

Journal of African Elections

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OBITUARY

PROFESSOR ABUBAKAR MOMOH

The Editorial Board of the *Journal of African Elections* notes with deep regret the recent passing away of Professor Abubakar Momoh, Director General of the Electoral Institute, an organ of the Independent National Electoral Commission (INEC).

Professor Momoh had an illustrious career and was until his death Dean of the Faculty of Social Sciences at the Lagos State University. He served on various boards and scientific committees, including those of the Centre for Democracy and Development, and the Council for the Development of Social Science Research in Africa. He was a highly regarded scholar, researcher and lecturer at many universities worldwide. A Senior Fulbright Scholar at the University of California, Los Angeles, Professor Momoh was also a visiting research fellow in Helsinki, fellow in the Department of Peace and Conflict Resolution in Uppsala, guest lecturer at the University of North Carolina, visiting scholar at the University of Cape Town's Centre for African Studies, and external examiner for the universities of Lagos, Ibadan and KwaZulu-Natal.

Professor Momoh also served as an election observer to several African countries on behalf of ECOWAS and African Union, and was involved in election benchmarking for the African Union.

In October 2016 Professor Momoh served as guest editor of a special edition of the *Journal of African Elections*, entitled 'Nigerian General Elections: from Reforms to Transformation'. He was also a contributor to and reviewer for the JAE, providing considered feedback and guidance to contributors.

We extend our deepest condolences to the family, friends and colleagues of the late Professor Momoh and salute his contribution to strengthening democratic elections on the African continent.

THE EVOLUTION OF THE SWAZI ELECTORAL PROCESS:

Ideological Contradictions, 1978-2015¹

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ABSTRACT

The subject of the election process has been analysed by different scholars in different historical periods. On the African continent this subject gained prominence after the Second World War when most African countries gained independence from colonial powers. This interest is because of the assumption that both electoral processes and elections are indicators of a transition to democracy and of its consolidation. Evidence indicates that electoral processes in different countries have evolved over time either as a reflection of a positive transition to democracy, or because leaders manipulate the process in order to pursue their own political agendas. This article analyses the evolution of the Swazi electoral process from the time of British colonial rule. The article argues that the Swazi electoral process has evolved over the past fifty years through manipulation by King Sobhuza II and later his son King Mswati III in order to retain their control and dominance over the Swazi population. It shows that as a result of such manipulation, the Swazi electoral process has undermined the transition to democracy in the country.

Keywords: monarchy, electoral process, evolution, democracy, indigenisation, reform, constitution, autocratic rule, traditionalists

INTRODUCTION

Electoral processes and elections themselves are very important for the development of democracy. Writing in the first half of the twentieth century Joseph

¹ The author is indebted to OSISA which funded research on electoral management bodies in the SADC region. Large portions of this article are based on data collected in that research.

Schumpeter argued that elections are the very heart of democracy (Schumpeter 1942). Some scholars have pointed out that regular, free and fair elections are some of the most important signposts of democracy (McQuoid-Mason et al. 1994; Harrop & Miller 1987; Katz 1997; and Niemi & Norris 1996). The African Charter on Democracy, Elections and Governance also emphasises the centrality of elections in the process of handing over power. While these conclusions are true, caution should be exercised because elections may simply be the means through which governments and political elites can exercise control over their populations, making citizens more quiescent, malleable and ultimately governable (Ginsberg 1982; Liebenow 1986; and Mazrui & Tidy 1984). The study of the electoral processes of some African countries can indicate whether elections have deepened democracy or are just periodic rituals.

Elections have become an important subject because from the time the majority of African states gained political independence, their elections have been contested. There has been failure or outright refusal to embrace the universal principles of democracy, using numerous pretexts. Consequently, there has been continued uncertainty in some states as to the extent to which the elections strengthen democracy or undermine it. Some scholars have argued that these challenges are due to the 'fickleness' of leaders (Carothers 2002). Such an argument is difficult to refute because some African leaders have engineered electoral processes to suit their ideological positions, while others have reduced elections to periodic rituals that do very little to enhance democracy (Simelane 2010).

Swaziland provides an excellent example of a country in which the democratic electoral process is generally disliked by the leadership. It is also a country whose development has changed over time and such change has been largely influenced by the ideological orientation of the country's leadership (Vilane 1986). For instance, while in 1968 the country inherited a parliamentary democratic system supported by a similar electoral process, in 1978 the situation changed completely as a pseudo-democratic electoral process was engineered. Since 1978 the electoral process has been revised more than once to suit the ideology of the monarchy and of traditionalists in general, while at the same time placating the concerns of the international community. An analysis of the Swazi electoral process reveals that it is ideologically conflicted, as traditionalism and absolute monarchy contradict basic universal democratic principles.

Though the Swazi case has such interesting elements, it has escaped the attention of academics and as a result there is paltry knowledge of the country's electoral process and of how and why it has changed over time. More importantly, very little research has been done on how the Swazi leadership has attempted to twist democratic principles to create a seeming synergy with traditional political arrangements revolving around absolute monarchism. The aim of this article is to

analyse the development and evolution of the Swazi electoral process, particularly how it has been gradually transformed to give it a semblance of democracy. The argument is that from the time of independence, the Swazi electoral process has not remained static but has been consciously transformed and restructured by the country's leadership to quell internal and external criticism. The article further argues that the Swazi electoral process has failed to be a vehicle for democratisation, but has instead worked as an instrument for entrenching traditionalism and monarchical rule.

METHODOLOGY

The methodology chosen for this study was determined by the fact that the study requires an in-depth analysis of the different aspects of the Elections and Border Commission (EBC) in terms of structure, functions, and actual conduct of elections. Consequently, one of the methodologies used is that of qualitative research. This allows for the accumulation of detail which can enrich the study. Interviews were the main method used and they generated a substantial amount of the data collected. The interviewees were identified through purposive sampling based on the researcher's prior knowledge of people with expertise in the elections process in the country. The first and major step using this methodology was to conduct in-depth interviews with members of the commission. The purpose was to gather information on how they were appointed into office and how they went about conducting elections. This proved to be a manageable task because the commission was only established in 2008 and it has conducted only two elections. Members of other relevant organisations and institutions were also interviewed.

A second method used to generate data was that of desktop research. One aspect of this methodology was archival research. The researcher consulted documents in the archives that pertain to the Swazi electoral process and how it has evolved over time. The EBC is fairly recent and there were very few archival documents relating to it; however, certain reports from the EBC were found in the Swaziland National Archives in Lobamba. Another important aspect of desktop research was that of consulting primary and secondary sources. The Constitution of Swaziland was exhaustively consulted in as far as it provides for the electoral process, as were different acts that create the legislative base for the operation of the EBC. Different reports from the EBC and some observer missions were consulted and they proved to have invaluable information for the compilation of this chapter. If there is a methodological weakness that can be identified in the study, it is that very few members of the public were interviewed. This was largely dictated by the nature of the study.

COLONIALISM AND EXPERIMENTING WITH A DEMOCRATIC ELECTORAL PROCESS

In general terms, the colonial state was autocratic and rarely governed through democratic principles (Berman 1990; Berman & Lonsdale 1980). However, as late as the 1940s the Colonial Office had started moving towards establishing a multi-tier system of representation in the colonies based on broad-based democratic elections (Fieldhouse 1983). This was an important development as it accommodated indigenous people who had acquired western education and had liberated themselves from traditional forms of deference. This perspective on the part of the colonial power led to the introduction of democratic elections and electoral processes in the majority of British colonies.

It was under British colonial authority that the first democratic elections were held in Swaziland. This was in a 1963 plebiscite to choose whether the country should be governed under a British or indigenous political dispensation (Daniel, Simelane & Simelane 1975; Matsebula 2015). The Swazi people voted overwhelmingly for an indigenous system but this was against the thinking of officials in the Colonial Office who held the view that ‘...sustained tribal loyalty became an obstacle to creating new “national” loyalties...’ (ibid.). Consequently, in spite of the result of the plebiscite, the Colonial Office went ahead and introduced a Westminster-type constitution that provided for membership of elected persons in a newly-formed legislative council. This formed the foundation for a Swazi electoral process based on multiparty democracy. The Swazi were encouraged to organise themselves into political groupings of their own preference. The first party that came into the picture was the Swaziland Progressive Party (SPP) founded by John June Nquku in 1960 (Swaziland Government, undated). It was born out of the Swaziland Progressive Association formed in the 1930s (Matsebula 1972). It was the political home of most of the western-educated Swazi who were largely opposed to political traditionalism. Two years later the party split into two factions with Dr. Ambrose Zwane breaking away with a splinter group that later called itself Ngwane National Liberatory Congress (NNLC). The group remaining with Nquku split again with Mr. K.T. Samketi and Obed Mabuza forming a party later called the Swaziland United Front (SUF). Two dominantly white parties aimed at protecting the interests of the white population were the United Swaziland Association (USA) and the Swaziland Independent Front (SIF).

The Constitution provided that there should be a Legislative Council whose membership would be constituted through democratic elections. When it was announced that the elections would take place in June 1964, King Sobhuza II formed the Imbokodvo National Movement (INM) to contest the elections. This party was formed in spite of the fact that Sobhuza had expressed his dislike for

political parties (Kuper 1978). He argued that 'political parties were an anomaly in a country without independence because before independence people have one goal – freedom – and not ideological differences' (*Times of Swaziland*, hereafter T.O.S. 1964). As later events demonstrated, his main concern was with political power. Sobhuza was angry with the British colonial officials who, through the Constitution, had forced him to contest for political power which he believed was the reserve of the Swazi monarchy (Libby 1987).

The legislative council elections of 1964 were based on the new Constitution of Swaziland that became the supreme law of the land in January 1963 (T.O.S. 1963). This Constitution was the first piece of legislation that extended the right to vote to most inhabitants in Swaziland. It also guaranteed freedom of association under which all individuals could form political groupings of their own or associate with any political grouping of their liking. It embraced the principles of multi-party democracy and as a result there was a proliferation of political parties in the country. The elections were managed by government officials and when Sobhuza's party received an overwhelming majority it became clear that the traditionalists were on their way to inheriting the reins of power from the British colonial authorities. Even after this victory Sobhuza did not forget to express his dislike for political parties; thus in 1965 he stated his view that political parties were a destructive force (T.O.S. 23 July 1965). He was not alone in this view as many of those who voted for Imbokodvo expressed the opinion that political parties were damaging Swazi society and destroying the spirit of kinship on which the Swazi nation was based (personal interview with Brigadier Fonono Dvuba, 30 September 2015).

The next election to be held before independence in 1967 was meant to determine which political party would form the first government of an independent Swazi state. Again, the elections were based on a Constitution very similar to that of 1963, except for a few revisions. The king's party received an overwhelming majority of votes, and was followed by the Ngwane National Liberatory Congress. The support for Sobhuza's party came mostly from rural areas where monarchical control was entrenched through control of access to land. Rural dwellers who faced the brunt of land alienation during British colonial administration believed that Sobhuza would be the Messiah to bring back their lost land (Crush 1980; Youe 1986; and Simelane 1991). The victory of the traditionalists in 1967 has been characterised differently by different scholars. Hugh Macmillan, for example, has referred to it as the 'Triumph of Tradition' (Macmillan 1986).

The period from 1963 to 1967 was very important in shaping the evolution of the electoral process in Swaziland. It contained certain developments that continue to inform the electoral process even today. For instance, it indicated that the Swazi monarchy was prepared to participate fully in politics and

even influence, where possible, the character of the electoral process. This was particularly evident in Sobhuza's arguments that the Swazi should employ a system that fitted their traditions and culture and not a foreign model. It also influenced Sobhuza's hostility to multi-party democracy or even political pluralism in general. From the time British colonialism came to an end in 1968, it was clear that the democratisation that began then faced serious challenges ahead. This trend had an important bearing on the development of the electoral process. What was also clear was that Sobhuza and his traditionalist supporters did not like the Westminster-style Constitution crafted in London and enacted as supreme law in Swaziland in 1963. In addition to issues of power and control of the natural resources of the country, another important evil of the Constitution, in the eyes of the monarchy, was that it provided for multi-party democracy. By 1968, therefore, the lines along which democratisation was to develop were clearly drawn and all that was left was for events to unfold.

INDEPENDENCE AND THE EVOLUTION OF THE ELECTORAL PROCESS

For the first five years of independence the democratic electoral process introduced by the British subsisted, even though there were rumblings on the horizon. The first elections after independence, held in May 1972, were governed by these inherited electoral procedures. Once again the king's party won with an overwhelming majority of votes. However in this election the Ngwane National Liberatory Congress received slightly more than 20% of the vote and thus gained three seats in parliament. According to some commentators this did not sit well with Sobhuza, who is believed to have felt that the continuation of political parties meant that his power was being contested (Daniel, Simelane & Simelane 1975). The Constitution on which the elections were based, was considered to be a foreign imposition that did not speak to the interests of the Swazi as a nation, especially because under this Constitution Swaziland was a constitutional monarchy. Sobhuza and his traditionalists continued to view political parties as a nuisance that were not in line with Swazi custom and values.

The parliament elected in May 1972 was unable to take its seat in its first sitting because of a misunderstanding between the NNLC and the majority INM. The INM decided not to attend. This appears to have been an orchestrated move because when Parliament eventually had its first sitting, both the House of Assembly and Senate (both riding on an INM majority) placed themselves 'at the disposal of the King-in-Council', (*New York Times* 13 April 1973) by handing over all power and authority to the monarch, King Sobhuza II (SADC Parliamentary Forum 2013). Sobhuza justified the abolition of the existing system by condemning

it as alien (Kanduza 2001). He asserted that the independence Constitution had brought a foreign spirit of bitterness to Swaziland and that the Swazi people wanted a system created by themselves which would give them full freedom and guaranteed peace and happiness. According to Prince Mfanasibili, 'As long as Swaziland continued to be governed by a constitution created by the British, the feeling of still being ruled by the British did not go away' (Mfanasibili, personal interview, 2015). This put control in the hands of Sobhuza because he assumed all powers of government. The king continued to prohibit all political activities and trade unions from operating. Evidence suggests that the INM was banned in name only because almost all its stalwarts and all its ideological inclinations remained intact. Even after the ban, the traditionalists remained in power and all that was left was to make the rest of the country toe the line. After a few months the king set up a commission to work on a political system that would be in accordance with Swazi law and custom.

While some of the political parties disbanded, others, such as the Ngwane National Liberation Congress, began to operate underground. For some commentators the coup against the independence Constitution meant an abrupt end to Swaziland's experiment with multi-party democracy (Proctor 1972). For others, the transition to democracy had not ended, but simply took on a different form. What is clear is that the electoral process that took root in 1964 was brought to an end in 1973. It was a short experiment that crumbled under the weight of the character it had assumed in 1964. For five years after 1973 a cloud of uncertainty engulfed Swaziland as to the future of elections and democracy, particularly multi-party democracy. This uncertainty was aggravated by the enactment of draconian laws such as detention without trial and a complete assault on freedom of expression and association.

Between 1973 and 1975 democratic practice and principles in Swaziland descended to a very low level. Following the repeal of the Constitution in 1973, the country was governed by decree. All state powers were in the hands of King Sobhuza II. He was assisted by a clique of princes who played the role of page-boy to the king. It was during this period that Sobhuza formed a commission tasked with crafting (under his tutelage) a new political dispensation for the country that would revise the democratic experiment inherited from Britain.

INDIGENISATION OF THE ELECTORAL PROCESS

The year 1978 was a watershed in the development of the Swazi governance system, electoral process and Swazi elections. The democratic dispensation inherited from Britain was subjected to different forms of mutilation in the name of developing a local governance and electoral system that was supposedly informed by Swazi

realities and traditions. This assertion is convincing at face value, but issues of power and control permeated the decision to revise the Swazi electoral process in 1978. As these revisions took place, Swaziland systematically moved away from principles of good governance and universal principles of democracy.

It was only in 1978 that the commission's report was released, following the repeal in 1973 of the Constitution crafted at independence. This report proved to be crucial to the political, electoral and governance history of the country. Through its recommendation, the commission introduced a new political system in Swaziland. This was the *tinkhundla* governance system that has become cherished by the monarchy and the traditionalists but detested by political parties and progressives in general (Levin 1991). As a concept, *tinkhundla* was as old as the modern Swazi state, and what happened in 1978 was a resuscitation of a system that could enable King Sobhuza II to restore his control of the parliamentary electoral system (Booth 1983). Different commentators have attempted to define *tinkhundla*, but divergent definitions should not detain us here (Mamba 2006; Shongwe 1983). Alan Booth has argued that after the long period of dormancy that followed the imposition of colonial rule in 1902, the system was resurrected in the 1950s, only to be pushed aside again (*ibid.*). When the system was revived again in 1978, it was made more conceptually sophisticated largely for reasons of power and politics. While traditionally *tinkhundla* meant meeting places in each chiefdom for purposes of dealing with local affairs, in 1978 it was re-crafted to embody an electoral process, an economic development structure, and a national governance system. The Constitution of the Kingdom of Swaziland states that the term *inkhundla* or *tinkhundla* (plural) is the Swazi name for a constituency.

When the system was introduced, its details as an electoral process were provided in the Establishment of Parliament Order, 1978, sometimes referred to as Kings Order-in-Council No. 23 of 1978. The first important aspect of the *tinkhundla* electoral process was its structure. The importance of the structure had to do with the manner in which all sections were dominated by the preponderance of monarchical control and influence. Sobhuza created what he called the Electoral Committee which had a supervisory role in the electoral process. This was a committee of seven members all appointed by and answerable to the king. Its principal function was stated as: '...to supervise and assist in the conduct of elections by *Tinkhundla* of their delegates to the Electoral College and the election of members of the House' (King's Order-in-Council 1978). According to the King's Order, the committee was responsible for the proper conduct of elections at *tinkhundla* or the electoral college, having regard to the traditional practices at meetings and elections of the Swazi nation. It was meant to steer the electoral process along traditional lines in terms of principles and practice. This committee served as a traditional watch-dog over the Swaziland electoral process under the revived *tinkhundla*.

Another part of the structure was the office of the chief electoral officer. This officer was appointed by the king and had the responsibility of conducting elections under the supervision of the electoral committee. The electoral officer had no power to change or make policy and his responsibility was limited to dealing with managing the secret ballot that was being introduced for the first time. He was merely an operational officer who operated on instructions from the king. This monarchical control was indicated by the fact that the first electoral officer of the *tinkhundla* electoral process belonged to the clan of the king's mother.

An important part of the structure was the electoral college (EC). This body was made up of people elected from all the *tinkhundla*, and the number of members was partly dependent on the determined number of *tinkhundla*. For instance, when the number of *tinkhundla* was determined at forty in 1978, the majority of the members of the electoral college came from this group. Members of the elections committee were also members of the college. Each *inkhundla* was allowed to have two delegates to this body. The main responsibility of the electoral college was to elect members of the House of Assembly from the list of candidates from *tinkhundla*. For some days they were introduced to their responsibility and probably told not to deviate from traditional ways of choosing representatives. What was emphasised in these introductions was the need to identify people who embodied the traditional values of Swazi society. Some of these values were respect for seniority and loyalty to the Swazi monarchy. Actually, the electoral college was the last stage of consolidating the control and domination of the monarchy over the general population.

Tinkhundla committees were part of the structure that connected the electoral process directly with the people in the urban and rural areas of the country. Each *inkhundla* had to establish a committee responsible for beginning the process of election. The membership of these committees was not specified. According to the order each *inkhundla* was to establish such a committee, though the number of members was left to each *inkhundla*. From an electoral point of view, the committee in each *inkhundla* was to play a role in the nomination of candidates to the electoral college. The order did not elaborate on the functions of the *inkhundla* committee but it seems to have played a role in initiating the process of electing candidates to the electoral college. At this stage, the system was open to manipulation by influential people. There is evidence that some regional chiefs interfered by telling their subjects which individuals to nominate and who to vote for. It was at the level of the functioning of *tinkhundla* committees that the ordinary citizens had a chance to participate in the electoral process. It was also at this level that the Swazi leadership claimed that the *tinkhundla* electoral process was democratic. Theoretically, people in each *inkhundla* nominated and voted for candidates of their choice.

Under this system the country was divided into forty constituencies which for electoral and development purposes were called *tinkhundla*. Each *inkhundla* cut across chieftainship boundaries so that within its boundaries it included people from different chiefdoms. The jurisdiction of the *tinkhundla* therefore overlapped with that of the chiefdoms. When the system was first established, it was meant to be a system of indirect representation. The electoral process began in each *inkhundla* under an *inkhundla* committee.

The process of elections began once the king had made the announcement that the process should begin. After receiving such instructions the head (*indvuna*) of *inkhundla*, appointed by the king, convened meetings in each *inkhundla* for the purpose of electing people to represent each *inkhundla* at the electoral college. During election day all employers were instructed to release their employees to participate in the *inkhundla* elections. The nomination of each candidate had to be supported by not less than five people. The conduct of elections at this stage was very crude as there was no voter registration and the identification of candidates was very rudimentary. Each candidate was placed at the end of a wooden channel and the voters for each candidate were instructed to go through the channel of their preferred candidate. Somewhere along the channels there were officials physically counting the voters for each candidate. The two candidates with the highest votes were declared winners and continued to represent the *inkhundla* at the electoral college (Levin 1997).

The next stage of the electoral process was at the level of the electoral college. This body consisted of all the delegates from different *tinkhundla*. At this level the delegates were instructed to nominate candidates from amongst themselves, whom they felt had the necessary merit to be members of parliament. These nominations had to be accompanied by a motivation explaining why the nominated candidates were considered fit to be members of parliament (Thwala, personal interview 2015). The electoral college was required to elect forty members for the House of Assembly. Before nomination and election, the candidates' backgrounds were investigated by both the electoral officer and the electoral committee. It is not clear what the investigation was looking for, but it stands to reason that loyalty to the monarchy was one of the main criteria used. According to the King's Order-in-Council No. 23 of 1978, the elections at this stage had to be by secret ballot. It was a very restricted election process because besides members of the electoral college who were to do the voting, 'Only the Chief Electoral Officer, members of the Electoral Committee in terms of Section 23, the person responsible for keeping the minutes of such election, secretarial staff, messengers, the *Indvuna* ye [of] *Tinkhundla* and the members of the Electoral College shall be present at such election' (*Establishment of the Parliament of Swaziland Order* 1978, Part IV (25)). In the final analysis, under this system the people who

eventually became members of parliament were indirect representatives of their constituencies.

According to Sobhuza and his traditional supporters, the *tinkhundla* system was an alternative to foreign models of parliamentary democracy. Some informants who worked closely with Sobhuza pointed out that its creation was based on the background of continued political strife in other African countries as a result of adopting political systems that were not natural to them (Thwala, interview 2015). Based on this argument, Sobhuza attempted to make the system internationally acceptable by sending delegates to several African countries to explain the nature of the system. Delegates were also sent to European countries such as the United Kingdom while others were sent to North America (Dvuba, interview 2015). There is no documented evidence showing the type of reception and responses that the delegates received. While the issue of the system being home-grown and African is appreciated, the question of it being a mechanism of entrenching the power of the Swazi monarchy cannot be ignored. As Kuper has observed, under this system 'individual rights were subordinated to the interests of an autocratic aristocracy' (Kuper 1963, p. 78).

This electoral process continued for about fifteen years and had noteworthy characteristics. The stamp of traditionalism and monarchical dominance was found throughout the stages of the process (Mzizi 2000). The King's Order-in-Council of 1978 provided that all elections should be conducted along traditional lines. This meant that all the candidates who were nominated and elected were vetted along traditional lines. The system was an endorsement of traditionalism as embodied in the institution of monarchy and Swazi traditional values. In effect, all the citizens who through education and other forms of acculturation had adopted modern values, were rejected by the electoral process unless they subscribed to traditionalism and proclaimed loyalty to the monarchy.

Naturally enough the system was not without its critics. Those who believed in the ideals of universal democratic principles did not participate in the electoral process, giving rise to a debate that continues even today on whether the *tinkhundla* political system and electoral process were capable of strengthening democracy in the country. This question is particularly pertinent considering the fact that Swaziland is the only country in southern Africa that has failed to democratise. All the waves of democratisation that have swept through the world, have brought very little democratic change in Swaziland (Huntington 1991).

The period from 1982 to 1986 produced no developments in the Swazi electoral process. Instead, it was characterised by political instability following the death of King Sobhuza. Palace intrigues and machinations took centre stage as some members of the royal family attempted a low-intensity palace coup. Even in this period of political confusion voices of protest against *tinkhundla* were still heard.

Calls for the democratisation of the system or its total elimination were heard but effectively suppressed.

REFORMING THE ELECTORAL PROCESS AND CONSOLIDATING MONARCHICAL CONTROL

King Mswati III's reign was greeted with protests as the electoral engineering commenced by King Sobhuza II in 1978 had a difficult existence, with criticism from different directions. Amongst the most notable critics were the political parties that were forced underground through the 1973 decree. The Peoples United Democratic Front (PUDEMO) and the Ngwane National Liberation Congress (NNLC) led the critics. Local civil society and the international community also added to the voices of protest and rejection of *tinkhundla*. While King Sobhuza died still trying to entrench the *tinkhundla* electoral process, his son King Mswati III, who ascended the throne in 1986, was not spared criticism. The voices of protest against the system became a crescendo in the 1990s. This was part of the wave of democratisation that was taking place internationally and in the southern African region. Of particular impact was the dismantling of the apartheid system in South Africa, highlighted by the release of Nelson Mandela from prison.

By the 1990s it became difficult for King Mswati III and the traditionalists to ignore the voices of protest against *tinkhundla*. PUDEMO continued to argue that Swaziland was in a state of political confusion because of the decree of 1973 which repealed the independence Constitution and banned all political parties in the country (*Weekend Sun* 24 January-7 February 1991).

However, instead of going for full democratisation, the Swazi leadership began a process of electoral transformation that left the country undemocratic. This began in September 1991 when King Mswati III established a body called *Vusela* 1 Commission under the leadership/chairmanship of Prince Masitsela. From the very beginning it became clear that the process was meant to manipulate democratic change in order to continue supporting control and domination by the monarchy. This was made clear by the calibre of people who were appointed by the king to be members of the commission. Outside this conservative circle the conclusion was that the whole process was being politically engineered. The main issue for consultation was whether Swazi citizens wanted to continue with the system established in 1978 or have it abolished. After collating the opinions submitted to the *Vusela* commissions, Prince Masitsela reported that the majority of the Swazi population wanted the *tinkhundla* system to continue. Once again, the Swazi leadership avoided transforming the undemocratic electoral process on the strength of dubious conclusions of the Prince Masitsela Commissions.

One of the most important unintended results of *Vusela 1* was an escalation of protests and criticism, especially of its aspect as an electoral system. The electoral system adopted in 1978 continued to be criticised for lack of inclusivity and its bias in favour of traditionalists. Under this system, it was not possible to state how many people voted because there was no voter registration (Thwala 2015). The system was also criticised for damaging family relations at the *inkhundla* voting stage as it did not use a secret ballot and the candidates could see when their relatives had voted for them.

As a result of general complaints against *tinkhundla* and more particularly against *Vusela 1*, King Mswati III was compelled to take action. In an action typical of the Swazi leadership, the king decreed the establishment of another commission named *Vusela 2* under the chairmanship of Prince Mahlalengani. To appease those who opposed *tinkhundla*, King Mswati included some members of the opposition in the commission. The main responsibilities of *Vusela 2* were to review the submissions of the Swazi nation under *Vusela 1*, and also to receive new submissions on the electoral procedures that had been operating since 1978 (Swaziland Government 1992).

The report of *Vusela 2* pointed out numerous shortcomings of the electoral system that had been in place since 1978. The commission toured the country to establish the people's views about the *tinkhundla* electoral system, and found widespread unhappiness about the fact that the system did not allow for direct election of their representatives to Parliament. They also pointed out that they were not free to exercise their votes because the traditional chiefs were telling them which candidates to vote for. It was also apparent that the citizens were not happy about conducting elections on traditional lines because this led to problems of administrative dysfunction. Some also expressed the view that the law should provide for an independent and impartial election supervisory mechanism. According to the report, the majority said there should be no political parties because the country was not ready for multi-party democracy. Another very important opinion was that the country should have a written constitution.

The *Vusela 2* report was a critical document for the evolution of the Swazi electoral process because it led to an almost complete revision of this process. This is particularly so because it recommended that the country should have a written constitution that would embody legal provisions for conducting elections, something not previously included. Two legal instruments that became the foundation for a reformed Swaziland electoral process emerged out of the commission report. The first is the Elections Order of 1992; this provided a detailed description of the process of nominating candidates at chiefdom level and what should happen at the different stages of an election. It was largely an attempt to clarify the confusion that attended the process established in 1978. The second

was the Voter Registration Order of 1992 which provided for the registration of voters for the first time in the country.

The legal framework so established also led to a complete revision of the electoral structures. For instance, the management of elections was left to the chief electoral officer and his deputy. For the first time these two positions were permanent and served as an election management body (Thwala 2015). All structures such as the electoral committee and the electoral college were dissolved. Support staff were only engaged during election year and the majority were civil servants. In spite of this change, Swaziland did not have an independent electoral commission but it was not alone in this regard because countries such as Botswana and Lesotho used a similar structure. This limited structure continued to function until 2008 because the Constitution that had been approved in 2006 provided for the establishment of a commission.

One important weakness of the system that was not highlighted by the two *vuselas* was that the *tinkhundla* system compromised the supremacy of Parliament. Such supremacy is limited by the fact that under this system, the legislative authority of Parliament does not extend to the offices of *ingwenyama* and *indlovukazi*, to the appointment or suspension of chiefs, to the composition and procedure of the Swazi National Council, and to the annual *incwala* ceremony or to the *libutfo*. However, the *vuselas*, especially *Vusela 2*, proved to be very important for the evolution of the Swazi electoral process. Whatever cosmetic changes the traditionalists were prepared to put in place were founded on the submissions made in the *vuselas*. This points to the agency of the Swazi population and the international community. It is worth noting that above all, the *vuselas* were a strategy by the traditionalists to reproduce autocratic rule under the guise of engineered popular acceptance. Implementation of submissions to the *vuselas* was left to the discretion of the traditionalists. At the end of the whole process, it was the views that supported the monarchy that were prioritised.

CONSTITUTIONAL DEVELOPMENTS AND TRANSFORMATION OF THE SWAZI ELECTORAL PROCESS

One element of apparent monarchical benevolence was that King Mswati chose the submission for a need to craft a written constitution for the country. The reality was that the king was facing pressure, both from within and from outside the borders of the country, to democratise Swaziland. In 1996 King Mswati III formed the Constitutional Review Commission (CRC) initially under the chairmanship of Prince Mangaliso (Booth 2000). The commission was made up of 30 members with the brief to draft a new constitution for the country by 1998. However, the

final draft of the Constitution came from the work of a different commission under the chairmanship of Prince David.

The Constitution on which the present electoral process is based came into force on 8 February 2006. Section 79 of the Constitution of Swaziland states that ‘the system of Government for Swaziland is a democratic participatory, Tinkhundla-based system which emphasizes devolution of state power from central Government to Tinkhundla areas and individual merit as a basis for election or appointment to public office’ (Constitution of Swaziland 2006). As is the case with systems of other Commonwealth countries, the *tinkhundla* system is constituency based. It emphasises that constituencies should be the driving force behind the development and empowerment at all levels, whether rural or urban. It also emphasises that power should devolve to the people; services should be accessed by all; and constituencies should be used as political organisations and for the popular representation of the people in Parliament and other legislative structures. The system emphasises that both election and appointment to public office should be based on individual merit. The right of the individual to participate in national activities like the constitution-making process has been recently endorsed by the Supreme Court of Swaziland.

In general terms, the Constitution of the Kingdom of Swaziland provides for the protection of the fundamental rights of citizens which include: freedom of assembly and association; freedom of movement; freedom of conscience and religious belief; and freedom to participate in elections (SADC Parliamentary forum 2013). In this manner the Constitution protects the participation of citizens in elections. However, there is still the question of the extent to which these rights and freedoms are fully enjoyed by the citizens because some are curtailed. Most importantly, the Swazi Constitution does not discriminate against women because it provides for equal treatment for both men and women who are also constitutionally guaranteed equal access to political, economic, and social activities. Again, the practical aspect of these guarantees has been questioned by some stakeholders who have argued that the Swaziland Government is not doing enough to ensure the implementation of these guarantees.

The Constitution transformed the electoral process in Swaziland as it provided for privileges and rights that were not previously enjoyed in the country. For instance, it provided for the establishment of an independent elections management body. This put Swaziland ahead of those countries in the region that had not enshrined such an important body in the Constitution.

Section 87 (1) of the Constitution provides for the election of persons through secret ballot at both primary and secondary elections following the first-past-the-post electoral system. This is irrespective of the office for which the candidates are standing – another new development. Section 84 of the Constitution guarantees the

right to representation in the legislative bodies and the right to be heard through freely chosen representatives. Section 85 guarantees the right to vote at elections and Sections 88 and 89 prescribe voter qualifications and disqualifications. Election by secret ballot is also guaranteed by the Constitution in Section 87.

Also specific to the country's electoral process is that the Constitution provided for the establishment of an independent elections management body. This puts Swaziland ahead of those countries in the region that had not enshrined such an important body in the Constitution. Section 90 (1) of the Constitution of the Kingdom of Swaziland provided that 'There shall be an independent authority styled the Elections and Boundaries Commission ("the Commission") for Swaziland consisting of a chairperson, deputy chairperson and three other members' (The Elections and Boundaries Act, No. 7 of 2013). The commissioners are appointed by the king on the advice of the Judicial Service Commission. However the source of the names recommended to the king is unclear, raising the issue of transparency and of equal opportunity to all qualifying persons to be members. The Constitution of the country and subsequently the founding or establishing Act highlight two significant aspects of the commission. Firstly, that the commission shall be independent and shall not be subject to the direction or control of any other person or authority in the performance of its functions. Secondly, that the commission shall be impartial and shall exercise its powers and perform its functions without fear, favour or prejudice. These two aspects are theoretically very important if the Commission is to conduct free, fair, and credible elections. However, even here the gap between theory and practice needs to be assessed and evaluated.

In terms of function the EBC is also responsible for demarcating constituency boundaries. This is different from what is happening in most countries in the SADC region where constituency demarcation is carried out by a separate body. Section 87 (1) of the Constitution provides for the election of persons by secret ballot at both primary and secondary elections following the first-past-the-post electoral system. This is irrespective of the category into which the candidates are being elected. Again, this provision set a new trend and solved some of the problems that had attended the indigenised electoral process.

Beyond constitutional provisions, the electoral process in the Kingdom of Swaziland is further bolstered by legal instruments that have developed over time in responses to certain circumstances and experiences. When the EBC conducted its first elections in 2008, there were only two pieces of legislation governing the elections process in Swaziland. First, there was the Voter Registration Order of 1992 that provided for various aspects of the voter registration process. Second, the Elections Order of 1992 provided for the conduct of elections in general. The

practical application of these election laws is fully captured in the various stages of the electoral process.

During the short life of the EBC several laws have been enacted to address changing circumstances. The year 2013 saw a proliferation of these laws for the conduct of the 2013 general elections and beyond. These new laws included the Elections Act, Act No. 10 of 2013; the Elections and Boundaries Commission Act, Act No. 7 of 2013; the Voter Registration Act, Act No. 8 of 2013; the Parliamentary (Petitions) Act, Act No. 12 of 2013; the Elections Expenses Act, Act No. 9 of 2013; and the Elections Expenses Act, Act No. 9 of 2013. This raised the concern among some stakeholders who felt that these were last-minute reforms which candidates and society at large found difficulty digesting. In fact these reforms were completed in 2011 but only managed to go through the approval chain in 2013 (Nkosungumenzi Dlamini, personal interview, Nkhanini 29 September 2015).

After the establishment of the Constitution and the EBC, the Swazi electoral process was based on a solid and comprehensive constitutional and legislative framework. The Constitution of the country provides a comprehensive foundation for the elections management body, so do the different legislative instruments that have been in place since 1992. Such a foundation gives the elections management body credibility and a robust framework on which to base decisions. However, one of the facts that has frequently been brought to light is the huge gap between the comprehensive policies and procedures, and compliance with the law. Comprehensive constitutional provisions and laws count for almost nothing if they are not used to inform practice. That is why it is important to have a monitoring and evaluation mechanism to ensure compliance. At the moment it is not clear who enforces compliance with the EBC. There are however several concerns regarding the EBC. For instance, this seemingly democratic institution is constructed within the framework of traditionalism and monarchical patrimonialism. The first chief executive officer of the body comes from the Dlamini clan and is a traditional chief. Among the commissioners, one is a staunch supporter of the monarchy and another is the daughter of a prince. The choice of commissioners clearly indicated that the body was meant to entrench traditionalism through the electoral process. Despite all the provisions of the Constitution and other comprehensive pieces of legislation, the ethos of traditionalism was not restricted in any way, as the king remained above all the law.

THE SWAZI ELECTORAL PROCESS AND THE STRENGTHENING DEMOCRACY

Elections are a very important part of democracy and electoral processes are meant to promote and strengthen democracy. Swazi traditionalists have argued

that the Swazi electoral process was created as an attempt to avoid copying electoral processes from foreign countries, especially western Europe. These are systems that have no relation to the traditions of the Swazi people. This is a very compelling argument because one of the major limitations of African political systems has been the fact that they were copied from former colonial masters and did not grow from the values and traditions of the people who are supposed to implement and practice them. While this is the case, it should be realised that there is very little that is traditional about the Swazi electoral process, except the institution of monarchy which has manipulated the process to strengthen itself in the face of different forms of opposition. Traditional systems are usually based on consensus and inclusivity, but the Swazi electoral process is not. It does not help much to craft a system for personal domination and manipulation as King Sobhuza II did.

According to the Swazi traditionalists who crafted the system, the Swazi electoral process is non-discriminatory. It enhances the right to equality in so far as all Swazis, regardless of their education or background, may be elected into public office. According to this thinking individual merit is the basis for the elected person to be continuously accountable to the people who voted them into office. It ensures that the elected person will deliver what he or she promised the voters during the campaign and will not be able to hide behind the banner of the organisation he or she represents. It ensures that the elected representative remains a true agent and voice of the people who have mandated him or her. This direct representation ensures that once a candidate is voted into parliament, he or she becomes a direct representative of the people who voted. It is democratic and participatory in that everybody participates in the decision-making process.

Much as positive aspects of the Swazi electoral process can be outlined, it should be noted that it still has serious limitations. The Constitution of the country provides for freedom of association, but the *tinkhundla* electoral system violates this provision because it does not allow political groups to register for elections and be voted for as a corporate entity. Its conditions are that people should stand for elections as individuals under the banner of very dubious promises. At the moment the Swazi are compelled to vote in a system that is based on a specific ideology, that is the ideology of traditionalism that nourishes monarchical domination and control. Institutionally, nothing separates one candidate from another as they all operate within the limits of the *tinkhundla* electoral process. This is a straight-jacket that does not allow for ideological differences.

While the Swazi electoral process has an element of democracy, it has done very little to strengthen democracy in the country. To a large extent, it does not conform to most principles of universal democracy. In the Swazi electoral process elections are conducted outside of political party formations. In fact, those political

parties that do exist in Swaziland, do so by default because the King's Decree banning political parties in the country is still in force, and as a result all political parties remain banned. Political parties such as The People's United Democratic Movement (PUDEMO) and the Ngwane National Liberatory Congress (NNLC) operate underground. The same fate is suffered by the numerous smaller political parties that have claimed to contest political space in the country. Consequently, political parties are not allowed to contest elections as party formations, something contrary to the provisions of the country's Constitution that stipulate freedom of association. Instead, members of these parties are allowed to contest elections as individuals. This failure to strengthen any vestiges of democracy that may exist in the system is the major weakness of the process. The Swazi electoral process is exclusive and does not accommodate all political groupings in the country. Instead, all candidates who stand for elections are compelled to conform to traditional structures at every stage of the electoral process. From the perspective of those who crafted the process, the idea was to make sure that everybody pays allegiance to the traditional power structure, particularly the monarchy.

CONCLUSION

The last decade of British colonial rule in Swaziland introduced an inclusive democratic electoral process, and it was hoped this would lead to a positive transition and consolidation of democracy. This was despite the fact that for the most part, British colonialism in Swaziland was never democratic. From about 1963 popular participation in the political arena and in the electoral process was emphasised by British colonial administrators. This was not peculiar to Swaziland, but applied to all British colonies after the Second World War. Swaziland experienced a proliferation of political parties because, at that time, the British allowed political plurality based on freedom of association.

It should be noted that King Sobhuza II and his traditionalist supporters participated in this process because of their concern with retaining power, not because they believed in the principles that governed the process. When independence came in 1968, King Sobhuza was eager to revise the country's political system and electoral process. This was in order to marginalise his opponents while entrenching the power of the monarchy and allowing the monarchy to dominate. Paramount in his scheme of things was the need to craft an electoral process whose purpose was to safeguard the power of the monarchy. This was at the centre of all attempts that were made to revise the Swazi electoral process.

This article has shown that the first major step in this direction came in 1973 when all political parties were banned and for about five years thereafter

the country was ruled by decree. The second step followed in 1978 when the electoral process inherited from Britain was indigenised. From that date the Swazi electoral process was governed and conducted along traditional lines. This was a major change because it literally compromised most aspects of the electoral process that had been inherited from the British. The significance of this change was that the electoral process had been centred on the citizens of Swaziland but became more about regime protection and strengthening. Whatever elements of democracy remained in the electoral process were meant to appease the international community which continued to highlight the undemocratic tendencies of Swazi leadership.

Inside Swaziland, protest continued to be heard against the lack of inclusivity in the Swazi electoral process. This was voiced through the pronouncements of the People's United Democratic Movement (PUDEMO), the Ngwane National Liberatory Congress (NNLC), and different civil organisations. These formations characterised the whole Swazi political environment as being undemocratic, and some resolved not to participate in the country's elections. Much as the leadership of the country attempted to stifle and ignore this protest, the international community added its voice in criticising the system. Partly because of the need to appease foreign investors and donors, the Swazi monarchy instituted cosmetic changes in the early 1990s. This article has outlined some of the changes that were put in place and indicated that these changes fell short of completely democratising the Swazi electoral process. One major change that was put into place was the introduction of direct representation in the Swazi electoral process.

As a result of increasing criticism of the system the monarchy was further forced to revise the country's electoral process. This came through the introduction of a second written Constitution which changed the structure of the Swazi electoral process and made the process more professional. This was particularly with regards to the formation of the country's first electoral management body which started operating in 2008.

This article has shown that throughout the history of its evolution from the 1960s to the present, the Swazi electoral process has been twisted and manipulated to serve the interests of the monarchy. Of particular importance here has been the preservation of the power of the monarchy. It has been an electoral process that has completely failed to grow and strengthen democracy in the country. All the changes that have been put in place have been cosmetic and intended to placate the opinion of the international community, foreign investors and donors.

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GHANA'S 2016 GENERAL ELECTION:
*Accounting for the Monumental Defeat of the National
Democratic Congress (NDC)*

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ABSTRACT

Ghana is now seen as a thriving African democracy after having gone through seven presidential and parliamentary elections, resulting in three overturns of political power in 2001, 2009 and 2017. The 2016 election was another crossroad for Ghana's maturing democracy. In this election, the incumbent National Democratic Congress (NDC) lost to the opposition New Patriotic Party (NPP). The margin of defeat suffered by the ruling NDC was puzzling and unprecedented. Using voter behaviour as a theoretical taxonomy, this paper attempts to explain the monumental defeat of the NDC in the 2016 general election. It poses the question: what factors led to this defeat and why was there such a monumental difference of over one million votes? The paper argues that firstly, the defeat was due to regime fatigue anchored in the two-term regime cycle of change and voting based on party identification. Secondly, the defeat was monumental because of poor economic performance; corruption on the part of some government ministers and attempts to shield them; unpopular last minute decisions; the gross display of arrogance by some ministers of state and party officials; a more appealing campaign message of hope from the main opposition party; poor branding and communication of NDC's campaign promises and ideas; abuse of incumbency; voter apathy

on the part of ruling party supporters and the general call for change across the world. The study concludes by offering some useful recommendations.

Keywords: Ghana, National Democratic Congress (NDC), New Patriotic Party (NPP), defeat, democracy, elections, democratic consolidation

INTRODUCTION

Since Ghana's fourth attempt at constitutional democracy in 1992, seven successful general elections¹ have been held with power alternating between two main political parties, namely the National Democratic Congress (NDC) and the New Patriotic Party (NPP). No incumbent seeking re-election lost in any of these elections other than the last.² That defeat could be described as monumental because of the unprecedented margin of victory of the NPP over the ruling NDC. Commendably, over the past several decades many African countries have incorporated the development of four prominent democratic trends, namely the embrace of elections; the acceptance of constitutional norms; the emergence of free media and an active civil society; and the establishment of regional pro-democratic conventions and protocols (Gyimah-Boadi 2015, p. 101). A classic example is Ghana when it adopted the Constitution in 1992 and returned to a democratic government with a vibrant media and civil society, rule of law, as well as holding periodic elections. In this regard Ghana is seen as a model of democracy in Africa (Ayee 1997; Gyimah-Boadi 2001; Daddieh 2009; Abdulai & Crawford 2010; Gyimah-Boadi & Prempeh 2012; Gyimah-Boadi 2015).

This explains why the peaceful conduct of the nation's 2016 general election, which led to the electoral victory of the opposition NPP and the concession of the incumbent, was not a surprise to many watchers of democracy in Africa and across the globe. The NPP won the 2016 general election with 53.9% of the total valid votes counted while the incumbent NDC polled 44.4% (EC-Ghana 2016). In numerical terms, the NPP garnered 5 716 026 votes, the NDC obtained 4 713 277 votes, while four other minor parties and an independent presidential candidate shared 1.8% of the valid votes cast (EC-Ghana 2016). The NPP secured 169 out of

1 General elections were held in 1992, 1996, 2000, 2004, 2008, 2012 and 2016.

2 In the 2000 election that resulted in a transfer of power from the NDC to the NPP, the sitting government led by Jerry Rawlings was not eligible, per Ghana's 1992 Constitution, to stand for re-election because he had served two four-year terms in office. Similarly, in the 2008 general elections that led to the return of power from the NPP to the NDC, sitting president John Kufuor was also ineligible because he too had served two terms in office. President Mills of the NDC served only one term, from 2009-2012, and died while in office. His successor President John Mahama of the NDC served one term in office, from 2013-2016, but was defeated in his bid to seek re-election in a second term in the 2016 general election. His defeat could be described as monumental in the sense that it was the first time a sitting government had been defeated, and also because the enormous margin of defeat was unprecedented in the political history of Ghana since 1992.

the 275 parliamentary seats, an almost two-thirds majority in Parliament, while the NDC garnered 106 seats. The defeat of the ruling NDC by the opposition NPP by over one million popular votes is what we describe as a monumental defeat. It is monumental because, in the political and electoral history of Ghana, no incumbent president seeking re-election has lost to the opposition party with such an enormous majority. Again, no opposition party has ever won an election against a ruling party at the first round without going through a run-off. It is this monumental defeat and fall of the NDC that the paper seeks to explain.

It must be noted that extant literature on Ghana's democracy and elections such as the work of Gyimah-Boadi (1991) focused on the transition to constitutional rule. Others have discussed the 1996, 2000, 2008 and 2012 presidential and parliamentary elections and have explained factors that may have accounted for electoral victories or defeats (Ayee 1997, 2002; Smith 2002; Daddieh 2009; Gyimah-Boadi 2001, 2009; Alidu 2014; Fobih 2008). Some scholars have also researched the role of the media, civil society, and state institutions in Ghana's democratic consolidation (Whitfield 2003; Arthur 2010; Gyampo & Asare 2015). The role of third parties in consolidating Ghana's democratic practice and their abysmal performance in elections in Ghana, as well as the function of ethnicity in Ghana's electoral politics, have also been researched by scholars like Yobo & Gyampo (2015) and Arthur (2009) respectively.

However, given that Ghana's 2016 general election is so recent, no detailed scientific interrogation, analysis or research has yet been conducted on the salient issues around this event. This is the first time an incumbent president seeking re-election has been defeated. Again, and as noted earlier, this is the first time an opposition party has won an election, not through a run-off, but in the first round with an unprecedented margin of victory. The unique nature of this study lies in the fact that it is arguably the first or at least one of the pioneering studies seeking to explain why the sitting president lost the 2016 elections. It delves into the factors accounting for the electoral victory of the opposition party in a first-round election. Regarding structure, the paper discusses the theoretical taxonomy and undertakes a historical/empirical sketch of election results in Ghana since 1992, highlighting the margins of defeat. It attempts an explanation of the NDC's defeat and proffers suggestions as to why the defeat was so substantial. Finally, it draws some conclusions and makes recommendations to further consolidate and strengthen the pillars of Ghana's democracy.

THEORETICAL UNDERPINNING

Voter behaviour forms the theoretical base of this study. Earlier studies on voter behaviour in general were grouped into the following three major schools of

thought. First is the sociological model, which focuses on the influence of social factors in shaping voter behaviour (Lazarsfeld, Berelson, & Gaudet, 1944 as cited in Antunes 2010, p. 146). Second is the psychosocial model, which assumes that party identification is the main factor behind the behaviour of voters. This model is attributed to the Michigan school, which has its major reference in the work of Campbell, Converse, Miller & Stokes (1960) (*ibid.*). Third is the rational choice theory, also referred to as a model of economic voting, that emphasises variables such as rationality, choice, uncertainty and information. This is known as the Rochester school, attributed to Downs (1957) (*ibid.*).

Africa had three waves of democracy between the 1950s and the 1990s, the first of which witnessed several countries engaged in a struggle for national independence. Many of these post-independence countries leaned toward authoritarian regimes in the period between the 1960s and the 1990s. As a result, much of what was known of African politics during this period was conceptualised as clientelism, neo-patrimonialism, personalism, prebendalism, and rentier state (Lindberg 2004, p. 4). Therefore, studies on voter behaviour were produced under conditions of restricted competition in one-party authoritarian systems. Elections under these one-party systems did not allow voters a choice of who should rule; neither did they give voters a chance to influence policy directions. Nevertheless, since the end of the Cold War in 1989 which was symbolised by the fall of the Berlin wall in Germany, there have been multiparty elections in 44 out of 48 African countries for over 15 years (Lindberg 2004, 2006).

Indeed, in the 1990s there were several democratic reforms in Africa in what Huntington (1991) described as the third wave of democracy. This wave swept away many dictatorial regimes and their one-party systems that had subjugated several African states since independence in the 1960s. The third wave of democratisation was also occasioned by the failure of both military and civilian regimes to deal with poverty, unemployment, oppression and the lack of essential services such as healthcare, housing, and education. Moreover, these states were crippled with administrative inefficiencies, corruption, and socio-economic mismanagement (El-Khawas 2001). This forced many countries in Africa to return to democratic rule in the 1990s, with elections playing a major role.

The question, however, is what were the theoretical explanations regarding factors that shaped and influenced voter behaviour in Africa after the third wave of democracy? Several scholars have proffered responses. First is the rational choice model which suggests that voters are rational decision-makers who make their own calculations about the expected outcomes before casting their ballots for a candidate or party (Debrah 2016; Fair 1996; Fiorina 1981). Another explanation is the consumption benefits of voting, a democracy model which suggests that voters consider voting as a civic duty (Brennan & Hamlin 2000;

Kan & Yang 2001). Although these two models elucidate positive voter turnout, they have been criticised for inferring that voter turnout is driven by factors not related to the principal element of the democratic process, which is the election of a government (Debrah 2016). This has led some scholars to suggest the ethical voter model, which states that although people serve their own self-interest, they also take into account other people's welfare (Camerer 2003; Debrah 2016). Lindberg & Morrison (2008) used two categories for explaining voting behaviour; namely the evaluative and non-evaluative assessment models. In their view, the evaluative voter assesses political parties against representatives or candidates as one dimension and retrospective versus prospective judgments as another. Secondly, the non-evaluative model considers assessments made by clientelism and proxy voting.

Arguably the most comprehensive theoretical explanations of voting behaviour were presented by Andrew Heywood (2002, pp. 242-245). He identified four key conceptual models to explain voter behaviour in general. First is what he calls the party identification model. This model suggests that voting behaviours are influenced by robust connections to a particular political party leading to the party's stability and continuity. This is specifically with regards to the habitual patterns of voter behaviour, which are often constant over a long time. Second is the sociological model which links voter behaviour to group affiliation. It argues that voter behaviour is a reflection of the economic, social position, race and gender of the group to which the voter belongs to or identifies with. The third is known as the rational choice model, which suggests that voters are rational actors. In this regard, voter behaviour is based on the policies of the candidates. This model is based on the significance of issue-based voting and not party identification, sociological or ideological models. The fourth model is that of dominant ideology, which argues that political ideology is prominent in shaping voter behaviour.

Many scholarly works on elections and voting behaviour in Ghana have shown that the Ghanaian electorate vote for political parties rather than individual candidates (Aye 1997, 2002; Bofo-Arthur (ed) 2006; Brierley & Ofori 2014; Daddieh 2009; Fobih 2008; Jockers, Kohnert & Nugent 2010; Osei 2013; Smith 2002). This is what Heywood (2002, pp. 242-245) calls the party identification model in explaining voting behaviour. It places much prominence on strong attachment to a political party rather than an election candidate. This partisan alignment produces stability and continuity, specifically regarding habitual patterns of voting behaviour that are often sustained over a long time. In the view of Osei (2013) political party tradition provides a necessary context for comprehending the complexity of voting patterns in Ghana. It is this tradition that has created the ethnic, regional and socio-economic support base for the two main parties in Ghana, the NDC and the NPP (Kwakye 2013; Lindberg & Morrison 2005). It is

within this context that we suggest that the ordinary Ghanaian voter is influenced by the party identification model in deciding who to vote for in an election. This often leads to either rejection or endorsement of a political party during polls, particularly after a political party has been in power or opposition for two four-year terms. This voting pattern has occasioned what is referred to as the two-term regime cycle of change³ in Ghana's current Fourth Republic.

Against this background, this paper seeks to explain the abysmal defeat of the incumbent NDC in Ghana's recent 2016 general election, which resulted in the peaceful transfer of power from President John Dramani Mahama to Nana Akufo-Addo of the NPP. This occasioned the third turnover of power during the Fourth Republic. Indeed, the 2016 elections offered Ghanaians an interesting situation whereby the electorate rejected the attempt by an incumbent president seeking a second term in office, which could have led to a third term for his party.⁴ In the following section of this paper we examine in depth the electoral history of Ghana's Fourth Republic.

HISTORICAL BACKGROUND OF ELECTION RESULTS AND MARGINS OF VICTORY/DEFEAT IN GHANA'S FOURTH REPUBLIC

Ghana's first general election in the Fourth Republic was held in 1992 with Jerry Rawlings of the ruling NDC being declared the winner, garnering 58.3% of the votes cast despite claims of electoral fraud. The main opposition NPP's candidate Albert Adu Boahen was placed second with 30.4% while the other candidates together polled 11.3% of the total votes cast (Jeffries & Thomas 1993, p. 331; Arthur 2010, p. 207; Yobo & Gyampo 2015, pp. 8,11). The margin of defeat as shown in Table 1 was 27.9% of the valid votes for NDC, which possibly explains the main opposition's claims that the elections were rigged for the NDC. Part of the reason was that the Provisional National Defence Council (PNDC) – the military junta that had been in power for eleven years – organised and took part in the election as the NDC. In this regard, some have argued the PNDC government essentially handed over power to itself (Jeffries & Thomas 1993; Aye 1997; Gyimah-Boadi 2001). Hence the opposition parties, particularly the NPP, refused to accept the results, claiming the elections were rigged for the NDC and therefore boycotted the parliamentary elections held on 28 December 1992. The NDC secured 189

3 This describes a cycle of alternation of power relations whereby a political party wins elections consecutively for two terms and is rejected in the third poll, paving the way for the opposition also to win the next two consecutive elections. In Ghana, both the NDC and the NPP have, under the Fourth Republic, alternated power in eight-year intervals consisting of two terms in office respectively.

4 Before the 2016 elections, the NDC had held onto power for two consecutive terms; that is, the Mills/Mahama-led Administration (2009-2012) and Mahama-led administration (2013-2016). Hence, the 2016 election was incumbent President Mahama's second term bid.

of the 200 seats, while smaller political parties aligned with the NDC held the remaining 11 seats. It was, therefore, evident that Ghana was a democracy only in name, and that some of the authoritarian tendencies from the PNDC era were still in force (Arthur, 2006).

Table 1
Presidential election results for the NDC and NPP since 1992

Political Party	Percentage won								
	1992	1996	2000		2004	2008		2012	2016
			Round 1	Round 2		Round 1	Round 2		
NDC	58.3	57.4	44.5	43.9	44.9	47.9	50.2	50.7	44.40
NPP	30.4	39.6	48.2	56.9	52.5	49.13	49.8	47.7	53.85
Variations	27.9	17.8	3.7	13.0	7.6	1.23	0.4	3.0	9.45

Source: authors' computation from the Electoral Commission of Ghana.⁵

Subsequently, in 1996 the NDC won both the presidential and parliamentary elections with a convincing majority. Rawlings secured 4 099 760 votes out of the 7 225 161 valid votes cast, representing 57.4%, while the NPP led by John Kufuor obtained 2 825 715 votes representing 39.6%, with the other smaller parties obtaining 3% of the rest of the votes (Ayee 1997). The margin of defeat this time was 17.8% for similar reasons to those of the 1992 general election. The NDC won 134 out of the 200 seats with the NPP securing 60 seats. The People's Convention Party (PCP) won 5 seats, and the People's National Convention (PNC) captured 1 seat (Arthur, 2010). Similar reasons for the NDC's 1992 victory have been adduced for its 1996 victory (*ibid.*).

In 2000, Jerry Rawlings could not contest again since he was barred from standing a third time in terms of the 1992 Constitution. His vice-president Prof J.E.A. Mills contested the elections on the NDC's ticket but lost to the opposition NPP, led by John Kufuor after a run-off. In the first round, John Kufuor secured 48.2% while Mills polled 44.5%. Given that neither obtained the 'fifty percent plus one vote' threshold per constitutional requirement, a run-off was held on 28 December 2000. John Kufuor of the NPP won with 56.9% of the votes with the NDC candidate polling 43.9%. The margin of defeat was 13% as shown in Table 1.

⁵ Table 1 shows the presidential results of the two major political parties NPP and NDC in Ghana's Fourth Republic. It also points out the variation in percentages of the defeat between the two parties from 1992 to 2016.

The reason for this margin was the support the NPP obtained from almost all the opposition parties during the second round of elections and the general call for change in Ghana as result of regime fatigue. The NPP captured 100 of the parliament's 200 seats and the NDC obtained 92, while independent and minor political parties had the remaining eight seats (Gyimah-Boadi 2001, p. 103).

In the 2004 general elections, John Kufuor was re-elected as president with 52.5% of the total votes cast, while J.E.A. Mills of the NDC received 44.9% and the margin of defeat was 7.6%. Clearly, a majority of Ghanaians supported the second term bid of the NPP to complete the two-term cycle (eight years) Although parliamentary seats had been increased from 200 to 230, the NPP retained its majority with 128 parliamentary seats, while the NDC won 94 seats. The PNC won 4 seats, Convention People's Party (CPP) won 3, and an independent candidate won the remaining seat (Fobih 2008).

After two terms i.e. eight years' rule by the NPP, the NDC was re-elected to power. Of the 230 parliamentary seats, the NDC won 114 as against 107 by the NPP. In the presidential race, Nana Akufo-Addo of the NPP polled 49.1% of the total votes cast while NDC's J.E.A. Mills obtained 47.9% of the total valid votes, as shown in Table 1. Again, just as in the 2000 general election, the 7 December 2008 presidential polls failed to produce a clear winner at the first ballot. Hence a run-off of the presidential election was held on 28 December 2008 (Yobo & Gyampo 2015, p. 13). After the runoff, the NDC won with 50.2% of the votes while NPP obtained 49.8%. As shown in Table 1, the margin of defeat was 0.4%, the smallest margin of defeat recorded in the electoral history of Ghana's Fourth Republic. Nonetheless, majority of Ghanaians felt that eight years of NPP was enough and what is called regime fatigue had set in. Hence a majority of the electorate had called for change, which led to the NPP handing over power to the NDC.

Ghana's sixth presidential and parliamentary elections were held concurrently on 7 December 2012, with the incumbent president, John Dramani Mahama,⁶ narrowly winning with 50.7% of the votes and the main opponent, Nana Akufo-Addo of the NPP, obtaining 47.7% of the votes. As shown in Table 1, the margin of defeat was 3% in favour of NDC, signifying the support for continuity of the NDC administration after the death of President Mills and the assumption of office by John Mahama as president. This result confirms our position that Ghanaians vote for political parties and thus gave the NDC a second term. The NDC further won a majority of 148 seats in parliament while the NPP secured 123 seats. The remaining seats were shared among independent candidates (3 seats), and the PNC (1 seat) (Brierley & Ofosu 2014; Yobo & Gyampo 2015, p. 15).

6 John Mahama, who had been the Vice-President, succeeded President Mills who died in his first term in the lead-up to the 2012 general election.

Following the declaration of the 2012 election results, the opposition NPP filed a petition at the Supreme Court, arguing that the 2012 election was marred by widespread electoral malpractices and fraud (Alidu 2014). The '2012 Election Petition', as it became popularly known, lasted for eight months until August 2013. Notwithstanding the prolonged legal battle, the verdict of the justices of the Supreme Court upheld President John Dramani Mahama as being validly elected. Indeed this was a major test of Ghana's democratic consolidation, and Ghana undoubtedly survived the possibility of post-election conflict when the opposition leader Nana Akufo-Addo accepted the decision of the Supreme Court even though he openly disagreed with the verdict (GhanaWeb 2013).

Ghanaians returned to the polls again on 7 December 2016 for the seventh consecutive time under the current Fourth Republic Constitution. This election was highly contested by the two major political parties in Ghana, the NDC and the NPP. Nevertheless, other political parties including the Convention Peoples' Party (CPP), the Peoples' National Convention (PNC), the Progressive People's Party (PPP), the National Democratic Party (NDP) and an independent candidate also participated. The EC had disqualified some aspirant presidential candidates who did not meet the requirements as stipulated in the Constitutional Instrument (C.I.) 94 for the conduct of the elections. In all, seven candidates gained ballot access for the presidential contest after a series of disqualifications and court actions (Adogla-Bessa 2016; Frimpong 2016).

At the end of polling, the opposition NPP led by Nana Akufo-Addo won a landslide victory with 53.9%, at the first round, unseating the incumbent President John Dramani Mahama of the NDC who managed 44.7% of the total valid votes as shown in Table 1.⁷ In Parliament, the NPP won overwhelming majority of 169 seats while the NDC garnered 106 of the total 275 seats (Kwakofi 2016b). With this historical background, two important questions are worth asking. Firstly, why did the NDC with a sitting president lose the elections with a 9.5% margin? Secondly, why was the defeat so monumental? These are discussed in subsequent sections of the paper.

ACCOUNTING FOR NDC'S DEFEAT IN THE 2016 GENERAL ELECTIONS

The acme factor that accounted for the NDC's defeat in the 2016 polls is regime fatigue. After being in government for eight years, Ghanaians were simply tired of the NDC and wanted a change. Indeed, the history of elections in Ghana since

7 The 1992 and 1996 elections results show a massive win for the incumbent NDC. Again, in the 2000 presidential contest, the opposition NPP won in the second round of voting with 13%, with the support of third parties. Similarly, the opposition NDC unseated the incumbent NPP in the 2008 run-off election with a slim margin of 0.4%.

1992 is a history of a two-term regime cycle of change. This has been consistently demonstrated since the inception of the Fourth Republic in 1992.⁸

With the two-term regime cycle of change ingrained in the minds of many Ghanaians, it was going to be an uphill task for the ruling NDC to break the chain irrespective of the massive proactive, temporary or artificial socio-economic interventions the party implemented to deal with the challenges confronting the people. In this regard, the rational socio-economic interventions by the NDC including the massive infrastructural development even angered many Ghanaians who were simply tired of the NDC and wanted a change.

Being cognisant of the political psyche of the Ghanaian electorate, the NDC's 2016 campaign sought to entrench in public minds that the 2016 election was only a second term bid for President John Mahama. To many Ghanaians, this was sheer propaganda, as it was also a third term bid for the ruling NDC. Given that Ghanaians vote for political parties and not candidates, it was clear that they were going to reject the NDC's third-term bid and by extension jettison President Mahama's second-term bid. So the NDC was clearly going to lose the 2016 general elections as a result of regime fatigue occasioned by the principle of the two-term regime cycle of change.

Secondly, the history of voter behaviour in Ghana's Fourth Republic shows that most of the electorate votes on the party identification model as pointed out by Heywood (2002); this is supported by several studies (Ayee 1997, 2002; Boafo-Arthur ed. 2006; Brierley & Ofori 2014; Daddieh 2009; Fobih 2008; Jockers, Kohnert & Nugent 2010; Osei 2013; Smith 2002). As Osei (2013) pointed out, in Ghana the political party tradition has led to the creation of ethnic, regional and socio-economic support bases for the two major parties in Ghana known as the NDC and the NPP (Kwakye 2013; Lindberg & Morrison 2005). Similarly, Lindberg & Morrison (2005, p. 571) show that since the 1992 general election a dominant two-party partisan alignment has characterised the Ghanaian political environment.

In addition, Whitfield (2009) argues that since the inception of the Fourth Republic, Ghana's keenly competitive elections are as a result of a *de facto* two-party system in which voters and the political elites are mobilised around two political traditions. These traditions offer ideological images, founding mythologies and political styles for the parties. This makes Ghana different from other African countries where parties are formed around leaders, who bring their popular support base with them. Furthermore, he argues that elections are not controlled by ethnic politicisation, since the two main parties in Ghana (NPP and NDC) have a strong political support base in most regions with party identification

⁸ Both the NDC and the NPP have, under the Fourth Republic, alternated power in eight-year intervals consisting of two terms in office.

being strongly based on cross-cutting social cleavages, and ethnicity playing only a small part.

Having noted this, we caution that Ghanaian electorates should desist from voting along purely partisan lines and rethink the need to vote on rational issues as articulated by Heywood (2002) in his postulations on the rational choice model of voting. With this model, voting is seen as a rational act. In this regard, voters stress the importance of issues-based voting such as the quality of candidates, policies, and performance of the candidate or political party. Even though President Mahama of the NDC had served for only one term and had pleaded with Ghanaians to be given a second term, Ghanaians objected to this claim and voted against the NDC which had been in power for eight years. In this regard, instead of looking at the person of President Mahama, the electorates were interested in how long his party had been in office.

There can however be no development without some stability. A developing country like Ghana cannot afford to change governments every eight years just because of regime fatigue occasioned by the two-term regime cycle of change. Just because a political party has been in power for eight years cannot be sufficient reason for changing it. Indeed, change for change's sake cannot be a desirable ingredient for democratic consolidation and development. Many Ghanaians lament that they attained independence around the same time as Malaysia and yet lag behind Malaysia's development. What they ignored is the regime stability Malaysia enjoyed for a long time. Mahathir Mohammad and the United Malays National Organization (UMNO) of Malaysia ruled for 22 years (1981-2003) by forming complex electoral and democratic alliances with other parties. The UMNO was maintained for over two decades due to the transformational economic policies it implemented in seeking to make Malaysia a fully developed country within 30 years (Wain 2009). These economic interventions were successful in reducing poverty and income inequalities. Indeed, in our view changing regimes simply because they have lasted for eight years is irrational and may be counter-productive to Ghana's developmental aspirations. Nonetheless, apart from regime fatigue and the two-term cycle regime change of eight years being the major factor contributing to the defeat of NDC, the question now, is what made the defeat monumental? The next section attempts to offer some responses.

WHAT MADE THE DEFEAT MONUMENTAL?

In the quest to investigate the monumental defeat of the NDC, myriad factors have been identified. To begin with, the poor economic performance of the NDC regime has been identified as a key factor accounting for its electoral loss in the 2016 polls (Ansah 2016b). Despite some progress having been made by the Mahama administration in both the macro- and microeconomic environments,

the Ghanaian economy is not resilient (The Economist 2016). Even though urban poverty decreased, rural poverty worsened considerably. Gross Domestic Product (GDP) growth had fallen from 14% in 2011 to 4.1% in 2015. The fiscal balance also deteriorated from -7.1% of GDP to -12.4% of GDP by 2014 (Kwakye 2014; Wiafe 2016). The Ghana cedis plummeted regularly, falling from US \$1:1.64 cedis in 2011 to US \$1:4.32 cedis by the time Ghanaians went to the polls in December 2016 (GBN 2012; TradingEconomics 2016).

The prolonged erratic power supply, which became known in local parlance as *dumsor*, and its attendant economic consequences, is not discrete (Arthur 2016). These power crises affected the cost of production because many companies had to rely on power generators for energy. Other companies faced severe equipment breakdown due to the frequent power outages. In addition, Ghanaians were economically deprived due to a high unemployment rate, yet the incumbent NDC downplayed the issue insisting that more jobs had been created in the construction sector as a result of the incumbent's infrastructure development drive. All these economic downturns resulted in a high cost and low standard of living, which pushed the NDC closer to electoral misfortune. Also, the NDC lost favour with the Ghanaian working class, particularly public sector workers, for its indifference to numerous labour problems. The concomitant and frequent labour unrest vilified the NDC administration as being insensitive to the plight of workers. President Mahama's own metaphor of 'dead goat don't fear knife' amplified this sentiment of insensitivity (Gadugah 2015).

In addition to these economic crises, there were frequent cases of actual and perceived corruption with which the NDC administration wrestled unsuccessfully. Even though the Mahama Administration launched the National Anti-Corruption Action Plan (2015-2024), it was implemented too late to redeem the NDC from the monumental electoral defeat by NPP on 7 December 2016. Key among the many corruption scandals that rocked the nation during the Mills/Mahama eight year regime (2009-2016) were the Savannah Accelerated Development Authority (SADA) debacle⁹, the misappropriation of Ghana Youth Employment and Entrepreneurial Development Agency (GYEEDA) funds, and the SUBAH deal (Abdul-Fatawu 2016).¹⁰ The rest are the Alfred Woyome's GH¢ 51

9 An Auditor-General's report revealed huge sums of taxpayers' money misappropriated by this body. SADA was a governmental initiative to address extreme poverty in the Northern part of Ghana but failed woefully owing to administrative lapses and financial malfeasance.

10 The SUBAH deal is a story of how the Ghana Revenue Authority entered into a contract with Subah Info-Solutions for the electronic monitoring of mobile networks to confirm whether they are truthful in declaring all their taxes. Under the contract, SUBAH was supposed to connect some physical nodes to the equipment of telecom companies to monitor revenues that are supposed to be paid by the telecoms, but this was not done. Subah InfoSolutions was, nonetheless, paid GH¢74 million from 2010-2012, after the company claimed to have adopted manual monitoring.

million judgment debt case, and the issue of financial malfeasance surrounding the 2014 World Cup appearance of the Black Stars which led to the formation of Justice Dzamefe Committee (Arthur 2016).¹¹ The opposition NPP thus capitalised on these corruption scandals in the incumbent NDC administration, and made a key campaign pledge to fight corruption when elected (Torny 2015). This campaign message of the NPP resonated well with most of the voting public, leading to the mass rejection of the NDC at the 2016 polls. Hence, the victory of the NPP over the NDC in the 2016 polls is partly attributed to the latter's lethargic attitude towards fighting corruption, and the former's resolve to combat corruption (Ansah 2016b). Ex-president John Rawlings, founder of the NDC, has maintained that 'impunity and corruption caused NDC's defeat' in the 2016 polls (Ansah 2016a).

Furthermore, a few months before the elections on 7 December 2016 the Mahama-led NDC took some unpopular decisions, which angered many Ghanaians. These included the cancellation of teachers' and nurses' trainee allowance and the August 2016 presidential pardon granted to three people (popularly known as the Montie Three) – a radio host and two panellists of an Accra-based FM station who were jailed for four months by the Supreme Court for criminal contempt (scandalising the Supreme Court) – and released barely a month after being jailed (Kwakofi 2016a). Other unpopular last-minute decisions of the NDC government included a notice filed by the Attorney General's Department at the Supreme Court to discontinue a case against businessman Alfred Agbesi Woyome in the controversial GH¢51 million judgment debt saga.¹² This despite the order by the Supreme Court in 2014 for Mr. Woyome to refund the GH¢51 million fraudulently taken from the state (Allotey 2016). This single act of the NDC administration reflected its lethargic attitude towards retrieving misappropriated public funds, and to a large extent the fight against corruption.

Consequently, there was both evidence and perception of arrogance, rudeness, and disrespect on the part of some ministers and officials of the NDC. This made President Mahama and the NDC over-confident creating an impression of immunity, invincibility, and complacency. This arrogance coupled with the perceived division in the leadership of the NPP made the Mahama-led NDC complacent. In September 2016, a few months before the December elections, astute Ghanaian journalist Paul Adom-Otchere interviewed President Mahama on *Good Evening Ghana*, a weekly television vision show on Metro-TV. In the interview they discussed various subjects including some of the issues around

11 The Committee became necessary after Ghana's Black Star exit in the 2014 World Cup tournament. The exit crowned scandalous events off the field including an embarrassing airlift of 3 million US dollars in cash on a presidential jet, an act that made Ghana a subject of global ridicule.

12 See more at <http://citifmonline.com/2016/11/02/ag-discontinues-woyomes-ghc51m-judgement-debt-case/>

the 2016 elections campaigns and the NDC's assertions that the NPP is a divided and not a united party. In part response President Mahama stated that:

Of course, NPP is divided ... my opponent's [Akufo-Addo] track record shows he is not able to bring his own party together ... today it's the truth people can't criticize Akufo-Addo in NPP if you criticize him they will suspend you or they will sack you or his attack dogs will set on you. Ask people in the NPP; there are quite a good number of people in the NPP. NPP are quiet they can see the bus [NPP] is going to crush but if they say it they would attack them and so they are quiet waiting for the bus to crush and when it crushes. I said they will take the bus to Kokompe [a hub for car repairs] and repair it and put it on the road for 2021. (Adom-Otchere 2016)

Also, in the aftermath of the 2016 polls former President John Rawlings of the NDC emphasised that: 'It was obvious a long time ago that we wouldn't make it. Our general negativity, impunity, disrespect and corruption was taking us further and further downhill. About the time when most were living in the painful reality with stress and anger, that's when some of us chose to be more impervious to reality' (Ansah 2016a).

Subsequently, the NPP's campaign message based on their 2016 manifesto was more appealing to many voters than the NDC's campaign message. Nana Akufo-Addo of the NPP campaigned on 'change, job creation linked to the industrialization of the economy and the modernization of agriculture' and the 'incompetence of the Mahama-administration' (NPP-Manifesto 2016). On the other hand, President Mahama and the NDC campaigned on 'continuity', 'unprecedented infrastructure achievements' and 'changing lives and transforming Ghana' (NDC-Manifesto 2016). Evidently, with an ailing economy, high level of unemployment and high utility bills to pay, many Ghanaians found the NPP's campaign message of job creation, industrialisation, and modernisation of agriculture more attractive than that of the NDC. Indeed NDC's 2016 campaign motto of 'Forward Ever, Backwards Never' was not as appealing as the NPP's 'Ghana Must Work Again' and 'Arise for Change' (NDC-Manifesto 2016; NPP-Manifesto 2016).

Besides, the NDC failed to brand itself prominently especially in communicating its core campaign messages and ideas. The Mahama-led NDC focused most of their campaign on attacking the personality of the opposition leader instead of focusing on an issues-based campaign (Akwa 2016; *Daily Guide Africa* 2016). Instead of responding to these claims by the NDC, Nana Akufo-Addo and the NPP clearly articulated their core campaign messages and slogans such as 'Free Senior High School (SHS) education', 'one district one factory' and 'one

village one dam' (*Daily Guide Africa* 2016; NPP-Manifesto 2016). The insistence of President John Mahama not to reinstate the teachers' and nurses' trainee allowance compared to the opposition NPP candidate's resolution to restore the same was more alluring to that cross-section of the voting public, mainly, current and future students of the colleges (*Asare* 2015; *Myjoyonline.com* 2016). In comparison the NPP 2016 campaign provided hope whereas the NDC prosecuted several politically inexpedient campaigns, lacking the efficacy of their 2012 Better Ghana Agenda campaign.

Moreover, the NDC's abuse of incumbency was evident during the 2016 election campaign. It used expensive advertisements in the media, building huge billboards and vote-buying (*Gadugah* 2016). During the 2016 campaign, the NDC overtly reverted from its successful 2008 and 2012 approach of door-to-door campaigning, towards adopting an elitist approach of gigantic billboards, musical concerts, and extravagant expenditure on influential chiefs that endorsed President Mahama's second term bid. This approach resulted in the public perception of President Mahama as a friend to chiefs rather than the vast majority of the people who constitute the voting public. Moreover, it is asserted that the campaign fund was highly centralised and did not trickle down to a grassroots campaign. Also, there were several instances where President Mahama used a helicopter to campaign in the Northern Region and Western Regions, while the NPP's Nana Akufo-Addo and his team were stuck on the road due to poor road accessibility for these communities (*Daily Guide* 2016; *Obempong* 2016).

Furthermore, there was a high level of apathy and dissatisfaction in the domain of the NDC's core constituencies as evident in the 'skirt and blouse' voting pattern in many pro-NDC constituencies. These included the Lawra and the Nandom Constituencies in the Upper West region; the Krachi East Constituency in the Volta region; and the Zabzugu and the Salaga South Constituencies the Northern region (*EC-Ghana* 2016). This was partly due to the inability of the party's leadership to resolve the many intra-party wrangles after the primaries, and the NDC government's bias towards urban development projects. The NDC is believed to draw core support more from rural areas than from urban dwellers due to its ideological posture of social democracy (*Kwakye* 2013; *Lindberg & Morrison* 2005). Nevertheless, most of the infrastructural achievements the party prided itself on had an urban bias, such as the magnificent Kotokuraba and Kejetia central markets, the Kasoa and the Kwame Nkrumah Circle Inter-Change, the Ridge Hospital project and the University of Ghana Teaching Hospital.

This led to dissatisfaction among many predominantly pro-NDC rural communities. Closely related was the NDC's inability to mobilise its core base to turn out on voting day, particularly the Volta region and the three Northern regions of Ghana *viz* the Northern region, the Upper East region and the Upper

West region. This, debatably, caused the electoral misfortunes of the party. The core base of NDC supporters felt mistreated by the ruling NDC government. For them, their consistent support for the ruling NDC had not been reciprocated regarding developmental projects under the John Mahama-led NDC administration. This sentiment was trumpeted by many pro-NDC communities who protested and chanted slogans such as 'No road, no vote!', 'No electricity, no vote!' during the height of the electioneering season. Thus the voter turnout in notable NDC strongholds, particularly in the Volta region, was remarkably low; around 61.6% as against 75.7% in 2012 (Alidu 2014; EC-Ghana 2016).

Nevertheless, elements within the opposition NPP uphold that this was a true reflection of the actual voter population of the region.¹³ They explained that the seemingly low voter turnout in the Volta region during the 2016 polls is as a result of the activities of NPP vigilante groups along the (porous) borders of the eastern corridor (the Ghana-Togo border) which prevented non-Ghanaian illegal registered voters from voting or perpetuating electoral fraud, which had allegedly been the status quo. More so, we believe that the high incidence of rejected/spoilt ballot recorded in these regions (Volta, Upper West, and Upper East) was largely deliberate and not erroneous. The act is described as an unorthodox mode of disapproving the incumbent NDC, though with reluctance to endorse the opposition NPP in an election. Strikingly, some Electoral Commission officials consulted for this study remarked that most of these rejected ballots were not thumb-printed at all, which is a protest vote of some sort. The instance of Ketu South Constituency, a major stronghold of the NDC where over 1,300-rejected/spoilt ballots were recorded, is a clear case in point (EC-Ghana 2016).

Finally, in this era of globalisation, the sway of global electoral politics as a contributory factor to the NDC's loss in the 2016 polls cannot be downplayed. Around the same period that Ghanaians went to the polls, Nigeria, the United States and the Gambia (on 28 March 2015, 8 November 2016 and 1 December 2016 respectively) had all voted out their incumbents. This wind of regime change which swept across the globe indirectly prejudiced the voting behaviour of the Ghanaian electorates. The dynamics of Nigeria's 2015 polls, in particular, had many interesting comparisons with Ghana's 2016 polls. Firstly, both incumbent presidents John Mahama of Ghana and Jonathan Goodluck of Nigeria assumed the presidency under similar circumstances. They continued the unexpired term of their bosses under whom they had served as vice presidents, and had subsequently contested and won an ensuing election and served their first term as presidents.

13 Other schools of thought also argue that the low recorded nationwide voter turnout gives credence to earlier claims which suggested that the national electoral register was bloated.

The opposition leader Muhammadu Buhari of Nigeria was an identical age as the opposition NPP's Nana Akufo-Addo of Ghana; both were septuagenarians. The elderly Buhari's landslide victory over the youthful and incumbent Goodluck in March 2015 polls dispelled the propagandised notion that Nana Akufo-Addo of the NPP was too old for the presidency, whilst at the same time offered a cue that John Mahama of the NDC could be rejected as the case had been in Nigeria (Al Jazeera 2015; BBC News 2015).

CONCLUSION AND WAY FORWARD

The 2016 general elections have yet again proved that Ghana is a bastion of democracy in Africa. In climbing the ladder of democratic progression, several deficits must be addressed. First of all, voter behaviour based solely on political parties and not on the quality of candidates contesting an election is irrational and must be checked. Secondly, changing regimes merely because they have lasted for eight years is also irrational and if not dealt with, may be counter-productive to development. Ghana may therefore take some lessons from Malaysia in maintaining political stability where necessary. In achieving stability for development, commitment to implementing properly considered developmental programmes would be critical in dealing with regime fatigue and upsetting the two-term regime cycle of change. In this regard, the NPP regime has to work to revive Ghana's failing economy; deal with pervasive institutional malaise; tackle corruption frontally; deal with winner-takes-all politics that polarises the country; provide an enabling environment for the private sector to thrive; create employment opportunities; and many more as indicated in the NPP's 2016 Manifesto (NPP-Manifesto 2016). In essence the Akufo-Addo administration must religiously adhere to its campaign promises in order to secure a second term in office and beyond.

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ELECTION OBSERVATION AND THE QUESTION OF STATE SOVEREIGNTY IN AFRICA

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ABSTRACT

The fundamental question of whether international election observation strengthens or weakens state sovereignty in African states is examined in this article, using a three-branched hypothesis. Firstly, that the presence of international election observers in the host state does not violate state sovereignty. Secondly, that international election observation enhances democratic legitimacy in the state concerned. Thirdly, that with the advent of the right to intervene in international law, international election observation is a tool used to reinforce the legitimate sovereignty of the state. Many researchers argue that international election observation has been used to infringe state sovereignty, especially in post-conflict states. This paper presents a different view by offering a general analysis of the African continent, demonstrating that international election observation makes an invaluable contribution to restoring and reinforcing legitimate state sovereignty.

Keywords: election observation, sovereignty, legitimacy

INTRODUCTION

Election observation in the modern world began in May 1948 when the United Nations led an election observation mission to South Korea to observe the Constituent Assembly election organised in that country. On the African continent, election observation emerged following the democratic wind of change which blew across sub-Saharan Africa after the 1990s. This change was experienced through the organisation of elections reputed to be democratic in countries which had, since their independence, been governed by the single-party system.

The question of whether election observation strengthens or weakens

state sovereignty is essential to our understanding of the relationship between election observation and the influence it could have on sovereignty. The notion of sovereignty is paramount to this work and deserves to be examined and contextualised in order to properly assess the role election observation can have on any specific type of sovereignty.

Several theories of sovereignty have been advanced, principally the separate but interrelated theories of popular sovereignty (Rousseau 1762) and of national sovereignty (Sieyes 1789). Other theories include internal sovereignty, Westphalian or external sovereignty, and legal international sovereignty. Internal sovereignty refers to the recognised authority of a legitimate government to administer within its territory using its laws and national police. Westphalian or external sovereignty describes the exclusion of external actors from the internal governmental process of a state, a practice that is reciprocal between states. International legal sovereignty confers international recognition on the state when it concludes international treaties with other states (Krasner 2001, p. 233).

According to the theory of popular sovereignty, every citizen is endowed with sovereignty which is translated through universal suffrage and direct democracy. With few exceptions remaining in the world today popular sovereignty, for the sake of convenience, works through elected representatives who hold an imperative mandate. National sovereignty for its part confers sovereignty on the nation, which is an abstract, inalienable and indivisible entity. National sovereignty operates through representative democracy wherein elected deputies work for the interest of the entire nation.

The use of elected representatives by popular and national sovereignties reveals the relationship between the two. This is evident through the inclusion in several state constitutions of the principle that national sovereignty belongs to the people who exercise it through elected representatives (see French Constitution of 1958, Article 3 & Cameroonian Constitution of 1996, Article 2).

How these representatives are elected is therefore an issue of great importance in the exercise of sovereignty. Ensuring that the right to vote is exercised in a way that procures popular participation in the exercise of national affairs becomes paramount. Having a neutral body watch over the credibility of the process is fundamental to guarantee the proper and legitimate exercise of sovereignty. To this end, election observation missions play an important and neutral role in objectively evaluating electoral processes which constitute the ideal means to select legitimate representatives in a state. Their assessment is done through a mandate to monitor or observe an electoral process. Though used interchangeably, election monitoring is more politically engaged than election observation.

According to the Institute for Democracy and Electoral Assistance (IDEA 1997, p. 10), election observation is:

... the purposeful gathering of information regarding an electoral process, and the making of informed judgments on the conduct of such a process on the basis of the information collected, by persons who are not inherently authorized to intervene in the process, and whose involvement in the mediation or technical assistance activities should not be such as to jeopardize their main observation responsibilities.

Election observation is considered by IDEA (1997) to be the act of collecting information and expressing a judicious opinion on the basis of the information collected, with reference to precise legislative and regulatory instruments within the framework of the specified electoral process.

Election observation is of invaluable importance to the state holding the election and includes: promoting openness and transparency; enhancing public confidence in the electoral process; secrecy of the vote; easing tensions and increasing security; deterring improper practices and attempts at fraud; identifying and defusing potential areas of conflict; increasing political credibility and legitimacy; and enhancing the credibility of the electoral authority. This explains why election observation is today an almost universally accepted endeavour. However, some countries, like Zimbabwe in 2008, prohibited election observation missions such as those of the European Union from observing elections in their countries.

Election observation is increasingly accepted and even advocated by states which wilfully consent to surrender part of their sovereignty in favour of belonging to international institutions and organisations saddled with the mission to observe elections. This is the case with member states of regional bodies such as the Economic Community of West African states (ECOWAS), the Southern African Development Community (SADC), and continental bodies like the African Union (AU).

Membership of the African Union, for instance, is based on shared values within the AU such as the constitutional change of power. It renders a member state accountable to the AU for respecting and submitting to this value. The provisions of Articles 4 (p) and 30 of the *African Union Constitutive Act* clearly state that the AU condemns and rejects any unconstitutional change of government and further emphasises that governments which come to power through unconstitutional means shall not be allowed to participate in the activities of the Union. In line with the above provisions, member states are suspended whenever they contravene a shared value adopted by the AU.

Examples include the suspension of the Republic of Madagascar in 2009 following the political crisis that led to an unconstitutional takeover of power. Madagascar was only readmitted after the country organised credible and

transparent presidential elections ascertained by the AU Election Observation Mission (AUEOM) to Madagascar in 2013. Guinea Bissau was suspended by the AU after a military coup d'état in April 2012. This country was only readmitted after the 2014 presidential elections were assessed by most election observer missions as being free, credible and transparent. Mauritania was suspended by the African Union in 2005 and again in 2008 because of military coups. It was finally readmitted after the 2014 elections were considered by international election observer missions to have been credible and acceptable (see AUEOM reports on Guinea Bissau & Mauritania in 2014). International election observation provides a leeway for suspended states to regain their lost membership and improve their international reputation and credit.

Scholars and researchers have approached election observation and state sovereignty from diverse angles. According to Matlosa (2002) election monitoring and observation are, principally, tools to entrench both western hegemony in African states and interference in their internal affairs. Kaiser (1999) opines that the extent to which sovereignty is affected by election observation is determined by the host country's dependence on the donor community; the willingness of donors to exploit this relationship; and the leverage local opposition forces have over the incumbent government regarding an international observer presence and commitment to free and fair elections. By focusing on elections in Nigeria and Madagascar, Kohnert (2004) maintains that election observation is characterised by both diplomatic and technocratic bias to advance the foreign policy of other states and of the international community. Others like Bakary (1992) hold that election observation contributes to the establishment and consolidation of emerging democracies, and to the instauration of peace and the reinforcement of sovereignty.

The available related academic works on election observation and sovereignty have analysed specific case studies on varied themes. This work analyses election observation and sovereignty from a general perspective of the African continent. The methodology used is a direct analysis of some African Union election observation missions and of related researched works on international election observation and state sovereignty.

This work hinges on a threefold hypothesis: the first is to examine whether state sovereignty is violated by the presence of an international election observer mission in a host country with the brief to evaluate and make declarations on the conduct of the electoral process. The next will verify whether the presence of international election observer missions does or does not enhance the democratic process in the country concerned. And finally, whether the advent in current international law of the right to intervene for democratic purposes does make international election observation a tool to promote and reinforce the legitimate sovereignty of the state.

We begin this work by first examining how the organisation of elections may constitute a challenge to state sovereignty. Secondly we analyse election observation and other related tools used to assess electoral processes. Thirdly, we demonstrate how international election observation enhances the legitimacy of state powers. And finally we explain how, with the advent of the right to intervene for democratic purposes, international election observation represents an invaluable tool for the instauration and fortification of legitimate sovereignty of the state.

BACKGROUND

International election observation under the OUA/AU began in Namibia in 1989. Initially this practice operated political missions because the observers were selected by member states and deployed under the OAU/AU Mission. After 2006, the AU adopted a technical approach by fielding election observation missions with election experts they recruited through a direct selection process. This was enabled by the adoption of an adequate legal framework that includes: the *Constitutive Act of the Union* adopted in July 2000; the *OAU/AU Declaration on the Principles Governing Democratic Elections in Africa* (AHG/Decl.1 XXXVIII) as adopted by the Assembly of Heads of State and Government of the African Union, and the *African Union Guidelines for Election Observation and Monitoring Missions*, both adopted in July 2002; the *African Charter on Democracy, Elections and Governance*, adopted on 15 February, 2012; the *Universal Declaration of Human Rights* (UDHR) adopted by the UN General Assembly in December 1948; the (ICCPR), March 1976; and the *International Covenant on Civil and Political Rights Declaration of Principles for International Election Observation* and its accompanying *Code of Conduct*, endorsed by the AU in 2005.

Today the AU practices short- and long-term election observations. Short-term observations concentrate on activities taking place on election day, while long-term election observation is a comprehensive assessment of the entire electoral process. At its 64th Ordinary Session held in Yaounde in July 1996, the OAU was enjoined by member states to step up its involvement in promoting the democratic process on the continent. To this end, the OAU/AU established the Democracy and Electoral Assistance Unit to provide more technical and professional assistance. This unit seeks to provide the AU with credible data to ensure that member states do not violate its shared democratic values.

ELECTIONS: A CHALLENGE TO NATIONAL SOVEREIGNTY

Elections are fundamental to the security and development of every democratic country and explain why states sacrifice enormous resources for their organisation.

One of the ways through which a state affirms its sovereignty is to organise and sponsor periodic elections. There may be some challenges to sovereignty when a state lacks the ability to fully fund its electoral process. Therefore, a state's dependence on the donor community to fund elections and the willingness of the donors to exploit the relationship in order to invade state sovereignty may be interesting (Kaiser 1999). Funding could consist of bilateral or multilateral funding, mainly from western countries and international financial institutions.

Elections in a democratic system offer the right to choose representatives of the people directly or indirectly. In monarchies, on the other hand, this right belongs to the monarch, his heirs and appointees. Election 'is the exercise of choice; especially the act of choosing from several possible rights or remedies in a way that precludes the use of other rights or remedies' (Black's Law Dictionary). Elections take place when people have the right to vote, and may vote to make their choices. Consequently, the fate of a country is strongly attached to the choices people make during elections. According to the Department for International Development (2010):

... in peaceful, established democracies, elections represent a crucial opportunity for citizens to select and to hold to account those that seek to govern. At the other end of the spectrum, in countries emerging from conflict, well-timed elections can contribute to conflict resolution and help to consolidate a peace agreement or power-sharing 'deal' between 'elites'.

Elections provide citizens with a real say in who their leaders are, and give them the opportunity to apportion power peacefully. We have general elections during which every eligible voter can exercise his right to vote, and by-elections which concern only designated sections of the electorate. Elections in every country call for the identification of those endowed with popular sovereignty and entitled with the right to exercise universal suffrage. The exercise of popular sovereignty by citizens cannot be seen as a challenge to national sovereignty of the state concerned.

Universal Suffrage and the Question of Popular Sovereignty

The theory of popular sovereignty endows powers in every citizen within the state to exercise individual sovereignty. Sovereignty belongs to the people who constitute an assembly of the individual citizens of the state. Article 2 of the 1973 French Constitution states that 'sovereignty resided within the people...every portion of the sovereign assembly has right to freely exercise its wish'.

Suffrage is simply referred to as the right to vote. McCrary (1897, p. 2) defines it as:

... a privilege, franchise or trust conferred by the people upon such persons as it deems fittest to represent it in the choice of magistrates or in the performance of political duties which it would be inexpedient or inconvenient for the people to perform in a body. The person upon whom the franchise is conferred is called in an election, an elector or voter. No community extends suffrage to all persons, but places such restrictions upon it as may best serve the ends of government.

Even modern democracies that have adopted the principle of universal suffrage are not much different from McCrary's perspective in 1897. Restrictions continue to exist on the exercise of the right to universal suffrage, the most widespread being the limitation on the age of citizens allowed to vote; for example Nigeria restricts voting to those aged 18 years and more (Nigeria 2010), Cameroon those of 20 years (Cameroon 1996) and Lebanon 21 years (CIA 2009).

Other restrictions include prior forfeiture of rights such as the right to civil liberty, and residence for a minimum duration in the country. In these cases the current implementation of universal suffrage is therefore at variance with the theory of popular sovereignty, which requires all citizens within the state to have equal rights to suffrage irrespective of their rank and social status in the state. The principle applied here is that of 'reasonable restrictions'. Unlike national sovereignty wherein a monarch is seen to incarnate the nation, that is the abstract entity entrusted with sovereignty, popular sovereignty resides within physical individuals and offers no opportunity for the emergence of a monarch. Thus under popular sovereignty, a system of pyramidal control exists between the electorate and their representatives, with the electorate reserving the right of recall at any time should the representatives go counter to their wishes.

The Central Role of the State in the Organisation of Elections

The organisation of elections is the supreme responsibility of the state. According to the *Declaration of Principles for International Election Observation (DoP)* (2005, p.1): 'Genuine democratic elections are an expression of sovereignty which belongs to the people of a country, the free expression of whose will provides the basis for the authority and legitimacy of government...'

The state establishes the legal and political framework within which elections will take place, and provides the necessary human and material resources required by election management bodies (EMBs) to organise elections. This is what makes the role of the state central to the holding of elections in every country. Another role of the state is to fund election expenses. Elections continue to be a costly

exercise especially to developing countries and transition states, and consume significant shares of their national income.

Many African countries, especially post-conflict states, depend on the donor community to fund their elections. These countries usually rely on technical, financial and material support from the donor community to meet their election demands. Examples include the Democratic Republic of Congo (2006 elections) and Sierra Leone (2007 elections) when over 70% of election funds came from the donor community (Leonard & Pintso 2008, p. 49).

ELECTION ASSESSMENT: BETWEEN OPINION, JUDGEMENT AND INTERFERENCE

Election observation seeks to evaluate a given electoral process in order to legitimise it, where appropriate. This is often accompanied by making informed opinions assessing the conduct of the electoral process, based on information gathered by independent and neutral persons who are not inherently authorised to intervene in the process. Some of the principles governing international election observation are: full coverage, impartiality, transparency and professionalism (IDEA 1997 & EU 2002, pp. 5-6).

Election monitoring is closely related to election observation. According to IDEA (1997), it refers to 'an activity which involves the authority to observe an electoral process and to intervene in the process if relevant laws or standard procedures are being violated or ignored'. Consequently, the mandate of an election assessment mission is determined by whether it is an election observation or an election monitoring mission.

The Mandate of Election Observers

Though they are different, both election observation and election monitoring have some key issues in common. Their main goals are to evaluate the entire electoral process which covers the pre-election, election and post-election phases. However, an election monitoring mandate is more thoroughgoing and extensive than that of election observation (Matlosa 2002, p. 132).

An election observation mandate is entrusted to a national or international election observation mission to purposefully gather information regarding an electoral process, and to make informed judgements on the conduct of such a process based on the information collected (IDEA 1997). The Commonwealth of Nations' *Good Commonwealth Electoral Practice* (1997) is one of the first international instruments to bear the semblance of an election observation mandate. It was premised on the 1991 Harare Declaration and provides that:

... the practice of permitting local and international observers to observe elections helps to inspire confidence in the electoral process and should be encouraged. All observers should operate within the laws of the host country and liaise with the electoral body. Any complaints received by observers from political parties, candidates or individuals should be brought to the attention of the electoral body.

The DoP (2005) defines election observers as having two types of mandate, that is general and specialised mandates. The general mandate evaluates the pre-election, election-day and post-election periods in a systematic and comprehensive manner. This is done through the accurate gathering and analysing of information concerning the laws, processes and institutions related to the conduct of elections, including other factors concerning the overall electoral environment. It usually involves long-term observations employing a variety of techniques.

Specialised election observation mandates examine limited pre-election or post-election issues and specific processes (such as delimitation of election districts, voter registration, use of electronic technologies and the functioning of electoral complaint mechanisms). Specialised mandates could be limited in time or scope and such missions must issue clear public statements specifying that their activities and conclusions are limited and do not cover the overall electoral process (*ibid.*).

Where election monitoring has an interfering mandate, election observation becomes a purposeful fact-finding mission by neutral persons regarding an electoral process wherein the observers are not inherently involved. Rwelamira and Ailola (1994, p. 211) consider election monitoring as:

... [a] little more involved than mere observing. It involves the careful scrutiny and assessment of an election for purposes of determining its impartiality in terms of organisation and administration. It also includes an assessment of the process and actual formulation of the electoral law and the role of the security forces. For this reason, military and police observers are, when appropriate, engaged to monitor the activities of national police and military forces. Other areas which may be monitored are the civil service, the media, political party campaigns, voter education, voter registration and the actual voting as well as the vote counting and announcing processes.

An election monitoring mandate is perceived by some researchers to be interconnected with the technical assistance accorded to an electoral process (Rwelamira & Ailola 1994, p. 211; Matlosa 2002, p. 135, & Daniel 1995, p. 95).

Election observation and monitoring have as their main goals the legitimation, where appropriate, of an electoral process; the enhancement of public confidence; respect for human rights; and the capability of conflict resolution (EU 2000). However, carrying out these different but intertwined mandates often confuses the roles of a classical election observation mission with that of the supervision and certification of electoral processes.

Confusion of the Roles of Observation, Supervision and Certification of Elections

The interchangeable use of some terms in the domain of elections such as observation, supervision and certification in official documents often breeds confusion (UNSG 1991). The principal reason is that these related practices share a common goal: to determine whether an election was open, free and fair. Differences, however, emerge through the political circumstances surrounding the election, depending on whether we are dealing with non-self-governing, independent or post-conflict countries. Another factor is the origin of the legal framework governing UN involvement: for example, the Trusteeship Council, General Assembly or Security Council; the role of the UN in organising and conducting an election; and the consequences of such involvement (Koenig-Archibugi 1997; Stoelting 1992; Théroux-Bénoni 2012). Their main purpose is to determine whether an election was free and fair. But their roles are often different within the context of an electoral process, as we can see below.

Election observation

Election observation, as described above, is the gathering of information regarding an electoral process. The purpose is to make informed judgments on the conduct of such a process, based on the information collected, by persons who are not inherently authorised to intervene in the process (IDEA 1997). This is not the case with election supervision and election certification.

Election supervision or monitoring

Election supervision oversees the organisation of the entire component of the electoral process, such as the registration of voters and electoral campaigns. In certain exceptional situations some international election organisations exceed the ordinary role of election observation of supervising and monitoring the electoral process. These organisations exercise the right to intervene in the electoral process whenever the applicable laws and established norms are violated or ignored.

UN Peacekeeping Operations are mandated in some countries to play a direct role in the process and even make judgements on its outcome. Examples include:

- Direct management and administration of the total electoral process in cases where a state has lost authority, such as in the Somalia United Nations Operation in Somalia (UNOSOM);
- UN technical assistance to South Sudan's referendum in 2011, through the United Nations Mission in Sudan (UNMIS) working alongside the UN Development Programme (UNDP) and the Department of Political Affairs (DPA). They provided major support, including printing and distributing ballots as well as training polling station staff. The mission leadership, and a high-level panel appointed by the UN Secretary-General, supported dialogue between key Sudanese parties in order to prevent conflict and build confidence in the process.

The United Nations also played similar roles in several post-conflict countries, including Timor Leste (2001); Liberia (2005); Democratic Republic of Congo (2006); and Sierra Leone (2007). The supervisory authority's involvement in the process could include offering technical assistance.

Election certification

Election certification goes beyond gathering information on the conduct of the electoral process, and electoral assistance which offers technical support. It is a recent addition to the United Nations toolbox (Théroux-Bénoni 2012, p. 3). But the African Union has not yet implemented certification of elections in a member state. The UN has used certification in post-conflict environments often dominated by deep mistrust amongst political actors and towards election management bodies, such as in Timor Leste (2007), and Côte d'Ivoire (2010).

As was the case in Côte d'Ivoire, the UN electoral certification intended to attest that the fundamental steps of a post-conflict electoral process adhered to international principles and standards (UNOCI 2009). A certification mandate, moreover, safeguards not only the electoral process, but also the results of the poll (Théroux-Bénoni 2012, p. 3).

Therefore the UN Security Council or the General Assembly may under certain circumstances authorise the Secretary-General to conduct the certification of any given electoral process. In such a case, the Secretary-General is enjoined to certify the credibility of the different aspects of the electoral process organised by the national election management bodies. It does not require the certifying authority to possess clear or perceived neutrality vis-à-vis the electoral process in question. Consequently, candidates may ignore the conclusions of an observation mission, but this is more difficult to do with UN-led certification processes (Théroux-Bénoni, 2012).

These three terms, observation, supervision and certification may share a common goal and are often used interchangeably. It is however clear that certification and supervision affect state sovereignty by not guaranteeing the complete neutrality of their authorities with regard to the process. Observation, on the other hand, demands a clear and perceived direct exclusion from any acts inherent in the electoral process evaluated by the observers.

Reports on the credibility of an electoral process by international election observation missions are based on the independence and neutrality of the mission towards the entire process. This accounts for the importance the international community attaches to these conclusions and reports which determine policy orientations toward state legitimacy and sovereignty.

ELECTION OBSERVATION: AN ACT TO ENHANCE STATE LEGITIMACY AND REINFORCE STATE SOVEREIGNTY

The principle established in Article 21 (3) of the Universal Declaration of Human Rights (1948) applies here – ‘that the will of the people, as expressed through periodic and genuine elections, shall be the basis of government authority’. Ensuring that the outcome of elections is the genuine expression of the will of the people becomes paramount. This is particularly crucial in situations where there is a deficit of trust between election competitors and the institutions responsible for organising elections.

The presence of a neutral and independent foreign body with a mandate to observe and assess the entire electoral process supports its credibility. This also paves the way for a government recognised as legitimate to emerge from a process that is considered free and fair by international election observation missions.

An international election observation mission is in the interests of both the people in the country organising elections and of the international community. In order for it to effectively and credibly conduct its work, basic conditions must be met. According to the DoP, these conditions include the issuing of an invitation by the country holding elections, and the observance of internationally recognised principles, standards and instruments of democratic elections by the host country (DoP 2005, p. 6).

The Discretionary Right of the State to Invite and Welcome Election Observers

The discretionary right of a state which intends to organise elections to issue a prior invitation to an international election observation mission serves to affirm

the sovereignty of the host state. This operates through the principle of prior invitation and the responsibility to welcome election observer missions upon their arrival in the host country.

The principle of a prior invitation

The condition here is that the country holding elections should 'issue an invitation or otherwise indicate its willingness to accept international election observation missions in accordance with each organisation's requirements sufficiently in advance of elections to allow analysis of all the processes that are important to organising genuine democratic elections' (DoP 2005, p. 4). It is vital to highlight here the relationship which exists between the prior invitation and the notion of state sovereignty. The consideration of a prior invitation is fundamental to demonstrate the discretionary powers of the state with regard to the deployment of an election observation mission on its territory. A state is therefore at liberty not to permit the deployment of any specific election observation mission on its territory (DoP 2005).

This principle of a prior invitation is equally upheld in Articles V (3) and (4) of the *Durban Declaration on the Principles Governing Democratic Elections in Africa* (AHG/Decl.1 (XXXVIII) of July 2002 and the *African Union Guidelines on Election Observation and Monitoring Missions* of 2002. Furthermore the African Union adopted this principle in its *Charter on Democracy, Elections and Governance* of January 2007 in Article 19(1): 'Each State Party shall inform the Commission of scheduled elections and invite it to send an electoral observer mission'.

The respect of the national sovereignty of the host state is an exigency imposed on organisations and institutions engaged in election observation (Laasko 2002, p. 437). In this regard, it is necessary for the election observation missions to wait and receive a letter of invitation from the country intending to organise elections before taking the initiative to deploy observers (Combacau, 1993, pp. 52ff).

The responsibility to welcome election observer missions

The principle of a prior invitation goes along with that of responsibilities towards the host state. By taking the discretionary decision to invite election observation missions to its territory, the state also commits itself to respect internationally recognised responsibilities that govern the presence of a national or international election observation mission inside its country. International election observation missions fall under the security of the host country. It is the responsibility of the host country and not that of the international election observation mission to guarantee the security of election observers on its territory.

On the African continent, the AU *Charter on Democracy, Elections and Governance* upholds this responsibility of the host state in Article 19(2) which

states that: 'Each State Party shall guarantee conditions of security...and full cooperation with the electoral observer mission'.

Subject to the respect of its international engagements, the host state is endowed with the sovereign responsibility to define the rules and conditions to be followed by international election observation missions invited to observe its electoral process. In 2014 Tunisia, for example, required proof of required training by the international election observer before his or her accreditation could be granted. The host state reserves the right to expel from its territory an individual election observer or an international election observation mission that the state considers to have violated these conditions and rules. A case in point is Zimbabwe: in 2000, the government of Zimbabwe banned some international organisations from observing the electoral process, in particular the National Democratic Institute (NDI) which had dismissed the entire electoral process as fraudulent even before it started. Zimbabwe also expelled Pierre Schori, a European Union observer who had entered the country on a tourist visa in February 2002. He made a political statement despite being warned against doing so by the Zimbabwean authorities (Matlosa 2002, pp. 131-134).

Therefore the host state still affirms its sovereignty through its discretion to grant a prior invitation to an international election observation mission; and in the exercise of its responsibility to welcome, secure and define certain rules and conditions to bind election observers on its territory.

The Role of Principles and International Instruments Governing International Election Observation

The role of principles in international election observation is essentially to ensure that the conduct of the mission safeguards the integrity of the election observation process and the mission as well protecting the sovereignty of the host state. However, the violation of some of these principles and international instruments on election observation has resulted in a negative perception of some international election observation missions, especially by states jealous of their sovereignty. One such example is the heated rivalry between the government of Zimbabwe and western countries during their elections of 2000 and 2002 .

The intergovernmental and international nongovernmental organisations and associations involved in election observation always carry out their work under a defined mandate. This clearly spells out the scope and limitations of their activities upon arrival in the host state. However, in post-conflict settings, there may be some confusion about the role of the principles of election observation.

Key principles that govern election observation include the neutrality of the mission, the deployment of a pre-election assessment mission and respect for the sovereignty of the state, as follows:

Neutrality of the mission and its approach

Neutrality is of paramount importance to the mission; firstly, as a fundamental principle, and secondly the actual and perceived independence and neutrality of the mission vis-à-vis the electoral process to be evaluated. This principle seeks to ensure objectivity in the assessment of the process to be carried out by the observers.

In addition, election observation is to be conducted in a rigorous and methodical manner through:

- An evaluation of the electoral process by independent institutions and organisations which differ from those involved in the organisation of the elections. These include the African Union (AU), the Southern African Development Community (SADC), Economic Commission for West African States (ECOWAS), the European Union (EU), the Commonwealth, Organisation internationale de la Francophonie, the National Democratic Institute (NDI), and The Carter Center.
- An objective assessment done by neutral persons and experts of the electoral process in question. In the case of the African Union observers must not be citizens of the country holding elections. Paragraph 6 of the DoP (2005, p. 6) provides that:

... No one should be allowed to be a member of an international election observer mission unless that person is free from any political, economic or other conflicts of interest that will interfere with conducting observations accurately and impartially and /or drawing conclusions about the character of the election process accurately and impartially... International election observation missions should not accept funding or infrastructural support from the government whose elections are being observed as this may raise a significant conflict of interest and undermine confidence in the integrity of the mission's findings ...

- A systematic assessment which takes into consideration respect for the existing system of laws and standards, both national and international, which relate to democracy.
- An objective evaluation which highlights the positive steps made by the host country and suggests recommendations for improvements in future democratic endeavours of the country concerned.

The deployment of a pre-election assessment mission

Most reputable international election observation missions deploy a pre-election assessment mission ahead of the deployment of election observers, in order to

evaluate the legal and political framework put in place for the elections. Such a mission seeks to evaluate whether these legal and political frameworks conform with internationally recognised standards for the conduct of democratic elections.

Paragraphs 4.4 and 4.5 of the *Guidelines for African Union Election Observation and Monitoring Missions* (2002) emphasise the principle of a pre-election assessment mission. These are included in the chapter on the criteria to determine the nature and size of the election observation and monitoring mission to be deployed. The condition of a prior invitation is therefore necessary for the deployment of the pre-election assessment mission. It will produce a report on its findings after evaluating the existing conditions for election organisation.

Should these findings be negative, the African Union will recommend that the country take adequate measures to redress the situation. This was the case with the 2015 elections in Burundi where the AU withheld the deployment of an international election observation mission as certain basic conditions had not been met. In line with Paragraph 11 of the DoP (2005):

A decision by any organization to organize an international election observation mission or to explore the possibility of organizing an observation mission does not imply that the organization necessarily deems the election process in the country holding the elections to be credible. An organization should not send an international election observation mission to a country under the conditions that make it likely that its presence will be interpreted as giving legitimacy to a clearly undemocratic process.

Consequently, the report of a pre-election assessment mission is considered highly important when deciding whether or not to deploy an international election observation mission. This also affects the nature of the mission to be deployed.

Enhancing respect for the sovereignty of the state

Every international election observation mission must be conducted with full respect for the sovereignty of the host country. Paragraph 9 of the DoP is very instructive here: it further recommends international election observation missions to respect the human rights of the people in the host country, the laws of the host country as well as its authorities, including electoral bodies, and to act in a manner that respects and promotes human rights and fundamental freedoms.

The role of this principle is also to enhance respect for the sovereignty of the host state by creating necessary conditions for the exercise of state sovereignty, as follows:

- International election observation encourages the participation of citizens in the host country in electoral processes. The presence of the mission increases the population's confidence with the effect of encouraging more citizens to get involved in the democratic process.
- Election observation by international missions has the potential to prevent electoral violence. In Kenya, post-election violence in 2007 left several hundred dead. The African Union deployed its first ever long-term election observation mission to this country from 12 January to 15 March 2013. The result was a significant reduction of post-election violence in Kenya. The African Union has in general experienced considerable reduction of post-election violence on the continent with the deployment of long term international election observer missions.
- International election observation missions encourage respect for national and international laws and promote the rule of law. The rule of law is a necessary condition for the instauration of democracy in any country. International election observation missions encourage the host country to respect both its self-legislated laws and the international laws which the state has ratified. Contestations, disputes and violence often erupt when laws and rules are violated; this is what international election observation missions aim to avert. A state will be better enabled to exercise sovereignty when it is at peace.
- International election observation promotes the acceptance of election results. The legitimacy of an elected government is reinforced through the acceptance of the election results by the other competitors. Preliminary statements released by international election observation missions, which consider the electoral process to be transparent and credible, will dissuade contestations and persuade the competitors to accept the outcome of the elections; for example, African Union's preliminary statements after the elections in Togo, 2005; Kenya, 2013; Mali, 2013.
- International election observation missions push for the use of established legal means to challenge the disputed outcome of the elections. The call for those taking part in elections to use the judicial means available in the host country, encourages the country concerned to exercise judicial sovereignty over its citizens. This was the case in Nigeria in 2011 when the loser in the presidential elections, Muhammadu Buhari, approached the court to challenge the results of the elections. Another example is Joyce Banda who went to court to challenge the results of the 2014 presidential elections in Malawi.

Confusion of principles governing international election observation

This confusion may occur in two ways. The first is when the international election observation mission oversteps its mandate, which is to simply observe the electoral process. The second is when a host state uses the presence of international election observation missions in the country to legitimise an undemocratic process. Experience shows that some international election observation missions have occasionally made declarations which have been considered by the host state to be premature, biased and to have ulterior motives in interfering with the process.

According to Paragraph 12(e) of the DoP, election observation missions are guaranteed the freedom, without interference, to issue public statements and reports concerning their findings and recommendations to improve the electoral process. Public statements are based on accurate and comprehensive observation which notes the positive as well as negative aspects that could have an important impact on the integrity of the electoral process. The findings which constitute the foundation for the public statement must be based on the highest standards of accuracy of information and impartiality of analysis.

However, available evidence has shown instances of alleged confusion of this principle in some public statements from international election observation missions. During the Zambian presidential election of 27 December 2001, the European Union (EU) issued a public statement congratulating Mr. Anderson Mazoka, the presidential candidate of the United Party for National Development (UPND), for supposedly winning the poll even before the vote count had been completed. It turned out that the candidate of the ruling Movement for Multiparty Democracy (MMD), Levy Mwanawasa, had in fact won the presidential election, though by a minority vote of less than 30%. The consequence was that the president-elect had to face a stiff challenge regarding the conduct of the election and the legitimacy of his presidency. Such confusion lends credence to the assertion of diplomatic bias (Kohnert 2004, pp. 83-84) which considers some international election observation missions to be promoting the foreign policies of some western countries.

The other area of confusion over the principle of international election observation is from host countries that exploit the presence of international election observers in the country in order to claim credibility over an undemocratic electoral process.

The experience in many African countries is that, after heavily contested elections, several incumbents may strive to have international election observation missions declare the process as free and fair. Free and fair are the words international donors want to hear in order to accord legitimacy to the victors of the elections (Kaiser 1999). This explains the recent quest by struggling democracies for international election observer presence in their countries during elections.

The term free and fair is defined in the protocol of the European Convention

on Human Rights as 'free, secret, universal and direct'. Other definitions of the term include the expression of the 'will of the people' or 'a step forward in terms of the country's progress toward democratic governance' (Kaiser, IDEA 1995, p. 14). The vagueness of these definitions and their absence of coherence opens the door for even severely flawed elections to be declared free and fair, to the delight of the victors and the frustration of the losers. A case in point is the highly contested 1995 multiparty elections in Zanzibar, seen by national observers and opposition parties to be poorly organised, whereas many international election observation missions declared them free and fair. The presence of an international election observation mission in this case imbued the electoral process with legitimacy, even though it was marred by controversy right from the start (Kaiser 1999, p. 30).

There are examples where host states successfully negotiated for the presence of international election observers in the country but on a non-invasive election observation mandate. For example, in Algeria in 2014, international election observers were not allowed complete freedom of access. Such a non-invasive mandate does not enable the observers to determine with a high level of certainty whether the electoral process is actually free and fair. Any attempt to engage an invasive election observation mandate is interpreted as interference and an infringement on state sovereignty. The host state's intention is to play to the gallery by exploiting the presence of international election observers in the country as a tool to justify the credibility of the electoral process.

The above acts have incurred huge criticism for international election observation missions, considering that local citizen observers are often not well trained and international observers are expensive to send out. In addition, international observers are frequently accused of not being impartial, of interfering with the election process and thus of creating unnecessary tension.

International law recognises sovereignty as the supreme undivided authority possessed by a state to enact and enforce its law with respect to all persons, property, and events within its borders (Bledsoe & Boczec 1987, p. 55). Sovereignty offers incumbent governments the international legitimacy to control all facets of governance, including the establishment, amendment, or implementation of laws relating to leadership transitions (Kaiser 1999, p. 31).

A growing phenomenon in Africa is that some incumbents, endowed with such powers, transform themselves into electoral dictators. They maintain their grip on power by always rigging and winning elections after having revised constitutions to include unlimited tenures. In countries where opposition groups have staged stiff resistance, violent contestations have occurred and humanitarian crises have ensued. The result is an increasing reaction, both national and international, to such undemocratic manoeuvres. These powers are today confronted with the inevitable advent of the doctrine of the Responsibility to Protect for democratic purposes.

THE ADVENT OF THE RIGHT TO INTERVENE FOR DEMOCRATIC PURPOSES

The principle of the Responsibility to Protect (R2P) for humanitarian purposes was adopted by world leaders in 2005. According to it, the international community has a role to play when sovereign states fail to protect their own populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. The principle makes it a responsibility for the international community to intervene in sovereign states whenever the state is unable or unwilling to handle a humanitarian crisis.

The international recognition of the legitimacy of democracy as the ideal means to acquire and change power dates back to the 1990s in Africa. The doctrine of democratic legitimacy states that democracy is the sole political value to be promoted and that only democratic governments are good. The R2P principle has given a new dimension to this doctrine with the advent of intervention for purposes of promoting democratic legitimacy. According to Reisman (1995) such intervention should be carried out by industrial democracies.

Elections are the major tool used by democracy to reach its goal. Consequently, the credibility of an election is paramount to the determination of democratic legitimacy. In this regard, we observe that the era when the international community remained indifferent towards a country's electoral process is coming to an end. The question of whether or not a country holds elections, postpones them, organises free or flawed elections, or conducts stage-managed or rigged elections is increasingly receding from national sovereignty. The interest of the international community in this domain may be explained by the potential crisis resulting from a flawed electoral process in one country, triggering humanitarian calamities with regional and international effects. Post-election violence in Kenya (2008) and in Ivory Coast (2010) produced humanitarian crises which extended beyond the national borders of both countries. This resulted in the International Criminal Court opening cases for prosecution against the alleged perpetrators of international crimes in both countries.

Though state sovereignty is challenged by the right to intervene, its fundamental objective is to protect, reinforce and strengthen the legitimate sovereignty of the state. This seeks to dissuade electoral dictators from maintaining themselves in power through stage-managed elections.

The Right to Intervene vs Democratic Sovereignty

The notion of the reserved domain of the state originates directly from international law and is considered in relation to state sovereignty. The dominant

theory of this notion linked it to what was intimate to the state, interpreted as what belongs to the domestic life of the state. All issues pertaining to the political regime, legislation, award of nationality, etc., belonged to the reserved domain of the state, excluded from external interference.

But with the introduction in international law of the international protection of fundamental human rights, the notion of reserved domain has been seriously eroded (League of Nations 1914). Several international conventions, international custom and even *jus cogens* have been consecrated on the exclusion of fundamental human rights from the reserved domain of a state's sovereignty. Fundamental human rights are defined as both individual and collective (Article 18, Universal Declaration of Human Rights 1948), and as such are protected under the international law.

The establishment of a democratic government through the organisation of genuine elections guarantees the protection of fundamental individual and collective human rights. This justifies efforts made by the international community towards the establishment of a universal democratic order to establish, maintain and consolidate peace which is essential for the protection of fundamental human rights (Kokoroko 2003, p. 8). Michael Reisman (1995, p. 794) affirmed that: 'Popular government is an internationally prescribed human right' and 'Democracy is a right guaranteed by international law'.

In furtherance of this doctrine to promote democratic legitimacy, the international community has intervened in several countries where democracy and genuine elections have been under threat. For example in Sierra Leone, the United Nations Security Council intervened for the first time in Africa in 1998, using coercive measures to oust the military junta. This paved the way for democratic elections to be organised (Acheampong 1998, p. 98).

The African Union has been very critical towards the undemocratic or unconstitutional acquisition of power. The AU has recently taken many actions to intervene in countries where the rules of democracy have been violated. For example the AU intervened in Togo in February 2005 to reverse the unconstitutional handing of power to Faure Gnassingbé through parliamentary designation, following the death of his father Gnassingbé Eyadema. Togo was constrained to organise presidential elections in May 2005, enabling Faure Gnassingbé to take power through constitutional means.

With the advent of the right to intervene for democratic purposes, state sovereignty is further influenced by the foreign policy orientation of many western states, particularly America and the European Union. These states include the promotion of democratic legitimacy in other states as national and regional foreign policy. This policy is illustrated in the European Union's inclusion of democratic conditionality in the EU/ACP Convention of 23 June 2000 in Cotonou (Benin), which included developmental aid (Feuer 2000, p. 106).

State sovereignty in Africa is increasingly influenced by the AU's consideration of adopting a policy in the future to deploy international election observation missions to member states holding elections, even without prior invitations from the states concerned. This deviation from the principle of a prior invitation before the deployment of an international election observation mission, seeks to promote democratic legitimacy. This is especially in states where governments have turned into dictatorships by organising elections and rigging a win.

Intervention to Restore and Reinforce the Legitimate Sovereignty of the State and its Institutions

The presence of international election observation missions and their assessment of the electoral process is an invaluable way to ascertain the credibility of the elections. This is the principal tool used to judge how power is acquired in a state. The will of the people expressed in the required conditions is the legitimate source of power in a state, hence the legitimate foundation of sovereignty.

Intervention to restore democratic legitimacy becomes necessary when political and military authorities unjustly exploit the notion of state sovereignty in order to abuse the legitimate will of their people. This will enable sovereignty to be handled by those rightly entrusted with legitimate power in the state. In order for this to be effective, it is important that the electoral process be evaluated by neutral international election observation missions which are not inherently involved in the process.

The international community had to rely on the findings of international election observation missions to restore legitimate sovereignty in Angola in the year 2000. International election observation missions had confirmed the verdict of the 2000 elections in Angola but UNITA (União Nacional para a Independência Total de Angola) refused to respect this verdict. The international community imposed a total isolation of the rebel movement and used this non-coercive measure to compel UNITA to respect the results of free and democratic elections (Thomé 2000, pp. 143-167). Through the assessment of the electoral process by international election observation missions, the international community was able to intervene and restore legitimate sovereignty to a democratic state.

The African Union condemned attempts by the incumbent president of the Gambia to withhold power after losing the election in 2016, and supported the ECOWAS intervention to restore democratic legitimacy in this country. Through suspension, coercive measures and intervention, African states were constrained to run organised elections evaluated by international election observation missions as being credible. This enabled them rejoin or stay in this continental

body. Legitimate power acquired through genuine and credible elections should be the foundation of sovereignty in African Union member states.

CONCLUSION

Far from limiting or eroding state sovereignty, international election observation should be perceived as a tool to confer either legitimacy or illegitimacy on an electoral process. This condition is a *sine qua non* for determining the democratic regime entrusted with sovereign powers in a state.

According to the DoP (2005, p. 1):

Genuine democratic elections are an expression of sovereignty, which belongs to the people of a country, the free expression of whose will provides the basis for the authority and legitimacy of government. The rights of citizens to vote and be elected at periodic, genuine democratic elections are internationally recognized human rights.

Flawed elections have served as drivers of violence and humanitarian catastrophes in Africa. The enfeebled nature of African states increases their vulnerability and the consequences of crisis here are often devastating, illustrated by the recent examples of Kenya (2007) and Ivory Coast (2010).

International election observation missions undertake their fact-finding tasks on elections in line with the constitutional provisions and electoral laws of individual countries, and within the broader framework provided by international and regional democratic and human rights instruments. Intervention for democratic purposes is necessary when the people are victimised under military or civilian dictators to whom free and democratic elections is merely a phrase. When the system of election consists of electoral holdup, intervention for democratic purposes becomes necessary.

International election observation may pave the way for intervention to reinforce the legitimate authority of elected officials in a state. The democratic legitimacy of power increases the moral authority of the state in the exercise of full sovereignty. But the quest for democratic legitimacy should not serve as a pretext for unilateral intervention by more powerful states in weaker countries. It should not become an excuse for the strong to impose arbitrary interventionist policies over the feeble. The right to intervene should not be subject to abusive and disproportionate qualifications that may promote the hegemony of powerful states in the west (Salmon 2002, p. 191).

In order to achieve their goal of objectively evaluating electoral processes, international election observation missions must scrupulously adhere to

internationally recognized principles and standards. Only in this way will international election observation restore and reinforce the legitimate sovereignty of states.

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ELECTORAL VIOLENCE
AND ITS INSTRUMENTAL LOGIC:
*Mapping Press Discourse on Electoral Violence during
Parliamentary and Presidential Elections
in Zimbabwe*

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ABSTRACT

Elections are one of the key benchmarks for assessing the international perception of a nation's democratic credentials. However, the credibility of elections is increasingly being tied to questions of whether or not they are conducted in a peaceful atmosphere. Where violence exists as part of the menu of manipulation the press becomes a crucial tool for shaping public perceptions about electoral legitimacy or lack thereof. This study employed a Foucauldian discursive approach to the analysis of election violence in two state-owned newspapers, namely The Herald and The Sunday Mail, and three privately-owned newspapers, namely The Zimbabwe Independent, The Financial Gazette, and the Daily News. Empirical data were drawn from a corpus of news stories published during the 2000 parliamentary and the 2002 presidential elections. The article argues that press construction of election violence was marked by competing discourses reflecting political and ideological bifurcation and this gave way to anti-democratic discursive strategies which could engender political intolerance among the citizenry.

INTRODUCTION

Zimbabwe has held regular elections since the country became independent from Britain in 1980. However, elections held after 2000 were unique in that the ruling party, the Zimbabwe African National Union Patriotic Front (Zanu-PF), which had previously enjoyed dominance, faced fierce competition from the newly formed

opposition party, the Movement for Democratic Change (MDC). In the ensuing political contestation the national press became a site for competing regimes of truth in relation to election violence. The state-owned press unapologetically defended the ruling party position while the privately-owned press rooted for the opposition. The partisan way in which the press reported was such that the precise meaning of election violence, its scale, the perpetrators and victims and its impact on electoral outcomes, were contingent upon the press that reported on it at any given moment.

Theoretically underpinned by Michel Foucault's discourse theory, this article examines the discursive construction of electoral violence in the Zimbabwean press during the 2000 parliamentary and the 2002 presidential elections in order to gain deeper insights into the actual role of the press in electoral conflicts. The principal question addressed in this article is: how did the press construct election violence and why did it construct election violence that way? The article further reflects on the wider implications of these discourses on democracy. The Foucauldian conception views discourse as embedded in relations of power in so far as it entails the reproduction of a particular regime of truth and knowledge distributed through text and talk. Understood this way discourse is viewed as a representation of versions of reality whereby meanings are ascribed, rather than having intrinsic meaning. Through its framing practices, the press therefore plays a crucial role in shaping citizen perceptions and attitudes about election violence.

The article argues that both the state-owned and the privately-owned press in Zimbabwe produced competing discourses about electoral violence, pitting a 'national interest' discourse against a 'liberal human rights' discourse respectively. These discourses demonstrate the instrumental logic of electoral violence whereby the press becomes a weapon for capturing or retaining power through an accentuation of particular discourses of election violence. The article posits that the discursive construction of electoral violence by the press in Zimbabwe constitute more than the mere existence of distinct regimes of truth by ideologically incompatible press groups. Instead, it signifies a press at the service of power rather than of democracy. The absolute morality imbued in discourses on election violence have the potential to engender anti-democratic practices and a political culture of intolerance in society, particularly in fragile societies bedevilled by social and political divisions. By asserting their discursive power through accentuating particular versions of election violence while suppressing others, the press in Zimbabwe became hostages of political power structures, thereby undermining democracy. The polarising discursive practices employed by the press present an opportunity to gain deeper insights into how the press can engender anti-democratic practices, political culture and intolerance. As Floss (2008, p. 4) notes, a society's political culture is gauged by the character of

its institutions, practices and rationalities, and the press is one of the most critical institutions through which political cultures, values, and practices are instilled among the citizens.

The remainder of this article is divided into four parts. Part one contains a brief discussion of the literature on media and election violence and situates the research questions about the press and election violence in an appropriate context. This section also discusses the conceptual framework which underpins this article, namely Foucauldian discourse, and how it links up with the literature and the methodology. Part two outlines the methodology of the study, focusing on methods of data collection and analysis. Part three discusses the press discourses on election violence based on the themes emerging from the data. Part four is the conclusion and reflects on press discourses on electoral violence and their wider implications for democracy in Africa.

THE PRESS AND ELECTION VIOLENCE: MEDIATING THE MENU OF MANIPULATION

There is an expansive literature on media coverage of political violence in its broad sense, encompassing demonstrations, protests, insurgencies, and terrorism (Schlesinger 1991; Miller 1992, Nossek et al. 2002, Ismail & Dean 2007, Hobart 2007; Strem lau et al. 2009). However, it is troubling to know that very little academic enterprise has been expended on examining election violence per se, given the fact that elections in Africa are increasingly punctuated by violence (see Khadiagala 2009; Koko 2010; Merilainen 2012; Motsamai 2010; Shilaho 2013). An understanding of how the media, particularly the press, is implicated in electoral conflicts in Africa is imperative in understanding how the press can either enhance or hinder electoral democracy in Africa. How the media construct meaning about election violence, and how such constructions impact on public perceptions and attitudes is a matter of conjecture. The liberal democratic perception of the media is that it has a crucial role in shaping public opinion and insight into the legitimacy or lack thereof of elections through their framing practices. However, there appears to be a mismatch between the normative ideals of the press and its practice. It is becoming increasingly clear that the wholesale application of the liberal Anglo-American democratic model, with its one-size-fits-all approach, is no longer tenable in the non-western context (Berger 2002; Hallin & Mancin 2004; Shaw 2009). Vladiasvlievic (2015, p. 1) argues that there is need to develop new theories that are more suitable for discerning the role that the media plays in democratisation. There are more compelling reasons for charting a research agenda around the media and elections in weak and fragile states. This is particularly true in Africa, against the backdrop of increasing election violence in recent times, forcing some scholars to view elections as a curse (Motsamai 2010, p. 1).

Notable cases of election violence include the Ivorian 2010/2011 post-election violence in which 3000 people died, the 2007/2008 post-election violence in Kenya, and the 2008 election violence in Guinea Bissau. Of these, only the Kenyan 2007/2008 post-election violence has received considerable scholarly attention (Anderson 2002; Smedt 2009; Khadiagala 2009; Koko 2010; Merilainen 2012; Shilaho 2013). However, the tendency has been a wholesale blame of the media for the election violence, thereby masking the real role of the media in this context and prematurely closing the debate on the nexus between the media and election violence.

There are few studies that directly address the role of the press in election violence in the African context. Of these a significant number focus on the role of the press in the Kenyan post- election violence of 2007/2008, while no studies exist on the bloodiest electoral conflict on the African continent, the 2010/2011 Ivorian elections. Notable studies on the Kenyan conflict include Onyebadi and Oyedeji's (2011) content analytic examination of how the country's main newspapers, the *Daily Nation* and *The Standard*, covered the post-election violence. Onyebadi and Oyedeji argue that the way in which the two newspapers reported on the post-election crisis in Kenya advanced peace rather than conflict, thereby debunking the 'stereotypical characterization of African media as sectarian advocates of mayhem or institutions that hardly play any constructive role during crises' (Onyebadi & Oyedeji 2011, p. 224).

The study observes that during the pre-election period these two newspapers used thematic frames to address the restoration of peace. This demonstrates that even in the context of worst-case scenarios such as the Kenyan post-election violence of 2007, the media's role is not wholly negative. Although the dominant view is that the media in Kenya, particularly the local language radio stations, were responsible for fanning violence (Ismail & Dean, 2008, Ogola, 2009), Onyebadi and Oyedeji's study shows that the mainstream press in that country generally played a positive role by fostering peacebuilding (Onyebadi & Oyedeji 2012). This debunks the wholesale indictment of the media's role in Kenya's 2007 post-election violence.

Although Onyebadi and Oyedeji's study is based on two newspapers with similar ownership, their study deviates from conventional wisdom about the role of the media in electoral conflicts in Africa. This supplies the impetus for further empirical studies and a rethink of the role of the press in political conflicts in fragile societies. The drawback, however, is that this was a small study which did not cover a full electoral cycle and the analysis is limited to only two newspapers. Although Onyebadi and Oyedeji illuminate the possible role of the press in election violence, their content analysis approach is limited to explicating themes rather than providing a holistic perspective on the meaning

and value ascribed to election violence. Similarly, Coesmans (2013) studied the discursive constructions of Kenya's post-2007 election violence in hard news reports from a linguistic-pragmatic approach. His methodology encompassed quantitative content analysis, qualitative discourse analysis and ethnographic fieldwork, comparing the thematic analysis of news reports from local newspapers (*Daily Nation* and *The Standard*) and foreign newspapers (*The Independent* (UK), *The Times*, *The New York Times* and *The Washington Post*). He concluded that news representation in British and American newspapers accentuated ethnicity while that of the national newspapers tended to politicise post-election violence. He argued that the difference in language use is attributed to 'contextual (political, social and pragmatic) factors' (Coesmans 2013, p. 179).

This article foregrounds the production of meaning in journalistic texts (Louw 2001). It is mindful of the fact that the media are ideological tools which co-construct meaning with 'multiple players embedded in ever shifting contextual arrangements within which there are simultaneous pressures for "opening" and "closing" reading (and coding) possibilities' (Louw 2001, p. 208). While existing studies lean more towards how the media are directly implicated in electoral conflicts by inciting violence, there has been no focus on how the media are indirectly implicated in electoral conflicts through their discursive and framing practices. This is therefore a more nuanced approach to exploring discursive constructions of election violence as an alternative 'way of seeing' (Schlesinger 1991).

The key questions which this article seeks to address are: How did the press and citizens in Zimbabwe construct election violence during Zimbabwe's presidential and parliamentary elections during 2000 and 2002? What meanings do the press generate about electoral violence? Why do they construct such meanings? In order to address these questions a discursive analytic approach was adopted in order to glean insights into the way in which the press constructed election violence during presidential and parliamentary elections in Zimbabwe.

Discourse, Power and Knowledge: A Foucauldian Perspective

One key concept that spotlights the production of meaning as being embedded in power relations is that of discourse. The concept of discourse is broad and multi-dimensional (Pitsoe & Letseka 2013, p. 24) and as a result scholars seldom agree on a precise definition, with some catch-all and other narrow definitions of the term, (Hobbs 2008, p. 7). Many scholars are however in agreement that the term discourse owes its origins to the works of French scholar and post-structuralist, Michel Foucault (Fairclough 1995; Chouliaraki & Fairclough 1999; Hobbs 2008). Foucault views discourse as 'social practice' and 'a way of representing knowledge

– about a particular topic at a particular historical moment...’ (Foucault, cited in Hall 1992, p. 291). This definition is broad enough to encompass language, social practices and ways of thinking about particular subjects. Chouliraki and Fairclough subscribe to Foucault’s definition of discourse but extend it to include the ‘economic, social and cultural changes of late modernity’ as well (Chouliraki & Fairclough 1999, p. 4). Conceived this way, discourse encompasses both material and extra-discursive facets of social reality such as money, power, relations, material practices, institutions, beliefs, values and modes of social relations (Chouliraki & Fairclough 1999, p. 6). Such a definition is elastic enough to incorporate all the elements of the Foucauldian discursive approach which underpins this study.

Viewing discourse as social practice implies that when analysing discourse it is imperative to pay attention to the social conditions in which discourse is produced, consumed and interpreted. This is because discourse is constitutive, meaning it is shaped by and shapes the conditions in which it is produced. This conception of discourse is important in that it does not confine discourse to language, but incorporates ways of talking, thinking, morality, and everyday social practices that are taken for granted. This links up with the concept of political culture which informs this article, in so far as media discourse shapes the work of journalists through framing practices that affect perceptions (Hobbs 2008, p. 7). The Foucauldian conception of discourse foregrounds the production of meaning as particular ‘regimes of truth’ (Foucault 1972; Hobbs 2008) distributed through text and talk, and incorporates Fairclough’s idea of discourse as a social practice (Fairclough, 1995, p. 13). To the extent that journalists have the privilege to ‘impart certain social truths’ to citizens (Hobbs 2008, p. 11) they can predispose citizens to particular political cultural practices and attitudes. Pitsoe and Letseka (2013, p. 24) correctly assert that, ‘as a social construct, discourse is created and perpetuated by those who have access to the means of communication’. The constitutive nature of discourse implies that discourse is both an effect and an instrument of power.

METHODOLOGICAL CONSIDERATIONS

This article contains a qualitative analysis of discursive constructions of presidential and parliamentary elections in Zimbabwe. It is concerned with the discursive constructions of election violence, which entail a systematic disclosure of textual meanings, thereby locating the study in the realm of social constructionism. Galbin (2014, p. 82) defines social constructionism as a ‘perspective which believes that a great deal of human life exists as it does due to social and interpersonal influences’. The over-arching concern of social

constructionism is meaning and power, concepts which lie at the heart of the Foucauldian discursive approach employed in this article. White (2000, p. 7) argues that people construct meanings according to their life experiences and contexts. Unearthing these meanings is the main task of the discourse analyst. Social constructionism rejects the positivist view that data already exists, positing that data must be uncovered. Social constructionists' belief that reality is socially constructed rather than 'merely there' (Alvesson & Skoldberg 2009, p. 23) means that meaning has to be disclosed by pricking holes in texts. The discourse analytic approach deployed in this article lends itself to the task of 'pricking holes' in the text as it is premised on the assumption that there are different regimes of truth in relation to a particular event. The Foucauldian notion of discourse adheres to the social constructionist premise which views knowledge as a social construction rather than something that is fixed or is simply out there (Jorgensen & Phillips 2002, p. 13). Foucault (1980, p. 119) notes that what makes power effective is that it is pervasive and produces discourse and knowledge. This view resonates with Durkheim's contention that social facts should be viewed as things (cited in Alvesson & Skoldberg 2009, p. 25) implying that social facts need to be interrogated.

DATA

Empirical data were drawn from a corpus of purposively selected archival textual data. These comprise hard news articles published in two state-owned newspapers, namely *The Herald* and *The Sunday Mail*, and three privately-owned newspapers, namely *The Zimbabwe Independent*, *The Financial Gazette*, and the *Daily News*, all of which are influential sources of public opinion in Zimbabwe. In order to get a deeper appreciation of the rationale for press representation of election violence, semi-structured interviews were held with the editors of these newspapers. Thus, while the textual data sought to address the question relating to how the press discursively constructed election violence, interviews with journalists and editors sought to gain insights into the rationale for such discursive constructions. To this extent, semi-structured interviews were conducted with purposively selected journalists and editors from the newspapers selected for the study. Arksey and Knight (cited in Gray 2009, p. 370) argue that 'interviewing is a powerful way of helping people to make explicit things that have hitherto been implicit – to articulate their tacit perceptions, feelings and understandings'.

The determination of the units of analysis was influenced by the research questions and interpretative approach adopted for analysing the data, whereby important themes had to be explicated from the data. This is in order to provide descriptions of the ways in which the press and citizens construct reality

about election violence. The main units of analysis were hard news articles as well as interview data. The data coding and organisation entailed identifying, summarising, explicating and structuring emerging themes or patterns that speak to the research questions using coding sheets, one for the textual data and another for the interview data. Analysis also involved looking for connections between conceptual categories emerging from the data, by carefully examining whether any of the concepts relate to the literature section. In order to draw meaningful conclusions from the data the author made inferences and reconstructed meanings from the data by exploring the attributes of the different data sets. Relationships between data categories were also drawn. Quotations that were considered key to addressing the research questions were incorporated in the analysis but the researcher was mindful of Patton's advice that one should 'strive for balance between description and interpretation' (cited in Zhang & Wildemuth, n.d). The next section discusses discourses on election violence which emerged from the analysis of textual and interview data.

Perpetrator and Victim Construction: The Blame Game

The representation of election violence produced polarised versions of reality whereby the state-owned press attributed election violence to the opposition MDC, while the privately-owned press blamed the ruling Zanu-PF and the state¹. The state-owned press published a significant number of stories blaming the MDC for most of the election violence. An example of news headlines which support this include: '31 injured as MDC supporters raid Zanu (PF) candidate's home' (*The Herald* 19 June 2000, p. 1); 'MDC supporters assault suspected Zanu (PF) youths' (*The Herald* 19 June 2000 p. 5); 'MDC youths provoke violence in Hwedza: Police' (*The Herald* 23 June 2000, p. 5); 'MDC plans pre-election country-wide terror campaign' (*The Sunday Mail* 10 February 2002, p. 1); and 'MDC youths embark on terror campaign' (*The Sunday Mail* 24 February 2002, p. 1).

The state-owned press used numerous sobriquets which sought to blemish the image of the opposition. Thus the state-owned press constructed MDC supporters as 'thugs' (*The Herald* 19 June 2000, p. 5); 'mobs' (*The Herald* 24 June 2000, p. 1); 'marauding gangs' (*The Herald* 16 June 2000, p. 1); 'rowdy' (*The Herald* 12 March, 2002, p. 4) or 'berserk'. This implies that the MDC was violent, criminal, bloodthirsty and destructive and hence was not worth voting for. In the state press the MDC supporters were also described as 'killers' (*The Herald*, 13 June 2000, p. 4 and 3 June 2000, p. 5; *The Sunday Mail* 8 June 2007, p. 2), and 'assassins'

1 As the economic and political crisis progressively worsened the distinction between the state and the ruling party became more and more blurred. This is largely attributable to the siege mentality occasioned by sanctions and external interference.

(*The Herald* 19 June 2000, p. 10). By depicting the opposition as perpetrators and the ruling party supporters as victims of election violence, the state-owned press sought to portray the MDC as uncivilised, evil and therefore unelectable. Further, exclusively attributing the perpetration of violence to one political party might have created the impression that the opposition party deserved a brutal clampdown by law enforcement agents. This view is bolstered by the state press's claim that the MDC had introduced 'a culture of violence in Zimbabwe' (*The Herald* 16 March 2002, p. 1), indicating that a clampdown on the opposition was not only justified but also overdue. *The Herald* reasoned that the birth of the MDC brought violence to Zimbabwean politics. *The Sunday Mail* (6 June 2000, p. 5) argued that the MDC's violent streak had a long history dating as far back as the 'run up to the February (2000) referendum on the draft constitution when the MDC/NCA alliance embarked on a violent campaign to disrupt report-back meetings of the Constitutional Commission'. It was also claimed that opposition supporters were emulating their leader Morgan Tsvangirai, who 'had vowed to remove President Mugabe from power' (*The Herald* 27 February 2002, p. 4). This was a veiled reference to Tsvangirai's threat to remove President Mugabe 'violently' (Ferret 2000) if he did not step down voluntarily. Tsvangirai is reported to have said: 'What we would like to tell Mugabe today is that please go peacefully. If you don't want to peacefully, we will remove you violently. The country cannot afford Mugabe a day longer than necessary'. He was addressing a gathering of his supporters in Harare at the occasion of his party's first anniversary.

In order to demonstrate that the culture of election violence was alien to Zimbabwe prior to the formation of the MDC, the state-owned press claimed that Zimbabwe had held many multi-party elections since 1980 without any violence, which of course was inaccurate. Quoting the then Zanu-PF Secretary for Information and Publicity, Dr. Nathan Shamuyarira, *The Herald* (27 February 2002, p. 4) reported that Zimbabwe had 'been holding multi-party elections without violence'. The newspaper selectively recounted how different political parties had graced the Zimbabwean political scene in the 1990s, adding that 'there was no violence at all' during that time. Contrary to Shamuyarira's assertion, some scholars have documented the history of election violence, noting how violence has been part and parcel of the Zimbabwean electoral culture since 1980 (Sachikonye 1990; Sithole & Makumbe 1997; Kiger, 2005). *The Herald* conveniently chose to gloss over this reality in order to buttress its version that election violence was a new phenomenon synonymous with the formation of the MDC. By constructing election violence as a new phenomenon in Zimbabwe, the state-owned press eliminated any possibility of a nuanced understanding of and possible remedies for this culture of violence.

Selectivity was also demonstrated through state-owned press constructions of the opposition MDC as the exclusive perpetrator of violence and ruling party supporters as passive victims of election violence. The state-owned press selected incidences of violence in which the MDC was alleged to be the perpetrator or had endorsed violence. Blame for violence was based on the previous record of a political party rather than on the objective material facts about what was happening at the time. Caesar Zvayi, editor of the state-owned newspaper, *The Herald*, gave an insight on this view when he said that:

... we have seen a number of times, for instance, the MDC supporters can, they know that Zanu (PF) is holding a rally in this area, they go there to provoke a situation and then you have these correspondents, some of them who moonlight for international media take those images and send them outside world.

Caesar Zvayi, interview, 7 May, 2015, Harare

This shows that the apportionment of blame for election violence was based on a stereotypical abstraction and not what was happening at the material time. Thus, in the state-owned press, the opposition was pigeon-holed as the perpetrator and the ruling party as an innocent victim. Given the polarised state of Zimbabwean society during electoral contests, it is not possible that only one party was responsible for all election violence. As Sachikonye (2011, p. 31) observes, both the ruling party and the opposition perpetrated political violence, although their culpability may not have been the same. That the press discursively constructs election violence through the lens of an absolute morality demonstrates how the press was used to either legitimise or delegitimise elections. In the state-owned press, this instrumentality was discursively concretised by sanitising all past elections and presenting them as violence-free. At the same time they were amplifying violence in contemporary elections as a discursive strategy to justify the causal link between rising election violence and the formation of MDC. Selectivity also entailed picking and choosing particular events (such as Morgan Tsvangirai's speech at Rufaro stadium) to use as a benchmark for the opposition's violent behaviour. Such a discursive strategy dovetails with Akpabio's 'framing up' technique. This entails selecting and organising news stories so as to foster a one-dimensional interpretation of events (Akpabio 2011, p. 45) in order to incriminate an opponent. Such discourses might have mobilised negative feelings against the opposition thereby exacerbating rather than reducing election violence. Akpabio (2011, p. 46) correctly observes that: '... persistent and negative framings are always a precursor to something evil'.

A dominant way of portraying enemies is to dehumanise them thereby justifying any mistreatment meted out to them. It could be argued that through such discursive practices, the state-owned press might have created an alibi for the liquidation of the opposition. This is because discourse has consequences in that it always translates into particular action and behaviour. Steuter and Wills (2009) support this view when they observe that once an 'enemy' has been stereotyped it becomes psychologically acceptable for the observer to engage in atrocities (Steuter and Wills 2009, p. 19). Hobart (2007, p. 190) concurs, adding that that stereotyping the 'enemy' may make the case of the perpetrators of violence appear common cause. He notes that 'Particular assumptions about space, time narrative, personhood, agency, and causation are distinctive of different genres; and are combined in ways that, through reiteration, give a sense of naturalness and self-evident truth to what are carefully constructed and inherently mediated accounts'. In the case of the state-owned press, assumptions about the opposition being responsible for introducing violence into Zimbabwean politics and their reiteration in the state-owned press could not only engender feelings of ill will against the opposition, but also justify its annihilation.

Like the state-owned press, the privately-owned press was equally selective in its attribution of election violence. It overwhelmingly blamed Zanu-PF and state security agencies for perpetrating election violence while remaining silent about the transgressions of the opposition. However, the culpability of the two could not have been identical given that the opposition did not control the instruments of power. Examples of news headlines where the privately-owned press routinely and selectively blamed the ruling Zanu-PF and state aligned institutions include: 'Zanu (PF) brings Marondera to a halt' (*Daily News* 22 May 2000, p. 2); 'Sekeramayi threatens commercial farmers' (*Daily News* 23 May 2000, p. 2); 'Violence: War vets, Zanu (PF) supporters remanded in custody' (*Daily News* May 2000, p. 2); 'CIO, ZNA join farm invasions' (*The Zimbabwe Independent* 13 July 2000, p. 10); 'Zanu (PF) supporters burn MDC vehicle in Muzarabani' (*Daily News* 13 July 2002, p. 15); 'Zanu (PF) trio charged with murder of two MDC activists' (*Daily News* 1 February 2002, p. 3); 'Zanu (PF) forces people to rally', Zanu (PF) trio charged with murder of two MDC activists' (*Daily News* 1 February 2002, p. 3); 'Militia seize hundreds of ID cards' (*The Zimbabwe Independent* 8 February 2002, p. 1); 'Government sets up 146 militia bases' (*The Zimbabwe Independent* 1 March 2002, p. 4); 'Zanu (PF) hijacks church to boots votes, political rallies disguised as prayer meetings' (*The Financial Gazette* 17 January 2002, p. 8); 'Millions forced to buy Zanu (PF) cards: Extortion sees party raking \$500m in three months' (*The Financial Gazette* 24 January 2002, p. 6); 'Trigger happy cops ignite orgy of violence in Bulawayo; Police, Zanu (PF) gang up to thwart MDC rally' (*The Financial Gazette* 24 January 2002, p. 9); and 'Zanu (PF) unleashes militia on Byo' (*The Financial Gazette* 7 February 2002, p. 20).

As can be seen in the some of the news headlines above, naming the political affiliation of the perpetrators of election violence (i.e. Zanu-PF or state agents) was intended to ensure that the question of who was responsible for election violence was not left open in the minds of the readers. Hobart (2007, p. 197) notes that using the active mood is a key aspect of identifying perpetrators. It has the effect of making the named appear as ‘the agent that disrupts the natural order’ while ‘exnomination’, which is the contrary process, has the effect of ‘masking the agent that disrupts the natural order’.

In the specific context of Zimbabwean elections, the privately-owned press’s identification of perpetrators of election violence was preceded by demands for ‘concrete action’ to be taken against the perpetrators. This was so as to ‘bring a semblance of normalcy to our tormented nation’ (*The Financial Gazette* 25 May 2000, p. 8). This would be followed by proposals for a raft of drastic measures such as that: ‘the police must swiftly crack down on anyone perpetrating violence’ (*The Financial Gazette* 8 June 2000, p. 8); ‘SADC must stop collaborating with rogue rulers’ (*The Zimbabwe Independent* 22 February 2002, p. 6); ‘Mugabe must step down’ (*Daily News* 23 March 2002, p. 4); or simply that observers should rein in Zanu-PF lest the elections be ‘rendered null and void’ (*The Financial Gazette* 8 June 2000, p. 8); and ‘We need to identify the impediments to a free and fair election so that they become a matter of public record’ (*The Zimbabwe Independent* 8 February 2002, p. 6). The naming of the perpetrator was almost always followed by a call for some form of sanction to be imposed on the perpetrators of election violence. This is consistent with Hobart’s observations that the press tends to frame news in such a way as to ‘anticipate and imply the need for appropriate future action’ (Hobart 2007, p. 200).

It could be argued that the privately-owned press’s use of naming as a strategy to deter would-be perpetrators of election violence is consistent with its espoused watchdog function. The statement by Wisdom Mudzungairi, acting editor of the privately-owned daily newspaper was instructive in this regard. Mudzungairi argued that if his newspaper did not cover election violence, that would be an abdication of its ‘role as the watchdog in society’ (interview with Wisdom Mudzungairi, 15 May 2015). Reporting on elections was considered part of his newspaper’s mandate to give a voice to the voiceless, curb election violence and promote peace, thus accentuating the sanctity of life. By blowing the whistle on election violence the privately-owned press accentuated a liberal human rights discourse pivoted on the watchdog role of the press. While exposing election violence was a noble thing, selective application – as was the case by the privately-owned press – could have heightened animosity between the opposition and the ruling party, thereby sowing the seeds of bitterness in a divided society.

It would not be farfetched to conclude that the selective reporting of election violence might have contributed towards the hardening of views among ruling party supporters, particularly given the gamut of derogatory epithets directed at the ruling party. Such epithets include 'mobs', 'terror squads', 'thugs' and 'gangs', while sparing the opposition from the same labels. It should however be noted that although the state-owned press used similar labels against the MDC, these were more tendentious in the privately-owned press, which deployed a liberal human rights lens. Examples of news headlines which portray this include: 'Zanu (PF) gangs on a looting spree' (*The Zimbabwe Independent* 18 February 2002, p. 2); 'Zanu (PF) mobs burn down MDC polling agents' homes' (*Daily News* 25 March 2002, p. 18); 'Zanu (PF) mob attacks MPs house' (*Daily News* 28 February 2002, p. 3); 'Rampaging Zanu (PF) supporters loot, damage house in Chinhoyi' (*Daily News* 27 February 2002, p. 19); and 'Rural folk flee orgy of terror' (*Daily News* 16 May 2000, p. 1).

Derogatory phrases such as 'gangs' and 'mobs' connote criminality, while the manner in which the violence is executed, such as 'rampaging' and 'orgy of terror', evoke barbarism and senselessness. Such phrases were pivoted on some form of moral absolutism (Napier & Jost 2008) in the sense that they normalised hateful attitudes towards the ruling party, while 'harvesting' sympathy on behalf of the opposition. The problem with such epithets, particularly in politically fragile societies where every group of people is convinced about the correctness of their assumptions and the sanctity of their positions, is that they can breed intolerance. In the privately-owned press, images of opposition victimhood were mainly refracted through the prism of appeals and calls for the international community to intervene in Zimbabwe. Victims of Zanu-PF violence were constructed as helpless, hapless and harmless. Appeals for international intervention were framed from a humanistic angle. For instance, in a story headlined: 'MDC appeals for help to end violence', *The Zimbabwe Independent* (22 February 2002, p. 2) reported that the 'besieged' MDC leader Morgan Tsvangirai was appealing for international intervention as 'mobs loyal to President Mugabe stepped up their retribution against the party's supporters'. The MDC complained that its supporters were 'being hounded and hunted down, kidnapped, tortured and killed by Zanu (PF) militias'. The story gave a blow-by-blow chronicle of MDC supporters who had fallen victim to Zanu-PF's violence. Framing election violence as one-sided ensured that the alleged victims of Zanu-PF violence elicited sympathy from the readers while at the same time it magnified the callousness of the ruling party. Journalists in the private press justify using words such as 'mobs', 'rampaging', 'gangs', and 'orgy of terror' on the grounds of professional considerations and their ability to capture reality at that time. While the effect of these epithets on the readers is debatable, the use of such labels suggests an objectivist, absolutist construction

of reality. In this construct the privately-owned press placed a premium on the sanctity of their versions of the truth, even if it meant disregarding the fact that the opposition was neither a hapless victim nor a bemused bystander with regards to election violence. One editor was convinced that 'There is no other way of describing them (the perpetrators of violence)', adding that the reason for using such labels was to bring the perpetrators to account (E2, interview, 11 May, 2015, Harare). Another editor added that the use of such sharp language was consistent with the journalistic genre and served to vividly portray events. He pointed out that:

Instead of just saying 'Zanu (PF) officials or supporters beat up MDC supporters' we will use strong language and call them thugs because that's what they are. If you are using extra-legal means to gain, eh, eh, an electoral advantage, you are unleashing violence we call it terror, depending on the scale. We use the words 'violence', 'terror', 'intimidation' depending on the scale. If it's widespread, it's terror. If it's isolated, it's intimidation. If it's systematic, it's violence. So we use those words depending on the prevailing conditions on the ground. We call it terror when it's all over the place.

Interview with Dumisani Muleya, 11 May, 2015, Harare

Such an absolutist stance found expression in language consistent with the watchdog function whose hallmarks are adversarial journalism (Goran & Otsman 2013, p. 309). Former editor of the *Daily News* Geoff Nyarota acknowledges this moralist stance of the press when he notes that journalists always like to occupy the high moral ground, lecturing politicians on what is good and bad. Nyarota notes that:

So they will say if I say if 'five people were killed' the politician may miss the point, but if I say there was an orgy in their constituency the politician will... Their intention is good and noble but sometimes it can be misunderstood because the purist will say, five people cannot be an orgy, ladies and gentlemen.

Interview with Geoff Nyarota, 11 May 2015, Harare

While the good intentions of journalists cannot be completely dismissed, it would be uncritical to accept the view that the intentions of the press are misunderstood. This is particularly so given the fact that journalists in Zimbabwe are hyper-political, almost to the extent that the fine line between professionalism and political activism becomes blurred during election time. As one editor pointed out

journalists are 'political creatures' with 'political aspirations' and the temptation to 'root for political parties in their personal capacities is reflected a lot in stories' (Vincent Kahiya, interview, 11 May 2015). This clearly runs against the grain of the objectivist stance of the privately-owned press and demonstrates that the press became a tool to delegitimise the ruling party by accentuating the victimhood of the opposition.

This image of victimhood was further intensified as seen through a human interest frame in which alleged victims of election violence were literally milked for sympathy while the ruling party was portrayed as evil. An example of news headlines which illustrate this include: 'Police raid widow's home' (*The Zimbabwe Independent* 8 February 2002, p. 4); 'Observer pastor assaulted' (*Daily News* 13 March 2002, p. 4); 'War veterans murder guard, assault farmer' (*Daily News* 18 March 2002, p. 2); 'Youth terrorise Chivhu villagers' (*Daily News* 8 February 2002, p. 12); 'War vets attack nurses' (*Daily News* 25 March 2002, p. 2); 'Zanu (PF) youths stone Motswana woman's car' (*Daily News* 6 January 2002, p. 6); and 'Villagers flee violence to the cities' (*The Financial Gazette* 25 February 2002, p. 2).

The thread running through these examples of victimhood (widow, pastor, nurse, guard, farmer, villagers, and women) is their vulnerability or presumed innocence.² This 'parasitic' tendency is best illustrated in 'Orphan's house damaged in clashes' (*Daily News* 22 March 2000, p. 2). This story highlighted the plight of a teenage orphan, Tawanda Neshiri, whose house was allegedly damaged by war veterans and 'suspected Zanu (PF) youths' in the high density suburb of Budiriro.³ The story is saturated with humanistic rhetoric intended to trigger the reader's sympathy by accentuating the callousness of the tormentors. The victim's plight is graphically illustrated. The damage to the house is extensively covered in a riveting and emotional narrative style that leaves the reader completely bewildered. The victim is allowed to relieve his ordeal in a testimonial style, thereby heightening the emotions of the readers. He is reported to have said:

They (Zanu (PF) supporters) threw stones at the house and one of them threw a ball of fire through one window...They later went around telling residents to stay in-doors. Those who refused were taken to Hunzvi's Surgery where they were allegedly assaulted.

The use of the pronoun 'they' is a way of 'othering' the alleged perpetrators of election violence and this widens the gulf between the 'evil' perpetrators and the

2 Although the white farmers belong to an economically powerful group in the specific context of farm occupations they were constructed in the international media and local privately-owned press as victims of 'Mugabe's tyrannical rule'.

3 Budiriro is a high density suburb in the capital city Harare.

readers. Through the victim's narrative, readers learn about the ubiquity of Zanu-PF's 'brutality' and 'tyranny'. Readers are further told that victim's father died in 1994 and his mother 'succumbed in the same month four years later'. The story was accompanied by a picture of the teenage boy in school uniform carrying a school bag, a vivid depiction of this alleged victim of Zanu-PF's election violence. The emotive style of the story eschews the rational, thereby generating intensely negative feelings against the ruling party. The default line seems to be that 'if Zanu (PF) can treat the most vulnerable in society like this how about the rest of the population'? As a discursive strategy, the power of humanistic rhetoric lies in suspending rationality by saturating readers with humanist values such as compassion, reason, love and the greater good so that the reader is compelled to empathise with the alleged victim (Harvey 2000). Humanistic rhetoric compels the reader to be outraged by the actions of the perpetrator and intensely sympathetic towards the victim, what Herman and Chomsky (1988, p. 43) have described as 'worthy victims'. The problem with humanistic rhetoric is that its emotive appeal may blind the reader to reason. Furthermore, it is a parasitic narrative which commodifies the weak, the meek and vulnerable in society by constructing simplistic binaries of 'Devils' and 'Angels' while complex issues fall through the cracks. Such oversimplification plays host to episodic frames and sensational headlines that have more sound than substance.

If it Bleeds, It Leads: The Use of Apocalyptic Headlines

The private press's reportage on election violence was couched in apocalyptic prophecies in order to draw the attention of local and international public. During elections life was portrayed as short and brutish thereby creating the impression that violence was omnipresent. Examples of such news headlines include: 'Brutal attack leaves MDC officials in coma' (*Daily News* 27 February 2002, p. 3); 'Zanu (PF) gangs on looting spree' (*The Zimbabwe Independent*, 18 January 2002, p. 2); '16 die in Zanu (PF) terror campaign' (*Daily News* 9 February 2002, p. 1); 'Zanu (PF) unleashes militia on Byo' (*The Financial Gazette* 14 February 2002, p. 2); 'Terror squads camp of farms' (*The Financial Gazette* 7 February 2002, pp. 1-51); and 'MDC supporters hacked to death' (*Daily News* 1 February 2002, p. 2). Phrases such as 'looting spree', 'terror campaign', and 'unleash', connote the senselessness of violence while 'brutal' and 'hacked to death' denote extreme viciousness. The motive behind such representation was to elicit and sustain attention and outrage from both the local and international public. A story headlined 'Agency warns on genocide' (*The Financial Gazette*, 28 February 2002, p. 5) demonstrates the hyperbolic constructions of election violence news in the private press. The story quoted the USA-based Genocide Watch Group speculating that 'Zimbabwe

could slide into genocide' ahead of the presidential elections in March 2002. The group is reported to have said: 'early warning signs for politicide (mass political killings) and possibly even genocide in Zimbabwe' had 'reached stage six which is considered the final'. Furthermore, the US and the European Union were reported to have warned President Mugabe that they would use 'military intervention if the situation deteriorated further' (*Financial Gazette* 28 February 2002, p. 5). Although there was undoubtedly election violence in Zimbabwe, arguing that the situation was anywhere near genocide was 'over the top'. Group Editor of *The Financial Gazette*, Sunsley Chamunorwa, believes that apocalyptic headlines such as 'no one should die for any politician'. He added that the headline 'Agency warns of genocide' is entirely appropriate because fears of ethnic cleansing triggered memories of Gukurahundi⁴ (Sunsley Chamunorwa, interview 11 May 2015). This suggests that *The Financial Gazette* used hyperbolic terms in order to sound alarm bells about the ruling party. The intention was to forestall the worst possible scenario rather than wait for disaster to strike, on the basis that prevention is better than cure. This is consistent with the classical perception of the press as watchdog and public sentinel (Norris, 2010). However, it could be argued that raising the spectre of another Rwanda was a discursive strategy beyond the realm of the watchdog function, as it was a means to instigating a military intervention in Zimbabwe, a familiar trope used by hegemonic powers to meddle in the affairs of sovereign nations.

MDC Provokes Violence, Zanu-PF Reacts

Although the image of Zanu-PF was predominantly that of an innocent victim of MDC violence, there were occasional discursive slippages in the state-owned press which unwittingly betrayed this as a façade. It was often reported that the MDC was largely responsible for 'triggering the violence' (*The Sunday Mail* 4 February 2000, pp. 1-4) while Zanu (PF) or the state 'reacted' or 'retaliated' (*The Herald* 23 March 2000, p. 1) in order to restore law and order. Examples of news headlines which support this are: 'MDC **committed** most of political crimes' (*The Herald* 16 March 2002, p. 1); 'MDC **perpetrates** more violence on the ruling party' (*The Sunday Mail* 11 June 2000, p. 5). The words in bold suggest the existence of more than one agent, meaning that the MDC could not have possibly perpetrated violence alone. *The Sunday Mail* story (11 June 2000, p. 5) headlined 'MDC perpetrates more violence on the ruling party' is illustrative in this regard. The newspaper sought to rebut allegations by an Amnesty International report that Zanu-PF was responsible for

4 Reference to the civil war in the early 1980s during which about 20 000 civilians were killed in a government-sponsored military operation in Matabeleland and the Midlands.

most of the violence in the run-up to the 2000 general elections. The newspaper quoted police officials who refuted the Amnesty International report, adding that the MDC was responsible for the lion's share of electoral violence in the country. The newspaper accused the Amnesty International report of being 'one-sided', noting that it chronicled in greater detail incidents of violence perpetrated against members of the MDC but was silent on violence against members of the ruling Zanu-PF party.

The Sunday Mail gave a litany of incidents of election violence allegedly perpetrated by the MDC dating back to February 2000 in order to prove that the MDC was not 'an innocent bystander' as far as election violence was concerned. In rationalising the view that the MDC had introduced political violence, the blame discourse congeals into one of moral equivalence. In this perspective election violence was constructed as being simply a case of members of different political parties 'beating each other' or as 'political clashes' between different political parties (Caesar Zvayi interview, 7 May, 2015, Harare). The acting editor of the paper, Mabasa Sasa, was more circumspect than Zvayi, choosing to accentuate the frame of moral equivalence by suggesting that both MDC and Zanu-PF were to blame for starting violence. Sasa further added that the MDC had a greater propensity to commit election violence because it stood to benefit financially, and through what he termed the 'politics of pity' (Mabasa Sasa interview, 15 May, 2015, Harare). From a state press point of view, the fact that the MDC 'profits' from election violence implies that the opposition party has more incentive for starting violence than the ruling party. Profiting from violence is no different from starting the violence. This implies that it was in the national interest for the state-owned press to project the MDC as a perpetrator of election violence since it was the only party that stood to benefit from election violence.

Mystification: Fighting against 'invisible' forces

A story published in *The Herald* (12 June 2000, p. 8) reveals the rationale for Zanu-PF's 'retaliatory violence' narrative in the comments of war veteran Mau Mau, Zanu-PF parliamentary candidate for Harare East in the 2000 general election. Mau Mau, who was addressing a rally in Harare, is reported to have commended his supporters 'for not engaging in violence in the constituency in the count down to the elections, but said *they would retaliate if provoked by the opposition*' (emphasis added). Border Gezi, then Zanu-PF Mashonaland Central provincial chairperson accompanying Mau Mau, made a revealing statement. Gezi is reported to have said that '...the whites whom we defeated were now coming back through the back door through black puppets. This time they are using a puppet, Morgan Tsvangirai, but we know that it is them. *Kana torova tsuro tinorova nedenhe racho*

(when we try to beat a hare hiding behind bushes we will not discriminate the hare from the bushes). The statement by Gezi, then a senior member of Zanu-PF, is crucial to understanding the instrumental logic of election violence and its mediation in the state owned-press. The fact that Zanu-PF believes that it is fighting not the MDC but a formidable and invisible force is significant as it shapes the discursive constructions of election violence in the state-owned press. This is seen as not only inevitable under the circumstances, but also as a legitimate tool for repelling neo-colonial forces. The view that Zanu-PF was battling bigger forces was made more succinct by President Mugabe. Addressing the 43rd Ordinary Session of his party's Central Committee soon after the 'close shave' of the 2000 general elections, in which the party obtained 63 seats against the MDC's 57, Mugabe reminded his members that:

Often a myth is peddled that Zanu-PF lost to a nine-month-old opposition party. Nothing can be further from the truth. Whilst we expect our enemies to peddle such a myth, we should never allow it to take root in our minds. Such a misconception encourages us to underestimate the forces ranged against us, and to underplay the significance of our hard earned victory. The MDC should never be judged or characterised by its black trade union face; by its youthful student face; by its salaried black suburban junior professionals; never by its rough and violent high density lumpen elements. It is much deeper than these human superficialities; for it is immovably and implacably moored in the colonial yesteryear and embraces wittingly or unwittingly the repulsive ideology of return to white settler rule. MDC is as old and as strong as the forces that control it; that converge on it and control it; that drive and direct; indeed that support, sponsor it. It is a counter-revolutionary Trojan horse contrived and nurtured by the very inimical forces that enslaved and oppressed our people yesterday.

Mugabe 2001, pp. 88-89

Although Mugabe's statement unpacks the MDC it also has the effect of creating a mystique about the opposition claiming that it is harboured by unknown forces and 'hides behind the bushes'. The point seems to be not to underestimate the strength of your enemy. The rationale for using excessive force to liquidate the MDC was because of the perception that the opposition party was an enemy 'hiding behind bushes'. Hence the state-owned press constructed discourses that legitimised violence against the MDC. The mystification of the MDC's strength implied that the opposition party was constructed not as a minion but as a very treacherous force that needed to be crushed by all means necessary. The view that

the MDC is only a front of the West and that there were invisible forces behind much of the election violence in Zimbabwe was echoed by Mabasa Sasa. He pointed out that 'there are outsiders who are prepared to finance Zimbabweans to fight each other' (Mabasa Sasa, interview 15 May, 2015, Harare). The perception that there are invisible forces behind election violence has forced the state-owned press to take a hardline stance in defending the ruling party's position in relation to election violence. Mabasa Sasa explains thus:

... So when faced with threats such as these external threats, this external interference, this meddling in our politics to try and destabilise us as a country, naturally, we, we have the mandate to defend those values that are expressed in our independence of 1980. So naturally, we become more robust in defence of our national interest, when faced by such threats, ahmm, not just in a defensive manner, we have to go offensive as well in defence of our country. So yeah, over the years, the, as this external threat became more and more apparent we too have become more robust in our responses to that threat. Ah, with, our intent being, ah, upholding the integrity of our state.

Interview with Mabasa Sasa, 15 May, 2015, Harare

Zvayi corroborates Sasa's sentiment about the existence of a third force, reasoning that although Zimbabweans are generally peaceful people, during elections they become violent because of outsiders who fund people to engage in violence (interview with Caesar Zvayi, 7 May, 2015, Harare). In the larger discursive scheme, projecting Zanu-PF as responding to invisible external threats against national sovereignty could possibly have further polarised the nation. Robust and offensive tactics would ordinarily encompass discursive strategies that tend to justify violence against the opposition and its alleged external funders, as has been demonstrated in the example of Border Gezi above. At the same time, constructing the ruling party as being engaged in a mortal fight with invisible forces helps to minimise the ruling party's moral culpability. This also sanitises the backlash against the supposed political fronts of external forces, which in this case would be the opposition.

Both Parties are to Blame: A False Moral Equivalence?

The mystery about the existence of a much bigger and invisible force lurking behind the opposition gave way to discourses about power symmetry in the state-owned press. This found expression in a false moral equation whereby Zanu-PF and the MDC were portrayed as being equally culpable for election violence.

Examples of news headlines which attest to this are: 'MDC-Zanu (PF) blamed for flare-up of violence' (*The Herald* 23 May 2000, p. 1); and 'Fresh clashes in Karoi' (*The Herald* 21 March 2002, p. 8). In a story headlined 'Political tension caused by extreme positions', *The Herald* (19 May 2000, p. 7) reported that the political tension prevailing at the time was a result of the 'extreme positions adopted by the two main rival parties, Zanu (PF) and the Movement for Democratic Change'. Quoting a political commentator, Dr. Admore Kambudzi from the University of Zimbabwe, the newspaper claimed that the violence stemmed from the MDC's 'super ambition' to form the next government and Zanu-PF's 'over-reaction' to the rejection of the draft constitution in the February 2000 referendum. Blaming the 'extreme positions', both parties rationalised violence thus creating the impression of 'moral equivalence', (Carr 2000, p. 84). Conscripting a supposedly knowledgeable expert from the university lends legitimacy to the narrative of equal blame. Constructing both parties as being equally to blame meant that nothing could be done to end election violence. It could be argued that the frame of moral equivalence has to do with the institutional processes of news-making, such as the need to have a semblance of balance and impartiality and objectivity in what (Toscano 1979, p. 177) called 'dubious neutrality'. Thus the ruling party, which is constructed as an innocent victim, became an active agent in a power symmetry. This clearly demonstrates how the meaning of election violence was contingent on who was invoking it (Hall 1997, p. 9). Hall aptly observes that meanings do not simply exist but are actively constructed through selection, inflection, inclusion and exclusion. In the specific context of Zimbabwean presidential and parliamentary elections, the meaning of election violence became elastic to suit the political agendas of the different press camps. This shows how discursive constructions of electoral violence in the state-owned press are circumscribed by tensions between ideological and professional considerations (Machin 2008, p. 64). Such considerations played an important role in determining who was blamed for violence, how they were constructed and what was said as well as what was not said about them.

CONCLUSION

This article has discussed the discursive construction of electoral violence in the state-owned and the privately-owned press in Zimbabwe during the presidential and parliamentary elections held in Zimbabwe between 2000 and 2002. The main observation was that the two press camps produced competing discourses on election violence. Although the actual role of the press in election violence could not be conclusively determined, it was apparent that both sides of the press divide deployed anti-democratic discursive practices which have the

potential to engender a culture of intolerance. The meaning of election violence became contingent on who was invoking it, with the state-owned press blaming the MDC for election violence, while the privately-owned press laid the blame on the governing party, Zanu-PF. Thus, election violence became the site for meaning contestation and a tool for delegitimising political opponents while maintaining silence on the transgressions of preferred political players. In the ensuing dialogue of the deaf, the meaning of election violence became elastic depending on who was the victim or perpetrator or who stood to benefit from it. It became clear that, contrary to the view that media simply reflect reality and that meanings are free-floating, meaning is socially constructed and deeply implicated in relations of power. As a consequence, election violence was viewed through a binary prism whereby the perpetrator was either the ruling party and state agents, or the opposition, thereby obliterating the middle ground. In the larger discursive scheme, competing and incompatible versions of election violence reflect ideological polarisation. These were crystallised through, on the one hand, the privately-owned press's liberal human rights model of journalism, epitomised by accentuating the watchdog function of the press; and on the other hand, the state-owned press's espoused journalism model of national interest put a premium on state sovereignty and the necessity of rebuffing imperial interests. That the press can construct contradictory versions of election violence is not only a cause for concern, but also has wider implications for democracy.

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LA QUESTION DU TROISIÈME MANDAT PRÉSIDENTIEL AU BURUNDI: *Quelles leçons pour la République Démocratique du Congo?*

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« [...] il faut tirer les leçons de ce qui s'est passé au Burundi [...]. Cela peut arriver en RDC, à une plus grande échelle... ».¹

INTRODUCTION

Depuis la désignation, en avril 2015, du Président Pierre Nkurunziza par son parti (au pouvoir), le Conseil National pour la Défense de la Démocratie – Forces de Défense de la Démocratie (CNDD-FDD), comme son candidat à l'élection présidentielle de juillet 2015, le Burundi est au centre du débat sur le troisième

¹ Texte extrait de la présentation de Tom Malinowski, Secrétaire d'Etat Adjoint américain pour la démocratie et les droits de l'homme, lors d'un débat à la Commission Tom Santos des droits de l'homme du Congrès américain consacré à la situation en République Démocratique du Congo. Le débat avait eu lieu le mardi 29 novembre 2016 à Washington. Y étaient également présents She Okitundu (Sénateur congolais, actuellement Ministre des Affaires étrangères), Kikaya bin Karubi (Conseiller diplomatique du Président Kabila), Tom Perriello (Envoyé spécial des Etats Unis dans la région des Grands-Lacs), Fred Bauma (membre du mouvement citoyen Lutte pour le Changement – LUCHA) et Ida Sawyer (chercheuse à Human Rights Watch). Lire Radio Okapi (2016).

mandat présidentiel ou encore sur la pertinence même du principe de limitation du nombre de mandats présidentiels successifs en Afrique.²

En effet, Nkurunziza fut élu Président du Burundi pour la première fois en juillet 2005, au suffrage universel indirect, par les deux chambres (Assemblée Nationale et Sénat) réunies du Parlement burundais. Il fut réélu en juillet 2010 au suffrage universel direct dans un processus largement boycotté par la plupart des partis politiques de l'opposition sur fond de désaccords se rapportant aux résultats des élections communales du 24 mai 2010 remportées par le CNDD-FDD avec 64%.³

La différence dans le mode d'élection de Pierre Nkurunziza (suffrage universel indirect en 2005 et suffrage universel direct en 2010) a donné lieu à des interprétations variées de la part d'acteurs socio-politiques burundais et d'experts des questions burundaises sur la légalité de sa candidature à l'élection présidentielle de 2015. Une première tendance considère ladite candidature comme régulière, car l'Article 96 de la Constitution burundaise du 18 mars 2005 n'interdirait que le renouvellement des mandats des Présidents de la République élus au suffrage universel direct (Vandeginste 2012).⁴ Une deuxième tendance, proche de la première, estime qu'au-delà du seul mode électoral, c'est la quintessence même du pouvoir « exceptionnel » conféré au premier Président de la République post-transition (tel que contenu dans l'alinéa 3 de l'Article 302 de la constitution) qui rendait la candidature de Nkurunziza à l'élection présidentielle de 2015 régulière (Vandeginste 2014a, pp. 13-36; Vandeginste 2012; International Crisis Group 2011).⁵ Enfin, une troisième tendance estime que la candidature du Président Nkurunziza violait non seulement la lettre de la Constitution de 2005

2 Par exemple, selon Kelley (2016), « [d]es hautes autorités américaines estiment que la République Démocratique du Congo pourrait glisser dans des violences pires que celles connues par le Burundi si le Président Joseph Kabila ne se retire pas du pouvoir à la fin de l'année [2016] ».

3 Il sied d'observer qu'aussi bien en 2005 qu'en 2010, le Président Nkurunziza fut candidat unique à l'élection présidentielle du Burundi pour différentes raisons. En effet, en 2005, ce fut l'écrasante victoire du CNDD-FDD aux élections législatives (58.6% à l'Assemblée Nationale et 78% au Sénat) qui découragea les autres partis à présenter des candidats contre Nkurunziza à une élection présidentielle organisée au second degré au niveau du parlement. En 2010, c'est plutôt l'appel au boycott des partis d'opposition qui finit par consacrer Nkurunziza comme le seul candidat à l'élection présidentielle. Cependant, en ce qui concerne l'appel au boycott par l'opposition aux élections de 2010, il existe une école de pensée qui estime qu'au-delà des malentendus autour du processus et des résultats des élections communales, c'est aussi l'incapacité de l'opposition de présenter une concurrence électorale redoutable au CNDD-FDD qui la poussa à contempler le boycott comme une issue « honorable » à une défaite électorale annoncée. Lire à ce sujet El Abdellaoui (2010).

4 Vue sous cet angle, l'élection de Pierre Nkurunziza en 2005 ne constituait pas en soi un cas de premier mandat, mais simplement une deuxième phase de la transition inaugurée au Burundi au lendemain de la signature de l'Accord d'Arusha.

5 Cet alinéa dispose que « [l]e Président élu pour la première période post-transition ne peut pas dissoudre le Parlement ». Cette disposition est exceptionnelle en ce sens que la constitution confère au Président de la République élu au suffrage universel direct le pouvoir de dissoudre le Parlement (voir Articles 104, 115, 118 et 203).

mais aussi l'esprit de l'Accord d'Arusha de 2000, tous deux opposés à toute idée de trois mandats successifs de la part de tout Président du Burundi post-conflit (Institute for Security Studies 2016, pp. 2&9; Reyntjens 2015; Prunier cité par Capitaine 2016).

Nonobstant les différences en matière d'interprétations sur la légalité ou non de la candidature de Pierre Nkurunziza à l'élection présidentielle de juillet 2015, il apparaît désormais évident que la quête d'un troisième mandat par ce dernier a eu pour conséquence directe l'irruption d'une crise politique majeure au Burundi, aux implications très significatives pour le pays, la sous-région des Grands-Lacs et même au-delà. De ce point de vue, la question du troisième mandat présidentiel au Burundi devrait inévitablement intéresser la RDC, un pays limitrophe du Burundi, où un débat intense sur la possibilité, voire l'opportunité, pour le Président Joseph Kabila de rester au pouvoir au-delà de son second et dernier mandat reste à l'ordre du jour.

Cet article s'appuie ainsi sur les développements au Burundi relatifs à la question du troisième mandat présidentiel pour mener une analyse prospective sur la RDC. L'article est ainsi subdivisé en quatre sections dont la première fait une analyse dynamique du débat sur le troisième mandat du Président Nkurunziza tel qu'il s'est déroulé et se déroule encore au Burundi tandis que la deuxième section analyse les implications de ce troisième mandat pour ce pays. La troisième section se focalise sur la question du troisième mandat présidentiel en RDC, en faisant ressortir les éléments de ressemblance et de dissemblance entre ce dernier pays et le Burundi. La dernière section identifie les leçons apprises de la problématique du troisième mandat présidentiel au Burundi et leur applicabilité au contexte congolais.

COMPRENDRE LE DÉBAT SUR LE TROISIÈME MANDAT AU BURUNDI

L'Accord d'Arusha pour la Paix et la Réconciliation au Burundi (ou encore Accord d'Arusha), signé entre les acteurs socio-politiques burundais en août 2000, constitue le point de départ pour comprendre le débat actuel autour du troisième mandat présidentiel au Burundi. Pourtant, l'Accord d'Arusha lui-même ne peut s'analyser de manière adéquate que lorsque remis dans le contexte historique global du cheminement politique de la société burundaise précoloniale, coloniale et post-coloniale dont il est un produit.

Ainsi, importe-t-il de rappeler ici que le Burundi est l'un des royaumes africains précoloniaux dont la configuration territoriale avait survécu à l'assaut colonial. Mais, comme ce fut le cas presque partout dans le reste du continent africain, c'est l'administration coloniale belge (qui succéda à l'administration allemande au Burundi au lendemain de la première guerre mondiale) qui y

systématisa l'usage du référent identitaire comme canal privilégié d'interactions entre l'autorité coloniale et les « indigènes » burundais. En outre, cette administration coloniale institua une politique différentielle de distribution des « bénéfiques de la colonie » (instruction, emploi, logement...) aux populations colonisées, basée sur l'identité « ethnique ». La conséquence directe de l'application de cette politique différentielle a été la politisation des identités hutu, tutsi et twa et, ce faisant, le renforcement de ce clivage social.⁶

L'histoire des 30 premières années d'indépendance du Burundi (1962-1992) a été ainsi émaillée d'épisodes récurrents de violence politique à grande échelle perpétrée par les acteurs étatiques et non-étatiques sur fond d'idéologie « ethnique ». On eût cru voir cette tendance s'estomper lorsque le pays s'embarqua sur la voie de la démocratisation en 1992. Cependant, l'assassinat, en octobre 1993, du Président Melchior Ndadaye et de plusieurs autres autorités gouvernementales hutu arrivées au pouvoir à la faveur des élections démocratiques de juin 1993 plongea le Burundi dans une guerre civile aux conséquences politiques, économiques, sociales et humanitaires désastreuses pour le pays.

En 1998, le gouvernement burundais sous l'égide du Président Pierre Buyoya (revenu au pouvoir deux années plus tôt à la faveur d'un coup d'état) et un bon nombre de partis politiques et regroupements de la société civile optèrent pour des pourparlers politiques directs, sous facilitation internationale, en vue de résoudre la crise sévissant dans le pays. Ce fut le processus d'Arusha, duquel sortit l'accord portant le même nom signé en août 2000. Considéré comme un document très ambitieux et hautement futuriste, l'Accord d'Arusha posa non seulement les bases d'une transition inclusive au Burundi, mais détermina aussi de manière claire les principes d'un exercice démocratique du pouvoir axé sur une représentation « équilibrée » des trois « ethnies » du pays (hutu, tutsi et twa) dans les institutions nationales.

L'une des stipulations essentielles de l'Accord d'Arusha était la limitation (à deux) du nombre total des mandats consécutifs pouvant désormais être exercés par un Président de la République élu. Pourtant, en avril 2015, le parti au pouvoir au Burundi, le CNDD-FDD, désigna pour la troisième fois Pierre Nkurunziza comme son candidat à l'élection présidentielle prévue en juillet 2015. Comme

6 Il sied de souligner que certains spécialistes de la sous-région des Grands-Lacs ne considèrent pas les Hutu, les Tutsi et les Twa comme trois groupes ethniques distincts, mais plutôt comme trois groupes sociaux constitutifs d'une même ethnie (Banyarwanda ou Barundi, selon le cas). Dans ce contexte, c'est simplement leur manipulation politique au fil des années qui a fini par en faire des « identités politiques » et des « instruments de mobilisation politique ». Ils appuient leur argument sur le fait que les Hutu, les Tutsi et les Twa partagent la même langue (Kinyarwanda ou Kirundi) et plusieurs autres traits culturels ; partagent les mêmes espaces géographiques et, dans la plupart de cas, envisagent leur avenir au sein d'une même entité politique. Lire à ce sujet, Prunier (2009); Lemarchand (2009); Mamdani (1997).

mentionné plus haut, déjà en 2005, Pierre Nkurunziza avait été, pour la première fois, candidat à l'élection présidentielle qui, en conformité avec l'Article 302 de la Constitution de 2005, avait été organisée au suffrage universel indirect au niveau des deux chambres du parlement. Candidat unique, Nkurunziza remporta ces premières élections avec 91.3% avant d'être réélu (avec 91.6%) en 2010 au suffrage universel direct, en conformité avec l'Article 96 de la même constitution.

Mais, il sied de remarquer que, contrairement à l'élection présidentielle de 2005 dont les résultats furent acceptés par toutes les parties au processus, celle de 2010 fut boycottée par la majorité des partis politiques de l'opposition. Au cœur de ce boycott fut la contestation de la régularité des résultats des élections communales du 24 mai 2010 tels qu'annoncés par la Commission Electorale Nationale Indépendante (CENI) et qui donnaient le parti au pouvoir vainqueur avec 64%. N'ayant pas obtenu l'annulation du scrutin ou encore la démission du directoire national de la CENI comme ils l'avaient souhaité, ces partis décidèrent de se retirer du reste du processus électoral. La conséquence de cette décision de boycott était que le CNDD-FDD remporta largement les élections législatives (81.2% à l'Assemblée Nationale et 78.1% au Sénat) tandis que Pierre Nkurunziza, désormais candidat unique, remporta aisément l'élection présidentielle avec 91.6%. Dans ce contexte, il apparaissait donc évident que le processus électoral de 2015 allait être particulièrement tendu étant donné qu'il serait approché par les acteurs (surtout de l'opposition) sous l'angle du passif découlant des élections de 2010.

La décision du CNDD-FDD de désigner Pierre Nkurunziza comme son candidat à l'élection présidentielle de 2015 tombait donc dans un contexte politique caractérisé par un manque de confiance criant entre les acteurs en matière de gestion du processus électoral. Un élément de différence entre le processus électoral de 2010 et celui de 2015 est, sans nul doute, la forte mobilisation de la société civile dans ce dernier, aux côtés de l'opposition politique dans une alliance *de facto* pour le respect de l'Accord d'Arusha. Aux yeux de cette alliance, la candidature de Pierre Nkurunziza ne violait pas seulement la lettre de la Constitution de 2005, mais encore et surtout l'esprit de l'Accord d'Arusha ayant inspiré la rédaction de ladite Constitution.

Cependant, pour Nkurunziza et ses partisans, sa candidature était conforme à la Constitution de 2005 en ce sens que cette dernière aurait, dans son Article 302, introduit une sorte de présidence transitoire pour le premier mandat post-transitionnel (2005-2010) à travers un mode électoral « exceptionnel » (suffrage universel indirect) et même une certaine limitation du pouvoir présidentiel (le Président ne pouvait pas dissoudre le parlement) (Vandeginste 2012).

Mais, bien au-delà même du débat « intéressé » entre les « pro-Nkurunziza » et les « anti-troisième mandat », la question de la candidature du Président

Nkurunziza à l'élection de 2015 représentait un test sur l'efficacité et l'acceptabilité des institutions de l'Etat burundais post-transitionnel.⁷ Il s'agit notamment de la CENI, de la Cour Constitutionnelle et des forces de défense et de sécurité. Les aspects relatifs à ces institutions sont davantage discutés dans la prochaine section. Néanmoins, il y a lieu de préciser qu'étant donné que le Code électoral du 3 juin 2014 promulgué en remplacement du Code électoral du 18 septembre 2009 ne confère à la CENI qu'un pouvoir de contrôle administratif des dossiers de candidature, c'est la Cour Constitutionnelle seule qui est habilitée, de par la loi burundaise, à se prononcer sur la légalité ou non d'une candidature (Vandeginste 2012; Vandeginste 2014b, pp. 8-11). Et après avoir été approchée par le bureau du Sénat à ce sujet, la Cour rendit son verdict le 5 mai 2015 selon lequel elle ne trouvait aucune entrave à la candidature de Nkurunziza à l'élection présidentielle de juillet 2015. Dans ce verdict, les juges reconnaissent que l'Accord d'Arusha ne prévoit que deux mandats présidentiels et que cela était bien l'intention des négociateurs desdits accords. Mais, ils évoquent un contexte de compromis à un moment où l'esprit des Burundais n'était pas « *apaisé* » et estiment, par conséquent, que « le flou entretenu dans l'Article 302 a ouvert la possibilité d'un troisième mandat pour le président, [étant donné] que son premier mandat était un mandat spécial » (Radio France International 2015). A cet effet, « le renouvellement une seule et dernière fois de l'actuel mandat présidentiel au suffrage universel direct pour cinq ans n'est pas contraire à la Constitution du Burundi » (Ndikumana et Vincenot 2015).

Cependant, quoique l'instance suprême, légalement compétente en matière d'interprétation de la Constitution, la Cour Constitutionnelle ne put faire l'unanimité au sein d'elle-même,⁸ moins encore au sein de la classe socio-politique burundaise et son arrêt mentionné ci-haut fut immédiatement rejeté par le camp anti-troisième mandat.

7 Vandeginste (2012, p. 6) estime qu'il était « très encourageant de voir que le débat sur l'éligibilité du Président Nkurunziza aux élections présidentielles de 2015 est abordé dans une perspective constitutionnelle. Cela semble indiquer que [...] le Burundi s'inscrit dans une dynamique de ce qu'on peut appeler l'institutionnalisation (et, plus particulièrement, la constitutionnalisation) de l'exercice et du transfert du pouvoir politique [...]. [Cette] référence quasi-automatique au besoin de se conformer à la Constitution indique que, progressivement, le droit remplace la violence en tant que principe ordonnant l'accès au pouvoir ». Toutefois, il y a lieu d'observer que, lorsque la crise éclate en avril 2015 au Burundi suite à la candidature puis l'élection du Président Nkurunziza, certains des acteurs y opposés ne se sont pas entièrement laissés retenir par les prescrits légaux (comme l'envisageait Vandeginste trois ans plus tôt), comme l'attestent le coup d'état manqué du 13 mai 2015, la vaste campagne d'assassinats ciblés et, par-dessus tout, la décision par certains opposants d'engager une lutte armée contre le gouvernement.

8 En effet, un jour avant la publication de l'arrêt de la Cour, le vice-président de la Cour Constitutionnelle, Sylvere Nimpagaritse, dénonça la pression apparemment exercée par les autorités sur les membres de la Cour en vue d'arbitrer en faveur du Président Nkurunziza. Mis en minorité, il refusa de signer l'arrêt avant de s'exiler du pays. Lire Institute for Security Studies (2016, p. 5).

C'est dans ce contexte de malentendu juridico-politique que se tint l'élection présidentielle de juillet 2015 (mais aussi les législatives, sénatoriales et communales qui suivirent). Comme ce fut déjà le cas en 2010, les élections de 2015 furent largement boycottées par une grande partie de l'opposition (appuyée en cela par plusieurs organisations et plateformes de la société civile).

ANALYSE DES IMPLICATIONS DU TROISIÈME MANDAT DU PRÉSIDENT NKURUNZIZA POUR LE BURUNDI

Depuis la décision du Président Nkurunziza d'accepter l'investiture de son parti en tant que candidat à l'élection présidentielle de 2015, le Burundi est plongé dans une situation de crise politique ayant des répercussions dans toutes les autres sphères de la vie de ce pays. Cette section analyse les implications internes (politiques, sécuritaires et socio-économiques) et externes (régionales et internationales) de la crise burundaise.

Du Point de Vue Politique

Nonobstant ses dimensions légales significatives, la crise sévissant au Burundi autour de la candidature de Pierre Nkurunziza a pour sous-bassement une lutte pour le pouvoir politique entre les acteurs.⁹ Elle a ainsi soulevé la question de la place du droit et de son effectivité dans le nouveau paysage socio-politique burundais. Sur un plan strictement politique, la décision du Président Nkurunziza de se porter candidat à l'élection présidentielle de 2015 a plongé le Burundi dans une crise politique majeure, comme le pays n'en a pas connu depuis la fin officielle de la guerre civile en 2002. Cependant, il est important d'appréhender la crise politique burundaise engendrée par la candidature suivie de la victoire électorale du Président Nkurunziza dans ses différentes dimensions, notamment internes et externes au parti au pouvoir.

Sur le plan interne au CNDD-FDD, la question du troisième mandat du Président Nkurunziza devrait se lire en relation avec les conflits de leadership

9 Pour beaucoup de Burundais, pour la plupart vivant dans l'arrière-pays, le conflit né de la candidature de Pierre Nkurunziza est en réalité une dispute entre les « Abagetsi », c'est-à-dire les interlocuteurs des Blancs, ceux qui parlent le français et qui possèdent des véhicules, bref les membres de l'élite mais qui ne représentent que 2% de la population. Ceci explique en partie que les mobilisations populaires se soient limitées à Bujumbura et ses périphéries (Rugero 2015).

interne qui caractérisent ce parti depuis l'époque où il était encore dans le maquis.¹⁰ Au cours des années post-transition, la première grande fracture interne du CNDD-FDD s'est produite en 2007 lorsque Hussein Radjabu fut demis de ses fonctions de président du parti avant d'écopier d'une condamnation de 25 ans de prison ferme pour haute trahison.¹¹ La mise à l'écart et la « persécution » de Radjabu laissèrent des profondes séquelles traduites par l'émergence des clivages ou des factions au sein du parti. C'est l'existence de ces clivages internes qui explique, en partie, le rejet du projet de loi portant révision de la Constitution de 2005 par un nombre de députés du CNDD-FDD en avril 2014. En effet, alors que la séance de l'Assemblée Nationale fut boycottée par les deux autres partis représentés en son sein, à savoir l'UPRONA et le FRODEBU-Nyakuri, le projet de loi portant révision constitutionnelle présenté par le Ministre de l'Intérieur, Edouard Nduwimana, ne put recueillir les 4/5^{èmes} des suffrages exprimés tel qu'exigé par la Constitution du pays. Le projet recueillit 84 voix sur 106 députés, une voix de moins que les 85 nécessaires (Agence France Presse 2014). Ce bras de fer ainsi publiquement exprimé inaugura une ère de révocation de leurs postes des personnalités du parti jugés opposés au projet de maintien de Nkurunziza au pouvoir tandis que d'autres choisirent librement de démissionner et/ou de s'exiler.

Sur le plan externe au CNDD-FDD, la crise politique provoquée par la candidature de Nkurunziza à l'élection présidentielle de 2015 s'est manifestée principalement par la rupture du dialogue entre les principaux groupements politiques du pays. Dans ce contexte, la rue devint l'arène de prédilection pour le combat politique tandis que l'opposition se retirait de toutes les échéances électorales. La décision de boycott prise par les partis politiques de l'opposition – appuyés pour la cause par plusieurs plateformes de la société civile – a contribué, comme ce fut déjà le cas en 2010, à une certaine délégitimation du processus électoral.

10 En effet, encore un mouvement rebelle, le CNDD (avec sa branche armée, FDD) avait déjà connu une première scission en mai 1998 lorsque la branche armée commandée par Jean-Bosco Ndayikengurukiye écarta le front politique dirigé par Léonard Nyangoma, le fondateur du mouvement. Les combattants reprochaient alors aux politiciens leur tendance de les écarter de processus de prise des décisions importantes de l'organisation. Trois ans plus tard, le CNDD-FDD connut une deuxième scission qui se solda par l'émergence de deux groupes rebelles distincts dirigés respectivement par Pierre Nkurunziza et Jean-Bosco Ndayikengurukiye. A l'origine de cette deuxième scission fut une dispute du pouvoir entre Ndayikengurukiye (accusé d'être conciliant et distant, surtout après sa décision de délocaliser le directoire du mouvement à Lubumbashi, au sud-est de la RDC) et le secrétaire général du mouvement, Hussein Radjabu, qui incarnait une aile radicale (à laquelle appartenait Pierre Nkurunziza) déterminée à intensifier les opérations militaires sur le terrain en vue de contraindre le régime Buyoya aux négociations. Lire à ce sujet Burihabwa (2014, pp. 21-22).

11 Radjabu s'est évadé de prison au cours de la période tumultueuse précédant l'élection présidentielle de juillet 2015. Son évasion aurait été facilitée par les services de surveillance de la prison. Nul ne sait avec exactitude où il se trouverait.

Mais, de façon plus globale, c'est le processus même de consolidation de la démocratie et de la paix qui s'est retrouvé mis à mal par la décision de Pierre Nkurunziza de se présenter à l'élection présidentielle de 2015. En effet, le Burundi est en plein processus de reconstruction après plus d'une décennie de guerre civile causée en grande partie par l'accaparement du pouvoir politico-militaire et des bénéfices socio-économiques y afférents par une élite identifiée à la minorité tutsi. Dès lors, il va de soi, dans ce contexte post-conflit, que se développe, au sein d'une certaine frange de l'élite socio-politique et de la population, la perception selon laquelle le CNDD-FDD a usé de sa mainmise sur les forces de sécurité pour imposer Nkurunziza comme candidat. Cette perception semble avoir poussé une partie de l'élite politico-sécuritaire à explorer des voies anticonstitutionnelles pour résister ou faire échec à ce qu'elle perçoit comme une usurpation du pouvoir par le CNDD-FDD.

Du Point de Vue Sécuritaire

Au-delà de ses implications politiques, la décision du Président Nkurunziza de se présenter à l'élection présidentielle de 2015 a eu des conséquences sécuritaires non moins négligeables. Premièrement, la candidature de Nkurunziza a posé un problème de neutralité et de cohésion interne des forces de sécurité nationales burundaises constituées de composantes qui, naguère, se firent la guerre.¹² Mais, plus que toutes les autres « factions » des forces de sécurité burundaises, c'est la loyauté des anciens membres du CNDD-FDD vis-à-vis de Nkurunziza et de leurs autres anciens camarades en charge des institutions étatiques qui était en question.

Deuxièmement, et directement lié au premier point ci-dessus, la candidature de Pierre Nkurunziza soulevait la question de la réponse des forces de défense et de sécurité aux manifestations de contestation organisées par les forces socio-politiques de l'opposition. A cet égard, il est important d'observer que plusieurs cas de répression violente des manifestations ont été enregistrés au cours de la période de contestation autour de la recevabilité de la candidature du Président Nkurunziza. Le bilan de ces répressions et violences fait état de près de 800 morts et de milliers de blessés.

Néanmoins, il importe de souligner que la violence armée n'a pas été et n'est pas l'apanage du seul gouvernement. A plusieurs reprises et à plusieurs endroits (surtout dans la capitale Bujumbura), les forces de sécurité ont également été la cible d'attaques armées de la part de groupes non identifiés. En réponse

12 En effet, à la faveur des accords de paix successifs signés entre 2000 et 2008, l'armée burundaise actuelle comprend d'anciens éléments des Forces Armées Burundaises ou FAB (l'ancienne armée nationale à dominance tutsi) et de tous les anciens groupes armés qui avaient rejoint le processus transitionnel, y compris le CNDD-FDD et le Palipehutu-FNL.

à ces attaques les ciblant spécifiquement, les forces de sécurité ont procédé à plusieurs reprises à des bouclages, des perquisitions, des arrestations et parfois des exécutions sommaires dans des quartiers de Bujumbura considérés comme contestataires, notamment Cibitoke, Musaga, Mutakura, Ngagara, Kanyosha, Jabe, Nyakabiga et Buterere.

Les violences politiques nées des contestations autour de la candidature de Pierre Nkurunziza à l'élection présidentielle de 2015 ont également pris la forme d'assassinats ciblés dirigés contre des officiers des forces de sécurité, des acteurs politiques, des activistes de la société civile, etc. En octobre 2015, par exemple, Bujumbura avait été le théâtre des attaques à la grenade considérées comme des actes liés aux violences politiques nées des contestations du troisième mandat du Président Nkurunziza.

Enfin, il convient de mentionner la tentative de coup d'Etat perpétré le 13 mai 2015. En effet, alors que le Président Nkurunziza prenait part à une réunion extraordinaire des Chefs d'Etat et de Gouvernement de la Communauté d'Afrique de l'Est (EAC) à Dar es Salam (Tanzanie), un groupe d'officiers des forces de sécurité, dirigés par le Général Godefroid Niyombare, tenta en vain de s'emparer du pouvoir à Bujumbura. Cette tentative de coup d'Etat consacra un tournant décisif à la crise burundaise née de la décision du Président Nkurunziza de se présenter à l'élection présidentielle de 2015. Premièrement, la tentative de coup d'état a étendu le champ de contestation politique aux forces de sécurité. Deuxièmement, et directement lié au premier point ci-dessus, la tentative de coup d'Etat a introduit la dimension armée dans la panoplie des stratégies utilisées par les opposants à la candidature du Président Nkurunziza. Le gouvernement reconnaît désormais faire face à trois groupes armés dont le plus structuré et le plus connu est les Forces Républicaines Burundaises (FOREBU) dirigé par le Général fugitif Godefroid Niyombare.¹³ Troisièmement, ce sont les repréailles du régime dirigées contre les maisons de media (radio et télévision) privées dont les putschistes s'étaient servis lors de leur tentative de coup d'état. Bon nombre de ces entreprises de presse furent incendiées, leurs matériels confisqués. De manière générale, c'est l'espace de travail des medias privés qui se retrouva réduit de manière drastique, le gouvernement doutant désormais de leur objectivité et de leur impartialité.

13 Les deux autres mouvements rebelles sont les FNL (du moins sa faction opposée au ralliement d'Agathon Rwaswa aux institutions issues des élections de 2015) et la Résistance pour un Etat de Droit au Burundi – Tabara (RED-Tabara). Il est également fait mention de l'existence d'un quatrième mouvement rebelle, le CNDD-FDD, dirigé par Hussein Rujaburwa. Mais, celui-ci a toujours nié l'existence d'un tel mouvement et son implication à un quelconque groupe armé.

Du Point de Vue Socio-économique

La décision du Président Nkurunziza de se présenter en 2015 n'a pas eu que des conséquences politiques et sécuritaires. Elle comporte également des implications socio-économiques significatives. En effet, la crise née de la contestation de la candidature du Président Nkurunziza a exacerbé les tensions sociales au Burundi, avec des risques de raviver les clivages « ethniques » hutu/tutsi. Ce risque s'était accru au lendemain des assassinats ciblés contre le Général Adolphe Nshimirimana (hutu) et l'ancien Chef d'Etat-major Jean Bikomagu (tutsi). La dimension « ethnique » est souvent évoquée dans le cadre des répressions menées par les forces loyalistes dans les quartiers contestataires cités plus haut, réputés être majoritairement habités par les Tutsi.

Il convient également de signaler que l'autre conséquence sociale de la crise burundaise concerne la détérioration des relations entre les forces de sécurité et les populations civiles compte tenu du rôle joué par les premières dans la répression des manifestations populaires organisées pour dénoncer la candidature puis la réélection du Président Nkurunziza. Cependant, la conséquence sociale directe de la crise politique burundaise actuelle est le décès des civils et leur déplacement, au sein comme en dehors de leur pays. Plus d'une année depuis le début de la crise, l'on dénombre près de 400.000 Burundais ayant cherché asile dans les pays voisins, notamment au Rwanda, en RDC et en Tanzanie.

Sur le plan économique, il ne serait pas exagéré d'affirmer que l'insécurité ainsi que le déplacement des populations (surtout dans la partie nord-est du pays, frontalière au Rwanda) ne peuvent qu'avoir un impact négatif sur l'économie burundaise, basée pour l'essentiel sur l'exportation du thé et du café ainsi que sur l'agriculture paysanne. Le Fonds Monétaire International (FMI) a révélé qu'en 2015, l'économie burundaise a régressé de 7% de sa valeur de 2014¹⁴ (*The Africa Report 2016*) tandis que le budget national pour l'année 2016 montre une baisse de plus de 46% dans les dépenses de l'Etat (Nimubona et IRIN 2016). Selon Roland Rugero (2015), l'insécurité à Bujumbura a contribué à l'exode des expatriés et des organisations non-gouvernementales (ONG) qui alimentaient l'économie locale, contribuant jusqu'à 55% du produit national. Elle a, en outre, réduit la masse monétaire en circulation sur le marché, provoquant ainsi l'inflation et réduisant systématiquement la capacité d'importation de ce petit pays enclavé.

Cependant, la conséquence économique la plus significative de la crise politique burundaise est à rechercher dans les impacts des mesures de suspension de tout concours budgétaire prises contre le pays par l'Union Européenne

14 Cette contraction économique soudaine contrastait drastiquement avec la moyenne annuelle de 4,7% de croissance économique enregistrée par le Burundi depuis l'avènement de Nkurunziza au pouvoir en 2005. Lire Analo (2015).

(UE) et les autres pays occidentaux. En effet, entre 2005 et 2014, le Burundi a continuellement reçu au moins 40% de son financement budgétaire annuel de l'extérieur, particulièrement de l'Occident, atteignant la somme de 552 millions de dollars américains en 2013 (Analo 2015). C'est cette assistance budgétaire qui fait désormais défaut à l'économie burundaise depuis la décision de l'Union Européenne (UE), de la Belgique, de la Hollande et de la France de suspendre leur aide financière à ce pays. Ce groupe de pays fut plus tard rejoint par les Etats Unis d'Amérique (USA) qui ont pris, le 30 octobre 2015, la décision de suspendre le Burundi de l'Initiative AGOA (*African Growth and Opportunity Act*), privant ainsi le pays d'un revenu annuel de 4 million de dollars américains (Analo 2015).

Mais, bien au-delà de cet appui budgétaire, les « puissances » occidentales octroient des appuis divers aux initiatives gouvernementales et surtout aux ONG burundaises dont les activités sont en berne depuis l'éruption de la crise en avril 2015.

Du Point de Vue des Relations Régionales et Internationales

Au-delà de ses implications (politiques, sécuritaires et socio-économiques) internes discutées ci-dessus, la crise politique burundaise provoquée par la réélection du Président Pierre Nkurunziza comporte également d'importantes implications pour les Etats voisins et la sous-région (des Grands-Lacs) ainsi qu'au niveau international.

Premièrement, cette crise a, à ce jour, obligé plus de 400.000 Burundais à fuir leur pays et à chercher refuge dans les pays voisins, notamment la RDC, le Rwanda et la Tanzanie. Le fait que plusieurs acteurs politiques et de la société civile du Burundi aient trouvé refuge au Rwanda ne cesse d'envenimer les relations diplomatiques entre ces deux Etats voisins. Cette situation provoque autant de colère de la part du gouvernement burundais que ces acteurs ont désormais été rejoints par d'anciens officiers des forces de défense et de sécurité, y compris ceux responsables du coup d'Etat manqué du 13 mai 2015.

Mais, bien au-delà d'une simple protestation de la part du gouvernement burundais face au laxisme apparent des autorités rwandaises à l'égard de l'activisme des exilés burundais présents sur son sol, le Burundi a, à plusieurs reprises, accusé le Rwanda d'avoir pris fait et cause pour les opposants au régime Nkurunziza. La position du gouvernement burundais en cette matière a été confortée par les révélations des experts de l'ONU enquêtant sur la RDC. Ces derniers ont attesté que des réfugiés burundais ont été recrutés et entraînés par les autorités rwandaises avant d'être envoyés à l'Est de la RDC (munis de fausses pièces d'identité congolaise leur fournies par des officiels rwandais) en route pour le Burundi pour y déstabiliser le régime (Nichols et Charbonneau 2016). Les autorités rwandaises ont totalement rejeté ces accusations.

La dégradation des relations diplomatiques entre le Rwanda et le Burundi a atteint son paroxysme en septembre 2015 lorsque le gouvernement burundais a déclaré le premier conseiller auprès de l'ambassade rwandaise au Burundi, Désiré Nyaruhirira, *persona non grata*. Le gouvernement burundais marqua davantage son désaccord avec le Rwanda en octobre 2015 lorsqu'il interdit l'accès à l'hémicycle du Sénat à l'ancien Secrétaire-Général de l'EAC, le Rwandais Richard Sezibera, quoique faisant partie de la délégation du Ministre ougandais Crispus Kiyonga qui visitait le Burundi au nom du médiateur Yoweri Museveni. Enfin, il sied de mentionner les expulsions réciproques de leurs nationaux respectifs par les deux pays soit pour des motifs de suspicion soit pour des raisons d'immigration irrégulière. Le cas le plus récent est intervenu en mai 2016 lorsque le Rwanda expulsa près de 1.500 Burundais « qui n'avaient pas de documents » (Mukantabana citée par RTBF avec Belga 2016).

C'est entre autres en prenant la mesure des implications de la crise burundaise pour la sous-région que les instances compétentes de l'EAC avaient tenu en date du 13 mai 2015, à Dar es Salam, un premier sommet extraordinaire des Chefs d'Etat et de Gouvernement consacré exclusivement au Burundi. Dans le communiqué final publié à l'issue de ce sommet (intervenue avant la tenue de l'élection présidentielle), les Chefs d'Etat et de gouvernement exhortaient les parties prenantes burundaises au dialogue et au compromis comme préalables à la tenue des élections (Mail & Guardian 2015). Cependant, il sied de rappeler que ce sommet extraordinaire des Chefs d'Etat et de gouvernement fut perturbé par la tentative de coup d'Etat manqué intervenu le même jour au Burundi. Le 31 mai 2015, un second sommet extraordinaire des Chefs d'Etat et de gouvernement eut lieu à Dar es Salam. Seuls les Présidents tanzanien Jakaya Kikwete, kenyan Uhuru Kenyatta et ougandais Yoweri Museveni étaient présents au sommet, leurs homologues rwandais et burundais ayant choisi de se faire représenter par des collaborateurs. Le sommet désigna le Président Museveni comme médiateur dans la crise burundaise. Toutefois, dans une reconnaissance voilée du manque de dynamisme dans le processus de médiation mené par le Président Museveni, les Chefs d'Etat et de Gouvernement de l'EAC ont décidé, en mars 2016, de lui adjoindre l'ancien Président tanzanien Benjamin Mkapa. Pourtant, malgré la détermination de Mkapa à faire évoluer le processus, les pourparlers inter-burundais n'ont pas à ce jour enregistré une avancée notable. En effet, le gouvernement burundais reste farouchement opposé à toute idée d'associer le Conseil National pour le Respect de l'Accord d'Arusha et de l'Etat de Droit au Burundi (CNARED) aux discussions, l'accusant d'abriter dans ses rangs des terroristes, c'est-à-dire les éléments impliqués dans la violence armée. Mais, en réalité, il s'agit là d'une stratégie réfléchie de la part du gouvernement, tirant

avantage de l'équilibre des forces sur le terrain qui n'a cessé depuis fin 2015 de pencher en sa faveur.¹⁵

Sur le plan international, il sied de noter que la question du troisième mandat du Président Nkurunziza a précipité la détérioration des relations entre le Burundi et la plupart de ses partenaires occidentaux, plus particulièrement l'UE, la Belgique et les Etats Unis d'Amérique (USA). En effet, comme souligné plus haut, depuis la réélection de Nkurunziza en juillet 2015, l'UE, la Belgique, les USA et d'autres Etats occidentaux se sont engagés dans un processus de réduction de leur assistance financière en faveur de ce pays. Et au-delà de l'assistance bilatérale directe, l'UE a également décidé de suspendre son appui au Burundi même dans certaines institutions intergouvernementales auxquelles le Burundi est membre. C'est le cas de l'EAC où le Burundi s'est vu suspendu d'activités et autres programmes financés par l'UE. Cette situation a contribué à la détérioration des relations entre le Burundi et le Rwanda, le premier soupçonnant une mainmise du second sur le choix de l'ancien Secrétaire Général de l'EAC Richard Sezibera – un ressortissant rwandais – d'obtempérer aux injonctions de l'UE.

En ce qui concerne les relations entre le Burundi et l'ONU, il est important de noter que le Secrétaire-Général Ban Ki-Moon avait, dès avril 2015, dénoncé l'initiative du Président Nkurunziza de briguer un « troisième » mandat qu'il considérait comme contraire aussi bien à la constitution burundaise qu'aux Accords d'Arusha. Au regard de la radicalisation des positions à l'approche du scrutin, Ban Ki-Moon donna mandat à son envoyé spécial pour la sous-région des Grands-Lacs, Saïd Djinnit, pour mener une mission de facilitation auprès des parties prenantes burundaises. Cependant, Djinnit s'est vu récuser par les opposants au « troisième » mandat, l'accusant de rechigner à la position de Ban Ki-Moon qui, déjà, condamnait sans équivoque l'initiative de Nkurunziza. Saïd Djinnit fut alors remplacé par Abdoulaye Bathily en sa qualité de Représentant Spécial du Secrétaire-Général de l'ONU pour l'Afrique centrale et Chef du Bureau des Nations Unies pour l'Afrique centrale (UNOCA). Ce dernier fut, à son tour, récuser par le gouvernement burundais, l'accusant de bafouer la souveraineté du Burundi.

15 Lire à ce sujet Institute for Security Studies (2016). Mais, en plus de cette stratégie du gouvernement mentionnée ci-dessus (ou ce que d'aucuns ont qualifié de son inflexibilité), d'autres raisons ont contribué et contribuent à bloquer les efforts de dialogue sur la crise burundaise, notamment l'attitude peu conciliante des forces socio-politiques de l'opposition au début de la crise, le manque de cohésion et de stratégie commune entre lesdites forces (symbolisé par les divisions continues au sein des plateformes qu'elles mettent en place), les disputes entre les Etats membres de l'EAC (notamment le Rwanda et la Tanzanie ainsi qu'entre le Rwanda et le Burundi) sur la crise burundaise ainsi que l'échec des approches utilisées par l'Union Africaine (UA) et l'Organisation des Nations Unies (ONU) en vue de résoudre la crise. Lire, par exemple, Okiror (2016) ; Charnas (2015).

L'on ne peut pourtant clore ces développements sur les relations entre le gouvernement burundais et la communauté internationale sans parler de l'Union Africaine (UA). Dès le départ, la Présidente de la Commission de l'UA, Nkosazana Dlamini-Zuma, avait dépêché son envoyé spécial, Edem Kodjo, au Burundi. Cependant, les efforts de l'équipe dirigée par Kodjo – qui incluaient des rencontres avec tous les protagonistes burundais, y compris le Président Nkurunziza lui-même – ne connurent pas de succès notable. A la longue, l'UA inscrivit son effort dans le cadre plus large de l'Equipe Conjointe Internationale de Facilitation (ECIF) aux côtés de l'ONU, de l'UE et des USA.

En outre, l'UA avait préconisé de déployer une équipe d'experts en droits de l'homme et en matière sécuritaire en vue d'évaluer la situation sécuritaire du pays avant les élections. Cette offre fut rejetée par le gouvernement burundais. Plus tard, l'UA a décidé, à l'instar de l'UE, de ne pas envoyer d'équipe d'observateurs à l'élection présidentielle de juillet 2015 au Burundi pour des raisons de sécurité. Enfin, en application d'une décision prise lors du Sommet ordinaire des Chefs d'Etat et de Gouvernement de l'UA en janvier 2016, une équipe de cinq Chefs d'Etat s'était rendue au Burundi en février 2016. Conduite par le Président sud-africain Jacob Zuma, cette délégation « de haut niveau » comprenait également les Présidents Macky Sall du Sénégal, Ali Bongo du Gabon et Mohamed Ould Abdel Aziz de la Mauritanie ainsi que le Premier Ministre Ethiopien Hailemariam Desalegn. Dans un communiqué publié le 29 février censé sanctionner la visite des Chefs d'Etat, l'UA invitait « toutes les parties prenantes de la crise burundaise à prendre part au dialogue, sans préconditions, et dans le strict respect de l'Accord d'Arusha pour la paix et la réconciliation ».

LA QUESTION DU TROISIÈME MANDAT PRÉSIDENTIEL EN RDC: RESSEMBLANCES ET DISSEMBLANCES AVEC LE BURUNDI

Comme souligné plus haut, l'objectif de cet article consiste à analyser les développements autour de la question du « troisième » mandat présidentiel successif au Burundi. Il s'agit par ailleurs d'en dégager les leçons applicables à la RDC dans le contexte du débat actuel sur la nécessité ou non pour le Président Kabila de se retirer au terme de son second et dernier mandat. Tout en reconnaissant qu'il existe plusieurs facteurs de similitude permettant une comparaison entre le Burundi et la RDC, cette section dégage également des éléments de dissemblance entre les deux pays, relevant ainsi la spécificité de chacune des situations.

Tableau 1
Burundi et RDC – chronologie comparée

Burundi	RDC
<ul style="list-style-type: none"> ▪ 1962 – Indépendance ▪ 1963 – Assassinat du Premier Ministre et Prince Louis Rwagasore ▪ 1966 – Coup d’Etat et prise du pouvoir par le Capitaine Michel Micombero ▪ 1992 – Fin du parti unique et amorce du processus de démocratisation ▪ 1993 – Elections démocratiques, assassinat des dignitaires hutu et début de la guerre civile ▪ 1996 – Coup d’Etat et retour de Major Pierre Buyoya au pouvoir ▪ 1998 – Début des négociations d’Arusha ▪ 2000 – Signature de l’Accord d’Arusha et mise en place d’une transition basée sur le partage du pouvoir (institutions civiles et forces de défense et de sécurité) ▪ 2005 – Promulgation d’une nouvelle constitution et premières élections démocratiques post-transitionnelles jugées transparentes et crédibles par tous les observateurs nationaux et internationaux ▪ 2010 – Deuxièmes élections démocratiques post-transitionnelles boycottées par une large frange des partis politiques de l’opposition 	<ul style="list-style-type: none"> ▪ 1960 – Indépendance ▪ 1961 – Assassinat du Premier Ministre Patrice-Emery Lumumba ▪ 1965 – Coup d’Etat et prise du pouvoir par le Général Joseph-Désiré Mobutu ▪ 1990 – Fin du parti unique et amorce du processus de démocratisation ▪ 1993 – Première guerre de Masisi (Nord-Kivu) entre populations d’expression kinyarwanda et les Hunde (et communautés « alliées ») sur fond de conflits fonciers et de luttes de positionnement politique ▪ 1996 – Début de la « guerre de libération » et prise du pouvoir par l’AFDL en mai 1997 ▪ 1998 – Début de la « deuxième guerre » ▪ 2002 – Signature de l’Accord Global et Inclusif précédée, une année plus tôt, par l’assassinat de Laurent-Désiré Kabila et suivie, une année plus tard, par l’ouverture d’une transition basée sur le partage du pouvoir (institutions civiles et forces de défense et de sécurité) ▪ 2006 – Promulgation d’une nouvelle constitution et premières élections démocratiques post-transitionnelles jugées transparentes et crédibles par tous les observateurs nationaux et internationaux ▪ 2011 – Deuxièmes élections démocratiques post-transitionnelles émaillées d’irrégularités, jugées peu crédibles par plusieurs observateurs nationaux et internationaux et aux résultats contestés par des acteurs politiques de l’opposition et même de la majorité au pouvoir

Source : Compilation des auteurs

*Ressemblances**– Il s’agit bien d’un « troisième » mandat*

Sur un plan strictement juridique, il a été dégagé plus haut que, malgré l’arrêt de la Cour Constitutionnelle de mai 2015, la polémique sur la légalité de la candidature du Président Nkurunziza perdure.

Mais, au-delà de ces interprétations juridiques divergentes, il sied de souligner que, d’un point de vue strictement politique, la candidature de Pierre Nkurunziza à l’élection présidentielle de juillet 2015 constituait bel et bien un cas de « troisième » mandat successif d’un Président de la République. C’est cette perception qui, déjà, en 2014, avait poussé le CNDD-FDD à envisager la possibilité d’une révision constitutionnelle à travers le projet de loi présenté sans succès par le Ministre de l’Intérieur de l’époque, Edouard Nduwimana, à l’Assemblée Nationale (voir supra). Ce projet proposait, entre autres, la suppression du principe de limitation du nombre de mandats consécutifs devant être exercés par un Président de la République au Burundi. Et, c’est seulement lorsque ledit projet de loi ne put recueillir les 4/5^{èmes} de votes requis par la Constitution en la matière que le Ministre de l’intérieur affirma avec force que les idéaux chers au parti au pouvoir contenus dans le projet de loi seraient réalisés par d’autres voies, y compris le référendum constitutionnel si nécessaire (Agence France Presse 2014).

Contrairement au Burundi, le sous-bassement juridique de la qualification d’un éventuel troisième mandat en faveur du Président Kabila ne laisse planer aucune ambiguïté du fait de la clarté des stipulations juridiques en la matière. En effet, contrairement à la constitution burundaise qui recèle une disposition transitoire et exceptionnelle en matière de mandats présidentiels, la constitution congolaise du 18 février 2006 dispose clairement en son Article 220 que le mandat présidentiel de cinq ans, renouvelable une fois (tel que prévu par l’Article 70), ne devrait jamais faire l’objet d’une quelconque modification. Dans ce contexte, contrairement au parti au pouvoir au Burundi qui a pu exploiter une ambiguïté constitutionnelle réelle pour conférer un mandat additionnel au Président Nkurunziza, une telle hypothèse en RDC buterait clairement sur un obstacle constitutionnel. Dans ce dernier pays, seule une modification constitutionnelle majeure (modifiant la nature du régime politique, y compris la modalité même de l’élection présidentielle, par exemple) ou la promulgation d’une constitution entièrement nouvelle permettrait au Président Kabila de rechercher un mandat supplémentaire au-delà de 2016.

– Il s’agit d’un pays « post-conflit » aux équilibres de pouvoir délicats

Les consultations électorales de 2016 en RDC devaient constituer, comme ce fut le cas avec les élections de 2015 au Burundi, les troisièmes échéances électorales « post-conflit » après celles de 2006 et de 2011. Le deuxième point de similitude entre le Burundi et la RDC en ce qui concerne l'analyse de la question du « troisième » mandat présidentiel est qu'il s'agit là de deux pays « post-conflit ». En effet, tout comme le Burundi sombra dans la guerre civile à partir de 1993 sur fond d'échec du processus de démocratisation amorcé dans ce pays une année auparavant, la RDC se retrouva elle-même, à partir de 1996, en proie à une série de guerres hybrides aux dynamiques à la fois internes et externes sur fond d'enjeux liés à l'impasse du processus de démocratisation, à l'accès au pouvoir, à la sécurité aux frontières, à la domination régionale ainsi qu'aux intérêts économiques et géostratégiques des acteurs étatiques et non-étatiques impliqués.

A la différence de la première guerre (1996 – 1997) qui connut une victoire des rebelles sur les forces loyalistes, la deuxième guerre (1998 – 2003) nécessita, comme ce fut le cas au Burundi, une médiation internationale en vue d'une fin négociée. En conséquence, le Burundi et la RDC passèrent par des mécanismes transitionnels inclusifs de la plupart de protagonistes et chargés de la double mission de poser les jalons de la consolidation de la paix et d'organiser les premières élections post-conflit. A cet égard, les institutions (particulièrement les constitutions) ayant régi le Burundi et la RDC depuis 2005 et 2006 respectivement représentent, dans une large mesure, des formes de compromis trouvés par les différents protagonistes nationaux comme gages de retour et de préservation de la stabilité ainsi que de la paix. Les compromis ainsi trouvés par les acteurs burundais et congolais au cours de leurs transitions respectives représentent des équilibres délicats de pouvoir sur lesquels sont basées les architectures institutionnelles nationales « post-conflit ». Ces équilibres du pouvoir concernent en premier lieu les forces de défense et de sécurité de ces deux pays. Elles sont, chacune en ce qui la concerne, la résultante d'une agrégation des groupes armés divers dont certains éléments continuent à entretenir leurs alliances pré-transitionnelles. En outre, la situation sécuritaire de ces deux pays est davantage rendue difficile du fait que les processus de démobilisation, désarmement et réinsertion (DDR) qui y ont été mis en œuvre au terme de leurs guerres civiles respectives n'ont jamais été totalement achevés. C'est cette situation qui explique la prolifération d'armes au sein de la société burundaise, mais aussi la persistance des mouvements insurrectionnels et/ou des groupes armés en RDC, surtout dans la partie orientale du pays.

Tandis qu'au Burundi, le choix porta sur le modèle consociatif sur base d'équilibre ethnique en vue de garantir l'inclusion politique de tous les trois groupes sociaux du pays (hutu, tutsi et twa), en RDC, l'option fut levée en faveur d'un système démocratique libéral ouvert s'appuyant sur un régime semi-parlementaire et une décentralisation poussée des entités administratives

infranationales. Qu'il s'agisse donc du Burundi ou de la RDC, l'idée « soutenue » en ce qui concerne le choix des modèles institutionnels « post-conflit » semble avoir été la recherche de la plus grande représentativité populaire, de l'inclusion, voire du maintien d'une sorte de dialogue continu et de quête permanente du consensus. Il va dès lors de soi que la question d'un « troisième » mandat présidentiel consécutif dans ces deux pays soit directement vue sous le prisme du double processus de consolidation de la paix et de la démocratie à une période critique de leur histoire politique respective.

– *Il s'agit d'une opposition politique et d'une société civile dynamiques*

Un troisième élément de similitude entre le Burundi et la RDC en matière du débat sur la question d'un troisième mandat présidentiel consécutif concerne le caractère bouillant et dynamique de l'opposition politique et des organisations de la société civile dans ces deux pays. Mais, peut-être plus qu'au Burundi, le paysage socio-politique congolais est caractérisé depuis le début du processus de démocratisation en 1990 par une implosion ininterrompue des partis politiques (la plupart se réclamant de l'opposition) et des organisations diverses s'identifiant à la société civile. Le fait que ces nouveaux acteurs aient été associés aux processus de prise des décisions politiques dès la conférence nationale souveraine (1991- 1992) contribua à leur légitimation aux yeux des citoyens et des partenaires extérieurs du pays comme des acteurs incontournables de la scène politique congolaise. C'est cette même logique qui prévalut lors du dialogue inter-congolais en 2002 lorsqu'il s'était agi de trouver une solution négociée à la deuxième guerre du Congo (1998 - 2003). Non seulement les partis politiques de l'opposition et les organisations de la société civile revendiquèrent et obtinrent une représentation adéquate à ces assises, ils arrachèrent également une participation « proportionnelle » dans les institutions de la transition (2003-2006).

Comme ce fut le cas au Burundi où la décision du Président Nkurunziza a donné lieu à l'émergence de plusieurs coalitions et plateformes anti-troisième mandat, la stratégie du glissement adoptée par la majorité politique au pouvoir en RDC a également conduit à l'émergence d'une multitude de coalitions regroupant des partis politiques et des organisations de la société civile. A ce jour, la plus importante de ces coalitions est sans nul doute le Rassemblement des Forces Politiques et Sociales Acquises au Changement (aussi connu sous le nom de Rassemblement) mis en place par les regroupements politiques et les organisations de la société civile ayant pris part au Conclave de Genval (Belgique). Ils s'y étaient réunis du 8 au 9 juin 2016 en vue d'adopter une stratégie commune de résistance à la tentative présumée de la Majorité de maintenir le Président Joseph Kabila au pouvoir au-delà de la fin de son deuxième mandat en décembre 2016. Mais, au-

delà de leur volonté de regroupement, les coalitions anti-troisième mandat ainsi mises en place en RDC font, à la lumière de leurs homologues au Burundi, face à d'importantes difficultés de cohésion interne dues, entre autre, aux conflits de leadership, à l'absence de vision partagée par rapport à la lutte, aux campagnes de déstabilisation par le pouvoir en place, etc.

Mais au-delà des partis politiques de l'opposition et des organisations de la société civile, c'est au sein même du parti et/ou de la majorité au pouvoir que se recrutent aussi les « opposants » au projet du « troisième » mandat présidentiel successif aussi bien au Burundi qu'en RDC. En effet, en ce qui concerne le Burundi, c'est une partie des députés membres du parti au pouvoir, le CNDD-FDD, qui en 2014 empêchèrent l'endossement du projet de loi portant révision constitutionnelle initié par le gouvernement. Plus tard, quand le Président déposa sa candidature, des dignitaires du parti quittèrent les postes de responsabilité qu'ils occupaient dans la sphère étatique et empruntèrent la voie de l'exil. Cette fracture dans la sphère politique se transposa au sein des forces de défense et de sécurité. En effet, le Général Godefroid Niyombare et la plupart des officiers qui avaient collaboré à la tentative de coup d'Etat manqué du 13 mai 2015 étaient d'anciens officiers du CNDD-FDD lors de la guerre civile burundaise.

En RDC, des voix « dissidentes » se sont également fait entendre au sein du parti au pouvoir (PPRD), mais surtout de la Majorité Présidentielle (MP), quant à l'éventualité d'une candidature du Président Kabila aux élections de 2016. Bien sûr, le cas ayant retenu le plus l'attention des observateurs est celui du « Groupe des Sept » ou G7, cette coalition constituée de sept partis radiés de la MP pour avoir publiquement désavoué le projet d'un éventuel maintien du Président Kabila au pouvoir au-delà de son deuxième mandat. Le G7 a été plus tard rejoint par Moïse Katumbi, l'ancien gouverneur du Katanga, qui quitta aussi son poste sur fond de désaccord vis-à-vis du redécoupage administratif induit par la Loi de programmation n° 15/004 du 28 février 2015. Cette dernière, prise en application des Article 2 et 226 de la Constitution du 18 février 2006, met en place de nouvelles provinces en scindant certaines de celles qui existaient auparavant, notamment l'ancienne province du Katanga. Sur les insistances du G7 et d'autres plateformes politiques, Katumbi s'est déclaré candidat à la prochaine élection présidentielle.

– *Il s'agit d'un régime entretenant des relations difficiles avec l'Occident*

Au Burundi, un groupe d'acteurs externes s'est invité au débat sur la candidature du Président Nkurunziza : les « puissances occidentales », notamment la Belgique, la France, les USA et l'UE, auxquelles il convient d'ajouter l'ONU. Ceci ne signifie aucunement que cet article remet en question le droit, voir le devoir, des acteurs précités de se préoccuper de la question du « troisième » mandat au Burundi et

ses implications pour ce pays et au-delà. Au contraire, l'article cherche à relativiser la pertinence des prises de position par ces acteurs vis-à-vis du Burundi étant donné que lesdites prises de position ne sont pas toujours constantes comparées à celles relatives aux autres pays concernés par la même problématique.

En effet, lors de sa visite au Burundi en avril 2013, la Représentante permanente des USA à l'ONU, Samantha Power, avait clairement exprimé l'opposition de son gouvernement à une candidature du Président Nkurunziza en 2015. Ce point de vue fut davantage relayé par l'envoyé spécial du Président Obama dans la région des Grands-Lacs, Russ Feingold, et son remplaçant, Thomas Perriello. L'UE et le gouvernement belge ont également, à maintes reprises, fait part de leur opposition sans équivoque à la candidature et, plus tard, à la réélection du Président Nkurunziza à travers principalement le Représentant de l'UE en Afrique des Grands-Lacs, Koen Vervaeke, et l'ambassadeur du Royaume de Belgique au Burundi, Marc Gedopt.¹⁶ Face à ce qu'elles considéraient comme l'intransigeance du régime du CNDD-FDD, toutes ces puissances ont pris des mesures de sanction contre le Burundi. Elles avaient déjà renoncé à appuyer financièrement les élections de 2015 dans ce pays.

Bien sûr, les « puissances occidentales » ont également critiqué les tentatives d'autres Chefs d'Etat de l'Afrique centrale de se maintenir au pouvoir au-delà de leurs derniers mandats constitutionnels. Mais, nulle part cela n'a été fait avec autant de vigueur qu'au Burundi (et plus tard en RDC). Quelques faits illustrent cet argument. Par exemple, dans une lettre ouverte adressée à Peter Fahrenholtz, l'ambassadeur de l'Allemagne au Rwanda, Vandeginste (2015) relevait l'anachronisme contenu dans les déclarations du diplomate européen. Celui-ci, tout en s'estimant, au cours d'une interview, incompetent de décider qui devait être le prochain Président du Rwanda ou encore de dire si la Constitution de ce pays devait être amendée ou pas, ne s'abstenait pourtant pas de souligner qu'il était mieux pour le Président Nkurunziza de ne pas se présenter à l'élection présidentielle de 2015. Le manque de constance dans les propos du diplomate allemand relevé ci-dessus rappelle un autre anachronisme en la matière : celui du Président français François Hollande. Dans son discours devant ses pairs de l'Organisation Internationale de la Francophonie (OIF) à Dakar en novembre 2014, Hollande (2014) clamait haut et fort que la francophonie était « soucieuse des règles de la démocratie, de la liberté du vote, du respect des ordres constitutionnels et de l'aspiration des peuples [...] à des élections libres ». Pour ce faire, affirmait-il, « [I]là où les règles constitutionnelles sont malmenées, là où la liberté est bafouée, là où l'alternance est empêchée, j'affirme ici que les citoyens de ces pays sauront toujours

16 En réponse aux prises de position de Marc Gedopt, le gouvernement burundais adressa, en octobre 2015, une note verbale au gouvernement belge lui demandant de retirer son ambassadeur (Belga 2015).

trouver dans l'espace francophone le soutien nécessaire pour faire prévaloir la justice, le droit et la démocratie » (Hollande 2014). Cependant, en octobre 2015 (quelques jours avant le référendum constitutionnel au Congo), au cours d'une conférence de presse commune avec le Président malien Ibrahim Boubacar Keita à Paris, Hollande reconnaissait au Président Sassou-Nguesso « le droit de consulter son peuple... » (Barthet 2015).

Il apparaît donc à partir de l'analyse présentée ci-dessus qu'au-delà de vraies préoccupations pour la démocratie et autres valeurs nobles de gouvernance, la sévérité de la réponse des USA, de l'UE, de la France et de la Belgique envers le gouvernement burundais relève aussi des relations difficiles cultivées entre le Burundi et ces « puissances » occidentales depuis près d'une décennie. Devon Curtis (2015) estime que cette situation – manifestée depuis toujours par le bas niveau d'assistance financière apportée par l'Occident au Burundi post-conflit (comparativement au Rwanda, par exemple) – est due aux problèmes d'absence de leadership fort et d'un manque de coordination dans les différents services du gouvernement burundais, mais aussi aux relations difficiles entre le CNDD-FDD et les puissances occidentales depuis les années de la guerre civile burundaise.

En matière de relations difficiles avec les « partenaires » occidentaux, la RDC est beaucoup plus proche du Burundi que de tout autre pays dans la sous-région des Grands-Lacs. En effet, qu'il s'agisse de ce que l'on a qualifié de « contrats chinois », de questions relatives aux droits de l'homme et autres libertés fondamentales ou encore de la gestion du processus de consolidation démocratique et des fonds relatifs à la réforme du secteur de sécurité, le régime Kabila n'a cessé, non sans raison, d'essuyer des critiques acerbes de la part de ses partenaires occidentaux. De son côté, c'est depuis 2007, quelques mois seulement après sa prise de fonction en tant que président élu de la RDC, que Joseph Kabila se plaignait du manque d'engagement résolu de la part des partenaires occidentaux de la RDC en ce qui concerne le financement de la reconstruction post-conflit de ce pays. En effet, c'est en raison de cet appui inadéquat offert par les partenaires occidentaux que le gouvernement congolais avait pris l'option d'explorer un partenariat plus étendu avec la Chine (Coloma 2011).¹⁷

Tout compte fait, il est important de rappeler que les relations diplomatiques compliquées entre la RDC et ses partenaires occidentaux précèdent le débat sur l'éventualité d'une candidature du Président Kabila aux prochaines élections présidentielles. En effet, à son accession au pouvoir en janvier 2001, Joseph Kabila hérita de contentieux diplomatiques significatifs entre la RDC et les puissances occidentales laissés par son prédécesseur, Laurent-Désiré Kabila. Dans une large

17 Pour une analyse académique sur les contrats chinois, lire Marysse (2010, pp. 131-150).

mesure, les désaccords entre le régime et ses partenaires occidentaux étaient dus aux prises de positions des pays tels que les USA, la Grande Bretagne, mais aussi l'ONU et l'UE vis-à-vis de la crise congolaise. En effet, tous ces acteurs internationaux avaient soit soutenu (diplomatiquement et/ou autrement) le Rwanda et l'Ouganda dans leur campagne de déstabilisation de la RDC, soit s'étaient abstenus de la condamner même lorsque toutes les preuves requises étaient devenues évidentes.

La décision de Joseph Kabila de s'impliquer dans une issue négociée de la deuxième guerre du Congo avait contribué à dissiper les tensions entre son régime et les puissances occidentales. Il se sentait légitimé par lesdites puissances d'autant plus qu'il avait décrété plusieurs mesures financières et économiques qui rencontraient l'assentiment des bailleurs de fonds. Bénéficiant désormais d'une légitimité tant intérieure qu'extérieure, Joseph Kabila avait ainsi réussi à renverser l'échéancier de l'accord de paix qui avait été imposé à son père (Willame 2007, pp. 53&60). Le rapprochement qui en découla fit même dire à certains observateurs que l'Occident avait fini par choisir Joseph Kabila comme son interlocuteur privilégié parmi tous les acteurs de l'imbroglio transitionnel congolais. Cependant, comme les développements de l'après-transition l'ont démontré, la méfiance réciproque est restée de mise entre le régime Kabila et les puissances occidentales depuis l'élection de Joseph Kabila en novembre 2006.

C'est donc suivant ce contexte de méfiance mutuelle entre le régime Kabila et ses partenaires occidentaux qu'il sied d'appréhender la prise de position de la France, des USA, de la Belgique, de la Grande Bretagne, de l'UE et de l'ONU en rapport avec le débat sur le troisième mandat présidentiel en RDC. Comme c'est le cas avec le Burundi et partout ailleurs, l'élément déterminant dans les prises de position des puissances occidentales et de l'ONU semble ne pas être en réalité la préoccupation de consolidation de la paix et de l'enracinement de la démocratie, mais bien la nature des relations entre ces acteurs influents de la communauté internationale et le régime Kabila.

Dissemblances

– Dissemblance en termes de popularité des partis et des Présidents au pouvoir

Nonobstant les facteurs de ressemblance analysés ci-dessus permettant de comparer le Burundi et la RDC et qui rendent ce dernier pays vulnérable à ce que nous qualifions de « syndrome burundais », d'importants facteurs de différence existent entre les deux pays, rendant spécifique la situation de chacun d'eux.

De prime abord, il faut souligner que la situation burundaise, en ce qui concerne le débat sur le « troisième » mandat présidentiel, diffère de celle de la

RDC en termes de popularité des partis et des Présidents concernés. Certes, il est à ce jour difficile de faire une comparaison judicieuse entre le CNDD-FDD et le PPRD, d'une part, et Nkurunziza et Kabila, d'autre part, concernant le niveau de leur popularité dans leurs pays respectifs. Ceci est principalement dû à l'inexistence de sondages fiables en la matière dans les deux pays, mais aussi et surtout au fait que les élections organisées au Burundi en 2010 et 2015 ont été largement boycottées par la grande majorité des partis politiques de l'opposition, ce qui ne permet pas de faire des résultats de ces scrutins un indicateur fiable de comparaison.

Toutefois, les élections de 2005 au Burundi et de 2006 en RDC – toutes deux acceptées par tous les observateurs électoraux internationaux comme crédibles et transparentes – permettent de comparer le niveau de soutien des partis au pouvoir et des Présidents en fonction dans leurs pays respectifs. En effet, aux élections législatives (Assemblée Nationale) de 2005, le CNDD-FDD obtint 58.6% de suffrages contre 22.2% pour le PPRD en 2006 en RDC. Aux élections sénatoriales burundaises de 2005, le CNDD-FDD remporta 78.1% des sièges (soit 32 membres sur 41) tandis que le PPRD dut se contenter de 20.4% (soit 22 membres sur 108) aux élections sénatoriales de 2007 en RDC. Enfin, aux élections communales de 2005 au Burundi, le CNDD-FDD était crédité de 55% (soit 1.781 des sièges sur 3.225) tandis que le PPRD ne gagna les élections provinciales d'octobre 2006 en RDC qu'avec 21% (soit 132 sièges sur un total de 632) (EISA 2007).

Certes, le fait que l'élection présidentielle du Burundi en 2005 fut organisée au suffrage universel indirect n'est pas de nature à faciliter une comparaison judicieuse avec la RDC où l'élection présidentielle de 2006 eut lieu au suffrage universel direct. Néanmoins, il est important d'observer que la performance du PPRD aux élections législatives de 2011 a décliné à moins de 15%. Une indication que le parti dirigé par le Président Kabila avait, entre 2006 et 2011 perdu du crédit aux yeux d'une bonne partie de la population congolaise.

- *Dissemblance en termes de capacité de contrôle du régime sur le territoire national*

Bien que le Burundi et la RDC aient emprunté la voie négociée pour mettre fin à leurs guerres civiles respectives, leur cheminement transitionnel et post-transitionnel affiche des différences notables. Au Burundi, par exemple, depuis la signature en 2008 de l'Accord de Paix de Magaliesberg (Afrique du Sud) entre le gouvernement du Burundi et le Palipehutu-FNL dirigé par Agathon Rwasa, jusqu'en 2015, il n'y a eu ni groupe rebelle moins encore un quelconque retour à la

guerre civile. La situation de stabilité progressive mais continue qui en a découlé a permis au gouvernement burundais post-transition d'étendre son contrôle et d'affirmer son emprise sur l'ensemble du territoire national. En outre, la possibilité pour le gouvernement burundais post-transitionnel d'affirmer son contrôle sur le territoire national a davantage découlé de la nature même du CNDD-FDD, le parti au pouvoir. En effet, du fait de son passé comme mouvement rebelle, le CNDD-FDD a été capable, en renonçant à la guerre, de se projeter aussi bien sur la scène politique (civile) que dans les forces de défense et de sécurité du pays. Ceci se concrétisa à travers l'écrasante victoire de ce parti lors des élections de 2005 qui lui ouvrirent la voie au contrôle de la majorité des circonscriptions administratives du pays et à la nomination de ses anciens officiers aux postes-clés dans l'armée, la police et les services de renseignement.

La situation burundaise telle que présentée ci-haut contraste de manière significative avec celle de la RDC. Premièrement, malgré la signature de l'Accord Global et Inclusif le 17 décembre 2002 entre protagonistes congolais, des groupes armés aussi bien congolais qu'étrangers demeurèrent actifs dans les parties orientale et septentrionale du pays. Cet état des choses n'a jamais permis à l'Etat de se déployer sur toute l'étendue du territoire national. Deuxièmement, malgré l'implication d'un groupe armé tel que le RCD-Goma dans le processus de transition, certains de ses officiers militaires – majoritairement tutsi – continuèrent à s'opposer au processus d'intégration d'anciens groupes armés. C'est ce groupe qui fut derrière les violences de mai-juin 2004 à Bukavu (Sud-Kivu) mais surtout la création du Congrès National pour la Défense du Peuple (CNDP) en juillet 2006. Ce dernier mouvement rebelle fut la cause principale de la montée des violences et l'« hyper-militarisation » de la province du Nord-Kivu à partir du second semestre de 2006. Au final, les actions du CNDP causèrent la reprise des hostilités entre ses troupes et l'armée régulière entre septembre 2008 et mars 2009. Et, malgré la signature, en mars 2009, de l'Accord de Goma entre le CNDP et le gouvernement congolais, d'anciens éléments du CNDP intégrés dans les institutions firent défection à partir d'avril 2012 avant de créer le Mouvement du 23 Mars (M23). Ce groupe rebelle resta actif dans la province du Nord-Kivu jusqu'à sa défaite en fin 2013 suite à une offensive des troupes loyalistes assistées par la Brigade d'Intervention de l'ONU.

Qu'il s'agisse donc des deux provinces du Kivu ou du nord de l'ancienne Province Orientale, le gouvernement de transition (2003 - 2006) ainsi que celui qui lui a succédé après les élections présidentielles, législatives et provinciales de 2006, n'ont pas pu exercer leur contrôle sur toute l'étendue du territoire national

congolais du fait de la persistance des groupes armés dans certaines régions.¹⁸ Cette situation a été aggravée par l'état même des forces de sécurité mises en place en RDC depuis la fin officielle de la guerre en juin 2003. En effet, ces forces sont considérées comme un conglomérat de factions antagonistes aux loyautés diverses. Ces forces « nationales » sont elles-mêmes à la base de l'insécurité dans le pays à travers des cas de collaboration avec des groupes armés ou encore des gouvernements étrangers, des crimes divers (extorsions, violences sexuelles et trafic en ressources naturelles), etc. Dans le cas du M23 entre 2012 et 2013, les forces de sécurité nationales mal intégrées ont enregistré des défections des combattants allant rejoindre ledit groupe armé.

– *Dissemblance en termes des stipulations juridiques relatives au mandat présidentiel*

Un aspect supplémentaire de différence entre le Burundi et la RDC en ce qui concerne le débat sur le « troisième » mandat présidentiel concerne les stipulations juridiques y relatives. Au Burundi, c'est en exploitant une disposition exceptionnelle ou transitoire contenue dans l'Article 302 de la Constitution de 2005 que le CNDD-FDD a poussé la candidature de Pierre Nkurunziza à l'élection présidentielle de juillet 2005. Et c'est sur cette même stipulation que la Cour Constitutionnelle du pays s'était appuyée dans la formulation de son arrêt du 5 mai 2015 qui conféra une base juridique à la candidature de Pierre Nkurunziza (voir supra).

En RDC, par contre, il n'existe aucune ambiguïté juridique semblable à celle du Burundi concernant le mandat présidentiel. En effet, non seulement l'Article 70 de la Constitution du 18 février 2006 limite à deux le nombre total de mandats présidentiels consécutifs (de cinq ans) pouvant être exercés par un Président élu. Par ailleurs, l'Article 220 de la même Constitution interdit, entre autres matières, toute modification constitutionnelle visant à altérer ledit nombre total de mandats consécutifs. Ceci signifie que, contrairement au Burundi où une ambiguïté juridique a suffi pour justifier la candidature du Président Nkurunziza, seule une modification constitutionnelle majeure ou encore l'adoption d'une nouvelle

18 Le cas le plus patent de la difficulté éprouvée par le gouvernement congolais d'avoir une mainmise réelle sur l'ensemble du territoire national est reflété dans ce que l'on appelle « les massacres de Beni ». Entre octobre 2014 et août 2016, près de 500 civils Congolais ont été brutalement tués à Beni et de manière régulière par des personnes armées appartenant au groupe armé d'origine ougandaise des ADF-NALU (Forces Démocratiques Alliées - Armée Nationale pour la Libération de l'Ouganda). Un rapport publié par le Groupe d'Etude sur le Congo présente de nouvelles perspectives sur les tueries de Beni. Lire Groupe d'Etude sur le Congo (2016). Mais ce qui laisse perplexe à propos de Beni c'est de s'interroger pourquoi de telles tueries ont continué sur une si longue période dans un territoire bien identifié sans que les pouvoirs publics ne soient à mesure de les arrêter.

constitution est susceptible de permettre au Président Kabila de se présenter à la prochaine élection présidentielle.

– *Dissemblance en termes d'importance géostratégique des pays concernés*

Lors de son allocution devant le Congrès (l'Assemblée nationale et le Sénat réunis) datée du 15 décembre 2014, le Président Joseph Kabila avait fustigé les ingérences étrangères intempestives dans les questions relatives au processus électoral en RDC en affirmant que « le peuple congolais n'est pas n'importe quel peuple. Nous sommes les descendants de Béatrice Kimpa Vita et de Simon Kimbangu, de Joseph Kasa Vubu et d'Antoine Gizenga, de Patrice Emery Lumumba et de Laurent-Désiré Kabila » (Kabila 2014). Si, aux yeux de Joseph Kabila, l'exceptionnalisme congolais tient avant tout à l'héroïsme national et à la bravoure populaire, il n'en est pas ainsi dans l'imaginaire occidental (voire universel) pour lequel la RDC tient son importance géostratégique de sa position géographique particulière (au cœur de l'Afrique), mais surtout de l'étendue difficilement estimable de ses ressources naturelles.

C'est cette approche occidentale particulière sur la RDC qui avait déjà déterminé le sort de ce pays lors de la Conférence de Berlin à la fin du 19^{ème} siècle et son futur colonial. C'est également cette approche occidentale qui influença la décision de la Belgique concernant sa politique de décolonisation du Congo belge. Cette même approche avait constitué la clé de voûte de la détermination des USA et de ses alliés occidentaux à influencer pleinement sur l'action de l'ONU en RDC entre 1960 et 1964 et, de manière subséquente, à orienter et contrôler la trajectoire post-indépendance du pays.

De ce qui précède, il est donc important d'avoir à l'esprit, lorsqu'il est question d'analyser le débat sur le troisième mandat présidentiel successif, qu'il est ici question d'un pays, la RDC, hautement stratégique et qui ne laissera indifférente aucune puissance nationale et aucune organisation intergouvernementale, d'importance majeure, moyenne ou même faible.

Par conséquent, contrairement au cas burundais où il est observé une implication limitée, voire périphérique, de la part de grands acteurs internationaux, une crise éventuelle provoquée par une quête d'un troisième mandat par Joseph Kabila conduira à des interventions beaucoup plus directes de la part d'acteurs internationaux de divers horizons en RDC.

LEÇONS APPRISES DE LA CRISE BURUNDAISE ET LEUR IMPORTANCE POUR LA RDC

La section précédente a fait ressortir les éléments de ressemblance (et de dissemblance) entre le Burundi et la RDC en ce qui concerne le débat sur le

« troisième » mandat présidentiel. L'objectif visé, ce faisant, consistait à démontrer que, nonobstant les différences évidentes dues aux spécificités de chaque Etat, un éventuel processus politique visant à permettre au Président Kabila de jouir d'un mandat supplémentaire au-delà de 2016 pourrait reproduire certains des développements en cours au Burundi depuis le dépôt de la candidature de Nkurunziza.

Troisième Mandat et Déchirement Interne du Parti (et de la Coalition) au Pouvoir

Comme indiqué plus haut, la question du « troisième » mandat pour le Président Nkurunziza au Burundi a conduit à un déchirement au sein du parti au pouvoir, le CNDD-FDD. Ce déchirement interne au parti s'est vite étendu aux institutions de l'Etat, la plupart des membres du CNDD-FDD et du parti UPRONA (allié au CNDD-FDD) hostiles au projet du « troisième » mandat du Président Nkurunziza ayant soit démissionné, soit été révoqués de leurs postes.

En RDC, après de longs mois de vaine quête de consensus, la Majorité Présidentielle (MP) a enregistré sa première plus grande fracture depuis sa création lorsqu'elle décida d'exclure sept de ses partis membres sur fond de désaccord sur la question d'un « troisième » mandat en faveur du Président Kabila. Les leaders du G7 avaient écrit une lettre ouverte au Président de la République en sa qualité d'autorité morale de la MP, lui demandant de se prononcer sur les campagnes engagées en sa faveur par des membres de son parti et de la MP pour son maintien au pouvoir au-delà de 2016. A la prise de position de G7, il convient d'ajouter la démission de Moïse Katumbi de ses postes de Gouverneur du Katanga et de membre du PPRD (dont il était Président de l'Interfédéral pour le Katanga).

Troisième Mandat en Tant qu'Élément Déclencheur d'une Crise Politique Profonde

Il a été souligné dans les sections précédentes que la crise politique que connaît le Burundi depuis avril 2015 est une conséquence directe des interprétations contradictoires des acteurs burundais sur la légalité ou non de la candidature, suivie de la réélection, du Président Nkurunziza en 2015. Cette crise politique, partie du déchirement interne du parti au pouvoir, s'est exacerbée avec le boycott global du processus électoral par les partis politiques de l'opposition et plusieurs organisations de la société civile intéressées.

Cependant, c'est le glissement vers la violence armée, avec des risques de basculement du pays dans la guerre civile, qui constitue à ce jour la dimension la plus préoccupante de la crise politique en cours au Burundi.

Comme souligné dans la section précédente, la question d'une possible candidature du Président Kabila à la prochaine élection présidentielle a déjà été au centre d'une division au sein de la MP. Elle polarise davantage le débat politique entre les différentes parties prenantes congolaises. L'on distingue ainsi deux tendances diamétralement opposées et aux positions difficilement conciliables : d'une part, ceux qui appellent ouvertement au maintien de Kabila au-delà de 2016 et, d'autre part, ceux qui s'opposent farouchement à une telle éventualité.

En outre, l'on ne saurait parler d'une éventualité d'exacerbation de la crise politique en RDC en occultant la question de la persistance des groupes armés, y compris les mouvances *Mai-Mai*, à l'Est de la RDC. En effet, de tels groupes pourraient être instrumentalisés par divers réseaux politiques congolais et étrangers désireux ou encore déterminés à empêcher la réalisation du dessein de la coalition au pouvoir de maintenir le Président Kabila en place au-delà de son second mandat. Dans ce contexte, une quête éventuelle d'un « troisième » mandat par le Président Kabila pourrait également conduire le pays à une situation de guerre civile.

Troisième Mandat et Fracture au Sein des Forces de Défense et de Sécurité

Il a été démontré dans les sections précédentes que la candidature du Président Nkurunziza à l'élection présidentielle de juillet 2015 a constitué un déclencheur des divisions au sein des forces de défense et de sécurité burundaises. Ces divisions devinrent évidentes lors du coup d'Etat manqué du 13 mai 2015 lorsqu'un groupe d'officiers militaires conduits par le Général Godefroid Niyombare tenta, mais en vain, de s'emparer du pouvoir. Si certains mutins ont été arrêtés par la suite, il est important de souligner toutefois que des nombreux éléments des forces de défense et de sécurité burundaises, y compris des officiers, ont depuis lors quitté le Burundi. Ils sont désormais à l'instigation des trois groupes armés (FOREBU, RED-Tabara et FNL) déterminés à poursuivre la guerre civile contre le gouvernement burundais. Certes, les forces de défense et de sécurité n'ont pas implosé comme plus d'un observateur l'aurait pensé. Néanmoins, il reste à voir si lesdites forces conserveraient leur unité interne au cas où une guerre civile de grande envergure venait à s'intensifier dans le pays.

Plus que l'armée burundaise, les Forces Armées de la République Démocratique du Congo (FARDC) sont une somme d'anciennes entités belligérantes successivement intégrées dans le cadre du processus de réforme du secteur de sécurité lancé depuis le début de la période de transition en 2003. L'expérience au cours des quatorze dernières années en ce qui concerne la réforme du secteur de la sécurité en RDC fait ressortir un nombre d'observations. Premièrement, le processus de réforme du secteur de la sécurité reste inachevé

entre autres parce que des groupes armés demeurent actifs dans le pays et donc susceptibles d'intégration dans les forces armées nationales. En outre, le processus de réforme du secteur de la sécurité en RDC se trouve aussi confronté au problème de la prise en charge des combattants démobilisés qui se trouvent encore dans des centres d'intégration, particulièrement à l'Est du pays, et qui, pour des raisons de mauvaise prise en charge, finissent par désertier lesdits camps.

Deuxièmement, l'intégration au sein d'une même armée n'a toujours pas conduit à l'émergence de la cohésion interne au sein des forces. Au contraire, il a été observé que différentes factions ont continué à maintenir leur loyauté à leurs anciens groupes tout en appartenant à l'armée nationale. Les cas relatifs aux rebellions du CNDP et du M23 sont illustratifs en la matière.

Troisième Mandat et Montée des Tensions dans la Sous-région

Comme il en a été le cas dans les autres régions africaines ces dernières années, la conflictualité dans la sous-région des Grands-Lacs a montré une forte propension à la contagion d'un pays à l'autre. Deux dimensions essentielles méritent attention en cette matière de contagion. Premièrement, une crise ou une guerre civile dans un pays suscite des masses de réfugiés dans les Etats voisins, avec ses corollaires de problèmes humanitaires, sécuritaires et de coexistence avec les communautés d'accueil. Deuxièmement, il existe un problème réel d'ingérence des Etats voisins dans les crises ayant cours dans les Etats limitrophes soit à travers un déploiement militaire direct, le soutien politique aux mouvements rebelles ou encore par l'octroi des bases-arrière à ces derniers. C'est dans ce contexte qu'il convient de comprendre les tensions interétatiques ou régionales qui n'ont cessé d'accompagner les crises dans des régions telles que la Rivière Mano, la Corne de l'Afrique et les Grands-Lacs ces dernières années.

Dans le cas du Burundi, la crise politique dans ce pays est à la base de la détérioration des relations diplomatiques entre ce pays et le Rwanda. Le Rwanda a ouvertement accusé le Président Nkurunziza de vouloir continuer à diriger son peuple « contre la volonté » de ce dernier. De son côté, le Burundi accuse le Rwanda de soutenir les opposants au régime, y compris à travers la fourniture d'armes et l'entraînement militaire de ces derniers. La crise diplomatique rwandoburundaise s'est étendue aux instances de la Communauté d'Afrique de l'Est (EAC) en raison de la présence à leur tête, jusqu'en mai 2016, du Rwandais Richard Sezibera, exerçant en qualité de Secrétaire Général. Le Burundi l'accusait en effet de piloter un agenda pro-rwandais et, par conséquent, anti-burundais.

En ce qui concerne la RDC, il existe un précédent suffisamment illustratif en matière d'interférence d'Etats voisins tels que le Rwanda, le Burundi et l'Ouganda dans les crises congolaises. Depuis la première guerre de la RDC en

1996, les relations diplomatiques entre la RDC et ses trois voisins précités ont connu de longs moments des tensions et surtout de méfiance, même après des efforts apparents de normalisation. Alors que les tensions se sont plus ou moins dissipées entre la RDC et le Burundi, les révélations sur le soutien du Rwanda et de l'Ouganda aux rebelles du M23 constituent une indication que le temps des interférences et des tensions diplomatiques n'est pas encore entièrement révolu dans la sous-région des Grands-Lacs. A ce titre, il convient de souligner plus particulièrement les tensions nées entre le Rwanda et la Tanzanie au sujet de la rébellion du M23. En effet, l'ancien Président tanzanien Jakaya Kikwete avait conseillé au gouvernement rwandais de négocier avec les rebelles des FDLR au même titre que le Rwanda exige, ces dernières années, que le gouvernement congolais négocie avec divers groupes rebelles congolais dont le CNDP et le M23. Cette proposition suscita la colère des autorités rwandaises qui allèrent jusqu'à accuser Kikwete d'alliance avec les génocidaires. L'on sait que la Tanzanie a déployé des troupes au sein de la Brigade d'Intervention de la MONUSCO qui a participé aux côtés des FARDC à la défaite du groupe rebelle M23.

Troisième Mandat et la Montée au Créneau des Acteurs de la Communauté Internationale

Comme c'est le cas en toutes situations portant sur la paix et la sécurité internationales, la question du « troisième » mandat pour le Président Nkurunziza au Burundi ainsi que la crise politique qui en a découlé n'ont pas laissé indifférents les acteurs majeurs de la scène internationale, plus particulièrement l'UE, les USA, la France et l'ONU. Le constat général est que chacune de ces puissances a désavoué la réélection du Président Nkurunziza, imposé des formes variées de sanction au régime burundais et continue d'exercer une pression significative sur le régime pour engager des pourparlers directs avec les opposants.

Comme au Burundi, l'opposition à l'éventualité d'un « troisième » mandat en faveur du Président Kabila est devenue un point essentiel de ralliement de divers acteurs internationaux dont l'ONU, l'UE, les USA, la France, la Belgique, le Royaume Uni et même l'UA. Tous ces acteurs ont déjà ouvertement exprimé leur désaccord à une éventuelle candidature du Président Kabila à la prochaine élection présidentielle.

Mais, une différence notable entre le Burundi et la RDC en matière de rapports avec les acteurs de la communauté internationale mérite d'être soulignée. Contrairement au Burundi dont la dépendance vis-à-vis des partenaires occidentaux se limitait jusqu'en 2015 à l'assistance financière (sous forme d'appui budgétaire), la RDC est dépendante de l'Occident aussi bien en matière d'assistance financière que d'appui pour sa sécurité et sa stabilité. En effet, la RDC continue à

abriter sur son territoire la MONUSCO, une mission de l'ONU comprenant près de 20.000 membres de personnel. Cette mission est essentielle au maintien de la paix et même à la préservation de l'intégrité territoriale de la RDC. A travers son ancien chef de mission, Martin Kobler, la MONUSCO avait, à plusieurs reprises et sans la moindre ambivalence, affirmé son opposition à toute tentative de la part de la majorité au pouvoir de maintenir le Président Kabila à la tête de la RDC au-delà de 2016.

Comme souligné plus haut, une position également appuyée par la communauté internationale, la quête d'un éventuel « troisième » mandat par le Président Kabila pourrait servir de mobile à différents groupes politiques pour explorer la possibilité d'une résistance armée susceptible de prendre la forme d'une guerre civile. Sur cet aspect particulier, un problème fondamental se pose. En effet, la MONUSCO (et son prédécesseur, la MONUC) travaille en étroite collaboration avec les autorités civiles et militaires congolaises dans la mise en œuvre de son mandat extensif de stabilisation. Ceci signifie qu'en contribuant à la détérioration de la situation sécuritaire du pays, une candidature éventuelle du Président Kabila contribuera à la détérioration des relations déjà fragiles entre la MONUSCO et les autorités congolaises. Dans l'hypothèse de la naissance d'une rébellion en réponse à la candidature du Président Kabila, il se posera un problème d'engagement de la MONUSCO aux côtés des FARDC étant donné que l'ONU ne saura pas concilier sa condamnation de cette candidature et son assistance aux FARDC.

CONCLUSION

La quête d'un mandat supplémentaire par des chefs d'Etat en fin d'exercice constitue une question récurrente dans nombre de pays africains. Partout où elle a été tentée, elle a conduit à une polarisation au sein de la classe politique et même de la société en général. Partout, il s'est agi d'une confrontation entre ceux qui ont soutenu le projet et ceux qui s'y sont opposés, avec des résultats variés dû principalement aux circonstances spécifiques de chaque Etat.

Le Burundi constitue l'un des derniers pays africains où le chef de l'Etat en fonction vient de briguer un « troisième » mandat. Suite à la décision du Président Nkurunziza de rester au pouvoir, le pays est depuis avril 2015 confronté à une grave crise politique présentant des risques de basculement du pays dans une guerre civile à grande échelle.

Cet article a présenté une analyse prospective portant sur les implications pour la RDC d'une candidature éventuelle du Président Joseph Kabila à la prochaine élection présidentielle. A cet effet, il s'est servi du cas du Burundi, un pays qui présente des similitudes frappantes avec la RDC. En effet, comme au Burundi, une candidature éventuelle du Président Kabila comporterait le risque

de polariser la société congolaise ainsi que sa classe politique et de provoquer une crise politique majeure propice à l'émergence d'une guerre civile ou de foyers de violence armée dans le pays.

En outre, compte tenu de l'importance de la RDC dans les Grands-Lacs et en Afrique centrale mais aussi des relations particulièrement difficiles entre la RDC et certains de ses voisins, une telle candidature et les frictions qui en découleraient pourraient servir de prétexte aux ingérences de certains Etats de la sous-région dans les affaires internes du pays. Une candidature éventuelle du Président Kabila à la prochaine élection présidentielle pourrait contribuer à une détérioration certaine des relations diplomatiques entre la RDC et les puissances occidentales ainsi que les institutions internationales sous leur contrôle, particulièrement l'ONU, le FMI et la Banque Mondiale. Enfin, une candidature éventuelle du Président Kabila entraverait le processus de consolidation démocratique et de stabilisation dans un pays en pleine reconstruction après près de trois décennies de violence.

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TRANSNATIONALISATION POTENTIAL OF ELECTORAL VIOLENCE IN BURUNDI

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ABSTRACT

Scholars have documented a correlation between different transnational factors and players, and a changing dynamics of civil war leading to the spillover of conflict from one country to another. The effects of diffusion and escalation are the primary causes of the transnationalisation of war. This paper considers whether electoral violence is also prone to these effects and therefore to the transnationalisation phenomenon. Electoral violence carries certain features that distinguish it from general political violence. It relates specifically to electoral events, with motives and timing being the determining factors. Firstly, the article demonstrates that electoral violence prevailed over political violence in the first phases of the 2015 internal conflict in Burundi. Secondly, it shows that there is a potential transnationalisation of electoral violence in the Great Lakes region. This is due to similar regional characteristics and goals of the incumbents, the similar nature of state institutions, and regional linkages among like-minded political groups.

Keywords: electoral violence, transnationalisation, Burundi, Great Lakes region

INTRODUCTION

In the post-Cold War period internal conflicts became more widespread, especially in Africa. In the mid-1990s, nearly 35% of the countries in sub-Saharan Africa fought civil wars (Blattman & Miguel 2010, pp. 3-4). These conflicts rarely remained purely internal. Scholars have widely documented a correlation between different

transnational factors and players and the changing dynamics of civil war (Keck & Sikhik 1998; Bennet & George 2005; Cederman, Girardin, & Gleditsch 2009; Blattman & Miguel 2010). These include rebel groups with active transnational links; the flow of goods and information in the region; transnational non-state actors with diverse economic or political interests; as well as nation states using conflict-ridden societies to fight their proxy wars, which all contribute to the spillover of conflict (Salehyan 2009, p. 5; Checkel 2013, p. 1). This begs the question of whether electoral violence can also become transnationalised.

Electoral violence is defined as a sub-set of activities within a larger political conflict, part of the trajectory of violent ethnic or communal disturbances clustering around the electoral events. It is seen as the ultimate electoral fraud featuring clandestine efforts to shape electoral results. Timing and motives separate electoral violence from other forms of conflict (Höglund 2009, pp. 412-427). At the same time, a large number of conflicts in fragile states re-escalate during the electoral period. These include the 2003 elections in Nigeria when at least 100 people were killed and widespread violence erupted in the north during the 2011 elections. The 2007 Kenya elections turned violent over disputed results. Violent confrontations also escalated during the 2007 run-off in Sierra Leone and 2010 elections in Ivory Coast and Guinea (Atuobi 2010, pp. 10-15; Goré Institute 2010, p. 18).

While the electoral process can legitimise the country's governance, the competition for political power can exacerbate existing tensions in society and elevate root causes of the conflict. Recent developments in Burundi show that a seemingly internal attribute of the conflict – electoral violence – could affect the regional electoral dynamics.

The decision of Burundian incumbent President Pierre Nkurunziza to launch a bid for a third mandate provoked demonstrations which were forcibly repressed by the government. International organisations, in-country opposition as well as some actors in the president's political camp judged the mandate unconstitutional and contrary to the spirit of Arusha Peace and Reconciliation Agreement (2000) (CECAB 2015; ICG 2015c, p. 18; Nshimirimana 2015). Pre-electoral, electoral and post-electoral developments have been marred by an atmosphere of fear, intimidation and generalised political violence carried out mostly by the Imbonerakure, the youth wing of the ruling party (APRODH 2015). As a result, 127 000 Burundians fled the country during the two months of the immediate electoral period (UNHCR 2015a).

The spillover of conflict in the region is generally influenced by six elements: the character of political institutions; willingness to seek support from similar ethnic or political groups; regional level of interdependence; economic insecurity and ethnic distrust; external powers backing internal rebellion; and inability of the state to control its borders (De Maio 2010, pp. 25-44; Keller 2002, pp. 1-15).

While the current situation in Burundi continues developing into a large-scale internal conflict, the article argues that this particular sub-element – electoral violence – could equally become transnationalised with a possible spillover into the Great Lakes region.

Firstly, the argument relates to political institutions. The ability of the incumbent president to embark on a third mandate creates a dangerous precedent for the region. This assessment relates to the events of January 2015 in Democratic Republic of Congo (DRC) where popular suspicions that Joseph Kabila wanted to stay in power beyond his terms of office showed that electoral tensions could quickly escalate (ICG 2015b). Similarly, a discussion on Kagame's third term took place in Rwanda in November 2015 (*Al Jazeera* 17 November 2015).

Secondly, the Imbonerakure has been trained in DRC. At the same time, Rwanda has been providing a safe haven to the opposition fleeing Burundi due to targeted political violence (ICG 2015c, pp. 16-17). These developments indicate both a willingness to seek support in neighbouring countries by the government and the opposition, as well as the interconnectedness of regional powers.

Thirdly, Nkurunziza's discourse and targeted electoral violence have sought to exacerbate ethnic differences – the root causes of the 1994 Rwandan genocide. Already tense relations between Rwanda and the DRC may deteriorate further through the proxy support of government or opposition in Burundi.

Finally, the uncontrolled flow of refugees caused by electoral violence and intimidation further impacts on regional stability (ICG 2015c, pp. 16-17).

In the case of Burundi, this article demonstrates that electoral violence can become transnationalised. Primarily, it explains the phenomenon of the transnationalisation of conflict and subsequently underlines the characteristics distinguishing electoral violence from a general understanding of conflict. It shows that electoral violence prompted current developments in Burundi and may spill over into the wider region. The article concludes by answering the question of the transnationalisation potential of electoral violence. At the same time, it underlines the importance of drawing a line between electoral violence and broader internal conflict.

TRANSNATIONALISATION OF CONFLICT

Transnationalisation of conflict is defined as a spillover of violence in a region due to the effects of diffusion and escalation. Diffusion involves the flow of information from one state or community to another, carrying with it the potential for conflict. Escalation starts when groups form alliances across the border. Such cross-border interactions influence the risk of civil strife if specific conditions are met when particular groups feel insecure due to the emergence of one or more other groups.

The state is unable or unwilling to mitigate these tensions. The collapse of the national government, the availability of weapons, ethnic distrust combined with general insecurity, constitute aggravating factors. The threatened regime often seeks to maintain its grip on power resulting in political tensions spilling across borders in order to obtain support and secure power regionally. Thus unstable regimes may engage in a proxy war (Keller 2002, pp. 1-15).

As Christine De Maio observes (2010, pp. 27-28), the character of political institutions, willingness to seek support from cross-border groups, and the level of interdependence in the region affect the likelihood that the state could experience a civil war. The conflict becomes transnationalised as a result of insecurity and distrust should external powers back the internal rebellion; also in situations where a weak state lacks the capacity to control the flow of refugees. At the same time, De Maio proposes that governments could use internationalised conflicts to strengthen their hold on power (Keller 1998, p. 278).

Scholars have demonstrated a correlation between internal conflict and the political dynamics within the region contributing to the spillover of wars (Blattman & Miguel 2010; Salehyan 2009; Tarrow 2007; Cooley & Ron 2002; Cederman et al. 2009; Checkel 2013). In Africa especially, domestic conflicts impact strongly on sub-regional security as for example witnessed in Rwanda or DRC. The refugee flow and the cross-border movements of armed combatants led to regionalised violations of human rights (Keller 2002, pp. 1-3). The existing body of research confirms that internal conflict in unstable regions may become transnationalised. This in turn poses the question of whether electoral violence could also spill across the national borders.

Transnationalisation Potential of Electoral Violence

Electoral violence often forms part of the broader conflict, defined as a subset of activities or part of a larger conflict trajectory. Nevertheless, the phenomenon of electoral violence carries certain features that distinguish it from general political violence. Electoral violence relates specifically to electoral events. As Höglund (2009, pp. 412-417) emphasises, motive and timing are the determining factors. Electoral violence could, nevertheless, carry elements of ethnic or community conflict, or exacerbate existing tensions. It includes threats and intimidation aimed at influencing voters or candidates and may result in political assassinations. These features of electoral violence could be interpreted as electoral fraud, with the intention of malevolently influencing electoral results.

Electoral violence can occur in all phases of the electoral cycle, but mostly in an immediate electoral period. The electoral arena becomes an arena of violent contestation particularly if incumbents attempt to extend their grip on power

illegally. Elections may be adjourned due to electoral violence in the pre-electoral phase (Höglund 2009, pp. 412-414; Bardall 2010).

Electoral violence during the electoral period in Burundi exacerbated tensions. Regional implications demonstrated that timing and motives reject ethnic, communal or any other general type of conflict at this stage. Equally, specifics of the current conflict show that electoral violence has spillover potential.

RECENT ELECTORAL DEVELOPMENTS IN BURUNDI

President Nkurunziza's first term in office ended in 2010 resulting in a crackdown on the opposition, forcing them to flee. Nkurunziza's second term was considered a further setback for democracy as the government launched a targeted campaign of repression against the re-structured opposition, and restricted political freedoms through a systemic manipulation of laws. With its attempt to monopolise state institutions through futile efforts to change the constitution, abandon the power-sharing provisions of the Arusha Peace Agreement, create a fictitious opposition and manipulate institutions, the government lost legitimacy in the eyes of its electorate (ICG 2015c). Had the 2015 elections been inclusive, that could have been a fresh start for Burundi; however the electoral process was marred by worrying developments (Thibon 2014, p. 3). The president's decision to bid for a third term provoked popular resistance, including among some cadres within his own political party, government and security forces (CECAB 2015; ICG 2015c, p. 18). Prominent opposition and civil society leaders launched an open resistance to the third mandate (Nshimirimana 2015). The electoral process became an arena of confrontation that resulted in a deteriorating electoral climate significantly worse than during the 2010 electoral problems (ICG 2015c, pp. 1-2).

The 2010 elections saw a strategy to eliminate the opposition. Nkurunziza aimed to divide the political movement, giving rise to the phenomenon of Nyakurisation (Ntamahungiro 2014, pp. 6-8).¹ Amending the Law on Political Parties (2011) enabled the government to exploit political differences and weaken the opposition. As a consequence, some strong opposition candidates had to run in the 2015 election as independents. In addition, numerous legal provisions allow for Nyakurisation and a weakening of the opposition. For example, according to the law on political parties (Article 10 and 62) the Minister of Interior can officially interfere in the internal organisation of political parties or suspend all activities of

1 The Nyakurisation technique: a faction within a political party contests the leadership and then leaves to form a splinter party subsequently recognised by the Minister of Interior. The original leaders, real political opponents, are allowed to contest elections only as independent candidates. As such, opposition leaders have regularly been refused the right to hold meetings or organise political campaigns (FIDH and Ligue ITEKA 2015, p. 14).

the political party should the maintenance of public order and safety so require. The law on the status of opposition (Article 21) stipulates that false statements and defamatory language tending to disturb peace and security can lead to prison sentences of between 30 and 90 days. This legal provision was widely misused during manifestations against the third mandate. Furthermore, the registration of new political parties faced a long and complex procedure taking up to eight or nine months. This provision has often prevented splinter political groups from registering in time for elections. Any coalition active outside of the electoral period can be deemed illegal by the government. (Article 8 defines coalitions as momentary gatherings of two or more parties established for the electoral period, thus declaring as illegal any coalition active outside the electoral period.)

The exploitation of incumbency further led to controversial re-appointments to the Independent National Electoral Commission (INEC). Both chairperson and spokesman were perceived to be loyal to the president and therefore rejected by the opposition. As a consequence, INEC became largely discredited. Lack of opposition representation in provincial election commissions, selective distribution of voter cards and constituency delimitation disadvantaging certain groups further diminished public confidence in the electoral process (ICG 2015c, pp. 3-5; ICG 2012, p. 18).

The first demonstration against electoral manipulation started in March 2014 and led to violent confrontation between opposition supporters and security forces. The MSD (Movement for Solidarity and Development) leader Alexis Sinduhije went into hiding and the MSD was suspended for four months on insurrection charges. This incident started attempts to neutralise opposition leaders through the judiciary (CG 2015c, p. 6). Any peaceful resistance against the government brought insurrection charges, a criminal offence punishable by the Penal Code (UNSC S/2014/550 [2014] section 8). On 12 August 2014, in contradiction to the Electoral Code, INEC declared it would not accept candidacies of party leaders subjected to legal proceedings (ICG 2015c, p. 6; Vandeginste 2014a). At least five prominent opposition leaders, including Agathon Rwaswa, the strongest rival to Nkurunziza, were subjected to doubtful legal proceedings. Even though finally allowed to run, the opposition was unable to compete on a level playing field (ICG 2015c, pp. 6-23; FIDH and Ligue ITEKA 2015, pp. 12-15; UNSC S/2014/550 [2014] section 11; Thibon 2014, p. 8; Ntamahungiro 2014, p. 3).

Ahead of the elections, large-scale peaceful demonstrations against the third mandate and the systemic manipulation of the electoral process started on 26 April 2015 in Bujumbura. Lawyers of the Burundi Bar Association as well as human rights activists confirmed (in personal interviews with the author, July/August 2015) that continuous violent repression, including grave violations of human rights by the security forces and Imbonerakure, marked the pre-electoral period.

This entailed the threat of systematically arresting protesters, including prominent civil society and opposition leaders. Several hundred people were arbitrarily detained before the parliamentary elections on 29 June (EU EOM Burundi 2015). At the same time, the line between party and state violence became blurred, notably with the ruling party allegedly arming the Imbonerakure to intimidate voters (ICG 2015c, pp. 9-10). The prevailing culture of impunity manifested itself again during the electoral period and directly contributed to an increased flow of refugees to neighbouring countries (UNHCHR 2015a).

Following the assassination on 23 May 2015 of Zedi Feruzi, president of the Union for Peace and Development (a small opposition party) reports of intimidation and threat against civil society and opposition leaders increased dramatically, forcing many into exile. At the same time criminal activities carried out by the Imbonerakure throughout the country were on the rise, particularly in the period immediately preceding the 29 June parliamentary elections (EU EOM Burundi 2015).

The widespread violation of human rights during the electoral period continued beyond the 2015 elections. As a result, at the end of December 2015 the African Union considered the deployment of a prevention and protection mission (MAPROBU), strongly opposed by Nkurunziza's regime (Williams 2015). At the same time, the opposition allegedly formed the Republican Forces of Burundi (FOREBU) with the aim of deposing Nkurunziza. Subsequently, Nkurunziza refused to participate in the peace talks scheduled for January 2016 thus pushing Burundi to the verge of civil war (ICG 'Crisis Watch Database' 2016).

Electoral Violence: Motives and Timing

Overall developments evince aspects of an internal conflict between protesters and the government that has led to a high number of refugees. A tense situation beyond the electoral period continues at present and has developed into large-scale internal conflict. Both the electoral violence preceding the current internal civil disturbances and similarly the conflict itself carry the potential for transnationalisation.

Following Höglund's hypothesis, electoral violence differs from other aspects of conflict in terms of motives and timing. In 2015, Burundi was set to conduct three types of elections – legislative and local on 26 May, and presidential on 26 June (Decret N. 100/71 [2015]). While voter registration started at the beginning of February, a period of contestation began only with the registration of candidates. For the legislative and local elections, candidates had to have presented their documents to INEC from 30 March. INEC had until 2 May and

21 April respectively to publish definitive lists.² Registration of candidates for the presidential election was supposed to have taken place from 30 April to 25 May. On 25 April, the ruling CNDD-FDD (National Council for the Defence of Democracy) announced that Nkurunziza would contest the election for the third time (FIDH and Ligue ITEKA 2015, p. 8). The resulting widespread demonstrations against his candidacy started just one day later.

Motives

Electoral violence commonly erupts if incumbents resist ceding power. Article 7 of the Arusha Peace Agreement and Article 96 of the Constitution stipulate that the president is elected directly for a five-year term renewable once, thus limiting the president's years in office to ten (Arusha Agreement [2000] Article 7.3; Burundi Const. [2005] Art. 96). Nkurunziza was first elected in 2005 completing his second term in 2015.

On 26 April 2015, fourteen senators raised the issue of the proposed third mandate with the Constitutional Court requiring the interpretation of Articles 96 and 302 of the Constitution. The proponents of the third term argued that the number of mandates must take into account the mode of election. In 2005, during the immediate post-transition period, President Nkurunziza was elected indirectly by Parliament according to Article 302 of the Constitution (Constitutional Court RCCB 303 [2015]; Vandeginste 2014b). The Constitutional Court approved the third mandate on 5 May on the basis of Article 302. Given that Nkurunziza had not been elected directly in 2005, it was suggested that the first term would not count (Constitutional Court RCCB 303 [2015]). It is worth mentioning that the vice-president of the Constitutional Court fled the country on 4 May denouncing political pressure on judges, including death threats (Ndikumana 2015; Nimpagaritse & Parmentier 2015).

This situation underlines the first motive indicating electoral violence rather than an internal conflict. The president manipulates the laws and legal institutions to secure his third mandate by all possible means. The brutal repression of peaceful demonstrations against his third term in the pre-electoral period pinpoints the case of election-related violence linked to the presidential contest.

Furthermore, as mentioned above, in order to remain in power and increase control over the country the president arbitrarily attempted to amend both legislation and the Constitution. The amendments aimed to restrict the opposition and abandon the power-sharing agreement between three ethnic groups, thereby depriving the Arusha Agreement of its sense (ICG 2012). On 21 March 2014, the government's attempt failed due to the vote of the UPRONA political party, which

2 For more information consult electoral calendar at <http://www.ceniburundi.bi>.

was normally allied to the ruling CNDD-FDD (UNSC S/2014/550 [2014] section 6; Ntamahungiro 2014, p. 4). To pass the amendment, the president would need the qualified majority of four-fifths (85 votes) of the National Assembly. After the 2010 elections, despite the opposition's boycott, CNDD-FDD only managed to secure 81 seats and therefore not enough to change the Constitution unilaterally (ICG 2011). Intimidation and threats against the opposition candidates, including the murder of opposition leaders, as well as the phenomenon of Nyakurisation, were an intentional collective motive to eliminate the opposition and win enough seats to control the National Assembly.

Therefore the motivation for in-country violence was undoubtedly linked to the electoral process with the explicit aim of the president retaining power. The manipulation of the electoral process was observed during the immediate pre-electoral period as well as in the longer term and throughout the wider electoral cycle.

Timing: Pre-Electoral Period

The second aspect signifying electoral violence is that of timing. From the start of electoral preparations, notably the registration of voters in February 2015, credible reports indicated that the Imbonerakure pressured opposition voters to support the ruling CNDD-FDD. During March and April the security situation in provinces worsened due to the mobilisation of Imbonerakure and continuous threats against the wider population. Burundians started to flee the country (APRODH 2015).

In April the atmosphere of fear became omnipresent with rumours circulating that everyone opposed to Nkurunziza's third mandate would be executed. Demonstrations against the third term began in March with smaller gatherings conducted by supporters of the five opposition parties as well as some members of the ruling CNDD-FDD. The police repressed these demonstrations with tear gas (APRODH 2015). By 17 April, more than 5 800 Burundians had fled the country amid fear of violence (*Al Jazeera* 17 April 2015).

The start of the electoral campaign in May 2015 was marked by the limited presence of the opposition. The only visible party was the ruling CNDD-FDD and occasionally their ally UPRONA. The demonstrations that started on 26 April continued and gradually led to large-scale violations of human rights that included torture and the arbitrary arrests of political opponents (APRODH 2015).

Claiming the protection of the Constitution and the spirit of the Arusha Agreement, a section of the army led by General Nyombare orchestrated a military coup on 13 May. This attempt failed and resulted in the imprisonment of presumed coup-plotters and stronger repression of the opposition. By 31 May

an additional 60 000 Burundians had fled the country seeking refuge in Rwanda, DRC, Tanzania and Uganda (UNHCR 2015b).

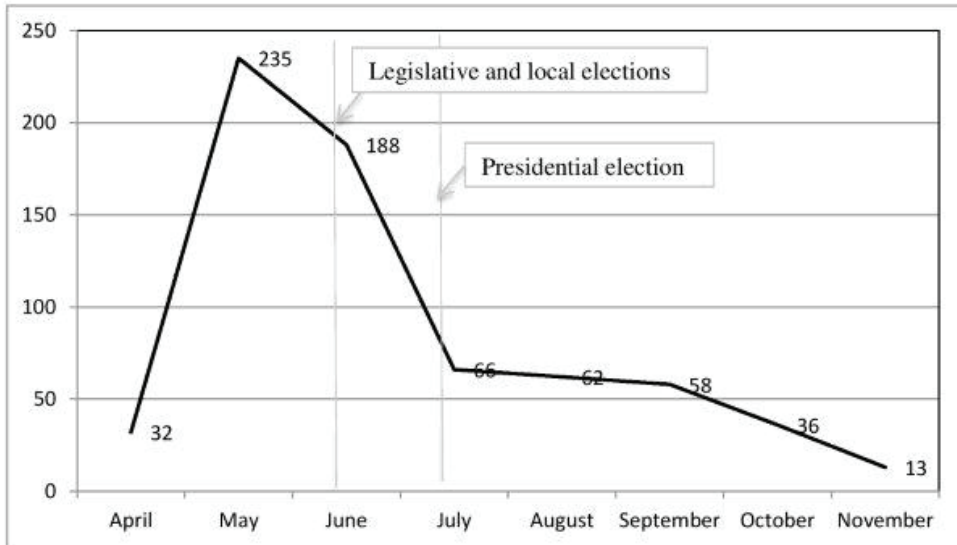
The demonstrations against the third mandate continued until June 26. An increase in electoral violence, along with the related withdrawal of the international electoral observers amid unfulfilled conditions for conducting credible elections, forced the government to postpone legislative and local elections to 29 June (EU EOM Burundi 2015). The withdrawal of observers as well as the demonstrations against alleged illegal candidacy further suggested that violence was linked to the elections in a highly contested political environment. The repression of the opposition intensified during the immediate pre-electoral period. People either fled the country or went into hiding (APRODH 2015).

Moreover, prominent persons within the government who opposed working under pressure started to flee. By the end of May, both the vice-president of INEC, Spes Caritas Ndironkeye and the commissioner of INEC Illuminata Ndabahagamyé resigned from their positions. They were joined by some representatives of the lower level election administration protesting at the government's alleged plan to steal the elections (APRODH 2015). Burundi's vice-president Gervais Rufyikiri together with the president of the National Assembly Pie Ntavyohanyuma fled the country on 25 June. Due to mounting political pressure and threats, many journalists, lawyers and human rights activists also left Burundi.

Before election day the number of Burundians in exile increased to 109 275. UNHCR reports indicated that the number of new Burundi refugees increased rapidly on 27 and 28 June (APRODH 2015; UNHCR 2015b). Various APRODH activists based in the provinces and some Burundi Bar Association lawyers confirmed in phone conversations with the author (July/August 2015) that as of the end of June 2015 more than 700 people were in prison on doubtful insurgency-related accusations.

Burundian citizens and human rights representatives in the provinces indicated that intimidation and arbitrary arrests by the Imbonerakure increased drastically during the immediate pre-electoral period and also on election day itself (phone interviews with the author, July/August 2015). Equally, the Ushahidi database³ registered a significant increase (about 280%) of verified reports of electoral violence during the immediate pre-electoral period. Figure 1 below shows the registered cases of electoral violence before and after the elections.

³ Ushahidi database was established to collect verified cases of electoral violence reported throughout the country during the electoral period.



Data source: Ushahidi, Elections Burundi 2015

Figure 1: Number of cases registered during the immediate pre-electoral period

Timing – Election Day Violence

A similarly tense atmosphere continued throughout the presidential election, which finally took place on 21 July 2015. Due to ongoing arrests, a generalised atmosphere of fear, and the exile of main opposition leaders, the anti-Nkurunziza demonstrations petered out around 29 June. A pattern of electoral violence continued, now orchestrated by those linked to the supporters of the ruling party as well as the opposition – both sides were guilty of intimidating voters. The supporters of the opposition attempted on various occasions to prevent people from voting, while the Imbonerakure checked people's voter cards in some provinces to ensure they cast their ballots. Influential members of the opposition coalition Amizero Y'Abarundi were increasingly detained and harassed. On both sides, a fear of repercussions from voting or from not voting emerged (APRODH 2015; Ushahidi Elections Burundi 2015). An additional 40,000 people fled the country between the legislative and local elections on 29 June and the presidential election on 21 July 2015 (UNHCR 2015b).

Timing: Post-Electoral Violence

The opposition boycotted the presidential election of 21 July 2015. Instead they proposed the creation of a government of national unity and called upon Nkurunziza to step down. On 1 August 2015 the opposition met in Addis Ababa and set up the National Council for the Respect of the Arusha Agreement and the Restoration of the Rule of Law ('Burundi: post-election crisis' 2016). In-country violence continued at a lower level but it was, however, interspersed with a number of high-level assassinations or attempted assassinations. Adolphe Nshimirimana, chief of the state secret service who had been implicated in the killings and torture of Nkurunziza's opponents, was assassinated in August 2015.

Figure 2 indicates the correlation between electoral developments and in-country political violence. The timing suggests that the violence was directly related to the electoral process.

		ELECTORAL DEVELOPMENTS		POLITICAL DEVELOPMENTS			
JAN							
FEB							
MAR	Voter registration and preparation of final voter lists (2/2 - 29/4)		Registration of candidates for elections: LEGISLATIVE (30/3 - 2/5) LOCAL (30/3 - 21/4) PRESIDENTIAL (30/4 - 25/5)	Mobilisation and arming of Imbonerakure	Nkurunziza announces candidacy (25/4)	5,800 REFUGEES (17/5)	
APR							
MAY	Printing and distribution of voter cards (29/4 - 26/5)		Election campaign: LEGISLATIVE LOCAL (10/5 - 26/6) PRESIDENTIAL (10/6 - 18/7):	Widespread anti-Nkurunziza demonstrations violently repressed (26/4 - 26/6)	Vice-President of Constitutional Court flees the country (5/5) Constitutional Court approves Nkurunziza's candidacy (6/5)	Attempt of military coup (13/5)	Ushahidi registers 521 electoral violence cases
JUN							
		ELECTION DAY - LEGISLATIVE AND LOCAL ELECTIONS (29/6)			109,275 REFUGEES		
JUL	ELECTION DAY - PRESIDENTIAL ELECTIONS (21/7)			143,519 REFUGEES			

Data Source: <http://www.ceniburundi.bi>; Ushahidi, Elections Burundi 2015; UNHCR 2015b

Figure 2: Correlation between in-country violence and electoral developments

Electoral Violence or Civil War?

In summary, this article suggests that the manipulation of the electoral process using all possible means became a primary motive for the violence orchestrated in Burundi. The perpetrators primarily used techniques of harassment, assault, and intimidation. The timing of the violence was closely linked to the immediate electoral period. This confirms that the criteria for the classification of electoral violence are fully met. In addition, the International Criminal Court issued a statement on 8 May 2015 classifying the developments in Burundi as electoral violence (ICC 2015).

Given that electoral violence was linked to the timing of electoral events, developments beyond the immediate electoral period can no longer be classified as electoral violence. The elections exacerbated Burundi's political tensions, and the political violence further increased in October 2015 following the deadlock in the government's negotiations with the opposition. Furthermore, violence intensified in December 2015 when unidentified assailants attacked three military camps killing 87 people. Arbitrary executions and a culture of impunity remain omnipresent, indicating the country's internal conflict following the elections (ICG 2015a; Vircoulon 2015; ICG Crisis Watch Database 2016).

An analysis of Burundi's internal conflict and its possible transnationalisation goes beyond the scope of this article. Nevertheless, it could be concluded that the electoral process exacerbated in-country political tensions, and electoral violence further developed into an internal conflict. Given that the electoral violence could form a sub-element of civil war, such developments do not negate the hypothesis that Burundi suffered from electoral violence that could spill over into the wider region. In order to analyse whether the electoral violence could become transnationalised, the timeframe of this article must be reduced to the immediate electoral period.

TRANSNATIONALISATION OF ELECTORAL VIOLENCE IN BURUNDI

As previously discussed, six elements play a role in the transnationalisation of conflict. The five main criteria needed to assess whether these elements are equally applicable to electoral violence are as follows:

- Character of election-related institutions;
- Willingness to seek support from and provide support to similar ethnic or political groups with a history of participation or likelihood of participation in electoral violence;
- Role of external powers backing internal rebellion or armed groups;

- Level of interdependence in the region, especially in terms of political similarities and information sharing that can spread electoral violence in neighbouring states;
- Economic insecurity, ethnic distrust and a weak state capacity to control national borders would contribute to the impact Burundi's electoral violence would have on the region.

To assess whether electoral violence in Burundi can become transnationalised, these criteria must be applied to the entire Great Lakes region. This region includes Burundi, DRC, Kenya, Rwanda, Tanzania and Uganda. Apart from Burundi, DRC and Kenya have a history of electoral violence (EU EOM Rwanda 2008, pp. 4-5, 16 & 26; Amnesty International 2003b; EU EOM DRC 2011, pp. 7, 23 & 40). Uganda's presidential election held on 18 February 2016 was marred by increased levels of violence. Re-elected Yoweri Museveni was running for his seventh term in office (EU EOM Uganda 2011, p. 10). DRC and Rwanda are heading into elections later in 2017 and their current leaders are considering a third term in office (Ntamahungiro 2014, p. 1; Vandeginste 2014b, p. 1). In Rwanda, a popular referendum approved the third term of President Kagame (Sow 2015). In DRC, violent protests met the adoption on 17 January 2015 of a law by the National Assembly that could lead to the extension of Kabila's term in office (ICG 2015b).

In the case of Rwanda, it is unlikely that the decision to bid for a third term in the upcoming election would spark a wave of electoral violence given Kagame's general popularity. Kagame's rhetoric is, however, worth highlighting. While opposing Nkurunziza's third mandate, Kagame did not refer to it as being unconstitutional, but rather stated that the president should never run against the will of the people. He also said repeatedly that the crisis in Burundi was not linked to the third mandate, but to the inability of the president to deliver on his promises. This particular rhetoric suggests Kagame feared that electoral tensions could spread to Rwanda and tried to anticipate such a possibility.

Even though it would seem that protests are not imminent in Rwanda, Kagame's ability to contest elections for a further three terms suggests that future protests should not be discounted. His move has the potential of giving him an additional 15 years in office and disadvantages the opposition. In addition a significant number of Burundian journalists, activists, lawyers and opposition politicians took refuge in Kigali. Their presence and a possible liaison with Rwandan opposition could inform and shape public opinion against the regime in its attempts to seek an additional term in office. In view of the ethnic dimension of Nkurunziza's election rhetoric, the potential of electoral violence in future elections in Rwanda remains significant. The potential of electoral violence could be further exacerbated by Burundian political exiles seeking alliances with the Rwandan opposition.

In DRC the National Assembly adopted a law on 17 January 2015 providing that a national census be carried out before elections could take place. Strong suspicions among Congolese citizens that Kabila wanted to stay in power beyond his term in office triggered violent protests throughout the country. The DRC has a history of fast escalating violence, including during electoral periods (ICG 2015b). Moreover, bidding for a third term has a dangerous precedent in Africa. For example in Burkina Faso such an attempt triggered violent protests in October 2014, leading to a military coup (Freedom House 2015).

Furthermore, credible reports indicate that the Imbonerakure have been trained in DRC (UN SC S/2014/550 [2014] section 15). In line with this, activists in the border areas as well unconfirmed reports indicated a possible infiltration of Rwandan Interahamwe into the Burundi security forces during the electoral period.⁴ If confirmed, this presence would suggest a potential collaboration with the Burundian regime. The interconnectedness and aforementioned alliances of militias and security forces, as well as similar protests in Burundi and DRC, can directly contribute to the transnationalisation of electoral violence during upcoming elections. Similarly, if electoral violence were to erupt in Rwanda during any future elections, it is likely that the Interahamwe and possibly the Imbonerakure would be implicated, as these groups share common characteristics and appear to seek mutual support.

The Arab Spring may serve as a good example of electoral violence spreading in the region. The Arab Spring showed that anti-regime protests move in interconnected waves exploiting the vulnerabilities of regimes and transferring information and tactics to other parts of the region with the aim of ousting dictators (Patel & Bunce 2012, pp. 10-12; Hess 2015, pp. 4-8). Burundi, DRC, Rwanda and Uganda are known for the limited space allowed to the opposition. Electoral institutions are in their infancy and as already mentioned the tradition of electoral violence remains prevalent (EU EOM DRC 2011, pp. 25-43; Amnesty International 2003a). These shared electoral characteristics suggest that electoral violence has the potential to exploit vulnerable electoral institutions in the Great Lakes region.

Given the prominent role that the search for a third mandate has played in electoral violence in Burundi, it is worth emphasising that at least two countries in the Great Lakes region share similar concerns. Similarity of electoral contexts and institutions, along with sharing and spreading information (the diffusion effect) indicate the potential electoral violence has of spreading to neighbouring countries in the region.

4 Democratic Forces for Liberation of Rwanda (FLDR) alias Interahamwe participated in the 1994 Rwandan genocide against the Tutsi population. Interahamwe is currently active in Eastern Congo (Bjarnesen 2015; Commission of Enquiry 2015, 16).

The aim of the threatened regime to hold on to power regardless often enables tensions to spill across the border. Attempts by Nkurunziza's government to seek support in DRC, for example, may later contribute to electoral violence in the region. To increase its legitimacy, Nkurunziza is likely to support the third mandate of President Kabila thus adding to DRC's electoral tensions.

As indicated earlier, internal conflicts are further transnationalised as a result of ethnic distrust, poor economic conditions, weak state structures, the inability of governments to control their borders and subsequent migration flow. Though not obvious, disappointment with the economic situation in Burundi and a lack of government delivery of economic and democratic development might have played a role in the outcry against the president seeking a third mandate. In contrast, Rwanda has a growing economy and stronger state institutions, including Rwanda's proven ability to control its borders and citizenry, as well as the Kagame regime's hard treatment of potential opponents and dissidents. As a result Kagame's subsequent mandate seems more acceptable to the general public. The economic factor can, nevertheless, contribute to the spillover of electoral tensions to DRC.

Despite the fact that Nkurunziza was accused of exacerbating ethnic tensions during the 2015 elections, ethnic distrust does not seem to play a role in Burundi and clashes were not based on ethnic considerations. The protestors were not from the same ethnic group but rather assembled from different ethnic backgrounds united in their opposition to Nkurunziza's candidacy (Manirakiza 2016). Therefore, ethnic rhetoric did not play a significant role in Burundi's recent electoral violence. However ethnicity could still play a role in inciting electoral violence should groups of the same ethnicity feel disadvantaged in the electoral and political competition and as a result unite in protest against actual and/or perceived injustices.

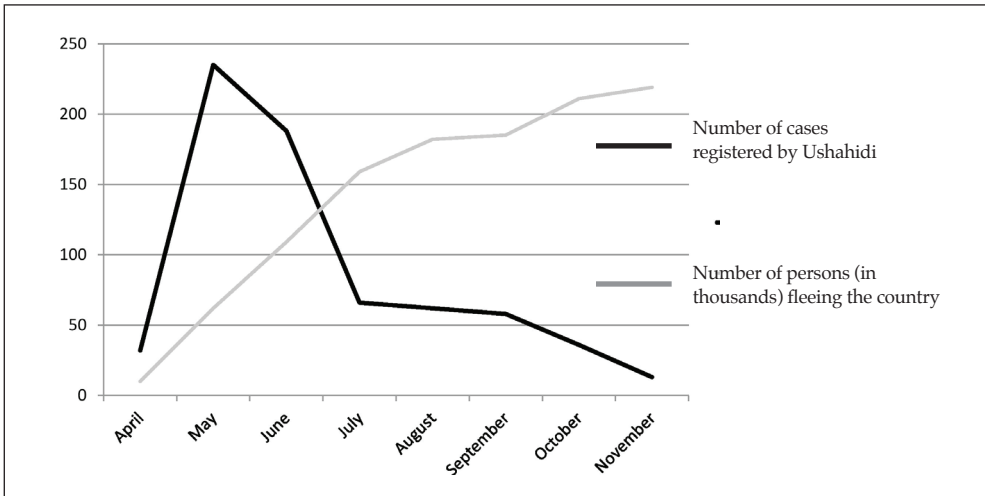
Drawing the Line between Transnationalisation of Electoral Violence and Internal Conflict

Whilst it would be difficult to argue that migration directly contributes to the transnationalisation of electoral violence, the phenomenon is worth noting as it helps distinguish between the transnationalisation of electoral violence and internal conflict.

Figure 3 shows a clear correlation between electoral violence and migration from Burundi to neighbouring countries. It shows cases registered by Ushahidi between April 2015, the start of the anti third mandate demonstrations, and November 2015, pointing to the immediate electoral period. The number of cases of electoral violence increased drastically in the pre-electoral period leading to the parliamentary elections (up to 235 cases in May and 188 cases in June). It

remained relatively high until September during the presidential elections and immediate post-electoral period. At the same time, migration started to increase significantly with more than 150,000 people fleeing as a result of the threat, intimidation and general atmosphere of fear generated by the regime’s loyalists during the immediate electoral period (Tertsakian 2015).

At the same time, however, this figure shows that migration from Burundi continues, supporting the argument that the country has moved from electoral violence to internal conflict immediately after the electoral period. Regional implications of internal conflict or civil war go beyond the scope of this article; nevertheless, this brief discussion aims to show the link between the transnationalisation of electoral violence and civil conflict. Figure 3 below demonstrates the exact numbers of cases registered by Ushahidi with the number of persons fleeing Burundi. Number of persons fleeing Burundi is in thousands.



Data Source: Ushahidi 2016, UNHCR 2015b

Figure 3: Correlation between electoral violence and numbers of refugees

CONCLUSION

Electoral violence falls into the sub-category of political violence and internal conflict. As such, it could spill over to other countries, especially given that 19 to 25 percent of countries in sub-Saharan Africa experience some violence throughout their immediate electoral period (Bekoe 2010, p. 1). Electoral violence differs from general conflict through its motives and timing; diffusion and escalation cause the transnationalisation of conflict. This article analysed whether electoral violence is also prone to these effects and could, therefore, be transnationalised. The case

of Burundi underlines the potential of transnationalisation for electoral violence, impacting on at least two countries in the Great Lakes region.

In order to classify in-country violence as electoral, it is necessary to first determine whether the motives and timing are linked to electoral events. President Nkurunziza and his party used violence and systemic manipulation to suppress the opposition to his candidacy and to secure enough votes in National Assembly to amend the Constitution. An increase in violent actions against the opposition was directly linked to the immediate electoral period. Therefore, the case of Burundi fulfils both criteria of timing and motives to be classified as electoral violence.

At the same time, the countries in the Great Lakes region also have a history of electoral violence, weak election institutions and the willingness of its incumbents to bid for mandates beyond the initial legal framework. Repression of opposition remains widespread. The character of political institutions and electoral landscape in the region therefore indicates that transnationalisation within the Great Lakes region remains possible.

Similarly, information sharing and potential alliances between the pro-government Imbonerakure and Rwanda's Interahamwe on one side, and Burundian opposition activists and in-country opposition in Rwanda on the other, may lead to mutual support during the upcoming elections and contribute to the increase of electoral violence in the region. Nkurunziza's regime, weakened by the conflict, is likely to seek support in neighbouring countries thus adding to the existing electoral tensions, especially in DRC. Diffusion and the effects of escalation in the Great Lakes area indicate a possible spillover of electoral violence from Burundi to the region.

While the flight of ordinary Burundians to neighbouring countries was a direct result of electoral violence, it is unlikely to be an exacerbating factor in the transnationalisation of electoral violence. Nevertheless, it plays a role in distinguishing between the period marked by electoral violence and the subsequent eruption of civilian conflict. Internal conflict has been provoked throughout the electoral period in Burundi, indicating that electoral violence can lead to broader civil disturbances. Further, such conflict can be transnationalised, which goes beyond the scope of the current article.

The transnationalisation potential of electoral violence has so far received very little attention as part of the systematic study of civil wars and conflicts. This article aims to contribute towards extending that research. Acknowledging the transnationalisation potential of electoral violence could play a role in mitigating conflicts emerging during the electoral cycle.

***Disclaimer:** The author participated in the 2015 European Union Election Observation Mission to Burundi. The opinions expressed in this article are exclusively those of the author and are not the position of the mission or the European Union.*

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PRESIDENTIAL ELECTION DISPUTES IN UGANDA

A Critical Analysis of the Supreme Court Decisions

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ABSTRACT

This article analyses the constitutional and domestic legal framework under which the president of Uganda has been elected since 1995. The focus is on the three Supreme Court decisions in the adjudication of presidential electoral disputes in 2001, 2006 and in 2016. It argues that presidential electoral laws are deficient in their capacity to facilitate fair political contestation. This is because they were not adequately constructed to address electoral malpractices pertaining to Uganda, and they have been interpreted to favour the incumbent.

Keywords: Constitution of Republic of Uganda 1995, electoral offences, presidential elections, presidential electoral laws, presidential electoral petition, Supreme Court

INTRODUCTION

The post-1995 constitutional reforms in Uganda were aimed at averting violent struggles for political power. One of these reforms was the introduction of direct presidential elections. The significance of this is that since the Constitution of 1995 came into force, and for the first time in the country's history, the majority of Ugandans could elect their president directly. In addition, more Ugandans than before are eligible to stand for election as president. This article studies how the Supreme Court in Uganda has adjudicated presidential electoral disputes since 1995. It evaluates the efficacy of the constitutional and domestic legal framework under which the president of Uganda is elected, in protecting fair

political contestation in order to achieve its objectives. This article further argues that presidential electoral laws have been constructed without attention to the electoral lawlessness prevalent in Uganda. These laws make it almost impossible to challenge the outcome of the election, particularly where the declared winner is the incumbent. Therefore, the laws are incapable of converting votes into a truly democratic choice, and are consequently unable to avert violent struggles for political power.

The article opens with a background to the development of the post-1995 legal framework under which the president of Uganda is elected. This is followed by an analysis of the decisions of the Constitutional Court in the presidential election petitions of 2001, 2006 and 2016. This in turn is followed by an explanation of the principles employed by the Constitutional Court in adjudicating presidential electoral complaints and a discussion of the deficiencies in the presidential electoral laws. The article also offers an alternative interpretation to the principles for adjudicating presidential electoral laws in an effort to address the electoral lawlessness that has plagued presidential elections in Uganda since 1996. Finally, the findings of this study are discussed in the conclusion. Methodologically, this article is a product of desk research including a review of primary sources (cases, constitutions, and statutes) and secondary documents (books, journals, and newspapers).

BACKGROUND

Britain organised the first general elections in Uganda in 1962 in order to prepare the country for self-rule. The elections were contested by the Democratic Party (DP), Kabaka Yeka (KY) and the Uganda People's Congress (UPC). Although the DP received a majority in the National Assembly, the KY and UPC merged to become the KY-UPC and became a majority. They formed the government under President Edward Mutesa II, the leader of KY, while Milton Obote of the UPC became the Prime Minister (Kasozi 1994, p. 58). The transfer of power from the Colonial Governor, Sir Walter Coutts, to President Mutesa II after the 1962 general elections is the only non-violent and undisputed transfer of government in the country's history. Mutesa II was removed from power by Obote in a military coup in 1966. Five years later Obote was disposed by Amin Dada in the same manner. The Uganda National Liberation Front (UNLF) toppled Amin's regime in 1979 and installed Yusufu Lule as president. After two months Lule was removed from power by the UNLF and replaced by Godfrey Binaisa. The military commission ousted Binaisa and organised the first post-independence general elections in 1980, which have been widely discredited as fraudulent (Mudola 1988, pp. 280-298; Museveni 1997, p. 21).

The 1980 elections were contested by the Conservative Party (CP), DP, Uganda Patriotic Movement (UPM) and UPC. It was a common occurrence during election campaigns for the armed forces to harass, torture and kill UPC's political opponents, and also to disperse political rallies organised by its political opponents (Mukasa 1980; Tamale 1980). By this time, Obote had distorted the ethnic composition of the armed forces in favour of members of his own tribe, the Langis (Mukasa 1980). Events before, during and after the elections suggest that the elections were neither free nor fair. Also, during the elections the chairman of the military commission, Paulo Muwanga, usurped the powers of the electoral commission by decree, Legal Notice No. 10 1980, which authorised him to assume responsibility for announcing the results. Mudola claims that this decree was issued for Muwanga to reverse the DP's victory once it became apparent that they were on the verge of winning the majority of seats in the National Assembly (Mudola 1980, p. 291). This same decree (1980, para. 4.6) also removed from the courts the authority to adjudicate any disputes arising out of the elections. These are some of the reasons why the credibility of the 1980 elections has been widely contested. The UPC under Obote took power while the DP, which had garnered the most votes but lacked military might, formed the opposition. Yoweri Museveni, then the UPM party leader, declared that the elections were fraudulent and unacceptable. Museveni formed a political organisation, the National Resistance Movement (NRM), which contested the validity of the elections through a popular and bloody armed conflict. Obote was removed from power in 1985 by Tito Okello Lutwa in an armed coup. In 1986, Museveni's NRM seized power from Lutwa following a bloody civil war. Thus, since independence, Uganda has had eight heads of state, seven of whom came to power by overthrowing the previous government.

After Museveni's NRM seized power, it embarked on the process of adopting a new constitution that would usher in a new democratic dispensation. The Constitution Commission (CC) was established for the purpose of consulting Ugandans on this new constitution and for writing a draft constitution. The Constitution Commission's Report (CCR 1992, p. 385) notes that 'there was an overwhelming desire among Ugandans to develop a new constitution containing fair and transparent electoral laws that would allow for the smooth transfer of political power'. In addition it noted that (1992, p. 87):

The people are demanding an end to sudden and violent changes of government and the consequent political, social and economic destabilisation that has caused so much suffering. They castigate the "fashion" "of going to the bush" to resolve political and constitutional conflicts which has resulted in terrible consequences to the ordinary

people who get caught up in the conflicts. They demand an effective mechanism to be put in place to ensure orderly transfer of power so that the people's lives are not unduly disturbed.

According to the CCR (1992, p. 94), 'the major problem in Uganda had been that those in power were reluctant to subject themselves to the electoral process'. The report therefore endorsed the demands of the people for leaders at all levels to be elected at known and regular intervals; and for the electoral process to be designed and implemented to minimise abuse. The purpose of this second clause is to guard against electoral results being challenged by violent means on the basis that they had been rigged (1992, p. 95).

The election of the presidency was not subject to direct elections under the previous constitutions, namely, the Uganda (Independence) Order in Council 1962 and the Constitution of Republic Uganda 1967. In this regard the CCR (1992, p. 134) notes 'that there was overwhelming support for the concept of a democratically elected president, which emanated from the people's experience of both colonial and independent Uganda'. It also observed that: 'the people want direct participation in the elections of their leader and also prefer to have a president who commands a national following and not one whose support is based on a particular region, group, or force'(1992, p. 134). The CCR (1992, p. 320) further reported that: 'There has been concern about the lack of orderly succession of government. Where leaders did not appear to be prepared to hand over power free and fair elections have been violently resisted. The culture of clinging on to political office was criticized in the many of the submissions we received'.

Thus the draft constitution of 1992, articles 105-108, provides that:

- The president should be directly elected by universal suffrage.
- The age of a president should be no less than forty years but not more than seventy-five (art.107).
- The president should have acquired at least a secondary education qualification (art.106).
- A president should be a citizen of Uganda by birth and should have been resident in Uganda for at least twelve months prior to the elections (art.107 (b)).
- In order to qualify as a presidential candidate, a candidate should have the support of a minimum of one thousand qualified voters from two-thirds of all the districts (art.108 (a)).
- A candidate in a presidential election who wins the majority of the votes cast should be declared the winner (art.108 (b)).

- Where no candidate obtains the absolute majority, a second run-off election should be held thirty days after the previous election (art.108(c)).
- Candidates for the second run-off elections should be those who obtained the two highest results in the previous election (art.108 (d)).
- The electoral commission should declare the winner of the presidential elections within twenty-four hours of ascertaining the results (art.109).
- Any person who challenges the validity of presidential elections should be required to show that they have the support of at least five hundred thousand voters (art.110).

In October 1995 the Constitution of the Republic of Uganda was promulgated (henceforth referred to as the Constitution). Rules for managing political competition and for transferring political power were instituted then in an effort to ensure that future leaders would be elected through the popular will of Ugandans, in order to avert the old violent struggles for political power.

THE 2005 AMENDMENT TO THE CONSTITUTIONAL ORDER FOR ELECTING A PRESIDENT

On 30 September 2005, Parliament repealed art.105 (2) of the Constitution. This provision had allowed a serving president a maximum of two five-year terms. The amendment was significant in that it created unlimited terms for the office of the president, and in doing so it paved the way for the incumbent, Museveni, to run for additional terms in office. In order to enact the amendment, Parliament passed the Constitutional Amendment Act (CCA) 2005 and the Constitutional Amendment Act No.2 (CAA No.2) 2005. There were several petitions presented to Parliament as well as submissions by civil society organisations opposing the removal of limits to presidential terms (Asimwe & Muhozi, 2005, p. 8). Members of the ruling government in the legislature and executive branches dominated the group that favoured repealing the term limits, while opposition groups in Parliament and civil society were in the opposite camp (2005, p. 9). Both sides of the political divide traded opinions about the legality of the amendment (2005, p. 10). Surprisingly, questions about the legality of the amendment were not put before the Constitutional Court which is vested with the authority to interpret the constitution (Constitution, art.137 (1)). President Museveni's comments accentuate his argument for repealing the term limits; he is quoted as saying, 'Why should I sentence Uganda to suicide by handing over to the people we fought and defeated? It is dangerous, despite the fact that the constitution allows them to run against me' (Ngozi 2003, p. 12). Also, at his party's national conference one year after he

started his second and last term in office, the President called for the removal of term limits from the Constitution (USAID 2005, para.1.3.4).

In 2003, Museveni's government appointed the Constitution Review Commission (CRC) to review the fundamental features of the Constitution. The Constitution Review Commission's Report (CRCR 2003, para.33.5) notes that it received over one hundred proposals for amending the Constitution from the National Executive Committee (NEC), the decision-making body of the NRM. The NEC argued that the amendments were necessary to allow for the smooth running of government because the president had routinely encountered difficulties, contradictions and inadequacies in implementing the Constitution (Ngozi 2003, p. 23). The term limits were considered a restriction on democratic choice; therefore their removal would allow Ugandans to exercise their democratic choice in electing the same person as many times as they chose (Kiwanuka 2003, p. 3).

The CRCR (2003, para.7.9.5) recommended that the question of repealing the presidential term limits should be decided by a referendum. It noted that 59% of the respondents were against lifting the term limits (2003, para.7.9.6). Two of the commissioners, including the CRC's chair, wrote a minority report opposing the repeal of the maximum presidential tenure of two terms (2003, pp. 262-266). The media reported that the government obtained an injunction preventing newspapers from publishing an article detailing opposition to this repeal among members of the CRC (Afedura & Atuhaire 2003).

In July 2005 a referendum was held on the government's proposals for amending the Constitution. It was boycotted by opposition parties because the contentious issue of repealing the presidential term limits was not included (2005, p. 13). It should be noted that the provision on the term limits can only be amended by a bill that obtains the support of two-thirds of all members of Parliament (Constitution art.262). Therefore, the NRM government opted to leave the issue for Parliament to determine. Most of the proposed changes to the Constitution, including repealing the term limits on the tenure of the president, were passed by Parliament after the third reading of the bill on 18 August 2005 (Asiimwe & Muhozi 2005, p. 28).

When recommending that a person elected as president should not hold office for more than two terms of five years each, the CC (1992, p. 332) noted that:

We have also reflected the view almost unanimously advocated for by the people that the tenure of office of the President should be constitutionally limited to put an end to the phenomenon of self-styled life presidents. We have recommended a limit of two-terms of five years each for any President.

Eleven years after the CCR, the CRC observed that the majority of respondents wished for the preservation of the two-term limits on the president. It found that changes in circumstances had not brought a divergence of opinion among Ugandans on the matter (CRCR 2003, para.794). It opined that in order to examine the issue of the removal of the term limits objectively, it could not merely recommend their retention or lifting. Therefore, it proposed that the matter should be subjected to an exhaustive and comprehensive debate that would provide for a nationally acceptable solution (2003, para.794). The proposal was ignored by the government. In order to usher in a new democratic dispensation and to garner popular support the NRM government would have to put the issue of removing the term limit to the people to determine, as was recommended by the CRC.

In addition to the amendment lacking popular legitimacy, it was also plagued by allegations of bribery. Several members of Parliament admitted that they had received financial inducements to vote in favour of the amendment, as the NRM government did not have the parliamentary majority required to pass the bill (Posner & Young 2007, p. 3).

ELECTORAL LAWS, OBLIGATIONS, AND POLITICAL COMMITMENTS IN THE CONDUCT OF ELECTIONS

Domestic laws have been appended to the Constitution for the purpose of administering presidential elections. These are further supplemented by Uganda's willingness to be bound by regional and international treaties and political commitments, both of which are aimed at promoting free and fair elections. At the time of writing the legal framework for conducting presidential elections is provided under the Electoral Commission Act (ECA) as amended 2010; the Political Parties and Organisations Act (PPOA) as amended 2010 and the Presidential Elections Act (PEA) as amended 2010.

Since 1986 Uganda has ratified, signed or acceded to 15 international and regional treaties, 12 non-treaty standards and 9 political commitments which provide for the legal protection and promotion of democratic electoral processes (EU 2012, pp. 53-55). It is from these documents that guidelines for conducting free and fair elections and for developing democratic institutions emerge. These guidelines impose extra legal obligations and commitments for democratic elections to supplement the constitutional and domestic legal framework for conducting presidential elections in Uganda. Examples of these include the Universal Declaration of Human Rights (UDHR) 1948, International Covenant on Civil and Political Rights (ICCPR) 1966 and the African Charter on Democracy, Elections and Governance (ACDEG) 2007.

UGANDA'S CONSTITUTIONAL AND LEGAL FRAMEWORK FOR PRESIDENTIAL ELECTIONS

The main constitutional and statutory provisions governing the election of the president of Uganda are as follows:

The 1995 Constitution art.103(1) stipulates that the election of a president shall be by universal adult suffrage through a secret ballot. It also provides that in order to be elected president, a candidate requires more than fifty percent of the total valid votes cast in the presidential election (art.103(4)). Where no candidate obtains sufficient votes as specified, a second election must be held within 40 days and the two candidates who obtain the highest number of votes shall be the only candidates (art.103 (5)). Following the amendment to repeal the two-term limits on the re-election of a president, a president may be elected for more than two terms (art.105 (2)). In order to qualify for election as president candidates must be a citizen of Uganda of not less than 35 years of age, but not more than 75, and qualified to be a member of Parliament (art.61). To be eligible for the membership of Parliament, candidates must be a citizen of Uganda, a registered voter and have completed a minimum formal education of Advance Level Standard or equivalent (art.80 (1)).

The electoral commission is entrusted with the responsibility of managing presidential, parliamentary and local government elections (art. 61). Members of the electoral commission are appointed by the president with the approval of Parliament (art.60(1)). Thus, Parliament may reject a presidential appointee to the commission. Elections must be held within the first third of the last ninety days before the presidential term expires (art.61(2)).

The electoral commission may declare that a presidential candidate has been elected unopposed, if only one candidate is nominated after the close of nomination (art.103(6)(a)). Presidential candidates must submit to the electoral commission a document confirming that their nomination has been supported by one hundred voters in each of at least two-thirds of all the districts in Uganda (art.103(2)). The Constitution, art.103(2) empowers Parliament to prescribe a procedure for the elections and assumption of office of the president, while art.104 sets out the procedure under which presidential elections may be challenged. An aggrieved presidential candidate may petition the Supreme Court for an order that a candidate declared by the electoral commission was not validly elected (art.104(1)). Under art.104(9) of the Constitution, Parliament is authorised to pass laws for challenging the conduct of presidential elections, including grounds for annulment and the rules of procedure. To give effect to arts.103(2) and 104(9), Parliament enacted the PEA and the ECA. The PEA s.59 provides grounds for challenging presidential elections.

Under the PEA s.59(5), the Supreme Court may dismiss a petition challenging presidential elections, declare which candidate was validly elected, or annul an

election. s.59(6) of the same act provides that the Supreme Court may issue a declaration annulling elections on three grounds:

- under s.59(6)(a), where it is satisfied that there has been noncompliance with the provisions contained in the same act and the noncompliance affected the outcome of the election in a substantial manner;
- under s.59(6)(b), where it is satisfied that the candidate was not qualified for the position of the president or was disqualified;
- or under s.59(6)(c), where it is satisfied that an offence was committed under the act by the candidate in person or by the candidate's agents with the knowledge or approval of the candidate. The said offences are listed under parts IX and X of the PEA. These include bribing, obstructing and intimidating voters, and publication of false statement as to illness, death or the withdrawal of another candidate.

Under the PEA s.59 (8), the Supreme Court has the discretion to order a recount of the votes cast when hearing a petition challenging presidential elections. This is only if the Court deems it necessary and practical. The chief justice in consultation with the attorney general is statutorily authorised to make rules for the conduct of petitions seeking to annul presidential elections (PEA 2010, s.59(11)). The rules are contained in the Presidential Elections Petitions Rules 2001, SI No.13 2000.

PRESIDENTIAL ELECTIONS

Uganda's first attempt at transferring power through elections occurred in 1962, ushering in self-rule after nearly 60 years of colonialism as part of the British Empire. This was followed by highly disputed elections in 1980. In 1994, constituent assembly elections were held for the purposes of adopting the Constitution (UEC 2007, p. 2).

Upon its adoption, the Constitution introduced a one-party, so-called 'Movement System' under which political parties were allowed to exist but not to engage in political activities (Constitution art.71). Article 74 of the Constitution also provided for a referendum on the choice of a political system to be decided after five years. Therefore, five years after the Constitution was promulgated, Ugandans would decide if they wanted to maintain the 'Movement System'. The NRM interim government under the leadership of Museveni held power from 1986 and surrendered to elections in 1996, the year after the Constitution was adopted. The first presidential and parliamentary elections took place under the Movement System and Museveni was elected president for the first time. In 2000, the first referendum was held and the Movement System was retained.

After the confirmation of the Movement System, Museveni was again elected as president in 2001. In the same year, Museveni's government appointed the CRC. In its report, the CRC recommended the return of the multi-party political system, which meant the abolition of the one-party Movement System (CRCR 2003, para.793). A second referendum in 2005 brought about the end of the one-party system when Ugandans overwhelmingly voted for multi-party politics (UEC 2007, p. 4). The government then passed the CAA and CAA No.2 for the purposes of effecting amendments to repeal both the one-party Movement System and the two-term limits on the re-election of a president, among other provisions of the Constitution. In the following years, opposition parties developed. President Museveni was elected again in 2006, 2011 and most recently in 2016. At the time of writing, President Museveni has been in power for 30 years. This is longer than all Uganda's post-independence leaders put together.

PRESIDENTIAL ELECTORAL PETITIONS (1995-2016)

Following the 2001, 2006 and 2016 presidential elections, two presidential candidates have been unsuccessful in their attempts to persuade the Supreme Court that the president had not been lawfully elected.

Mr. Kiiza Besigye, leader of the main opposition party, the Forum for Democratic Change (FDC), was a presidential candidate in the three elections. He petitioned the Supreme Court to nullify the elections on the grounds that Museveni had not been duly elected in the 2001 and 2006 presidential elections. In 2001 Museveni was declared by the electoral commission to be the winner of the elections with 69% of the total valid votes cast (UEC 2001, p. 3). In 2006, the incumbent gained 59% of the total valid votes cast (UEC 2006, p. 2). Besigye was runner-up in both elections with 37% of the valid votes cast in 2001 (UEC 2001, p. 3), and 27% in 2006 (UEC 2006, p. 2). The two electoral petitions sought to annul the outcome of the elections on almost identical grounds.

In the case of *Col. Dr. Besigye Kiiza v Museveni Yoweri Kaguta and the Electoral Commission [2001] Presidential Electoral Petition No. 1 UGSC 3 (PEP No.1 2001)*, the petitioner made many complaints against the two respondents and their agents. These were for acts and omissions which he contended amounted to non-compliance with provisions of the PEA and the ECA, and illegal practices and offences under the same acts. The main complaints against the second respondent (the Electoral Commission) were that it allowed multiple voting and vote stuffing in many electoral districts in favour of Museveni, contrary to PEA s.32(1). It disenfranchised the petitioner's voters by deleting their names from the voter's register, contrary to PEA s.19(3) and s.50. Contrary to PEA s.120(e) and 12(f), it increased the numbers of polling stations on the eve of polling day

without sufficient notice to candidates other than Museveni. It chased away the petitioner's polling agents or failed to ensure that they were not chased away from polling stations and tallying centers. This amounted to an attempt at interfering with the free exercise of the franchise, contrary to PEA s.26(c). It allowed or failed to prevent agents of the first respondent from interfering with electioneering activities of the petitioner and his agents, contrary to PEA s.12(e).

In his complaint against the first respondent, Museveni, the petitioner alleged that the president personally or by his agents, with his knowledge or approval, committed illegal practices and offences. These included publications of a false statement that the petitioner was suffering from AIDS. This was tantamount to using words or making statements that were malicious, contrary to PEA s.24 (5) (b). Additional allegations included offering gifts to voters, contrary to ECA s.64; and appointing partisan sections of the army to take charge of security during the elections, contrary to PEA s.43(2)(a). The Supreme Court found unanimously that there were widespread violations of the PEA and the ECA as a result of intimidation, voter buying and mismanagement of voters' registers, publication of false statements and irregular voting (PEP No.1 2001, para. 99). It also held that the second respondent did not comply with provisions of s.28 and s.32(5) of the PEA (2001, para. 88). The Court also found that in many areas of the country the principle of free and fair election was compromised (2001, para. 129). It uncovered evidence that there was cheating in a significant number of polling stations (2001, para. 101). However, by a majority of 3-2, the Court concluded that the irregularities did not 'substantially affect the outcome of the election' (2001, para. 156). Therefore, it could not annul the election under the PEA s.59(6)(a). Also, by a majority of 3-2, the Court held that no illegal practice or offence under the PEA was proved to have been committed in connection with the said election by the president personally, or with his knowledge or by his agent with his approval (2001, para. 149). Thus, it could not invalidate the elections under the PEA s.59(6)(c).

Following the outcome of the 2006 presidential elections, Besigye complained to the Constitutional Court about electoral malpractices that occurred before and during the election. In the case of *Rtd. Col. Kizza Besigye v the Electoral Commission and Yoweri Kaguta Museveni [2006] Presidential Electoral Petition No.1 UGSC 2 (PEP No.1 2006)*, the petitioner's criticisms were that the elections were characterised by acts of intimidation; voter buying; lack of transparency; unfairness, and violence; and the commission of numerous offences and illegal practices by the incumbent. He alleged that Museveni personally bribed members of the electorate, and similar acts were carried out by his agents with his knowledge or approval before and during the elections. This interfered with the free exercise of the franchise, contrary to PEA s.64.

The petitioner also complained about electoral malpractices allowed by the Electoral Commission. These include multiple voting, vote stuffing, and the failure to declare results in accordance with the law. The absence of freedom and fairness in the entire electoral process amounted to an attempt to interfere with the free exercise of the vote, contrary to PEA s.26(c). Besigye therefore contended that because of electoral illegalities which occurred before, during and after the elections, Museveni had not been duly elected as president. He petitioned for an order to annul the election.

The Court found unanimously that there was a lack of compliance with the provisions of the Constitution, PEA and the ECA in the conduct of the election (PEP No.1 2006, para. 98). It held that the Electoral Commission disenfranchised voters by removing their names from the voters' register, thus denying them the right to vote (2006, para.61). The Court also declared that the principle of free and fair elections was compromised by widespread bribery, intimidation and violence in some areas of the country. The principles of equal suffrage, transparency and secrecy were infringed by multiple voting, vote stuffing, and incorrect methods of ascertaining the results (2006, para.122). By a majority decision of 5-2, the Court found that no illegal practice or offence had been proved to its satisfaction to have been committed either by Museveni personally or by his agents with his knowledge or approval (2006, para. 128). Consequently, it declared that it could not annul the election on the alleged violation of PEA s.59(6)(c) (2006, para. 129). By a 4-3 majority, the Court ruled that the noncompliance with electoral laws did not 'substantially affect the outcome of the election' (2006, para.144).

In a dissenting opinion, Justice Kanyeihamba, (2006, paras 1-24) found that there was sufficient evidence presented for the Court to decide as follows: that the presidential election was so badly conducted, and fatally affected by irregularities, malpractices and illegalities, as to affect the final results in a substantive manner; therefore the result of the election ought not to have been upheld. He decried the fact that 'the Court, having unanimously found that the alleged contraventions of the electoral laws occurred, they were bound to annul the election, and to find otherwise would be based purely on the conjecture and personal inclination of the judges' (2006, para.19). He went further, saying (2006, para. 20):

Such an opinion would be grossly unfair to Ugandans because the 1st respondent refused adamantly to produce the only evidence which could have helped the petitioner, 2nd respondent, and this Court, to prove and be satisfied that the allegations that were irregularities, malpractices and illegalities were justified or unjustified.

In other words, according to Justice Kanyehamba, where the Court found unacceptably widespread contraventions of electoral laws that affected the quality of the election, it should have annulled the election.

In the case of *Amama Mbabazi v Museveni & Ors.* (2016) Presidential Electoral Petition No.1 UGSC3 (PEP No.1 2016), the petitioner alleged that the 2016 presidential election was conducted without complying with the provisions and principles of the PEA, ECA and the Constitution. For this, he faulted the second respondent, the Uganda Electoral Commission. He sought a decision that President Museveni had not been validly elected, and an order that the election be annulled.

President Museveni was declared the winner by 5 617 503 votes, representing 61% of the valid votes cast; Amama Mbabazi polled 132 574 votes representing 1.5% of the valid votes cast. The other candidates received votes as follows: Abed Bwanika 86 075 (1%), Baryamureeba Venansius 51 086 (0.5%), Benon Biraaro 24 675 (0.3%), Kiiza Besigye 3 270 290 (35%), Mabiriizi Joseph 23 762 (0.3%), Maureen Faith Kyalya Waluube 40 598 (0.4%) (UEC 2016, pp. 2-3).

Specific charges against the first respondent, President Museveni, were as follows:

- That he had committed several illegal practices and electoral offences personally, or through his agents with his knowledge or approval.
- It was further alleged that the second respondent, the Electoral Commission, nominated the first respondent when he had not yet been sponsored by the NRM on whose ticket he supposedly stood, contrary to PEA s.8 and s.10.
- The second respondent failed to declare the first respondent's nomination papers null and void. Instead it acted improperly when it extended the deadline to give him more time after all other candidates had submitted their respective documents, contrary to PEA s.11.
- The petitioner also claimed that his agents and supporters were abducted, and some were arrested by elements of the security forces with the knowledge of President Museveni. This was to pressurise them to vote for the President, or to refrain from voting, contrary to PEA s.76 (b).
- He further complained that his polling agents were denied information concerning the counting and tallying process, contrary to PEA s.76 (b).
- The second respondent was said to have failed to ensure that the conduct of the presidential electoral process was free and fair. As a result the petitioner's campaigns were interfered with by elements

of the military, including the Special Forces and the so-called crime preventers under General Kale Kayihura, contrary to the PEA s.76 (c).

Counsel for the petitioner pleaded that the Court should depart from its decisions in PEPs No. 01 2001 and No. 01 2006. These held, *inter alia*, that numbers are important in assessing the effect of noncompliance with the law on the election result. In the opinion of the counsel for the petitioner, the Court had placed undue reliance on a quantitative test in interpreting the phrase ‘affected the result of the election in a substantial manner’, and set an extremely restrictive and nearly impossible standard for a petitioner to meet (PEP No.1 2016, para.17).

The Court found that in applying PEA s.59(6)(a) to this matter, it was respecting the spirit of the law in the Constitution art.1(4). This deals with the sovereignty of the people and provides that ‘the people shall be governed through their will and consent’ (2016, para.19). It therefore opined that s.59(6)(a) enables the Court to reflect on whether the proved irregularities affected the election to the extent that the ensuing results did not reflect the choice of the majority of voters as envisaged in art.1 (4) of the Constitution, and in fact negated the voter’s intent (2016, para.20).

The Court declared that although the mathematical impact of noncompliance is critical in determining whether or not to annul an election, its evaluation of evidence and resulting decision is not exclusively based on the quantitative test. Nevertheless, it was satisfied that noncompliance did not affect the result of the election in any substantial manner (2016 para. 24). Also, the Court did not find any evidence to support the allegations that electoral violations were committed by President Museveni or by his agent with his knowledge or approval. However, it acknowledged that there were widespread violations of electoral law by the incumbent’s supporters (2016, paras. 28-33). It also criticised the Uganda Electoral Commission’s gross incompetence and noncompliance with electoral laws (2016, paras. 33-36).

In a unanimous ruling, the Supreme Court found that President Museveni was lawfully elected (2016, para. 38). However, it observed that the incumbent’s use of his position was to the disadvantage of other candidates (2016, para. 37). It also expressed concern about the use of state resources and the unequal use of state-owned media by the president (2016, para. 37). The Court noted that it had made some important observations and recommendations with regard to the need for the reform of presidential electoral laws in its decisions in PEPs No. 01 2001 and No. 01 2006; however, many of these calls remained unanswered by the executive and the legislature (2016, para. 39-40).

In their report on the 2016 presidential and parliamentary elections, the European Union (2016) was particularly critical of the Uganda Electoral

Commission. It noted that the Commission permitted the incumbent to use state resources for campaigns, including denying equal access to opposition parties and candidates to state media (2016, pp. 2-5). All these acts are in violation of electoral laws.

This study will now analyse the legal principles for adjudicating presidential elections in Uganda for the purposes of offering alternative interpretations, and to highlight the deficiencies in the law. The overall aim is to assess the efficacy of presidential electoral laws in facilitating fair contest for political power in order to avert violent struggles, and to promote democracy.

LEGAL PRINCIPLES FOR ANNULLING ELECTIONS

The legislative intent of s.59(6)(c) appears to be the need to prevent presidential candidates from committing electoral offences similar to those witnessed during the 1980 general elections. As discussed above, during the 1980 elections presidential candidate Milton Obote and his supporters intimidated voters and threatened their political opponents with death (Mukasa 1980, p. 2). This lawlessness disenfranchised the voters and also disadvantaged Obote's challengers in the elections. Despite this, Obote was declared president and his UPC the winner of the elections. Under the current presidential electoral legal framework, similar acts are recognised as electoral offences and they are prohibited by the PEA and the ECA.

Though the Supreme Court found violations of electoral laws (PEPs No.1 2001, No.1 2006 and No.1 2016), it held that they were not committed by President Museveni, or with his knowledge or approval by his agent. Therefore it could not invalidate the elections on the basis of s.59(6)(c). This suggests that the provision imposes an obligation on presidential candidates to conduct themselves in a manner that does not defeat or violate electoral laws. Sub section (c) also implies personal liability. Violations of electoral laws, even those from which a presidential candidate gains unfair electoral advantages, do not engage the candidate's liability if they are not committed by the candidate or by their agent with the candidate's knowledge or approval. Therefore, under s.59(6)(c), the Supreme Court may only invalidate elections where a presidential candidate fails to conform to standards of electoral conduct, or where the candidate's agent with the candidate's consent or approval, violates electoral laws.

With regard to s.59(6)(b), this provision is designed to remedy the exclusion of persons who do not meet the constitutional criteria for the presidency. It is intended to preserve the calibre of presidential candidates from which the electorate can choose.

The most contentious item under s.59(6)(a) has its origin in international human rights law. At the international level, the Universal Declaration of Human Rights (UDHR) 1948, art.21(3) provides that: 'That the will of the people shall be the basis of the authority of government. This will be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.' The International Covenant on Civil and Political Rights (ICCPR) 1966, art.25 states that:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in art.2 and without unreasonable restrictions: (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

These two foundational international treaties provide the legal principle that the authority to govern shall be based on the will of the people as expressed in periodic and genuine elections. The concept of a popular government that emerges out of genuine elections is also common to regional treaties. In Africa, it is found in the African Charter on Human and Peoples' Rights (ACHPR) 1981, art. 13(1). In the Americas, it is provided for by the American Convention on Human Rights (ACHR) 1969, art.23; and in Europe it is found under the First Protocol to the European Convention on Human Rights (ECHR) 1950, art.3. Together, international and regional treaties provide the source of principles that capture the human aspiration to be governed through the genuine will of the people and underpin it as a legal obligation that states must observe. The legal obligation to govern, based on the genuine will of the people, has been included in the constitutions of many states. African examples of these include the Constitution of Republic of Angola 2010, art.4(1); the Constitution of the Republic of Benin 1990, arts. 3-6; and in Uganda, The Constitution art.1(4).

The legal requirement to govern through consent has international, regional and domestic appeal. International, regional and domestic rules cumulate in universal legal principles which provide a basis for measuring whether a state's actions give effect to the human aspiration for rule by consent. These legal instruments provide standards for conducting elections with integrity, protecting the political environment and citizen participation.

These principles act as a basis for measuring whether domestic electoral laws violate the accepted standards. For example, in the case of *Luis Felipe Bravo Mena v Mexico* (10/07/1993), the Inter-American Commission on Human Rights (IACHR) held that international standards are applicable in any case in which the rights of individuals, political or otherwise, are infringed. The case related to various

allegations of electoral irregularities which the government of Mexico argued were solely within the purview of domestic remedial organs. Similarly, in *Zdanoka v Latvia* [2006] Eur. Ct. H.R., App. No. 58278/00, the European Court of Human Rights held that although a state will be afforded a margin of appreciation in implementing electoral laws, such laws must not depart from accepted principles which give effect to the will of the people.

These legal principles are applied by the courts in the adjudication of electoral complaints in order to protect the will of the people. The danger, however, is that regardless of collusion in electoral laws and institutions in a country or jurisdiction, the legal principles for adjudicating electoral complaints assume that the outcomes of elections are pure and uncorrupted. They should only be invalidated in exceptional circumstances.

In many countries electoral laws indicate that the complainant must prove that these irregularities changed the outcome of the election in a substantial manner. This is in instances where the validity of the election is challenged on the basis of irregularities. Examples of these include the Elections Act No. 24 2011, s.83 of Kenya; the Law on the Elections of Member of Parliament 2002, art.100 (2) of Macedonia; and the Presidential and Vice-President Election Act No.31 1952, art.18(b) of India. This is because elections are meant to give a voice to the will of the people and to provide governments with the authority to exercise power. Therefore, technical irregularities during elections should not affect the declared results unless they distort the will of the people by changing the election outcome. Courts in many jurisdictions have held that election outcomes should only be overturned in extraordinary circumstances, where evidence of illegality, dishonesty, unfairness, malfeasance or other misconduct is clear; and most importantly where such improper behaviour has distorted the will of the people. Some of the authoritative cases are:

- in England: *Morgan & Others v Simpsons* [1974] 3 ALL E.R 722, [1975] QB 151-;
- in Nigeria: *Alhaji Mohamed D. Yusuf v Chief Olusegun A. Obasanjo & Ors* SC.122/2003, 2003(10) LEDLR 1, [2003];
- and in United State of America: *Andrews v Blackman*, 59 So.769 (La.1912).

This globally accepted legal concept, which is intended to protect the will of the people, forms the basis for annulling elections under s.59(6)(a). It is, therefore, widely conceived that candidates, parties and their supporters who lose elections in which minor irregularities occurred, should accept the outcomes, rather than routinely claim that the governments they produce are illegitimate. In this

regard, the Supreme Court in Uganda did not stray from international principles for adjudicating electoral complaints. There are, however, several reasons for criticising the Supreme Court decisions, as discussed below.

WEAKNESSES IN THE LAW

Despite the Supreme Court's findings of widespread violations of electoral laws, it held that these violations were not personally committed by President Museveni or with his knowledge or approval by his agent. The overall effect of such electoral offences was that they distorted the will of the people. This study asserts that the legislative intent of s.59(6)(c) is to prevent presidential candidates from both committing electoral offences similar to those witnessed during the 1980 elections, and benefitting from them. Given the Court's findings, it is reasonable to conclude that President Museveni acquired advantages in the elections as the result of electoral offences which also disadvantaged the electorate. The law should allow for elections to be annulled in instances where a candidate gains advantages over competitors, or disadvantages the electorate as a result of widespread violations of electoral laws. This should be regardless of whether the violations were personally committed by the candidate declared as president or with their knowledge or approval by their agent.

Where electoral gains are a result of offences such as intimidation or bribing voters, the will of the people is distorted and this influences the outcome of the elections. The will of the people cannot be said to be protected where there is evidence of widespread and distorting electoral violations. The fact that these irregularities are ignored is largely because the violations were not committed by the victorious candidate, or by agents with the candidate's knowledge or approval. Perfect compliance with electoral laws in every instance is unlikely, and the Court should avoid nullifying an election for minor violations or technical requirements. However, the law should indicate whether the violated electoral laws are mandatory or directory. Mandatory provisions would include those that prohibit voter disenfranchisements, such as bribing voters and voter intimidation. Widespread violations of such provisions distort the will of the people and should form the basis of annulling an election regardless of whether or not they are committed by the victorious candidate, or by their agent with their knowledge or approval. Directory provisions would be those that require candidates to conduct themselves in a respectful manner towards each other, such as those which prohibit defamatory remarks among candidates.

The Supreme Court has acknowledged the presidency's domination over all institutions of government and that President Museveni has gained an unfair advantage over his competitors through using state resources in the electoral

process (PEP No.1 2016, para. 37). It is, therefore, impossible to imagine how President Museveni, who has the state resources and machinery at his disposal, could fail to hide evidence of electoral offences that he has committed, or those committed by his agent with his knowledge or approval, in order for the Court to annul the elections under s.59(6)(c). Moreover, in civil proceedings such as electoral challenges, the burden of proof should lie with the petitioner to prove to the Court the allegations made against the respondent on the standard of 'the balance of probabilities' (*F.H. v McDougall* (2008) S.C.J. No. 54). However, the Supreme Court's decisions (*PEPs* No.1 2001, No.1 2006 and No.1 2016), indicate that the petitioner must prove, 'to the satisfaction of the Court', the allegations made against the respondent on a higher threshold, that is 'beyond reasonable doubt', which is the standard of proof required to validate a criminal conviction (Grechieng, Niclisch & Thoeni 2010, pp. 847-862). This imposes an almost impossible task for the challenger of the election's outcome. For these reasons, s.59(6)(c) is deficient in preserving the will of the people and in facilitating fair competition for the presidency.

INTERPRETING S.59 (6)(A) OF THE PRESIDENTIAL ELECTION ACT 2010

When interpreting the phrase 'affected the results of the election in a substantial manner' under s.59(6)(a), the Supreme Court in *PEP* No.1 2001 was guided by two authorities, namely, the cases of *Mbowe v Eliufoo* (1967) EA 240 and *Re Kensington North Parliamentary Election* [1960] 1 W.L.R 762, [1960] 2 ALL E.R 150. In the former case, Georges CJ defined the phrase 'affected the result' as follows:

In my view, the phrase 'affected the result' the word 'result' means not only the result in the sense that a certain candidate won and the other lost. The result may be said to be affected after making an adjustment, the effect of proved irregularities the contest seems much clearer than it appears to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be affected by any noncompliance of the rules (1960, para. 242).

In the latter case, Justice Boyce (1967, para. 115) reasoned that:

Out of the total voting electorate of persons who recorded their votes, 3 or possibly 4 were shown by the evidence to have voted without having a mark placed against their names in the register and each of them voted only once. Even if one was to assume in favour of the

Petitioner that some proportion of the remainder 111 persons, who we have not seen were in somewhat similar case, there does not seem to be a thread of evidence that there is any substantial noncompliance with the provision requiring a mark to be placed against the voters names in the register; and when the only evidence before the court is that 3 or possibly 4 people who are affected in that they recorded their votes without a mark placed against their names, each voted only once, one cannot possibly come to the conclusion that although there was a breach of statutory rules, the breach could have had any effect on the result of the election. Even if all the 117 persons were similarly affected, it could not possibly have affected the result of the election; therefore, although there was a breach in regard to the matter set out in para 3(1) of the petition, I should be prepared to say that there was a substantial compliance with the law in this respect governing elections and that omission to place a mark against the names did not affect the result.

In order to determine that the electoral malpractices did not affect the outcome of the elections in a substantial manner, the courts in *Mbowe* (1967) and in *Re Kensington* (1960), took a similar approach. They quantified the number of votes which the petitioners alleged they were deprived of as the result of the electoral malpractices, and deducted that number from the total votes cast in favour of the respondents. This was in order to determine if 'but for' the malpractices, the petitioners would have won the election. The courts could not invalidate the election where the majority margin between the respondent and the petitioner was so wide that even allowing for the votes deprived of the petitioner as a result of the malpractices, the respondents would still have won the election. In *Mbowe* (1967), there were 30 889 voters on the register, of which 6 393 voted for the petitioner and the respondent was declared the winner with 20 213 votes. The majority margin between the respondent and the petitioner was 13 820; 4 238 people did not vote. Even though the petitioner satisfied the Court that the respondent had intimidated his voters, it could not invalidate the election because the majority margin between the respondent and the petitioner was so wide. Assuming that 4 238 people did not vote because of intimidation and would all have cast their votes for the petitioner, the petitioner would still not have won the election.

There is, however, a problem when it is not possible for the court to determine the number of voters that may have been affected by the electoral malpractices. For example, in the 2001 presidential election, the Supreme Court found evidence of widespread voter bribing and intimidation (PEP No.1 2001, para.67). It was not possible for the Court to quantify how many voters were bribed to vote for President Museveni or how many people did not vote because they were

intimidated by the President's supporters. The facts, however, tell a different story. According to the Uganda Electoral Commission's Report (2001), President Museveni acquired 5 123 609 votes and Kizza Besigye polled 2 055 795. The other presidential candidates polled as follows: Awori Aggrey, 103 915; Bwengye Francis, 22 751; Karuhanga Chappa, 10 080; and Kibirige Mayanja Muhammad, 7 379. The total number of votes cast in the election was 7 389 691, and there were 10 775 836 persons on the electoral register.

The majority margin between the President and the petitioner was 3 067 565. According to evidence submitted to the Court by the Uganda Electoral Commission (PEP No.1 2001, para. 87), the total number of invalid votes cast was 186 453. Therefore, 3 386 145 people did not vote and could have been prevented from doing so by the intimidation meted out by President Museveni's supporters. Even though it was not possible to ascertain their reasons for not voting, the number of eligible voters that did not vote (3 386 145) was more than the majority margin between President Museveni and the petitioner (3 067 565) without considering the invalid votes cast (186 453). It is also not known how many people were bribed to vote for the President. Do these facts suggest that the Supreme Court got it wrong? Although it is not possible to ascertain the reasons why 3 386 145 people did not vote, on analysis the facts damage the credibility of the elections and the legitimacy of Museveni's presidency. It should be noted that in a country with an unenviable record of electoral malpractices, the Supreme Court had the option of ordering a new election under s.59(5) when there was any doubt about electoral legitimacy.

ELECTION RESULTS: A QUESTION OF QUALITY NOT QUANTITY

The legitimacy of a democratic government is established in large measure by credible elections. Credible elections occur in an electoral environment in which the citizenry can participate without fear or obstruction; political parties, candidates, and the media can operate freely; and independent state and democratic institutions function fairly and expeditiously. Also, electoral laws must be fair, they should be adhered to, and they should be capable of translating votes into the free will of the people in order to preserve the credibility of elections.

It is therefore important that the law should seek to protect all aspects of the electoral process in order to preserve the credibility or quality of elections. In some jurisdictions, electoral laws seek to achieve this aim. Examples of these include the Election Act 173 1988, s.56(a) of South Africa which allows the Electoral Commission or the Electoral Court to declare elections invalid where a serious irregularity has occurred concerning any aspect of an election. Also the Electoral Act 2010, s.138 (b) of Nigeria provides that elections may be annulled by reason of

corrupt practices or noncompliance with the provisions of the same Act. Courts have also strived to protect the quality of elections. In the case of *Valance v Rosier* 675 So. 2d 11389 La Ct App 1996, the Supreme Court of Louisiana (1996, para. 32) held that:

If the court finds that the proven frauds and irregularities were of such serious nature as to deprive the voters of the free expression of their will, or as to make it impossible to determine the outcome of the election, it will decree the nullity of the entire election even though the contestant cannot prove that he would have been elected but for such fraud or irregularities.

This case stands for the proposition that where widespread violations of electoral laws occur, they affect the quality of the elections because they distort the will of people and therefore the elections should be annulled.

Another example of where the court invalidated an election because it was conducted so badly that the credibility of the election could not be assured, is in the Hackney Case, *Gill v Reed and Holms*[1874] 2 O M & H 77 E.L.R 263. In this case, only 2 of the 19 polling stations were closed; as a result, 5 000 voters could not vote. The court did not engage in the impossible exercise of determining which candidate would have benefited from 5 000 votes had they been cast. It annulled the election on the basis that it was badly conducted and in noncompliance with electoral laws.

In this context, the term 'election result' is conceived of as a question of quality informing an election's outcome. It is seen as the entire electoral process not limited to only the votes tallied, because the outcome of the election cannot be guaranteed where the processes that deliver it are corrupted

Uganda's only post-independence attempt at conducting elections in 1980 was marred by electoral illegalities (Tamale 1980). Also, history indicates that unelected leaders have held political power at all costs. These factors, including the need to reverse the country's history of political and constitutional instability, (as expressed in the Preamble and art.1(4) of the Constitution) motivated the country's desire to hold free and fair elections in order to be ruled by consent. During the public debates on the Constitution, Ugandans demanded that 'electoral laws should be built into the new constitution in order for elections to be the mechanism for the smooth transfer of power from one administration to another' (CCR 1992, p. 89).

In PEP No.1 2006, the Supreme Court found instances of ballot paper stuffing in at least 22 out of the 69 districts. Over 2 000 ballot papers were stuffed at one polling station and more than 600 people voted at a sham polling station (2006,

para. 54). It also found evidence of falsification of results by the Uganda Electoral Commission, and voter intimidation and voter bribes by persons associated with the president (2006, para.124). In PEP No.1 2016 the court criticised the Uganda Electoral Commission for late delivery of voting materials, which led to a substantial number of voters being unable to vote. The commission was also accused of failing to provide a credible explanation as to why the results of the election were delayed or missing in 1787 polling stations (2016, paras. 97 and 123). It also noted that in some cases, the petitioner's agents were denied information to which they were entitled. Among other acts of electoral lawlessness the police and other security agencies interfered with the petitioner's electioneering activities (2016, paras 145-149). These widespread electoral malpractices violated core constitutional values in that they undermined the principles on which the new democratic dispensation in Uganda was founded. In doing so they affected the quality of elections as envisioned by the citizenry of Uganda and as provided for in the Constitution.

The conclusion was that the election was not only noncompliant with domestic electoral laws but also disregarded core constitutional values. Thus the quality and result of the election were affected in a substantial manner, in terms of s.59(6)(a). The result of the elections is interpreted to mean the number of votes cast but not the quality of the electoral process, as has been preferred by the Supreme Court, fails to protect the quality of elections. It also defeats fair political contestation and it is inadequate in protecting the will of the people.

CONCLUSION

An analysis of the post-1995 constitutional and domestic legal framework under which the president of Uganda is elected reveals that it is deficient in facilitating fair political contestation and in promoting democracy. This is mainly because presidential electoral laws make it almost impossible to challenge the outcome of the election, particularly when the present incumbent is declared victorious. Also, electoral laws have been interpreted without the judicial activism necessary to address issues of electoral lawlessness and the challenges to elections pertaining to Uganda. Moreover, the abolishment of the presidential term limits without the popular consent of Ugandans has enshrined a president-for-life who commandeers the Constitution and all instruments of state power. Presidential elections in Uganda have failed to display the procedural fairness and substantive uncertainty that makes democratic elections normatively acceptable. As such, they are incapable of offering the prospects of transferring power. They may be perceived as an institutional facade of democracy aimed at concealing the harsh realities of an entrenched regime. They do not offer a choice, are not a

symbol of popularity or legitimacy, and they have failed to translate votes into a democratic choice. Presidential elections in Uganda are a periodical ritual that affirms President Museveni's grip on power.

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ELECTION DEPOSIT AND DEMOCRACY IN DEVELOPING COUNTRIES: *A Comparative Overview in Selected Southern African Development Community Countries*

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ABSTRACT

After their independence most African countries adopted constitutions that enshrine democracy and the right to vote and stand for public office. These political rights are important tools for ensuring democracy as they enable citizens to participate in both constituting and having a say in their own government. Despite entrenching these rights in their constitutions, many African countries went further and adopted laws requiring citizens who wish to participate in elections to pay an election deposit fee. Given the fact that most developing countries in Africa experience fairly widespread poverty, many potential candidates may not be able to afford the election deposit fee. Accordingly, the election deposit fee may well hinder the cause of democracy by excluding citizens from exercising their political rights. This paper discusses the effect of an election deposit fee on democracy in developing countries in Africa. The discussion is limited to selected countries in the Southern African Development Community.

Keywords: election, deposit, democracy, vote, constitutionalism

INTRODUCTION

Most African countries adopted constitutions that enshrined democracy and guaranteed political rights to their citizens.¹

¹ See section 19 of the Constitution of the Republic of South Africa, 1996; article 1 of the Constitution of the Republic of Mozambique, 2004; article 1 of the Constitution of the Republic of Namibia, 1990 and section 3 of the Constitution of the Republic of Zimbabwe, 2013.

Furthermore, these countries adopted laws aimed at implementing the provisions of their constitutions regarding the exercise of political rights. These laws prescribed the conditions and procedures for accessing the rights which, among other things, included the requirement for an election deposit fee to be paid by a candidate or political party wanting to participate in elections. Consequently, those candidates and political parties who could not afford the election deposit fee were excluded from exercising their political right to participate in the election.

This study discusses the effect of the election deposit on the attainment of democracy in developing countries. This it does by conducting a comparative overview of Southern African Development Community (SADC) countries with regard to enshrining democracy in their constitutions, the environment in which elections are held, and the laws that regulate the participation of candidates and political parties in elections. As background to the main discussion, the concept of democracy and the right to participate in elections and stand for public office is discussed. Finally, a conclusion is drawn regarding the effect of an election deposit fee on the achievement of democracy.

THE CONSTITUTIONALISATION OF DEMOCRACY

The concept of democracy has a contested meaning, with different writers having their own definitions and understanding of the concept (De Vos 2014). One of the most fundamental values of democracy is that of self-government, that is the freedom of individual citizens to rule over themselves through a concerted collective process (Lindberg 2006). Two of the institutional conditions of democracy are the election of representatives by universal adult suffrage to institutions that allow those representatives to govern; and the free entry of citizens to candidacy for electoral office (Greenberg 1993). The core of democratic self-government is thus representative democracy whereby citizens participate in the governance of their own affairs through their elected representatives.

Given the history of colonialism and apartheid on the African continent, most African countries included constitutional democracy as one of their core founding values. This sent a positive message that after achieving liberation, African countries would not revert to an era in which some people were excluded from enjoying certain benefits or were discriminated against because of their race, gender, religion or other features. In this regard, the Namibian Constitution provides that the Republic of Namibia is established as a secular and democratic state founded upon the principles of democracy [art. 1(1)]. In Zimbabwe, the Preamble to the Constitution provides that the people of Zimbabwe commit themselves to upholding the principles of democracy and good governance. Furthermore, Zimbabwe's Constitution is founded on respect for the principles

of good governance which include a multi-party democratic political system [sec. 3 (2) (a)].

The Mozambican Constitution states that the Republic of Mozambique is an independent, democratic state of social justice (art. 1). The Republic of Mozambique is a state governed by the rule of law based on the pluralism of expression and democratic political organisation [art. 3.(f)]. In Zambia, the people commit themselves to upholding the principles of democracy and good governance and resolve that Zambia shall remain a multi-party and democratic state. Their Constitution proclaims the Republic of Zambia as a multi-party democratic state [sec. 4 (3)]. In addition, democracy is one of the national values and principles upon which the Republic of Zambia is founded [sec. 8 (c)]. In Angola, the Constitution of Angola declares Angola to be a state whose primary objective shall be to build free, just, and democratic equality and social progress (art.1). In South Africa, the Constitution proclaims South Africa to be a democratic state founded on the values of a multi-party system of democratic government to ensure accountability, responsiveness and openness [sec. 1 (d)].

The question needs to be posed as to the effect of constitutionalising democracy. A constitution is a founding document from which the authority of the state is derived. It regulates and limits the exercise of power by the state (De Vos 2014). According to Mueller (1996, p. 43), the effect of the constitution in democratising a country is manifested when the constitution is consciously chosen and designed by the citizens. When these constitutions are regarded by both citizens and government as being supreme law, they place real limitations on what the citizens and government can do. A country therefore takes a positive step in democratising itself by entrenching democracy in its constitution, if such a constitution is chosen by the citizens themselves. Such a constitution ought to be a binding declaration that democracy will prevail and will be realised. Accordingly, the conclusion can be drawn that these states are binding themselves to being constitutional democracies. A constitutional democracy is defined as a system of government in which decisions are made in terms of the constitution (De Vos 2014).

Democracy is further entrenched by the declaration by all SADC countries that their constitutions are the supreme laws of their countries. Zambians proclaim their Constitution to be the supreme law of that nation [art. 1 (1)]; the Constitution of Namibia provides that the Constitution shall be the supreme law of Namibia [art. 1 (6)]; in Zimbabwe the Constitution is the supreme law, and any law, practice or conduct inconsistent with the Constitution is invalid (sec. 2); the Constitution of Mozambique provides that the state is subordinate to the Constitution, and the Constitution shall prevail over all other rules of the legal order [art. 2 (3)]; in Angola the Constitution is the supreme law of that country [art. 6 (1)]; and in South Africa, 'the Constitution is the supreme law of the Republic; law or conduct

inconsistent with it is invalid, and the obligations imposed by it must be fulfilled' (sec. 2). Thus, given the supremacy of the constitution in SADC, no law or conduct should undo democracy or impinge on the citizens' rights to stand for election. Accordingly, SADC countries are obliged to ensure that conditions are conducive to the prevailing of democracy.

THE RIGHT TO CONTEST ELECTIONS

Apart from constitutionalising democracy, most SADC countries guarantee their citizens the right to stand for public or political office. In Namibia, every citizen who has reached twenty-one years of age has the right to be elected to public office [art. 17 (2)]. The Zambian Constitution provides that the electoral systems for the election of president, members of Parliament or councillors, should ensure that citizens are free to exercise their political rights [art. 45 (1)]. A citizen who has attained the age of eighteen years is entitled to register as a voter and to vote in an election, and a political party has the right to sponsor a candidate for election or nomination to a state office. In Zimbabwe every citizen has the right to regular election to elective public office, and every citizen who has attained eighteen years of age has the right to stand for election for public office [sec. 67 (1) & (3)]. In Mozambique, citizens are entitled to exercise political power through the election of their representatives [art. 73]. In Angola every citizen has the right to stand for public office [art. 53 (1)]. In regulating this right, the law may determine only the ineligibilities required to guarantee electors the freedom of choice. Every citizen who has attained the age of eighteen years has the right to stand for election for any state or local authority [art. 54 (1)].

In South Africa, every citizen has the right to make political choices, and every adult citizen has the right to stand for public office and, if elected, to hold office [sec. 19 (3)]. The right to stand for public office is another aspect of the political rights provided for in the Bill of Rights in the Constitution. Accordingly, the right to vote, to participate in an election as a candidate and to seek public office, are protected by the Constitution. The right of the citizens to have free and fair elections and to stand for public office was prompted by the Constitutional Court case of *Khan V Electoral Commission* [2016 (2) SA 388 (CC)]. The applicants, who were independent ward candidates contesting by-elections at Tlokwe Local Municipality, challenged the outcome of the elections on the grounds that some people who voted in the by-elections were not resident in the voting districts where they voted and that the voters' roll did not contain the physical addresses of the voters. The failure of the Independent Electoral Commission (IEC) to provide candidates with copies of a voters' roll which included the addresses of the registered voters was contrary to the provisions of the Municipal Electoral

Act. As a result, the court found that the elections conducted at Tlokwe Local Municipality had not been free and fair [para. 126]. The process of election to public office is of cardinal importance for achieving democracy. This view is reinforced by the *Kham* judgment in demonstrating that the mere existence of the right to participate in elections through voting or standing for public office, without the existence of conducive conditions for its effectiveness, does not contribute positively to the democratisation of government.

Elections are primarily about the right of citizens to participate in and to have their say in government. The right to vote and to stand for public office is linked to free and fair elections. While there is no universal definition of free and fair elections the expression 'free and fair elections' was explained in the *Kham* case [para. 86]. This highlighted both the freedom to participate in the electoral process and also the ability of the candidates to compete with one another on relatively equal terms. For example, the denial of facilities for conducting meetings and the non-availability of voting stations within the reach of the citizens who are entitled to vote, could prevent an election from being categorised as free and fair. Free and fair elections are those in which all citizens are entitled to stand for election and to be treated in the same manner. The importance of political rights cannot be overlooked in Africa as many people struggled for, fought for and lost their lives to secure these rights for all citizens. In the dissenting judgment in the Constitutional Court case of *Electoral Commission v Hlophe* [2016 (5) SA 1 (CC) para. 141], Judge Jafta defined political rights by stating that: 'These rights constitute a cornerstone of our democratic order and are pivotal to the creation and legitimacy of a government formed after elections. Without them democracy itself cannot exist'. Accordingly, for a government to be based on the will of the people and to be the government of the people, citizens should enjoy political rights without any hindrances. The electoral laws that regulate participation in elections by the citizens should thus not exclude citizens from the enjoyment of these rights.

THE OPERATING ENVIRONMENT FOR ELECTIONS

As stated above, most SADC countries enshrine political rights and democracy in their constitutions. Each SADC country has its own electoral laws that prescribe the qualifications and requirements for a candidate who wishes to stand for election to the office of president, or for the national and provincial legislatures or local authority. The question arises as to whether the environment under which elections are held is conducive for attaining democracy and exercising political rights in these countries. Thus the legal framework and environment in which elections are held in SADC countries is assessed in order to establish whether these countries adhere to the principles of democracy and the law.

Zambia

The Electoral Institute for Sustainable Democracy in Africa (EISA) reports that conditions in which elections took place in Zambia were largely peaceful (EISA 2008). In Zambia electoral laws prescribe that a deposit be paid by any candidate wanting to contest either the presidential or National Assembly election [sec. 21 (1) (b) and 23 of the Electoral Act].

As a result the Electoral Commission of Zambia (ECZ) prescribed what fees were to be paid for contesting elections for the office of the president, National Assembly and mayoral office in local government. According to Paul Shalala, political analyst and reporter for the Zambia National Broadcasting Corporation (2016), the ECZ increased the election fee by more than 100% for the 2016 presidential election. As a result of the requirement for an election deposit in Zambia, reports indicate that only five of the forty-six registered political parties paid the presidential nomination fees which were fixed at K75,000 (*Daily Nation* 2016). Consequently, all those political parties who failed to pay the deposit were disqualified from standing in the elections and opposition parties thus disqualified were enraged (*Zambia Reports* 2016).

Allan Sakala, an independent candidate for Munali constituency in Lusaka, threatened to take the ECZ to court over the high nomination fees (*Africa Fight Now* 2016). He also wrote that these fees make politics and leadership the preserve of the rich and the corrupt in Zambia. Several other candidates similarly disqualified from standing for the office of the president argued that hiking nomination fees was discriminatory because it barred rural communities from participating in the governance system and marginalised poor in the electoral system and process.

Namibia

Conditions under which elections are held in Namibia are fairly satisfactory (SADC Observer Mission 2014). The Namibia Electoral Act of 2014 states that in the case of a candidate nominated by a political party for the election of president, the nomination form must be accompanied by a receipt indicating that an amount of N\$2000 (Namibian dollar, which is equivalent to the South African rand) has been deposited with the state revenue fund by the party. In the case of an independent candidate, the nomination form must be accompanied by a receipt showing that an amount of N\$10000 has been deposited with the state revenue fund by the candidate [sec. 73 (4) (c)-(d)]. The deposit is forfeited if a candidate records fewer than 10% of the overall total votes cast in that specific presidential election. Consequently all but two of the political parties that took part in the presidential election lost their deposit of N\$10000 after failing to garner sufficient votes (Maletsky 2009).

Zimbabwe

Although the Zimbabwean Constitution enshrines both democracy and the right to vote and to stand for public office, the country has failed to adhere to the spirit of the Constitution. A high incidence of violence and vote-rigging during elections has become the norm. This was evident in the 2008 presidential elections which were characterised by violence, included several arrests of the leader of the opposition, Morgan Tsvangirai (EISA 2008).

The 2013 general elections were perceived to be free and fair because they were not tainted by any visible incidence of violence and intimidation. However, according to Southall & Van Zyl Slabbert (2013, p. 142) the 2013 elections were another case of election rigging. The authors refer to other serious issues which demonstrate the failure of the Zimbabwe African Union Patriotic Front (Zanu-PF) government to uphold the rule of law. For these reasons, Southall & Van Zyl Slabbert (2013, p. 139) argue that although the 2013 Zimbabwe elections were not characterised by violence, the governing party of President Mugabe implemented numerous dubious measures devised to skew the vote. This view is reinforced by Masunungure (2013, p. 100) who argues that although the 2013 elections in Zimbabwe appeared to be free and fair the Zanu-PF manipulated the process. According to Masunungure (2013, p. 103), in an abuse of the public media a day before the election Zanu-PF invented a public survey indicating a thrashing victory by President Mugabe's Zanu-PF over Mr Tsvangirai of MDC-T. In this regard Zanu-PF went the extra mile not so much to win but to publicise their win as credible and inevitable

In a practical sense, the right of Zimbabwean citizens to vote and to stand for public election was affected when President Mugabe failed to proclaim the 2013 election date before the end of the life of the Parliament. In the unreported case of *Mawarire v Mugabe* (CCZ1/13), the court held that the failure by the president to proclaim an election date before the expiry of the life of Parliament was contrary to the principle of constitutionalism and violated the citizen's political right to vote and to stand for public office as protected by para. 10 of the Constitution.

In Zimbabwe, the Electoral Act of 2004 [sec. 46-47] provides that the nomination of candidates for election as members of Parliament shall be accompanied by a deposit of such a sum as may be prescribed which will be deposited with the constituency registrar, by, or on behalf of, the person nominated. If the candidate records less than a fifth of the votes cast for the successful candidate, the sum deposited by the unsuccessful candidate shall be forfeited.

Despite the legal framework that regulates the holding of elections in Zimbabwe, it is arguable that the country might not be adhering to the principles of democracy and rule of law. This conclusion is supported by the history of election rigging, intimidation, violence waged against opposition parties, and

the failure of the president to comply with the prescripts of the law, so offending the rights of citizens to participate in elections.

Mozambique

After gaining independence in 1975, Mozambique was plagued by civil war (EISA Observer Mission 2014). However, it is noted that since the end of the civil war the political environment has been relatively conducive to free and fair elections.

The Constitution of Mozambique delegates the regulation of electoral procedure to law. The Electoral Law of Mozambique of 2004 [art. 123,125,141,142 &144] regulates nomination for both the post of president and members of the National Assembly (referred to as deputies of the Assembly) but makes no mention of a nomination deposit fee. In order to stand for election a candidate nominated for presidential office must be endorsed by 10 000 citizens who are voters (EISA 2010). Accordingly, an election deposit is not required for contesting elections in that country. Furthermore, the Mozambique electoral system makes provision for election campaigns for both the presidential and National Assembly elections to be funded. Pursuant to this arrangement, the state allocates electoral campaign funds equally to all the participants who contest the elections (EISA 2014).

Angola

After independence Angola was riven by a civil war which ended in 2002. The history of elections in Angola shows that the political climate has evolved from a post-conflict situation, characterised by violence and allegations of election rigging, to one of normality (EISA 2012).

Angola is one of the SADC countries to fund the election campaigns of political parties. The amount of funding to be provided for each party and coalition in an election year is announced by presidential decree (EISA 2012). No election deposit is required for candidates for either the office of the president or the National Assembly in Angola. Articles 106 and 111 of the Constitution of Angola, which provide for the appointment of the president and members of the National Assembly, make no mention of an election deposit fee. In addition the Angola Electoral Law of 2004, which regulates the qualifications of candidates for nomination to the office of president and to the National Assembly, makes no mention of an election deposit fee. The law requires that the candidates proposed for election for the national constituency must be supported by between 5 000 to 5 500 voters, and by 500 to 550 voters for the provincial constituencies [art. 62(2)].

South Africa

Many observers perceive South Africa as a country riven by excessive and widespread violence, including political violence. According to Schonteich and

Louw (2009), recorded criminal violence has increased consistently since 1994 unlike overall recorded crime levels which decreased slightly in 1995-1996. This view is reinforced by Dovey (2009, p. 50) who argues that when South Africa became a democratic republic in 1994, it faced a decrease in political violence but an escalation in violent crimes and this has led to South Africa's reputation as a crime capital. After the first democratic election on 27 April 1994, political violence throughout the country decreased greatly (Dovey 2009). It is evident from the reports of EISA for the 2014 national and provincial elections and 2016 local government elections that conditions in South Africa are conducive to free and fair elections (EISA 2014, 2016).

In South Africa, a political party may contest the national and provincial elections if that party is registered and has submitted a list of candidates [sec. 26 (a)-(b) of the Electoral Act of 1998]. The list of candidates submitted to the chief electoral officer must be accompanied by the prescribed deposit. The amount of the deposit is prescribed by the Independent Electoral Commission (IEC) with the proviso that the amount of the deposit by a registered party contesting an election of a provincial legislature must be less than the amount for contesting an election of the National Assembly. In local government candidates are elected through the dual electoral system of both the constituency and proportional representation. Norris (1997, pp. 303-305) states that in a constituency system, voters cast a single ballot for one candidate in the constituency, and the candidate with the largest share of the vote in each seat is returned to office. Under the proportional representation system, the seats in a constituency are divided according to the number of vote cast for the party list. Thus, in the dual system half of the seats are elected direct from the constituency and half are elected from party lists allocated by proportional representation.

At local government level the Local Government: Municipal Electoral Act of 2000 [sec. 13 (1)] provides that only registered parties may contest an election by submitting a list containing the names of candidates to stand for the party's proportional representation to the council. In addition, they may also nominate a ward candidate as a representative of the political party in that ward. The parties are required to submit a party list and a deposit equal to a prescribed amount to the office of the IEC local representatives not later than a date stated in the timetable for the election. A person may be nominated to contest an election in a ward either by a registered party or by an ordinary person who is a registered voter on the municipal voter's roll. Ward candidates are also required to pay a prescribed deposit. An independent ward candidate needs to pay the prescribed deposit, and the nomination must also be supported by at least 50 voters on the voter's roll for any voting district in the ward.

Concern has been raised about the payment of an election deposit and the issue has been contested in the courts. In the Constitutional Court judgment of *African Christian Democratic Party v Electoral Commission* [2006 (3) SA 305 (CC)], the applicant – the African Christian Democratic Party (ACDP) – lodged a party list and nominated ward candidates for election to the Cape Town Metropolitan Council at the Cape Town offices of the Independent Electoral Commission, but it omitted to pay the deposit fee at the Cape Town office. Furthermore, the applicant made a bulk payment by way of a bank guaranteed cheque to the national office of the IEC in respect of a range of municipalities, but the Cape Town metropolitan area was erroneously not included in the list of municipalities. There was, however, enough surplus money in the bulk payment to cover the deposit for the Cape Town candidates. When the IEC refused to allocate the surplus funds as a deposit for the Cape Town metropolitan area, the applicant approached the court for relief. In interpreting the provisions of the Electoral Act relative to the payment of a deposit, the court held that the Act must be construed in the light of the foundational values of the Constitution. This states that the Republic of South Africa is a democratic state founded on the values of universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness' (para. 21). These fundamental values require both the courts and the IEC, when interpreting the provisions of the Electoral Act, to promote enfranchisement rather than disenfranchisement and participation rather than exclusion. The court found that the IEC had erred in concluding that the applicant had not complied with the provisions of the Electoral Act on the payment of the deposit (para. 35). This judgment emphasizes the value of political rights in that the legislation regulating these rights should be interpreted in a manner to promote the enjoyment rather than the denial of political rights.

In the Gauteng High Court judgment of *Economic Freedom Fighters v President of South Africa* (16247/14) [2014] ZAGPPHC 109 (11 March 2014), the issue involved as applicant the Economic Freedom Fighters (EFF), which was a newly-registered political party still finding its feet financially and administratively. The EFF had asked the IEC, the first respondent, to waive the deposit fee for the 2014 national and provincial government elections because the fee was unaffordable for the EFF. When the IEC refused to waive the deposit fee, the EFF approached the court for relief, asking among other things that an order be granted suspending the operation of the regulations regarding payment of the deposit. The applicant's arguments were based on the fact that, as a newly formed party, it did not receive the parliamentary funding available to political parties which had representatives in Parliament. The court held that it could not interfere with the determination

made by another branch of government, the legislature, on the payment of the election deposit fee (para. 23).

This judgment demonstrates the fact that the requirement for an election deposit places political parties who are participating in elections on different and unequal footings. In this regard the political parties that are represented and receive funding from Parliament can easily afford to pay the election deposit, and therefore participate in the elections. On the other hand new political parties who are not represented and thus do not receive funds from the legislature may not participate in the elections if these parties are unable to afford the deposit fee.

The issue of the election deposit also arose in the context of local government elections in the Electoral Court judgment in the case of the *National Freedom Party v Electoral Commission* (011/2016 EC) [2016] ZAEC 3 (5 August 2016). The National Freedom Party (NFP) failed to pay the election deposit fee on the prescribed date. Consequently the NFP was not registered by the IEC as a party to contest the national municipal elections because it had failed to pay the deposit required in terms of the law. The NFP approached the Electoral Court for relief against the decision of the IEC which, it was alleged, had declined to exercise its discretion by refusing to extend the time period in which the NFP could pay the required deposit. In dismissing the application of the NFP, the court held that there was no provision in the legislation that enabled the IEC to grant an extension to anyone regarding that person's non-compliance with the law (para. 20).

As was the case with the *African Christian Democratic Party* (para 23), the interpretation of the electoral law should seek to promote enfranchisement rather than disenfranchisement and participation rather than exclusion. Arguably, the court in the *National Freedom Party* case failed to interpret the provisions of the Municipal Electoral Act in a manner seeking to promote democracy. The NFP is a well-known national political party. It was represented in many municipalities and was also a governing party in at least two municipalities in KwaZulu-Natal prior to the 2016 local government elections; in the final list it has six seats in the National Assembly, and six seats in the KwaZulu-Natal provincial legislature (Parliamentary Monitoring Group 2014). Moreover, there is no dispute that the NFP intended to contest the local government election, but only that it erroneously paid the deposit after the deadline for the payment of such deposits. The court applied an inflexible and narrow interpretation of the law, arguing that the law does not grant the IEC the discretion to condone non-compliance with the deadline for payment of the deposit requirement. In the case of the *African Christian Democratic Party* (para. 31), it was held that in interpreting the provisions of the Municipal Electoral Act on the payment of the election deposit, the importance of promoting multi-party democracy and the political rights of citizens should be borne in mind. If the court had applied the guidelines of the Constitutional Court, the NFP could

have been condoned for paying the deposit after the deadline, more particularly because there was no evidence before the court that any political party would have been prejudiced by granting condonation for late payment of the deposit fee. Consequently thousands of members of the NFP and other ordinary citizens were denied their democratic and political rights to participate in the local government elections owing to the rigid requirement for the deposit fee.

General Position in SADC

The election deposit fee cannot be isolated from the environment in which elections are held in SADC countries. The comparative overview in SADC countries indicates that, despite guaranteeing democracy and political rights in their constitutions, some of these countries still fail to adhere to the spirit of their constitutions. This offends constitutionalism and impinges on democracy. The question arises as to why these countries fail to uphold their constitutions. Although this question is beyond the scope of this study, some of the reasons could be attributed to the history of civil wars that took place in these countries after independence. Conflicts are normally characterised by a culture of defiance, lawlessness, and a lack of respect for human rights. Ndulo and Lulo (2010) reinforce this view when they point out that elections organised in post-conflict environments take place in a tense and high-risk atmosphere. They support this argument by pointing out that challenges involved in post-conflict environments arise from the decline in humanitarian, economic and other related attitudes that prevails during the conflict. The issue of the post-conflict dilemma is worsened by the culture of former liberation movements which fail to transform into political parties after independence. This conclusion is supported by Mapuva and Muyengwa-Mapuva (2014) who attribute the culture of intolerance and the failure of Zimbabwe to transform into a democratic state to the culture of Zanu-PF, which has failed to transform from being a liberation movement to being a political party. Even though the matter of post-conflict attitudes might influence the culture of flagrant disregard for the rule of law, it must be noted that SADC countries obtained their independence more than twenty years ago. They should, thus, have transformed themselves from post-conflict environments to stable democracies. In this regard the African Union (AU) has adopted a number of instruments to promote democracy in Africa, including the African Charter on Democracy, Elections and Governance of 2004. The objectives of this charter include the adherence by each signatory state in the AU to the universal values and principles of democracy and respect for human rights; and to enhance adherence to the principle of the rule of law premised upon respect for, and the supremacy of, the constitution and constitutional order in the political arrangements of political

parties in each state. The effective implementation of this charter will enhance the promotion of democracy and the rule of law in Africa. In a practical sense west African countries have forced the former president of Gambia, who had lost in the elections, to transfer power to the new president who had won the elections (Atek 2017). The former president agreed to transfer power to President Barrow who won the elections only after west African countries threatened to remove him through military intervention. The action of these west African countries regarding the situation in Gambia demonstrates that the implementation of the AU instruments on the promotion of democracy will accelerate the democratisation of African countries.

THE EFFECT OF THE ELECTORAL DEPOSIT ON DEMOCRACY

The main focus of democracy in this study relates to the role of elections in democratising a country. Central to the procedure of democracy is the selection of leadership through competitive elections by the citizens (Barro 1999). Each country has its own set of procedures for the selection of candidates and election contests, which it claims to be based on its understanding of democracy. It is widely accepted that democracy is a commitment to government of the people, by the people, for the people (Catt 1999, p. 7). Catt argues that self-government and equal access are seen as vital components of democracy by those who aim at achieving political equality, and that the value of democracy lies in its provision of other desirable ends, such as the basic idea of equality. Accordingly, democracy is not an end in itself. When all people are seen as equals, this means, in terms of democracy, that all people must have the same opportunities to participate in the process.

Lack of access to the economy and the poverty that has affected developing countries in Africa has the potential to deprive people of equal access to participating in elections. This is because of the requirement of an election deposit as a qualification for candidates wishing to participate in elections. According to Statistics South Africa (2016) the rate of unemployment in South Africa in May 2016 was reported at 26.7%; in Zambia it was 7.8% in 2014 (Mujenja 2014); in Namibia it was 28.1% in 2014 (Namibia Statistics 2014); and in Zimbabwe it was reportedly 37% in 2014 (Zimstats 2015). These figures demonstrate that these countries have weak economies. The unequal treatment of rich and poor can be explained as an unequal access to election participation. This view is reinforced by left-leaning writers such as Catt (1999) who argue that candidates who feel inferior with regard to their incomes and jobs are not able to participate in the political arena on the same footing as those who have money (Catt 1999). This sentiment is also echoed by Maiko Zulu, an independent candidate for Kabwata constituency in

Lusaka, Zambia, when raising his concern about the election deposit fee (*Africa Fight Now* 2016). He argued that the electoral process now seems to be a preserve of the rich, thereby commercialising participation in leadership. The argument against election deposit fees is reinforced by the high rate of poverty in developing countries. Accordingly, the deposit fee may not be appropriate for the economic level of the majority in the SADC countries.

The requirements for an election deposit have the potential to create and sustain an elite democracy in developing countries. Elitism is explained as the view that only a few are qualified to rule (Girvetz 1967). Girvetz further states that the term elite refers to any group set apart because of some superior quality or condition. Democracy, on the other hand, stands in contrast to rule by a particular group, for instance aristocracy, where a privileged class rules (Catt 1999). In a democracy, people who are able, favoured or preferred for reasons other than wealth or other privileges may govern. The deposit fee required in developing countries affected by inequality, their poverty and lack of a sound economy thus disadvantages aspiring candidates with regards to participation in elections. Consequently, this impinges on democracy.

THE VALUE OF AN ELECTION DEPOSIT

The popular view of the need for an election deposit is in order to establish the party's or candidate's serious intentions with regard to contesting elections, as elections involve huge costs for the state. This view is reinforced by the Chief Communications Officer of the Independent Electoral Commission of South Africa, Kate Bapela, when explaining that the purpose of an election deposit is to ensure that only parties of substance participate and that the threshold is intended to avoid frivolity in the electoral process. Accordingly, it seeks to obviate the possibility of a long ballot which raises the costs of printing to an unreasonably high figure (Geldenhuys 2013).

The purpose of the election deposit should be weighed against the value of political rights and democracy, and the context of electoral contests which are increasingly competitive. Electoral competition results in political parties spending exorbitant funds on the election. In this regard, in the 2016 South African local government elections political parties spent unprecedented amounts of money, with the African National Congress (ANC) spending R1 billion, the Democratic Alliance (DA) spending R350 million, and the Economic Freedom Fighters (EFF) spending R10 million (Hunter et al. 2016). Given the fact that funding political parties is not regulated in many countries, including South Africa, the uneven funding of political parties by private funders may put different parties in an uneven situation with regard to participation in elections. Parties that receive more funding are advantaged over those receiving less funding or no funding

at all. Money has thus become an essential tool in influencing the success of election campaign.

It should furthermore be noted that those countries requiring an election deposit fee do not even fund political parties for election campaigns. The election deposit thus further disadvantages those parties which do not receive funding. They are not only disadvantaged by being unable to compete evenly with well-funded parties, but are further excluded from participating in elections because of their inability to afford the election deposit. Given the history of the struggle for political rights and the attainment of democracy, citizens should not be denied these rights easily. It cannot be said that the election deposit fee is the only mechanism that could measure the participants' seriousness to contest elections.

The relevance of the election deposit has recently been questioned in developed countries. In this regard, the Electoral Commission (EC) of the United Kingdom (UK) is reported to have proposed scrapping the deposit fee for elections in the Rochester parliamentary by-election (Perraudin 2015). The EC described the requirement of an election deposit fee as unreasonable in that the ability to pay a specific fee should not be a valid criterion for determining access to the right to participate in elections. The commission suggested that instead of a deposit fee, a candidate should be required to gather the signatures of a set number of supports to show that he or she is seriously contesting an election. The report of the commission is important in demonstrating that there are other effective ways of alleviating the possible abuse of the election system by citizens. Moreover some countries in the SADC such as Angola and Mozambique successfully run their elections without requiring an election deposit.

The conclusion can be drawn that the election deposit fee creates a barrier for citizens wishing to participate in elections. This is evident from political parties in South Africa and Zambia who were excluded from participating in elections simply because they could not pay the election deposit fee.

CONCLUSION

The environment within which elections take place in most SADC countries indicates that despite the fact that they proclaim principles of democracy and constitutionalism in their constitutions, they do not adhere to these principles. The reported incidence of political violence and the election rigging results in some SADC countries indicate that the conditions under which elections are held are not conducive to democracy.

Elections are very important as they provide one of the main guarantees of democracy. Equal participation in elections democratises a country in that it minimises post-election violence and the unlawful overthrowing of the

government. If elections are contested fairly, citizens are more inclined to unseat an unpopular government through elections rather than by violence. If the purpose of the deposit is to establish the party's or candidate's serious intent, the deposit is not the only criterion for achieving this purpose. The exclusion of the NFP (which is represented in the National Assembly) from contesting elections might indicate that deposit requirements may not be the sole criterion for determining whether a party can contest the elections. The party whose members and office bearers make a living by representing it in parliament, in provincial legislatures and municipalities, and whose internal machinery has not been reported to be dysfunctional, could hardly be said to lack a serious intention to contest the elections. Furthermore, it is evident from the EFF case that the deposit fee requirement might place political parties in unequal situations with regard to participation in elections because of affordability. New political parties that are not represented in parliament might thus be excluded from contesting elections simply because they lack a deposit fee. In this instance, the election deposit fee would be a rigid and inaccurate means of determining the party's serious intentions to contest elections.

The deposit fee criterion may not be relevant in all cases in determining the seriousness of a candidate with regard to contesting elections. In some SADC countries, such as Mozambique and Angola, there is no nomination fee or deposit fee. Yet there have been no reports of abuse of the system in these countries by individuals, or reports of political parties who lack the serious intention to participate in elections. In other SADC countries, however, political rights are still denied owing to the inability of candidates and candidate parties to afford the election deposit fee in a democratic dispensation. Accordingly, the conclusion can be drawn that the election deposit fee stifles democracy in developing countries.

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