

OVERVIEW OF THE LEGISLATION AND CASE LAW RELATING TO ELECTIONS

Introduction

The historical records of our country show that competitive politics was introduced into our country in the 1920s. The constitutive instruments of the time provided for elections for the selection of the representative of a number of municipal towns to the emerging national legislature. From that time through independence to 1978, we held about seven national elections and two referenda. There were no international observers or monitors at these elections. There was sporadic violence and irregularities in some cases. But the losers always accepted defeat and congratulated the winners. That phase of our competitive politics seems to have died with Victor Owusu's gracious concession of defeat to Dr. Hilla Limann in 1979.

Now we have international observers and monitors. We also have local monitors and observers. This is in part a function of the fact that we live in a globalised world. Yet some of the losers find it difficult or even humiliating to admit defeat. They threaten to mine the elections in mayhem and intractable complaints, even, before the first ballot is cast. Apart from the fact that the campaigning never seems to end, having no fixed season, our elections are threatening to derail our national enterprise. Clearly, we need to deploy all our resources and platforms to roll back this development. Hence the importance of the judiciary in our electoral architecture. Having good electoral laws no longer seems to be sufficient. We need an effective, efficient and expeditious judiciary as part of our electoral architecture.

The **ECOWAS HANDBOOK ON ELECTION OBSERVATION** prepared for ECOWAS by the Chairman of our Electoral Commission, Dr. K. Afari-Gyan has this to say about Elections:

“As a contest to select a person(s) to occupy a public position(s), an election in a democracy has three basic features:

- The contest is between individual candidates or political parties, or both.
- An election management body (EMB) mediates the contest.
- The votes of the electorate decide the outcome of the contest
- A trustworthy election is the only legitimate door to democratic leadership. It constitutes a form of consultation and provides an avenue for the electorate to express their will in choosing between aspiring leaders and, sometimes, alternative ways of managing public affairs.
- By exercising their vote, the electorate every so often express their sovereignty and give legitimacy to their political leaders.
- An election represents a critical test of social cohesion and, if badly managed, can constitute a potential cause of conflict and a threat to peace and stability. ...

For all these reasons, well managed elections are an important part of the democracy index. Indeed, they are essential to consolidate peace, democracy, good governance and the rule of law.”

Without doubt, the Judiciary are an important pillar for the proper management of elections. Judges should see themselves and be seen as belonging to the Election Management Body, though not in a physical sense. For closely examined, differences can arise in an election for any of the reasons contained in the ECOWAS HANDBOOK and quoted above.

LEGISLATIVE FRAMEWORK FOR ELECTIONS **IN GHANA**

My task at this Workshop has been made easy by the publication of the Judicial Service **MANUAL ON ELECTIONS ADJUDICATION IN GHANA**. By and large therefore, I will confine my delivery to copious references to the pages of the Manual.

The laws relate to Qualification and Eligibility for the Office of a Member of Parliament and the Office of President as well as voters i.e. voters and contestants. They are to be found in the 1992 Constitution – Articles 42, 62, 63, 64 for the Presidency and Article 94 for Parliament. Of relevance also is the Representation of People Law, 1992 (PNDCL. 294), Electoral Commission Act, 1993 (Act 451), Public Elections (Registration of Voters) Regulations, 1995 (C. 12), Political Parties Act, 2000 (Act 574) and Public Elections Regulations 1996 (C. 15) – See pp. 57-164.

These laws also prescribe how elections are to be conducted and managed, the key actors and institutions and their roles. They clearly identify the High Court and the Supreme Court as the parts of the Judiciary with responsibility for adjudicating on electoral disputes relating to Parliamentary and Presidential Elections respectively. While

it is not easy to identify with certainty the actual or potential disputes that can arise out of an election in Ghana, the law mentioned above split them into the usual civil or criminal jurisdiction. The civil ones take the form of Petitions to the High Court with an appeal to the Court of Appeal for Parliamentary Elections and Petitions to the Supreme Court in the case of Presidential elections.

There is a slight complication arising from Article 130 of the 1992 Constitution relating to the enforcement and interpretation jurisdiction of the Supreme Court and cases like **Awoonor-Williams v. Gbedemah (1969) 2 G & G 438**. On this complication, I cannot do better than repeat the opinion of the late Chief Justice Acquah at a similar workshop in 2004 when he said:

“It is important to realise that it is not the form in which a relief is couched that determines the nature of the action, but the substance of the action. Thus irrespective of how one frames his relief, if the substance of his action is TO UNSEAT someone who had been elected to Parliament (or should I add Presidency) on grounds of any defect in his qualification or the election, the action would in substance be an election petition in that it would in reality be challenging the validity of that person’s election to Parliament.”

Though the contexts maybe different, the Supreme Court has spoken in similar vein in the past in the case of chieftaincy disputes wrapped up or veiled as something else and in the **Edusei v. Attorney-General cases, Nos. 1 & 2**.

The jurisdiction in criminal offences arising out of elections has been comprehensively covered in the Manual already referred and I will simply urge all participants in this Workshop, My Lords, to consult the Manual.

To conclude this short presentation, I will urge all to pay particular attention to Sections 16 to 23 of PNDCL 284 and Article 99 of the 1992 Constitution. These provisions spell out who has capacity to institute an Election Petition, the grounds on which the Petition can be based and what the High Court should do on the presentation of an Election Petition. I also commend the decision in **Enos v. Electoral Commission [1999-2000] 1 G.L.R. 564** noted on page 39 of the Manual.

Finally, the Manual contains some words of wisdom which I would like to commend to you all, My Lords. At page 37, we read:

"It is ... important to stress that a whole election is not to be invalidated by the High Court or the Supreme Court because an irregularity had been established. If the trial judge is satisfied that, the established irregularity/irregularities apart, the results, taken as a whole, reflect the expressed will of the majority of voters at that constituency, then the results should be upheld by the trial judge."

This clearly is the spirit of our electoral laws and the correct attitude which a Judge must bring to the adjudication of electoral disputes.

Thank you.

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