

ADINYIRA (MRS) JSC;

Your Ladyships and Lordships, permit me to start my opinion with this prologue:

“...[W]hat all citizens expect form the highest court of the land is the interpretation and enforcement of the Constitution and the law, and their application to the evidence adduced in this trial without fear or favour, as the judicial oath of the learned justices of this Honourable Court requires of them.”

-The Petitioners’ Plea, at page 171 of Written Address

INTRODUCTION

Human rights as outlined in the Universal Declaration of Human Rights (UDHR) of 1948 and guaranteed by the International Covenants on Civil and Political Rights and on Economic, Cultural and Social Rights (collectively known as the International Bill of Human Rights) to which most countries including Ghana subscribe; include:

UDHR ARTICLE 21.1:

Everyone has the right to take part in the government of their country, directly or through freely chosen representatives.

UDHR ARTICLE 21.3

The will of the people shall be the basis of the authority of government; this will, shall be expressed in periodic and general elections, which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The Principle of Universal Adult Suffrage as affirmed in the preamble of the Constitution of Ghana, 1992, is guaranteed and entrenched in Article 42 of the Constitution of Ghana. It reads:

“Every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and entitled to be registered as voter for the purposes of public elections and referenda.”

The fundamental purpose of this right to vote was described in **Figueroa v. Canada (Attorney General) 2003 SCC 37, 1 S.C.R. 912** by Iacobucci J., for the majority at para. 39:

*“In the final analysis, I believe the Court in **Haig v. Canada [1993] 2 S.C.R. 995**, define s.3 with reference to the right of each citizen to play a meaningful role in the election process. Democracy of course, is a form of government in which sovereign power resides in the people as a whole. In our system of democracy, this means that each citizen must have a genuine opportunity to take part in the governance of the country through participation in the selection of electoral representatives. The fundamental purpose of s.3, in my view, is to promote and protect the right of each citizen to play a meaningful role in the political life the country. Absent such a right, ours would not be a true democracy.”*

On 7 and 8 Dec 2012 the people of Ghana, exercised their natural and inalienable right and their political will as makers and main beneficiaries of the Constitution, and cast their votes, to elect the Head of State and Head of Government and Commander in Chief of the Armed Forces of Ghana: Article 57 (1) of the Constitution, 1992.

What is now before the Court is a case in which the Petitioners are seeking electoral justice. Electoral Justice gives people who believe their electoral rights

to have been violated, the ability to make a complaint, get a hearing, and receive adjudication within a reasonable.

Your Lordships, permit me to quote from an international statement of the “Principles of Electoral Justice” developed by senior judicial officers and experienced election commissioners known as the Electoral Integrity Group, in Accra Ghana 15 September 2011; in a manual entitled: *Towards an International Statement of the Principles of Electoral Justice*.

“Electoral Justice[is] a broader concept than the holding of a technically correct polls [it] fulfils the human rights belonging to all people and as citizens as outlined” above in the UDHR of 1948 and International Bill of Human Rights.

“The Principles of Electoral Justice requires a set of institutions, practices, norms, mechanisms, practices and procedures that culminates in fair and open processes by which citizens choose those who are to govern them and to hold them to account-and this is not simply on polling days but on day to day basis. Electoral Justice gives people who believe their electoral rights to have been violated, the ability to make a complaint, get a hearing, and receive adjudication within a reasonable time.”

The guiding principles of electoral justice developed by this august group include: “**integrity**”...“a vital element that contributes to the legitimacy of, every aspect of the electoral process”

“**Participation**”- “the principle that the voice of the people must be heard, respected, and represented in the context of a free, fair and genuine contest...Elections provide a way for all to decide on the decision makers in a way that ensures that all voters have a free and equal opportunity to participate in the election process”

“Lawfulness” (Rule of Law)-The lawfulness of every electoral act and likely consequences of violations must be firmly established and widely understood in order to secure the legitimacy of the outcome...The laws themselves must comply with relevant international norms and their implementation should reflect the principles of Electoral Justice and appropriate sanctions must be defined.”

“Impartiality and Fairness-The principle of impartiality and fairness guarantees the equal treatment of voters and contestants”

“Professionalism-Managing the electoral process requires technical knowledge of electoral issues and competent delivery of the process.”

“Independence- The independence of all those authorities that are legitimately engaged in the electoral process and the resolution of electoral grievances and disputes must be respected and guaranteed by law. There must be no interference by any outside interests.

“Transparency- Transparency is a core element that involves openness at all stages of election organization, which must include access to relevant information on a timely basis, a readiness to provide justification for decisions and a frank admission and swift correction of any mistakes or oversights so as to inspire confidence and credibility in the system in the mind of all stakeholders”

“Timeliness-Timeliness must be demonstrated in a manner consistent with the other principles before, during and after the poll and at all stages in electoral management, including resolution of disputes as this is an integral element in Electoral Justice. The element of time in the administration of justice cannot be ignored, because justice is a time bound concept.”

“Non-Violence(Freedom from threats and violence)- All stages of the electoral process must be conducted without violence, intimidation, coercion, corruption, or other conduct that can interfere with the free conduct of the elections in accordance with the values of Electoral Justice.’

“Regularity- Elections must be conducted periodically, and at more or less intervals, as well as any variations, must be clearly set out.”

“Acceptance-Where the foregoing principles of Electoral Justice have been substantially observed, the electoral processes reflect the will of the people. It is then an overriding principle of Electoral Justice that everyone abides by the outcome; that the outcome be given effect by the institutions of government; and that the legitimacy of the results be acknowledged by the international community.”

These principles of Electoral justice would be used or applied as a yardstick in this opinion to determine whether the electoral processes were substantially observed and reflected the will of the people.

BACKGROUND

The Role of the Electoral Commission

The Electoral Commission (EC) is conferred with the responsibility for conducting free, fair and transparent elections under Article 45 (d) of the Constitution, 1992. The EC at various stages of the 2012 election began with the compilation of the register, demarcation of electoral boundaries, education of the people and political parties and election officials that culminated in the 7 and 8 December elections.

The EC at various stages of the election used a new technology of a Biometric Voter Registration by the use of a biometric verification device (BVD). This involves biometric technology, which uses computer finger-print scanners and

digital cameras to capture the bio-data of an applicant; such personal details of finger-prints and face photo technology are used to verify the authenticity of the voter, and to ensure greater transparency and credibility in the elections. The Public Elections (Registration of Voters) Regulations, 2012 (C.I. 72) regulates the procedure on registration of voters.

After conducting the election which took place on the 7 and 8 December 2012, the Chairman of EC, Dr Kwadwo Afari Gyan announced on 9 December 2012, that Mr John Dramani Mahama has received 5,574,761 votes (50.70% of the votes cast), while Nana Akuffo Addo has received 5,248,898 votes (47.74% of the votes cast). Pursuant to Article 63 (9), the EC declared Mr John Dramani Mahama the President Elect.

Subsequent to the announcement, a petition challenging the results of the presidential elections was filed at the Supreme Court on 28 December 2012 by the 1st Petitioner Nana Akufo -Addo the presidential candidate of the New Patriotic Party (NPP), in the 2012 elections; the 2nd Petitioner, Dr Mahamadu Bawumia the running mate of the 1st Petitioner, and the 3rd Petitioner, Jake Otanka Obeitsebi-Lampsey the National Chairman of the NPP; against John Dramani Mahama, and the Electoral Commission as 1st and 2nd Respondents respectively. The National Democratic Congress, the party on which the 1st Respondent stood as its presidential candidate applied and was joined as the 3rd Respondent.

The Petition

The petition filed on 28 December 2012 was amended on 8 February 2013. The Petitioners say that prior to the December elections, 2nd Respondent informed

all regional executives of registered political parties that all the results would be received through faxes installed in the 'Strong Room' of the 2nd Respondent directly from its officials from the regions and that there could be no opportunity for tampering with the results before same were received in the 'Strong Room'. Petitioners say however that it came to their notice, during the declaration of the provisional results, that the offices of Superlock Technologies Limited (STL), a security installation and information technology company, was receiving the results of the elections before transmitting same to 2nd Respondent in its 'Strong Room'. NPP hence sent a delegation to confront the STL officials whereupon they were informed that they had a contract with EC to provide IT services which included receiving all results of votes cast and faxed from the regional offices of the 2nd Respondent before transmitting same to the 'Strong Room' of 2nd Respondent.

Petitioners claim the said arrangement with STL was made without the knowledge of the NPP or the Inter-Party Advisory Committee (IPAC) to which NPP belongs and it provided an opportunity to tamper with the election results.

Petitioners also say that before the elections in December, the Chairman of the 2nd Respondent announced to Parliament that he had registered some 1,000,000 voters who have not been assigned to any polling station, even though the Public Elections (Registration of Voters) Regulations 2012, (C.I. 72) requires that registration of voters shall be carried out in designated polling stations (registration centres).

Petitioners state further that the total number of registered voters after 2nd Respondent had conducted its biometric registration exercise was a little less than 13,000,000 however this number inexplicably increased by over 1,000,000 after cleaning the provisional register and verifying same.

Petitioners say that around the 26th of September 2012, that is about 42 days before the presidential election scheduled for 7th December, the Chairman of the 2nd Respondent officially announced the total number of polling stations to be employed in conducting the elections as 26,002. This is in compliance with Regulation 16 of C.I. 74.

The Petitioners complain that the total number of registered voters that the NPP was furnished with was 14,031,680. However on 9th December 2012, 2nd Respondent declared the total number of registered voters as 14,158,890. Further on the same date, 2nd Respondent posted on its website the total number of registered voters as 14,031,793 showing a clear disparity of 127,097. The Petitioners also contend that the total number of registered voters for the presidential elections exceeded that of the registered voters for the parliamentary elections by 127,210 voters.

Petitioners say that 2nd Respondent delayed in furnishing the NPP with the final voter's register until just a few days before the December 2012 elections which prevented the NPP from scrutinizing the register and this contributed in undermining the transparency of the elections.

The irregularities emerging from the case of the Petitioners are as follows:

- Change in total number of registered voters
- Printing of ballot papers
- Over-voting
- Voting without fingerprint biometric verification
- Same serial numbers on pink sheets with different results
- Polling stations bearing the same polling station codes and yet with different results

- Absence of signature of presiding officer on some pink sheets
- 28 locations where elections took place which were not part of the 26,002 polling stations created by the 2nd Respondent for purposes of the elections
- Widespread instances where figures and words of votes cast in the elections and as recorded on the pink sheet did not match
- Padding of votes for the 1st Respondent and reducing the votes of the 1st Petitioner.

However, by paragraph 23 of the affidavit of Dr Mahamadu Bawumia filed on the 7th April 2013, pursuant to the directions given by the court on the 2nd April 2013, the grounds set out in the petition were subdivided by the Petitioners into six categories as follows:

- i) Over-voting, that is to say, widespread instances of polling stations where (a) votes cast exceeded the total number of registered voters or (b) votes exceeded the total number of ballot papers issued to voters on voting day in violation of Article 42 of the Constitution and Regulation 24 (1) of C1.75
- ii) Widespread instances of polling stations where there were no signatures of the presiding officers or their assistants on the pink sheets in clear violation of Article 49 (3) of the Constitution and Regulation 36 (2) of C.I.75
- iii) Widespread instances of polling stations where voting took place without prior biometric verification in breach of Regulation 30 (2) of C.I.75
- iv) Widespread instances where there were the same serial numbers on pink sheets with different poll results, when the proper and due procedure established by the 2nd Respondent required that each polling station have a unique serial number in order to secure the integrity of the polls and the will of lawfully registered voters
- v) Widespread instances of polling stations where different results were strangely recorded on the pink sheets in respect of polling stations bearing the same polling station code, when, by 2nd Respondent's

established procedure, each polling station was assigned a unique code in order to avoid confusing one polling station with another which could not be explained by a reference to special voting

vi) Twenty three (23) locations where voting took place which were not part of the twenty six thousand and two (26,002) polling stations created by the 2nd Respondent for purposes of the December 2012 elections.

The Petitioners contend that the irregularities vitiated the presidential results in eleven thousand nine hundred and sixteen (11,916) polling stations by four million six hundred thousand five hundred and four votes (4,670,504). That if these votes were to be annulled, the 1st Petitioner would get three million seven hundred and seventy-five thousand five hundred and fifty-two votes representing 59.69% of votes cast while the 1st Respondent gets two million four hundred and seventy-three thousand one hundred seventy-one votes representing 39.1% of votes cast.

The Petitioners say that in circumstances the 1st Respondent did not obtain more than 50% of the total votes cast in the election as required by Article 63 (3) of Constitution, in order to become President and such ought not to have been declared President. The Petitioners concluded that the 1st Petitioner having obtained more than 50% of the votes cast ought to be declared the President of the Republic of Ghana.

The Petitioners say that the irregularities were a deliberate well-calculated ploy to assist the 1st Respondent thereby subverting the sovereign will of the electorate contrary to the preamble of the Constitution, Articles 1(1), 42 and 63(3) of the Constitution.

The Petitioners therefore request the Court to declare that:

1. John Dramani Mahama, the 1st Respondent was not validly elected as President of Ghana

2. Nan Addo Dankwa Akufo-Addo, the 1st Petitioner herein was rather validly elected President of Ghana
3. Consequential orders as to this Court may seem meet.

1st Respondent's Answer

1st Respondent denies the allegation of the Petitioners that STL was contracted by the 2nd Respondent to carry out the said functions in respect of the elections and this was affirmed when a delegation of political parties led by Hon. Osafo Maafo visited STL.

1st Respondent asserts that the difference in the figure of 13, 917,366 announced by 2nd Respondent was provisional since 2nd Respondent had at that time not yet registered prisoners and other voters, including those in the diplomatic missions abroad and on peace-keeping missions, and had also not done the mop-up exercise it undertook subsequently. He disputes any suggestion that there were some veiled reasons in the differences in the provisional registered voters after the biometric registration; and that the suggestion is without basis and smacks of utmost bad faith. 1st Respondent also says that Petitioner has failed to supply them with particulars of the manner in which the results of the presidential elections were tampered with.

1st Respondent also denies that 2nd Respondent delayed in making the voters register available to the NPP and states that the register was delivered to both parties at the same time. He added that a common register was used for both the presidential and parliamentary elections.

1st Respondent contends that the basis of the declaration of the results was the aggregate of total valid votes cast which was 10,995,262.

1st Respondent rejects the irregularities canvassed by the Petitioners and states that fingerprint verification is not the only means of verification. He contends

that in terms of Article 42 of the 1992 Constitution, failure or the inability of voters to go through fingerprint verification should not be used to deprive voters of their Constitutional right to vote. As such, any electoral law which has that effect is inconsistent with the Constitution and as such unconstitutional.

1st Respondent contends the 1st Petitioner's agents certified the results at the polling stations without protest, and thereby accurately represented to the world that the results accurately reflected the outcome of the election in the respective polling stations.

1st Respondent contends that duplicate codes on pink sheets would not invalidate the declared results of supervised elections in those polling stations and the votes validly cast.

1st Respondent contends further that the absence of signatures on any of the pink sheets cannot invalidate the results shown on those sheets as they were the result of painstaking, public and transparent sorting and (re)counting at the various polling stations with the full participation of 1st Petitioner's agents.

In addition to denying the allegation of duplicate serial numbers, 1st Respondent says that even if it were true, it did not affect the declared results of the elections.

1st Respondent says that the change in the total number of registered voters between that given to the parties and that declared on 9th December, even if it were true would not invalidate the elections.

He also states that as the polls were declared publicly and openly, even if there were conflicts between the words and figures on the pink sheets that did not affect the declared results of the elections. This is even more so as 1st Petitioner's agents were present at the various polling stations and did not protest.

1st Respondent disputes the table set out in paragraph 20 of Ground 3 of the petition and states that it is the product of double counting in many instances. He says further that the request to annul that number of votes would undermine the fundamental rights of Ghanaians under Article 42 of the Constitution. Also any deduction derived from that table, lacks any basis in law or in fact.

1st Respondent states that there was no ploy to unlawfully assist him to win and 1st Petitioner is only finding an excuse for losing the elections.

2nd Respondent's Answer

The 2nd Respondent states that there was no arrangement with STL to receive and transfer election results. Instead STL after winning a competitive bidding was chosen to provide services to the 2nd Respondent which included training of staff and field support and provision of equipment including the provision of a VSAT (Very Small Aperture Terminal) system whereby Registration Database would be sent directly from the 2nd Respondent's District Offices to the Registration Database at its Head Office.

Also the situation of one million voters not being assigned to any polling station was corrected.

The 2nd Respondent says that the initial provisional figure he announced was 13, 917,366 which was later changed to 14, 158, 890 after the registration of foreign service officials, students abroad on government scholarship, other Ghanaians working abroad in international organisations and the late registration of service personnel returning from international peace keeping duties. After adding those wrongly omitted, excluding those wrongly added and removing multiple registrations, the number finally obtained was 14,031,680. He adds that the

voters register is dynamic and not static as required by *Regulation 9 of (C.I. 72)*.

2nd Respondent states that the number of registered voters that was given to the political parties including the NPP was 14,031,793 and that the figure of 14,158,890 stated in the declaration result was an error. The correct number of registered voters of 14, 031,793 was duly posted on the 2nd Respondent's website. It states that the error would have no bearing on total votes cast and would only affect the turnout percentage and change it from 79.43% to 80.15%.

The 2nd Respondent states that the NPP and NDC were the first to receive the final voters register on 21November, 2012 and that the preparation of the final voters registers was a mammoth exercise.

The 2nd Respondent also states that all the political parties, including the NPP, received daily print outs of the registration effected at the registration centres.

The 2nd Respondent also states that the registers for both the parliamentary and presidential elections had the same number of registered voters. The 2nd Respondent states further that each voter was verified only once to cast votes for the candidate of his choice for both the presidential and parliamentary elections.

The 2nd Respondent states further that the total number of valid votes cast is 10,995,262 and not 14,158,880 as shown in the Petition.

The 2nd Respondent claims it kept to its decision and allocated to each polling station, 10% ballot papers that were above the number of registered voters for the polling station. Further, during printing, representatives of political parties were present at the printing houses that were engaged by 2nd Respondent. They were also briefed prior to this about the statistics of the number of ballot papers

that were to be given to each polling station in booklets of 100, 50 and 25 sheets which could not be split.

The 2nd Respondent claims that the polls were counted in the public view and results announced publicly in the presence of the agents of the candidates. Agents also have a right to ask for a re-count or to refuse to sign the declaration form.

2nd Respondent also states that it were only persons who were successfully verified that were allowed to vote and this is why the elections in 400 polling stations were postponed to the next day, when the biometric verification equipment broke down. The EC also noted that the Commonwealth Observer Group recommended on page 36 of their report that the requirement that elderly people be biometrically verified should be reviewed. The EC contends that the fact that every voter was verified is also supported by the pink sheets.

2nd Respondent also claims that every polling station had a name and unique code. Its examination of the further and better particulars supplied by the Petitioners showed that wrong codes were quoted by the petitioners in their particulars and also that where a polling station used for the presidential and parliamentary election was also used for Special Voting (by Security Personnel, etc.), that polling station kept the same code number though the Results of the Special Voting and the results of the voting on December 7 and 8 were given separately. Thus the request to invalidate votes should be refused as it is without merit.

The 2nd Respondent claims that of the 2,009 Pink Sheets that the Petitioners claimed to be unsigned, 1,099 were, in fact signed by the Presiding Officer at the polling station or, at the instance of the Returning Officer, at the Collation Centre; 905 were unsigned representing 3.5% of the total number of Pink Sheets nationwide; and 1,989 Pink Sheets, representing 99% of the number claimed to

be unsigned, were signed by the Polling or Counting Agents of the candidates. It could also be that the signature failed to appear as the Pink Sheets the Petitioners had were only copies of the original.

It also claims that there was no instance where total votes cast exceeded number of voters on the register.

It also claims that in instances where different polling stations had the same serial number, they bore different names and code as such the request to annul those Sheets should be rejected.

It also states that there is no explanation for how the figures in the table in ground 3 of paragraph 20 of the petition were arrived at; and above all there is no justification for the deduction.

2nd Respondent claims further that of the three instances of over padding cited, two were wrong and one was a transposition error in which 17 was stated instead of 97.

The 3rd Respondent's Answer

The 3rd Respondent claims that 2nd Respondent declared 1st Respondent the winner of the 2012 presidential elections based on the tally of votes and that the voters were biometrically verified and voted in the full view of the public, the media and domestic, as well as international, election observers who reported that the elections were generally free and fair. The media also kept a tally of the results from the various polling stations, and reported tallies consistent with that of the 2nd Respondent.

3rd Respondent claims that at the instance of the NPP, the Peace Council organized a meeting, involving the 2nd and 3rd Respondents and representatives of NPP, on the evening of 9th December 2012. This was to enable the latter make representations to the 2nd Respondent about alleged irregularities in the

elections. After hearing the NPP, the 2nd Respondent found no reason to defer announcement of the results and proceeded to give same.

3rd Respondent states the allegations about the premises of STL being used to change election results in favour of 1st Respondent were proved false.

3rd Respondent claims that the spokespersons of the NPP and of the 1st Petitioner have given different figures as the figures by which they claim the votes of 1st Respondent were illegally inflated without giving a meaningful account of how this happened.

It states that 1st Respondent defeated 1st Petitioner in eight out of ten Regions in the Presidential elections. 3rd Respondent also won 148 out of 275 seats in Parliament while the NPP won 123 seats.

3rd Respondent contends that Petitioners cannot claim that the Presidential elections were conducted irregularly, in respect of voter verification, for instance, while acknowledging the validity of the parliamentary elections.

It also claims that the Petitioners through their polling agents acknowledged that the presidential elections were validly conducted and claims to the contrary are an afterthought and in bad faith.

Issues for determination by Court

At the close of pleadings, the parties were not able to agree on issues for determination by the Court. Each of them filed multiple issues. The Court therefore reduced the issues to two which were agreed on by the parties. The issues set down for determination by the Court were:

1. Whether or not there were violations, omissions, malpractices and irregularities in the conduct of the presidential election held on the 7th and 8th December, 2012.

2. Whether or not the said violations, omissions, malpractices and irregularities, if any, affected the results of the election.

Mode of Trial and Burden of Proof

This is the first time that a petition challenging the election of a President of the Republic of Ghana under the 1992 Constitution has taken place and there was therefore no precedent to follow. Guided by the principle of timeliness as an integral part of Electoral Justice this Court ruled, on 10 April 2013 that:

“ It 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. That being so all other laws must be applied with modifications to effectuate this constitutional intent... To expedite the determination of this case the trial will be by affidavits. However, the parties themselves may lead oral evidence. Oral evidence by any other person may be allowed where compelling reasons therefore are given.”

The Court held further that rules as to the burden of proof are observed even with affidavit procedure - see *Republic vs. Director of Prisons Ex parte Shackelford* (1981) GLR 554 at particularly 577 – 582, *Republic vs. Mensa-Bonsu Ex parte Attorney-General* (1995-96) 1 GLR 377 and the recent decision of this Court in *Republic vs. High Court, Accra; Ex parte Concord Media Ltd. & Ogbamey (Ghana Ports & Harbours Authority & Owusu Mensah Interested Parties)* (2011) 1 SCGLR 546.

Standard of Proof

What is the standard of proof required in an election petition brought under constitutional provisions that would impact upon the governance of the nation and the deployment of the constitutional power and authority?

The Evidence Act, 1975 (NRCD 323), section 10 (1) and (2) provides:

Section 10

(1) For the purposes of this Decree, the burden of persuasion means the obligation **of a party to establish a requisite degree of belief concerning a fact in the mind of** the tribunal of fact or the court.

(2) The burden of persuasion may require a party to raise a reasonable doubt concerning the existence or non-existence of a fact or that he establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.

Section 11

(1) For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.

(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence.”

Thus in *Ackah v. Pergah Transport Limited and Others*, [2010] SCGLR 728; I had this to say at page 736:

“It is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things (often described as real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as a jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more reasonable than its non-existence. This is a requirement of the law on evidence under sections 10 and 11 of the Evidence Decree.”

Comparative judicial practice on the burden of proof informs this Court's perceptions, in a case which rests, to a significant degree, on fact. In the Nigerian election case of *Abu-Bakr v. Yar'Adua [2009] All FWLR (Pt. 457)1 SC*; the Supreme Court of Nigeria held "that the burden is on the Petitioner to prove, not only non-compliance with the electoral law, but also that the non-compliance affected the results of the election. The same jurisprudence was enunciated in *Buhari v. Obasanjo (2005) CLR 7(k) (SC)*, also cited by the Attorney-General; the various components of burden of proof were distinguished, in their shifting pattern: the burden is on the petitioner to prove non-compliance with the electoral law; and it then shifts to the Respondent, or the electoral board, to prove that such non-compliance did not affect the results of the election."

In the Ugandan election petition, *Col. Dr Kizza Besigye v. Museveni Yoweri Kaguta & Electoral Commission, Election Petition No. 1 of 2001*, the majority of the Ugandan Supreme Court Justices held as follows:

"... [T]he burden of proof in election petitions as in other civil cases is settled. It lies on the Petitioner to prove his case to the satisfaction of the Court. The only controversy surrounds the standard of proof required to satisfy the Court."

In a recent Canadian case of *Opitz v. Wrzesnewskyj 2012 SCC 55-2012-10-256*, the Canadian Supreme Court tersely held, by majority opinion, that:

"An applicant who seeks to annul an election bears the legal burden of proof throughout..."

From the foregoing it seems to me that high standards of proof required in cases imputing election malpractice, appears to be the norm. In this respect I refer to the Kenyan Supreme Court Case; *Petition No. 5 of 2013 between Raila Odinga v. Uhuru Kenyatta [2013]* at paragraph 196:

“We find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite et solemniter esse acta*: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law.”

Accordingly the Petitioners bear the burden of proof to establish that there were violations, omissions, malpractices and irregularities in the conduct of the presidential election held on the 7th and 8th December, 2012 but also that the said violations, omissions, malpractices and irregularities, if any, affected the results of the election. It is after the petitioners have established the foregoing that the burden shifts to the respondents, to establish that the results were not affected.

The threshold of proof should, in principle, be above the balance of probability,

Witnesses

The Court began taking evidence on 17 April 2013 with live television and radio broadcast which was unprecedented. Dr Mahamadu Bawumia testified on behalf of the Petitioners; the General Secretary of the NDC, Mr Johnson Asiedu Nketia gave evidence on behalf of President John Mahama and the party; while Dr Kwadwo Afari-Gyan testified on behalf of the Electoral Commission. All the witnesses were subjected to rigorous cross-examination.

Six additional witnesses testified on behalf of the petitioners, while about 4,000 people testified on behalf of President Mahama and the NDC, through sworn written affidavits.

Documentary Evidence

The Petitioners by their initial petition alleged that the stated irregularities occurred at 4,709 polling stations. It was later amended to indicate that, the irregularities occurred at 11,916 polling stations. The Petitioners further reduced the number to 11,842, 11,138, 11,115, 10,119 and finally 10, 081 polling stations.

The Respondents throughout the trial to the time of closing addresses disputed the exact number of pink sheets the Petitioners allege the irregularities could be determined on the face of the pink sheets. They indicated they were served with a lower number and also cited instances of duplication in the exhibits they received. By a Court Order dated 9 May 2013 this Court appointed KPMG an auditing firm as referee to undertake the following task.

1. To make a faithful and truthful count of all the exhibits of pink sheets delivered by the Petitioners to the Register of the Supreme Court according to and under the various categories of alleged electoral malpractices as appearing, contained and specified in paragraphs 44 to 67 of the affidavit of the second Petitioner filed in the registry of the Supreme Court on 7 April 2013; and
2. Specifying in respect of each pink sheet, its exhibit number, if any, as well as its polling station name and code number.

A further order was made by the Court on 5 June 2013 ordering KPMG to use the set of exhibits of the Presiding Judge to cross check and finalise the count of the pink sheets. Appendix A1 of the report which contained a summary of pink sheet count shows that 13,926 pink sheets were filed a variance of 2,084 of the 11,842 mentioned in the affidavit of 2nd Petitioner. In all the KPMG identified 8,675 polling stations, but as many as 1, 545 were partially or totally ineligible.

By the close of the Petitioners' case statutory violations and the irregularities relied on by the petitioner on the face of the pink sheets were as in the order considered in this opinion:

- Absence of signature of presiding officer on some pink sheets
- Voting without fingerprint biometric verification
- Over-voting
- Same serial numbers on pink sheets with different results
- Polling stations bearing the same polling station codes and yet with different results
- 22 Unknown polling stations.

Before dealing with these issues I will deal with the voters register

Voters Register

An election is a process which consists of various activities that include the demarcation of constituencies, the registration of voters, the nomination of candidates, the conduct of the election and the declaration of results and these culminate in the activities of Election Day and the subsequent declaration of election results.

In this election the biometric verification was first used in Ghana. The Chairman of the EC, Dr Kwadwo Afari-Gyan, provided information on the biometric verification process. He said it is a system used to register a voter's ten fingers and capture the face image. The biometrics is captured using this device of registration, comprising software, a laptop computer, a digital camera and a device to capture fingerprints. The voter's personal bio data were taken and filled on a Form 1C by a registration assistant and this is scanned unto the

BVD, an electronic copy is printed out and the Voters ID with picture is detached and laminated for the registered voter. The information captured was used in the compilation of the Voters Register.

Provision was made for: a) voters with disability: those whose fore-limbs or parts of their fore-limbs were unavailable for the purposes of capturing their biometrics; b) those who, due to the nature of their work or age, who had either their fingerprints scarred or those whose fingerprints had lost impression and could not be captured. Such persons were to be identified facially only [FO] and this fact are indicated on their voter's ID card, and in the voters register and in the bio data on the BVD.

The Petitioners cited variations in the Voting Register and the register used at the polling stations and double registration as factors of illegality in the conduct of the Presidential election.

The evidence adduced in support of the bloated register by the 2nd Petitioner was that the EC provided the NPP with a voters' register of 14,031,680 which was used for the election; but that at the time the election results were declared the number was 14,158,890, a difference of 127,210.

Explanation given by the EC was that in compiling the Provisional Voters Register, they noticed from the daily printouts and the Forms1C that some voters were inadvertently assigned the wrong polling stations; there were names of people whose biometric details had not been captured, or were captured but subsequently lost. Furthermore, there were some registration centres that showed zero registration, some areas turn out much fewer voters than was anticipated.

The EC said they searched their data base and were able to recover some of the lost data; particularly in situations where wrong codes were used and as a result the people were thrown to some other place. The EC could not restore all the

people to the Voters Register. The EC went to 400 affected polling stations and did what was called special inclusion in order not to disenfranchise the people. Other affected people were allowed people to go to district offices for them to be put back on the register. As a result of this exercise nearly 11,000 people were placed back on the Voters Register.

Another reason given by the EC for the variation in the Voters Register was that initially, they had a figure of 13,917,366 but after the registration of Ghanaians working in diplomatic missions and international organization of which Ghana is a member, Ghanaian students on government scholarship, security personnel, soldiers and policemen who were returning home from peace keeping duties; this figure jumped from 13,917,266 to 14,168,890. This was a difference of 241,524.

The petitioners asked for a production of the names and bio-data of this 241,524. The EC provided 2,883 names, 705 of which were supposed to be for diplomatic missions. The petitioners in examining the 705 names, found 51 of them to be duplicate names, with same ages, except the voter ID number. The Petitioner further showed evidence of double registration at the Mampong Anglican Primary School. The EC though conceding those instances of double registration said those persons could only vote once due to the use of biometric verification.

Although the Petitioners claimed the number of registered voters entered on the pink sheets varied from what was listed in the voters register, they could not substantiate the allegation. The Petitioners also claimed that the EC gave the NPP a register different from what was used for the presidential elections.

1st and 3rd Respondents' Response

The 1st and 3rd Respondents' evidence was that the register by the nature of the processes involved kept changing because after the provisional register was

announced further registration was done for Ghanaians in missions and organizations abroad some Ghanaians on scholarship and troops returning from peace keeping duties and a few others.

Mr Johnson Asiedu-Nketia who spoke on behalf of the 1st and 3rd Respondents said the basis of a clean free and fair election is a credible voters register and throughout our electoral history under this Fourth Republican Constitution the 2012 elections register which is a biometric register has been the most accurate register that we have ever had in any elections in this country. According to him because of the biometric registration, it was not possible to have the name of the same individual repeated in the register and because of the verification procedure, it is also not possible for one person to vote more than once and indeed the records show that there is nowhere, where the total number of votes exceeded the number of registered voters.

On the claim by the Petitioners that different registers in respect of parliamentary and presidential elections, the 1st and 2nd Respondents respond that there was only one register that was used for both the parliamentary and presidential elections; and that voters were verified only once they cast their votes for presidential and then they proceeded to cast their votes for parliamentary.

I appreciate the concern raised by the Petitioners on the voters register as the Constitution that conferred the right to vote also conferred the right to registration as underscored by this Court in *Tehn-Addy v. Electoral Commission [1996-97] SCGLR 58*; and *Ahumah-Ocansey v. Electoral Commission; and Centre for Human Rights & Civil Liberties (CHURCIL) v. Attorney-General & Electoral Commission (Consolidated) [2010] SCGLR 575*.

One of the core values of Election Justice is the principle of *Participation*: “that the voice of the people must be heard, respected, and represented in the context of a free, fair and genuine context.” A citizen can only exercise his right to participation by registering as a voter for the purpose of public elections and referenda.

Two other core values are *Professionalism*: “Managing the electoral process requires technical knowledge of electoral issues and competent delivery of the process.” [Reference Accra Guiding Principles *supra*]

The other is *Transparency*: “Transparency is a core element that involves openness at all stages of election organization, which must include access to relevant information on a timely basis, a readiness to provide justification for decisions and a frank admission and swift correction of any mistakes or oversights so as to inspire confidence and credibility in the system in the mind of all stakeholders” [Reference Accra Guiding Principles *supra*]

As a demonstration of transparency in the electoral process leading to the elections, an Interparty Advisory Committee [IPAC] was established with the purpose of achieving consensus in managing the elections which was to be organized under the auspices of the Electoral Commission. The EC had series of meetings with IPAC at various stages in the electoral process.

The political parties and the public were fully informed by the EC about the voter registration exercise and the various steps taken to assure the integrity, accuracy, impartiality, efficiency, simplicity and security of voter registration. The print and electronic media covered the process.

It is the duty of the EC to ensure that all eligible persons are registered and have their names on the Voters register. The EC is therefore required by Regulation 22 of the Public Elections (Registration of Voters) Regulations 2012, to exhibit the Provisional Register for public inspection at the registration centres. The

purpose of the public display is for the registered voter to check whether his name is on the register and to ascertain whether the particulars on his voter's identification card are the same as the particulars contained in the provisional register. In case of any discrepancy a person may request for the exhibition officer to make correction in the provisional register. In case a person is registered and his name does not appear in the provisional register he may make a claim in the prescribed manner to have his name entered on the provisional register. A person may also file a challenge to a person whose name appear in the provisional register on the ground that the person is not qualified to be registered as a voter.

These claims and objections are settled by a District Registration Review Officer. The Commission certifies the register after the determination of claims and objections.

This verification exercise naturally resulted in a variation between the number of registered voters in the provisional register and the final Voters Register.

It seems to me that apart from the discrepancies in the voters register, I do not find any substance in the complaints being made by the Petitioner against the voters register. The Political parties and citizens had the shared responsibility to check the provisional register for accuracy when it was exhibited, though the ultimate responsibility for a clean and reliable register rests on the EC.

There was bound to be hiccups during the registration and compilations of the Principal Register by the use of biometric verification devices for the first time in Ghana namely unfriendly climatic conditions in which the machine was operated causing it freeze; and unfamiliarity with the device by the users.

Despite these few setbacks, I find that the EC had conducted its affairs professionally and transparently to produce a clean, credible and reliable voters register. Information regarding the voters register is available on the EC's

Website. At the trial it was established that the final register was given to all political parties in the form a CD-ROM and hard copies as well.

From the foregoing I hold that the petitioner's complaint that the compilation of the voters register had an adverse impact on the 2012 December Elections cannot be sustained.

Violations, Omissions, Malpractices and Irregularities in the Conduct of the Presidential Elections held on the 7 and 8 December, 2012.

The petitioners in the written address made what I term the Petitioner plea that:

“...[W]hat all citizens expect from the highest court of the land is the interpretation and enforcement of the Constitution and the law, and their application to the evidence adduced in this trial without fear or favour, as the judicial oath of the learned justices of this Honourable Court requires of them.”

And this is what I set out to do.

CONSTITUTIONAL AND STATUTORY VIOLATIONS

Article 49 of the Constitution makes provision for the conduct of voting. The same Constitution under Article 51 empowers:

“The Electoral Commission, by constitutional instrument, make regulations, for the effective performance of its functions, under the Constitution or any other law, and in particular, for the registration of voters, the conduct of public elections and referenda, including provisions for voting by proxy”

One of such regulations is the Public Elections Regulations, 2012, (C.I. 75).

The Petitioners are seeking annulment of results in certain polling stations for alleged violation of the Article 49 and Regulation 30 of C.I.75. These alleged

violations came about from the conduct of the election, and the Petitioners identified them as voting without biometric verification, over voting and non-signature of declaration forms.

In the evidence put before the Court the Petitioners made no allegation of misconduct against voters and the 1st and 3rd Respondents. The allegation of collusion by the EC with STL was dropped. Allegation of vote padding was dropped. The violation and irregularities complained about were as a result of lapses on the part of presiding officers and polling/counting agents.

The election at the polling stations was conducted by presiding officers and polling assistance on behalf of the EC, and supervised on behalf of the candidates by their appointed polling and counting agents. It is therefore pertinent to set out the role of the presiding officer, the polling agents and counting agents on Election Day.

Role of Presiding officers and Polling/Counting Agents

The role of Presiding officers and Polling/Counting Agents are constitutionally and statutorily regulated. Article 49 of the Constitution clearly articulates the constitutional roles of polling agents alongside presiding officers at public elections.

“49. (1) at any public election or referendum, voting shall be by secret ballot.

(2) Immediately after the close of the poll, the presiding officer shall, in the presence of such of the candidates or their representatives and their polling agents as are present, proceed to count, at that polling station, the ballot papers of that station and record the votes cast in favour of each candidate or question.

(3) The presiding officer, the candidates or their representatives and, in the case of a referendum, the parties contesting or their agents and the polling agents if any, shall then sign a declaration stating -

(a) the polling station; and

(b) the number of votes cast in favour of each candidate or question: and the presiding officer shall, there and then, announce the result of the voting at the polling station before communicating them to the returning officer.”

Additional Functions of Presiding Officer

Regulation 17 of C.I. 75 provides for the appointment and role of presiding officer and polling assistants. Their appointment is made by the EC. The role of the presiding officer includes:

- (a) Setting up the polling station;
- (b) Taking proper custody of ballot boxes, ballot papers, biometric verification equipment and other materials required for the poll; filling the relevant forms relating to the conduct of the poll
- (c) Supervising the work of the polling assistants;
- (d) Attending to voters without identity cards
- (e) Attending to proxy voters;
- (f) maintaining order at the polling station;
- (g) undertaking thorough counting of the votes;
- (h) announcing the results of election at the polling station; and
- (i) conveying ballot boxes and other materials to the returning officer after the poll.

I notice that no mention is made of the signing of a declaration form and giving a copy of the pink sheet to the candidate or his or her agents. This omission is not fatal as they are covered by Article 49 (3) and Regulation 36 3 (b). I however recommend they are included.

Role of Polling Agent

Regulation 19 of C.I. 75 provides for the appointment and role of polling agents. The role description shows that Polling agents are not mere or “exalted observers” as claimed by the Petitioners. The section provides:

“19. (1) A candidate for parliamentary election, may appoint one polling agent to attend at each polling station in the constituency for which the candidate is seeking election.

(2) A candidate for presidential election may appoint one polling agent in every polling station nationwide.

(3) An appointment under sub-regulations (1) and (2) is for the purpose of detecting impersonation and multiple voting and certifying that the poll was conducted in accordance with the laws and regulations governing the conduct of elections.”

(4) A presiding officer shall give a polling agent the necessary access to enable the polling agent to observe election proceeding at a polling station.”

Role of a Counting Agent

Regulations 35 make provisions for the appointment of counting agents and counting of votes.

“35 (1) A candidate for parliamentary or presidential elections may appoint a counting agent to attend the counting of votes at each polling station in the constituency which the candidate is seeking election.

(2) In the case of a candidate for presidential elections the candidate may appoint a counting agent in every station nationwide.”

The counting agent is also given specific roles to play at the counting stage of the elections. The regulations allow a polling agent to act as a counting agent as well. Regulations 36 provides as follows:

(1) The presiding officer shall immediately after the close of the poll, in the presence of the candidates or their representatives and counting agents:

- (a) open each box and take out all the ballot papers in the box ;
- (b) sort out, the ballot papers into valid ballot papers and rejected ballot papers in accordance with regulations 37;
- (c) proceed to count the ballot papers at the polling station
- (d) record the total number of votes cast in favour of each candidate
- (e) record the total number of rejected ballots

(2) The presiding officer, the candidates, or their representatives and the counting agents shall then sign a declaration stating

- (a) the name of the polling station;
- (b) the total number of persons entitled to vote at that polling station;
- (c) the number of votes cast in favour of each candidate; and
- (d) the total number of rejected ballots.

- (3) The presiding officer shall
- (a) then announce the results of the voting at that polling station before communicating the results to the returning officer; and
 - (b) give each candidate or the representative of the candidate or the counting agents a copy of the declaration of the results.”

It is clear from these provisions that a presiding officer, a polling agent and a counting agent have important roles to play from the beginning of polling to the declaration of results; and that they complement each other in conducting the polls. Looking on the face of the pink sheets it is not farfetched to say that both 1st Petitioner and 1st Respondent appointed a polling agent and a counting agent to the polling stations, that explains why invariably two agents signed the pink sheets as Regulation 36(2) *supra* permits ‘candidates, or their representatives and the counting agents shall to sign’. Regulation 35 (6) permits a polling agent appointed by a candidate to act as a counting agent. It is in the interest of a candidate to appoint at least one agent to be at each of the 26,002 polling stations due to the roles they are mandated by the constitution and regulations to perform.

Swearing of Oath

The duties of a presiding officer, polling agents and counting agents are weighty as it is by their performance that an election can be judged fair, impartial, and non-discriminatory and the results accepted by all as credible. Since their role requires honesty, integrity and impartiality they are all (including polling assistance) at the various stages of their appointment) required “to swear to an oath that they shall abide by the laws and regulations governing the conduct of elections”.

The presiding officer and polling assistants who work under him, in taking their oaths swear further that ‘they will faithfully carry out duties in a fair and impartial way’. [Regulation 17(4) (a) and (b)]

An additional oath taken by a counting agent is that he:

(c) “will sign the declaration of results following the count of the ballot, or state in writing to the presiding officer the reason for failing to do so.” [Regulation 35(4)]

Sanctions for breach of oath

In the case of presiding officer and polling assistance, Regulation 17(5) provides that:

“A person appointed a presiding officer or polling assistant who contravenes the laws and regulations governing the conduct of elections commit an offence and is liable to sanctions applicable under the electoral laws of Ghana.”

For a counting agent, he takes the oath “upon penalty of perjury”. [Regulation 35(4)] In the case of a polling agent no sanction is stated but under common law an oath is taken upon penalty of perjury.

Is the role of the polling /counting agent a mere observing role as put out by the Petitioners?

It is clear from the constitutional and statutory regulations that the polling agent forms an integral part of the conduct of the polls on Election Day. He has before the polls sworn to the same oath that the presiding officer and polling assistance have sworn to abide by the laws and regulations governing the conduct of the election.

Although he does not directly perform the tasks assigned to the polling assistance, for instance matching ID cards of voters or distributing ballot papers, he is enjoined by his oath see to it that the rules for the conduct of elections are followed. The presiding officer is also to give him space to do that. Accordingly

before the polls begin at a polling station, a polling agent is required to observe the presiding officer setting out tables and materials for the election and most importantly fill Sections A and B of the pink sheet.

When polling starts polling agents as watchdogs are to help detect impersonation, multiple voting, tampering with the contents of a ballot box and polling staff that do not follow the laid down procedures, or misconduct themselves.

A polling agent is expected to call the attention of the Presiding Officer to anything he considers to be irregular, and if necessary, fill an irregularity form or give a written account of the irregularity to the Presiding Officer or a higher election officer like the returning officer at the collation centre.

Under Article 49.3 polling agents are required to certify the results of their polling stations, consequently polling agents are expected to pay close attention to rejected ballots, closely observe the counting of votes; and make sure that the total number of votes obtained by each candidate has been properly recorded. A polling agent may ask for a recount if he genuinely thinks that the votes have not been counted correctly. Recount is done only once at the polling station. If still unsatisfied the all agents must accompany the ballot box to the constituency centre for the Returning Officer to count the ballots.

A counting agent is required to sign the Declaration of Results form. Poling agents should obtain copies of the signed copy of the results for their candidates. If a polling agents refuse to sign the results he must give reasons to the Presiding Officer or a superior election official.

To conclude the discussion on the role of presiding officers and polling/counting agents I wish to observe that these presiding officers and polling/counting agents have to undergo intensive and proper training to be able to carry out this very sensitive tasks assigned them under the Constitution and

C.I. 75. These persons have to show professionalism, understanding of the electoral laws which may seem simple but complex to carry out. Even though the EC offers training for the agents of candidates, I think it is the responsibility of Political parties to ensure that the agents they appoint have been thoroughly trained and acquainted with what they have to look for. Most of the irregularities complained of in this petition are not trivial as it is the inaction of both the polling agents and presiding officers that has brought us here. Had the polling/counting agents been more attentive to what the presiding officers were required to fill on the forms and the sources from which the information is to be extracted e.g. the voters register, ballot booklets and the biometric verification equipment the errors on the pink sheet might have been minimal. Political parties must invest in the training of their polling agents and not leave it all to the Electoral Commission which appears to organize crash training programs due to limited time.

I will now proceed to deal with the allegation of no signatures of pink sheets by presiding officers to be followed by voting without biometric violation.

ABSENCE OF SIGNATURES BY PRESIDING OFFICERS

This category of irregularity is outside the voter's control, and is caused solely by the error or omission on the part of the presiding officer. Article 49 (3) *supra*, and Regulation 36 (2) *supra* requires the presiding officer, the candidate or their representatives to sign a declaration stating that the results are a true and accurate account of the poll at that polling station, the name of the polling station, the total number of votes cast in favour of each candidate and the total number of rejected ballots.

There was evidence that some forms were unsigned by the presiding officers and the party agents. The Petitioners are requesting that the votes in these

polling stations be annulled as the non-signing of the sheets by presiding officers is an infringement of Article 49 (3).

Counsel for Petitioners submits that:

“It should respectfully be noted that article 49 (3) does not place any premium on the presence of the signature of the agent on the declaration forms unlike that of the presiding officer. That is why it stipulates that “the polling agents (if any)” shall then sign the declaration form after the signing by the presiding officer.”

I find this argument misplaced as the words the ‘polling agents if any’ is taken out of context. To single out the words ‘the polling agents if any’ without reference to the remaining words in section 49(3) of article 49 would be a totally wrong approach to the interpretation of that subsection. For it is important in interpreting a provision of a statute to take account of all the words used since the legislature is presumed not to have used the words unnecessarily. In *Halsbury’s Laws of England*, (3rd ed.) at pages 389 to 390, paragraph 583, states:

“It may be presumed that words are not used in a statute without a meaning and are not tautologies or superfluous, and so effect must be given, to all the words used, for the legislature is deemed not to waste its words or say anything in vain.”

It is also trite law that the overriding principle of statutory interpretation is that the “words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act.” E. A. Driedger, *Construction of Statutes* (2 ed. 1983) at page 87.

Article 49(3) which states:

“The presiding officer, the candidates or their representatives and, in the case of a referendum, the parties contesting or their agents and the polling agents if any, shall then sign a declaration stating...”[Emphasis added]

In my opinion by the use of the commas in the sentence, the underlined words relate to referenda and the phrase ‘if any’ refers to the whole of the underlined words. This makes sense as voting in a referendum does not involve candidates vying for public office; but is usually to decide on constitutional issue(s) as was held in 1977 or 1978 on the issue of UNIGOV or on 28 April, 1992 for the adoption of the 1992 Constitution; or as the citizens of Ghana may probably be required do in the future for the amendment of some entrenched provisions of the Constitution following the recommendations of the Constitution Review Commission.

It is not envisaged that there would be or should be contesting parties in a referenda that is why the words ‘if any’ was used by the legislator. The phrase ‘contesting parties’ to me does not necessarily mean political parties. It includes any group of persons such as civil society, pressure groups, organised labour and civil rights activists who may choose to campaign on the issues that affect governance and civil rights of citizens or group of persons; and also to be watchdogs at the polling stations.

Mr. Addison compares the signatures of the polling agents on the declaration forms:

“...at best, are akin to those of witnesses to a document. The signature of a witness to the execution of a document is valueless in the absence of the signature of the principal party itself, i.e. the party who is to be bound by the contents of the document.”

Contrary to counsel’s submission, the language of Article 49 (3) does not speak or imply that polling agents are required to sign the declaration form as

witnesses to the signature of the presiding officers. A polling agent who represents the candidate is obliged to sign the declaration together with the presiding officer. Both of them have the same obligation to certify the regularity of the conduct of the poll in accordance with the laws and regulations. That is why the polling agent has to pay attention to the sorting and counting of the votes and rejected ballots have to be shown to him and he is entitled to object to the rejection of a ballot paper.

The role of the polling agent as shown in the preceding paragraphs is not a mere spectator at the polls. The Presiding officer is obliged to give him space to observe the poll and where a polling agent has any complaint, he can refuse to sign the declaration form and give reasons in the column provided on the declaration form and/or file a complaint which must be resolved at the collation centre.

The polling agent and presiding officer both face sanction if they do not perform their duties according to the electoral laws.

It is noteworthy that in a majority of the pink sheets where there is no presiding officer's signature the polling agents of the two contesting parties signed the pink sheets, because they are required by the constitutional and statutory regulations to do so.

Counsel for the Petitioners submits further that:

... "It has always been the law that an unsigned document, in circumstances where signatures is essential, is bad in law and void," citing *Akowuah & Anor vs. Ammo & Anor* [2012] 1SCGLR 261 which deals with cancellations and lack of signature on a bail bond; and *Attorney-General, Kwara State & Anor v. Chief Joshua Alao & Anor*. (2009) 9 NWLR Part 671, 84 @ 104 and *Omega Bank Plc. v. O. B. C. Limited*, 21 NSCQR 771 @ 794 (per Musdapher JSC).

Counsel for the 1st Respondent submits that:

“The competing constitutional provisions guaranteeing the right to vote under Articles 42, and Article 49(3), which impose a duty on the Presiding Officer to sign a declaration form, should be resolved in favour of preserving the Ghanaian citizen’s inalienable right to vote, particularly when there is no proof that failure by the Presiding Officer to sign the declaration was wilful or affected the results in any manner.

He submits further that:

“In resolving the issue, therefore, we invite your Lordships to take into consideration the following factors:

- (a) Petitioners do not allege that the voter has committed any unlawful act;
- (b) Voters had no control over the acts and omissions of the Presiding Officers
- (c) Petitioners do not allege collusion between the voter and the Presiding Officers, or indeed between the Presiding Officers and any candidate or political party;
- (d) They do not allege misconduct on the part of the Presiding Officers. Indeed it would have been counter-productive on the part of Petitioners to allege wilfulness on the part of the Presiding Officer because then that would make Petitioners the beneficiaries of such misconduct, if their claim in this regard were upheld;
- (e) There are no allegations of wilfulness on the part of the Presiding Officers;
- (f) The polling agents of the candidates signed their respective portions of the pink sheets in accordance with Article 49(3) of the Constitution;
- (g) Petitioners are not alleging any other head of claim in respect of the polling stations that have the exclusive irregularity;
- (h) Petitioners do not challenge the results that were tallied and declared at those polling stations;
- (i) Petitioners have not complained in prescribed manner, either at the polling stations or at the constituency collation centres, about the conduct of the elections or the declaration of the results.”

The submissions by Mr Lithur are in line with election jurisprudence. Counsel cited **Halsbury's Laws of England 4th Edition, Volume 15(4) at paragraph 670**, where it was stated as follows:

“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. The function of the court in exercising this jurisdiction is not assisted by consideration of the standard of proof but, having regard to the consequences of declaring an election void, there must be a preponderance of evidence supporting any conclusion that the rule was affected.”

And also *Opitz case, (supra)*, where it was held on page 42 (paragraph 66) as follows:

“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.”

Counsel concludes that:

“It would be misdirecting punishment indeed for entitled voters who stayed in long queues to cast their votes, and whose vote had been counted, entered onto a declaration form and publicly declared to be deprived of the right to have those votes counted as a result of an act of omission by an electoral officer (not wilfully done), over whose conduct the voters have no control.”

I find these authorities persuasive. Compliance failures do not automatically void an election; unless explicit statutory language specifies the election is voided because of the failure. There is no such explicit language in Article 49 or C.I. 75. In election jurisprudence, as in Canada, when election officials fail to comply with election codes, the statutes are evaluated as directory unless the officials' committed fraud, the statute expressly declares noncompliance fatal,

or the noncompliance changed or muddied the result. *McCavitt v. Registrars of Voters of Brockton*, 434 N.E.2d 620, 626 (Mass. 1982) (“A voter who has cast his ballot in good faith should not be disenfranchised ‘because of the failure of a ministerial officer to perform some duty imposed upon him by law.’”)Att’y Gen. ex rel. Miller v. Miller, 253 N.W. 241, 243 (Mich. 1934); Pyron v. Joiner, 381 So.2d 627, 629(Miss. 1980) (en banc) (quoting authorities that stated that elections held at the proper time and place and under the supervision of competent persons will not be overturned for irregularities in the manner the election was conducted unless the contestant proves that legal votes were rejected, illegal votes were allowed, or a combination in a number sufficient to change the results or render them uncertain).”

In this petition as enumerated above by the 1st Respondent, no evidence was adduced to show that the noncompliance were premeditated and carried out by the presiding officers who were agents of the 2nd Respondent, with the intent of causing prejudice to any particular candidate or change the election’s outcome or to render it uncertain. Courts usually apply the election code to protect—not defeat—the right to vote. Public policy favours salvaging the election and giving effect to the voter’s intent, if possible. The right to vote is at the core of our democratic dispensation, a principle I have earlier affirmed in this opinion with reference to *Tehn-Addy and Ahumah-Ocansey* line of cases *supra*.

Counsel for the 2nd Respondent drew the Court’s attention to **The Representation of the People Law 1992, (P.N.D.C.L. 284)** as amended by the **Representation of the People (Amendment) Law 1992 (P.N.D.C. L. 296)**, to apply to any public elections, in its Section 20 (2) (b), provides as follows:

‘Where at the hearing of an election petition the High Court finds that there has been failure to comply with a provision of this Act or of the Regulations, and the High Court further finds

- (i) that the election was conducted in accordance with this Act and Regulations, and

(ii) that the failure did not affect the result of the election,

the election of the successful candidate shall not, because of the failure be void and the successful candidate shall not be subject to an incapacity under this Act or the Regulations.’

Clearly, this Law requires that it is not enough to allege and indicate a failure, but that it must also be demonstrated that the failure affected the results of the election. I agree with him.

From the foregoing I would in the absence of explicit statutory language that specifies the election is voided because of the failure of the signature of a presiding officer; conclude that the votes on the unsigned sheets are valid. Failure by Presiding Officers to sign declaration forms did not affect the results of the elections at the respective polling stations. The presiding officers who did not sign the declaration forms are liable to be sanctioned.

I am conscious of the role of this Supreme Court to interpret and enforce the Constitution, which is one of its underlying concepts of the Constitution. Ghana has progressed immensely in electoral laws and processes and we are in fact the beacon of light in Africa in the conduct of elections. Suffice me to say that gone were the days as in the 60’s:

“...where to register as a candidate for an opposition party required an act of faith; to vote for a United Party member in an election for example, was tantamount to a criminal offence before rural CPP thugs. Whatever went on behind the screen in the polling booths was discovered to be no secret to CPP polling assistants; for the blinds have been rigged so high and the ballot boxes for the parties positioned so far apart that by watching the voter’s feet it was easy to tell for which candidate he was voting [By courtesy and culled from page 63 of T. Peter Omari’s book “KWAME NKRUMAH- The Anatomy of an African Dictator; Reprint 2009].”

Gone were the days when counting was not done at the polling station but taken to a collation centre that led to abuses like ballot stuffing and in extreme cases dumping opponents ballot boxes.

With the kind of peaceful election that we experienced on the 2 polling days 7 and 8 December are we setting the clock back by a narrow interpretation of electoral laws? A strict interpretation would curtail and erode the gains we have made so far. What Ghanaians need to do is to shun and shame the growing violence that has come about as a result of irresponsible, impudent, disrespectful and chauvinistic persons, whose unguarded utterances, and machinations at times bordering on treason are causing disunity in this our dear country all in the name of politics.

I request my colleagues who are not persuaded by my stand to reflect on the following legal exposition by Mr S. Y. Bimpong Buta, the eminent and luminous lawyer and author in his monumental book, “*The Role of the Supreme Court in the Development of Constitutional Law in Ghana*”; at pages 617 to 618, where he ably sums up what is expected to be our role in nation building. He noted that:

“...the Supreme Court has made very distinctive contribution to the important and crucial question of the policy considerations for determining the interpretation of a national Constitution. It is suggested that the principles of constitutional interpretation, such as the need for a benevolent, broad, liberal and purposive construction of the 1992 Constitution as a political document *sui generis*, and capable of growth (as stated by the Supreme Court in cases such as *Tuffuor v. Attorney-General*) would very much assist the court in the exercise of its original jurisdiction in all matters relating to the enforcement or interpretation of the Constitution under article 2 and 130(1). As pointed elsewhere, the 1992 Constitution as the fundamental law of the land must not be

narrowly construed. Rather the Constitution must be given: ‘...a wide generous and purposive construction in the context of the people’s aspirations and hopes and with special reference to the political, social and economic development of the country. Such an approach would, it is submitted, create the peaceful and congenial atmosphere necessarily required for addressing the challenges for national development in all facets.’[1991-92] 18 RGL93 at 104; See also the dissenting opinion of Sophia Akuffo JSC in *Tsatsu Tsikata (No1)* where she pointed out the need to avoid “absurdity and stultification of the organic dynamism that must inform constitutional development.”] [See also *New Patriotic Party v. Ghana Broadcasting Corporation [1993- 94] 2 GLR 354* at 366 where Francois JSC said: The Constitution, 1992 itself points the way to its liberal interpretation. It illustrates from the horse’s own mouth the spirit that should guide its construction. Thus in Articles 165 and 33(5) of the Constitution, 1992 we are required not only to go by the written letter, but to adopt as well, the known criteria which attach to the democratic environment, so that the fundamental human rights guaranteed under chapter 5 of the Constitution are not curtailed.”][Emphasis added]

I rest my case.

I accordingly hold that this head of claim fails and dismissed accordingly.

VOTING WITHOUT BIOMETRIC VERIFICATION

Regulation 30 of Public Elections Regulations, 2012, C.I. 75 sets out procedures that a voter goes through before casting his/her vote in accordance with article 42. It reads:

- (1) A presiding officer may, before delivering a ballot paper to a person who is to vote at the election, require the person to produce (a) a voter identification card, or (b) any other evidence determined by the Commission, in order to establish by fingerprint or facial recognition that

the person is the registered voter whose name and voter identification number and particulars appear in the register.

(2) The voter shall go through a biometric verification process.

Regulation 47(1) of C.I. 75 defines a biometric verification equipment to mean: “... a device provided at a polling station by the [Electoral] Commission for the purpose of establishing by fingerprint the identity of the voter.” [It seems to me this definition is too limited as the biometric verification equipment (BVD) is also used for facial recognition]

The claim by the Petitioners that there has been a violation of the rules relating to biometric verification is based on sub-regulation (2) of Regulation 30 which provides that: “(2) the voter shall go through a biometric verification process.”

The Petitioners submits that the ordinary meaning of Regulation 30(2) of C.I. 75 is that no registered voter should be allowed to vote without first and foremost going through a biometric verification process. The word “shall” makes it obligatory for all voters to be verified biometrically before being allowed to vote.

The Respondents responds that a strict interpretation of Regulation 30(2) of C.I. 75 would disenfranchise a lot of people especially those without fingers and those whose fingerprints have so eroded that the BVD cannot pick them.

Mr Tony Lithur submits:

“If Your Lordships, however, take the view that indeed people voted without biometric verification, it is the case of the 1st Respondent... that fingerprint verification was not the only permissible means of verification under the law. Therefore failure to undergo fingerprint verification before voting did not constitute an infringement of the law. Anyhow, the fundamental right to vote under the Constitution could not be whittled away by subsidiary

legislation. To the extent that any legislation seeks to do that, same would be unenforceable.

[T]he use of the word “or” in sub-regulation (b) clearly shows that fingerprint verification is not the only mode of identifying voters. Indeed the existence of FOs on the biometric register is a clear proof of the position of the law.”

The process contained in the legislation envisages a two-step procedure. The first is the presentation of a voter identification card. The second is the presentation by the voter of “*any other evidence determined by the Commission in order to establish by fingerprint or facial recognition that the person is the registered voter whose name and voter identification number and particulars appear in the register*”. Thus, the alternative to the production of a voter identification card is the production by the voter of evidence that would enable the Commission or its officers to properly identify the voter for purposes of voting. Such evidence may consist either of the fingerprints of the voter or evidence of facial recognition (e.g. a traveller’s passport or driver’s license). In the former case, the only procedure for producing the fingerprint of the voter is the use of the biometric verification equipment provided by the Commission. Indeed, Regulation 47 of the Public Election Regulations defines biometric verification equipment as “a device provided at a polling station by the Commission for the purpose of establishing by fingerprint the identity of the voter.”

He continues:

“Even if this extrapolation were correct, we submit that within the broader context of our electoral laws, a more expansive notion of

biometric verification is necessary in order to give meaning to the right to vote as guaranteed by the Constitution. The restrictive approach being put forth by the Petitioners harbours the potential of nullifying or impairing the right of ordinary citizens who cannot be verified biometrically by fingerprint to vote. For example, persons who are lepers, or have coarse fingers due to farming or other manual labour or double amputees cannot vote by reason of this restrictive meaning of biometric verification.”

He concludes that:

“Your Lordships, be that as it may, it is our contention that the requirement to go through biometric verification must be given a purposive meaning within the context of the constitutional right to vote and the electoral laws of the country. Therefore failure to undergo fingerprint verification before voting did not constitute an infringement of the law. Anyhow, the fundamental right to vote under the Constitution could not be whittled away by subsidiary legislation. To the extent that any legislation seeks to do that, same would be unenforceable.”

As for Mr Tony Lithur’s view that a restrictive approach in applying fingerprint identification will impair a citizen’s right to vote, Mr Addison points out that:

“Biometric verification was intended to deal with instances of voter fraud and impersonation witnessed in the past. It is an even-handed restriction, since as Dr Afari-Gyan stated in evidence, every voter is supposed to be verified. Even persons with the words “Face Only” (“F. O”), written by their names in the voters’ register, and, thereby, suggesting the presence of one form of disability or the other which would disable them from being verified by fingerprint, were verified. The only difference is the manner of verification. It

is correct to say that, under the current legal regime of Ghana, biometric verification is uniformly applied to all classes of voters. It is an even-handed restriction intended to protect the reliability and integrity of the electoral process itself. As held in the U.S. case of **Anderson v. Celebreeze 460 U. S. 780 (1983)**, reasonable, non-discriminatory restrictions which achieve the object of strengthening the electoral system cannot be unconstitutional.”

It is obvious that the BVD is not only for fingerprint identification but also for face or picture verification by these wiping of the bar-coded identification card on the machine. On Election Day every voter with an ID card had to go through face verification before those who are not listed as “face only” went through finger print verification. The system made special provision for those without fingers and fingerprints to be verified by face only and such data is captured on the BVD machine as well as on their voters ID card. From the foregoing it is my contention that sub-regulation (2) of Regulation 30 which provides that: “(2) [T]he voter shall go through a biometric verification process” is therefore misleading as a strict implementation of it would disenfranchise all persons who cannot go through fingerprint identification.

In any event, the compilation of a new voters register using biometric technology, plus the mandatory use of biometric verification devices on polling day, as provided by both C. I. 72 and C. I. 75 respectively, were the necessary mechanisms lawfully put in place to enhance the integrity of the ballot in Ghana. In my view the law requiring that every voter shall go through a process of verification is legitimate and is consistent with international norms. Reference is made to election jurisprudence, where the decisive question that arose for consideration is:

When can it be legitimately said that a legislative measure designed to enable people to vote in fact results in a denial of that right?

In **Ted Opitz** supra the Supreme Court of Canada at par.38 has this to say:

“While enfranchisement is one of the cornerstones of the Act, it is not freestanding. Protecting the integrity of the democratic process is also a central purpose of the Act. The same procedures that enable entitled voters to cast their ballots also serve the purpose of preventing those not entitled from casting ballots. These safeguards address the potential for fraud, corruption and illegal practices, and the public’s perception of the integrity of the electoral process. Fair and consistent observance of the statutory safeguards serves to enhance the public’s faith and confidence in fair elections and in the government itself, both of which are essential to an effective democracy; *Longley v. Canada (Attorney General)*, 2007 ONCA 852,88 O.R. at para, 64 .”

Mr Addison also referred to the South African case of *New National Party v Government of the Republic of South Africa and Others* (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 (13 April 1999). The impugned provisions prescribed that, pursuant to the Electoral Act, No. 73 of 1998, South African citizens otherwise entitled to vote could only participate in the 1999 elections if they possessed and produced one of two identification documents when voting: either a bar-coded identification card or a temporary identification card (TIC).

The Constitutional Court, per Yacoob J, held:

“But the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless. The Constitution takes an important step in the recognition of the importance of the right to exercise the vote by providing that all South African citizens have the right to free, fair and regular elections. It is to be noted that all South African citizens irrespective of their age have a right to these elections. The right to vote is of course indispensable to, and empty without, the right to free and fair elections; the latter gives content and meaning to the former. The right to free and fair elections underlines the importance of the exercise of the right to vote and the requirement that every election should be fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised. Two of these implications are material for this case: each citizen entitled to do so must not vote more than once in any election; any person not

entitled to vote must not be permitted to do so. The extent to which these deviations occur will have an impact on the fairness of the election. This means that the regulation of the exercise of the right to vote is necessary so that these deviations can be eliminated or restricted in order to ensure the proper implementation of the right to vote.”

From the foregoing I hold that the Respondents have failed to demonstrate a corresponding interest equally weighty to justify the non- application of Regulation 30 (2). What has weighed on me to come to this conclusion is that the EC during the registration exercise made special provisions to ensure that persons who because of trauma cannot go through fingerprint verification are not disenfranchised by being verified by face only.

To prevent abuse, FO is embossed on the voters ID card; indicated in the voters register; and in the bio data on the BVD. I accordingly I hold that the requirement by Regulation 30 (2) for a voter to go through fingerprint identification before casting his/her vote does not infringe his or her constitutional right to vote.

The requirement is necessary to prevent those who are not entitled to vote from voting and thus ensure free and fair elections as protecting the integrity of the democratic process is a central core principle of Electoral Justice.

Mr Addison further submits that:

“Quite remarkably, contrary to the clear dictates of Regulation 30 (2) of C.I. 75, the 2nd Respondent in its training manual, exhibit EC2, granted unto its official, particularly, presiding officials at the polling stations, some amount of discretion in permitting persons whose fingerprints could not be verified to be allowed to vote.”

This submission is misplaced as nowhere in the manual was the presiding officer given the discretion to allow a person whose fingerprints could not be verified to vote. At page 28 of the training manual under the heading of **‘Possible Challenges in Processing Voters’** some challenges that may be

encountered when using BVD with their corresponding solution were dealt with. The first deals with situations where the voter do not possess his/her voter ID or the registration receipt, the presiding officer was directed to accept any other form of valid identification document like Passport, NHIS,NIA,Driver's Licence and SSNIT ID cards **with photograph and having the same name of voter** in the register. This is in conformity with Regulation 30 (1) of C.I. 75.

Attending to people without identity card is one of the duties of a presiding officer, specified under regulations 17 (d).The manual provides further that even if the voter has no identification document, the presiding officer is permitted to use the voter's name as recorded in the registration exercise to look for his/her details in the Name Reference list and be made to go through fingerprint verification. [This is where the reference to the Omanhene by Dr Afari-Gyan perhaps comes in.] In other instances where the voter ID number does not tally with the ID number in the Register but all other details including photograph match; or where biographic details in the voter register do not match voter's photo, the voter should be allowed to go through fingerprint verification as fingerprint match is unique to an individual and therefore it is a perfect and conclusive form of identification. And where in all these cases the finger verification is successful the voter is to be allowed to vote,

Though it is not open to the Commission to over-ride the Regulations and rules governing the conduct of elections, such as a requirement of a voter holding a voter's ID card or some form of a valid photo of ID; it is evident that the administrative instructions in the manual are to be applied by the election officials to facilitate, and not to deny an eligible voter the right to vote. The application is not a free fall, as ultimately a voter is only allowed to vote where the verification by fingerprints is successful. [Emphasis added]

So ultimately with the exception of FOs a voter shall only be allowed to vote after going through verification by fingerprints.

What evidence are the Petitioners relying on to support their claim that people voted without going through biometric verification as required by Regulation 30(1) and (2) of C.I. 75?

For the Petitioners, the only evidence of voting without biometric verification is to be found in section C3 of the pink sheets.

A pink sheet comprises of two forms. Form EL 21B, the statement of poll for the office of the President for the Republic of Ghana and Form EL 22B, a declaration form to be signed by the presiding officer and polling agents of the candidates certifying the accuracy of the results of the ballots at the polling station. Form EL 21B comprise of Section A, Ballot Information, and Section B Information about the register and other lists such as proxy list. Section C Ballot Accounting Section D Rejected Ballot Report, the next Section is headed Presidential Election-Polling Station Results Form.

A presiding officer is required to answer a question on a portion of the pink sheet as follows:

C3: What is the number of ballots issued to voters verified by the use of Form 1C (but not by the use of BVD)?

The Petitioners throughout the trial contend the pink sheets tendered in evidence without more constituted the primary evidence on which they relied in support of their case. The Petitioners relied on the figures entered in answer to the above question as evidence of people who voted without going through verification by BVD. According to Dr Bawumia what he and his team did was to aggregate all the figures in section C3 in pink sheets in the MB-M series as evidence of people who voted without biometric verification.

The Respondents denied the claim. Dr Afari-Gyan stated that the Column C3 was not required to be filled by the presiding officers. According to him, that column was created to take care of voters who had been registered by 2nd Respondent during the biometric registration exercise that preceded voting, but whose biometric data had, unfortunately, been lost as a result of some technical difficulties that Commission had encountered. The facility was to allow such persons to vote without going through biometric verification. Some of the political parties raised objections. So the idea was dropped and the presiding officers were instructed not to fill that column; and the Forms 1C were not sent to the polling station.

The Petitioners did not provide any evidence about any complaint lodged by the 1st Petitioners polling agents in prescribed form or affidavit evidence as to people voting without biometric verification. On the face of the pink sheets none of the NPP polling agents attested there was no biometric verification of voters at the polling station.

On his part Counsel for 1st Respondent submits that:

“That the polls were adjourned to 8th December in selected polling stations is not in doubt. The reason for the adjournment is also not in doubt. It was precisely to ensure that no voter would be allowed to vote without first undergoing biometric verification. 2nd Petitioner under cross-examination by Counsel for 1st Respondent testified to this...”

Counsel submits further that:

“What is clear from the testimony is that the use of Form 1C was intended at all times to be the condition precedent to making any entries in column C3. In the absence of any evidence to the effect that those forms were taken to the polling stations against the express instructions of the witness, and that they were indeed utilized, the irresistible conclusion is that any entries made in the column were made in error. This is a clear corroboration of Johnson Asiedu Nketia’s testimony.”

The account of the origin of the column C3 was unchallenged. I find the EC's explanation that the column was created to take care of persons who had been registered during the biometric registration exercise that preceded the election but whose biometric data was lost due to technical hitches, plausible. Any democratic society must treat all its citizenry equally and fairly. The Constitution guarantees the right of persons to equal treatment. So the system should seek to enfranchise all entitled persons to come and vote on Election Day.

The fact that the Form 1C of the affected persons were not sent to the polling centres is also unchallenged. The inference then is that people were not verified by the use of these forms and in the absence of any evidence offered by the Petitioners to the contrary; this Court can reasonably conclude that no-one voted without going through biometric verification.

Furthermore, even though the 1st Petitioner had polling agents at all the 26,002 polling stations there was not a single complaint of non-verification by BVM filed by any of them.

To preserve the integrity, transparency and credibility the election process is open and public. Polling officials work in a public environment at a polling station where their actions can be observed by other election officials like the presiding officer, the parliamentary and presidential candidates or their polling and counting agents, election observers, the media, and members of the public present to vote and present later to watch/join in the counting of votes which is done audibly by the presiding officer. It is reasonable to expect people to protest if others voted without going through biometric verification.

Opportunity was given to the parties in pursuance of the Court's direction on the mode of adducing evidence to file affidavit evidence. The 3rd Respondents filed thousands of affidavits from their polling agents and other persons

testifying that they participated in the election that was regularly conducted at their various polling stations and all who voted went through biometric verification. Even though Counsel for the Petitioners tried to downplay the evidential value of their affidavits, I am of the view that some weight is to be attached to them as they recounted the procedure that everyone went through at the polling stations.

The Petitioners had polling agents at all the 26,002 polling stations yet they did not produce a single affidavit evidence to support their allegation that some voters did not go through finger verification before voting. They also failed to apply to have any of the witnesses of the 3rd Respondent to be cross-examined to test their credibility. Having failed to call a single person for cross-examination, the Petitioners cannot turn round to say the evidence was untested. The rules as to the burden of proof are observed even with affidavit procedure - see ***Republic vs. Director of Prisons Ex parte Shackelford*** supra, ***Republic vs. Mensa-Bonsu Ex parte Attorney-General supra***, and ***Republic vs. High Court, Accra; Ex parte Concord Media Ltd. & Ogbamey (Ghana Ports & Harbours Authority & Owusu Mensah Interested Parties;)*** supra.

So the affidavit evidence filed by the 3rd respondent in support of their case stood unrebutted. I recall how about three hundred people claiming to have participated in the elections which they claim was regularly conducted in accordance with law applied to be joined as respondents but were turned down by this Court for the very reason that they could give evidence on behalf of the Respondents. From the Appendix attached to 3rd Respondents' written address a total of 3,794 affidavits were sworn to denying the various heads of irregularities alleged by the Petitioners.

We take judicial notice of the fact that voters with valid ID cards whose photo and bio data have been verified by the BVD but could not be verified by fingerprints due to technical defects were turned away. The elderly, especially women were the major victims. Breakdown of the BVM resulted in long queues making some people go away without voting.

It is a pity that technical difficulties disenfranchised some citizens. See *Ahumah-Ocansey v. Electoral Commission; Centre for Human Rights & Civil Liberties (CHURCIL) v. Attorney-General & Electoral Commission (Consolidated)*

Participation in elections is one of the core values of Electoral Justice that states: “The voice of the people must be heard, respected, and represented in the context of a free, fair and genuine contest. Citizens are the core representative of democracy as it is they who chose by secret ballot those who represent and govern them. Elections provide a way for all to decide on the decision makers in a way that ensures that all voters have a free and equal opportunity to participate in the election process. Full participation and diversity are manifested when arrangements facilitate the involvement of all, including first-time voters, women, and disadvantaged groups.”[Reference Accra Guiding Principles *supra*]

I find the reasons given by Dr Afari-Gyan plausible. The fact that elections were postponed to the next day due to failure of the BVD machines attest to the fact that all who voted went through biometric verification.

From the foregoing I hold that the Petitioners have not discharged the burden of proof and this category also fails is hereby dismissed.

OVER-VOTING

In paragraph 20 Ground 2 (1) (a) of the 2nd Amended Petition, over-voting is claimed to have occurred “in flagrant breach of the fundamental constitutional principle of universal adult suffrage, to wit, one man, one vote.”

This principle of Universal Adult Suffrage is affirmed in the Preamble to the Constitution, 1992. Article 42 of the Constitution, to which 2nd Petitioner refers in paragraph 23 (i) of his affidavit as one of the two bases for the proposed vote annulment for over-voting, states as follows:

“42. The right to vote

Every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda.”

Regulation 24(1) of C.I. 75, which is the other legal provision on which 2nd Petitioner relies, also provides as follows:

“A voter shall not cast more than one vote when a poll is taken.”

So as Mr Tsatsu Tsikata, Counsel for the 3rd Respondent submits:

“It is absolutely clear, therefore, that an allegation of a voter casting more than one vote is of the essence of what Petitioners are seeking to rely on here. In paragraph 20 Ground 2 (1) (a) of the 2nd Amended Petition, over-voting is claimed to have occurred “in flagrant breach of the fundamental constitutional principle of universal adult suffrage, to wit, one man, one vote.”

However nowhere in the Petition or in the affidavit of the 2nd Petitioner is it alleged that any voter voted more than once, thus infringing the one man, one vote principle. The Petitioners did not lead any evidence to prove that someone voted more than once in the elections.

The case of the Petitioners in respect of over-voting is that whenever the ballot accounting portion of the pink sheet shows that the figure in B1, representing the number of registered voters at the polling station, or the figure in C1, representing the number of ballots issued at the polling station, is exceeded by the total number of votes in the ballot box, the votes of all those who voted in

that polling station must be annulled. This includes, according to the evidence of 2nd Petitioner, where A1 or B1 has a blank since “blank means zero.”

What is over-voting?

There is some divergence of opinion between the parties about what constitutes over-voting. Petitioners claim there are three definitions. The first one is the situation in which the ballots in the sealed box exceed the number of registered voters in a particular polling station. That definition is accepted by all the parties. Dr Afari-Gyan describes that situation as the classic definition of over-voting. That is where the agreement ends. Petitioners define over-voting further to include a situation in which the ballots in the ballot box exceed ballots issued at the polling station. The third definition is the situation where the issued ballots exceed the number of registered voters.

Usually over-voting occurs primarily through impersonation, multiple voting and stuffing of ballot boxes. The adoption of biometric registration is expected to have reduced to the barest minimum impersonation and multiple voting. The use of finger print verification and the marking of a voter’s finger with indelible ink before casting his/her vote, use of transparent boxes placed in full public view are measures to eliminate voting malpractices,

Furthermore the openness of the environment, with the presence of polling agents, the media and in some places observers made up of civil society, domestic and international observers and security personnel prevent malpractices at polling stations such as violence and intimidation. The only thing that is not done in the open but done in secret is the marking of the ballot paper to preserve the sanctity of secret ballot as enshrined in Article 49 (1), and the UDHR Article 21.3*supra*

It is the task of the presiding officers and polling agents to monitor the conduct of the election, to detect and prevent such frauds. It is also the duty of the

presiding officer under the eagle eye of people mentioned above particularly counting agents of candidates, immediately after close of voting, to do ballot accounting and fill the necessary entries on the pink sheet and then proceed to sorting and counting procedures as required by Article 49 (2) of the Constitution and provided in details in Regulations 36 and 37 of CI 75.

The presiding officer then breaks the seals on the ballot box and in full view of the agents removes all papers from the ballot box sort out the ballots into separate piles for each candidate and another pile for rejected ballots if any.

Rejected Ballot Papers

A ballot paper should not be counted if it does not bear the official ballot validation of the polling station, or it is blank, or it is marked for more than one candidate, or there is reasonable doubt as to the candidate the person voted for, or something that identifies the voter has been written on it.

The presiding officer must show every rejected ballot paper to the polling agents and give reasons for its rejection. The presiding officer has to record at the appropriate column of the pink sheets the number of rejected ballot papers. If a polling agent raises any objection the presiding officer must write the words 'rejection objected to' on the rejected ballot and put it in an envelope and notify the returning officer at the collation centre.

I have taken pains to go through the process to demonstrate that if there is any foreign material in the ballot box and the presiding officer and agents are vigilant then it could be detected and taken out and not counted. So that only valid ballots is to be counted at the election. If correct entries are made then after a careful scrutiny the occurrence of over voting should be detected as was done in the 4 polling stations in Nalerigu-Gambaga after checking the BVD to ascertain the number of voters verified and thus eligible to vote at those stations.

It is also the duty of the polling agents to file a complaint if there is such occurrence, unless there is collusion among the election officials, polling agents and voters the public, which is highly unlikely due to competing interests at stake.

What is the evidence relied on by the Petitioners in support of their claim that there was over-voting in some of the polling stations?

This is one area that the burden of persuasion weighed heavily on the petitioners as election results benefit from a presumption of regularity. This reflects the fact that the Petitioner bears the burden establishing, on a balance of probabilities, that there was irregularities that were so substantial that it affected the results of the election. It happens that the species of evidence the Petitioners relied upon were the entries on the pink sheets. As Dr Bawumia stated he headed a task force whose duties, ‘was to examine the election records in search of technical administrative errors in the hope of getting a second chance’. See par 56 of the Canadian case *Opitz v. Wrzesnewskyj*. By this method the Petitioners capitalized on errors made in the entries in the statement of polls form.

The case of the Petitioners in respect of over-voting is that whenever the ballot accounting portion of the pink sheet shows that the figure in B1, representing the number of registered voters at the polling station, or the figure in C1, representing the number of ballots issued at the polling station, is exceeded by the total number of votes in the ballot box, the votes of all those who voted in that polling station must be annulled. This includes, according to the evidence of 2nd Petitioner, where A1 or B1 has a blank since “blank means zero.”

There were mistakes in the entries of ballot information, information about the register, ballot accounting, rejected ballots and tallying of votes in ballot boxes. There were silly arithmetically errors that was capable of being detected by a simple scrutiny of the columns. The Petitioners also capitalized on entries in C3,

which this Court has held by a majority decision that the entries were made in error as no one was verified by Form 1C. Accordingly such entries cannot be used as basis for over-voting.

Some of my brother justices have dealt in detail with this ground so I would not delve into it, except to remark that the Petitioners failed to persuade me that there were votes cast that exceeded the number of voters entitled to vote at these polling stations.

It seems to me that Dr Afari Gyan and Mr Asiedu Nketia demonstrated that it is misleading for the Petitioners simply to look at the entries on the face of the pink sheets without checking the figures against other available and reliable information contained in the voters register, ballot booklets and even the biometric verification device which recorded the number of people who were verified and thus entitled to vote.; before coming to a conclusion that there was over vote. These other sources in my opinion are rather the primary sources to look at under this head of claim when the results is scrutinized for over-voting in view of the patent errors on the face of the pink sheets. The presiding officer (if working according to procedure)has to extract the information to fill columns A, B, C from the voters register, ballot booklets, proxy voters list and the Biometric verification device before he opens the ballot box to sort and count the ballots.

However I am not convinced that no entry in B1 by itself is evidence of over-voting without establishing the number of registered voters at the polling station. The number of registered voters could be easily verified or ascertained from the Voters register of the particular polling stations which every candidate /Party had copies. Having procured the number of voters on the voters register, then the Petitioners should demonstrate the occurrence of over-voting by using any of the definition of over-voting as defined variously by the parties. The

Petitioners having failed to provide such evidence cannot legitimately claim the absence of any entry in B1 as evidence of over-voting.

There were also instances where C1 or the whole of C columns were blank and the Petitioners claim this was also evidence of over-voting but for the reasons given above there is no empirical evidence to show this was the case.

Furthermore some of the Pink sheets under the MB-C series were not full pink so there was no basis for determining whether there was over-voting or not. The 2nd Petitioner said under cross-examination that he deleted 53 of such pink sheets from the list after giving evidence.

We take judicial notice of the fact that there was immense pressure on the presiding officers, election officials and even the polling and counting agents on the day of the elections, the majority of whom has no previous experience in election procedures. The EC officials and presiding officers may have made some clerical errors; but there is no evidence upon which mischief or advantage can or should be attributed thereto. This is not a phenomenon peculiar to Ghana alone.

In *Opitz vs. Wrzesnewskyj* SCC 55, ([2012] 3 S.C.R. in which the Supreme Court of Canada held as follows in paragraph 46:

(46) ‘The practical realities of election administration are such that imperfections in the conduct of elections are inevitable. As recognized in *Camsell v. Rabesca*, [1987] N.W.T.R. 186 (S.C.), it is clear that “in every election, a fortiori those in urban ridings, with large numbers of polls, irregularities will virtually always occur in one form or another” (p. 198). A federal election is only possible with the work of tens of thousands of Canadians who are hired across the country for a period of a few days or, in many cases, a single 14-hour day. These workers perform many detailed tasks under difficult conditions. They are required to apply multiple rules in a setting that is unfamiliar. Because elections are not everyday occurrences, it is difficult to see how workers could get practical, on-the-job experience.’”

One other factor which was lacking and need to be mentioned is the absence of a complaint. The Petitioners led no evidence on events at the polling stations except by one affidavit evidence of one Peter Awuni a parliamentary candidate for the NPP, that the 2nd Petitioner annulled the results of Kuligona, Nanyeri, Bongni and Langbesi Police Station polling stations, in the Nalerigu- Gambaga constituency because the ballots counted at the polling stations exceeded the number of persons verified by the BVD by one or two people.

Mr Tsikata submits that:

“[t]he Petitioner fails to appreciate that in the absence of any person being even alleged to have voted twice or illegally, or any person having been identified as having made a complaint of over-voting, whether formally or informally, merely invoking entries on the administrative portion of pink sheets which have been shown to contain errors cannot meet the burden of proof on the Petitioners. His testimony continues to dwell exclusively on these administrative entries.”

Mr Lithur also submits:

“In determining whether or not there was over voting in the December 2012 election, in terms of Petitioners’ definition, it is important to note that Petitioners have neither challenged the tallied results at the polling stations nor do they challenge the collation of the results at constituency collation centres. Their case, as stated on numerous instances including in the 2nd Amended Petition and also in their oral testimony in court, is limited to the entries made on the voting accounting sections of the pink sheets. The only evidence being relied on by Petitioners in proof of over-voting, therefore are those entries,”

This brings me to the issue:

Whether the over-vote if any should lead to an annulment of the total votes cast at the polling station?

This Honourable Court was invited to advert its mind to the fact that, in an election at a polling station shown to have been affected by over-voting, it is not possible to determine which of the votes cast constitutes the invalid votes and, therefore, which votes cast count as the lawful votes. The practice, therefore,

has been to annul all the results of the polling stations where they are proven to have occurred

I do not subscribe to this suggestion and its application in this case. In seeking to annul votes, it needs to be clear which polling stations are being called into question. The confusions about exhibits have undermined their case. As there is insufficient clarity on the polling stations in question, the attempt to annul certain votes cannot even get off the starting blocks. Moreover the few instances of over-voting that was demonstrated during the hearing, going by the average of those votes; there is no mathematic chance that the results in those polling stations would change the outcome of the results at the polling station. Even if the aggregate of the actual over-vote in polling stations where over votes is established and proportionally deducted from the votes of each candidate, it would not affect the results. Even if they are deducted from the winning candidate's vote it would still not affect the votes.

My brethren who took the position that there was over- voting and so the votes are to be annulled for a re-run of polls in the affected were unable to ascertain and provide the total number of over votes from the pink sheets for me to change my position on this claim.

The Petitioner could not establish to my satisfaction whether the number of votes cast in these polling exceeded the number of registered voters as indicated in the Voters Register. They had copies of those registers but only produced one to show there was double registration at the Mampong Anglican School.

The Petitioners have not led sufficient evidence for me to come to the conclusion that there was clearly a mathematical chance that the results could change then the votes would have to be annulled and a re-run held. But then in many instances the over-voting was either one or two, and certainly that cannot lead to annulment of the entire votes.

Dr Bawumia referred to a statement made by Dr Afari-Gyan before the election that if the ballots are counted at the end of the day and it is found that even one ballot exceeds what was issued to voters verified to vote; the results of that polling station would be annulled.

I find this pronouncement disturbing as it is not based on any statute or any constitutional instrument made by him as he is empowered to do under Article 51 of the Constitution. The directive that an over vote by one ballot would invalidate the whole results of a polling station when despite the over vote a winner is clearly ascertainable, is contrary to both the letter and the spirit of the Constitution and contravene articles 42 on the right to vote.

In Tehn-Addy V Electoral Commission [1996 – 97] SCGLR 589

Acquah JSC (as he then was) at page 594:

“Whatever be the philosophical thought on the right to vote, article 42 of the 1992 Constitution of Ghana makes the right to vote a constitutional right conferred on every sane Ghanaian citizen of 18 years and above.

As a constitutional right therefore, no qualified citizen can be denied of it, since the Constitution is the supreme law of the land.

Article 45 entrusts the initiation, conduct and the whole electoral process on the Electoral Commission and article 46 guarantees the independence of the Commission in the performance of its task. A heavy responsibility is therefore entrusted to the Electoral Commission under article 45 of the Constitution in ensuring the exercise of this constitutional right to vote. For in the exercise of this right, the citizen is able not only to influence the outcome of elections and therefore the choice of a government but also he is in a position to help influence the course of social, economic and political affairs thereafter. He indeed becomes involved in the decision-making process at all levels of governance.”

The underlined words above informs my opinion that this directive cannot override a constitutionally protected right to vote.

I respect the views and the authorities cited by Mr Addison, to support the Petitioner's request to annul the polls in polling stations where there is proof of over-voting.

He referred to the dictum of the Us Supreme Court in the case of **Reynolds v. Sims 377 US, 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)** which is to the effect that:

“The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.”

I absolutely affirm the concept that over voting debases and dilutes the weight to be accorded each individual vote. So where in **Lamb v. McLeod (1932) 3WWR 596**, cited by counsel the subject matter of the complaint was the validity of 17 votes in an election where the margin of victory between the candidates was only 5, the court rightly in my view annulled the votes on the grounds, inter alia, that:

“It cannot be said that there was an electing of a Member of Parliament by the majority” as the intrusion by wrongdoers made “it impossible to determine for which candidate the majority of qualified votes were cast”.

However, it is my considered opinion that with the margins of over-vote involved in each of the impugned polling stations, it was possible to determine the winner at each polling station where over-voting occurred and accordingly **Lamb vs. Macleod** is inapplicable to this case.

The Plaintiffs have not been able to discharge the burden of persuasion in accordance with the Evidence Act. Accordingly I would also dismiss this category of irregularity.

SAME SERIAL NUMBERS

This head of irregularity does not violate any statutory regulation.

The claim under this head is stated in Paragraph 20 Ground 1(b) of the 2nd Amended Petition as follows:

“That there were widespread instances where there were the same serial numbers on pink sheets with different poll results, when the proper and due procedure established by 2nd Respondent required that each polling station have a unique serial number in order to secure the integrity of the polls and the will of the registered voters.”

According to Petitioners, the serial number is the only security feature which is pre-embossed on the pink sheet from the printers. The polling station name and polling code is entered in the space provided on the form by hand by the presiding officer. Once a pink sheet is filled the serial number locks the polling station name and code to that polling station for good. However Dr Bawumia admitted under cross examination that the complaint relating to the serial numbers was not derived from any constitutional or statutory infraction but as the numbers were huge they were serious and inferentially must have affected the outcome of the elections.

He said the use of duplicate serial numbers was a major ‘instrument’ for the perpetuation of the constitutional statutory violation of the law, irregularities and malpractice in this election.

It happened that two sets of pink sheets for the presidential elections were printed. Dr Afari-Gyan explained that the order for printing was made before the filing of nominations and balloting for positions on ballot papers was done. He said they wanted space for 18 names and this was divided into two sets, in

anticipation that a lot of candidates will file nominations. As it happened only 8 candidates successfully filed their nomination papers. So after the balloting for position the EC informed the printers who printed the 8 names on both sets.

Instead of distributing one set, the EC unwisely distributed the booklets randomly and hence two sets of pink sheets with the same serial numbers were found at different polling stations.

There was much wrangling between counsel for the Petitioners, Mr Addison, and Dr Afari-Gyan over the significance of pre-embossed serial numbers on the pink sheets by the printers. According to counsel, in order to guarantee the security of electoral materials, it has been the practice of the EC among other measures to pre-emboss electoral materials with unique serial numbers. As a result ballot papers, ballot boxes tamper proof envelopes, stamps and the pink sheets have pre-embossed serial numbers.

Dr Afari-Gyan, on the other hand said, whereas Regulation 26 (2) of CI 75 requires that numbers are printed on every ballot paper, there is no such requirement for the printing of pink sheets. The serial numbers on the pink sheets are generated by the printing firm to enable the EC to keep count of the number produced. He said the pink sheets are distributed randomly. He said the serial numbers have absolutely no relevance to the compilation and declaration of result as polling stations are identified by their unique codes.

Dr Afari-Gyan explained further that, if two polling stations have pink sheets with the same serial number that will in no way have any effect on the validity of the votes cast. As each of the two polling stations will have different polling codes and names. They will have a different voter's register, different presiding officers, election officials and polling agents, and different results. When the results are taken from the polling stations to the collation centres, they are dealt with on the basis of polling stations codes and not serial numbers.

A cursory check of the pink sheets confirms that the polling stations concerned have different identities, different numbers of registered voters, different results, and different election officers and polling agents. Accordingly I do not see how with the explanation by the EC as to how two sets of pink sheets were printed and randomly distributed could affect votes cast at different polling stations. Even though it was suggested by the petitioners that any one up to mischief can sit in his or her house and fill in the duplicate pink sheets with correct polling station code and name and sign them; this is farfetched as the pink sheets are filled in the open at the polling stations in full glare of the public and endorsed by the agents and the agents receive a duplicate copy thereof there and then, and so there is no opportunity for any swap to take place. The pink sheets tendered by the Petitioners were collected from their polling agents present at the polling station. There was no suggestion of a swap of pink sheets at the trial under this head of claim.

Although the handling of the order of printing of the pink sheets and its random distribution is not the best of administrative decisions, the petitioners have not shown in any way as to how it interfered or compromised the vote. I will therefore without hesitation dismiss this head of claim as baseless.

22 UNKNOWN POLLING STATIONS

Before voting day, the EC gave the political parties and the independent presidential candidates a list of 26,002 polling stations in which elections were to be conducted. The petitioners in scrutinizing the pink sheets claimed they discovered that voting occurred in 22 polling stations which were not included in the list of the 26,002 polling stations supplied them by the EC.

The EC denied this claiming the presidential results were declared on the results from 26,002 polling stations. The reason why the Petitioners described them as

unknown is because polling codes and polling station names in some instances were wrongly quoted. The EC was able to identify those polling stations. In respect of these 22 polling stations supervised elections took place there and the results in those stations. They were endorsed by the party agents.

In any case, from the pink sheets that the petitioner supplied, there is proof that there were supervised elections at those polling stations. The 1st Petitioner sent his polling agents to those 22 polling stations and that the agents did sign those pink sheets and collect duplicate copies. In so far as the Petitioners sent polling agents to the said polling stations, they cannot say they are unknown.

We find no merit in this complaint and it is therefore dismissed.

SAME POLLING STATION CODE WITH DIFFERENT RESULTS

Each polling station is identified by its name and by its polling code. The polling code is unique to each polling station.

The Petitioners further claimed that there were instances where different results from different polling stations were recorded on pink sheets bearing the same polling station code. The petitioner submits that where two polling stations bear the same polling station code, it is not possible to establish which of the results is genuine.

The EC explained that the situation where the same polling station code shows different polling station results arises where the same polling station code is used for special voting and regular voting, or where the polling station is split due to the huge number of voters. Where the station is split into two the polling station code will end with the letter A or B.

Mr Addison submits that special voting results are not recorded on pink sheets and, accordingly, the explanation proffered by Dr Afari-Gyan for pink sheets with duplicate polling station codes is untenable and false. He based his submission on the fact that provision is made for entry of special voting results of the whole constituency in the first column on Constituency Results Collation Form, without reference to any polling station name or code. [In stark contrast, the results of votes cast in any constituency on general election day are entered on the Constituency Results Collation Form by reference to the different polling station codes in that constituency.]

Counsel further referred to Regulation 21 (11) on the procedures by which the results of special voting are counted, the ballot boxes are sealed with the seal of 2nd respondent and entered onto the Constituency Results Collation Forms. It provides that, after special voting, the returning officer for the constituency shall ensure that the ballot boxes are sealed and kept in safe custody; and that he/she shall, on polling day, arrange for the ballot to be opened and the ballot boxes counted in the same manner as those contained in the ballot boxes used on polling day. Counsel concludes that no reference whatsoever is made to entering the results of the count of special voting ballot papers on pink sheets.

What is really at the heart of the issue is whether pink sheets are used to record results of special voting. Counsel's contention that no reference whatsoever is made to entering the results of the count of special voting ballot papers on pink sheets is not entirely correct if all the relevant provisions in C.I. 75 relating to special and regular polling are read as a whole and not in isolation. It is trite law that the overriding principle of statutory interpretation is that the "words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act." **E. A. Driedger, *Construction of Statutes* (2 ed. 1983)** at page 87.

Section 21 (10) and (11) deal with voting and counting of special votes. Voting at a polling station for special voting and counting of special voting are conducted in the same manner as that of voting on polling day. The only difference is that counting of ballots of special voting is not done at the polling station on the date of special voting but the box is sealed and kept in a safe place and taken to the collation centre on the polling date and counted in the same manner as those contained in ballot boxes used on the polling day.

Regulation 36 deals with the counting and recording of results of election. (See above). Regulation 32 (1) (d) and (e) requires of the presiding officer to record total number of votes cast in favour of each candidate and record rejected ballots and (2) signing of the declaration by the presiding officer and representatives or counting agents. All these records are made on pink sheets on which the polling station name and code are handwritten by the presiding officer.

Once the law requires that voting and counting of ballots of the special vote is to be carried out in the same manner as the regular voting, then it follows that a statement of poll form and a declaration form used for regular voting to record the poll results is required to be used for the special vote for both parliamentary and presidential candidates as well, before they are transposed onto the Constituency Collation Forms. If there is a voter and ballot accounting which had to be done before counting, I expect that sections A, B, and C of the forms should be filled and placed in the sealed ballot box before transporting it to a safe place. It is also expected that the presiding officers and polling or counting agents who conducted the special voting would be at the collation centre for the counting of the special votes on the Election Day; and they would ultimately sign the declaration form.

Interpreting regulations 21 (11) and regulation 32 as a whole, the use of pink sheets to record the poll and election of special voting is a requirement. Consequently if the same polling station with the same polling code is used for both special voting and regular voting; then it would explain the existence of two pink sheets with the same polling station code with different results. The same explanation can be given for where a polling station is split into two. I may even go further to say that there can be three pink sheets where all the scenarios occurred.

From the foregoing I reject counsel's submission and dismiss this category of claim.

CONCLUSION

In my attempt to resolve these electoral issues, although there may be an unlimited number of ways to guide me, the fundamental one, in my opinion, is fidelity to the terms of the Constitution, and of such other law as objectively reflects the intent and purpose of the Constitution, to uphold the right to vote, and the enfranchising objective of the Constitution.

Overturing an election is a very serious matter. In order to uphold the grounds for annulling votes that the Petitioners are requesting to be annulled for irregularities, malpractices and statutory breach, this court must be satisfied that the petitioners have successfully discharged the onus they bore right from the onset.

While it is conceivable that the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it rests on the person who thus alleges, to produce the necessary evidence in the first place. I cannot be so satisfied that the Petitioners discharged the burden of proof.

The Petitioners relied on pink sheets and no other evidence, and in view of the fact that the Petitioners kept changing categorization, number of exhibits they are relying, admission of mislabelling and double counting, I cannot be confident that these slips did not affect their case.

Using the yardstick of the principles of Electoral Justice, I am satisfied that the elections were conducted substantially in accordance with the principles laid down in the Constitution, and all governing law; that there was no breach of law such as to affect the results of the elections; and that the said elections do reflect the will of the Ghanaian people.

I accordingly hold that John Dramani Mahama was validly elected as the President of Ghana.

I will also dismiss the petition.

So I end with this delivery with this epilogue:

“Acceptance”-Where the foregoing principles of Electoral Justice have been substantially observed, the electoral processes reflect the will of the people. It is then an overriding principle of Electoral Justice that everyone abides by the outcome; that the outcome be given effect by the institutions of government; and that the legitimacy of the results be acknowledged by the international community.”

(SGD) S. O. A. ADINYIRA (MRS)

JUSTICE OF THE SUPREME COURT