

# CHAPTER 3

## ELECTORAL JUSTICE UNDER GHANA'S FOURTH REPUBLIC

*Lydia A Nkansah*

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### Abstract

*Election may be contentious and disputes may arise at any stage of an electoral process. The African Charter on Democracy, Elections and Governance requires State Parties to establish and strengthen national mechanisms that redress election-related disputes in a timely manner. The practice of electoral justice under Ghana's Fourth Republic has made room for aggrieved persons in the electoral process to seek redress as opposed to resorting to violence as a means to resolving conflicts. Electoral justice under Ghana's Fourth Republic has mainly been by court adjudication. The courts have exercised activism in electoral judicial review to bring finality to pre-electoral disputes to safeguard the electoral process. They have thus 'facilitated ... the continual process' of succession in Ghana's democratisation process. However, the incessant spate of court litigation in the ninth hour of elections particularly as occurred during the 2016 elections created tensions and uneasiness, stalling the electoral process. This chapter argues that electoral justice could be strengthened if Alternate Electoral Dispute Resolution (AEDR) structures are also utilised to complement the courts adjudication especially that of pre-election disputes. It advances that the effectiveness of AEDR to a large extent depends on the political actors and also the Electoral Commission's stance towards an amicable peaceful resolution of electoral disputes.*

### 1 Introduction

One of the basic features of democratic governance is holding periodic elections, which subject the principal apparatus of government to change and reconstitution. Election may be contentious, and disputes may arise at any stage of an electoral process. The effective resolution of disputes is critical to the integrity of elections, hence electoral justice. An electoral justice system requires that each action, procedure and decision related to the electoral process should be in line with the law, it should protect or restore electoral rights when breached and should give aggrieved persons a hearing and redress.<sup>1</sup> Since the inception of the Fourth Republic, Ghana

<sup>1</sup> The part of this chapter headed Part III. Viability of Alternate Electoral Dispute Resolution appears in a previous paper by the author entitled 'Electoral adjudication in

has conducted seven general elections to choose presidents and members of parliament to form government. The seventh election was conducted on 7 December 2016 to form the current government. Under the Fourth Republic, the six elected governments with the exception of President John Atta Mills have completed their terms of office for the first time as a Republic due to incessant *coup d'états*. President Atta Mills died in office and President John Dramani Mahama the then Vice President completed the unexpired term of Mills' government.<sup>2</sup>

Ghana has also succeeded in changing government through the ballot box in 2001 since its independence in 1957 when the New Patriotic Party (NPP) emerged as the winner in the 2000 general elections and took the political baton from the National Democratic Congress (NDC). The wheels of power turned again when the NDC won the 2008 elections and took the political baton from the NPP in January 2009.<sup>3</sup> Ghana has passed Huntington's *two-turnover test* for democratic consolidation. Huntington maintained that democracy is consolidated when the government that has won power in the initial election loses power to another party in the second election and the winner of the second election also loses power in subsequent elections.<sup>4</sup> Ghana's democratic credentials notwithstanding, elections under Ghana's Fourth Republic are characterised with incessant pre and post-election disputes.<sup>5</sup> The 2016 general elections was particularly characterised with pre-election disputes. There have also been sharp contentions on the state of the voters register among the major actors of the electoral process. There has been a spate of litigation at the eleventh hour of the 2016 elections.<sup>6</sup> The electoral laws under Ghana's Fourth Republic anticipate disputes at different stages of the electoral process and make room for their resolution.<sup>7</sup>

Africa: A prerequisite for electoral justice' presented at the 2nd International Conference on Democratic Governance in Africa, Asia and Middle East, held from 30 June to 3 July 2014, in Kigali, Rwanda. The conference was jointly organised by Rwandan Governance Board and Cheyney University of Pennsylvania, USA. International Institute for Democracy and Electoral Assistance *Electoral justice: The International IDEA Handbook* (2010a) [http://www.idea.int/publications/electoral\\_justice/upload/inlay-Electoral-Justice.pdf](http://www.idea.int/publications/electoral_justice/upload/inlay-Electoral-Justice.pdf); ACE Electoral Knowledge Network *The ACE Encyclopedia: Legal Framework* (2012) <http://aceproject.org/ace-en/pdf/lf/view>; International Institute for Democracy and Electoral Assistance *Electoral justice: An overview of the International IDEA Handbook* (2010b) 35.

- 2 LA Nkansah 'Transfer of power to a new administration in Ghana's democratic system: The way forward' in NA Apt (ed) *Positioning Ghana: Challenges and innovations* (2015) 35-36.
- 3 LA Nkansah (n 2 above).
- 4 SP Huntington *The third wave: Democratization in the late twentieth century* (1991) 267.
- 5 See The Judicial Service of Ghana *Manual on adjudication* (2012) for cases on electoral disputes under the Fourth Republic.
- 6 See *Republic v Mrs Charlotte Osei & The Electoral Commission; Ex parte Dr Papa Kwasi Nduom*, Suit No. GT/1401/2016 unreported; *Abu Ramadan & Another v Electoral Commission & Attorney General*, Writ No. J1/14/2016 unreported; *Kwesi Nyame-Tesease Eshun v Electoral Commission*, Suit No. J1/24/2016 unreported; *Kwame Amoako Tuffuor & Others v Electoral Commission & Attorney General*, Writ No. J1/1/2017 unreported.
- 7 See for example arts 48 and 64, of the 1992 Constitution; The Public Elections (Registration of Voters) Regulations, 2016, C.I. 91 and Public Elections Regulations, 2016 (CI 94).

Against this background the paper examines Ghana's electoral justice architecture, which consists of courts adjudication, and other Alternate Electoral Dispute Resolution Mechanisms (AEDR), for pre and post-election disputes. The paper maintains that electoral justice under Ghana's Fourth Republic has mainly been by court adjudication, where the courts have exercised activism in electoral judicial review to bring finality to the issues being contested. The judiciary has thus 'facilitated in the continual process' of succession in Ghana's democratisation process. However, the incessant spate of court litigation in the eleventh hour of elections created tensions and uneasiness, stalling the electoral process at some points.

The AEDR or out of court electoral justice structures are hardly utilised. The paper also examines the viability of utilising alternate dispute resolution or out-of-court resolution for election disputes. It maintains that the sharp contentions which characterise elections in Ghana could be minimised if both formal and informal AEDR mechanisms in place are utilised or, where non-existent, are put in place to complement courts adjudication. However, the AEDR as an effective electoral justice tool to a large extent will depend on the EC's posture towards an amicable peaceful resolution of electoral disputes. This is because the EC in recent times has become a major disputant in electoral disputes and has taken a stance in preference of litigation as a means of resolving electoral disputes.

Concepts of electoral dispute resolution have emerged, one of which is electoral justice, which forms the conceptual basis of this study. The International Institute for Democracy and Electoral Assistance (IDEA)<sup>8</sup> conceived electoral justice as the means, measures, and mechanisms that have been wedged into an electoral system to prevent the occurrence of irregularities and for that matter electoral disputes or to mitigate them or to resolve them and punish perpetrators when they do occur.

An electoral justice system involves the means and mechanisms for ensuring that, (1) 'each action, procedure and decision related to the electoral process is in line with the law (the constitution, statute law, international instruments, and all other provisions)', (2) 'and also for protecting or restoring the enjoyment of electoral rights,' and (3) 'giving people who believe their electoral rights have been violated the ability to make a complaint, get a hearing and receive adjudication'<sup>9</sup> The ACE Encyclopaedia referred to electoral dispute resolution system as 'a system of appeals through which every electoral action or procedure can be legally challenged ... Such a system aims at ensuring regular and completely legal elections. Legal elections depend on legal corrections of any mistake or unlawful electoral action.'<sup>10</sup>

8 International IDEA (n 1 above).

9 International IDEA (2010a) (n 1 above).

10 ACE Electoral Knowledge Network (n 1 above) 113.

An electoral justice system aims to 'prevent and identify irregularities in elections and to provide the means and mechanisms to correct those irregularities and to punish the perpetrator'.<sup>11</sup> It is at a cornerstone of democracy, in that it safeguards both 'the fundamental role in the continual process of democratisation and catalyses the transition from the use of violence as a means for resolving political conflicts to the use of lawful means to arrive at a fair solution.'<sup>12</sup> Even though an electoral justice system is informed and shaped by the history, politics, law and cultures of a given country, electoral justice system needs to conform or adhere to certain principles in order to be efficient and effective. These principles are integrity, participation, lawfulness (rule of law), impartiality, professionalism, independence, transparency, timeliness, non-violence and acceptance.<sup>13</sup> The electoral justice principles are meant to lead to procedurally-correct elections and compliance with citizen's electoral rights. Electoral justice mechanisms may be categorised into formal systems whose decisions are corrective of irregularities, or those that are punitive and whose decisions lead to the punishment of offenders, or also alternate dispute resolution mechanisms that parties to an electoral dispute may resort to for amicable settlement of disputes.<sup>14</sup>

In Ghana, the law provides for electoral rights; the right to vote and be voted for. The laws on the electoral process make room for dispute resolution of issues that emanate from the process; pre and post-election disputes. This spans from issues relating to the demarcation of constituencies, challenging the registration processes as well as challenging the election results. There are also provisions on the qualification of candidates, voter registration, the voter register, appointment of registration officers, voting and election results among others.<sup>15</sup> These issues may be dealt with through court adjudication and some through administrative or out of court settlement. The following sections look at the spate of pre-election disputes and electoral litigation through the lens of 2016 electoral process.

## **2 The spate of litigation and the judiciary in the 2016 electoral process**

### **2.1 Electoral judicial review**

The role of the judiciary in election adjudication is hinged on its traditional role of ensuring adherence to the constitutional limits placed on them

11 International IDEA (2010b)5.

12 IDEA (2010a) (n 1 above).

13 IDEA (2010 a) (n 1 above).

14 IDEA (2010a) (n 1 above).

15 The Judicial Service of Ghana (n 4 above).

through judicial review. Judicial review ensures conformity with constitutional limits placed on public officials and adherence to all constitutional provisions. Also, it allows for the compliance of validity, legality, rationality and reasonableness of governmental actions.<sup>16</sup> In the contexts of electoral adjudication the judiciary exercises ‘electoral judicial review’.

First the judiciary resolves disputes over electoral rules to ensure that the rules create ‘a level playing field – they are rule-evaluating’.<sup>17</sup> They make sure that the rules governing the conduct of elections are in consonance with the higher norms and principles of the constitution. There were cases on the procedural appropriateness of the Public Elections Regulations, 2016 (CI 94); such as whether political parties should be given copies of collated sheets or not.<sup>18</sup> In *– Kwesi Nyame – Tease Eshun v Electoral Commission*,<sup>19</sup> the Supreme Court ordered the EC to give copies of the collation sheets of the presidential election results to the agents of political parties. Under CI 94, the EC was not obliged to make the collation sheets available to political parties; neither did it make room for the signing of the collation sheet by returning officers and agents of political parties. The Supreme Court ordered the EC to confer with the lawyers for the plaintiff to amend CI 94 to make *collation* sheets available to political parties. The amended CI 94 was then adopted by the Court for the conduct of the 2016 general elections.

Also in *Tufour and Others v The Electoral Commission and Attorney-General*<sup>20</sup> the Supreme Court affirmed Regulation 23 of CI 94 as being consistent with Article 49 of the Constitution. The main issue in that case was whether special voting should be counted at the close of the special polls or be sealed and counted alongside the general polls as provided for by Regulation 23(11) of CI 94. The plaintiff maintained that the said Regulation 23(11) is inconsistent with Article 49 of the 1992 Constitution which provides that for any public polls, counting of the polls shall be done immediately after the polls. The Supreme Court held that the close of polls means the close of polls in a given constituency. In this case, counting of the special polls at the close of the general polls in a given constituency and for that matter Regulation 23 of CI 94 is consistent with article 49 of the 1992 Constitution. To uphold the plaintiff’s application would mean a fractional declaration result not reasonably contemplated by the Constitution. That ‘the fractional declaration of results is not an effective

16 P Cumper *Constitutional & Administrative Law* (1999).

17 S Gloppen ‘Elections in court: the judiciary and Uganda’s 2006 presidential and parliamentary elections’ (2007) <https://www.hitpages.com/doc/6208987393425408/1#pageTop> (accessed 7 November 2016).

18 The Supreme Court ordered the EC to give copies of the collation forms to political parties.

19 Suit No J1/24/2016.

20 Writ no J1/1/2017, 14 November 2016.

way of conducting elections, which to be effective must be *inter alia*, as smooth, easy to track, coherent, complete and expeditious as possible'.<sup>21</sup>

The second function of the courts is for '... securing fair plays-they are rule-enforcing'.<sup>22</sup> In this sense, they act as referees of the election competition and decide complaints of violence to redress irregularities and even cancel where they deem it necessary to do so. On 10 October, 2016, barely two months to the 2016 presidential general elections, the Electoral Commission disqualified 13 presidential aspirants on the basis of errors and irregularities on their nomination forms, some of which amounted to criminality, as the attached Table 1 depicts.<sup>23</sup> This led to a spate of litigation as some of the disqualified candidates rushed to court to challenge their disqualification.<sup>24</sup>

One of such cases is *The Republic v Charlotte Osei and The Electoral Commission Ex Parte Dr Papa Kwesi Nduom*.<sup>25</sup> In this case Dr Nduom, the flag bearer of the Progressive People's Party (PPP) had been disqualified by the EC because he did not have the required number of subscribers on his nomination form mandated by Regulation 7(2)(b) of CI 94. Nduom challenged his disqualification in the Accra High Court arguing among other things that he was not given the opportunity to be heard by the EC before the decision was taken to disqualify him. He maintained that he should have been given the opportunity to correct the errors on his form. He argued that the EC had set the nominations period to close on 30 September 2016 and also set 29 and 30 September 2016 as the dates to receive nomination forms from aspirants. He submitted his nomination form on 30 September 2016. EC did not leave room to make it possible for him to be heard before his disqualification was announced. He asked for the reliefs of *certiorari* to quash the EC's decision and prohibition to prevent the EC from conducting balloting for positions in the presidential elections. Nduom further requested the Court to give directives to the EC to allow him to correct the error and resubmit his form, and the EC to take the form upon submission. Regulation 9 of CI 94 mandates the EC to point out errors on nomination forms to applications and also gives them the opportunity to correct them during the nomination period.

The EC on its part conceded that it had set 29 and 30 September 2016 as the dates to receive nominations. Thus, if Dr Nduom wanted to take advantage to have errors on his forms pointed out to him for correction

21 *Tufour and Others v The Electoral Commission and Attorney-General* [1980] GLR 637 642.

22 Gloppen (n 16 above) 3.

23 See Statement by the EC on reasons for disqualifying candidates for 2016 elections.

24 See *The Republic v High Court, (Commercial Division (Exparte Electoral Commission – Papa Kwesi Nduom – Interested Party, 2016 Civil Motion No J5/7/2017; The Republic v Mrs Charlotte Osei and Another (Exparte Dr Papa Kwesi Nduom, Suit No GT/ 1401/2016; Nana Konadu Agyemang Rawlings v Electoral Commission; Hassan Ayarega v Electoral Commission; People's National Convention (PNC) v the Electoral Commission.*

25 Civil Suit No GT/1401/2016 delivered by Justice Eric Kyei Baffour in the High Court, Accra on the 28 October 2016.

before the end of nominations he should have submitted his forms earlier and ignored the dates set by the EC in order to take advantage of that before the close of nominations in accordance with the rules. Since Nduom 'purported to have relied on the notice issued regarding the two specific dates of 29th and 30th September, 2016 for the submission of his forms, then the Applicant [Nduom] voluntarily assumed the risk associated with the late submission of forms'.<sup>26</sup> The High Court ruled in favour of Nduom, by quashing his disqualification and also ordered the EC to allow him to correct the form and accept same from him. The Court further held that the timelines for nominations are within the discretion of the EC. The EC however had not set the nomination period required by Regulation 9(2) of CI 94; hence the EC could not complain that the nomination period had elapsed.

The EC appealed to the Supreme Court against the decision of the High Court in *The Republic v High Court (Commercial Division); Ex parte Electoral Commission*<sup>27</sup> where the Supreme Court ordered the EC to (1) extend the nomination period from 7 November 2016 to the close of 8 November 2016; (2) give Nduom the opportunity to correct the errors and accept his nomination upon submission; (3) invite the other disqualified applicants who had submitted their nomination by 30 September 2016 and give them a hearing within the extended period and (4) give candidates the opportunity to make correction in accordance with Regulation 9(2) of C.I. 94. The Supreme Court further gave an order to stay all proceedings pending in the High Court.

Also in *Abu Ramadan and Another v Electoral Commission and Attorney-General*,<sup>28</sup> the Supreme Court ordered the Electoral Commission on 5 July 2016 to 'immediately' delete from the register names of the 56,739 persons it said registered with National Health Insurance cards. The court also ordered the Commission to delete persons whose names were not submitted to the Supreme Court but who registered with the NHIS cards. The Court had already ruled in 2014 that it was illegal for the EC to register persons with NHIS cards.

In *Progressive People's Party v Electoral Commission* the plaintiff challenged the presidential filing fee of GHS 50,000.00 and parliamentary filing fee of GHS 10,000.00 fixed by the EC for being 'arbitrary, capricious and unreasonable'. The plaintiff also sought for an interlocutory injunction to restrain the EC from accepting filing forms as scheduled. The suit was dismissed by the High Court.

26 As above, 3 & 4.

27 *The Republic v High Court, (Commercial Division (Ex parte Electoral Commission – Papa Kwesi Nduom – Interested Party)*, 2016 Civil Motion No J5/7/2017.

28 Writ No J1/14/2016.

## 2.2 Analysis and implications of the spate of litigation

Litigation allowed the court to review and clarify the rules for the actors and the citizenry on specific aspects on the electoral process. Thus *Ex parte Papa Kwesi Nduom*<sup>29</sup> made it clear that the disqualified aspirants were entitled to an opportunity to correct errors on their forms and be heard before being disqualified. *Tufour and Others v The Electoral Commission and Attorney-General*<sup>30</sup> for example clarified that special voting should be counted with the general polls together in respective constituencies at the close of the polls in those constituencies. The spate of litigation which engulfed the 2016 pre-election process created a lot of tension, uneasiness and uncertainty about the elections and stalled some of the electoral processes. This is because the issues involved had to be resolved before the EC could continue with some scheduled activities. For example, the plan of the EC to have balloting by aspirants for their positions on the balloting paper could not be done as planned, as the EC had to wait for the outcome of the cases on the disqualification in order to know the number of presidential aspirants. Likewise, it could not receive filling fees as planned until the case challenging the fees fixed by the EC had been dealt with by the court.

It is observed that the cases under consideration were all brought against the EC rather than the usual disputes that occur among the political parties and allied organisations concerning the elections. Some of the cases could have been resolved out of court only if the EC was amenable to hear the complainant out or to comply with its own regulations put in place for the elections. This seems to suggest that the EC had become part of the contest instead of being an impartial referee in the process. The litigation allowed for a review of the work of the EC and held the EC accountable. Thus, in *Ex parte Electoral Commission*<sup>31</sup> the Supreme Court clarified Regulations 6 and 7 of CI 94 that presidential aspirants were entitled to the opportunity to correct errors on their form. Had the Electoral Commission adhered to the Court's order in 2014 against registering voters with NHIS cards, the subsequent case of *Abu Ramadan* in 2016 would not have arisen. They revealed lapses in the EC's work and also made it accountable. Since the EC's work has come under the scrutiny of the court it is likely to improve upon its performance in the future and possible law reform.

Likewise, litigation revealed the defects/gaps and ambiguity of an electoral law and addressed it. *Kwesi Nyame – Tease Eshun v Electoral Commission*<sup>32</sup> is the case in point. It ended in judicial law-making as the Supreme Court got the CI 94 amended to make it mandatory for the EC to make collation sheet (pink sheet) available to political parties. This is very

29 *Ex Parte Dr Papa Kwesi Nduom* (n 24 above).

30 Writ No JI/1/2017.

31 *Ex parte Electoral Commission* (n 27 above).

32 (n 19 above).



crucial to the integrity of the process in ensuring transparency because the pink sheet has the collated results of given constituencies. It is fair that the key actors in the process are furnished with copies of the laws. Electoral laws should inherently conform to the substantive and procedural requirements of rule of law in order to produce fairness, clarity and certainty in the electoral process.<sup>33</sup>

Litigation served as a safety valve for the contestants to cool off their frustration, anger and loss because of the possibility of succeeding in court. In the cases considered above which dealt with pre-electoral disputes, there were sharp contentions by those involved and their supporters. The situation did not escalate because of the safety valve provided by the court. The judiciary came under fierce criticism and attack for its decisions leading to contempt and a clash between the Judiciary and the Executive. In *In Re The owner of the Station – Montie FM, Salifu Maase, Alistair Nelson and Godwin Ako Gunn & Others*,<sup>34</sup> the 2nd, 3rd, and 4th contemnors, were radio host and panellist *respectively*. The 3rd and 4th contemnors with the support of the 2nd contemnor hurled insults at the Supreme Court judges with threats of death should the decision in *Abu Ramadan's case* go against the EC. The Supreme Court was hearing the case on validity of voters registered with NHIS. The contemnors also incited the public to reject the Supreme Court's decision on the validity of the voters register. The Supreme Court charged them with contempt for, (a) scandalising the court, (b) defying the authority of the court, and (c) bringing the authority of the court into disrepute. On 18 July 2016, the court found them guilty on their own plea and sentenced them to a term of four months imprisonment and a fine of GHS10 000 each. The directors were also fined GHS30000. The President John Mahama invoked Article 72 of the Constitution to grant the contemnors pardon when top members of the ruling NDC party submitted a petition to the President.

The response to the spate of litigations was judicial activism. The judiciary played an active role in getting the issues resolved in an expeditious manner to enhance electoral integrity. For example, in *Ex parte Electoral Commission*<sup>35</sup> the Supreme Court was proactive in making a general order to cover all the other disqualified candidates so that they did not have to individually pursue their case. By this, the judiciary saved costs and time. The decision also allowed all electoral processes, such as the balloting for the positions of the presidential candidates on the ballot paper to continue. The judiciary has also showed its preparedness to handle election cases expeditiously by setting up 17 specialised courts across Ghana for such purposes.

33 See H Barnett, 'Constitutional & administrative law' (2004), for detailed examination on substantive and procedural requirements of rule of law.

34 Civil Motion No J8/108/2016.

35 *Ex parte Electoral Commission* (n 26 above).

Although the judicial activism within this period is laudable, we risk inundating the courts with litigations in future elections. This calls for consideration of alternative electoral dispute resolutions.

### **3 Viability of alternate electoral dispute resolution**

The idea of alternative dispute resolution is well established in legal systems as a means of addressing myriad forms of disputes. These could be formal and informal. In the contexts of election disputes, alternate electoral dispute resolution mechanisms (AEDR) include compromise, mediation, conciliation, negotiation, dialoguing, etc. However, debates surround the suitability of out-of-court resolution of election disputes.

Proponents of AEDR maintained that AEDR could enhance electoral justice because it provides for; 'easier, faster and more cost effective access to justice; a less threatening environment for the disputants; the possibility of win-win outcomes for all disputants; and the opportunity to circumvent the problems of discredited EDR mechanisms'.<sup>36</sup> Green, a proponent of AEDR, adds that it has an advantage of legitimising democracy when it provides timely resolution as opposed to protracted adjudication and that disputants are able to work out their interest fairly and quickly.<sup>37</sup>

Critics of AEDR on the other hand argued that election is a zero-sum game – you win or you lose. A dispute resolution should therefore follow suit to determine who wins or who loses. There is no middle way and there is no room to share or split the pie so any AEDR mechanism that is intended to slice the pie is unsuitable. It has been asserted, 'Democracy demands a winner and a loser. There is nothing in election Beyond Winning'.<sup>38</sup> AEDR may not lead to the closure of the dispute and the dispute may eventually end up in court as it is the case with ADR practice, whereas litigation when determined brings a closure to an electoral dispute. Lawyers in particular prefer litigation in court to mediation in post-election contexts since that is a familiar constituent that had been tried and tested. There is also the issue of neutrality of mediators or arbitrators.

In the contexts of EDR systems in Africa, both formal and informal AEDR exist but these deal mainly with pre-election disputes. Thus several African countries have out-of-court resolution platform for handling pre-election disputes both at the formal and informal levels. For example South Africa and Lesotho have institutionalised interparty liaison

36 International IDEA (n 1 above) 188.

37 R Green 'Mediation and post-election litigation: A way forward' (2012) 27 *Ohio State Journal on Dispute Resolution* 325.

38 As above, 325.

committees that serve as a platform to engage the EMB and political parties for consultation and cooperation on election matters.<sup>39</sup>

However, post-election disputes are mostly mandated by the law to be resolved through the court. In view of the potential of resolving some election disputes through AEDR, they should be nurtured to complement adjudication. This is possible because within the African contexts settling dispute out of court is the norm rather than the rule. African indigenous dispute resolution mechanisms have informed Western theories and practice of ADR and are being reshaped and reconstituted at the macro and micro levels both in Africa and elsewhere. It would therefore not be out of place to consider AEDR and have it institutionalised within the electoral justice architecture of respective countries. In fact ad hoc international mechanisms were instituted outside the constitutional framework of Kenya and Zimbabwe to address post-election disputes. In the case of Kenya the African Union through Kofi Annan, the former UN Secretary-General, mediated the Kenyan post-election violence of 2007 that led to the establishment of a coalition government.<sup>40</sup> Similarly, the Southern African Development Committee (SADC) appointed Thabo Mbeki, former South African President, to mediate in the post-election violence that followed the 2008 election in Zimbabwe. This culminated into power-sharing agreement and the formation of the government of national unity.<sup>41</sup>

It should be pointed out that not every electoral dispute would be amenable for AEDR. The International Foundation for Election Systems (IFES) examined the possibility of ADR being utilised to address election disputes. IFES identified certain election disputes cases that are not amenable for ADR. These included (1) cases relating to fundamental rights, (2) cases in which binding precedents are desirable, and (3) cases in which the court system can provide a timely, credible decision.<sup>42</sup> Each electoral system should disaggregate electoral disputes in terms of those amenable for AEDR and those that are not. This is in no way suggesting that AEDR should replace adjudication by the court, because when AEDR does not work the matter may end up in Court; but that parties in a post-election dispute should be allowed to resort to AEDR when they deem it fit. In this way, the burden on the court could be lessened and parties may succeed in working out a position that caters for their interest and that of their supporters. With AEDR, election may not always be a zero-sum game in all cases.

39 International IDEA, 2010 a. (n 1 above).

40 As above.

41 See LA Nkansah 'Electoral adjudication in Africa's democratization process: A prerequisite for electoral justice' in SM Haque, A Shyaka & GM Mudacumura (eds) *Democratizing public governance in developing nations: With special reference to Africa* (2016) 256.

42 Green (n 37 above).

## 4 Out of court electoral justice

The constitutional instruments put in place for the respective election periods for the conduct of elections under the Fourth Republic have wedged in them out of court settlement of disputes. One particular area where out of court settlement mechanism has been provided for can be found in all Constitutional Instruments under the Fourth Republic regulating registration of voters. The Public Elections (Registration of Voters) Regulations, 2016, CI91 will be examined as a framework of analysis. It will be helpful to acquaint the reader with the Voters Register under the Fourth Republic before examining the mechanisms for resolving complaints on registration and the register.

### 4.1 The voters register under the Fourth Republic

The EC by article 45 of the Constitution has the responsibility to prepare the voters register by registering qualified Ghanaians. The EC inherited the voters register used for the 1992 elections from the National Commission for Democracy. This register had been prepared in 1987 and had been used for the 1992 referendum on the adoption of the Constitution.<sup>43</sup> The register was over bloated because the mode of registration was by house to house and market-to market so there was multiple and double entries.<sup>44</sup> The EC tried to clean the register but in the words of Annoh, 'it was not totally reliable and verifiable'. The NPP rejected the results of the presidential election which was conducted on 3 November 1992 with the register and boycotted the parliamentary election scheduled for December 1992. The NPP came out with a book: 'The stolen verdict: Ghana, November 1992 presidential election: report of the New Patriotic Party' (1993) to register its protest.<sup>45</sup>

The EC discarded the register and prepared a new one in 1995 which was reviewed in June 1996 and used for the 1996 presidential election. Coloured photo ID cards were partially introduced. Thus photo ID cards were issued to voters in the ten urban centres and ten rural communities within the urban capital. This was to forestall impersonation. In the villages, it was felt that people could be identified easily than the urban capitals. This was an improvement on the previous situation where thumb printed ID card was used. Some voters crossed over to register in other

43 *Graphic Online* on 18 October 2016 reported a breakdown of the 17 specialised courts as follows: Greater Accra, six; Ashanti and Western, two each, while Eastern, Central, Upper West, Upper East, Northern, Volta and Brong Ahafo have been assigned a judge each. <http://www.graphic.com.gh/news/general-news/cj-designates-17-courts-to-handle-electoral-disputes.html>.

44 Sylvia Annoh 'Research on Inter Party Dialogue in Ghana; IPAC (2010).

45 As above.

electoral areas because they wanted to have photo ID cards. It was also considered discriminatory by some political parties.<sup>46</sup>

In 2000 there was a review of the voters register and voters were issued with black and white photo ID cards throughout the country. Political parties insisted on having photos included in the register to check impersonation. This register was used for 2004 and 2008 although incremental registration was undertaken in the process. It was visual registration whereby the face and fingerprint were taken to allow officers to identify a voter facially. The registration system where one officer undertook the registration was reviewed to make room for 'four officials; registration official, shaver, laminator and a cameraman in a photo taking area'.<sup>47</sup> For the 2012 general election, a biometric registration was introduced to allow for biometric identification, a system that allows for biometric identification i.e. fingerprints, ears, full face to be verified as opposed to visual identification used in the past. The idea of biometric registration was to eliminate the incidence of impersonation.

For the 2016 elections all sides to the political divide held the view that the register is over bloated. This is a fact the EC acknowledged. In the words of Dr Afari Djan, former EC Chairman:

If our population is indeed 22million, then perhaps 13 million people on our register would be statistically unacceptable by the world standards. If that is the case, then it may mean that there is something wrong with our register ... All of us as Ghanaians, if we think that the figure is not realistic, have a collective responsibility to try to clean the register.<sup>48</sup>

There have been sharp contentions on how to address the problem of the register. The New Patriotic Party called for a new voters register, whereas the National Democratic Congress and its allies called for the retention of the existing register which can be cleaned. The saga on the voters register for the 2016 elections resulted in a demonstration orchestrated by political pressure groups comprising the Alliance for Accountable Governance, Let My Vote Count Alliance and the New Patriotic Party which led to police clash and brutality.<sup>49</sup> The EC's response to the saga was to set up a Five-Man Voters' Register Panel for two days public hearings which took place

46 As above.

47 As above, 8

48 See VCRAC Crabbe 'Report of the Panel on the Biometric Voters Register' available at [https://www.graphic.com.gh/images/pdfs/Panel%20Report%20On%20Voter%20Register\\_graphiconline.compressed.pdf](https://www.graphic.com.gh/images/pdfs/Panel%20Report%20On%20Voter%20Register_graphiconline.compressed.pdf) (accessed 10 November 2016).

49 SK Obour 'Police clash with let my vote count demonstrators' <http://www.graphic.com.gh/news/general-news/police-clash-with-let-my-vote-count-demonstrators.html> (accessed 10 November 2016).

on 29 and 30 October, 2015.<sup>50</sup> The Panel reported that the voters' register should be validated and not be discarded.<sup>51</sup>

## 4.2 Voters registration and alternate dispute resolution

Under CI 91 the EC appoints registration supervisors and officers to carry out specific tasks during the election. A political party or an interested person could request for the names of persons the EC proposes to appoint as officers and supervisors not later than two weeks before they are appointed. A 'registered political party or a person qualified to be a registered voter' that has an objection to the appointment of any of the proposed person could submit it in writing to the EC. The EC should communicate its decision to the parties involved within seven days of the receipt of the objection.<sup>52</sup>

First, it should be observed that by this arrangement, the interested party will have to request for the list of those who are about to be appointed to serve in the capacity as registration officers and the request should be made fourteen days before the appointment of the officers. This poses a problem - how are people to know that within fourteen days the EC will appoint the officers in order for them to request for the list and thereafter raise any necessary objection? This smacks of *Kwaku Ananse's law*.<sup>53</sup> The better option to tackle this problem is to adopt the provision under the repealed Registration of Voter's Public Elections (Registration Regulations 1995, CI 12) that provided for the publication of the list in each registration centre and allowed interested parties to object to the appointed officers within seven days of publication.

Secondly, Regulation 8 of CI 91 is not exhaustive and leaves a lot of open ends. For example, it does not establish a procedure for resolving complaints. It only provides that the EC makes a decision on the objection and communicates it to the objector. Is it then the end of that process? There is the need for an exhaustive process to be put in place to make it viable for disputes to be thoroughly resolved. This is an administrative dispute resolution platform which can be effective if the concerns raised are addressed.

A person who is qualified to be a registered voter may submit a complaint on any matter concerning the registration process to a registration office or supervisor, or assistant. The officer shall resolve it or

50 Members of the panel were; His Lordship Professor VCRAC Crabbe, Most Reverend Professor Emmanuel Asante, Dr Grace Bediako, Dr Nii Narku Quaynor, and Maulvi Bin Salih

51 See Crabbe (n 48 above).

52 Regulation 8 of CI 91.

53 Kwaku Ananse in the Akan folklore of Ghana is a cunning character who personifies cheating and unfairness.

refer it to a higher officer for 'further action'.<sup>54</sup> What happens next? This is an administrative process through which the EC can have the opportunity to resolve myriads of complaints on the registration process and minimise misunderstanding and disagreements in the process. This can be effective if concerns raised are solved. The application for registration by a person seeking to register as voter can be challenged by a registration officer, a supervisor of registration, a registered political party, or a person qualified to be a registered voter. The ground for challenge is on the basis of qualification of the applicant.<sup>55</sup> The challenge shall be determined by the District Registration Review Committee (DRRC). The DRRC is composed of:

- (a) one representative of each registered political party active in the district;
- (b) the district officer of the Commission, who is the secretary to the Committee;
- (c) The police commander in the district or the representative of the police commander;
- (d) The District Director of Education or the representative of the District Director;
- (e) One representative of the traditional authorities in the district.<sup>56</sup>

The Committee appoints its own chairperson.<sup>57</sup> The Committee in conducting its proceedings 'shall be fair to the parties to the dispute'.<sup>58</sup> The DRRC examines the ground for the challenge within seven days of the receipt of the challenge and decides within seven days as to whether or not the applicant qualifies to be registered or not and communicate its decision to the EC within forty-eight hours of the determination of the matter.<sup>59</sup> Unless the decision of the DRRC is appealed against, the EC shall give effect to it after fourteen days of the DRRC's communication of its findings to the parties to the dispute.<sup>60</sup> A party to the dispute who is not satisfied with the decision of the DRRC may appeal against the findings to the Chief Registration Review Officer (CRRO) who is the High Court Judge. The CRRO determines the procedure for hearing of the appeals. The CRRO in writing communicates his decision on the appeal to the EC and the parties and the EC shall comply with the decision.<sup>61</sup>

The DRRC is a body with exhaustive mandate and procedures in place to comprehensively address the issues on the qualification and disqualification of applicants who seek to be registered. The process starts

54 Regulation 17 of CI 91.

55 Regulation 18 of CI 91.

56 Regulation 19(1) & (2) of CI 91.

57 Regulation 19(3) of CI 91.

58 Regulation 19(5) of CI 91.

59 Regulation 20(1)(c) of CI 91.

60 Regulation 20(4) of CI 91.

61 Regulation 21 of CI 91.

from the registration centres and this creates a viable system to flush out unqualified voters from the register or to prevent unqualified people from registering to begin with. This process must be nurtured as it is effective in ensuring that the voters register is cleaned at the micro level rather than waiting to have it infested before attempting cleaning at the macro level through the EC or the Supreme Court.

The inclusion of a political party on the basis of being active in a particular district is difficult to determine. The meaning of 'active' has not been clearly provided for and so may make the composition of the DRRC in this regard problematic.

Again, in a situation where there are so many political parties being active the numbers will swell up. In any case it is not prudent to have political parties represented on the DRRC because this may generate conflict among the political parties. Determining who should be the Chairperson can also create a stalemate. This should have been determined by the Regulation.

After the initial/provisional voters register is exhibited, by exhibition officers' claims (to have names included) on the register or objections (to have names omitted) from the register could be made by filling of relevant form. The claims and objections are pasted at the registration centre. Copies are transmitted to the district officer of the EC and to the Regional officer of the EC and as well as to the District Registration Review Officer.<sup>62</sup> The claims and objections raised on the register are settled by the District Registration Review Officer (DRRO), who is the District Court Magistrate. In the absence of a District Court, the Judge of the High Court appointed as Chief Registration Review Officer (CRRO) of the region will appoint a lawyer of not less than three years standing, preferably residing in the district, to serve as the DRRO.<sup>63</sup>

The DRRO adopts the procedure for dealing with claims and objections and shall hear the persons or their representatives. The Commission shall give effect to the decision of the DRRO unless it receives a notification of appeal on the decision.<sup>64</sup> A person aggrieved by the decision of the DRRO shall appeal to the High Court.<sup>65</sup> As soon as practicable, the High Court shall inform the EC and the parties to the dispute of its decision.<sup>66</sup> The EC shall comply with the decision of the High Court. The EC certifies the register after the objections on it are settled and publishes it. It replaces every existing register.<sup>67</sup>

62 Regulation 25 of CI 91.

63 Regulation 26 of CI 91.

64 Regulation 26(5) of CI 91.

65 Regulation 26(7) of CI 91.

66 Regulation 26(6) of CI 91.

67 Regulation 26(7) of CI 91.



### 4.3 Other AEDR mechanisms for consideration

The Alternate Dispute Resolution Act of Ghana, 2010 (Act 798) provides for various mechanisms for out of court dispute resolution. Among these are arbitration, mediation and other out of court dispute resolution mechanisms. The other out of court mechanisms may include mechanisms which may not be expressly provided for under the ADR Act of Ghana yet are consistent with general ADR practice. One of such mechanisms is the Early Neutral Evaluation mechanism which may be suitable for use within the context of electoral dispute. Under the Early Neutral Evaluation, an independent person or body of persons critically evaluates the respective cases of the parties in accordance with the applicable law devoid of the procedural bureaucracies that inundate the normal court adjudication.<sup>68</sup> The parties are therefore aware of how meritorious their cases are and advice themselves accordingly without going through the excessive delay and expense that is associated with the court adjudication in electoral disputes.

For instance, the case of *Republic v Charlotte Osei and The Electoral Commission Ex Parte Dr Papa Kwesi Nduom*<sup>69</sup> went all the way to the Supreme Court<sup>70</sup> only to be decided on the basis of, *inter alia*, a breach of the rules of natural justice, particularly the principle of *audi alteram partem*. The electoral process was nonetheless halted during the pendency of the suits as the EC awaited the decision of the Court before it could proceed any further with the electoral process. And this contributed to the added tension and doubts as to whether or not the Electoral Commission could even conduct the elections on 7 December 2016 as scheduled. An Early Neutral Evaluation of this matter of disqualification would have averted all the tension and spared all parties the expense of time and resources while at the same time ensuring an amicable settlement of the dispute. It is therefore being recommended that just as the Chief Justice has appointed 17 specialised courts for the adjudication of electoral disputes, the Chief Justice could appoint judges to operate as Early Neutral Evaluators to speedily and efficiently resolve all electoral disputes that may arise.

Other bodies or organisations can facilitate in resolving out of court settlement of pre- election disputes except those which have specifically been mandated to be settled through petition in court. These include Inter Party Advisory Committee (IPAC) and the National Peace Council. IPAC can be a forum to resolve pre-election disputes. IPAC was formed in March 1993 by the EC following the criticisms of the 1992 elections. Currently, it is instituted at the regional, district and constituency levels.

68 For further reading on early neutral evaluation see MVB Partidge *Alternative dispute resolution: An essential competency for lawyers* (2009).

69 Civil Suit No GT/1401/2016 delivered by Justice Eric Kyei Baffour in the High Court, Accra on the 28th of October 2016

70 *Ex parte Electoral Commission* (n 27 above).

The IPAC brings representatives of political parties to a forum with the EC on election matters. The IPAC forum has resulted in critical electoral reforms in Ghana and addressed issues of contention at various stages of the electoral cycle.<sup>71</sup>

The National Peace Council can also be an avenue for resolving electoral disputes by virtue of their mandate as a body to 'harmonise and co-ordinate conflict prevention, management, resolution and build sustainable peace through networking and co-ordination.'<sup>72</sup> The National Peace Council has already been involved in past elections to try and forge peace among political parties. Given its institutional representation, it can be a formidable body provided they remain objective to the cause of peace.

## **5 The Electoral Commission and dispute resolution**

The effectiveness of any Electoral Management Body (EMB) like the EC in carrying out any of their functions including dispute management depends by and large on the independence of the body. This is irrespective of their composition and mode of appointment. The factors that go to make them independent are identified by Open Society Initiative for West Africa (OSIWA) as 'strength of character of members, ... security of tenure, ... the stability of administrative personnel, ... The security of funding, ...' as well as '... the degree to which the EMB has effective control over all the task that must be completed in the electoral process'.<sup>73</sup> In addition, the mandate of the EMB to relate with the political parties and the quality of collaboration between EMB and other institutions and stakeholders in the electoral process is critical.

OSIWA established in their study that one of the common challenges of the EMBs in West Africa is 'the low level of involvement of EMBs in the management of electoral dispute'.<sup>74</sup> In Ghana, however the EC has been specifically given dispute resolution functions; administrative or otherwise as already discussed. Ordinarily dispute management including prevention and resolution is an integral part of any electoral system. The effective management of electoral dispute by the EC and its posture towards AEDR is critical to the success of any AEDR platform; administrative or otherwise.

The EC should make it possible to resolve issues and disagreement with stakeholders like political parties through negotiations, dialoguing,

71 Annoh (n 40 above).

72 Sec 3(a) of the National Peace Council Act, 2011 (ACT 818).

73 IM Fall & M Hounkpe 'Overview: The contribution of electoral management bodies to credible elections in West Africa' in IM Fall, M Hounkpe, A Jinadu & P Kambele (eds) *Election management bodies in Africa: A comparative study of the contribution of electoral commissions to the strengthening of democracy* (2011) 1 5-8.

74 As above 8.

compromise, and mediations instead of the practice of asking them to go to court. The spate of litigation which engulfed the 2016 election would have been minimised if the EC had had an amenable disposition to resolving differences. A case in point is *Ex parte Nduom*, where Nduom had already sought an audience with the EC Chair for the opportunity to correct the errors but the EC Chair still resisted and did not cooperate so Nduom had no option than to go to court. The inability of the EC to carry out its inherent function of resolving disputes is a pointer to a weakness of the system. Admittedly, some issues must necessarily be adjudicated in court or by a formal adjudicatory body but as the UN (Economic Commission for Africa) has pointed out:

The more efficient and effective an electoral system is, the fewer the electoral disputes requiring adjudication by the courts or other bodies. Still few elections are so perfect that they do not generate disputes. They can occur between parliamentary candidates, competing parties and rival presidential candidates.<sup>75</sup>

In the case of Ghana, the EC has been the major disputant in almost all the cases as opposed to the actual contestants. This trend should not continue as it will be weakening the electoral system. The EC should organise the elections in such a way as to minimise disputes for public confidence.

## 6 Conclusion

There have been sharp contentions in the electoral process under Ghana's Fourth Republic. The practice of electoral justice under Ghana's Fourth Republic has made room for aggrieved persons in the electoral process to seek redress as opposed to resorting to violence as a means to resolving conflicts. Ghana's electoral justice consists of court's adjudication, and other alternate electoral dispute resolution mechanisms (AEDR). Electoral justice has mainly been by court adjudication. There has been a spate of litigation at the eleventh hour especially during the 2016 elections. The judiciary handled the cases expeditiously and exercised activism in the handling of the issues to safeguard the 2016 elections. Although courts adjudication to a large extent brought finality to the issues being contested, they created tensions and uneasiness, stalling the electoral process at some points. Electoral justice may be strengthened if AEDR structures in place are also utilised to complement the courts. This could mitigate the incidence of litigation and tensions associated with it due to the adversarial nature of litigation. To strengthen electoral justice in future the following should be taken into consideration; the laws for the conduct of elections should comply with the dictates of the substantive and procedural requirement of the rule of law so as to produce fairness, certainty, and

75 United Nations Economic Commission for Africa *African governance report iii: Elections & the management of diversity* (2013) 159.

clarity in the electoral process. Parliament should scrutinise proposed constitutional instruments for the conduct of elections placed before it for approval. Citizens should also provide review of such proposed instruments for Parliament in the form of memoranda. Also, voter education should be intensified to create an understanding of the electoral laws to avoid incessant rush to court. The EC should respect and comply with its own rules it has formulated for the conduct of elections and avoid the incidence of impunity. The EC should be seen as an impartial referee of the game of election rather than descending into the arena of the contest to ensure public confidence in the electoral process.