

**THE ROLE OF THE JUDICIARY IN STRENGTHENING DEMOCRATIC
GOVERNANCE IN AFRICA: AN EXAMINATION OF THE RESOLUTION
OF THE RECENT PRESIDENTIAL ELECTION DISPUTES IN GHANA
AND KENYA**

**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF
THE DEGREE OF LLM (HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA)**

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31 OCTOBER 2013.

Plagiarism Declaration

I MIRIAM AZU do hereby declare that the dissertation '**The role of the judiciary in strengthening democratic governance in Africa: An examination of the recent resolution of the presidential election disputes in Ghana and Kenya**' is my original work and that it has not been submitted for any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

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Dedication

A la gloire de Dieu.

When the road was winding way too long and I felt like I could not go on, You came through for me. Thank you.

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List of Acronyms

Unless otherwise stated, the following abbreviations mean:

ACDEG	African Charter on Democracy, Elections and Governance, 2007
ACHPR	African Charter on Human and Peoples' Right, 1986
ACHR	American Convention on Human Rights, 1969
AU	African Union
DPGDEA	Declaration on the Principles Governing Democratic Elections in Africa, 2002
EMBs	Election Management Bodies
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms, 1950
ICCPR	International Covenant on Civil and Political Rights, 1966
NGOs	Non-governmental organisations
UDHR	Universal Declaration on Human Rights, 1948
WB	World Bank

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Chapter 1

Introduction

1.1 Background

Elections play an important role in governance because of their democratisation and conflict prevention potential.¹ They can impact positively on governance by minimising conflict and providing greater opportunities for democratisation or negatively by stoking conflict and derailing the democratisation process. Therefore, elections always represent an important transitional period in the political life of a country.

Elections are able to help minimise conflict and enhance democratisation because by providing a platform for an electorate to participate in government, they create in them a sense of ownership over the political process and thereby reduce political tension.² The decrease in political conflict increases opportunities for peace, security, stability, development and good governance.³ However, when elections are not managed tactfully, they can foment violence and derail democratisation;⁴ and the post 2007 electoral violence of Kenya perfectly illustrates the conflict generating capability of elections.⁵

Therefore, it can be concluded that elections have the far reaching potential of either strengthening or weakening the democratisation process of a country.⁶ Notwithstanding this pivotal role they play in governance, it is important not to view elections as an elixir of democracy. This is because they constitute a microscopic fraction of democracy and are actually only one of the means of achieving democracy.⁷ Indeed, events that have characterised the Egyptian political landscape since at least the middle of 2012⁸ have clearly demonstrated that elections are 'neither the sole means nor exclusive end of democracy'.⁹

¹ A Reynolds & T Sisk 'Elections and electoral systems: Implications for conflict management' in T Sisk & A Reynolds (eds) *Elections and conflict management in Africa* (1998) 15-18.

² N Udombana 'Articulating the right to democratic governance in Africa' (2003) 24 *Michigan Journal of International Law* 11.

³ n 1 above.

⁴ E Gyimah-Boadi 'Managing electoral conflicts: Lessons from Ghana' in Sisk & Reynolds (n 1 above) 101-102. See also Reynolds & Sisk (n 1 above) 11-14.

⁵ Viewpoint: Can Kenya avoid election bloodshed? <http://www.bbc.co.uk/news/world-africa-19948429> (accessed 30 August 2013).

⁶ Reynolds & Sisk (n 1 above) 14.

⁷ Reynolds & Sisk (n 1 above) 13-14.

⁸ J Bowen 'Egypt crisis: How the euphoria turned to tragedy' <http://www.bbc.co.uk/news/world-middle-east-23724269> (accessed 30 August 2013).

⁹ Reynolds & Sisk (n 1 above) 13.

Nevertheless, elections are important and have featured prominently in African politics since independence. In fact even in the kingdoms of Lesotho¹⁰ and Swaziland¹¹ where executive authority is reposed in a monarch, elections exist in the form of parliamentary and/or local council elections. It is even on record that elections existed in traditional African political systems centuries before colonisation.¹²

To further highlight how important elections are to governance, the African Charter on Human and Peoples' Rights (ACHPR),¹³ the Declaration on the Principles Governing Democratic Elections in Africa (DPGDEA)¹⁴ and the African Charter on Democracy, Elections and Governance (ACDEG)¹⁵ promote elections as a means of enhancing democratic governance in Africa.

But because of the competitive nature of elections, post electoral disputes are almost inevitable.¹⁶ In recognition of this and in order to resolve them in a civil manner, constitutions provide for the judicial challenge of election results, specifically presidential election results.¹⁷

Moreover, as if to cater for exceptional circumstances, the ACDEG enjoins state parties that do not have national mechanisms for resolving electoral disputes to establish same and for challenges to the validity of election results to be made through exclusively legal channels.¹⁸ Thus, presidential election petitions are filed with legal backing.

There is a burgeoning practice in Africa whereby losing candidates in presidential elections have mounted judicial challenges against the validity of election results declared by Election Management Bodies (EMBs). While some of these presidential election disputes date as far back as the beginning of the second independence of Africa in the 1990s,¹⁹ others are as recent as 2013.

¹⁰ National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Lesotho (A/HRC/WG.6/8/LSO/1) 2 http://www.upr-info.org/IMG/pdf/A_HRC_WG-6_8_LSO_1.pdf (accessed 15 September 2013).

¹¹ National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Swaziland (A/HRC/WG.6/12/SWZ/1) 5-6 http://www.upr-info.org/IMG/pdf/a_hrc_wg.6_12_swz_1_e.pdf (accessed 15 September 2013).

¹² A Aubynn 'Behind the transparent ballot box: The significance of the 1990s elections in Ghana' in M Cowen & L Laakso (eds) *Multi-party elections in Africa* (2002) 78.

¹³ Art 13.

¹⁴ AHG/Decl. 1-2 (XXXVIII)) 25-31 <http://www.africa-union.org/root/au/Documents/Decisions/hog/E1AHG.pdf> (accessed 20 September 2013).

¹⁵ Arts 2(3) & (4); 3(3), (4) & (10); 4; 17; 32(6) & (7).

¹⁶ Reynolds & Sisk (n 1 above) 18.

¹⁷ See for egs art 44, 1991 Constitution; art 64(1), 1992 Constitution; art 104(1), 1995 Constitution; sec 139(1) (a), 1999 Constitution; & art 140(1), 2010 Constitution.

¹⁸ Art 17(2) & (4).

¹⁹ T Sisk & A Reynolds 'Democratization, elections, and conflict management in Africa: Exploring the nexus' in Sisk & Reynolds (n 1 above) 1.

Some of the countries that have so far contributed to the current jurisprudence in Africa on presidential election disputes are Kenya,²⁰ Zambia,²¹ Nigeria,²² Uganda,²³ Sierra Leone,²⁴ Ghana²⁵ and Zimbabwe.²⁶ However, the main focus of this scholarship is the *Raila Odinga* case²⁷ of Kenya and the *Nana Akufo-Addo* case²⁸ of Ghana because they are the two most recent presidential election disputes in Africa to have been decided on merits.

Although presidential election disputes may not necessarily be the most complex cases, they bring the role of the judiciary²⁹ as a major stakeholder in the democratic enterprise into sharp focus.³⁰ The judiciary's impartiality, competence and independence, generally considered a basic condition for democracy,³¹ are very crucial then because the acceptance or rejection of its decision as legitimate has ramifications for whether democratisation would be enhanced or not.

Indeed, when the judiciary has been perceived to be compromised, its involvement in resolving presidential election disputes has rather sparked violent conflict and derailed democratisation. A case in point is the civil war that ensued in Cote d'Ivoire following the Constitutional Council's proclamation of Mr Laurent Gbagbo as the winner of the 2010 presidential elections, contrary to the announcement by the EMB that Mr Alassane Ouattara had won the elections.³²

1.2 Problem statement

The presidency is the soul of the government and so disputes concerning it are of great significance.³³ It is therefore important that presidential election disputes are resolved timeously and in a manner that results in peace, justice, security and stability.

²⁰ *Orengo v Moi & 12 Others* (Election Petition No 8 of 1993); *Mwau v Electoral Commission of Kenya & 2 Others* (Petition No 22 of 1993); *Kibaki v Moi & 2 Others* (no 3) (2008) 2 KLR (ep) 351; *Moi v Matiba & 2 Others* (2008) 1 KLR (ep) 622 & *Raila Odinga v The Independent Electoral and Boundaries Commission & 3 Others* (2013) eKLR.

²¹ *Lewanika & Others v Chiluba* (1999) 1 LRC 138; *Anderson Kambela Mazoka & 2 Others v Levy Patrick Mwanawasa & 2 Others* (SCZ/EP/01/02/03/2002).

²² *Buhari v Obasanjo* (2005) 13 NWLR 1; *Muhammadu Buhari v Independent National Electoral Commission & 4 Others* (SC.51/2008) & *Abubakar v Yar'Adua* (2008) 1 SC 77.

²³ *Besigye v Electoral Commission, Yoweri Museveni* (2007) UGSC 24; *Besigye Kiiza v Museveni Yoweri Kaguta, Electoral Commission* (2001) UGSC 3.

²⁴ *Sierra Leone People's Party v National Electoral Commission & Another* (S.C. NO. 4/2012).

²⁵ *Nana Addo Dankwa Akufo-Addo & 2 Others v John Dramani Mahama & 2 Others* (Writ No J1/6/2013).

²⁶ *Morgan Tsvangirai v Robert Mugabe & 3 Others* (Case No CCZ71/2013).

²⁷ n 20 above.

²⁸ n 25 above.

²⁹ The 'judiciary' in the context of this research is used to mean the Supreme Court, Constitutional Court, Constitutional Council or such other national arbitral bodies with the mandate to resolve presidential election disputes.

³⁰ *Raila Odinga* (n 20 above) para 177.

³¹ G Bluwey 'State organisations in the transition to constitutional democracy' in KA Ninsin (ed) *Ghana: Transition to democracy* (1998) 118.

³² Human Rights Watch 'A long way from reconciliation: Abusive military crackdown in response to security threats in Cote d'Ivoire' (November 2012) 14 <http://www.hrw.org/sites/default/files/reports/cotedivoire1112webwcover.pdf> (accessed 30 August 2013).

³³ *Raila Odinga* (n 20 above) paras 298-300.

But when the judiciary has been seen as a puppet, its involvement in resolving a presidential election dispute has been counterproductive.³⁴ Therefore, one of the aims of this study is to highlight some of the characteristics that a judiciary must possess and exhibit so that its resolution of presidential election disputes would promote peace and strengthen democratic governance instead of the opposite.

Furthermore, although it is most expedient that they are resolved speedily³⁵ most presidential election disputes drag for months, sometimes years. For example, it took the Ghanaian Supreme Court eight months and one day to dispose of the *Nana Akufo-Addo* case.³⁶ Similarly in Nigeria, the *Buhari* and *Abubakar* cases against President Umaru Musa Yar'Adua were resolved some eight months after their institution.³⁷ Also, the *SLPP* case of Sierra Leone was determined seven months after its institution; meanwhile, the Sierra Leonean Supreme Court had previously spent almost five years on a dispute relating to the 2007 election.³⁸

These delays occur because the constitutions of these countries are silent on timelines for the determination of presidential election disputes. In Ghana, for example, the situation is further complicated by the fact that the Constitution of the Republic of Ghana (1992 Constitution) allows a person whose election as president is challenged to be sworn into office during the pendency of the suit.³⁹ First of all, this whittles down the need for a speedy determination of the matter, and secondly, the petitioners then have to contest against a sitting president.

There are however some exceptions. The Constitution of the Republic of Kenya (2010 Constitution)⁴⁰ and the Constitution of the Republic of Uganda (1995 Constitution),⁴¹ for example, contain strict timetables for both the institution and determination of presidential election disputes. So the determination of the *Raila Odinga* case in a fortnight,⁴² perhaps one of the most expeditious merits based resolution of a presidential dispute in Africa, can be fairly credited to the 2010 Constitution. Moreover, for good measure, the 2010 Constitution is designed such that a presidential election dispute is resolved before a president-elect is sworn in.⁴³ Accordingly, Mr

³⁴ See generally Human Rights Watch (n 32 above).

³⁵ Art 17(2), ACDEG.

³⁶ The petition was filed on 28 December 2012 and judgment was delivered on 29 August 2013.

³⁷ E Ojo 'Public perceptions of judicial decisions on election disputes: The case of the 2007 General Elections in Nigeria' (2011) 10 *Journal of African Elections* 108.

³⁸ E Kamada & I Tommy 'Democracy and rule of law: Sierra Leone's Supreme Court hears 2012 presidential election petition' 7 June 2013 <http://www.carl-sl.org/home/articles/606-edmond-kamanda-a-ibrahim-tommy> (accessed 1 September 2013).

³⁹ Art 64(2); see also *Nana Akufo-Addo* (n 25 above) 304.

⁴⁰ Art 140(1-3), 2010 Constitution.

⁴¹ Art 104(1-3).

⁴² The judgment was delivered on 30 March 2013, 14 days from the filing of Petition Nos 4 & 5 of 2013 on 16 March 2013: see *Raila Odinga* (n 20 above) paras 9 & 15. But the Supreme Court gave the reasoning for its decision on 16 April 2013.

⁴³ Art 141(2) (b).

Uhuru Kenyatta was sworn in as president only after the Supreme Court's judgment in the *Raila Odinga* case. So with Kenya as a yardstick, another aim of this research is to investigate the practical advantages of providing stringent timelines for the determination of presidential election disputes.

Finally, this research notes that presidential election petitions are usually unsuccessful although the petitioners adduce evidence of transgressions against electoral laws in support of their claims. Indeed, in Africa, all the presidential election disputes referred to above failed.⁴⁴ The only success story so far has been in Cote d'Ivoire, which is even distinguishable because a petition was not filed. Instead, acting upon its powers under the Constitution of the Republic of Cote d'Ivoire (2000 Constitution)⁴⁵ the Constitutional Council proclaimed Mr Gbagbo as the winner of the 2010 presidential elections.⁴⁶ Ukraine is probably the only country where a presidential election petition has been successful.⁴⁷

In declining the invitation to invalidate presidential election results, the mantra of the judiciary has invariably been that the acts of non compliance with the electoral laws have not been substantial enough to adversely affect the results.⁴⁸ Therefore, this research finally investigates whether this is the only reason why presidential election petitions usually fail or whether some extra legal considerations have also influenced the judgments.

1.3 Research questions and objective

The ultimate aim of this scholarship is to outline the role of the judiciary in strengthening democratic governance in Africa through its resolution of presidential election disputes. Within this broad context, the following are addressed.

- What is democratic governance; and what role do elections, including presidential elections, play in it?
- Why is it important that presidential disputes are resolved in a timely fashion?
- What are the pros and cons of providing or not providing strict timelines in constitutions for resolving presidential election disputes?

⁴⁴ n 20-26 above.

⁴⁵ Art 94.

⁴⁶ Human Rights Watch (n 32 above) 14.

⁴⁷ For an account of why the Ukrainian Supreme Court annulled the results of the 2004 presidential elections see '2004: Yushchenko wins Ukraine election re-run' 27 December 2004 http://news.bbc.co.uk/onthisday/hi/dates/stories/december/27/newsid_4408000/4408386.stm (accessed 30 September 2013).

⁴⁸ *Nana Akufo-Addo* (n 25 above) 131, 446, 526 & 543; see also *Raila Odinga* (n 20 above) paras 304-306.

- What qualities must the judiciary possess and exhibit so that its resolution of presidential election disputes can strengthen democratic governance in Africa?
- Do presidential election disputes often fail because petitioners are unable to discharge the evidentiary burden and standard of proof or because the judiciary is sometimes influenced by extra legal considerations?

1.4 Significance of the research

The role of the judiciary in resolving election disputes has attracted fair scholarly attention. But the discussions often revolve around three broad themes: the detection of issues before and during elections and post election measures implemented to improve upon subsequent elections; analyses of public perceptions of the fairness of the judiciary's resolution of electoral disputes; and commentaries on how election petitions fail. There is however a dearth in the literature of why presidential election petitions are usually not resolved expeditiously and also on why they are often unsuccessful. This research hopes to fill these lacunae.

1.5 Limitations

This study is neither concerned with the broad topic of elections nor disputes regarding the election of members of parliament. Rather, it is an examination of the role the judiciary plays in strengthening democratic governance in Africa through its resolution of presidential election disputes. To this end, the research extensively evaluates the *Raila Odinga* and *Nana Akufo-Addo* cases. But whenever it is appropriate, reference is made to other presidential election disputes. The primary consideration for choosing the *Raila Odinga* and *Nana Akufo-Addo* cases for this research is that they are the most recent merit based presidential election judgments in Africa.

1.6 Methodology

This is a desktop research which relies heavily on comparative research methodology and case studies and employs a textual analysis of the issues raised. While evaluating the current state of Ghanaian and Kenyan electoral laws on this topic, this author comments on relevant continental and international human rights and governance instruments, constitutional and electoral provisions, case-law, books, journal articles, reports and internet articles.

1.7 Literature review

The role of the judiciary in most constitutional systems of governance is tripartite: supervisory, protective and interpretive.⁴⁹ This is because the judiciary has an oversight mandate to shield the

⁴⁹ Art 120, 1991 Constitution; art 125, 1992 Constitution; art 126, 1995 Constitution; art 6, 1999 Constitution; and art 159, 2010 Constitution.

constitution from executive and legislative excesses; protect fundamental human rights from violations by individuals and/or the public; and interpret the law.⁵⁰ It is in this capacity as the vanguard of democratic rights in the constitutional order that the judiciary has the authority to resolve disputes, including presidential election disputes.

Based on Nigeria's 2007 general elections, Ojo discusses how the failure of the judiciary to resolve election related disputes in an impartial manner decreases public confidence, hinders national integration and impedes social cohesion.⁵¹ On the other hand, Enweremadu analyses the jurisprudence the 2003 and 2007 Nigerian general elections produced and examines how the judiciary stabilises democracy as it resolves election disputes.⁵²

Meanwhile Aubynn,⁵³ Gyimah-Boadi,⁵⁴ Ayee⁵⁵ and Sisk *et al*⁵⁶ have concluded that regular elections are important to the democratisation process because they provide an opportunity to learn from past mistakes and improve upon the conduct of subsequent elections.

In another work, Ayee analyses the 2000 general elections of Ghana and highlights how competition, participation and civil society involvement legitimise elections and contribute to deepening democratic governance.⁵⁷

Although both the International Covenant on Civil and Political Rights (ICCPR)⁵⁸ and the ACHPR⁵⁹ contain provisions on the right to elections, they provide no clue as to how the resolution of electoral disputes contributes to democratic governance. But the ACDEG, which basically reproduces the DPGDEA,⁶⁰ appears to link the expeditious resolution of electoral disputes to the consolidation of democratic governance.⁶¹ Unfortunately, the ACDEG is a soft normative document and so it is not binding on state parties.

It is hoped that this research would contribute to the existing literature on electoral disputes by identifying the root cause of the inordinate delays that plague the resolution of presidential election disputes and also by highlighting the reasons why most presidential election petitions fail.

⁵⁰ S Pfeiffer 'The role of the judiciary in the constitutional systems of East Africa' (1978) 16 *The Journal of Modern African Studies* 35.

⁵¹ n 37 above, 101.

⁵² D Enweremadu 'The judiciary and the survival of democracy in Nigeria: Analysis of the 2003 and 2007 Elections' (2011) 10 *Journal of African Elections* 114.

⁵³ Aubynn (n 12 above) 78.

⁵⁴ Gyimah-Boadi (n 4 above) 101.

⁵⁵ J Ayee 'The December 1996 general elections in Ghana' (1997) 3 *Electoral Studies* 16.

⁵⁶ T Sisk *et al* *Democracy at the local level: The international IDEA handbook on participation, representation, conflict management and governance* (2001) 13.

⁵⁷ See generally J Ayee (ed) *Deepening democracy in Ghana: Politics of the 2000 elections* (2001).

⁵⁸ Art 25(a) & (b).

⁵⁹ Art 13.

⁶⁰ n 14 above.

⁶¹ Art 17.

1.8 Chapter outline

There are five chapters in this work. Chapter one introduces this research, reviews some of the extant literature on elections, defines the limits and methodology of this study, states the research questions and objective and gives a synopsis of the significance of this work. Chapter two discusses democratic governance and identifies the role that elections, including presidential elections, play in it.

Chapter three highlights the importance of resolving presidential election disputes in a timely fashion, critiques the merits and demerits of the provision or otherwise in constitutions of strict timelines for the determination of presidential election disputes, and discusses the qualities the judiciary must possess and exhibit so that its resolution of presidential election disputes can strengthen democratic governance in Africa.

Chapter four investigates whether presidential election disputes usually fail because petitioners are unable to discharge the evidentiary burden and standard of proof, or whether in addition the judgments are sometimes influenced by extra legal considerations. Chapter five concludes this work with some recommendations.

Chapter 2

The role of elections in democratic governance

2.1 Introduction

Because self-government is central to democracy, it has been said that the ideal way to arrive at the true majoritarian will of a people is to allow them to decide on all matters that concern them

through direct participation in how they are governed.⁶² However, the size of a community's population and the level of sophistication of its political and social organisation can hinder the direct participation of everybody in government.

Accordingly, in most modern societies the more pragmatic way of realising the majoritarian will is through representative government whereby the majority elects representatives to whom they delegate decision making powers.⁶³ Since elections constitute a participatory way of democratically deciding on government, it can be reasonably argued that elections have their antecedents in democratic governance. What then is democratic governance, and what role do elections play in it?

2.2 Unpacking democratic governance

The African Charter on Democracy, Elections and Governance (ACDEG) would have been an ideal source to turn to for the meaning of democratic governance since it is a specialised continental normative framework on how to achieve democratic governance and even refers to democratic governance in article 36, for example. Unfortunately, it does not define democratic governance. But since democratic governance obviously combines the concepts of 'democracy' and 'governance', its meaning may be logically deduced from what 'democracy' and 'governance' are.

As with democratic governance, the ACDEG contains no definition of 'democracy' or 'governance' although it refers to them 17 and 20 times respectively. The African Charter on Human and Peoples' Rights (ACHPR) is also not instructive in this regard because it does not even mention 'democracy' and 'governance' at all. International instruments like the Universal Declaration on Human Rights (Universal Declaration), the United Nations Charter and the International Covenant on Civil and Political Rights (ICCPR) are similarly not helpful sources in this respect because they also do not refer to 'democracy' and 'governance'. This work therefore relies on other sources for the definition of 'democracy' and 'governance'.

2.2.1 Democracy defined

Democracy has its etymological roots in the Greek words *demos*, which means 'people' and *kratos*, which means 'rule'.⁶⁴ This probably explains why democracy has been simply defined as 'rule by the people'.⁶⁵ Abraham Lincoln is credited with defining democracy as 'government of the

⁶² Sisk *et al* (n 56 above) 1 & 13.

⁶³ Sisk *et al* (n 56 above) 13-14.

⁶⁴ G Sorensen *Democracy and democratization: Processes and prospects in a changing world* (1993) 3.

⁶⁵ S Lindberg *Democracy and elections in Africa* (2006) 30.

people, by the people and for the people'.⁶⁶ Schumpeter provides a more elaborate definition when he states that democracy is 'that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote'.⁶⁷

Dahl, on the other hand, has defined democracy in terms of the following eight characteristics. He has stated in his seminal work that for there to be democracy in a political system, there must be the right to be eligible for public office; the right to vote; the right to compete for votes; the existence of institutions that make government policies dependent on votes; free and fair elections; the right to express other preferences; the right to alternative sources of information; and the freedom to form and join organisations.⁶⁸

Although it would seem appropriate to infer from the above that a political system is undemocratic if it lacks all of these attributes, Lindberg cautions against such a generalisation on the basis that the mere existence of some or most of these qualities does not necessarily mean that there is democracy. Instead, he proposes that democracy should be viewed as 'a matter of degree' so that countries would fall 'somewhere along the continuum between the poles of full democracy and complete nondemocracy'.⁶⁹

Vidmar attempts to rationalise the various definitions of democracy and concludes that they can be classified into two; what he refers to as the 'procedural understanding' and the 'substantive definition' of democracy.⁷⁰ According to him, the definitions that give elections a central place in political governance and make them both a necessary and sufficient condition of democracy constitute the procedural understanding of democracy; while the substantive definitions of democracy comprise those definitions that look beyond the election event to the principles that underpin democracy.⁷¹ Put differently, while the procedural definitions make democracy contingent upon the existence and/or conduct of elections, the substantive definitions go beyond merely portraying democracy as a product of elections.⁷²

⁶⁶ A Christopher 'Democracy and the crisis of leadership in Africa' (2006) 31 *The Journal of Social, Political and Economic Studies* 255.

⁶⁷ J Schumpeter *Capitalism, socialism and democracy* (1947) 269.

⁶⁸ R Dahl *Polyarchy: Participation and opposition* (1971) 3.

⁶⁹ Lindberg (n 65 above) 23 & 25.

⁷⁰ J Vidmar 'Multiparty democracy: International and European human rights law perspectives' (2010) 23 *Leiden Journal of International Law* 211-215.

⁷¹ Vidmar (n 70 above) 213.

⁷² G Goodwin-Gill *Free and Fair Elections* (2006) 21. See also S Marks *The riddle of all constitutions* (2000) 51.

It appears from the foregoing discussions that democracy is a very fluid concept. Indeed the official United Nations (UN) position, which a UN Secretary-General has concurred with,⁷³ is that democracy is relative and so there cannot be a single model for universal application.⁷⁴ Nevertheless, it is generally agreed that the features of governance described in the definitions of democracy above are generally attributable to democracies.⁷⁵ Accordingly, no matter what definition one prefers, it can hardly be seriously contested that to qualify as a democracy a political system must allow its citizens to participate in their government through healthy competition and meaningful deliberation.

2.2.2 The meaning of governance

Governance basically consists of the processes through which decisions are made and implemented. It has therefore been said that it is a product of all the formal and informal actors involved in decision making and all the formal and informal structures that are instituted for the implementation of decisions.⁷⁶ Government, civil society and the military constitute the principal actors in governance.⁷⁷

Blunt has defined governance as the equitable management of a country's economic and social resources, the distribution of political power and the ability of a government to develop good policies and perform efficiently.⁷⁸ The World Bank (WB)⁷⁹ and the United Nations Development Programme (UNDP)⁸⁰ have also defined governance in terms of the equitable distribution of power and the effective management of economic and social resources.

For Weiss, governance is the manner in which the affairs of a country are managed, political authority is exercised, conflict is resolved, government relates with its citizenry, interests are pursued, and rights are asserted, respected and promoted.⁸¹ Finally, in recognition of the

⁷³ B Boutros-Ghali *An Agenda for Democratization* (1996) para 4.

⁷⁴ Para 10, Preamble (UN Doc A/RES/60/253) http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/253 (accessed 20 September 2013); Para 7, Preamble (UN Doc A/RES/61/226) http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/61/226&Lang=E (accessed 20 September 2013); Para 7, Preamble (UN Doc A/RES/62/7) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/464/19/PDF/N0746419.pdf?OpenElement> (accessed 20 September 2013).

⁷⁵ Sisk *et al* (n 56 above) 12.

⁷⁶ United Nations Economic and Social Commission for Asia and the Pacific (2007) 'What is good governance?' <http://www.unescap.org/pdd/prs/projectactivities/ongoing/gg/governance.asp> (accessed 5 September 2013).

⁷⁷ As above. Civil society comprises the media, military, lobbyists, cooperatives, NGOs, research institutes, religious leaders, finance institutions, political parties, multinational corporations, associations of peasant farmers, influential landowners and international donors.

⁷⁸ P Blunt 'Cultural relativism: "good" governance and sustainable human development' (1995) 15 *Public Administration and Development* 1-10.

⁷⁹ See generally World Bank *Governance and development* (1992).

⁸⁰ UNDP *Reconceptualising governance* (1997b) 10.

⁸¹ T Weiss 'Governance, good governance and global governance: Conceptual and actual challenges' (2000) 21 *Third World Quarterly* 795-814.

significant role that civil society plays in ensuring accountability and transparency, governance has also been defined with reference to the interrelationship between state and non-state actors in the conduct of government business.⁸²

It would seem from these definitions that governance goes beyond government and encompasses the whole gamut of the economic, social and political organisation of a people. Accordingly, those who have simply equated governance with government have been criticised for ignoring the realities of the socio-political composition of countries.⁸³ It has therefore been suggested that a better way is to view governance as government together with efficient institutions, sound policies and an economic system that accommodates the private sector in the conduct of government affairs.⁸⁴

From the foregoing definitions of democracy and governance, democratic governance may be simply defined as governance that is democratic. In other words, democratic governance refers to a political regime where power is transferred only through legal channels; credible elections are organised regularly; opposition is lawful and non violent; minority views are accommodated in policy making; the electorate have the opportunity to change their leadership whenever they are dissatisfied; and civil, political, socio-economic, developmental and environmental rights and freedoms are respected, protected and promoted. This author therefore agrees with the view that democratic governance is 'about how individuals and societies achieve institutions that make politics both civil and capable'.⁸⁵

2.2.3 The significance of elections

Elections have been defined as one of the processes by which leaders are chosen to fill the executive and legislative offices of government or to replace undesirable regimes.⁸⁶ Elections provide an opportunity for people to determine their leadership through participating in their government. So in democratic systems of governance, elections are a way of actualising the right to self-determination.⁸⁷

⁸² D Williams & T Young 'Governance, the World Bank and liberal theory' (1994) 42 *Political Studies* 87-88; see also art 28, ACDEG.

⁸³ A Leftwich *States of development: On the primacy of politics in development* (2000) 108.

⁸⁴ B Smith *Good governance and development* (2007) 3.

⁸⁵ Udombana (n 2 above) 11.

⁸⁶ F Hayward (ed) *Elections in independent Africa* (1987) 5; see also Lindberg (n 65 above) 22-23 and Nana Akufo-Addo (n 25 above) 570.

⁸⁷ Art 13(1), ACHPR.

Generally, the fact that elections are a recurring theme in discussions on democracy and governance underscore their importance to democratic governance. Indeed, elections mark a watershed period in the governance of a country because what happens in their wake determines whether democratisation will be enhanced or derailed. This section highlights the role of elections in democratic governance by discussing their significance in governance.

First of all, elections play a significant role in governance because they liberalise the political environment. This effect of elections is especially felt in regimes that are newly transitioning from autocracy, authoritarianism or dictatorship to democracy.⁸⁸ From this perspective, it has been observed that the 1996 elections of Ghana were important because they marked a break from military rule and the beginning of liberal politics that has ultimately contributed positively to Ghana's advancement towards enhanced democracy.⁸⁹

Secondly, elections play a significant role in democratic governance because they provide a standard against which democracy is determined. Although the presence of elections does not necessarily mean that a political system is democratic,⁹⁰ the extent to which elections are free and fair is usually a good indication of the degree of democracy that obtains in a political system.⁹¹ It has therefore been observed that despite all the criticisms leveled against them, elections are still the yardstick against which democracy is measured.⁹² This has probably been so because elections are the most tangible and noticeable aspect of democracy.⁹³

Moreover, elections are still important even when they were reputed to have been flawed. This is because imperfections of earlier elections provide lessons which can help to improve the democratic quality of subsequent elections.⁹⁴ The 1992 and 1996 elections of Ghana explain this point. The December 1992 parliamentary elections were boycotted due to massive irregularities that had characterised the presidential elections a month earlier. Therefore, the 1992 elections are generally famed to have been flawed. In order to avoid repeating the mistakes that marred the credibility of the 1992 elections, constitutional measures were implemented to strengthen Ghana's Electoral Commission. This ultimately led to an improvement in the 1996 elections, which were generally labelled as free, fair and credible.⁹⁵

⁸⁸ Lindberg (n 65 above) 2.

⁸⁹ Aubynn (n 12 above) 102.

⁹⁰ M Cowen & L Laakso 'Elections and elections studies in Africa' in Cowen & Laakso (n 12 above) 1.

⁹¹ Lindberg (n 65 above) 23 & 35.

⁹² Vidmar (n 70 above) 215.

⁹³ Reynolds & Sisk (n 1 above) 13-14.

⁹⁴ Sisk *et al* (n 56 above) 56-61.

⁹⁵ Aubynn (n 12 above) 102.

Additionally, there is evidence that when experiences gained from past elections are used to improve upon subsequent elections, it increases transparency and thereby boosts voter confidence and participation in later elections.⁹⁶ When voter turnout is high, elections can be said to be important to democratic governance because their outcome is a fair reflection of the majoritarian will.

Furthermore, elections are important to democratic governance because they create an enabling environment for human rights to thrive. Elections are able to achieve this because their periodic conduct institutionalises and entrenches a culture of respect for civil liberties.⁹⁷

Also, from the perspective of the ACDEG, elections are significant to democratic governance because they are a means of institutionalising legitimate government authority and ensuring democratic changes in government. Unconstitutional changes in government impede stability, security, peace and development.⁹⁸ In an attempt to rid the continent of these retrogressive effects of unconstitutional regime changes, the ACDEG promotes the use of elections as the democratic means of determining and legitimising leadership.⁹⁹

Finally, elections are significant to democratic governance because they can minimise political conflict and enhance democratisation. By providing an opportunity for people to participate in the way they are governed, elections create in people a sense of ownership over the political process and can thereby reduce the incidence of conflict. Therefore, it is important to view elections as a crucial vehicle for national integration and not merely a means of recruiting people into public offices.

2.3 Conclusion

Elections play multitudinous roles that are important for democratic governance. But ultimately, all these roles are geared towards preventing and/or minimising political conflict and increasing the democratic qualities that exist in a political system.

Elections take various forms, including presidential, parliamentary, local council and local government. The preoccupation of this research is however presidential elections. This author

⁹⁶ As above.

⁹⁷ Sisk *et al* (n 56 above) 71-98.

⁹⁸ Art 2(4), ACDEG.

⁹⁹ Paras 1 & 7, Preamble & arts 2(3) & 17, ACDEG.

takes the view that if elections enhance democratic governance through their democratisation and conflict management prowess, then by parity of reasoning presidential elections, which are a subset of elections, also enhance democratic governance in the same manner. From this premise, it is this author's view that the manner in which the judiciary resolves presidential election disputes is equally important to democratic governance because it can either make or break the democratisation process of a country.

Chapter 3

The impact of the resolution of presidential election disputes on democratic governance

3.1 Introduction

In Africa, the ACDEG¹⁰⁰ and constitutions provide legal backing for the institution of petitions challenging the validity of presidential election results. Accordingly in Ghana for example, article 64(1) of the 1992 Constitution provides that any citizen is entitled to file a petition at the Supreme Court to challenge the validity of the election of a person as president. Similarly in Kenya, article 140(1) of the 2010 Constitution states that a person can file a petition at the Supreme Court challenging the validity of the election of a president-elect.

The story is no different in Nigeria, where section 139(1) (a) of the Constitution of the Federal Republic of Nigeria (1999 Constitution) mandates the National Assembly to enact legislation that outlines the modalities for instituting a petition to challenge the validity of the election of a person to the office of president. Also, article 104(1) of the 1995 Constitution of Uganda provides that any candidate who is dissatisfied with the declaration of a person as president can lodge a petition at the Supreme Court to dispute the validity of the presidential election results.

In Sierra Leone, article 44 of the Constitution of the Republic of Sierra Leone (1991 Constitution) which enjoins Parliament to make laws for the regulation of elections and 'other matters connected therewith' constitutes the constitutional basis for challenging the validity of the election of a person as president.

While some of these constitutional provisions allow a person, arguably any adult person with voting capacity, to initiate presidential election disputes, others restrict legal capacity to institute such proceedings to only citizens or candidates. But for the purposes of this study, the most important consideration is that these constitutions make provision for challenging presidential election results through the judicial process. They therefore provide legitimacy to challenging presidential election results.

It is often said that justice delayed is justice denied,¹⁰¹ and so it is essential to justice delivery that disputes are resolved within a reasonable period of time. Indeed, reasonable timing is so important to dispute resolution that some international and continental laws provide that disputes must be resolved expeditiously. For instance, the International Covenant on Civil and Political Rights (ICCPR),¹⁰² the American Convention on Human Rights (ACHR)¹⁰³ and the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)¹⁰⁴ all provide that disputes must

¹⁰⁰ Art 17(2) & (4).

¹⁰¹ H Sarokin 'Justice rushed is justice ruined' (1985-1986) 38 *Rutgers Law Review* 431.

¹⁰² Art 14(3) (c).

¹⁰³ Art 8.

¹⁰⁴ Art 6.

be resolved without undue delay. With specific reference to elections, the African Charter on Democracy, Elections and Governance (ACDEG) places an obligation on state parties to properly equip national mechanisms so that they can resolve election related disputes in a timely manner.¹⁰⁵

However, experiences from at least Ghana and Sierra Leone have shown that an inordinately long period of time is spent on the resolution of presidential election disputes. Although some commentators have blamed the courts for the tardiness,¹⁰⁶ it is the view of this author that the delays are rather attributable to the absence of fixed timetables for the determination of presidential election disputes in the constitutions of these countries. In the opinion of this author, one of the reasons why the Kenyan Supreme Court was able to resolve the *Raila Odinga* case in 14 days is because the 2010 Constitution provides stringent timelines for both the institution and determination of presidential election disputes.¹⁰⁷ Constitutions therefore play a pivotal role in ensuring that presidential election disputes are resolved expeditiously.

This chapter does two things. First, it evaluates the merits and demerits of stipulating or not stipulating a time frame for the resolution of presidential election disputes in constitutions and highlights how the speedy or tardy resolution of presidential election disputes impacts on democratic governance. Second, it discusses how the involvement of the judiciary in resolving presidential election disputes can either strengthen or weaken democratisation. In connection with this, suggestions are made on the qualities that the judiciary must possess and exhibit in order for it to be able to resolve presidential election disputes in a manner that promotes peace and deepens democratic governance.

3.2 The need for strict temporal provisions in constitutions for the determination of presidential election disputes

According to article 140(1) of the 2010 Constitution of Kenya, a challenge to the validity of the election of a president-elect must be filed at the Supreme Court within seven days after the declaration of the results of a presidential election. Beyond that, article 140(2) provides that the Supreme Court must resolve the dispute within 14 days after the filing of the petition, and that its decision is final. These strict temporal provisions have injected certainty into the time frame for the disposition of presidential election disputes in Kenya.

¹⁰⁵ Art 17(2).

¹⁰⁶ *Nana Akufo-Addo* (n 25 above) 303.

¹⁰⁷ Art 140(1-3); see also n 20 above, paras 9 & 15.

It is against the background of these constitutional provisions that the first, second and third petitioners in the *Raila Odinga* case¹⁰⁸ filed their respective suits in the Supreme Court of Kenya. They challenged the validity of the declaration by the Kenyan EMB on 9 March 2013 that Uhuru Kenyatta won the 4 March 2013 presidential elections. All the petitions were filed within the constitutional time limits: the first and second petitioners filed their suit on 16 March 2013 while the third petitioner's suit was filed on 14 March 2013. The Supreme Court therefore had 14 days from 16 March 2013 to determine the dispute. It delivered its judgment on 30 March 2013. Its decision was final and the petitioners accepted it as such.¹⁰⁹

The position in Ghana is slightly different: it is only the institution of presidential election disputes that is time barred by the 1992 Constitution. According to article 64(1), a presidential election petition must be filed in the Supreme Court within 21 days after the declaration of presidential election results. Beyond this, the 1992 Constitution is silent on the time by which the dispute must be determined and does not also say that the Supreme Court's decision is final. It is therefore expedient to turn to secondary legislation for guidance on these issues. This is because article 64(3) mandates the Rules of Court Committee to enact rules of procedure for regulating the conduct of presidential election petitions in Ghana.

The secondary legislation enacted pursuant to article 64(3) is the Supreme Court Rules¹¹⁰ as amended by the Supreme Court (Amendment) Rules¹¹¹ and the Supreme Court (Amendment) Rules.¹¹² CI 16 is not of much help because the closest indication it gives of time limits is that the Supreme Court must deliver its judgment 'at the conclusion of the hearing of the petition'.¹¹³ Moreover, CI 24 does not contain any provisions on timelines for the institution and determination of presidential election disputes. But CI 74 appears to have been passed with the expeditious disposition of presidential election disputes in mind. It provides that the Supreme Court must deliver its judgment not later than 15 days upon the conclusion of the hearing of the petition.¹¹⁴ Additionally, CI 74 provides that the Supreme Court's decision in presidential election disputes is final and not open to review.¹¹⁵ However, the Supreme Court has struck down this finality clause in one of its judgments.¹¹⁶ The implication of this state of the law is that the Supreme Court can

¹⁰⁸ n 20 above, paras 6-18.

¹⁰⁹ Kenya's Raila Odinga "to continue struggle peacefully" <http://www.bbc.co.uk/news/world-africa-21985744> (accessed 2 October 2013).

¹¹⁰ 1996 (CI 16).

¹¹¹ 1999 (C I 24).

¹¹² 2012 (CI 74).

¹¹³ Rule 71.

¹¹⁴ Rule 69C.

¹¹⁵ Rule 71B.

¹¹⁶ *Nana Akufo-Addo* (n 25 above) 308.

review its decision in a presidential election dispute in terms of article 133(1) of the 1992 Constitution.

According to rule 54(a)¹¹⁷ which was enacted pursuant to article 133(1), the Supreme Court can review its decisions if two conditions are fulfilled. The first is if an applicant can prove that exceptional circumstances have led to a miscarriage of justice; or secondly, if an applicant discovers new and important evidence which no amount of due diligence could have revealed to the applicant at the time of the original hearing.¹¹⁸

What these provisions imply vis-à-vis the *Nana Akufo-Addo* case is that after it took the Supreme Court eight months and one day to deliver its judgment¹¹⁹ the finality of the case could have been further deferred to a later date if the petitioners had invoked article 133(1) and rule 54(a). Clearly this state of the law cannot be reasonably said to be ideal.

Another concern is that in Ghana, the institution of a presidential election dispute does not preclude the person whose victory is challenged from being sworn in as president.¹²⁰ But it cannot be overemphasised that the moral legitimacy of and public confidence in the government of such a president depends upon the final determination of a presidential election dispute to which he or she is a respondent. It is therefore important that a dispute regarding the validity of his or her election is resolved expeditiously so that the administration of government is not unduly encumbered.¹²¹ This author is therefore puzzled that the drafters of the 1992 Constitution omitted to stipulate a finality clause and a timetable for the disposition of presidential election disputes in Ghana.

This chapter compares the practical advantage(s) or disadvantage(s) of the non-provision in the 1992 Constitution of temporal provisions for the disposition of presidential election disputes with the stipulation of such provisions in the 2010 Constitution of Kenya. It assesses how both the Ghanaian and Kenyan positions impact on democratic governance.

3.2.1 Merit of the Ghanaian position

It appears the sole advantage of the Ghanaian position is time. According to article 64(1) of the 1992 Constitution, a presidential election petition must be filed 'within twenty-one days after the declaration of the result of the election in respect of which the petition is presented'. Accordingly,

¹¹⁷ CI 16.

¹¹⁸ For a detailed examination of the circumstances under which the review jurisdiction of the Supreme Court can be triggered, see *Tsatsu Tsikata (No 2) v Attorney-General (No 2)* [2001-2002] SCGLR 622-628.

¹¹⁹ The petition was filed on 28 December 2012 and judgment was delivered on 29 August 2013.

¹²⁰ Art 64(2); see also *Nana Akufo-Addo* (n 25 above) 304.

¹²¹ *Raila Odinga* (n 20 above) para 217.

from the date the Chairman of the EMB declares presidential election results, a petitioner has up to 21 days to file a petition to contest the validity of the results. Thereafter, the named respondents have 10 days from the date of the service of the petition on them to file their answer.¹²²

The Supreme Court is also given the discretion to allow the parties to amend their pleadings.¹²³ So in the *Nana Akufo-Addo* case, the Supreme Court granted leave for the petition to be amended twice.¹²⁴ Finally, because the 1992 Constitution does not state the time for the conclusion of pre-trial conferences in presidential election disputes, another four months was spent on pre-trial sittings in the *Nana Akufo-Addo* case.

Therefore, it is this author's view that the 1992 Constitution makes the Ghanaian position very advantageous in the sense that it affords the parties sufficient time to meticulously gather the evidence that would found their respective claims and responses.

3.2.2 Demerits of the Ghanaian position

It is on record that during the pendency of the *Nana Akufo-Addo* case, the Ghanaian economy stalled because the inflow of foreign direct investments decreased. According to Ghana's Minister of Trade and Investment, Ghana lost approximately US\$2 billion in foreign investments because of the 'eight-month long' election petition.¹²⁵

Reports also indicate that during that period, Ghana was declared a risky place to do business.¹²⁶ This plunged the business environment into a state of uncertainty,¹²⁷ reduced investor confidence in the political stability of Ghana,¹²⁸ and caused most investors to delay investment decisions.¹²⁹ In fact, it has been predicted that Ghana's economy would grow by just a little over eight percent in 2013 partly because of losses incurred during the pendency of the dispute.¹³⁰

It was not only in terms of foreign direct investment that Ghana recorded economic losses. Because of the enormous national interest in the petition and also to address issues regarding the transparency of the process, the Chief Justice directed that the proceedings be broadcast live on television. This automatically meant that the state owned broadcaster, Ghana Broadcasting

¹²² Rule 69A (1) (a), CI 74. Rule 69 of CI 16 gave a petitioner 21 days from the date of service to file their answer.

¹²³ Rule 49, CI 16.

¹²⁴ n 25 above, 3.

¹²⁵ NPP's election petition cost Ghana \$2bn – Haruna Iddrisu' 10 September 2013

<http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=285332> (accessed 30 September 2013).

¹²⁶ <http://maplecroft.com/about/news/country-reports-ghana-january9.html> (accessed 30 September 2013).

¹²⁷ <http://maplecroft.com/about/news/election-monitors-december12.html> (accessed 30 September 2013).

¹²⁸ As above.

¹²⁹ X Rice 'Ghana anxiously awaits court ruling on disputed December poll' <http://www.ft.com/cms/s/0/b3131ecc-0b3b-11e3-bffc-00144feabdc0.html#axzz2gMiMBXZF> (accessed 30 September 2013).

¹³⁰ 'Ghana's election: Still shining' 15 December 2012 <http://www.economist.com/news/middle-east-and-africa/21568385-despite-disputes-over-election-result-ghana-still-success-story-still> (accessed 30 September 2013).

Corporation (GBC), had to cover the proceedings. The financial cost of the production, transmission and live telecast over the period turned out to be gargantuan.

According to the acting deputy director of the GBC, the GBC expended about US\$1.7 million on the live coverage of the proceedings alone.¹³¹ It is also on record that other television companies spent approximately US\$22 704 daily on the live telecast of the proceedings and also incurred financial losses in respect of the interruption of programmes that had already been paid for.¹³²

Apart from the humongous economic implications of lengthy hearings as demonstrated by the Ghanaian position, delays in bringing closure to presidential election disputes can also have far reaching political consequences: lengthier hearings increase political tension, deepen polarisation and impede social cohesion.¹³³

Another disadvantage is that the absence of a specific timetable creates uncertainty, undermines the rule of law and provides a fertile ground for the abuse of court processes by parties, lawyers and even courts.

As regards abuse of the court process by parties, in Ghana for example, the parties capitalised on the absence of the strict timelines to make several interlocutory applications for the amendment of their petition and answers to petition. This delayed the pre-trial phase of the hearing and contributed to the overall delay in the resolution of the dispute.¹³⁴

Also, the ten days that counsel for the third respondent spent on cross examining the second petitioner in the *Nana Akufo-Addo* case is an example of how lawyers can abuse the absence of strict temporal provisions in a constitution for the speedy resolution of presidential election disputes.¹³⁵

In respect of abuse by the court itself, when a constitution is silent on a fixed timetable for the determination of presidential election disputes, the courts can spend an inordinately long time on implementing certain administrative measures that are a precondition for the commencement of

¹³¹'Live broadcast of Supreme Court election petition hearing cost GBC Gh¢3.5m' 29 August 2013 <http://gbcghana.com/index.php?id=1.1505796> (accessed 30 September 2013).

¹³²'TV stations lose Gh¢47, 680 daily for live coverage of election petition' <http://www.modernghana.com/news/461204/1/tv-stations-lose-gh-47680-daily-for-live-coverage-.html> (accessed 30 September 2013).

¹³³ Y Ngege 'Kenya 2013 elections: Reflections on the Supreme Court ruling and the role of the judiciary in democratisation' 18 April 2013 <http://www.opendemocracy.net/yuhniwo-ngege/kenya-2013-elections-reflections-on-supreme-court-ruling-and-role-of-judiciary-in-dem> (accessed 30 September 2013).

¹³⁴ See *Nana Akufo-Addo* (n 25 above) 314-315.

¹³⁵'Tsatsu Tsikata ends 10-day cross examination' <http://elections.peacefonline.com/politics/201305/164327.php?storyid=100&> (accessed 4 October 2013).

the hearing itself. In this regard it can be reasonably argued that the Sierra Leonean Chief Justice may have spent lesser than five months in empanelling a bench to hear the *SLPP* case if the 1991 Constitution contained a fixed timeline for resolving presidential election disputes.¹³⁶

Moreover, the Ghanaian position which permits the person whose victory is disputed to be sworn in as president pending the determination of the suit is inequitable. This is because it creates an unlevel playing field in which the petitioners must contest against a sitting president.

Furthermore, it defeats the essence of the challenge, which is to determine whether the respondent has the legitimate mandate of the electorate to lead the country. This author disagrees with the suggestion that there would otherwise be a hiatus in the executive leadership of the country.¹³⁷ This is because in Ghana, as in other jurisdictions, the devolution of executive power is such that at all material times the functions of the presidency are exercised by the President or in his or her absence the Vice-President or Speaker of Parliament or the Chief Justice.¹³⁸ So even when the tenure of the incumbent President, Vice-President and Speaker of Parliament expires during the pendency of a presidential election dispute, the Chief Justice can act in the interim. But of course since it is undesirable to have a Chief Justice to act as President for a long period, that is why it is all the more important to resolve presidential election disputes within a reasonable time.

Another demerit of the Ghanaian position is that a declaration of invalidation can have potentially onerous consequences for the administration of government. According to article 64(2), '[a] declaration by the Supreme Court that the election of the President is not valid shall be without prejudice to anything done by the President before the declaration.' Even though this provision is positive in that it allows the 'president' to carry on with government business in spite of the challenge to the validity of his or her election, it is dangerous for the following reason. In the event of the invalidation of his or her election, succeeding governments must honour all executive commitments made by the invalidated president's administration, including even obviously disadvantageous commitments, or in default face legal suits or diplomatic sanctions.

Finally, it would appear that if the court invalidates an election and does not order a rerun or fresh elections but instead declares the petitioner as the winner, it may amount to a hijacking of the electoral process by the unelected arm of government, albeit with constitutional backing. In such cases, the electorate is likely to feel alienated from the decision-making process leading to the

¹³⁶ Kamada & Tommy (n 38 above).

¹³⁷ *Nana Akufo-Addo* (n 25 above) 304-305.

¹³⁸ Arts 57(1), (2) & 60(11), 1992 Constitution; see also art 139, 2010 Constitution and art 104(7), 1991 Constitution.

determination of who becomes their leader. This feeling of disenfranchisement can lead to a rejection of the court's decision and spark conflict. The political crisis that was experienced in Cote d'Ivoire after the Constitutional Council reversed the 2010 presidential elections results and proclaimed Mr Gbagbo as president instead of Mr Ouattara is an illustration of this point.

3.2.3 Advantages of the Kenyan position

Article 140(1) of the 2010 Constitution of Kenya provides that:

[a] person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.

Also, according to rule 7(2) of the Supreme Court (Presidential Election Petition Rules)¹³⁹ a petitioner must serve the petition on the respondent(s) within two hours after filing it at the Supreme Court registry. Thereafter, '...a respondent who wishes to oppose the petition may within three days of service of the petition file a response'.¹⁴⁰

Furthermore, from a combined reading of rules 9(1) and 11 of the Petition Rules, the maximum duration of the pre-trial conference is two days. Finally, article 140(2) provides that '[w]ithin fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final'.

Accordingly, as the 2010 Constitution and subsidiary legislation on presidential elections currently stand, the outcome of a presidential election dispute in Kenya must be known in no more than 14 days. One obvious reason for these strict timelines is to ensure that the legal challenge is resolved before the swearing in of the president-elect.¹⁴¹

From these temporal provisions, it can be said that the first benefit of the Kenyan position is that it allows for the speedy resolution of presidential election disputes in compliance with international and continental standards mentioned.¹⁴²

Secondly, the fixed nature of the timetable creates certainty. So from the economic perspective, any delays in investment decisions would only be for a fortnight. The beneficial result is that any economic losses from the reduction of the inflow of foreign direct investment are unlikely to be as enormous as what was experienced in Ghana during the pendency of the *Nana Akufo-Addo* case.

¹³⁹ 2013 (Petition Rules).

¹⁴⁰ Rule 8(1), Petition Rules.

¹⁴¹ Art 141(b), 2010 Constitution.

¹⁴² Art 14(3) (c), ICCPR; art 8, ACHR; art 6 ECHR and art 17(2), ACDEG.

Furthermore, due to the brevity of the time, media houses are very likely to incur lesser financial losses and expenditure in respect of the production, transmission and live broadcast of the proceedings.

Also, another advantage is that the political atmosphere is tense for only a short and predetermined period of time. Finally, the question of who has the valid mandate of the people to legitimately serve as president is settled before the swearing in of the president-elect. Therefore, the essence of the challenge is preserved. The playing field is also level as the contest is between equals and a petitioner and a sitting president.

3.2.4 Disadvantage of the Kenyan position

It is this author's view that perhaps the only disadvantage of the Kenyan position is that it gives respondents only three days to respond to a petition that the petitioners had seven days to prepare. Admittedly, rules of procedure fix timelines by which parties must file their cases because it is in the public interest that litigation does not continue in perpetuity.¹⁴³ However, equity must not be sacrificed at the altar of expedition in a way that unreasonably hastens the time for respondents to file their court processes. After all, respondents have a right to fair hearing,¹⁴⁴ which includes being afforded a reasonable and equitable time within which to present their case.

Based on the merits and demerits above, it is this author's view that the Kenyan model is preferable to the Ghanaian model. It is clear from the overall advantages it presents that there is greater value in stipulating a fixed timetable in a constitution for the resolution of a presidential election dispute.

But one of the main reservations this author has with the Kenyan position is the shorter time it gives respondents to file an answer to a petition. Although it is important that presidential petitions are disposed of in a timely manner, the need to act swiftly must be properly balanced with the need to dispense justice. Otherwise, it has been observed that any undue rush can lead to a miscarriage of justice because 'justice hurried is justice buried'.¹⁴⁵

It may very well be that the omission of such a strict timetable in the 1992 Constitution is intended to assure that a petitioner accesses justice fairly and effectively.¹⁴⁶ But because presidential election disputes have implications for social cohesion and national integration,¹⁴⁷ the right of

¹⁴³ *Conca Engineering (Ghana) Ltd v Moses* [1984-86] 2 GLR 325.

¹⁴⁴ Art 50, 2010 Constitution; see also art 19, 1992 Constitution.

¹⁴⁵ *Nana Akufo-Addo* (n 25 above) 306-307; see also Sarokin (n 101 above) 431.

¹⁴⁶ 'Report of the Constitution Review Commission: From a political to a developmental constitution' (CRC report) 20 December 2011 para 74(f) <http://www.ghana.gov.gh/index.php/information/reports/2573-report-of-the-constitution-review-commission> (accessed 15 September 2013).

¹⁴⁷ *Ojo* (n 37 above) 101.

petitioners to be afforded all the opportunity to present their cases must be fairly balanced with the public interest to resolve presidential elections disputes expeditiously. After all although litigants need adequate time to present their cases, it is the probative value of the evidence they adduce in support of their claims that ultimately matters and not necessarily the abundance of time at their disposal as Ofori-Atta appears to suggest.¹⁴⁸

It is also apparent from the time spent on the *Nana Akufo-Addo* case that CI 74 as subsidiary legislation may be insufficient to inject expedition into the determination of presidential election disputes in Ghana. This author actually doubts that its temporal provisions would ever be strictly enforced by the judiciary in the absence of explicit constitutional backing.

Thus, it can be reasonably argued that a holistic assessment of the current position of Ghanaian law is that it does not provide for the expeditious resolution of presidential disputes. This author therefore disagrees with the assertion that '[i]t is deducible from Article 1(2), 64(1) and (3) and Part VIII of C.I. 16 aforesaid that a presidential election petition is intended to be determined with the utmost expedition'.¹⁴⁹ This is because neither these provisions nor any other constitutional provisions on the subject evince the need for speedy resolution of presidential election disputes in Ghana.

The point this author wishes to stress is that the Kenyan and Ghanaian models on which this research focuses present two extremes that have inherent flaws. Therefore, the better way forward would be to marry the two positions and attain a hybrid model that facilitates expedition and yet ensures that all parties are given equal and reasonable time to present their cases.

3.3 Judicial qualities that enhance democracy in the resolution of presidential election disputes

The independent and impartial manner in which the judiciary resolves disputes, including presidential election disputes, indicates the level of maturity of a country's democracy.¹⁵⁰ In exercising its judicial function the judiciary must be reasonably seen to be independent from the executive and the legislature in accordance with the principle of the separation of powers.¹⁵¹ Also, if the decisions of a judiciary cannot be predicted with precision, that is a good indicator that it is impartial and independent.

¹⁴⁸K Ofori-Atta 'Democracy looks to Ghana's supreme court' 7 June 2013 <http://www.theafricareport.com/Soapbox/democracy-looks-to-ghanas-supreme-court.html> (accessed 18 September 2013).

¹⁴⁹ *Nana Akufo-Addo* (n 25 above) 119-120.

¹⁵⁰ *Nana Akufo-Addo* (n 25 above) 51.

¹⁵¹ *Nana Akufo-Addo* (n 25 above) 233-235.

The independence and impartiality of the judiciary in resolving presidential disputes are crucial to democratic governance. This is because they have direct implications for whether the electorate would accept its judgment as credible, legitimate and binding or reject it as compromised. If they accept it, the involvement in the judiciary in the dispute resolution process strengthens democratisation. But if they reject it, that can lead to conflict and derail the democratisation process.

Thus, the independence and neutrality of a judiciary are assets to both the rule of law and the protection of fundamental liberties.¹⁵² Therefore, it is absolutely important to democratic governance to ensure that judges are not stooges of the executive or legislature in order to maintain the integrity of their decisions.¹⁵³ This is because when the judiciary is shielded from external influence, it is in a better position to be strong and deliver judgments that consolidate democracy.¹⁵⁴ The traditional way of strengthening the judiciary has been to guarantee its independence in constitutions through the entrenchment of such matters as the appointment, dismissal and emoluments of judges,¹⁵⁵ and also by exclusively reserving the resolution of judicial matters for the judiciary.¹⁵⁶ This way, judges are able to efficiently play their vanguard role in democratic governance.¹⁵⁷

3.4 Conclusion

When the judiciary is generally reputed to be strong, independent and fair, its involvement in the resolution of presidential disputes deepens the rule of law, ensures stability and strengthens democratic governance.¹⁵⁸ On the other hand, even a mere perception that the judiciary is compromised greatly undermines judicial integrity, erodes trust and confidence in the judicial process, and can ultimately lead to a breakdown of law and order. Indeed, the violence and instability that was witnessed in Cote d'Ivoire after the Constitutional Council's proclamation of Mr Gbagbo as president is a good example of the corrosive and counterproductive effect a judiciary that is perceived to be biased can have on democratic governance.

The judiciary is therefore a pivotal institution in a constitutional order. First, it can be an effective tool for political control. It can be used to check abuse of power by the executive and legislature.

¹⁵² L Madhuku 'Constitutional protection of the independence of the judiciary: A survey of the position in Southern Africa' (2002) 46 *Journal of African Law* 245.

¹⁵³ A Chatterjee 'Independence of the judiciary' (1973) 2 *Social Scientist* 65.

¹⁵⁴ A Aydin 'Judicial independence across democratic regimes: Understanding the varying impact of political competition' (2013) 47 *Law & Society Review* 105.

¹⁵⁵ H Burton 'An independent judiciary: The keystone of our freedom' (1953) 39 *American Bar Association Journal* 1067.

¹⁵⁶ Madhuku (n 152 above) 232-233.

¹⁵⁷ Art 33, 1992 Constitution and art 20(4) (a) & (b), 2010 Constitution.

¹⁵⁸ M Harfe 'Supreme Court decision: Ghana's 2012 presidential election' 29 August 2013 <http://www.state.gov/r/pa/prs/ps/2013/08/213617.htm> (accessed 18 September 2013).

It can also be used to manage the conflicts that arise from the scramble for power and economic resources that are inherent in multiparty electoral democracies. Second, the judiciary is an agent of democratic advancement and sustenance: it upholds the rule of law and ensures justice. But whether or not a judiciary can actually be an effective oversight institution depends upon the powers that a society gives it. It can only contribute to the survival and prosperity of democracy if governmental power is deployed in a manner that makes it strong, independent and competent.

Since a strong, independent and competent judiciary is central to democracy, it is expedient that measures are implemented to ensure that the judiciary has democracy enhancing qualities. Indeed, dissatisfied candidates in presidential elections will only pursue judicial avenues for resolving their differences if the capacity of the judiciary is built such that it is seen as a credible mediator and trustworthy partner in the democratisation process.

Beyond this, the judiciary itself must also take advantage of its constitutional security and resolve presidential election disputes in a neutral manner. This will foster political stability and social harmony and enhance democratisation. The judiciary must exhibit integrity, impartiality, independence and competence in its resolution of presidential election disputes because otherwise it could suffer from a credibility crisis, which can trigger conflict and weaken the democratisation process.

Chapter 4

Lessons from the *Raila Odinga* and *Nana Akufo-Addo* cases

4.1 Introduction

With the possible exceptional Ivorian¹⁵⁹ and Ukrainian examples,¹⁶⁰ most presidential election results have been unsuccessfully challenged. The numerous unsuccessful petitions in Africa so

¹⁵⁹ See generally Human Rights Watch (n 32 above).

¹⁶⁰ http://news.bbc.co.uk/onthisday/hi/dates/stories/december/27/newsid_4408000/4408386.stm (n 47 above).

far include the Kenyan,¹⁶¹ Nigerian,¹⁶² Sierra Leonean,¹⁶³ Ugandan,¹⁶⁴ Zambian,¹⁶⁵ Ghanaian¹⁶⁶ and Zimbabwean¹⁶⁷ cases listed in chapter one.

In all of these unsuccessful presidential election disputes, although the petitioners alleged non-compliance with electoral laws and adduced evidence in support of same, the courts held that the irregularities were not substantial enough to affect the validity of the results. Therefore, they declined to invalidate the results. This raises questions about the burden and standard of proof applicable in presidential election disputes and how they are discharged.

Using the *Raila Odinga* and *Nana Akufo-Addo* cases as the main reference point, this chapter does three things. First, it examines the evidentiary rules, especially the burden and standard of proof that must be discharged in presidential election disputes. Second, based on the relevant case-law it discusses the circumstances under which the courts would invalidate presidential elections results. Finally, it ends with a commentary on the extra legal matters that occasionally influence judges when they are confronted with presidential election disputes. But before launching into these discussions, an account of the facts and holdings of both cases is necessary as a background.

4.1.1 The *Raila Odinga* case

On 9 March 2013, the chairman of Kenya's EMB, Mr Issack Hassan announced Mr Kenyatta as the winner of the 2013 presidential race. It was the first time in Kenya's history that biometric voting technology was used. According to Mr Hassan, Mr Kenyatta polled 6 173 433 out of a total of 12 338 667, representing 50.07% of all the votes cast. His closest contender, Mr Raila Odinga garnered 5 340 546 votes, representing 43.31% of all the votes cast. Consequently, pursuant to article 138(4) of the 2010 Constitution Mr Hassan declared Mr Kenyatta as the president-elect of Kenya. This automatically meant that Mr Kenyatta's running mate, Mr William Ruto, became the deputy president-elect.

Following the announcement, three separate petitions were filed at the Supreme Court of Kenya challenging the validity of Mr Kenyatta's election. The first petition, which was filed by three persons against the EMB and its chairman as the respondents alleged that the inclusion of rejected votes by the first and second respondents in the final tallying of the results had the

¹⁶¹ n 20 above.

¹⁶² n 22 above.

¹⁶³ n 24 above.

¹⁶⁴ n 23 above.

¹⁶⁵ n 21 above.

¹⁶⁶ n 25 above.

¹⁶⁷ n 26 above.

prejudicial effect of increasing the percentage votes won by Mr Kenyatta and decreasing that of the petitioners. They asserted that this was an irregularity in contravention of articles 36(b) and 138(c) of the 2010 Constitution and rule 77(1) of the Elections (General) Regulations.¹⁶⁸

The second petition was filed by two people against the EMB, its chairman, Mr Kenyatta and Mr Ruto. This petition urged the Supreme Court to annul the results because they alleged the elections were not conducted substantially in accordance with the 2010 Constitution and electoral laws of Kenya. First, they averred that the EMB failed to establish and maintain an accurate voter register. Second, that the credibility of the electoral system was compromised due to the failure of the electronic management system to electronically transmit the results. Finally, that in addition to the failure of the EMB and its officials to tally and verify results at the polling stations as mandated by law, they excluded designated party agents from the National Tallying Centre in contravention of the law.

The third petition was filed by Mr Odinga against the EMB, its chairman, Mr Kenyatta and Mr Ruto. First, it alleged that the EMB failed to develop and maintain a credible voter register and so there was a material difference between the total number of registered voters announced during the declaration of the results and the figure in the voter register that had been circulated to political parties before the elections. Further, that the failure of the electronic voting technology systems to electronically transmit the results was fatal to the whole exercise. Finally, that the elections were fraught with several instances of over voting, errors in the manual tallying of results and the declaration of results using declaration forms that had not been signed by the relevant agents of the EMB.

After the Supreme Court consolidated the cases on 25 March 2013, Mr Odinga was designated the first petitioner, the second petitioners were jointly made the second petitioner and the first petitioners were jointly referred to as the third petitioner. The EMB, its chairman, Mr Kenyatta and Mr Ruto were designated the first, second, third and fourth petitioners respectively. The respondents opposed all the allegations contained in the petition.

It was agreed that the main issue for determination was whether the third and fourth respondents were validly elected as president-elect and deputy president-elect respectively. To arrive at a determination of this issue, the Supreme Court set down two main issues: one, whether the

¹⁶⁸ 2012 (Election Regulations).

presidential election was conducted in a free, fair, transparent and credible manner in compliance with Kenyan law; and two, whether the second respondent erred in including rejected votes in its tally of the final votes cast in favour of each presidential candidate.

After analysing the facts in the light of relevant national, regional and international jurisprudence, the Supreme Court held that the third and fourth respondents were validly elected. According to the Supreme Court, because of imperfections associated with electronic voting technology, section 39 of the Elections Act,¹⁶⁹ and regulation 82 of the Elections Regulations had to be construed to mean that the electronic transmission of results is neither exclusive nor mandatory in Kenya. It therefore held that the EMB exercised its discretion properly when it resorted to the manual tallying of votes when the electronic system failed.¹⁷⁰ The Supreme Court unanimously held on this score that no injustice resulted from the fact that the EMB did not use the electronic system exclusively throughout the elections.

Furthermore, the Supreme Court held that the petitioners failed to prove that the tallying system used by the first and second respondents inflated the votes of the third respondent but deflated that of the petitioners.¹⁷¹ Additionally, it was not satisfied on the evidence that the discrepancies in the voter register were of a magnitude that could adversely affect the elections. In its words,

Although, as we find, there were many irregularities in the data and information-capture during the registration process, these were not so substantial as to affect the credibility of the electoral process; and besides, no credible evidence was adduced to show that such irregularities were premeditated and introduced by the 1st Respondent, for the purpose of causing prejudice to any particular candidate.¹⁷²

It therefore held that the voter registration process was generally transparent, accurate and verifiable and so the voter register which resulted from that registration process was generally credible.¹⁷³

Finally, as regards the issue of the rejected votes, the Supreme Court held that 'all the votes cast' in article 138(4) (a) of the 2010 Constitution could only properly refer to only the valid votes cast in the election. Accordingly, it noted that the rejected votes ought not to have been included in the computation of the total votes of the candidates. That notwithstanding, the Supreme Court did not uphold the petitioners' claim on this ground. Instead, while acknowledging that it was irregular for

¹⁶⁹ 24 of 2011.

¹⁷⁰ *Raila Odinga* (n 20 above) para 235.

¹⁷¹ *Raila Odinga* (n 20 above) para 246.

¹⁷² *Raila Odinga* (n 20 above) para 256.

¹⁷³ *Raila Odinga* (n 20 above) para 257.

the EMB to have included rejected votes in the final tallying, the Supreme Court held that the petitioners failed to prove that the inclusion distorted the election results such that they were not a reflection of the electoral intent of the Kenyan people.¹⁷⁴ In unanimously dismissing the petition, it held that:

In summary, the evidence, in our opinion, *does not disclose any profound irregularity* in the management of the electoral process, nor does it gravely impeach the *mode of participation* in the electoral process by any of the candidates who offered himself or herself before the voting public. It is *not evident*, on the facts of this case, that the candidate declared as the President-elect had not obtained the basic vote-threshold justifying his being declared as such.¹⁷⁵

4.1.2 The Nana Akufo-Addo case

On 7 December 2013, Ghanaians went to the polls to elect a new president. It was the first time in Ghana's history that biometric voting technology was employed. It was also the first time since the commencement of the Fourth Republic that voting occurred on more than one day, spilling over from 7 to 8 December. On 9 December 2013 the chairman of the EMB, Dr Kwadwo Afari-Gyan, declared that 5 574 761 votes representing 50.70% of the total votes were cast in favour of Mr John Dramani Mahama. He also announced that 5 248 898 representing 47.74% of the votes went in favour of Nana Addo Dankwa Akufo-Addo, the closest challenger. Based on these results, Dr Afari-Gyan declared Mr Mahama as the winner of the presidential elections in accordance with article 63(9) of the 1992 Constitution.

On 28 December 2012, a petition was filed at the Supreme Court by Mr Akufo-Addo as the first petitioner, Dr Mahamudu Bawumia – his running mate – as the second petitioner and the chairman of their New Patriotic Party, Mr Jake Otanka Obetsebi-Lamphey as the third petitioner. Mr Mahama was named in the petition as the first respondent while the EMB was made the second respondent. The National Democratic Congress, the party on whose ticket the Mr Mahama contested and won the elections successfully applied and was joined as the third respondent. On 7 January 2013, while the petition was still pending before the Supreme Court, Mr Mahama was sworn into office as president in accordance with the 1992 Constitution.¹⁷⁶

By their second amended petition, the petitioners sought an order setting aside the election and swearing in of Mr Mahama as president. They alleged that the elections had been marked by the following six categories of non-compliance, in various combinations, with Ghana's electoral laws:

¹⁷⁴ *Raila Odinga* (n 20 above) paras 303-304.

¹⁷⁵ *Raila Odinga* (n 20 above) para 306. For similar comments on when the courts would treat non-compliance as being of such a magnitude as to result in the invalidation of presidential election results see also *Nana Akufo-Addo* (n 25 above) 42-45.

¹⁷⁶ Art 64(2); see also *Nana Akufo-Addo* (n 25 above) 304.

over voting, voting without biometric verification, the absence of signatures of presiding officers on some result declaration forms, duplicate serial numbers, duplicate polling station codes, and results from polling stations unknown to the 26 002 polling stations of the country. They averred that if the Supreme Court annulled 4 381 145 votes from 11 138 of the 26 002 polling stations of the country, the results would tilt in favour of the first petitioner. Accordingly, they prayed for an order annulling those votes and for a declaration that Mr Akufo-Addo instead of Mr Mahama was the validly elected president of Ghana. As is to be naturally expected, the respondents opposed the averments contained in the petition.

After perusing the evidence on record, the Supreme Court unanimously found no merit in the last three allegations and accordingly dismissed them. It therefore resolved the case based on the allegations of over voting, voting without biometric verification and the absence of the signature of presiding officers on some result declaration forms.¹⁷⁷ The main issue for determination was whether the first respondent was validly elected as president of Ghana. To arrive at a determination, the Supreme Court set down the following issues: first, whether there had been violations against the electoral laws in the conduct of the presidential elections; and second, if there were such violations, whether they affected the election results.

In a sharply divided opinion, the Supreme Court decided by a very narrow margin of a five-to-four majority that Mr Mahama had been validly elected as president. While four judges held that the alleged instances of over voting, voting without biometric verification and the absence of the signature of the presiding officers on some of the declaration forms were fatal to the validity of the election of the first respondent, the other five judges were of the opposite opinion.

It must be mentioned that the minority decision itself was not unanimous in its outcome because of the interesting conclusions of some of the judges. Four judges in the minority were satisfied that the petitioners had proven the allegations of over voting, voting without prior biometric verification and the declaration of results using irregular forms. But while three of them ordered a rerun of elections at the affected polling stations,¹⁷⁸ one made an order for the conduct of fresh presidential elections.¹⁷⁹ Also, Baffoe-Bonnie JSC who had generally voted in support of the majority opinion found for the petitioners in respect of the allegation of voting without prior biometric verification. Therefore, he ordered for a rerun of elections at the affected polling stations

¹⁷⁷ *Nana Akufo-Addo* (n 25 above) 3-4.

¹⁷⁸ *Nana Akufo-Addo* (n 25 above) 101, 218, 231-232 & 418-419.

¹⁷⁹ *Nana Akufo-Addo* (n 25 above) 505-506.

in respect of that allegation alone.¹⁸⁰ But collectively, the minority view was that because of the mandatory nature of the electoral laws, the various infractions against them were 'monumental irregularities' that could not be mitigated by any lenient considerations.¹⁸¹

But in the end, what holds sway is the majority opinion that dismissed the petition. First, the majority held that it was unfair to visit the administrative blunders of EMB agents upon the electorate, especially when those errors could be corrected by court orders.¹⁸² Therefore, it declined to cancel votes based on the allegations of voting without prior biometric verification and the declaration of results using irregular forms.¹⁸³ In respect of the former, the majority also took judicial notice of the fact that the elections were continued on 8 December 2012 to enable voters whose biometrics could not be verified at polling stations where the biometric machines had broken down on 7 December to be able to vote.¹⁸⁴ In respect of the declaration of results using irregular forms, it was observed that the number of irregular declaration forms were not so much as to make any impact on the election results. In support of this, Akoto-Bamfo JSC held that:

elections cannot be perfect so when we are faced with the consideration of irregularities that are alleged to have occurred in an election, we should exercise a reluctance in striking down every single vote just by reference to a provision of the law. On the contrary, the irregularity must have affected the integrity of the elections.¹⁸⁵

Finally, the majority held that the petitioners failed to prove the allegation of over voting except to the limited extent admitted by Dr Afari-Gyan, which it held 'cannot impact much on the declared results.'¹⁸⁶ Indeed, Adinyira JSC held that the mere fact that there had been setbacks in the elections did not without more automatically mean that the results had been adversely affected.¹⁸⁷

It is obvious from the two judgments that both the 2012 and 2013 presidential elections in Ghana and Kenya were marred by instances of non-compliance with the relevant electoral laws. Indeed, the respondents did not deny that, and the courts also acknowledged the imperfections. However, the prevailing consideration in the determination of both cases was whether the non-compliance was substantial enough to have adversely impacted on the results. While the Kenyan Supreme Court unanimously held that the non-compliance did not significantly affect the validity of the

¹⁸⁰ *Nana Akufo-Addo* (n 25 above) 543.

¹⁸¹ *Nana Akufo-Addo* (n 25 above) 65-73.

¹⁸² *Nana Akufo-Addo* (n 25 above) 37.

¹⁸³ *Nana Akufo-Addo* (n 25 above) 16.

¹⁸⁴ *Nana Akufo-Addo* (n 25 above) 25.

¹⁸⁵ *Nana Akufo-Addo* (n 25 above) 543 & 565-566.

¹⁸⁶ *Nana Akufo-Addo* (n 25 above) 28.

¹⁸⁷ *Nana Akufo-Addo* (n 25 above) 131.

results and so did not warrant a declaration of invalidation, in Ghana it was the majority of the bench that held the same view.

So what is substantial non-compliance, and under what circumstances would the courts invalidate presidential election results because there has been substantial non-compliance?

4.2 Circumstances under which the courts would invalidate presidential election results because of non compliance with electoral laws

According to Halsbury's Laws of England the general position of the law is that:

No election is to 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 appropriate elections rules if it appears to the tribunal having cognizance of the question that the election was conducted substantially in accordance with the law as to the elections, and that the act or omission did not affect the result.¹⁸⁸

So in *Medhurst v Lough Casquet*,¹⁸⁹ Kennedy J observed that election results should not be declared void just because there had been inadvertent breaches of the law by EMB officials, provided that in spite of the breaches the court is satisfied that the elections were conducted in substantial compliance with the electoral laws and that the breaches could not adversely impact on the success of one candidate over the other(s). These views by Kennedy J in the *Medhurst* case were rehashed by the Ghanaian Supreme Court speaking through Ansah JSC.¹⁹⁰

The justification for not invalidating election results merely because there have been administrative breaches appears to lie with the authorship of the infractions. The general thinking in the jurisprudence is that it is unfair and contrary to the principles regulating adult suffrage that the administrative sins of election officials be visited upon voters so long as the latter have voted in accordance with the law.

So in *Opitz v. Wrzesnewskyj*, the court observed that:

By contrast, if a vote cast by an entitled voter were to be rejected in a contested election application because of an irregularity, the voter would be irreparably disenfranchised. This is especially undesirable when the irregularity is outside of the voter's control, and is caused solely by the error of an election official.¹⁹¹

¹⁸⁸ Vol 15(4), Fourth edition, para 670.

¹⁸⁹ [1901] 17 LTR 230.

¹⁹⁰ *Nana Akufo-Addo* (n 25 above) 95.

¹⁹¹ (2012) SCC 55-2012-10-256 para 66; see also *McCavitt v Registrars of Voters of Brockton* 626 (Mass. 1982).

Similarly, in the *Nana Akufo-Addo* case, Adinyira JSC held that so long as voters cast their ballot in good faith their votes should not be annulled just because an officer failed to perform some duty imposed upon by law.¹⁹² However, there are exceptions to the general principle as stated above in Halsbury's Laws of England.¹⁹³

First, it has been held that whenever the court is satisfied that the legal trespasses are of such a magnitude that they have resulted in substantial non-compliance with the existing electoral laws, or that there is a reasonable doubt that the breaches have affected the results¹⁹⁴ and it is open to doubt whether the returned candidate actually won the majority of the votes from the election, then the court is under an obligation to declare the elections void.¹⁹⁵

It is from this perspective that *Morgan & Others v Simpson & Others*¹⁹⁶ must be understood. The English Court of Appeal had occasion to consider the conditions under which electoral results could be nullified on grounds of violations of electoral statutes. According to the facts, the votes in the ballot box at an election were 23 691. Forty-four of these were rejected because some officials at 18 polling stations had inadvertently not affixed the official stamps to the ballot papers. The winner won by a majority of 11 but it was argued that if the rejected votes had been included, he would have had a majority of seven. A petition was filed for a declaration that the election was invalid because the issue of unstamped ballot papers was a breach of the officials' duty which had affected the results adversely.

The court of first instance dismissed the petition, holding that as the election was conducted substantially in accordance with the electoral laws, the fact that there had been a small number of administrative errors was not a sufficient reason for declaring it invalid. On appeal, the Court of Appeal reversed this decision and ruled that the election was invalid despite the fact that it had been held in substantial compliance with the electoral laws.

Lord Denning MR then outlined two circumstances under which the court would nullify election results. The first is that if elections are so poorly conducted that they cannot be said to have been conducted in substantial compliance with the electoral laws, then they are void whether or not the non-compliance affected the results. The second is that even if the elections are conducted substantially in accordance with the electoral laws but there are breaches or mistakes at the polls that adversely affect the results, then the results have to be cancelled.

¹⁹² *Nana Akufo-Addo* (n 25 above) 144.

¹⁹³ n 188 above.

¹⁹⁴ *Nana Akufo-Addo* (n 25 above) 446.

¹⁹⁵ *Medhurst* (n 189 above) 230.

¹⁹⁶ [1974] 3 WLR 517.

The Nigerian case of *Ibrahim v Shagari & Others* canvasses the same principles in the following opinion:

[T]he Court is the sole judge and if it is satisfied that the election has been conducted substantially in accordance with Part II of the Act it will not invalidate it. The wording of Section 123 is such that it presumes that there will be some minor breaches of regulations but the election will only be avoided if the non-compliance so resulting and established in Court by credible evidence is substantial. Further, the Court will take into account the effect if any, which such non-compliance with [the] provisions of Part II of the Electoral Act, 1982 has had on the result of the election.¹⁹⁷

These common law principles are codified in section 83 of the Elections Act,¹⁹⁸ which provides that elections shall not be declared void if they are conducted in accordance with law and the non-compliance did not affect the election results.

Another exception has to do with express statutory stipulation. It was observed in the *Nana Akufo-Addo* case that if the electoral laws explicitly provide that non-compliance with electoral laws automatically voids an election then the courts will give effect to that explicit statutory stipulation.¹⁹⁹ It was in this respect held in the *Nana Akufo-Addo* case that since neither article 49 of the 1992 Constitution nor the Public Elections Regulations²⁰⁰ contained any such express stipulations the non-compliance with their provisions was not fatal to the election results.²⁰¹

The last exception to be discussed in this work is fraud. It is a basic principle of law that fraud vitiates everything.²⁰² The courts have therefore held that if the non-compliance with electoral laws can be attributed to fraud or any fraudulent intentions on the part of the election officials then the election results would be annulled.²⁰³ It is on the strength of this principle that in 2004 the Ukrainian Supreme Court ordered a repeat runoff presidential election between Viktor Yanukovich and Viktor Yushchenko when it was proven that the original election had been marked by widespread electoral fraud.²⁰⁴

It is clear from the jurisprudence under review that the courts would invalidate presidential election results only if the results are the product of fraud; or if there is an express statutory injunction that

¹⁹⁷ (1985) LRC (Const.) 1.

¹⁹⁸ n 169 above.

¹⁹⁹ n 25 above, 144.

²⁰⁰ 2012 (CI 75).

²⁰¹ n 25 above, 144.

²⁰² G Woodward 'Collateral attack upon judgments on the ground of fraud' (1916) 65 *University of Pennsylvania Law Review and American Law Register* 109.

²⁰³ n 25 above, 144.

²⁰⁴ http://news.bbc.co.uk/onthisday/hi/dates/stories/december/27/newsid_4408000/4408386.stm (n 47 above).

non-compliance with the electoral laws automatically voids election results; or if the elections were not conducted in substantial compliance with the electoral laws; or even where the elections were conducted in substantial compliance with the electoral laws, if certain statutory infractions have muddied the election results.

Therefore, it can be concluded that it is only when non-compliance with electoral laws adversely affects presidential election results that the courts would consider the non-compliance to be substantial enough to require an invalidation of the results. The philosophical underpinning of this school of thought is that elections, of which presidential elections are a subset, cannot be without hitches and so the judiciary should hasten slowly in invalidating their results.²⁰⁵ A purposive approach to interpreting electoral laws is therefore preferred by the proponents of this school to a regimental interpretive approach.²⁰⁶

But the question is how does a petitioner prove to a court that there has been substantial non-compliance with electoral laws?

4.3 The threshold of proof in presidential election disputes

At common law, it is generally presumed that all official acts are rightly and regularly done.²⁰⁷

It is also presumed that all official records are accurate.²⁰⁸ It is therefore presumed that presidential elections are conducted regularly and that presidential election results as published by an EMB are right and accurate. These presumptions of regularity and accuracy are however rebuttable.²⁰⁹ Accordingly, it is the duty of a petitioner who disputes them to adduce evidence in rebuttal.²¹⁰ This is because by the very nature of the burden of proof, it is the person who would lose a case if any stated proposition in issue is not proven who has the singular duty to prove same.²¹¹ Applied to a presidential election dispute, since it is a petitioner who would lose if no evidence is adduced to support the allegations in the petition, it is a petitioner who bears the initial burden of proving any allegations of non-compliance with electoral laws.²¹² Thereafter, the burden shifts to the respondents to counter the evidence produced by a petitioner.²¹³

In Ghana and Kenya, the constitutional provisions on elections as well as the electoral laws are silent on the burden of proof that must be discharged in presidential election petitions. Accordingly,

²⁰⁵ *Nana Akufo-Addo* (n 25 above) 543 & 565-566.

²⁰⁶ *Raila Odinga* (n 20 above) para 285.

²⁰⁷ *Raila Odinga* (n 20 above) para 196.

²⁰⁸ *Nana Akufo-Addo* (n 25 above) 59-60 & 62.

²⁰⁹ Sec 37(1), Evidence Act, 1975 (NRCD 323).

²¹⁰ *Nana Akufo-Addo* (n 25 above) 459.

²¹¹ J Thayer *A Preliminary treatise on evidence at the common law* 355.

²¹² Sec 17(1), NRCD 323; see also n 210 above.

²¹³ *Raila Odinga* (n 20 above) para 203; see also *Nana Akufo-Addo* (n 25 above) 58-59, 204-205 & 458-459.

the burden of proof is regulated by the general provisions of the common law as codified in NRCD 323 and the Evidence Act.²¹⁴ This means that the common law rules on the burden of proof as enunciated above apply with the same force to presidential election disputes in Ghana and Kenya. So how did the Ghanaian and Kenyan Supreme Courts apply the rules on the burden of proof to the *Nana Akufo-Addo* and *Raila Odinga* cases respectively?

4.3.1 The burden of proof

The burden of proof is basically concerned with the question of whose duty it is to place evidence before a court and to prove allegations of facts. It has been observed that since presidential election disputes rest to a significant degree on facts,²¹⁵ they must be proven in the same way as other factual cases are - the petitioner must establish an appreciable degree of belief in the mind of the court.²¹⁶ So in *Hawkins v Powells Tillery Steam Coal Co Ltd* Buckley LJ stated that:

When it is said that a person who comes to court for relief must prove his case, it is never meant that he must prove it with absolute certainty. No fact can be proved in this world with absolute certainty. All that can be done is to adduce such evidence as that the mind of the tribunal is satisfied that the fact is so. This may be done either by direct evidence or by inferences from facts. But the matter must not be left to rest in surmise, conjecture or guess.²¹⁷

The burden of proof has two components: the burden of producing evidence that is satisfactory enough to prove a particular issue and the burden of persuading the court that the allegations made are true or untrue.²¹⁸

The burden of producing evidence is also known as the evidential burden²¹⁹ while the burden of persuasion is sometimes referred to as the legal burden.²²⁰ Therefore beyond adducing evidence in support of an allegation, a party must also satisfy the court that the allegations are true before it would be deemed that he or she has discharged the burden of proof. It is therefore probable to succeed in the former but fail in the latter.

In the context of presidential elections, it has been held that a petitioner successfully surmounts these two hurdles in the burden of proof if he or she adduces clear evidence that apart from the fact that there was non-compliance with electoral laws, the acts of non-compliance substantially

²¹⁴ 2009 (Cap 80).

²¹⁵ *Raila Odinga* (n 20 above) para 191.

²¹⁶ *Nana Akufo-Addo* (n 25 above) 458.

²¹⁷ [1911] KB 996.

²¹⁸ M Opoku-Agyemang *Law of Evidence in Ghana* (2010) 145; see also sec 10, NRCD 323 and *Nana Akufo-Addo* (n 25 above) 458.

²¹⁹ Opoku-Agyemang (n 218 above) 157.

²²⁰ n 218 above.

affected the election results.²²¹ The legal burden of proving that non-compliance which adversely affected the electoral outcome occurred at the polls lies on the petitioner throughout the proceedings. Then if the petitioner discharges it, the onus shifts to the respondents to controvert it.²²²

The common thread that runs through the jurisprudence on the burden of proof in presidential election petitions is that where a petitioner alleges non-compliance with electoral laws the petitioner must first prove that there has been such non-compliance by introducing evidence to that effect. In addition, the petitioner must satisfy the court that the non-compliance has adversely affected the validity of the election results. It is after the petitioner has successfully cleared these hurdles that the respondent is called upon to prove the contrary. It is therefore incumbent on a petitioner to first and foremost establish firm and credible evidence of the EMB's departure from the prescriptions of the law. Thereafter, the burden shifts and keeps shifting until the court reaches a determination. In the words of Ansah JSC,

If the petitioners are able to establish the facts they rely on to ask for their reliefs, the onus will then shift to the respondents to demonstrate the non-existence of that fact. This [i]s because the court bases its decision on all the evidence before it; the petitioner and the respondent alike have a burden to discharge so as to be entitled to a claim or a defence put up.²²³

In conclusion, EMBs are constitutionally mandated to organise, manage and conduct elections so that people can exercise their political right to vote.²²⁴ It is conceivable that the electoral laws under which EMBs operate can be violated through violations, omissions, incompetence, malpractice or sheer fraud on the part of EMB officials. Notwithstanding, it is appropriate to place the initial burden of proof on a petitioner since it is a petitioner who challenges the presumptions of regularity and accuracy in favour of the presidential election results.²²⁵ Thereafter the court may deliver judgment for the petitioner if the respondents fail to discharge the burden of proof when it shifts to them.

But to what standard must a presidential election dispute be established? This requires a discussion of the standard of proof in presidential election petitions.

²²¹ *Nana Akufo-Addo* (n 25 above) 121-122.

²²² *Nana Akufo-Addo* (n 25 above) 61.

²²³ *Nana Akufo-Addo* (n 25 above) 62.

²²⁴ Art 45, 1992 Constitution and art 88(4), 2010 Constitution.

²²⁵ *Nana Akufo-Addo* (n 25 above) 178-179.

4.3.2 The standard of proof

The standard of proof is concerned with the weight that a court should place on the material facts that are placed before it.²²⁶ Generally, in civil cases the standard of proof is ‘on the preponderance of probabilities’ and in criminal trials it is proof ‘beyond reasonable doubt’.²²⁷

Unlike the burden of proof, the standard of proof applicable in presidential election disputes varies from one jurisdiction to the other. For example in Ghana, presidential election disputes are civil in nature and so the standard of proof is on the preponderance of probabilities.²²⁸ It is only when a crime is alleged in a presidential election petition that the criminal elements of the case must be proved beyond reasonable doubt. So in the *Nana Akufo-Addo* case Anin Yeboah JSC stated that:

[t]he petition is simply a civil case by which petitioners are seeking to challenge the validity of the presidential elections. From the pleadings and the evidence, no allegations of fraud or criminality were ever introduced by the petitioners. The standard of proof of allegations in civil cases is proof by preponderance of probabilities. It is only when crime is pleaded or raised in the evidence that the allegation sought to be proved must be proved beyond reasonable doubt.²²⁹

The position is the same in India. In *Shri Kirpal Singh v Shri VV Giri* the court held that:

[a]lthough there are inherent differences between the trial of an election petition and that of a criminal charge in the matter of investigation, the vital point of identity for the two trials is that the court must be able to come to the conclusion beyond any reasonable doubt as to the commission of the corrupt practice.²³⁰

Later on, in *M Narayan Rao v G Venkata Reddy & Another*,²³¹ the Indian Supreme Court explained that this is so because allegations of corrupt practices are quasi-criminal in nature and so they have to be proven beyond reasonable doubt.

But in some other jurisdictions, the standard of proof in presidential election disputes goes beyond the preponderance of probabilities but falls slightly below the criminal standard. For example, in the *Chiluba case*²³² it was held that the standard of proof in presidential election petitions is a degree higher than that of the civil standard.²³³ Also, in the *Raila Odinga* case, the Supreme Court

²²⁶ *Nana Akufo-Addo* (n 25 above) 58.

²²⁷ *Opoku-Agyemang* (n 218 above) 164.

²²⁸ Sec 12, NRCD 323.

²²⁹ n 25 above, 459-460.

²³⁰ 1970(2) SCC 567.

²³¹ 1977 (AIR) (SC) 208.

²³² n 21 above.

²³³ But in the *Mwanawasa* case (n 21 above), which was decided later, the Zambian Supreme Court reviewed its position and held that the applicable standard of proof must depend upon the allegations contained in the petition.

held that the threshold for proving presidential election petitions is slightly above the preponderance of probabilities but below proof beyond reasonable doubt.²³⁴

So in Kenya, a presidential election dispute must be established to a degree between the civil and criminal standard. But in Ghana, although Adinyira JSC stated that the standard of proof in presidential election petitions ought to be above the civil standard,²³⁵ the correct position of the law is proof on the preponderance of probabilities; except that when a crime is alleged, that must be proven beyond reasonable doubt.²³⁶ The Ghanaian position on the standard of proof in presidential election disputes is aptly summed up in the following opinion of Anin Yeboah JSC:

The standard of proof of allegations in civil cases is proof by preponderance of probabilities. It is only when crime is pleaded or raised in the evidence that the allegation sought to be proved must be proved beyond reasonable doubt... The fact that this petition is brought under Article 64 of the 1992 Constitution does not make any difference in the applicability of the standard of proof. The allegations in the petition that were denied by the respondents in their answers to the petition ought to be proved as required in every case. The fact that the petition is a constitutional matter is also entirely irrelevant. The standard of proof in all civil cases is the usual standard of proof by preponderance of probabilities and no more.²³⁷

So is it the case that most presidential election disputes are unsuccessful because the petitioners generally fail to discharge the burden and standard of proof, or are the judgments sometimes influenced by extra legal considerations?

4.4 Extra legal considerations in the resolution of presidential election disputes

Presidential election disputes are very important because they trigger all the three arms of government into action simultaneously: they constitute a challenge to the highest executive office of a country which the judiciary must resolve based on laws enacted by the legislature.

Presidential elections disputes are not foreign to the law: they are instituted with constitutional backing. They are also not necessarily exceptional because the judiciary has the authority to dispose of them in accordance to the rules of evidence just like all other cases. However, some judges have created the impression that they are a special breed of cases. In *Peters v Attorney-General* for instance, Sharma JA said that election petitions are '*sui generis*'.²³⁸ The Court of

²³⁴ n 20 above, para 203.

²³⁵ *Nana Akufo-Addo* (n 25 above) 123.

²³⁶ Sec 12, NRCDC 323; see also *Opoku-Agyemang* (n 218 above) 164 & 167-168.

²³⁷ *Nana Akufo-Addo* (n 25 above) 62 & 459-460.

²³⁸ (2002) 3 LRC 32 CA 101.

Appeal in *Chris Nwebueze v Peter Obi and 436 Others*²³⁹ also remarked that election petitions are ‘peculiar from the point of view of public policy’.

Furthermore, the Kenyan Supreme Court stated in the *Raila Odinga* case that a presidential election dispute consists of ‘special circumstances’.²⁴⁰ Finally in the *Nana Akufo-Addo* case, presidential election disputes were variously described as ‘serious and volatile’;²⁴¹ of a ‘peculiar nature and potential effects’;²⁴² and ‘multidimensional’ with ‘several legitimate interests at stake which cannot be ignored’.²⁴³

These interesting adjectival descriptions of presidential disputes justify an enquiry into whether the courts are influenced by extra legal considerations when resolving presidential election disputes.

Drawing inspiration from *Bush v Al Gore*,²⁴⁴ counsel in the *Raila Odinga* case argued that presidential election disputes are essentially political contests²⁴⁵ involving questions that are more political than they are constitutional or legal.²⁴⁶ Counsel therefore contended that the role of the judiciary in resolving presidential election disputes is very limited²⁴⁷ and so the courts must exercise ‘judicial care and restraint’.²⁴⁸

What was subtly meant by these arguments is that since it is the province of the electorate to determine their leadership, judicial intervention in presidential election disputes must preserve that political right.²⁴⁹ The Kenyan Supreme Court appears to have somehow fallen for the political bait of counsel because it said that its role in resolving the *Raila Odinga* case was ‘fundamentally political-cum-constitutional’.²⁵⁰

Similarly in Ghana, it appears that some extra legal considerations engaged the minds of some of the judges in the majority. For example Akoto-Bamfo JSC observed that:

²³⁹ [2006] 18 WRN 33.

²⁴⁰ n 20 above, para 230.

²⁴¹ *Nana Akufo-Addo* (n 25 above) 434.

²⁴² *Nana Akufo-Addo* (n 25 above) 51.

²⁴³ *Nana Akufo-Addo* (n 25 above) 34-37.

²⁴⁴ 531 US (2000) (United States Supreme Court).

²⁴⁵ n 20 above, para 225.

²⁴⁶ n 20 above, para 188.

²⁴⁷ n 245 above.

²⁴⁸ *Raila Odinga* (n 20 above) para 189.

²⁴⁹ *Raila Odinga* (n 20 above) paras 220 & 225.

²⁵⁰ n 20 above, para 226.

*Democracy is an evolving phenomenon and elections cannot be perfect so when we are faced with the consideration of irregularities that are alleged to have occurred in an election, we should exercise a reluctance in striking down every single vote just by reference to a provision of the law.*²⁵¹

Adinyira JSC echoed similar sentiments and concluded that since it is a very serious matter to overturn election results '[p]ublic policy favours salvaging the election and giving effect to the voter's intent, if possible'.²⁵² Moreover, Atuguba JSC also stated that '...the [j]udiciary in Ghana, like its counter parts in other jurisdictions, does not readily invalidate a public election but often strives in the public interest, to sustain it.'²⁵³

But what is this 'public policy' or 'public interest' and why does it favour a voter friendly approach? The answer appears to lie in the following statement in the *Raila Odinga* case:

An alleged breach of an electoral law, which leads to a perceived loss by a candidate, as in the Presidential election which has led to this Petition, takes different considerations. The office of President is the focal point of political leadership, and therefore, a critical *constitutional office*. This office is one of the main offices which, in a democratic system, are constituted strictly on the basis of majoritarian expression. The whole national population has a clear interest in the occupancy of this office which, indeed, they themselves renew from time to time, through the popular vote.²⁵⁴

The Supreme Court then concluded its point by saying that 'as a basic principle, it should not be for the Court to determine who comes to occupy the Presidential office.'²⁵⁵ This opinion of the Kenyan Supreme Court had been expressed in the *AI Gore* case thus:

None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people...and to the political sphere.²⁵⁶

4.5 Conclusion

Most presidential election disputes have been unsuccessful. Although the petitioners have almost invariably adduced evidence of non-compliance with electoral laws, so far the judiciary has hardly been persuaded that these trespasses have adversely affected the validity of presidential results. In the opinion of the judiciary, the petitioners have failed to prove that the non-compliance with electoral laws have had any significant or adverse impact on the particular presidential election

²⁵¹ *Nana Akufo-Addo* (n 25 above) 565-566; emphasis supplied.

²⁵² *Nana Akufo-Addo* (n 25 above) 144-147 & 178-179.

²⁵³ *Nana Akufo-Addo* (n 25 above) 40.

²⁵⁴ n 20 above, para 298.

²⁵⁵ *Raila Odinga* (n 20 above) para 299.

²⁵⁶ *Raila Odinga* (n 20 above) para 222.

results. The courts have insisted that they have been guided by only the law in declining to disturb presidential election.²⁵⁷

But it may very well be that the courts have also been influenced by public policy: perhaps, the judiciary has been mindful that it is the unelected minority arm of government and so it must tread cautiously on any path that would be misconstrued as a usurpation of the right of the masses to determine their leadership through the ballot.

In conclusion this author notes that even if the judiciary plays a 'very limited role' in the resolution of presidential election disputes as was urged in the *Raila Odinga* case, nevertheless that role still has critical implications for democratic governance. Accordingly, it is the view of this author that the judiciary strikes a proper balance between not supplanting its will for that of the people and providing effective redress. This is because the public's perception of the legitimacy of its judgment is crucial to the acceptance of the judgment and subsequent effect on the democratisation process of a country.

Chapter 5

Conclusion and recommendations

²⁵⁷ *Raila Odinga* (n 20 above) para 230.

5.1 Conclusion

This research has highlighted the implications the judiciary's resolution of presidential election disputes has on democratic governance. It has been noted that public perception of and confidence in the ability of the judiciary to reach an independent and impartial decision in presidential election disputes has far reaching consequences for managing post-electoral conflict effectively. It has also been observed that since the judiciary can contribute positively or negatively to the democratic credentials of a country, it is important to equip it with democracy enhancing capabilities.

Both the *Raila Odinga* case and the *Nana Akufo-Addo* case have reaffirmed that presidential election disputes are inevitably bound to be fraught with instances of non-compliance with electoral laws partly because of several intended and/or inadvertent administrative lapses. In order to eliminate or at the least reduce the incidence non-compliance with electoral laws, measures must be implemented that ensure that EMBs perform their duties with near accuracy. Also, legal and administrative sanctions ought to be imposed on erring EMB officials depending upon the degree of gravity of their actions and/or inactions.

Furthermore, although the judiciary has so far been of the general view that the infractions of electoral laws alleged in presidential election petitions are negligible because they have not adversely or materially affected election results, this author is of the view that courts ought to take allegations of over voting more seriously. This is because although every person is entitled to only one vote during presidential elections, over voting admits the possibility that some persons voted more than once. Accordingly, over voting means that some votes are weightier than others and therefore sins against the principle of the equality of votes.²⁵⁸

Additionally, the need for presidential election disputes to be resolved expeditiously cannot be overemphasised. Several domestic, regional and international human rights instruments have acknowledged the need for resolving presidential election disputes in a timely fashion. This is because the justice of the circumstances surrounding presidential election disputes demand that a mode of trial is adopted that assures an effective yet speedy determination of all issues in controversy. In this regard it is most commendable that the Kenyan Supreme Court strictly enforced the timelines in the 2010 Constitution for the speedy resolution of the *Raila Odinga* case, rejecting several applications to file further processes after the close of pleadings.²⁵⁹

²⁵⁸ Ojo (n 37 above) 105.

²⁵⁹ n 20 above, 214-218.

Meanwhile, the *Nana Akufo-Addo* case has shown that the absence of clear timelines in the 1992 Constitution for resolving presidential election disputes is counterproductive. It leaves the temporal jurisdiction of the Supreme Court as regards the resolution of presidential election disputes somewhat boundless in scope, making the expeditious resolution of a presidential election dispute contingent upon the modalities the Supreme Court adopts.

It was also noted that the absence of a finality clause in the 1992 Constitution in respect of a Supreme Court's judgment in a presidential election dispute can contribute to further delays in determining presidential election disputes. Indeed throughout the proceedings in the *Nana Akufo-Addo case*, several Ghanaian civil society organisations had to repeatedly urge the parties to accept the Supreme Court's judgment as final in the public interest.²⁶⁰ Although that initiative from the civil society is laudable, it is this author's view that a finality clause in the 1992 Constitution is a more authoritative way of bringing an end to litigation in the public interest.²⁶¹

It is thus the considered opinion of this author that the time for filing, hearing and determining presidential election petitions as well as the finality of judgments in such presidential election disputes must be primarily regulated by constitutions. The role of subsidiary legislation should be to detail procedural rules for operationalising those constitutional provisions. Since constitutions have more binding force, this would be a better way to ensure that the judiciary would strictly enforce stated timelines and avoid delays.²⁶² It would also avert the situation where the courts are unduly criticised for stalling proceedings when the root of the problem is actually the law.

It must be mentioned at this point that in the *Nana Akufo-Addo case*, Dotse JSC went to great lengths to point out the inadequacies in Ghanaian law that make speedy resolution of presidential election disputes a mirage.²⁶³ Further, this author notes that the Constitution Review Commission (CRC) identified undue delays in the resolution of electoral disputes as a problem in Ghana.²⁶⁴ Consequently, it proposed legislative reform for the adoption of procedural rules that would ensure that electoral disputes are disposed of within six months.²⁶⁵ Unfortunately, the government of Ghana rejected this proposal.²⁶⁶ Although six months is still too long a time, the CRC's proposal

²⁶⁰ 'Election petition: Akufo-Addo and Mahama must commit to accept verdict - PPP' 17 April 2013 <http://www.ghanaweb.com/GhanaHomePage/politics/artikel.php?ID=271340> (accessed 15 September 2013).

²⁶¹ Woodward (n 206 above) 103-104.

²⁶² n 259 above.

²⁶³ n 25 above, 303-316.

²⁶⁴ CRC report (n 146 above) para 65.

²⁶⁵ CRC report (n 146 above) para 78.

²⁶⁶ 'White paper on the report of the Constitution Review Commission presented to the president' (2012) 19 http://www.ghana.gov.gh/images/documents/crc_report_white_paper.pdf (accessed 15 September 2013).

corroborates the point made in this work that the current state of Ghana's electoral laws does not allow for the resolution of presidential election disputes expeditiously.

The silence of the 1992 Constitution in respect of time limits for the determination of presidential election disputes in Ghana is problematic. The absence of a finality clause as regards the Supreme Court's decision in presidential election disputes is also not the best. Admittedly, the 2010 Constitution of Kenya made strict temporal provisions for the disposal of presidential election disputes because the swearing in of a president-elect can only take place after the determination of the dispute. But in Ghana, the pendency of a presidential election dispute does not preclude a disputed president from being sworn in and performing the functions of the office of president. That is probably why the 1992 Constitution is silent on timelines and finality. Nevertheless the demerits of the Ghanaian arrangement outweigh the advantage it presents. There is therefore a need for constitutional amendment.

Finally, although the only master of the judiciary is the law, certain judicial pronouncements indicate that the judgments of some judges in presidential election disputes are influenced by the socio-political and economic context in which they find themselves. The various references to public policy and/or the public interest sum up the extra legal considerations that sometimes weigh on their minds when they are placed in the delicate position of deciding the critical question of the leadership of a country.

5.2 Recommendations

The following recommendations are made in no particular order of importance.

1. It is imperative that specific time frames are stipulated in constitutions for the determination of presidential election disputes. To this end, it is specifically recommended that the 1992 Constitution of Ghana is amended to provide for a specific timetable. But in order not to sacrifice efficiency for expedition, the timelines must be reasonable. Also, in the interest of equity and equality of treatment, all parties ought to be given a reasonable amount of time within which to present their cases. Although the specific duration of 'reasonable time' may vary from jurisdiction to jurisdiction, the phrase obviously connotes striking a proper balance between expedition and efficiency. It is specifically suggested that the 21 days allowed for a petitioner to file a petition should be abridged to seven days. The ten days allotted to respondents can also be reduced to seven. Furthermore, the 1992 Constitution must be amended to provide that the Supreme Court's decision in presidential election disputes is final. This author further proposes that the 2010 Constitution of Kenya be

amended to afford respondents seven days to file an answer, instead of the current three days.

2. Additionally, administrative reforms should be introduced that would ensure that presidential election disputes are given priority over other matters on the cause list of the Supreme Court. In this regard, it is suggested that all matters on the cause list of the Supreme Court are suspended pending the determination of presidential election disputes so that the latter can be expeditiously disposed of. But in jurisdictions like Ghana where not all the justices of the Supreme Court are empanelled to hear a presidential election dispute, the recommendation would be to suspend the other cases of the judges hearing the presidential election petition. However, this recommendation can only be workable if the timetable for resolving presidential election disputes is fixed and reasonable. This is because the other cases on the cause list need to be determined expeditiously too.
3. Moreover, although Ghanaian electoral laws make provision for the use of electronic procedures,²⁶⁷ traditionally manual processes were employed in the *Nana Akufo-Addo* case. Therefore, valuable time was lost in respect of matters that could have been better facilitated through the use of information and communications technology systems. For future purposes, it is suggested that the Chief Justice orders the mandatory use of electronic processes in presidential election disputes right from inception to conclusion. Moreover, since the respondents to a presidential election petition are more than likely to be public figures on whom service can be easily effected, it is doubtful whether the rules on substituted service, which can create further delay, are necessary.²⁶⁸ It is therefore suggested that CI 74 be amended to delete the provision for substituted service. This author is fortified in this view by the fact that even in the absence of an order for substituted service, the named respondents can still be fixed with constructive notice under the publication procedures in rule 68B (3) of CI 74.
4. Also, although there is a sound policy justification for invalidating presidential election results only when electoral laws have been so flagrantly flouted as to affect the credibility and integrity of elections, it is equally important that the judiciary bears true fidelity to the political principles that underpin universal adult suffrage. Accordingly, whenever the pith of the irregularities complained of constitute an assault on the right to vote itself, the judiciary must not be timorous - it must be bold enough to annul such votes and order for a rerun of elections, or fresh elections as the case may require, at the affected polling stations.

²⁶⁷ Rule 69B, CI 74.

²⁶⁸ Rule 68B, CI 74.

5. Although presidential election disputes are political in nature, the judiciary is the institution with the mandate to resolve legal questions that arise therefrom. Accordingly, it must dispense justice in such cases without fear or favour and exclusively on the basis of the law. It must neither consider nor be bound by any extra legal factors.
6. In addition, EMBs must be adequately resourced and provided with the necessary logistics to enable them discharge their duties more efficiently. To this end, first of all sufficient budgetary allocation must be made for their expenses. Secondly as a matter of policy, high standards must be set for the recruitment of EMB personnel. Just like judges, EMB officials must be qualified, literate persons of high moral character and proven integrity. Also, the capacity of temporary staff engaged for the conduct of elections must be built through effective training on their responsibilities during elections.
7. Considering the enormity of the economic, social and political cost of presidential election disputes, erring EMB personnel must be fixed with strict liability. Sanctions should be imposed depending on whether the nature of their omissions. Tortious actions such as negligence may attract lesser punishment but the punishment for fraudulent conduct ought to be severe. Perhaps, the knowledge of the probability of punishment would encourage them to be meticulous in the discharge of their duties.
8. Ghana has only signed the ACDEG. It is finally suggested that pending the constitutional reforms proposed in this research, Ghana ratifies and incorporates the ACDEG into its domestic law since the ACDEG provides justification for the expeditious resolution of presidential election disputes.

In conclusion, the dispute resolution role of the judiciary vis-à-vis presidential election litigation in strengthening democratic governance is extensive. The challenges that have been identified in this scholarship as well as the suggestions made to overcome them are by no means exhaustive.

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