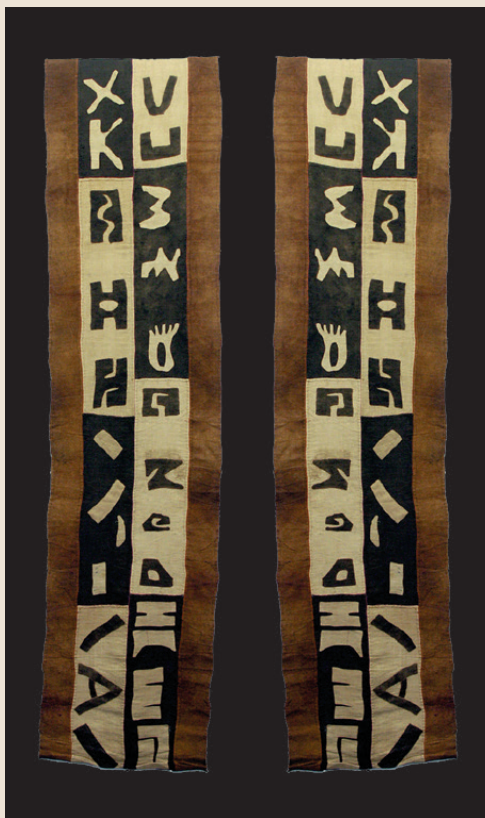


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A CRITIQUE OF PROCEDURALISM IN THE ADJUDICATION OF ELECTORAL DISPUTES IN LESOTHO

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ABSTRACT

One of the characteristic features of electoral democracy in Lesotho is disputed elections. Since 1993, when the country returned to constitutional democracy after a long haul of dictatorship and monarcho-military rule, every election has been subjected to one form of discontent or another. The aggrieved parties use various ways to vent their dissatisfactions, and more often than not, disputes end up in the courts of law. The courts are then called on to determine the validity or otherwise of the election results declared by the election management body. All seven elections since 1993 have been challenged in the courts of law. Despite this determination by political players in Lesotho to resolve electoral disputes through the courts of law, amongst other means, there is no court in Lesotho that has overturned an election result or ordered the reallocation of seats since 1993. The petitions are almost invariably dismissed on procedural grounds or on the basis of misapplication of the substantial effect doctrine. This approach to the adjudication of disputes in Lesotho has not only jeopardised substantive electoral justice in the country but has also arguably perpetuated the electoral violence that has been one of the characteristic features of electoral politics in Lesotho. The purpose of this article, therefore, is to critique this approach. Methodically, the paper uses the politico-legal approach to critique the pattern as it manifests itself through the many court decisions that have been handed down on election petitions since 1993.

Keywords: adjudication of election petitions, electoral system, electoral law, Lesotho, constitution, substantial effect doctrine

INTRODUCTION

The history of elections in Lesotho is punctuated by a constant pattern of electoral disputes. In these disputes the judiciary features pre-eminently because these disputes invariably end up in the courts of law. This pattern dates back to Lesotho's maiden parliamentary election in 1965 held on the eve of independence, to be given to the country in 1966 by the United Kingdom. Thus, the election was critical because it had a direct bearing on the post-independence pathway the country was going to take. The election was fiercely contested but in the end the Basutoland National Party (BNP) narrowly secured a win. This win by the BNP was not accepted by the Basutoland Congress Party (BCP). As Shale (2008, p. 114) contends, 'since 1965 opposition parties have questioned the legitimacy of the incumbent government. Their objections have been expressed in various ways, all of which have had a negative impact on the stability of the kingdom'. The BCP could not accept the reality that despite its overwhelming victory during the local government election in 1960, it lost the parliamentary election only a mere five years down the line (Matlosa 1993). Nevertheless, BNP was endorsed as the winner and the transition from colonial rule to independence was under its aegis. This included the adoption of the new Constitution. As was expected, the five years between 1965 and 1970 were not smooth sailing for the ruling BNP. The opposition marshalled all manner of alliances, including an alliance with the chieftaincy, to unsettle government. The strategy seems to have worked because at the next election in 1970 the opposition managed to dislodge the government. The 1970 election has been subjected to many studies (Weifelder 1977; Macartney 1973); but for present purposes it suffices to state that the election was disputed. After a colossal defeat by the opposition, the ruling BNP refused to accept the outcome of the election, suspended the constitution and arrogated power. The nascent post-independence judiciary, which still consisted largely of expatriate judges, never had an opportunity to investigate the veracity of the alleged election manipulation. The country started a long haul that spanned the period from 1970 to 1986 of mono-rule by BNP, continued by the monarcho-military rule between 1986 and 1993 (Mothibe 1990).

In 1993 the country returned to constitutionalism and electoral democracy. The first democratic election was held on 23 May 1993 after two decades of virtual dictatorship. This transition too has been a subject of equally long and worthy scholarly analysis, including the investigation edited by Southall and Petlane (1995). The interesting aspect for the present analysis is that the election was won overwhelmingly by the BCP. Similarly, its arch-rival, the BNP, did not accept the election outcome. It launched no less than 28 election petitions in the courts of law seeking to demonstrate how in those constituencies there were irregularities

that substantially affected the results. The analysts were quick to dismiss those petitions as baseless and they proceeded to sketch out superficial reasons that led to the abysmal performance of BNP in the election (Southall 1994). In fact, Sekatle (1995) contends that the allegations of election rigging were spurious as they were 'founded much more upon a pervasive lack of trust which exists between politicians in Lesotho than upon any firmly grounded evidence' (ibid. p. 105). Contrarily, the painstaking analysis of those petitions reveals much about the role of the judiciary in electoral justice in Lesotho. The analysis of the case of *Moupo Mathaba and Others v Enoch Lehema and Others* (1993), which came so early in the consolidation of a newly reborn democracy, reveals a monumental assault on electoral justice in the country. Surprisingly, this case became the revered authority and precedent for the abuse of the substantial effect doctrine in electoral adjudication in the country.

The succeeding election of 1998 was won by the then newly founded Lesotho Congress for Democracy (LCD). This election has also been a subject of analysis but, as with all other elections, the role of the judiciary has been handled with much trepidation (Shale 2008). The allegation of rigging in this election was so serious that when the courts failed to dispense electoral justice, the aggrieved parties, led by BNP, organised widespread protests. In the ensuing violence the country teetered on the brink of anarchy with looting and burning in the capital, Maseru, resulting in foreign intervention. Arising out of this the election was investigated under the auspices of Southern African Development Community (SADC). The eminent judge from South Africa, Pius Langa, found in his investigation that there were indeed irregularities but these were not sufficiently substantial as to affect the validity of the election outcome (Langa 1998). His findings have attracted much commentary, largely critical. One scholar disparages the report in that its finding was 'rather [a] limp finding – [which] gave some measure of satisfaction and dissatisfaction to both the government and the opposition parties' (Southall 1998, p. 682).

The pattern seems to be the same throughout all the following elections with a noteworthy abuse of the substantial effect doctrine in favour of proceduralism. The intention of this article is not to analyse the seven elections held since 1993, for that has been ably and extensively handled elsewhere.

The mainstay of the present analysis is to critique the jurisprudence of proceduralism that seems to have taken root in electoral adjudication in Lesotho. This jurisprudence is manifested through the many court decisions that have been handed down on election petitions in Lesotho and, to some extent, in the constitutional and statutory framework. Methodically, this purpose will be attained by studying the key judgements that anchor this jurisprudence and the legal instruments on election disputes resolution such as the Constitution of Lesotho (1993) and National Assembly Elections Order (1992) and National

Assembly Electoral Act (2011)¹. The first section of the paper posits its argument within its theoretical framework. The second section deals with legal framework for electoral dispute resolution as a precursor to the essence of the paper embodied in the third section – the actual case-by-case analysis of the jurisprudence of the superior courts in Lesotho on election petitions. A purely legalistic methodology for a study that straddles both political and legal disciplines would not be appropriate. As Nkansah argues, the ‘purely legal doctrinal analysis alone will not suffice as it will not exhaust the domain for the examination and analysis for [this kind of] study. It will be woefully limited in terms of content and context’ (Nkansah 2016, p. 100). As such, the study is not limited to an analysis of cases; it also uses a wide array of sources such as commission reports, media, official statements, laws and regulations. It also critically evaluates existing literature on election dispute resolution in Lesotho.

GENERAL PRINCIPLES AND THEORY ON ADJUDICATION OF ELECTORAL DISPUTES

The Notion of Election Petition and its Origins

The concept of election petition, now widely used and accepted in electoral law practice in Lesotho and elsewhere, has its origins in British electoral history (Jack et al. 2011). The ascendance of electoral democracy and extension of franchise in Britain in the 19th century brought with it all manner of contestation around purity of elections as a means of selecting members of parliament. From early in the evolution of elections, corruption and improper practices have been a major threat to the purity and freedom of electoral outcomes (O’Leary 1961). These grievances about elections and the return of members of parliament have always been the preserve of the House of Commons. It was ‘the sole proper judge’ of its members’ returns, ‘without which the freedom of election were not entire’ (*R (Woolas) v The Parliamentary Election Court*, 2010). As far back as 1604 the Commons Committee, which was entrusted with elections petitions, boldly asserted that:

We avouch that the House of Commons is the sole proper judge of return of all such writs and of the election of all such members as belong to it, without which the freedom of election were not entire: And that the Chancery, though a standing court under your Majesty, be to send out those writs and receive the returns and to preserve them, yet the same is done only for the use of the Parliament, over which neither the Chancery nor any other court ever had or ought to have any manner of jurisdiction.

(*Woolas* para 23)

1 Under the military government laws were styled Orders.

Thus, the resolution of election-related disputes has been the province of parliament, pretty much to the exclusion of the traditional courts, and the system was virtually non-judicial in nature. It later became apparent that partisanship was eroding the credibility of the House decisions on elections and the ultimate diminution of public confidence in elections as a whole. This necessitated the drift from a parliament-based to a judicial resolution of disputes. The judiciary was initially loath to take on the new task of adjudicating election disputes. This attitude of the judiciary was expressed by the Chief Justice to the Lord Chancellor on the 6th February 1868:

This confidence will speedily be destroyed, if, after the heat and excitement of a contested election, a judge is to proceed to the scene of recent conflict, while men's passions are still roused... The decision of the judge given under such circumstances will too often fail to secure the respect which judicial decisions command on other occasions. Angry and excited partisans will not be unlikely to question the motives which have led to the judgment. Their sentiments may be echoed by the press.

(Woolas, 24E)

This aversion of the judiciary towards electoral disputes notwithstanding, the transition from the legislative to a judicial electoral dispute resolution mechanism was facilitated for the first time through the Parliamentary Elections Act of 1868. Antiquated as the legislation might seem, it remains very important in understanding the election petition as it is commonly used and applied today in many jurisdictions, including Lesotho. The legislation did not only empower the Court of Common Pleas to determine and try election disputes but it was also to be presided over by a judge. The classical essence of an election petition is embodied in section 11(13) of the Act which empowered the presiding judge at the conclusion of the trial to:

... determine whether the member whose return or election is complained of, or any and what other person, was duly returned or elected, or whether the election was void, and shall forthwith certify in writing such determination to the Speaker, and upon such certificate being given such determination shall be final to all intents and purposes.

This conceptualisation of an election petition has, by and large, been replicated in contemporary electoral statutes. The Representation of People Act of 1983 posits

that 'no parliamentary election and no return to parliament shall be questioned except by a petition questioning an undue election or undue return' (Section 120(1)). The Constitution of Lesotho (1993) still retains the same formulation wherein section 69 empowers the High Court with the exclusive jurisdiction to determine whether 'any person has been validly elected as a member of the National Assembly'. It would seem that Lesotho's definition of election petition is very narrow; it restricts the ambit of the concept only to electoral disputes on whether a person has been validly elected as a member of the National Assembly. It does not extend to other disputes, however election related they may be, such as registration, nomination or even counting. In the case of *National Independent Party (NIP) and Others v Manyeli and Others* (2007), for instance, the Court of Appeal excluded a dispute relating to the submission of party lists for the purpose of proportional representation seats in the run-up to the election.

The Doctrine of Substantial Effect

One of the central doctrines in the adjudication of election petitions is the time-honoured doctrine of substantial effect which originates from British electoral law. The doctrine still resonates with the historical origins of election petitions. As demonstrated in the foregoing discussion, election petitions were not initially legal processes per se; they were parliamentary processes concerned with the substance of the complaint about returns rather than the legal technicalities of the case. The doctrine has been the recurring bulwark of electoral legislation since the transfer of electoral disputes adjudication from parliament to the judiciary in 1868. Presently it is embodied in the United Kingdom Representation of People Act (1983) under section 23(3), thus:

No parliamentary election shall be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the parliamentary elections rules if it appears to the tribunal having cognizance of the question that—

- (a) the election was so conducted as to be substantially in accordance with the law as to elections; and
- (b) the act or omission did not affect its result.

This doctrine has been replicated in the Lesotho National Assembly Election Order of 1992. Section 104(2) of the Order posits that when deciding election petitions, the High Court shall be guided by 'substantial merits ... without regard to legal

form or technicalities, and shall not be bound by rules of evidence'. The principle has been retained under section 130(3(a) of the new National Assembly Electoral Act of 2011. This doctrine seems to reverberate throughout electoral legislation in most African countries. However, African judiciaries often abuse the doctrine in order to maintain the status quo rather than preferring substance over form, which is the thrust of the doctrine. This approach of African countries has been widely criticised (Kaaba 2015; Azu 2015; Nkansah 2016). For instance, Kaaba (2015, p. 345) notes that 'the substantial effect rule has worked in the most disingenuous way in Africa to uphold elections fraught with major irregularities and fraud'. Consequently, other African countries such as Kenya and Zambia have elevated the notion of substantive justice to the constitutional level. For instance, Sec 159(2) (d)) of the Kenyan Constitution (2010) provides that 'justice shall be administered without undue regard to procedural technicalities.'

Lesotho has not yet raised the notion to constitutional level. The doctrine remains as a statutory injunction. Hitherto, there is no court in Lesotho that has ever overturned an election result since the return to electoral democracy in 1993, arguably because of the misapplication of this doctrine. The problem is, nevertheless, not peculiar to Lesotho; most African judiciaries often misapply the oft-quoted principles of this doctrine as outlined by Lord Denning in the celebrated decision in *Morgan v Simpson* (1974). This was the petition concerning the local election for the Greater London Council in 1973. It so happened that 44 ballot papers were inadvertently not stamped by election officials and as such not counted. The candidate who was declared a winner had a majority of 11, and if the uncounted papers were included the rival would have won by 7 votes. The defence of the election management body was, as usual, that the omission was a small technical error which might not invalidate an election by the principle of substantial effect. The court disagreed and made three very important guidelines in the application of this principle. The guidelines are that:

- if the election was conducted so badly that it was not substantially in accordance with the election law, the election would be vitiated, irrespective of whether or not the result was affected.
- if the election was so conducted that it was substantially in accordance with the law as to elections, it would not be vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election.
- even though the election was conducted substantially in accordance with the law as to elections, if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election would be vitiated.

Most judiciaries handling election petitions, including Lesotho's judiciary, are aware of these impeccable guidelines but often misapply them to justify their preference of form over substance.

Adjudication and Proof of Election Petitions

One of the key features of an electoral court which often eludes the High Court of Lesotho and other superior courts in Africa, is that it has the discrete feature of inquisitorial adjudication. The common law practice of adjudication of disputes is ordinarily adversarial, whereby the court sits passively to hear the case of each party before it within strict rules and procedures. An election court is an exception to this practice. It is not bound by the strict procedures and rules of evidence that are common with ordinary adjudication; it goes even beyond the evidence already provided by the parties to inquire into the substance of the allegations made. This approach resonates with the emergent tenets of legal realism which rejects legal formalism. While it has its origins in American legal thought, it has taken root in most jurisdictions throughout the world (Hawthorne 2006). In Lesotho, the Court of Appeal warned of the dangers of legal formalism in the case of *National University of Lesotho v Motlatsi Thabane* (2008 para 4) thus:

... formalism in the application of the Rules should not be encouraged. Opposing parties should not seek to rely upon non-compliance with the Rules injudiciously or frivolously as an expedient to cause unnecessary delay or in an attempt to thwart an opponent's legitimate rights.

The influence of legal realism notwithstanding, the adjudication of electoral disputes continues to be entrapped in the morass of legal formalism. The electoral courts have consistently battled with the notions of burden and standard of proof in electoral petitions (Hatchard 2015). On the burden of proof, the ordinary tenets of the law of evidence are that the person who makes the allegation must have proof (Belengere et al. 2013). The onus is therefore on the petitioner to prove electoral irregularity. However, 'once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election...then the evidentiary burden shifts to the respondent... to adduce evidence rebutting that assertion' (*Raila Odinga case* 2017 para 133). The onus of rebuttal then shifts to the election management body to demonstrate that the election was substantially conducted in compliance with the law.

These principles present consistent pragmatic challenges to petitioners in African elections because many a time the best evidence in electoral disputes is

to be found in electoral materials such as used ballot papers, which invariably are in the hands of the respondents. Thus, it is virtually impossible that the petitioner can approach a court of law already armed with evidence which is in the hands of the opponent. This is the problem confronted by the petitioner in the most recent Zimbabwean case of *Nelson Chamisa v Emerson Mnangagwa and Others* (2018). The court dismissed the petition on the grounds, inter alia, that the petitioner failed to discharge the burden of proof by producing primary evidence in the form of ballots and V11 Forms. This position of the court does not accord with the principles of the adjudication of electoral disputes. The court ought to have been inquisitorial and called that kind of evidence it considered crucial for deciding the petition in a just and fair manner; rather than being adversarial and expecting the petitioner to produce evidence that is for all intents and purposes in the hands of the respondents (O'Leary 1961).

Alongside the notion of the burden of proof is that of the standard of proof. In ordinary common law practice, the standard of proof in civil matters is on the balance of probabilities. This is a lower scale than used in criminal matters; the criminal scale is higher as it requires proof beyond reasonable doubt. There is a raging controversy on whether the standard in election petitions is a civil or criminal standard. This controversy is based on the fact that more often than not, there are quasi-criminal allegations made in election petitions such as bribery, fraud, corruption and undue influence. In ordinary litigation, allegations about violations of electoral law are civil and therefore proof would ordinarily require the lower (civil) standard of proof. But this is complicated by the quasi-criminal allegations that often accompany the civil allegations. The Kenyan Supreme Court jurisprudence is much more helpful in solving this conundrum. The court in the landmark decision in *Odinga v Independent Electoral and Boundaries Commission* (2017) struck a sensitive balance between the criminal standard (beyond reasonable doubt) and the civil (balance of probabilities) standard. The court convincingly posited that:

... where no allegations of a criminal or quasi-criminal nature are made in an election petition, an "intermediate standard of proof", one beyond the ordinary civil litigation standard of proof on a balance of probabilities, but below the criminal standard of beyond reasonable doubt, is applied.

The court was building on the jurisprudence it had started in 2013 in the case of *Raila Odinga v Independent Electoral and Boundaries Commission* (2013), where the court had already started to hint that the standard of proof in elections disputes is slightly higher than the civil standard but below the criminal standard; the court should therefore maintain a very sensitive balance between these two scales.

The rationale for this approach is twofold; firstly, it is because of the quasi-criminal nature of some of the allegations which often inhere in elections petitions. Secondly, it is because of the principle of *omnia praesumuntur rite et solemniter esse acta* (the presumption of correctness or validity of an election). There is an existing rebuttable presumption that when people have voted, such election is valid and must be given effect. In the Kenyan case of *Steven Kariuki v George Mike Wanjohi & Others* (2013), the court held that the presumption, albeit rebuttable, operates in favour of the respondents that the election was conducted properly and in accordance with the law. Therefore, the court of law must be slow to invalidate an election unless there is compelling evidence to the contrary. Thus, although an election petition concerns one or two people that have approached a court of law to vent their grievance, it does not exclusively concern those petitioners. It concerns the broader citizenry that has voted with a view to selecting the ruler or rulers within the confines of the law. Hence, it is a litigation *sui generis* (of special kind) that must be understood for what it really is.

CONSTITUTIONAL AND STATUTORY FRAMEWORK FOR ADJUDICATION OF ELECTION PETITIONS IN LESOTHO

One of the central planks of the 1993 Constitution of Lesotho is the right accorded to citizens to elect representatives. Section 20 of the Constitution gives to every citizen a right to 'take part in the conduct of public affairs, directly or through freely chosen representatives' and to be able 'to vote or to stand for election at periodic elections under this Constitution under a system of universal and equal suffrage and secret ballot'. This injunction is a bridge from the immediate past that spanned the period from 1970 to 1993 when the government of Lesotho was not based on the will of the people. Thus, the Constitution had foreseen that elections, however central they might be to the new dispensation, may be disputed. Consequently, it provided for an election dispute resolution mechanism.

Unlike other Commonwealth countries where the election disputes are decided by the apex courts, the Constitution of Lesotho vests the original jurisdiction in the High Court, not the Court of Appeal. Section 69 of the Constitution empowers the High Court with exclusive jurisdiction amongst others, 'to hear and determine any question whether...any person has been validly elected as a member of the National Assembly'. In terms of the original Constitution (1993), the High Court was not only empowered with original jurisdiction, but its decision was not appealable. Section 69 (6) unequivocally provided that 'the determination by the High Court of any question under this section shall not be subject to appeal'. The rationale for the finality clause in the election petitions is that, whilst everyone has a right to seek recourse from the courts for any

grievance, post-election litigation has the potential to 'harm the ideals of finality, certainty, and legitimacy in the election process' (Douglas 2013, pp. 1019). In fact, there are scholars who strongly recommend measures to discourage post-election litigation completely or, at least, impose measures to disincentivise it. The proposed measures range from finality clauses, strict procedures and heavy costs for such litigation (Douglas 2013). However, another scholarship, which is rights-based in its inclination, proposes that any person who is aggrieved must vent his dissatisfaction in the highest court in the country. In any event it would be unfair to discriminate electoral litigants from all other litigants (Ishola 2014).

The Parliament of Lesotho was persuaded by this latter view in 2011 when it removed the finality clause in the Constitution of Lesotho through the enactment of the Sixth Amendment to the Constitution of Lesotho (2011). The Amendment effectively provided for the right of appeal in election petitions to the apex court, the Court of Appeal. Since the enactment of this Amendment, few cases have been pursued before the Court of Appeal (*Basotho Democratic National Party v The Independent Electoral Commission and Others* 2015).

As the Constitution decrees, parliament may make provision for 'the circumstances and manner in which and the conditions upon which any application may be made to the High Court for the determination' of an election petition. The first statute on elections in general and election petitions in particular was the National Assembly Election Order of 1992. This Act enshrined two fundamental principles of election petitions: the first being the substantial effect doctrine. Section 104(1) of the Act provided that:

In determining a petition, the High Court shall be guided by the substantial merits of the case and good conscience, without regard to legal form or technicalities, and shall not be bound by the rules of evidence.

The same doctrine is reiterated in section 107(4) of the Act. The most important rules of evidence which the Act does away with relate to the burden and standard of proof. The section is clearly based on long-established jurisprudence which has its origins in English electoral law.

The second principle manifested by the Act is to be found in section 104(3); that an election court, unlike conventional courts, is inquisitorial as opposed to being adversarial. This section provides that in deciding on an election petition the High Court may, on its own motion, compel the attendance of witnesses and it may examine those witnesses. This principle, as will more fully be demonstrated in the succeeding section, is often missed by the courts. The courts are always influenced by the dictates of adversarial practice wherein the courts passively

observe as parties present their cases, and then decide afterwards; and oftentimes the petitioners are left with the burden and high standard of proof.

The 1992 law has been replaced by the National Assembly Electoral Act of 2011. This new Act retains the same principles embodied under the 1992 Order relating to the substantial effect doctrine and the inquisitorial nature of the court presiding on election petitions (Section 27).

PROCEDURALISM IN THE ADJUDICATION: CRITIQUE OF SELECTED PETITIONS

The 1993 Election Petitions and the Precedent of Proceduralism

The National Assembly Election held on the 27 May 1993 remains important in many respects for the development of constitutional democracy. For purposes of this study its importance is that the precedent for proceduralism in election petitions in Lesotho was set in the aftermath of this election. In this highly charged election, the main contenders were the Basutoland Congress Party (BCP) and Basotho National Party (BNP). The BCP won the election, much to the chagrin of BNP, by winning the popular vote by 74% while BNP got a meagre 22.5% (Southall 1993). The BNP was generally dissatisfied with the election results but its candidates filed individual petitions in 28 constituencies. All 28 petitions were consolidated in the oft-quoted case of *Moupo Mathaba and Others v Motlasele Lehema and Others* (1993). Although all the candidates were BNP candidates, they instituted separate petitions because the law at the time did not permit political parties to challenge the election results. This was largely due to the majoritarian electoral system used at the time in terms of which candidates were theoretically regarded as individuals, even when they are endorsed by political parties (Mahao 1998). However, when these election petitions were pending, the BNP instituted another case in *Basotho National Party v Principal Secretary of Ministry of Law, Parliamentary and Constitutional Affairs and Others* (1993). It is important to note that although it was seeking to stay the proceedings in the *Moupo Mathaba case*, the BNP case was not instituted as an election petition per se, but as a normal urgent application in the High Court. The main grievance in the BNP case was that the applicant (BNP) alleged that the ballot envelopes for all the disputed constituencies had been removed from the care and custody of the Chief Electoral Officer to the care and custody of the Principal Secretary of the Ministry of Justice and Prisons after the 28 petitions had been filed; and that the ballot envelopes had already been tampered with. It was alleged further that there had been a general re-packing of ballot papers in contravention of the law. The applicant contended that it was concerned that:

... the purpose for the removal of the ballot envelopes from the office of the Chief Electoral Officer to the office of the Principal Secretary of Law Parliament and Constitutional Affairs at the Government Complex is sinister and is likely to prejudice the scrutiny that is called for in various election petitions by the candidates of Applicant.

The court did not understand the *BNP case* as an interlocutory matter to the main case; neither did it investigate the veracity of the factual allegations made therein, and the law relating to the storage and disposal of ballot papers. Instead, it easily veered into proceduralism. The main procedural points on which the case ultimately turned were jurisdiction of the court and the *locus standi in judicio* (standing) of the applicant. The jurisdictional point arose as a result of the fact that the case was instituted as an ordinary application, not an election petition. The court was very quick to rule that the High Court cannot decide an election-related matter in its ordinary jurisdiction. The court contended that:

... the High Court's powers in the matter, have been expressly provided for by Parliament, namely that any such question, or any matter ancillary to such question, can only be determined by the High Court sitting as the Court of Disputed Returns, upon an election petition.

This reasoning is overly formal and technical. The High Court of Lesotho is empowered by the Constitution to adjudicate the electoral petitions. The fact that a provision of the electoral statute (section 100) provides that the High Court shall be 'a Court of Disputed Returns' should not be interpreted in a manner that undermines the Constitution. In any event, the *BNP case* was an ancillary matter to the main election petition in *Moupo Mathaba case*. The least the court could have done (particularly as it was the same court) would have been to consolidate it with the main petition.

On *locus standi*, the court relied on section 101(2) of the National Assembly Election Order (1992) which provided for only three categories of people who could bring an election petition to court: namely, an elector whose name appears on the electoral list for the constituency concerned, a candidate, and the Attorney General. The section did not allow political parties to institute an electoral petition because of the electoral system which was then constituency-based.

Having dismissed the *BNP case* on the basis of proceduralism, the same court mutated into a Court of Disputed Returns and perpetuated the same formalism into the main *Moupo Mathaba case*. This case consolidated all 28 election petitions filed by BNP candidates in 28 of the 65 constituencies countrywide. The

petitions were based on many allegations, but for purposes of this paper, one major allegation will be interrogated. The one allegation that permeated almost all the other allegations was that people were allowed to vote without proper verification of their registration status, in contravention of section 79(3)(b) of the National Assembly Election Order (1992). The section imposes an obligation on presiding officers at polling stations to ascertain whether the aspiring voter is properly registered for the constituency concerned and to inspect the hands of the aspiring voter to ensure 'that no ballot paper has previously been used to the applicant at that or another polling station at the election'. This provision is therefore fundamental as it operationalises the higher principle of 'one person one vote', and is also a backstop against electoral malpractice such as multiple voting. On this allegation, evidence was led which indeed proved to the satisfaction of the court that section 79 of the National Assembly Election Order (1992) was violated. The court then made a finding that 'the conduct of the Presiding Officer[s] constituted non-compliance with procedure prescribed section 79(3) (b) of the National Assembly Election Order (1992) and provisions of subsection 4 of section 107 apply' (ibid., p. 419). Thereafter the court ran into the clear difficulty of applying the substantial effect doctrine as embodied under section 107(4) of the National Assembly Election Order (1992). The section provides that a court may not invalidate an election of a candidate on the grounds that a procedure prescribed by the law has not been complied with or that there was an irregularity, 'unless the court is satisfied that the non-compliance irregularity would or could have affected the result of the election'. Having found that people voted in clear violation of section 79(3) (b), the court then avowedly ran into the problem of applying the substantial effect doctrine to the situation at hand. It candidly declared its difficulty as follows:

I am in some difficulty here ... Which standard then applies: can the court avoid the election if satisfied that the result of the election could have been thereby affected, or can it only do so where satisfied that the result was affected? The difficulty is apparent and I would respectfully refer the provisions of section 107 to the consideration of the Parliamentary Draftsman.

(ibid., pp. 419-420)

The court was clearly having some difficulty with a problem that has been resolved elsewhere. The principle laid down in the time-honoured decision in *Morgan v Simpson* (1974) is that if the election was conducted so badly that it was not substantially in accordance with the law regarding elections, the election would be vitiated, irrespective of whether the result was affected or not. The

clear issue in the *Moupo Mathaba case* was that the court was confronted with a situation where it made a finding that in some constituencies people voted without verification regarding whether they had previously voted, in violation of the law. In that situation there is the real possibility, which the court did not establish, that there were duplicate voters, a situation that clearly undermines the outcome of the election in the constituencies concerned. So, the elections in those constituencies were not conducted according to the law, and stood to be vitiated. That notwithstanding, the court easily concluded that 'the omission by the presiding officer did not affect the result of the election' (*ibid.*, p. 420), and proceeded to dismiss the petitions as having no merit.

The 1998 and 2002 Elections: the Perpetuation of Proceduralism and Abuse of the Substantial Effect Doctrine

The 1998 election will go down in the history of Lesotho as the most controversial and fiercely contested of its elections. The election was held on the 23 May under the plurality electoral system. The then newly-founded Lesotho Congress for Democracy (LCD) won 79 of the 80 constituencies countrywide; the BNP won 1 constituency. The disproportion brought by the electoral system has been a subject of intense investigation (Elklit 2002; Southall & Fox 1999; Mahao 1998). The election outcome was heatedly disputed by the three main opposition parties: BNP, BCP and Marematlou Freedom Party (MFP). After instituting their own private audit of the result, the parties launched their petition, conjointly in the case of *Moeketsi Tsatsanyane and Others v Litsitso Sekamane and Others* (1998). The petitioner sought, amongst others, 'an order setting aside the results of the candidates returned in the various constituencies in terms of the general elections held on the 23 May 1998' (*ibid.*, p. 2). Since the protests had already attracted the attention of the international community an international expert commission was appointed under the aegis of the SADC while the case was pending. The Commission was led by Justice Pius Langa, a judge from South Africa, and it will hereafter be called 'Langa Commission'. When the Langa Commission was instituted, the petitioners in the *Tsatsanyane case* were persuaded, and they agreed, to withdraw their petition in order to allow the investigations of the Commission to proceed unimpeded. The task of the Commission was virtually to do that which the petitioners had sought the court to do; amongst others, to 'inquire into all matters relating to the alleged irregularities in respect of the 1998 national elections in Lesotho' (Langa Commission 1998, p. 2). The Commission had far-reaching powers despite the limited time it had to scrutinise the entire balloting. In order to empower it, parliament enacted the National Assembly Election (Amendment) Act of 1998 to enable the Commission to re-open the ballot boxes for the purposes of a recount.

After a recount in 66 constituencies, the Commission noted that the results were not reconcilable because 'there were discrepancies between the total on the A45's and the announced results, which are captured in the A47's' (ibid., p. 22). This finding was profound. However, the Commission conveniently opted, perhaps with the influence of the precedent set by the *Moupo Mathaba case*, to invoke the substantial effect doctrine. Consequently, the Commission found that:

We are unable to state that the invalidity of the elections has been conclusively established. *We point out, however, that some of the apparent irregularities and discrepancies are sufficiently serious concerns. We cannot however postulate that the result does not reflect the will of Lesotho electorate. We merely point out that the means for checking this has been compromised and created much room for doubt.* (emphasis added)

(ibid., p. 28)

Clearly, the Commission was trying to walk a very tight rope; its conclusion was not in keeping with its own findings of pervasive violation of the electoral law. Much more importantly, the Commission found that there were 'discrepancies between the results of the recount and those announced by the IEC' (ibid., p. 27). The consequences of this incongruent finding were devastating as large parts of the capital Maseru and other major centres were torched by protesters who were struggling for electoral justice. Such electoral justice could not be provided by either the courts of law or the Langa Commission. As a result, the concerned parties agreed to a fresh election within 18 months in terms of the Interim Political Authority Act (1998).

The 2002 election, which succeeded the aborted 1998 election, was not free from electoral dispute either, although of a lesser magnitude. The election was held under the then newly adopted mixed member proportional (MMP) electoral system. The election result was still disputed in the case of *Thebe Motebang v The Returning Officer for the Constituency of Khafung* (2002). The petitioner was the candidate for the newly-founded Lesotho People's Congress (LPC) which was also a breakaway from the ruling party, LCD. The petitioner wanted the ballots to be scrutinised, the election to be declared invalid and a directive issued for holding a fresh election for the concerned constituency. With the subtle influence of the *Moupo Mathaba case*, the court segued into proceduralism and put primacy on two procedural points raised by the respondents. The first point was the non-joinder of the Speaker of the National Assembly. The respondents contended that the Speaker was a necessary party to the proceedings and should have been enjoined. A non-joinder is, even in ordinary litigation, only dilatory; it does not render proceedings fatally defective. But in this case the court decreed that 'the

petitioner has thus failed to join the Speaker. This in itself is fatal to the petition and on that ground alone the petition would in any case have failed' (ibid., p. 9).

Another procedural technicality on which the case turned was that the petition was filed out of time. Ordinarily, the court has inherent powers to condone non-compliance with times and modes of litigation. This principle was adroitly captured by the Zimbabwean Constitutional Court in the case of *Chamisa v Mnagagwa* (2018) as follows:

It is common cause that the application was eventually served on the respondents...outside of the timeframes stipulated in the Constitution and contrary to the provisions of the Constitutional Court Rules... The applicant clearly breached the Rules of the Court, and filed a defective application. *However, due to the importance of the matter and the public interest, the Court has the power to condone the non-compliance with the Rules in the interests of justice.* (emphasis added)

The court in the *Thebe Motebang* case did not find the need to condone the procedural technicality in the interest of substantive electoral justice. Instead, the court reasoned, rather bizarrely, that 'time is a very important factor in the election petition because every party to the petition must act within a specified timeframe' (ibid., p. 9). This reasoning is not in keeping with the established principles of adjudication of electoral petitions. It also flies in the face of section 104 of National Assembly Election Order (1992) which embodied the substantial effect doctrine.

The 2007 and 2015 Seat Allocation Petitions and the Consolidation of Proceduralism

The problem of proceduralism in election petitions also became evident in the petitions that challenged the allocation of seats in the aftermath of 2007 and 2015 snap elections. In the run-up to 2007, two main political parties, LCD and All Basotho Convention (ABC) entered into pre-election political alliances together with the other two smaller parties, the National Independent Party (NIP) and Lesotho Workers Party (LWP) respectively. LCD formed a pre-election alliance with NIP while ABC formed an alliance with LWP. Since the country was using the mixed member proportional (MMP) electoral system, the two bigger parties wanted to maximise the proportional representation seats in National Assembly. The nature of the agreements was such that the bigger parties would only contest constituency seats while the smaller parties would only contest proportional representation (PR) seats. The only exception to this arrangement was in the case

of the leader of the LWP, Billy Macaefa, who contested the Matelile Constituency under the arrangement with the ABC (Shale 2017). It is generally agreed amongst experts that the arrangement was intended to manipulate the spirit and true nature of the MMP system as the compensatory electoral model. As one observer instructively observes,

It is clear that the LCD/NIP MOU – with the specifications of the party list positions to which each party was entitled – was a deliberate circumvention of the constitution, as amended in 2001. The reason for stating this in no uncertain terms is that the MOU would – if permitted by IEC – secure for the LCD a number of compensatory seats over and above its full complement of seats won in the constituencies.

(Elklit 2008, p. 17)

The High Court of Lesotho had an occasion to determine the propriety of the alliances and the seat allocation in *Marematlou Freedom Party (MFP) v The Independent Electoral Commission and Others* (2007). The thrust of the petition was that, in view of the pre-election alliances, the allocation of seats was not properly done. Consequently, the court must declare the alliances as single entities for purposes of allocating proportional representation seats. This is the substantive question that the court was called upon to determine. In its usual approach, the court veered into pedantic technical issues. Following the long-established precedent from the *BNP case* of 1993, the court dismissed the *MFP case* of 2007 on both *locus standi in judicio* (standing) and jurisdiction (competence). On standing, the court was persuaded by the literal interpretation of section 69 of the Constitution. The section enlisted people who may institute election petitions and did not have 'a political party' in the list of such people. Indeed, the court did not even interpret section 69 in view of the Fourth Amendment to the Constitution of Lesotho (2001) which introduced the proportional representation leg to the electoral system in Lesotho. By introducing proportional representation, the Constitution perforce placed political parties at the centre of the electoral system, including questions related to election results. Instead, the court found comfort in the old jurisprudence which was based on the plurality electoral system used prior to the 2001 constitutional amendment. The court pedantically decided that 'both under the Constitution and under the supporting electoral legislation, a political party – the applicant being one – lacks *locus standi in judicio* to question the final allocation by IEC of PR seats' (ibid., para. 15). Consequently, the court declined jurisdiction. As the then SADC envoy and facilitator, Sir Ketumile Masire (2009), sarcastically noted, 'the court decided not to decide' the matter. Like all other

cases prior to it wherein the High Court literally declined to dispense substantial electoral justice, the decision plunged the country into the abyss of political instability that spanned almost the entire electoral term between 2007 and 2012.

The problem did not show any signs of abatement in the latter decision of the Court of Appeal of Lesotho in the case of *Basotho Democratic National Party (BDNP) v Independent Electoral Commission and Others* (2015). The case was an election petition in the aftermath of the 2015 snap election. The appellant was one of the political parties that had contested the 2015 general election in respect of both constituency and proportional representation seats. None of the candidates on its proportional representation list was allocated a seat. In calculating the 'quota of votes' under section 2 of Schedule 3 to the National Assembly Electoral Act of 2011, IEC did not include the 5 651 votes won by independent candidates who had not participated in the proportional representation election. The appellant contended that if those 5 651 votes had been taken into account it would then have been allocated one seat. Thus, it sought two orders in its petition. The first was to declare as irregular, null and void the legal notice declaring the elected members of parliament, for its omission of the appellant. The second directed the Independent Electoral Commission (IEC) to publish a fresh notice relating to the proportional representation seats which included the appellant as a party to which a proportional representation seat was allocated. Instead of being guided by the purposive interpretation, which is a norm in constitutional cases, the Court fell into pedantic legalism and decided that 'it is important to bear in mind that, as appears from the definition of 'political party' in section 2, that expression 'for the purpose of proportional representation elections includes an independent candidate'.

It was incorrect for an Act of Parliament which operationalises the mixed member proportional (MMP) electoral system to decree that for purposes of allocating proportional seats, a party include an independent candidate. In principle, proportional representation is for political parties, not independent candidates; and constituencies are theoretically for independent candidates. It is not the spirit of the Fourth Amendment to the Constitution to conflate these principles. Rather, the Amendment is very clear that the 40 proportional representation seats are allocated to political parties using the principle of proportionality applied in respect of the seats of the National Assembly as a whole ('Nyane 2017).

CONCLUSION

The forgoing discussion demonstrates that ever since the return to electoral and constitutional democracy in 1993, the courts in Lesotho have generally been loath

to overturn election results. This approach has been, in most cases, not necessarily because the allegations made by petitioners were spurious, but rather because of the precedent of proceduralism that was established by the 1993 decisions of the High Court in the *BNP* and *Moupo Mathaba* cases. The precedent of these maiden cases still reverberates today in the jurisprudence of the superior courts in Lesotho on electoral disputes adjudication. As has been demonstrated by the 2002 decision in *Thebe Motebang case*, the High Court has used the technicalities of *locus standi in judicio* and jurisdiction as the predominant procedural bars to substantive electoral justice. This trend has recurred despite the fact that the High Court, which until 2011 when the finality clause was removed from the Constitution, has been the first and final court of disputed returns. Virtually all the election petitions since 1993, with the notable exception of the 2015 Court of Appeal decision in the *BDNP case*, have been hit by these procedural hurdles. Consequently, this pattern became the disincentive for aggrieved parties to trust the judiciary with their electoral disputes; so much that most litigants withdraw their petitions midstream after lodging them. To that effect, Shale (2008, p. 112) pointedly observes that:

A number of petitioners either withdrew or abandoned their cases. As a result, the cases have proven of little value to the development of electoral process. Why would petitioners seek to withdraw cases they filed so enthusiastically? Can it be true that losing parties institute cases as face-saving strategy or is the reason for the withdrawal diminishing hope and confidence in the judicial system?

In virtually all the elections since 1993, when the judiciary showed aversion to substantive electoral justice, the aggrieved parties resorted to extra-legal methods for ventilating their grievances. These methods range from, but are not limited to, parliamentary sit-ins, street protests, looting commercial establishments and stay-aways which ultimately put the country up for external intervention (Weisfelder 2015). The external intervention has not only been diplomatic but, at times, it has also been military (Likoti 2007).

Rather than indulging in undue pedantic legalism that has characterised election petitions, the superior courts in Lesotho have not really come to terms with the dictates of substantive justice in general and the doctrine of substantial effect in particular. Although the Constitution of Lesotho does not expressly embody substantive justice doctrine, the electoral statutes have unequivocally and persistently embraced the doctrine since 1993. However, the High Court has, almost invariably, misconstrued the thrust of this doctrine. Many a time, in its attempt to apply this doctrine, the court asks the wrong questions. The enquiry does not end with whether the returned candidate committed an

electoral malpractice or not; neither does it end with the finding that the alleged irregularity has not affected the result. Those are important in the inquiry, but they are not conclusive. According to the authority in *Morgan v Simpson* (1974), if the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. The proven widespread violations of the electoral law in the 1993 election (according to *Moupo Mathaba case*) and 1998 election (according to Langa Commission) strongly militated against the validity of those elections.

Thus, two main recommendations may be made to reverse this trend. The first is to constitutionalise the doctrine of substantive justice outright. This may work in shifting the paradigm, a shift that has already been realised in Kenya. Prior to 2010, the problem of proceduralism in electoral disputes was rife and caused political disruptions of unprecedented proportions in Kenya (Azu 2015). The problem was ameliorated when they introduced their 2010 Constitution. In 2017, in an unprecedented decision in the *Raila Odinga case* (2017), the Supreme Court in Kenya did not only overturn the presidential election but it also revolutionised electoral jurisprudence as a whole. Lesotho may take a leaf out of this approach.

The second recommendation is that the electoral law may be improved to demonstrate explicitly that when confronted by an election petition the duty of the court is to dispense substantive electoral justice; the court must be inquisitorial rather than adversarial. This principle is already envisaged in the current electoral legislation, but it has not been realised. In fact, as early as 1993 the High Court of Lesotho demonstrated discomfort with the vague draughtsmanship of the principle in the electoral legislation. In the *Moupo Mathaba case*, the court candidly noted that '[t]he difficulty is apparent and I would respectfully refer the provisions of section 107 to the consideration of the Parliamentary Draftsman' (*ibid.*, pp. 419-420). Thus, this may be an opportune moment to re-visit the draughtsmanship of the electoral justice principles in the electoral law of Lesotho.

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IS VOTING IN GHANA ETHNICALLY BASED?

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ABSTRACT

Ghanaian scholars often argue that ethnicity is the leading factor shaping the electoral choices of voters in Ghana, and that voting in Ghana, like that of many other African countries, is ethnic-based. This paper seeks to test the validity of these perceptions. Voters in three key constituencies were selected and asked about considerations that shaped their voting preferences in Ghana's latest election in 2016. Their answers indicate a complicated mixture of motives which suggest that in areas believed to have been politically shaped by ethnic identities, voter choice is instrumental and rational, influenced more by bread and butter concerns than by ethnic loyalty.

Keywords: ethnicity, voting, rational choice, party identification, ideology, Ghana

INTRODUCTION

When Ghanaian voters make their electoral choices are they mainly influenced by ethnic identity? There is a powerful body of scholarship that helps to maintain this proposition. Voting and the composition of national government in many established democracies in the Western world are supposedly shaped by more rational issues of ideology, philosophies and policies (Arthur 2009). However, in many developing democracies it is chiefly identity-based concerns that reportedly direct voting behaviour. In Ghana itself the view that elections are principally ethnic-based is shared widely, as is the view that Ghanaian politics conforms to a pattern in which political life is moulded by affinities to ethnic groups (Chazan 1982; Frempong 2001; Nugent 2001; Oelbaum 2004; Asante 2006; Andrews & Inman 2009; Norris Mattes 2003; Berman et al. 2004).

Fridy (2007, p. 286) asserts that ethnicity appears to be 'extremely significant in Ghanaian elections and that its implication to the electoral outcome is of immense importance'. One explanation for this might be that ethnic mobilisation is a pragmatic choice for politicians in a setting in which particular ethnic groups dominate certain regions and constituencies in Ghana, and hence appeal to common ethnic ties to generate unified support (Bates 1974, p. 470, cited in Arthur, 2009; Lentz & Nugent 2000).

Such support may not necessarily reflect fixed loyalties. Ghana's political history suggests that at different times different ethnic solidarities have successively predominated. Since independence in 1957, Ghana has witnessed as many as seven different political regimes, all of which had varying ethnic dispositions, right until the inception of the Fourth Republic in 1992. Running state machinery had moved from the southern Akan groups during the Nkrumah era, through the Ga-Ewe alliance under the National Liberation Council (NLC); the central Akan (Asante-Brong) alliance of Busia; the fairly balanced ethnic government of the National Redemption Council (NRC)/Supreme Military Council (SMC) assemblage; a minority accumulation with uneven northern representation within the Limann administration; and finally to a profoundly Ewe-based ruling faction within the Provisional National Defence Council (PNDC) (Chazan 1982, p. 461).

In seeking to clarify the ethno-political distribution within the Ghanaian electoral system, Amoah (2003) sought to expose the ethno-national patterns that emerged from the elections in 2000. He found strong suggestions that each vice-presidential candidate from the four leading political parties (the National Democratic Congress, (NDC) the New Patriotic Party (NPP), the Convention People's Party (CPP) and the Peoples National Convention (PNC)) should have originated from one of the three northern regions. His work uncovered the ethno-nationalistic sentiments that had beclouded some Ghanaians as a way of showing solidarity towards their ethnic groupings, rather than promoting a patriotic political nationalism beyond their ethnic cleavages.

Lentz and Nugent (2000) are less certain about the salience of ethnicity in Ghana's politics. At certain times, they note that ethnic tensions have manifested themselves, only to be followed by long periods when the importance of ethnicity is denied by virtually all sides.

Ethnic membership does seem to influence political appointments. The two leading political parties in Ghana, the NPP and the NDC, are ostensibly regarded as Asante/Akan and Ewe-based parties respectively (Gyimah-Boadi & Asante 2006). Political appointments have been dominated by Asantes/Akans whenever the NPP is in power. Ewes and to some extent people from the northern regions of Ghana have also dominated the appointees during the NDC regimes. This pattern

appears to confirm claims that the two parties are ethnically-based and hence derive their support from the ethnic groups that form their strongholds. Ghanaian scholars have also argued that electoral competition in Ghana only fuels anxiety and friction between Ewes and the Asantes (Frempong 2001; Gyimah-Boadi, 2001).

There are, however, other ways of understanding Ghanaian voting choices that are evident in the scholarship. Within Ghana there appears to be general academic agreement that ethnicity is the primary determinant in shaping voter choice; but studies by outsiders offer a more complex picture. Paul Nugent (2001), for example, does not discount the effects of ethnic bloc voting in certain regions but also argues that there are substantial groups of swing voters and that voters outside the bloc regions are also influenced by other considerations. Lindberg and Morrison (2008) believe that clientelism may be more important than ethnic identity; in other words that voters may support certain candidates in the expectation that they will be rewarded or protected in one way or another. Peter Arthur (2009) is also inclined to view a range of factors other than ethnic identity as determinants of choice. There has been a long tradition in Ghana of competing and distinct ideologies helping to shape the two bases of party politics that emerged during the Nkrumah/decolonisation era. These ideological strains have persisted, helping to configure the divide between the two main parties in Ghana (Fridy 2007). Hence the respective Asante/Akan and Ewe coalitions may have class-based and intellectual lineages helping to constitute them, not simple ethnic solidarity. There is, however, another reason for asking questions about ethnicity in Ghana's politics, quite aside from the variations in academic perceptions. In contemporary Ghana, batteries of interventions and programmes have been introduced to promote issue-based voting among the citizenry. These have been implemented by state bodies like the National Commission for Civic Education (NCCE) and other non-state institutions (Gyimah-Boadi 2008). Since 1992, there has been a rise and growth of strong civil society organisations such as the Institute of Economic Affairs (IEA-Ghana), IMANI-Ghana, Institute for Democratic Governance (IDEG), the Christian Council of Ghana (CCG), and the Centre for Democratic Development (CDD-Ghana). These bodies have undertaken massive and sustained voter education programmes with a view to informing and sensitising Ghanaians about the rational considerations that must inform their preferences in elections (NCCE, 2016; Gyimah-Boadi 2008).

In the lead-up to elections since 2000, several voter education programmes in Ghana have aimed at promoting rational voting (NCCE 2016; IEA 2017). These include the conduct of town hall meetings, presidential debates, and evening encounters with presidential aspirants before elections. Since 1992 the NCCE has carried out several voter education programmes to sensitise voters on what to look out for before voting. The CDD-Ghana, the CCG, and the IEA-Ghana, have all

created platforms for a healthy contest of ideas, through debates, by presidential and parliamentary aspirants in the lead-up to elections in Ghana (Gyampo, 2011). It cannot be said that these interventions merely amounted to 'pouring water on stone'. Indeed, studies show that these interventions have had some impact on voting behaviour (Gyampo 2009; IEA 2017; Gyampo 2013; NCCE 2016).

Given this context it seems worthwhile to explore the possibility that growing numbers of Ghanaians are prompted by party identification and political ideology when they make their respective choices during elections.

THEORETICAL MODELS OF VOTING

This study is grounded in Andrew Heywood's four explanatory models for the way people make their voting decisions. Heywood (2000) listed party identification, sociological identity, rational choice and dominant ideology as the main factors that shape voter behaviour in any election. These are explained below and form the bases for analysing the empirical data or findings of the study.

Party Identification Model

In this model, attitude towards policies and leaders as well as perceptions about group and personal interests, tend to develop on the basis of party identification (Heywood 2000). This partisan alignment creates stability and continuity, especially in terms of the habitual patterns of voting behaviour. One weakness of this model is the growing evidence of partisan de-alignment (Green et al. 2002). In other words, people now prefer to vote not merely for the party but they also consider the quality of the candidates contesting an election on the party's ticket. In Ghana this has led to a phenomenon popularly referred to as 'skirt and blouse voting', which takes place when voters choose their party's presidential candidate but prefer a parliamentary candidate from a different political party. This is because the parliamentary candidate presented by their preferred party cannot serve their interests, and vice versa, and indicates a decline in party identification and habitual voting patterns, particularly among voters in developed democracies (ibid.).

Sociological Model

Rather than developing a psychological attachment to a party on the basis of family influence, the sociological model highlights the importance of social alignment, reflecting the various divisions and tensions within society. The most significant of these divisions is ethnicity. Other important considerations may

include class, religion, gender and race. In simple terms, the theory states that people may vote for an aspirant if he or she belongs to their class, comes from their ethnic group, shares the same religious beliefs, etc.

This model has, however, been attacked on the grounds that voting to simply protect ethnic or religious interest may not necessarily advance the interests of voters in terms of ensuring the selection of the right calibre of people to lead them. There is also growing empirical evidence that the link between sociological factors and party support has weakened in modern societies.

The sociological model of voting has some shortcomings. In the first place, it is deficient in expounding the variations that take place in voting as a result of economic factors specific to each election. Although social factors may attempt to explain the long-term constancy of voting behaviour, they do not explicate the disparities in the behaviour of voters in different elections. In similar vein they do not explain why persons with an affinity to certain social groups vote in a manner expected of people belonging to different social groups (Antunes 2010). The model also fails to acknowledge the importance of individual policy preferences and the appraisal of government performance on voting.

Rational Choice Model

In this model, voting is seen as a rational act, in the sense that voters are believed to decide their party preference on the basis of personal interest (Heywood 2000). Rather than being habitual and a manifestation of broader attachments and allegiances, voting is seen as essentially instrumental: that is, as a means to an end (Popkin 1994). The rational choice model, which is usually associated with highly educated people, stresses the importance of 'issue voting', and suggests that parties can significantly influence their electoral performance by reshaping their policies. Erdmann (2007) is of the view that there is a considerable connection between the level of education and the quality of voter choice in elections. By implication, societies with high literacy rates are more likely to take into deeper consideration the consequences of their motive for the choice of a candidate than societies with lower literacy levels. It is generally accepted that one of the consequences of partisan and class dealignment has been the spread of issue voting. The weakness of this theory is that it removes the individual voter from his or her social and cultural context.

Dominant Ideology Model

This model stresses the importance of political ideology in influencing the behaviour of voters. The basic premise of the dominant ideology model is that:

... there is in most class societies a pervasive set of beliefs that broadly serves the interest of the dominant class. This dominant ideology is then adopted by subordinate classes which are thereby prevented from formulating any effective opposition.

(Abercrombie & Turner, 1978)

This model simply states that the dominant ideology influences voters (Heywood 2000). Consequently, if voters' attitudes conform to the tenets of a dominant ideology, parties would develop their policies in line with that ideology so as to gain voter support. The weakness of this ideology is that it removes individual calculation and personal autonomy from the equation. It implies that people are not willing to weigh the merits and demerits of policy options being presented to them. Only once a candidate or a policy conforms to their ideological persuasion would they support it (*ibid.*).

METHODOLOGY

This paper seeks to test the validity of the long-held and derogatory view that elections and voter behaviour in Ghana are influenced by ethnic considerations. Three main constituencies were selected to test this hypothesis, and the reasons for their choice are explained below. Within each constituency, purposive samples of respondents answered questions about the considerations that shaped their voting preferences in Ghana's most recent election in 2016.

The constituencies selected were the Ho West Constituency (HWC) in the Volta Region, the Manhyia South Constituency (MSC) in the Ashanti Region, and the Ayawaso West Wuogon Constituency (AWWC) in the Greater Accra Region. The HWC and the MSC are among those constituencies believed to vote overwhelmingly on ethnic lines for the NDC and NPP respectively (Gyimah-Boadi & Debrah 2008; Frempong 2001; Arthur 2009).

The MSC is situated in the heart of the Kumasi metropolis, which is the capital of the Ashanti Region. Constituents in this area have since 1996 voted for the NPP in all general elections. For instance, in 1996 they voted 79.9% for the NPP and only 18.7% for the NDC. In 2000 they voted 85.7% for the NPP and gave only 12% of their support to the NDC. Similarly, in 2016 they voted 86.2% for the NPP and gave 13.4% of their votes to the NDC. Table 1 below shows the full picture of the voting pattern.

Table 1: Historical performance between NDC and NPP in Manhyia South

| Party | 1996 | 2000 | 2004 | 2008 | 2012 | 2016 |
|-------|-------|-------|-------|-------|-------|-------|
| NPP | 79.9% | 85.7% | 79.0% | 77% | 80.8% | 86.2% |
| NDC | 18.7% | 12.0% | 20.0% | 21.9% | 18.8% | 13.4% |

Source: Electoral Commission of Ghana

The HWC was selected for similar reasons as this constituency is also located in the capital of the Volta Region. Like the MSC, the HWC has since 1996 voted overwhelmingly for the NDC. In 1996 they voted 97.4% for the NDC and 2.3% for the NPP. In 2000, they voted close to 90% for the NDC and 5% for the NPP. In 2016, they voted 88.6% for the NDC and 10.3% for the NPP. Table 2 below gives the full detail of the voting trend.

Table 2: Historical performance between NDC and NPP in Ho West

| Party | 1996 | 2000 | 2004 | 2008 | 2012 | 2016 |
|-------|-------|-------|-------|-------|-------|--------|
| NPP | 2.3% | 5.0% | 10.1% | 7.9% | 7.4% | 10.3% |
| NDC | 97.4% | 89.9% | 89.1% | 90.3% | 91.8% | 88.56% |

Source: Electoral Commission of Ghana

Unlike the other two parties the AWWC cannot be labelled as a stronghold of any political party. Elections in this constituency are very competitive and either the two main parties could win but not by a large majority. For instance, in 1996 voters in the area gave 48.4% of their support to the NPP and 48.6% to the NDC. In 2012, they voted 49.1% for the NPP and 49.9% for the NDC. Similarly, in 2016 they voted 56.4% for the NPP and 42% for the NDC. Table 3 below provides more information about the voting pattern from 1996 to 2016.

Table 3: Historical performance between NDC and NPP in Ayawaso West Wuogon

| Party | 1996 | 2000 | 2004 | 2008 | 2012 | 2016 |
|-------|-------|-------|-------|-------|-------|--------|
| NPP | 48.4% | 58.0% | 54.8% | 48.7% | 49.1% | 56.45% |
| NDC | 48.6% | 37.6% | 43.4% | 48.6% | 49.9% | 42.05% |

Source: Electoral Commission of Ghana

The AWWC was selected primarily because it is situated in the Greater Accra Region (a swing region) and also because the constituency is recognised as a cosmopolitan community with people from diverse ethnic, educational, religious and economic backgrounds. More importantly, most people in the AWWC are highly educated; it is appropriate to test whether even the highly educated also vote on ethnic grounds, given the seeming prevalence of ethnicity as the main factor that shapes voting. If ethnicity is indeed a determinant of voting among Ghanaians, it should not be confined to areas that are supposedly known to vote on ethnic lines. It should spread to even cosmopolitan constituencies, hence the selection of the third constituency as a test case.

The target population for the study comprised respondents aged 18 years and above at the time when the 2016 general elections were organised.¹ The population of AWWC was 65 000; that of the HWC was 62 000 while the MSC had 68 000 as their population (Electoral Commission 2016). Through the purposive sampling technique, 110 respondents were sampled from the three constituencies as follows:

- Forty (40) respondents from the MSC of which twenty (20) were card-bearing members of the NPP and the other twenty (20) comprised voters who were not necessarily supporters of the NPP. The reason for this mode of selection was that it was also desirable to know whether there existed any difference in the voting pattern between card-bearing members (supporters) of the NPP and those who did not have evidence of support for the NPP within the constituency. Also, twenty (20) out of the forty (40) respondents were men and the other twenty (20) were women. This was to establish whether any difference existed in the pattern of voting among the genders. The same process was repeated in the HWC.
- Thirty (30) respondents were interviewed from the AWWC of which ten (10) were card-bearing members of the NPP, ten (10) were card-bearing members of the NDC, and the other ten (10) respondents were neutral and had no formal evidence of affiliation with any political party. The justification for this choice of sampling was because the study sought to identify any difference in the voting pattern among these groups of respondents. Additionally, fifteen (15) out of the thirty (30) respondents were males and the other fifteen (15) were females simply because the study intended to establish whether there existed any difference in the pattern of voting among the genders.

1 The 2016 election was Ghana's last general election at the time of conducting this research.

Using a planned set of semi-structured or open-ended questions, the study deployed a central question that guided conversational interviews and interactions with the selected respondents. The central question was whether voting patterns in Ghana could still be described as ethnic-based in spite of the giant strides made in voter education and democratic consolidation. This form of qualitative approach was useful as it also provided the grounds for respondents to express their views about other issues without undue restrictions. In asking questions the researcher was careful to use phraseology that did not imply a value-laden view of ethnically motivated voting. For example, the researcher did not suggest in his interactions with respondents that ethnic voting was irrational and that ideologically or programmatically-based party identification was more rational.

RESULTS OF STUDY

Gender Distribution of Respondents

Out of the total sample size of 110 voters from the three study areas of MSC, HWC and AWWC, fifty-five (55) of the respondents (representing 50%) were males while the remaining were females, implying that the selection of respondents was evenly distributed between males and females. It must be noted from the outset that gender differences in this study had no correlation with the determinants of voting. As Heywood (2000) has observed, the models or theories of voting are not gender-sensitive.

Educational Background of Voters

Among the interviewees from the MSC, 35% (14 respondents) had obtained a basic education followed by 30% (12 respondents) with secondary level education. Six people (15%) had university education; one person (2.5%) had teacher training certificate while 17.5% (7 people) had no formal education. In the HWC, 30.5% (12 respondents) had obtained secondary education. Those with basic level education came second with 25.5% (11 respondents), followed by those with no formal education 25% (10 respondents). Those with university education had a representation of 12.5% (6 respondents) and finally, those with teacher training education or a related certificate represented 2.5% (1 person). In the AWWC, 43.3% (13 respondents) had acquired secondary education. Those with basic education constituted 23.3% (7 respondents) of the population while 16.7% had university education. Ten (10%) were trained teachers while 6.7% had no formal education. These proportions compare reasonably closely to the generalised distribution of access to education in Ghana, though the samples included rather larger percentages of university graduates. This is borne out by the representative sample of Ghanaians who participated in the 2016/2018 Afrobarometer survey,

which broke down into the following educational categories: no formal schooling, 15.3%; basic education, 27%; secondary schooling, 43%; and post-secondary, 14%.

Table 4: Distribution of respondents by level of education

| Level of Education | Frequency | | | Percentage | | |
|-------------------------|---------------|---------|---------------------|---------------|---------|---------------------|
| | Manhyia South | Ho West | Ayawaso West Wuogon | Manhyia South | Ho West | Ayawaso West Wuogon |
| None | 7 | 10 | 2 | 17.5 | 25 | 6.7 |
| Basic Education | 14 | 11 | 7 | 35.0 | 25.5 | 23.3 |
| Secondary Education | 12 | 12 | 13 | 30.0 | 30.5 | 43.3 |
| Teacher Training | 1 | 2 | 3 | 2.5 | 5 | 10 |
| University/ Polytechnic | 6 | 5 | 5 | 15.0 | 12.5 | 16.7 |

Source: Field data (2017)

Voting Frequency

The study shows that voters in the three constituencies had all voted previously in elections conducted in Ghana. Even though some respondents had voted only once since 1992, others had voted in all seven elections conducted in Ghana. For instance, in the MSC, 3 (7.5%) of the respondents claimed to have voted only once in their lifetime since 1992. However, 6 (15%) of the respondents had voted in all seven elections held in Ghana. Most of the respondents in all three constituencies had voted at least thrice in their life time, as illustrated in Table 5 below.

Table 5: Distribution of respondents by number of times voted

| Number of times voted | Frequency | | | Percentage | | |
|-----------------------|---------------|---------|---------------------|---------------|---------|---------------------|
| | Manhyia South | Ho West | Ayawaso West Wuogon | Manhyia South | Ho West | Ayawaso West Wuogon |
| Once | 3 | 2 | 3 | 7.5 | 5.0 | 10.0 |
| Two times | 8 | 9 | 8 | 20.0 | 22.5 | 26.7 |
| Three times | 7 | 10 | 9 | 17.5 | 25.0 | 30.0 |
| Four times | 2 | 3 | 4 | 5.0 | 7.5 | 13.3 |
| Five times | 11 | 7 | 3 | 27.5 | 17.5 | 10.0 |
| Six times | 3 | 5 | 1 | 7.5 | 12.5 | 3.3 |
| Seven times | 6 | 4 | 2 | 15.0 | 10.0 | 6.7 |

Source: Field data (2017)

Party Affiliation

In line with the methodology of the study, 50% of the respondents selected in the MSC were card-bearing members of political parties while 50% had no party affiliation. The same outcome can be said of the HWC and the AWWC. For instance, of the 40 respondents in the MSC, 20 were card bearing members of a political party while 20 claimed they had no affiliation to any political party. Similarly, of the 30 respondents from the AWWC, 15 were party members while 15 had no affiliation with any party. See Table 6 below for details:

Table 6: Distribution of respondents by their affiliation with a political party

| Type of voter | Frequency | | | Percentage | | |
|---------------------------|---------------|---------|---------------------|---------------|---------|---------------------|
| | Manhyia South | Ho West | Ayawaso West Wuogon | Manhyia South | Ho West | Ayawaso West Wuogon |
| Party member | 20 | 20 | 15 | 50 | 50 | 50 |
| Not a party member | 20 | 20 | 15 | 50 | 50 | 50 |

Source: Field data (2017)

Knowledge of Ethnic-Based Voting

Most of the respondents knew what ethnic-based voting was, or at least had an idea of the incidence of ethnic-based voting. In the MSC these constituted 84% while in the HWC they accounted for 91% of the respondents. In the AWWC all 30 respondents were aware of ethnic-based voting in Ghana's politics. Findings from the study also revealed that all the respondents who had knowledge about the incidence of ethnic-based voting accepted that it is a form of voting where the voter's decision on how to vote is influenced by his or her ethnic affinity with the candidate rather than by policy considerations or the competence of the candidate. One respondent from MSC, for example, stated that ethnic-based voting '... is when people vote for politicians because they share a common ethnic background'. Another participant from HWC stated that 'Ethnic-based voting occurs when a person's desire to vote is influenced by the ethnic relations s/he shares with the contestant vying for political power'.

It is, therefore, safe to establish that the conceptual phase of ethnic-based voting equally implies voting based on the ethnic background of the candidate and the ethnic outlook of the political party. More precisely for these informants,

ethnic-based voting 'is defined relative to both party flag bearer and the party itself' (Arthur 2009, p. 47).

Determinants of Voting in Ghana

The empirical findings of this study indicate that even though respondents had previously been influenced by ethnic considerations in voting, that situation may be changing. Certainly, in the MSC 8 (20%) of the 40 respondents consented that sociological factors, particularly ethnic attachments, influenced their decision in the 2016 general elections. But as many as 24 (60%) of the respondents asserted that they voted for the NPP because of their belief in the competence of the flag bearer of the party and the sound policy prescriptions encapsulated in the NPP manifesto. The remaining 8 (20%) respondents also voted for the NPP because of their loyalty to the party. One respondent expressed it thus:

[...] when elections in the Fourth Republic commenced, I used to vote for the NPP because I am an Ashanti and I felt more comfortable voting for the party because I perceived it to be a party for only Asante. As times went by, I realised that the New Patriotic Party was not made up of only the Akan or Asante but rather, people from all sort of ethnic backgrounds and that I was misled by the political propaganda of the day. In addition, the Ashanti Region is now seen to be infiltrated by people from all the regions of the country who equally support the NPP strongly. I, therefore, had to realign my intentions for voting so as to benefit from the choice I make and to help the democratic development of the nation.

So in this case party identification appears to be the guiding impulse.

Similarly, in the HWC 6 (15%) of the respondents voted on ethnic grounds while 26 (65%) of the respondents voted because of rational factors such as competence, capability and track record. Eight (20%) respondents voted for the NDC because of their loyalty to the party.

In the AWWC, 2 (6.7%) respondents voted on ethnic grounds in the 2016 elections and 2 (6.7%) respondents voted because of their loyalty to the parties they voted for. But as many as 26 (86.6%) respondents voted because of the performance of the government of the day, as well as the accomplishments or track record of candidates. One respondent explicitly stated that:

When I started voting, the direction of my vote was influenced by my family, but after a while when I became more independent, I began

to look at the capabilities of the candidates before I decided on where my vote should go [...]

From the above, it may be argued that ethnicity may have played a key role in shaping voter behaviour in the past, and may still play some role in determining voting among a segment of the voter population in fledgling democracies. However, evidence from respondents who voted in the 2016 elections suggests the considerable influence of rational choice in guiding voter behaviour among the people sampled for the study in the respective constituencies. It is plausible to argue that in spite of the ostensibly ethnic constitution of the political parties' core support, ethnicity may no longer be the key determining factor of voting, even in core areas such as the HWC and MSC constituencies. A range of circumstances may have helped to alter the considerations affecting voter behaviour, including urbanisation and the kinds of social mobility described in one of the interviews as infiltration. Another key factor may indeed be the efforts all over Ghana to institutionalise democracy through a series of voter education programmes. Respondents in the interviews often referred to the work of these programmes.

The electoral performance of a political party in a region may not be adequate to describe the voting pattern of the people there as being ethnically based, as is shown by the study. Between 1992 and 2012 the Ashanti and Volta regions demonstrated massive support for the NPP and NDC respectively. For instance, the electoral outcome of the 1992 presidential race shows that while the NDC in the Volta Region led by J.J. Rawlings (whose mother also hailed from the Volta Region) acquired 93.2% of the votes, the NPP, whose frontrunner was Albert Adu Boahen, obtained only 3.6% of the valid vote cast. The results were reversed in the Ashanti Region, where the leader of the NPP Albert Adu Boahen received 60.5% of the votes cast while Rawlings had 32.9%; see Table 7 below.

Table 7: Results of the 1992 presidential election

| Region | Turnout (%) | Total Votes Cast | Rawlings (NDC) Vote (%) | Adu-Boahen (NPP) Vote (%) |
|---------|-------------|------------------|-------------------------|---------------------------|
| Ashanti | 50.05 | 732 990 | 32.9 | 60.5 |
| Volta | 62.4 | 491 551 | 93.2 | 3.6 |

Source: Electoral Commission of Ghana, 1992

The findings in the 1996 election were not different from that of 1992 as Rawlings gained 94.5% of the valid votes cast in the Volta Region and John Kufuor (the

leader of the NPP) also received 4.7%. In the Ashanti Region, on the other hand, Kufuor came up with 65.8% of the votes, whilst Rawlings obtained 32.8% of the votes; see Table 8 below.

Table 8: Results of the 1996 presidential election

| Region | Turnout (%) | Total Votes Cast | Rawlings (NDC) Vote (%) | Kufuor (NPP) Vote (%) |
|---------|-------------|------------------|-------------------------|-----------------------|
| Ashanti | 79.8 | 1 258 032 | 32.8 | 65.8 |
| Volta | 81.8 | 730 251 | 94.5 | 4.7 |

Source: Electoral Commission of Ghana, 1996

Voting trends in the 2000 and 2004 elections were no different from those of previous elections, although the founder and leader of the NDC had retired after successfully serving his constitutionally-mandated two terms as president of Ghana. The flag bearer of the NDC, Atta Mills, whose lineage hailed from the Central Region, maintained a firm control of the Volta Region with 86.81% of votes whilst Kufuor came up with only 6.64% of the valid vote cast. In the Ashanti Region on the other hand, while Kufuor obtained 75.56% of the valid votes cast, Atta Mills received 22.73%. Table 9 below illustrates the point.

Table 9: Results of the 2000 presidential election

| Region | Turnout (%) | Total Votes Cast | Atta Mills (NDC) Vote (%) | Kufuor (NPP) Vote (%) |
|---------|-------------|------------------|---------------------------|-----------------------|
| Ashanti | 88.7 | 1 655 760 | 24.0 | 74.6 |
| Volta | 87.6 | 705 827 | 83.8 | 14.2 |

Source: Electoral Commission of Ghana, 2000

The 2004 elections followed a similar trend to the previous elections as Kufuor won in the Ashanti Region by 74.6% of the valid votes cast and Atta Mills received 24%. In the Volta Region, on the other hand, Atta Mills won by 83.3% and Kufuor received 14.2% of the votes. In the 2008 general elections, the NPP presented a new candidate in the person of Nana Akufo-Addo as a successor to Kufuor, who had successfully completed his two-term constitutional mandate as president of the

Republic of Ghana. The NDC, on the other hand, maintained their presidential candidate who had stood in both the 2000 and 2004 elections. In the end, Atta Mills won the Volta Region with 82.88% while Akufo-Addo received 14.98% of the votes. In the Ashanti Region, on the other hand, Akufo-Addo won by 72.4% while Atta Mills received 26.1% of the vote (see Table 10).

Table 10: Results of the 2008 presidential election

| Region | Turnout (%) | Total Votes Cast | Atta Mills (NDC) Vote (%) | Akufo-Addo (NPP) Vote (%) |
|---------|-------------|------------------|---------------------------|---------------------------|
| Ashanti | 79.7 | 1 270 844 | 26.1 | 72.4 |
| Volta | 81.8 | 733 938 | 82.28 | 14.98 |

Source: Electoral Commission of Ghana, 2008

By 2012, two presidents had completed their constitutionally-mandated terms. President Mills, the third sitting president, died in office and his vice president, John Mahama, was sworn into office to complete the remaining term of the late president. Going into the 2012 elections, the NPP maintained their presidential candidate of 2008 whilst the NDC presented John Mahama as their candidate. That notwithstanding, the pattern of voting between the two regions was not altered. Whereas Akufo-Addo won with 70.86% of the total valid vote cast in the Ashanti Region, Mahama secured 28.35% of the votes. In the Volta Region, on the other hand, Mahama won with 85.47% of the votes but Akufo-Addo received only 12.93% of the votes (see Table 11).

Table 11: Results of the 2012 presidential election

| Region | Turnout (%) | Total Votes Cast | John Mahama (NDC) Vote (%) | Akufo-Addo (NPP) Vote (%) |
|---------|-------------|------------------|----------------------------|---------------------------|
| Ashanti | 80.3 | 1 572 361 | 28.35 | 70.86 |
| Volta | 82.4 | 1 090 007 | 85.47 | 12.93 |

Source: Electoral Commission of Ghana, 2012

Even though the voting patterns may suggest the influence of ethnicity, two main objections may be raised. First, Atta Mills and John Mahama did not hail from the Volta Region yet they continued to receive massive support from the area.

Secondly, no empirical study had been conducted to interrogate what actually shapes the voting behaviour of people in the regions that were supposedly voting on ethnic lines. So, these historic patterns once again appear to confirm the salience of the party identification model in explaining decision-making among Ghana's voters.

That ethnicity has an influence in the electoral process of Ghana's politics remains likely. However, judging from this study, ethnicity is not sufficiently important to warrant its description as the topmost variable to influence voting in Ghana. A thorough analysis of the election results from 1992 to 2012 shows that the strength of the NDC and NPP in their strongholds is diminishing. In general, and with reference to Heywood's explanatory models, the evidence suggests that Ghanaian voting conforms less to the sociological model and that the party identification model is more relevant. This is hardly surprising, given that at present the two predominant political parties in Ghana have had a longer history than any of their predecessors. Rational choice may be more relevant in determining voter decisions in the more localised settings but more research would be needed to establish this.

It needs to be noted that on the whole the language used by respondents did not imply strong disapproval of ethnic loyalty or ethnic identity. Indeed, it is evident that some respondents had no hesitation in reporting the influence of ethnic considerations in the past, while substantial numbers still retained ethnic attachments and were not defensive in speaking about them. This is important as one methodological objection to our findings is that they may have been shaped by respondents' perceptions that ethnic voting is often perceived derogatively.

INSTITUTIONALISING RATIONAL VOTING AMONG GHANAIS

Nearly all the respondents in the three constituencies sampled agreed on the need for voting to be based on programmatic issues and factors that shape national development. They highlighted the impact of interventions such as voter education and other debate platforms that force the discussion of issues to the forefront of public discourse in the leadup to elections. In the AWWC for instance, as many as 28 of the 30 respondents identified the conduct of presidential debates prior to elections in Ghana as one key intervention that influenced people to vote on policy issues rather than ethnicity or party identification. In the MSC, 18 respondents indicated the role of the NCCE in reducing ethnic voting and promoting voter decision based on fundamental bread and butter issues. Twenty-two respondents also pointed to town hall meetings and debates as key to institutionalising more issue-based voting. One respondent observed that: 'We liked and voted for the president and the ruling party because of their policy position on education

which was highlighted during the various debates'. Among voters in the HWC, 33 respondents highlighted the crucial role of key interventions such as debates and other voter education programmes undertaken by civil society and the NCCE, prior to elections, in promoting the exercise of rational choice during voting. These responses attest to the impact of key initiatives and interventions of voter education in reducing ethnic voting and promoting the exercise of rational choice in deciding who should lead the Ghanaian people. In effect, even though ethnic cleavages may still exist and may have shaped voting patterns among some Ghanaians in the past, the current situation cannot be described as the same. This is particularly true during Ghana's 2016 elections which saw key democracy-enhancing voter education programmes by civil society and other state agencies evolve in Ghana.

CONCLUSION

Since 1992 when Ghana's fourth attempt at constitutional democracy commenced, seven consecutive general elections have been conducted. These elections have generally been described as free, fair, peaceful and transparent. However, what appears to be a dent on the nation's democratic credentials has been the view that voting as well as electoral outcomes have been shaped by ethnic considerations. This paper holds a dissenting view and challenges the long-held position that Ghanaian voters cast their ballots under the influence of their ethnic cleavages. Elections and voting in contemporary times in Ghana can no longer be simply described as ethnic consensus.

This study indicates that ethnic considerations may no longer be the overarching factors that shape voter behaviour in Ghana. Admittedly, the limited sample of the paper may not be adequate for an accurate representation of the factors that shape voting patterns in Ghana. It must, however, be noted that the results of Ghana's 2016 presidential elections clearly indicate that the choices of Ghanaian voters are shaped by party loyalty, programmatic ideology and instrumental concerns rather than simply by affective identity. Ghanaian elections are not ethnic competitions. Indeed, in the 2016 presidential elections, the sitting president of the ruling NDC lost to the opposition NPP by an unprecedented landslide margin of 44.4% to 53.85% (Electoral Commission, 2016). In addition, the NDC lost in as many as six out of the ten regions of Ghana, including the swing regions of Greater Accra, Central and Brong Ahafo. The electoral outcome of the 2016 elections could thus not have been only because of the ethnic preferences of voters, and it is obvious that other considerations determined the choice of Ghanaians.

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THE JUDICIARY AND DEMOCRACY IN GHANA'S FOURTH REPUBLIC

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ABSTRACT

Since the advent of multi-party elections in 1992, Ghana has successfully held six free and fair presidential and parliamentary elections, including the peaceful alternation of power on three occasions. Despite this impressive record, transparent and peaceful elections are never a guaranteed outcome in Ghana. General elections in the country are highly competitive and tightly contested by the two main political parties, the New Patriotic Party (NPP) and the National Democratic Congress (NDC) and their support bases. The 2016 general elections season was a fierce fight marked by apparent attempts at fraud and corruption on the part of the Electoral Commission. Although there was a tense lead-up to the vote, the elections proceeded without incident, largely due to the actions of the Supreme Court. These Supreme Court rulings on electoral transparency and fairness during the 2016 elections continue a long history of judicial intervention in electoral disputes. Nearly three decades of judicial activism has effectively constrained the major political parties in their ongoing attempts to use fraud and corruption for gains at the polls. This study thus supports the early work of Ruti Teitel on judicial policy-making in transitional states by demonstrating how an activist Supreme Court has effectively preserved and advanced democratisation in the face of weak political institutions.

Keywords: Ghana, democracy, judiciary, Electoral Commission, Supreme Court, elections

INTRODUCTION

Ghana enjoys a reputation as a model of successful democratisation. Since the advent of multi-party elections in 1992, the country has successfully held six free and fair national elections, three of which resulted in a peaceful transfer of power. This outcome is even more impressive considering the number of neighbouring countries that are still recovering from recent electoral violence. Despite this commendable record, democratic consolidation and transparent elections are not a guaranteed outcome in Ghana (MacLean 2014, p. 93). Ghana's two dominant political parties compete in tightly contested national elections characterised by viciously fought campaigns. In recent elections both major parties demonstrated their willingness to use fraud and corruption in the hope of securing a win. The 2016 national election season was a fierce fight that took place in a tense political climate, and yet the election proceeded without incident and ended with a peaceful transfer of power. While there are multiple reasons for Ghana's demonstrated ability to overcome the ever-present threat of electoral crisis, this paper contends that the role of the Supreme Court as a mediator of potential fraud and corruption is of paramount consideration in Ghana's much vaunted electoral record.

A mandamus is a judicial order that compels a person or institution to perform their functions in accordance with the law. Over the past few decades Ghana's Supreme Court has produced such rulings, compelling the country's electoral institutions to act in free, fair and transparent ways. These rulings have built strong public trust in the judiciary as a mediator of electoral disputes, creating a constituency that prefers to take its grievances to court rather than into the streets. Thus, despite a demonstrated willingness to use nefarious and even corrupt tactics to win votes, the major parties have little choice but to accept the judiciary as the final arbitrator on electoral processes and results. There is a rich literature in legal studies debating the merits of judicial policy-making, particularly in moments of major societal upheaval. This study supports the early work of Ruti Teitel by demonstrating how an activist Supreme Court may be a means of preserving and advancing democratisation when faced with weak or transitional political institutions.

POLICY-MAKING BY THE JUDICIARY

Tate and Vallinder describe the 'judicialisation' of politics as one of the most significant trends of governance in the late 20th and early 21st century (Tate & Vallinder 1992, p. 5). For these authors, to 'judicialise' politics refers to the increasing infiltration of judicial methods and actors into non-judicial governance sectors within the United States. The authors evince both enthusiasm and concern in their observation that judicial thinking and approaches to problem-solving are

playing an ever more prominent role in governance: enthusiasm for a strengthened rule of law and concern for the implications this might have on the principle of the separation of powers.

The intellectual history of literature on judicialisation grows from a long-standing debate in legal studies between scholars of the judicial activism school and their interlocutors advocating for judicial restraints on the policy-making functions of national courts. Judicial activists advocate that judges ought to have an important policy-making role. These scholars see judges as guarantors that government actions should not only be consistent with the law, but should also be compelled to be just when legislation proves unethical. A judicial activist would, for instance, insist that the court should have the power to set a new precedent in defence of the most moral outcome possible, even if such a ruling goes against existing legislation or governing practices. In contrast, an advocate of judicial restraint would argue that the role of legislation and administration belongs exclusively in the hands of elected officials, and that the court's role is limited to interpreting those laws. Policy-making, in this view, is the sole prerogative of non-judicial institutions.

Judicial activism is an intellectual successor to legal realism. The central thesis of legal realism argues that judges base their adjudication on how the case moves them politically and morally. Essentially, these scholars argue that rather than applying existing legal sources or legal reasoning to judicial decisions, judges decide on a moral verdict and only subsequently seek legal justifications for that ruling (Bugaric 2001, p. 428). Legal realism became a prominent school of judicial thought in the 1920s and 1930s with authors such as Karl Llewellyn, Thurman Arnold, Max Radin, and Jerome Frank. The implication of the legal realism argument is that political ideology plays a much greater role in judicial outcomes than a strict reading of legal doctrine would suggest. In more contemporary literature, the legal realism school is updated by the works of Segal and Spaeth (2002) who refer to the approach as an 'attitudinal model' of judicial decision-making. The authors argue that justices should be free to decide cases based on their policy preferences due to the privileges bestowed on judges, which are based on their standing as highly regarded legal experts who have achieved lifetime tenure (Segal & Spaeth 2002).

The legal process school is critical of legal realism, and is associated with scholars such as Lon Fuller, Henry Hart, Hans Kelsen, Tom Clark, Herbert Wechsler, John Hart Ely and Alexander Bickel. For these authors, there are both principled and practical arguments against allowing the power of the judiciary to expand into a policy-making body (Dun 2008, p. 3). In principle, judges lack legitimacy as national policy-makers; first, because their involvement in policy-making violates the separation of powers; and second, because they lack

legitimacy as policy-makers because they are unelected representatives often coming from an economic and political elite (*ibid.* p. 5; Tate & Vallinder 1992, p. 6).

In more practical terms, legal process writers further criticise the courts for overstepping their mandate because judges ultimately have no role in the implementation of policies they impose on an administration. For successful implementation, public policy requires coordination, negotiation and oftentimes horse-trading between a multitude of government actors (Fuller 1978, p. 357). Furthermore, policy decisions do not happen in a vacuum and require the allocation of budgetary and other resources, usually at the expense of other priorities. Courts are not in the position to perceive, let alone coordinate, the many competing interests and agendas that will need to be reconciled to effectively implement the policies they devise. Critics of legal activism refer to this practical challenge of policy implementation as a polycentric problem, noting that policy-making is a matter of managing competing interests, while legal decision-making is generally a binary analysis of the specific case appearing before the court (Dun 2008, p. 6).

Underlining the legal realist versus legal process debate is the central question of what political role courts can legitimately play in the governance of a democracy. The politicisation of courts was observed by Robert Dahl in his much cited 1957 article 'Decision-making in a democracy: the Supreme Court as national policy-maker'. While there is no controversy about high courts making decisions with political implication in their daily work, for Dahl the politicisation of a high court specifically refers to the extent that judges reach beyond precedent and constitutional law to establish a new legal alternative based on what is perceived as the best possible policy outcome (Dahl 1957, p. 565). The court's role in political decision-making is especially significant when such a decision clashes with a large segment of popular opinion. Dahl illustrates the risks but also the appeal of a politically active supreme court. He cites, amongst many examples, the American experience in which the Supreme Court intervened in cases of race segregation (*ibid.*, p. 565). Indeed, throughout the 1960s and 1970s, the United State Supreme Court demonstrated the power and appeal of judicial activism by applying its influence to overcome institutionalised racial and gendered oppression in law and public policy (Rabkin 1983, p. 66). Thus, in democracies, high courts can play a unique role in protecting minorities against the oppression of an exploitative or intolerant politically powerful majority (Dahl 1957, p. 567).

As Marshal, Curry and Pacelle have illustrated, the legitimacy of court decisions depends upon the public perception that these are non-political institutions (2014, p. 38). Blurring the line between legal doctrine and policy-making risks inviting critique and potential loss of confidence from the public as well as colleagues in the legislature (Dahl 1957, p. 565). Essentially, the legal

process school presents a paradox first described by Lori Hausegger and Lawrence Baum (1999, p. 170): maintaining some role in national policy-making requires carefully preserving the court's legitimacy by refraining from too active a role in policy-making. That said, empirical research by Gibson, Caldeira and Baird suggests that the risk of eroding the legitimacy of top courts is much less than suggested by the legal process theorists. In a study looking at public opinion towards high courts in eighteen countries, the authors discovered that supreme and constitutional courts are held in universally high esteem, with the public 'crediting the courts for pleasing decisions but not penalizing it for displeasing one' (Gibson, Calderia & Baird 1998, p. 343).

Beyond issues of legitimacy, other critics warn that a highly activist supreme court exists in tension with democratic principle (Tushnet 1999, p.8). Legal process advocates see a limited role of the judiciary as not only necessary to preserve the legitimacy of the courts, but also as a practical necessity for democratic rule. Kelsen, an advocate of the legal process school of thought, presents the constitutional court as a 'negative legislator' with the primary purpose of monitoring the legal acts of parliament. The political role of the court is, essentially, limited to ensuring the alignment of government policy with statute law and constitutions (1942). This is because a court must respect the role and influence of the legislature should it wish, in turn, to continue seeing its own rulings respected and implemented by government officials (Clark 2009, p. 973; Gerhardt 2008). Legal process advocates therefore insist on the importance of maintaining a strong degree of separation between legislation and judicial practice both to preserve the legitimacy of the courts and to ensure the quality of democratic institutions.

Tushnet frames debate on role of the judiciary in policy-making around the risk of creating 'judicial supremacy'. He is describing a situation where courts amass too much authority compared to the legislatures (1999, p. 7). Judicial supremacy is a matter of how much policy-making power a court has over national legislation if, for example, it becomes

... emphatically the province and duty of the judicial department – and no one else – to say what the law is. [Such that] once [they] say what the law is... no one obliged to support the Constitution can fairly assert that the Constitution means something different.

(Tushnet 1999, p. 10)

Tushnet's main concern is with striking a balance between, at one extreme, the notion that courts can only advocate on policy questions on a case-by-case basis; and the other extreme position that the court's interpretation of any given case is akin to law henceforth in all related cases.

TRANSITIONAL DEMOCRACIES AND JUDICIAL POLICY-MAKING

In recent years, the concept of judicialisation in politics has been taken up by scholars who observe the growing role of constitutional or supreme courts in governance as a global phenomenon. This thinking has produced a literature on the role of courts in transitioning democracies that parallels the legal activism and legal processes debate addressed above. Ruti Teitel is credited with founding a new field of scholarship looking at the role of the judiciary in transitional states (1996). Favouring an activist approach to the role of the courts in democratic societies, Teitel understands political transitions as moments of ideological shift in the core meaning of law and justice in a society (*ibid.*, p. 2014). She explains that in periods of political change, the law partially abandons its role as the source of order and stability in society to take on a guiding function in the normative transformation of moral and legal codes (*ibid.*, p. 2029). As compelling as Teitel's thesis may be, her position faces considerable pushback.

Others argue that in times of political transition it is especially important for the judiciary to defer power to the legislature, thus allowing elected policy-makers to create new laws and a constitutional order less encumbered by the threat of judicial review (Bugarcic 2001, p. 273).

Teitel's critics insist that courts do not have the legitimacy, the institutional power, or the capacity to develop and implement policy intended to push forward major social change. This position reflects the fact that, in legal theory, there is an inherent tension between the threat of judicial review and the success of democratisation. On one hand, the respect and authority often enjoyed by a high court can be leveraged to help advance and consolidate democratic values. On the other hand, overstepping the separation of powers to augment the role of courts in a democratisation process undermines a central tenet of democracy: the principle that only elected representatives should produce policy because they are ultimately accountable to constituents in a way that judges are not.

In a parallel critique, Stephen Holmes warns that placing too much confidence in the power of constitutional courts during major political transitions weakens the authority of legislative institutions that need bolstering at precisely these times of upheaval (1993). He explains that in moments of major political change, the overriding aim should be to strengthen the capacity of the legislature and executive, thus allowing these nascent institutions to earn the trust and respect of public opinion. When constitutional courts step in and do the work of legislating a transition, the power and legitimacy of the central government will suffer. On the other hand, courts may be necessary in times of transition to enforce rights and obligations that would be politically costly for legislators to defend. For instance, Landau refers to the key role of the constitutional courts

in India, Colombia and South Africa, in defending socio-economic rights that are necessary for a successful transition yet are highly unpopular with some reactionary elements and hence potentially destabilising for the legislator (Landau 2014, p. 1052).

Further evidence from recent case studies suggests that, when allowed to act as a paramount authority during political transitions, the court can play an important role securing democratic practice and compensating for institutional weaknesses in the policy branches of government. The Constitutional Court in Colombia, for example, has actively sought to balance the institutional weakness of the legislature and executive in the wake of a protracted civil war and rampant state corruption. The Court openly critiques Congress in its statements and often overrules the political branches with judicial decisions (Landau 2014, p. 1514). Murison observes the high court in Uganda playing a key role in reducing electoral fraud there (2013, p. 496). Similar examples are seen in former Soviet states as new legal standards for the behaviour of government officials are being negotiated under the active authority of high courts (Bugarcic 2001). In a counter example, allocating the court supreme authority on questions of political transition may erode democratic processes by concentrating power in the hands of a small number of unelected representatives. For example, the South African Supreme Court has long stood in open contestation with the post-apartheid government. This clash has reached such an extent that the Court often is criticised by the central state for attempting to run a judicial dictatorship (Ngang 2014, p. 657).

The central contention of this paper aligns with the thinking of the legal activist school. Looking at the work of Diana Kapiszewski, we emphasise that the risk the elected leaders in new or transitioning democracies often demonstrate is a 'propensity to disregard constitutional constraints' (2011, p. 497). New democracies face an immanent risk of slipping back into authoritarianism due to weak or corrupt political institutions. Kapiszewski posits that this risk can potentially be counterbalanced by courts acting as 'constitutional guardians' (ibid., p. 497). Similarly, for Taylor-Robinson & Daniel (2012) the separation of powers should not necessarily be viewed as rigidly distinct spheres in a transitioning democracy. He argues that during moments when democratisation is challenged by the legislative branches of government, the overstep of judicial authority into policy-making is a legitimate democratic practice (2008, p. 15). Authors in this school of thought argue that democratic institutions benefit from strong constitutional courts which steer the country during times of political flux (Kapiszewski 2011, p. 497). When political institutions demonstrate their deficiency at enforcing democratic principles and the rights of citizens, it becomes legitimate, if not necessary, for courts to subject policy-makers to judicial review (Ngang 2014, p. 661; see also Ackerman 1997).

CASE STUDY

Using the 2016 presidential elections in Ghana as a case study, this paper shows that the positive impact of judicial activism on governance in states with weak or transitioning political institutions is critical to the democratisation process. Despite its reputation as one of the most successful democracies on the African continent, Ghana consistently runs highly competitive national elections that are often marred by fierce confrontations between the main political parties. By serving as a bulwark against the threat of corruption and fraud in electoral institutions, the judiciary has emerged as a key protagonist in the Ghanaian electoral process. As discussed below, this role was especially significant in the tightly contested presidential elections that took place in December 2016, and the fact that Ghanaian elections are so competitive is one reason why Ghana is a democratic success story. This success can also be attributed to additional factors such as the development of a vibrant media, a resilient civil society, and the growth of democratic institutions.

GHANA'S ELECTORAL HISTORY

Ghana gained independence in 1957, the first sub-Saharan African country to do so, excluding settler-ruled South Africa. Since that time, the west African nation has followed an imperfect but consistent road towards consolidated democracy. Although Ghana's democratic project was delayed by military rule and authoritarian regimes in the years following independence, the country has since held peaceful and democratic elections for nearly three decades. Ghanaians have experienced six peaceful elections in a row since its transition to a multiparty democracy in 1992, including three non-violent transfers of power. This is despite ongoing challenges to the democratic process from highly antagonist major political parties who vie for power in a deeply divided and fiercely competitive electoral system. There are, of course, multiple reasons for the continuance of peace and stability despite a potentially volatile electoral system in Ghana. In this work, the role of the Supreme Court as a check on fraudulent behaviour by electoral institutions and political parties is a principal source of continued peace and stability in the face of constantly emerging threats to the democratic process.

Under the 1992 Constitution, all Ghanaians over the age of 18 with a national identity card enjoy universal suffrage by secret ballot.¹ Presidential and parliamentary elections are held every four years, and presidents are limited to a two-term mandate. Should no clear winner emerge in the presidential elections

¹ In addition to constitutional dictates defining electoral rules, the electoral process is also defined within the Representation of the People Law (PNDC Law 284) of 1992, Political Parties Act (Act 574) of 2000, and the Electoral Commission Act (Act 451) of 1993.

with a fifty percent plus one victory in the first round of voting, there is a run-off election. Though officially a multi-party democracy, Ghana effectively has a two-party system with the New Democratic Congress (NDC) and New Patriotic Party (NPP) dominating the electoral scene. The NDC and NPP offer opposing ideological visions of the country that divides the population into two roughly equal political camps every four years. Albeit imperfect, party support in Ghana cuts across regional, ethnic and social cleavages (Whitfield 2009, p. 623). Through survey-based research, Ferree et al. (2009) determined that Ghanaian voters demonstrate a degree of party affiliation based on ethnicity; however, voting patterns do not strongly reflect support for ethnic groups. This is especially pertinent when contrasted with a strong tendency towards ethnic voting in other parts of west Africa.

The National Democratic Congress (NDC) is oriented towards social democracy. The NDC is associated with the Ewe ethnic group who represent approximately 13% of the population and are concentrated in the Volta Region along the Togo border (Ichino & Nathan 2013, p. 348). The NDC also draws significant support from predominately Muslim regions in the north (Nathan 2016, p. 1906). It is associated with a statist development model for Ghana administered by a large and interventionist government. That said, during the early years of NDC rule the government of Ghana implemented an extensive IMF-mandated SAP program that radically reformed and reduced government size and spending (Ohemeng & Anebo 2012, p. 162). The reforms arguably increased the efficiency of government and helped stabilise the national economy. However, a significant reduction in public services was keenly felt amongst the Ghanaian population, contributing to growing disillusionment with the longstanding NDC regime and the increased popularity of a new opposition party (Ohemeng & Ayee 2016, p. 278).

The NPP emerged as a centre-right political party when Ghana returned to constitutional rule in 1992 after 12 years of military dictatorship. In their founding documents, the NPP committed to 'complete change from the NDC's shameful and depressing record that has led Ghana and Ghanaians into poverty and insecurity' (Ayee 2008, p. 193). The NPP is predominately affiliated with the Akan, Ghana's largest ethnic community encompassing 45% of the population (Ichino & Nathan 2013, p. 348). The NPP is a centre-right party, closely associated with a market-led development model and commitment to the liberalisation of government, industry and the economy.

Both parties have regional strongholds of similar sizes. This means that electoral outcomes are ultimately determined by swing-regions where population groups loyal to neither party are concentrated. Fierce opposition between the two ideological visions for Ghana has resulted in highly competitive and frequently contested elections as the parties scramble to persuade swing-voters both with promises of their own generosity and by defaming their competitor.

THE ELECTORAL COMMISSION

The first multi-party elections following the end of military rule in 1992 were easily won with a suspiciously large margin of victory by the former President Jerry John Rawlings. This dubious electoral outcome was fiercely contested by the NPP resulting in their boycott of the parliamentary elections four days later. The 1992 NPP boycott initiated an ongoing process of electoral reforms aimed at creating confidence in the country's new multiparty democratic system. Chief amongst these reforms was the creation of an Electoral Commission (EC).

In its early years the Electoral Commission enjoyed a high degree of credibility, due in large part to the personal appeal of its first Chairperson Kwadwo Afari-Gyan, who ran the EC from 1993 to 2015. As chairperson, Afari-Gyan announced the first successful defeat of the ruling NDC party in 2000, demonstrating to the electorate the effectiveness and trustworthiness of the EC (Cheeseman, Lynch & Willis 2017, p. 99). The Commission further consolidated its credibility with the creation of the Inter-Party Advisory Committee (IPAC). This is a neutral political forum that allows representatives of all primary political parties to field concerns about the electoral process and discuss reforms in an ongoing way (*ibid.*, p. 99). Thanks in large part to the influence of the EC, the 1996 electoral process was declared free and fair. This first successful election earned Ghana the praise and, perhaps more importantly, increased support of multinational donors (Piccolino 2016, p. 507). In 2000, power transferred once again: this time from the NDC back to the NPP, in a peaceful and transparent election (*ibid.*, p. 508).

In the wake of the 2000 election new developments emerged to discredit the once widely respected Electoral Commission. Following the NDC win in 2012, the Electoral Commission confessed that the national voter registration list contained approximately 1.5 million 'ghost names' (Piccolino 2016, p. 508). The admission was especially damaging to the Commission's reputation given that the voter registration database had been completely overhauled only a few years earlier by the EC itself. The identified 'ghost voters' included names of voters who were dead, or minors – especially in the parties' respective strongholds. In a second major concern, the EC confessed that many foreign residents in Ghana were illegally registered on the voters' list.

The next major blow to EC credibility came during the 2008 election season. The final electoral results were extremely tight with fewer than 50,000 votes out of more than nine million determining the winners. Prior to the election, the EC was overwhelmed by nearly two million unanticipated new voter registrations. The subsequent disorder caused by the EC's lack of preparedness prompted a thorough investigation into the registration process, ultimately revealing that the EC registration activities that year were poorly administered and 'marred by violence and irregularities' (Piccolino 2016, p. 508).

In 2012 once again, widespread allegations of ‘over-voting’ and registration ‘irregularities’ further damaged the credibility of the EC (Kwarteng 2014, p. 84). These ‘irregularities’ involved potentially tens of thousands of retained ‘ghost-names’ as well as the discovery of ‘ghost’ polling stations that were not on the official electoral list, yet had collected votes (Cheeseman, Lynch & Willis 2017, p. 99). Despite acknowledging the existence of irregular voting, the Electoral Commission declared before the Supreme Court that the problem was not extensive enough to change the electoral results. Although the Supreme Court intervened to confirm the victory of NDC President Mahama in the 2012 elections, the court also mandated major reforms to the EC (Cheeseman, Lynch & Willis 2017, p. 99).

In a context where elections are fiercely competitive and often determined by a small margin, the admission of error in voter registration on the part of the EC was a drastic blow to the Commission’s credibility. More detrimental still to the EC public image, the NPP 2012 elections petition to the Supreme Court was broadcast publicly on national radio and television networks, capturing national attention with a theatrical confrontation between the parties, the Court and the EC. The highly publicised drama exposed endemic problems within the organisation, permanently marring the credibility of the Commission in the public eye (Kwarteng 2014, p. 86).² In a December 2015 survey, a quarter of the respondents reported that ‘they did not trust the EC at all’ with only 24% of Ghanaians reporting that they trusted the EC ‘a lot’ (Cheeseman, Lynch & Willis 2017, p. 99). Regardless of whether it is true that voter registration irregularities significantly affected electoral results in 2012, the situation has since resulted in a general sense amongst the Ghanaian public that both the voter list and the Commission itself are no longer credible.

The long-term impacts on Ghanaian democracy of electoral irregularities and a subsequent nationwide loss of confidence in the EC are potentially devastating. Given the tense context that has always surrounded national elections in Ghana, the failures of the Electoral Commission to remain partisan and credible meant that the institution designed to defend the sanctity of electoral transparency was now at the centre of national scandal. When the public does not trust that the institutions running elections are transparent and impartial, dissatisfied electoral losers can easily mobilise support for public disruption and, at times, violence, rather than accept an allegedly unwarranted loss. The loss of legitimacy experienced by the EC over the last decade could destroy Ghana’s once-lauded democratic tradition. This was the political climate preceding the 2016 electoral

2 For instance, the national hearing revealed that the once-highly respected Commission Chairperson Kwadwo Afari Gyan had misrepresented his age on his own voter registration card, revealing that even the highest levels of the organisation were marred by a lack of credibility.

season, with the NPP noisily predicting that the 2016 election would also be marred by what they perceived as a pro-NDC bias on the part of the Electoral Commission.

ELECTIONS 2016

The NDC government entered the 2016 electoral season initially confident of securing yet another victory. The government had invested heavily in industry and innovation during its most recent tenure in office, resulting in a major jump in the GDP from 4.1% in 2015 to 5.4% in 2016. Despite the impressive growth rate, most Ghanaians felt only the negative side of rapid economic growth. For most Ghanaians, the NDC regime's economic success story meant high inflation and growing commodity prices. Meanwhile, infrastructure continued to crumble and youth unemployment reached nearly 50% (Cheeseman, Lynch & Willis 2017, p. 94). In the months before the December 2016 election, signs began to appear in the NDC's own strongholds reading 'No lights, no votes'. Mounting evidence showed that many Ghanaians wanted a major government overhaul and were ready to throw out the incumbent NDC.

Simultaneously, fears circulated that the Electoral Commission would rig the election in favor of the NDC. The NPP fears that the Electoral Commission was biased in favor of the NDC were intensified when the Commission's chairperson was replaced in 2015 by Ms. Charlotte Osei (Cheeseman, Lynch & Willis 2017, p. 93). As the former chairperson of the National Commission for Civic Education, Ms. Osei had a long history of close collaboration with the NDC government. Confirming the NPP worries, the 2016 election saw Ms. Osei 'on the wrong side of significant court litigation' leading up to the election (Akoto to Charlotte Osei, November 3, 2016). Amongst numerous troubling actions on the part of the EC, she defended significant errors in the voter registration list before the Supreme Court. Also, under Ms. Osei's leadership, the EC unsuccessfully attempted to adopt a non-transparent methodology for tallying electoral results that would keep candidates ignorant of the numbers until the EC had finished its overall count. Finally, the 2016 election saw the disqualification of all but four presidential candidates based on bureaucratic technicalities (Nyabor 2016).

SUPREME COURT INTERVENTION

In the lead-up to the 2016 Election, the Electoral Commission found itself before the Supreme Court with a series of accusations of potential corruption. The Supreme Court ruling in favour of the incumbent NDC following the 2012 election was accompanied by list of instructions to the Electoral Commission requiring

substantial reforms to its operations, mostly regarding the voter registration process. This prompted the NPP to write the Electoral Commission a note filing its concerns about the damaged credibility of the EC, particularly considering the persistent presence of fraudulent voters on the national registration list. The petitioners argued that many names appearing on the Ghana voter registration list were also seen on voter lists in Cote d'Ivoire, Burkina Faso and Togo and therefore could not be eligible as voters in Ghana. The second issue raised was with regard to registration by National Health Insurance cards, which the state does not recognise as an official form of citizenship identification. When the EC ignored the letter, the NPP took their concerns over the voter list and other irregularities in the electoral process to the Supreme Court.

VOTER REGISTRATION IRREGULARITIES

Voter registration has always been a major challenge to the success of free and fair elections in Ghana. National identification cards were introduced in 1970; however, the process was interrupted by a military coup d'état before the service could be provided to the entire country. With significant gaps in national coverage of the required identity documents, many Ghanaians registered to vote with a self-approval process (Piccolino 2016, p. 506). For example, it was once common practice for two qualified voters to accompany the applicant to the registration office as witnesses and verbally confirm identity without the requirement of a national ID. Although biometric voting was introduced before the 2012 election, a significant number of ghost names continue to exist on the national register that the EC has been unable to identify and remove despite ongoing efforts to clean the list. Without a reliable registration process, both major parties accuse the other of encouraging their supporters to double-vote (ibid., p. 508).

Prior to the 2016 election, the Electoral Commission faced a petition that reached the Supreme Court in a case entitled *Abu Ramadan II*. Abu Ramadan II of the PNC party and Nimako from the NPP brought the Electoral Commission before the Court demanding that the names of ineligible voters be removed immediately from the voter list. The petitioners accused the EC of allowing voters to register with a National Health Insurance card as an official state identification. The insurance cards are available to all residents of Ghana regardless of whether the individual is an eligible voter, sparking concern that the cards were used by foreigners living in Ghana to illegally register and vote. This phenomenon is highly controversial due to the geographic concentration of NDC and NPP's respective strongholds. The NDC enjoys a significant support base amongst foreign migrants in Ghana, especially in the predominantly Muslim region of the North (Nathan 2016, p. 1906). To the extent that ethnicity does predict voter choice in Ghana, allowing NHIS card holders to register to vote disproportionately benefits the NDC.

On May 5 2016, the Supreme Court released its verdict stating that the use of National Health Insurance Service (NHIS) cards for the purposes of voter registration was unconstitutional, and that all such registrations became invalid with immediate effect. The following unanimous court decision was read by Justice Gbadegbe:

... The 1st defendant (that is, the Electoral Commission) {must} take immediate steps, that is, forthwith, to take steps to remove from the current register of voters all persons who had used NHIS cards to register. This order having been made under Article 2(2) of the Constitution therefore takes precedence over any existing statutory provision... In order not to violate their fundamental electoral rights and in order not to disenfranchise such persons, the {Electoral Commission must} give adequate notice to those affected by the order of the processes of deletion and re-registration, subject to eligibility. The removal of the names from the register {...} precedes the processes of re-registration ...

(Akoto & Kwasi Prempeh 2016)

As is clear in the statement above, the court further ordered the Commission to present the 56 772 voter names removed from the list with reasonable accommodation needed to re-register with an official form of identification as provided by the Constitutional Instrument 91. On July 13 2016, the Electoral Commission announced that it had deleted the NHIS registered voters. Also, in compliance with the Supreme Court ruling, the EC publicly released the list of deleted names and gave a ten-day window for re-registration.

Before complying, however, the EC defended its initial voter list by claiming that the EC benefitted from a constitutionally-protected independence from the oversight of all other government entities (*ibid.*). This stance, however, reflected a misinterpretation of the constitutional protections of Electoral Commission independence. Should an act or action of the Commission be deemed unconstitutional by the Supreme Court, the Court is vested with power under the Constitution (Article 2(2)) to compel the EC to take steps necessary to correct the violation (Allotey 2016). Akoto Ampaw, a prominent Ghanaian constitutional lawyer, confirms that a declaration by the Supreme Court of unconstitutional behaviour by another state entity takes precedence over any other statutory provision, including provisions that are themselves guaranteed by the constitution, such as the independence of the EC (Akoto & Kwasi Prempeh 2016).

This ruling is significant for the long-term prospects of Ghanaian democracy. Aside from resolving inconsistencies in the voter registration process, Abu

Ramadan II demonstrated that the Supreme Court has the authority to overrule the independence of the Electoral Commission in instances when the former acts in ways deemed unconstitutional by the Court itself. For Ampaw, the case touched on what he considers the most fundamental question in a constitutional democracy: the meaning of the supremacy of the constitution (ibid.). The case, he writes, offered an 'authoritative and clear resolution of this matter'. The Court ruled on its own behalf that it requires 'no existing or new legislation' to demand any other governance institution to rectify actions deemed unconstitutional (Allotey 2016).

NON-TRANSPARENT METHODS FOR ANNOUNCING VOTE RESULTS

A second case regarding the release of electoral results was heard by the Supreme Court on 27 October 2016, few weeks before the December elections. The plaintiffs complained to the Supreme Court about a recently adopted EC method for collecting and tallying polling station results. The new methodology appeared to reduce the transparency of the vote-counting process significantly, thus opening the way for possible fraud and abuse by political parties and the EC. The NPP was specifically concerned with vote-counting documents known as Presidential Election Result Collation Forms. These are the 275 forms of compiled results collected from about 29 000 polling stations across the country. Akoto Ampaw, lead counsel on the case, argued that the new counting methods concealed electoral collation forms from the opposition during the counting process. This means that only the Electoral Commission itself would have access to the polling station results prior to compiling a national tally (*Kwesi Nyame-Tsease Eshun vs. Electoral Commission*, 2016).

Akoto and his fellow legal counsellors warned that the new counting methods left a dangerous gap in the transparency of the electoral process. Moreover, it was a gap that could easily be exploited by the Electoral Commission to skew results in favor of the incumbent NDC party. The matter was of particular concern because, following the 2012 elections petition verdict, the Electoral Reforms Committee had already recommended that the collation forms be made available to agents of candidates and then signed to confirm that all electoral procedures were duly and fairly performed. The EC, however, had ignored the recommendation and this roused suspicions amongst the political opposition that the EC was adopting a new non-transparent policy on precisely the issue it was previously instructed to reform (ibid.).

The Supreme Court ruled that the existing legislation regarding collation forms:

... is unreasonable, unfair, non-transparent and does not promote or secure free and fair elections and is accordingly inconsistent with... the Constitution and the core constitutional values of transparency, accountability and the rule of law. (ibid.)

The Court ruling henceforth requires the EC to present agents of each candidate with polling station results as that information is compiled. Ensuring that the collation forms were made available to and endorsed by representatives of each candidate meant the political parties could verify official election results against their own count. This added layer of transparency reduced the fear of cheating by the EC, and subsequently helped elevate tension in the lead-up to the 2016 Ghanaian election (*Daily Statesman* 2016).

EXCLUSION OF PRESIDENTIAL CANDIDATES

A third Supreme Court ruling took place during the 2016 electoral season on the issue of presidential candidate disqualifications. The Electoral Commission disqualified 13 out of 17 presidential candidates, citing anomalies on their nomination forms (Delali 2016).³ According to the EC, some candidates did not properly sign their nomination forms, others provided insufficient registration fees, while still others had listed ineligible sponsors for their candidature. The High Court overruled the disqualifications, prompting the Electoral Commission to take the matter to the Supreme Court. Faced with court cases from all the major political parties, the EC hoped for reprise from the Supreme Court.⁴ Instead, the SC ruled that candidates could not be denied participation in national elections based on minor errors in their application forms and must be given due accommodation to allow their registration. The court gave its verdict on the legality of the disqualification of the Progressive People's Party (PPP) candidate Dr. Papa Kwesi Nduom, ruling that the Dr. Nduom must be given adequate opportunity to register in the presidential race. This decision automatically applied to the other disqualified candidates. In response to the Supreme Court decision, the legal counsel for Dr. Nduom announced, 'Some people (namely, the EC) tried to create the impression that the disqualified candidates were involved in fraudulent activities. I am very happy that the Supreme Court has told the EC to live by the law' (Aku Baneseh & Ebo Hawkson 2016).

3 The four candidates originally accepted were Nana Addo Dankwa Akufo-Addo of the New Patriotic Party (NPP), John Dramani Mahama of National Democratic Congress (NDC), Ivor Kobina Greenstreet of the Convention People's Congress (CPP) and Jacob Osei Yeboah (JOY), an independent candidate.

4 These parties were the Great Consolidated Popular Party (GCPP), the National Democratic Party (NDP), the Independent People's Party (IPP), the All People's Congress (APC), and the People's National Convention (PNC).

AN ELECTORAL CRISIS AVERTED

On December 7 2016, Ghanaian voters and political parties peacefully navigated a 'high-stakes, highly competitive election that many had feared would strain their country's political stability to the breaking point' (Cheeseman, Lynch & Willis 2017, p. 92). The election ended with the peaceful transfer of power from the NDC incumbent to the NPP opposition party. The election and subsequent handover of power proceeded without serious incident, and the elections themselves were widely recognised both at home and abroad as free, fair and transparent.

As discussed above, this was not the first time the Supreme Court had intervened to defend the democratic process in Ghana. In 2012, the Court demonstrated its role as a guarantor of peaceful conflict resolution by rejecting an appeal from NPP candidate Nana Akufo-Addo, asking the court to cancel 40% of the 11 million votes, alleging voter fraud (Kwarteng 2014, p. 83). Over a period of fifty sessions, the Court ultimately confirmed the incumbent NDC candidate John Mahama as president, striking down the NPP petition. In 2008, the Court also intervened to ensure a peaceful outcome to the highly competitive election fraught with charges of fraud and other irregularities. For Abdulai and Crawford, these successes are clear evidence that Ghana is a consolidated democracy in the sense that there are 'no significant political groups seriously attempting to overthrow the democratic regime' (2010, p. 32).

For Kwarteng, Ghana's Supreme Court is accredited with the role of judicial exorcism by serving as a barrier to political extremism in the electoral system (2014, p. 88). As a case in point, Justice William Atuguba, former head of the nine-member Supreme Court Panel, publicly lashed out at the primary political parties in 2008. Accusing them of seeking to destroy the political institutions in Ghana for their own profit, Justice Atuguba warned the parties that – if necessary – the Court would 'marshal its state-conferred power to contain the political class' (Kwarteng 2014, p. 89). As further evidence that the Supreme Court considers itself a barrier to the risk of electoral crisis in Ghana, the Court has published a manual explaining to political parties and civil society how to access the court and invoke its participation in dispute resolution (Abdulai & Crawford 2010, p. 36).

The 1992 Constitution gives the Supreme Court of Ghana authority to rule on the constitutionality of all other state entities including independent commissions such as the EC. The 2016 election clearly demonstrated the ability and willingness of Ghana's highest court to compel state institutions to end any unconstitutional behaviour with the ruling known as mandamus orders. Using this judicial power, the Court has consistently cast itself between the political parties, acting as a bulwark against encroaching corruption and the threat of violence in Ghana's elections. This became especially clear in the 2016 election as the Court actively

intervened to block suspicious activities on the part of the Electoral Commission in the lead-up to the national vote.

Abdulai and Crawford accredit the peaceful transfer of power through democratic processes in Ghana for over two decades to a commitment from the dominant political parties to rely on appropriate institutions to resolve disputes and grievances (2010, p. 35). Yet, over the last few decades both major political parties have also demonstrated their willingness to use corruption and other hostile tactics to win the national vote. Cooperation between the NDC and NPP is notoriously poor, with both parties often adopting defamatory campaigns against the other (Aye 2008, p. 208). In the 2016 election, the NDC party exercised its power as an incumbent to undermine the independence of the Electoral Commission. It is therefore the contention of this paper that, rather than accrediting politicians with a commitment to democratic practice as Abdulai and Crawford appear to do, the more important element in the success story of Ghanaian democratisation is the activism of the Supreme Court.

The willingness of Ghana's main political parties to take their concerns with the electoral process before the Supreme Court is not evidence that these parties are committed to a free and fair democratic procedure. As seen in the cases cited above, both main parties are perfectly willing to undermine the democratic process in hopes of securing a win. Instead, the Court has proven itself strong enough and reliable enough in the public eye that the political parties have no choice but to respect judicial rulings. Robert Dahl has famously stated that when rulers face mounting opposition, they can either reform or repress. For Cheeseman et al., the willingness of Ghanaian incumbents to reform rather than repress is evident in the Ghanaian electoral success over the last decades, especially in the case of the peaceful transfer of power in 2016 (Cheeseman, Lynch & Willis 2017, p. 100). This article seeks to qualify Dahl's statement by noting a potential third option in which the role of an activist Supreme Court has constrained potentially repressive politicians and the arrogance of state institutions so effectively that they have no choice but to reform.

Having achieved more than two decades of free and fair electoral proceedings, Ghana is considered a model of democratisation in its region. Yet, despite the outward image of consistent electoral successes, this reputation has faced serious threats over the last decade due to the tightly competitive nature of electoral results in Ghana and the hostile political environment created by both major parties around elections. With the addition of mounting controversies resulting from non-transparent EC behaviour, these threats to free and fair democratic procedure came to a head in the lead-up to the 2016 vote. And yet, despite these challenges, Ghanaians once again proved to its credit the global reputation of being a democratic model in Africa and worldwide.

CONCLUSION: AN ACTIVIST SUPREME COURT AS GUARANTOR OF DEMOCRATIC PRACTICE

There are certainly multiple factors behind this achievement; however, the role of an activist Supreme Court in defending democratic procedure is clear in the Ghanaian case. The legal process school discussed in the opening sections of this paper warns that an overly active supreme court risks eroding the legitimacy of the judicial system in the public eye and in the eyes of the legislative authority. In Ghana we see the opposite. An activist Supreme Court has instead built enough confidence in the political parties through its interventions in electoral politics to ensure that election-related complaints are now reliably brought to court rather than being worked out in the streets. These findings support the position advanced by Ruti Teitel that weak democratic institutions require interference from a strong Supreme Court to act as an ethical guide and mediator for the rest of governance. As a case in point, during the 2016 national elections in Ghana suspicious behaviour on the part of the Electoral Commission was exposed and corrected by the Court before these issues could create a national crisis.

We should not underestimate the serious challenges to democracy that the fiercely opposed political parties present, especially in a highly competitive electoral environment. To appreciate the important role the Supreme Court has played in preserving peace in the face of potential electoral crisis, we need look only to recent events in Ghana's regional neighbourhood. During the last decade, corrupt or weak democratic institutions were at the centre of electoral crises that dissolved into civil war in Cote d'Ivoire, The Gambia, Gabon and Central African Republic. Also, prior to the democratic renewal in Ghana in 1992 that created Ghana's Fourth Republic, political polarisation did reach violent extremes, resulting in a coup d'état and ten years of military rule. Despite its location in a bad neighbourhood when it comes to electoral crises, contemporary Ghana has retained its reputation as a model for peaceful democratisation. This paper contends that this success should be attributed in large part to the activist role of the Supreme Court. As seen in the case study above, the Ghanaian high court has built enough credibility to effectively constrain an ever-present threat of undemocratic practice on the part of Ghana's main political parties. As Teitel predicted, the willingness of the Supreme Court to intervene when other democratic institutions fail has today ensured that in Ghana potential electoral crises are brought before the judges rather than ending in crisis.

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THE CONCEPT OF AGENCY THEORY IN ELECTORAL DEMOCRACY

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ABSTRACT

This essay analyses the doctrine of the law of agency in the context of electoral democracy in assessing the rights and liabilities of the political elite and the voting public. The principal-agent model was employed to expatiate challenges in the relationship between the agent's performance and how the principal can reward or punish the agent through competitive elections. In doing so, the elected political authorities are deemed to be agents of state governance while the voters, and by extension the population, are seen as principals of the state. The principal-agent relationship generates the electoral accountability of representatives to constituents by checking and controlling the behaviour of the political elite to ensure that national programmes, policies and laws are applied for the benefit of the general public. The study concludes that voters, as principals, expect political agents to deliver public goods and services to their benefit and that failure do so attracts a vote of censure. This means that competitive elections create a relationship of formal accountability between political leaders and voters. This accountability minimises the ability of political leaders to use the advantage of information asymmetry.

Keywords: principal-agent theory, agency cost, electoral agency theory, moral hazard, adverse selection, public accountability

INTRODUCTION

The doctrine of agency has been widely expounded in different academic fields. In recent years various economic and political scholars have applied the doctrine of the principal-agent relationship to the study of the nexus between the elected and the electorate (Hammond & Knott 1996; Weingast & Moran 1983). A study by Bratton and Logan (2014), avers that 84 percent of the voting public in several African countries associate themselves with free and fair elections –

including Tunisia, South Africa, Ghana, Senegal and Algeria, Nigeria, Lesotho and Botswana, where there is indisputable support for competitive elections as the instrument for electing leaders. Competitive elections create a relationship of direct accountability between citizens and the organs of state. An important contribution to this concept was made by Ferejohn (1986), who assumed a situation of moral hazard between voters and the government. He posits that government can improve the outcome for voters by executing its mandate in the interests of the voter. According to Ferejohn, voters could in turn commit to a retrospective voting strategy by voting the government out should its performance fall below expectations. These electoral rewards and punishments are realised on election day.

A useful analysis of the test of accountability between elected and electorate is the theory of political agency, which elucidates the incentives provided by elections. The rational choice theory of political agency perceives agents as decision makers with the capacity for rational choices to pursue the interests of their principals (Downs, 1957). From that perspective, all citizens might be regarded as principals whose interest political agents must pursue. Other theorists, particularly those inspired by Immanuel Kant, focus on moral agency, that individuals be held accountable for their acts and are capable of assuming duties with rights. This exercise of accountability requires the voter to make decisions in an atmosphere of autonomy and freedom with the reflective capacity to guide such decisions.

This theoretical framework asserts that incentives are driven by the incumbent government in an effort to impress the voters, and this desire often conflicts with the commanding authority, that is the obligation to advance the interest of the voters rather than pursue policies of self-interest. The incumbent's electoral incentives to act within or contrary to the voters' interests is guided by the voters' decision to act rationally in all electoral cycles. Aidt and Magris (2003) postulate that the dynamic incentives provided by retrospective voting can partially solve the problem of 'capital levy'. At the core of democratic governance is the expectation that citizens can compel public officials to be responsive to issues of government policies, public expenditure, and popular needs of the people (Moncrieffe 1998; Goetz & Gaventa 2001). This is also supported by Besley and Burgess's (2002) use of the incentive model to generate workable predictions about the determinants of government responsiveness in providing public good to the citizens. For example, after the adoption of the 1992 Constitution, the political system of Ghana took place in a framework of a presidential, representative democratic republic (Crawford 2004). The political system after 1992 was a blend of both the parliamentary and presidential systems. Article 42 of the 1992 Constitution provides that every citizen of Ghana who is eighteen years of age

or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda in elections that take place every four years. Since its return to multi-party democracy in 1992, Ghana has had seven successive elections which have seen power alternating from incumbent to opposition.

Voters in turn do not always look at performance during the course electoral cycles. As electoral competition has come of age with several decades' worth of electoral events, voters sometimes vote on an ideological basis and/or a political track record, and not just the current crop of politicians and programmes. Voters are often unwilling to be carried away by self-serving politicians in exchange for hollow promises, and thus the debate among voters in some African economies focuses on politicians' performance, track-records, and citizens' own expectations and aspirations. These factors inform the voter's choice in elections; however, this may be defeated during elections by political coalitions and ideologies. For example, in South Africa the continued hegemony of the African National Congress (ANC) since 1994 allows the party to short-circuit their electoral accountability to the citizens, which may presage the need for political coalitions by opposition parties to reduce the electoral preference for ANC.

Every five years the South African electorate has the opportunity to hold government to account for its past performance in office. South Africa has held five successful national and provincial democratic elections since 1994 which have seen the electoral dominance of the governing ANC. While voters in Ghana may have the opportunity to hold political leaders accountable through competitive elections, their counterparts in South Africa have a lesser level of accountability due to the historically predictable outcome of elections. The electoral imbalances in the party system and the static and predictable nature of voting outcomes have raised concerns that elections fail to hold politicians to account.

For elections to act as an effective accountability tool, voters must be willing to sanction incumbents by looking at their past performance and punishing poor governance by revoking their support at the polls. O'Donnell (1994) posits that competitive elections provide citizens with periodic opportunities to reward or punish incumbent leaders. According to Sean (2012), elections have been identified as the main tool for getting politicians to act in the interests of voters. Elections allow citizens to hold their leaders accountable even in infant democracies. This provides a direct agency relationship between the voters and the elected government with the voters acting in the capacity of principal while the executive and legislative arm of government acts in the representative capacity of an agent. This amounts to bestowing public accountability on the agent (government) to act at all material times in the best interests of the principal (voters).

For example, Nigeria, the most populous country in Africa with the largest economy, runs a four-year electoral cycle which gives voters the opportunity

to hold political office-bearers accountable. As Nigeria goes to the poll in 2019, voters will use the election as a referendum on the president, governors and all federal and state legislators. Similarly, Botswana has an uninterrupted history of competitive elections since 1965, and voters hold political leaders to account every five years.

However, incentives provided by elections could be driven by the agent's desire to impress the voters, and this desire often conflicts with the imperative to advance the interests of the voter, endorsing the demand and supply theory of Rose et al (1998). This theory is used to differentiate popular demand for political goods from the supply of such goods produced by the political authority. The political authority may seek to maximise its own freedom motivated by the drive to occupy political office, and in so doing may insulate itself from excessive popular claims. In pursuit of their own political agenda, incumbent leaders find advantage in managing mass demands and limiting the amount of accountability they are willing to supply. As a result, the electorates can demand accountability by making political leaders answer for their official conduct. However, this demand by voters is effective only to the extent that information on government programmes, policies and performance can be accessed freely through political offices, mass media and social media. This in turn casts some doubt on the rational choice theory of the voter. According to Ashworth (2012), the political authority's electoral incentives to act contrary to voters' interests might arise even if all voters act perfectly rationally. This means that rational voters can create bad incentives especially in an ethnically obsessed political economy which does allow for proportional representation. Voter's choices during competitive elections in those economies may not be based on whether or not the incumbent government performs in the interest of the citizens; rather, that choice may be influenced by ethnic and partisan ideologies. For example, in Kenya, the ethnic, social and political fragmentation between the Kikuyus and Kalenjins has been consciously manipulated by the political elite during elections which invariably reduce discussions to bread and butter issues. In contrast the implementation of the list system of proportional representation in South Africa has promoted inclusivity by opening up the elections to a number of parties, allowing them to vie for some degree of representation for different ethnic and other concerns. Although this system may dilute the accountability threshold of the political authority, it may nonetheless foster national cohesion and inclusiveness.

Voters can decide to vote either for or against an incumbent political authority, at least potentially on the basis of political ideology, affiliation and/or ethnicity. This is regardless of whether or not the incumbent or the incoming administration performs in the interest of the voters.

Public accountability is a function of the capabilities of principals to pass judgement on the performance of their agents (Achen & Bartels 2002; Healy & Malhotra 2010; Lenz 2012; Lupia & McCubbins 1998). The accountability view of elections therefore suggests that elections serve to hold governments responsible for the results of their past actions. Because they anticipate the judgment of voters, governments are induced to choose policies that in their judgment will be positively evaluated by citizens at the time of the next election (Afrobarometer Round 2, 2002). This calls on an incumbent government to prioritise policies and programmes aimed at boosting and meeting the legitimate interests of the voters. To make sense of the relationship, the government must establish accountable institutional structures to function in the interest of the voter. However, the agency problem arises in many situations in sub-Saharan Africa where governments, once elected, begin to implement policies and programmes that are inimical to voters' interests. Although most literature on agency is in the context of industrial economics, the concept has substantial implications for the study of electoral politics. Consequently, this article seeks to explore the principal-agent theory which has become a widely-used model for analysing public accountability. This is largely because it provides a flexible framework for modelling the performance variations in the competencies of various political parties and their candidates, thereby affording voters the opportunity to compare their potential for inducing desirable behaviour by agents.

PRINCIPAL-AGENT THEORY

In the case of *The Queen v Kane* (1901), Lord Alverstone CJ defined an agent as 'any person who happens to act on behalf of another'. The *United States Restatement of the Law of Agency* (2006) defines agency as 'a fiduciary relationship that arises when one person (a principal) manifests assent to another person (an agent) acting on the principal's behalf and subject to the principal's control, and the agent manifests or otherwise consents so to act'. Agency model is considered to be one of the oldest theories in the literature of management and economics (Daily, Dalton & Rajagopalan 2003; Wasserman 2006). Agency theory helps to implement various governance mechanisms to control the agents' action(s) in the interest of the principal. Berle and Means (1932) found that the modern organisation experience dispersed ownership, warranting the need to separate ownership from control. In a limited liability company, ownership is held by individuals or groups by virtue of share ownership and these shareholders (principals) delegate the authority to the managers (agents) to run the business on their behalf (Jensen & Meckling 1976; Ross 1973). The major issue is whether these managers are performing in the interest of the owners or for their own interest.

According to Sealy and Hooley (2008) there are three main theories that seek to define and explain agency. These are power-liability theory, consent theory and qualified consent theory. Firstly, according to the power-liability theory an agency exists when a person (the agent) acquires the power to alter the principal's legal relations with a third party so that only the principal and not the agent can sue or be sued by that third party. Secondly, consent theory takes a different approach to the definition of agency: according to the US Restatement (Third) of Agency (Tentative Draft No 2) (2003), agency constitutes the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents to act. This deals with the criticism of the power-liability theory by focusing on the fiduciary duty owed by an agent to a principal. Finally, the qualified consent theory combines consent theory with the protection of 'misplaced reliance' to account for actual and apparent authority.

The question of agency tends to focus on the extent of the agent's authority and how this affects the principal's interest. An agent can only bind the principal if the agent has some kind of authority to do so, otherwise the principal will not be bound to the contract (Sealy & Hooley 2008). Basically, the agent would have to express either actual authority or apparent authority in order to bind the principal. This article seeks to analyse the agency relationship between the incumbent government and the voter in respect of actual authority bestowed on the incumbent by the voter. In certain jurisdictions the nature and design of the electoral system could produce different outcomes of this formal contractual agency theory. For example, in jurisdictions where proportional representation electoral system is practised such as South Africa and Lesotho, parties gain seats in proportion to the number of votes cast for them. Agency relationships between government and voters in these countries could result in an unexpected outcome because parties might campaign individually on manifestoes but could subsequently form coalitions and alliances after the elections, thereby defeating the electoral-based contract between a particular incumbent government and the voters.

Actual (express) authority is the mandate the principal gives the agent to enter into the arrangement on the principal's behalf. The actual authority of the agent could be either expressed or implied. In the case of *Aviva Life and Pensions UK Ltd v Strand Street Properties Ltd* (2010), it was established that express actual authority may be contained in documents or agreements between the principal and the agent detailing the express instructions within which the agent must operate. Where the agent acts in excess of actual authority, the principal shall not be bound by that transaction. According to Article 57(1) of the 1992 Constitution

of Ghana 'there shall be a president of the Republic of Ghana who shall be the Head of State and Head of Government and Commander-in-Chief of the Armed Forces of Ghana'. Again, through the doctrine of agency, Article 93 of this Constitution requires the election of members of parliament to represent the constituent principals. The mandate of state governance is given to the elected executive and legislative arm of government (the agents) by principals, being the voters in democratic elections through the ballot box. Note, however, that once elections produce agents, both the voters and non-voters together form citizens (the principals) in whose best interests the elected officials must serve.

This means that with regard to the actual authority of the state, the state's agents need express authorisation from the principal (the state) to execute its responsibilities. These authorisations are contained in laws enacted by the citizen's representatives (parliamentary agents). This underscores that fact that under the express authority agency theory, the elected and appointed state officials are required to perform their activities in compliance with the express dictates of the law, and that failing to do so amounts to a breach of agency relationship. A vote of censure can then apply during re-election. The theory of implied actual authority requires an agent to undertake activities that are necessary and incidental to perform task(s) within the agent's actual express authority. In state governance, this translates to those who have been elected formulating programmes, policies, cabinet decisions, institutional establishment as well as appointing heads of ministries, departments and agencies necessary for executing the mandates bestowed on the government by the voters.

This calls into question the extent of accountability between the institutions of state and the people they represent. There is thus a need to analyse and evaluate the degree of public accountability, which demands a specific structure of who is accountable to whom. This is the overarching characteristic of principal-agent theory. According to *The Queen v Kane* (1901), in principal-agent models an agent undertakes an action on behalf of another person called the principal. In support, Sean (2012) avers that the principal can therefore make decisions that affect the incentives of the agent to take various possible actions. This process of structuring incentives for the agent is an essential ingredient of principal agent theory. Bolton and Dewatripont (2004) posit that principal-agent theory is an agreement in a form that is generally coterminous with contract theory. This makes the decision of the principal that structures the agent's incentives to take various actions constitute a binding contract between the principal and the third party, whereby non-performance on the part of the agent would constitute a breach of contract. In *Montgomerie v United Kingdom Mutual Steamship Association* (1891), it was established that where a person contracts as agent for a principal, the contract is that of the principal, and not that of the agent; and, prima facie, in common law the only

person who may sue and be sued under the contract is the principal. Analogous to contractual relationships there exist rights and obligations between the agent and the principal such that a breach of agency duties can result in contractual damages. This means that principal-agent models specify a set of possible actions the parties can take, and how they evaluate consequences of those actions.

However, where an agent carries out an act in the name of a principal for which he was not authorised, the principal may decide to ratify the transaction. If the principal decides to ratify the transaction then he adopts the agent's unauthorised acts, which then become authorised *ab initio*. In other words, ratification is equivalent to antecedent authority and the agent will be regarded as having retrospective actual authority. In electoral agency, ratification can be described as a situation where a particular candidate or political party seeks re-election or parliamentary impeachment proceedings by an absolute majority of vote by members of parliament in the form of vote of no confidence. A motion of no confidence requires the majority of the members of parliament to vote in favour of the motion. For example, in 2017, then president of South Africa, Jacob Zuma, survived a motion of no confidence when the opposition members of parliament joined forces to censure him for various allegations of corruption.

This calls on the voters (principals) to decide whether or not to ratify the failure of the candidate to perform in their interest. In competitive elections where the incumbent is voted into power, the doctrine of agency ratification is deemed to have taken place. On the other hand, when the incumbent is voted out of power, the voter is deemed to have exercised the power of censure by declining to ratify the incumbent's unauthorised conduct, both action and inaction, making the agent liable to state governance.

Notwithstanding the above, the principal-agent theory relationship is not without fundamental challenges. These difficulties concern the relationship with moral hazard or hidden actions, and those dealing with adverse selection or hidden information. In moral hazard problems, the agent takes actions that may affect the principal's interest. This happens where the principal and agent have different preferences over the choice of possible actions the agent could take, but the principal cannot directly control the agent's action. The principal observes some information affected by or correlated with the agent's action and administers a reward or punishment, such as re-election or rejection, based on that information. In adverse selection problems, the agent is privy to some information that the principal needs in order to decide in the principal's interest, but the agent prefers such information to be used differently. This makes it difficult for the principal to directly control the actions of the agent.

The moral hazards and adverse selection difficulties arise whether the contract is explicit, as with implementation of programmes and policies, or is

opaque and only enforceable to a limited extent, as with politics (Jan-Erik Lane 2013). Central to the analysis of both moral hazard and adverse selection problems is the compatibility of incentive. According to Rasmusen (2006), the application of the principal-agent theory in the private sector has been related to the salary of CEOs and the choice of contracts. Here the model is analysed on the principle that the principal hires the agent on the basis of a contract involving work whereby the agent is paid according to the value of the output delivered. The principal's output expectation is a function of the effort required of the agent. Since the principal aims for high output, the principal would create a contract that requires high effort from the agent. These contracts are subject to the contract meeting the expectations of the principal, that is the contract between agent and principal must meet the expectations of the principals, the voters. When it is applied to politics, the principal-agent interaction will start backwards with first, the government choice of agents to handle the provision of public services; and second, the electorate's choice of political agents with different policy preferences. However, with asymmetric information regarding hidden actions and hidden knowledge, there are suboptimal solutions. This is evident in political and bureaucratic literatures. The Niskanen model of bureaucracy with public choice provides a principal-agent model whereby the agents employ information to their advantage to deliver a suboptimal level of public service. In an undemocratic political state where power is centralised, the government monopolises politics for its own benefit in order to reduce the population to some form of political subjugation by restricting the choice of the electorate in order to systematise control.

Incentive compatibility simply means that the principal must make the agent's role worth the principal's interest. However, incentive compatibility imposes constraints on the principal. This requires the principal to trade off the benefits of improved decision from its own point of view, against the costs of inducing the agent to take that particular course of action. For example, if the agent's liability for poor performance is limited in one way or another, then in general, incentive compatibility constraints imply that the principal will not induce the agent to pursue the principal's interest, even if the principal is theoretically able to do so. Principals are therefore called upon to trade off agency loss against the cost of satisfying incentive compatibility. However, the mere existence of agency loss does not imply that the public accountability of the agent is suboptimal in the view of the principal since agency loss is not necessarily inevitable.

ELECTORAL AGENCY THEORY

Bovens (2007) defines accountability as a relationship in which an agent has an obligation to explain and justify conduct to a principal. In an electoral democracy,

the key relationship is between voters as principals and public officials as their agents. According to Adsera and Boix (2003) accountability (referring to how well any government functions) hinges on how good citizens make their politicians accountable for their actions. Competitive elections create a relationship of public accountability between policy makers and citizens. This responsibility is handed out on election day through electoral reward and punishment. The overarching objective is that this formal public accountability should give birth to good governance. For example, the architects of the Ghanaian constitution created an institutional framework for the creation of not just democracy, but of a representative democracy where election is centripetal. This representative form of democracy through elections produces incentives and disincentives for an agent acting on behalf of a principal that he is presumed or contracted to represent. However, voting on election day alone is not enough to guarantee the assessment of incentives offered by the agents. Studies indicate that voters seem to do well in a relative performance evaluation of the economy but do less well in assessing shock factors of the economy (Besley & Case 1995b; Kayser & Peress 2011). This means that other variables in a competitive democratic electoral process must be in place, such as an election campaign period allowing parties, candidates and voters to interact freely and sufficiently to exchange necessary information for an informed decision by the electorate/principal. This has the potential of affording the voter a pre-election evaluative choice in selecting a particular candidate or political party, which prevents agents holding political power from putting their own interests over those of the voters. The dividend of electoral democracy is that voters can hold political officials accountable for their policy choices, and thereby ensure a close connection between the will of the public and public policy options. However, in holding the political authorities accountable, cognisance must be given to voter imperfections. Voter imperfections include the inabilities, irrationalities and lack of attention on the part of the voter to hold political officialdom accountable.

Regardless of the imperfections in voters, the question is whether state agencies such as election management bodies, the judiciary, security forces, media and civic educators are fulfilling their constitutional duties. For example, while it remains a reasonable expectation by the rational voter that the media will hold political authority to account by exercising their watchdog role, in some instances the state media is used as a propagandist vessel for the government at the expense of the voter. Again, while the role of the courts is to hold the executive legally accountable, parliaments in a democracy are empowered to command political accountability. However, these state institutions may fail to exercise their constitutional checks and balances on the political executive to the disappointment of the voter. These factors, therefore beg the question as to whether, even in

conditions of perfect voter attention and rationality, these state agencies do limit the accountability of the voter's interest. This issue underscores the exploration of the principal-agent analyses of elections where voters are the principal(s) and politicians remain the agents (Dixit et al 1997). Studies show that a pure moral-hazard concept of electoral accountability uses elections as instruments of control (Barro 1973; Ferejohn 1986). The practice of political advantage and the mitigation of agency loss with competitive elections is inherently dynamic. In this respect, Ferejohn's model involves multiple periods of an infinite horizon, to be exact. In this model an incumbent political authority can exert effort on behalf of citizens, who prefer more effort to less. It is important to note, however, that the dividends of political effort change over time and the incumbent political authority remains observant of this effort. O'Donnell (1994) posits that in competitive elections, high levels of voter awareness matter more to accountable governance than other social and economic factors. In recent times voters have also become vigilant regarding the actions and inactions of political authorities. In most countries, citizens stay informed about governance and actively register their displeasure with maladministration through demonstrations and the formation of pressure groups to shape national development in an attempt to demand accountability from political leadership.

The instrument used by the voter to assess the value of political dividend is the simple retrospective voting rule. This defines an approach whereby voters re-elect the incumbent political authority for another term if their effort exceeds a specific threshold. This is not without the voter incurring agency cost for their voting choice. Voters' expectations compared to the performance of the political authority have consequences on voting patterns. According to Sean (2012) if the dividend of effort to voters is too small, the incumbent political authority completely neglects a duty, knowing that even very high effort will not be enough to put voters' expectations over its retrospective threshold. If, however, the dividend of effort to voters is large enough, politicians exert some effort but only the minimal amount necessary to be re-elected. This effort diminishes when the dividend of effort increases, because the incumbent can work less hard and still satisfy the voters' retrospective threshold. Note, however, that the extent of agency loss can be judged relative to an alternative institutional arrangement. Persson et al (1997) show that the creation of separate institutions with powerful checks and balances can mitigate agency loss. In essence, the authors argue that where there is a separation of powers in which political actors have inherent preferences, conflicts for example between the legislature and the executive can serve as a good source of information to the voter about the possible dividend of policy-making to inform the voter's choice.

Until recently, principal-agent analyses of the electoral nexus centred on the concept of moral hazard. The focus of this assertion was to use elections as instruments of control over politicians' behaviour, their desires and choices. However, about a decade ago scholars like Banks and Sundaram (1998) postulated the formal analysis of elections with both moral hazard and adverse selection. In support of this proposition, Fearon (1999) noted that elections not only provide an instrument with which to sanction wayward politicians, but also an instrument for selecting politicians with desirable traits or preferences. This idea of elections serving as a sanctioning and selection tool provides a more pragmatic solution to agency problems than previously thought to be predicated on moral hazard theory. The limitation therefore is that though voters face both adverse selection (selecting competent politicians) and moral hazard problems (inducing the politician's choice of the voter's preferred policy), the adverse selection dimension trumps the moral hazard in equilibrium (Sean 2012). This is because the rational behaviour by voters, coupled with their information asymmetry and limited instruments of control over politicians, can lead to the decision by politicians to neglect their own private information about socially desirable policies and pursue a populist course of action that the less-informed electorate considers beneficial (Majumdar & Mukand 2004). However, with the proliferation of mass media and the attendant power of social media and community-based radio stations, the degree of information asymmetry is drastically minimised and thereby broadens the measure of accountability options for the voter. Studies on principal-agent models assert that public accountability in electoral democracies is inherently limited, notwithstanding the fact that the voters may exhibit imperfection in their voting choice (Fox & Shotts 2009; Ashworth & Bueno de Mesquita 2009). This makes the rational concept in principal-agent models useful in assessing the outer limits of public accountability that can be produced by competitive elections, principally because it indicates that the limitations of voters can be blamed only so much for an accountability crisis in governance.

AGENCY COST

Once political leaders are elected into public office they may pursue their own political agendas, thereby limiting the amount of accountability they are willing to supply. The expectation differential between principals (voters) and agents (elected leaders) may incur a deficit of political accountability in which the demands of the voter usually exceeds supply by the incumbent government. In electoral democracies, the citizens as principals of the agency theory incur two main costs. The first is the compensation cost which consists of remunerations paid to the political authorities once they are elected into public office. The second is the

indirect cost of performances and mistakes by the agents (political authorities), which could go as high as the complete loss of huge national assets in the form of public wastage. This arises where politicians promise 'paradise on earth' during political campaigning but end up accomplishing only destruction once elected into office. One example is the cost to the United States of America in terms of both money and loss of life during the Gulf War of 1990-1991 and the subsequent invasion of Iraq in 2003 during the presidencies of George HW Bush and his son, George W Bush respectively. This is similar to the resources spent by the Obama administration in 2011 when a multi-state NATO-led alliance joined forces to intervene in the Libyan revolution to oust Gaddafi, against the expectations of some American citizens.

The incumbent political authority may exercise discretion on which policy choices to implement. This is a general mandate and legitimacy conferred on the incumbent by voters is to implement policies that are in their (i.e. the voters) interest. However, sometimes an overt or covert political agenda may override the voter's interests. This is because the politician's attempt to implement the election contract with the agent tends to make them implement ad hoc, haphazard and uncoordinated programmes that are inimical to the voter's interest. Due to the opaque nature of the election contracts, the politicians would wish to amass monetary resources to allow them to operate freely as political entrepreneurs. These resources will sometimes be used to remunerate the people who helped them win elections, using massive propaganda to convince the principals about their suitability as political agents.

The classical Burkean theory of politicians as guardians of the general interests of the principal serves as the foundation of agency cost (Burke 1999). The concept of the asymmetry of information leads to voter ignorance being exploited by political authority. Sometimes the rent-seeking ambitions of political agents lead them to engage in illegal activities such as patronage, misappropriation, corruption, tax fraud, and commissions on public contracts. An economic rent is an unearned income, meaning an excessive remuneration compared with what had to be paid, or it is a payment in excess of the opportunity cost. The theory of economic rent focuses on monopoly profits, collusion gains from oligopolistic competition, as well as rents for lobbying government to secure lucrative contracts (Tullock 2005). This means that the nature of the political regime and its basic structures of public law affects how political agents maximise the rents. In competitive electoral democracies, the agency costs for political regimes with open access tend to be much lower than those of closed regimes. Political agents who cause excessive cost to the voters may be voted out of office. Thus, in agency theory, the voter as principal may exercise a vote of censure against the incumbent government (the agent) which incurs an agency cost that is expensive to the voter. Agency cost

means any action or inaction on the part of the incumbent government that is inimical to the interests of the voter.

CONCLUSION

The theory of agency has been shown to be a useful concept for analysing the impact of competitive elections on the accountability of political incumbents and the implementation of their policy options. Continuous expansion of this doctrine of political accountability offers a rich field for literature in political and social science. One area of study could be a narrow focus on the effect of agency theory on parliamentary democracy and the relationship between judicial precedents on the law of agency and public accountability. The theory is better understood as an accountability model in both political, social and commercial life. Politics consists of both policy-making and policy implementation, and in their quest to win political power, politicians offer myriad promises in the form of manifestoes. Political agents package these promises as products and sell them to the voters through both direct engagement and mass media publicity. In competitive elections, once a political party or candidate (agent) is elected into power, then the products are deemed to have been bought by the voters (principals) to satisfy their utility. This utility includes the expectation of the voters that the elected political agents will formulate and implement programmes in the interest of the population.

Voters as principals rely upon these political agents to deliver public services. However, sometimes political agents pursue programmes and policies that depart from the interests of the electorates and the population as whole. This results in information asymmetries, incentive problems, and agency cost.

In the long term, a lack of symmetrical information does not pose a major challenge as the voter, or principal, has the authority to direct the work of political authorities (the agents). However, in the short term the election of bad government can only be remedied by high agency costs, as failure to fulfil electoral incentives and voter expectations may be interpreted as a breach of contract between the principal and the agent. This may be contested in court to seek the enforcement of directive principles of state policy to the benefit of citizens. This means that in a regime governed by the rule of law, the hidden actions and knowledge of the political elite in taking advantage of the voters' choice will be minimised. This reveals the fundamental limitations on accountability imposed by political institutions, apart from the capabilities of the principals to enforce performance through legitimate and legal means or to adopt a vote of censure in the next electoral cycle. The principal-agent theory of electoral democracy seems to adopt a reasonable exploration of information asymmetries and challenges in the

achievement of electoral incentives, juxtaposed with the best that the principals can expect to attain by exercising their voting choice. The study concludes that competitive elections offer direct choice to the voter ensuring that the principle of state governance remains accountability to the voting public.

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ELECTION ADMINISTRATION IN NIGERIA

A Researcher's Account of the 2015 General Elections¹

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ABSTRACT

Using empirical field accounts of the 2015 general elections in the Ibadan South-East local government area, this article investigates the problems and prospects of election administration in Nigeria. It argues that while the Independent National Electoral Commission (INEC), Nigeria's electoral management body, made elaborate preparations for the conduct of the general elections across the country, the conduct of the elections in Ibadan South-East local government area was characterised by logistics, manpower and security challenges. The combination of the character of the electorates and that of the electoral officials, as well as the attitude of the dominant political parties at grassroots level, shaped the outcomes of these elections.

Keywords: election administration, political parties, Independent National Electoral Commission, electoral malpractices, election outcomes, Nigeria

INTRODUCTION

Election administration, construed as the management of 'a parade of public affairs and events called the electoral process' (Agbaje 1999, p. 91), dates back to 1923 in Nigeria. This was when an election was conducted for the first time in the country for the purpose of electing members representing Lagos and Calabar in the colonial Central Legislative Council (Akanji 2014; Bamidele & Ikubaje 2004; Akinboye & Anifowose 1999). Since then election administration in Nigeria has expanded. Except for the elections on 12 June 1993, the traditional mark of election administration in Nigeria – particularly since independence in 1960 – has been their poor conduct, as they have been tainted by both malpractice and violence.

1 An earlier version of this article was presented at a national conference, *The 2015 General Elections in Nigeria: The Real issues*, organised by the Electoral Institute (of Nigeria), Abuja, Nigeria, 27 to 28 July 2015.

These have undermined the credibility of both the electoral process and the election results. It is in view of this and the broader context of studying dilemmas in Nigeria's electoral and democratic history that this study sets out to explain the dynamics and interplay of forces involved in the conduct of general elections in the country. The conduct of the Independent National Electoral Commission (INEC) in the 2015 general elections in Ibadan South-East Local Government Area (LGA) of Oyo state in southwestern part of the country is used as a case study. The study focusses on INEC's preparation; the structure of the elections; the role and contribution of INEC permanent and ad hoc staff; and the involvement of political parties and civil society. The study has significance for future general elections in Nigeria, particularly the upcoming 2019 general elections, in that highlighting past errors may help to avoid these shortcomings in the future. Both Professor Mahmood Yakubu, INEC Head since 2015, and his predecessor during the 2015 general elections, Professor Attahiru Jega, have promised to conduct credible elections taking cognisance of past errors.

Specifically, Professor Mahmood Yakubu has demonstrated INEC's commitment to conduct credible elections in the country by promising to ensure inclusiveness, accountability and transparency in the 2019 general elections (Mwantok 2018) and by engaging critical local and international election stakeholders such as the European Union (INEC News 2018) on ways to achieve successful elections.

In order to properly address the focus of the study and achieve a balanced perspective the following questions were formulated:

- what was the nature of INEC's preparation for the 2015 general elections?
- what was the structure of the elections?
- how and in what ways did INEC's preparations and structure of activities affect the conduct and outcomes of the elections in Ibadan South-East LGA?
- to what extent did political elite manipulate the electoral process through financial inducements of INEC permanent and ad hoc staff?
- what challenges did voters face during the elections in the LGA, and how were they managed?
- what roles did security agents and political parties play?
- what factors contributed to the outcomes of the elections in the LGA?

One overarching question in the study was whether and to what extent the nature and outcome of these elections was a reflection and function of INEC's preparations.

Answers to the questions above provide insights into why elections in Nigeria have been problematic, and what can be done to address the problem. From the outset several hypotheses were formulated, as follows:

- that elections in Nigeria failed because successive governments failed to address their divisive issues;
- that proper and adequate preparations by INEC led to the success of the 2015 elections in Ibadan South-East LGA;
- that the inability of the political elite to appropriate and manipulate the electoral process contributed to the way the elections were conducted in the LGA, and the subsequent outcomes.

The following propositions were also set out to summarise this line of reasoning:

- that the recurrent lack of credibility in election results presupposes the failure of governance and the absence of political culture among both the political elite and the electorate;
- that the success of elections depends on the electorates' perception of the neutrality of the electoral body, and its level of preparedness for elections;
- that when electoral officials, both permanent and ad hoc, rebuff and reject all forms of inducement by political elites, the prospect of credible election outcomes is high;
- that even if the administration of an election is flawed, an acceptable outcome/result may be achieved where political parties cooperate to remedy the flaws.

Using this framework, the study investigates the conduct of the 2015 general elections in Ibadan South-East Local Government Area (LGA) of Oyo state, southwestern Nigeria. The article is divided into five sections. The first focuses on the research methodology for the study, while the second is a short historical analysis of elections and electoral administration in Nigeria. The third section interrogates INEC preparation for the 2015 general elections, while the fourth and fifth sections respectively analyse the conduct of the 2015 general elections in Ibadan South-East LGA, focusing on the nature and dynamics of the elections, and the election outcomes.

RESEARCH METHODOLOGY

The studying of election administration encompasses both primary and secondary research, that is archival/library, survey, and participatory research. Thus, various

types of documents and publications are used, together with the questionnaires, interviews and observation of non-verbal clues. Written materials provided the historical context of this study, together with an analysis of INEC documents, interactions with INEC officials and participant observation during the 2015 general elections. This collection of available information reveals which factors underlined and contributed to the conduct of the general elections, and how these were represented. Between 28 March and 11 April 11, my official position as INEC Registration Area/Ward Collation Officer (RA/Ward CO) provided the opportunity to gather information about the elections from INEC permanent and ad hoc staff members, security agents, party agents and voters. In my interactions with these categories of participants, close attention was given to both verbal and non-verbal information. The research covered the twelve electoral wards (constituencies) of Ibadan South-East LGA, with particular focus on Wards 3 and 6 where the researcher served as INEC RA/Ward CO during the 28 March and 11 April elections respectively. On returning from the field, library/archival data and field notes were analysed by means of content analysis.

HISTORICISING ELECTIONS AND ELECTION ADMINISTRATION IN NIGERIA

Elections and election administration in Nigeria date back to 1923. These were facilitated by the inclusion of an elective principle in the 1922 Constitution, introduced into Nigeria's body politic by the colonial administration of Sir Hugh Clifford (Akanji 2014, p. 38; Bamidele & Ikubaje 2004, p. 4). Though no electoral body was formally established, elections were conducted in 1923 and every five years thereafter until 1938. These elections were for the purpose of electing four representatives onto the Central Legislative Council in Lagos, three of whom represented Lagos while one represented Calabar. The elections of 1923, 1928, 1933 and 1938 were however limited to those who fulfilled the constitutional provisions of one-year residency and gross annual income of £100 (Bamidele & Ikubaje 2004, p. 4; Akinboye & Anifowose 1999, p. 240). Despite its restrictive nature, the elective principle of the 1922 Constitution triggered political consciousness and encouraged the establishment of political parties by Nigerian nationalists. Some of the political parties included the Nigerian National Democratic Party (NNDP) led by Herbert Macaulay, and the Nigerian Youth Movement (NYM), formerly Lagos Youth Movement, led by Ernest Ikoli, Samuel Akinsanya, JC Vaughan and HO Davies (Akanji 2013, p. 38; Ngou 1989, p. 90; Dare 1989, p. 110). Both the NNDP and NYM dominated elections in the country until the 1940s. While the NNDP dominated elections in 1923, 1928 and 1933, the NYM defeated the NNDP in 1938 and dominated the polity until the introduction of another constitution in 1946 (Keay & Thomas 1986, p. 202).

The 1922 Constitution was, however, defective, despite its elective principle. This was particularly because this constitution was effective only in the southern provinces of Nigeria, as the north was administered through proclamations of the colonial governor. Also, electoral representation under the constitution was limited to Lagos and Calabar, and the franchise was limited to men aged 21 or over (Akanji 2014; Osaghae 2002; Akinboye & Anifowose 1999; Keay & Thomas 1986). These defects undermined Nigeria's political and electoral development, as apart from excluding all women and many men from electoral participation, it hindered the growth and development of electoral and party politics in northern Nigeria. In view of these considerations, the 1922 Constitution was replaced in 1946 by the colonial government of Sir Arthur Richard.

The key features of the 1946 Constitution were the creation of a Central Legislative Council with powers covering the entire country; the division of the country into three regions, being the northern, eastern and western regions; the establishment of regional legislatures (Akanji 2014; Bamidele & Ikubaje 2004, p. 53; Keay & Thomas 1986, p. 178); and the retention of the elective principle, though with a reduction in the £100 franchise qualification from £100 to £50 (Akanji 2013, p. 40; ERC 2008, p. 82). However, like the 1922 Constitution, the 1946 Constitution did little to engender broad-based political and electoral participation, as women and un-propertied men in Lagos and Calabar, and women and men in other parts of the country were not entitled to vote in the elections that took place between 1946 and 1951. These shortcomings fuelled political agitation by nationalists for inclusive government, and led to the introduction in 1951 of another constitution to replace that of 1946.

The 1951 Constitution broadened the political space in Nigeria. It enlarged the Central Legislative Council, providing for the election of more Nigerians onto the council; it granted some measure of legislative power to the regional legislatures; it replaced the elective principle of the 1922 and 1946 constitutions with one that enfranchised all adult tax-paying males; and introduced an electoral college system (Akanji 2014; Keay & Thomas 1986). These encouraged local participation in governance and the formation of political parties across the country.

Political parties that emerged as a result of this constitution, and took advantage of the opportunities it created, included the Action Group (AG) and the Northern Peoples' Congress (NPC), both established in 1951; the Middle Belt Peoples' Party (MBPP) in 1953; and the United Middle Belt Congress (UMBC) in 1954 (Akanji 2013, p. 41; Ngou 1989; Dare 1989). These political parties and others existing at the time, such as the National Congress of Nigeria and the Cameroons (NCNC), formed in 1946, and the Northern Elements Progressive Union (NEPU) established in 1950 (Akanji 2013, p. 41), changed the nature and character of elections and of electoral and political participation in Nigeria. This

was in view of the fact that elections in the country became fully multiparty and more competitive, though more crisis-prone than previously.

At the same time, the interface between ethnicity, sectionalism and politics in the country assumed a frightening dimension, as ethnic and sectional considerations became factors for victory at regional and general elections by political parties and in addressing national issues. This posed a very serious challenge to the unity and stability of Nigeria, as, for example, it underlined violent riots in Kano, northern Nigeria, protesting against the visit of southern political leaders to the region in May 1953 (Akanji 2014; Albert 1998; Ngou 1989). The riot was a direct reaction to the ill-treatment and humiliation of northern parliamentarians by angry southerners in the House of Representatives in Lagos and on the streets of Lagos, who jeered at and verbally insulted them over their opposition to the demand by southern political leaders in the House that Britain should disengage from Nigeria in 1956 (for full detail see Akanji 2014; Albert 1998).

Furthermore, Nigeria's political and electoral landscape was altered when the colonial administration of Oliver Lyttleton introduced a constitution in 1954 to remedy the defects in the 1951 Constitution. The 1954 Constitution reintroduced the principle of direct election and further decentralised the electoral process. This was in view of the fact that the Constitution granted relative electoral autonomy to the regions, allowing them to formulate electoral rules and regulations and conduct elections in regional political offices. This gave rise to a situation whereby different electoral systems and regulations were adopted and used by the regions in the conduct of elections, both regional and federal. For example, while the Western Region adopted and used the single-member constituency system, the Eastern Region used the multi-member constituency system for elections (ERC 2008, p. 83).

While the Western and Eastern regions articulated electoral frameworks that accommodated the electoral and political rights of women, the Northern region's electoral framework ignored the franchise for women (Akanji 2013). This multiple approach to elections promoted ethnic politics, as it gave the dominant political party in each region the opportunity to manipulate elections and political appointments. The practice of multiple approaches to elections was revised at the 1957 and 1958 constitutional conferences when a uniform electoral approach and a single election management body for federal elections was proposed and adopted.

Consequently, the 1959 federal elections were conducted on the basis of the electoral framework articulated at the 1957/58 constitutional conferences. Part of the electoral guidelines for the 1959 federal election, for example, stated that 'every person shall be entitled to register as an elector and if so registered to vote at an election who on the qualifying date is ordinarily resident in Nigeria and... in Northern region a male' (cited in Oyekanmi 1999, p. 86). Also, the 1959 federal

elections were conducted by a single election management body, the Electoral Commission of Nigeria (ERC 2008, pp. 84, 94). Since then, the management and conduct of elections in federal and state executive and legislative offices have been the responsibility of the national electoral body, which assumed different names at different times², while each state manages and conducts elections for local government councils. According to the 1999 Constitution [amended] the Independent National Electoral Commission (INEC) has the responsibility to organise, undertake and supervise all elections for federal and state offices, while state electoral commissions are expected to conduct elections for local government councils (FRN 2011, Third Schedule Part IF & Part IIB). This explains why INEC conducted the presidential and National Assembly elections and the governorship and House of Assembly elections across the country on 28 March and 11 April 2015 respectively.

INEC AND THE 2015 GENERAL ELECTIONS: GENERAL ARRANGEMENT AND STRUCTURE

INEC is constitutionally empowered to conduct elections into federal and state executive and legislative offices in Nigeria. The offices are those of president/vice president; governor/deputy governor; National Assembly (Senate and House of Representatives); state houses of assembly; chairmen/vice-chairmen of area councils in the Federal Capital Territory (FCT), Abuja; and councillors of local area councils in FCT (INEC 2015, p. 8). In line with this and the constitutional requirement that in no less than one hundred and fifty (150) days and no later than thirty (30) days prior to the expiration of the terms of the substantive elected federal and state political office holders, INEC made arrangements for the conduct of the general elections in 2015. This was to fill the vacant positions of president, vice president, members of the National Assembly (i.e. senators and members of the House of Representatives), state governors and deputy governors and state houses of assembly, whose tenure expired on 29 May 2015. The 2015 general elections in Nigeria were the fifth to be conducted by INEC in the country's Fourth Republic. As part of the preparations, INEC developed a timetable and schedule of activities for the conduct of these elections. Unlike the past where elections were staggered, with the presidential election often being conducted last, the timetable for the 2015 general elections showed that the presidential and National Assembly elections were paired. Both were to be held on 14 February, while the governorship and state houses of assembly elections followed on 28 February 2015.

2 Some of the names are Federal Electoral Commission (FEC) (1964-1966); Federal Electoral Commission (FEDECO) (1979-1983); National Electoral Commission (NEC) (1987-1993); National Electoral Commission of Nigeria (NECON) (1994-1998); and Independent National Electoral Commission (INEC) (1998-date).

However, insurgency by the Boko Haram sect in the north-eastern part of the country necessitated a last-minute change in the election timetable. Though the insurgency was of major concern to all, the change in the election timetable was also related to the statement made at Chatham House in London on 22 January by Colonel Sambo Dasuki (rtd), the National Security Adviser (NSA) to President Goodluck Jonathan. This statement alleged that INEC was ill-prepared for the elections because of the poor distribution of the Permanent Voters Cards (PVC), and advised the INEC chairman to postpone the elections (*Punch*, 2015; *Premium Times*, 2015; *Vanguard*, 2015). INEC consequently postponed the elections by six weeks (Suleiman 2015). This meant that the presidential and National Assembly elections were rescheduled for 28 March, and the governorship and state houses of assembly elections for 11 April 2015. INEC also introduced the use of Permanent Voters Cards (PVCs), containing the biometric details and embossed passport photograph of voters, and Smart Card Readers to verify the authenticity of PVCs presented by voters. The introduction of both these items by INEC was aimed at preventing multiple voting and checking multiple voter registration as only one card was issued to each registered voter, a move intended to ensure electoral integrity.

Another notable arrangement for the elections was the adoption of the Remodified Open-Secret Ballot System (REMOBS). In this system, voters were to indicate the candidates of their choice in secret using a thumb or fingerprint on the ballot, and cast their votes in open (INEC 2015, p. 8). Similarly, INEC delineated the country into 119 973 polling units (PUs), with Lagos having the highest number, followed by Kano, Katsina and Oyo States in the second, third and fourth places respectively (*The Nation* 2015). Each polling unit was expected to be manned by a presiding officer (PO) and three assistant presiding officers (APOs) (INEC 2015, p. 9). In large polling units (those with over 750 registered voters), voting points (VPs) were created. Each voting point was to be manned by four APOs under the supervision of the assistant presiding officer in charge of the voting point (APO (VP)) (INEC 2015, p. 9). Voting during the general elections was scheduled to take place at polling units or voting points, with the PO having the responsibility to carry out accreditation of voters, and prepare and issue ballot papers to eligible voters (INEC 2015, p. 9). In the case of voting points, the POs were however allowed to delegate the responsibility to the APOs (VPs).

Furthermore, apart from the POs, APOs and APOs (VPs), INEC's structure and preparations for the general elections included the appointment of 9 000 supervisory presiding officers (SPOs), one per registration area; collation officers (COs) of different categories³; 774 electoral officers (EOs), one per local government

3 These included Registration Area/Ward Collation officers and LG Collation officers.

area (LGA), assisted by assistant electoral officers (AEOs); and 37 resident electoral commissioners (REC), one per state and one for the Federal Capital Territory, Abuja (FCT) (INEC 2015, p. 15). While the SPOs supervised the activities of the POs in their registration areas, and the EO took charge of the management and conduct of general elections in the LGAs in each state, the RECs coordinated activities of the EOs and other electoral officials in the states and the FCT. In addition to the permanent staff that made up the ranks of RECs, EOs, and AEOs, INEC recruited ad hoc staff from members of the National Youth Service Corp (NYSC) to serve as POs; different categories of tertiary institution graduates as APOs and SPOs; and academic and non-academic staff of universities and allied institutions as ward/LGA/state collation officers.

INEC permanent staff also scheduled and undertook training its ad hoc officials in how to conduct elections, the professional and ethical conduct of officials on election duties, the process of collation, computation and declaration of election results, and security and safety tips on election days. The security of both permanent and ad hoc election officials and of election materials was important to INEC as part of the general preparation. As a result, the Commission collaborated with government security agencies including the Nigeria Police Force, State Security Service (SSS), and the customs and immigration services. While the use of military personnel in the general elections was banned by the courts, they were nonetheless deployed to the headquarters of Ibadan South-East LGA of Oyo state to safeguard election materials. This deployment was however a violation of court orders and an act of impunity on the part of the Jonathan administration. In a ruling on 23 March 2015, Justice Ibrahim Buba of the Federal High Court, Lagos had declared as unconstitutional the use of the military for election purposes (Anaba, Usman & Asomba 2015).

In addition, INEC contracted members of the National Union of Road Transport Workers (NURTW) to transport election materials and personnel, including youth corps members and collation officers. Though some concerns were raised about privatising the transportation of election materials and personnel because of fears that NURTW members could be manipulated by politicians to compromise the integrity of the elections, this arrangement saved INEC a considerable amount of money that would have been used to purchase vehicles of little or no use after the elections.

Furthermore, in order to ensure the credibility of the elections, INEC allowed independent local/national and international election observer groups to monitor the elections. These included the Transition Monitoring Group (TMG), a national coalition of Nigerian civil society groups, the International Foundation for Electoral Systems (IFES) and European Union Election Observation Delegation.

THE 2015 GENERAL ELECTIONS IN IBADAN SOUTH-EAST LOCAL GOVERNMENT AREA

Ibadan South-East is one of the 33 LGAs in Oyo State in the southwest of the country and was one of the LGAs where the 2015 general elections took place in Nigeria. As in other states, the LGAs in Oyo State were structured into three senatorial districts, with Ibadan South-East LGA in the Oyo South senatorial district. The Ibadan South-East LGA is one of the LGAs that constitutes the city of Ibadan, the capital of Oyo state, and covers a large part of the interior, the core ancient areas of Ibadan. The LGA, headquartered at Mapo, covers such interior parts of Ibadan as Oranyan, part of Molete, Kobomoje, Elekuro, Eleta, Aperin Oniyere, Agbongbon, Odinjo, and Idi Aro. The 2006 national population census put the population of the LGA at 266 457 (National Bureau of Statistics 2011, p. 59). Political leadership at the LGA was appointive, headed at the time by a caretaker chairman appointed by the state government. This was because local government elections in the state had not been conducted.

Preparations

Along with other LGAs in Oyo State, preparations for the 2015 general elections in Ibadan South-East LGA were coordinated by the office of the INEC's Resident Electoral Commissioner (REC) in the state. These preparations included the recruitment, training and deployment of ad hoc electoral personnel alongside permanent INEC staff on how to conduct the elections. Ad hoc officials were educated on the nature of the elections, the use of election kits, how to collate and compute results, how to set up polling units, and on safety and security during the elections.

Corps members, members of the NYSC and graduates of tertiary institutions who applied for recruitment were trained in the jobs of POs, APOs and SPOs. University lecturers and non-academic staff of universities and allied institutions who indicated their interest to serve as ad hoc election officers were trained on how to collate election results in order to serve as ward/registration area (RA)/LGA/state collation officers. During the training of the ad hoc staff, particularly the collation officers, the four INEC officials showed the participants the various types of materials available for the elections such as Forms EC8A, EC8A (I), and EC8A (II) for presidential, senatorial and House of Representative elections. The training of the ad hoc election officials was for two days in the first instance, and one day in the second instance, at designated centres for those who applied as collation officers (COs), but two days only for POs and APOs.⁴ Thus, applicants

⁴ While the researcher was involved in the training for collation officers, information about the training of POs and APOs was sourced from participants at the training at Baptist High School Ogbomosho.

for PO and APO positions were trained for the two batches of the elections at once, at the Baptist High School Ogbomosho.⁵ Training of applicants for COs was, however, in two phases.

The first training of COs was for the presidential and National Assembly elections and was held on 23 and 24 March 2015 at the Faculty of Arts Large Lecture Theatre of the University of Ibadan. A retraining session was organised for the governorship and state houses of assembly elections on 8 April 2015 at the same venue. Apart from refreshing the memories of those who had served as COs during the presidential and National Assembly elections, this retraining session was an avenue for the recruitment of new COs to replace those who had withdrawn after the first batch of elections, or those found to be inefficient during the election. The researcher observed that more people showed up for the retraining session than for the presidential and National Assembly elections training sessions. This was for two reasons: both the relatively peaceful nature of the presidential and National Assembly elections and the remuneration package of the COs who participated in the elections.

One of the major considerations before the presidential and National Assembly elections was that of security and violence during the elections. Given the history of elections in the country, many had anticipated that the elections would be chaotic and violence-ridden. However, this was not the case, at least in Ibadan South-East LGA in particular and Oyo State in general. Similarly, the uncertainty as to the actual remuneration package for COs before the presidential and National Assembly elections discouraged some of those who could have participated in the training sessions. The critical issue of remuneration was evident during the training sessions for the presidential and National Assembly elections, as participants insisted on getting information from INEC permanent officials about the remuneration package for each unit of the CO.

However, information about the remuneration of COs which showed that each was entitled to the sum of 77 000 naira per electoral exercise, was not released until 27 March, a day before the start of the elections. Consequently, it was only those ready to brave the odds who accepted the offer of CO positions after the training for the presidential and National Assembly elections. This was not the case at the commencement of the training session for the governorship and House of Assembly elections, as that remuneration package was known to the public. Consequently, the researcher observed in the course of interactions with participants that this attracted people to the training session for the governorship and House of Assembly elections.

Furthermore, as a prerequisite for appointment as a CO, participants in the training sessions for would-be ad hoc officials in Oyo State completed and signed

5 Information was supplied by two participants at the training.

the Oath/Affirmation of Neutrality for Election Personnel form. This implied swearing to and affirming neutrality during the elections. The last part of the preparations for the general elections in the state was the distribution and posting of those selected for election duties among the participants at the screening and training sessions, some of whom were designated RA/Ward COs, and LGA COs.

The release of the postings of those selected as ad hoc elections officials after the screening and training for the presidential and National Assembly elections showed that Ibadan South-East LGA had 12 registration areas (RA)/wards. As a result, 12 RA/Ward COs and one LGA CO were posted to the local government for the presidential and National Assembly elections. The same number of RA/Ward COs, but with an additional two LGA COs, were posted to the local government after the training session for the governorship and House of Assembly elections. By INEC design, each RA/Ward comprised a number of polling units, with some having voting points. Wards 3 and 6 in the LGA, for example, comprised 8 and 28 polling units respectively. Furthermore, each RA/Ward had three identifiers: a name/number for the ward, a code, and a collation centre. The name/number, code and collation centre of Ward 3 in Ibadan South-East LGA, where the researcher served as RA/Ward CO during the presidential and National Assembly elections, were S2A, 003, and Oranyan Maternity Centre respectively. The identifiers for Ward 6, where the researcher was the RA/Ward CO during the governorship and House of Assembly elections, were S4A, 006, and Public Day School Elekuro. The identifiers, which appeared on the sensitive election materials for the RA/Wards were, as the researcher gathered during the training sessions, unique to each RA/Ward, and part of INEC strategy to ensure the credibility of the elections by preventing electoral malpractice.

The list of ad hoc staff postings was, however, unduly delayed. The list of CO postings, for example, was not released until the afternoon of the day before each election. In the case of the presidential and National Assembly elections, this list was released at 1.45 pm on 27 March, and in the case of governorship and House of Assembly elections, at noon on 10 April. This affected the COs, especially those posted to locations outside the Ibadan metropolis. As observed by the researcher, such COs had little time to travel to their duty stations before nightfall and settle down properly for the elections. Even for those COs, including the researcher, posted to locations within the Ibadan metropolis, the late release of the list caused some discomfort. This was because it was only after the release of the list that many of the COs, some of whom were not indigenes of Ibadan nor long-term residents of the city, could locate the headquarters of their local government of assignment and the EO in charge. This discomfort was compounded by the unusually chaotic transport situation in the city caused by the vehicle restriction order that federal government had imposed on the days of the elections, resulting in last-minute

shopping for essential household needs. Also, as a result of the late release of the list of selected ad hoc staff for the presidential and National Assembly elections, the INEC office at Ibadan South-East LGA was unduly crowded with people seeking to ascertain if they had been selected as ad hoc staff for the elections, and where they had been posted to serve.

CONDUCT AND OUTCOMES OF THE 2015 GENERAL ELECTIONS

The two components of the 2015 general elections took place at Ibadan South-East LGA on 28 March and 11 April 2015 in line with INEC arrangement and schedule of activities. However, the conduct of the presidential and National Assembly elections in the LGA was to some extent different from that of the governorship and House of Assembly elections. The difference was that the presidential and National Assembly elections were characterised by serious logistical and manpower problems, foremost of which was the slow start in some of the polling units/voting points in the LGA. This was in view of the fact that though ad hoc officials on election duties as SPOs, POs, APOs, and APOs (VP) left the LGA headquarters at Mapo as early as 7.00 am to set up polling units and voting points in preparation for accreditation, there was a shortage of election materials at some of the units. As a result, the researcher observed that accreditation either did not start or had been stopped in some polling units/voting points at the same time it was ending in others. The severity of the problem was evidenced by several frantic telephone calls to the EO at the LGA headquarters by officials at polling units about the malfunctioning of the card readers and the absence of election materials such as result sheets. This prompted the EO to leave the LGA headquarters in order to personally inspect the situation at the affected polling units.

The steps taken by the EO proved successful as the short supply of materials was remedied, leading to the accreditation of voters and voting in the affected polling units/voting points. However, this solution engendered another problem: the late start to collating results in the LGA. The researcher observed that, as a result of the absence of the EO from the LGA headquarters, all arrangements were left in abeyance, particularly those concerning logistics – the distribution of materials for the collation of results and transportation of collation officers (the RA/Ward CO) to collation centres. This situation continued until about 6.45 pm, long after voting had ended and when some POs and APOs had concluded their counting and were waiting for the RA/Ward COs at the collation centres. As night drew near there was still no sign of the EO and materials for collation of results had not been distributed, so this delay created serious confusion among the RA/Ward COs and the LGA CO. Besides, there was no permanent INEC official at the LGA headquarters who could offer any logical and reasonable explanation as to

why the COs were left unattended to when voting had been officially concluded in many polling units. This situation angered the COs, many of whom complained bitterly about the ineffectiveness of the EO for failing to delegate matters relating to distribution of collation materials to any of the AEOs.

As a result, and as the situation persisted, the RA/Ward COs decided among themselves that the collation of results would be better done at the LGA headquarters at Mapo, where they had been waiting for the EO, as opposed to the various INEC-designated collation centres. This decision was informed partly by the fact that the LGA headquarters were large, adequately protected by security officers (including military personnel) and well illuminated, with a power generator on standby. On the other hand, however, the decision was equally informed by concerns for personal safety and security at the INEC-designated collation centres since it was obvious that the collation of results would last until well into the night or the following morning.

The security concern expressed by the COs was due to the fact that the LGA was notorious for violent crimes and in particular criminal activities by youth. For example, a week after the 28 March election, a Division Police Officer (DPO) was murdered by some young people at the Adekile area of Orita Aperin in the LGA (*National Mirror* 2015). Moreover, while inspecting the polling units and designated collation centres around the LGA headquarters, some of the RA/Ward COs reported the absence of adequate security in the neighborhood. They had also encountered several hoodlums publicly smoking Indian hemp who threatened to injure or even kill anyone who opposed them. The security concerns expressed by the RA/Ward COs were corroborated by the police and security officials in the LGA headquarters, though none of them wanted to be quoted or dragged into the heated disagreements that later ensued between the EO and the RA/Ward COs over the matter.

Consequently, the late arrival of the EO at about 6.45 pm and the decision of the RA/Ward COs about collation generated heated arguments, with the EO insisting that collations should be done at designated centres. This further delayed both the distribution of materials for collating results and the transportation of officials to collation centres. It was the intervention of the LGA CO that solved the problem by brokering a truce between the EO and RA/Ward COs with the promise that no RA/Ward CO would be compelled to collate in a centre where his or her security and personal safety could not be guaranteed. After this the RA/Ward COs, alongside the LGA CO, left the LGA headquarters at about 8.30 pm in a convoy of two buses to take each RA/Ward CO to his or her collation centre. As agreed, the convoy started with the farthest centres and ended with those closest to the LGA headquarters. In the process, and before the researcher reached his collation centre at Ward 3 (Oranyan Maternity Centre, one of the centres close

to the LGA headquarters), a female RA/Ward CO was not allowed to disembark from the bus because of security concerns arising from the lack of electricity and perimeter fence, and also the threats of attack by hoodlums near her collation centre. Also, two RA/Ward COs were observed by the researcher collating results at the headquarters at about 2.00 am, indicating that at least three RA/Ward CO did not collate results at their own collation centres. This emphasised the issue of security previously raised by the RA/Ward CO.

Another major aspect of the March 28 elections was the attitude and approach of the youth corps members, who served as POs at polling units and voting points. Based on observation by the researcher at his collation centre and by interactions with other RA/Ward COs, many of the POs were ill-informed about how to tally votes and enter scores on the result sheets. As a result, there were many incorrect calculations and misrepresentations of numbers on the result sheets submitted to the RA/Ward CO for collation. This, as the researcher garnered from communication with permanent INEC staff, was because many of the youth corps members failed to pay close attention to details during the training sessions organised for them before the elections. The youth corps members were accused of being uninterested in the training sessions, focusing on their mobile phones and texting messages rather than taking notes and listening to their trainers.

Interactions with the youth corps members on duty as POs revealed that the main reason for their lacklustre attitude and poor performance at tallying and recording votes was the rigorous nature of the elections. In addition to both elections being run concurrently, the tally continued late into the night in some cases, causing stress, strains and fatigue. The POs further revealed that this distress was exacerbated by the failure of INEC to provide basic refreshments, particularly snacks and water. Despite these challenges, the presidential and National Assembly elections in the LGA were conducted successfully, as they were relatively peaceful and the results were duly declared as and when due and in line with established provisions.

The conduct of the governorship and House of Assembly elections on 11 April in the LGA was an improvement on that of the presidential and National Assembly elections on 28 March, as many of the challenges that characterised the latter were conspicuously absent. First and foremost, there were no serious shortages of election materials for the polling centres, and where such occurred they were properly managed. Also, materials for the collation of results were distributed on time, and the RA/Ward CO commenced the process of collation as early as 6.30 pm. This was the case in the researcher's collation centre, instead of 10.30 pm as during the March 28 elections.

Nevertheless, the conduct of both the March 28 and April 11 elections in the LGA was similar in many respects. Firstly, some of the non-sensitive materials

such as biros, calculators, rechargeable lamps, stamps and stamp pads, and official prescribed bags for carrying collated results were either unavailable or insufficient. For example, some RA/Ward COs were not given rechargeable lamps because there were not enough to go round; even those who did receive lamps, including the researcher, used their personal lamps or their telephones as lamps because the brand-new INEC rechargeable lamps had not been charged, and switched off as soon as collation started. Similar problems were encountered by RA/Ward COs with INEC calculators; when they were available and distributed, they stopped working as soon as it was dark, because they were solar-powered and there was no provision for battery back-up as an alternate source of power.

Consequently, RA/Ward COs, including the researcher, improvised with their mobile telephones and personal calculators for the collation exercise. Secondly, there was no improvement in the performance of the youth corps members who served as POs, as there were many errors in their calculations and vote tallying during the two elections. Thirdly, although some election observers, notably local/national observers, were seen at voting centres during the day, neither local nor international observers were present at the collation centres when the results took place. A reason for this, particularly for the March 28 presidential and National Assembly election, was that collation continued late into the night and there was inadequate security at the collation centres. Fourthly, there were also cases of altercations between the EO and RA/Ward CO during the April 11 elections, as in the March 28 elections, on whether to use the officially-designated collation centres or to improvise. Some of the RA/Ward COs, including the researcher, wanted to collate election results in either the LGA headquarters or the nearest secure collation centre because of fears that their lives were not safe in the officially designated collation centres. This was however rejected by the EO. Though attempts to improvise with collation centres were frustrated by the EO's objections and vehement opposition, events later justified the security concerns of the RA/Ward CO. For example, at Elekuro Public Day School, the official collation centre for Ward 6 where the researcher was the RA/Ward CO, news of imminent attacks by hoodlums led to an abrupt closure of the centre at around 11.30 pm while collation was still under way.

The decision to stop the collation process was taken after security agents attached to the centre had on three occasions informed the RA/Ward CO that they could not guarantee the security of people present at the centre if the collation continued deep into the night. This was despite the fact that the collation centre was a stone's throw from a police station, and despite the presence of a sizeable number of people, including political party agents, youth corps members who served as election officials, SPO, police and customs and immigration officers. The reason given by the security agents was that the collation centre, a dilapidated

public primary school with no perimeter fence or electricity and located in an area notorious for violent crime, was too porous to be effectively monitored and secured. This was obvious and the same reason why the RA/Ward CO had earlier decided to improvise. Though results from only three polling units had yet to come in, efforts to convince the armed plain-clothes security agents to allow the collation of results to continue was aborted by news that hoodlums had gathered at a building close to the collation centre and were on their way. During the ensuing stampede the generator supplying electricity to the collation centre was disconnected, throwing the centre and its neighbourhood into total darkness and creating more panic. In the midst of this chaotic situation, with everyone trying to board available vehicles in order to escape from the centre, gunshots were heard. Shortly thereafter, military personnel deployed to the area because of its notorious reputation for violence, together with a number of anti-riot police vehicles with blaring sirens, rushed to the centre to rescue election officials and election material. Consequently, the collation of results for Ward 6 was completed at the LGA headquarters in the presence of party agents and security agents. These challenges notwithstanding, the April 11 elections were successfully conducted in the LGA, as the exercise was relatively peaceful in other parts and the collated results duly declared.

RESULTS

The results of the 2015 general elections in Ibadan South-East LGA on 28 March and 11 April were due to a number of factors. One was the resilience of the voters in protecting their votes. In seven of the twelve collation centres in the LGA that the researcher visited during the two elections, voters were seen waiting after elections to ensure that their votes were properly counted and collated. At polling units, for example, voters milled around POs as votes were being counted. The researcher observed that as the POs read out the figures, the voters in the area repeated the result. Alongside this was the readiness of the dominant political parties in the LGA to ensure that correct process was followed by electoral officers and that the right environment was established for the elections. The dominant political parties in the LGA, by virtue of popularity among the electorate and the history of performance at elections, were the ACCORD party, All Progressive Congress (APC), Peoples' Democratic Party (PDP), and Labour Party (LP).

Apart from their presence at polling units/voting points and collation centres, and participation in the process of counting and collating results, agents of the dominant political parties in the LGA assisted in providing an environment conducive to a successful election. Reports from RA/Ward COs and personal observations at Wards 3 and 6 during the two elections at the LGA revealed that

while INEC failed to provide alternative sources of electricity at collation centres, party agents remedied the situation by providing generators and fuel. Also, communications with RA/Ward COs revealed that the agents of the dominant political parties in the LGA cooperated with election officials. The attitude of the political parties, as demonstrated by their agents and by the attitude of the voters, gave little if any room for electoral malpractices in the LGA, at least as far as manipulation of figures and results was concerned.

Similarly, security agents were present in seven of the twelve collation centres in the LGA that the researcher visited during the two elections. Polling units around the vicinity of or at collation centres also had security agents attached to them; however, these agents were disproportionately distributed. While there was heavy security presence at some collation centres during the March 28 elections, including Ward 3, it was less evident in others such as Ward 6 during the April 11 elections. At the LGA headquarters at Mapo, which served as the base of INEC in the LGA, security was extraordinarily heavy, with military, police, Department of State Security Service and customs and immigration personnel. This diminished the extent to which politicians and hoodlums or political thugs could foment trouble. The presence of police officers at polling units and collation centres and on the streets, and the deployment of soldiers to volatile communities in the LGA, particularly Adekile, contributed to the relatively peaceful conduct of both the March 28 and April 11 elections in the LGA. Also, the ability of INEC permanent staff to address some of the serious problems that plagued the March 28 elections contributed to the successful conduct of the April 11 elections in the LGA. This manifested in the timely distribution of election materials and transportation of election officials to their assigned locations during the April 11 elections, as opposed to the delay that characterised the earlier elections on 28 March.

Furthermore, the election outcomes at the LGA were connected to the level of sensitisation and mobilisation of ad hoc election personnel, and that the COs in particular need to be transparent and to shun financial inducements by politicians. During the pre-election training sessions, the COs were advised against accepting gratuities from politicians in either cash or kind. Similarly, during the course of the elections COs were inundated with telephone and text messages reminding them of the role bribery plays in damaging democratic processes, and the need to avoid being used by politicians, both of which would compromise the integrity of the elections. Two of these text messages read thus:

Half-A-Word: Take no bribe. Respect other workers and agents. Be vigilant. Record rightly. Be diligent. Be faithful to figures. Be neutral. Return with pride.

(Coordinator of INEC Collation Officers, University of Ibadan, Ibadan,
1.10pm, 11April 2015)

Bribery is not a One-Way road. Reject being compromised. Avoid being joined in avoidable litigation. Security reports point at a number of LGs and COs. Beware.

(Coordinator of INEC Collation officers, University of Ibadan, Ibadan,
7.51pm, 11 April 2015)

Besides, measures were taken when it was observed that politicians were making frantic efforts to lure COs with money during the April 11 elections. Some COs were recalled from their duty stations because they were suspected of having been bribed by politicians⁶; there were also threats to publicise the names of COs who had compromised the integrity of the elections. A telephone text message to all COs about this issue reads as follow:

Save your institution's name. Reject offers in cash and kind. Our job is to count, not to connive with Enemies of order. We will publish names of bribe takers.

(Coordinator of INEC Collation Officers, University of Ibadan, Ibadan, 6.18pm,
11 April 2015)

Though the text messages were sent to all COs in the state, one-on-one interactions and communications with the majority of the RA/Ward COs at Ibadan South-East LGA headquarters on 11 and 12 April 2015 revealed that they were aware of and supported these measures. The RA/Ward COs in the LGA were also seen to be disgusted at the fact that politicians had attempted to bribe COs.

CONCLUSION

Election management is a notoriously difficult task, given the plethora of activities and events that are involved. The role of the electoral umpire and both its permanent and ad hoc officials is critical to the outcome of any election. As the case of the 2015 general elections in Ibadan South-East LGA has shown, where the electorates are politically mobilised about the importance of their votes, and political parties are committed to the elections, the failings or shortcomings of the electoral management body can be easily mitigated. The integrity of elections is also assured when and where electoral personnel are adequately motivated,

6 The researcher reliably gathered from four COs, three from Ibadan South-East LGA and one from Oluwa Oluwa LGA, that some COs suspected of having been compromised were recalled from Ogbomosho and its environs. One informant, who was close to the Coordinator of the coalition officers at the University of Ibadan, confirmed this information.

are both mobilised and sensitised against inducements by politicians, and where those who compromise or attempt to compromise them are punished.

The conduct of the 2019 general elections and future general elections in Nigeria should therefore take their cue from the 2015 elections. For instance, the use of technological devices such as smart card reader machines and biometric PVC should be continued but improved on so as to curb election fraud. In addition to the live television and radio broadcast of election results at state and national collation centres only during the 2015 general elections, INEC should in future general elections explore the possibility of live transmission (both on radio and television) as well as the online streaming of the collation and declaration of election results at both ward and LGA collation centres.

Similarly, the leadership of INEC should demonstrate commitment and determination to deliver credible elections; it should reject any form of interference, inducement and pressures by politicians and their acolytes, and should devise innovative strategies to correct past errors and other challenges confronting the country's electoral process. In this regard, INEC's announcement in December 2017 of the dates for the 2019 general elections is commendable, as it provides ample time for stakeholders to prepare for the elections.

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PUBLIC PARTICIPATION, ELECTORAL DISPUTE AND CONFLICT RESOLUTION MECHANISMS

The Case of Moutse, South Africa, Wards 5 and 6, 2013-2016

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ABSTRACT

This study examines the concept of public participation and the dispute resolution mechanisms that can be utilised to resolve electoral disputes and conflicts at the level of local government in South Africa. The study stems largely from community-based participatory action research, also referred to as café conversations. This research project was conducted in Moutse, Wards 5 and 6 of the Ephraim Mogale Local Municipality, a category B municipality that is the smallest of the four municipalities in the Sekhukhune district. It is a cross-border district that extends across the north west of Mpumalanga and the southern part of Limpopo. Sekhukhune is 94% rural and 5.3% urban and approximately 50% of the population are under the age of 18. Moutse comprises four villages: Mamaneng-Matatadineng, Ga-Matlala Ramoshebo, Mokgwaneng and Tshikannosi. Research data collected in the form of community dialogues are used in this article together with relevant journal articles, books and media reports on the same subject. The aim of the article is to explore the importance of public participation by community members in the affairs of their community. The article argues that enhanced public participation can properly facilitate members of the community to take part in the resolution of disputes and conflicts in their community. The findings of the research are that public participation remains an important element of a democracy, and that the public at all times wants to be involved in making decisions that affect their rights.

Keywords: public participation, community, formal and traditional mechanisms, election disputes, conflicts

INTRODUCTION

Public participation is the cornerstone of democracy in any country and should be viewed not as a privilege but as a constitutional right (Maphazi, Raga, Taylor & Mayekiso 2013, p. 56); Davids 2005, p 12). Public participation is an inclusive process that goes beyond mere representation. Public participation allows community members to have control over the public affairs of their community and enables them to resolve any disputes and conflicts that may arise in their community. Public participation can be defined as a process whereby community members are afforded an opportunity to have their voices heard by government institutions that are meant to represent their needs (Mofolo 2016, p. 232; Sebola 2017, p. 26).

Former Tanzanian president Julius Nyerere once opined that ‘if development is to benefit the people and communities, the people must participate in considering, planning and implementing their development plans, ... the duty of the government is to ensure that the leaders and experts implement the plans that have been agreed upon by the people themselves’ (Nyerere 1979, p. 41).

Napier points out that public participation in the decision-making process of local government is the cornerstone of participatory democracy (Napier 2008, p. 166). In addition, effective public participation involves the sharing of information and requires that public participation must affect decision-making (ibid.). Participatory democracy is a term used to cover a wide variety of democratic models and entails the participation of constituencies in the direction and running of a democratic society (Held 1996, p. 264). Esau points out that the participation of communities enables them to take up their citizenship rights, enhances state accountability and ensures that communities have a say in issues affecting their livelihood (Esau 2007, p. 1).

The importance of public participation has been further highlighted by the Constitutional Court in *Doctors for Life International Speaker of the National Assembly* (2006 6 SA 416 (CC)), *Matatiele Municipality v President of the RSA (No 2)* (2007 6 SA 477 (CC)) and *Merafong Demarcation Forum v President of the RSA* (2008 5 SA 171 (CC)). Moreover, legislative interventions such as the *Municipal Structures Act 117 1998*, the *Municipal Systems Act 32 2000* and the White Paper on Local Government (1998) provide legal frameworks for public participation at local levels for the promotion of democracy.

Furthermore, sections 59 and 72 of the Constitution provide for public participation in the National Assembly (NA) and National Council of Provinces (NCOP). Section 152(2) of Constitution of the Republic of South Africa 108 of 1996 establishes that the objective of local government is to provide democratic and accountable government and to facilitate public participation in decision-making, while section 195 establishes the accountability of decision-makers. *The*

Public Participation Framework for the South African Legislative Sector (2013) was also promulgated to institutionalise public participation.

MOUTSE AREA

The Ephraim Mohale Local Municipality is a category B municipality, and is the smallest of the four municipalities in the Sekhukhune district. It is a cross-border district municipality that extends across Mpumalanga and Limpopo province and is situated in the north west of Mpumalanga and the southern part of Limpopo (Sekhukhune District Municipality IDP 2005; Department of Water Affairs and Forestry 2006). Sekhukhune's population is 94% rural and 5.3% urban (Sekhukhune IDP 2004/2005), and approximately 50% of the population are under the age of 18. Moutse comprises four villages: Mamaneng-Matataidimeng, Ga-Matlala Ramoshebo, Mokgwaneng and Tshikannosi.

The villages are among the 605 sparsely populated villages dispersed throughout the Sekhukhune District, and those under Ephraim Mogale Local Municipality comprise almost one million people according to Statistics South Africa (Stats SA 2011; Ephraim Mogale Local Municipality 2017b; Maphunye 2017, p. 403). The municipality was established after the 2000 local elections and consists of five local municipalities: Elias Motsoaledi, Greater Tubatse, Fetakgomo, Makhuduthamaga and Ephraim Mogale (Ephraim Mohale Local Municipality 2017a). The Sekhukhune web page (LIM471) states that the establishment of the municipality was a result of the amalgamation of Marble Hall, part of Moutse (West), Transitional Local Council (TLC), Leeuwfontein, a portion of Hlogotlou/Lepelle Transitional Rural Council (TRC), and Springbokvlakte TLC.

The unemployment rate is 34% in the Sekhukhune District, with 42% of the households having no formal income. As only 36% of the population in Sekhukhune have full access to electricity, most households rely on paraffin and gas to cook (Poverty nodes Sekhukhune-SANRAL). In addition, the Sekhukhune District has a high level of illiteracy, with 28% of the population having no formal education while only 1% of the population has any tertiary qualifications (Poverty Nodes Sekhukhune-SANRAL).

Most of the electoral disputes in Moutse pertain to the fact that these communities were unilaterally incorporated into Limpopo prior to the 2009 elections, without consultation. As a result, community members threatened to boycott the 2009 elections in an effort to convince the government to relocate them back to Mpumalanga (*news24.com* 2009). Among the reasons for their unhappiness at being moved to Limpopo was that the Limpopo provincial administration provided poor service delivery compared to that of Mpumalanga. The community further complained of a lack of consultative meetings with government officials

about the demarcation process and the reason behind the demarcation (Maphunye 2017, p. 486).

The frustration of the community in the period leading to the 2009 elections was exacerbated by the failure of a public referendum or public consultative meeting between communities, IEC officials and government officials under the Department of Corporative Governance, to reach a conclusion (*news24.com* 2009). The community approached the Constitutional Court of South Africa to have the demarcation issue solved but to no avail and they continue to live in the same dire circumstances. The public hospital, for example, is in Polokwane which is about 200 km away from Moutse. With no efficient public transport this means that many patients are unable to access the hospital (Kotlolo 2011).

Representative Public Participation

In the context of local governance public participation can be characterised as both participatory and representative (Phooko 2014, p. 42). The former means that the community participates directly in day-to-day decision-making on matters affecting their communities. This form of governance is achieved through community meetings where community concerns and demands are expressed (Kotze 2013, p. 496-9). Representative or indirect public participation means that the community elects their own representatives for the decision-making processes that affect them (Mafunisa & Xaba 2008, p. 453). Elections are an example of this form of public participation.

Community protests generally indicate frustration when the community is denied the opportunity to participate in matters affecting them. Lack of public participation may also concern the attitude of the government towards public governance, in particular the top-down notion that government should decide on what is best for communities (Moynihan 2007, p. 59). Attempts to transform the image of local governance have largely consisted of giving effect to public participation. However, it can be argued that such transformation is reflected in legislation but fails to filter down to the community, and in this context community members in Moutse Village expressed the view that their situation had barely changed since the first democratic elections of 1994 (4 December 2014)¹.

Maphunye and Mafunisa indicate that public participation is not only consistent with certain rights in the Constitution, particularly freedom of speech, but also represents a departure from apartheid-era governance where decisions and policies were imposed on communities (Maphunye & Mafunisa 2008, p. 467). The role of public participation in a democratic society is further enhanced

1 Sources where we have provided only the date are the views of community members and are not included in final reference list.

through the African Charter on Promoting Popular Participation. Decisions and policies in a democratic state are likely to be accepted and legitimised if they encompass the wishes of the community (Levi 1998, p. 82). Public participation must be clearly illustrated through advancing consultation, collaboration, involvement and cooperation between the government and the community concerned. This cooperation is essential to achieve better and more accessible decisions, and to realise communal goals (Naidu 2008, p. 82). Monitoring the effectiveness of mechanisms adopted to enhance public participation can also reveal whether the desired public goals are achieved, using appropriate tools. (Maphunye & Mafunisa 2008, p. 469).

Although voting is regarded as the most legitimate form of public participation, during the community dialogues that we conducted some villagers of Mokgwaneng argued that voting alone is insufficient to effect significant changes in governance (26 October 2014). Effective participation in the affairs of the community with regard to governance appears to be an important issue. While the villagers of Mokgwaneng stated that though they seldom experience disputed elections and/or conflicts at voting stations, they feel that the government only listens a few months before the election (26 October 2014) and that their participation in governance diminishes afterwards. Reduced community participation in governance is often more pronounced in the rural areas where the electorate may be unaware of the identity or mandate of their municipal councillors.

Public participation is a vital tool for the success of a democracy; without it governance may seem autocratic and this may lead to disputes and conflict (Maphunye & Mafunisa 2008, p. 469). Booyesen argues that the importance of public participation can be acute when the needs of the electorate are neglected; the community may then vent their frustration in various ways, some of which may be violent (Booyesen 2009, p. 3). Ile and Mapuva point out that this may be because politicians sometimes manipulate the concept of public participation in order to serve their own interests (Ile & Mapuva 2010, p. 40).

Democratic participation enables citizens to elect public representatives who must in turn be accountable (Murambo 2008, pp. 124-127). Held asserts that 'democracy is championed as a mechanism that bestows legitimacy on political decisions when they adhere to proper principles, rules and mechanisms of participation, representation and accountability' (Held 1996, p. 263). Thus, decisions taken in the absence of public consultation cannot be said to represent the wishes of a society founded on the principles of democracy and social justice.

Forums in a Representative Democracy

A representative democracy needs a forum that enables the people to monitor their representatives, functions as the centre of rational debate, allows for electoral

competition and in so doing produces better leaders. A mechanism that best promotes democratic values also benefits the community, and values that promote and protect democracy include freedom and equality before the law. Such freedom should entail political participation in order to make meaningful contributions to the decision-making processes. Freedom of expression must therefore be central in the decision-making process, even though this does not necessarily entail adopting every view expressed (Held 1996, p. 107).

The result of a lack of proper public consultation was reflected in the decision by the National Executive Committee of the African National Congress (ANC) to nominate member of parliament, Thoko Didiza, as their mayoral candidate in Tshwane (Gauteng Province) in 2016. The community responded with violent protests and malicious damage to property as they considered the nominee to be unrepresentative since her nomination had been imposed on them. While this article is not concerned with the details of the incident, what it illustrates is that meaningful public participation in decision-making processes underpins democratic values. This in turn means that the government has to afford both space and opportunity for the public to engage in decision-making, particularly at local government level (Mafunisa 2007, p. 489-96). Mofolo argues that two decades into democracy there is still a need for public participation at local government level. Public participation should also be promoted at intragovernmental forums to address service delivery protests (Mofolo 2016, p. 231).

Williams writes that there is more to local government elections than the right of people to vote for a certain political party (Williams 2007, p. 16). Local government elections must be seen as a mechanism that enables citizens at local level to participate and be heard in governance. Ile and Mapuva also point out that elections provide citizens with a political voice through electing leaders they feel will properly represent their needs (Ile & Mapuva 2010, p. 35).

Public participation and attendant rights are constitutionally guaranteed, thus rights connected to public participation should not be limited to or manipulated for electioneering purposes (Mothepe et al. 2015, p. 904). Unfortunately, electioneering appears to be a machinery designed to collect votes that bear little fruit for the voters. The voices of the voters should be reflected through their representatives; however, there is a lamentable disconnect between the public and the elect (Williams 2007, p. 16), a gulf that may lead to election boycotts. Plattner argues that boycotting elections illustrates public frustration which stems from unfulfilled promises (Plattner 2005, p. 184).

Role and Challenges of Public Participation

The purpose of public participation is to promote democracy in order to advance public needs. However, some representatives entrusted with this task, such as

councillors, traditional leaders and their advisors, may lack morality, have vested interests or in other ways use their positions to further their own ambitions. This goes against the essence of public participation.

The Department of Cooperative Governance and Traditional Affairs (COGTA) has an Integrated Development Plan (IDP), which also facilitates public involvement in decision-making processes. IDP can be regarded as a key strategic plan and instrument for development in local government (Aklilu, Belete & Moyo 2014, p. 257). However, the role of IDP creates more questions than answers; the main question is, who benefits from IDP and how? IDP is criticised because it seems to benefit those who are politically connected while communities are left to fend for themselves (Mautjana & Makombe 2014, p. 54).

Despite the good intentions surrounding the adoption of the IDP, it has not enhanced public participation due to several obstacles. A study conducted by Mafunisa and Xaba points to the fact that in many municipalities community participation was conducted for compliance only. Lack of resources is one of the obstacles to meaningful public participation (Mafunisa & Xaba 2008, p. 459); other examples include the lack of coordination and alignment of municipal policies and the needs of the community (Mafunisa & Xaba 2008, p. 460). Mautjana and Makombe write that IDP programmes fail to assist those who may want to participate in the process but are unable to do so because of impairments such as illiteracy and innumeracy (Mautjana & Makombe 2014, p. 54). In many cases public participation is elusive because there is generally a lack of information concerning public meetings and an accompanying culture of non-participation. The importance of public participation was evident in the 1990s with the establishment of inclusive bodies such as the South African National NGO Coalition (SANGOCO).

Today, public participation is encouraged and conducted through forums like the Presidential Public Participation Programme (Izimbizo/Imbizo), Ward Committee Council and IDP processes. These include the facilitation of structures for community participation in improving service delivery by the Department of Provincial and Local Government (DPLG), together with GTZ (Deutsche Gesellschaft für Technische Zusammenarbeit) and Co-Operative Governance and Traditional Affairs (COGTA). Kondlo however points out that programmes such as Izimbizo need to be re-constructed to allow ordinary community members to create the agenda, because the Izimbizos have been misused by government officials for their own benefit (Kondlo 2010, pp. 385-6).

Other challenges that affect public participation include the reluctance of government to listen to complaints, and the concomitant tendency to provide a platform for the well-connected only. For example, the government would prefer to engage with traditional leaders, with community members reduced to being

mere spectators (Kondlo 2010, p. 386). During our research similar sentiments were raised by the community of Tshikannosi (7 December 2014).

Vigorous election contestations serve many different purposes, including an understanding of electoral issues; but these may also result in the aggravation of national disunity (Williams 2007, p. 17). Issues debated during elections are likely to highlight the socio-economic priorities of the communities. Municipalities thus need to have clear organisational capacity and decision-making processes in order to achieve their socio-political mandates in line with the socio-economic development of the community (Williams 2007, p. 17).

Community participation in elections is not limited to outcomes only but also to the voting itself. This includes access to voting stations, a secret ballot, dispute resolution both before and after elections, and the opportunity for voters to freely choose their preferred candidate without any influence from political parties (Williams 2007, p. 17). When election promises are not fulfilled, this can result in disputes and conflict.

RESEARCH METHODOLOGY

This study stems largely from community-based participatory action research, also referred to as café conversation (Stratford et al. 2003, pp. 585-7; Horowitz et al. 2003, pp. 541-5). The research on electoral dispute and conflict resolution was conducted in Moutse, Wards 5 and 6 of the Ephraim Mogale Local Municipality, one of the five local municipalities making up the Sekhukhune District Municipality in Limpopo Province (formerly Greater Marble Hall) municipality of Limpopo.

The research project was conducted between May 2013 and December 2016 and was aimed at improving community contribution with regard to preventing, managing and resolving electoral disputes. The Unisa research team comprised three institutions, namely the Institute for Dispute Resolutions in Africa (IDRA), the Institute for African Renaissance Studies (IARS) and the WIPHOLD-Brigalia Bam Chair in Electoral Democracy in Africa.

These institutes deal mainly with dispute resolutions, elections, democracy and African renaissance. The rationale behind the choice of Moutse as a site for this research lies in the predicament of the local municipality, a community still enraged by the decision of the Municipal Demarcation Board to incorporate it into Limpopo Province (*News24.com* 2009). As a result, public participation issues raised by various members of the public in Moutse are probably unique to the area, hence the study's conclusion and recommendations cannot be extrapolated to other South African communities.

A thorough consultation with community stakeholders and the dialogues conducted in four villages revealed that there were underlying factors beyond the

scope of this research. These included political dynamics and limited knowledge of electoral matters. Although the focus of this research was on electoral dispute and conflict resolution, a general argument raised by members of the respective communities was that issues of service delivery cannot be excluded as they are central to local governance, particularly if these issues relate to electoral dispute and conflict resolution.

This seems to accord with Mofolo's argument in which he avers that if public participation is enhanced it can result in a reduction in the number of service delivery protests (Mofolo 2016, p. 232), as public participation by definition also includes community participation in policies regarding delivery (ibid.). This view has also been echoed by Molepo et al. who point out that service delivery protests are a manifestation of non-compliance with constitutional and legislative requirements for public participation (Molepo et al. 2015, p. 367).

The research was facilitated by the Unisa research team through community dialogues in the villages the team visited. Their brief was to find out from the residents what the causes of election-related disputes were and how they thought these disputes could be resolved, and also to tap into community knowledge about dispute resolution. The research was conducted by identifying community representatives who later formed a Community Representative Committee (CRC) for each village. The Unisa research team trained the CRC on how to conduct community dialogues and also discussed the aims and objectives of the research. The research was conducted according to Unisa's ethical clearance certification and guidelines.

Freedom to Participate

The participants of the research, including the CRC and community members, had to sign a consent form confirming their willingness to participate. The form also gave the participants an opportunity to withdraw from participating or refuse to disclose their identity (names) at any time during the research. One of the responsibilities of the CRC was to identify community knowledge holders who could provide the political history of the respective communities and share invaluable information on election-related disputes to which some community members might not be privy. During these discussions members of the community were divided into groups and each group was assigned a CRC member and a member of the Unisa research team.

The members of the CRC, with the assistance of the Unisa research team, emphasised the aims and objectives of the research and the topic for the dialogues. They allowed community members to participate by expressing their views on the topic based on their individual experiences and knowledge. The discussions

were regulated using a 'talking object' which maintained order during the discussions. This talking object, which could be any small object such as a pen or stick, was circulated among community members and no one was allowed to speak without having the object in his or her hand. Once a community member had spoken, the token was passed to a different community member. The role of the CRC and the Unisa research team was to direct the discussion.

The languages that dominated the discussion during these community dialogues were Sepedi and Sesotho sa Leboa, although some of the community members preferred IsiSwati, IsiZulu and IsiNdebele. The proceedings during the community dialogues were recorded. The Unisa research team formulated questions that were discussed in the dialogues and with the CRC during their training before being presented at the dialogues. These questions were as follows:

- What mechanisms, traditional or formal, are used to resolve community disputes in Wards 5 and 6 in Moutse?
- Where, when and how often do community members converge to address election-related disputes?
- What steps ought to be taken to resolve election-related conflicts in Wards 5 and 6 in Moutse?
- Who is responsible for community disputes, conflict negotiation and mediation during elections in Ward 5 and 6 in Moutse?

The CRC advised the community members to be solution-driven when responding to these questions and therefore their responses and suggested solutions form part of the conclusion and recommendations in this article.

MECHANISMS FOR DISPUTE AND CONFLICT RESOLUTION

There are two mechanisms, namely traditional and formal, that can be used to resolve electoral disputes and conflicts. The traditional method of dispute resolution forms part of living customary law and has been embraced as an essential African method to resolve community disputes and conflicts (Adeyinka et al. 2014, p. 147). It relies on traditional leaders and community forums to resolve disputes within their respective communities and is consistent with the African concept of ubuntu, a concept which embraces a widely humanist philosophy. While it does not have a precise meaning (Mbigi 1995, pp. 1-5; Ramose 2008, p. 2) ubuntu is described as a philosophy of life which values group solidarity, humaneness and order in society (Mokgoro 1998, p. 3). Dispute resolution in African communities is predicated on this concept, which highlights the need to resolve disputes and conflict in a manner that promotes consensus-building

and social reconstruction without harming the prospect of future relationships (Adeyinka et al. 2014, p. 157). Midgley and Keep (2013, p. 48) note that the concept of ubuntu has been a key value in South Africa's young democracy as it embodies the cultural diversity of the country and the importance of sharing. Ubuntu forms part of a social system driven by more than resolving conflicts, but also improving social relationships (Choudree 1999, p. 20). In contrast, the formal mechanism makes use of Western and European methods of dispute and conflict resolution such as the courts and law enforcement officials. The formal method of resolving disputes and conflicts is not popular in South Africa's rural areas such as Ga-Matlala Ramoshebo and is sometimes viewed by communities as a winner-takes-all approach that does not focus on continued relationships (15 November 2014). This can be a challenge when one considers that the formal mechanism may present solutions to which rural communities are not accustomed.

The community in Ga-Matlala Ramoshebo prefers traditional mechanisms because they believe their community members do not have the capacity to understand formal mechanisms and that the accessibility of the formal process remains a problem (*ibid.*). The other issue of prime concern is that the courts generally require a person educated in law to represent the interest of the litigant, and this legal representative may not be acquainted with the community traditions he or she represents (*ibid.*). Similarly, the courts have specific locations which may require members to travel long distances or seek accommodation near the court's location, far from their families.

The cost of litigation is also an issue that could discourage the community from invoking the courts (*ibid.*). In this respect, some Tshikannosi residents highlighted their dissatisfaction with Western methods (7 December 2014). These respondents are generally suspicious of lawyers, judges and the entire formal justice system and are of the view that the formal machinery does not have their interests at heart (*ibid.*). The traditional mechanism of resolving disputes and conflict pre-exists formal legal structures, and according to them, it is tested and reliable. For centuries these methods were employed to resolve disputes and conflict between locals and opposing communities (Osi 2005, pp. 222-223).

Traditional mechanisms are often based on community culture and encompass many elements of dispute resolution; these include teaching, storytelling, respect and fostering continued relationships beneficial to all (Osi 2005, p. 194). Traditional courts were created by traditional communities for the purpose of resolving their own disputes and conflict (Osi 2005, p. 195) when there were no formal courts to speak of.

However, some members in Tshikannosi expressed disaffection with traditional justice mechanisms which they consider might discriminate unfairly against some members of the community (opinions of the community given on

7 December 2014). They preferred a formal legal process, based on the Constitution, that does not discriminate. Other community members argued that there are different forums that can be approached before the dispute or conflict can be brought to the attention of traditional leaders (16 November 2014). One of the examples they gave is that a dispute can be resolved by other community representatives such as family councils or ward councillors and their advisers.

Only if the dispute is not resolved can the issue be taken to a traditional leader (Kariuki 2005, p. 5). The power of traditional leaders to hear disputes was recognised when the colonialists enacted the Black Administration Act of 1927 which enabled chiefs to resolve disputes. However, they were limited in terms of the sanctions they could impose. For instance, chiefs do not have the power to impose imprisonment, but a person can be banished from a community for a transgression (Kariuki 2005, p. 6). If a decision of a traditional leader is undermined, the traditional leader can report the default to a magistrate's court. Similarly, an offender has the option of approaching a magistrate to appeal against the outcome of a traditional court. Unfortunately, traditional courts carry little authority and this enables parties to take their matter to a magistrate's court, even when the case has not been finalised in the chief's court (Bennett 2001, p. 164).

Conflicts between political parties and community members have arisen during voting campaigns in Tshikannosi when a particular political party, or traditional leader with an affiliation to a political party, denies other community members or political parties access to a community hall to campaign for elections (7 December 2014). These conflicts escalate when community members are either coerced into voting for a particular political party, or prevented from attending gatherings organised by particular political parties (this view was provided by an elderly community member interviewed on 7 December 2014). In Tshikannosi, political coercion was said to be rife and community members accused traditional leaders of pressurising them. In addition, members of the community warned the Unisa research team about what they described as 'the hostile environment' in Tshikannosi.

The research was therefore conducted with much caution, as researchers were warned that they might be physically attacked by individuals belonging to certain political parties. These might view the dialogue as an attempt to oppose their own political party rather than create awareness of political tolerance in the community. Other members of the community were discouraged from joining in the study, and fearing for their lives they chose not to participate. These examples indicate that a struggle for political power would be aggravated in the pre-election period.

Some community members claim that the problem in Tshikannosi is how to resolve political disputes when traditional leaders entrusted with resolving

community issues have themselves become politicians or are affiliated with political parties (7 December 2014). One elderly woman interviewed in a community hall in Tshikannosi, pointed out that community members have forgotten what the spirit of ubuntu entails and that guidance from community elders on disputes and conflict resolution is often ignored (7 December 2014). Community interviews indicate that age may determine which method is to be adopted, with the younger generation preferring the formal i.e. legal approach while elders prefer the informal, traditional mechanism.

Some community members of Mokgwaneng expressed their scepticism regarding the judicial process and its composition (15 November 2014). They were of the opinion that the formal judicial process might be presided over by a third party who would apply the letter of the law but be oblivious of the need to foster continued relationships between the parties. As a result, this formal machinery might ignore the culture of the litigants as it seeks to apply the law constructed on a Western ideology that would not consider the background of the parties (Osi 2008, p. 201).

Another community member in Mamaneng argued that he still preferred a traditional method of resolving disputes, which he believed to be more connected spiritually to the ancestral way of doing things (16 February 2015). This participant argued that the traditional African approach offers more reconciliation and spirituality than do legalistic Western mechanisms. He further pointed out that a traditional method was intended to appease the ancestors when they were wronged. According to African culture, the relationship between the living and the dead plays a major role in resolving disputes, requiring specific rituals to be performed when certain transgressions occurred.

Furthermore, he argued that exposure to Western culture had led to the death of African methods of dispute resolution. He felt that people needed to go back to their roots and recognise what is important. He further stated that exposure to a Western lifestyle is problematic, and that the youth of today are migrating to urban areas where they are exposed to new methods and turn their backs on their roots. Correspondingly, the youth who were interviewed were critical of the traditional mechanisms for resolving disputes, describing these as old and outdated (18 October 2014). Their biggest concern was the impartiality and ineffectiveness of traditional courts.

Similarly, women argued that their voices are not heard because traditional leaders marginalise them and they feel oppressed in traditional forums, despite the Constitution protecting their right to equality and freedom of speech (18 October 2014). Some community members pointed out that women were not allowed to speak in traditional forums such as mediation because traditionally women are considered to be minors under the tutelage of a male guardian.

Scholarly research emphasises the fact that customary law has been subjected to a repugnancy clause since colonial times and this has affected its reliability among certain community members. Section 211(3) of the Constitution states that customary law is applicable, provided that its application is consistent with the Constitution. Section 211(1) recognises the role and institutions of traditional leaders, while subsection 211(2) empowers traditional leaders to apply their customs. Section 212(1) goes further to state that national legislation may provide for the role of traditional leaders as an institution at local government level.

The Constitutional Court in *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) has also recognised the power of traditional leaders to develop customary law. Despite all these efforts there appears to be little relevance and use of traditional mechanisms. It seems that the Constitution has awarded traditional leaders de jure authority without proper checks and balances to ensure that they perform their duties properly. Measures should be adopted to ensure that during elections, or when managing conflicts, traditional leaders remain impartial and are not directly affected by political matters nor become biased towards certain issues or people.

Corruption was another issue raised by some community members in Tshikannosi who argued that the formal mechanism is independent and cannot be manipulated through corruption, bribes and nepotism. Perhaps the far-reaching effects of corruption should not be limited to informal forums only, as in light of recent media reports it appears that judicial officers at the courts are not immune to corruption (*Heraldlive* 2014).

Community members in Mamaneng consider that both the formal and indigenous courts are effective (26 October 2014). They believe the gravity of the matter should determine which court should administer the matter, and that indigenous courts should deal with purely traditional matters, while other matters should be heard by formal courts.

PREFERRED MECHANISM FOR PUBLIC PARTICIPATION

The community-based participatory action research in Moutse, Wards 5 and 6 revealed that other villagers also held community meetings to collectively discuss and address issues affecting them. These issues are, however, not limited to electoral disputes and conflicts. For example, the village of Mokgwaneng held meetings in their community hall every Wednesday (26 October 2014). Ga-Matlala Ramoshebo villagers stated that they initially used to convene community meetings and that they no longer do so due to political differences and conflict (15 November 2014).

Failure to convene community meetings culminated in reduced or diminished input from the community members with regard to decisions directly or

indirectly affecting them. The village of Mamaneng/Matatadibeng did convene community meetings; however, the person or structure that called such a meeting often influenced how many people would attend the meeting (18 October 2014). It is the representative's function to listen to the concerns and demands of the village, and according to the community members of Mamaneng/Matatadimeng it is unclear whether these concerns are considered in the decision-making process (18 October 2014). The villagers of Tshikannosi indicated that they used to meet once a week but this is no longer the case (7 December 2014).

Voter access presented different problems and concerns, particularly for the elderly and the disabled. In Moutse voting stations were far from voters' homes; some community members in Mamaneng/Matadimeng alleged that they had to walk a distance of four kilometres from their homes to reach the voting stations. This problem is aggravated by the lack of public transport to take community members to voting stations (19 October 2014).

Similarly, blind and illiterate people find it difficult to cast their ballot in secret because of the assistance they need; names are read in public and they have to indicate their voting choices verbally, thus their choice could be overheard by those behind them in the queue. Community members informed the research team that a tactile voting template for the blind (a Braille ballot) should be used to ensure confidentiality, and pointed out that they had not yet benefitted from the use of such a ballot even though these were in use in urban areas. Voter confidentiality is in name only for many disabled people (Williams 2007, p. 17).

RECOMMENDATIONS AND CONCLUSION

The responses to the questionnaires posed during community dialogues in the respective villages were solution-driven and therefore form part of the recommendations from the community. This is because the purpose of the project (community-based participatory action research) was aimed at educating and similarly gaining insight from the members of the community about electoral dispute and conflict resolution. It was aimed at assisting community members to find ways of resolving their own electoral disputes and conflicts rather than imposing solutions on them. Responses and recommendations to the research questions discussed by community members during the community dialogues are as follows:

- The community of Ga-Matlala Ramoshebo urged the Independent Electoral Commission of South Africa (IEC) to take full responsibility for resolving electoral disputes and conflicts. They were also of the view that the South African Police Service must be actively involved in ensuring security before, during and after elections.

- The communities suggested that the IEC should actively engage with the community by educating the community about voting processes. In this regard, the community proposed that ward committees should be elected to represent the community on electoral matters, with members drawn from the community they are representing.
- Because some members of the community of Mokgwaneng preferred the traditional mechanism, this community was of the view that the traditional authority, as a representative body of the community, must take responsibility for ensuring that electoral disputes and conflicts are resolved. The community also expressed concerns about visibility and access to municipal councillors, alleging that some municipal councillors reside far from their communities and could therefore be ignorant of the challenges experienced by the communities they represent. Conversely the community may not know their councillors if they live far away from the areas they represent.

Public participation forms an integral part of every democratic state and encompasses collective governance by ensuring that people have a say in matters affecting many aspects, including political, social and economic life. According to Booysen (2009, p. 24) the process of public participation needs to be revisited to ensure that the people have an efficient form of representation. The legislative framework governing the process of public participation is intended to regulate this process. However, this legislative framework has to a large extent failed to achieve the progressive realisation of a free and fair democratic society characterised by participatory governance.

This representation is meant to give impetus to effective participatory governance ensuring that the wishes and demands of the community are both protected and included in decision-making. Dispute and conflict resolution mechanisms can be effective only if the authorities listen to those concerned. Participation in elections does not necessarily guarantee that members of the public contribute to how governance is to be steered. For public participation to make a meaningful contribution to governance the community must participate in the decision-making process, rather than merely elect their representatives and then delegate subsequent decision-making to them.

The Constitution advocates for meaningful participation in social or political decision-making. Thus, politicians must have regular meetings with members of the public and relevant stakeholders to promote and enhance the effect of public participation in South Africa. This will capacitate community members and encourage them to develop a sense of responsibility in relation to affairs affecting their communities. By taking part in decision-making processes the community

will also be able to monitor and evaluate whether the proposed objectives or ventures are attained.

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