parliamentary Power Index (Fish & Kroening 2009).<sup>4</sup> This relatively high score demonstrates that the Mauritian legislature possesses most of the features of a functioning legislature, but the question that should be posed is: how effective is it in carrying out its various functions, as outlined in the work of Barkan (2009)?

Mauritius's legislature follows a well-established procedure according to the 'standing orders and rules of the National Assembly' (1995), with all the necessary administrative and procedural mechanisms of a well oiled machine,

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<sup>4</sup> The PPI, developed by Fish & Kroening, is constructed by determining how many of 32 pre-established features a given legislature has. From this, the percentage of affirmative answers is computed. Scores range from .00 to 1.00 (the higher the score, the more powerful the legislature).

including the various sessional committees (selection, public accounts, standing orders and the house), select committees and the types of questions asked (private notice questions and questions to ministers, among others). However, observation of successive parliaments has revealed a gradual weakening of the legislature, particularly in its role and responsibility in exercising oversight, especially over the executive. Barkan (2009, p 25) defines 'parliamentary oversight as the core relations between the legislature and the executive and, at the same time, ... one of the basic components of the theoretical and constitutional foundations of Parliament'.

Over the years the executive has grown stronger, with an increase in the number of ministerial portfolios<sup>5</sup> and the creation of a parliamentary private secretary (PPS), which is equivalent to a junior ministerial position. Currently, the ruling coalition, headed by the Labour Party, has 45 elected members of Parliament, of whom 35 hold executive posts (25 ministers and 10 PPSs). A simple mathematical exercise indicates that well under 30 per cent of the ruling coalition are backbenchers, making it very difficult for them to exercise due oversight. In fact, legislative oversight in the current Parliament has essentially become the sole responsibility of the opposition, which numbers 22 MPs.

The second observation relates to the process of legislation, most of which is initiated, managed and controlled by the executive. It is extremely rare to see the legislature initiate or propose any type of legislation. Barkan (2009), in his extended study of African legislatures, writes about the importance of reformers who can push for the 'coalition of change' with a given legislature. Reformers, he believes, are a core group willing to lead their fellow members to adopt change: push for new laws, strengthen oversight and develop cross party alliances, among other things. In such circumstances the *modus operandi* of the reformer is to emphasise the idea of parity among members of the legislature and not to follow party allegiances blindly.

There has been very little research into the Mauritian legislature and no doubt such work would help shed important light on the means and mechanisms of helping it to become a space where democratic traditions are observed and practised.

### *The rise of soft authoritarianism*

Authoritarianism settles in when there are very few, or no checks and balances. Often it is a direct consequence of leaders who are self-elected and, in the

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5 Following the 2010 general election the Cabinet was increased from 18 to 25. This was done to accommodate the different coalition parties and to ensure ministerial positions.

process, control most of the power levers. Above I have referred to the dynastic, ailing and closed culture that typifies Mauritian politics. Soft authoritarianism is essentially linked to the deteriorating relationship between the current prime minister, Navin Ramgoolam, and a section of the print media, more specifically La Sentinelle Group, considered to be one of the most influential media groups in the country.

Since 2006 there have been notable tensions between the prime minister and certain Mauritian journalists, a problem reflected, to a certain extent, in the fact that Mauritius has tumbled from 25th (2007) to 65th (2010) place on the Reporters Without Borders 'Index'. The tensions have ranged from hostile verbal exchanges through the banning of journalists of La Sentinelle Group from ministerial press conferences to an extended withdrawal of government advertisements from the group's publications. Damning reports have emerged from Reporters Without Borders (6 May 2011) about the growing levels of antagonism between the prime minister and certain journalists:

Reporters Without Borders deplores the extremely aggressive comments about the independent media that Prime Minister Navin Ramgoolam made at a meeting of the ruling Alliance of the Future on 1 May, when he accused the daily *L'Express* and the weekly *Week-End* of just defending the interests of opposition leader Paul Bérenger of the Mauritian Militant Movement. Such comments by the prime minister are creating an appalling climate between the government and media. They are liable to induce most journalists to censor themselves and do Mauritius' image a great deal of harm. The fact that they were made just two days ahead of World Press Freedom Day, on 3 May, is particularly shocking.

There is no doubt that relationships between the media and those in power have often been conflict prone and history is peppered with examples attesting to this. However, a point of no return can be reached very quickly when the nature of conflict becomes vitriolic, abusive and threatening.

### *Rise in corruption and a growing culture of impunity*

Corruption is the one issue that even the most democratic and open societies have to deal with. According to the latest figures (2010) released by Transparency International, which compiles an annual 'Corruption Perceptions Index',



Mauritius has a score of 5.4.<sup>6</sup> A number of observers have actually questioned the usefulness of such a score, which essentially deals with perceptions rather than concrete facts.

Mauritius has both the necessary legislation and the institutional infrastructure to combat corruption. The Prevention of Corruption Act (2002) provides for an Independent Commission Against Corruption (ICAC) to be set up. Unfortunately, since its creation ICAC has been ineffectual as it has been unable to deal with major cases of corruption. A case it is currently investigating concerns the valuation and acquisition by the government of a private clinic which belonged to the son-in-law of the current president of the republic, Sir Aneerood Jugnauth, and the brother-in-law of the current deputy prime minister and minister of finance, Pravin Jugnauth.

What has caused a general public outcry over what is now termed the 'MedPoint Saga' is the lack of transparency surrounding the deal as well as the over-valuation of the property. At the time of writing it was more than six months since ICAC's investigation had begun and no real breakthrough had been achieved. Public opinion was heated over the way public funds were used to line the pockets of those in power. The matter also casts doubt on the independence and autonomy of ICAC in the delivery of its mandate.

Another growing concern is the culture of impunity of those in power. Mauritian politics has, over the years, fine tuned the politics of cronyism whereby once a party or a coalition gets into power it systematically puts friends/family members/political activists in key positions in public and parastatal bodies. Most of the time these purely political nominees do not have the most basic understanding let alone the necessary skills to run these often complex institutions. There have been numerous cases of bad decision-making, mismanagement or wastage of funds, which have cost tax payers a great deal of money, while those who have been the source of the problems have either walked away or, worse, continue to 'manage' key institutions.

Both corruption and impunity, if left unchecked, constitute a direct threat to democracy and a society that is seen to be unequal in terms of access to resources can ultimately implode. Among the elements of the rhetoric of the current government is legislation designed to promote equal opportunity. The much anticipated 'Equal Opportunity Bill', introduced in 2005 and passed by Parliament but still to be promulgated, might help to usher in some form of merit. However, many observers believe that if the Bill ever becomes law it will be yet another white elephant, as the culture of corruption, cronyism and impunity is embedded in Mauritian society.

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6 Countries are scored from 10 to 0, 10 representing the cleanest and 0 highly corrupt.

## THE CONSOLIDATION OF MAURITIAN DEMOCRACY: THE WAY FORWARD

One does not wish to be alarmist, but the much vaunted Mauritian melting pot is turning into a boiling pot as mounting evidence shows that socioeconomic disparities are widening, ethnic intolerance is on the rise and the political class is becoming closed, even regressive, in its approach.

These factors could be reversed if the necessary commitment could be mustered from both politicians and the citizenry. Firstly, there is an urgent need to move away from self-glorification (about our leading position on the African continent) and to adopt a more introspective and nuanced assessment of the state of Mauritian democracy.

Over the years Mauritius has done little to improve its democratic score, while countries like Cape Verde, Kenya and Tanzania, to name but a few, have made tremendous efforts to hoist themselves up the democratic ladder. Here it is important to emphasise that democracy is about consolidation, not about maintaining the status quo.

There is an urgent need to renew the Mauritian political class, whether through a process of electoral reform (which has been in abeyance for ten years) or through a more engaged and enlightened citizenry. One hopes that Mauritius is inspired by the Arab awakening, essentially led by the younger generation, who are fed up with ailing, dynastic and closed regimes.

Lastly, Mauritian citizens must play a watchdog role. There is no purpose in voting in each general election and remaining silent between elections. Participation and vertical accountability are two aspects that allow for greater scrutiny of and transparency from those we vote into power.

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# LES ELECTIONS DE 2010 AU BURUNDI : QUEL AVENIR POUR LA DEMOCRATIE ET LA PAIX ?

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## ABSTRACT

*Political pluralism and well-functioning political parties are crucial to sustaining democracy. In a democracy elections allow for open political competition in order to win votes. Thus elections are a necessary but not sufficient condition to consolidate democracy. The 2010 elections in Burundi showed that elections, although crucial to the establishment of democracy and peace, are not a guarantee in themselves that this goal will be attained. Rather than being a step towards more democracy and peace Burundi's last elections gave an overwhelming majority to one party, the CNDD-FDD, and marginalised the opposition because of its decision to boycott the process as a way of protesting against the results. With one party dominating all institutions and with an authoritarian response to opposition parties who, in the absence of dialogue, are increasingly considering the option of using guns to voice their concerns, democracy and peace are at risk. This article analyses the causes and consequences of Burundi's 2010 elections in terms of political environment and behaviour and against the background of the country's recent electoral history.*

## INTRODUCTION

Une démocratie solide et durable dépend de l'existence d'une pluralité politique et de partis politiques bien opérationnels. Ces derniers sont des acteurs cruciaux dans la mise en commun de divers intérêts, dans le recrutement et la présentation de candidats et dans l'élaboration de projets de société concurrents offrant

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<sup>1</sup> Avec la contribution d'Aymar Nyenyezi, étudiant à la Chaire UNESCO des Droits de l'Homme et Résolution pacifique des conflits à l'Université du Burundi.

au peuple un choix quant à ceux qui le gouvernent. Dans une démocratie, la compétition ouverte entre les partis politiques se passe à travers les élections dans lesquelles le peuple exprime son choix. Les élections comme l'expression du gouvernement par le peuple sont essentielles dans la consolidation de la démocratie quand bien même, elles ne sont pas l'unique facteur important dans la réalisation de la démocratie. Si selon la thèse de Lindberg (2006) les élections ont un effet d'auto-renforcement et de démocratisation, particulièrement pour les deuxièmes et troisièmes élections successives, dans quelle mesure les deuxièmes élections post-transition au Burundi ont effectivement contribué à la consolidation démocratique ?

Dans cet article nous nous focalisons principalement sur le rôle des élections et donc du régime et acteurs politiques dans la consolidation démocratique tout en étant conscient que le concept de consolidation démocratique va au-delà de cette approche. Ainsi comme il est dit dans Ducatenzeiler (2001), la définition du concept de consolidation démocratique dépend étroitement de la définition de démocratie qui lui sert de référence. A une définition étroite de la démocratie, en tant que type spécifique de régime politique, correspond une définition étroite de la consolidation, tandis qu'à une définition large de la démocratie, conçue non seulement comme un régime politique, mais comme un système économique et social spécifique, correspond une définition large de la consolidation.

Dans cet article nous nous référons donc à la définition étroite de la démocratie. Si on conçoit la démocratie politique comme un mécanisme pour choisir les dirigeants politiques, comme un arrangement institutionnel pour choisir des leaders qui gouverneront entre deux élections, la consolidation démocratique sera interprétée comme le processus d'institutionnalisation des règles qui permet la répétition des élections. L'accent est mis sur la durabilité et l'efficacité de la procédure électorale, sur l'absence de crises. Si on se réfère à cette définition, les pays réalisant une certaine ritualisation des élections connaîtront des démocraties consolidées (Ducatenzeiler 2001).

Or, un autre facteur fondamental à prendre en considération dans la consolidation démocratique est le comportement des acteurs politiques. Dans quelle mesure ces acteurs se plient-ils aux règles du jeu démocratique ou, au contraire, s'engagent-ils dans des actions anti-démocratiques mettant en péril la démocratie? Ainsi dans le cadre d'une compétition politique, une des règles de jeu de base est le renoncement à toute forme de violence. Le recours à l'assassinat de rivaux politiques, les atteintes à la liberté, à l'intégrité physique et à la propriété d'adversaires politiques, l'intimidation des candidats et électeurs, les tentatives violentes de renversement des élus sont tous des exemples qui vont à l'encontre d'une consolidation démocratique.

Se conformer aux règles du jeu signifie également qu'on accepte l'institution

fondamentale du régime: des élections libres et équitables. Si des partis politiques refusent de participer aux élections démocratiques, nient activement à d'autres acteurs le droit d'y participer, tentent de manipuler les élections par la fraude et l'intimidation, ou n'acceptent pas les résultats d'élections démocratiques, mais organisent plutôt des protestations hors des institutions, boycottent le processus électoral ou prennent les armes afin de s'imposer, la démocratie n'est clairement pas consolidée. Le respect de l'état de droit est un autre aspect fondamental dans la consolidation démocratique (Schedler 2001).

Ces comportements sont spécialement mis à l'épreuve lors des élections dans les démocraties naissantes. Il s'agit en quelque sorte d'un test pour voir dans quelle mesure les acteurs politiques réussissent à respecter les règles du jeu dans une période de compétition pour le pouvoir et donc de grands enjeux. Ces tests cherchent à mesurer la capacité des acteurs politiques à accepter la démocratie, non seulement comme une route vers le pouvoir mais comme un système où les partis perdent les élections (Schedler 2001). Dans cet article il s'agit donc d'analyser dans quelle mesure le Burundi s'est engagé sur la route de la consolidation démocratique, non seulement en prenant en considération la tenue régulière des élections mais surtout les comportements des acteurs politiques dans cette période de mise à l'épreuve à grands enjeux.

Avec les élections de 2010 en effet, le Burundi se trouvait à la croisée des chemins en matière de démocratie. Leur déroulement et leur issue étaient essentiels pour déterminer la direction dans laquelle ce pays allait évoluer. Ainsi, en gros, deux scénarii étaient possibles. Premièrement, réussir les élections sans violence avec des résultats reconnus par la majorité des principaux acteurs et évoluer ainsi vers la consolidation de la démocratie et de la paix. Deuxièmement, organiser des élections sur fond de tensions et de suspicions, aboutissant à des résultats contestés. Alors que d'aucuns espéraient un processus électoral multipartite, transparent et apaisé, son déroulement effectif a pris une tournure toute autre, qui a d'ailleurs surpris tant l'opinion nationale qu'internationale. En effet, il s'agit du retrait de la plupart des partis de l'opposition du processus électoral en guise de protestation contre des 'élections entachées de fraudes massives', offrant une victoire massive à un seul parti, le Conseil National pour la Défense de la Démocratie-Forces pour la Défense de la Démocratie (CNDD-FDD).

Comme il est constaté dans le rapport d'International Crisis Group (2011), ce boycott a porté un coup dur au processus de démocratisation car il a été fatal pour la survie politique de ces partis de l'opposition et de leurs leaders et dès lors pour l'avenir de la démocratie au Burundi. Ainsi, au lieu de consolider la démocratie et le pluralisme politique, ces élections ont renforcé la dominance d'un seul parti dans la vie publique et elles ont fragilisé l'opposition par son choix de



se mettre en dehors du processus et par conséquent en dehors des institutions de prise de décision. Ce rétrécissement de l'espace démocratique a ainsi ouvert la voie à l'incertitude politique et à de forts risques de régression de la stabilité, voire de la paix.

Cette tournure ne s'explique pas par un refus d'organiser des élections ni par la qualité de celles-ci vis-à-vis des normes internationales mais par un boycott de la plupart des partis de l'opposition du fait de leur perte aux élections communales. Cependant, nous ne voulons pas nous limiter à qualifier cette opposition de 'mauvais perdants'. Nous cherchons à aller au-delà de leur comportement et à analyser ce que cette décision nous apprend par rapport au fonctionnement des partis politiques, les relations entre eux et l'environnement dans lequel ils évoluent. Dans cette analyse nous ne voulons pas mettre en cause l'importance des élections dans la consolidation de la démocratie mais nuancer celle-ci tout en adhérant à la thèse de Lindberg (2006) qu'afin que les élections puissent contribuer à la démocratie, il faut qu'elles soient participatives, compétitives et légitimes et c'est là où se trouve le grand défi pour la plupart des pays d'Afrique.

En effet, ce que nous constatons dans beaucoup de pays d'Afrique, c'est que les élections sont organisées mais elles ne sont pas forcément participatives, compétitives et légitimes. Lorsque les élections permettent une compétition équitable et libre entre partis politiques, elles sont formellement légitimes. Mais un facteur peut-être encore plus important dans cette légitimation est l'acceptation des résultats par les différentes parties prenantes. Cette dernière condition semble être problématique dans la plupart des pays d'Afrique où selon l'hypothèse de Guié (2009) les élections sont presque toujours contestées. A la réponse de savoir quelles en sont les raisons, référence est faite à l'organisation même des élections n'ayant pas été honnête, transparente et donc crédible. C'est ce même argument que nous trouvons évoqué par les partis de l'opposition au Burundi. Or, selon les rapports des observateurs tant nationaux qu'internationaux, même si des insuffisances ont été constatées, globalement, les élections ont été qualifiées de crédibles. Il s'agit donc de divergences d'opinion selon les intérêts des uns et des autres. L'administration électorale ne semble donc pas être le seul facteur qui provoque la mise en cause des résultats : l'environnement politique et le comportement de ses composantes déterminent largement l'existence d'une culture démocratique et donc d'un climat favorable à l'acceptation des résultats.

Dans cet article nous cherchons à comprendre les contestations des résultats qui ont suivi les élections de 2010 au Burundi. Un an après les élections et donc avec un certain recul, quelle peut être l'analyse de ce processus qui a pris un tournant plutôt inattendu ? Quels étaient les éléments précurseurs qui portaient le germe d'une telle issue ? Et quelles sont les leçons à tirer de cette expérience électorale qui était non seulement d'une importance majeure pour le pays mais aussi pour

la communauté internationale et régionale, s'étant investies pendant de longues années pour soutenir la sortie de la crise, tout en présentant le Burundi comme l'exemple d'une démocratie 'consociative' (Vandeginste 2006)?

Après avoir passé en revue le cycle électoral et ses résultats, il s'agit surtout de dresser le bilan du comportement des partis politiques et plus particulièrement de la stratégie de la chaise vide des principaux partis de l'opposition. C'est avant tout ce choix de boycotter le processus électoral qui sera au cœur de notre attention. Il s'agit de comprendre la motivation de ce choix, les raisons externes et internes aux partis, et les conséquences de ce choix non seulement pour le processus électoral mais surtout pour l'avenir politique du pays.

Afin de comprendre l'impasse politique suite aux élections de 2010 il faudra la situer dans l'histoire politique récente qui se caractérise par des expériences électorales fortement liées à des situations de crise. Cette mise en perspective ne se fait pas seulement pour rappeler les expériences électorales du Burundi mais aussi pour souligner leur issue et les efforts déployés par la communauté internationale pour accompagner le pays à sortir des impasses et des conflits entre protagonistes de la scène politique. Nous estimons que ces éléments contribuent à une meilleure compréhension des attitudes et décisions des uns et des autres lors du dernier processus électoral.

## SITUER LES ELECTIONS DE 2010: BREF RAPPEL HISTORIQUE DES ELECTIONS PRECEDENTES

### *Des élections démocratiques vers une crise politico-ethnique*

Au Burundi, comme d'ailleurs partout en Afrique subsaharienne, le vent de la démocratie a soufflé à la fin des années 80, imposant une ouverture de la vie politique aux partis autres que le parti unique, l'Union pour le progrès national (Uprona), dominé par la minorité Tutsi<sup>2</sup> et gouvernant le pays depuis trois décennies. Ainsi, en 1987, avec l'arrivée au pouvoir du major Pierre Buyoya (Uprona), le Burundi a entamé un processus d'ouverture démocratique et le multipartisme et la liberté d'expression ont été légalisés dans la Constitution de 1992, qui stipulait, dans son article 26, que 'toute personne a droit à la liberté d'opinion et d'expression dans le respect de l'ordre public et de la loi'. Cette disposition a rapidement trouvé son expression concrète dans la création de partis politiques concurrents de l'Uprona dont le plus important était le Front pour la Démocratie au Burundi (Frodebu), défendant la cause des Hutu.

2 Poids démographique habituellement reconnu aux différentes ethnies: les Hutu 85 pour cent, les Tutsi 14 pour cent et les Twa 1 pour cent. Cependant, il est à souligner que ces chiffres datent de l'époque coloniale et sont donc peu fiables aujourd'hui.

Au moment des élections présidentielles de juin 1993 huit partis politiques étaient agréés. Cependant, la compétition se faisait essentiellement entre l'Uprona et le Frodebu sur base de division ethnique. Les élections du 1 juin 1993 ont donné la victoire à Melchior Ndadaye (Frodebu), qui a obtenu 64 pour cent des voix, quand ses adversaires, Buyoya et Sendegeya (Parti pour la Réconciliation du Peuple), ont dû se contenter respectivement de 34 et 2 pour cent des voix. Pour la première fois dans l'histoire du pays, un président Hutu était élu démocratiquement. Cependant, rapidement les contestations de la part des militants du parti perdant se sont manifestées, jusqu'au 21 octobre 1993 quand un coup d'état par des militaires Tutsi a mis fin à ce processus de démocratisation et a fait sombrer le pays dans une crise généralisée qui a pris les allures d'une véritable guerre civile (Reyntjens 1993).

Ainsi, l'histoire politique du Burundi est fortement marquée par la crise politico-ethnique qui a suivi ces premières élections démocratiques après plus de 30 ans de monopartisme.

### *Négociations de paix : Accord d'Arusha et sa difficile mise en application*

Plusieurs tentatives de négociations de paix ont été entreprises par la région et la communauté internationale. Le conflit a également bénéficié d'une attention particulière de l'Union Africaine, qui a assisté le pays dès les premiers moments de la crise et qui a mis en place la Mission Internationale d'Observation au Burundi (MIOB) en avril 1994. En juin 1996 une réunion régionale était tenue à Mwanza et puis à Arusha, le début d'une série de négociations dans cette ville. Le durcissement de la crise a incité le Major Pierre Buyoya à reprendre le pouvoir par un coup d'état militaire en juillet 1996. Les pays de la région, appuyés par la communauté internationale, ont alors décrété un embargo pour obliger le président Buyoya à négocier avec l'opposition politique et la rébellion hutu. Un accord de paix a finalement été signé le 28 août 2000 à Arusha.

L'Accord d'Arusha est le fondateur du processus de transition pour sortir de la crise et préparer des élections démocratiques. Il prône l'exigence d'une réconciliation et d'une unité nationale et prévoit le principe de l'équilibre ethnique, politique et du genre. Ainsi, conformément à cet accord un gouvernement de transition était mis en place respectant l'alternance ethnique entre Hutu et Tutsi et politique entre le Frodebu et l'Uprona.<sup>3</sup> Cependant, le CNDD-FDD de Pierre Nkurunziza, non signataire de l'Accord d'Arusha, a continué sa lutte armée et ce n'était qu'en novembre 2003 que les Protocoles de Pretoria entre le Gouvernement

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3 La première période de transition, lancée le 1 novembre 2001, a été gouvernée par le président Tutsi, Pierre Buyoya (Uprona), et la deuxième par le président Hutu, Domitien Ndayizeye (Frodebu).

de transition ont abouti à la signature d'un accord global de cessez-le-feu entre les deux parties. Après l'entrée effective du CNDD-FDD dans les institutions de transition et dans la Force de la Défense Nationale (FDN) dont ils occupent 40 pour cent des effectifs, l'intensité de la violence a fortement diminué sans pour autant disparaître vu que le PalipeHutu – Forces Nationales de Libération (FNL), dernier mouvement rebelle, a continué sa lutte armée (Reyntjens 2006).

### *Les élections de 2005 : une transformation du paysage politique*

Les premières élections post-transition se sont déroulées entre juin et septembre 2005.<sup>4</sup> Lors de ces élections, une large majorité s'est prononcée, à tous les niveaux, pour le CNDD-FDD. Il a obtenu 57,3 pour cent des voix aux élections communales, 58,55 aux élections législatives et 30 sièges sur 34 au Sénat. Son leader, Pierre Nkurunziza, a été élu au scrutin indirect comme président de la République. Ces élections ont ainsi conduit à une transformation totale du paysage politique dominé, à l'époque, par le Frodebu et l'Uprona. Ce vote pour le changement peut être interprété d'une part comme une volonté d'en finir avec l'ancien régime, tout en espérant une amélioration dans la gestion du pays et d'autre part comme la seule option pour garantir la paix, le CNDD-FDD menaçant de reprendre les armes si jamais il ne gagnait pas les élections.

Ce processus s'est déroulé dans des circonstances très différentes de celles entourant l'expérience de 1993. Alors que la situation en 1993 était bipolaire dans un double sens – opposant deux partis (Frodebu et Uprona) et deux ethnies (Hutu et Tutsi) – en 2005 le paysage était devenu multipolaire. Les deux principaux partis 'hutu' (CNDD-FDD et Frodebu) entraient en compétition pour l'électorat hutu, tandis que plusieurs partis 'tutsi' tentaient de séduire les Tutsi ainsi menaçant la prééminence de l'Uprona. La contestation électorale se faisait donc plutôt entre les partis de la même appartenance ethnique. Vu qu'il s'agissait des premières élections après la transition, elles ont bénéficié d'un soutien financier important de la communauté internationale et d'un appui logistique de l'Opération des Nations unies au Burundi (ONUB), la mission de maintien de la paix (Palmans 2008).

### *Le gouvernement du CNDD-FDD : éléments précurseurs d'un climat électoral tendu*

Le gouvernement de Nkurunziza a dû faire face à d'importants défis comme la transformation du CNDD-FDD d'un mouvement rebelle en un parti politique

<sup>4</sup> Le 3 juin pour les élections communales, le 4 juillet pour les législatives, le 19 juillet pour les sénatoriales, le 19 août pour la présidentielle, ces deux dernières au suffrage indirect, et enfin le 23 septembre pour les collinaires.

démocratique au pouvoir, alors que ses membres n'avaient qu'une expérience limitée de l'administration civile et la négociation d'un accord de paix avec le PalipeHutu-FNL. Cependant, plutôt que d'évoluer vers plus de démocratie, le CNDD-FDD s'est montré hostile à une pluralité politique et une société civile jouant un rôle d'observateur critique des actions politiques. Ainsi, comme il a été constaté dans le rapport d'ICG (2006), le CNDD-FDD semblait guidé par un mépris de l'état de droit et une dérive autoritaire. Ainsi, dès son installation, le régime a recouru à des pratiques non-démocratiques pour réduire l'opposition et les voix critiques au silence.

Un facteur qui a contribué à la dérive autoritaire était la faiblesse des contre-pouvoirs: le Parlement était dominé par le CNDD-FDD et l'opposition politique était divisée. En outre, le CNDD-FDD a remplacé les postes dans les entreprises de l'état et dans l'administration locale par ses fidèles. Par ailleurs, au sein même du gouvernement de nombreux remaniements étaient observés. Cette instabilité des institutions était directement liée à l'instabilité des partis politiques. Les trois partis politiques représentés au gouvernement,<sup>5</sup> ont tous en effet constamment souffert de luttes internes, de fragmentations, de divisions et de démissions. Un autre facteur menant à l'instabilité du gouvernement était la destitution de leur fonction d'un certain nombre d'élus, comme des administrateurs communaux du Frodebu dans la mairie de Bujumbura et dans Bujumbura rural. En violation de la loi sur l'administration locale, ces derniers étaient remplacés par des administrateurs du CNDD-FDD, aggravant ainsi le climat politique déjà tendu, jusqu'au retrait du Frodebu du gouvernement en 2006.

De plus, à l'interne, le CNDD-FDD était confronté à des tensions qui ont fait que la deuxième vice-présidente Alice Nzomukunda<sup>6</sup> a démissionné de ses fonctions et que Hussein Radjabu, alors considéré comme l'homme fort du pays, a été destitué en tant que secrétaire général du parti et arrêté en avril 2007 pour atteinte à la sécurité de l'état. Cette destitution a créé une scission au sein du CNDD-FDD en opposant le bloc des pro-Radjabu à celui des fidèles au président Nkurunziza. Par la scission des fidèles de Radjabu (il s'agissait de 22 députés), l'équipe de Nkurunziza ne détenait plus la majorité au niveau de l'Assemblée nationale et ne réunissait plus le quorum des deux tiers nécessaire pour voter les lois ou pour faire passer d'autres décisions, ce qui a paralysé les institutions.<sup>7</sup>

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5 CNDD-FDD, Frodebu et Uprona.

6 Elle a créé son propre parti : Alliance Démocratique pour le Renouveau (ADR).

7 L'article 175 de la Constitution stipule que 'l'Assemblée nationale ne peut délibérer valablement que si les deux tiers des députés sont présents. Les lois sont votées à la majorité des deux tiers des députés présents ou représentés'. Ainsi, très peu de lois étaient votées.

Le CNDD-FDD ainsi affaibli a été obligé de former un nouveau gouvernement pour sortir de cette impasse, cette fois-ci en respectant les consignes de la Constitution en accordant davantage de postes au Frodebu et à l'Uprona.

Sur le plan sécuritaire, même si le gouvernement avait signé un accord global de cessez-le-feu avec le PalipeHutu-FNL le 7 septembre 2006, les hostilités ont continué et ce n'est que plus de deux ans après cette signature que les parties sont parvenues à un accord final sur la mise en œuvre du cessez-le-feu. Après son désarmement et la renonciation à la partie de son nom à connotation ethnique (PalipeHutu), les FNL ont finalement été agréés comme parti politique le 21 avril 2009.

Au niveau économique, les cas de corruption et de malversations économiques incombés au CNDD-FDD étaient nombreux, ce qui nuisait à la crédibilité du gouvernement et au déblocage des fonds par les bailleurs. De plus, quoique le rôle de la communauté internationale ait été essentiel dans le processus de paix, ses relations avec le pays se sont détériorées sous le gouvernement du CNDD-FDD. Ce dernier refusait une 'interférence' étrangère dans les affaires intérieures du pays malgré le fait que les bailleurs de fonds contribuaient à 60 pour cent du budget national (ICG 2006).

Le gouvernement du CNDD-FDD se caractérisait donc par son comportement plutôt autoritaire et arrogant à la fois à l'interne et vis-à-vis de ces opposants et même de la communauté internationale. Ce climat tendu caractérisant la période entre les élections de 2005 et 2010 a marqué également la période pré-électorale, tout en compliquant les préparatifs électoraux. La raison pour laquelle nous accordons beaucoup d'importance à la période pré-électorale est qu'à notre sens des ingrédients précurseurs des événements à venir s'y trouvaient déjà. Dans ce qui suit, nous dressons un bref tableau de la période pré-électorale et des élections en tant que telles avec une attention particulière pour les éléments ayant contribué au blocage.

## LES ÉLECTIONS DE 2010

### *Contexte pré-électorale: désaccords entre le CNDD-FDD et les partis de l'opposition*

Contrairement aux élections de 2005 l'organisation des élections de 2010 revenait entièrement aux autorités burundaises, même si financées par la communauté internationale et assistées par le Programme des Nations unies pour le développement (PNUD), et aucune force militaire internationale n'était présente pour sécuriser le processus électoral. La série des élections était composée de cinq



scrutins dont les communales (24 mai),<sup>8</sup> la présidentielle (28 juin), les législatives (23 juillet), les sénatoriales (28 juillet) et les collinaires (7 septembre). Ces dernières ne prévoyant pas la participation des partis politiques, elles ne sont pas commentées dans ce qui suit, même si nous n'en excluons pas l'importance.

Le pays se trouvait donc confronté au défi d'organiser lui-même des élections libres et équitables dans un climat apaisé. Cependant, au cours de l'année 2009 les divergences de vues par rapport à chaque étape du processus électoral se sont manifestées entre le CNDD-FDD et les partis de l'opposition. En même temps, le terrain sur lequel se sont déroulés les préparatifs des élections était marqué par des cas de violation des libertés d'expression, de réunion et d'association et par des cas de meurtres dont étaient victimes surtout les partis de l'opposition. Tous ces éléments traduisaient une certaine nervosité du côté du CNDD-FDD quant à l'épreuve des élections. Fragilisé par des divisions internes, il recourait de plus en plus à des méthodes autoritaires pour assurer sa victoire.

Ainsi, la mise en place de la Commission Electorale Nationale Indépendante (CENI) a été à l'origine d'une forte polémique entre le CNDD-FDD et les partis de l'opposition. Le texte portant création, missions, organisation et fonctionnement de la CENI a été revu le 12 décembre 2008 sur pression des partis de l'opposition. Le premier décret y relatif, celui du 18 juin 2008, avait buté à des protestations énergiques de ces partis. Aussi, la composition de la commission telle qu'elle était proposée par le président de la République a été contestée par l'opposition et rejetée par le Sénat. Il a fallu forcer le dialogue à l'endroit du président de la République pour que soit mise en place une commission consensuelle jugée impartiale (OAG 2009).

Après avoir surmonté l'épreuve de la mise en place d'une CENI consensuelle, la révision du Code électoral a créé de nouvelles polémiques. A l'origine des désaccords se trouvait essentiellement la question de l'ordre des scrutins qui, pour le parti présidentiel, devait commencer par l'élection présidentielle, comptant ainsi sur la popularité du président en fonction, Pierre Nkurunziza, pour remporter tous les scrutins. Ce calcul était d'ailleurs un des facteurs déterminant dans la désignation de ce dernier comme candidat à sa propre succession et ceci malgré les rumeurs de divisions internes par rapport à cette candidature. Les partis de l'opposition, par contre, défendaient la séquence des scrutins qui commence à la base et donc par les élections communales. Un autre désaccord se trouvait au niveau du type de bulletin à utiliser, selon la préférence du CNDD-FDD, le bulletin multiple. Le choix du bulletin multiple, tel qu'utilisé en 2005, donne la place à

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8 A la veille du jour du scrutin, les élections communales, initialement prévues pour le 21 mai, ont été reportées au 24 mai.



d'éventuelles pressions et menaces sur les électeurs. Les partis de l'opposition, par contre, défendaient l'usage du bulletin unique. Finalement, des compromis étaient trouvés et ont permis l'adoption du Code électoral, le 18 septembre 2009, sur base d'un consensus 'suffisant', notamment l'organisation des élections communales en premier lieu en utilisant le bulletin multiple.

La question de la délivrance de la carte nationale d'identité (CNI) a provoqué une nouvelle crise entre les partis de l'opposition et le parti présidentiel. Vu que la possession de ce document était une condition pour obtenir la carte d'électeur, sa distribution devenait un enjeu électoral. Selon les partis de l'opposition, cette distribution effectuée par l'administration locale, en grande majorité dominée par le CNDD-FDD, se faisait de façon sélective et donc en faveur des militants du parti au pouvoir, tout en défavorisant cette distribution des cartes aux partisans d'autres partis politiques. La CENI a fini par résoudre la question en mettant à la disposition des agents recenseurs un autre document d'identification de l'électeur qui permettait à chacun de se faire enrôler sans aucune entrave (UE 2010a).

D'autres facteurs de tensions étaient les tentatives de déstabiliser les partis de l'opposition à la fois à travers des lenteurs administratives au niveau des agréments de certains d'entre eux, des interdictions de réunions et autres activités politiques, des arrestations de leurs leaders et des tentatives de créer des divisions au sein de ces partis. Cette situation s'est aggravée les mois avant le début de la campagne pour les communales, allant d'accusations mutuelles de distribution d'armes et de constitution de milices à des confrontations violentes entre le CNDD-FDD et les différents partis de l'opposition surtout à travers les groupes de jeunes militants dont ceux du CNDD-FDD, les *Imbonerakure* (littéralement : 'ceux qui voient loin'), étaient les plus redoutés (HRW 2010).

### *Elections communales : sondage électoral au résultat décisif pour la suite du processus*

Ces relations politiques pré-électorales tendues s'expliquent non seulement par le contexte décrit ci-dessus mais également par les enjeux que ces élections présentaient par rapport à l'avenir politique du pays et de chaque parti. A l'approche des élections, le paysage politique s'est élargi avec de nouveaux partis, mettant à 44 le nombre de partis agréé par le Ministère de l'Intérieur. Cependant, cette diversité de partis politiques ne se fonde pas sur la diversité des programmes politiques, souvent ces partis ne disposant ni de programme ni d'activités réelles sur le terrain.

Ceci peut confirmer l'hypothèse selon laquelle la mise en place d'un parti politique au Burundi est souvent motivée par les intérêts individuels plutôt que l'intérêt général même si la loi les régit, dans son article 49, alinéa 2, les

oblige à présenter leurs projets de société pour être agréés. En général, les partis politiques au Burundi se caractérisent par plusieurs faiblesses telles que les divisions internes, le manque de culture politique des militants, ce qui explique leur va-et-vient entre partis politiques, le parti d'attraction étant souvent celui qui gagne les élections. Le manque de ressources financières constitue un autre défi difficile à relever vu le contexte de pauvreté et le fait que la Constitution et la loi sur les partis politiques stipulent que l'état ne finance pas le fonctionnement des partis politiques et que le financement extérieur est interdit<sup>9</sup>. Cependant, la même loi prévoit que l'état contribue au financement des campagnes électorales avec un montant à déterminer<sup>10</sup>. Malgré cette disposition, le Ministère de l'Intérieur n'avait pas prévu cette rubrique dans le budget de l'état pour l'année 2010.

Ainsi, sur les 44 partis enregistrés, seulement 24 partis et cinq candidats indépendants ont participé aux élections communales. Cinq partis, le CNDD-FDD, le Frodebu, les FNL, l'Uprona et l'Unité pour la Paix et la Démocratie (UPD)<sup>11</sup> ont pu déposer des candidatures dans toutes les 129 communes du pays et trois partis se sont retrouvés dans plus de 100 communes (Mouvement pour la Solidarité et la Démocratie – MSD,<sup>12</sup> CNDD de Nyangoma et Frodebu Nyakuri)<sup>13</sup>. Les partis restant étaient présents dans moins de 100 communes.

Vu la multiplication des acteurs politiques visant plus ou moins le même électorat (électorat hutu),<sup>14</sup> la compétition s'est annoncée tendue. A part les partis ayant déjà participé aux élections de 2005, tels que le CNDD-FDD, le Frodebu, intégré au gouvernement mais se comportant comme parti d'opposition,<sup>15</sup> et le CNDD de Nyangoma, s'étaient ajoutés aux concurrents : le FNL, dont le président, Agathon Rwasa – perçu comme l'un des plus importants opposants au pouvoir, l'UPD et le MSD.

Vu l'inexistence de sondages au Burundi, il a été difficile de savoir quelles

9 'Le financement extérieur des partis politiques est interdit, sauf dérogation exceptionnelle établie par la loi. Tout financement de nature à porter atteinte à l'indépendance et à la souveraineté nationale est interdit. La loi détermine et organise les sources de financements des partis politiques' (Constitution, article 84).

10 Article 20 de la Loi n 1/006 du 26 juin 2003 portant organisation et fonctionnement des partis politiques.

11 Parti officieusement dirigé par Hussein Radjabu, ancien secrétaire général du CNDD-FDD, destitué de ses fonctions et emprisonné depuis avril 2007.

12 Parti fondé par l'ancien directeur de la Radio Publique Africaine, Alexis Sinduhije.

13 Parti fondé par l'ancien président du Frodebu, Jean Minani, et donc une scission de ce parti et considéré comme parti satellite du CNDD-FDD.

14 Même si ces partis sont perçus comme de mouvance hutu, la loi sur les partis politiques stipule dans l'article 33 que l'organe dirigeant d'un parti au niveau national ne peut comprendre plus de 3/4 de membres provenant d'une même ethnie.

15 Cette attitude ambiguë va à l'encontre de la Constitution qui stipule dans son article 173 qu' '[u]n parti politique disposant de membre au gouvernement ne peut se réclamer de l'opposition'.

étaient les éventuelles tendances avant la tenue du scrutin communal. Les élections communales étaient dès lors d'une importance majeure car constituant, d'une certaine manière, le premier sondage électoral dont le résultat était décisif pour la suite du processus. Le contexte pré-électoral était également caractérisé par des spéculations autour des coalitions éventuelles entre les partis de l'opposition dont l'objectif était de faire bloc face au parti CNDD-FDD. Cependant, les partis de l'opposition ont attendu les élections communales pour mesurer leurs forces et se sont donc présentés tous séparément, tandis que 11 partis 'satellites' s'étaient ralliés derrière le parti présidentielle dans la Coalition pour des Elections Libres, Apaisées et Transparentes (CELAT).

Malgré les craintes liées au contexte pré-électoral tendu, la campagne s'est déroulée dans un environnement jugé globalement calme quoique marqué par des confrontations entre le CNDD-FDD et les partis de l'opposition et une disparité de moyens utilisés. Par manque de financements publics pour faire campagne la plupart des partis ont eu du mal à assurer une campagne électorale d'envergure, ce qui fait que seule une minorité des 24 partis et cinq candidats indépendants en lice ont eu une réelle visibilité sur le terrain. De plus, le CNDD-FDD disposait de moyens largement supérieurs à ceux des partis de l'opposition et ceci partiellement en faisant recours aux ressources de l'état. Bien que cette pratique soit interdite par le Code électoral, elle n'a pas été sanctionnée par l'autorité en la matière, la CENI. De plus, vu les enjeux de cette élection, la campagne communale se faisait à l'allure d'une campagne présidentielle avec la participation très active de candidats potentiels à l'élection présidentielle et avec la quasi absence de candidats aux conseils communaux à proprement parlé (UE 2010b).

### *Les résultats des élections communales : l'origine du blocage politique*

Les élections communales, initialement prévues pour le 21 mai, ont été reportées à la veille du scrutin au 24 mai 2010 et ceci, selon la CENI, pour des raisons techniques. Même si ce report n'a pas provoqué de larges contestations au moment où il est survenu, la CENI bénéficiant encore d'une confiance suffisante, il s'est avéré que suite aux résultats de cette élection, ce report a été à l'origine d'une crise de confiance des partis de l'opposition face à cette institution. Selon ces derniers, ce report a montré un manque de professionnalisme de la CENI et dès lors toutes les actions de celle-ci éveillaient des suspicions.

Malgré les craintes de violences, le scrutin s'est passé sans incident majeur et sans dénonciation de son déroulement. Avec un taux de participation massif de 90,67 pour cent, les résultats ont donné une large victoire au CNDD-FDD qui a obtenu 64 pour cent des voix au niveau national. Il s'est distancié de tous les autres partis dont le plus méritant, les FNL, n'ont obtenu que 14,15 pour cent des

voix. Les autres partis ont obtenu respectivement des scores suivants: l'Uprona 6,25 pour cent, le Frodebu 5,43 pour cent, le MSD 3,75 pour cent, l'UPD 2,21 pour cent, le Frodebu Nyakuri 1,36 pour cent et le CNDD 1,26 pour cent.

Ces résultats qui non seulement ont montré une augmentation du score du CNDD-FDD par rapport à 2005 mais aussi un écart plus considérable avec le parti en deuxième position, soit un écart de 50 points en 2010 contre 34 en 2005, ont mis en colère les partis de l'opposition surpris par ces scores. Convaincus de l'impopularité du CNDD-FDD, vu son comportement autoritaire, son bilan de gouvernance plutôt négatif et les nombreux cas de corruption, ces partis n'ont pas crû à ces résultats. Cependant, ce calcul de la soi-disant impopularité du CNDD-FDD semblait n'avoir marché, même si partiellement, que dans la capitale où le CNDD-FDD a gagné de justesse, montrant ainsi la différence entre les réalités de la ville et du milieu rural où le parti a gagné en moyenne avec 70 pour cent. La province de Bujumbura rural, fief des FNL, était la seule où le CNDD-FDD n'a pas pu s'imposer; il y a terminé en deuxième position (26,60%) derrière les FNL (57,48%) (UE 2010a).

Malgré les appréciations quant au bon déroulement du scrutin tant des observateurs nationaux qu'internationaux (UE 2010b ; COSOME 2010), les partis de l'opposition ont rejeté en bloc les résultats de ces élections car s'agissant, selon eux, d'un 'holdup électoral organisé conjointement par le CNDD-FDD et la CENI' (ADC-Ikibiri 2010). Ainsi, ces derniers se sont réunis dans l'Alliance des Démocrates pour le Changement au Burundi-Ikibiri (ADC-Ikibiri),<sup>16</sup> une alliance regroupant des partis très divers, n'ayant rien en commun si ce n'est leur aversion vis-à-vis du CNDD-FDD, et ils ont revendiqué le remplacement de la CENI et l'annulation des résultats du scrutin.

Face à ces revendications, évoquant des 'fraudes massives', entre autres, à travers le bourrage des urnes, des urnes non dépouillées, des coupures d'électricité orchestrées, le secret du vote non respecté, l'intimidation et l'achat de conscience des électeurs, la réaction de la CENI était de dire qu'il était normal que les partis insatisfaits puissent s'exprimer mais qu'ils devraient pour cela passer par des voies légales tel que prévu par le Code électoral. Les partis devraient introduire leurs recours, avec des preuves à l'appui, au niveau des Commissions Électorales Provinciales Indépendantes (CEPI). Or, selon les partis de l'opposition, il n'était pas nécessaire de passer par les CEPI car elles auraient été utilisées par le CNDD-FDD pour fausser les résultats et, selon eux, une solution politique et non juridique devrait être envisagée. Malgré cette position, des plaintes ont quand même été adressées aux CEPI, mais elles ont été rejetées par ces dernières car ne s'appuyant

16 Font partie de cette alliance: ADR, CDP, CNDD, FEDS-SANGIRA, FNL, MSD, PARENA, PIT, PPDRR, RADEBU, FRODEBU et UPD.

pas sur des 'preuves irréfutables' et n'ayant pas été inscrites au préalable dans les procès-verbaux. Cependant, même si les preuves de 'fraudes massives' ne semblaient pas exister, la gestion du contentieux électoral n'était pas exempte de critiques. Ainsi, l'opposition politique tout comme les observateurs ont critiqué le fait que ces procès-verbaux n'ont pas été mis à la disposition de ces partis, ni affichés en public, comme il l'était prescrit par le Code électoral. Cette donne a nui à la transparence du processus et dès lors à sa crédibilité (UE 2010a).

### *Election présidentielle à candidat unique*

L'absence de réponse satisfaisante à leurs revendications et la perte de confiance de ces partis dans l'administration électorale les ont conduit à jouer la politique de la chaise vide pour la suite du processus. Ainsi, les six candidats aux élections présidentielles ont retiré leurs candidatures, laissant le président sortant, Pierre Nkurunziza, comme candidat unique.<sup>17</sup> Vu les efforts déployés par la communauté internationale et régionale dans le processus de paix et la sortie de crise, à travers, entre autres, l'appui au processus électoral, ce blocage a vu la réaction de hautes personnalités comme Ban Ki-Moon, Secrétaire Général des Nations unies et Roland van de Geer, envoyé spécial de l'Union européenne lors de leur passage à Bujumbura. Tout comme les diplomates, ils ont appelé la classe politique à régler les différends par les voies institutionnelles et à participer pleinement au processus électoral.

Cependant, les partis de l'ADC-Ikibiri et l'Uprona – ce dernier ne faisant pas partie de cette alliance bien que partageant l'essentiel des revendications de l'ADC-Ikibiri – refusaient de revenir dans le processus électoral et exigeaient qu'un dialogue politique soit entamé avant de réintégrer le processus électoral. Ce retrait de la majorité des partis de l'opposition du processus électoral aggrava la crise politique et contribua à un climat d'insécurité grandissante. Ainsi, la période couvrant la campagne pour l'élection présidentielle fut caractérisée par des atteintes aux libertés de réunion, de manifestation et d'expression politique et des actes de violence faisant des blessés et des morts. Ce climat d'intimidation a d'ailleurs été évoqué par Agathon Rwasa, président du FNL, pour justifier sa fuite à la date du 23 juin, faisant craindre, pour certains, le retour des hostilités armées.

Dans une élection sans compétition qui a pris l'allure d'un vote référendaire et avec une opposition appelant au boycott, le président Pierre Nkurunziza, a été réélu avec 91,62 pour cent au niveau national avec un taux de participation de

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17 Cinq candidats (Frodebu, MSD, UPD, FNL, CNDD) ont retiré leurs candidatures en date du 1 juin. Le 4 juin, après de longues consultations au sein du parti, l'Uprona a décidé de retirer également son candidat de la compétition.

76,98 pour cent. Dans les provinces où le CNDD-FDD avait gagné de justesse et à Bujumbura rural où il n'avait pas remporté les élections communales, l'appel au boycott a été globalement bien suivi: le taux de participation était de 41,15 pour cent dans la capitale (soit – 45,89% par rapport aux élections communales) et de 58,75 à Bujumbura rural (soit – 36,23% par rapport aux élections communales) (CENI Burundi 2010).

### *Elections législatives aux apparences d'une compétition pluraliste*

Concernant les élections législatives, malgré les efforts des acteurs nationaux et internationaux pour convaincre les partis de l'opposition de réintégrer le processus, la plupart de ceux-ci ont persévéré dans leur boycott tout en espérant que cette pression pourrait arrêter le processus afin d'entamer un dialogue.

Cette stratégie de la chaise vide a mis en péril la légitimité des élections, si jamais elles s'organiseraient sans compétition réelle. Il fallait une participation minimale des partis autres que celui qui se savait déjà vainqueur afin de légitimer cette victoire. Ceci explique les tentatives du CNDD-FDD lui-même de convaincre les partis de l'opposition de rejoindre le processus, en leur promettant un certain nombre de sièges. Cette démarche a été vaine pour les partis de l'ADC-Ikibiri, qui y voyaient une preuve de manipulation des résultats car attribuant des sièges avant même la tenue du scrutin. L'Uprona, par contre, a renoncé à la stratégie de la chaise vide afin de garantir sa survie politique. Pour donner des apparences pluralistes à ces élections, le CNDD-FDD a encouragé également ses partis 'satellites' à participer, alors que ces derniers n'avaient ni implantation ni expérience politiques significatives vu leur quasi absence et leur score très bas aux élections communales.

La liste définitive des candidats et des indépendants en lice pour les élections législatives était dès lors composée de sept partis et deux indépendants. Le CNDD-FDD a obtenu 81 sur 106 sièges au Parlement, soit 76,4 pour cent des sièges, tandis que l'Uprona en a obtenu 17 et le Frodebu Nyakuri, parti 'satellite' du CNDD-FDD, cinq.

Ce score était largement supérieur à celui de 2005 où le CNDD-FDD avait obtenu 54 pour cent des sièges. Et donc, le CNDD-FDD avait cette fois-ci une majorité absolue et celle des deux tiers pour pouvoir voter des lois sans devoir passer par les négociations avec les autres partis au gouvernement comme il en était le cas sous le gouvernement précédent. Pour l'élection des sénateurs, élus par les conseillers communaux, seuls deux partis politiques ont participé, à savoir le CNDD-FDD et Uprona, dont le premier a obtenu 32 des 34 sièges (CENI Burundi 2010).



### *Les résultats des élections de 2010 : un recul du pluralisme politique*

Les résultats de toutes ces élections ont dessiné un paysage politique se caractérisant par un recul du pluralisme et équilibre politiques et un basculement vers un modèle de parti unique ayant une majorité absolue dans les différentes institutions. Si cette tendance s'est manifestée déjà au niveau des élections communales elle s'est renforcée lors des élections législatives et sénatoriales, principalement par le retrait de la plupart des partis de l'opposition qui, dans l'ensemble, avaient obtenu 35 pour cent des voix au niveau communal. L'opposition étant éparpillée, les partis pris séparément avaient obtenu des scores largement en dessous de leur attentes et les principaux d'entre eux ont vécu ces résultats comme un véritable choc car étant tous convaincus d'une victoire potentielle.

Vu la succession rapide des scrutins, ces partis n'ont pas eu le temps de digérer la défaite, de se remettre en question et d'éventuellement revoir leur stratégie dans le sens de la participation aux scrutins suivants. Si déjà avant les élections communales les partis de l'opposition n'avaient effectivement pas considéré la stratégie de la coalition, leur défaite respective n'a pas non plus déclenché cette option. Ainsi, plutôt que d'envisager des coalitions pour faire face au parti gagnant, leur réponse a été la contestation des résultats et le boycott du processus par leur retrait. A travers cette stratégie, ils espéraient imposer l'arrêt du processus et le dialogue avec les acteurs impliqués. Cependant, le train des élections étant en marche, il n'y avait plus moyen de l'arrêter, le risque de déstabilisation étant trop grand et les arguments pour le retour à la table de négociations trop faibles.

Ainsi, le processus s'est poursuivi sans ces 12 partis, unis au sein de l'ADC-Ikibiri. En se retirant du processus ces partis se sont fragilisés quant à leur impact éventuel sur la prise de décision, tout en donnant encore plus d'espace au CNDD-FDD de gouverner le pays selon son entendement. Même si l'Uprona a rejoint le processus, en n'obtenant que 17 députés à l'Assemblée nationale et deux sénateurs, ce parti n'allait pas être en mesure de réaliser un véritable contrepoids car n'ayant pas la minorité de blocage. Le CNDD-FDD, par contre, a obtenu la majorité des deux tiers pour pouvoir voter des lois et il ne lui manquait que 4 sièges pour avoir la majorité des quatre cinquièmes nécessaires pour pouvoir réviser la Constitution, ces sièges pouvant facilement être obtenus avec le Frodebu Nyakuri, considéré comme son allié.

## COMPRENDRE LES RESULTATS DES ELECTIONS DE 2010

### *CNDD-FDD : les stratégies d'une victoire assurée ?*

L'issue des élections de 2010 déterminant l'avenir politique du pays mérite une analyse plus approfondie à la fois des résultats et de la réaction quant à ces



résultats tant par l'opposition que par le parti vainqueur. Comme nous avons essayé de démontrer à travers la présentation de la période préélectorale, le déroulement et les résultats des élections ne se décident pas le jour du scrutin mais se préparent longtemps à l'avance. On pourrait dire que le CNDD-FDD l'a compris très tôt et a mis en place toute une architecture électorale dès l'aube de son premier mandat. Ainsi, il s'est mis à construire sa popularité en milieu rural et autour de la personnalité de son candidat, Pierre Nkurunziza, alors président de la République. Celui-ci a passé cinq ans à battre campagne en distribuant matériel et nourriture, en construisant écoles et hôpitaux et en organisant des campagnes de prière à travers tout le pays.<sup>18</sup>

Même si des fonds illicites, souvent issus des affaires de corruption, ont servi à cette cause, le but était atteint : pour la première fois dans l'histoire burundaise un président de la République se montrait à côté de la population en écoutant ses besoins. Même si ces méthodes, qualifiées de populistes et fortement critiquées par l'intelligentsia de la capitale, elles semblent avoir porté leurs fruits auprès de la population rurale, constituant le plus grand nombre (89% de la population), qui a donné sa récompense à travers les urnes. Et même si le bilan de cinq ans au pouvoir était jugé négatif quant à la lutte contre la pauvreté, la bonne gouvernance, le respect de l'état de droit, des mesures populaires, telles que la gratuité scolaire pour l'école primaire et la gratuité des soins pour les enfants de moins de cinq ans et les femmes enceintes, ont eu des répercussions positives sur la vie quotidienne des populations les plus démunies en faisant de son initiateur le grand favori. De plus, comme dans la plupart des pays en Afrique, le vote a porté plus sur la personne que sur le parti. Ainsi, pour la population, le plus important était de voter pour le président et elle l'avait fait déjà lors des élections communales.

Justement les partis de l'opposition ont cru que les nombreux cas de corruption et un bilan plutôt négatif du gouvernement du CNDD-FDD allaient discréditer ce parti en le mettant en mauvaise position pour gagner les élections. Ainsi, ils ont pensé que la volonté de changement allait déterminer le choix de la population, tout en se fiant à l'histoire électorale du pays, qui montre que la population burundaise vote effectivement pour le changement. Cependant, vu le contexte des élections de 2010, le changement semblait être moins évident. En 2005 la population a voté principalement pour le CNDD-FDD et donc pour le changement par rapport au régime précédent afin de garantir la paix, le CNDD-FDD menaçant de reprendre les armes en cas d'une éventuelle défaite. Cette paix ayant été obtenue et conservée sous ce régime, il semblait ne plus y avoir

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18 Depuis son arrivée au pouvoir, président Nkurunziza, de religion protestante, s'était présenté comme un 'envoyé de Dieu' ayant reçu 'la mission divine' de diriger le pays. Ce rapprochement entre la politique et la religion était ainsi utilisé comme moyen de faire campagne auprès d'une population en général très croyante (les religions catholique et protestante sont les plus répandues).

de raison de voter pour un parti tel que le FNL issu du maquis – tout comme le CNDD-FDD en 2005 – et donc prédisposées aux mêmes erreurs que ce dernier faute d'expérience politique.

La population a préféré de voter pour le CNDD-FDD qu'elle connaissait mieux mais aussi qui la gardait sous sa surveillance et qui menaçait de recourir à la violence en cas de perte de ses privilèges. Ainsi, le vote de la population a été dicté non seulement par une récompense matérielle et sur base de la personnalité de celui qui donne mais aussi par peur de la force de nuisance de ce dernier en cas de perte de sa place au pouvoir. En effet, tout comme en 2005, le CNDD-FDD menaçait de recourir à la force si jamais il ne remportait pas les élections.

A part la préparation du terrain électorale à travers une campagne permanente, la période entre les deux élections telle que décrite ci-dessus montre également un parti au pouvoir ayant mis tout en œuvre pour s'assurer la victoire électorale en passant par des méthodes plutôt non-démocratiques comme des arrestations, intimidations et interdiction vis-à-vis des opposants. Quant au cadre légal et institutionnel des élections, le CNDD-FDD avait pris également ses précautions, quoique la pression des partis de l'opposition ait pu assurer un minimum de consensus par rapport à la composition de la CENI et l'ordre des scrutins. Cependant, plus le processus avançait, plus le Code électorale montrait ses failles et la CENI ses faiblesses surtout au niveau de la transparence, entre autre par le refus de rendre public les procès-verbaux des résultats au niveau des bureaux de vote, et de son pouvoir de sanction quant aux irrégularités observées (UE 2010a).

### *L'opposition, victime d'un mauvais calcul ?*

Du côté de l'opposition, ensemble, ils ont réalisé un score de 35 pour cent lors des élections communales, mais pris séparément le score du premier n'arrivait qu'à 14 pour cent, tandis que les autres oscillaient autour de 5 pour cent. Si une des explications de ces scores plutôt bas se trouve dans la multiplication des acteurs politiques visant plus ou moins le même électorat et donc un morcèlement des voix de l'opposition, une autre réfère à une certaine faiblesse interne due à des divisions, un manque de moyens et d'implantation solide sur le terrain. Convaincus de l'impopularité du CNDD-FDD d'une part et de leur propre force de l'autre, beaucoup d'entre eux se pensaient vainqueur potentiel d'où leur réticence quant à une éventuelle coalition avant le premier scrutin. Cependant, nombre de ces partis venaient de naître et probablement leur optimisme était exagéré jusqu'à ce que ne pas être préparés psychologiquement aux scores obtenus et donc à la stratégie à adopter pour faire face à cette déception. Au lieu donc de se contenter de leur score et de se coaliser pour assurer un véritable contrepoids au parti gagnant, ils

ont préféré de s'unir dans le boycott. Il s'agit là en quelque sorte d'un manque d'appréciation du rôle de l'opposition car tout en ayant perdu les élections, ils auraient pu obtenir une minorité de blocage au Parlement.

Une particularité dans cette démarche est la solidarité entre des partis qui n'ont rien en commun, ni au niveau de leur origine (ethnique, régionale), de leur historique et donc expérience, ni au niveau du poids qu'ils représentent dans la société. Leur divergence se confirme par le fait qu'avant les élections ils n'ont pas réussi à se regrouper pour former un poids réel face au parti présidentiel. C'est leur défaite aux élections communales et leur aversion vis-à-vis du parti vainqueur, le CNDD-FDD, qui les ont finalement poussées de former une coalition.

Leur frustration par rapport à un régime autoritaire et leur perte de confiance dans l'administration électorale, jugée sous l'influence du CNDD-FDD, les a poussé à résister jusqu'à ce que s'isoler du processus et de toutes les institutions. Cette tentative d'arrêter le processus électoral comme moyen pression pour retourner à la table de négociation pourrait se comprendre en référant à l'histoire récente du pays, caractérisée par de longues années de négociations pour finalement arriver à un accord de paix qui rassemblait le plus grand nombre d'acteurs en se basant sur le principe 'gagnant-gagnant'. Il était donc estimé que la paix au Burundi dépendait de la satisfaction de la plupart d'acteurs importants. Alors que l'Accord d'Arusha était pensé dans un cadre dépourvu de toute légitimité électorale, nous pourrions dire que sa logique de compromis a survécu dans l'esprit des partis de l'opposition à travers leur demande de créer un cadre de dialogue et de négociation à la place de la poursuite du processus électoral.

Cependant cette démarche était interprétée par la plupart des analystes et représentations diplomatiques comme une démarche des mauvais perdants, n'acceptant pas les résultats des urnes comme une manifestation de leur propre faiblesse et manque d'implantation et popularité sur tout le territoire. Ainsi, leur retrait du processus électoral a aggravé leur position sur la scène politique et a donné au CNDD-FDD un pouvoir presque absolu et cette fois-ci légitimé par les résultats des urnes.

### *Rétrécissement de l'espace politique: quel avenir pour la paix et la démocratie au Burundi ?*

Les élections de 2010 étaient censées être une étape importante dans la consolidation de la démocratie et la pacification des relations politiques au Burundi. Bien que les élections aient été jugées globalement crédibles par les missions d'observations locales et internationales, et acceptées par la majorité de la population, elles n'ont cependant pas réussi à faire avancer le pays vers plus de démocratie et de paix. Au contraire, en raison de son boycott, l'opposition s'est placée en dehors des

institutions politiques ainsi affaiblissant les mécanismes de contrôle. De plus, même si elle voudrait jouer un rôle comme opposition extra-parlementaire, les mesures autoritaires du parti vainqueur ne lui facilitent pas la tâche. En effet, les autorités réélues semblent privilégier une logique d'étouffement de l'opposition, tout en cédant à une sorte 'd'autoritarisme postélectoral' (ICG 2011, p 14).

Pourtant, le président Pierre Nkurunziza avait rassuré dans son discours à la nation au lendemain de la mise en place du gouvernement que la victoire remportée aux élections appartenait à tous les Burundais, ceux qui avaient voté pour lui et ceux qui ne l'avaient pas fait et que les bonnes décisions qu'il prendrait seraient dans l'intérêt de tous les Burundais, sans discrimination aucune. Ce discours ne s'est pas mis en action, au contraire, la situation postélectorale est restée caractérisée par le harcèlement des militants et membres des partis de l'opposition et par la volonté du CNDD-FDD de verrouiller l'espace des libertés politiques. Ce comportement intolérant constitue une menace, non seulement pour la stabilité intérieure mais aussi pour la survie politique des formations membres de l'ADC-Ikibiri, voire pour les libertés civiles et politiques des acteurs de la société civile et des médias.

Les moyens mis en œuvre pour désorganiser, voire détruire les partis de l'opposition concernés, semblent proportionnels au poids électoral obtenu au cours des élections communales. Pour le FNL, une cinquième opération de fragmentation, menée sous la bénédiction du Ministre de l'Intérieur, a permis à une nouvelle équipe de 'destituer' Agathon Rwasa et de s'emparer de la direction de FNL, plaçant ainsi l'ancien titulaire dans l'illégalité, en ne lui laissant aucun autre choix que la clandestinité. Agathon Rwasa ferait des navettes entre le Burundi et l'Est de la République Démocratique du Congo où le FNL aurait renoué d'anciens liens avec des groupes armés (ICG 2011). De façon concomitante, le MSD s'est retrouvé dans la tourmente à travers des actes d'intimidation, des menaces et l'arrestation de certains de ses membres. Alexis Sinduhije, président de ce parti, est parti en exil depuis août 2010, tout comme la plupart des leaders des partis politiques membres de l'ADC-Ikibiri.

Ainsi, la restriction de l'espace politique a eu comme entre autres conséquences, la fuite des principaux leaders politiques de l'opposition vers l'étranger ou dans la clandestinité et notamment dans les régions forestières qui servaient de bases rebelles lors de la guerre civile (OAG 2010). Cette situation fait que le CNDD-FDD n'a plus de véritable interlocuteur. Il s'agit donc d'une absence de dialogue et de cadre d'expression libre pour l'opposition extra-parlementaire. Le danger consiste justement à ne pas laisser ces partis s'exprimer, à ne pas leur donner un cadre légal de se manifester. Dans cette absence de cadre d'expression ces partis pourraient être poussés à utiliser d'autres moyens de se faire entendre comme il a été le cas lors des crises précédentes et donc à recourir à la violence. En effet,

de plus en plus, il est question de la gestation d'une nouvelle rébellion, dont certains signes sont déjà visibles, notamment des départs signalés de nombreux jeunes, y compris d'anciens combattants et de démobilisés, vers des destinations inconnues. Pour empêcher l'émergence d'une rébellion le pouvoir semble avoir entrepris des opérations et des frappes préventives en utilisant la force. Cette dérive progressive vers la violence, combinée au rétrécissement de l'espace démocratique est porteuse de germes d'une plausible résurgence d'un nouveau conflit armé au Burundi. Ainsi, comme il est souligné dans ICG (2011), seuls le rétablissement du dialogue politique, la sortie de la clandestinité pour le FNL et le renforcement des institutions démocratiques sont de nature à inverser cette dangereuse évolution.

## CONCLUSION

J'ai commencé cet article en évoquant l'importance d'un pluralisme politique et des partis bien opérationnels dans le développement d'une démocratie solide et durable où la compétition entre ces partis se passe à travers les élections. J'ai également fait référence à la thèse de Lindberg (2006) qui laisse entendre qu'afin que les élections contribuent à la démocratie, il faut qu'elles soient participatives, compétitives et légitimes. Nous avons vu qu'une des composantes importantes de ces qualifications sont les conditions dans lesquelles les partis de l'opposition participent dans les processus électoraux.

Si les élections permettent une compétition équitable et libre entre partis politiques elles sont formellement légitimes, mais un facteur peut être encore plus important c'est l'acceptation des résultats par les différentes parties prenantes. Cependant, le cas du Burundi, comme d'ailleurs nombre de pays en Afrique, montre que cette acceptation cause souvent problème. Dans la plupart des cas les partis perdants contestent les résultats, même si les élections sont qualifiées de 'libres et crédibles' par les observateurs tant nationaux qu'internationaux.

Non seulement cette donne suscite des questions quant à cette qualification de 'libres et crédibles' attribuée aux élections par les observateurs, mais elle exige aussi une analyse plus approfondie du concept de la légitimité en allant au-delà d'une participation et acceptation du processus par les partis politiques. Dans cette perspective la participation de la population au vote devient également un indicateur important quant à la qualité de la démocratie et la légitimité des élections et de ces résultats (Lindberg 2006).

Pour ce qui est de la validation internationale du processus, ces élections ont montré effectivement son importance: les deux camps opposés cherchaient à gagner cette communauté internationale chacun pour sa cause respective. Du côté du parti vainqueur en effet, il s'agissait d'obtenir la qualification des

élections comme 'libres et crédibles' tandis que du côté des opposants c'est le contraire qui était recherché. Dans sa réponse et donc à travers la validation des élections la communauté internationale a en quelque sorte favorisé le statut quo, la stratégie la plus objective non seulement vu l'absence de preuves de ces 'fraudes massives' tant décriées par l'opposition mais aussi pour préserver la stabilité d'une paix encore fragile. En effet, beaucoup d'efforts ont été fournis par la communauté internationale dans le processus de paix et électoral et l'échec n'était pas acceptable dans une telle situation. Ceci peut aussi expliquer la position ferme des représentants de cette communauté internationale en acceptant le résultat des urnes malgré les imperfections observées quant à la transparence, la gestion du contentieux et le respect des libertés, tout en rejetant et condamnant la stratégie de la chaise vide et le boycott comme un moyen de retourner à la table de négociation.

Quant à la compétition électorale d'une pluralité de partis politiques et l'acceptation des résultats comme conditions de la légitimité du processus, le cas du Burundi pose le problème général des relations entre les partis politiques. Il s'agit d'une relation souvent tendue entre le parti au pouvoir et l'opposition surtout due à un déséquilibre dans l'accès aux ressources et, par conséquent, dans la compétition électorale, ne donnant pas les mêmes chances aux différents partis. Cette donne montre que les enjeux politiques se situent plus au niveau de l'accès aux ressources que sur les idées des uns et des autres. Même si la place au pouvoir semble donc offrir tous les avantages dans la compétition électorale pour remporter la même place et donc assurer le statut quo, l'histoire électorale du Burundi nous montre également que le changement de pouvoir à travers les urnes est possible. Or, vu la marginalisation de l'opposition suite à leur retrait du processus électoral et donc de toutes les institutions, le renversement de la donne politique est devenu plus compliqué. En effet, la place omniprésente du CNDD-FDD lui donne tous les atouts d'organiser les futures élections qu'il ne pourrait que gagner.

Ainsi, l'exemple du Burundi évoque non seulement la question des élections équitables, mais aussi de la maturité politique et donc du respect des règles du jeu démocratique à la fois du côté du parti au pouvoir que du côté de l'opposition. Dans les deux cas nous constatons un manque de cette maturité et de ce respect: le premier par ses pratiques autoritaires, empêchant le développement d'une culture démocratique et donc de libertés politiques et civiles et le deuxième par son boycott du processus électoral, mettant en péril les règles du jeu démocratique qui stipule que la compétition se fait à travers les élections et que les perdants ont toujours un rôle important à jouer.

Et dans tout cela, quelle est la place de l'acteur le plus important mais très souvent oublié dans ces débats politiques; cet acteur dont le rôle est pourtant



capital dans la détermination de la composition du paysage politique, à savoir la population? A travers une participation massive, la population burundaise s'est exprimée à tous les niveaux pour le CNDD-FDD et son président, Pierre Nkurunziza. Finalement, c'est cette participation massive qui donne la légitimité ultime à cette victoire; la démocratie donnant le pouvoir au peuple pour désigner ses représentants à travers des élections même si celles-ci ne signifient pas nécessairement un pas vers plus de démocratie en termes de pluralisme et liberté politiques.

Le cas du Burundi, nous rappelle donc que la tenue régulière des élections ne suffit pas pour consolider la démocratie, ainsi contredisant en quelque sorte la thèse de Lindberg (2006), selon laquelle les élections ont un effet d'auto-renforcement et de démocratisation. Lindberg va jusqu'à dire que les élections jouent ce rôle important dans la consolidation démocratique indépendamment de leur qualité vu qu'elles améliorent les libertés civiles. Selon toujours sa thèse, le fait d'organiser des élections compétitives de façon répétitive, même si elles sont fraudées, est un des facteurs le plus important pour empêcher la fragilisation de la démocratisation. Or, même si nous acceptons que les élections sont une condition nécessaire dans la consolidation démocratique, il est difficile de croire que l'organisation régulière des élections fraudées contribuerait à l'installation de l'état de droit et de la liberté d'expression. Plutôt, ce type d'élection fraudée risque de désillusionner les parties prenantes quant au bien fondé des élections, voire de la démocratie. Ainsi, la régularité des élections ne suffit pas seule à crédibiliser un processus électoral, encore moins à en faire un indicateur de la démocratie. Par contre, la tenue régulière des élections de bonne qualité qui reflètent la volonté de la population et dont le résultat arrive à être accepté par toutes les parties prenantes, peut contribuer à construire une culture démocratique (Kadima & Booyesen 2009).

En effet, les deuxièmes élections post-transition au Burundi nous montrent que les élections ne sont pas forcément un pas vers plus de démocratie et la consolidation de l'état de droit et des libertés civiles. Le cas du Burundi nous apprend que non seulement la qualité du processus électoral mais également le comportement des acteurs politiques impliqués dans le processus déterminent si les élections contribuent ou pas à la consolidation démocratique. Dans cet article nous avons montré que c'est effectivement le comportement des acteurs politiques qui a causé ce résultat négatif par rapport à la consolidation démocratique.

En effet, à travers l'analyse du processus électoral, nous avons démontré le non-respect des règles du jeu démocratique telles que définies dans l'introduction étant le renoncement à toute forme de violence, le respect de l'état de droit et l'acceptation de la démocratie, non seulement comme une route vers le pouvoir, mais comme un système où les partis perdent les élections. La responsabilité de ce



non-respect est partagée entre le parti au pouvoir, principalement par son attitude autoritaire, recourant à différentes formes de violences telles que les atteintes à la liberté et à l'intégrité physique d'adversaires politiques, l'intimidation des candidats et électeurs et le non-respect de l'état de droit. Du côté de l'opposition, il s'agit principalement du non-acceptation des résultats d'élections démocratiques, tout en boycottant le processus électoral, sans exclure le recours à la violence afin de se faire écouter.

Ainsi, paradoxalement, les résultats des élections qualifiées de 'libres et équitables' par les observateurs ont donné lieu à un recul du pluralisme politique en ouvrant le champ libre à l'installation d'un régime autoritaire, voire à un retour à la violence. Il s'agit donc plutôt d'une consolidation autoritaire à travers des élections démocratiques. Dans ce sens, les élections de 2010 ont constitué en quelque sorte un rendez-vous manqué dans la consolidation de la démocratie et de la paix au Burundi.

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# TEN YEARS OF DEMOCRATIC LOCAL GOVERNMENT ELECTIONS IN SOUTH AFRICA

## *Is the Tide Turning?*

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### ABSTRACT

*Since the 2006 local elections the ruling African National Congress (ANC) has lost a total of 48 wards in by-elections and won only 15. This is a complete reversal of the party's performance between 2000 and 2006 when it lost only five wards and won 47. Does this signify a change in South African voting patterns? This chapter is based on an in-depth analysis of election data provided by the Electoral Commission of South Africa on its website. The analysis covers a ten-year period from 2000 to 2010 and includes results of the 2011 local elections. It also refers to the national elections of 1994 and 1999 to make a comparison. The analysis shows the dominance of the ANC since the first democratic elections in South Africa in 1994, which it won, and continued to increase its voter support, peaking in 2004 with a 69.69% majority. Similarly, in local elections the ANC dominated in 2000 and 2006. The 2011 local elections show a slightly different picture. By-elections are also discussed, with data demonstrating a similar trend to that in the national and local elections. The period from 1994 to 2006 was a period of growth for the ANC and the period 2007 to 2010 was a period of decline, thus demonstrating a Bell Curve pattern.*

### INTRODUCTION

This article looks at the performance of political parties, mainly the African National Congress (ANC), Democratic Alliance (DA) and Inkatha Freedom Party (IFP), in 10 years of democratic local elections in South Africa, with a view to assisting the reader to estimate the possible outcomes of the national and provincial elections of 2014.

The article begins with a discussion of the system used for local government

elections in South Africa. It then considers the performance of the main political parties in the national and provincial elections of 1994, 1999, 2004 and 2009 as precursor to the discussion of local elections in 2000, 2006 and 2011. By-elections are also discussed because they provide an important indicator of party support between elections. The article divides by-elections into two periods: First Period (2000-2006) and Second Period (2006-2010). The other factor to consider in distilling the information on by-elections is that some of the data at the source ([www.elections.org.za](http://www.elections.org.za)) are incomplete, particularly the comparative tables<sup>1</sup> for three by-elections (14 July 2001, 24 October 2001 and 17 September 2003). Once again, the missing data do not render the analysis invalid because they are insignificant in the broader scheme of things.

### THE ELECTORAL SYSTEM

The Constitution prescribes an electoral system that results in proportional representation (PR) for both the National Assembly and municipalities. However, for municipalities it gives two options – full PR based on a closed party list or a model that combines PR with a system of ward representation, that is, a mixed system.

I do not wish to go into the merits of the electoral model as this subject has been discussed adequately elsewhere (see Bogdanor 1984; Bogdanor & Butler 1983; Boix C 1999; Elklit 2003; Lijphart 1994; Matlosa 2003; Powell 2000) except to say that proportional representation is a system that matches the voting patterns with the composition of legislatures. For instance, a party that wins 10 per cent of the vote is expected to hold 10 per cent of the seats in the legislature, depending on the formula for allocating seats and surplus seats.

The most highlighted weakness of the PR system is that it deprives voters of the ability to elect candidates directly and thus hold them accountable. The system of ward representation for local government, as provided for in the Constitution, allows voters to elect individuals directly. This system is commonly referred to as majoritarian or plurality or first-past-the-post. The strength of this model is that it holds candidates directly accountable to the electorate, for, if they do not deliver, they will not be re-elected. Its obvious weakness is that it can catapult into power a government that does not enjoy majority support.<sup>2</sup> A mixed system was therefore adopted as most appropriate for local elections in South Africa, to try to balance the need for accountability and the need for proportionality.

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1 The comparative tables provide information about party gains or losses during by-elections.

2 An example is where four candidates contest an election and the winning candidate emerges with a mere 26% of the vote. Various adaptations have been made to overcome this problem, eg, transferable votes and run-off elections.

To satisfy the constitutional requirement of ward representation and proportionality at local level parties are required to submit closed lists to contest the PR component of the elections and to provide individual candidates for the ward elections, with the final result reflecting proportionality. It is only at the level of ward representation that independent candidates may contest elections in South Africa. And indeed there has been an increase in the number of independent candidates standing alongside party candidates in by-elections.

It has also emerged that the mixed system creates some challenges, particularly in relation to how best to match the two sets of candidates for positions in municipal councils. Currently, party list candidates seem to dominate the full-time council positions – chief whips and mayors – while candidates who have received a direct mandate from the voters are often overlooked. In some instances, mayors have been parachuted in from other areas to run municipalities and this has caused tensions within councils. This factor may be one of the reasons for service delivery protests and the resurgence of the independent candidate in by-elections. Communities are often surprised when mayors are announced, because they have not had the opportunity to view party lists before the election. It is my belief that if mayoral candidates were to contest ward elections voters would be more supportive throughout their terms because they would say ‘we chose him/her’.

## ELECTION TRENDS

This section begins with a brief glimpse into the national and provincial elections to set a basis for understanding the general trend in South African elections.

The first democratic elections, held in 1994, provide an interesting starting point. The elections were held without a national voters’ roll and there are accusations that many people who voted then should not have done so. The only two controlling factors were the presentation of an identity document, which was stamped at the polling booth, and the marking of the voter’s thumb with indelible ink. As a result, the figures provided and the trend set by these elections give little comfort to our analysis.

Chart 1 illustrates the performance of the political parties in the four national and provincial elections since 1994. The ANC showed a healthy growth pattern, peaking at 69.69 per cent in the 2004 elections, but began to backslide in the 2009 elections. The key question is whether this marked a turning point. It is only when we make comparisons with local election and by-election trends that we can begin to make concrete assumptions.

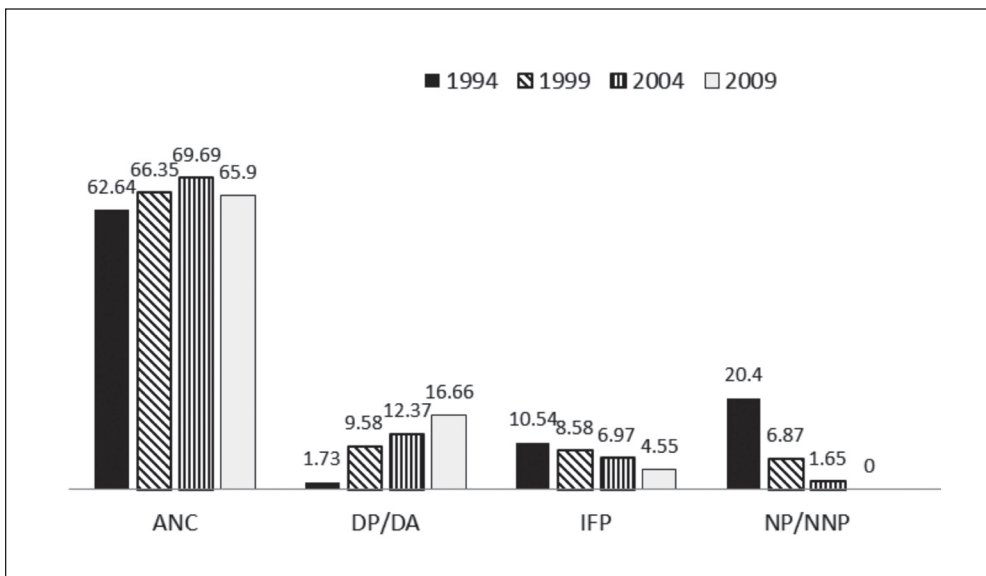
Chart 1 also confirms that the DA is the only party that has shown exponential growth trends over the four elections. The jump from a mere 1.73 per cent support

in 1994 to 10.3 per cent in 1999 (when it displaced the NNP as the official opposition in Parliament) and to 16.66 per cent in 2009 provides adequate evidence from which to conclude that it is, indeed, on a solid growth path. The key question is whether it can grow to a point where it can displace the ruling party.

The chart also shows that the two other parties, the IFP and the New National Party (NNP) were on their way out, in fact, the NNP has already departed the political arena. It is important to note the performance of the National Party in the first elections of 1994, when it was still in power. Several questions arise from this peak performance, which was followed by a collapse in the next elections.

The first question is: to what extent does access to state resources help a ruling party to win an election? The second question relates to the nature of the 1994 elections themselves. There was no voters' role and, as mentioned above, many people voted in 1994 who should, otherwise, not have voted. It has, for instance, been reported that many Namibians, who, at that point used the same identity documents as South Africans, were assisted to come to South Africa to vote. The author has met Namibians who have confirmed that they were brought to South Africa and paid a fee to vote in 1994. Is it possible that the NP received votes from these people?

**Chart 1**  
**Party performance in all four national elections**

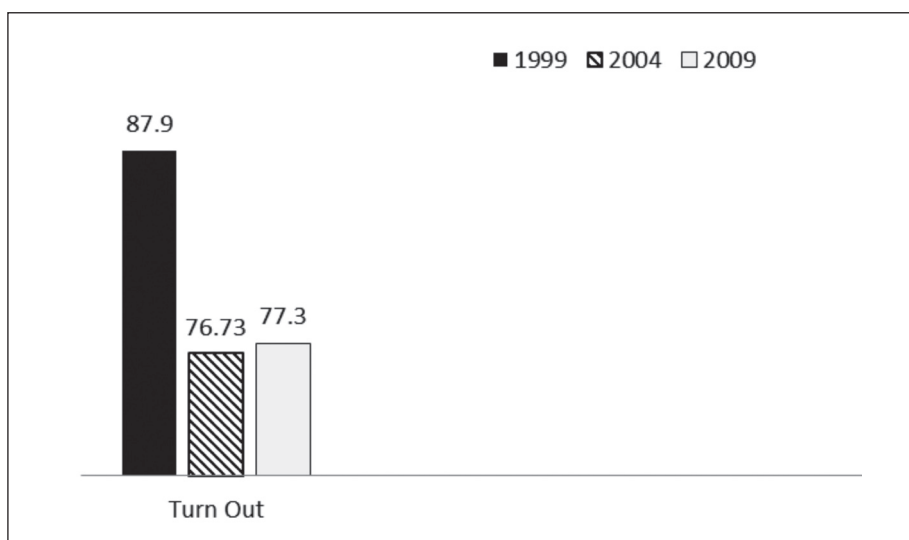


NB: DP/DA refers to the Democratic Party, which later became the Democratic Alliance  
 NP/NNP refers to the National Party, which later became the New National Party  
 The NNP disbanded in August 2004 and thus did not contest the 2009 elections

## VOTER TURNOUT FOR NATIONAL AND PROVINCIAL ELECTIONS

Chart 2 shows the number of voters who cast their votes in the elections from 1999 to 2009. No data are available for the 1994 elections since there was no voters' roll. It is important to consider this factor when looking at Chart 1 because it raises questions about the relationship between voter turnout and party performance. At a glance, one would wonder whether the decline in voter turnout in 2004 had a positive spin-off for the ANC or whether it meant that supporters for the other parties were not adequately motivated to go to the polls. This indicates that it is important in an election campaign not only to say 'vote for me' but to say 'go out and vote'.

**Chart 2**  
**Voter turnout as percentage of registered voters**



## LOCAL ELECTION TRENDS

Local elections have elicited little excitement and enthusiasm among voters and some political parties. This is likely to change, though, as it becomes increasingly clear that many political parties will either rise or fall based on their performance at local level. Some parties have, in the past, misconstrued the significance of local government and neglected it at their peril. Their leaders have secured comfortable positions in the national and provincial legislatures and have forgotten about local elections, particularly by-elections. The result is that they have almost reached their sell by date. The Pan Africanist Congress of Azania (PAC) and the United Democratic Movement (UDM) are examples.



The first local government elections in the new dispensation took place in 1995, following the successful national election in 1994. This election was considered transitional and as no data are readily available it is excluded from this discussion. Our 10-year period begins with the local elections of 2000.

In the 2000 local elections the ANC received an average of 56.2 per cent of the votes, increasing this to 62 per cent in 2006. The poor performance in 2000 compared to the party's performance in the national elections in 1999 can be attributed to various factors, one of which could be the fact that since the period of transition little enthusiasm had been built up about local government. The transition of local government was complex and the focus was largely on national government. It is only after the 2006 local elections that many people started waking up to the reality that local government is the alpha and omega of governance and service delivery. Even the tenderpreneurs (people who have made government tenders a source of enrichment)<sup>3</sup> have woken up to the reality that local government is where the action is. Local government will become highly contested in the future and it is here that politicians will have to show their mettle.

Table 1 shows the dominance of the ANC in all three periods in all provinces except the Western Cape. In the 2000 local elections the ANC received fewer votes than the DA in the Western Cape but turned this around in 2006, when it dominated. In 2011 the ANC lost the Western Cape to the DA, with little hope of a comeback in the near future. Overall, the performance of the ANC in the 2011 elections showed a decline in all provinces, with the exception of KwaZulu-Natal.

The greatest losses in percentage terms were not, in fact, in the Western Cape, but in the Eastern and Northern Cape. In the Eastern Cape the ANC suffered an 8.26 per cent loss. Only in KwaZulu-Natal did it achieve an attractive 9.97 per cent growth between 2006 and 2011. Table 1, therefore, shows a Bell Curve tendency for the ANC in all provinces except KwaZulu-Natal, where the curve is exponential.

An interpretation of the emerging trend shows that in 2000 the political environment in South Africa was still convoluted. People did not fully appreciate the significance of local government in their lives, mainly because they were still reeling from the mania of national liberation under the leadership of Nelson Mandela and nothing was more important.

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3 The expression is credited to Blade Nzimande (General Secretary of the South African Communist Party and Minister of Higher Education).

**Table 1**  
**Percentage of the vote won by the ANC, DA and IFP in the 2000, 2006**  
**and 2011 local elections**

Province	Elections	ANC	DA	IFP
Eastern Cape	2000	72.3	10.2	0.42
	2006	81.7	7.5	0
	2011	73.44	14.26	00
Free State	2000	70.4	17.5	0.27
	2006	76.7	12.5	0.07
	2011	71.74	19.34	0.04
Gauteng	2000	58.7	30.6	2.22
	2006	62.3	26.4	1.9
	2011	60.21	33.04	0.95
KwaZulu-Natal	2000	33	13.4	47.8
	2006	46.6	8.2	38.5
	2011	56.57	10.75	17.33
Limpopo	2000	78.6	15.8	0.12
	2006	84	5.5	0
	2011	81.63	6.65	0
Mpumalanga	2000	77.7	12.5	1.45
	2006	80.6	10.4	0.72
	2011	78.9	13.81	0.17
North West	2000	69.3	19.8	0
	2006	76.6	8.6	0.08
	2011	74.99	16.14	0
Northern Cape	2000	62.4	28.6	0.13
	2006	69.9	13.6	0
	2011	63.57	16.14	0
Western Cape	2000	39.7	49.9	0.17
	2006	40.2	39.3	0
	2011	34.07	57.08	0

The people of KwaZulu-Natal were licking the wounds inflicted by the violence that preceded the 1994 elections and still viewed the ANC with suspicion. The people of the Western Cape were still prisoners of the apartheid '*swart gevaar* (black danger)' ideology and did not fully exercise their democratic right to free choice. By the 2006 elections political maturity had begun to set in as prejudices started to wane. People who had regarded the ANC as a terrorist organisation only saved by the astute leadership of Nelson Mandela had little evidence to sustain such a view when Mandela stepped down, leaving the ANC intact. This boosted trust and confidence in the ANC.

The combination of this and other factors, such as the dissolution of the NNP following its dismal performance in the national polls in 2004 and its subsequent merger with the ANC, prompted many voters to embrace the ANC and support it in the 2006 local elections. It is evident that a significant number of supporters of the NNP voted for the ANC in 2006. As indicated above, in 2011 the ANC showed a decline in all provinces except KwaZulu-Natal. This signifies an important trend in the province – the people of KwaZulu-Natal are rapidly getting over the trauma of the violence and the perception that the ANC is a terrorist organisation bent on destroying cultural traditions.

Irrespective of the declining trend, the ANC still wins the highest support in Limpopo province, where it received 78.61 per cent of the vote in 2000, 83.99 per cent in 2006 and 81.63 per cent in 2011. Conversely, in KwaZulu-Natal it received the lowest votes in the 2000 elections (33.02%) but has since maintained a steady increase to 46.59 per cent in 2006 and 56.57 per cent in 2011. The Western Cape remains the province showing the lowest support for the ANC, with the party's share of the vote dropping from 40.26 per cent in 2006 to 34.07% in 2011.

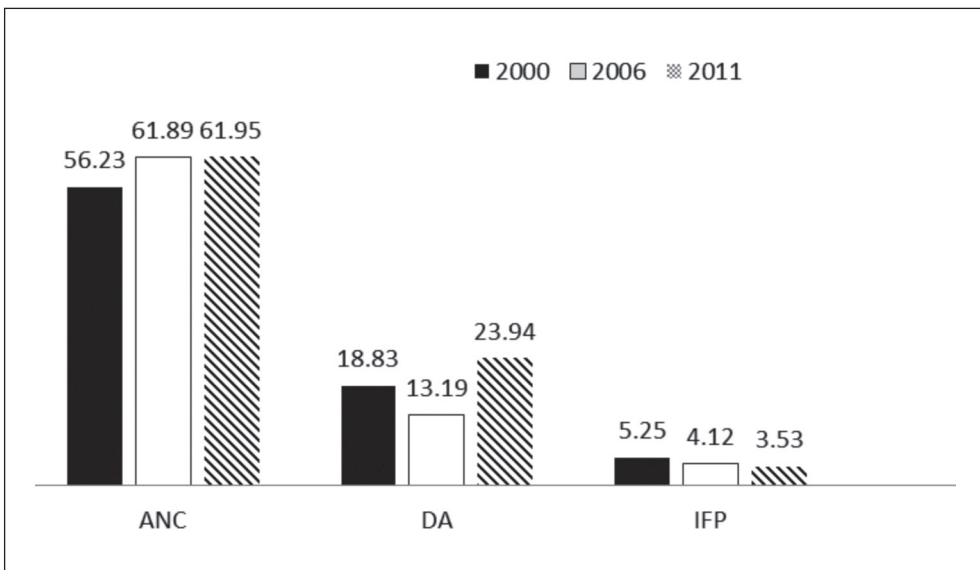
Thus it is clear that the 2006 elections marked the high point of the ruling party's growth. The ANC's overall performance in the 2011 elections was saved largely by the results in one province – KwaZulu-Natal. I predict that support for the party in KwaZulu-Natal will continue to grow as people desert the dying IFP, after which it will begin to decline. This declining trend is likely to continue until such time that a balance is reached where diehard members will remain entrenched and weaker ones will either despair and not vote or jump ship. Such a situation is, however, unlikely to diminish the dominance of the ANC in the long term because it is unforeseeable that a tangible alternative will emerge. Although the DA is showing significant growth trends its entrenched white dominance and control make it unlikely that it will grow to a point where it will be a threat to the ANC. It will not be easy for South Africans to entrust a white-dominated party with their hard won liberation. The DA must cede its white dominance to a credible black leadership if it is to begin a process of reconciliation and growth.

The DA has, however, demonstrated a unique growth pattern. In the 2000 local elections it performed beyond expectations, attracting a significant portion of the white vote following its alliance with the NNP after the latter's poor performance in the 1999 national elections. The marriage between the two parties did not last and, in 2001, the NNP announced its divorce from the DA and decided to go it alone in the 2004 national elections, a fatal decision, as it turned out, for it died at the polls. The results of this divorce haunted the DA during the local elections of 2006, where it shed about five per cent of its votes. It is not clear whether the five per cent the DA lost was the same five per cent the ANC gained in those elections, particularly because the NNP had decided to join hands with the ANC after the 2004 elections.

If this is true this behavior confirms that the NNP had a loyal support base that was prepared to sway with its leaders as they played musical chairs. However, specific mention should also be made of the fact that the IFP also lost about 1 per cent in the same election. On the balance of probabilities it is prudent to conclude that the boost in the ANC's gains could indeed have come from the NNP. The DA dropped about 10 per cent of its support in the Western Cape, a province that promises to be a battlefield for the ANC and DA for the foreseeable future, but recouped the losses in 2011.

The IFP, on the other hand, has suffered a downward slide, with the other parties, particularly the ANC, continuing to erode its support base. In the IFP's

**Chart 3**  
**Party support in the three local elections**



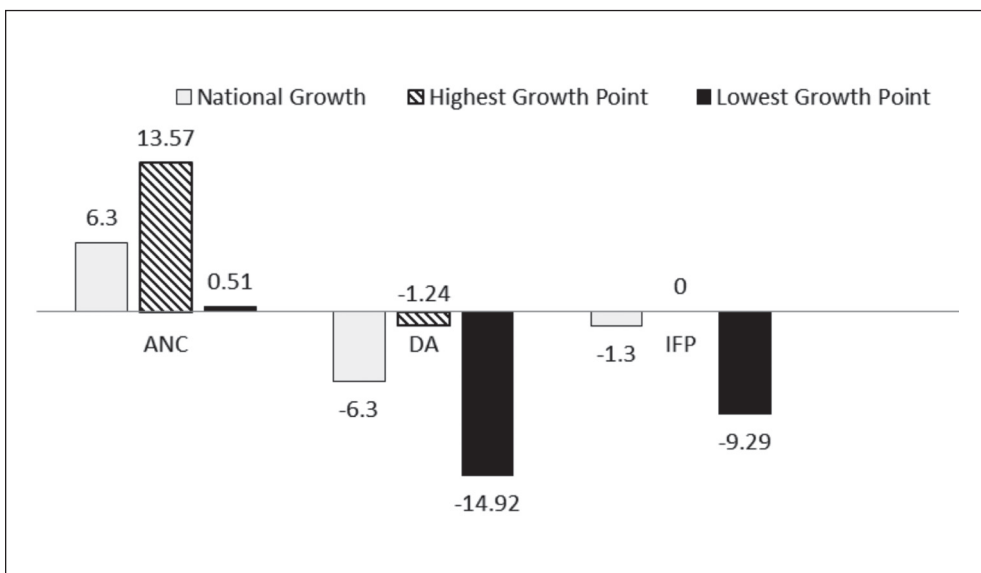
stronghold, KwaZulu-Natal, support has dropped from an all-time high of 47.8 per cent in 2000 to 38.5 per cent in 2006 and 17.33 per cent in 2011 – a decline which might, indeed, sound the death knell for the party, which has negligible support in the other provinces.

Chart 3 shows that the ANC's support increased in all three local elections, but with diminishing returns in 2011. I maintain that the decline has started and that evidence from eight of the nine provinces of declining support is significant for our understanding of the emerging trend.

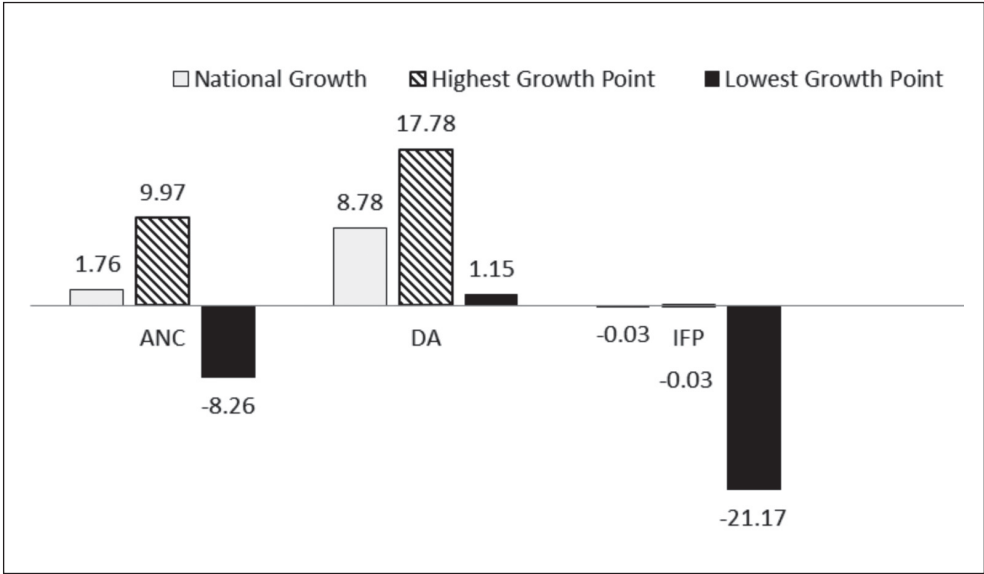
Chart 4 demonstrates clearly that in the local elections in 2000 and 2006 the ANC was growing at the expense of the other two major parties, particularly the DA. Its support grew least in the Western Cape (0.51%) and most in KwaZulu-Natal (13.57%). There were no growth points for the DA, which suffered its worst losses in the Northern Cape (14.92%) and least in North West (1.24%). The IFP, on the other hand, neither lost nor gained in North West and lost the most in its stronghold, KwaZulu-Natal (9.29%).

Between 2006 and 2011 the only party to register positive growth in all three areas was the DA. The ANC suffered its biggest setback in the Eastern Cape, largely because it was fighting opposition from two sides – the newly-formed Congress of the People (Cope) and the DA. The two charts clearly indicate growth on the part of the DA and decline on the part of the ANC. Statistically, if this trend were to remain constant, the DA would become the ruling party in about four elections.

**Chart 4**  
**Party support in the 2000 and 2006 local elections**



**Chart 5**  
**Party support in the 2006 and 2011 local elections**



I now turn to by-elections to see whether the trend can be confirmed.

LOCAL GOVERNMENT BY-ELECTIONS  
*The First Period: 2000-2006*

**Table 2**  
**Total number of by-elections between 2000 and 2006**

	By-elections	ANC	DA	IFP
Total	536	341	77	66
Percentage	100%	63.62%	14.37%	12.3%

**Chart 6**  
**Percentage of by-elections won between 2000 and 2006**

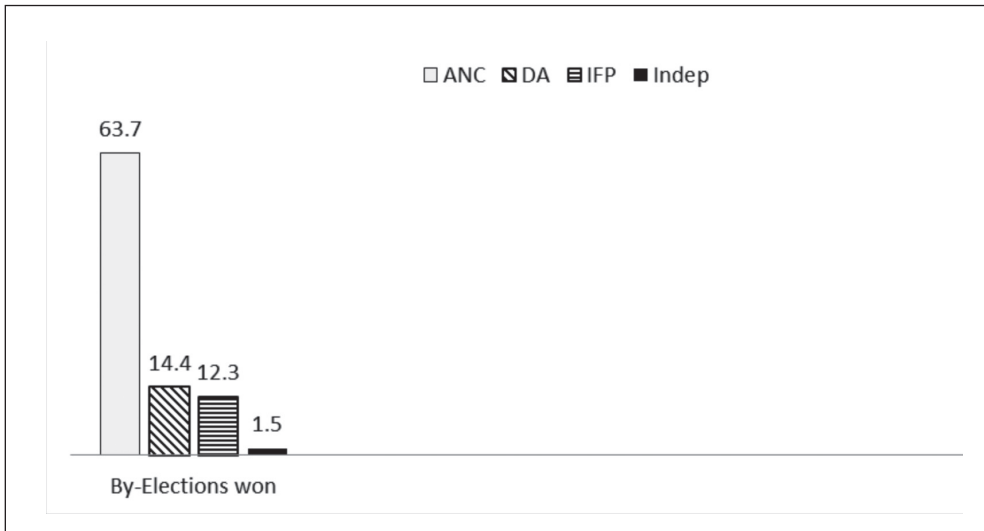
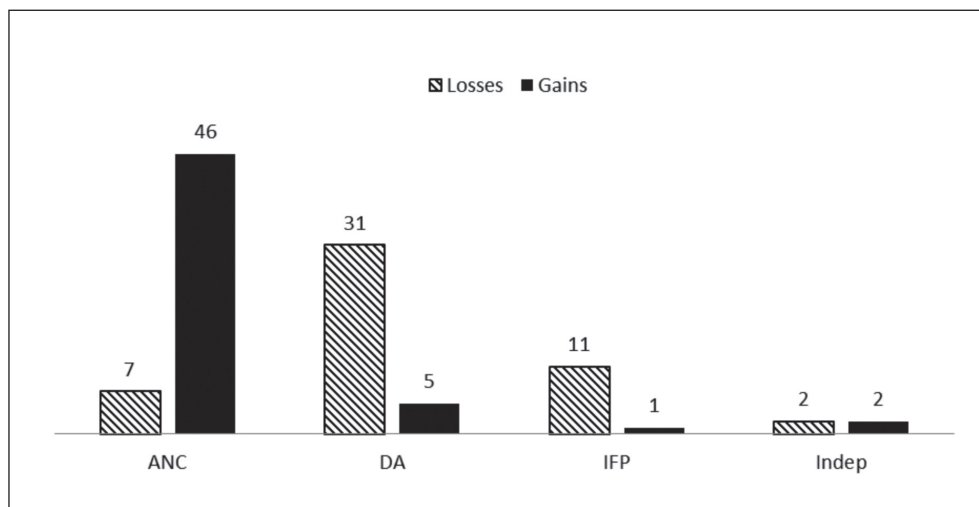


Chart 6 demonstrates once again the dominance of the ANC in local elections and by-elections between 2000 and 2006. Its dominance is such that even the contending parties combined did not pose a real challenge.

The number of wards gained or lost are, however, more important than the percentage of by-elections won, because they represent a change of guard and gain or loss of control. Chart 7 shows that the ANC gained a total of 46 new wards or constituencies during this period and lost only seven. All the other parties lost more than they gained, thus confirming that the ANC was consuming their support bases. The DA was the biggest loser, with 31 wards taken from it and only five gained. I have included independents in this chart to demonstrate the resurgence of the independent candidate. Independents are the only segment that broke even – losing two wards and gaining two. In other words, the performance of independents during this period was better than that of all parties apart from the ruling party – a significant indicator.



**Chart 7**  
**Party losses and gains in by-elections between 2000 and 2006**



**Table 3a**  
**Party-to-party gains 2000-2006**

	From ANC	From DA	From IFP	From indep	From other	Total gains
ANC	–	26	11	2	8	47
DA	4	–	0	0	0	4
IFP	1	0	–	0	0	1
Indep	1	0	0	–	0	2
Other	1	3	0	0	–	4

**Table 3b**  
**Party-to-party losses 2000-2006**

	To ANC	To DA	To IFP	To indep	To other	Total losses
ANC	–	4	1	1	1	7
DA	26	–	0	1	3	30
IFP	11	0	–	0	0	11
Indep	2	0	0	–	0	2
Other	8	0	0	0	–	8

The ANC lost a total of four wards to the DA and one to the IFP but gained a total of 26 from the DA and 11 from the IFP. This is so disproportionate that it is doubtful whether the other parties will ever be able to wrest a significant amount of power from the ruling party.

*The Second Period: 2006-2010*

**Table 4**  
**By-elections 2006-2010**

Total	ANC	DA	IFP	Independent	ID	Cope	Other
533	349	92	48	21	10	4	9
100%	65.5%	17.3%	9.2%	3.9%	1.8%	0.75%	1.7%

**Chart 8**  
**Percentage of by-elections won between 2006 and 2010**

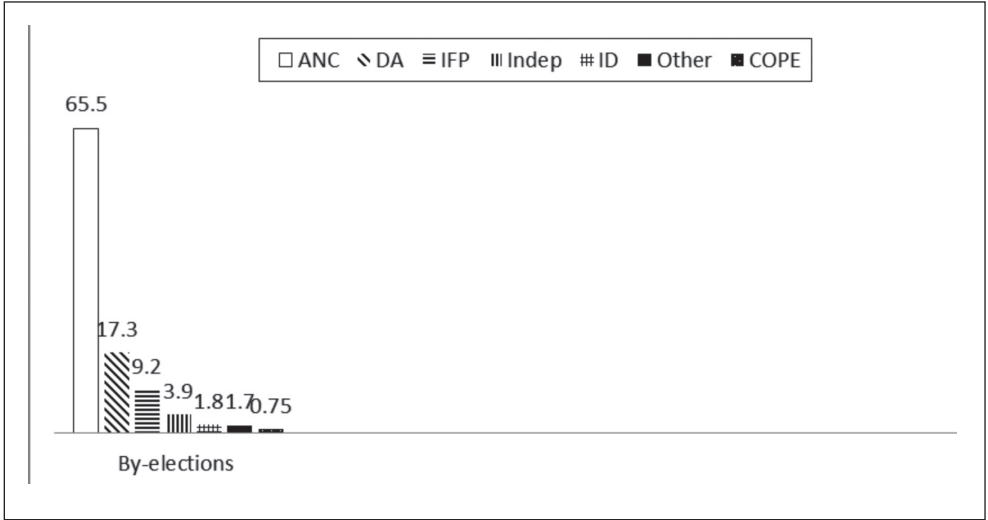


Chart 8 shows the continued dominance of the ANC in by-elections during this period, with an increase to 65.5 per cent from the 63.7 per cent in the previous period. The chart also shows an increase in the number of by-elections won by the DA in the same period, while the IFP continued to decline. I have also included independents in this chart to demonstrate the increase in support for independent candidates from a mere 1.5 per cent in the First Period to 3.9 per cent in the Second.

Could this be the first indication of a desire to move away from PR towards an individual, merit-based (first-past-the-post) system of elections? The chart also indicates the performance of new parties – the Independent Democrats (ID) and the Congress of the People (Cope) to demonstrate the level at which they currently stand. Cope’s performance in the by-elections is a far cry from the impressive results it achieved in the national elections in 2008. Could this be an indication of the teething problems of a young party or is it a reflection of the leadership problems that dog Cope?

I turn to the all-important data on party gains and losses for the Second Period, as represented in Chart 9. The ANC lost a total of 50 wards and gained only 18, while the DA won 25 wards and lost just five, followed by independents (17 gains, 5 losses). The IFP, on the other hand, followed the ANC, with more losses than gains.

**Chart 9**  
**By-elections 2006-10: Party losses and gains**

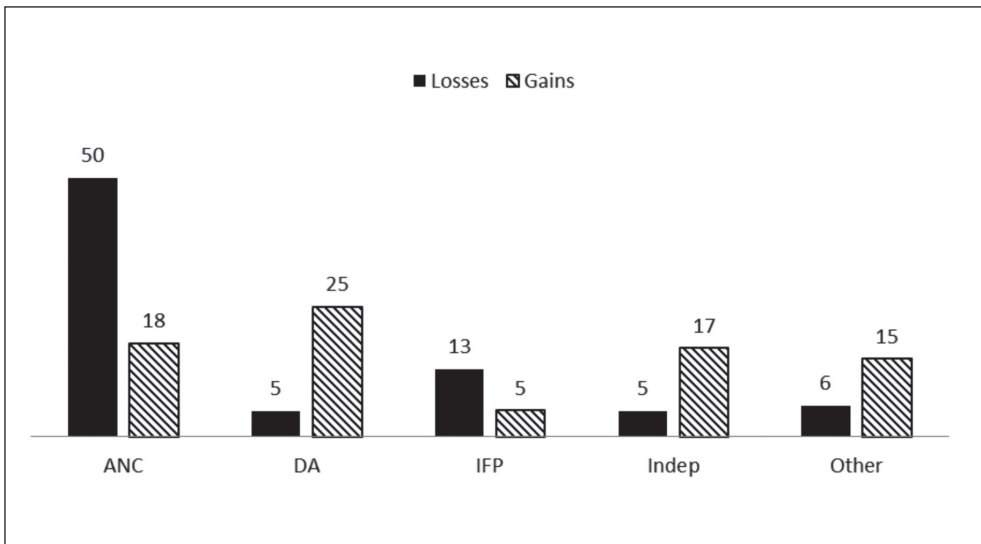


Table 5 shows party-to-party gains and losses. The ANC’s biggest losses were to the DA (19) and to independent candidates (16). Most of the losses to independent candidates were to people who had formerly been ANC ward candidates. The losses suffered in the Western Cape were the result of the leadership problems the party continues to experience in that province.

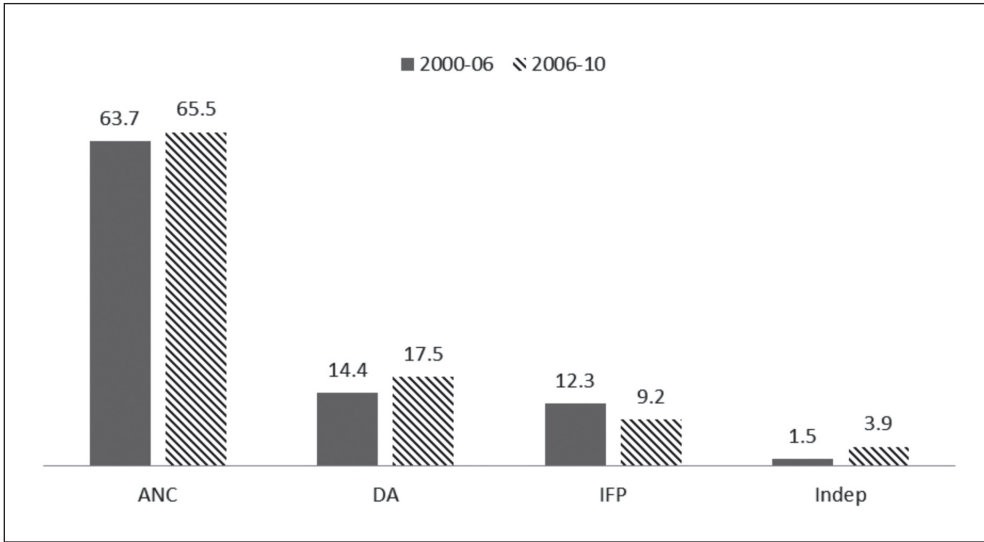
**Table 5a**  
**Party-to-party gains 2006-2010**

	From ANC	From DA	From IFP	From indep	From other	Total gains
ANC	–	0	12	4	2	18
DA	19	–	1	1	4	25
IFP	4	0	–	0	0	4
Indep	16	1	0	–	0	17
Other	11	4	0	0	–	15

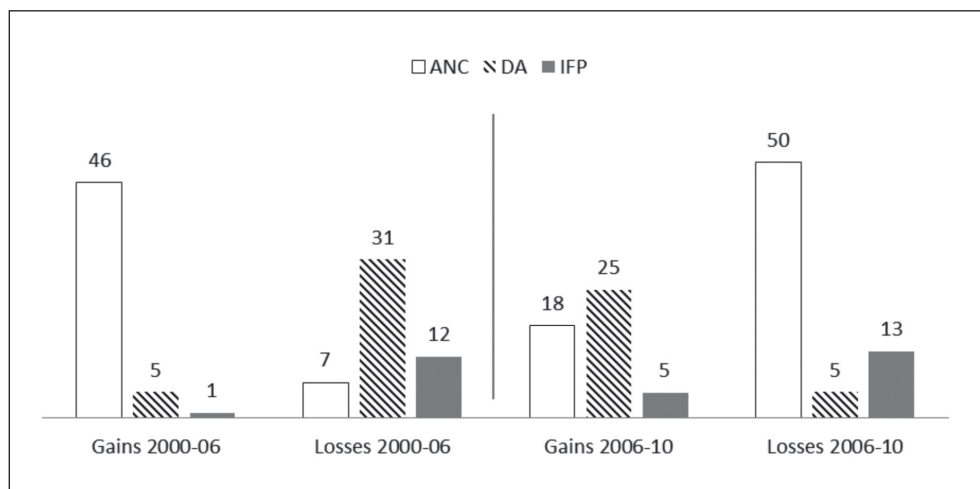
**Table 5b**  
**Party-to-party losses 2006-2010**

	To ANC	To DA	To IFP	To indep	To other	Total losses
ANC	–	19	4	16	11	50
DA	0	–	0	1	4	5
IFP	12	1	–	0	0	13
Indep	4	1	0	–	0	5
Other	2	4	0	0	–	6

**Chart 10**  
**Comparison of by-elections won in the two periods**



**Chart 11**  
**Comparison of gains and losses in by-elections in the two periods**



Charts 10 and 11 show that the ruling party has had mixed fortunes. Chart 10 shows positive growth in by-elections won while Chart 11 shows positive growth in terms of the number of wards won in the first period (2002-2006) and negative growth in terms of the number of wards won in the second period (2006-2010). Chart 11 shows that in by-elections between 2000 and 2006 the ANC enjoyed the most gains, mainly from the DA and the IFP, while the DA suffered the most losses. In the succeeding period the ruling party suffered the most losses, mainly to the DA and to independents, particularly in the Western Cape.

The ANC suffered its worst defeat in the by-elections held on 10 December 2008 in the Western Cape, where it lost nine wards to independent candidates, mainly former members of the ANC; five to the DA and three to the ID. During the entire period between 2006 and 2010 the ANC lost 19 wards to the DA, four to the IFP, six to the ID, 16 to independent candidates, three to Cope and two to civic organisations. This is not a good record for the ruling party. A drop from 46 constituency wins to a loss of 50 in just two inter-election years is rather alarming.

The noteworthy factor here is the rise of the independents. It is disconcerting that the ruling party, with all its resources and support structures, could lose 16 of its constituencies to independents. It is, however, noteworthy that in the October 2010 by-elections the ANC was able to claw back two wards from the independents in the Western Cape. Although charts 10 and 11 show a mixed pattern, it is my belief that Chart 11 must be given more credence in the analysis

because it represents actual growth or decline in terms of the number of areas under the control of each party.

OVERALL PARTY PERFORMANCE

Charts 12 and 13 show the performance of the individual parties in the various elections.

Chart 12  
ANC performance in all elections

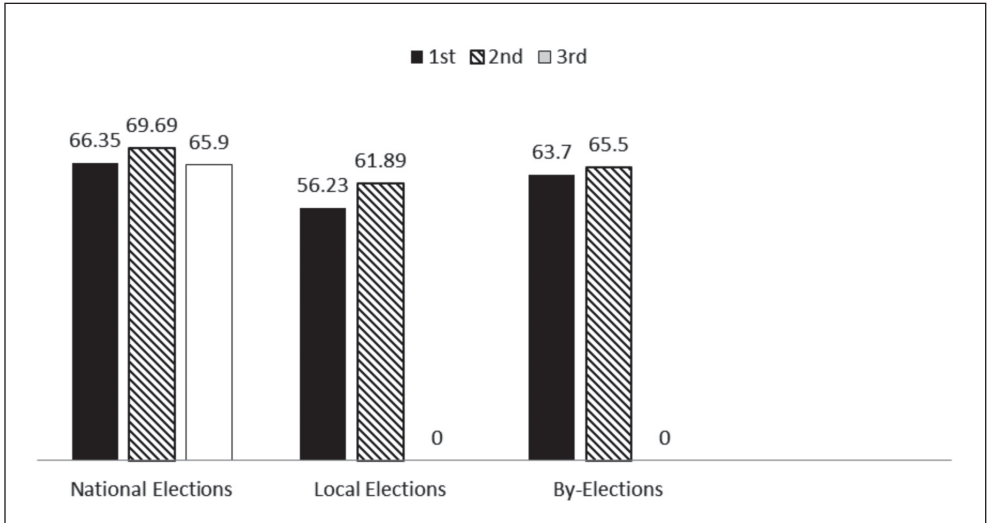
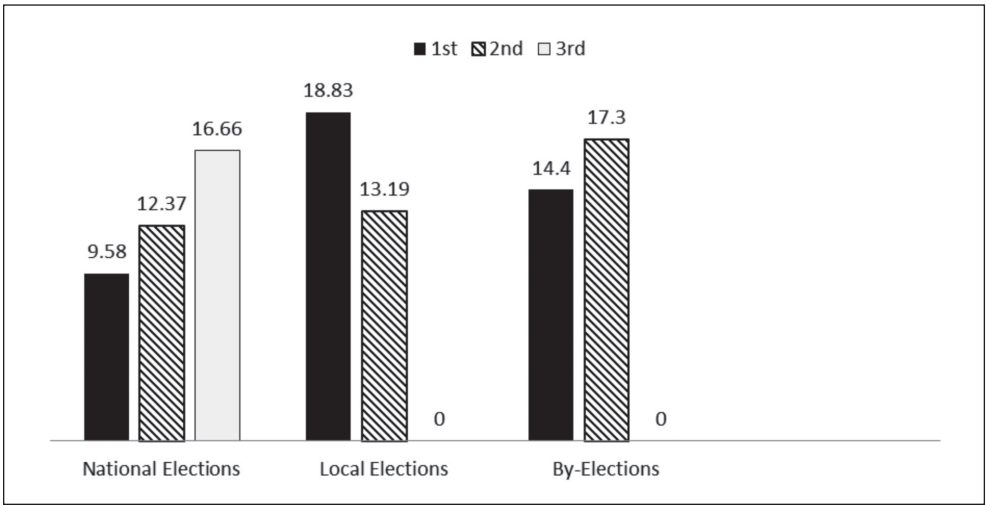


Chart 13  
DA performance in all elections



**Chart 14**  
**IFP performance in all elections**

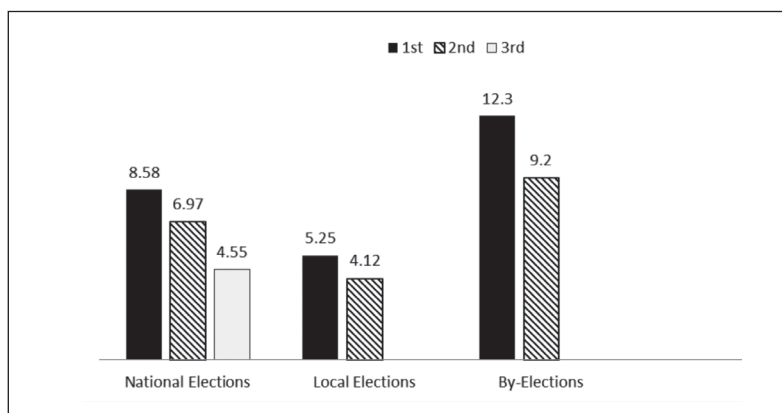


Chart Index:

- *National elections: 1<sup>st</sup> election 1999, 2<sup>nd</sup> election 2004, 3<sup>rd</sup> election 2009. NB: The 1994 elections are excluded from this comparison*
- *Local elections: 1<sup>st</sup> election 2000, 2<sup>nd</sup> election 2006, 3<sup>rd</sup> election 2011. NB: The first local elections held in 1995 are not included as they were transitional and there are no available data*
- *By-elections: 1<sup>st</sup> by-elections refer to 2000-2006, 2<sup>nd</sup> by-elections refer to 2006-2010*

Charts 12, 13 and 14 can be summarised as follows:

	National	Local	By-election
ANC	Growth and Decline + -	Growth +	Growth +
DA	Growth +	Decline -	Growth +
IFP	Decline -	Decline -	Decline -

*Some important factors to consider*

- The first democratic elections, in 1994, were complicated by many factors, one of which was the absence of a voters' roll. Many people who voted in 1994 should not have voted. The positive showing of the National Party in the 1994 national elections could partially be explained by this phenomenon, as can its collapse at the polls in 1999.
- The 2000 local elections took place at a time when parties were still reeling from the outcome of the 1999 national elections. There was general confusion among the smaller parties as they tried to pick up the pieces and realign themselves through pacts and alliance agreements following the failure by a hairsbreadth of the ANC's bid to win a two-thirds majority. The period



between the 1999 elections and the local elections of 2000 did not provide sufficient time for political realignments to be completed. The National Party, which had changed its name to the New National Party to shed the old apartheid image, was quick to recognise the sudden change in temperature and went into an alliance with the Democratic Party to form the Democratic Alliance in preparation for the local elections of 2000. This appeared to work, because the DA increased its stake to 18.83 per cent in the 2000 elections.

- The United Democratic Movement (UDM), a young party launched with much enthusiasm in 1997, won 3.4 per cent of the vote in the national election of 1999. The departure of Roelf Meyer, a former member of the NP, who, along with former 'homeland' leader Bantu Holomisa, had founded the UDM, saw the fortunes of the party change as many white members, who had followed Meyer out of the NP, lost hope. Professor Susan Booysen is quoted as saying: 'I won't be surprised if other white senior leaders followed Meyer because he was their backbone and a bonding force in the UDM. Holomisa on his own has failed to come out as a leader that both white and black could cherish and follow with equal enthusiasm' ([www.iol.co.za/index.php?sf=115&set\\_id=1&click\\_id=13&art\\_id=ct20000112205221603H620450](http://www.iol.co.za/index.php?sf=115&set_id=1&click_id=13&art_id=ct20000112205221603H620450)). These views were echoed by Professor Mafa Sejanamane, who said, 'because the UDM was trying to be "everything to everybody" and had not defined its niche, Meyer's resignation was a major blow'. He was doubtful that the party's membership had bonded strongly enough to survive, because it was merely 'a coalition of former NNP and ANC members' ([www.iol.co.za/index.php?sf=115&set\\_id=1&click\\_id=13&art\\_id=ct20000112205221603H620450](http://www.iol.co.za/index.php?sf=115&set_id=1&click_id=13&art_id=ct20000112205221603H620450)). Sejanamane's view proved to be accurate. The organisation was still too fragile to suffer such a major leadership loss; the centre could no longer hold and things were bound to fall apart. The abandoned voters, as I wish to call them, became fodder for the other parties, particularly the DA.
- The Pan Africanist Congress of Azania (PAC) has suffered numerous internal organisational and leadership problems since it was unbanned and there is little evidence that it has been able to overcome these problems. The election of veteran Zephania Mothopeng as PAC president in 1986 (while he was still in prison)<sup>4</sup> was an attempt to rebuild stability and give the party

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4 Mothopeng was sentenced to a 15-year prison term in 1976 and was granted early release in 1988.

direction. However, the Lion, as he was fondly called, roared on his release and rejected negotiations with the President F W de Klerk's regime, opting to continue the armed struggle. Mothopeng died in October 1990, leaving the party in a state of flux. The PAC has had the highest leadership turnover of all South Africa's political parties. Clarence Makwetu stepped into Mothopeng's shoes in 1990 but was ousted in 1996 and replaced by Bishop Stanley Mokgoba, whose term lasted until 2003 when he was replaced by Motsoko Pheko. The current president is Lehlapa Mphahlele. Many PAC leaders left the party, taking with them their supporters. Like the UDM the PAC has not placed much emphasis on local elections and its participation in by-election has been negligible.

- The Inkatha National Cultural Liberation Movement, founded by Mangosuthu Buthelezi in 1975, transformed itself into a political party, the Inkatha Freedom Party, on 14 July 1990 and advocated a federal state option. The IFP threatened to boycott the first democratic elections, in April 1994, because of disagreements over the federal option and representation in the interim government. A breakthrough was achieved just over a month before the elections, on 2 March 1994, when an agreement was reached to consider international mediation with regard to the federal option. It is widely assumed that the party's late entry into the election race cost it dearly at the polls – it received a mere 10.5 per cent of the national vote. The party has continued on a downward slide ever since, losing support, largely to the ANC. Its image was dented by accusations of complicity with the so-called 'third force' that wrought havoc during the build-up to the negotiations and first democratic elections and by accusations of a lack of inner-party democracy, which led to a split just before the 2011 local elections. The formation by Zanele Magwaza-Msibi of a splinter party called the National Freedom Party (NFP) had a significant effect on the IFP's performance in the 2011 elections. In its stronghold, KwaZulu-Natal, it was able to rally only 11.06 per cent of the vote and its share of the national vote was a mere 2.42 per cent. The new kid on the block, the NFP, is worth watching, as it outperformed Cope nationally. The IFP has been a consistent player in local elections and by-elections during the 10 years under consideration, but its future is in serious doubt.
- The ANC, under the impeccable leadership of Nelson Mandela, could only grow bigger in numbers and stature. The careful succession planning that marked the handover to Thabo Mbeki was also a plus for the party, as it convinced many people that the ANC was the correct organisation to run

the machinery of state. The apparent tranquillity was, however, not to last forever, as leadership wrangles began to surface between Mbeki and Jacob Zuma over succession. This hurt the party, a factor that was evident at the polls in 2009, when the ANC dropped about 3 per cent of its support. It will be a considerable challenge for the party to regain this lost ground. Leadership problems in the Western Cape and service delivery protests have also cost the ANC dearly – the first because of poor succession planning, the second because of the manner of its response to protests.

Leadership is an important factor in party stability and support because it is usually the first signal that the centre can no longer hold. Leadership stability should not be misconstrued to mean lifelong leadership, but it involves various factors, one of which is succession planning and leaders who resonate with the sentiments of the people. In recent months the ruling party has had to contend with a belligerent youth league and criticism from its alliance partners, particularly the Congress of South African Trade Unions (Cosatu). President Zuma appeared to have dealt with these challenges at the all important National General Council (NGC) of the ANC, held in Durban in September 2010, but it remains to be seen whether peace will return to the party as it prepares for its millennium celebrations in 2012.

## CONCLUSION

From the above data it can be concluded that a trend is starting to emerge in the performance of the various political parties in South African elections. The ruling party seems to be showing a Bell Curve tendency, with growth in the beginning and decline more recently. Between 1994 and 2004 the trend was towards upward growth, but 2009 marked a downturn. The combined results of national elections, local elections and by-elections indicate that the decline can be located between 2007 and 2008, the period during which there were leadership battles within the ANC that led to the birth of Cope, which undoubtedly took a considerable number of votes from the ANC in the 2009 elections. This is a normal trend in African democracies, where strong opposition parties grow out of the liberation party.

The birth of an opposition from the womb of the ANC was expected, although it seems to have happened much earlier than anticipated. There is a strong possibility that more such splinter organisations will mushroom, at least in the foreseeable future, until such time as our democracy consolidates into two major parties. Such splinter parties can only eat into the support base of the larger parties, particularly the ruling party. The challenge for the ruling party is to try to contain the exodus of its supporters to become independents or to join

splinter parties that are likely to converge at some point to constitute a tangible opposition that can actually unseat it.

The DA, as the official opposition, has shown a consistent growth pattern in national elections, but has stumbled in local elections, especially in 2006. However, it has shown resilience in by-elections since 2006 and managed to put up a strong fight in the 2011 elections. It is, however, unlikely that it will grow to such a point that it will unseat the ruling party. The party has repeatedly been accused of a failure to transform itself from a liberal, white-dominated party into a broad-based mass party.

The IFP has demonstrated one consistent trend – decline, decline and decline. It appears that nothing much can be done to reverse this trend. The party has lost most of its constituency to the ANC at local level. In fact, it is the only party from which the ANC won seats in the by-elections of 2006 to 2010. The propensity of IFP voters to join the ANC may indicate a desire for a possible merger of the two parties. A merger with the ANC or Cope or the DA seems to be the only viable option to rescue the IFP, otherwise it is clear that any future analysis of the performance of major parties in the elections will exclude it.

Cope's performance as a newcomer in the 2009 elections was notable – it won 7.42 per cent of the vote. Many political commentators believe that this performance was a fluke and Cope will die at the next elections. Cope was born at an unfortunate time, when tempers were high as many people were trying to deal with the Mbeki-Zuma tussle. Were it not for the highly emotional state of affairs it might have made serious inroads into the ANC's support base.

Whether Cope will adequately resolve and reverse the emotional nature of its birth is another issue, but it seems likely that this will continue to be a major stumbling block for the party unless it goes through a total rebirth, with a new and untainted leadership. Its current leadership problems will not make it easy for the party to stabilise itself and win the hearts of many voters. Its performance in the 2011 local elections was not impressive – it won only 2.1 per cent of the national vote, a significant drop from the 7.42 per cent it won in 2009. Could this mark the beginning of the end for Cope?

The fact is, the search for alternatives has begun in our political milieu. The ANC will continue to be criticised for self-enrichment and tenderpreneurship. The service delivery protests and leadership battles in the Western Cape have hurt the ANC and will continue to hurt it, particularly because of the way in which it has responded to these challenges. There are other problems that will continue to affect the ANC with regard to local government:

- Internal political squabbles over leadership roles within the party. The contestation of political space at local level will continue to be intense,

particularly because political leadership is, correctly, seen to be a licence to accumulate wealth. Local government is the main employer in many areas and control of its machinery gives individuals real power. Any party that wishes to occupy this space must be ready to deal with the intensity of contestation for leadership. If uncontrolled such contestation has the potential to destroy political parties as in-fighting can lead to dirty tricks and even assassinations. The ANC suffered its biggest voter declines in provinces where there were leadership battles, that is, the Western Cape and the North West province. The simplest way to deal with such problems is to act decisively in endorsing democratically elected leaders, thus leaving little room for doubt about the support local leaders enjoy from the party leadership.

- Lack of resources (financial and human) for delivering the mandate of local government. Local government in South Africa is, literally, bankrupt. The income (rates and taxes) collected by municipalities falls far short of the needs and services expected by communities. Municipalities have become top-heavy, with numerous administrative functions imposed by bureaucrats at provincial and national government level. Councillors and local leaders are frequently ill-prepared to manage the highly sophisticated and complex nature of governance at local level. The good thing about democracy is that it gives everyone a chance, even those who are ill prepared to take centre stage. It is therefore important to create mechanisms to provide the necessary support for such people.

This article has outlined trends, from which extrapolations can be made. It is obvious that the 2014 elections will be highly contested and will return results that are different from those we have experienced in the past. It is also likely that all parties will be vying for the ANC vote.

The DA has consolidated its position in the Western Cape by merging with the ID and will continue to dominate the province, making it very difficult for other parties to make any inroads. As yet the ANC has shown little commitment to challenge the dominance of the DA in the province and I believe that it is a lost cause and serious choices have to be made between investing a great deal of effort in a province that has already been lost and putting more effort into areas where the ANC still dominates, to ensure that encroachment is stalled or prevented. Areas like the Eastern Cape will continue to be highly contested, with Cope and the DA continuing to lurk in the shadows.

The UDM has not been a key player in local elections, a fact that has continued to marginalise the party. In fact, the UDM is in the twilight of its political career

and the sooner Holomisa approaches Zuma with a suggestion of reintegration into the ANC the better for his political future.

The IFP has been a big player in local government elections and has fought on equal terms with the ANC and the DA in the by-elections. However, the party is in decline and it is speculated that the fact that Jacob Zuma is a Zulu will further erode its influence in rural KwaZulu-Natal, as happened in the 2011 elections. The survival of the IFP also depends on some serious soul-searching and political realignment. It is clear that most IFP voters are going to the ANC and what better incentive does a party need than to follow the wishes of its supporters?

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# DEMOCRATISATION IN NIGERIA





# PUBLIC PERCEPTIONS OF JUDICIAL DECISIONS ON ELECTION DISPUTES

## *The Case of the 2007 General Election in Nigeria*

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### ABSTRACT

*In a plural and deeply divided society like that in Nigeria post-election disputes are a recurring problem and if care is not taken in their resolution may exacerbate the problems of national integration. Elections do not only perform the function of elite recruitment into public office but are a mechanism for national integration. In a heterogeneous society like that in Nigeria if post-election conflict is not handled with the required neutrality the election suffers enormously from a credibility crisis. It is against this background that this article examines the role of the judiciary and its impartiality in resolving election-related conflicts arising out of Nigeria's 2007 general elections. It infers that, in a number of cases, the public perceived judicial officers to have compromised themselves. No doubt this compounded the problem of integrating Nigeria's disparate ethnic groups and, at the same time, whittled down the confidence of members of the public in the capacity of the judiciary to be an impartial arbiter. The article recommends training and retraining for judges in the interests of both national integration and democratic sustenance.*

### INTRODUCTION

There is no doubt that the judiciary is a cardinal institution in an established democracy. This is not unconnected with the fact that a constitutional government must, in part, be a judicial government (Hague & Harrop 1990, p 279). The Constitution vests the judiciary, as the third estate of the realm, *inter alia*, with the power to interpret and apply all laws relating to both criminal and civil matters and to disputes between individuals and groups and between individuals and political authorities as well as between political authorities in a parallel

relationship or in a vertical relationship such as between a state and the federal government in a federal system (Awa 1996, p 8). Thus, it is the guardian of the rule of law and the upholder of justice, fair play and equity. For this reason, in all Nigeria's constitutions it has enjoyed a great measure of independence from both executive and legislature, except during military interregnums.

It is imperative to note, however, that the welfare of citizens depends greatly on speedy and impartial justice. James Bryce (2006, p 613) has remarked aptly that there is no better test of the excellence of a government than the efficiency of its judicial system. The judiciary is the guardian of the rights of citizens and it protects these rights from all individual and public encroachment. If citizens feel they can rely on the certain and prompt administration of justice this maximises their liberty.

If there is no adequate provision for the administration of justice the liberty of the people is jeopardised, for there is no means of ascertaining and deciding on rights, punishing crimes or protecting the innocent from injury.

If law be dishonestly administered, the salt has lost its flavour; if it be weakly and fitfully enforced, the guarantees of order fail, for it is more by the certainty than by the severity of punishment that offenders are repressed. If the lamps of justices go out in darkness, how great is that darkness?

Bryce 2006, p 613

In ancient polities the executive and judicial functions were combined. The early monarch was the fount of justice. Later it was recognised that justice could not be secured if the judicial and executive functions were combined in one person. Historically, the concentration in the same hands of the power to interpret and administer has always been associated with tyranny (Laski 1925).

Every citizen needs complete protection against the danger of a capricious interpretation of the law. The modern state is, accordingly, inconceivable without a separate judicial organ functioning independently and impartially (Kapur 2006). In the same vein, Chaturvedi (2006, pp 160-161) noted that without an adequate mechanism for rendering justice no modern state can exist. The modern democratic state assures the people rights, generally by guaranteeing them in the constitution. However, if rights are not properly safeguarded they remain only on paper (Chaturvedi 2006). Hence, members of election petition tribunals are expected to be independent and impartial.

In view of the above, the judiciary is generally regarded as a catalyst for both democratic transition and sustenance (see Ojo 2006; Alabi 2002). But in its bid to fulfil this role the judiciary in Nigeria suffers from serious limitations, the

most chronic of which is corruption (Davies 2003), as will be shown below. The thrust of this article, therefore, is an in depth discussion of public perceptions of judicial decisions relating to the 2007 general elections.

The article is divided into a number of sections. The next section dwells on the conceptualisation of public perception to avert misunderstanding. The third attempts a survey of election petitions across the six geopolitical zones of the country, while part four gauges public perceptions of the tribunals in the light of their integrity and the length of time they have taken to dispense justice. The inference drawn is that there is a need to amend the Electoral Act of 2006 to enhance the rapid dispensation of justice, while the National Judicial Council should be enabled to handle cases of corruption against any erring judge.

### CONCEPTUALISING PUBLIC PERCEPTION

... the general purpose of ... a study (literature review) brings the reader to date in the previous research in the area, pointing to general agreements and disagreements among the previous researches ... carefully review the studies that led to the acceptance of those ideas ...

Babbie 1998

This section takes its cue from the above premise. Without necessarily defining them, for the purpose of this study we intend to properly conceptualise public perceptions. Public opinion as a term in its contemporary sense was first used in the writings of Machiavelli when he suggested that a wise prince will not ignore public opinion about such matters as the distribution of offices. In his social contract Rousseau, too, dealt with public opinion as it relates to the democratic process. Many contemporary writers have also used the term. Yet its precise meaning is often unclear as its usage varies with each writer (Kousoulas 1982, pp 85-86). Put differently, the term does not lend itself to a precise definition despite the abundant literature it has inspired.

The precise meaning of the word 'public' or 'individual' is uncertain and has long been debated and public opinion creates quite a different type of confusion, a confusion which, according to Benson (1967/8, p 522), 'stems from the concept's moral implications'. In an attempt to emphasise the moral quality of opinion most scholars have restricted the meaning of the term 'public opinion' to collections of individual opinion measuring up to a 'certain standard of excellence'. However, what that standard is has never been ascertained. In a similar vein, Sanerwein (1983, p 29) has maintained that 'it is rather an exaggeration to pretend that there exists at the present time a "public opinion" in the intellectual sense, outside of

the elite'. The problem with this position is that it renders the masses politically irrelevant.

Another source of conceptual confusion is the tendency of some theorists to equate opinion with attitude. An 'opinion' usually connotes a position on specific political issues, while an 'attitude' represents a persistent general orientation towards some individuals, groups, institutions or processes, which does not necessarily result in a specific position on specific issues (Rodee, cited in Ojo 2004).

Although attitudes may help to shape opinion and each may be used as an indicator of the other, 'the complex inter-relationships between opinions and attitudes can perhaps be uncovered and disentangled after painstaking investigation, they cannot automatically be assumed, *a priori*, to take a particular form' (Newcombe, cited in Ojo 2004). Idang (1973, p 78) posits that people who hold similar attitudes to a particular political issue, for instance, may nevertheless have contradictory opinions on a specific public policy dealing with the issue. It is instructive to note that distinguishing between 'opinion' and 'attitude' is therefore more than a mere semantic exercise. Nevertheless, V O Key (1961, p 14) has offered a relatively popular definition of public opinion as 'those opinions held by private persons which governments find prudent to heed'.

The problem with this definition is the word 'heed'. How does one infer that an opinion expressed but not heeded by the government is not prudent? Indeed, the definition is too broad, as the barometer for determining prudence is not only obscure but vague. For Hennessy (1970, p 20), 'public opinion is the complex of beliefs expressed by a significant number of persons on an issue of public importance'. Scholars generally believe that public opinion is the collection of individual opinions on an issue of public interest and that such opinions can exercise great influence over individual and group behaviours vis-à-vis government policies.

For analytical simplicity more recent literature conceptualises public opinion as the opinion of a people, made up of different views or comments, including the sentiments of the citizenry. Some comments, says Bryce (cited in Kapur 2006, p 613)

develop more strength than others, because they have behind them large numbers or more intensity of conviction and when one is evidently the strongest, it begins to be called public opinion par excellence being taken to employ the views supposed to be held by the bulk of the people.

Public opinion is the opinion the people in general hold on questions of common

interest at a certain time. In a perceptive work Adebayo & Omotola (2007, p 203) state that 'an idea, a belief, or an image one has of reality as a result of how one sees or understands the reality, is coterminous with public opinion'.

The task of measuring public opinion is, therefore, a difficult one and must take cognisance of the basic attributes of a good public opinion poll. These include, apart from intensity and the social status of the respondents, the saliency of the opinion, defined in terms of its prominence or weight. Others include fluidity, that is, the adaptability of the opinion, its violability – how rapidly it changes, latency – visibility, and intensity – the strength of the opinion or the degree to which it is held (Ripley & Slotwick 1989, pp 49-50; Adebayo & Omotola 2007, p 204).<sup>1</sup> These criteria provide us with the benchmark against which to assess public perceptions of election petition tribunals in relation to the 2007 general election in Nigeria.

#### ELECTION PETITION TRIBUNALS: A SURVEY

The 2007 general election in Nigeria was reputed to be the most litigious in the country's history. Both local and international election monitors were unanimous that the election was greatly flawed. This finding is not unconnected with the fact that the conduct of the election failed to meet the minimum internationally acceptable standards, whereas an objective electoral process must meet certain criteria (Odhiambo, 2009).

Firstly, every eligible voter must have the opportunity to participate in the process. Secondly, an independent body should conduct the elections. Thirdly, each vote must carry equal weight, that is, one-person-one-vote. Further, the process must be transparent. Moreover, the result should reflect the number of votes that have been cast. Lastly, dissatisfied candidates must be given an opportunity to challenge the results before independent courts or tribunals. The absence of these key ingredients, or their presence in haphazard manner, makes it difficult for an election to be deemed free and fair (see Omotola 2009). The absence of most of these ingredients from the 2007 general elections led to unprecedented litigation that compelled Omotola (2009) in his perceptive work to describe Nigeria as operating a 'garrison democracy'.

We now turn to a brief survey of election petitions across the geopolitical zones of the country. One major observable phenomenon is that no zone of the

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1 For standards, see International Convention on Civil and Political Rights, GA Res 2200 (XXI) UN GAOR, 21st Sess Supp No 16 cat 52, UN Doc A/6316 (1966) 999 UNTS 171 (entered into force 23 March 1977) (ICCPR), Arts 2(3), Universal Declaration of Human Rights, UNGA Res 217 A. GAOR 3rd Sess, 183 plenary Mtg at 22, UN Doc A/810 (1948) \*UNHR, Arts 8 and 21. Also cited in Odhiambo 2009, p128.

country was immune from litigation after the conduct of the elections, which triggered off a serious succession crisis (see Ojo 2007, pp 14-32).

Beginning in the South-West zone, which comprises six states, Ademola Adeoye of the National Democratic Party (NDP), Muiz Akande of the People's Redemption Party (PRP) and Senator Isiaka Abiola Ajimobi of the All Nigeria Peoples Party (ANPP) contested the election of Governor Adebayo Alao Akala in Oyo State. However, the real legal fireworks erupted between Akala and Ajimobi. After ten months of legal battle the election petition tribunal sitting in Ibadan, Oyo State, gave its judgement on the petitions challenging the declared victory of Akala (*The Guardian*, 18 March 2008). Despite the lengthy litigation process the judgement did not go down well with the majority of voters in the state.

In Lagos State, Jimi Agbaje of the Democratic Peoples Alliance (DPA) also appeared before the tribunal because his picture was not on the ballot papers used in the poll. It did not take much time, however, before the tribunal validated the victory of the governor, Babatunde Fashola (*Tell*, 28 May 2007, p 27).

In Ekiti State, Kayode Fayemi, gubernatorial candidate for the Action Congress (AC), claimed that the Independent National Electoral Commission (INEC) erred in declaring Segun Oni of the People's Democratic Party (PDP), governor-elect, alleging that the election was fraught with irregularities and manipulation. The election petition tribunal agreed with the AC candidate and nullified the election, asking for a rerun, which again returned the PDP candidate. The ding-dong battle continues, with the AC candidate still asking for justice some three years after the election. Eventually Oni's victory was reversed.

In Osun State the scenario was dramatic. Rauf Aregbesola, the AC's gubernatorial candidate, in a 108 000-page petition, alleged massive rigging of the polls. His lawyers submitted to the tribunal six large bags containing the statements of witnesses and other documents in respect of their case. During the trial it was leaked to the public that the tribunal, led by Justice T S Naron, had compromised itself. An examination of Justice Naron's telephone records revealed that he had been in constant communication with Governor Olagunsoye Oyinlola's lawyer.

Virtually all the news media were awash with the report. When the tribunal delivered its judgement it was already tainted with bias in the eyes of the public. Predictably, the judgement favoured Oyinlola. Aregbesola appealed and the AC and its candidate petitioned the National Judicial Council (NJC) on the unethical conduct of the judge. The Court of Appeal ordered a retrial of the case *ab initio*. The litigation was resolved some three years after the election in favour of the AC candidate. The judgement was well received by the public.

In Ogun state Governor Gbenga Daniel of the PDP faced two aggrieved contestants – Dipo Dina of the AC and Amosun Kunle of the ANPP. The trial and



retrial dragged on until 2010, when Daniel's election was validated by the Court of Appeal sitting in Ibadan, Oyo State.

In Ondo State, Segun Mimiko of the Labour Party (LP) challenged Governor Olusegun Agagu of the PDP. The trial, which began in October 2007, ran until 2009, when Agagu was removed by the Court of Appeal sitting in Benin, capital of Edo State. This judgement, too, was considered to be courageous.

There were similar cases in the South-South zone of the country, which comprises six states. Adams Oshiomhole formally assumed office as governor of Edo State on 12 November 2008. His journey to Government House was made possible by the Court of Appeal's Benin Division, which upheld the 20 March 2008 verdict of the State Election Petitions Tribunal that he and not Oserheimen Osunbor had won the April 2007 gubernatorial election (*The Punch*, 13 November 2008, p 7).

The tribunal received 56 petitions and decided all the cases in favour of the respondents (*Nigerian Tribune*, 5 May 2008, p 6). For record purposes one may note that, after a long-drawn-out legal battle the Election Petition Tribunal in Asaba threw out the petition filed by Chief Great Ogboru (DPP) against the election of Governor Emmanuel Uduaghan of Delta State on the grounds that Ogboru had failed to comply with the statutory conditions for filing such a petition (*Nigerian Tribune*, 5 May 2008, p 6).

In the same zone the Court of Appeal, sitting in Calabar, Cross River State, upheld the election of Governor Godswill Akpabio of Akwa Ibom State, dismissing the appeal brought by the AC's gubernatorial candidate, James Iniama (*The Guardian*, 25 March 2008, p 4).

In the South-East zone, which comprises five states, the Court of Appeal in Port-Harcourt dismissed the appeals against the elections of Governor Ikedi Ohiakim of Imo State and his counterpart in Abia State, Theodore Orji. The petition against Ohiakim, which was filed by Chief Martins Agbaso of the All People's Grand Alliance (APGA), was dismissed in a leading judgement by Justice O Ariola (*The Punch*, 25 April 2008, p 1).

In North-Central zone, which comprises six states including the Federal Capital Territory (FCT), Gbenga Olawepo of the Democratic People's Party (DPP) in a lengthy process challenged the victory of Governor Bukola Saraki of the PDP in Kwara State (*Nigerian Tribune*, 21 February 2008, p 8). The battles of the governorship candidates did not divert those of aggrieved candidates in the April elections for the Senate and the House of Representatives.

Also in Kwara State, for example, Biliki Sulu Gambari, the AC's National Assembly candidate, claimed to have been denied justice and wanted the tribunal to annul Gbemisola Saraki-Fowora's victory (*Tell*, 28 May 2007, p 27). In Benue State the election petitions tribunal annulled David Mark's election as senator

representing the Benue South Senatorial District after Usman Abubakar, candidate for the ANPP, contested Mark's victory in Okpovu and Agatu, two of the nine local government areas that make up the senatorial district, where he claimed the results were cancelled due to electoral malpractices (*Tell*, 10 March 2008, p 21). Mark appealed the judgement and his election was later validated, but his victory was seen as the result of interference by the powers-that-be.

The Kaduna State elections petition tribunal received about 19 petitions from aggrieved candidates in the 2007 polls (*The Guardian*, 25 May 2007). Also in the North-West zone, Aliyu Wamakko's election as governor of Sokoto State was nullified by the Court of Appeal sitting in Kaduna on the grounds of improper nomination – the person who had won the party primaries was another person altogether, but Wamakko was fielded as the party's nominee, which contravenes the provisions of the Electoral Act of 2006. While Wamakko lost his seat his counterpart in nearby Kebbi State, Usman Bakingiri, retained his.

In Adamawa State, which falls under the North-East zone, the Court of Appeal ordered a fresh gubernatorial election (*The Guardian*, 11 March 2008, p 9).

The presidential election, too, did not pass unchallenged. General Muhammadu Buhari of the ANPP and Atiku Abubakar of the AC challenged the victory of President Umaru Yar'Adua of the PDP and it was about eight months before the presidential election petition tribunal validated the victory of Yar'Adua as president and Goodluck Jonathan as vice-president.

There were many more cases of challenges, which will not be covered in this article, but there is no doubt that the 2007 general election was the most fiercely contested in Nigeria's history.

## PUBLIC PERCEPTIONS OF THE ELECTION PETITION TRIBUNALS

A number of observations can be made about the way the above cases were handled and the nature of the judgements. The salient ones made by members of the public revolve around three key issues. First, as correctly observed by Mohammed Haruna (*The Nation*, 5 March 2008, p 48), the courts not only refused to take judicial notice of '... these and other attempts by the authorities to fix the elections, they dismissed the opposition's petitions as "miniature complaints"! Yet, there were fundamental flaws in the very foundation of the elections.'

This perception is probably a response to the handling of the gubernatorial election petition in Oyo State. During the conduct of the election there was unprecedented violence in the state. During the tribunal's sitting in Ibadan 20 guns 125 cartridges, 41 cutlasses, one axe, one iron glove, six bundles of charms and amulets, 72 voters' cards and ballot boxes were among exhibits tendered by

Taiwo Lakenu, an assistant commissioner of police (*Nigerian Tribune*, 6 September 2007, p 1).

Ironically, despite all this evidence, the tribunal ruled that the petitioner – Senator Isiaka Ajimobi, the ANPP gubernatorial candidate in the election – had not proved beyond reasonable doubt that the election violated the provisions of the Electoral Act, particularly the provisions of s 136, which concerned violence.<sup>2</sup>

In addition, while the cases in Oyo and Edo states were similar, the judgements were quite different, with the result in Edo State being overturned while that in Oyo State was upheld.

Another factor that must influence public perceptions is the allegations of rampant corruption against tribunal and appeal panelists. Newspapers and news magazines were full of shocking details of attempted and even successful bribery of judicial officers presiding over election matters (*The Guardian*, 10 September 2008, p 18). Lending credence to these allegations *The Punch* reported that some of the election petitions tribunals might have compromised their integrity, as in two states a whopping N2.3-billion was allegedly paid to pervert justice.

Among the allegations was that about N1.5-billion had been paid into bank accounts for certain tribunal members in one of the states in the South-South geopolitical zone. In addition, N800-million was allegedly paid into a bank account for tribunal members in one of the states in the North-West zone. The allegations of graft coincided with a communication from the House of Representative Committee on Justice to the Nigeria Bar Association (NBA) soliciting its partnership in maintaining the sanctity of the judicial process.

Though the states and identities of the judges involved in the scandal have not been established, according to *The Punch* (4 April 2008) bank statements showing how the N2.3-billion was lodged were attached as evidence to petitions sent to appropriate institutions. As though tacitly corroborating media reports of corruption the president of the Court of Appeal, Justice Usman Abdullahi, accused politicians of using various means to tilt justice in their favour.

The allegations were so rife that judges were refusing to handle election tribunal matters because of harassment by politicians. For this reason, Justice Abdullahi had to preside personally over the Court of Appeal panel that handled the Edo State governorship tussle (*The Punch*, 13 November 2008). There is no doubt that the Nigerian judiciary is a reflection of societal rot, whereas,

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2 Section 136 (Offences on election day) sub-section (1) of the Electoral Act 2006 states that no person shall on the date in which an election is held do any of the following acts or things in a polling station or within a distance of 300 metres of a polling station:

(f) be in possession of any offensive weapon or wear any dress or have any facial decoration which in any event is calculated to intimidate voters.

an independent and corruption-free judiciary is a *sine qua non* for democratic sustenance and consolidation (see Ojo 2003, pp 294-311; Davies 1990; Ojo & Adebayo 2009, pp 1-26).

The third worrying issue to have emerged from the litigation process is not unconnected with unwarranted delays in the adjudication of cases and uncertainty about the law owing to conflicting judicial pronouncements in similar cases and in the face of similar evidence (*The Guardian*, 10 September 2008, p 18). It is almost beyond dispute that even the most dogged and painstaking jurist would have problems detecting and making sense of the legal reasoning behind some of the decisions by the various divisions of the Court of Appeal. There is 'neither rhythm nor rhyme to the ratio of the decisions of the appellate court' (*The Guardian*, 10 September 2008, p 18).

This was the case, for instance, in respect of the appeal judgements relating to the governorship elections in Sokoto and Kebbi states on the one hand and Enugu State on the other. Add to the mix the decision in the senate president's petition in Benue State. What has emerged is 'an uncomplimentary image of a Yoyo Court of Appeal' commented *The Guardian* (10 September 2008, p 18), adding that 'this has in turn put the judiciary on trial in the court of public opinion'.

On the other hand, the unwarranted delays in disposing of election disputes – trial and appeal – are as exasperating as they are ridiculous. It is scandalous that close to three years after the presumed winners of the May 2007 elections were sworn in, the election petitions tribunals and the courts were still inundated with petitions. The late President Yar'Adua observed that the distractions 'for smooth governance and delivery of the dividends of democracy' caused by this anomaly 'are better imagined'. He was not aware of any other country 'where litigations arising from elections drag on for years after presumed winners have been sworn in' (*The Punch*, 20 November 2008, p 14).

Yar'Adua regretted that, 'while the electoral law puts a firm ceiling on the period within which electoral petitions must be filed, the same law does not put a similar ceiling on when such cases must be concluded' (*The Punch*, 20 November 2008, p 14). Without doubt, the impact of these obvious anomalies on the nascent democratic project since 1999 is enormous. In 2003 Chris Ngige took office unlawfully as the governor of Anambra State and remained there for more than two years before the Court of Appeal invalidated his election. In Edo State Osekheimen Osunbor was installed instead of the rightful winner for more than two years before Adams Oshiomole was inaugurated in 2009. The political uncertainty, confusion and waste of public funds are unfortunate and point to the serious flaws inherent in the 2006 Electoral Act.

Yet Nigeria was once able to decide all election cases far ahead of inauguration ceremonies. For instance, s 177(3) (a) and (b) of the Electoral Decree

No 73 of 1977 that delivered the 1979 elections provides that election petitions in respect of the office of the president and vice-president shall be completed not later than one month from the date of the election and that petitions relating to other elections must be disposed of not more than two months from the date of the elections and s 118 says 'any appeal to supreme court must be filed not later than 14 days from the date of the decisions of the election petition tribunal, and the decision of the supreme court in the appeal shall be given no later than 14 days from the date on which the appeal was filed'. The anticipated electoral reforms should take care of these problems because to allow an unelected person to stay in office even for one day is the worst form of corruption.

### CONCLUSION: THE WAY FORWARD

The judiciary is long overdue for a general overhaul if it is to deliver in a democratic dispensation. Society is a mirror of the kind of judiciary it gets and with pressure on Nigeria to attain minimum international standards with regard to the conduct of elections, both the Bar and the Bench must be sanitised so that the third estate of the realm is braced for the challenge ahead. To do this, members of both the Bench and the Bar must be attuned to the reality that a corrupt judiciary cannot be a catalyst for democratic sustenance.

An ideal judiciary is one whose personnel are above board as regards moral rectitude. The strongest recommendation of this article is that government must be seen to be maintaining discipline so that judicial officers who are found to be wayward can be thrown out of the system. It is also imperative that because of the crucial role the judiciary is expected to play in administering justice, its personnel must be well remunerated to dissuade them from yielding to temptation.

The courts are in dire need of modern facilities and an environment conducive to speeding up the pace of dispensation of justice, which is currently at its lowest ebb (Ojo 2000, p 12). In the words of William Gladstone, 'justice delayed is justice denied'.

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# THE JUDICIARY AND THE SURVIVAL OF DEMOCRACY IN NIGERIA

## *Analysis of the 2003 and 2007 Elections<sup>1</sup>*

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### ABSTRACT

*For many Nigerians, and indeed in the eyes of most foreign observers of Nigerian affairs, the restoration of democratic rule in Africa's largest country in May 1999 has brought little or no change in the politics of this vast nation of 150-million people. Corruption, electoral malpractice and political violence, the usual causes of governmental instability, have remained intractable despite a deluge of reform initiatives. Yet, as this article will show, while the benefits of most institutional reforms have been difficult to measure, there has been significant progress in a few other key areas of national political life. One of them is the relatively successful reform of the judiciary, which has led to the institution's gradual emergence as a courageous and impartial arbiter in intra-elite electoral disputes in this chronically unstable federation. The transformation of the judiciary is amply demonstrated by the large number of judicial pronouncements that have upturned the results of several flawed elections and restored to office elected officials, such as state governors, wrongfully removed from their positions. This article argues that these decisions and the new activist role of the judiciary which produced them have, in many ways, helped to reinforce the role of the judiciary as a vital instrument of political control and democratic stabilisation and by so doing have helped to prolong the life of Nigeria's Fourth Republic.*

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## INTRODUCTION

On 29 May 2009 Nigerians from all walks of life trooped out in their millions to mark their country's tenth year of uninterrupted democratic rule. This was no mean feat. During many of the past 49 years Nigeria's political history had been dominated by fraudulent elections, violent political conflict and military coups. The country's two previous attempts at civilian-to-civilian transitional elections (1960-66 and 1979-83) were both dogged by allegations of massive fraud and violence, before they were cut short by military coups (Lewis 2003).

As soon as the results of these elections were announced defeated political aspirants rushed to denounce them, while manipulating their political thugs and supporters to unleash violence and mayhem on their perceived opponents. When such tactics failed they issued open invitations to the military to seize power and disband all democratic structures, as a way of punishing their rivals. Thus, despite open professions of commitment to the idea of democracy, elections and political power were perceived as do-or-die affairs. The practice of resorting to the law courts to resolve electoral or political disputes was thought to be a fruitless venture, especially where the courts were perceived to be biased in favour of incumbents.

Since the return to democratic rule on 29 May 1999, however, some major behavioural shifts seem to have occurred among Nigerian politicians. While some continue to practice violence and political thuggery many others now prefer to use judicial channels to resolve their conflicts. More importantly, these politicians are also learning to accept the decisions of the courts as final, whether or not they are in their favour.

These radical changes spring largely from transformation within the judiciary itself, which has, since 1999, been encouraged to play an increasingly assertive role as a courageous and impartial arbiter in the country's democratic politics in general and its electoral disputes more specifically. The clearest evidence of this fact is the increasing number of judicial decisions that have upturned the results of several rigged elections, mainly in favour of opposition parties or individuals opposed to the federal government, led by the Peoples Democratic Party (PDP). The transformation of the Nigerian judiciary has also been underlined by some other judicial pronouncements which restored state governors wrongfully removed from office in the course of disagreement with the federal government or political godfathers.

While acknowledging that there have also been controversies over some cases handled by the judiciary, especially in terms of contradictions between the pronouncements of the lower and higher courts on similar or identical cases, which, in some cases, may not be unconnected with the corrupt tendencies of

some judges, this paper argues that as a result of the decision of many Nigerian politicians to embrace the judiciary as a reliable arbiter of political conflicts the courts are indeed becoming an instrument of democratic advancement and stability in the Fourth Republic. In a nutshell, therefore, this article discusses the factors responsible for the change in the attitude of the Nigerian political class and courts and the extent to which the change has contributed to stabilising politics and democracy since 1999.

The analysis begins with a historical review of the Nigerian judiciary before 1999. That is followed by a summary and discussion of recent reforms in the judiciary, which, we believe, are at the root of these changes. The following section reviews the political consequences of these reforms in terms of the judiciary's involvement in democratic stabilisation. This is done through a review of some selected landmark cases arising from the 2003 and 2007 elections. The conclusion presents a brief summary of the findings of the study.

#### THE JUDICIARY IN THE PRE-1999 ERA: AN OVERVIEW

The stability and quality of a democratic constitution is often determined by the degree of importance a society attaches to the judiciary and the powers it gives to it (Mbanefo 1975). This can be measured in several ways. The first is whether the judiciary is independent, that is, if it is not beholden to any special interest or to either of the other two arms of government (executive and legislature).

As Davies points out, the independence of the judiciary is desirable in any organised society that cherishes the idea of the rule of law and human freedom and, in order to ensure this, the appointment, promotion and dismissal of judges are usually placed in the hands of a neutral body such as a national judicial commission whose members are paid through a special fund (Davies 1990). The competence and integrity of the Bench is the second criterion. Judges must be competent, learned and of high integrity in order to command universal respect and approval.

A third factor is the availability of adequate facilities and personnel, that is, whether there are sufficient judges and courts to meet the needs and demands of the public (Davies 1990).

All indications are that before 1999 Nigeria's judiciary was not defined by any of these factors. While a detailed analysis of the character and operations of the judiciary before 1999 is beyond the reach of this chapter, the point can still be made that the Nigerian bench before that time was beset by a number of challenges (Oko 2002; 2005). One of the key challenges was the lack of independence arising from the judiciary being tied to the apron strings of the executive arm

of government, which, by a variety of means, including the process of selecting judges (appointments, promotion and conditions of service) and the deft use of pliable judges to execute unpopular agendas, made the judiciary more or less the government's rubber stamp (Otteh 2004; Nwabueze 1992).

A second problem was the credible evidence of widespread sectional bias and corruption within the bench (Federal Republic of Nigeria 1994; 2003). These shortcomings, and many others, notably the issue of inadequate judges and the inability to deliver judgements in good time, encouraged potential litigants to seek out extra-constitutional means of securing justice (UNODC 2003; 2004). For instance, during the first (1960-1966) and second (1979-1983) republics several appeals or election petitions brought before Nigerian courts by aggrieved political aspirants ended in controversial decisions (Abdul-Razaq 2005). These helped to stoke political violence and, ultimately, bloody military interventions.

Under this arrangement the capacity of the judiciary to mediate in conflicts, especially election disputes and, by so doing, to help maintain democratic stability, was increasingly undermined. As a number of studies will show, these problems were later compounded by Nigeria's long experience with military dictatorship (Nwabueze 1992).

Beyond its inability to mediate conflicts, the neglect and politicisation of the judiciary transformed this important institution in several other negative ways.

One of these was that the judiciary became an anti-democratic institution. That is to say that, contrary to its democracy enhancing role, it became a potent tool for undermining democracy and fostering authoritarian rule (Davies 1990) to such a degree that it has been blamed for the collapse of the second and third civilian republics.

During the Second Republic, for instance, petitions emanating from the two general elections held during the period flooded the courts and elections tribunal (Olurode 1990). But rather than do justice to these petitions the courts appeared bent on ensuring the status quo and not disturbing the balance of political power among the various contenders (Unobe 1990). Frustrated by the courts, several politicians resorted to calling on the military to intervene. This call was eventually heeded on the night of 31 December 1983, when the military struck, putting an end to Nigeria's second civilian regime.

Similarly, the annulment of the 12 June 1993 presidential election, which was supposed to have concluded the transition to Nigeria's Third Republic, was facilitated by the inglorious role of the judiciary. The drama began when Justice Bassey Ikpeme of the Abuja High Court granted an interim injunction stopping the conduct of the presidential polls. This order came only two days before the election and was given despite an existing law barring the courts from entertaining suits relating to the elections. More importantly, the ruling was in response to a

suit instituted by the Association for a Better Nigeria (ABN), led by a controversial politician, Arthur Nzeribe, who was a well-known advocate of military rule.

Although the National Electoral Commission (NEC) disobeyed the ruling on the grounds that Section 37 of the Transition to Civil Rule Decree ousted all court rulings on the conduct of an election, the action of the courts gave then military ruler, General Ibrahim Babangida, sufficient reason to annul the elections (Agbo 2008).

From the above it is clear that Nigeria's pre-1999 judiciary did not enjoy a smooth course as a democracy enhancing institution. Instead it was often caught in contradictory trajectories between vulnerability in practice and independence in theory. These developments, as Omotola argues, may not be unconnected with the prebendal character of the Nigerian state, prolonged military rule, and the attendant weak institutionalisation of democratic political institutions and culture (Omotola 2007c).

#### THE 1999 TRANSITION AND THE TRANSFORMATION OF THE JUDICIARY

Soon after Nigeria completed her transition from military to civil democratic rule in May 1999 its judiciary became enmeshed in a gigantic corruption scandal which culminated in the sacking of several senior judges. Between 1999 and 2004 alone at least five senior judges were dismissed for corruption and abuse of power, following investigations by the National Judicial Council (NJC) (*Newswatch*, 9 February 2004).

The increasing corruption among Nigerian judges, including judges of superior courts who were thought to be relatively immune from graft, immediately became an issue of national concern. Yet these developments could not obscure the improving level of independence and integrity of Nigerian courts and judges, which had suffered greatly under the country's preceding military regimes (Otteh 2004; Nwabueze 1992; Oko 2005; Federal Republic of Nigeria 2003). Indeed, one can reason that many of the sanctions (suspension and dismissal) applied against corrupt judges since 1999 had been the result of specific reform initiatives which have converged to take the judiciary from its position of relative political obscurity at the beginning of 1999 to one of national prominence by the end of 2009.

Three of these reform initiatives are worthy of more detailed mention. The first relates to some unique provisions introduced by the 1999 Constitution, especially those providing for the establishment of two independent regulatory institutions, the NJC and the Federal Judicial Service Commission (FJSC). Chapters 20(a) and 21(a) of the Third Schedule of the Constitution empower the NJC to investigate judges accused of wrongdoing and recommend appropriate sanctions

to the president and commander-in-chief of the state governors in the case of a judge of a state court. The body is also charged with recommending judges for appointment and promotion and enforcing the procedures laid down for judges, especially the Code of Conduct for Judicial Officers of the Federal Republic of Nigeria.

Similarly, judges are to be appointed by the president, not only subject to Senate confirmation but also on the basis of the recommendation of the NJC, which, itself, receives advice or nominations from the FJSC. According to s 158(1) 'the National Judicial Council shall not be subject to the discretion or control of any other authority or person' (Federal Republic of Nigeria 1999). The FJSC, on the other hand, oversees the general welfare of members of the judiciary. In order to guarantee their independence the composition of both bodies is largely independent of the executive and legislative arms of government. Thus, both institutions are headed by the chief justice of Nigeria (CJN) and comprise some of the most senior members of the Nigerian Bench and Bar, plus some representation from outside the legal profession. As Suberu (2008) observes aptly, despite criticisms that these bodies represent an assault on Nigeria's federal system they have, since 1999, functioned relatively well to promote judicial independence and integrity.

The second source of transformation came from the judiciary itself, in terms of the personal commitment of successive CJNs, notably Justice Mohammed Uwais, who was the country's chief justice from December 1995 to June 2006 (Suberu 2008). Throughout his tenure Justice Uwais was committed to the idea of judicial integrity and independence. For instance, under his leadership Nigerian judges adhered substantially to both the Code of Conduct for Judicial Officers of the Federal Republic of Nigeria, a nationally prescribed code, and the Bangalore Principles of Judicial Conduct of 2002, an international judicial code of which the Nigerian judiciary, under Chief Justice Uwais was one of the major initiators. As a consequence, Nigeria participated actively in all the stages leading to the adoption of the code in April 2000 in Vienna. Justice Uwais also embraced the numerous administrative reforms championed by some international bodies (UNODC 2003b), in collaboration with the rest of the leadership of the judiciary, which helped to raise the integrity and efficiency of Nigerian courts.

The third factor that enhanced the transformation of the Nigerian judiciary was the unprecedented vigilance and heightened awareness of the public, especially court users (lawyers and their clients), civil society groups, human rights advocates, democracy activists and politicians, particularly those from the opposition parties. Taking advantage of the current liberal political and constitutional environment these groups have increasingly monitored the activities of judges and have, in many instances, raised the alarm when traces of corrupt practices or abuse of powers were found. Consequently, some of their petitions have led to the launching



of several investigations, many of which culminated in the retirement or outright dismissal of scores of judges. As is to be expected, most of these retirements related to matters involving election petitions (Enweremadu 2006).

How, then, did these three factors interact to take the judiciary from a position of relative political obscurity at the beginning of 1999 to one of national prominence a few years later? How did the changed role of the judiciary contribute to the stabilisation of democracy? In our view, one way of answering these questions may be to look at the role of the judiciary in the management of some key post-election disputes and the resultant changing attitudes of Nigeria's political class towards the courts and the legal process.

The analysis presented here is structured in two parts. The first focuses on the judicial review of some election and political disputes that followed the 2003 vote. The second examines the judicial resolution of selected electoral disputes traceable to the highly disputed 2007 general elections. During the period under review (1999-2009) Nigeria held three national elections (1999, 2003 and 2007). All electoral or political disputes emanating from the military-supervised 1999 transitional election are excluded from our analysis because of their less polarising nature and the limited role played by the judiciary during and after the vote.

### THE JUDICIARY AND THE 2003 ELECTION

Although the prospect of a general election has always been a source of panic in Nigeria the stakes in the 2003 election were particularly high. There were three reasons for this. The first was that a successful election would represent Nigeria's first civilian-to-civilian transition, potentially leading to the longest period of civilian democratic rule in the country's history. Secondly, successful conduct of the elections, it was thought, would permit Nigeria to consolidate its rising diplomatic profile and the economic clout made possible by its return to the committee of democratic nations and its soaring oil revenues. Thirdly, and perhaps most importantly, in a decentralised political system victory in the elections, especially the gubernatorial elections, held the possibility of increased access to massive financial resources, especially for would-be governors of the nine oil-rich Niger Delta states, who looked set to profit from the sharp increase in the international price of crude oil and the decision of the federal government in early 2000 to begin to implement existing constitutional provisions on derivation, requiring the payment of 13 per cent of all oil receipts to oil producing states in relation to their productive capacities (*The Sun*, Lagos, 8 May 2006).

But the assumed importance of an election will not, on its own, translate into success. In the case of the 2003 elections success depended on a number of other factors. One was whether political parties and their candidates would



live up to the 'Code of Conduct for Political Parties', eschew political violence and intimidation and commit to open and fair campaigning (Jeter 2003). More importantly, success also depended on the capacity and willingness of the managers of Nigeria's electoral system, especially the Independent National Electoral Commission (INEC), to deliver a relatively clean, that is, free and fair election. This implies an election whose outcome is such that most participants will perceive the results as reflecting the wishes and aspiration of the voters and that, where this is not the case, there is a capable and honest judiciary to attend to the grievances of the losers.

The 1999 Constitution provided for judicial outlets for the resolution of such grievances, which, as indicated above, have been complemented by institutional reforms aimed at insulating the judiciary from politics and political influences, as well as the decision to retain existing safeguards against the ethnicisation of the legal system.

Although Nigeria is a federal state its judicial architecture remains unitary in nature. Depending on the issue at stake appeals typically emanate from the magistrates, customary and sharia courts, or from the Federal High Court, State High Court, State Customary AC and State Sharia Court Of Appeal. They then go on to the Federal AC, before terminating at the Federal Supreme Court.

All election complaints, except those pertaining to a presidential election, must first be heard by State Election Petition Tribunals (SEPTs), to be constituted by the president of the Federal AC and established in all 36 state of the federation. Petitioners who are dissatisfied with the decisions reached by the SEPTs can appeal to the Federal AC, which has the final say in all matters relating to all elections, except presidential elections. Petitions relating to presidential elections, on the other hand, will first be heard by the Presidential Elections Tribunal (equivalent to a federal AC) sitting in Abuja. Further appeals will go straight to the Federal Supreme Court, which is the highest court in the land. Both courts are to be constituted by the chief justice of the federation. While this judicial structure may reflect the centrist proclivities of its military promulgators (Suberu 2008), the important point, as we shall see in our analysis of some of the most important petitions brought before the courts after the 2003 elections, is that it has worked relatively well to secure the neutrality and independence of and respect for the judiciary.

### *Stormy preparations and a flawed election*

Arrangement for the epic elections of 2003 began several months before voting day in April. In total 64-million voters were registered at some 120 000 polling booths (Obassa 2003). Additional political parties were also registered, taking

the number from just three in 1999 to 30 in 2003 (Aderibigbe 2001). This greatly expanded the political space and increased competition, but, at the same time, it fragmented the political class and opened new channels for potential conflict. Several months before the elections INEC began to put the necessary logistics in place. But despite all these efforts the elections were marked by violence, including high-profile political assassinations, thuggery and constant harassment of political opponents, especially during the run-up (Ologbenla 2003).

The 2003 elections brought a number of new challenges. Firstly, the sheer number of political aspirants and parties participating meant there was bound to be an extremely high number of post-election petitions. Secondly, unlike the 1999 transitional election supervised by a departing military regime, which, itself, was not a direct participant, almost all the candidates at all levels in the 2003 elections were incumbents running for re-election.

The result was that the propensity to engage in electoral fraud would probably be particularly high and the judiciary, especially the judges who were scheduled to hear election petitions, were likely to come under unprecedented pressure to deliver 'politically' correct judicial decisions. Another source of worry was doubts about the capacity of INEC to cope with the political and logistical challenges involved in organising both federal and state elections.

In a bid to dampen tension and ensure a more manageable election INEC decided to stagger the elections. All legislative elections were fixed for 12 April, while presidential and gubernatorial elections were reserved for 19 April. The dates proposed by INEC coincided with the Easter holidays, sparking calls for the elections to be postponed. Indeed, one political party went to court, seeking to compel INEC to postpone the elections. The court ruled that such a postponement would be incompatible with both the Constitution and the 2002 Electoral Act, which stipulated that elections must be held at least 60 days before the expiry of the tenure of elected officials. The strategy adopted by INEC and its doggedness paid off. The elections proved less violent than widely expected. Despite this, INEC's efforts were not sufficient to make the vote credible or acceptable.

Like previous Nigerian elections the 2003 poll was characterised by massive vote-buying, ballot-box stuffing and intimidation of voters. A number of new forms of irregularity emerged. One of these was changing the names of candidates on party lists submitted to INEC in Abuja, replacing them with those of individuals who had neither won primary elections within their political parties nor were known to be candidates. The result was that individuals who had not even stood in the election were declared elected (Ogunsanwo 2006). While all the parties were involved in such acts the PDP led the field.

A second challenge arising from the conduct of the 2003 election was the outbreak of potentially destabilising intra-elite disputes, such as disagreements

between some elected officials and their godfathers (ie, financiers) over the modalities for sharing power and, by implication, public resources, as well as the attempts to employ the then fledgling anti-corruption programme as a tool for the elimination of political rivals.

As the date set for the 2007 elections approached these conflicts assumed even more dangerous dimensions, as the Constitution was routinely ignored by some of the key actors in their desperate bid to bring down their perceived political enemies. In many states political disputes escalated into impeachment proceedings launched against several embattled state governors. The task of righting some of the wrongs of the severely flawed 2003 election, as well as resolving the disputes emanating from the attempted removal of elected officials without recourse to guidelines set out in the Constitution, ultimately fell on the shoulders of the judiciary, now seen as the last hope of the politically oppressed.

#### THE SPECTRE OF INTRA-ELITE DISPUTE: THE JUDICIARY AS MEDIATOR

The scale of malpractices observed during the election was confirmed by the number of complaints to the judiciary that arose from the elections. In all, 527 petitions were received in respect of the 2003 elections (*The Punch*, 10 February 2009), covering all categories of elections. A number of lawsuits were also lodged with the various courts over the legality or otherwise of the procedures adopted in seeking to effect the removal of some elected officials, notably state governors, in several key states. The question on every tongue was whether the judiciary was sufficiently prepared to act to save Nigeria's democracy by upholding justice and rule of law? Or would it, as in the past, side with the highest bidder and the powers that be?

As it turned out, the courts were well disposed to use their powers to help advance justice and democracy. Thus, while most of the petitions brought before the courts failed, mainly for lack of evidence (*The Guardian*, 10 July 2004) and there were serious levels of corruption among some Nigerian judges, notably judges of the lower courts, a few landmark decisions were taken by the higher courts which tended to suggest that Nigeria might have entered a new era of judicial independence and preeminence. Three cases were particularly important.

#### *The governorship elections in Anambra State: Governor Chris Ngige vs Peter Obi*

The election in Anambra state was officially won by the ruling PDP, which also controlled the state from 1999 to 2003, under former governor Chiwonke

Mbadinuju. The party's flag-bearer in that election was Chris Ngige. Mbadinuju lost the PDP ticket for re-election in 2003 to Ngige after falling out with his local godfather, Sir Emeka Offor, and the leadership of the party, based in Abuja. But the new PDP governor, Chris Ngige, had himself been sponsored by a local godfather, Chris Uba, a multibillionaire businessman with strong links to Abuja. Thus, soon after his inauguration in May 2003, Ngige, like Mbadinuju, faced several challenges to his position.

These challenges initially came from Ngige's self-proclaimed godfather who, vexed by his increasingly independent approach to governance, tried unsuccessfully to kidnap him and force him out of office (Ologbenla 2003). Ngige will face an even more daunting challenge from his closest rival in the governorship race, Peter Obi of the APGA. Obi filed a petition with the Anambra State Elections Petition Tribunals (ASEPT) immediately after the 2003 elections, challenging the purported victory of Chris Ngige. His argument was that he and not Ngige had won the election. While Obi's petition was being considered Ngige's godfather confessed that he had helped Ngige rig the 2003 governorship election based on a pact between the two former allies. Ngige himself gave interviews suggesting he was not very confident of his election. In one he said:

If we are taken to the tribunal we shall also cross swords with them because we have evidence of electoral malpractices against them. We are trying to carry out a cross litigation if Peter Obi fails to accept our right hand of fellowship. But if he keeps quiet we will extend our right hand of fellowship to him and ask him and the rest to come over. Otherwise my simple advice is that those who live in glasshouses should not throw stones.

*The Guardian*, 7 June 2003

The fraudulent nature of Ngige's victory was, therefore, never in doubt. Nor was the tendency towards the criminalisation of politics in Anambra State, brought about by the phenomenon of godfathers in Nigerian politics. The problem of godfathers was not unique to Anambra State. It had taken hold in several Nigerian states (Omotola 2007a), had become a popular topic for academics, and was widely debated in the media. But curiously nothing was done about it. In the case of Anambra State the problem could only be corrected by a court (the ASEPT), which, on 12 August 2005, after nearly two years of hearings, overturned INEC's decision and declared Peter Obi the authentic winner of the 2003 Anambra gubernatorial election. This decision would later be upheld by the Court of Appeal (CofA), thus putting a stop to all the desperate attempts by some godfathers within the PDP to take over Anambra State at all costs.

*A tainted impeachment:  
Governor Rashidi Ladoja vs Oyo State House of Assembly*

Apart from the issue of godfathers another defining feature of the Obasanjo presidency (1999-2007) was the constant friction between the legislature and the executive at all levels of government, manifesting in several cases of impeachment. As with godfather related conflicts these legislature-executive frictions were usually rooted in the personalisation and monetisation of politics.

The Oyo case, arguably one of the most controversial, was triggered on 12 January 2006 when the elected governor of Oyo State, Rashidi Ladoja, was impeached by the Oyo State House of Assembly, dominated mainly by legislators from his own PDP, and was immediately replaced with his deputy, Christopher Alao-Akala. Before his impeachment Governor Ladoja was locked in a mortal power struggle with a local power broker and his own godfather, Lamidi Adedibu, who enjoyed the loyalty of most members of the state assembly. Thus, even though Ladoja's removal was premised on specific allegations of corruption and abuse of office, in reality, the fight, like that between Ngige and his godfather, Chris Uba, in Anambra State, actually centred on the modalities for sharing public offices and resources, as agreed during a pre-election pact (Omotola 2007c).

Even though Ladoja's impeachment was not the first under the Fourth Republic – in 2005 Governor DSP Alamieyeseigha of Bayelsa State had been impeached by the Bayelsa State House of Assembly after jumping bail in Britain, where he was facing charges of money laundering – he decided to challenge the move before an Oyo State High Court sitting in the city of Ibadan. After hearing his appeal the lower court upheld the impeachment, forcing him to file an appeal to the CofA in Ibadan.

On 1 November 2006 the CofA nullified his impeachment and ordered that he be reinstated immediately. The court held that the impeachment process was illegal and unconstitutional and was therefore null and void.

In the opinion of the court the process was faulty on several counts – the legislators had sat in an hotel rather than in the State House of Assembly, the notice of impeachment had been delivered through the newspapers, only 18 not 22 legislators had been present, an affidavit of suspension had been unavailable, the time-frame of the process was flawed and the High Court did not have jurisdiction. Thus, here, as in the case of Anambra, the courts were true to their democracy-enhancing role.

*Impeachment by a minority:  
Governor Joshua Dariye vs Plateau State House of Assembly*

Like that in Oyo State the case in Plateau State involved the reinstatement of

an elected governor, who was wrongful removed from office midway into his tenure. The matter began on 2 September 2004, when Governor Joshua Dariye of Plateau was arrested in London by agents of the London Metropolitan Police on suspicion of money laundering. On the basis of this and other allegations made against Dariye, the Economic and Financial Crime Commission (EFCC), one of Nigeria's anti-corruption agencies, opened an investigation into the matter.

When Dariye was indicted the EFCC began prosecution in a Kaduna High Court but the process was halted when the court ruled that Dariye, like the other 35 state governors, enjoyed constitutional immunity from arrest and prosecution while still in office. In response, the EFCC decided to turn his file over to the Plateau State House of Assembly (*The Guardian*, 15 December 2005), which was constitutionally empowered to impeach the governor. When this move failed (a majority of the 24-member Plateau legislature threw their support behind the governor), many of the Plateau lawmakers were accused of corruption and picked up by the EFCC for questioning. In the confusion that followed the house could not sit for several weeks as it was unable to form a quorum. The state became ungovernable and the parties to the conflict traded accusations and counter-accusations.

In 2006 six members of the Plateau State House of Assembly, prodded by the EFCC, met at an undisclosed location and announced that they had impeached Governor Joshua Dariye, who, at the time, had already gone into hiding for security reasons. This decision was obviously a violation of the constitutional provision on impeachment, which provides that a governor can only be impeached by a two-thirds majority of all assembly members. Yet such a flagrant constitutional breach did not invite any significant response from the presidency, which is well known for its own numerous constitutional violations (Omotola 2007c), suggesting that the action had a wider political dimension.

Indeed, as was the case with the earlier impeachment of Governor Alamieyeseigha (an exercise that was also orchestrated by the EFCC and the federal government), the impeachment of Mr Dariye was widely interpreted as a political move intended to punish a governor who refused to support the 2003 re-election bid of President Olusegun Obasanjo, or allied himself with Obasanjo's arch-rival, Vice-President Atiku Abubakar.

Convinced that the motives for his impeachment were political and unconstitutional Dariye filed a suit before a high court located in Jos, the capital of Plateau State, challenging the legality of the procedure followed by the six lawmakers. Again, like Governor Ladoja of Oyo State, Dariye was ultimately restored to power by the CofA, which found that his impeachment had not strictly followed the procedures laid down in the Constitution (Ajanaku 2007). In this case, again, we can clearly see how the judiciary is helping to stabilise democracy



and promote the rule of law. It is particularly instructive to note that since the Plateau saga no attempt to remove an elected governor has succeeded.

### THE JUDICIARY AND THE 2007 ELECTION

If the phenomenon of unlawful impeachment has been largely discouraged by the prompt intervention of a vigilant and resolute judiciary the question of politicians rigging their way to power through fraudulent elections remained a challenge in 2007 and beyond. The deluge of electoral petitions that followed the 2007 elections showed that the role of the judiciary as a credible mediator in political disputes will, in the years to come, remain vital.

The divisive nature of the 2007 vote is partly explained by the high stakes involved in the election. Like the 2003 election the 2007 election was viewed as a landmark, partly because if it was conducted successfully it would mark the first 'civilian to civilian leadership change' (Ajayi 2007).

The election was also held amid fears of widespread political instability. According to Jibrin Ibrahim (2007) there were three reasons for this apprehension. The first was public awareness of the vast knowledge and repertoire of the techniques of electoral fraud and electoral violence at the disposal of the political class, which have often been used to frustrate the rights of Nigerians to elect their leaders.

The second was the willingness or capacity of INEC and the security forces to prepare adequately a level playing field for free and fair elections. The third was the growing tensions within the political class, ethno-regional zones and political parties, which have constituted the most important threat to the political stability of the country. All these tensions ultimately combined to produce a highly discredited election.

### THE CONDUCT OF THE 2007 ELECTION: LEGAL PROTESTS AND JUDICIAL MEDIATION

The conduct of the election did indeed prove that Nigeria had made little progress in the very important task of cleaning up its electoral system, long tainted by electoral fraud and corruption (Suberu 2007). As widely expected, the results showed that the ruling PDP had won the presidential election and a majority of the state governorship positions, as well as the federal and state assemblies. This victory, as was the case with the 2003 elections, was procured on the back of widespread electoral malpractices and corruption.

Both international and domestic public opinion were heavily critical of the conduct and outcome of the election, which was generally regarded as 'falling



far short of basic international and regional standards for democratic elections' (*The Guardian*, 24 April 2007). Despite these concerns the declared winners of the elections were duly sworn into their respective offices on 29 May 2007, leaving aggrieved aspirants with no option but to seek redress in the courts.

Consequently, the number of petitions filed before the courts in respect of the 2007 general elections reached 1250 (INEC 2007) – the highest number in the country's history and more than double the 527 petitions lodged in respect of the 2003 elections (*The Punch*, 10 February 2009). The surge in the number of petitions is important in itself because it may be regarded as an affirmation of confidence in the integrity of the judiciary. But more noteworthy was the actual handling of the petitions, which, as the subsequent sections of this chapter will show, demonstrated that the Nigerian judiciary was moving to consolidate and improve on its role as an agent of democracy. Again an analysis of all the petitions filed (see annexure) is clearly beyond the scope of this article, so only petitions emanating from governorship elections in six states (Anambra, Imo, Edo, Rivers, Ondo, Ekiti) are considered here.

### *Ekiti State: Kayode Fayemi vs Segun Oni*

Ekiti State is one of the five south-west states won by the PDP in 2003. In the 14 April 2007 governorship election the state was again won by the PDP, according to results announced by INEC. This victory, however, proved very controversial. Immediately after INEC announced the result the Action Congress (AC) candidate, Kayode Fayemi, who came second on INEC's list, challenged the result before the Ekiti State Elections Petitions Tribunal (ESEPT). There were two main grounds for Fayemi's complaints – that there had been serious irregularities and fraud in 63 wards in ten local government councils and that the election was marred by non-compliance with the Electoral Act (*The Guardian*, 18 February 2009).

After losing his appeal at the ESEPT Fayemi appealed to the CofA in Ilorin. In February 2009 the court upheld one of his two major complaints, which was enough to nullify the election of the PDP's Segun Oni. Specifically, the court found that Oni's purported election had failed substantially to comply with the 2006 Electoral Act. The second ground for complain was rejected because the AC candidate failed to prove beyond reasonable doubt his allegation of ballot-box stuffing. Consequently, the court ordered Oni to hand over the leadership of the state immediately to the Speaker of the House of Assembly, Olatunji Odeyemi, while re-runs of the elections in 10 of the 16 local government areas of the state were to be held within 90 days.

The reactions of the two protagonists showed their positive perceptions of the judiciary and, in this case, are worth noting. Immediately after the final

judgement was read both parties expressed their willingness to accept and abide by the verdict. In his response, Oni, the PDP governor who had just been removed by the court, underlined the changing approach of politicians to the rule of law when he said: 'It is the will of God. The verdict is not a setback. I do not see the re-run as a setback because, if we do it again, we will still win. My message to the Ekiti people is that everybody should remain in a jubilant mood.' Indeed, in the days that followed both candidates conducted themselves peacefully even as they commenced preparations for the re-run.

The limit of the progress made was, however, highlighted by the violence and confusion that followed the re-run election in Ekiti, which eventually took place on 25 April 2009. Several days after the vote the results remained unknown. After disappearing for few days, fuelling speculation that she might have resigned her position under pressure, the resident electoral commissioner, Ayoka Adebayo, who had supervised the re-run, surfaced in INEC's Abuja headquarters to announce that she would return to Ekiti State to conclude the announcement of the results (*The Punch*, 30 April 2009).

The result that was announced when she returned to her post in Ekiti again awarded victory to the PDP, fuelling suspicion that the vote or, more correctly, the result, had been rigged. The announcement of the result led to a temporary breakdown of law and order as angry supporters of the AC clashed with PDP thugs and security agents.

Eventually the AC candidate returned to the ESEPT, complaining, again, that the result announced by INEC was a farce. This suit succeeded in October 2010, when Oni's election was nullified on the grounds of non-compliance with the Electoral Act. The AC candidate was immediately sworn in as the duly elected governor of Ekiti State.

### *Ondo State: Mimiko vs Olusegun Agagu*

The 2007 governorship election in Ondo state, like those in other states of the federation, featured several political parties and candidates, including the incumbent PDP governor, Olusegun Agagu, who was running for a second term.

The first petition against the result was received on 15 April 2007, 24 hours after the PDP's candidate was announced as winner. The result was eventually challenged by four contestants, the most forceful being the candidate of the relatively unknown Labour Party, Olusegun Mimiko, whose petition resulted in the removal of the PDP governor from office on 22 February 2009 when the CofA, sitting in Benin, declared Mimiko to be the rightful governor of Ondo State. In reaching this conclusion the court was merely affirming the judgement of the

lower tribunal, which had annulled the disputed poll and declared Mimiko to be the winner (*The Guardian*, 23 February 2009).

Like others before it, the judgement was greeted with widespread jubilation and celebration. Almost immediately after it was read Akure, the Ondo state capital, erupted in a frenzy of jubilation, with youths taking to the streets in a victory dance along major roads and drinking spots, which had been closed, reopening. Thousands of residents gathered in the streets to celebrate what one described as 'a triumph of the majority over the oppression of the minority' (*The Guardian*, 23 February 2009). In the end, the removal of the former Ondo State governor passed without any major political incident, except a well publicised message from the president, Umaru Musa Yar'Adua, congratulating Mimiko and assuring him of the full cooperation of his administration (*ThisDay*, 28 February 2009).

### *Edo State: Adams Oshimole vs Oserheimen Osunbor*

The governorship election in Edo State was also concluded on 14 April 2007 and the results remained contested several months later, with the AC candidate, Adams Oshimole, a former president of the Nigerian Labour Congress, challenging the election of Oserheimen Osunbor of the PDP. In March 2008 the Edo State Elections Petitions Tribunal upheld Oshimole's petition, thereby invalidating Osunbor's election. This decision forced the governor to file an appeal in the CofA in Benin City, which he lost on 11 November 2008 (*The Punch*, 13 November 2008).

Like other governors who had been removed from office by Nigeria's increasingly assertive judiciary, Professor Osunbor left the state house in Benin City within 24 hours, underlining the fact that Nigerian politicians have come to regard the power of the judiciary as a *fait accompli*. The conduct of the opposition in Edo State, even in the face of delayed justice, also needs to be underlined. Throughout the litigation process the party and its leaders maintained their faith in the capacity of the judiciary to deliver justice. This was underlined in Oshimole's statement when his appeal was launched in 2007:

The good news is that we are running a system that is based on the principles of separation of powers. So, the president could use INEC, police or even the army, but he does not have control over the judiciary – and there is enough evidence that a number of judicial pronouncements have embarrassed the federal government

*Saturday Tribune*, 22 March 2008

The judiciary proved him right.

*Imo State: Ikedi Ohakim vs Ifeanyi Araraume*

The 2007 election in Imo State was won by an opposition candidate, Ikedi Ohakim. Before he emerged as governor Ohakim and his party, the Progressive People's Alliance (PPA) were hardly known to Nigerians outside the state. Ohakim's popularity soared when the hitherto ruling PDP became entangled in an extra-legal and potentially damaging nomination process, for which it was heavily punished by both the courts and the electorate.

The PDP's governorship primary was won by Ifeanyi Araraume, a former senator. But soon after the vote the PDP leadership replaced Araraume with another politician, Charles Ugwu, who had not stood in the primaries. Contrary to the provisions of the Electoral Act the party gave no reason for its decision. Araraume challenged his replacement in the Supreme Court, which declared it invalid, noting that, in the eyes of the law, he remained the authentic candidate. Instead of complying with the ruling the PDP withdrew from the Imo governorship election completely, leaving Araraume running without his party's support. Araraume was roundly defeated by his lesser-known challenger, Ikedi Ohakim.

Ohakim's victory was further cemented by subsequent judicial interventions. After he assumed office in 2007 his opponents went to court to challenge the result. The major challenge, ironically, came from Araraume, who pleaded with the court to annul Ohakim's election on the grounds that it had been marred by corrupt practices and violence and that he, rather than Ohakim, had won a majority of the votes cast.

Araraume also wanted the court to order by-elections in nine local government areas where the alleged elections had, in fact, not taken place, claiming that the results declared for those areas had been fabricated by INEC (*The Guardian*, 24 March 2009). In the end, the Imo State Elections Petitions Tribunal and the AC ruled that Araraume's petition lacked merit in every respect and that he had failed to prove his case convincingly (*Saturday Tribune*, 8 March 2008), putting an end to an apparent plot by the PDP to regain the state through the back door.

*Rivers State: Chibuike Amaechi vs Celestine Omehia*

The election dispute in Rivers State was similar to that in Imo State in that Chibuike Amaechi, the PDP candidate who won the party primary, was replaced by another candidate, Celestine Omehia, who had not participated in the primary. Again the party gave no reason for the change, although Amaechi was subsequently indicted for corruption by an administrative panel set up by the federal government (*Daily Sun*, 11 October, 2007).

Unlike in the Imo case, Omehia went on to contest and win the election for the party, but instead of uniting the party, his victory only served to boost Amaechi's determination to demand justice. Thus, immediately after the gubernatorial election he challenged Omehia's election in court. The grounds for his appeal, not unexpectedly, were that the party had failed to comply with s 34(1) of the Electoral Act 2006, which provides that a political party must give cogent and verifiable reasons for substituting a candidate. The PDP, angered by Amaechi's audacity in challenging the authority of 'the party' in court suspended him.

Initially Amaechi's substitution was upheld by both the High Court and the CofA, which declared the substitution lawful. The CofA went further, citing Amaechi's indictment by a federal government administrative panel as a further justification. However, this judicial anomaly was subsequently corrected by the Nigerian Supreme Court, which, in a unanimous decision on 25 October 2007, concluded that the PDP had not provided cogent and verifiable reasons for the substitution, as required by law.

The court also held that the claim that Amaechi had been indicted by a federal government administrative panel was untenable because 'there is no indictment known to the law against the appellant, no court of law has pronounced the appellant guilty of any criminal offences as to justify his unlawful exclusion from the election' (*The Guardian*, 26 October 2007). Consequently, the court ordered that Omehia immediately vacate office and Amaechi be sworn in as the rightful governor of Rivers State (*The Guardian*, 26 October 2007).

The response of the PDP hierarchy to this embarrassing judgement came through President Yar'Adua. In a press statement released by his spokesman the president directed all 'relevant authorities and agencies to take immediate steps to implement the orders of the Supreme Court'. He also 'called on all parties to the suit to respect and abide by the ruling ... and to accept the judgment in good faith' (*The Guardian*, 26 October 2007). The governor immediately handed over power, saying he accepted the judgement as 'the the will of God', while calling on his supporters and the people of the state to 'cooperate with the incoming administration' in order to 'maintain the existing peace, which, he observed, was necessary for development of the state' (*The Guardian*, 27 October 2007).

### *Anambra State: Peter Obi vs Andy Uba and INEC*

The 2007 governorship elections took place simultaneously in all 36 states of the federation, including Anambra State, where Peter Obi had become governor in March 2006 after successfully challenging the election of Chris Ngige, wrongfully declared by INEC to be the winner of the April 2003 governorship election. Consequently Obi had only been in office for 12 months and, believing his tenure

was four years, he had not stood in the 2007 election. The election was won by Andy Uba of the PDP, a former aide and well-known ally of the then-outgoing president, Olusegun Obasanjo.

The key question was when Governor Obi could be said to have completed his term as governor. Was it April 2007 or March 2010? Not unexpectedly Obi contended that his term would end in March 2010. Without resolving this constitutional issue satisfactorily INEC went ahead with the governorship polls in Anambra on 14 April 2007.

Immediately after the election Obi once again headed to the courts. This time his port of call was the Supreme Court, which he asked to determine whether INEC's decision to organise the election had been correct. In taking the matter to court he was supported by a large section of the Nigerian Bench and, indeed, the public, who argued that Obi should have been allowed to remain in office for four years in line with the wishes of the voters and with the law.

Some lawyers, such as the well-known democracy and human rights activist, Gani Fawehinmi, argued that the CofA should be the final court in matters relating to the tenure of a governor and that the Supreme Court should not have entertained Obi's case in the first instance. But Obi's suit was simply to seek an interpretation of the provisions of the Constitution as it affected his tenure and, strictly speaking, did not challenge the election of any other person – he was not asking for the nullification of the April 2007 election.

In the event, the Supreme Court ruled that Obi's tenure should extend to March 2010 and the Anambra State Elections Petition Tribunal nullified Uba's win, giving vivid expression to an opinion indirectly expressed by the apex court that the holding of an election when the tenure of the occupant of an office has not expired was 'an action in error' (*The Guardian*, 15 June 2007).

## CONCLUSION

One of the basic requirements for the survival and prosperity of a liberal democratic state is the presence of strong and independent oversight institutions, one of which is the judiciary (Mbanefo 1975; Walraven & Thiriot 2002). Competent and independent judiciaries are, in many ways, central to democracy (Leonard 2009, p 8). A good judiciary will not only check the abuse of power by government (Davies 1990; Ige & Ige 2006) it will also be capable of managing the intra-elite disputes and/or conflicts which are bound to result from the competition for power and economic resources involved in party politics in a multiethnic society (Suberu 2001).

Many of Nigeria's democratic failings in the past have been the result of the inability to construct an impartial and honest judiciary that commands the respect



and confidence of most of the members of its fractious political class and its deeply divided population (Olurode 1990; Unobe 1990). Since 1999, when Nigeria moved from a military autocracy to a multiparty democracy, some carefully crafted legal and administrative tinkering has transformed its judiciary from an extension of the executive into an impartial and credible arbiter of political disputes.

Indeed, from our review of the 2003 and 2007 elections and the series of political disputes that followed them, notably those involving state governors wrongfully removed from office, we can see clearly that, while the Nigerian judiciary has not succeeded in introducing a culture of free and fair elections or solved the problem of judicial corruption, or even enthroned a flawless framework for electoral justice (Omotola 2010a; 2010b), it has undergone a major transformation, becoming a reliable partner in Nigeria's historic struggle for a fairer electoral process.

To quote the country's former vice-president, who won several legal victories in his political battles with former-president Olusegun Obasanjo, 'even though major elections have continued to be dogged by widespread irregularities, fraud and violence ... all hope has not been lost as the current role of the judiciary has been enough saving grace' (*ThisDay*, 15 February 2009).

Put differently, the political consequences of recent reforms of the judiciary have been significant. Although Nigeria continues to be plagued by serious intra-elite wrangling, very often resulting in bloody political conflicts, the increasing willingness of political elites to seek judicial avenues for the resolution of conflicts has helped to maintain political stability and social harmony. Nigerian politicians are increasingly resorting to the courts to resolve their differences and have come to see an acceptance of court verdicts, in whichever direction they go, as being in their long-term interest. This largely explains the longevity of the Fourth Republic.



## ANNEXURE

## Summary of the April 2007 governorship elections: Grounds for and outcomes of appeals

State	Winner	Main appellant	Plea/grounds for appeal	Decision	Outcome
Abia	PPA	PDP, APGA	Non-compliance with the Electoral Act; membership of secret cult and non-resignation from office as required by law	Petition upheld and election annulled by tribunal, but later revalidated by Court of Appeal (CofA)	PPA gov to remain in office until 2011
Adamawa*	PDP	AC	Unlawful exclusion of AC candidate from election by INEC	Appeal upheld by tribunal & CofA. Election voided	Re-run election held & won by PDP
A/Ibom	PDP	ANPP	Obstruction by INEC; electoral malpractices; winner had been indicted for fraud	Appeal rejected by both tribunal and CofA for lack of merit	PDP gov to continue in office until 2011
Bauchi	ANPP	AC	Election marred by fraud & malpractice	Not available (NA)	ANPP gov to continue in office until 2011
Bayelsa*	PDP	AC	Irregularities, violence and disparities between voters' register and votes cast	Petition rejected by tribunal for lack of evidence but later upheld by CofA, which voided the election	Re-run election held & won by PDP
Benue	PDP	ANPP, AC	N A	N A	N A

Bornu	ANPP	AC	Election marred by fraud	Appeal rejected by tribunal and CofA for being lodged late & lack of jurisdiction	Incumbent ANPP gov to continue in office until 2011
C/River*	PDP	ANPP, AC, ARP, PPA	Irregularities & non-compliance with electoral law	Appeal rejected by tribunal, but upheld by CofA; election nullified	Re-run election held and won by PDP gov
Delta	PDP	AC, DPP	Irregularities & unlawful exclusion of CofA candidate by INEC	Tribunal dismissed petition & declined jurisdiction, CofA now before the appeal court	Incumbent to continue in office until 2011
Ebonyi	PDP	ANPP	Electoral malpractice, irregularities and violence	Appeal rejected by tribunal for want of evidence	Incumbent to continue in office until 2011
Edo**	PDP	AC	Irregularities and non-compliance with Electoral Act	Appeal upheld by tribunal and CofA; appellant declared winner	Appellant sworn in as governor to replace PDP gov
Ekiti*+	PDP	AC	Irregularities and fraud in 63 wards in 10 LGAs and non-compliance with Electoral Act	Appeal upheld by both tribunal and CofA; re-run held ending in stalemate	Acting governor to remain in office until winner emerges
Enugu	PDP	DPP, AC, PPA, AP, LP	Electoral fraud and non-compliance with Electoral Act	Appeal upheld by tribunal but rejected by CofA	Incumbent PDP gov to continue in office until 2011.

Gombe	PDP	AC	Electoral fraud	Appeal rejected by tribunal and CofA for want of evidence and being status barred	Incumbent PDP governor to continue in office until 2011.
Imo**	PPA	PDP, APGA, AC	Fraud and irregularities	Appeal rejected by tribunal and CofA for want of evidence	PPA gov to remain in office pending Supreme Court decision
Jigawa	PDP	ANPP, AC	N A	N A	N A
Kaduna	PDP	ANPP, DPP	Fraud and irregularities	Petition rejected by tribunal, now before CofA	PDP gov to remain in office until 2011
Kano	ANPP	PDP	Irregularities and winner unqualified for office having been indicted for fraud	Petition rejected for want of proof and administrative indictment not grounds for disqualification	ANPP gov to remain in office until 2011
Katsina	PDP	ANPP	Corrupt practices; over-voting and non-compliance with Electoral Act	Petition dismissed by tribunal for insufficient evidence; now before CofA	PDP gov to continue in office until CofA rules
Kebbi	PDP	ANPP	Winner not duly nominated by his party and unqualified to stand for election	Appeal upheld by tribunal but rejected by CofA	PDP gov will remain in office until 2011
Kwara	PDP	AC	INEC	Appeal rejected by tribunal and now before CofA	AC gov to continue in office until 2011

Lagos	AC	DPA, DPP	Electoral fraud and irregularities	Appeal rejected by tribunal & CofA; election upheld	AC gov to continue in office until 2011
Nassaraw	PDP	PDP, DPA	Irregularities and non-compliance with electoral law	Petition dismissed by tribunal & CofA for lack of evidence	PDP gov to remain in office until 2011
Niger	PDP	ANPP	Irregularities & fraud	Appeal rejected by tribunal & CofA; election upheld	Incumbent gov to continue in office until 2011
Ogun	PDP	ANPP	Improper substitution by the PDP of the petitioner with the winner and non-compliance with Electoral Act	Appeal rejected by tribunal on technical grounds; CofA orders a retrial by tribunal after appellants alleged bias	Litigation at tribunal continues
Ondo**	PDP	LP	Electoral fraud; irregularities and non-compliance with Electoral Act	Appeal upheld by tribunal & CofA; petitioner declared winner	Appellant sworn in as gov to replace PDP gov
Osun	PDP	AC	Electoral fraud; irregularities and non-compliance with Electoral Act	Appeal rejected by tribunal but CofA orders retrial by tribunal after appellants allege bias	Litigation continues at tribunal
Oyo	PDP	ANPP, AC	Irregularities and violence (in 12 of 30 LGAs)	Appeal rejected by tribunal & CofA; election upheld	PDP gov to remain in office until 2011

Plateau	PDP	AC	Irregularities; violence and non-compliance with Electoral Act	Petition rejected by tribunal & CofA for coming too late	PDP gov to remain in office until 2011
Rivers**	PDP	PDP	Electoral fraud; irregularities	Petition upheld by Supreme Court; petitioner declared rightful winner of the elections	Incumbent PDP gov removed and replaced by petitioner
Sokoto*	PDP	DPP	Improper substitution by PDP of the petitioner by the winner; non-compliance with Electoral Act	Petition rejected by tribunal but upheld by CofA; election voided for non-qualification and massive irregularities.	Re-run election held and won by PDP gov
Taraba	PDP	AC	Winner nominated by both ANPP & PDP; not duly nominated; had no running mate; electoral malpractice	Petition rejected by tribunal for lack of merit; now before CofA	PDP gov to continue in office until CofA rules
Yobe	PDP	ANPP	Winner was not qualified having been indicted for fraud; failed to resign before contesting election and tendered falsified documents	Appeal rejected by tribunal & CofA; election upheld	ANPP governor to remain in office until 2011

Zamfara	ANP	PDP	Gov not duly nominated by his party and so not qualify to run; petitioner excluded from election; irregularities and non-compliance with electoral law	Petition rejected by both tribunal and CofA	ANPP gov to remain in office until 2007
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Source: Comprehensive review of Nigerian dailies from 2003 to 2010 carried out by the author

- \* State where election has been nullified by the court and re-run. All these cases produced victory for the incumbent PDP
- \*+ Election has been nullified by the court and re-run took place but ended in a political stalemate
- \*\* Court decision led to a change of government after candidates who INEC had declared elected were ordered to vacate their office in favour of their rivals

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# THROWING OUT THE BABY WITH THE BATH WATER

## *The third-term agenda and democratic consolidation in Nigeria's Fourth Republic*

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### ABSTRACT

*The date 29 May 1999 marked the advent of another period of democratic governance in Nigeria. Before that the country's post-independence history had been mired in instability and characterised by political violence, frequent military coups and a profound crisis of legitimacy. The military, which had given the people some hope in the face of the patron-client politics of the first and second democratic republics, dashed expectations as military rule became synonymous with corruption, economic mismanagement and gross human rights abuses such that Nigerians began to yearn for a return to democracy. This was the mood when the 'fourth wave' of democracy flowed across the political landscape in 1999. The article examines how democracy fared in Nigeria between 1999 and 2009, especially under former president Olusegun Obasanjo, who, in 1999, became Nigeria's third democratically elected president. It examines specifically Obasanjo's self-perpetuation bid and its impact on democratic consolidation in the country and concludes that Nigeria's democratisation process is still trapped in its transitional stages.*

### INTRODUCTION

On 29 May 1999 democratic governance came to Nigeria for the fourth time in its post-independence history. Before that date the country's post-independence history was mired in political instability and characterised by frequent military coups, inconclusive and contested election outcomes, frequent changes in policy, political violence, and a crisis of legitimacy (Osaghae 2002, p 14). For example,

between 1960 and 1998 there were ten officially accepted coups,<sup>1</sup> six of which (two in 1966 and one each in 1975, 1983, 1985 and 1993) led to the successful overthrow of the existing government and two of which (1976 and 1990) were bloodily aborted. According to Osaghae (2002), two (1986 and 1995) were nipped in the bud and the officers involved were either jailed or executed. In this period (1960-1998), which saw military rule accounting for 30 years of Nigeria's 48 years of post-independence history, the country had only ten years of democratic governance, including Ernest Shonekan's six months as head of an interim national government hurriedly put together by General Ibrahim Babangida, who was arguably Nigeria's most notorious military ruler.

Nigeria's first stint of self-determined democratic governance, which has been labelled the First Republic,<sup>2</sup> lasted for three years and was punctuated by the military coup led by Kaduna Nzeogwu, which resulted in the assassination in January 1966 of the prime minister, Sir Abubakar Tafawa Balewa, and a host of other important government functionaries. This coup signalled the start of the first phase (1966-79) of military incursion into and adventurism in Nigerian politics. The Second Republic (1979-1983), led by President Shehu Shagari, was cut short by the Idiagbon/Buhari coup of 1983 and Nigeria remained under the military dictatorships of Generals Muhammadu Buhari (1983-85), Ibrahim Babangida (1985-93), Sanni Abacha (1993-98) and Abdulsalam Abubakar (1998-99) until Olusegun Obasanjo was sworn in as the third democratically elected president of Nigeria, thus inaugurating the Fourth Republic.

Given these circumstances it is clear that Nigeria lacks democratic experience since democracy has never been practised for long enough to have become entrenched as a political culture, system and practice. Added to the democratic deficit and political instability which have plagued the country since independence Nigeria has also been bedevilled with economic stagnation, endemic corruption and a pervasive crisis of underdevelopment which has left the people feeling despondent and alienated from the state.

The brief experience of democracy during the first and second republics did not result in the anticipated difference between military rule and democratic governance. The Second Republic, for instance, was defined by widespread corruption, economic mismanagement and decline arising from the low price of petroleum in the global oil market, poor intergovernmental relations, a tendency

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1 There is a widely held public perception that General Abacha's death and his replacement by General Abubakar was a quiet military coup in itself

2 Each of Nigeria's democratic dispensations has been labelled a 'republic'. The First Republic lasted from 1963 to 1966, the Second Republic from 1979 to 1983. The incomplete democratic transition of Babangida's regime, which saw the election to office of people at all levels of governance except the presidency between 1992 and 1993, is generally referred to as the aborted Third Republic (see Achike 1978, p 97). The current regime is known as the Fourth Republic.

towards dominant-party rule and bad political governance as well as religious extremism, nepotism and patron-client politics (Richard 1987; Abubakar 1997; Banjo 2008). These factors combined to make life difficult for the majority of Nigerians, who were groaning under the stress of a declining, if not comatose economy (Uzodike 1994). They also explain the people's desire for and embrace of the various military regimes that used the deplorable state of the nation to justify their unconstitutional incursion into politics (Agbese 1996).

Ironically, the military itself dashed the people's expectations as military rule became increasingly synonymous with corruption, nepotism, economic mismanagement, tyranny and gross human rights violations, which alienated the people even further. According to Banjo (2008, p 56) the military repressed the Nigerian people, damaged the economy through mismanagement and impoverished the country through the selfish and unrestrained pursuit of personal wealth and power, causing the masses to demand a second liberation and yearn for civil democracy. Thus, when, in 1999, the 'fourth wave' of democracy swept across the political landscape expectations were high and the people greeted the Obasanjo government with enormous goodwill and public support. Their hopes for a new beginning were raised by his declaration that his government would not pursue 'business as usual' and that there would be no sacred cows in his pursuit of an anti-corruption agenda.

So, how did democracy fare under the rule of President Olusegun Obasanjo? While it has, arguably, yielded some democratic dividends<sup>3</sup> our position is that the democratisation process is still trapped in its transitional stages, making democratic consolidation elusive. What factors militate against democratic consolidation in Nigeria, and how can they be mitigated to enable democratic consolidation and actualise the much vaunted development dividends accruable from developmental democracy?

In grappling with these questions we contend that leadership succession and, specifically, President Obasanjo's alleged bid to extend his tenure beyond the constitutionally prescribed two-term limit, popularly referred to as the 'third-term agenda (TTA)', are significant factors. This is because they dictated the political actions and development agenda of the Obasanjo administration, especially in its last four years. Accordingly, the thrust of this paper will be to

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3 Obasanjo's administration left an ambivalent record of democratic consolidation and underdevelopment of democracy, which Joseph & Kew (2008, p 167) describe as 'a paradoxical legacy of both far reaching reforms and anti-reformist actions'. His achievements include debt relief and buy-back for Nigeria, extensive banking reforms and consolidation, macroeconomic stability and an average 6% growth in the economy between 1999 and 2007; revamping of the telecommunications sector, making it the fastest growing in the world today; the institutionalisation of the anti-corruption fight, however selective, and an increase in the level of military professionalism (see Sklar, Onwudiwe & Kew 2006, p 100).

analyse the impact of the third-term agenda on the review of the 1999 Constitution and consequently on democratic consolidation in Nigeria.

The constitutional review process remains germane to our analysis because the review, which is critical to democratic consolidation, was aborted and thrown out completely by the National Assembly in the popular quest to 'kill' the TTA. Thus the National Assembly threw out 'the baby and the bath water' and the Nigerian family was left to bear the pain of the 'loss of a precious baby in a family without children'.

### CONCEPTUAL FRAMEWORK

It is pertinent to explain a number of concepts that are germane to a good grasp of our analysis. These concepts include democratic consolidation, the TTA and constitutional review.

#### *Democratic consolidation*

What is democratic consolidation? Does it mean the entrenchment of the institutions of democracy as enunciated in a constitution or the inculcation of democratic values in the citizens to the point where they are willing to defend those values against those who hold state power and those who control the instruments of coercion?

Since the collapse of communism in the former Soviet Union there has been a steady rise in the number of countries embracing democracy in different forms. The many conditions for qualifying a political system as democratic notwithstanding,<sup>4</sup> a democratic state may become engulfed in a socio-political and economic crisis to the extent that it slips into autocracy, authoritarianism and, ultimately, into anarchy. Therefore, the transition to democracy alone cannot

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4 Democracy is essentially a contested concept, not only because it means different things to different people but also because it is an abstract idea, the practice of which is virtually impossible anywhere (Gitonga 1995, p 7). While it is not our task in this paper to define democracy, we state from the outset that we subscribe to the view of democracy as both an ideal and a practice, an end and the means towards achieving that end. Those who support the view of democracy as a moral ideal, a system of values and a way of life see its core values as individual liberty and rights as well as social cooperation among free individuals (Talisie 2003). As a practice, democracy is the means or machinery for realising the democratic ideal and, as such, it is a concrete reality which can be observed and measured. In this sense it is seen as a system of government and/or a set of institutions and political arrangements meant for the selection of a government (Schumpeter 1977, p 171; Appadorai 1968, p 143). By way of synthesis we attempt to conceive democracy as a system of values, a way of life and moral ideals which help to internalise and utilise individual freedom and social cooperation towards the establishment of elected government as a social institution that guarantees the development of individuals within society. This leaves room for debate about whether or not the Nigerian political system as presently constituted is a democracy. Again, that is not our concern here.

safeguard a democracy from failure. Given the multiplicity of claims of democracy<sup>5</sup> and the existential challenges which militate against democratic stability there is a need to set out minimum requirements for securing a democracy against possible overwhelming socio-economic and political challenges and collapse.

There are numerous scholarly views on the minimum conditions for safeguarding democracy and thus sustaining or consolidating it. It is widely held that unless a democracy is consolidated there is a possibility that it will slump into a system that falls short of democracy, or, at best, remain trapped in an endless transition. This position is supported by Diamond (1994, p 15), who defines democratic consolidation in the context of the politics of a state as 'the process by which democracy becomes so broadly and profoundly legitimate among its citizens that it is very unlikely to break down'.

Diamond (1994, p 15) contends that democratic consolidation depends on behavioural as well as institutional changes and increasing confidence in the survival of democracy and that this 'requires the expansion of citizen access, development of democratic citizenship and culture, broadening of leadership recruitment and training, and political institutionalization'. Democratic consolidation, therefore, is the process by which a young or new democracy matures and democratic ethos and practice deepen to such an extent that the total breakdown of democracy or reversion to authoritarianism becomes extremely unlikely. This involves deep, unquestioned, and principled 'loyalty' to the democratic ideal, framework and procedures and a shared normative and behavioural commitment by both the political elite and the masses to the specificities of democratic rule and practices of the country's constitutional system.

There is a plethora of views on the necessary and sufficient conditions for democratic consolidation and the literature is well documented, not only in the global context (Lipset 1959; Hadenius 1992; Linz & Stepan 1996) but also more specifically in the African context (Ake 1996; Nzongola-Ntalaja 1998; Diamond 1994).

For example, Linz & Stepan (1996, p 5) suggest that democratic consolidation has been attained when democratic processes and institutions have become 'the only game in town', making popular acclamation the criterion. On the other hand Ibeanu (2000) argues that what consolidates a democracy is the length of time and number of transitions within the democratic practice.

While these arguments all have their strengths and weaknesses, this paper

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5 Because democracy means different things, even dictatorships have labelled themselves democracies. For instance, President Pinochet of Chile popularly referred to his autocratic regime as an 'authoritarian democracy'. In the same vein, the 'dictatorship of the proletariat' in Marxian parlance is simply another name for 'popular democracy' (Gitonga 1995).



is in favour of the simplified and manageable concept of the minimum factors required for democratic consolidation set out by Afrifa Gitonga (1995). We shall complement Gitonga's generic analysis with that of Idowu Awopetu (2007), which is Nigeria-specific.

Gitonga identifies three features of a consolidated democracy: the *material infrastructure*, the *institutional techno-structure* and the *human superstructure*. Awopetu identifies four conditions, namely: the *material condition*, the *constitutional condition*, the *intellectual condition* and the *psychological condition*. Broadly construed, a combination of Gitonga and Awopetu gives us the material and the human indices. The material index includes Gitonga's infrastructure and techno-structure, and Awopetu's material and constitutional conditions, while the human index covers Gitonga's superstructure and Awopetu's intellectual and psychological conditions.

Using the new framework, the *material* index for democratic consolidation involves securing basic human needs (food, water, shelter) and consequently ensuring a sufficient degree of economic well-being to permit citizens to devote the time and energy necessary for participation in governance, not necessarily without any coercion, but without the fear of any form of vulnerability, which leads to intimidation. In addition, the constitution, as well as other mechanisms for governance, in terms of their objective value as instruments (means) of the democratic ideal and practice, must guarantee the people's rights and must be open and accessible to all.

Consequently, the material index extends to the institutional requirements or supervisory facilities (techno-structure), checks and balances, power-sharing, system of succession, space for opposition, duties, tasks, responsibilities, jurisdiction, and division of labour. It is only when these are well established that democracy can be consolidated. However, on its own, the material index amounts to nothing significant without the human index to complement it.

The human index is the human structure that propels the material index because, with the democratic process as with development, people are the means and end of the process. Neither the economic nor the constitutional conditions can be put in place, let alone function properly, without a developed human factor.<sup>6</sup>

The economic prosperity of a democratic community may be sufficiently

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6 The human factor has been defined as the spectrum of personality characteristics and other dimensions of human performance that enable social, economic and political institutions to function and remain functional over time. None of these institutions can function effectively without being upheld by a network of committed persons who stand firmly by them, believing strongly in and continually affirming the ideals of society (Adjibolosoo 1995, p 33). According to Owusu-Ampomah (2004, p 66) the personality characteristics that enhance human performance in all spheres and which are a sine qua non for the attainment of development goals include responsibility, integrity, loyalty, trustworthiness, commitment, tolerance, discipline, humility and love.



supportive of active and courageous participation but it takes an informed and willing citizenry actually to face up to the challenge (see Owusu-Ampomah 2004). The human index, therefore, entails a complex mix of dispositions and attitudes that must be manifested by the individual members of the democratic community for a system to be considered a consolidated democracy. Among the elements of the human index are qualitative education, national orientation, political culture and the values, beliefs and attitudes of the people.

The national culture and orientation must promote good leaders and followers who are well informed. According to Awopetu (2007, p 25) 'neither educational institutions, nor informational media, nor the act of communication is likely to be well developed or properly used if appropriate traits of character are not common place among citizens'. Crucial to democratic consolidation is the level of legitimacy the system enjoys among the people, who should believe in the system rather than in a political party, a regime or an individual. Though it is hardly possible to have everyone believe in a particular system the level of scepticism, apathy and opposition should be insignificant. It takes a politically educated and sophisticated citizenry to participate actively and constructively and thus play its role in a democracy on a continuous basis.

### *The third-term agenda*

The concept of the third-term agenda as it relates to Nigerian politics refers to the alleged attempt of President Olusegun Obasanjo to extend his rule beyond the constitutionally prescribed limit of two four-year terms by means of an amendment to the 1999 Constitution of the Federal Republic of Nigeria. It denotes an agenda for tenure extension for President Obasanjo but it is uncertain whether such an extension would have meant three terms of four years each starting from 1999, or three terms of four years each starting from 2007, in which case it could easily have meant life presidency.

Even after the demise of the project there is still speculation about just whose idea the TTA was, but it was widely believed to have emanated from the presidency itself (Timberg 2006, p 10). President Obasanjo's ambiguous position on the issue, 'that a third term would allow him to complete initiatives he started in his previous seven years in office' (Timberg 2006), but that he had not decided whether to run, did not wash with Nigerians. He was also contradicted by some of his former close political associates such as Dubem Onyia, Minister of State for Foreign Affairs (1999-2003), who claimed that the president had sought his support for an extension of his tenure as early as 2003 (Aluko 2007).

The use of state security agencies such as the police against anti-TTA protesters also lent support to claims that the attempt to extend the presidential

term originated with President Obasanjo. Among the protests which were forcibly put down was one organised by Youth for Good Governance in Kano on 18 April 2006 in which more than 5 000 protesters participated (*Africa Research Bulletin* 2006).

Despite widespread knowledge of the role of the presidency in the prosecution of the TTA through both the National Political Reform Conference (NPRC) and the National Assembly, there were claims that the project did not exist. Could there be any truth in such claims? Was the TTA only a ploy by Obasanjo's detractors to discredit him; a fiction 'fertilized to a level of fact by the media', as alleged by Chief Onyema Ugochukwu, a senior special assistant to the president (Ogbodo 2006)? Or was it really an attempt by the core North to divert attention from the constitutional review which would have accommodated the interests of the South-South and the South-East, as claimed by Chief Mathew Mbu (Ogbodo 2006)? Did Obasanjo, in fact, attempt to extend his tenure? We ask this question to draw attention to the controversy around the third-term project.

It has been suggested that there were multiple attempts to extend tenure. The first entailed an attempt to use the government-organised NPRC. According to Ayobolu (2006), the government attempted 'to manipulate the process and outcome of the NPRC to adopt a tenure elongation agenda in a very surreptitious and clandestinely manipulative manner that will not be quickly and out rightly decipherable by the prying eyes of the public'. The second attempt was more widely known – the use of the Ibrahim Mantu committee on the review of the Constitution to recommend tenure extension. It is now history that both attempts failed, but their consequences remain.

One of the immediate results of the TTA was that constitutional amendments which would have enhanced good governance, transparency, accountability and, *ipso facto*, democracy, national integration and development, were thrown out along with the review process. In the end, the 119 amendments that were sought to deal with festering issues such as fiscal federalism, the derivation principle, the secular nature of the country, equality of states and local governments, state-federal government relations, citizenship, police, judicial independence, human rights, women's rights and land use all had to be discarded because of the tenure extension controversy (Sango 2006).

As there were antagonists of the TTA so were there protagonists.<sup>7</sup> Those who supported it did so for diverse reasons, none of them public-spirited, altruistic, or patriotic. Tunde Rahman and Oma Djebah (2005) identify 30 politicians, most of

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7 Although our focus in this paper is on protagonists among the political elites, other groups and individuals in society also supported the TTA. For example, the Manufacturers' Association of Nigeria (MAN), under the leadership of Charles Ugwu, 'publicly endorsed Obasanjo for a third term', even though he was later disowned by the association (see Duro 2007).

them state governors, who, for reasons of political advantage, to secure re-election, escape prosecution for corruption, or merely to survive politically, supported the TTA. According to them, 30 of the 36 state governors, cutting across party lines, supported the agenda. All 30 would have benefited from extended tenure; some by gaining further immunity from prosecution by the Economic and Financial Crimes Commission for corruption and related offences; some by the extension of the scope of their political power and standing in their states and zones and the corollary, containment and curtailment of the political relevance and efficacy of their opponents; yet others were looking to higher national office.

Many had mixed motives. Some had changed their political allegiance and affiliation from Obasanjo's vice-president, Alhaji Abubakar Atiku, to Obasanjo after it had become obvious that Atiku loyalists would be hunted down and forced out of office and into prison. Among the governors who jumped ship were Victor Obong Attah, James Ibori, and George Akume (Rahman & Djebah 2005; *Africa Research Bulletin* 2006). All were short on moral and political integrity in that they were willing to subvert by fraudulent and anti-democratic means the Constitution they had sworn to protect.

Some supported the TTA in expectation of its failure, in the hope that Obasanjo would back their own presidential ambitions in appreciation for their support for his tenure extension project. This explains the number of TTA governors who wanted the nomination of Obasanjo's party, the Peoples Democratic Party (PDP), in the 2007 election. With hindsight it can be argued that their support was half-hearted. According to Obi (2006) 'the flood gate of aspirations betrayed one fact – those third-term governors who declared their presidential ambition immediately Obasanjo's own ambition was aborted were pretenders'. While some state governors could be regarded as field commanders<sup>8</sup> of the third-term campaign the infantry was to be found in the two chambers of the National Assembly and in the electoral and security apparatuses of the state.

The primary protagonists of constitutional amendments were located in the National Assembly as senators and honourable members since, in terms of s 9(1), the power to amend the Constitution lay with the National Assembly. Subsections 2, 3 and 4 of the same provision set out the conditions to be fulfilled for such alterations to be effected. Thus s 9(2) requires a concurring vote of a two-thirds majority of all the members of each of the two chambers as well as the approval by a two-thirds majority of members of the houses of assembly of two-thirds of all the states. Section 9 (3) provides that

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<sup>8</sup> Adamu Muazu, chairman of the contact committee of the third-term project and Saminu Turaki, chairman of the finance committee, were such field commanders.

An Act of the National Assembly for the purpose of altering the provisions of this section, section 8 or Chapter IV of this Constitution shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than four-fifths majority of all the members of each House, and also approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.

Section 9(4) specifies that the number of members to be used in the calculation of these majorities is the absolute membership of the respective houses as provided for in ss 48 and 49 of the Constitution, regardless of any vacancies that may exist in any house. The provisions of s 9 of the 1999 Constitution, which borders more on consensus than on majoritarian democracy, accounted, more than any other factor, for the failure of the TTA.

The members of the State Assembly were another set of people who supported the TTA. Because they were largely under the control and patronage of the governors of their respective states it was expected that had the Senate passed the resolution to alter the Constitution they would have concurred. At the public hearings held by the Constitutional Review Committee the houses of assembly of most of the states of the federation endorsed the third-term proposal. The Lagos State House of Assembly was one notable exception.

The role of the legislators at both national and state levels in propagating the TTA speaks volumes about the representative function of Nigerian lawmakers. According to Sango (2006)

many media organizations, across the country conducted several opinion polls on the issue of whether Obasanjo should be allowed to remain president beyond May 2009. Severally and collectively, these polls returned an emphatic NO! In all the geographical areas of the country, an average of 80% of all those polled opposed the idea.

Despite this, a majority of state legislators in the country, as evidenced in the number of state assemblies that endorsed tenure extension during the public hearings conducted by the Mantu review committee, supported and actively canvassed for an extension of tenure for Obasanjo and the governors (*Punch* 22 February 2006). Eventually the TTA was defeated by default – the inability of its sponsors to muster the two-thirds majority required for a constitutional amendment.

Among legislators, both national and state, monetary inducement was a primary factor in determining support for the TTA. Support for the project rose

and fell, it is alleged, on the basis of bribe money and its distribution. Amounts of money said to have been distributed to members of the National Assembly ranged from N50-million to N70-million. The support of law makers for the TTA cut across party affiliation, ethnic and geopolitical considerations, religious divides, and other social and political cleavages.

In addition to monetary inducement was the official position of the ruling party, which seemed to support tenure extension for Obasanjo (Umar, Ojo & Bamidele 2006). For example, the national executive committee of the ruling PDP, under the chairmanship of Alhaji Ahmadu Ali, 'got the PDP to adopt Obasanjo's third-term ambition as an "official project" and employed "bullying tactics", calling those opposed to Obasanjo and his plans all kinds of names' (Adebiyi, Rahman & Abonyi 2006).

The party machinery in those states whose governors had declared support for the tenure extension project was also massively behind the project. Instruments used by the party to prosecute the project included impeachment and the threat of impeachment, deregistration, expulsion, and marginalisation of members opposed to tenure extension. Among those deregistered was Atiku, while Senator Ararume was expelled from the PDP for 'anti-party activities', a euphemism for his 'anti-third-term stance' (Omotola 2007, p 147).

Although civil society and the general public also provided platforms for TTA campaigns and contests, the main battleground was the chambers of the National Assembly because that was where those with the real power to carry out the project through a review of the Constitution were to be found.

### *Constitutional review*

Constitutional review in the context of this paper refers to the attempted alteration/ amendment of the 1999 Constitution of the Federal Republic of Nigeria. Constitutional review should ordinarily seek to align constitutional provisions with the requirements and aspirations of a people for good governance and democracy and there had been calls from many sectors of the nation and from civil society organisations for the Constitution, which had been imposed by the military, to reflect the aspirations of Nigerians for political and economic development. However, the review process, when it came, was not only government driven, it was also largely undemocratic and anti-people (Sango 2006).

The focus of the review, both within the framework of the National Political Reform Conference and in the Joint Committee Constitutional Review (JCCR) of the National Assembly, was not to make the document accessible to ordinary citizens but to render it less relevant to the daily governance of the country. In the end, because the review became framed by the debate over extended tenure,

polarising the National Assembly, the Constitution Review Bill was thrown out, paving victory for democracy, as Obasanjo himself acknowledged (*Vanguard*, Lagos, 19 May 2006).

There is a nexus between the TTA, the constitutional review and democratic consolidation. As mentioned above, Nigeria is still trapped in the transition phase of its democratisation process, with the nascent democracy still very far from consolidation. Of the numerous factors which account for this, the problem of leadership succession has been an intractable challenge, as is the case not only in Nigeria, but all over Africa, where it is widely considered to be one of the main causes of armed conflict and civil war (Nzongola-Ntalaja & Lee 1998; Deng 2000).

Obasanjo's alleged 'third-term agenda' was a manifestation of the crisis of succession, which, although it did not lead to civil war,<sup>9</sup> heated the polity and tested the faith of the Nigerian people in the constitutional governance of elected representatives and the political elites in general. Beyond this, the political pathology of *leadership sit-tightism*, which pre-dates Obasanjo,<sup>10</sup> has grave consequences for politics, democracy and development in Nigeria that extend beyond Obasanjo's administration. It is to the specific impact of the TTA on constitutional development and on democratic consolidation that we turn below.

#### IMPACT OF THE THIRD-TERM AGENDA ON THE REVIEW OF THE 1999 CONSTITUTION

Nigeria has had a chequered history of constitutional development, due, among other factors, to the fact that it has never had an autochthonous constitution (one which derives its force from its own native authority and not by virtue of its having been enacted or authorised by an imperial power) (Nwabueze 1982, p 90). A society's constitution is said to be autochthonous if it is indigenous to that society and its people and if its power of enforcement is derived from that society.

Popular participation in the making of a constitution is vital as it gives it legitimacy as the ground norm of society upon which present and future

9 It was reported that violence erupted in the northern parts of the country in connection with the third-term agenda. In the same report, militants in the Niger-Delta reportedly warned of dire consequences if the president stayed on in office (*Africa Research Bulletin* 2006).

10 Past Nigerian military leaders have been known to nurse 'sit-tight' ambitions, evidenced in their constantly postponing their own transition programmes. Gowon did not want to go, Babangida was bent on perpetuating himself in office, Abacha wanted to become a life president (then became a dead one), and now Obasanjo has placed himself squarely among this gallery of rogue leaders.



generations can depend for socio-political benefits, and thus defend. This has support in Ihonvbere's (2000) thesis that the basis of constitutional legitimacy must now be measured by the extent to which the masses have been part of the process of compacting the constitution. Similarly, the essence of a people-made constitution is well encapsulated in the words of a former Chief Justice of South Africa, the late Justice Ismail Mohammed:

The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed, it is a 'mirror of the national soul', the identification of the ideals and aspirations of a nation, the articulation of the values binding its people and disciplining its government.

Hatchard 2001, p 210

In the main Hatchard (2001, pp 215-6) contends that while there is no single best model for constitution-making or review there are some basic principles of good practice which make constitutions legitimate, durable and effective tools of democracy and development. These include developing appropriate procedures and structures that will enable people to participate, putting in place mechanisms to ensure the integration of the ideas of all stakeholders, the use of a referendum to validate the proposed constitution, and the provision of a realistic timeframe within which to undertake the constitution-making exercise. He concludes that these represent the best and most realistic chance of constructing an autochthonous constitution that is both acceptable to the majority of the people and can stand the test of time. In his words, an autochthonous constitution is

a crucial step towards the establishment of an *ethos of constitutionalism* i.e. a recognition by the people that the document is 'their constitution' upon which they were consulted and which they endorse, which contains provisions that are meaningful to them and from which they can derive demonstrable benefits. The resultant document can then become 'trans-generational' in that it retains and develops public support over a period of time and thus is able to withstand attempts to undermine it either by 'unconstitutional' or 'constitutional' means.

Hatchard 2001, p 216

Unfortunately the Nigerian people have never been given the opportunity to exercise their sovereign power to make their constitution, as past constitutions have either been foreign-driven or elite-driven and imposed on the people.

According to Nwabueze (1982, p 90) the 1963 constitution, which was the



closest to an autochthonous constitution in Nigeria's constitution-making history (1922 to 1999), was still not autochthonous because 'it was enacted by parliament in virtue of power derived from the pre-existing imperial constitution; it was therefore authorized (though not directly enacted) by the British government'. It thus failed to delink Nigeria's legal order from the British government and launch the country on a new legal order with new constitutional roots springing directly from its own soil.

In addition to the plethora of defects in the constitutions put in place between 1922 and 1963, some of which are very well documented in Coleman (1958), the fact that none of them was indigenous, wholly made and owned by Nigerians, greatly compromised their integrity and effectiveness in dealing with the many problems of an emerging independent and plural Nigeria.

While the 1979 and 1999 constitutions could be said to be indigenous and thus autochthonous in that they were enacted by and derived their force from a Nigerian authority – the military – they were compromised by the fact that the Nigerian people did not participate in the constitution-making process. It is thus hypocritical to claim 'we the people of the Federal Republic of Nigeria ... do hereby make, enact and give to ourselves the following constitution' (Constitution of the Federal Republic of Nigeria 1999, p 1).<sup>11</sup>

Indeed, it is fair to conclude that the 1979 and 1999 constitutions are the constitutions of the Nigerian military rather than the Nigerian people, resulting in a lack of legitimacy, with implications for their effectiveness in dealing with the myriad problems bedevilling the country, combinations of which serve to impede democratic consolidation. According to Ihonvbere (2000) elite-driven constitutions in post-colonial Africa have never enjoyed widespread acceptability, and this lack of acceptability makes them less effective as a means of entrenching democracy on the continent.

Against this background, as early as 1999 a broad section of civil society started calling for a review of the 1999 Constitution which, like that of 1979, was handed down to the new democratic government and was therefore imposed on the Nigerian people by the outgoing military regime of General Abdulsalam Abubakar on 29 May. Apart from the question of autochthony real flaws were widely recognised,<sup>12</sup> which led to calls in some quarters for an entirely new constitution that would be based on the recommendations of a sovereign national conference (SNC).

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11 The preamble of both the 1979 and 1999 constitutions of the Federal Republic of Nigeria begins and ends this way.

12 This is hardly surprising since the 1999 Constitution was put together hurriedly by the military elites in an atmosphere of extreme social and political restiveness following calls for the breakup of the country after the death of General Abacha.

According to Aguda (2009) the SNC was a conference in which all the ethnic nationalities in the country would participate as autonomous entities, free to re-negotiate their membership of the Nigerian nation.<sup>13</sup> This idea, which was vigorously canvassed, still underlies the thinking of many Nigerians on the Constitution (Aguda 2009). Among the defective provisions of the 1999 Constitution are the directive principles of state policy, fundamental human rights, and organs of government as well as revenue mobilisation and devolution of power. There were also a number of calls by civil society to remake the Constitution to remedy contentious issues such as the electoral system, the practice of true federalism, the revenue sharing formula and state creation<sup>14</sup> as well as other issues germane to nationhood. Accordingly, there was consensus across the country and between civil society and government that there should be a wholesale review of the Constitution.

Evidence of government's early recognition of the many defects in the Constitution is apparent in the fact that in October 1999 it set up a Presidential Technical Committee on the Review of the 1999 Constitution. There was also the Presidential Committee on the Provisions for and Practice of Citizenship and Rights in Nigeria as well as the Presidential Committee on National Security in Nigeria, the terms of reference of all of which involved a review / amendment of some sections of the Constitution. However, it would seem that the government simply hijacked the people's call for a constitutional review, thus perpetuating a history of an elitist and statist top-down approach to constitution-making in the country. A pointer to this was its apparent rejection of calls for a SNC from which a new constitution might flow.<sup>15</sup> In response, the government inaugurated

13 The SNC is a contentious issue in Nigerian politics as it means different things to different people and groups. For example, as defined by Aguda, the SNC evoked fears among the political elite that it could lead to the breakup of Nigeria. The debate around the different meanings and positions of different interest groups on the SNC is well captured in Okpeh 2003.

14 It has been argued that Nigeria does not practice true federalism – that there is too much power in the centre, which negates the federal principle of sharing power between the centre and the federating units (Osaghae 2002). This is, for instance, reflected in a lopsided revenue allocation formula decided by a strong central government which supports its units rather than the units supporting the centre. Another important issue relating to revenue-sharing is the formula of derivation. Minority ethnic groups, such as those in the Niger-Delta region, support a sharing formula heavily weighted in favour of derivation (how much a unit derives for the federation) rather than one related to need or population, as provided for in the Constitution. There is also the thorny issue of creating states to satisfy the demands of minorities who feel marginalised by majority ethnics who dominate the political economies of such states (federating units), where they co-exist.

15 According to Aguda, a judge, although the National Assembly is, with the concurrence of two-thirds of the houses of assembly of the states of the federation, vested with the power to 'alter' any part of the Constitution (s 9(1) & (2) of the Constitution) that power does not encompass carrying out a wholesale review of the Constitution, which would amount to the making of a new constitution. The prescription of the content of the constitution is the prerogative of the People (with a capital 'P'), which they may exercise through their representatives sitting in a constituent assembly or at a general constitutional conference.

instead the National Political Reform Conference, headed by Justice Niki Tobi, which handed its report to the executive in July 2005.

An earlier example of state leadership in the constitutional review process without recourse to the people was the National Assembly's Joint Committee on Constitution Review, which was set up in May 2000 but had failed to reach a conclusion by the time that National Assembly was dissolved. A new JCCR, headed by the deputy senate president, Senator Ibrahim Mantu, was constituted and inaugurated on 30 October 2003, but the process was aborted because of the third-term agenda.

How did the TTA affect the attempt at constitutional review? Was the process flawed in any way? Using Hatchard's (2001) principles of good practice for constitution-making as a measure, the review process failed the autochthony test. Firstly, on technical grounds the intended large-scale review of the Constitution by the National Assembly together with the Executive was fundamentally flawed *ab initio* as it was unconstitutional. The Constitution itself prescribes that any large-scale review is the prerogative of the people, which they may exercise through their representatives sitting in a constituent assembly or at a general constitutional conference (Aguda 2009).

Secondly, any legitimacy the people might have accorded to such an illegal exercise was further undermined by undue government interference in the process. The people's perception that the whole purpose of the review was to extend the president's tenure by means of constitutional approval of a third term in office would have had a negative impact on their response to the process and, worse still, its final product, if it had been passed by the National Assembly.

Thirdly, although the government developed procedures to enable people to participate in the process through public hearings there was widespread criticism of the way in which the JCCR carried out the public hearings in the different geopolitical zones. For example, it is questionable whether public hearings organised on the basis of geopolitical zones were representative enough of the country and its population of more than 130-million people. The popular sentiment was that public hearings in the states would have been more representative, affording more people the opportunity to attend the hearings and make representations.

There were also complaints about the sizes of the venues used for the hearings in some zones, while in others, such as Maiduguri (North-East) and Lafia (North-Central), last minute changes of venue served to alienate further those who wished to attend. In Osogbo (South-West), a rumoured change of venue also caused problems (*Punch*, 22 February 2006). This issue is not unconnected to Hatchard's fourth principle of good practice in constitution-making, which entails providing a realistic timeframe within which to undertake the constitutional review exercise.

The 1999 constitutional review process, which kicked off for the second time with the inauguration of the Mantu-led JCCR in 2003 and ended in 2006, set aside three days (22-25 February 2006) for public hearings in the six geopolitical zones. Thereafter, the JCCR and the National Assembly used the three months between the end of the so-called public hearings in February 2006 and the presentation of the Bill to the National Assembly for consideration in May to process the 'inputs' of over 130-million Nigerians. This, by any standards, would have been an almost impossible feat for the National Assembly to achieve even if it worked non-stop.

Since there had been three years in which adequate structures could have been put in place to facilitate consultation with the people, ensure the integration of all shades of opinion and tie up technical loose ends<sup>16</sup> it would seem that the constitutional review process was rushed in the year preceding the 2007 elections in order to create a constitutional basis for the TTA rather than to canvass the views of the Nigerian people through a referendum.<sup>17</sup>

In the end, the constitutional review failed. On 16 May 2006 the Senate voted to throw out the entire Constitutional Amendment Bill containing the tenure extension clause that would have paved the way for President Obasanjo to contest the 2007 elections.

Supporters of the Bill could not muster the two-thirds majority required for a constitutional amendment to bring it into effect, which is unfortunate because the Bill contained 119 other amendments that would have effectively addressed festering issues in the country. Had it not been for the TTA, the constitutional review process would not have been government-led and so rushed and would have been the first real effort at autochthonous constitution-making in the history of Nigeria.

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16 According to Dr Ahmed Hamawa, a university of Maiduguri don:

The entire exercise is not being done in good faith. This [Ibrahim] Mantu [Constitution Review] Committee has been dormant for the past five years and suddenly it seems to have regained its strength because the next elections are around the corner. They want to amend the constitution so that some people can perpetuate themselves in power. If they are sincere, let them wait until after the 2007 elections. Then, we will trust them and go there and present position papers.

*Punch*, 22 February 2006

A street survey conducted by *Punch* in Maiduguri city on 21 February 2006 confirms the people's views in this regard, with almost all commentators claiming the entire review process was a charade intended to legitimise the third-term agenda (*Punch*, 22 February 2006.)

17 A referendum would have helped to validate the process to make up for the technical flaw of not organising a sovereign national conference and or constituent assembly, as is constitutionally required.

As some have argued, the crises in the polity could be resolved through genuine commitment and adherence to the tenets of constitutionalism. In other words, a Nigerian state built on the principles of participatory democracy and social justice could be re-invented through constitutionalism. If this is to happen an autochthonous constitution, with its potential for acceptability and legitimacy, will be the starting point for reinventing Nigeria (Ihonvbere 2000; Aguda 2009). The Obasanjo administration missed this opportunity between 1999 and 2006 because of the bid to secure a third term in office using a non-transparent, non-inclusive and non-participatory constitution review process.

### IMPLICATIONS OF THE THIRD-TERM AGENDA FOR DEMOCRATIC CONSOLIDATION

The TTA has both positive and negative consequences for democratic consolidation in Nigeria. On the positive side, if, by democratic consolidation, we mean the entrenchment of democratic values and ideals in the psyche and consciousness of citizens and their subsequent ability to register their views by organised or spontaneous action such as demonstrations and submission of petitions to those in authority, then one way to measure the impact of the TTA campaign of Obasanjo and his supporters is to evaluate the number of actors who entered the civil society space and the positions they adopted.

An increase in the number of individuals and groups participating in the debate is an indication of the emergence of a participatory citizenry, irrespective of the quality and basis of the debate. For example, according to Ibrahim (2007), many Nigerians opposed the TTA. Among them were religious leaders who openly condemned it, bankers who informed journalists about the amounts and the recipients (legislators) of bribes passing through their banks, musicians who performed songs condemning the TTA advocates, street children and youths who assaulted pro-TTA legislators in their constituencies and some communities even threatening to recall such legislators (Ibrahim 2007, pp 9-10).

Another indicator would be the coordination of civil society organisations (CSOs) and other opposition groups and activities for maximum effect. Prominent anti-TTA CSOs included the National Civil Society Coalition Against Third Term, the Transition Monitoring Group and the United Action for Democracy. According to Ibrahim (2007, p 9) 'the mass media, especially private television stations and newspapers, became the vanguard of the struggle, running a very effective "name and shame" campaign against legislators supporting TTA'. In a sense, the organisation of opposition activities by CSOs, who collaborated to establish the Pro-National Conference Organizations (PRONACO) that organised a National Conference parallel to government's National Political Reform Conference, could

be regarded as a reflection of the entrenchment of democratic values in the psyche and consciousness of Nigerians. Indeed, Nigerians, in their political conduct with regard to the TTA, displayed behavioural changes reflective of a developed democratic citizenship and a move towards the normalisation of democratic politics and increasing confidence in its survival.<sup>18</sup>

However, in the same breath, and this is perhaps indicative of the ambivalent nature of Obasanjo's legacy,<sup>19</sup> the TTA dictated the administration's political actions and inactions in ways that detracted from democratic consolidation as they tended to compromise the quality of governance between 2003 and 2007. Firstly, as stated above, the constitutional review process and its potential for reinventing Nigeria was compromised and scuttled by the scourge of the TTA. Secondly, the TTA, which is characteristic of the political pathology of 'leadership sit-tightism' that bedevils African politics (Nnoli 2000), compromised the moral integrity of the Obasanjo administration and thus the legitimacy of the political system, as the president selectively tolerated corruption because of re-election considerations.

It will be recalled that when Obasanjo was sworn on 29 May 1999 the people's expectations of a new dawn were very high, after the dismal performance of the military in terms of good governance and development. He further raised the people's expectations when he pledged in his inauguration speech, aptly titled 'The New Dawn', that it would not be 'business as usual' and that in his fight against endemic corruption 'there will be no sacred cows'; that 'nobody, no matter where, will be allowed to get away with the breach of the law or the perpetration of corruption and evil'.

By the end of his first term it was back to business as usual. Among the many allegations of corruption in the presidency<sup>20</sup> the most instructive is that relating to

18 Diamond (1994, p 15) contends that normalisation requires 'the expansion of citizen access, development of democratic citizenship and culture, broadening of leadership recruitment and training, and political institutionalization' if democracy is to be consolidated.

19 Alongside the achievements recorded by his administration, some of which were enumerated above, Obasanjo's legacy included increasing levels of poverty; deficient health, transportation and education systems; pervasive insecurity arising from crime; and comatose refineries. His many failures included an inability to fix the electricity problem despite billions of dollars poured into it, autocratic rule characterised by disregard of the rule of law; insurgency in the Niger-Delta; gross human rights abuses and tolerance of political godfatherism and state gangsterism in states like Anambra (See Joseph & Kew 2008).

20 In 2001 the permanent secretary of the Ministry of Defence, Julius Mankanjuola, was indicted for stealing N42-million of the ministry's money but was never prosecuted because of his alleged close relationship with the president (see 'Top ten corruption cases?' available at: [www.nigeriavillagesquare.com/articles/mobolaji-aluko/10-top-corruption-cases-and-a-cutlass-to-cut-the-snake-s-head-pl-2.html](http://www.nigeriavillagesquare.com/articles/mobolaji-aluko/10-top-corruption-cases-and-a-cutlass-to-cut-the-snake-s-head-pl-2.html)). In addition, Kayode Naiyeju, was indicted, reportedly for the abuse of proceeds of the Education Trust Fund, but was promoted by Obasanjo to the post of accountant-general of the federation. This was cited in the 'resign or face impeachment' motion passed by the House of Representatives against the president in 2002.



Works and Housing Minister, Chief Tony Anenih, who allegedly misappropriated N300-billion allocated to his ministry for the rehabilitation of the Lagos/Benin/Port Harcourt roads in 2001. It was reported that the reason the president took no action against Anenih was not only his position as chairman of the Board of Trustees of the ruling People's Democratic Party but also his reputation as a 'political fixer' who could be trusted to deliver the South-South vote in the 2003 elections. In other words, Anenih, in spite of the accusations of embezzlement against him and his apparent technocratic deficiency, was tolerated by the president because of his strategic role in the president's bid for re-election.

This is one way in which the politics of re-election, either for a second or a third term, subtracts from good governance and development in Nigeria. All around the country politicians come into office with the attitude that once elected they are entitled to a second term in office. Therefore, almost immediately after been elected for the first time, politicians tend to set their sights on re-election and go as far as to start planning for it in the very first year of being elected. Characteristically, they retain or recruit and maintain a 'private army' of cultists and political thugs, hob nob with Motor Park touts,<sup>21</sup> popularly known as 'Agberos', and common criminals known as 'Area Boys'. A patron-client system is established to line the pockets of so-called political godfathers who are instrumental to re-election. In a sense then, re-election politics has done more harm than good to Nigerian politics.

Thirdly, the TTA polarised the ruling party, which had negative implications for the good governance and development of the country. The latter part of Obasanjo's administration was tainted by a bitter feud between the president and his vice-president, Atiku Abubakar, which was rooted in the politics of re-election in 2003 and exacerbated by the TTA. According to Odimegwu Onwumere the tension between them started when a PDP re-election committee launched Obasanjo's second-term election campaign without the vice-president, who was away from the country at the time, completely excluding him from the ticket. According to Odimegwu this action was based on speculation that the vice-president intended to stand against the president in the PDP primaries in 2003 (see Odimegwu 2007).

Throughout the period between 2003 and 2007 the two worked at cross purposes, compromising and sacrificing the people to their personal political battles for re-election in 2003 and the TTA in 2007 and therefore validating the saying that 'when two elephants fight, the grass suffers'. Thus, at a time when the full weight of government machinery as an instrument of development should have been deployed to confront the challenges of a people living in increasing poverty<sup>22</sup> it

21 Bus stations or taxi ranks, as they are called in Southern Africa, are known as motor parks in Nigeria and touting by jobless people is a common characteristic of these parks. This is a Nigeria-specific phenomenon given the unregulated/informal nature of the Nigerian transport system.

22 Though these figures can be questioned, the World Bank, according to Joseph & Kew (2008, p 168), estimates that 92% of Nigerians live on less than \$2 a day, while 52% live on less than \$1 a day.



was circumvented and used to prosecute personal battles between those elected to lead by example.

According to Nnana (2007) the dispute between the incumbent and his vice-president compromised the elections in Africa's most populous country as the president openly declared in 2007 that 'over his dead body would Atiku succeed him'. '[T]aking serious interest in who succeeds you as a leader is ordinarily not wrong except that the manner Obasanjo is going about it suggests an exercise that will end up in a "selection" rather than an election. That, of course, portends danger for this diverse country of 140 million people,' wrote Nnana (2007).

Fourthly, the TTA had a negative impact on Nigeria's electoral system because the president sacrificed to his campaign for a third term the opportunity to reform the flawed system. Emerging from extensive reviews of the 2003 elections and stakeholder meetings organised by Nigeria's electoral body, the Independent Electoral Commission (INEC), in December 2003 and February 2004, all parties, including government agencies, political parties and civil society organisations, agreed with INEC that four critical obstacles to free and fair elections in 2007 had to be removed by 2005 (Ibrahim 2007, p 3). These included a constitutional amendment to give INEC administrative and financial autonomy, passing the revised Electoral Act of 2002 into law, imposing limits on campaign expenditure by political parties, early commencement, continuation and updating of voter registration and the distribution of new voter identity cards with embossed photographs and biometric features.

Apart from the revised Electoral Act of 2002, which was only passed in June 2006, INEC was very slow in prosecuting this road map to free and fair elections in 2007, leading Ibrahim (2007) to conclude that its apparent reluctance was symptomatic of programmed failure, which was not unconnected to the TTA. Apparently the president would, as he had in the 1999 and 2003 elections, have benefited from a flawed electoral system in 2007 had the TTA bid succeeded. Indeed, by failing to call INEC to order or to act in the spirit of the electoral road map the president failed to place the nation on a sustainable path of democratic consolidation. Another important indicator in this regard is the report of the NPRC, which contained very significant recommendations that would have addressed the scourge of electoral malpractice in Nigeria (interview 6 January 2007). However, thanks to the TTA, the Federal Executive Council did not consider the NPRC's report, nor has the report yet been made public.

Finally, beyond the Obasanjo era, the TTA served to compromise the quality of governance and the legitimacy of the new leadership in terms of leadership succession planning and its effect on the legitimacy of the new government. Apparently because of the TTA the president did not plan adequately for his successor. Instead of helping his party to enable an internal democratic process

that produced a credible presidential aspirant or, at the very least, head-hunting and mentoring a possible successor as well as ensuring a credible general election process to legitimise such a successor, the president planned for self-succession.

By the time his bid for a third term in office failed, in May 2006, Obasanjo and his party had less than eight months (May to December)<sup>23</sup> to 'shop' for a new presidential aspirant.<sup>24</sup> In the end, Nigeria was hurriedly given a leader who was mentally and physically ill-prepared, not only for the demanding task of running a complex country like Nigeria but also for bringing it out of the woods of underdevelopment.<sup>25</sup>

To compound the situation, the general election which ushered in the new president was marred by widespread irregularities, violence and alleged vote-rigging, which cast serious doubts on its credibility (see Omotola 2007b; Joseph & Kew 2008). In addition to the unanimous verdict of local and international observers to the effect that the election was highly flawed, President Yar'Adua, on ascending to office, admitted that the exercise was devoid of credibility. This no doubt informed his decision to do what the TTA had prevented Obasanjo from doing: reform the electoral process.

However, this action did not make the resulting legitimacy question, which hung around President Yar'Adua's head like the Sword of Damocles, go away. Analysts have pointed to the fact that the legitimacy question significantly affected the president's actions and inactions both in the domestic and international arenas in the early days of his presidency. And in spite of the temporary reprieve granted by a 2008 election tribunal ruling, which upheld the election, President Yar'Adua and the entire nation were still embattled during the wait for the final ruling by the Supreme Court. Although it swung in the president's favour, it resulted in a certain political instability which does not bode well for democracy and development.

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23 December 2006 was the deadline set by INEC for presidential nominations.

24 The race for the presidency only came alive after the defeat of the TTA in May 2006. Apparently the leading contenders were all waiting for the president to declare his intentions before going ahead with their bids.

25 Alhaji Umar Yar'Adua, Obasanjo's chosen successor, was an obscure governor of Katsina state who, six months earlier, had had no ambition to become president and thus had no well articulated vision, mission or manifesto for developing Nigeria. In addition, he was known to be terminally ill with a kidney disease. Yar'Adua died one year after this article was written. Thus the article does not cover the crisis of leadership and political instability into which his illness plunged Nigeria from November 2009, when he became too ill to carry out his role, until May 2010 when he eventually died.

## CONCLUSIONS AND RECOMMENDATIONS

We have argued that democracy in Nigeria is still trapped in the early stages of transition and is thus far from being consolidated. Basically we contend that among the numerous factors militating against democratic consolidation in Nigeria the question of re-election politics and, specifically, President Obasanjo's alleged bid to extend his tenure beyond the constitutionally prescribed two-term limit, popularly referred to as the 'third-term agenda', are particularly significant. This is because the TTA became the ideological compass that was used to navigate the ship of state as democratic principles of good governance, rule of law, and popular participation, including the goal of development, became subordinated to the TTA.

Specifically, the TTA robbed Nigeria of the opportunity to reinvent the country through constitutionalism when it resulted in the Senate aborting the top-down process of reviewing the 1999 Constitution. Consequently, the entire Constitutional Amendment Bill was thrown out, along with 119 potential amendments which might have helped resolve some of the thorny issues relating to the country's federalism and place it on a sustainable path to democratic consolidation.

Indeed, the TTA was a threat to democratic consolidation as, in the main, it compromised the quality of governance under Obasanjo, polarised the ruling party and ensured the retention of a flawed electoral system. In addition, it extended beyond President Obasanjo's administration to compromise the quality of governance and the legitimacy of President Yar'Adua's administration, casting doubts on the political stability of Nigeria.

However, in some ways, the TTA was a positive test of democratic consolidation because the people's opposition to it was a measure of how well Nigerians have entrenched the democratic value of political inquiry, which augurs well for the development of democratic citizenship.

The number of individuals and civil society organisations that participated in the debate is an indication of the emergence of a participatory citizenry, irrespective of the quality and basis of their contribution. The fact remains that if strong opposition to the TTA had not been palpable among the citizenry and civil society organisations<sup>26</sup> the anti-TTA members of the National Assembly might have lost steam in forging ahead with the struggle, especially given the anti-democratic

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26 Apart from the aforementioned roles of Nigerians and CSOs in opposing the TTA, in the thick of the TTA controversy all the national dailies in Nigeria conducted daily opinion polls on the subject. The question was basically 'Do you support President Obasanjo's third-term bid?' and each time a majority (80% average) of the people who participated answered 'No'. One of the authors conducted a personal survey and analysis of these poll results to determine the level of popular opposition to the TTA. These opinion surveys are separate from those randomly conducted on the streets of various Nigerian cities by some of the dailies, and the results, like those of the survey conducted by *Punch* in Maiduguri on 21 May 2006, reflected a similar response pattern.

antecedents of Nigeria's political elites (see Banjo 2008). This is a positive move towards normalising democratic politics and increasing confidence in its survival, which Diamond (1994) contends are essential constituents of democratic consolidation. However, as he further argues (1994, p 15), democratic consolidation requires the expansion of citizen access, development of democratic citizenship and culture, broadening of leadership recruitment and training, and political institutionalisation. Therefore we cannot reasonably conclude that the emergence of the participatory citizen during the TTA debate meets all the requirements for democratic consolidation highlighted above. For example, the same citizens could not sustain the tempo of political activism used against the TTA to ensure and protect their vote, as the 2007 elections were massively rigged. In most cases the citizens who fought against the TTA were the instruments of widespread vote-rigging, ballot-box stealing and general violence that characterised the 2007 election, thus leaving us to wonder whether the people's activism against the TTA was merely a flash in the pan.

What, then, is the way forward in respect of entrenching democratic values and practices in Nigerians to the point where their total breakdown or a reversion to authoritarianism becomes extremely unlikely and so that everyone can reap the material benefits of democracy? Having located the TTA problem in the politics of re-election it is our recommendation that Nigerians consider seriously the possibility of a single fixed term of more than four years but fewer than eight years for executive positions.

While the nexus between the quest for re-election and electoral malpractice in Nigeria may still be the subject of further research we do not need a soothsayer to tell us that a single fixed term of office will augur well for democratic consolidation. For example, from our analysis of the TTA we know that the vested interests of an incumbent regime with re-election ambitions could dissuade it from pursuing extensive electoral reforms. Implicitly, therefore, only a reformist regime with no re-election prospect whatsoever will be able to reform Nigeria's electoral system to enable it to produce credible and legitimate leaders.

Obasanjo's third-term bid showed that even the Constitution is not necessarily a barrier to personal ambition. However, we contend that the attempt by Obasanjo and his cronies to change the Constitution to facilitate the TTA was possible because, in the first place, the 1999 Constitution was an illegal document in that it was not created by the people. Therefore, since illegality begets illegality, an autochthonous constitution will be much more difficult to undermine if it provides for a single fixed term in office. A reminder of Hatchard's concept of an autochthonous constitution is perhaps instructive here:

a crucial step towards the establishment of an *ethos of constitutionalism*,

i.e. a recognition by the people that the document is 'their constitution' upon which they were consulted and which they endorse, which contains provisions that are meaningful to them and from which they can derive demonstrable benefits. The resultant document can then become 'trans-generational' in that it retains and develops public support over a period of time and thus is able to withstand attempts to undermine it either by 'unconstitutional' or 'constitutional' means.

Hatchard 2001, p 216

Clearly then, Nigeria cannot run away from the thorny issue of creating its first autochthonous constitution no matter how much the political elites postpone 'the evil day'. And if this is so, nor can government continue to run from the question of a sovereign national conference, which is the most credible way to guarantee maximum participation of and support by Nigerians in the constitution-making process.

As things are, and with Nigerians becoming increasingly politically conscious, if government does not take the initiative in planning for and convening such a conference of accredited representatives of all interest groups including the National Assembly, civil society organisations will do it some day in what might yet turn out to be political revolution. If the authors were in a position to attend a national conference of Nigerians and or a Constituent Assembly to change the 1999 Constitution our one recommendation would be a single fixed term of office for executive positions.

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# POLITICAL CORRUPTION, DEMOCRATISATION AND THE SQUANDERING OF HOPE IN NIGERIA

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## ABSTRACT

*The hope of a new Nigeria characterised by good governance and rapid socio-economic development, which accompanied Nigeria's democratisation in 1999, seems to have largely been squandered 12 years into the process. In view of the effects of dashed hopes on the psyche of most ordinary Nigerians, as well as their impact on the overall development of the country – the pivot around which the African continent should revolve – this article attempts a critical examination of some probable causal factors. Among the various possible factors the paper identifies political corruption as the most prominent and debilitating. It discusses the effects of political corruption on the character of the state in Nigeria as well as the corruptive impact of the system of party funding in the country. Similarly, it analyses the effects of the country's phenomenal earnings from the sale of crude oil, which are not properly accounted for, and the uncontrolled culture of impunity among many holders of sensitive public office. It concludes that there is a need to re-invent state functionality, particularly through purposely engaging professionals and civil society groups in governance and public affairs in general.*

## INTRODUCTION

The great expectations that accompanied Nigeria's political independence in 1960 have, over the years, encountered serious challenges and problems. From an independence built on a vision of becoming the Giant of Africa and the entire black race, Nigeria, 50 years later, is one of Africa's most under-developed countries. How, despite its huge human and material resources, did Nigeria find itself in its present position? What are the probable causes of the evident lack of

good governance and sustainable development in the country? Why is the state so fragile? To what extent can the re-introduction of civil rule address the various crises brought about by the long period of military rule in the country? In short, how can Nigeria's squandered developmental hope be fully restored?

The burgeoning literature on Nigeria's multi-dimensional predicament is replete with scholarly explanations of the probable causes of the numerous challenges and problems facing the country. The most prominent among these trace Nigeria's inability to harness its potential and actualise its vision back to the country's colonial beginnings, multi-ethnic nature, leadership failure, political instability, military rule and inappropriate constitutions.

Although these explanations are quite logical and plausible, political corruption, or the general abuse of official positions and privileges, especially through the rapid erosion of the autonomy and functionality of the state, seems to be a more appropriate explanation. In light of this, in analysing Nigeria's major predicaments I will concentrate on the debilitating effects of political corruption as well as leadership failure.

The rest of the paper is divided into four main sections. First, I explain the concepts that are central to the analysis. The second section comprises a brief discussion of Nigeria from an historical and theoretical perspective. Next I apply the knowledge of the basic elements articulated in the second section to the examination of selected cases in the Fourth Republic, with a view to analysing the extent to which democratisation has enhanced the fight against political corruption and helped to restore the country's image in the comity of nations. The final section summarises, draws conclusions and suggests alternative measures that might assist the attainment of good governance, particularly by reducing political corruption.

### CONCEPTUAL CLARIFICATIONS

The main concept I shall attempt to explain is political corruption. Other concepts, such as democracy, good governance and development, which are hampered in Nigeria by political corruption, will also be explained.

Political corruption is a ubiquitous global issue of serious concern. It is prevalent in all human societies, but the degree or nature varies from one society to another. Similarly, the content and mode of expression of corruption are culture specific and, in addition, vary with time.

In the case of Nigeria corruption in public life seems not to be a mere error to be remedied. Indeed, its systematic and persistent nature depicts a problem that 'manifests an indictment of something fundamental about the society' (Odekunle 1986, p 4). In line with the pivotal role played by state-society relationships in the

overall enhancement of the capacity of the state the endemic political corruption in Nigeria also explains the fragile nature of public institutions and other agencies of the state.

For ease of reference, political corruption is used in the context of this article as any act of a public official, civilian or military, aimed at changing the normal or lawful course of events, especially when the perpetrator uses such a position of authority for the purposes of a personal or group interest, most often at the expense of others (Olopoenia 1998; Yagboyaju 2004). It should be noted that this conceptualisation of the term makes it adaptable to such practices as:

Ethnic and personal misuse of office for accumulation of wealth, unauthorized sale of government property, illegal hoarding of essential and critical commodities, favouritism, nepotism, purchase of loyalty by an illegitimate or outrightly illegal regime through inducement for supporters and victimization of opponents and critics, election rigging, falsification of election results and examination malpractices among others.

Yagboyaju 2008, p 3

Obviously, the list contained in the article of corrupt acts in Nigeria's public domain is not exhaustive – they also include rent-seeking, kleptocracy, state capture and the manipulation of lobbying by the political class.

The other key concepts, namely democracy, good governance and development, will be articulated in a way that demonstrates clearly the relationship between them and political corruption. In other words, the explanation of these concepts should deepen our understanding of the way one may impede or enhance the actualisation of the other. It is pertinent to note that democracy, good governance and development constitute different aspects of an ultimate goal that is attained mainly through the process of democratisation. In light of this, it may be useful to conceptualise democratisation before discussing these higher levels.

In simple terms, democratisation implies a 'series of continuous actions and changes geared toward the replacement of an existing system of authoritarian and undemocratic regime with one that is participatory and democratic in nature' (Yagboyaju 2007, p 35). This process is essentially open and competitive and more representative and accommodating.

Democracy, according to its earlier antecedents in the Greek city-states, literally means rule of or by the people. Ever since its evolution it has largely been characterised by equality (in terms of voting rights), natural rights and sovereignty (Heater 1964, p 117). Apparently, direct participation in day-to-day governance is no longer possible in modern nation-states because of the growing population

and complexities. In Nigeria, as in many other modern states, liberal democracy, or representative democracy, is, therefore, the dominant model.

The most important features of this model include the rule of law, transparency, accountability, periodic elections and constitutionalism. It is, perhaps, necessary to note that democracy has, up to now, been widely accepted as the best form of government. Democracy and other types of government may be classified under the broad traditional notion of governance, which links the concept to the activities of 'specific occupants of public office who are in a position to make binding decisions at any given time' (Collier 1982, p 7). In this sense governance is applied as a set of norms to appraise governmental systems and prescribe appropriate or acceptable practice of the manner in which power is utilised (Olowu 1999, p 3). However, governance, in more recent times, has become synonymous with democracy or democratic rule. This is, perhaps, because the essence of any modern government is seen as the greatest happiness for the greatest number of people, or, in simple terms, good governance.

While governance and democracy might be inseparable in the advanced democracies of the developed world, democratisation in Nigeria and many other parts of the less developed world that are not totally free from a possible relapse into the dark past can still be divided into those under good and those under bad governance. According to Fadakinte (2008, p 12) good governance must entail the capacity of the state to function well in the service of the public good. In doing so the state must be transparent in its activities, and this includes transparency about the way government makes decisions, conducts business and spends public funds. Similarly, good governance requires that rulers abide by the rule of law and be accountable to the people. It must also incorporate mechanisms for 'peaceful conflict resolution, for it is a bad government that resorts to violence in resolving conflicts' (Fadakinte 2008, p 12). In all of this there must be an interplay of such factors as justice, fairness and equity.

Finally, development, which consists of such elements as economic growth and generalised access to the good things of life, can be attained through the sustainability of the democratisation process. In more concrete terms, development can be attained effectively through greater and continuously improving access to such basic needs as food, shelter, clothing, education, health, political and economic freedom and personal self-esteem, which comes from an individual's capacity to participate in meaningful and socially productive interactions with other members of the community (Olopoenia 1998).

It is appropriate to examine critically the character of the state in Nigeria so as to understand how and why the hope of achieving and consolidating all the elements of development discussed above was gradually squandered.

## NIGERIA IN HISTORICAL AND THEORETICAL PERSPECTIVE

It is, perhaps, appropriate to start by asking why and how Nigeria reached its present stage? Why is it that one is confronted, almost everywhere one turns in modern Nigeria, by strong feelings of alienation and despondency among the people? How can we explain the evidently mindless corruption and insensitivity to social justice among the leaders, as well as the wanton vandalism and criminality of the ordinary citizens? There is, undoubtedly, strong evidence that all is not well with Nigeria and, more particularly, Nigerians. In order to understand all these socioeconomic and political elements it is necessary to examine the country critically from both an historical and a theoretical perspective.

In Nigeria, as in most African countries, colonialism, the politics of independence including its resultant effects – ‘colonial inheritance and inappropriate political structures and system’ (Okunade 2008, p 20) – and the country’s multi-ethnic character were among the prominent factors scholars advanced to explain the country’s predicament during and immediately after colonial rule.

It should, for instance, be noted that most early scholarly works, including Lewis (1965), Sklar (1966), Dudley (1973), Ekeh (1975) and several others that emphasised colonialism and the presence of diverse ethnic nationalities in Nigeria, did not portray ethnicity or its salience in negative terms. Rather, they argued that the colonial state suffered from its lack of legitimating ideals because it was essentially perceived as an alien structure. Apparently this was largely because the colonial state was created from outside Nigeria and not as a result of a demand or request by the indigenous people.

In light of this, a relationship that Ekeh (1975) articulated in his concept of the ‘two publics’ – the ‘primordial’ and the ‘civic’ – manifested in many ways. According to Ekeh the primordial realm is a moral one, while the civic is, for the most part, amoral. The primordial involves a sense of membership of a community, a sense of citizenship, while the civic derives from the colonial administration and its imposed military, civil service and police institutions (Joseph 1991, p 193). The private individual has a sense of being morally linked with his primordial group, therefore he relates to it with integrity and moral uprightness, while he relates to the second, the colonially contrived nation-state and its institutions, with no moral commitment and a minimal sense of responsibility or decorum. In light of this, the perpetration of political corruption in Nigeria can be traced to the faulty beginnings of the country.

However, there is a need to interrogate further how and why political corruption became bolder and more ravenous in spite of the loud pronouncements made against it by successive regimes since political independence. Similarly, we



need to examine critically why it has been difficult to establish democratic rule in the country despite the people's avowed preference for democracy and the rule of law. Most of the recent explanations advanced, especially since the first military regime, the subsequent interchange between civil and military rule and, finally, the return of civilian rule since 1999, have not totally disregarded colonialism but have placed more emphasis on the narrow concept of politics, by which it is reduced to the contest for political office and the competition for its spoils.

According to Dudley (1975) politics in Nigeria 'is not about alternative policies but about the control over men and resources'. This is well articulated in more theoretical terms by Joseph (1991), with his prebendalist perspectives on the country's political sociology. Similarly, Ikpe (2005) and a host of others have adapted Max Weber's explanations of the concept of patrimonialism to explain the nature of the state and politics in modern Nigeria. As articulated by these scholars, the most prominent features of patrimonialism or a patrimonial state include, among others, nepotism, administrative inefficiency, political corruption, political instability and a general lack of development.

Obviously all these explanations, either for the Nigerian situation or for others (Callaghy 1987; Theobald 1990; World Bank 2000), which are more generalised about the lack of development in most parts of Africa, point to the fragile nature of the state. In the case of Nigeria, even after 50 years of political independence the state barely fits the description of 'the organized aggregate of relatively permanent institutions of governance' (Duvall & Freeman 1981, p 106), largely because it is 'captured' and manipulated by a majority of its political leaders and technocrats.

Apparently, a plausible explanation for this practice is that a majority of political rulers and senior public officials exploits the combination of some negative aspects of the traditional or indigenous patrimonial system like the *Kabiyesi* mentality (the African king or patriarch should never be faulted) and the oppressive character of the colonial and post-colonial state to sustain personal rule and other forms of abuse.

The discovery of crude oil and the phenomenally large resources that has brought over the years have also, in several ways, exacerbated the challenges of political corruption, which are greater in Nigeria than in other African states. There are, for instance, elements of political corruption in Ghana, Botswana and other emerging democracies on the continent, but the debilitating effects are minimised, probably because most political rulers and technocrats in those countries do not have direct access to the huge resources available to their Nigerian counterparts.

The endemic political corruption is a manifestation of the evident lack of capacity on the part of the state as well as of the acute governance crisis in the



country that can be traced back to the long period of arbitrary and personal rule there. Troublingly, while the democratisation process appears to have liberalised the political space, it is yet to guarantee significantly the rule of law, transparency and accountability that should ultimately curtail the culture of impunity and other forms of violation by a majority of public officials who have, over the years, manipulated governmental powers to the detriment of ordinary citizens (Yagboyaju 2010b). As will be discussed in the next section, it may therefore not be surprising that the same people are the major financiers and political godfathers who largely determine the course of the country's democratisation process in the Fourth Republic.

### SELECTED CASES

This section examines and discusses specific instances during the Fourth Republic where government at different levels has, through its actions, fuelled or curbed political corruption, thus either enhancing or hampering the process of democratisation. Specifically, the section concentrates on such key areas as election finance and party funding, the economy and budgeting process and the judicial process.

#### *Money and politics*

Discussions about money and politics in contemporary Nigeria, especially relating to the impact of money on political corruption, often generate serious concerns, which seem to derive from the significant role played by party funding and election financing in the realisation of genuine democratic participation (Onuoha 2002, p 135). It is patently clear, for instance, that party and election financiers may easily exploit their control over the parties they fund either in order to discriminate against particular candidates or to hijack the machinery of government if their party is victorious.

In short, whether the function of the political party to select candidates freely is vitiated or governance itself is hijacked, the lack of proper and effective management of party funding leads to abuse, political corruption and the restriction of political participation.

There are two schools of thought about the issue of financing of political parties. The first, referring back to the early 1990s, when the Babangida military regime registered and provided most of the funds needed by the two parties in existence at the time, believes government should participate in funding political parties. They argue that the modest success recorded during the ill-fated Third Republic, when the regime funded the Social Democratic Party (SDP) and the

National Republican Convention (NRC), showed the effectiveness of such a contribution by government. The second school believes political parties should organise their own funding but that the government should enact laws to guide the way the parties generate and dispense their funds.

The latter is the case in the Fourth Republic. Although all the parties receive subventions and financial assistance from the government, the bulk of their funds comes from party members, supporters, candidates and other patrons, especially the very rich. However, officers and officials of the ruling parties at federal, state and local government levels who are elected or appointed to various public positions still use their positions to win juicy contracts and other privileges, through which the parties can also be funded.

The main concern of this article is the financiers and 'moneybags' who deploy funds in order to hijack political positions and decisions. Specifically, I refer to the examples of Anambra State under Governors Chinwoke Mbadiniju (1999-2003) and Chris Ngige (2003-2006) and Enugu State under Governor Chimaroke Nnamani (1999-2007).

Mbadiniju's election in 1999 was reportedly financed by Sir Emeka Offor. In fact, Mbadiniju confessed that he had rewarded Offor for the N 4-million he had contributed by allowing him to nominate the commissioner for finance and works (*Tell* 31, p 2). However, trouble arose when the governor, probably because of his newly acquired wealth, declared his intention to seek re-election in 2003.

Chief Chris Uba, who financed Governor Chris Ngige, proved to be shrewder – he reportedly made Ngige sign an agreement stating that he would not seek re-election (*Tell* 51, p 4). Ngige had also, prior to his election, signed a covenant of relationship in which he pledged to continue to do Chris Uba's bidding and was alleged to have signed three undated letters of resignation from the positions of party candidate, governor-elect and governor (Ayoade 2008, p 91). The significance of these was that if Ngige reneged on his pledge the appropriate resignation letter would be dated and submitted.

Uba reportedly put in place a caucus, designed, essentially, to serve as a 'clearing house' for all government policies and decisions. If all these arrangements had been fully implemented Ngige would have been a mere figurehead and a lame duck. He was, however, alleged to have reneged on his promises within six weeks of his inauguration as governor and, as a result, was abducted, with the connivance of the police, on 10 July 2003.

All these events, and Ngige's removal from office in 2006, largely accounted for the under-development of Anambra State. More importantly, the abuse of privileges, especially by the godfather and financier, constituted political corruption, which also hindered the deepening of democratic rule in the state.

The situation in Enugu state was similar. Here Chief Jim Nwobodo supported

and funded the gubernatorial campaign and election of Chimaroke Nnamani and, in return, had his nominees appointed as commissioners in the state's cabinet. However, trouble started when Nnamani allegedly embarked on the deconstruction of Nwobodo's political machine when Nwobodo attempted to stand for a second term as governor.

There are several other similar instances of abuse of privilege by political godfathers and financiers in other parts of the country. The prominent ones include Oyo State under Governor Rashidi Ladoja, whose disagreement with his political godfather, Chief Lamidi Adedibu, disrupted the process of governance in the state between 2003 and 2007.

The abuse by wealthy and influential Nigerians of party funding and election finance constitutes a great threat to the country's democratisation. Nigeria and its political class seem to have learnt little or nothing from best practice in the developed world, where, for instance, President Barack Obama of the USA and his party funded their activities from the small donations they gathered from across the country. Troublingly, election financing and political godfatherism in Nigeria's Fourth Republic have also sown doubts about the legitimacy of the electoral process and have created an environment that distances the people from the state and its numerous functions.

### *The economy*

As highlighted above the economy and the budgeting process are key aspects of the Fourth Republic that are affected by political corruption and contribute to the gradual erosion of the hope of establishing and sustaining democratic rule in the country. It is, perhaps, necessary to note that the first civilian administration in the Fourth Republic inherited from its military predecessor an ailing economy characterised by mismanagement, extra-budgetary spending, general fiscal indiscipline, an oversized workforce and a visibly ill-equipped and ill-motivated bureaucracy (Yagboyaju 2010a).

Evidence of the ailing economy at the time was the country's external debt, which creditors put at \$32-billion. Surprisingly, Nigeria was neither sure of the exact amount it owed nor could it provide evidence of the projects for which the loans that made up the debt had been used. In addition, the country was, at different times during this period, classified by various international organisations as 'one of the world's poorest', 'a poorly managed economy', 'a fragile economy', and so on (World Bank 1996; United Nations Development Programme 1997).

Similarly, Transparency International, the Berlin-based anti-corruption organisation, ranked Nigeria as the most corrupt of the 54 countries assessed around the world in 1998. Certainly, all of these were serious signs of an ailing

economy. However, there was great hope that the economy would be resuscitated with the reintroduction of a civilian government and the subsequent establishment of democratic rule. This expectation was based on such basic democratic principles as rigorous scrutiny of the budgeting process, public procurement, the process of employment and appointment of public office bearers and, more importantly, the experiences of other countries where democratic rule had enhanced economic growth and sustainable development.

As expected, the democratisation process in the Fourth Republic seems to have partly enhanced the country's economic sector. For instance, various efforts by the Obasanjo administration (1999-2007) led to the cancellation of more than \$12-billion of the country's foreign debt. In addition to the debt-exit strategy the Obasanjo administration helped to build the country's external reserves from a modest \$4-billion in 1998 to \$48-billion in 2007 (Yagboyaju 2010b). The administration also helped to improve openness and transparency in government business by enacting legislation that established such anti-corruption agencies as the Independent Corrupt Practices and Allied Offences Commission (ICPC), and the Economic and Financial Crimes Commission (EFCC).

However, apart from the reputation and image-building goals the Obasanjo administration's economic feat achieved, it never made any significant impact on the physical development of Nigeria and the general well-being of its people. It should, for instance, be noted that despite the phenomenal rise in the country's external reserves and the prompt settlement of the foreign debt, made possible through better management of the resources from the sale of crude oil, other critical sectors of the economy such as manufacturing, power generation and distribution, transportation, health, education and many others were largely neglected.

The net effect of this neglect was rising levels of poverty and general deprivation among ordinary citizens, whose belief in democracy is rapidly being squandered. The reason is that democracy, which should mainly be about the people and the political mechanisms by which their well-being, freedom and happiness are secured and sustained, functions in Nigeria little differently from military rule.

### *The legislature*

At another level, the legislature, a key institution of democratic rule that is supposed to distinguish the system from that operating under military rule, has also contributed to the squandering of hope in the country's democratisation.

Perhaps it is necessary to start by examining the role of the legislature in filling key government and public positions. Quite importantly, the role of the legislature in Nigeria's budgeting process is even more critical and sensitive. In the case of the appointments of such high-ranking public officials as ministers, commissioners,

board members and similar others, which must be approved by the legislature, it is almost becoming the norm that the legislators must be lobbied. The process of lobbying in Nigeria, unlike that in the USA and other advanced democracies, is often characterised by the exchange of money or other pecuniary benefits between the legislators and the executive.

In the more important exercise of budget approval the legislators have displayed a disturbing lack of understanding of the needs of ordinary Nigerians and the workings of democracy. For instance, not only do they often disagree with the executive about the inclusion of huge votes for their constituency projects in the yearly budget, they also insist that they must be directly in charge of the execution of such projects.

In addition, delays in approving the budget, sometime up to the end of the first quarter of the year, have been traced to some exploitative activities among the legislators. It should be noted that under presidents Obasanjo and Yar'Adua both arms of the National Assembly were often at loggerheads with the executive arm, especially during budget approval exercises. While such disagreements add to the vibrancy of democratic rule in many places, they threaten the system in Nigeria because they do not appear to be the product of altruistic motives.

A concrete example is that of Anambra State. In 2008 the state's Governor Peter Obi presented a budget proposal of N84.2-billion to the State House of Assembly, but this was slashed to N57.6-billion by the assembly's Committee on Finance and Appropriation (*The Punch*, 24 April 2008, p14). While in other societies this action might have been regarded as purely altruistic, it generated considerable comment in Nigeria because the reduction affected recurrent expenditure (reduced from N24.2-billion to N21.9-billion) and capital expenditure (reduced from N60-billion to N35.7-billion), while it increased the allocation to the assembly by 300 per cent (from N284-million to N1 235-billion), giving no cogent reasons for the increase. It is curious that the legislature increased its own budgetary allocation while dramatically reducing the allocations which directly affect the ordinary citizens whose interests the legislators had sworn to protect.

Similarly, the legislators have approved for themselves outrageous salaries that are not in any way in tune with current realities in the country. In 2009, for instance, a senator earned N240-million (about \$1.7m) in salaries and allowances, while his counterpart in the House of Representatives earned about N204-million (about \$1.45m). In the United States a senator earns \$174 000 and the UK pays a parliamentarian about \$64 000 a year (Sagay 2010, p 68).

Legislators are not alone in granting themselves huge rewards. The outlandish salaries and privileges enjoyed by political appointees were one of the main reason why President Yar'Adua called for the reduction of the salaries and allowances of the political class. Ironically, rather than being reduced, especially in

light of the country's economic downturn, which has reduced its foreign reserves to an all time low of about \$4-billion, wasteful and unproductive spending by public officials has increased.

In early August 2010, for instance, the Minister of Information, Professor Dora Akunyili, announced after the weekly Cabinet meeting that the Executive Council had approved the purchase of three aircraft to boost the presidential fleet, which already numbers eight. According to the minister, one of the aircraft, a Falcon 7x, is the latest of its kind. The three aircraft will cost Nigeria \$154-million (*The Punch*, 18 August 2010, p 80). This decision was taken in the same week as an outbreak of cholera led to the deaths of more than 100 people in various parts of the country.

These actions portray the political elites as not only insensitive but as profligates and poor economic managers who are, themselves, great threats to democratisation in Nigeria. Perhaps it is necessary to note that while senior public officials in Nigeria engage in these unproductive and provocative activities David Cameron, the British prime minister, travelled to the US on a commercial flight in August 2010, reportedly saying that the UK had a huge budget deficit and could therefore not afford to spend money on executive planes.

President Barack Obama and many others in the developed world have also travelled on public transport at various times despite their countries' impressive per capita income (\$35 468 in the UK and \$46 350 in the US in 2009) measured against Nigeria's lowly \$2 249 in the same year (Sagay 2010).

Many members of Nigeria's political elites have been found guilty of abuse of privileges and other official misconduct since the beginning of the Fourth Republic. In several cases involving legislators the perpetrators were merely investigated by their colleagues and removed from key legislative positions if found guilty, instead of being properly prosecuted. In the case of the executive arm many of the corrupt public officials, especially former governors, ministers and other top-level officers who were prosecuted either entered into plea bargaining agreements and received ridiculously light punishments, or were not prosecuted at all.

In brief, Nigeria's democratisation is threatened because the well-being of ordinary citizens is being jeopardised by general deprivation, alienation, poverty and the ailing economy fuelled by maladministration, incompetence and lack of accountability. Obviously, all these factors negate the advancement of such elements of the democratic ethos as openness, wide consultation and wealth creation.

### *The judiciary*

Finally, I shall take a critical look at the judiciary, examining the impact of official venality on its role in Nigeria's democratisation and on the expectations of ordinary citizens.



Thus far the judicial arm has performed well in its roles as policy adjudicator and constitutional interpreter. Indeed, it has played a significant role in moderating the activities of individuals, groups and agencies during the country's 11 years of democracy. It should, for instance, be noted that during this period it resolved several acrimonious inter- and intra-governmental disputes. These included the legal tussle in 2001 between the federal government and some oil producing states in the South-South geopolitical zone over resource allocation and control; the case in 2005 of the federal government withholding funds allocated to local governments in Lagos State and the attempt by the presidency in 2007 to prevent Atiku Abubakar, then vice-president, from contesting the presidential election.

All these cases, and several others, including many labour-related issues, were resolved in the Supreme Court. Similarly, several election cases, such as those between Chris Ngige, one-time Governor of Anambra State, and his successor, Peter Obi; Senator Araraume and Chief Ugwuh of Anambra State; Governor Rotimi Amaechi of Rivers State and the Independent National Electoral Commission (INEC); Governor Adams Oshiomhole of Edo State and his predecessor, Oserheiman Osunbor; and Governor Olusegun Mimiko of Ondo State and his predecessor, Segun Agagu, were also resolved by the judiciary.

Although the political elites have, at various times, criticised the judiciary for its 'judicial activism', especially in relation to overturning many controversial election results, it must be noted that this arm of government has generally won accolades for helping to restore the confidence of ordinary citizens in Nigeria's democratisation.

However, a disturbing blight on the performance record of the judiciary is the corrupt attitude of some of its officials and the general allegation against many others of abuse of the judicial process. Examples are the dismissal in 2006 of justices Wilson Egbo-Egbo, Stanley Nnaji and Chris Selong for corruption (*The Punch*, 21 June 2006, p14) and the investigation of allegations of bribery and other misconduct committed by the election tribunal, led by Justice Naaron, that looked into petitions relating to the 2007 general elections in Osun State. The outcome of this investigation is not yet known.

In addition, the role played by some senior advocates and other influential members of the Bar and Bench in handling the cases of corrupt former governors also appears to be suspicious. It should, for instance, be noted that former governors Saminu Turaki, Peter Odili, Chimaroke Nnamani and many others have secured unnecessarily long stays of execution against their prosecution while others, such as Lucky Igbinedion and D S P Alamisieyegha reached controversial plea bargaining agreements with the government, resulting in the imposition of paltry fines that constituted only a fraction of the amounts they allegedly misappropriated in their official capacities.



In summary, Nigeria's democracy has performed abysmally in terms of finance and the general conduct of political party affairs, the effective implementation of budgets for economic growth and the general well-being of ordinary citizens and the deepening of an assertive judicial process. The 11-year democratic journey which began amid great hope and expectations has yielded dividends that are in no way comparable to the huge investment and expectations of most ordinary Nigerians, especially those who are aware of the workings and effects of democratic governance in other parts of the globe.

### CONCLUSION

The main theme of this article is the debilitating effects of political corruption on Nigeria's 11-year-old democracy. Instead of maturing into a full-blown democracy that guarantees development and the consolidation of the hopes and expectations of ordinary people, the process has faltered to such an extent that sceptics have concluded that democracy may simply not work in the country.

The article has traced the genesis of most of the daunting challenges confronting democratisation to Nigeria's colonial origins and, more importantly, to a failure of leadership, trying, in various ways, to find an explanation for the hijacking of public institutions and sensitive agencies for the personal use of the officials in charge.

In light of the great danger the evident lack of good governance in Nigeria poses both to the country and to the rest of the world, this article expresses the opinion that the state must urgently be restored to functionality. Essentially this process should start with the identification of selfless and reform-oriented leaders with proven records of service, preferably at local community level. It is expected that such leaders might serve as the pivots around which functional public institutions could be built. The proposed starting point at local community level conforms to a global trend towards a bottom-up approach to governance. However, there is also a need for effective collaboration between civil society organisations and other professional groups.

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# ELECTORAL REFORM AND THE PROSPECTS OF DEMOCRATIC CONSOLIDATION IN NIGERIA

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## ABSTRACT

*The article analyses the ongoing electoral reform process in Nigeria and the prospects for the consolidation of democracy. Specifically, it explores the justifications for reform, evaluates the mechanisms adopted to promote electoral reform, notably the inauguration of the Electoral Reform Committee, its report, government's white paper on the report and the implementation of approved reform measures. Generally, the reforms have been targeted at instituting a strong election management body with substantial administrative and financial autonomy and at promoting a democratic political culture within parties and the populace. Drawing concrete insights from the 2011 Nigerian elections, which provided the first litmus test of the possible impact of the reform on the democratisation process, the article argues that while the reform process holds some promise of consolidation, it does not go far enough. Though institutional designs matter for effective electoral governance institutional reengineering without corresponding attitudinal and behavioural reform is not sufficient. The strategic decisions of the political actors, both senior and junior, to take advantage of the institutional reform process within legally permissible limits hold an important key to the restoration of credibility and public trust in the electoral process and its outcome.*

## INTRODUCTION

The relationship between electoral reform and public trust in electoral institutions needs to be investigated in the context of whether reform helps to increase confidence in electoral processes and outcomes and if so, under what conditions. The answer helps in determining the effect of the unprecedented discourse about

electoral reform and the prospects of effective electoral governance and democratic consolidation in Nigeria. The study becomes more pressing given recent developments in the struggle for electoral reform geared towards the attainment of institutional and administrative autonomy for Nigeria's electoral management body (EMB), namely the Independent National Electoral Commission (INEC). As will become evident below, there are emerging signs of pervasive confidence in electoral reform, especially within civil society and the opposition parties, as possibly the ultimate solution to Nigeria's electoral dilemmas.<sup>1</sup>

If it is certainly beyond debate that Nigeria is in urgent need of electoral reform the same cannot be said about the potential impact and outcome of such a process. This is particularly the case in the light of recent Nigerian elections, which many commentators, scholars and the democracy aid industry have roundly condemned as falling below acceptable international standards (see, eg, Adebayo & Omotola 2007, pp 201-216).

There is widespread belief, backed by intimidating evidence, that the quality of Nigerian elections nose-dives with successive elections, as was the case with the 1999, 2003 and 2007 general elections. Though longstanding, the deepening crisis of electoral governance in Nigeria has recently assumed epidemic proportions, creating an urgent need for electoral reform. Over the years Nigerian elections have offered the electorate little or no genuine choice, leading a consistent student of Nigerian politics to conclude that the history of elections in the country is one of 'electoral fraud and competitive rigging' (Ibrahim 2007, pp 2, 3). This trend, as evidenced most recently in the 2007 general elections, has degenerated into a situation where results are concocted for areas where no voting actually took place. For instance, in 2007 there were reported cases of elections not being held or many registered voters being disenfranchised in several parts of the South-East and South-South. Reasons for this included violence and the non-availability, late arrival, or shortage of voting materials. Yet the regions returned full results (See, among others, *The Week*, 14 May 2007, pp 14-22; NDI; *The Week*, 17 May 2007, pp 24-28 and *Tell*, 7 May 2007, pp 16-29; International Crisis Group on the 2007 Nigerian Elections, 30 May 2007; Adejomobi 2007, pp 14-15 and Adebayo & Omotola, 2007, pp 201-216).

The electoral process, from registration and the review of the voters' roll, through party primaries and election campaigns to the conduct of the elections and the handling of post-election issues (including protests and election tribunals) has often left a lot to be desired. Specifically, the review of the voters' roll was characterised by allegations of deliberate disenfranchisement of opposition

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1 For a detailed analysis of Nigeria's electoral dilemmas under the Fourth Republic, see Omotola 2010, pp 535-53 and, at a more general level, starting with the colonial government, Kew 2010, pp 499-521.

elements, for example, through an undersupply of registration kits to their perceived strongholds.

Party primaries were mere rituals, allowing no room for internal party democracy. Candidates were largely imposed by 'godfathers' and, when their scheming failed, leading to the emergence of an 'un-anointed' candidate, the godfathers resorted to substitution by elimination, using the INEC, the agency which has the overall responsibility for electoral administration in Nigeria. Its roles include registration of parties and candidates for elections and the supervision of political parties, especially in relation to finances and the conduct of elections. But the fact that it is constituted by the president, coupled with the absence of an independent source of funding and its reliance largely on the presidency for its finances means its independence is severely compromised, making it vulnerable to executive manipulation through the power of incumbency.

Despite the overwhelming justification for reform it is surprising that the notion has become very controversial in Nigeria. The controversy is partly reflected in the fact that some of the recommendations contained in the reports of Muhammed Uwais's Electoral Reform Committee (ERC), which many believed to be the archetype of genuine electoral reform, have already been voted down by the presidency and/or the National Assembly (NA). Moreover, former president Olusegun Obasanjo recently cast aspersions, covertly, on the electoral reform process, with his statement that even if Jesus Christ came to administer Nigeria's elections they would still not be free and fair (see *The Nation*, 2 May 2010; [www.nigeriavillagesquare.com/articles/adebowale-oriku/obasanjos-retort-and-the-death-of-imagination.html](http://www.nigeriavillagesquare.com/articles/adebowale-oriku/obasanjos-retort-and-the-death-of-imagination.html)).

Will the alternative electoral architecture envisaged by the ERC yield a different level of public trust in electoral processes and outcomes? What are the sources of the pressure for electoral reform in Nigeria? In what ways may electoral reform affect popular participation (voter turnout, for example) in the electoral process? How about confidence in electoral institutions, particularly the INEC? Succinctly put, what are the likely consequences of electoral reform in Nigeria? These are the main questions this study seeks to address, with the aim of evaluating the consolidation of Nigeria's democracy.

The article explores the sources of the pressure for electoral reform; evaluates the mechanisms adopted to promote it, notably the ERC, the reconstitution of INEC, constitutional amendments, the new Electoral Act and attempts to promote internal party democracy and explores the prospects of these reform measures for democratic consolidation.

It argues that while the reform process holds some promise for consolidation it does not go far enough. Though institutional designs are important for effective electoral governance, institutional reengineering without corresponding attitudinal



and behavioural reform is inadequate. The strategic decisions of political actors, both senior and junior, to take advantage of the institutional reform process within legally permissible limits hold an important key to the restoration of credibility and public trust in the electoral process and its outcome. Broader issues concerning the political economy of the country, particularly human security, also deserve greater attention.

### ELECTORAL REFORM AND PUBLIC TRUST

The importance of electoral governance, defined as 'the wider set of activities that creates and maintains the broad institutional framework in which voting and electoral competition take place' (Mozaffar & Schedler 2002, p 7), to democratic transition and consolidation cannot be overemphasised. Electoral governance is a comprehensive and multifaceted activity that takes place on three levels – rule-making, rule application and rule adjudication. Rule-making involves designing the basic rules of the electoral game; rule application deals with implementing these rules to specifications to organise the electoral game; and rule adjudication entails resolving disputes arising from the game. On the whole, electoral governance involves 'the interaction of constitutional, legal, and institutional rules and organisational practices that determine the basic rules for election procedures and electoral competition. It involves organising campaigns, voter registration and the vote count, resolving disputes and certifying results' (Hartlyn, McCoy & Mustillo 2008, p 75).

In these processes 'the interplay of power structures and processes is central to electoral outcomes' (Agbaje & Adejumobi 2006, pp 25-44). In these circumstances EMBs are part of 'a set of institutions and rules that together determine the probity of electoral processes, and in emerging democracies, where administrative processes are weak and distrust among political actors is high, their role at the centre of electoral processes tends to be more visible' (Agbaje & Adejumobi 2006, p 76). This implies that the nature of electoral governance can contribute to democratic consolidation or regression, depending on the independence and professionalism of electoral institutions, particularly the EMB, because, 'institutional structures that promote a "level playing field" at each stage of the electoral process will enhance the extent to which voters perceive their elections to be fair' (Birch 2008, pp 305-20).

In their study of Latin America to test the importance of electoral governance to the consolidation of democracy Hartlyn, McCoy & Mustillo (2008) established 'an important positive role for professional, independent electoral commissions on electoral outcomes', showing that 'formal-legal independence matters when the rules of the game are likely to be respected'. In addition, they found that 'low-



quality elections occur disproportionately where incumbents seek re-election and where victory margins are extremely wide rather than narrow’.

It should, however, be noted that effective electoral governance alone does not guarantee good elections. A number of forces, including social, economic and political variables, intervene to play prominent roles in influencing the process, integrity and outcome of elections. Nevertheless, good elections are said not to be possible without effective electoral governance (Mozaffar & Schedler 2002, p 6).

Perhaps for this reason the new focus of research in electoral studies and democratisation is gradually shifting towards electoral administration (Mozaffar 2002, pp 85-101; Elklit & Svensson 1997, pp 32-46; Mozaffar & Schedler 2002; Elklit 1999, pp 28-51; Elklit & Reynolds 2002, pp 86-119; Pastor 1999, pp 1-27).

These studies demonstrate that EMBs, as the primary institutional mechanism of electoral administration, are vital to the overall quality of the electoral process, defined as ‘the extent to which political actors see the entire electoral process as legitimate and binding’ (Elklit & Reynolds 2002, pp 86-87). Elections are meaningfully democratic if they are free, fair, participatory, competitive and legitimate. This is possible:

when they are administered by a neutral authority; when the electoral administration is sufficiently competent and resourceful to take specific precautions against fraud; when the police, military and courts treat competing candidates and parties impartially; when contenders all have access to the public media; when electoral districts and rules do not grossly handicap the opposition; ...when the secret of the ballot is protected; when virtually all adults can vote; when procedures for organizing and counting the votes are widely known; and when there are transparent and impartial procedures for resolving election complaints and disputes.

Diamond 2008, p 25

Studies have also shown that winners and losers can accept electoral processes and results as binding provided elections are effectively administered, which is only possible if the EMB has autonomy, measured basically in terms of its structure, composition, funding and capacity (IDEA 2006). This is why one of the hallmarks of a mature democracy is a professional, independent, non-partisan election administration. However, other relevant institutions, like political parties, mass media, the security agencies and civil society groups (CSOs) are also required to play their roles effectively, including providing logistic support, which is vital to the operation of the electoral body. The oversight functions of the legislature and judiciary are also crucial.

In Nigeria the primary responsibility for electoral administration rests with an EMB which has undergone several changes in nomenclature under different regimes, but not as many as the changes to its structure. Between 1959 and 1999 the EMB was renamed six times: Electoral Commission of Nigeria (ECN), 1959-1963; Federal Electoral Commission (FEC), 1963-1966; Federal Electoral Commission (FEDECO), 1976-1979. During the Babangida regime (1986-1993) it was renamed the National Electoral Commission (NEC). General Sanni Abacha (1993-1998) replaced the NEC with the National Electoral Commission of Nigeria (NECON), while General Abdusallami Abukakar, Abacha's successor (1998-1999) rechristened it the Independent National Electoral Commission (INEC) (Agbaje & Adejumobi 2006, p 31). Although it has been reconstituted endlessly: in 1958, twice in 1963, in 1964, 1977, 1981, 1987, 1989, 1993, 1994, 1998, 2000 and 2004 (Browne 2004, p 39) the EMB has not been able to administer elections effectively because its 'autonomy and capacity' over the years has been suspect (Agbaje & Adejumobi 2006, p 31).

Largely because of these shortcomings INEC has been regarded as incapable of administering Nigeria's elections effectively. Reforming it in a way that addresses these shortcomings, it is believed, would help reposition it for its Herculean task. Against this background the question of electoral reform assumes greater significance in Nigeria. Will reform engender effective electoral governance and public trust in electoral institutions, processes and outcomes? This is the main question that will be addressed in this article.

This concern is legitimate because the comparative literature on the causes and consequences of electoral reform is far from settled. Depending on which reforms have been executed electoral reforms have generally been seen to have diverse political consequences, including for participation and voter turnout, parliamentary activities, electoral processes and outcomes and trust in electoral institutions (See Green & Gerber 2004; Johnson, Rossiter & Pattie 2006, pp 557-569).

Electoral reform, too, has many dimensions – among others reforming the electoral law, the electoral geography (eg, redrawing constituency boundaries), electoral and party systems and the EMB. In some other instances electoral reforms have been known to produce results that are both positive and negative. Specifically, Elizabeth Rigby and Melanie J Springer (2001, pp 420-34) find in their study of the consequences of electoral reform in the United States of America that 'some electoral reforms promote equality, while others further stratify the electorate, particularly when state registration rolls are already unrepresentative in terms of income groups'.

Similarly, though Ailsa Henderson (2006, pp 41-58) finds, in the case of Canada, that electoral reforms, especially those that promote proportional representation,

may help smaller parties, increase the number of female representatives, increase turnout and improve the attitude to politics, she found no consistent evidence that electoral reforms would produce such changes. In another interesting study, Adam J Berinsky (2005, pp 471-91) concludes that electoral reform aimed at enhancing voter turnout in the USA ultimately complicated the problem by increasing socioeconomic biases in the composition of the voting public.

In Belgium, Marc Hooghe, Bart Maddens and Jo Noppe (2005, pp 351-68) found that reforms of the electoral law affect both the electoral behaviour of voters and political parties and party financing and strategy. It is partly because of this inconsistency in the consequences of electoral reform that Robert Stein, Chris Owens and Jan Leighley (2003, p 1) contend that 'the effectiveness of electoral reforms is contingent upon the strategic behavior of elites. Without strategic decisions by elites to use electoral reforms to their advantage, electoral reforms will be unrelated to voter turnout.'

Given the apparent confusion in the comparative literature about the consequences of electoral reform, which makes it difficult to generalise, it seems more rewarding to focus on specific cases, such as the ongoing reform efforts, in Nigeria.

#### JUSTIFICATIONS AND SOURCES OF PRESSURE FOR ELECTORAL REFORM

The main justification for electoral reform in Nigeria is rooted in the historiography of Nigerian elections, which some have characterised as a history of competitive rigging (Ibrahim 2007, pp 2-3). Indeed, throughout the various epochs of the country's political development (pre- and post-independence) electoral issues have remained, arguably, among the most influential factors in the political cycle of the country.

Over the years elections in Nigeria have lost their democratic content and relevance, due, largely, to the failure to honour the social contract between the governed and the government that elections ordinarily symbolise (Kew 2010, pp 499-521). Although electoral politics under the colonial government and in the immediate post-independence period was rooted in ethnicity, elections were, to a reasonable extent, still able to guarantee some quality and the social contract. This manifested in, for example, the existence of an 'ethnicised' but vibrant oppositional and coalition politics that is central to the good health of democracy.

This began to change during the Second Republic and the situation has been exacerbated since the criminal annulment of the 12 June 1993 presidential election. The reasons for the country's electoral misfortunes are the colonial foundation of the state, coupled with the neo-patrimonial character of its post-independence

variant, which have served to undermine the development of the institutional architecture for effective electoral governance. These problems reached a crescendo in the aftermath of the 2007 'garrisoned' election.<sup>2</sup>

Allegations of massive irregularities marring the 2007 elections are supported by some verifiable indices. First, the results were bitterly disputed and contested in an unprecedented manner, though largely non-violently. There were 1 250 petitions relating to the conduct of the elections alone – eight relating to the presidential election, 105 to the gubernatorial election, 150 to the Senate, 331 to the House of Representatives and 656 to the State House of Assembly. But when the electoral process is treated as a cycle rather than as a specific event on the day of the election the 1 250 cases amount to just the tip of the iceberg.

In an astonishing revelation *The Herald*, a national daily, revealed on 12 May 2008 that an alarming 6 180 complaints had been lodged throughout the process of the 2007 elections. Moreover, results were annulled in several states and at different levels, including the gubernatorial elections in Kogi, Edo, Kebbi, Sokoto, Adamawa, Ekiti, Osun and Ondo states. In most of these cases a rerun was mandated and, with the notable exception of Osun, was won by the ruling People's Democratic Party (PDP). In Ondo and Edo states, however, declaratory judgements were given, leading to the restoration of the electoral victories of the Labour Party and the Action Congress. The Supreme Court also reinstated the substitute candidate in Rivers State (Omotola 2010a, pp 535-553).

The main explanation for these events has been the institutional weaknesses of the EMB, most especially its lack of administrative and financial autonomy. There are three major reasons for the lack of autonomy. The first is its composition, which is the exclusive prerogative of the president. INEC is composed of a chairman, 12 national commissioners and 37 resident electoral commissioners – one for each of the 36 states of the federation and one for the Federal Capital Territory – all of whom are appointed by the federal government. This makes the INEC easily susceptible to manipulation by the president and the federal authorities. The oversight role expected of the legislature in the screening of presidential nominees for INEC positions is nullified by the fact that the president's party, the PDP, has a legislative majority to secure its wishes in Parliament (Omotola 2010a).

The second reason is the insecurity of tenure of the INEC chairman and commissioners. Security of tenure gives the leaders of an electoral commission a greater stake in securing the electoral process. If they fail to do so, they are in danger of losing their positions. Unlike in Ghana, where the chairman of the

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2 A garrison democracy is one where opposition forces are permitted limited or no room and the ruling party assumes a position as master of all but servant of none (Omotola 2009a).

electoral commission and the two deputies not only have security of tenure on the same terms and conditions of service as judges of the Court of Appeal, which means they cannot be removed arbitrarily until they retire at age 70 (Omotola 2009b, pp 42-64; Agyeman-Duah 2005, p 3), Nigerian electoral officials statutorily occupy the office for five years, renewable for a further term.

They can, however, be removed by the president on flimsy grounds. This was the fate of two successive electoral commission chairmen under Babangida, namely professors Eme Awa and Humphrey Nwosu, who were removed from office in 1989 and 1993 respectively in questionable circumstances. The former was removed because of his uncompromising stance on the management of the electoral commission and the latter following the military government's decision to annul the 12 June 1993 presidential elections against the wishes of the electoral commission (Nwosu 2008).

The third issue relates to the funding of the electoral body (Omotola 2009a, pp 195-221). Ordinarily an independent EMB should be funded directly from the consolidated account, thereby limiting the extent of financial control the executive can exert over it. In Nigeria, however, this is not yet the case. Under the current regime the INEC does not have an independent budget or sources of funding. Rather, it depends almost entirely on the presidency to fund its activities. This allows the presidency considerable financial control over the body, contributing to its inability to make adequate, timely plans and preparations for successive elections.

INEC has also been severely constrained with respect to capacity. Two primary indicators of this are the appointment of people without professional and intellectual competence to man the body. For instance, Professor Maurice Iwu, the immediate past chairman, has neither professional nor intellectual experience in electoral management – he was trained in the health sciences.

The second is INEC's reliance on the use of *ad hoc* staff, who are usually partially briefed for a day on their duties. After every flawed election INEC tends to place most of the blame on these temporary employees (Iwu 2008).

Worse still, INEC reflects the centrist proclivities of the federal democracy, with its over-centralisation of power. The most visible evidence is that it is responsible for the administration of all federal elections (presidential and National Assembly) and state elections, including gubernatorial and state houses of assembly in the 36 states of the federation. The only responsibility assigned to state independent electoral commission (SIECs) is the administration of local government elections. As a result of these institutional constraints it has been difficult for INEC to govern the electoral processes effectively in order to produce credible elections whose outcomes will be acceptable to all political players, or at least a majority of them.

This is not to say that the only motivation for reform was the need to reposition the EMB for effective electoral administration. Other election-related institutions, particularly political parties, have also been a very weak link in the electoral processes of the country (Omotola 2009c, pp 612-634; Omotola 2010b, pp 125-145; Adejumobi & Kehinde 2007, pp 95-113).

Some of the notable limitations of political parties in Nigeria include their weak ideological foundations, which induce them to mobilise on the bases of identity, particularly ethnicity and religion, and, more importantly, the lack of internal party democracy, which fuels a culture of impunity, indiscipline, intra-party squabbles and political vagrancy. These shortcomings are known to be the core underpinnings of electoral corruption and violence in the country (Omotola 2010c, pp 52-73).

Essentially, the pressure for electoral reform has largely been from within, with opposition political parties, civil society organisations and the electorate the leading voices. Leading opposition parties, particularly the Action Congress of Nigeria (CAN) and the All Nigeria Peoples Party (ANPP) were upset about the fact that INEC's ineffectiveness undermined their efforts by conferring undue advantage on the ruling PDP. Pro-democracy activists and civil society groups were also determined to ensure the establishment of a capable EMB to conduct free, fair and credible elections in which the votes would actually count.

For example, during its protest about the crisis relating to the health of President Umaru Yar'Adua (who later died in office) (Omotola 2011, pp 222-253) and the National Assembly's refusal to make then-Vice-President Goodluck Jonathan acting president, one of the three demands of the Save Nigeria Group (SNG), a coalition of civil society groups and democracy and human rights activists,<sup>3</sup> was a 'quick and thorough implementation of the Uwais report on reform, starting with the immediate removal of Professor Maurice Iwu as chairman and the reconstitution of INEC with persons of impeccable integrity and competence' (Agbo 2010, pp 32, 34).

## THE REFORM PROCESS AND THE 2011 ELECTIONS

The electoral reform process in Nigeria has mainly been built on fostering the independence of the EMB and promoting a democratic political culture within political parties. The essence is to evolve a strong institutional basis of politics

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3 Among the notable members of the SNG are Professor Wole Soyinka, Nobel Laureate; Femi Falana, a radical lawyer; Pastor Tunde Bakare, founder of the Latter Rain Assembly; Rotimi Akeredolu, president of the Nigerian Bar Association; Balarabe Musa, former governor of Kaduna state and chairman of the Conference of Nigerian Political Parties; Pat Utomi, a renowned economist, and Ayo Obe, a former president of the Civil Liberties Organisation.



capable of governing the electoral process effectively and regulating the behaviour of political actors. This is understandable because one of the main limits of effective electoral governance in Nigeria over the years has been the gross lack of institutional autonomy for the EMB and the absence of internal party democracy, as illustrated above.

The reform process began with the inauguration of a 23-person Electoral Reform Committee (ERC) on 28 August 2007, with a comprehensive mandate 'to evolve an electoral process that will enable us to anchor democracy as the framework for national integration, sustained growth and national development' (Yar'Adua 2007). The ERC consists of some notable and credible Nigerians, with former Chief Justice Muhammed Uwais as its chairman and representatives of diverse interests, including civil society, mass media, academia, women's groups, trade unions and professionals.

In fulfilling its mandate the ERC conducted public hearings around the country, in the process collating memoranda from diverse stakeholders. Specifically, the committee received a total of 1 466 memoranda from the general public. It also held public hearings in two capital cities in each of the six geopolitical zones and the Federal Capital Territory, during which a total of 907 presentations was made (the report was submitted to President Yar'Adua shortly before his death). This created the impression that not only does the ERC enjoy some level of autonomy, which is important for the effectiveness of its activities, but also that the government seems genuinely to intend to reform the electoral process.

The ERC made important recommendations that would not only guarantee INEC's autonomy, it also suggested options for ensuring a system in which internal party democracy will thrive. Specifically, the committee recommended the establishment of a new, truly non-partisan independent and impartial INEC comprising a chairman, deputy chairman and six members of unquestionable integrity, one of whom must come from each of the six geopolitical zones.

In addition, it recommended the inclusion of six further nominees – one from each of organised labour, the Nigerian Bar Association, the media, the National Youth Council, civil society and women's organisations. All the appointments will be subject to Senate confirmation.

It is recommended that the chairman be appointed in an open and transparent process, with the National Judicial Council advertising the position, spelling out the requisite qualifications, receiving applications or nominations from the general public, short-listing three people for each position and sending the nominations to the National Council of State which will select one for each position and forward the names to the Senate for confirmation.

More importantly, the ERC recommended that INEC be funded directly



from the Consolidated Revenue Fund in order to guarantee its financial and administrative independence.

With respect to the conduct of the elections the ERC suggested an open secret ballot system which allows voters to mark their ballots in secrecy and drop them in boxes in the open, as well as the accreditation of registered voters prior to the commencement of voting for the purpose of tracking the number of people who vote at a particular polling station.

The ERC also recommended that the voters' register be displayed prior to the elections to enable registered voters, political parties and the electorate generally to make claims and lodge objections, and that elections results should be announced at all polling centres by presiding officers, be signed and copies be given to accredited agents, the police and the State Security Service (SSS), the intelligence arm of the federal security apparatuses.

In order to obviate situations where winners whose victory has been contested assume office and deploy state resources to prosecute cases brought against them the ERC recommended that all objections be dealt with before winners are sworn in. This may have informed the recommendation that all electoral petitions be dealt with up to the highest level of appeal within a maximum period of six months (four for the tribunal, two for the appeal). It also recommended that provision be made for independent candidates.

Other important recommendation from the ERC were:

- the establishment of a Political Parties Registration and Regulatory Commission (PPRRC) to, among other things, register political parties, monitor their organisation and operations and arrange for the annual auditing of accounts;
- the establishment of an Electoral Offences Commission (EOC) to, among other things, deter the commission of electoral malpractice, investigate where it occurs and prosecute alleged offenders;
- the establishment of a Centre for Democratic Studies (CDS) to undertake broad civic and political education of legislators, political office holders, security agencies, political parties and the general public.

These recommendations were hailed by civil society groups and opposition political parties as capable of laying the foundations not only for an independent and a more effective INEC, but also for the consolidation of democracy. However, the initial euphoria soon began to wane as the government dragged its feet about making official pronouncements on the committee's recommendations (IFES).

By the time the Federal Executive Council (FEC) did respond its white paper

further dampened popular expectations. Among the recommendations the FEC rejected were that the NJC should appoint INEC's chair, the deferment of the swearing in of elected persons until the courts have fully disposed of petitions against them, and the shifting of the onus of proof to INEC. Instead, the FEC insisted that the INEC chairman be appointed by the president, that those elected should be sworn in as soon as the winner is announced and that the onus of proof should remain with the petitioner.

The rejection of these crucial recommendations raises questions about government's commitment to a fundamental reform of the electoral process.<sup>4</sup> Opposition parties, notably the Action Congress (AC), now Action Congress of Nigeria; the All Nigeria People Party; the Democratic Peoples Alliance (DPA); and the Conference of Political Parties (CNPP), the umbrella body of opposition parties; as well as leading civil society groups, including the Nigerian Labour Congress (NLC), the Alliance for Credible Election (ACE), the Transition Monitoring Group (TMG), the Electoral Reform Network (ERN), the Citizen's Forum for Constitutional Reform (CFCR), the Gender for Constitutional Reform Network (GCRN) and the National Coalition on Affirmative Action (NCAA), all spoke against the rejection (see Akintude 2008).

In spite of the popular outcry that attended the release of the white paper the government proceeded with the reform process. The first major step was the appointment of Professor Attahiru Jega, a respected political scientist and democracy activist, as chair of INEC, a decision that was positively received.<sup>5</sup> INEC's financial autonomy was guaranteed by the fact that its funding will come directly from the consolidated funds, which allows it to prepare its budget and defend it before Parliament.

With these two important changes made INEC was able to commence preparation for the elections, beginning with the voter registration exercise. The exercise was characterised by a number of irregularities, for example, the unavailability of an imported data-capturing machine and sundry logistical problems such as power failures, malfunctioning machines, particularly their inability to capture fingerprints, which bedevilled its early stages. Most of these were rectified as the exercise progressed and the relative speed with which INEC secured the release of funds for the registration process would have been unthinkable without the reforms. In addition, within a remarkably short time the

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4 The Electoral Reform Network, a coalition of more than 100 civil society groups committed to the reform and promotion of credible elections in Nigeria, alluded to this fact at its National Civil Society-Legislative Consultative Forum held at the National Assembly Complex, Abuja, on 15 September 2009. See [www.electoralreformnetwork.org/news\\_details.php?news\\_id=17](http://www.electoralreformnetwork.org/news_details.php?news_id=17).

5 Jega was national president of the Academic Staff Union of Universities during the Babangida regime. He was credited with a solid performance, especially in his rejection of all attempts to win him over to the side of the military junta.

Senate had approved the N87 721 961 531 requested by INEC for the 2011 general elections ([www.nigerianelitesforum.com](http://www.nigerianelitesforum.com)).

These moves were closely followed by changes in the composition of INEC's national and resident electoral commissioners. Up to that point only four of the required 12 national commissioner positions were occupied, which many considered inappropriate. Still, civil society groups and opposition parties were unhappy for two reasons – some members of the reconstituted INEC were card-carrying members of political parties, which could compromise their neutrality and some members of the highly discredited Maurice Iwu's INEC, which had given the country the worst elections in its political history, were retained (the [tidenewsonline.com](http://tidenewsonline.com)). Both the president and the INEC chairman promised to investigate the allegations and, if necessary, make changes. This never happened, either because of time constraints or because of the absence of political will to follow through on the reform effort.

Some of the proposed reform initiatives required constitutional amendments. This necessitated a review of the Electoral Act of 2006 and the 2010 Electoral Act was adapted to accommodate the changes, for example, the new order/sequencing of elections, as well as a provision banning floor crossing – candidates who change parties once they are elected will have to forfeit their seats and stand for election again under the banner of their new party.

Despite considerable criticism at every stage of the reform process the effort would appear to have made some positive impact on the overall administration of the elections. This is particularly the case at the level of voting and the counting of results. The reports of international and local election observers were unanimous in declaring the 2011 Nigerian elections a significant improvement on those of 2007.<sup>6</sup>

Although all observed that the elections were generally conducted in a peaceful atmosphere there were some notable reservations. In many places materials and officials arrived late; in some states there were many underage voters; there was political violence and ballot box snatching and stuffing – there were several cases of people being arrested with sizeable quantity of ballot papers on the eve of the presidential and gubernatorial elections in many parts of the country. INEC claimed they were contractors charged with producing dummy ballot papers.<sup>7</sup>

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6 For a representative excerpt from the reports of the various monitoring groups on the presidential election, see 'International Observers Comment on Nigeria's Elections'. Available at: [sahelblog.wordpress.com/2011/04/20/international-observers-comment-on-nigerias-elections/](http://sahelblog.wordpress.com/2011/04/20/international-observers-comment-on-nigerias-elections/) For The European Union Election Observation Mission's final report see [www.eueom.eu/files/presseleases/english/final-report-nigeria2011\\_en.pdf](http://www.eueom.eu/files/presseleases/english/final-report-nigeria2011_en.pdf).

7 See 'PDP Chieftain Arrested in Eket as SSS Seals off Printing Press for Alleged Printing of Ballot Papers'. Available at: [www.osundefender.org/?p=14670](http://www.osundefender.org/?p=14670)

Most importantly, there were alleged manipulations and inflation of votes for the ruling PDP at collation centres, practices that were reportedly rampant during the presidential election of 16 May in the South-East and the South-South, two zones regarded as strongholds of incumbent president Jonathan Goodluck. The two leading opposition parties, the Action Congress of Nigeria (ACN) and the Congress for Progressive Change (CPC), for example, complained bitterly about what they called magic numbers. The CAN stated:

... An analysis of the results put out by INEC itself has shown a troubling pattern of clear manipulation. Everywhere the PDP perceived it was strong, it came out with incredibly high numbers of votes in his favour. Conversely, anywhere the opposition was perceived to be strong, the opposition's margin of victory was unreasonably low.

*Osun Defender*, April 2011<sup>8</sup>

A few examples will suffice:

- In both the South-South and South-East, where President Jonathan is believed to have strong support, the average turnout was 67 per cent, compared to 32 per cent for the South-West, where there is believed to be a strong opposition.
- In the North-West and North-East, which are considered bastions of opposition, the average turnout of registered voters was 54 per cent.

And whereas high voter turnout was recorded in states perceived to be sympathetic to President Jonathan in the different geopolitical zones (Bayelsa in South-South 85%, Imo in South-East 84%, and Plateau in North-Central 62%), the opposite was the case in areas where the opposition, was believed to be strong. Even in Katsina, in the North-West, the hometown of General Mohammadu Buhari, Goodluck Jonathan's CPC opponent in the presidential election, the turnout was a paltry 52 per cent. The story was much the same in Kano (53%), Sokoto (40%) and Zamfara (51%).

It is also instructive that even though Edo state is in the South-South, the turnout was only 37 per cent, apparently since the figure cooks did not believe the state to be sympathetic to President Jonathan because it was controlled by the ACN. The turnout figures for the South-West are also revealing: Lagos (31.8%), Ogun (28%), Osun (39%) and Oyo (33%).

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<sup>8</sup> These allegations constitute the bases of petitions by the CPC against Jonathan's presidential victory, which are yet to be proved at the electoral tribunal, but are ongoing.

Also, while the margin of victory for the PDP in the South-South was 98% and for the South-East 98.9%, the highest margin of victory for the CPC in the North-West was 55.8%.

These allegations, however, remain to be proved beyond reasonable doubt. The CPC has already filed a petition asking for the ballot papers from these zones be subject to forensic analysis. Until the outcome of the analysis the allegation remain what they are, mere allegations.

### CONCLUSION: ELECTORAL REFORM AND THE PROSPECTS OF DEMOCRATIC CONSOLIDATION

There has been no scientific interrogation of the impact of the electoral reform process on the level of public trust in the electoral institutions, the electoral processes and the outcomes, thus only tentative conclusions can be drawn, relying on the reports of election observers, both local and international, as well as the personal observations of the researcher and media reportage on the elections.

Judging from these sources there seems to be widespread belief that the conduct of the 2011 elections was a significant improvement on that of any election since 1999.<sup>9</sup> Notable areas where the improvement manifested itself include voters' enthusiasm not only about participating but about policing the elections to ensure that their votes counted; the adoption of a modified 'Option A4', which reduced the possibility of manipulation of results, at least openly, at the voting booths; and the announcement and placement of results on notice boards at the voting and result collation centres, which gave interested parties the opportunity to tabulate the votes.<sup>10</sup>

Despite these advances there were notable reservations about the democratic qualities of the elections in terms of competitiveness, participation and legitimacy. For instance, there were allegations that the playing field was not level. A few examples illustrate this:

- The PDP reportedly prosecuted its elaborate presidential campaigns relying heavily on state resources, especially the presidential jets.

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9 Preliminary reports by the European Union, the National Democratic Institute, the Commonwealth, the African Union and local monitoring groups made this clear. For representative views, see 'International Observers Comment on Nigeria's Elections'. Available at: [sahelblog.wordpress.com/2011/04/20/international-observers-comment-on-nigerias-elections/](http://sahelblog.wordpress.com/2011/04/20/international-observers-comment-on-nigerias-elections/)

10 Option A4 is a method of voting originally introduced by Humphrey Nwosu, then electoral umpire of the country, during the transition to the aborted Third Republic in 1992-93, which 'had voters meet within a designated time frame on election day and line up behind the party standard for which they wished to vote, and then a single count of all the votes would be taken in plain sight of the community in question' (Kew 2010, p 505).

- There were unsubstantiated allegations that the PDP also deployed a whopping N107-billion (about \$16 050-million) within three days to the presidential election to buy votes, the lion's share of which was reportedly allocated to the northern part of the country, considered to be the stronghold of the opposition CPC.<sup>11</sup>

To date the PDP has not rebutted these allegations.

- The media landscape was also disproportionately skewed in favour of the PDP, contrary to the provision of the Electoral Act of 2010, which stipulates that media time shall be allocated equally among political parties and candidates. For instance, the European Union Election Observation Mission (EUEOM) noted in its preliminary statement about the election that:

the state-owned Nigerian Television Authority (NTA) lacked balance towards the candidates. Only 21 parties and their representatives were mentioned during the NTA prime time. 80 percent of the coverage allocated to the political actors was devoted to PDP, five percent to ACN and CPC each, and ANPP gained a three percent. Twelve out of the 20 presidential candidates were mentioned during the NTA prime time. With regard to direct speech in the NTA news bulletins, 75 percent of it was dedicated to the incumbent President Jonathan.

Worse still, the elections were characterised by various forms of fraud and violence, most notably the alleged falsification of results at collation centres, intimidation of voters, arrest and detention of domestic election observers by security agents until after the elections, hijacking and stuffing of ballot boxes, bombings in Kaduna and Borno states, and the electoral violence that attended the declaration of Goodluck Jonathan as the winner.<sup>12</sup>

It is not yet clear how many of the successes of the elections can be attributed to the reform of the electoral process. But for now it is safe to say that the reform process tried to insulate INEC from political influence by guaranteeing its financial

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11 See 'Must Win Election: Jonathan Spends 107 Billion in 2 Days, Meets Jega in Private'. Available at: [www.nairaland.com/nigeria/topic-647222.0.html](http://www.nairaland.com/nigeria/topic-647222.0.html); [www.nigeriannewsservice.com/nns-news-archive/lead-stories/must-win-election-jonathan-spends-n107-billion-in-two-days](http://www.nigeriannewsservice.com/nns-news-archive/lead-stories/must-win-election-jonathan-spends-n107-billion-in-two-days)

12 The northern part of the country was deeply engulfed in post-election violence following the declaration of President Jonathan as the winner of the election. Many attributed this to a statement credited to General Buhari while casting his vote, that the PDP had airlifted ballot papers to the north with the aim of rigging the election. Many lives were lost and property worth billions of naira destroyed.



and administrative autonomy to a very large extent. However, the fact that the appointment of its chair is still the exclusive prerogative of the presidency remains a weak link in the reform process, which could be exploited by desperate politicians to undermine the independence of the body.

It can also be argued that there was not enough time for the reconstituted EMB to rectify the administrative and credibility issues that have plagued it over the years. Generalising about the impact of the reform process on INEC, using the administration of the 2011 elections as an example, may, therefore, result in too harsh a judgement, particularly since there is, as yet, no empirical evidence on which to judge.

However, there are sufficient grounds to suggest that the reform process had a positive impact on the electoral landscape in Nigeria. For the first time the electoral body was able to prepare an independent budget and defend it before Parliament rather than having, as in the past, to go cap in hand to the presidency to solicit funds, thereby subjecting INEC to political influence.

Nevertheless, what the 2011 elections reveal is that institutional reengineering without corresponding attitudinal and behavioural reform is not sufficient to ensure effective electoral administration. While institutional designs are important to effective electoral governance the strategic decisions of the political actors at all levels to take advantage of the reform process within legally permissible limits hold an important key to the restoration of credibility and public trust in the electoral processes and outcome.

As the 2011 elections illustrate, the refusal of political actors, including electoral officers, to play according to the rules largely accounted for the corruption and violence that characterised the process. The failure to respect regulations on electoral finance and the media, for example, cannot be blamed on INEC. It does, however, raise questions about the capacity of the electoral institutions to structure the electoral behaviour of political actors in the Nigerian context. By implication, there are still some loopholes in the institutional architecture of the election-related bodies, which tend to undermine their independence and effectiveness.

This finding has some research implications, most notably the need to undertake a comprehensive empirical study to determine how many of the successes and failures of the 2011 elections may be attributed to the electoral reform process by measuring the level of public trust in the electoral institutions, especially INEC and political parties, and in the electoral process and outcomes.

The challenge for the Nigerian researcher, however, remains that of funding. INEC should be able to develop a strong research unit to undertake self-assessment for further improvement of its current scorecard.



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