

DOTSE JSC:

INTRODUCTION

In 1776, John Adams, one of the United States' most respected statesmen and author, wrote in his **"Thoughts of Government"** the following profound statement on the working relationship between the three arms of government, to wit, the **Executive, Legislature** and **Judiciary**. He stated thus:

"The dignity and STABILITY of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislature and executive, and independent upon both, that so it may be a check upon both, and both should be checks upon that."

The realities of the said statement have dawned on me in my attempt to deliberate on this presidential election petition which is pending before the Supreme Court. This is a monumental and epoch making era for the Ghana Judiciary. This is because, for the first time in the history of the 4th Republic, the Ghana Supreme Court has been called upon to make pronouncement on whether the declaration made by the Chairman of the Electoral Commission in the *President-Elect Instrument, 2012 (C. I. 80) of 11-12-2012* which declared John Dramani Mahama, the 1st Respondent herein as having been validly elected as President of Ghana is sustainable or not.

It is generally understood that there are three branches of government, to wit, the **Executive, the Legislature** and **the Judiciary**. Of the three, it is only the Judiciary that is not elected. Whilst both the Executive and the Legislature are elected and appointed for fixed terms, the Judiciary to a very large extent, are appointed by the Executive sometimes with the approval of the Legislature in the case of the Supreme Court Judges, but once appointed in democratic states, the Judges have security of tenure and cannot be removed from office unless upon stated and proven misbehavior.

In most parts of the civilized world, including Ghana, the three arms of government are separate, distinct and independent, at least on paper. In practical terms however, even though there are close working relationships between the **Executive** and **Legislature** since their memberships overlap, **that of the Judiciary is expected to be truly independent in order to ensure strict adherence to the "rule of law"**.

It is in this respect that I am of the view that the statement quoted above, and attributed to John Adams has become a certainty and a road map for the Ghana Supreme Court to navigate delicately during this case as it does in other cases.

It cannot be gainsaid that the stability and progress of any nation depend upon an upright and skillful administration of justice.

Secondly, in the exercise of judicial power, the ***courts should be seen as being distinct and independent from both the Executive and Legislative organs of state.***

Thirdly, in the performance of its duties, all the organs of government must be seen to be independent one of the other, so however that each may become a check on the other.

Finally, whilst the Judiciary is independent of the Executive and Legislature and a check on both, the other two should also be a check on the Judiciary not so however in the performance of its duties.

The above statement clearly epitomises the principles of separation of powers which is the bedrock of all modern and truly democratic constitutions of the free world of which Ghana is indeed a proud member.

The task facing the Supreme Court under the 4th Republican Constitution of 1992, is therefore an enormous one which demands a lot of circumspection, in order to achieve substantial justice such as would protect the dignity and morals of the society thereby upholding the dignity and stability of the state.

Since this is an election petition, I have taken inspiration from Alexander Hamilton's speech in the New York Assembly, June 21, 1788 when he stated thus:

*"After all, Sir, we must submit to this idea, **that the true principle of a republic is that the people should choose whom they please to govern them.** Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed."*

In also describing the enormity of the task that faces a Judge when such delicate issues come up for adjudication, another colossus of a giant in the U.S Judiciary, **Benjamin Cardozo**, one time Associate Justice of the U. S. Supreme Court, in his invaluable and ground breaking book "**The Nature of The Judicial Process**", described in simple and understandable language, the conscious and unconscious processes by which a Judge decides a case. This is the task that now faces me.

This is what is contained in *page 10 of Benjamin Cardozo's* book referred to supra:

"What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions. I am not concerned to inquire whether judges ought to be allowed to brew such a compound at all. I take judge-made law as one of the existing realities of life."

In this judgment, as far as my ability and capacity can carry me, I shall endeavour to follow such a practice or method especially as there is no known local precedent in this aspect of the law that we are requested to enforce and or interpret.

In this case, I am called upon to make very serious decisions on the validity of the presidential elections held on 7th and 8th December 2012. The sources of information that I should be looking at, are the ***Constitution 1992, The Presidential Elections, Act 1992, (PNDCL 285) (Sections 4 and 5). Public Elections (Registration of Voters) Regulations 2012 C. I. 72, Public Elections Regulations, 2012 C.I. 75, Supreme Court Amendment Rules, 2012 C. I 74*** and the 2nd Edition of the Manual on Election Adjudication in Ghana prepared by the Judicial Service, July 2012, decided cases, Constitutional Instruments, pleadings and relevant exhibits used by the parties in this case, decided cases from other common law jurisdictions and my own understanding of the issues and law applicable based on the evidence adduced in Court in order to ensure justice and equilibrium in our body politics.

WHAT THEN ARE THE FACTS OF THIS CASE?

In pursuit of its democratic practice, under the 4th Republic Constitution, 1992, Ghana again went to the polls on the 7th and 8th December 2012 to elect a President and also members of Parliament for the 275 constituencies that had been demarcated by the 2nd Respondents, the Electoral Commission. It must be noted that, general elections had been conducted in Ghana for the same dual purposes in 1992, 1996, 2000,

2004 and 2008. The 2012 election was thus the 6th under the Constitution 1992 that the 2nd Respondents had conducted.

The 2012 Presidential Election was contested by the following candidates:

1. John Dramani Mahama - representing National Democratic Congress (NDC)
2. Dr. Henry Herbert Lartey- representing Ghana Consolidated Peoples Party (GPCC)
3. Nana Addo Dankwa Akufo-Addo - representing the New Patriotic Party (NPP)
4. Dr. Papa Kwesi Nduom- representing Peoples Popular Party (PPP)
5. Akwasi Addai Odike - representing United Front Party (UFP)
6. Hassan Ayariga - representing People's National Convention (PNC)
7. Dr. Michael Abu Party Sakara Forster - representing Convention People's (CPP)
8. Jacob Osei Yeboah - Independent Candidate

It is to be noted that, the 2nd Respondents herein, the Electoral Commission is the body charged under article 45 (c) of the Constitution 1992 inter alia, to conduct and supervise all public elections and referenda.

In consequence of the above, the 2nd Respondent therein, through its Chairman, Dr. Kwadwo Afari-Gyan on the 11th December 2012 issued and published the ***Declaration of President – Elect Instrument, 2012 (C. I. 80)*** in which the **1st Respondent, John Dramani Mahama** who had already been declared on the 9th of December 2012 as having won the 2012 Presidential Election was declared therein as having been validly elected as President of the Republic of Ghana. The total votes declared with their corresponding percentages as having been cast in favour of the contesting presidential candidates referred to supra are as follows:-

i.	John Dramani Mahama	-	5,574,761	
			50.70%	
ii.	Dr. Henry Herbert Lartey	-	38,223	0.35%
iii.	Nana Addo Dankwa Akufo Addo-		5,248,89	
			47.74%	
iv.	Dr. Papa Kwesi Nduom	-	64,362	
			0.59%	
v.	Akwasi Addai Odike	-	8,877	
			0.08%	
vi.	Hassan Ayariga	-	24,617	
			0.22%	
vii.	Dr. Michael Abu Sakara-Forster	-	20,32	
			0.18%	
viii.	Jacob Osei Yeboah	-	15,201	
			0.14%	
	Total Votes	-	<u>10,995,262</u>	
			<u>100%</u>	

Feeling aggrieved with the declaration by the 2nd Respondent of the 1st Respondent, **John Dramani Mahama**, the Presidential Candidate of the National Democratic Congress, as the winner of the 2012 Presidential Elections, the Petitioners herein, namely Nana Addo Dankwa Akufo-Addo, the Presidential candidate of the New Patriotic Party, Dr. Mahamudu Bawumia, the running mate to the Presidential Candidate of the N.P.P, and Jake Otanka Obetsebi Lamptey, National Chairman of the New Patriotic Party commenced a petition as 1st, 2nd and 3rd Petitioners respectively on the 28th of December 2012 pursuant to article 64 of the *Constitution 1992*, section 5 of the *Presidential Election Act, 1992 (PNDCL 285)*, and *Rules 68 and 68A of the Supreme Court (Amendment) Rules 2012, C. I. 74* challenging the validity of the election of the 1st Respondent as the President of the Republic of Ghana and sought the reliefs stated in the petition.

The original petition filed by the Petitioners on 28/12/2012, was by order of this Court dated 7th February, 2013 amended in consequence of which the Petitioners filed their 2nd Amended Petition dated 8th February 2013.

In order to set the records straight, I wish to point out that, the Petitioners were ordered by this court to amend their original petition for the first time when the **3rd Respondents** herein, the **National Democratic Congress** were by a majority decision of 6-3 joined to the Petition as the 3rd Respondents.

That explains the 1st and 2nd amended petitions respectively.

RELIEFS CLAIMED BY THE PETITIONERS

- 1. That John Dramani Mahama, the 2nd Respondent herein was not validly elected President of the Republic of Ghana,**
- 2. That Nana Addo Dankwa Akufo-Addo, the 1st Petitioner herein, rather was validly elected President of the Republic of Ghana**
- 3. Consequential orders as to this Court may seem meet.**

GROUND FOR SEEKING RELIEFS

Out of abundance of caution, I will set out in extenso the particulars of the Petitioners as set out in their 2nd amended petition from paragraphs 20, ground I through to ground 2A, Ground 3 and all their particulars to paragraphs 21-27 inclusive.

GROUND FOR CHALLENGING THE VALIDITY OF THE DECEMBER 2012 ELECTION

Ground 1

“There were diverse and flagrant violations of the statutory provisions and regulations governing the conduct of the December 2012 presidential election which substantially and materially affected the results of the election as declared by the 2nd Respondent on 9th December 2012.

Particulars

- a. That the 2nd Respondent permitted voting to take place in many polling stations across the country **without prior biometric verification by the presiding officers of 2nd Respondent or their assistants, contrary to Regulation 30 (2) of C. I. 75.**
- b. That the voting in polling stations where voting took place without prior biometric verification were unlawfully taken into account in the declaration of results by 2nd Respondent in the presidential election held on 7th and 8th December 2012.
- c. That by 2nd Respondent’s established procedure, 2nd Respondent conducted the December 2012 presidential and parliamentary elections at polling stations each of which was **assigned a unique code to avoid confusing one polling station with another and to provide a mechanism for preventing possible electoral malpractices and irregularities.**
- d. That there were, however, **widespread instances where different results were strangely recorded on the declaration forms (*otherwise known as the ‘pink sheet’ or***

'blue sheet') in respect of polling stations bearing the same polling stations codes.

- e. That the existence of polling stations of the nature referred to in the preceding sub-paragraph (d) and the results emanating therefrom were patently illegal.
- f. That there were **widespread instances where there were no signatures of the presiding officers or their assistants on the declarations forms as required under Regulation 36 (2) of C. I. 75. And yet the results on these forms were used in arriving at the Presidential results declared on 9th December 2012 by the Chairman of 2nd Respondent, thereby rendering the result so declared invalid.**

Ground 2

- (1) That the election in 11,916 polling stations was also vitiated by gross and widespread irregularities and/or malpractices which fundamentally impugned the validity of the results in those polling stations as declared by 2nd Respondent.

Particulars

- (a) That the results as declared and recorded by the 2nd Respondent contained **widespread instances of over-voting in flagrant breach of the fundamental constitutional principle of universal suffrage, to wit, one man one vote.**

- (b) 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 will of the lawfully registered voters.**
- (c) That, while the total number of registered voters as published by the 2nd Respondent and provided to all political parties or candidates for the presidential and parliamentary election **was fourteen million, thirty-one thousand, six and eighty (sic) (14,031,680), when 2nd Respondent announced the result of the presidential election on 9th December 2012, the total number of registered voters that 2nd Respondent announced mysteriously metamorphosed to a new and inexplicable figure of fourteen million, one hundred and fifty-eight thousand, eight hundred and ninety (14,158,890). This thereby wrongfully and unlawfully increased the total number of registered voters by the substantial number of one hundred and twenty-seven thousand, two hundred and ten (127,210).**
- (d) That there were **widespread instances of voting without prior biometric verification;**

- (e) That there were widespread **instances of absence of the signatures of presiding officers or their assistants on the Declaration Forms known as 'pink sheet'; and**
- (f) That there were widespread instances **where the words and figures of votes cast in the election and as recorded on the 'pink sheets' did not match.**

Ground 2a

That there were 28 locations where elections 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.

Ground 3

- (1) That the statutory violations and irregularities and/or malpractices described under Ground 1, 2, and 2a herein, which were apparent on face of the Declaration Forms ('pink sheet'), had the direct effect of introducing into the aggregate of valid votes recorded in the polling stations across the country, **a whopping figure of four million six hundred and seventy thousand five hundred and four (4,670,504) unlawful and irregular votes, which vitiated the validity of the votes cast and had a material and substantial effect on**

the outcome of the election, as shown in the table below:

Particulars

No	Violations, irregularities and/or Malpractices	Number of Votes
1	Exclusive instances of over voting due to total votes exceeding ballots papers issued to voters or the polling station voters register	128,262
2	Exclusive instances of the joint occurrence of: <ul style="list-style-type: none"> <li data-bbox="371 1077 1082 1317">i. Over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register <li data-bbox="371 1346 1082 1451">ii. Voting without biometric verification 	48,829
3	Exclusive instances of the joint occurrence of: <ul style="list-style-type: none"> <li data-bbox="371 1615 1082 1854">i. over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register <li data-bbox="371 1883 1082 1921">ii. voting without biometric verification <li data-bbox="371 1951 1082 1989">iii. same serial numbers on 'pink 	145,129

	sheets' with different results	
4	<p>Exclusive instances of the joint occurrence of:</p> <ul style="list-style-type: none"> i. over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register ii. voting without biometric verification iii. same serial numbers on 'pink sheets' with different results iv. absence of presiding officers or assistants' signatures on 'pink sheets' 	34,167
5	<p>Exclusive instances of the joint occurrence of:</p> <ul style="list-style-type: none"> i. over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register ii. voting without biometric verification iii. absence of presiding officers or assistants' signatures on 'pink sheets' 	9,004
6	<p>Exclusive instances of the joint occurrence of:</p>	425,396

	<ul style="list-style-type: none"> i. over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register ii. same serial numbers on 'pink sheets' with different results 	
7	<p>Exclusive instances of the joint occurrence of:</p> <ul style="list-style-type: none"> i. over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register ii. same serial numbers on 'pink sheets' with different results iii. absence of presiding officers or assistants' signatures on 'pink sheets' 	93,035
8	<p>Exclusive instances of the joint occurrence of:</p> <ul style="list-style-type: none"> i. over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register ii. absence of presiding officers or assistants' signatures on 'pink sheet' 	34,023

9	Exclusive instances of voting without biometric verification	137,112
10	Exclusive instances of the joint occurrence of: <ul style="list-style-type: none"> i. voting without biometric verification ii. same serial numbers on 'pink sheet' with different results 	395,529
11	Exclusive instances of the joint occurrence of: <ul style="list-style-type: none"> i. voting without biometric verification ii. same serial numbers on 'pink sheets' with different results iii. absence of presiding officers or assistants' signatures on 'pink sheets' 	71,860
12	Exclusive instances of the joint occurrence of: <ul style="list-style-type: none"> i. voting without biometric verification ii. absence of presiding officers or assistants' signatures on 'pink sheets' 	21,071
13	Exclusive instances of same serial numbers on 'pink sheets' with different results	2,583,633
14	Exclusive instances of the joint occurrence of: <ul style="list-style-type: none"> i. same serial numbers on 'pink sheets with different results ii. absence of presiding officers or 	352,554

	assistants' signatures on 'pink sheets'	
15	Exclusive instances of absence of presiding officers or assistants' signatures on 'pink sheets'	117,870
16	Excusive instances of same polling station codes with different results	687
17	Exclusive instances of the joint occurrence of: <ul style="list-style-type: none"> i. over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register ii. voting without biometric verification iii. same serial numbers on 'pink sheets' with different results iv. same polling station code with different results 	3,977
18	Exclusive instances of the joint occurrence of: <ul style="list-style-type: none"> i. same serial numbers on "pink sheets' with different results ii. same polling station code with different results 	7,160
19	Exclusive instances of the joint occurrence of:	7,160

	<ul style="list-style-type: none"> i. Same serial numbers on 'pink sheets' with different results ii. absence of presiding officers or assistants' signatures on 'pink sheets' iii. same polling station code with different results 	
20	<p>Exclusive instances of the joint occurrence of:</p> <ul style="list-style-type: none"> i. over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register ii. same serial numbers on 'pink sheets' with different results iii. same polling station code with different results 	6,537
21	<p>Exclusive instances of the joint occurrence of:</p> <ul style="list-style-type: none"> i. voting without biometric verification ii. absence of presiding officers or assistants' signatures on "pink sheets' iii. same polling station code with different results 	671
22	<p>Exclusive instances of the joint occurrence of:</p>	7,920

	<ul style="list-style-type: none"> i. voting without biometric verification ii. same serial numbers on "pink sheets" with different results iii. same polling station code with different results 	
23	<p>Exclusive instances of the joint occurrence of:</p> <ul style="list-style-type: none"> i. over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register ii. same serial numbers on "pink sheet" with different results iii. absence of presiding officers or assistants' signatures on "pink sheets" iv. same polling station code with different results 	4,885
24	<p>Exclusive instances of the joint occurrence of:</p> <ul style="list-style-type: none"> i. voting without biometric verification ii. same serial numbers on "pink sheets" with different results iii. absence of presiding officers or assistants' signatures on "pink 	3,471

	<p>sheets”</p> <p>iv. same polling station code with different results</p>	
25	<p>Exclusive instances of the joint occurrence of:</p> <p>i. over voting due to total votes exceeding ballot papers issued to voters or the polling station voters registers</p> <p>ii. voting without biometric verification</p> <p>iii. same serial numbers on “pink sheets” with different results</p> <p>iv. absence of presiding officers or assistants’ signatures on “pink sheet”</p> <p>v. same polling station code with different results</p>	1,787
26	<p>Exclusive instances of 28 locations which were not part of the twenty-six thousand and two (26,002) polling stations created by the 2nd Respondent prior to the December 2012 elections for purposes of the elections but where elections took place</p>	9,757
	Grand Total	4,670504

21. **Petitioners contend that these four million six hundred and seventy thousand five hundred and four votes have been**

rendered invalid by reason of the above violations and irregularities and accordingly ought to be annulled.

22. Petitioners say that upon the annulment of the votes in the eleven thousand nine hundred and sixteen (11,916) polling stations, the following votes ought to be deducted from the respective votes declared in favour of the presidential candidates:

1.	John Dramani Mahama	3,101,590
2.	Henry Herbert Lartey	21,134
3.	Nana Addo-Dankwa Akufo-Addo	1,473,346
4.	Papa Kwesi Nduom	33,416
5.	Akwasi Addai Odike	4,817
6.	Hassan Ayariga	14,520
7.	Michael Abu Sakara Forster	11,636
8.	Jacob Osei Yeboah	10,045

23. Petitioners say when these figures are annulled and deducted from the total votes declared by the Chairman of 2nd Respondent on 9th December 2012, the results that ought to be returned are as follows:

	EC DECLARED	VOTES TO BE ANNULLED	NEW VOTES	% OF VOTES
John Dramani Mahama	5,574,761	3,101,590	2,473,171	39.1
Henry Herbert Lartey	38,223	21,134	17,089	0.27

Nana Addo Dankwa Akufo-Addo	5,248,898	1,473,346	3,775,552	59.69
Papa Kwesi Nduom	64,362	33,416	30,946	0.49
Akwasi Addai Odike	8,887	4,817	4,060	0.06
Hassan Ayariga	24,617	14,520	10,097	0.16
Michael Abu Sakara Forster	20,323	11,636	8,687	0.14
Jacob Osei Yeboah	15,201	10,045	5,156	0.08
Total	10,995,262	4,670,504	6,324,758	100.0

24. **Petitioners say that in some instances, votes earned by the 1st Petitioner were unlawfully reduced whilst, at the same time, votes of the 1st Respondent were illegally padded with the sole purpose of procuring the victory of the 1st Respondent in the 2012 December Presidential Elections.**

25. When due account is taken of the statutory violations as well as of the gross and widespread irregularities and malpractices, and the necessary deductions effected from the votes wrongfully credited to 1st Respondent by the 2nd Respondent and the nullification as required by law of the results declared at the polling stations where these substantive infractions occurred, **1st Respondent did not obtain the total of more than fifty percent (50%) of the valid votes cast as required by Article 63 (3) of the Constitution in order to become President, and accordingly ought not to have been declared President.**

26. Petitioners say that all of the irregularities and electoral malpractices captured above were nothing **but a deliberate, well-calculated and executed ploy or a contrivance on the part of the 1st and 2nd Respondents with the ultimate object of unlawfully assisting the 1st Respondent to win the 2012 December Presidential Elections.**

27. The Petitioners say that, in **consequences of these statutory violations and infractions, as well as the irregularities and malpractices, the results declared by 2nd Respondent in favour of 1st Respondent were far in excess of the valid votes cast in his favour, thereby subverting the sovereign will of the electorate contrary to the preamble of the Constitution, Article 1 (1) and Articles 42 and 63 (3) of the Constitution, 1992"**

RESPONSE BY THE RESPONDENTS

All the Respondents herein filed their amended answers.

1ST RESPONDENT'S AMENDED ANSWER

The substance of the 1st Respondent's answer is to the effect that the 2nd Respondent declared the results of the 2012 Presidential Election Results at a press conference which was widely carried on radio and television on 9th December 2012 and same was thus published in a

gazette notification in the *Declaration of President – Elect Instrument, 2012 (C. I. 80) on 11th December, 2012.*

The 1st Respondent further stated in the amended answer **that the basis of the declaration of the results by the 2nd Respondent was the aggregate of total valid votes cast, which was 10, 995, 262.**

Whilst the 1st Respondent generally denied the basis of the Petitioners claims and contentions in all the grounds urged on this court in paragraphs 20-27 of the amended petition, the 1st Respondent specifically denied all the grounds of the Petition and put the Petitioners to strict proof thereof.

In order to put matters in proper perspective, I deem it quite appropriate to refer to in detail and in extenso the specific answers of the 1st Respondent as contained in paragraphs 16 (a), (c), (i), (ii), (iii) (iv) (e) (f) (g) (h) (i) (j) and also paragraphs 17 (d) (i) (i or j), 17B, 20, 21, 26, 27 (a) and (d) as follows:

16. “The 1st Respondent denies paragraph 20 and ground 1 of the 2nd Amended Petition generally and puts petitioners to strict proof of the statements and allegation contained therein.

a. 1st Respondent does not admit paragraph 20 grounds 1 (a), and 1 (b) of the petition and puts petitioners to strict proof of the averments contained therein.

c. The first Respondent shall contend further, or in the alternative, as follows:

i. **Fingerprint verification is not the only means of verification permissible under the law, in terms of Article 42 of the 1992 Constitution, failure or the inability (if at all) of eligible voters to undergo fingerprint verification as a result of the breakdown of equipment and/or for any other reason not attributable to them cannot constitute the basis for denying such voters of their constitutional rights to vote, and have their votes counted.**

ii. That any electoral laws and/or directives, the effect of which would be to invalidate the votes of such persons, who had properly presented themselves at polling stations to vote, and **had been duly identified as registered voters in the biometric voters register, would be inconsistent with Article 42 of the Constitution, and therefore, unconstitutional;**

iii. That 1st Petitioner had, or ought to have had polling and/or counting agents at the various polling stations who were part of the prescribed voter identification processes prior to voting. The said polling and/or counting agents having participated in that process and, having, after public and transparent counting and/or collation, certified the results of the polling

stations and/or Constituencies, by signing without protest, the polling returns, had thereby represented to the whole world that the declared results accurately reflected the outcome of the election in the respective polling stations and/or Constituencies.

- iv. **That the 1st Respondent shall contend therefore that the allegations contained in the said paragraph 20 grounds 1 (a) and 1 (b), even if true (which the 1st Respondent denies) did not affect the declared results of the elections.**

- e. In further response to paragraph 20 ground 1 (d) of the petition, the 1st Respondent says that **all authentic** "pink sheets" reflect genuine results of lawfully supervised voting at various polling stations.

- f. 1st Respondent states further that, **assuming without admitting, that some polling stations had the same code numbers, that fact alone would not invalidate the declared results of supervised elections in those polling stations and the votes validly cast.**

- g. The 1st Respondent therefore denies paragraph 20 ground 1 (e) of the 2nd Amended Petition, and, in further denial, repeats

Paragraphs 16 (e) and 16 (f) herein. The 1st Respondent shall

also contend that the allegations contained in the said paragraph 20 ground 1 (d), even if true (which the 1st Respondent denies), did not affect the declared results of the elections.

h. The 1st Respondent does not admit Paragraph 20 ground 1 (f) of the 2nd amended petition and puts Petitioners to strict proof of the allegations contained therein. **The 1st Respondent states that, anyhow, to the knowledge of the Petitioners and their polling and/or counting agents the results that were declared at the various polling stations were the product of painstaking, public and transparent sorting and counting and/or collation (and sometimes re-counting) at the various polling stations and collation centres with the full participation of 1st Petitioner's accredited polling and/or counting agents, who did not protest at the declared results at the time of their declaration.**

i. In further response to paragraph 20 ground 1 (f) of the 2nd amended petition, the 1st respondent says that assuming, without admitting, that 2nd Respondents officers omitted to sign declaration forms, **such omission cannot operate to invalidate the lawful exercise by eligible voters of their fundamental rights under Article 42 to vote in supervised elections in the affected areas. The 1st**

Respondent also repeats paragraph 16 (c) (iii) herein in further response.

- j. The 1st Respondent shall also contend that the allegations contained in the said paragraph 20 ground 1 (f), even if true (which the 1st Respondent denies), did not affect the results of the elections.

- 17. (d) The 1st Respondent states further that, assuming, without admitting, that in some instances, different polling stations had the same serial numbers, that fact alone would not invalidate the declared results of supervised elections in those polling stations. The 1st Respondent shall also contend that the allegations contained in the said paragraph 20 ground 2 1 (b), even if true, did not affect the declared results of the elections.

- i. Further or in the alternatives, the 1st Respondent states that the results of the election in each polling station were declared openly and publicly, and the votes credited to each candidate arising from the declared results are matters of public knowledge and verifiable. **Therefore, granted that there may have been conflict between the words and figures stated on the "pink sheets", that did not affect the declared results of the elections.**

j. The 1st Respondent states in further response to Paragraph
20

Ground (1) (f) that the results of the election were publicly declared at the various polling stations and Constituencies and are matters of public knowledge. To the knowledge of the Petitioners and their polling and/or counting agents, the results that were declared were the product of painstaking, public and transparent sorting and counting and/or collation (and sometimes recounting) at the various polling stations and collation centres with the full participation of 1st Petitioner's accredited polling and/or counting agents, who did not protest at the declared results at the time of their declaration.

17B. The 1st Respondent states in further response to the said paragraph that the results declared in all polling stations throughout the country (as reflected on all genuine "pink sheets"), were the product of properly supervised elections in which the Petitioners and the NPP, their political party, together with their polling and/or counting agents participated; **and that in all cases, voting was done on the basis of a biometric voters register, made available to all the political parties prior to the elections.**

20. The 1st Respondent denies paragraph 22 of the 2nd Amended

Petition and puts Petitioners to strict proof of the statements contained therein. The 1st Respondent states in further response **that the invitation by the Petitioners to annul votes from 11,916 polling stations constitute an attempt to undermine the fundamental rights of Ghanaians under Article 42 of the 1992 Constitution, and should be rejected by the Honourable Court as completely lacking any basis in law and/or fact.**

21. The 1st Respondent denies paragraph 23 of the 2nd amended petition and puts petitioners to strict proof of the statements contained therein. The 1st Respondent states in further response to the said paragraph that the statements and calculations contained therein completely lack any basis in law and/or fact and should be wholly rejected by the Honourable Court.

26. The 1st Respondent denies paragraph 27 of the Petition and puts Petitioners to strict proof of the allegations and statements contained therein. **The 1st Respondent states in further response that it is rather the Petitioners who, by the present Petition, are seeking to subvert the Constitution, undermines the integrity of 2nd Respondent and the whole electoral system and the sovereign will of the people of Ghana by demanding from the Honourable Court an order annulling the**

results of the exercise of their fundamental rights under the Constitution.

27. In general response to the Petition, the 1st Respondent states

as follows:

- a. That it was acknowledged by all observers, domestic as well as international, that the conduct of the elections had been generally free and fair as well as transparent.
- b. That the whole Petition lacks merit and should be dismissed.

In essence the 1st Respondent stated quite emphatically that the basis of the Petitioners claims is the product of double counting in numerous instances.

2ND RESPONDENTS 2ND AMENDED ANSWER

The 2nd Respondent explained the basis of the Petitioners claims of differences in the electoral register given to their party the NPP, vis-à-vis the total registered voters on the electoral calendar in copious terms as spelt out in their paragraph 8 of their amended answer.

8. In answer to paragraph 14 of the 2nd amended petition, the 2nd respondent says that the total number of registered voters that it forwarded to all the political parties, including the NPP, was

14,031,793 as explained in paragraph 6, above. **The figure of 14,158,890 registered voters stated in the declaration of results was an error.** The correct number of registered voters (**14,031,793**) was duly posted on the 2nd respondent's website. In this context, it is important to emphasise that this error has no bearing whatsoever on the total votes cast in the election and, consequently, the valid votes obtained by each candidate. **The error would only affect the turnout percentage and change it from 79.43% to 80.15%.**

In order to set the records straight, the 2nd Respondent stated the correct results as declared by the Chairman of the 2nd Respondents as follows:

12 (ii) Total votes declared as cast in favour of the contesting presidential candidates

1.	John Dramani Mahama	5,574,761	5 0.70%
2.	Henry Herbert Lartey	38,223	0.35%
3.	Nana Addo-Dankwa Akufo-Addo	5,248,898	
			47.74%
4.	Papa Kwesi Nduom	64,362	0.59%
5.	Akwasi Addai Odike	8,877	0.08%
6.	Hassan Ayariga	24,617	0.22%
7.	Michael Abu Sakara Forster	20,323	0.18%
8.	Jacob Osei Yeboah	15,201	0.14%
		<u>10,995,262</u>	<u>14,158,880</u>
			<u>100%</u>

In order to put in proper perspective, the specific answers of the 2nd Respondent's it is deemed proper to set out verbatim their answers to the specific grounds of the petitioners' allegations. These answers are spelt out in paragraphs 15, 15 (a), 16, 17, 18, 18 (a), 19, 20, 22 and 24 thereof.

15. The 2nd respondent denies paragraph (a) of ground 1 of the 2nd amended petition and says, in answer thereto, **that registered voters who were not successfully verified were turned away from polling stations and at the about 400 polling stations in which the verification process faced challenges (slowness or malfunction of equipment) on December 7, 2012, voting continued the following day when functioning verification machines were made available.**

A Press Release was issued by the 2nd respondent on this. Further, the 2nd respondent says that the Commonwealth Observer Group, in its report (page 36) on the Ghana 2012 Presidential and Parliamentary Elections, made the following recommendation:

"The Electoral Commission should review the exceptions to the current practice on the use of the biometric verification device to minimize the number of elderly people being refused their vote due to the difficulty in matching fingerprints".

- 15 (a) That, upon being served with the further and better particulars

provided by the petitioners following the Orders of this Honourable Court, dated February 5 and 7, 2013, the 2nd Respondent made an examination and analysis of its records, in particular the Statements of Poll and Declarations of Results for the Office of President ("Pink Sheet") for the polling stations listed in the particulars supplied by the Petitioners (which the 2nd Respondents found to be less than the 11,916 claimed by the Petitioners). **The analysis confirmed that no voters were allowed to vote without verification at any polling station. The Pink Sheets used for the 2012 Election were designed and printed before the decision was taken, at the instance of the NPP, that at each polling station every person should be biometrically verified before being allowed to vote. Thus, the Pink Sheets contained Question C3 as follows:**

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

In view of the late decision regarding verification, all Presiding Officers, during the training exercise, were instructed to leave Question C3 blank as verification would be carried out for each voter at the polling station. Given that 26,002 Polling Agents had to be recruited by the 2nd Respondent, some of who were carrying out such duties for the first time and that the biometric register was being used in Ghana for the first

time, it did happen, in a number of cases, that Question C3 was mistakenly filled. However, this did not affect the number of votes validly cast and counted in public. The 2nd Respondent therefore maintains that the Petitioner's request that the number of votes cast at the polling stations listed by them should be nullified is entirely without merit and should be refused.

16. In answer to paragraphs (c) (d) and (e) of Ground 1 of the 2nd amended Petition, **the 2nd Respondent says that each polling station had a name and a unique code.** Further, the 2nd Respondent says that the examination and analysis it conducted upon receipt of the further and better particulars supplied by the Petitioners showed that **(a) Wrong Codes were quoted by the Petitioners in the said particulars; and (b) 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, 2012 were given separately.** Thus, the request to invalidate the votes of the polling stations as requested by the Petitioners should be refused as being unjustified and entirely without merit.

17. The 2nd Respondent denies paragraph (f) of Ground 1 of the 2nd amended Petition and says that upon being served with the further and better particulars provided by the Petitioners following the

Orders of this Honourable Court dated February 5 and 7, 2013, **it conducted an examination and analysis which showed 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. Thus, the 2nd Respondent maintains that the request by the Petitioners that votes cast at the said polling stations are invalid and should be deducted is without merit and should be refused. It should also be noted that when several pages of paper impregnated with a carbon are used in order to have several copies of each page, it could happen that if the person signing or writing thereon does not press hard enough on the paper, the signature or writing could appear faint or illegible on some of the pages.

18. The 2nd Respondent says that the particulars set out in Ground 2 of

the 2nd amended Petition are a mere repetition of those set out in Ground 1 of the 2nd amended petition and that the particulars provided by the Petitioners did not cover the **11,916** Polling Stations mentioned in the 2nd Amended Petition. **The findings of**

the examination and analysis carried out by the 2nd Respondent, upon receipt of the particulars provided by the Petitioners in this regard, showed that there was not one single instance where the total votes cast exceeded the number of voters on the register of the polling station. The 2nd Respondent denies Ground 2 (a) of the 2nd amended Petition and affirms that voting in the 2012 Election took place in 26,002 polling stations all of which were located in Ghana. The 2nd respondent requests this Honourable Court to Order the Petitioners to comply with the Court's Rulings of February 5 and 7, 2013 by providing particulars of the alleged other 28 locations.

- 18(a) **In the preparations for the 2012 elections, the 2nd Respondent estimated that it would receive between 12 and 18 nominations of Presidential candidates. The 2nd Respondent, accordingly, decided to issue to each polling station, for the purpose of the Presidential Election, two sets of Statement of Poll and Declaration of Results Forms ("Pink Sheet") in two booklets, each bearing the same serial number and each booklet containing 9 carbonised sheets (for candidates 1 to 9; and for candidates 10 to 18, respectively) in order to ensure that each booklet would not be too thick and, would not thereby render the carbonization ineffective.**
- At the close of presidential nominations eight valid presidential nominations were received by the 2nd**

Respondent. (It is on record that Mr. T. N. Ward-Brew, Nana Konadu Agyeman-Rawlings (Mrs), Mr. Kofi Akpaloo and Prophet Nkansah unsuccessfully challenged, in the High Court, the 2nd Respondent's "rejection" of their nomination papers and that Mr. Kofi Wayo and Madam Ekua Donkoh had attempted to file Presidential Nomination Forms) thus, each polling station needed, for the Presidential Election with eight presidential candidates, only one booklet. Had two or more of the above-mentioned "potential" Presidential candidates successfully submitted their Nomination Forms each polling station would have needed two booklets. As each booklet, even if it bore the same serial number as another booklet, would have the name of the polling station and its unique code written on the forms it contained, the 2nd Respondent issued the second booklets for use at polling stations for the Presidential Election. As clearly shown in the further and better particulars provided by the Petitioners, where the serial numbers were identical, the names of the polling stations and their codes were different. The 2nd respondent therefore denies the allegation in ground 2 that the procedure established by it required each polling station to have a unique serial number and urges this Honourable court to reject the Petitioners' contention that votes recorded in any two polling stations on pink sheets with the same serial numbers should be invalidated.

19. As regards ground 3 of the 2nd amended petition, the 2nd respondent

notes that in the 2nd amended petition, the word "exclusive" has replaced the ubiquitous "aggregate" in the tables in the petition filed on 28/12/2012. However, the 2nd respondent maintains that there is no indication of how the number of votes were arrived at in the table. Moreover, the 2nd respondent's examination and analysis, mentioned above, shows clearly that there is no justification for the deduction requested by the Petitioners and mentioned in paragraph 21, 22, and 23 of the 2nd amended petition.

20. As regards paragraph 24 of the 2nd amended petition and the particulars thereof provided by the petitioners in the Affidavit sworn to by Fred Oware and filed on 03/02/2013, in opposition to the application by the 3rd respondent for further and better particulars, the 2nd respondents **examination and analysis shows that of the three instances listed by the Petitioners, one was correct and involved a transposition error at the Collation Centres stating "17" instead of "97" votes (a difference of 80 votes) and the other two instances being entirely wrong.**

22. Prior to the declaration of the results of the Presidential Election by the Chairman of the 2nd Respondent, representatives of the NPP, in the presence of the National Peace Council, made

representations to the Chairman of the 2nd Respondent claiming that there were discrepancies between the results declared at the polling stations in the seven constituencies listed below, and the results as declared by the 2nd Respondent:

- For the **Techiman North Constituency**, which has 77 polling stations Declaration Forms for 56 polling stations were presented:
- For the **Kimtampo South Constituency** which has 107 polling stations, Declarations Forms for 84 polling stations were presented;
- For **Lower Manya Krobo Constituency** which has 112 polling stations. Declaration Forms for 85 polling stations were presented;
- For **Upper West Akyim Constituency** which has 76 polling stations, Declaration Forms for 61 polling stations were presented;
- For **Yilo Krobo Constituency** which has 124 polling stations, Declaration Forms for 96 polling stations were presented;
- For **Berekum West Constituency** which has 44 polling stations, Declaration Forms for 45 polling stations were presented; and
- For **Yendi Constituency** which has 93 polling stations, Declaration Forms for 96 polling stations were presented.

It should be kept in mind that all Agents (of candidates) present at each polling station, were given copies of the certified results of the polling station, based on the information presented by the representatives, as set out above, **it was clear that the representatives had presented incomplete or inaccurate constituency data to sustain the allegation of discrepancies which the 2nd respondent considers to be the heart of this suit. Under the circumstances, the Chairman of the 2nd Respondent declined to halt the declaration of the results since unreliable evidence had been provided to him.**

24. The 2nd Respondent maintains that the 2nd amended petition is without merit and prays this Honourable Court to dismiss it.

3RD RESPONDENT'S ANSWER

In substance, the answer of the 3rd Respondent is not different from that of the 1st Respondent, save that the answer of the 3rd Respondent is much more detailed than that of the 1st Respondent.

In terms of details which are different from those of the 1st Respondent, I will set those out and avoid a repetition of those that are similar in content and substance.

On general observations and commentary on the entire petition, the 3rd Respondent stated in paragraph 26 and 27 as follows:-

26. 3rd Respondent states that not only are the grounds for challenging

the validity of the Presidential elections of the 7th and 8th days of December, 2012 as contained in paragraphs 20 of the 2nd amended petition unfounded, **particulars of the categories of alleged irregularities set out by Petitioners clearly overlap and, therefore, adding the votes in these categories as the Petitioners have done amounts to double/multiple counting and is part of a pattern of obfuscation resorted to by Petitioners to create an appearance of a real issue when there is none.**

27. 3rd Respondent further states that, in bringing this Petition before the

Honourable Court, Petitioners are acting in bad faith and that the Petition is frivolous, vexations and an abuse of the process of this Honourable Court.

SETTLING OF MEMORANDUM OF ISSUES AND PRACTICE DIRECTIONS ISSUED BY THE COURT DATED 2ND APRIL 2013

Following the inability of counsel for the parties in the case to file and agree upon a memorandum of issues as directed by the Court, the Court on the 2nd day of April, 2013 settled the memorandum of issues based on the pleadings filed before the Court. These are:

- 1. Whether or not there were violations, omissions, malpractices and irregularities 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 outcome of the results of the elections.**

DIRECTIONS ON MODE OF TRIAL

The Supreme Court on the same 2nd day of April, 2012 issued the following directions on the mode of trial aimed at expediting the hearing of the petition and to reduce the time spent by witnesses if any that will be called by the parties to testify in the trial. Out of abundance of caution, I quote verbatim the specific orders made by the Court in this respect.

“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. Accordingly, the Petitioners should file their affidavits of the witnesses they propose to rely on in proof of their case on or before 7th April, 2013”. The Respondents should likewise file the affidavits of their witnesses within 5 days from the service upon them of the Petitioners said

affidavits. Cross-examination and re-examination of all the affidavits may in the discretion of the Court be allowed."

In pursuance of the above directives, the Petitioners, acting through the 2nd Petitioner, Dr. Mahamadu Bawumia filed on the 27th of April, 2013 an affidavit together with all the exhibits they intend to rely on to establish their case.

Out of abundance of caution, I deem it appropriate at this stage to refer specifically to paragraphs 42 through to 67 of the affidavit sworn to by the 2nd Petitioner, already referred to supra.

2ND PETITIONERS SWORN AFFIDAVIT

42. **"That in combining these multiple categories statistically, care was taken to avoid double counting. This was achieved by making sure the various categories of irregularities are mutually exclusive so that no polling station where an irregularity occurred could belong to more than one category.**

43. That the constitutional and statutory violations, irregularities and malpractices which constitute the basis of this petition have been classified into twenty-four (24) distinct and mutually exclusive categories **in which no polling station can belong to more than one category, thereby avoiding double counting.**

The Specific Combination of Constitutional and Statutory Violations Irregularities and Malpractices

44. That there were **320 polling stations** where exclusive instances of

the constitutional and statutory violations of **over voting occurred**, and can be found on the same pink sheets. This completely vitiated all the **130, 136 votes** cast in those polling stations. Attached herewith and marked as **Exhibits MB-C, MB-C-1 to MB-C-319** are photocopies of the pink sheets of the polling stations where these infractions occurred.

45. That there were **122** polling stations where instances of combined constitutional and statutory violations in the nature of: (i) **over-voting** and (ii) **voting without biometric verification occurred**, and can be found on the same pink sheets. This completely vitiated the **45,497 votes** cast at those polling stations. Attached herewith and marked as **Exhibits MB-D, MB-D-1 to MB-D-121** are photocopies of the pink sheets of the polling stations where these infractions occurred.

46. That there were **374 polling stations** where instances of combined

constitutional and statutory violations and irregularities in the nature of: (i) **over-voting**; (ii) **voting without biometric verification**; and (iii) **same serial numbers on pink sheets with different results occurred, and can be found on the**

same pink sheets. The combined effect of these infractions completely vitiated the **147,032** votes cast in those polling stations. Attached herewith and marked as **Exhibits MB-E, MB-E-1 to MB-E-373** are photocopies of the pink sheets of the polling stations where these infractions occurred.

47. That there were **66 polling stations** where instances of combined

constitutional and statutory violations, malpractices and irregularities in the nature of: (i) **over-voting;** (ii) **voting without biometric verification;** (iii) **the same serial numbers on 'pink sheets'; with different results** and (iv) **absence of signatures of the presiding officers or their assistants on pink sheets occurred, and can be found on the same pink sheets.** The combined effect of these infractions completely vitiated the **32, 469 votes** cast in these polling stations. Attached herewith and marked as **Exhibits MB-F, MB-F-1 to MB-F-65** are photocopies of the pink sheets of the polling stations where these infractions occurred.

48. That there were **20 polling stations** where instances of combined

constitutional and statutory violations, malpractices and irregularities in the nature of: (i) **over-voting;** (ii) **voting without biometric verification;** and (iii) **absence of signatures of the presiding officers or their assistants on pink sheets occurred, and can be found on the same pink**

sheets. The combined effect of these infractions completely vitiated the 9,408 votes cast in these polling stations. Attached herewith and marked as **Exhibits MB-G, MB-G-1 to MB-G-19** are photocopies of the pink sheets of the polling stations where these infractions occurred.

49. That there were **882 polling stations** where instances of combined

constitutional and statutory violations, malpractices and irregularities in the nature of; (i) **over-voting** and (ii) **the same serial numbers on pink sheets with different results occurred, and can be found on the same pink sheets.** The combined effect of these infractions affected the **397,532** votes cast in those polling stations. Attached herewith and marked as **Exhibits MB-H, MB-H-1 to MB-H-881** are photocopies of pink sheets of the polling stations where these infractions occurred.

50. That there were **196 polling stations** where instances of combined

constitutional and statutory violations, malpractices and irregularities in the nature of (i) **over-voting**; (ii) **same serial numbers on pink sheets with different results**; and (iii) **absence of signatures of the presiding officers or their assistants on pink sheets occurred, and can be found on the same pink sheets.** The combined effect of these infractions vitiated **91, 129 votes.** Attached herewith and marked as

Exhibits MB-J, MB-J-1 to MB-J-195 are photocopies of pink sheets of the polling stations where these infractions occurred.

51. That there were **71 polling stations** where instances of combined

constitutional and statutory violations and malpractices in the nature of **(i) over-voting and (ii) absence of signatures of the presiding officers or their assistants on pink sheets occurred**, and can be found on the same pink sheets. The combined effect of these infractions vitiated **31,561 votes**. Attached herewith and marked as **Exhibits MB-K, MB-K-1 to MB-K-70** are photocopies of pink sheets of the polling stations where these infractions occurred.

52. That there were **379 polling stations** where exclusive instances of

voting without biometric verification occurred and can be found on the pink sheets. The combined effect of this infraction vitiated **134,289 votes**. Attached herewith and marked as **Exhibits MB-L, MB-L-1 to MB-L-378** are photocopies of pink sheets of the polling stations where these infractions occurred.

53. That there were **1,068 polling stations** where instances of combined statutory violations and malpractices in the nature of: **(i) voting without biometric verification; and (ii) same serial numbers on pink sheets with different results occurred, and can be found on the same pink sheets**. The combined effect of these infractions vitiated **408,837 votes**. Attached

herewith and marked as **Exhibits MB-M, MB-M-1 to MB-M-1,067** are photocopies of pink sheets of the polling stations where these infractions occurred.

54. That there were **185 polling stations** where instances of combined

constitutional and statutory violations, malpractice and irregularities in the nature of: (i) **voting without biometric verification**; (ii) **absence of signatures of the presiding officers or their assistants on pink sheets occurred, and can be found on the same pink sheets.** The combined effect of these infractions vitiated **72,953 votes**. Attached herewith and marked as Exhibits **MB-N, MB-N-1 to MB-N-185** are photocopies of pink sheets of the polling stations where these infractions occurred.

55. That there were **59 polling stations** where instances of combined

constitutional and statutory violations in the nature of: (i) **voting without biometric verification**; and (ii) **absence of signatures of the presiding officers or their assistants on 'pink sheet' occurred, and can be found on the same pink sheets.** The combined effect of these infractions **vitiated 19,816 votes**. Attached herewith and marked as **Exhibits MB-O, MB-O-1 to MB-O-58** are photocopies of pink sheets of the polling stations where these infractions occurred.

56. That there were **6,823 polling stations** where exclusive instances

of the **malpractice of same serial numbers on pink sheets with different results took place.** The combined effect of these infractions vitiated **2,614,556 votes.** Attached herewith and marked as Exhibits MB-P, **MB-P-1 to MB-P-6,822** are photocopies of pink sheets of the polling stations where these infractions occurred.

57. That there were **907 polling stations** where instances of combined

constitutional and statutory violations and malpractices in the nature of: (i) **same serial numbers on pink sheets with different results; and (ii) absence of signatures of the presiding officers or their assistants on pink sheets occurred, and can be found on the pink sheets.** The combined effect of these infractions vitiated **365,676 votes.** Attached herewith and marked as **Exhibits MB-Q, MB-Q-1 to MB-Q-906** are photocopies of pink sheets of the polling stations where these infractions occurred.

58. That there were **310 polling stations** where exclusive instances of

constitutional and statutory violations in the nature of: **absence of signatures of the presiding officers or their assistants on pink sheets occurred, and can be found on the pink sheets.** The combined effect of these infractions vitiated

112,754 votes. Attached herewith and marked as **Exhibits MB-S, MB-S-1 to MB-S-309** are photocopies of pink sheets of the polling stations where these infractions occurred.

59. That there were **3 polling stations** where exclusive instances of the

irregularities and malpractices of polling stations with **same polling station codes and different results occurred, and can be found on the pink sheets.** The combined effect of these infractions vitiated **687 votes.** Attached herewith and marked as **Exhibits MB-T, MB-T-1 and MB-T-2** are photocopies of pink sheets of the polling stations where these infractions occurred.

60. That there were **2 polling stations** where instances of combined malpractices, statutory violations and irregularities in the nature of: (i) **same serial numbers on pink sheets with different results;** (ii) **voting without biometric verification;** and (iii) **polling stations with same polling station codes and different results occurred,** and can be found on the same pink sheets. The combined effect of these infractions **vitiated 581 votes.** Attached herewith and marked as **Exhibits MB-U and MB-U-1** are photocopies of pink sheets of the polling stations where these infractions occurred.

61. That there were **12 polling stations** where instances of combined

malpractices and irregularities in the nature of: (i) **same serial numbers on pink sheets with different results;** and (ii)

polling stations with same polling stations codes and different results occurred, and can be found on the same pink sheets. The combined effect of these infractions vitiated **4,710 votes.** Attached herewith and marked as Exhibits **MB-V, MB-V-1 to MB-V-11** are photocopies of pink sheets of the polling stations where these infractions occurred.

62. That there were **4 polling stations** where instances of combined constitutional and statutory violations, malpractices and irregularities in the nature of: (i) **same serial numbers on pink sheets with different results;** (ii) **absence of the signatures of the presiding officers or their assistants on the pink sheets;** and (iii) **polling stations with same polling stations codes and different results occurred, and can be found on the same pink sheets.** The combined effect of these infractions vitiated **1,261 votes.** Attached herewith and marked as **Exhibits MB-W, MB-WI, MB-W-2 and MB-W-3** are photocopies of pink sheets of the polling stations where these infractions occurred.

63. That there were **8 polling stations** where instances of combined constitutional and statutory violations, malpractices and irregularities in the nature of: (i) **over-voting;** (ii) **same serial numbers on pink sheets with different results;** and (ii) **polling stations with same polling stations codes and different results occurred, and can be found on the same pink sheets.** The combined effect of these infractions vitiated **3,167 votes.** Attached herewith and marked as **Exhibits MB-X,**

MB-X-1 to MB-X-7 are photocopies of pink sheets of the polling stations where these infractions occurred.

64. That there were **2 polling stations** where instances of combined constitutional and statutory violations, malpractices and irregularities in the nature of: (i) **voting without biometric verification**; (ii) **absence of signatures of presiding officers or their assistants on the pink sheets**; and (iii) **polling stations with same polling station codes and different results occurred, and can be found on the same pink sheets**. The combined effect of these infractions vitiated **671 votes**. Attached herewith and marked as **Exhibits MB-Y and MB-Y-1** are photocopies of pink sheets of the polling stations where these infractions occurred.

65. That there were **4 polling stations** where instances of combined constitutional and statutory violations, malpractices and irregularities in the nature of: (i) **over-voting** (ii) **same serial numbers on pink sheets with different results** (iii) **absence of signatures of the presiding officers or their assistants on the pink sheets**; and (iv) **polling stations with same polling stations codes and different results occurred, and can be found on the same pink sheets**. The combined effect of these infractions vitiated **2,105 votes**. Attached herewith and marked as **Exhibits MB-Z, MB-Z-1 to MB-Z-3** are photocopies of pink sheets of the polling stations where these infractions occurred.

66. That there were **2 polling stations** where instances of combined constitutional and statutory violations, malpractices and irregularities in the nature of: (i) **voting without biometric verification**; (ii) **same serial numbers on pink sheets with different results** (iii) **absence of signatures of presiding officers or their assistants on the pink sheets**; and (iv) **polling stations with same polling station codes and different results occurred, and can be found on the same pink sheets**. The combined effect of these infractions vitiated **793 votes**. Attached herewith and marked as **Exhibits MB-AA** and **MB-AA-1** are photocopies of pink sheets of the polling stations where these infractions occurred.

67. That there were **23 locations**, which were not part of the **twenty-**

six thousand and two (26,002) polling stations created by the 2nd Respondent prior to the December 2012 elections for purposes of the elections but where voting took place. The total number of votes cast in those locations was **9,685**. Attached herewith and marked as **Exhibits MB-AB, MB-AB-1 to MB-AB-22** are photocopies of pink sheets of the polling stations where these infractions occurred.”

The Petitioners then listed the method used by them in arriving at their conclusion that specific numbers of votes of each candidate ought to be annulled. This methodology is spelt out in paragraph 70 of the said affidavit which states as follows:-

70. "That the votes that ought to be annulled from the declared results of each of the candidates were determined by the following method:

- a. All the polling stations where the violations, irregularities and malpractices occurred were identified.
- b. To avoid double counting, the violations, malpractices, and irregularities were classified into 24 mutually exclusive categories.
- c. For each of the categories of infringements, all the votes declared in favour of each of the candidates at the affected polling stations by the 2nd Respondent were totalled.
- d. The total obtained above by each candidate was then subtracted from the overall total declared by the 2nd Respondent for the specific candidate to arrive at the new total valid votes for that candidate.
- e. The new totals and the resultant percentage for each candidate represent what the 2nd Respondent should have declared as the results of the presidential elections."

Even though the Petitioners have since revised the number of polling station results they seek to annul from the original 11,842 to the current figure of 10,119 the depositions in the affidavit refer to the original 11,842 polling stations.

It would appear from paragraphs 73, 74, 75 and 76 of the affidavit of the 2nd Petitioner that the Petitioners have classified the multiple constitutional and statutory violations, malpractices and irregularities into 4 broad classifications.

These are as follows:

1. **Over voting** which occurred in **2,065 polling stations** in which case the 1st Petitioner will obtain **49.3%** whilst the 1st Respondent obtains **49.1%** of the valid votes cast.
2. Voting without biometric verification which occurred in **2,279 polling stations** in which case the 1st Petitioner will obtain **49.38%** whilst the 1st Respondent will obtain **49.13%** of the valid votes cast.
3. **Use of same serial numbers for different polling stations with different results in the 10,533 polling stations where these occurred will lead to the 1st Petitioner obtaining 57.55%** of the votes whilst the 1st Respondent will obtain **41.1%** of valid votes case.
4. **Absence of signature of the presiding officers in the 1,826** polling stations where these occurred will lead to the 1st **Petitioner to obtain 49.03% of the votes whilst the 1st Respondent will obtain 49.45% of the valid votes cast.**

The Petitioners therefore prayed that the combine effect of all the above violations be brought to bear on the outcome of the 7th & 8th December 2012 elections such that the 1st Respondent ought not to have been declared as the elected President, rather it ought to have been the 1st Petitioner.

In consequence of the depositions in the affidavit of the 2nd Petitioner, they sought the following reliefs from this court:

- a. "That John Dramani Mahama, the 1st Respondent herein was not validly elected President of the Republic of Ghana.**
- b. That Nana Addo Dankwa Akufo-Addo, the 1st Petitioner herein, rather was validly elected President of the Republic of Ghana, and**
- c. Consequential orders as to this court may seem meet."**

AFFIDAVIT OF JOHNSON ASIEDU-NKETIA PURSUANT TO THE DIRECTIVES OF THE COURT DATED 2/4/2013 FOR AND ON BEHALF OF THE 1ST AND 3RD RESPONDENTS

Mr. Johnson Asiedu-Nketia, aka General Mosquito, the General-Secretary of the N.D.C swore to a joint affidavit on behalf of the 1st and 3rd Respondents.

Even though the depositions in the affidavit are not materially different from the material particulars of the answers by the 1st and 3rd Respondents referred to supra, I think it will be prudent to still refer to

some material particulars in extenso to indicate the vehemence of the denials of the petitioners case by the 1st and 3rd Respondents.

In this respect, the affidavit of Johnson Asiedu-Nketia answered the various heads of claim as follows in paragraphs 15, 15A, 15B, 15C, 15D, 15E, 15F, 16, 17, 22 (a) (b) (c) (d).

15. "Regarding each of the heads of claim, I say as follows:

15(a) Over-Voting

- i. In respect of all the pink sheets exhibited on over-voting, in no instance are the Petitioners alleging that the valid votes cast exceed number of registered voters at the polling station.
- ii. What the Petitioners are alleging to be instances of over-voting are in reality **patent clerical, and sometimes, arithmetic errors in recording, which have no material effect on the actual votes publicly cast, sorted, counted and recorded.**
- iii. A number of the pink sheets do not support in any manner the allegation of over-voting.

15 (b). Voting Without Prior Fingerprint Biometric Verification

- i. For the first time during elections, the 2nd Respondent used fingerprint biometric verification machines as well as a biometrically compiled register. The fingerprint verification machines in certain instances were found not to be functioning and as a result of delays occasioned by having no remedy faults in these machines during the voting exercise 2nd Respondent adjourned the polls to the next day to enable it to deal with the problems on the fingerprint verification machines. **To the best of my knowledge, based on accounts of our agents at the polling stations, no voter voted without prior biometric verification.**

- ii. My attention has been drawn to paragraph 31 of the affidavit of the 2nd Petitioner alleging that certain votes were annulled at a collation center in the Northern Region, I have been advised by Counsel and believe that, if indeed it did happen, that annulment was unlawful. In any event, as this is not an issue arising from the pleadings in this case, I am advised and verily believe that this is not an issue before this Honourable Court.

- iii. The affidavits sworn to by our polling agents and filed before this Honorable Court confirm that in all the polling stations in respect of which they swore their respective affidavits, voters were biometrically verified before they were permitted to vote.

- iv. **I have also been advised by counsel and believe that biometric verification cannot be restricted to fingerprint verification and that if as a result of equipment failure,**

any voting occurred without a voter having undergone fingerprint verification but the voter was otherwise verified in terms of the biometric register this was not wrongful.

- v. The 1st Respondent's statement referred to by the Petitioners that where there were still challenges with the fingerprint verification machines voters be allowed to vote without prior fingerprint verification, reflected his view of the constitutional rights of Ghanaian citizens, **which I am advised by Counsel and verily believe is the correct statement. In any event the statement of 1st Respondent was not the basis of any decision of officers of 2nd Respondent in conducting the elections.**

15 (c) Absence of Signatures of Presiding Officers on Pink Sheets

- i. In all instances in which the Petitioners allege that the Presiding Officers did not sign pink sheets, the Petitioners do not challenge the results documented on the said pink sheets. Indeed, their own polling agents had, in most cases, signed the declared results without having raised any complaints.
- ii. **I am advised by Counsel and verily believe that the neglect or failure of Presiding Officers to sign the pink sheets, whether by oversight or for any other reason, cannot be a basis for annulling lawfully cast votes.**

Otherwise Presiding Officers would be able, by design, to disenfranchise voters by failing or refusing to sign declaration forms.

15(d) Pink Sheets With the Same Serial Numbers Having Different Results

It would appear that the allegation under the head of claim is based on a lack of appreciation of the nature and role of serial numbers on pink sheets. **It is polling station codes, and not serial numbers, that are used in identifying polling stations.** 2nd Respondent has given sufficient explanation to this head of claim in its amended answer to the 2nd amended petition.

We note that the Petitioners do not allege that voting did not take place at any of the polling stations that they claim are affected by the allegation. I note also that, at those polling stations, the polling/counting agents of the 1st Petitioner duly signed the pink sheets, which are the products of lawfully supervised elections.

15 (e) Different Results on Pink Sheets Having the Same Polling

Station Code

- i. I note that the Petitioners do not allege that voting did not take place at those polling stations. In addition to the unique codes, polling stations can also be partially identified by their names; so that assuming that the Petitioners were correct (which I

deny) the names of the polling station would have provided sufficient distinguishing point for the particular polling station.

2nd Respondent has explained that where polling stations have been used for special voting which preceded the general voting, two separate results would appear on the pink sheets with the same polling station code, one representing the results of the special voting, and the other those of the general voting. Anyhow, I maintain that each pink sheet represents the genuine results of supervised election, and the polling/counting agents of the 1st Petitioner duly signed them.

15(f) Unknown Polling Stations

- i. I was in court when the Counsel for the Petitioners indicated that they were restricting this allegation to the 22 polling stations they identified on the basis of the orders of the court to supply further and better particulars. Counsel for the Petitioners confirmed they no longer were making claims in respect of 28 polling stations as they originally alleged. The Affidavit of 2nd Petitioner now refers to 23 polling stations meaning there is one polling station in respect of which further and better particulars have not been supplied as ordered by the court.
- ii. We have also checked the details of the polling stations provided by the Petitioners, and have found that their confusion

arose, in some instances, out of the wrong spelling of the names of the polling stations and, in others they misquoted the polling stations. In some cases, the polling stations were used for special voting. All the polling stations exist and were all part of the 26,002 polling stations that were created by 2nd Respondent for the conduct of the December 2012 elections. Anyhow, the pink sheets exhibited by the Petitioners in respect thereto reflect the genuine results of supervised elections, signed by the Petitioners' and 1st Respondent's polling/counting agents.

iii. I attach to this affidavit, marked Exhibit "Jan 5", an analysis of the details relating to the Petitioners' allegation. The 2nd and 3rd columns show the details provided by the Petitioners in their allegation. The 4th and 5th columns show the correct details of the polling stations. The 6th column shows the Constituencies under which the polling stations falls.

16. In general response to the various allegations made by the Petitioners, I say that, in most of the polling stations in respect of which the Petitioners have made claims, their own polling/counting agents signed without complaint the pink sheets and **the current complaints are merely the afterthought of bad losers clutching at straws. The Petitioners only started complaining long after the results had been declared at the various polling stations and when the overall trend nationwide began to show that 1st Petitioner would lose the elections. Indeed on December 8, 2012, after the**

President had said that voting should be allowed without prior fingerprint biometric verification, Boakye Agyarko, the Campaign Manager of the 1st Petitioner, gave a press conference to inform the country about the NPP's impression of the conduct of the elections so far. He stated that the elections were the most transparent, credible and peaceful elections ever held in Ghana, and that the 3rd Respondent and I, should not attempt to challenge the results.

17. This Petition is an act of bad faith and a brazen attempt by the Petitioners to find some reason to question the validity of the December 7 and 8 Presidential Elections after they lost.

22. After the declaration of the results, representatives of the NPP have

made changing allegations about the alleged irregularities and malpractices, which they claim accounted for their defeat, including the following:

a. The results declared in favour of 1st Petitioner had been swapped with those declared in favor of 1st Respondent;

b. That results declared in favour of 1st Respondent had been unlawfully increased between the collation centres and the strong-room and that the results that came to the strong-room

and declared by 2nd Respondent did not reflect those recorded at the various constituency collations centres;

- c. That at certain polling stations the declared results in words were different from those in figures in a manner that favoured 1st Respondent;
- d. That 1st Respondent had conspired with 2nd Respondent to steal votes for 1st respondent.

Based upon the above depositions, the 1st and 3rd Respondents prayed the court that the Petition is wholly unmeritorious and lacks in substance.

2ND RESPONDENTS AFFIDAVIT PURSUANT TO THE DIRECTION OF THE COURT DATED 2ND APRIL, 2013 SWORN TO BY AMADU SULLEY DEPUTY CHAIRMAN OF THE COMMISSION

It should be noted that, in this petition the position of the 2nd Respondent, as the constitutionally mandated body in charge of organizing and or conducting elections in Ghana is paramount.

I will therefore devote some time to an analysis of the case as is contained in the detailed affidavit sworn to by the 2nd Respondents.

In this regard therefore, I think it is pertinent to refer in extenso to some relevant portions of the affidavit sworn to by Amadu Sulley and referred to supra.

The relevant portions of the said affidavit are paragraphs 3, 6, 13, 14 and 15 of 2nd Respondents Affidavit sworn to by Amadu Sulley on 16-4-2013.

3. "The manner in which the 2012 Elections were conducted, as described in paragraph 14 of the 2nd amended answer filed on behalf of the 2nd respondent on April 3, 2013, and the participation of representatives of all the political parties in the procedures followed in the Constituency Collation Centres and in the 2nd Respondent's Headquarters (Strong Room), makes it impossible to falsify the votes cast and to conceal such falsification. By the same token, it is impossible to make a false allegation of falsification and to sustain such an allegation.

6. In the petition, the Petitioners are now seeking to overturn the results declared by the 2nd Respondent on the grounds of irregularities and malpractices in six "main categories". Each of those categories have been effectively refuted by the 2nd Respondent in its answer filed on 07/01/2013; its amended answer filed on 27/02/2013; its Analysis of the Further and Better Particulars provided by the petitioners application, the response filed on 12/02/2013 by the 2nd respondent to the Interrogatories submitted by the Petitioners and the Supplementary Affidavit filed on the 2nd Respondent on 01/04/2013 regarding the alleged 28 unknown polling stations.

13. Paragraph 34 of the 2nd Petitioners affidavit is false. Polling Stations

are identified by their names and their unique Polling Station Codes. The serial number on a Polling Sheet is NOT a security feature. Further, this matter has been fully explained in paragraph 18 (a) of the 2nd Respondent's 2nd amended answer.

14. Paragraphs 36 to 68 contain inconsistencies and are denied. The 2nd

Respondent says that the Petitioners are fastening onto errors, committed **in the completion of pink sheets, by Presiding Officers that do not benefit any particular candidate or affect the number of valid votes cast at polling stations.**

15. The reliefs sought by the Petitioners are without merit and the Honourable Court is requested to dismiss their petition."

From the above depositions of the 2nd Respondent, which should be jointly read with the depositions contained in the affidavit of Johnson Asiedu-Nketiah, sworn to on behalf of the 1st and 3rd Respondents, already referred to supra, it should be clear that all the Respondents vehemently deny in substance the claims of the Petitioners.

There are some preliminary observations and comments that I would wish to make in the case before I address the points of substance posited in the issues.

PRELIMINARY COMMENTS AND OBSERVATIONS

It has already been noted that, this Presidential Election Petition is the first of its kind in the legal annals of this country. Several persons have therefore commented on the procedure that was adopted by the Court. Most of the comments compared the swiftness of the Kenyan Supreme Court in dealing with a similar election petition challenge in that country as opposed to the near snail pace approach adopted by us in the Ghana Supreme Court.

This therefore calls for discussions of some constitutional and statutory provisions germane to the Ghana situation.

CONSTITUTIONAL PROVISIONS ON CHALLENGE OF VALIDITY OF PRESIDENTIAL ELECTION

Article 64 (1) (2) and (3) of the Constitution, 1992 provides:-

64. (1) "The validity of the election of the President may be challenged

*only **by a citizen of Ghana** who may present a **petition** for the purpose to the Supreme Court **within twenty-one days** after the declaration of the result of the election in respect of which the petition is presented.*

(2) A declaration by the Supreme Court that the election of

President is not valid shall be without prejudice to anything done by the President before the declaration.

(3) The Rules of Court Committee shall, by constitutional instrument, make rules of court for the practice and procedure for petitions to the Supreme Court challenging the election of a President."

From the above provisions, it is certain and clear that, in the first place, any challenge to the validity of the election of a President can only be filed after the declaration of the results of same by the Electoral Commission. This means that, the Chairman of the Electoral Commission, who is the returning officer for the Presidential election must have declared the results by a President Elect Instrument pursuant to article 64 (9) of the Constitution 1992.

Secondly, any person desirous of challenging the declaration of a person as a President by the Electoral Commission has to do so within 21 days of the declaration of the said result.

Thirdly, it should be noted that, by the provisions in article 64 (2) of the Constitution 1992, a clear intention has been indicated that the pendency of a challenge to the validity of the election of a person as a President cannot stop the President from acting in that capacity as a President. That is the purposive way in which the said provisions should be interpreted such that there will not be any vacuum in the running of affairs of the state.

That explains the rationale why the constitutional provisions in article 64, clause 2 does not invalidate any action taken by the President before the declaration by the Supreme Court on the validity or otherwise of the election of the President.

Finally, article 64 (3) mandates the Rules of Court committee to make constitutional instruments to regulate the conduct, practice and procedure of petitions to the Supreme Court seeking to challenge the election of a President.

It was in pursuant of the said provisions that the Supreme Court (Amendment) Rules, 2012 C. I. 74 was promulgated.

In order to illustrate the point made supra, it is pertinent to refer to the preamble to C. I. 74 which reads thus:

"In exercise of the powers conferred on the Rules of Court Committee by clause (4) of article 33, clause (3) of article 64 and clause (2) of article 157 of the Constitution, these Rules are made this 9th day of January, 2012."

As the title of the C.I. 74 indicates, it is an amendment of the *Supreme Court Rules, 1996 C.I. 16* as amended by the *Supreme Court (Amendment) Rules, 1999 (C. I. 24)*.

C.I.74

This instrument reiterates the constitutional provisions in article 64 (1) and (2) of the Constitution 1992 already referred to supra.

RULE 69A

This rule states that a respondent has 10 days within which to raise a preliminary objection or file an answer to the petition. Thus, if the petitioner has 21 days to file a petition after the declaration of the result, then the respondents have 10 days after service to either file an answer or raise a preliminary objection.

Considering the fact that the petition may not be served on the same date that is filed, then there is the possibility that valuable time may again be lost in service which may even be by substitution as provided for under *Rules 68 B, sub-rules 4 and 5 of C. I. 74*.

As a country, if we are desirous of proceeding in the express highway (fast lane) approach to the determination of such petitions by the courts, then it is my opinion that appropriate legislation must be passed to reflect that phenomenon. The blame must not be put at the door posts of the courts for the snail pace approach, but with the enabling constitutional provision and rules of procedure. These provisions and rules certainly need to be amended to make room for expedition, without sacrificing efficiency. This is because, there is an adage in which I believe which states that, **"Justice hurried, is justice buried"**. It must also be noted that, the Constitution which was promulgated and enacted and came into force on 7th January 1993 must be considered as a constitutive act of the people of Ghana which affirmed and endorsed

priceless principles and precepts which must be honoured and respected.

ELECTRONIC SERVICE – RULE 69 B

Even though the rules provide for electronic service, it is a pity that in this modern I.C.T world, we have not been able to implement this provision. I believe the time is ripe for the full and effective utilization of the rules of I.C.T not only in our mode of service of documents, but more importantly in our scheme of work and also adduction of evidence before the court.

It is in respect of the above that I regret the inability of the Court to heed the many applications by the Petitioners to adopt I.C.T methods of adduction of evidence which unfortunately were not granted. It is my wish and hope that in future, steps would be taken to ensure a smooth blend of I.C.T with our procedural rules, just as the live telecast of proceedings was handled progressively to allow all Ghanaians and the world at large to watch these proceedings.

On the whole, it should be noted that C. I. 74 was passed with expeditious and fast disposal of petitions commenced under it as its philosophical underpinnings. This explains why provisions were made for the court to give its decision not later than 15 days from the close of the hearing of the petition.

Again it is instructive to note that, the day to day sitting including Saturdays, Sundays and public holidays and no review of final decision including the opening of the Court registry on all days including Saturdays and Sundays are all designed to ensure expedition. Unfortunately, some of the above provisions i.e. sitting on public holidays and no review have been shot down by the Supreme Court at the instance of a plaintiff.

I have had to deal at length with the above constitutional provisions as well as Rules of Court applicable in dealing with presidential election petitions to drum home the fact that there is the need to make for further radical reforms in our laws if we are to achieve what has been done elsewhere i.e. the Kenyan experience.

PRACTICE DIRECTION

In this respect, I think the Court acted with the necessary dispatch when it gave the practice directions on the 2nd April 2013. In retrospect, I think the court should have been more radical in content by not allowing unnecessary cross-examination of the parties who gave depositions in their affidavits. Even though I concede that these cross-examinations were very useful and gave us a lot of insight into the case before the Court, am of the opinion that in future, learned counsel should be limited by allotting time for the cross-examination and arguments on motions and objections. This will definitely eliminate over elaboration,

repetitions and excessive playing to the gallery especially the television cameras.

INTERLOCUTORY RULINGS

During the course of hearing this petition, several interlocutory rulings were delivered which on hindsight I thought should have been otherwise decided in order for this Court to do substantial justice and move the petition faster. I will refer only to a few.

1. THE RULING ON MOTION TO PRODUCE DOCUMENTS FOR INSPECTION AND DISCOVERIES

This application was filed by the Petitioners seeking an order from the Court directed at the 2nd Respondents to produce for their inspection and copy being made thereof of the following:

- i. The results collation forms for all the 275 collation centres for the Presidential elections.
- ii. The declaration forms that is the pink sheets for all 26,002 polling stations.

On the 7th of February 2013, this Court by a unanimous decision dismissed the Petitioners motion for production and inspection of the documents referred to supra.

Even though the court made it clear in the ruling, that it was premature at the time it was applied for, the Petitioners never brought it up again

for re-consideration. Perhaps if it had been brought up again, it could have been favourably considered.

Why am I of the view that it could have been favourably considered?

- i. The 2nd Respondents are the constitutional body charged with the conduct of all public elections in Ghana.
- ii. They are therefore the custodians of all the original documents being requested for by the Petitioners.
- iii. The explanation by the 2nd Respondent's in their answer that the legibility of the duplicate copies of the pink sheets which the political parties including the Petitioner's have is the problem. This therefore makes it necessary that the 2nd Respondent's who have the originals should have been made to produce them for the parties and the Courts to apprise themselves of the original copies. *Exhibits E.C 11 A1, E.C. 11 A2 and E. C. 11A* which are all copies of original pink sheets that the 2nd respondent was made to tender speaks volume. These exhibits exposed the lack of credibility in some of the conduct of the 2nd respondent's during the last December 2012 presidential elections in view of the discrepancies between those originals and duplicate pink sheets.
- iv. Besides, evidence adduced by the Chair of the 2nd Respondent Dr. Afari-Gyan, is to the effect that collation forms are not given

to the political parties as with pink sheets. Therefore if the petitioners had access to the originals of these documents, they could have revised the number of pink sheets and polling stations they were contesting.

As a matter of fact, now that evidence has been concluded in the matter, am of the considered opinion that, in future, in all Presidential election petition hearings, the Electoral Commission should be mandated to produce for inspection all the documents being contested by the Petitioners. This will help solve problems of ineligibility or otherwise of "pink sheets" exhibited by the petitioners.

This is very important because, as the custodian of the original copies of these primary documents, the 2nd Respondents owe a duty to the good people of Ghana to make a clean breast of the documents if they really do not have any skeletons in their wardrobes to hide, reference the Exhibits E. C. 11A - E.C 11A2 series referred to supra.

For example, the explanation that some pink sheets were signed at the collation centres by the Presiding Officer's at the instance of the Returning Officer's when same was detected in the absence of the political party agents speaks volumes.

If indeed the pink sheets had been signed at the collation centres, then perhaps those complaining might have revised their stand. Since the duty of the courts in any case, is to do substantial justice these points should be well noted.

Secondly, because of the problems of ineligibility of duplicate copies, the originals if produced will be legible, then the problem could have been solved, and the doubts about some figures which we encountered on the pink sheets would not have arisen.

ATTEMPT BY 2ND RESPONDENTS TO TENDER COLLATION SHEETS

In the course of the testimony by Dr. Afari Gyan, an attempt was made by him to introduce some collation forms which was objected to and upheld by this court. Then further during the trial, it came to light that some polling stations like the "*Finger of God*", "*Juaso Court Hall*" and others had more than one pink sheet, and in some cases triple pink sheets, reference exhibit X, which are pairs of serial numbers appearing more than once and exhibit Y, duplicate polling station codes.

When the 2nd Respondent's, rightly in my view sought to tender the collation sheets for those constituencies for the Court to be satisfied that not more than the required number of pink sheet results were taken into account in the collation for those constituencies, the objection was again upheld. This denied the 2nd respondents the opportunity to explain that not more than one pink sheet was used to collate the results.

I am however of the opinion that, those objections were upheld because the court had previously denied the Petitioners the same opportunity when they first sought to introduce them into the case. For purposes of

consistency, the court persisted in its previous ruling by denying the introduction of the collation sheets.

For now, doubts have been created in our minds as to whether the ***Exhibit Y***, type of situation actually found their way into the collation of the results and therefore the declaration made by the 2nd Respondent in favour of the 1st Respondent could have been based on exaggerated and duplicated figures. But luckily these doubts have now been erased in our minds by *exhibits X, Y* and *E.C 11* series.

Similarly, when the 2nd Respondent's also sought to introduce pink sheets from Ashanti Region during the cross-examination of the 2nd Petitioner, Dr. Bawumia an objection was raised and upheld by the Court which denied the opportunity to the Respondent's to tender pink sheets from the stronghold of the petitioners. If indeed there were similar malpractices and or irregularities and constitutional violations in other parts of the country, then equity would have demanded that uniform rules of application be made to apply to all such infractions of the law.

In this instance, if the 2nd Respondent had been directed to produce at least pink sheets that are being contested for by the petitioners, those pink sheets would have been in evidence or at least before the court, and no legitimate objection would have been raised. After all, "*What is good for the goose is also good for the gander*". However, because of prior rulings in the case, the court has been left with no opportunity to examine the bonafides of the other claims.

If the above documents, had been tendered, they could have helped the Court to determine whether the December 7th and 8th Presidential elections were completely flawed and bereft of any legitimacy or not.

I believe as a people and country, we will take a cue from these procedural lapses and make amends in future cases if they should arise.

2. AMENDMENT OF PETITION

I am also of the view that it is not for nothing that the Constitution 1992 and C.I. 74 provide that the petition challenging the validity of an election should be filed within 21 days after the declaration of the results by the Electoral Commission.

If therefore, a Petitioner has not been able to comprehensively assemble all the allegations which he intends to use for the petition within the 21 days at his disposal, such a Petitioner should not be permitted to amend his case as and when he discovers new evidence after the 21 days has lapsed. This definitely contributed to delay in the petition hearing.

JOINDER OF THE NATIONAL DEMOCRATIC CONGRESS (NDC)

Even though the Court has derived much assistance from Counsel for the NDC Mr. Tsatsu Tsikata for his incisive cross-examination, I am of the considered opinion having reflected on the provisions of the Constitution 1992, the Supreme Court Rules 1996, C.I. 16 and C. I. 74, already referred to, that there is really the need for such petitions to be expeditiously dealt with. I am therefore of the considered view that in

future, political parties as entities should be left out of such petitions as happened when this court granted the application for joinder of the National Democratic Congress.

The attempt by the Petitioners in including their Party Chairman in the petition as a 3rd Petitioner I dare say was one of the factors that motivated the 3rd Respondents to seek to join.

Once the beneficiary of the declared election result is one of the Respondents, to wit the 1st Respondent and as at now belongs to a recognised political party, i.e. NDC, what has to be done is for the party to arrange the legal representation for the President such that the fortunes of the party are not compromised.

I am making these observations because I am of the view that valuable time was equally lost when the application for the joinder was made. Similarly, the many spurious applications made by persons claiming to be members of the NDC to join the suit to protect their votes also engaged valuable time of the Court. But for the pro-active ruling delivered by this court to deal with all such applications, the systematic and strategic manner in which the applications were being filed and fixed for hearing could have further derailed the hearing of this petition.

There is therefore the need for appropriate amendments to be made to the rules of Court to explicitly deal with and prevent joinder of such corporate entities like political parties and other individuals who do not have a direct beneficial interest in the outcome of the election.

BURDEN OF PROOF

There is no doubt that the petitioners are very much aware of the standard of proof that lies upon them as petitioners to discharge the evidential burden to enable them convince the court as is required by law, reference *sections 10, 11(1) and 12 (1) of the Evidence Act, 1975 NRCD 323*.

This sections stipulate that the burden of persuasion which the obligation of a party requires to establish a requisite degree of belief concerning facts in the mind of the court to prevent a ruling being made against him on an issue is by proof by a preponderance of probabilities.

In giving teeth to the above provisions of the Evidence Decree, my respected brother, Ansah JSC in the case of ***Takoradi Flour Mills v Samir Faris [2005-2006] SCGLR 882, at 900*** stated authoritatively concerning this burden of proof in civil matters as follows:-

*"It is sufficient to say that this being a civil suit, the rules of evidence requires that the plaintiff produces sufficient evidence to make out his claim on a preponderance of probabilities, as defined in section 12 (2) of the Evidence Decree, 1975 (NRCD 323). Our understanding of the rules in the Evidence Decree, 1975 on the burden of proof is that in assessing the balance of probabilities, all the evidence, be it that of the plaintiff, or the defendant, must be considered **and the party in whose favour the balance tilts is the person whose case is the more probable of the rival versions and is deserving of a favourable verdict.**"*

Throughout the trial of this case, this duty and standard of the burden of proof which the law has put on a plaintiff, in this case the petitioners, has not been lost on them.

All the respondents agree with the proposition of the law on the burden and standard of proof that lies on the petitioners to sustain their petition.

See for example the written address of learned counsel for the 1st Respondent, Tony Lithur when he stated thus:

*"The law is settled that the party who bears the burden of proof must produce the required evidence of the facts in issue that has the quality of credibility for his claim to succeed. (See sections 10 (1) and (2) and 11 (1) and (4) of the Evidence Act, 1975 (NRCD 323). Thus, in **Ackah v Pergah Transport Limited & Others [2010] SCGLR 728**, Her Ladyship, Mrs. Justice Sophia Adinyira, JSC succinctly summed up the law, at page 736 as follows:"*

*"It is a basic principle of 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...**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 a fact is more reasonable than it's non-existence.** This is the requirement of the law on*

evidence under section 10 (1) and (2) and 11 (1) and (4) of the Evidence Act, 1975 (NRCD 323)”

Learned counsel for the 1st Respondent, continued his address on this issue in the following terms:-

*"Election petitions have their own dynamics in relation of proof. In the Nigeria election case of **Abubakar 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.***

*In the same vein, in the Canadian case of **Opitz v Wrzesnewskyi 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..."

Also, in ***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:

"...the 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."

Continuing his submissions in the written address, learned counsel stated as follows:

*"It should be noted that, if a legal rule requires a fact to be proved, the court must decide whether or not it happened. In the recent case of **Re B [2008] UKHL 3**, Lord Hoffman aptly stated the position, using mathematical analogy thus:*

*"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. **The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carried the burden of proof. If the party who bears the burden of proof fails to discharge it, a value 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.**"*

The above statement is therefore quite authoritative and conclusive of the issue of burden of proof.

Learned Counsel for the 3rd Respondent, Tsatsu Tsikata, in his written address on the subject, made similar remarks as follows:-

*"It is essential to proving the case of the Petitioners that they not only clearly establish the legal basis on which they ask this honourable Court to annul votes of millions of votes, which would deprive these citizens of their constitutional right to vote, **but also that they clearly establish the factual basis on which they have brought the petition.** This requires that the pink sheets that they reference in the relevant paragraphs of the affidavit must*

be available to the Court and to the other parties. It is submitted that based on the uncontested evidence of the referee, KPMG, the Petitioners have failed to make available the pink sheets claimed to be made available in the affidavit of 2nd Petitioner, for this reason alone their petition must fail. "

Learned counsel for the 3rd respondent then drew references to a number of things why in his opinion the Petitioners have failed to discharge the burden that lay upon them in proof of their petition.

Notable among these is the changing face of the number of pink sheets they rely upon which according to counsel has been disproved by the **KPMG report.**

Another instance is the fact that, the pink sheets upon which the petitioners relied entirely for the proof of their case is itself dependent upon several other primary sources of evidence like **polling station voters register, the polling station biometric machine the record of ballot papers issued to the polling station,** just to mention a few.

The input on the burden and standard of proof by learned counsel for the 2nd Respondent, Mr. James Quashie-Idun was not different in content from the 1st and 3rd respondents. In essence, whilst acknowledging the fact that it is the petitioners who have the burden to discharge in establishing the proof of their case, he argued that they failed woefully to discharge that burden. This is because, the only evidence the petitioners proffered in proof of their many allegations are

the pink sheets. According to Mr. Quashie-Idun, the pink sheets perse cannot prove the case for the petitioners without resort to the primary records which learned counsel for the 3rd respondents referred to.

It is definitely not in dispute that the petitioners have made the statements of Poll and Declarations of results – "Pink Sheets" as the bedrock or alter ego of their case.

I have examined in detail the characteristics of a pink sheet, elsewhere in this judgment. Suffice it to be that, evidence abounds conclusively in this case that it is the pink sheets that are used to tally results on the constituency collation sheets at the constituency collation centres.

These are in turn transmitted to the 2nd respondent's strong room and used for the purpose of declaration of the results. I am fairly well convinced that a similar procedure was used in the declarations of the 2012 presidential election results.

In my opinion, whenever the petitioners have through a pink sheet, cast doubts on the authenticity or correctness of a result declared at a polling station, for purposes of the principle of producing evidence on the balance of probabilities, as provided for in *sections 10, 11 and 12* of the *Evidence Act, 1975, NRCD 323*, that duty appears to have been discharged until an explanation is given as to why it ought not to be presumed to have been discharged. The only institution or body that can give such an explanation is the 2nd respondent.

As a matter of fact, from the evidence, the only record of the election given the contesting parties are the pink sheets. If therefore an issue arises about this or that polling station in relation to it's pink sheets

which have been produced by the party upon whom the burden lies in law, then under such circumstances, the burden would be deemed to have shifted to the respondents, especially the 2nd respondent to call evidence in rebuttal.

KPMG

It is also an undeniable fact that the petitioners case in respect of the pink sheets has been changing consistently like the face of aameleon. Indeed from an initial figure of **11,916** pink sheets which they claimed they filed, to a reduced number of 11,138, then to the KPMG counts of the following:

1. **13,926** - actual number of pink sheets counted from the Registrar's set. Out of this, 8675 are unique.
2. **9,856** were counted from the presiding Judge's set.
3. **1,545** pink sheets initially unidentified.
4. **10,119 as per Table 1A of the volume 2A page 160 of the address are the number of pink sheets the petitioners now claim to be relying upon.**

They give a breakdown of this as follows in their address:

Registrar's set (KPMG)	-	7999
Registrar's remarks (KPMG)	-	690

President's set (KPMG)	-	804
President's remarks (KPMG)	-	60
Respondents cross examination exhibits -		566

Table 1A of Volume 2A of the address also lists **9,095** pink sheets on page 302 thereof as the total number of pink sheets the respondent's prefer, whatever that means.

Table 4 on page 287 of volume 2 of the address also lists 287 pink sheets as the pink sheets that were duplicated by the petitioners.

All the above go to prove that the petitioners were not consistent with the number of pink sheets they relied upon. However, once the settled figure of 10,119 pink sheets, is far lower than their original 11,926 and also the 10,119 appear to be based somewhat on actual physical count of exhibits by KPMG, then for purposes of admissibility the petitioners must be deemed to be within the remit of what they originally claimed to be contesting.

Evidence abounds on record of several exhibited pink sheets which were deleted by the petitioners from the original list that they were relying upon. This explains why I have stated elsewhere in this judgment that being the first of its kind in Ghana, there is the need for this court to define rules of procedure in determination of such cases. **This will**

definitely be in tandem with Rules 69 c (4) (8) and (9) of C. I. 74 which gives power to the Supreme Court to inquire into and determine the petition, by leave of the court cross-examine and re-examine a party who has sworn an affidavit before the court, and the examination or recall of a witness for re-examination by the court.

These are all novel provisions upon which the court may have to issue practice directions for the purposes of giving practical effect and demonstration to some of the above provisions.

Finally it has to be observed and noted that, since most of the crucial and critical primary sources of authentic records of any election are in the possession of the 2nd respondents, it should be clear that such documents must be easily made available to the court and by necessary implication to the contesting parties to solve issues of authenticity and genuineness of records when these arise from the hearing of an election petition.

With the above general comments, and the observation that the petitioners have to some extent provided credible evidence in the nature of evidence on the face of the pink sheets, it remains to be seen how they can succeed in proof of the various heads of claims of violations, malpractices, irregularities, etc. These must as it were then be aligned to the resolution of the memorandum of issues settled for and agreed to by the parties in order for a determination of the issues involved.

WHAT THEN IS THE CASE OF THE PETITIONERS

Dr. Bawumia, the 2nd Petitioner, in his testimony on the 17th day of April 2013 summarised the case for the Petitioners thus:-

"In our examination and analysis of the pink sheets in the areas of over-voting, in voting without biometric we found constitutional and statutory violations in the areas of over-voting in voting without biometric verification and in the presiding officer or the assistant not signing the results before declaration as required by law. We also found irregularities and violations in the areas of the large use of duplicate serial numbers on polling stations forms and duplicate polling stations codes. In our examination, we also found polling stations which we could not trace to the list of 26,006 polling stations provided by the 2nd respondent for the conduct of the election. My Lords, on the fact of the pink sheets, we also found evidence of a bloated voters register. So these were the broad irregularities, the constitutional and statutory violations, malpractices that we found in our examination of the pink sheets."

The above summed up the various categories of constitutional and statutory violations, malpractices and irregularities that the Petitioners highlighted in their evidence before the court. These are:

1. Over-voting

2. Voting without biometric verification
3. No presiding officer signature on the pink sheets as required under the Constitution
4. Multiple use of duplicate serial numbers of pink sheets for polling stations.
5. Use of different results on pink sheets having same polling station code.
6. Non-existent 22 polling stations outside the 26,002 recognised ones or unknown.
7. Bloated voters register

CONSTITUTIONAL BASIS FOR CHALLENGING PRESIDENTIAL ELECTION

Before I proceed to deal with the above categories, let me deal briefly with a preliminary issue. This is the Constitutional Basis for challenging presidential results.

Undoubtedly, article 42 of the Constitution, 1992 provides as follows:-

"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 or referenda”.

This right has been conferred on all citizens of Ghana who have the qualifications stated therein, i.e.

- i. Must be Ghanaian citizen
- ii. Must be 18 years of age or over
- iii. Must be of sound mind

These are the basic constitutional qualifications that will entitle a person who satisfies them to be entitled to be registered and thereafter to exercise that right to vote.

What must be noted is that, even though the said right may be said to be absolute in some respects, it does not confer an automatic right on a Ghanaian citizen of 18 years and over, to just walk into a polling station during an election and demand to exercise that right.

The constitutional right to vote enshrined in article 42 of the constitution 1992 is itself contingent upon some other factors, like being registered to exercise the right as a voter.

Article 45 (a) (b) (c) (d) (e) and (f) deals with the functions of the Electoral Commission such that it is empowered to compile the register

of voters and to revise it at such regular intervals as may be determined by law.

Article 46 of the Constitution guarantees and preserves the independence of the Electoral Commission, whilst article 46 gives the Commission the power to divide the country into constituencies for purposes of parliamentary elections.

Article 51 of the Constitution 1992, actually confers on the Electoral Commission to make rules and regulations for the conduct of its functions. For the avoidance of doubt, the article provides as follows:-

"The Electoral Commission shall, by constitutional instrument, make regulations for the effective performance of its functions under this constitution or any other law, and in particular, for the registration of voters, the conduct of public elections and referenda, including provision for voting by proxy".

It is therefore clear that, the provision of the right to vote in article 42 whilst appearing to be absolute, is itself contingent upon the rules and regulations made by the Commission for the conduct of the elections.

For example, if in the exercise of its functions, the Commission has advertised for registration of persons qualified to vote within a certain time duration and at designated polling stations, any qualified prospective voter who fails to avail

himself of that opportunity to register, during that period and at a designated station cannot expect to exercise the right to vote, because he himself failed to exercise the right to be registered. It is thus to be clearly understood that, even though the Constitution 1992 has conferred on Ghanaian citizens, the right to vote, it is contingent upon certain other factors, the non occurrence of which will deny any qualified and prospective voter the chance and right to vote.

I articulated these positions clearly in my opinion in the case of *Ahumah Ocansey v Electoral Commission, Centre for Human Rights and Civil Liberties (CHURCIL) v Attorney General & Electoral Commission, consolidated [2010] SCGLR 575*, especially at 580 as follows:-

"Whilst the 1992 Constitution per article 42 allows all citizens of Ghana of eighteen years and above and of sound mind including prisoners both remand and convicted the right to be registered to enable them vote in public elections and referenda, there is still the need for a legislative framework within the confines of the Constitution (reference article 51) to regulate, control, manage and arrange the effective exercise of that function to ensure that the Electoral Commission is not stampeded into taking hasty decision which would result into chaos and confusion. Whilst the Tehn-Addy case is authority for the proposition that every sane Ghanaian citizen of

eighteen years and above had the automatic right under article 42 of the 1992 Constitution, to be registered as a voter, the instant case is authority that irrespective of the provisions of section 7 (5) of PNDCL 284 remand and convicted prisoners confined in a legal detention centre have the right to be registered as voters for the conduct of public elections in Ghana subject to the Electoral Commission making the necessary legislative arrangements to take care of the control, management and regulatory regime of such an exercise.

Commenting further on the effect of articles 42, 45 (a) and 51 all of the Constitution 1992, I stated at page 662 of the above case as follows:

"In the instant suit, the words in article 42 which are germane to the entire suit have to be read together with the relevant and consistent provisions of the Constitution as a whole and, in particular, articles 45 (a) of the 1992 Constitution, which mandates the Electoral Commission to compile the register of voters and revise it as such periods as may be determined by law; and also article 51, which also mandates the Electoral Commission to make regulations for the effective performance of its functions under the Constitution or any other law. It is important to note that article 51 specifically mentions functions like the registration of voters, conduct of public elections and referenda, etc."

The above opinion clearly establishes the principle that I have labored to explain above on the constitutional right to vote. What has to be taken into serious consideration is the fact that, no constitutional or statutory law can be effective if it does not take into consideration the existing conditions and circumstances of the society for which it was enacted or for whose benefit it was made.

In this instance, the maxim, "*ex facto jus oritur*" literally meaning "*out of the facts, grows the law*" has to be made to apply because if the Judges knew their facts very well such as I have labored to explain in this case, then an attempt to interpret the Constitution will help develop it into a living and organic document.

It is in pursuance of the above interpretation of the powers granted the Electoral Commission that the following legislations had been enacted to govern, control and regulate various aspects of the 2012 Presidential and Parliamentary elections.

- i. The Public Election (Registration of Voters) Regulations, 2012 (C. I. 72) and*
- ii. Public Elections Regulations, 2012 (C. I. 75) already referred to supra.*

As far as I understand article 42, and 51 of the Constitution 1992, any prospective and qualified voter, who first refused to comply with C. I. 72 and did not register under that law cannot exercise the constitutional right to vote.

Secondly, having exercised the constitutional and statutory right to be registered, such a prospective voter must comply with C. I. 75 during the conduct of the elections if he wants his vote to be valid.

It should be noted that, any infractions of the laws in C. I. 72 and C. I. 75 in particular may render invalid the votes cast by a constitutionally qualified voter.

I have had to deal with this subject at some length because it appears to me that all the respondents are of the view that, because the right to vote is a constitutional right, no court, not even this Supreme Court has power to invalidate the exercise of that right when infractions are made not of the voters making but of administrative officials.

I am of the considered opinion that such a way of thinking is not only absurd but will completely defeat the provisions in article 64 (1) of the Constitution 1992 which provides for the challenge of the validity of the election of a President.

I think, it will also be tidy at this point to tie in the submissions of learned counsel for the 1st Respondent in the concluding stages of his written address in which he chastised the petitioners of not exhausting the administrative procedures before rushing to court.

Out of abundance of caution, let me reproduce the said submissions of learned counsel for the 1st respondent on this point as follows:

"Respectfully, Your Lordships, we take the view that the nature of this Honourable Court's Article 64 jurisdiction to

adjudicate disputes relating to presidential election is such as with the greatest respect, ought to be exercised with circumspection. Indeed, it is our considered opinion that it requires significant judicial deference to the Electoral Commission on a wide range of issues.

We take the respectful view that the true intent and purport of the broad grant of jurisdictional power under Article 64 is that its exercise must be subject to the overarching constitutional scheme, including the balance of institutional roles and the need to guard against excesses. On this basis, we invite your Lordships to exercise judicial restraint and to defer to the Electoral Commission on matters that touch and concern the exercise of its core functions.

In the specific context of this case, the fact that Your Lordship have had to painstakingly pore over pink sheets for months and listen to tedious testimony on technical aspects of elections could have been avoided if the Petitioners were compelled to settle their grievances, in the first instance, through the administrative process available for redress before initiating their petition. In this way, all that Your Lordships would have been required to do in the exercise of your power under article 64 of the Constitution would have been to review the decision of the Electoral Commission in line with the constitutional standard of review under article 23 of the Constitution and decide whether or not it was reasonable and in accord

with the requirements imposed by the Presidential Elections Act and the Public Elections Regulations.”

At this stage, let me quote also verbatim the provisions of article 23 of the Constitution which provides as follows:-

Administrative Justice

“Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal”.

Evidence abounds in this Court that the first point of call by the Petitioners was to send a letter of complaint to the Chairman of the 2nd Respondents in which they catalogued a number of irregularities and sought his intervention.

Exhibit N.D.C 43, which is a petition to the 2nd respondents by the petitioners which was tendered by Counsel for the 3rd respondents through the 2nd petitioner on 14th May 2013.

*"The Returning Officer
Presidential Election 2012
Electoral Commission
Accra*

9th December 2012

Dear Sir

RE: REQUEST FOR AN AUDIT OF VERIFICATION MACHINES AND RECOUNT OF THE PRESIDENTIAL BALLOT

I write as Chairman of NPP to express concerns of our Party over the conduct of this year's general election, particularly with regards to the Presidential poll. I am doing so because I believe that the proper conduct and declaration of results of a credible process is the surest way to promote the peace and stability of our democratic nation.

I have attached here a copy of a statement I have issued, that has set out in detail our concerns.

I ask that you consider the widespread and systemic abuse of the electoral process, witnessed across the country and aided by H.E the President, John Dramani Mahama's statement for people to vote even if not verified by the machines, which is clearly unlawful, some of which are cited in our attached statement.

We request that you, as the Returning Officer of the Presidential Elections,

- (i) Cause an audit of the Verification Machine to establish that it tallies with Constituency Collated signed results and***
- (ii) Order a re-collation of the presidential ballot at the constituency level to help establish the credibility and accuracy of this year's Presidential election.***

This in my view would assist considerably to allay public anxiety, which is growing hour by hour and due to the announcements being made in the Ghanaian media. It would also obviate any legal and protracted judicial proceedings on the issues and permit the resolutions of our concerns promptly, to enable due declaration to be made.

In the light of the above concerns, we request for an immediate meeting with your good self to find a resolution to these matters before you announce the results of the 2012 elections.

Yours truly,

Jake Otanka Obetsebi-Lamptey

National Chairman, New Patriotic Party"

In the light of the above scenario, it is my opinion that, the Petitioners were pushed to this court albeit prematurely by the indecent haste of the Chair of the 2nd Respondent who took less than a day to address the concerns raised in the above petition and asked the petitioners to go to court.

Perhaps, if the 2nd Respondent had exercised a little bit of tolerance and discretion which are hallmarks of the type of office which the Chairman occupies, the quick resort to this court may have been avoided.

It should also be clear to all and sundry that time begins to run immediately the Presidential Elections results have been declared by the chairman of the Electoral Commission. This is further buttressed by

article 64 (1) which provides a 21 day period within which the petition to challenge the election of the President must be presented. As far as I am concerned, the petitioners having been pushed to the wall by the 2nd Respondent, they then had to act timeously to ensure that time does not run against them. In the circumstances I am unable to accede to learned Counsel for 1st Respondent, Mr. Tony Lithur's submissions in this respect, questioning the propriety or impropriety of the request considering the independent nature of the Electoral Commission vis-à-vis the Administrative bodies intended in article 23 of the Constitution 1992.

I am of the firm conviction that, the petitioners have lawfully and validly invoked this courts jurisdiction under article 64 (1) of the Constitution 1992 and this court rightly assumed jurisdiction in the matter.

I cannot but agree with the petitioners that in a petition of this nature, for the reasons stated hereunder, this Court can declare as invalid the election of any candidate as a President of Ghana, as the quotation from the written address of learned Counsel for the Petitioners, Mr. Philip Addison clearly depicts as follows:-

"REASONS TO DECLARE INVALID THE ELECTION OF A CANDIDATE AS PRESIDENT

- (a) The candidate declared elected as President of Ghana at the presidential election did not, in fact, obtain more than fifty percent (50%) of the total number of valid votes cast at the election;

- (b) There has been non-compliance with or violations of the Constitution,
the Regulations or any other law relating to the conduct of the election and that the non-compliance/violations affected the result of the election;
- (c) The election was tainted by the perpetration of a corrupt, or other criminal act, misconduct or circumstances which reasonably could have affected the outcome of the election;
- (d) The candidate declared elected as President of Ghana was at the time of the election not qualified or disqualified for election as President of Ghana in terms of article 62 of the Constitution."

OVER-VOTING

Regulation 24 (1) of C. I. 75 provides as follows:

"A voter shall not cast more than one vote when a poll is taken"

When the above provision is compared with the entries in columns A,B & C that are required to be filled in on the pink sheets by the Presiding Officers before the commencement of polls and in the case of Column C after polls but before counting, then a somewhat clearer picture of what exactly over voting means can be imagined. This is because, if columns A,B and C are entered correctly on the pink sheets, then the number of ballots issued to the polling station will be known, the range of the serial numbers of the ballot papers will also be known as well as the number

of voters on the polling station register, including the number of ballots issued to voters on the polling station register.

In column B for example, the number of voters on the polling station register will be stated and filled in together with those on the proxy list. The total number of the two items will give the total number of voters eligible to vote at the polling station.

If therefore at the end of the polls any of the following scenario does occur, then something irregular has occurred.

1. The total valid votes cast as found in the ballot box exceeds total number of ballots issued out.
2. The total valid votes cast as found in the ballot box exceeds the total number of voters on the register eligible to vote at that polling station.

Is this the phenomenon that is called over voting? In this case, the petitioners, speaking through Dr. Bawumia, the 1st and 3rd Respondents, speaking through Johnson Asiedu Nketia, and Dr. Afari Gyan for the 2nd respondents have all given their own definitions of what is over voting. I will therefore look at all these various definitions and attempt to see if a common thread runs through them.

DR. BAWUMIA'S DEFINITION

"Q. Can you tell the court what you mean by over voting?"

*A. Over voting comes in two forms. **Essentially we have a principle***

of one man one vote as we have in the Constitution in the laws of Ghana. The two forms of over voting. First, over voting would arise if the total votes in the ballot box as recorded on the face of the pink sheets exceeds the voters register at the polling station as recorded on the face of the pink sheet. Secondly, over voting would arise if the total votes in the ballot box as recorded on the face of the pink sheets exceed the total ballots issued to voters recorded in Section C1 and C2 including proxy voters. So the total votes in the ballot box if they exceed the number of voters you have given ballot to, to vote then there is over -voting. So if hundred people line up and you issue them 100 ballots and you count at the end of the day and you find 150 ballots in the ballot box, then you have over voting. I must add that this phenomenon of over voting was one that the 2nd respondent was very emphatic on before the election. The Chairman of the 2nd respondent made it very clear and for good reason, that if the ballots are counted at the end of the day and it is found that even one ballot exceeds what was issued by voters verified to vote, the results of that polling station will be cancelled. My Lords this was because if that happens even if you have one ballot above what was issued, then the integrity of the entire voting process at that polling station is compromised. And yet my Lords the 2nd respondent not only made this clear but actually put this into practice during the 2012 elections.”

From the above quotation of 2nd Respondent's testimony on 17th April 2013, the following significant scenarios emerge for consideration. These are

- i. If the total votes in the ballot box as recorded on the pink sheets exceeds the voters register as recorded on the pink sheets, then there is over voting.
- ii. The second scenario is when the total votes in the ballot box as recorded on the face of the pink sheets exceed the total ballots issued to voters as recorded in columns C1 and C2 including proxy voters then there is over-voting as well.

In order to understand this second scenario, it must be clear what C1 and C2 refers to. The C1 and C2 are columns in the Ballot Accounting section of the pink sheet, normally referred to as the C column. This is to be filled in at the end of the poll but before the commencement of counting.

C1 is to the following effect – **what is the number of ballots issued to voters on the polling station register?**

C2 has the following question – **what is the number of ballots issued to voters on the Proxy Voters List?**

If this is the state of what the 2nd Petitioner meant by over-voting, then why did learned counsel for the 1st Respondent state thus in his address

"On what constitutes over voting, the 1st Respondent states as follows:-

*"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 ballots box exceed ballots issued at the polling station. The third definition is the situation where the issued ballots exceed the number of registered voters."***

On the other hand, learned Counsel for the Petitioners, Philip Addison, in his address to the Court gave the following two scenario's as the classical instances of over voting which 2nd Petitioner referred to:

- i. Firstly, it is eminently clear that, **where all the number of people duly registered to vote at a particular polling station turn up on election day to vote, (and this can be discovered from the number of ballots issued); the number of ballots found in the box at the end of the polls cannot be more than the number of voters registered to vote at that polling station."***

The above is quite straightforward and is a common sense approach to the issue.

The second instance of over voting raised by learned Counsel for Petitioners is as follows:-

(2) *"Where a number less than the number of registered voters at a particular polling station show up to vote (and this can also be determined from the number of ballots issued) **it goes without saying that the number of ballots found in the box at the close of the polls should not be more than the number of ballots issued to the voters.**"*

In real terms, this second scenario is only a natural deduction from the first one stated supra and it logically flows from it.

To put matters in proper perspective, I think it will be very beneficial for our purposes if we consider in some detail the evidence and the explanation of Dr. Afari Gyan on what he meant by classical definition of over voting alongside that of the witness for the 1st and 3rd respondents, Johnson Asiedu-Nketia.

BEGINNING WITH DR. AFARI GYAN

*Q. Oh yes my Lords the classical definition of over votes is **where the***

ballots cast exceed the number of persons eligible to vote at the polling station or if you like the number of persons

on the polling station register that is the classical definition of over voting. Two new definitions have been introduced there is nothing wrong with that but I have problems with this new definition proposed and the problem I have with both definitions is that they limit themselves **visibly to what is on the face of the pink sheet as I understand the definition.**

Q. Definition by?

A. The petitioners of the two definitions of over voting, where the number of ballot exceed issued the number of voters as indicated on the pink sheet that is the definition.

Baffoe-Bonnie: Dr. all this while we are dealing with the pink sheets in one breath the pink sheet is your reference point so in this case just let's limit ourselves, I heard you say is an excess votes or something

Witness: I said when you see there will be an excess of votes.

Baffoe-Bonnie: So it will not be an over voting

Witness: Well you see clear how you call it, this is why I have problem with this definition **is that it limits itself exclusively to what is on the face of the pink sheet, what if what is on the face of the pink sheet as we have seen.**

Dotse: Before you proceed you were giving us the problems with

the two new definition of over voting. Can you finish the problem associated with the two new definitions?

*Witness: **I have a general problem with any definition of over voting that limits itself exclusively to what is on the face of the pink sheet because what is on the face of the pink sheet.***

*Witness: My Lords we have just seen an instance where on the face of the pink sheet the Presiding Officer said he was given 4 votes whereas in fact upon close scrutiny he was given 325 votes so any definition of over voting that limits itself suggests to me personally that you are saying so to speak **that the face of the pink sheet never is and might be an error on the face of the pink sheet.** If there is an error on the face of the pink sheet it can be corrected by reference to the register itself so my problem is that this definition does not make any reference whatsoever to the register which is the based document for the conduct of the elections that is my problem.*

Dotse: Who does the correction you are talking of?

Witness: Well if I were to read this document that one that said

and has given the serial range suggest that he has been given 325 and has actually conducted an election involving 198 people then I would be inclined to take the 325 as the correct representation and not the 4.

*Baffoe-Bonnie: In that case the correction is done by recourse to other figures on the pink sheet which you say can also be wrong, but in the other case what you are saying is that you have to make recourse to the register which means that for example the accounting information: what is the number of ballot issued to voters on the polling station register, you see we have a situation where we have the polling station register and we have the question which says the number of people who have been issued with but if you have to make recourse to the register to find out whether the number voting is actually over and above the number registered then we don't even make room for people dying or people not voting, on the voters register you may have 100 and we may actually have and as you have rightly aware with your 34 years or so you will realize there is hardly **a 100% voting in any situation so if you say that over vote is only when it is above the number of people in the register that is duly something your...***

Witness: Your Lordship I have not said over voting is only when

I

*said that was the classical definition now we have adopted a new technology **I was going to go on to that and we spent a lot of money in buying that technology and that technology should help us modify our definition of over voting that I am saying, I am making technical point when you limit it only to what is on the face of the pink sheet then I have a problem with it.**"*

THEN JOHNSON ASIDEU-NKETIA'S DEFINITION

This is the definition of over voting by the witness for 1st and 3rd respondents, Johnson Asiedu Nketia.

Q. What is your response to those allegations as made by the petitioners?

A. My Lord I can state that there was nowhere in all the 26,000 polling

stations where over voting took place.

*I am saying this because we have **come to know over voting to mean an occurrence where the number of votes found in the ballot box exceed the number of people who are entitled to vote at that polling station. So that clearly is my understanding of over voting and I do not have any indication of this happening in any of the 26,002 polling stations which were involved in the 2012 elections.***

Q. You heard the 2nd petitioner also indicate that over voting is where

the ballots that are tallied at the end of voting for each candidate where those exceed the number of ballots issued in a polling station?

A. *I have heard about it but that was my first time of hearing over voting being defined that way in all my 34 years experience in election in this country.*

Q. *In respect of the over voting allegation, you also heard the 2nd petitioner testified in relation to pink sheets where no number has been entered in the column about ballots issued at a particular polling station, where no number was present, it was blank. What do you have to say to that?*

A. *Yes my Lords. **This must be as a result of some clerical error because ballot papers are issued and then voting takes place, then the box is opened at the close of voting, counting takes place, sorting takes place, the tallies are made and the agents of the parties attest to the results that are obtained, they certified the results that are obtained and my Lords I think that if no papers were issued then the election could not have taken place at all.** So I think that must be a clerical error and at all material times, there are processes where people who are dissatisfied or parties who are dissatisfied with the outcome can lodge a specific complaint about what they are dissatisfied with on the spot and action is taken subsequently on those complaints. And I am not aware of any polling station where such complaints have been*

lodged besides what were tendered about five or so polling stations by the 2nd petitioners."

Based on the above pieces of evidence, learned Counsel for the 1st Respondent, Tony Lithur submitted very forcefully that with the introduction of new technology, to wit biometric verification, whilst it would be worthwhile to look at new definitions of over voting as stated by the petitioners, it would be wrong to limit the extent of the newer expanded definitions to entries made on the pink sheets alone, without looking at Polling station register, the machines and conduct of the elections. According to learned counsel, if wrong entries are made on the pink sheets, **a phenomenon learned counsel admitted has been demonstrated to have happened during the trial**, it would be wrong to disenfranchise voters thereby.

It is however very significant to note that there has been an admission of occurrence of entries on the pink sheets which learned Counsel conceded are errors. **What then is to be done to those entries, since they were the basis of the declaration of the results by the 2nd respondents?**

In an attempt to offer some explanation as to how this phenomenon of wrong entries which are errors are to be handled, Dr. Afari Gyan testified as follows:-

"2nd Respondent in his evidence on 3rd June stated thus on issue of over voting:

Q. You mentioned in your evidence some of the errors that were

committed by Presiding Officers in completion of the pink sheets. Do you have a general comment on that?

A. My general comment will be that the errors must be looked at

very closely in order to be able to reveal their true meaning. I must say that at the end of the day, it is the Electoral Commission that appointed these people, these officials and we are prepared to take responsibility for their actions. **But errors are to be distinguished from intentional wrong doing.** A mistake is something that can be detected and corrected and we all make mistakes. So why we take responsibility for their actions, so that we will keep in mind, may be all of us make one mistake or the other in the course of our work, but I will also hope that the candidates will take responsibility for the agents they appoint.

Witness: **Let me put it in a very short sentence. If I notice on the**

face of the pink sheet that there appears to be excess votes, I will subject the situation to very close scrutiny before I take firm determination as to what to do.

Q. Where there is an excess of votes in the ballot box in

comparison with what is written on the pink sheet as the votes issued to the polling station, what would be your reaction when you see such a pink sheet?

A. *As I said just a moment ago, I will subject the situation to very*

*close scrutiny. There are a number of things that will have to be done. I will not assume that the Presiding Officer had done anything directly or wrongly, I will seek to redo what was supposed to have beendone, **I will look at the ballot papers to find out whether all of them fall within the serial range of the ballot issued. I have narrated some of these things before that I will go through the things that I mentioned. But I must tell you that, I must do everything possible to make sure that indeed, there are excess votes because we are dealing with not abstract numbers but votes of people who have a constitutional right to take part in the choice of their leaders.***

Based on all the above pieces of evidence, learned Counsel for the 1st Respondent finally concluded his submission thus:

"It is clear that, Petitioners have taken a very unsustainable and unrealistic position in respect of what would constitute over voting. Their position is that you look only to the form and not the substance. In doing so, they discount any other source of information, including the primary sources from which one can verify the information on the voting accounting section of the pink

sheet. In fact, they make no allowance for any clerical or arithmetic errors on the part of officials of 2nd Respondent in filling the said ballot accounting section, and, according to them, whatever information is on the voter accounting section is sacred. In the words of 2nd Petitioner.

"You and I were not there, the evidence is on the face of the pink sheet."

Learned Counsel for the 1st Respondent then referred to the Canadian case of **OPITZ** and quoted from pages 38 and 39 of the report to draw necessary comparison, to the effect that, the imperfections of the Presiding officers in filing the forms should therefore not result in the annulment of the votes of the affected polling stations affected by the error entries.

"Juxtaposing the evidence in this case with the Canadian case, this is what the 1st Respondent's state:

This situation is not different from the one described by Dr. Afari-Gyan in relation to the temporary officers that 2nd Respondent employs to run general elections. The imperfections of the Presiding Officers in filling the forms should therefore not result in the annulment of the votes at the affected polling stations. Indeed on pages 38 and 39 (paragraph 57) of the Opitz case the Canadian Supreme Court held that

"In our view, adopting a strict procedural approach creates a risk that an application under Part 20 could be granted even

*where the result of the election reflects the will of the electors who in fact had the right to vote. **This approach places a premium on form over substance, and relegates to the back burner the Charter right to vote and the enfranchising objective of the Act.** It also runs the risk of enlarging the margin of litigation, and is contrary to the principle that elections should not be lightly overturned, **especially where neither candidates nor voters have engaged in any wrongdoing.** Part 20 of the Act should have been taken by losing candidates as an invitation to examine the election records in search of technical administrative errors, in the hopes of getting a second chance”.*

Learned Counsel continued 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”.***

SUBMISSION OF 2ND RESPONDENT

On his part, learned Counsel for the 2nd respondent, James Quashie-Idun referred copiously to the definitions of over voting and the statutory definitions as well as the classical definition of Dr. Afari Gyan already referred to supra. Learned Counsel also referred to *Regulation 36 (2) (a) of C. I. 75* to buttress his point in addition to *Regulation 24*

(1) of C. I. 75 already referred to supra and of particular importance to the submission of learned Counsel for the 2nd Respondent is his reference to exhibits EC 8, EC9 and EC10 which were all tendered by the 2nd respondent's witness Dr. Afari-Gyan to debunk the allegations of over voting in some three polling stations.

Learned Counsel also reiterated the earlier contentions of the 1st and 3rd respondents to the effect that the evidence offered by the petitioners on their 2nd definition of over voting which is based entirely "*on the face of the pink sheets*", are based only on errors made in completing the ballot accounting part of the pink sheets.

Counsel concluded that if any over-voting had occurred, it would have been detected during the counting of votes and the Polling agents would have protested. Since there were no protests, Learned Counsel concluded that there were no instances of over voting and urged this head of claim to be dismissed.

SUBMISSION BY COUNSEL FOR 3RD RESPONDENTS

Even though the submissions of learned Counsel for the 3rd respondent Tsatsu Tsikata are not fundamentally different from the other respondents, there are some striking differences which I need to highlight.

In the first place, the phenomenon of blank portions in the C and sometimes D columns of the pink sheets had been highlighted. **In this respect I cannot but agree with learned counsel for the 3rd**

respondent that it is wrong to deduce that any blank on column C or D amounts to over voting.

However, what has emerged from the very extensive and rigorous cross-examination of Dr. Bawumia by Counsel for 3rd respondents is that, there were indeed entries on some of the pink sheets of the polling stations which on the face of it gave the impression that there was over voting. But the respondents contend that these are only clerical errors.

Secondly, learned counsel made reference to exhibits of polling station pink sheets outside the range of exhibits mentioned in the affidavit of the 2nd Petitioner. **So far as I am concerned, the real issue for determination is whether there was any instance of over-voting as denoted by the definition of over-voting and whether those particulars exhibits i.e. polling station pink sheets had been captured by the KPMG report,** and is also part of the range of exhibits mentioned in the affidavit.

If it is captured by the KPMG report, then this Court would have to determine whether that instance of over voting affected the declaration of the results, or constituted mere errors which only go to form and not to substance.

Thirdly, it has to be noted that, the evidence of the petitioners on over voting is really not based on directly accusing anyone of voting more than once as is prohibited by law, but solely on the basis of entries made on the pink sheets.

Learned counsel for the 3rd respondents, made his strongest attack to this phenomenon of over voting in a very skating and concluding remark which I consider as inappropriate use of language as follows:-

"The cavalier approach of the 2nd petitioner towards the votes of citizens, which makes him eager, for instance, to have votes cancelled because of his dogmatic view that it is figures on the pink sheets that should be taken and not words, is totally at odds with the significance that our Lordship have given in many cases before this Court to the importance of protecting the right to votes of the citizens of Ghana. See for instance **Tehn-Addy v A.G. & Electoral Commission 1997-98 1 GLR 47, Apaloo v Electoral Commission 2001 – 2002 and Ahumah-Ocansey v Electoral Commission & Others**, already referred to supra."

Whilst not downplaying the constitutional significance of the above cases, it must also be observed that, the importance of entries made on the pink sheets should also not be glossed over as being of no significance. This is because, if my understanding of the evidence on record is anything to go by, then entries made on the pink sheets, which constituted the primary source upon which constituency collation centre results were collated and transmitted to the 2nd respondents strong room in Accra and which formed the basis of the declaration of the Presidential results by the Chairman of the 2nd respondent which are under challenge in this Court then the pink sheets, cannot be treated lightly, except in cases where it is clear that the pink sheet entries are errors which can be corrected by reference to other

more authentic primary sources which may include entries on the pink sheets itself, the polling station register and the B.V.D.

The ***Apaloo v Electoral Commission*** case referred to supra, is authority for the proposition that once the Electoral Commission has published Constitutional Instruments numbers C.I. 12 and C.I. 15 respectively which had regulations dealing with identity cards used in an election and under which the 1996 elections were held, there being no distinction between photo I.D. and thumbprint cards, the subsequent publication by the Electoral Commission of a Gazette Notice, containing directives limiting the I.D cards to be used for the 2000 election to photo I.D cards only constituted an indirect amendment of relevant portions of regulations in C. I. 12 and C. I. 15 and this was held to be ultra vires articles 51 and 297 (d) of the Constitution 1992.

This Apaloo case is also authority for the proposition that the authority given to Presiding Officers and their assistants to verify and check the identity of prospective voters cannot be delegated to candidates agents, highlighting the maxim of "*delegatus non potest delegare*". Delivering his opinion in this case, my very respected brother, Atuguba JSC made the following pronouncements.

*"The ascertainment of the identity of a prospective voter is part of the conduct of public elections **and as the constitution places that duty on the Electoral Commission, it can only do so by itself and its proper agents...To surrender the judgment of the Presiding Officer as to the identity of a voter to the candidate's polling agents, is in effect, to***

delegate that function to those agents, contrary to articles 45 (c) and 46 of the Constitution.”

It can therefore be seen clearly that despite the fact that the Supreme Court upheld the constitutional right of the prospective voter of his right to vote and was prepared to protect that right, the protection was done in tandem with the other statutory provisions that the Electoral Commission was permitted by article 51 of the Constitution to enact i.e. C.I. 12 and C. I. 15 respectively.

In the instant case, it would appear that once the directives of what constitutes over voting are in Regulation 24 (1) of C. I. 75, the Courts also have a duty to purposively look at the effect of those provisions and the constitutional right to vote.

Similarly, it should be noted that, the ***Tehn-Addy v Electoral Commission case*** is also authority for the proposition that the right of a citizen to register is an inalienable right which the Supreme Court observed the Electoral Commission failed to register the plaintiff therein and therefore enforced it.

I will however be comfortable with a proposition which states that since the right of a citizen to vote is constitutionally guaranteed by and under the Constitution, that right must always be protected and defended to ensure that participatory rights which are part of our democratic rights via the electoral process is well guaranteed and secured.

In this case, the rights of the voters in the December 2012 presidential election did not come under threat, and is still not under any threat. The

plaint of the petitioners is to invite this Court to annul results on the basis of entries on the face of the pink sheets of what appears to them to be infringements under the law. Is this a legitimate request or claim? I think so. **But this Court must be in a position to distinguish between clear instances of over voting which arise from clear breaches of the law in Regulation 24 (1) of C. I. 75 as against errors made by the presiding officers in the filling of the pink sheets etc.** For example, if it is clear on the pink sheet, that instead of stating the correct number of ballot papers that had been issued to a polling station as 350 made up of (2) 100 booklets (2) 50 booklets and (2) 25 booklets making 6 booklets in all, the Presiding officer merely states 6, but gives the range of serial numbers from which the correct figure of 350 can be deduced then it would be wrong to use such an entry to annul results.

In such an instance, once the information to correct the error made on the pink sheet can itself be gotten from the pink sheet, then it should be perfectly legitimate to use such an information to correct the error.

In situations of this nature the number of registered voters, and those who actually were issued with the ballot would have exceeded the number 6 wrongly filled in on the pink sheet. **Any mechanical interpretation of the entries on the pink sheets will not only be absurd but lead to incongruent results and consequences.**

The Court should however use information on the face of the pink sheets to correct this latent error. However, if the information to correct the error on the pink sheet cannot be verified from the pink sheet, and that figure had been used to declare the result, and if the wrong result

has had an effect on the declared result, then it should be possible to annul it, if there are no credible primary sources of evidence like the polling station register to be used to cross-check such an error entry.

In view of all the above discussions **I will define over voting to mean an instance where total votes cast as found in the ballot box exceeds the total number of ballots issued out to voters at that particular polling station.**

So far as I am concerned, this definition should encompass all other definitions be they classical or otherwise. This is because, votes cast as found in the ballot box, be they valid or rejected votes would have been issued based first after the voters have been verified by the machine and also based on the polling station register. **Thus, assuming there is a 100% turn out at a particular polling station, then the votes cast as found in the ballot box will not and should not exceed, first the ballots issued out and also total number of voters on the register at that particular polling station including proxy voters.**

It is only when there is a consistency between the entries on the pink sheets and the primary sources which formed the basis upon which the entries have been made and these include the polling station register, ballots issued to the polling station and the results as counted and declared that the entries on the pink sheets can be said to be impeccable and not subject to any variation, change or correction.

It has to be noted that, it is also possible to have a broad based definition of over-voting which will link the total votes cast as found in

the ballot box with the number of voters on the polling station register. This is because, whilst the number of voters on the polling station register is the maximum number of persons entitled to vote at a polling station, the number of ballots issued out to voters on the polling station register, represents the actual ballots issued out to voters who turned out to vote.

This broad based definition will allow situations where the Presiding officer has not made a diligent count of the ballots issued out or did not fill in column C1 on the pink sheet to enable that determination to be made using that formula.

What should be noted however is that, no matter what definition is applied, the value is the same. The only problem is that, if a Presiding officer has refused and or neglected to fill in column C or C1 in particular, or columns A, B, C or D as has been found by me to have happened in some cases, then the polling station voters register and the record of ballots issued to this polling station remain the only authentic sources by which the issue or phenomenon of over-voting can be verified.

For purposes of transparency, I believe the time has come for the 2nd respondent's to come out with a Constitutional Instrument to regulate and direct the officers it engages for the conduct of elections in the country, such that more severe sanctions than is currently applicable in *PNDCL 284, section 30 (a) & (e)* can be applied to them when flagrant and inexplicable infractions occur in their performance of their official duties has been proven to have happened.

This phenomenon has become very critical because of observations I have made in a very detailed study and analysis of pink sheets stated in Table 10A of volume 2B of the Petitioners address which is List of pink sheets the Petitioners have relied on to prove the instances of over-voting, describing them as (Respondents preferred Data Set) whatever that means.

In this examination, I found out that there were some clear instances of over-voting. This resulted after comparison of the entries in C1 to Total Votes in ballot box. Wherever there was an irregularity, resort is made to other columns in the C column in order to account for the ballots.

When the ballots issued out cannot be reconciled with the ballots found in the box using all available means of verification on the pink sheet, then the conclusion is reached as an over-vote.

Secondly, the study and analysis revealed that there was either wrong addition made of the entries on the pink sheets, or there was error on the pink sheets. In such a situation, I think the errors have to be corrected if possible by reference to primary sources of information.

Thirdly, there are instances where one can observe that the entries have not been completed, or errors made in the filling process. Here again, if the evidence to correct the errors can be gotten from the pink sheet, or from records available to the polling station, then it should be used.

Perhaps this explains the reason why it is desirable for such concerns to be raised at the polling station with the view that they be corrected at the polling station.

This is by no means an endorsement of the view that this Court has no jurisdiction in the matter. It is clear from the Constitution 1992 and the Presidential Election Act, 1992, PNDCL 285 that this Court has jurisdiction alongside C. I. 16 as amended by C. I., 74 to question such infractions of election regulations.

Fourthly, entries on some of the pink sheets clearly create serious doubts about the authenticity of entries on the pink sheets. This is because even though the pink sheets are photocopies, you see instances of fresh writing on them and other entries which make it doubtful for it to qualify as an over-vote. **In this and other instances, the production of the original pink sheet would have solved the problem.**

In the fifth place, there were simply blanks in all the columns except A or B and the results. What happens in instances like this? The guess is anybody's that such pink sheets cannot be relied upon.

In the sixth instance, the writing on the pink sheets are clearly ineligible in some of the columns or the entire sheet, apart from the results. Sometimes, the results are also not clear. In such cases, since we rejected an earlier application for the original pink sheets to be provided by the 2nd respondents, the writings on the pink sheets remains ineligible. The Petitioners unfortunately have to be declared as not having proven their case in such instances.

Finally, in some instances, the observation is that the interpretation put on the pink sheets by the Petitioners has been found to be clearly wrong and untenable.

In retrospect, I am of the considered view that, taking the sheer numbers of the affected pink sheets in this category into contention, it would have been proper for the court to have ordered an Audit of the pink sheets, in this over voting and indeed the other categories, in order for the count of all pink sheets that qualify to be considered in line with the definition stated supra. This would have been consistent with the request of learned counsel for the petitioners, Mr. Addison who raised the issue on 23rd May 2013 but did not pursue it.

One would ask, what will be the effect of such an audit? In my mind, the effect of such an audit will be to detect if for instance out of the number of pink sheets the petitioners allege in this category of over voting – reference tables 10 and 10A in volume 2B of Petitioners address, pages 298-328 and 330-358 which gives the list of polling stations where over-voting occurred, in general and also using the respondents preferred Data set respectively those that indeed qualify under this definition can be identified without any reservations.

Taking all the above factors into consideration, it would have been fairly easy to tally the number of votes as far as my eyes can see in this over-voting category and decide the figures that are to be annulled in respect of the 1st Petitioner and the 1st Respondent. But there is a key determinant in the analysis on the pink sheets which may affect any tally for any of the candidates. These are the entries in the C3 column of the Ballot Accounting section on the pink sheets. As I have indicated elsewhere in this judgment, there appears to me to have been sufficient indication from the 2nd Respondent's to the presiding officers not to fill in the C3 column because of opposition from the political parties. As a

consequence Form I C which was going to be the yardstick used to fill in that column was not even distributed to any of the polling stations.

As a result, I am of the considered view that, in order for any meaningful tally of the votes in this category of over -voting to be properly made, any entry in the C3 column which was used as a basis for this conclusion as an over-vote has to be deleted. It will therefore be difficult, if not impossible for me, considering the time constraints to make these detailed and thorough analysis before coming out with the tally in the judgment.

In these circumstances whilst upholding the principle of over-vote as a phenomenon capable of having votes annulled, I will hasten slowly with the following as a roadmap.

All pink sheets in Table 10A of volume 2B of the petitioners address pages 330-358 already referred to supra, which are the pink sheets identified and classified by the petitioners as being in this over-voting category, using the Respondents preferred Data Set, (whatever that means) have to be sorted out.

In this instance, an audit will have to be made, to clean the pink sheets in that Table 10A, by ensuring that the following conditions have been met:-

1. That all the pink sheets have been captured by KPMG.
2. That all the pink sheets where the C3 column was used as a phenomenon to denote this instance of over-voting should be deleted and cleaned.

3. The residue of the pink sheets in Table 10A referred to supra are those pink sheets that are to be tallied for the 1st Petitioner and the 1st Respondent respectively and the total votes therein annulled from their aggregates.

That is the only way by which my judgment will be consistent with my decision on the C3 column.

For now, my decision on the over-voting category is that in so far as the entries on the pink sheets constitute over voting in line and consistent with relevant statutes, and the definition of over voting as has been stated supra, those votes on the pink sheets that qualify under this definition and clean up exercise under the road map agenda should be annulled after due examination. In all other cases, where the entries on the pink sheets indicating over -voting are errors in the filling of those pink sheets and the information on the primary source is clear and verifiable to correct the errors then no over-voting occurs. In such instances, there is no over -voting.

VOTING WITHOUT BIOMETRIC VERIFICATION

The Petitioners state in their opening address on the above issue as follows:-

"Voting without biometric verification is also linked to the protection of the integrity of the electoral process as well as to the principle of universal and equal adult suffrage. It is to ensure that only persons entitled and properly

accredited to vote exercise their franchise in accordance with the law.”

I have already discussed the ingredients of what the constitutional right to register and vote in public election means as contained in article 42 of the Constitution 1992. There is no need to re-argue and discuss the same points here. Suffice it to be that, pursuant to the above constitutional rights and those of the Electoral Commission to make rules and regulations governing the conduct of public elections in Ghana, C. I. 72 and C. I. 75 have been enacted.

It is therefore pertinent to consider some of the relevant provisions of C. I. 75 as follows:-

“Definition under Regulations 18 (1), 47 (1) (3) and 34 (1) (c) all of C. I. 75

Regulation 18 (1) of C. I. 75 makes it mandatory for every polling station to be provided with a biometric verification device. It reads:

*“The returning officer **shall** provide a presiding officer with: (a) a number of ballot boxes and ballot papers; (b) **a biometric verification equipment**; and (c) any other equipment or materials that the commission considers necessary.”*

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”.

Regulation 30 of C. I. 75 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 34 (1) of C. I. 75 lists the specific grounds upon which voting can be adjourned:

*“Where the proceedings at a polling station are interrupted or obstructed by (a) riot, open violence, storm, flood, or other natural catastrophe, or (b) **the breakdown of an equipment, the presiding officer shall in consultation with the returning officer and subject to the approval of the Commission, adjourn the proceedings to the following day.**”*

From the above legislation, it is clear that before a qualified and registered voter is given the ballot to exercise his or her franchise, the Presiding Officer shall perform all of the following functions:-

- i. Require the voter to produce an identity or any evidence to establish finger print or facial recognition that the prospective voter has his name on the register.
- ii. Thereafter, the voter shall go through a process of biometric verification process.

It is to be further noted and observed that, so important is this issue of biometric verification that Regulation 34 (1) of C.I. 75 states several reasons some of which are "*force majeure*" or *the* breakdown of a biometric equipment as some of the reasons to adjourn polling at a station to the next day.

As was rightly stated by the Petitioners, biometric verification is basically the fact of verifying that a person is whom he says he is and it is a unique way of indentifying some distinct biological traits of the person.

For now, it appears the biological verification process produces the true identity of the person no matter the methodology that is used.

It is therefore re-assuring that Dr. Afari Gyan in his cross-examination on 10th June 2013 stated in answer to questions germane to the above issue as follows:

Q. Would you agree that BVD device reinforces the principle of one man, one vote?

A. Yes my Lord I would agree that it reinforces and it enhances it.

Q. The BVD device also keeps account of successful verifications?

A. My Lord it does

Q. And therefore if election officials do what they are supposed to do, nobody can vote more than once?

A. My Lords that will be correct

Learned Counsel for the Petitioners in re-emphasising this issue of biometric verification as a pre requisite before the exercise of one's right to vote and in an attempt to show that the 2nd Respondent properly enacted C. I. 75 referred this Court to a number of local and foreign cases, some of which are:

- 1. Apaloo v Electoral Commission [2001-2002] SCGLR I**
- 2. D.P.P v Smith [1988] UK HL 11 (12 July 1990)**
- 3. Anderson v Celebreeze 460 U.S. 780 (1983)**
- 4. New National Party v Government of the Republic of South Africa & Others (CCT9/99) 1999 ZACC5, 1999 (3) S.A 191, 1999 (5) B CLR 489, (13 April 1999)**

5. **Norman v Reed 502 US 279, 288 – 289**
6. **Mackay v Manitoba 1989 2 S.C.R 357 at 361-362**
7. **Asare-Baah III v A. G & Electoal Commission [2010] SCGLR 463 at 470-471 per Wood C.J.**
8. **Republic v Tommy Thompson Books Ltd. [1996-97] SCGLR 804 at 851**
9. **F. Hoffman – La Roche & Co v Secretary of State for Trade & Industry [1974] 2 A.E.R 1128 HL**
10. **The Australian case of Commonwealth v Tasmania (The Tasmania Dam Case) 158 CLR. 1**
11. **William Crawford v Marion Country Election Board 553 US (2008)**
12. **See also Ahumah-Ocansey v Electoral Commission, Centre for Human Rights and Civil Liberties (GHURCIL) v A. G. & Electoral Commission – Consolidated, already referred to supra.**

- 13. Gorman v Republic [2003-2004] 2 SCGLR 784**
- 14. The Indian Supreme Court case of A. C. Jose v Sivan Pillai & others 1984 SCR (3) 74 at 75 paras 86 H-89G**
- 15. Bush v Gore 531 U.S 98 148 L.ED 2nd 388**
- 16. U.S case of Moore v Ogilvie, 394 U.S. 814, 89 S. CT. 1493, 23 L. Ed. 2d 1 1969**
- 17. Canadian Supreme Court case of R v Oakes, 1986 Can. LII 46 (SCC) 1986 S.C.R. 103 at 136**

The gist in some of the above cases is that, despite the grant of the right to vote which in most cases is a constitutional right, the Electoral Administrator, in this case the 2nd Respondent, has an equal constitutional and statutory duty and right to make rules and regulations for the proper conduct of such an election.

Thus, where the regulations enacted by the 2nd Respondent, in this instant, C.I. 72 and C. I. 75 have been properly and validly enacted by the legislature in accordance with the requirements of the Constitution reference article 11 (7) (a) (b) and (c) of the Constitution, 1992, it possesses all the trappings of validity. As such these subsidiary legislations must be read alongside the Constitution to give meaning and

content to it. It was certainly in this context that the Supreme Court spoke with one voice through Prof. Ocran JSC of blessed memory in the ***Gorman v Republic case***, supra as follows:-

“However, we must always guard against a sweeping invocation of fundamental human rights as a catch-all defence of the rights of defendants. People tend to overlook the fact that the Constitution adopts the view of human rights that seek to balance the rights of the individual as against the legitimate interest of the community. While the balance is decidedly tilted in favour of the individual, the public interest and the protection of the general public are very much part of the discourse on human rights in our Constitution.”

It must therefore be well understood that, once the enactment of C.I. 72 and C.I. 75 have not been proven to have infringed the rights of persons or any constitutional provisions protecting the rights of citizens to vote, those provisions must be given their full legal effect and force.

The other cases also reiterate the fact that the Electoral Administrative bodies must exercise their mandate whenever required within the framework of constitutional provisions, statutory in respect of substantive or subsidiary legislation and exercise their discretion only when the law so directs or permits. The powers of the Electoral bodies are not meant to supplant the Constitution and the law, but rather to supplement them. Since I have not noticed anything unconstitutional about the provisions in C.I. 75 on biometric or face only verification

before voting, I am not interested in discussing the other cases save those that are relevant in some other core areas of relevance.

I have to come to the above conclusion despite the submissions of the 1st and 3rd Respondent's to the contrary on this issue. Learned counsel for the 1st Respondent's in his written address stated as follows:-

"On 1st Respondent's arguments on non legal effect of biometric verification

Your Lordships, the claim by the Petitioner's that there has been a violation of the rules relating to biometric verification is based on an opportunistic reliance on sub-regulation (2) of Regulation 30 which provides that: "(2) The voter shall go through a biometric verification process." Notwithstanding that this sub-regulation does not define what view from the definition of biometric verification equipment in Regulation 47 that it means the process of verifying the identity of a voter by establishing by fingerprint the identity of the voter.

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 Petitioner's harbors the potential of nullifying or impairing the right of ordinary citizens who cannot be verified biometrically by finger print 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.”

With the greatest respect, I do not accept the above submissions and I reject them. This is because it seeks to give election officials undue discretion which reliance on biometric verification sought to remove by making our electoral process more transparent.

The contention of the Petitioner’s which has been denied by the Respondents, is that there had been many instances of people voting without biometric verification as is evident on the face of the pink sheets. The 2nd Respondent in particular has stated that, having examined all the pink sheets in this category, their analysis confirmed that no voters were allowed to vote without verification at any polling station.

This is in direct contrast to the evidence of Dr. Afari Gyan that it could be possible for all prominent persons like Chiefs to vote without a biometric verification. I must concede, that this statement coming from the Electoral Commission Chairman is very unfortunate and completely nullifies the effect of the provisions of Regulations 30 (1) and (2) of C. I. 75, which states that ***“The voter shall go through a biometric verification process.”***

This in effect means that, every prospective voter, must go through the process of biometric verification before casting his or her vote. Any votes that are therefore found to have been

cast without this biometric verification stands the risk of being nullified.

Based on the above analysis, the Petitioners concluded their submissions on this aspect of the case by stating as follows:-

"It is our respectful submission that, when the account is taken of all the circumstances surrounding the conduct of the elections and the inconsistent and implausible answers given by Dr. Afari-Gyan, petitioners have on the balance of probabilities proved that voting without biometric verification occurred in various parts of the country, contrary to the electoral laws of Ghana. It is the further contention of the petitioners that, indeed, question C3 was deliberately put on the pink sheet by the 2nd respondent because in the December 2012 elections the 2nd respondent's officers were given discretion to dispense with biometric verification contrary to the law. This is borne out by Exhibit G, (The Biometric Verification Device (BVD) User Manual, 2012 Presidential and Parliamentary Elections) pages 16 and 20 tendered on 13th June 2013 by Counsel for Petitioners through the Chairman of the 2nd Respondent, Dr. Afari-Gyan. Thus, it is the aggregate of information entered in C3 on the pink sheet that gives the total number of persons who voted without biometric verification, contrary to the law."

Based on the above, the Petitioners in Table 11A of volume 2B of their address have a list of Polling Stations where they allege there was voting without biometric verification – respondents preferred Data-Set (whatever this means).

By this table 11A on pages 406-437 of Volume 2B, the Petitioners want this court, to annul 221,678 votes of the 1st Petitioner, whilst also annulling 526,416 votes of the 1st Respondent.

The 1st Respondent's response to the claims of the petitioner's was swift and vehement. Learned Counsel for the 1st Respondent, Mr. Tony Lithur, stated in his written address as follows:-

"In the face of consistent absence of any proof of complaint in prescribed manner at any level of the electoral system of the irregularity alleged, (and this is the instance of voting without biometric verification) it is submitted that the entries in C3 could not by themselves form a sound basis for annulling votes cast by eligible voters."

In further support of the above submissions, learned Counsel argued that, from the evidence of the 2nd Petitioner during cross-examination by the counsel for the 1st and 3rd Respondents, it came to light that the evidence on this issue of voting without biometric verification was at best confusing, based on pink sheets entries. According to learned Counsel, once the 2nd Petitioner admitted not having received any evidence of voting without biometric verification at any polling station which recorded 100% of such voting without verification the allegations must not be accepted.

Learned Counsel therefore referred the Court to bits and pieces of evidence during the cross-examination of 2nd Petitioner. The evidence on this issue was based on same entries in Column C1 and C3 of the pink sheets and according to respondents, this is not logical. These are the

bits and pieces of the evidence of 2nd Petitioner under cross-examination on the issue of voting without biometric verification.

Q. "I am suggesting to you that nobody in the 2012 election (voted) whose name and identity has not been checked through the biometric verification?

A. My Lords I was not at those polling stations all we can say is on the face of the pink sheet this number of people voted without biometric verification.

Q. Before the election presumably every polling station had biometric fingerprint verification machine. At least in every polling station?

A. Yes those that worked.

Q. I believe the hullabaloo started when it was discovered that some of the verification devices were not functioning properly?

A. I think the hullabaloo started when the machine was not functioning

properly and **1st Respondent asked that contrary to the law people should be allowed to vote without biometric verification.**

From the evidence on record, the confusion on this issue of voting without biometric verification has been highlighted in the column C3 on the pink sheets.

According to the 2nd Respondent's witness, Dr. Afari Gyan, the Presiding Officers were all under strict instructions not to fill in that column. However, an examination of the pink sheets has revealed that some of the Presiding Officers did not carry out this instruction and filled this column C3 even though they did not have the requisite Form 1 C which was to be used to fill in that column.

Eager to find out the method by which this directive to the Presiding Officers was conveyed, I made an intervention which Dr. Afari Gyan answered thus:-

"Dotse: "For the purpose of clarity so how were the presiding officers to fill in that C3 column?"

Witness: No, we told them that they should put zero because they wouldn't have even the means, yes to fill.

Dotse: Was it communicated to them verbally or you wrote to them with copies to all the parties?

Witness: Erm, well, I don't know whether we wrote to them but we did make it part of the training."

From the above, it is clear the 2nd Respondents did not recall writing to their Presiding Officers or just instructing them verbally.

In any case, no further evidence was solicited by any of the parties in this case, and so we take it that, that part of the evidence that they made those instructions on not filling column C3 an integral part of the training of the presiding officers substantially, stands unchallenged and must be accepted. Reference cross-examination of Dr. Afari Gyan by learned Counsel for the petitioners on 6th June 2013.

Learned Counsel for the 3rd Respondent, launched a systemic attack on this phenomenon of voting without biometric verification. Because of the clarity of thought and detailed references to the evidence of Dr. Afari-Gyan as a basis for the creation of the C3 column, I will quote it in extenso:-

"The witnesses for the Respondents denied that the entries on the pink sheets in respect of C3 were evidence of voting without biometric registration. They insisted that many of those entries were clerical errors. The most decisive testimony in relation to this head of claim was that given by Dr. Afari-Gyan, the Chairman of 2nd Respondent in evidence-in-chief. He stated that the column C1 was not required to be filled in at all by Presiding Officers. According to him, that column was created to take care of those 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 difficulties that 2nd Respondent had encountered.

*As an election administrator, he thought his duty was to give every such person the chance to cast his ballot. 2nd Respondent therefore devised this facility to allow such persons to vote without going through biometric verification. **They would be required to fill in Form 1C before voting. When the idea was mooted to the political parties, they all rejected it. He therefore gave instructions that the Form 1C should not be sent to the***

polling stations. The C3 column was therefore not supposed to be filled.

*"...C3 was put there in an attempt to take care of those people who through no fault of theirs would have valid voter ID cards in their possession but whose names will not appear on the register and therefore could not vote. **But let me add that when we discussed this with the political parties, some of them vehemently said no, that we will not allow any persons to be verified other than by the use of verification machine. I am just explaining why the C3 came there. The parties said no and we could understand that argument that this facility is not given to one person, it is being given to every presiding officer.** So you are given this facility to 26,002 and it is possible to abuse it. So we do not want it and we agreed that that facility would not be used. Unfortunately, the forms had already been printed, these are offshore items, so we could not take off the C3. And what we said, and we have already said this in an earlier communication, was that we will tell all the presiding officers to leave that space blank because they had already been printed and there was no way that we could take it off. And that explains the origin of C3 on the pink sheet. It was a very serious problem."*

This account of the origin of the column C3 on the pink sheet was not challenged by Counsel for the petitioner's in cross-examination.

Figures in the C3 column of the pink sheet, such as the same figure in C1 being found in C3, also showed the difficulties that occurred with this column as it was filled in according to how a Presiding Officer interpreted it. 2nd Petitioner who did not fill in the pink sheets was in no position to testify about the understanding of the Presiding Officers which went into filling that part of the pink sheet."

The explanation of the Electoral Commission Chairman to me makes sense. I would however have expected that such a decision not to use the C3 column would have been communicated to the Presiding Officers in a written form. However, as stated supra, that piece of evidence was not challenged and it has therefore settled the matter.

CONCLUDING REMARKS ON THE BIOMETRIC VERIFICATION

I have already stated that I find Dr. Afari-Gyan's explanation on the C3 column on the pink sheets which is to this effect "*what is the number of ballots issued to voters verified by the use of Form 1C (but not by the use of BVD)*" quite convincing and reasonable under the circumstances.

It must be noted that, during the testimony of Dr. Afari-Gyan, he attempted to explain how the BVD machine can be used to store data on all those persons who voted at a particular polling station and explain how the BVD machine works. An objection was taken by learned counsel for the petitioners Mr. Addison to this evidence. However, by a majority decision of 7-2, the objection was over ruled.

Proceeding further, Dr. Afari Gyan then explained as follows:-

“We had the machines brought to our headquarters in Accra and verified the information and downloaded the data and made print out of the information on the biometric verification machine.”

After this explanation, Dr. Afari Gyan then sought to tender the printout of this information from the BVD.

However, learned counsel for the petitioners, Mr. Addison objected and following the discourse that ensued as captured by part of the proceedings of 3rd June 2013, this is what transpired as per the records.

“Addison: My lords we object to the tendering of this document. This is *a document that can be produced by anybody, there is nothing on the face of this document which shows that it is an original that comes from a particular BVD machine. In any event, this evidence takes the petitioners by surprise. We have stated our full case, we have filed our affidavit to which we attached a number of pink sheets pursuant to the order of this court dated 2nd April 2013. The 2nd respondent has had the opportunity to controvert the issues raised in our pleadings and affidavit. Nowhere in its response was there any statement that BVD machines have been recalled from various parts of the country and that they were going to tender print outs of these machines to contradict information provided by the petitioners. My lords, more importantly, these matters were not put to our witness when he was in the box and therefore they are trying to conduct a new case behind our back. Again it violates the order of this court on the 2nd April, they have not attached it to their*

affidavit neither is there any indication in their affidavit. My lord I would like to refer your lordships to the Evidence Act 1975 Section 52(C) and it provides: COUNSEL READS OUT...

Dotse: Mr. Addison, I am not an IT specialist but I stand to be corrected. Where there is a dispute on the pink sheets and as we are been told, some data has been captured by the BVD during the exercise, that is the voting and if as is been sought to be done, the document is an accurate record of what transpired during the polls, do we have the expertise to be sure that the data captured by the machine is correct because in these matters, that is why I believe Ghana opted for the BVD and we cannot just throw it off like that, we must make use of it in times of crisis or in times of dispute like this...

Quashie-Idun: My lord I would first wish to say that there is a distinction between admissibility of a document and the weight to be attached to it and much of what my learned friend says the goes to the weight not the admissibility of the document. Secondly, there is no surprise, when they were saying that people were not biometrically verified, what they mean other than verified by the machine. So there is no surprise, they know the machine is there and they are saying it was not used. When we were filing our affidavit we did not know the evidence that was going to be led by them...

By court: By a majority of 7 to 2, Atuguba and Akoto-Bamfo, JJSC dissenting, the objection is sustained. Document marked as Exhibit R5."

As can be seen from part of the proceedings just referred to, an opportunity to match the data allegedly captured from the BVD with the allegation that some people voted without biometric verification was lost. This resulted into the rejection of the document which was subsequently marked as Rejected 5.

This document R5 supposedly contains a list of persons who were captured as having been verified by the BVD during voting at the polling station. Other printouts could have been produced and compared with the number that voted at the Polling Stations to match this allegation of voting without biometric verification but since that document was rejected at the instance of the Petitioners I cannot look at it.

But I can make the necessary inference and deductions. Having lost this opportunity, I think it is inconceivable to disregard Dr. Afari Gyan's explanation especially as the evidence on record has not been challenged.

The 2nd Respondent's have maintained some consistency in their explanation of the origins of the C3 column on the pink sheets, reference paragraph 15 (a) of the 2nd respondents amended answer.

Secondly, the petitioner's themselves in Exhibit NDC 43, which is the letter authored by the 3rd Petitioner dated 9th December 2012 and addressed to the Chair of the 2nd respondent emphatically requested for "*Audit of verification machines and recount of Presidential Ballot*".

Even though I have already quoted this letter in extenso for purposes of emphasis, I would want to refer to the following relevant portions again:- it states:

"We request that you, as the Returning Officer of the Presidential Elections; (i) cause an audit of the verification machine to establish that it tallies with constituency collated signed results".

The above is ample proof that, the petitioner's themselves recognise and admit the use of the verification machine to establish the tallies of the election results. This is the main reason why I have stated that, it was wrong first for learned counsel for the petitioner's to have objected to the tendering of the print outs from the Biometric machines to verify anomalies whilst they themselves had requested for it as far back as 9th December 2012.

Perhaps, at that time, because of the contemporaneous nature of the request and the conclusion of the election being almost at the same time, they did not think about the problems of tampering with the machines.

However, there are certain things and practices as a nation we ought to have confidence and trust in its administration, and a typical one is this biometric verification device. Once we asked for it and it was provided, at huge cost, we must accept it and learn to rely on it for the verification that it was meant to provide.

The no biometric verification therefore in my estimation fails in its entirety.

As a matter of fact, if one considers the number of pink sheets where the C3 column was inadvertently filled in, as apposed to those instances where it was not filled in, the impression is that, the instruction not to fill in the C3 column was honoured more in the observance than in the breach, I will therefore give the benefit of the doubt to the 2nd respondent's and accept their explanation.

This is because of the presumption of regularity which presumes that the instructions to the presiding officers was regular on the face of it, no contrary evidence having been led on the matter see *section 37 of Evidence Act NRCD 323*. In circumstances like this, it is critical to consider the write up on page 16 of Exhibit E. C. 2, tendered on 24/4/2013 which is a Guide to Election officials, column D on the said page states as follows:-

"Record the number of ballots issued to voters on the polling station register by checking the number of ticks on the voters register.(for this biometric register tick against the barcode) Adding the figure obtained from the ticks in the proxy register should equal the number of ballots in the ballot box on the assumption that each voter issued with a ballot paper cast a ballot. The ticks on the Names Reference List must also equal the ticks on the main voters register"

The above constitute the procedure that Presiding Officers are to follow at each polling station. If there should be an irregularity on the face of any pink sheet, which should give a contrary opinion to the effect that there were some instances where voting without biometric verification

was permitted, the first place to verify this will be the polling station documents referred to in the quotation supra.

Another contention by the 2nd petitioner, despite his sterling performance in the witness box which I find puzzling is that, all entries made in CI – wrongly should equal zero or dash.

See for example, table 10B of the petitioners address, volume 2B pages 360-363 where a list of polling stations where CI equals zero or blank. In this instant, votes of 28,805 for the 1st Petitioner, and 62,576 for the 1st Respondent are to be annulled.

Having considered this analysis vis-à-vis the evidence of Dr. Afari-Gyan on why the C3 column was initially created but later abandoned at the insistence of the political parties, I am left in no doubt that the whole contention of voting without biometric verification has not been properly made out. I will therefore for this and other reasons stated elsewhere in this judgment, reject this voting without biometric verification as not having been properly made out by the Petitioners. It is accordingly dismissed.

NO PRESIDING OFFICER SIGNATURE CATEGORY

In order to drum home the constitutional significance of the issue of this contentious "*No Presiding Officer signature on the Pink Sheets*" it is perhaps pertinent to quote verbatim how the provisions are articulated in the Constitution.

Article 49 provides as follows:

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.”

Regulation 36 of C. I. 75 contains provisions to the like effect as has been stated in article 49 of the Constitution supra.

The Petitioners contend that in a number of polling stations, **the presiding officers refused, neglected or omitted to sign the pink**

sheets thereby constituting a breach of the constitutional provisions in article 49 (3) of the Constitution.

In order to properly understand how these views have been articulated by the Petitioners, it is pertinent to quote in extenso their written submissions on the matter. They contend as follows:

"It is especially significant to note that, indeed, article 49 is the only occasion on which details of voting at elections and referenda are specifically spelt out in the Constitution itself. In all other situations, the power to determine the manner in which elections shall be conducted is left to the 2nd respondent to regulate through the enactment of regulations pursuant to article 51. It is obvious that the Constitution itself recognises that activities at the polling stations are at the bedrock of the democratic system of governance, hence the need for specific regulation of same by the Constitution, rather than being left to determination by the Electoral Commission. The mandatory provisions in article 49 have an even greater significance when due account is taken of the Preamble to the Constitution. Serving as the spirit within which the Constitution is enacted, the Preamble operates as the yardstick by which the tenets of good governance ought to be measured. In this vein, it is humbly submitted that any conduct on the part of a person which militates against the attainment of the principles spelt out in the Preamble

ought to be jettisoned by this Honourable Court. When regard is had to the Preamble, this Honourable Court will find that the Principle of Universal Adult Suffrage, as well as the commitment to establish a framework of government in accordance with democratic principles, run through the Preamble. It is our further respectful submission that, this being the case, any provision in the Constitution which aims at advancing or regulating the conduct of public elections and referenda in order to realise the goals of the Preamble must be respected and enforced by this Court."

It must therefore be noted that, any constitutional provision, especially one that deals with the ground rules for the exercise of our democratic choice of our leaders in pursuit of the principles of universal adult suffrage is not to be taken for granted.

Furthermore, if due consideration is given to the pride of place that the Constitution occupies in the laws of Ghana as the Grundnorm or basic law, then such provisions should not be treated with careless and reckless regard. In my opinion, and I dare say the opinion of all those who have due regard to the principle of Constitutionalism, the Constitution 1992 must be regarded and considered as sacrosanct.

As such it must be given its due pride of place in the scale of laws of Ghana as article 11 of the Constitution stipulates. This article puts the *Constitution* first among the laws of Ghana and in descending order to *Acts of Parliament, Constitutional Instruments* and others of similar nature, *the existing law* and *the common law*.

It is in this respect that I wish once again to quote excerpts from the written address or submission of learned Counsel for the petitioners, Mr. Philip Addison on the philosophical underpinnings of the provisions in article 49 of the Constitution. He writes:

"PHILOSOPHICAL UNDERPINNINGS OF THE REQUIREMENT OF PRESIDING OFFICERS SIGNATURE AS PROVIDED FOR IN ARTICLE 49 (3) OF THE CONSTITUTION 1992

It is the humble contention of the petitioners that, save in certain instances where it can clearly be demonstrated that the subject matter in question properly belongs to the

class of matters that can aptly be classified as having been consigned to the exclusive authority of a particular branch of government, like parliamentary proceedings (as held by this Court in the cases of Tuffuor v. Attorney-General [1980] GLR 637 CA and J. H. Mensah v. Attorney-General [1996-97] GLR 320), every provision in the Constitution is to be enforced by this Honourable Court. This is what is contained in the principle of the enforceability of the Constitution. The Constitution, being the primary law, serves as the yardstick for good governance and the standard by which the actions of all persons, particularly public officers, are to be measured. It is for this reason that article 3(4) entrusts every citizen with the duty to defend the Constitution, after article 2 (1) has also accorded unto the citizen a right to bring an action in the Supreme Court for the enforcement of the Constitution. This was the effect of this Honourable Court's decision in New Patriotic Party v. Attorney-General [1993-94] 2 GLR 35 where the Court held that every provision in the Constitution is capable of enforcement by the Supreme Court. In so holding, the Court stated that the doctrine of "political question" was inapplicable in Ghana, because, under articles 1, 2 and 130, all issues of constitutional interpretation were justiciable by the Supreme Court. The Court, further stated that, in any event, the Constitution itself was a political document, since every matter which

arose from it for interpretation or enforcement was bound to have a political dimension.

The signing of declaration forms by the presiding officers, apart from being in fulfilment of a constitutional duty, is also to authenticate the results of the elections. It is submitted that any announcement of the results of the polls, when same have not been recorded and duly signed in accordance with article 49, will render the subsequent communication of the results to the returning officer unconstitutional, null, void and of no effect. This is because the returning officer, before acting on the declaration containing the results of the polls at a particular polling station, must be satisfied and ensure that the constitutional requirement of a signature on the declaration form has been discharged, and that the pink sheet is, in truth, the act or deed of the official representative of the Electoral Commission, i.e. the presiding officer at the polling station.

In direct contrast to the above submission, learned Counsel for the 1st Respondent, Mr. Tony Lithur, in his written address on the subject, recounted in extenso the evidence led by the 2nd Petitioner, Dr. Bawumia during cross-examination on the subject and the evidence in chief of Mr. Asiedu-Nketia the witness of the 1st and 3rd respondents and made the following submissions:

"The Constitution doesn't provide a remedy for the breach of the provisions. In resolving the issue, we invite Your Lordships to adopt the purposive approach. Under article 49 of the Constitution the duty of the Presiding Officer to sign the declaration form is preceded, first, by a count of the votes validly cast, followed by the recording of the tallied results (article 49 (2)). In the present instance, the Presiding Officers had performed those duties, and the complaint by the Petitioners is not about the counting, the tallying or the recording of those votes.

It is significant to note that under article 49 (2), the duties of the Presiding Officer as stipulated above, are required to be performed by him in the presence of polling agents. One of the objects of Article 49 is, therefore, transparency. There is no allegation by Petitioners in respect of this head of claim that, in undertaking his duties in respect of the count and recording of the tallied votes, the processes undertaken by the Presiding Officer were not transparent."

After interrogating several issues learned Counsel sought protection under the submission that, since the voters at those particular polling stations have not been alleged to have committed any wrong during the voting, they should not be penalized for the acts of the Presiding Officers.

Learned Counsel therefore enumerates in my view what are very weighty and serious issues for the consideration of this Court. These are as follows:

"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 counterproductive on the part of Petitioners to allege willfulness 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 willfulness 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 centers, about the conduct of the elections or the declaration of the results.***

Learned Counsel concluded his submission on this point by referring to a quotation from *Halsbury's Laws of England, 4th Edition, Volume 15 (4) at paragraph 670* and also quoted a passage from the Canadian case of ***Ted Opitz v Borys Wrzesnewskyj [2012] SCC 55*** to support their contention.

"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 election 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."

This position is in accordance with persuasive authority. In the ***Orpitz case***, (supra), 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."

Learned Counsel for the 3rd Respondent, Mr. Tsatsu-Tsikata in his written address also made similar submissions in terms as referred to supra. The only difference is that he combined the role of the party agents alongside those of the presiding officers and the effect of other subsidiary legislations on the "*no presiding officer signatures*" phenomenon, in C. I. 75.

In effect, the thrust of Mr. Tsikata's submissions on this point is briefly that, once the party agents of the Petitioners have signed the pink sheets in accordance with the constitutional and statutory requirements, they must be deemed to have accepted the results as declared to be correct and consistent with all requisite laws and regulations.

On this point, Mr. Tsikata specifically submitted as follows:-

"It is worth emphasizing that what is certified by the candidate's agents includes certifying that the poll was

conducted in accordance with the laws and regulations governing the conduct of the elections". In almost all of the exhibits filed as attachments to the affidavit of the 2nd Petitioner, the agents of the 1st Petitioner were present and their signatures on the pink sheets on which Petitioners rely constitute admissions of regularity of the election results. On the face of their own documentary evidence, therefore, the Petitioners are confronted starkly by these admissions made on their behalf at the polling stations. There is also evidence that these admissions were repeated at the constituency collation centres where these results were entered on the collation sheets and signed off again by representatives of candidates."

Concluding his submissions on this matter, learned Counsel invited the Court to reject the invitation to the Court to annul votes of citizens of Ghana who exercised their constitutional right to vote in the 2012 Presidential elections by relying on pink sheets which he considered unreliable.

On his part, learned Counsel for the 2nd Respondent, Mr. James Quahsie-Idun, the main respondent i.e. Electoral Commission, whose conduct formed the basis of the violations had a very brief comment to make to the following effect:-

"In response to the Further and Better Particulars submitted by the Petitioners on this subject, and in Exhibit P, tendered by the Chairman of the 2nd Respondent on 8th July 2013, the 2nd Respondent maintained that out of the

905 pink sheets that were not signed by the Presiding Officer, 99% were signed by the Polling Agents of the Petitioners. Dr. Afari-Gyan admitted the obligation of the presiding officers to sign the declaration of results but stated that where he omitted to sign but the Polling Agents signed, the 2nd respondent considered it acceptable for the purposes of the declaration of the results. In this context, reference is made to paragraph 19 above to emphasise the fact that votes at each Polling Station were counted and declared in public. We respectfully urge your Lordship to conclude that on the evidence presented, there is no basis to annul the votes of any Polling Station on the basis of the absence of the signature of a Presiding Officer. The Petitioners have not shown how that affected the outcome of the elections.”

The above is the entire submission of the 2nd Respondent on the subject. What is not in dispute is that, indeed, some of the Presiding Officers who are agents of the 2nd Respondent at the polling stations did not sign the pink sheets.

Secondly, there is evidence on record from the 2nd Respondent that, when some of the Returning Officers detected the phenomenon of the non signing by the Presiding Officers at the collation centres, they as it were called the erring Officers to order and requested them to sign. It should however be noted that, at that stage, all the party agents must have left with their unsigned copies of the pink sheets by those Presiding Officers.

Thirdly, it must be noted that, any results declaration form that is not signed by the Presiding Officer is in breach of article 49 (3) of the Constitution 1992.

The issue that begs for an answer is whether the failure of the Presiding Officers to sign the results declaration form (pink sheets) being a constitutional requirement was a violation, omission, malpractice or irregularity of the Presidential election held on 7th and 8th December 2012 **and whether these affected the outcome of the results of the elections.**

What is the purpose of the provisions in article 49 of the Constitution being inserted therein instead of leaving it for the Electoral Commission to make rules and regulations as provided for in article 51, 63 (2) and 65 of the Constitution 1992?

The draft proposals and report of the 1992 Constitution do not provide any answer.

It is however safe to surmise that it might be due to our turbulent political history in the past especially where there has been allegations of ballot stealing and stuffing and other electoral malpractices prevalent in the 1st Republic and thereafter.

It is therefore safe to conclude that it is an attempt to entrench that part of our constitutional democracy by protecting the integrity of the ballot from the very foundations of the law, that is the Constitution.

Indeed, if one considers, the provisions of article 49 (1) which guarantees that in all public elections in Ghana, voting shall be by secret

ballot, the above deduction of protecting the integrity of the polls cannot be gainsaid.

For example, if there are allegations that during an election, at a particular polling station, the casting of the ballot was not secret, that will definitely be an infringement of the Constitution. Even though the consequences of a breach of that provision has not been provided, a Court of law such as this Supreme Court, vested with powers under article 2 (1) and (2) of the Constitution 1992 to enforce and or interpret all or any of the provisions of the Constitution as the Supreme law of Ghana as has been provided in article 1 (2) of the Constitution 1992 cannot sit idly and do nothing.

Indeed, there are other provisions in the Constitution which makes general provisions about the doing or performance of an event or conduct, without necessarily providing the mechanisms for enforcement and or provide sanctions for breach of those provisions.

For example, article 144 (7) provides that, the office of a Justice of the Superior Court shall not be abolished while there is a substantive holder in office.

In that respect therefore, even if Parliament should enact a law to abolish any of the levels of the Superior Courts, whilst there is a holder of that office, such a conduct will be declared unconstitutional if an action is commenced to that effect. This is irrespective of whether the holders of the office acquiesced in it or not.

It is in this respect necessary to regard the Constitution 1992 as a sacrosanct document capable of being to enable it have sanctity and honour.

Besides, it must also be assumed rightly that the Constitution did not want to leave these provisions contained in article 49 to the whims and caprices of any institution or body of persons to meddle and toy with that is why such detailed provisions on procedure at voting during public elections have been made. If these provisions in article 49 are compared with the provisions in article 63 and 65 of the Constitution 1992, the difference in approach is clear and without doubt. Being an entrenched provision, article 49 cannot even be amended by a party with an overwhelming majority in Parliament, unless by a referendum.

In article 63 (2) (a) and (b) the Electoral Commission has been granted enormous powers to make by constitutional instrument regulations to prescribe the conduct of Presidential elections including the date of the election inter alia.

Article 65 on the other hand prescribes that the Electoral Commission shall by constitutional instrument make regulations for the conduct of the presidential elections generally as stated in article 63.

In this respect therefore, it is quite clear that the provisions in article 49 are so precise and mandatory that it requires no other meaning other than what has been attributed therein. That is why this particular provision is one of the few entrenched provisions.

It has been forcefully argued by all the Respondents that because the Party agents have signed the pink sheets, and the results declared after they had been sorted and counted in public, the complaint of the petitioners is not well founded and must be dismissed.

Reference has already been made to the locus classicus case of ***Tufuor v Attorney General [1980] GLR 637*** and I think I need to refer to it here again. See also the case of ***J. H. Mensah v Attorney General [1996-97] SCGLR 320***.

Sowah J.A, (as he then was) made a notable pronouncement when he spoke on behalf of the Court of Appeal, sitting as the Supreme Court in the Tufuor v A.G. case as follows:-

"...The decision of Mr. Justice Apaloo to appear before Parliament cannot make any difference to the interpretation of the relevant article under consideration unless that decision is in accordance with the postulates of the Constitution. It is indeed the propriety of the decision which is under challenge. This court does not think that any act or conduct which is contrary to the express or implied provisions of the Constitution can be validated by equitable doctrines of estoppel. No person can make lawful what the Constitution says is unlawful. No person can make unlawful what the Constitution says is lawful. The conduct must conform to due process of law as laid down in the fundamental law of the land or it is unlawful and invalid..."

The above statement is binding on this court and I find no cogent reason to depart from it. Besides, the Court in the **Tufuor v A.G.** case also justified its statement with the following explanation which is hereby adopted as my own words.

"Neither the Chief Justice nor any other person in authority can clothe himself with conduct which the Constitution has not mandated. To illustrate this point, if the Judicial Council should write a letter of dismissal to a Judge of the Superior Court of judicature and that Judge either through misinterpretation of the Constitution or indifference signifies acceptance of his dismissal, can it be said that he cannot subsequently resile from his own acceptance or that having accepted his dismissal, he is stopped by conduct or election from challenging the validity of the dismissal? This Court certainly thinks not. The question whether an act is repugnant to the Constitution can only be determined by the Supreme Court. It is that Court which can pronounce on the law."

And since it is to this Supreme Court that the Petitioners have come to for the interpretation and enforcement of the breach of this article 49 (3) of the Constitution 1992, I hold that notwithstanding the conduct of the Petitioner's agents in signing the pink sheets that act, cannot clothe the unconstitutional conduct of presiding officers in not signing the pink sheets with constitutionality.

Quite recently, the Supreme Court in two landmark decisions upheld the supremacy of the Constitution in the hierarchy of legal norms and laws

in the legal system and stated that these principles have to be preserved and jealously guarded.

See the unreported cases of ***Martin Amidu v The Attorney-General and 2 others*** (a.k.a *The Woyome case*) S.C. No. J1/15/2012 dated 14th June 2013 and ***Martin Amidu v Attorney-General and 2 others***, (a.k.a *Isofoton case*) S.C J1/23/2013 dated 21st July 2013.

ROLE OF PARTY AGENTS

The Respondents have in their combined responses urged this Court to consider the position of political Party Agents endorsement of the pink sheets and purposively interpret that part of the constitution to give validity to the non-signing of same by the Presiding Officers.

STATEMENT OF POLL FOR THE OFFICE OF PRESIDENT OF GHANA – FORM EL 21B AND THE DECLARATION – FORM EL22B – REFERRED TO AS PINK SHEETS

An examination of the uncompleted pink sheet gives a very vivid and clearer vision of the real intention and effect of the non-signature of a Presiding Officer on a pink sheet.

1. Column A:- Ballot Information

The indication at the top of the column A, is to the effect that it is to be filled in at the start of the poll. The two questions stated therein really become relevant when this is considered in context. These are:

- i. What is the number of Ballots issued to this polling station?
- ii. What is the range of serial numbers of the ballot papers issued to the polling station?

The question which any critical mind should ask before proceeding any further with the examination of the information on the pink sheet, is to ask who is responsible for the filling in of the questions on the pink sheet.

Undoubtedly, this is to be the sole duty of the Presiding Officer. Indeed Regulation 17, sub-regulation (2) states the following inter alia, as the duties of the Presiding Officer:

- a. setting up the polling station;
- b. taking proper custody of ballot boxes, ballot papers, biometric verification; equipment and other materials required and used for the poll;
- c. Filling the relevant forms relating to the conduct of the poll;**
- d. supervising the work of the polling assistants;
- e. Attending to voters without identify cards;
- f. Attending to proxy voters;
- g. Maintaining order at the polling station;
- h. Undertaking thorough counting of the votes;
- i. Announcing the results of the election at the polling station, and
- j. conveying ballot boxes and other election materials to the returning officer after the poll.

On the other hand, sub-regulation 3 of Regulation 17 states that, a polling assistant among other duties shall work under the supervision of the Presiding Officer in charge of the polling station.

On Polling Agents, Regulation 19 sub-regulation (2) states as follows:-

"A candidate for Presidential election may appoint one Polling Agent in every polling station nationwide."

Sub-regulation (3) of Regulation 19 of C. I. 75 which spells out the role of a Polling Agent of a candidate states as follows:-

*"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**".*

Sub-regulation (4) of Regulation 19 which is also relevant states as follows:-

*"A Presiding Officer shall give a polling agent the necessary access to **enable the polling agent to observe election proceedings at a polling station.**"*

In view of the provisions of Regulation 17 and 19 as referred to supra concerning the functions and roles of a Presiding Officer and his assistant vis-à-vis those of the Polling Agents of the candidates, it is clear that whilst it is the duty of the Presiding Officers to manage, control and be responsible for all activities connected with the poll which includes the filling in of the pink

sheets, the candidates agents are merely to OBSERVE the election proceedings at the polling station and certify at the end of the poll that it was conducted in accordance with the laws and regulations governing the election.

From the questions in column A, and the clear provisions of regulation 17 (2) (c) of C.I. 75, it is clear that it is only the presiding officer or in his absence, his assistant who can fill in and answer those questions.

Column B

This is a continuation of column A, to the effect that it has to be filled in at the start of the poll by the Presiding Officer. The questions therein stated are:-

- 1. What is the number of voters on the polling station register?**

- 2. What is the number of voters on the proxy voters list?**

- 3. What is the total number of voters eligible to vote at this polling station? B1 plus B2**

Column C

This column C to me is a very important and critical part because this is the ballot accounting section of the pink sheets. It states at the top as follows:-

"(To be filled in at END of the poll before counting commences)"

Questions in this column are as follows:-

- 1. What is the number of ballots issued to voters on the polling station register?**
2. What is the number of ballots issued to voters on the Proxy Voters List?
3. What is the number of ballots issued to voters verified by the use of Form IC (but not by the use of BVD)?
4. What is the total number of **spoilt** ballots?
5. What is the total number of **unused** ballots
6. What is the total of C1, plus C2, plus C3 plus C4? This number should equal A1 above.

Since Form 1C was not distributed to the Polling Stations C3 was not to be filled in.

Column D

This is significant in the sense that, whilst it is a detailed account of rejected ballots, it also indicates that this is to be filled in at the **end** of poll after counting is completed.

It should be noted that, despite all the above important questionnaire that the Presiding Officer is expected to fill in on Form EL 21 B, which is one half of the pink sheet, no provision is made for the signature of the Presiding Officer to authenticate the said information provided by him on the forms. It is also to be further noted and observed that, Forms EL 21B and 22B have been joined together and must accordingly be read together as one document in order for the full meaning and understanding of same to be made.

The next item or column on the pink sheet is the Presidential Election – Polling Station Results Form.

Here, the names of the candidates are in one box, with indications as to their party or independent status in another box, then votes obtained in figures and in words are also in different boxes.

At the end of this column are columns A , B and C for Total Valid Votes for Column A, Total Rejected Votes from D6 above for B, Total Votes in Ballot Box (A+B) for C.

It must again be noted that in all these, there is no indication for signature.

The Declaration is the place indicated on the pink sheet for the signatures of the Presiding Officer and the Polling Agents of the candidates.

The words opening on this Declaration are important and is worthy to be quoted in full. It states: "*We, the undersigned, do hereby declare that the results shown above are a true and accurate account of the ballots in this polling station*". Immediately after this comes the Names of Presiding Officer, His Signature, Date and Time before the names of the Polling Agents, their party affiliation or status, signature and reasons if they refused to sign.

The point at issue here is that, since by law, the Presiding Officer is the Officer required and mandated by law under Regulation 17 (2) (c) of C. I. 75, to fill in the columns on the pink sheets, i.e. columns A, B, C, and D on the pink sheets, as well as the results declaration, the signature of the Presiding Officer is mandatorily and constitutionally required to authenticate not only the results, but also the filling of the forms as required by law.

Thus any pink sheet, which has not been signed by the Presiding Officer lacks this crucial authentication and must be rejected as not satisfying the requirements of the Constitution and the law.

The difference in weight between the role and functions of the Presiding Officers and the candidates' agents is so clear that any attempt to equate the two, and to raise the candidates signatures to the level of the Presiding Officer signature is not only to undermine the constitutional provisions on this issue as enshrined in the Constitution 1992, but also crucify the bedrock upon which the democratic

foundations of the representative Government that the people of Ghana have embarked upon since January 7th 1993. That position has been made clear in the ***Tufuor v A. G.*** case already referred to supra.

As a consequence, I am of the very considered view that, not having signed and authenticated the entries made by them on the pink sheets, the non signature of same by the Presiding Officers has invalidated the offending pink sheets, and to that extent, by virtue of article 49 (3) of the Constitution 1992, same are declared null and void, and of no effect. The result therefore is that all votes at all the polling stations where this phenomenon of no presiding officer signature has occurred is hereby annulled and or cancelled. If they are annulled, then all votes attributed to any candidate at those polling stations will be deducted from the total tally.

If however, they are cancelled then the polls will have to be re-run in those particular polling stations.

In the opening pages of this judgment, I referred to a statement attributed to **Benjamin Cardozo** a former associate Justice of the U.S. Supreme Court in which he wrote that in deciding a case that there is no precedent for the Judge to follow, what does he do?

In seeking to reach a decision that may become a precedent for the future, I have to be consistent and logical in my legal reasoning.

It has been urged upon this court, that since the voters in the offending polling stations did not commit any wrong, it will be a denial of their rights if their votes should be annulled for the failure of a public officer in the performance of their duties.

If the results of this category of no presiding officer signature as has been upheld by me to be annulled, are annulled as ordered then the problem that will arise is what criteria and number of pink sheets that are to be affected?

This question is relevant in view of the mess that had been created by the Petitioners in their use of polling station pink sheets in their analysis of the various categories.

I am however aware that the Petitioners in volume 2B of their appendix to their address, in their table 12 A, have a list of polling stations indicating List of Presiding Officers signature, (*Respondents preferred Data Set*).

The assumption I believe is that, this list in table 12A is devoid of the many instances of mislabeling, and use of Exhibits outside the range of exhibits marked in the affidavit of 2nd Petitioner and also devoid of the duplications and or triplication that some of the pink sheets of the Petitioners have become notorious for. I also believe that all the pink sheets in this category have been counted by KPMG and are therefore in the KPMG unique count.

Using this table 12A, the votes that are attributed to the 1st Respondent, are 382,088 whilst those of the 1st Petitioner are 170,940. See page 497 of Volume 2B of the address. Subject however to verification and scrutiny based on the KPMG unique count. To prevent double use of polling station results that are to be cancelled, care must be taken to ensure that only the residue of the polling stations that have not been affected by over-voting category are to be affected in this category. Since I am of the view that, it is more equitable to cancel the results of the polling stations in this category and order a re-run in only those polling stations, I will go for that option.

What then is to be done to the Presiding Officers who failed woefully to perform this sacred constitutional duty as is stated in article 49 (3) of the Constitution 1992?

The resolution of this issue will involve a discussion of the Canadian case of ***Opitz v Wrzesnewskyi 2012 SCC 55-2012-10-256*** to determine its applicability. Learned Counsel for the 3rd respondents has referred this Court to a quote in the Canadian case of Opitz just referred to supra which states as follows:-

“The practical realities of election administration are such that imperfections in the conduct of elections are inevitable. A federal election is only possible with the work 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 task under difficult conditions. They are required to apply multiple rules in a setting that is unfamiliar. Because elections are not everyday occurrence, it is difficult to see how workers could get practical on the job experience. The current system of electoral administration in Canada is not designed to achieve perfection, but to come as close to the ideal of enfranchising all entitled voters as possible. **Since the system and the Act are not designed for certainty alone, Courts cannot demand perfect certainty. Rather, Courts must be concerned with the integrity of the electoral system.*** This overarching concern informs our interpretation of the phrase “irregularities that affected the result” **opinions of Rothstein and Maldaer JJ**

In the Ghanaian context, the Chairman of the Electoral Commission Dr. Afari-Gyan in his evidence in chief also lamented over the fact that all the Presiding officers and their assistants, including even the Returning Officers, who all play very critical roles in the electoral administration are temporary staff of the Electoral Commission.

According to him, these are recruited only some few weeks to the date of the election and given some form of training.

My examination of some of the contentious pink sheets, which were identified and upon which some cross-examination has been conducted upon in court has revealed that some of the Presiding Officers appeared to be illiterates and know next to nothing. They do not only have very bad writing skills, but cannot express themselves in simple language and

even denote figures in words correctly. I will in this context blame the appointing authorities of such low caliber of staff.

It is in this respect that I think the Electoral Commission Chairman, Dr. Afari Gyan cannot escape blame. My observation is that, Dr. Afari Gyan appeared to have concentrated his oversight responsibility at the top notch of the election administration, thereby abdicating his supervisory role at the grassroots or bottom, where most of the activities critical to the conduct of elections are performed.

In this instance, he even appeared not to be conversant with some of the basic procedural steps and rules that are performed by his so called temporary staff. So far as I am concerned, Dr. Afari Gyan has cut a very poor figure of himself, and the much acclaimed competent election administrator both nationally and internationally has evaporated into thin air once his portfolio has come under the close scrutiny of the Courts.

Can the Canadian Supreme Court observations be relevant and applicable in Ghana?

Taking a cue from his testimony on the subject, and bearing in mind the wealth of experience Dr. Afari-Gyan should have gained since 1993, I am of the considered view that he cannot entirely escape blame for the many infractions of the Returning Officers, Presiding Officers and their assistants and to some extent their printers. To that extent, I will hesitate in applying hook, line and sinker the observations of the Canadian Court in

the *OPITZ case*, bearing in mind that there was a powerful dissent in that case.

I also observe that, whilst the *Presidential Election Act, 1992 PNDCL 285*, does not contain any provision of criminal sanctions on breach of election duties, it's sister Act, *Representation of the People Law, 1992 PNDCL 284*, has adequate and detailed provisions stipulating criminal sanctions for breach of all electoral regulations.

I also observe that, article 49 of the Constitution 1992 in its entirety does not provide any sanctions for the breach of any of it's provisions mentioned therein.

In this respect, I will like to make reference to section 30 (a) and (f) of PNDCL 284 referred to supra.

These sections provide as follows:

*(30) An election Officer, clerk, interpreter or any other person who has a duty to discharge, **whether under this Act or otherwise**, in relation to an election, and who*

(a) makes in a record, return or any other document, which is required to be kept or made in pursuance of this Act or of the Regulations, an entry which that person knows or has reasonable cause to believe to be false, or does not believe to be true, or

(f) without reasonable cause acts or fails to act in breach of official duty,

commits an offence and is liable to a fine not exceeding five hundred penalty units or to a term of imprisonment not exceeding two years or both the fine and the imprisonment.”

I am of the opinion that, considering the fact that, the issue in contention here is Presidential elections, there should be a higher requirement of compliance of election officials to their duty than is required in other instances.

I will therefore urge the application of the sanctions provided for in this section 30 of PNDCL 284 to any breach of article 49 (3) of the Constitution. This is because the conduct of the presiding officers in not signing the pink sheets amounted to a failure to act in the performance of their official duties as provided for in section 30 (a) and (e) of PNDCL 284 I will further direct that aside the punishment of a fine and imprisonment, the 2nd respondents should as a matter of policy blacklist all such offending presiding officers to prevent them from ever acting for the 2nd respondents in future. This I believe will serve as a deterrent.

Finally, I will also recommend that, henceforth, the Electoral Commission should apply merit based criteria to the appointment of their key electoral staff, albeit temporary to avoid the appointment of people who appear to be crass illiterates.

To conclude this matter, I will state that even though I find the Canadian case of **OPITZ** quite instructive, I am of the considered opinion that having apprized myself of the facts of that case, it is wholly inapplicable under the circumstances of this election petition. This is precisely because the infractions alleged by the petitioners here are

based on constitutional and statutory violations and or irregularities, not so much on the voter not being qualified to vote, or properly identified as is the case of the no biometric identification, no vote (N.B.N.V) phenomenon.

In view of all the above discussions, I will uphold the petitioner's claims under the category of Presiding officers not signing the pink sheets.

DUPLICATE SERIAL NUMBERS ON PINK SHEETS

Learned counsel for the Petitioners, in his address on the above head of claim submitted that, one of the methods by which the 2nd Respondent's has sought to guarantee the security of the election materials by avoiding the substitution of election materials by unscrupulous persons who might be determined to compromise the electoral process was to secure the integrity of the electoral process as follows:

"One of the means by which the 2nd respondent has over the years sought to do this, alongside other measures, has been to pre-emboss electoral materials with unique serial numbers. This is to ensure that specific electoral materials, so far as possible, are used only once at every polling station and also to detect the introduction of forged materials into the electoral process. Thus, for example, the ballot papers have serial numbers embossed on them to ensure that each ballot paper is unique in its identity. The series equally ensures that ballot papers are allocated to constituencies and polling stations in accordance with serial numbers known to the 2nd

respondent. In the same way, in order to avoid the threat of replacement of official ballot boxes with unofficial ballot boxes, the ballot boxes officially used by the 2nd respondent have embossed on them serial numbers. Even the tamper proof envelopes, into which presiding officers at polling stations put all election materials post announcement of the results at the poll, have serial numbers in order to enable detection of any attempt to replace an authentic tamper proof envelope with a counterfeit one. It should be noted that, in each of these examples the serial numbers come already embossed on the article from the manufacturers/printers. It would, accordingly, be astonishing, if not self defeating, where the primary record of the election, which are the pink sheets, on which results are declared, has no serial number as a security feature to prevent substitution or forgery of such critical electoral materials.”

The above statement had been re-emphasised supra in paragraph 56 of the affidavit sworn to by the 2nd Petitioner in which reference has been made by the Petitioner's to **6,823 polling stations** where they claimed exclusive instances of the malpractice of same serial numbers on pink sheets with different results took place.

It must be noted that, this category of malpractice is by far the largest category and it was therefore not surprising that the petitioners devoted some valuable and quality time to this phenomenon.

What then is the evidence in support of this? Dr. Afari-Gyan who testified for and on behalf of the 2nd respondent admitted in his testimony the use of some pink sheets with duplicate serial numbers. Admittedly, the evidence given by the petitioners in their MB P – series of exhibit supports the use of pink sheets with duplicate serial numbers.

What is the meaning of this? In effect, what this means is that, a pink sheet, which has a number embossed on it from the printing stage 0002895 for *Ghartey Hall Block "B" U.E.W* polling station in the Effutu Constituency in the Central Region will have the same corresponding serial number on another pink sheet for another polling station in a constituency either within the same region or another region. The evidence however showed that this phenomenon of same serial numbers was duplicated in different regions, not same region and constituency.

In effect, whilst the number on the pink sheets for these two polling stations are the same, the polling station name and code are different.

However, according to the petitioners, there is an assumption that, the numbers on the pink sheets are generated serially and so ought to be unique to a particular polling station.

In circumstances like the above scenario that I have given, the results attributable to each polling station as per the pink sheets are different, with different presiding officers and party agents.

However, the Petitioners contend that as an electoral material, it must have a unique security feature which is the number embossed on it from the printing press, and once this number has been generated, it is

unique and applicable to only one polling station. They therefore contend that the widespread use of duplicate serial numbers of pink sheets is a malpractice for which reason results of all the polling stations in which this phenomenon was manifested must be annulled.

In order to understand the basis of this claim, it is perhaps useful at this stage to quote the words of Dr. Afari Gyan when he testified on 10th June 2013 as follows:-

Q. "Dr. Afari Gyan, we will go to the duplicate serial number, the alleged

duplication of serial numbers. You heard the evidence of Dr. Bawumia the duplication of serial numbers should result in an annulment of the votes on all polling stations where the same serial number exists for two polling stations on the pink sheet.

A. My Lords, I strongly disagree with that.

Q. Can you tell us why?

*A. Well, in the first place the serial numbers that you find on the pink sheets are not even generated by the Electoral Commission. They are generated by the firm or company that printed the pink sheets. Also unlike in the case of ballot papers, where the law requires that we print numbers, there should be a number on every ballot paper, **I have seen no reference in the Constitution or a Stature or an Instrument to a serial number of the pink sheet. The serial number is important only to the extent that it allows us to keep count of the number of pink sheets produced.** The pink sheets are*

distributed randomly and the serial number printed on the pink sheet. It has absolutely no relevance to the compilation and declaration results. We identify our polling stations by their unique code and by their names and in fact throughout this trial so far I have never heard anybody identify a polling station. If two polling stations have the same serial number that will in no way affect

Q. Do you mean two pink sheets. Two pink sheets with the same number for different polling stations, it will not have any effect whatsoever on the validity of votes cast. Why?

*A. Each of the two polling stations will have a different code and a different name. There will be two different presiding officers and two different sets of officials, there will be two different sets of candidate's agents and there will be two different results entirely. **So I see no problem, and when the results are taken from the polling station to the collations center, they are dealt with on the basis of polling stations codes and not serial numbers.** So I do not see the basis for the allegations surrounding the serial numbers. I see no basis at all."*

All the respondents have denied the allegations of the petitioners on the duplicate serial numbers with such vehemence that, the issue calls for thorough analysis and understanding. For example, learned counsel for the 2nd respondent, James Quashie-Idun in his very brief but incisive written submission stated on this duplicate serial numbers on pink sheets as follows:

“Your Lordship, this category can properly be described as the weakest link in an already weak chain”.

On his part, learned counsel for the 3rd Respondent, Tsatsu-Tsikata in his written statement stated on this malpractice as follows:-

“Indeed, there is no basis whatsoever for a number printed on the pink sheet which was not generated by the Electoral Commission and which was not known to the political parties as a distinguishing mark of polling stations, to be used retroactively to disenfranchise millions of innocent voters.”

Even though I am not comfortable with the explanations of Dr. Afari-Gyan, in his evidence on the duplicate serial numbers as has been reproduced verbatim, the petitioners have to my mind not discharged the burden of proof that lies upon them in such cases as has been stated supra.

I have previously quoted in extenso, the written statement of learned counsel for the petitioners Philip Addison on this point, wherein he asserts strongly that it should be desirable that pink sheets with specific numbers should be assigned to specific polling stations as is done with codes and ballot papers.

It would have been quite easy for me to accede to the contention of the petitioners if they had led evidence to establish that, in the past elections, or at least the last 2008 presidential elections, all “pink sheets” had serial numbers embossed on them which were assigned specifically to

particular polling stations. In that respect, there would have been an established practice that, the number embossed on the "pink sheets" is assigned to a polling station just as a polling station code is assigned using a regional alphabet followed by the numbers, i.e. constituency identification number, and the unique polling station number which all make up the unique code.

No evidence whatsoever on this matter has been led by the petitioners, to establish such a practice. In circumstances where the petitioner's have failed with any degree of certainty to establish that, it had been the practice of the Electoral Commission to assign the numbers on the pink sheets to polling stations making them a unique feature, the case of the petitioner's must fail in this respect.

For now, what has been established as the practice in our electoral process and administration is that, the following are the security checks and features that are attributable to a polling station and by which it is known.

1. Name – though this may be similar e.g. E.P. Primary School or C.M.B Shed, Finger of God etc.
2. **Unique Polling Station Code** – by which the region, constituency and polling station are clearly identified making it really unique.

3. Ballot papers – the serial numbers on the ballot papers are unique to a polling station in the sense that, no two polling stations can have and use the same ballot papers with same serial numbers.

REFORMS

The importance of the Statement of Poll and Declaration of Results forms, "*pink sheets*" has informed me to suggest a number of reforms in our electoral process, including better management of the "***serial***" numbers on these pink sheets.

It really does not make sense for the Electoral Commission Chairman, Dr. Afari Gyan to state that it is the printers who generate the numbers on the pink sheets in order for them to keep count of the number of pink sheets they have printed. This is not only absurd but also exposes the Electoral Commission as lacking any control mechanism to really check the actual number of pink sheets delivered to them.

For example, if a printer generates his own numbers from say 0000001 and goes on to 9,000,000, whilst in actual fact, the physical count is less than the quantity the Electoral Commission paid for, then the Electoral Commission would have been short changed.

Dr. Afari Gyan to me, was not convincing on this point at all, just as he was on many other issues. But for the weakness in the petitioners case on this issue, I would have dismissed the Electoral Commission's explanation as not being reasonable.

It is for this and other reasons stated in this judgment that I am of the view that there are indeed urgent reforms needed in our electoral process and administration.

In the first place, it does appear to me that there is the need for the ***Inter Party Advisory Committee (IPAC)*** to consider legislation to legitimise the use of serialized pink sheets in just the same way as there are unique polling station codes. Does it not matter that, the pink sheets, which form the primary documents upon which election results are declared by the Electoral Commission are not serialized to prevent their multiple use and abuse as was apparent in some few cases in the December 2012 Presidential elections?

In order to give validity and raise our elections to a higher pedestal, I think it will not be a bad idea if IPAC and indeed the entire country will consider proposals aimed at legislation to ensure that, security features are enhanced on the pink sheets, to make them identifiable to a particular region, constituency and polling station just as it is with the polling station codes.

Even though the above suggestion is likely to be a strain and an added burden on the Electoral Commission, it is better to put such a stringent requirement on them, than to live with the type of mess that was created by the lack of control in the printing, marking, distribution and use of the pink sheets.

Secondly, since the Electoral Commission Chair, who is the returning officer for the presidential elections was not present at the polling

stations and could in any case not be present thereby lending credence to the 2nd petitioners oft quoted statement of *"You and I were not there"* a lot of caution and circumspection ought to be exercised in anything that has to do with reliance on entries on the pink sheets.

This is because, if the pink sheets for now remain the only authentic, valuable and credible document upon which the results are declared, then everything has to be done to ensure their sanctity, credibility and legitimacy. Situations, such as those recounted by Dr. Afari-Gyan about how pink sheets for the December 2012 elections were ordered, printed and distributed are so bizarre that it could have been a recipe for disaster. Urgent steps should therefore be taken to reform the electoral landscape promptly to ensure a clean, fair and a level playing ground.

I am making these suggestions against the background of the explanation given by Dr. Afari Gyan as the basis for the printing of two (2) sets of pink sheets. Even though the reasons are not credible and lack candour, the claims of the petitioners about the widespread use of the duplicate serial numbers category to perpetuate most of the malpractices and violations have not been well made out.

For instance, if it is because of the late settlement of the issue of the actual number of contesting presidential candidates that led to the printing of the two sets of pink sheets thereby accounting for the duplications, then only one set could have been used, since the other set of candidates never had the green light. Besides, the names of the candidates on the first set of printed pink sheets, is the same as the

second set. This therefore has exposed the Electoral Commission as not being candid in their explanation.

It is possible that something sinister could have been the basis behind the printing of the two sets of pink sheets. But since a court of law such as this Supreme Court does not deal with speculation and conjecture in a serious and volatile matter as disputed presidential election results, it is better to err on the side of caution than to yield to assertions which have not passed the litmus test of proof on the balance of probabilities as has been discussed elsewhere.

My concluding remarks on this matter of duplicate serial numbers on the pink sheets is that, once the petitioners have failed to prove the existence of an established practice in the use of assigned specific serial number on pink sheets to polling stations in past presidential elections and their further inability to also prove that these resulted into the massive malpractices they alleged in this category save for the isolated instances, mentioned supra, I reject the invitation being made to this court to annul votes in this category. It is accordingly rejected.

SAME POLLING STATION CODE RESULT ON DIFFERENT PINK SHEETS

The petitioners have based their contention on the malpractice of same polling station code results on different pink sheets on Table 14 in volume 2B of their address.

The petitioners rely also on the testimony of Dr. Afari-Gyan when he said in court on 30th May 2013 as follows:-

“The code is unique; first in the sense that no two polling stations ever have the same number or code. It is also unique in the sense that the code is consciously crafted to contain information that directs you to the location of the polling station. And the system we use is alpha-numeric; that is to say, it combines the letters of the alphabets and numbers; and the system is a letter followed by 6 digits and it may end or may not end with another letter.”

As I have stated supra, there is incontrovertible evidence that polling station codes are unique to each polling station and the occurrence of multiple results as per pink sheets in some few polling stations can indeed only be the work of the *"Hand of God"*.

In this respect, the petitioners tendered a number of exhibits through Dr. Afari-Gyan and I will refer in this instance to exhibits S and Y just to mention and rely on a few.

It is also interesting to observe that, Dr. Afari-Gyan was emphatic during his testimony that no one polling station should have more than one

pink sheets. In answer to a question, Dr. Afari-Gyan put it bluntly as follows:-

“I am saying that no polling station should have two pink sheets.”

The petitioners do not accept the explanation of the Electoral Commission Chair that this discrepancy may have occurred as a result of special voting having taken place at those polling stations thereby explaining the occurrence of the two pink sheets, or the splitting up of the polling station into two due to its size.

This court in order to do justice will have to give meaning and content to *Regulation 21, sub regulation 11 of the Public Elections Regulations, 2012 (C. I. 75)* which deals with special voting procedures and other matters. It provides thus:-

“The returning officer shall at the end of the special voting

a. Ensure that the ballot boxes are kept in safe custody after the poll has closed.

b. Ensure that the ballot boxes are sealed with the seals of the commission and candidates who wish to add their seal; and

c. Arrange for the ballot boxes to be opened at the time of the counting of the votes cast on the polling day and the ballot papers shall be counted in the same manner as

those contained in the ballot boxes used on the polling day.”

Regulations 35 (7) and 36 (1) (2) and (3) of C.I. 75, deals with the manner in which the votes are counted at a polling station in any general election. The votes in a special voting are also to follow the same pattern stated in the C. I. 75 referred to supra.

It should be noted that, after the sorting out of the ballots into valid and rejected categories, the votes are then counted and the votes obtained by each candidate are registered against their names and rejected ballots are also recorded after which the results are announced.

I believe this is the procedure that the counting of the special voting is to follow. If that is the case, then there must be an indication by which the special voting is to be indicated to denote it separately from the general voting.

The address of learned counsel for the 2nd Respondent, Mr. Quashie-Idun on this issue is very terse. As stated earlier, it deals with the issue of special voting and split polling stations.

The evidence also unfolded that where polling stations are split, they are denoted as A & B. However, in the Table 14, which the petitioners have attached to their address, this distinction is not well made out. **For example, L/A Primary School Mame Krobo East A, which are numbers 5 and 6 on the Table 14, all have one polling station code number E. 261001A in all the two instances with no**

indication that it is a split polling station. The same phenomenon is exhibited in respect of *St. Emmanuel Nursery/Primary School Zenu* indicated in numbers 9 and 10 on the Table and there is no indication that it is a split polling station.

Then there is the infamous *Juaso Court Hall* indicated in numbers 11 and 12 and the *Finger of God* which has really turned into the "*Hand of God*" features prominently in numbers 20 and 21 all in Table 14 but most of these stations had been deleted in Exhibit Y.

My understanding and appreciation of the above analysis is that, there was indeed no indication whatsoever as to whether the polling stations were used as a split polling station in which case I presume they ought to be identified as A & B to prevent confusion.

This conclusion is irrespective of the submission of other learned counsel for the 1st and 3rd Respondents who all base their positions on the testimony of Dr. Afari-Gyan on the splitting of large polling stations and use of the polling stations for special voting.

In the absence of clear proof that the duplicated polling station codes with different pink sheets results have either been used for special voting or split into two, I am inclined to accept the petitioners' claims that the 2nd respondent used the said phenomenon in clear violation of accepted practice in electoral process and as spelt out in C.I. 75. However, if one considers the deletion of certain polling stations from this category as is evident from Exhibit Y, which is headed Duplicate

Polling Station Codes, where these pairs of numbers 3, 4, 7, 8, 11 and 12 are deleted then the basis of the claims has somehow been eroded. In this respect, the petitioners themselves had deleted 2 polling stations each of Juaso Court Hall, Finger of God Church, Kubekro B and Kalpohin S.H.S A.

There is also the observation that some of the remaining polling stations on Exhibit Y have already been captured in the no Presiding Officer category. To prevent double count, I will not give any further consideration to this category.

UNKNOWN POLLING STATIONS

Ground 2 (a) of the petition is to the effect that presidential elections were conducted in 22 locations which did not form part of the 26,002 polling stations created by the 2nd respondent for purposes of the December, 2012 elections.

The 2nd petitioner was however candid in his evidence that a polling station apart from its name is also identified by the unique code which is special to the polling station. Nonetheless, the petitioners contend that elections were held in these 22 locations by the 2nd Respondent in the December 2012 elections outside the official list of the 26,002 polling stations designated by the 2nd respondent contrary to C. I. 75. The

petitioners rely on a list prepared by them in Table 15 of volume 2B of their address to this court.

I have tried to examine whether this list of 22 locations is additional to the 26,002 or is part of the 26,002 but only that they are not known to the petitioners as per the list supplied them by the 2nd respondent. My examination has revealed that the 22 locations form part of the 26,002 designated polling stations.

The 2nd respondent's argued very forcefully that, because the petitioners sent agents to those 22 "unknown" polling stations, they should be stopped from questioning their lawful existence.

The 1st and 3rd respondents responded to this head of claim by relying on exhibit EC3 which is a letter signed by the 1st petitioner among others tendered by the 2nd respondent that party agents were indeed appointed by the petitioners to those 22 locations.

In view of the serious doubts that have been cast on the authenticity of those exhibits 1 will not rely on them.

It will be recalled that, on 15th April 2013 Johnson Asiedu Nketia, the General Secretary of the National Democratic Congress, who testified on behalf of the 1st and 3rd respondents, swore to an affidavit which is quite revealing. In substance, the depositions contained in paragraphs 15F, under the heading ***UNKNOWN POLLING STATIONS (i) (ii) and (iii)*** show clearly that the basis of the petitioners claims under this category has not been well founded or grounded.

In essence, what the depositions, together with an exhibit "JAN 5" which was attached, contained details of the constituencies with the variations in their names and mistakes in mislabeling which positively depict that the petitioners have no case. Out of abundance of caution, it is useful to reproduce the relevant portions of the said affidavit referred to supra in extenso for the full force and effect of the conclusion reached that this head of claim ought to be dismissed.

- (i) *"I was in court when the counsel for the petitioners indicated that they were restricting this allegation to the 22 polling stations they identified on the basis of the orders of the court to supply further and better particulars. Counsel for the petitioners confirmed they no longer were making claims in respect of 28 polling stations as they originally alleged. The affidavit of 2nd Petitioner now refers to 23 polling stations meaning there is one polling station in respect of which further and better particulars have not been supplied as ordered by the Court.*

- (ii) *We have also checked the details of the polling stations provided by the petitioners, **and have found that their confusion arose, in some instances, out of the wrong spelling of the names of the polling stations and, in others, they misquoted the polling station codes. In some cases, the polling stations were used for special voting. All the polling stations exist and were part of the 26,002 polling stations that were created by the 2nd Respondent for the***

conduct of the December 2012 elections. Anyhow, the pink sheets exhibited by the petitioners in respect thereto reflect the genuine results of supervised election signed by the Petitioners and 1st Respondent's polling/counting agents

(iii) I attached to this affidavit, marked exhibit "JAN 5" an analysis of the

details relating to the Petitioners' allegation. The 2nd and 3^d columns show the details provided by the petitioners in their allegation. The 4th and 5th columns show the correct details of the polling stations. The 6th column shows the constituencies under which the polling stations falls."

I have looked at Table 15, prepared by the petitioners as an explanation to their address in Volume 2B. I have compared the polling station codes in that Table 15 with the particulars contained in the affidavit of Asiedu Nketia sworn to on 15th April 2013 already referred to with the Exhibit JAN 5 and I am satisfied that the polling station codes are the same for all the 22 locations.

In respect of some of the names, there are some similarities. I am therefore unable to accede to the request of the petitioners to annul results in this category. This claim by the petitioners is accordingly dismissed.

OTHER ALLEGATIONS ABANDONED BY PETITIONERS

Since the petitioners have evinced a clear intention not to proceed with the allegations of padding and reduction of votes save in one polling station as well as the allegations on STL issue, no time whatsoever will be spent in dealing with these.

BLOATED VOTERS REGISTER

There is no doubt, that the Petitioners claim of a bloated voters register has been admitted by the 2nd respondents in paragraph 8 of their second amended answer.

The explanation for this phenomenon has been attributed to error. Explaining further, the 2nd respondent stated that this error resulted in the figure of 14,158,890 instead of 14,031,793 being announced as the total registered voters who turned out for the 7th and 8th December 2012 presidential elections.

They however state that the error would only affect the turn out percentage and change the percentage from 79.43% to 80.15%.

The error effect is really very negligible and but for the credibility effect it has on the 2nd respondent's as an electoral administrator I will not give it any serious thought.

However, if I consider the effects of Exhibits U and V, which are final voters register for Adaklu constituency, polling station code number D090201, (Adaklu Torda in the Volta Region) and for Afadjato-South constituency, polling station code number D170901, E. P primary school respectively, then the fine attributes of the biometric registration as the

panacea to the double and or multiple registration is a far cry from being over.

Refer also to instances of double registration which occurred in the registration of prospective voters conducted outside the country for those working in Foreign Missions, International Organisations and those studying abroad.

However, since the effect of these infractions in the registration exercise has not been proven to have had any effect on the final outcome of the election, I will dismiss them, as I hereby do.

CONCLUDING REMARKS

This Court has set down two issues in the memorandum of issues it had settled for the parties. These are as follows:-

- i. Whether there were violations, omissions, malpractices and irregularities of the Presidential election held on 7th and 8th December 2012 and
- ii. Whether or not the said violations, omissions, malpractices and irregularities, if any affected the outcome of the results of the elections.

Having reviewed the entire pleadings and the evidence in this case, there is absolutely no doubt in my mind that there have been some

violations, omissions, malpractices and irregularities of the Presidential elections held on the 7th and 8th December 2012.

What must be noted is that, even though these infractions were not proven to have been orchestrated by either the 1st or 3rd Respondents, but by the agents of the 2nd respondents, once they are infractions which have been established in some instances, I will uphold them. This is pursuant to powers conferred on this Court under article 64 (1) and (2) of the Constitution, 1992.

The resolution of the second issue is somewhat difficult to resolve. This is because, it has to be determined whether these violations, omissions etc, affected the outcome of the results.

In a vast majority of the categories, I can conclusively say that they have had no effect on the outcome of the elections whatsoever. However, when cumulatively put together, the said violations may affect the outcome of the elections.

My decision on the

- i. Duplicate Serial numbers;**
- ii. Voting without biometric verification; and**
- iii. Unknown polling station categories;**
- iv. Duplicate polling station results**

is that I reject those claims outright and no consequence arises. They are therefore dismissed.

However, since I have upheld in its entirety the "*No presiding officer signature category*", albeit with a different and much reduced set of pink sheets, I must admit these may affect the outcome of the results of the presidential elections. See Table 12A of Volume 2B of petitioners address referred to above and my conclusion on this category as stated in the main body of the judgment.

The petitioner's relief one will therefore be granted in respect of the ***No Presiding Officer Signature Category*** in terms of my decision as is contained in the main body of the judgment.

Similarly, the petitioners would be deemed to be successful in respect of their relief one in the over-voting category in terms as shall be determined using the road map as indicated in the main body of the judgment during the audit of the affected pink sheets.

Relief two is however accordingly dismissed. In respect of relief three, and in view of my decision in the over voting and no presiding officer signature category, and subject also to the total tally of votes in these two categories that the audit shall disclose, where the total tally of votes in the said category, reduce the total votes attributed to the 1st Respondent to fall below the 50% plus one percentage, then in that case in line with constitutional provisions in article 63 (3) I will direct

that there should be a re-run of the presidential elections in only the affected polling stations between the 1st Petitioner and 1st Respondent.

Subject to the above decision, the petitioners claims stand dismissed.

To me the lessons in all these for the 2nd respondent's as an institution is very important. As an electoral administration body, the 2nd respondent's and I dare say the political parties who are major stakeholders have a duty to review our entire electoral system with particular reference to entries on the pink sheets. This has become very critical in view of the many errors, that have become a routine feature of the pink sheets.

If it is understood that, these pink sheets are the documents that are used to declare the results if no objections are raised, then the method of recruitment, training and general orientation of the staff that fill those forms at the polling stations, be they temporary or permanent engaged in performing critical core functions on election day has to be revised.

Similarly, I will also appeal to the political parties or candidates to ensure that those persons they engage as agents to observe the elections at the polling stations are not only loyal and dedicated party persons, but persons who are competent enough to understand the implications of the recordings on the pink sheets and the sequential nature of the said recordings.

I will also take this opportunity to congratulate the parties and their Counsel for their conduct and assistance to the Court. This was despite

the fact that, even though tension was initially very high with loss of confidence and trust among the Lawyers, with the passage of time, those barriers were removed and the case progressed apace to its conclusion.

Today's judgment is a victory I believe once again for Ghana's democratic credentials, to wit, the rule of law and our pursuit of governance related issues. Let me therefore conclude this judgment with my favorite childhood poem of Lord Alfred Tennyson **"THE BROOK"**.

"I am sometimes really amazed at whether Lord Tennyson had in his mind rivers and streams like the Volta, Dayi, Tordze or Onyasia when he wrote "The Brook" which I believe many people were made to memorise in their basic school.

Since I find the words therein very apt and useful for the closing pages of this judgment, I have decided to use them by adopting it to our local situation.

*I come from haunts of coot and hern,
I make a sudden sally
And sparkle out among the fern,
To bicker down a valley.
By thirty hills I hurry down,
Or slip between the ridges,
By twenty thorps, a little town,
And half a hundred bridges...*

The little town might well be Accra.

*I chatter over stony ways,
In little sharps and trebles,
I bubble into eddying bays,
I babble on the pebbles.*

*With many a curve my banks I fret
By many a field and fallow,
And many a fairy foreland set
With willow-weed and mallow.*

*I chatter, charter, as I flow
To join the brimming river,
For men may come and men may go,
But I go on ever.*

*And I add, for NPP and NDC may come and go, but Ghana goes
on forever as a country.*

*I wind about, and in and out,
With here a blossom sailing
And here and there a lusty trout
And here and there a grayling,*

*And if I may substitute Tilapia for the trout that will be more
meaningful*

*And here and there a foamy-flake
Upon me, as I travel
With many a silvery waterbreak
Above the golden gravel,*

*And draw them all along, and flow
To join the brimming river,
For men may come and men may go,
But I go on for ever.*

*And I add that individual political giants may come and go,
but we as citizens of Ghana continue with our lives*

*I steal by lawns and grassy plot,
I slide by hazel covers;
I move the sweet forget-me-nots
That grow for happy lovers.*

*I slip, I slide, I groom, I glance,
Among my skimming swallows;
I make the netted sunbean dance
Against my sandy shallows.*

*I murmur under moon and stars
In brambly wildernesses;
I linger by my shingly bars;*

*I loiter round my cresses;
And out again I curve and flow
To join the brimming river,
For men may come and men may go,
But I go on for ever.*

*And I add that as Nkrumah, Busia, Limann, Rawlings,
Kufuor and Mills have all come and gone, but we as
Ghanaians will go on forever*

*It is a happy thought that the brook in our context, the Volta goes
on for ever: but we come and go."*

In this respect, I will liken the river in the poem to the Volta and other rivers and streams mentioned supra. The Volta flows from the North by different tributaries until it is dammed at Akosombo.

Thereafter it flows swiftly through to another Dam at Kpong and flows thereafter through the turbines to the dry savanna lands through Adidome, Sogakope until it enters into the sea at the estuary at Ada.

Is it not a joy to realise that whilst the Volta flows into the sea every second and in the process loses its identity, the phenomenon of its flowing down through its tributaries in to the sea goes on forever.

I will therefore entreat all my countrymen and women to bear this happy thought about the brook, which goes on forever, but we the

players, i.e. those of us who benefit from the brook we come and go. Life must definitely continue to go on forever despite the reverses we suffer one way or the other.

GOD BLESS GHANA.

(SGD) J. V. M. DOTSE

JUSTICE OF THE SUPREME COURT