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POLICY BRIEF: Electoral Justice in Liberia

Prepared by: The Center for Democratic Governance in partnership with the West Africa Democracy Solidarity Network (WADEMOS)

INTRODUCTION:

This policy brief, which focuses on electoral justice and its implications on the adjudication of electoral petitions was commissioned by the Center for Democratic Governance (CDG). The brief highlights the standards set by the Supreme Court in adjudicating disputes that arise from the conduct of an election in Liberia, identifies challenges and proposes recommendations on how to address them.

Objective:

The primary objective of this brief is to inform and engage policy makers and help to structure advocacy and actions aimed at electoral justice reform.

Background:

In a participatory democracy, electoral justice plays an essential role in stabilizing political systems, contributing to adherence to the rule of law and consolidating peace and democratic governance. With elections in most African countries being contested and marred by allegations of fraud and administrative irregularities, electoral justice will continue to be a cardinal element in contributing to democratic development through the conduct of credible and fair election based on a set of established rules and procedures in keeping with the legal framework.

While some political actors in Africa opt for demonstrations and political rallies as a means to express their grievances related to contested election results, which sometimes result to violence, there have been recent experiences of others resorting to the legal process to seek justice in relation to allegations of electoral fraud and irregularities.¹ There were also legal challenges to the recently conducted presidential elections in Nigeria and Ghana. The results of the Kenya presidential elections held in August 2022 were challenged in court.²

Key Messages:

Overall, elections results will continue to be contested so to reduce the risk of electoral violence, the court must be perceived as being neutral and impartial.

Cases related to electoral justice are not normal civil cases so the standard of evidence that is required for the adjudication of civil matters should not be the same applied to electoral petitions.

Judicial officers handling electoral petitions need to be trained in electoral procedures around counting, tallying, and transmission of election results.

Lawyers are not usually aware of electoral management procedures and some do not familiar with the standards set by the courts in handling election matters and may ill-advise their clients.

¹ <https://www.aljazeera.com/opinions/2017/9/2/why-did-kenyas-supreme-court-annul-the-elections> and <https://malawilii.org/akn/mw/judgment/mwsc/2020/1/eng@2020-05-08/source.pdf>

² <https://www.reuters.com/world/africa/kenyas-odinga-challenge-presidential-poll-result-court-today-lawyer-2022-08-22/#:~:text=a%20later%20date,->

While Liberia has conducted four (4) presidential and legislative elections since the end of its fourteen years of civil unrest (2005, 2011, 2017, 2023), the outcome of the 2017 presidential election results were legally challenged. This was the first time in the conduct of these elections, that a presidential candidate sought a legal means to overturn the results based on allegations of fraud and irregularities.³ The opinion of the Supreme Court on this matter set the legal standards and benchmarks for electoral justice in Liberia. The standards set from this case were applied in the resolution of other electoral petitions during the conduct of the 2020 Special Senatorial Elections and the adjudication of electoral disputes related to the conduct of the 2023 legislative elections.⁴

Legal Context for Electoral Justice:

In Liberia, the legal framework to respond to electoral justice related to the credibility of the election's results is grounded in four instruments.⁵ This legal framework is operationalized using a three-tier model of adjudicating electoral grievances: Hearing Officer (HO), Board of Commissioners (BoC), and Supreme Court (SC). A determination from the HO can be appealed to the BoC and a determination by the BoC can be appealed to the SC.

In keeping with Article 83 c of the Liberian Constitution, the adjudication of electoral petitions starts with the NEC with the right to appeal to the Supreme Court. Complaints arising from the conduct of an election that questions the credibility of the results and how such complaints can be filed are informed by Chapter six of the NEL. Any party or candidate who has justifiable reasons to believe that the elections were not impartially conducted shall have the right to file a complaint with the NEC no later than seven (7) days after the pronouncement of the results.⁶

While the hearings at the level of the HO and BoC should be both an administrative proceeding and a fact-finding exercise, lawyers representing party litigants apply the strict rules of the civil procedure law in defending their clients. This has resulted to the application of unnecessary legal technicalities which run contrary to the logic of an administrative proceeding to gather all relevant facts to make a determination of an electoral complaint. At the level of the SC, the proceeding follows the civil procedure law and its standards of burden of proof and standard of proof. These are the same standards that are applied in other common law jurisdictions in dealing with electoral justice.

ISSUE: Whether or not the adjudication of electoral petitions should adhere strictly to the civil procedure law and principles of the burden and standard of proof?

Holding: No

Discussion:

The adjudication of electoral petitions is grounded in two core principles of civil procedure law: burden and standard of proof. On the burden of proof, the primary tenet of the law of evidence is that the person who makes the allegation must demonstrate proof. Applying this principle to electoral justice, the onus is therefore on the petitioner to prove electoral irregularity or fraud. However, 'once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election...then the evidentiary burden shifts to the respondent... to adduce evidence

,THE%20DISPUTE,the%20vote%20against%20Odinga's%2048.5%25.&text=Public%20confusion%20reigned%20over%20the,80%25%20of%20the%20vote%20counted.

³ Liberty Party Versus National Elections Commission

⁴ The 2023 elections were both for the presidential and legislative elections but there was no legal challenge to the presidential election.

⁵ Art. 83 c of the Liberian Constitution, Chapter 6 of the NEL on Contested Results, Regulation on Complaints and Appeals and Regulation on Hearing Proceedings.

⁶ Section 6.1 of the NEL

rebutting that assertion'.⁷ In the event where NEC is a respondent, which is the case in overwhelming of the electoral petitions in Liberia, the onus of rebuttal then shifts to the election management body to demonstrate that the election was substantially conducted in compliance with the law and procedures.

Alongside the principle of burden of proof is that of the standard of proof. In ordinary common law practice, the standard of proof in civil matters is based on the balance of probabilities. As compared to criminal matters, this is a lower scale as criminal matters require proof beyond reasonable doubt. There is an emerging controversy on whether the standard in election petitions should be a civil or criminal standard. This contention is based on the fact that most of the electoral petitions are quasi-criminal allegations of fraud which has a criminal implication.

Notwithstanding, allegations about violations of the electoral laws are civil and as such proof would ordinarily require the lower (civil) standard of proof. Inherently linked to this standard is the doctrine of substantial effect. The basic legal logic underpinning this doctrine is that the proof of fraud and irregularities must be substantial to the extent that it has an impact on the result of an election. Nonetheless, there is an emerging view among election observers that an election outcome may be adversely affected if the conduct of an election does not comply with the procedures and laws related to the administration of an election. This principle supports procedural democracy and advances the view that if procedures and laws are not followed the outcome may not reflect the will of the people and therefore in the adjudication of electoral petitions, courts should consider striking a balance between the doctrines of "substantial effect" and procedural compliance of the election guideline, regulations and laws in the conduct of an election.

Standards and benchmarks set by the Supreme Court of Liberia:

Though the Supreme Court ruled on a couple of electoral related petitions during the conduct of the 2005 presidential and legislative elections, its 2017 opinion on the Liberty Party (LP) versus NEC case with CDC as joiner to the suit is a precedent for the adjudication of electoral disputes. The LP filed a 38-count complaint with the alleging that the elections were conducted not in compliance with the Constitution, NEL and regulations governing the conduct of the elections and that the process was tainted with gross irregularities and fraud. The LP challenged the results and called on the NEC to cancel the results and to organize a fresh election.

Even though the NEL does not specifically define electoral fraud, Section 10.1a states that influencing or attempting to influence the results of any election including the trucking of voters constitutes an electoral offense categorized as an electoral malfeasance. While there is no widely acceptable definition of electoral fraud it is generally defined as an intentional and illegal action aimed at changing, influencing and forcing the results of an election by either depressing or increasing the vote share of a particular candidate.⁸ Some forms of electoral fraud include intimidation, vote buying, ballot stuffing, and altering of election results. On the other hand, election irregularities are acts by election workers that are not in compliance with acceptable procedures in the administration of an election.

In its ruling of the case mentioned above, the SC opined that there were irregularities during of the 2017 elections but that they were not "egregious" enough to warrant the conduct of a fresh election. In other words, the evidence was not substantial enough to warrant the conduct of a new election. The Court further stated that complaining parties must show that violations were of such high a magnitude that it altered or could have altered the results of the elections. The evidence must show that the electoral violations impacted the final results in such manner that if not committed the results would have been different or that the positions of the parties would have changed, as for example, from first position to second position or from second position to third position.

⁷ The Supreme Court of Kenya in the Raila Odinga case of 2017, paragraph 133.

⁸ <https://www.polyas.com/election-glossary/election-fraud>

The Court further opined that for there to be such massive turn around in the entire electoral process, political parties challenging the results based on irregularities are under a legal obligation to show that these irregularities occurred not just at a few isolated centers but that they occurred at most if not all of the polling centers. As above, the Court did not set the threshold on the number of polling places that would constitute most of the polling places to nullify an election result because of irregularity.

This was an example of the application of the principle of preponderance of evidence as a standard of proof. However, the Court did not qualify the level of substantial evidence that is required for irregularity to be proven to warrant the nullification of an entire election results. Maybe if the Court would have taken into account the failure to adhere to set procedures in the conduct of the elections and how non-compliance with election procedures can equally affect the outcome of the results and which can lead to irregularities, the opinion could have been different.

Conclusion:

In 2023, then incumbent President George Weah conceded defeat to his rival former Vice President Joseph Boakai. This was unusual for many political leaders of Africa and his concession contributed to a peaceful political transition from one democratically elected president to another thereby deepening the country's democracy. While this was a positive development, the region has also witnessed elections results that were highly contested and aggrieved parties sought redress using the judicial system. It is more and more likely that most election disputes will end up at the courts in pursue of electoral justice.

Electoral cases are not the same as the normal civil cases and therefore the adjudication of electoral petitions should not be a strict adherence to the principles of civil procedure law that are used in most common law jurisdictions. There needs to be a striking balance between substantial evidence and adherence to procedural democracy which calls for compliance with procedures and rules in the conduct of elections because non-compliance to set procedures has an adverse effect on the outcome of an election. To focus too much on the doctrine of substantial evidence serves as an incentive for the election administrators to not pay keen attention in ensuring that the conduct of any election should be in accordance with acceptable procedures.

Recommendations: The following recommendations are proposed for consideration to improve electoral justice:

To NEC:

- That in addition to trainings provided on the NEL and procedures for adjudicating electoral petitions, Electoral Magistrates and Hearing Officers also be educated on the Supreme Court's opinions of 2017, 2020 Special Senatorial Elections and the 2023 elections.

To national and international CSOs:

- That the legal team of political parties and independent candidates be provided legal education training on the Supreme Court's opinions on the adjudication of electoral petitions.

To National Legislature:

- That the current civil procedure law that is used to adjudicate electoral petitions be modified to be responsive to the special needs of adjudicating electoral disputes which are slightly different from the usual civil matters.