

**A Mini Thesis Submitted in Fulfilment  
of the Requirements for the Degree of  
Master of Administration  
Political Studies**

**Obstacles to Universal Voter Access?  
The Impact of the 2013 Tlokwe Municipal  
By-Elections and Related Court Decisions  
on Voter Access in South Africa**

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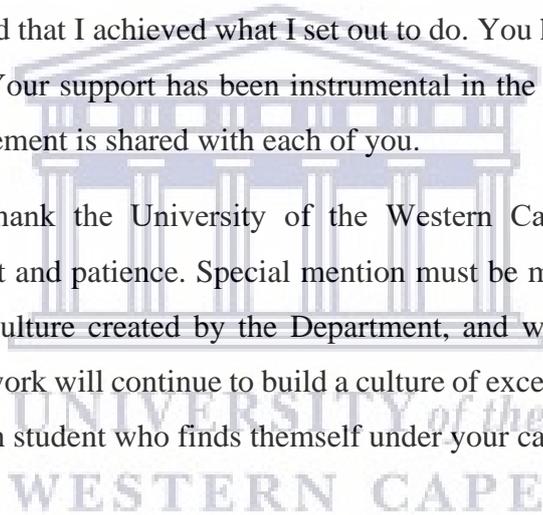
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## **Abstract**

This thesis provides an in-depth explorative case study of the relationship between electoral management and civil rights, using the 2013 Tlokwe By-Elections in South Africa as a case study. The central question in this thesis was: what are the implications of the Tlokwe Ruling on South Africa's electoral democracy? This topic is extremely important to the field of democracy and elections, as electoral processes become ever more essential in allowing citizens to access free and fair elections. Without the ability to access free and fair elections, the power of citizens to hold leaders accountable is diminished. The study used the framework provided by Diamond and Morlino on the quality of democracy because it contains useful normative values of a democracy and assisted in providing a lens by which to view and analyse elections in a democratic regime. Mozaffar and Schedler's framework on electoral governance assisted this study in identifying the key components of electoral management. Both frameworks suggest a cooperative model of how to conduct electoral management. With the use of these frameworks, this thesis presents an exploration of how electoral activity surrounding the incorrect input of data on the Voters' Roll - as a tool for free and fair elections - impacts the democratic civil rights of citizens. In this thesis I argue that electoral processes, such as a Voters' Roll, allow for access to the values that underpin a democracy. This study shows that Electoral Management Bodies (EMBs) play a central role in securing and enhancing access to democratic civil rights, through elections. Additionally, the environment an EMB creates is critically important to ensure that citizens can hold democratically elected officials accountable. Through an analysis of the Tlokwe case, this research shows that rulemaking, implementation and adjudication are interdependent functions of electoral governance and that the breakdown of just one of these functions has substantial implications for democratic governance.

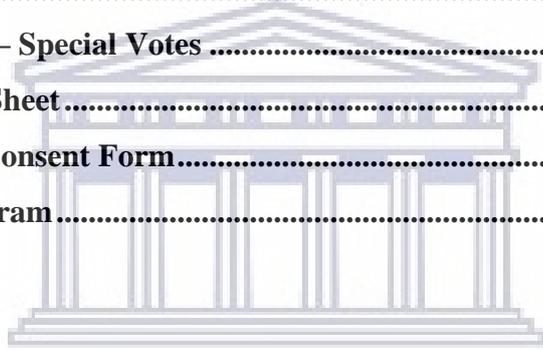
**Key Words:** Electoral Management Bodies, democracy, elections, Voters' Roll, free and fair, electoral processes, accountability, civil rights

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# CHAPTER ONE: INTRODUCTION

## 1.1 Introduction

In 2015, the Constitutional Court of South Africa ruled that the By-Elections conducted in Tlokwe<sup>1</sup> in 2013 were not free and fair. This ruling came as a result of nearly three years of protest by independent candidates, who argued that voters were being incorrectly registered on the common Voters' Roll for eligibility to vote in this district. The Constitutional Court found - through an investigation conducted by the Independent Electoral Commission (IEC) - that these claims were indeed true. The judgment by the Constitutional Court, being a primary source of information, highlighted numerous flaws in the electoral process, which impacted<sup>2</sup> South Africa's universal democratic civil rights.

On the cusp of the 2016 national local government elections, the Independent Electoral Commission (IEC) revealed that around sixty-six (66) percent of registered voters had incomplete addresses on the Voters' Roll. This disclosure, in light of the previous year's ruling, of the 2013 Tlokwe by-elections, had several implications on whether the IEC would be able to administer free and fair elections. As a result, the IEC's management of the South African Voters' Roll came under scrutiny, which forced the Constitutional Court to issue a judgement, compelling the IEC to take corrective measures. Further the efforts by the Electoral Management Body (EMB) to ensure addresses on the Voters' Roll, were correctly captured and processed were insufficient and opened this process up to manipulation. This phenomenon emphasised the importance that EMBs play in promoting civil rights. Questions about the extent and role of EMB's play in ensuring free and fair elections provided a scope for possible research to consider.

With the large number of missing information on the voters roll this thesis desired to explore how the electoral democratic civil rights of South Africans are affected by electoral

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<sup>1</sup> The Tlokwe Local Municipality has now been absorbed in to the JB Marks Municipality. The reference to the name Tlokwe remains accurate according to the period which this study examines.

<sup>2</sup> The term "impact" in the title and throughout this study is meant to understand: 1. The action steps needed to ensure elections are free and fair by the IEC, and 2. How stakeholders like the voters, political parties and all candidates are affected by the Constitutional Court's ruling on the (Kham and Others v Electoral Commission and Another, 2015) matter, either negatively or positively.

management systems. This thesis focused on the particulars of the 2016 Tlokwe Local Government By-Elections as a case study, to understand how a Voters Roll may have such wide implications on electoral democracy.

According to the Institute for Security Studies (ISS)<sup>3</sup>, EMBs play an important role in ensuring free and fair elections, through the management of electoral processes. Additionally, courts are also a fundamental defence against electoral irregularities, which impede freeness and fairness. EMBs provide the framework through which voters can exercise their civil rights. Relevant courts assess and make declarations on disputes as to whether any processes constrained ideals of free and fair elections. The purpose of this research is to explore the relationship between electoral management systems and electoral democratic civil rights in South Africa by using the Tlokwe By-Elections as a case study to examine this relationship.

### **1.1.1 The IEC and its Powers in Promoting Democracy in South Africa**

Electoral processes in South Africa are managed by the IEC<sup>4</sup>. One of the roles of the IEC is to ensure that the Voters' Roll is properly managed and updated. Additionally, the IEC is expected to promote the democratic civil rights of all South Africans through the impartial management of electoral processes. The institution is expected to keep a record of the addresses of all voters on the Voters' Roll, for purposes of canvassing, transparency and the freeness and fairness<sup>5</sup> of elections.

According to the Constitution of South Africa<sup>6</sup> (henceforth, the Constitution), the IEC is an institution whose work is vital in supporting democracy. In this research, the role of the IEC in

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<sup>3</sup> (Louw-Vaudran, 2020). For additional literature on the role of electoral management bodies, please see the *Journal of African Elections*, Vol. 9, 2, October 2010; *Journal of Public Administration*, Vol. 48,1, March 2013; and *International Journal of African Renaissance Studies*, Vol. 12,1.

<sup>4</sup> The IEC's mandate, guiding laws and its strategic objectives can be located on its website, which gives additional information about this the role of this organisation.  
<https://www.elections.org.za/pw/Downloads/Documents-Library-Annual-Reports>

<sup>5</sup> The usage of the term "free and fair" has been derived by its appropriateness in the case of (*Kham and Others v Electoral Commission and Another*, 2015, p. 43) . The Constitutional Court determined its applicability to this case upon acknowledging the importance of the term "free and fair elections" under the United Nations Security Council Resolution 435. This study used the Court's definition of free and fair elections so that reference may be made more clearly to the similarities and contrast of the literature to the case study. While there may be many competing definitions of free and fair elections, this research considers the binary under the context of the aforementioned Court judgment and the administrative legal requirements of elections, as set out by the *Electoral Act* (South Africa, and Republic of South Africa, 2000).

<sup>6</sup> South Africa's Constitution is its supreme law, and no other law or action may cause conflict with it (Constitution of the Republic of South Africa, 1996). Chapter 1(c).

promoting democratic civil rights for South Africans is analysed using Tlokwe as the case study. The Constitution, being South Africa's supreme law, recognises that the most important conditions for its democratic elections are freeness and fairness. As a result, the IEC's role does not only rest with the oversight and the declaration of results of elections but also requires that the organisation ensures that elections meet the constitutional expectations of freeness and fairness within its systems.

The IEC has been a trusted partner of the South Africa's democratic regime since 1994. In the 2016 Election Satisfaction Survey Report (ESS)<sup>7</sup>, the IEC held ninety-one (91) percent of voter's confidence for being a trusted Electoral Management Body. In 2021, the preliminary report of the next ESS publication indicated that "of the sampled voter, 9 in 10 indicated that they trusted or strongly trusted the Electoral Commission of South Africa (IEC)"<sup>8</sup>. Overall, these surveys show a high level of consistency in confidence amongst voters for the IEC to execute elections in their best interest. While there may be certain instances where individuals may feel that there is room for improvement, the IEC, in the eyes of voters, generally performs well as an electoral body. In the IEC's 2020 Strategic Report, it demonstrates the importance of its work in supporting South African democratic values as it administers elections to a sum of 26.6 million voters. The large voting population of South Africa is by no means easy to manage and coordinate in short spaces of time and the IEC's ability to reach almost all corners of South Africa is commendable. Furthermore, its work since the first democratic election in 1994 has enhanced the freedom of South Africans through regular democratic elections.

As an institution, the IEC is seen as a guardian of voters' equality and freedom, as its "role is to protect events that are the very foundation of democracy"<sup>9</sup>. The impartiality and autonomy of the IEC are important features in the continued development of democratic civil rights. Should this important institution not practise impartiality or have its independence taken away, electoral processes could arguably deny equal opportunity at the polls for both voters and candidates. For this reason, the Constitution protects the IEC's autonomy and impartiality in Section 181(2) and 181(3), and even imposes a duty on other organs of state to assist in maintaining this. In this research, the operational independence of the IEC is examined in order

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<sup>7</sup> (Human Sciences Research Council, 2016, p. 146).

<sup>8</sup> (Teagle, 2021).

<sup>9</sup> (Murray, 2006, p. 15).

to understand its autonomy in creating processes that allow for free and fair participation of all parties involved in electoral processes.

Countries, nation/s or states that have adopted similar institutional mandates regarding the role of an EMB to ensure elections are free and fair, may encounter problems with these very principles if an EMB were to act partisan or be politically subservient. This would surely mean that an EMB could possess the power to negatively affect participatory civil rights. Additionally, if this is the case, elections may alter levels of accountability over government, even after the polling day. In this research, it is pertinent to explore the interconnected relationship between voters' civil rights, such as accountability, and democracy and establish whether an irregular election could contain the power to influence these principles.

To properly understand these principles, I have drawn on the work of Diamond and Morlino<sup>10</sup>. Their work stresses the importance of accountability in a democracy and specifies that elections are a form of vertical accountability<sup>11</sup>. For Diamond and Morlino, vertical accountability is a necessary condition of democracy and its elections. The oppression of some civil rights in a democracy may not allow for citizens to access other liberties. Their definition of vertical accountability emphasises the importance of the citizenry using elections as a tool when holding a government responsible for its actions. However, this is only guaranteed through elections that are devoid of manipulation and maladministration. The IEC's role in protecting accessibility in elections is that of overseeing non-partisan participation and processes - this forms the fundamental core of its work. In this regard, this research will seek to understand how the denial of accessibility to certain electoral processes in the Tlokwe case study affect democratic universal civil rights.

The intention for South Africa's electoral system to be used as a framework in achieving accountability is outlined in Section 152 of the Constitution of South Africa. If accountability were to be removed from elections, then officials standing for office would have no incentive to guarantee free and fair access to civil rights. This research examines how certain mechanisms in electoral systems work to ensure that voters have access to accountability through elections. While the task of free and fair elections is a clear objective that has been set out, the IEC, like

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<sup>10</sup> (Diamond & Morlino, 2004).

<sup>11</sup> See chapter 2.2 for definition on vertical accountability.

any developing institution, can also be prone to errors, which lead to disputes. In cases where there are disputes or complications regarding the IEC's role in managing electoral processes, relevant courts are able to adjudicate and assist in these matters. This research follows the process of how a dispute that affects civil rights is undertaken and resolved. This research uses the case study of Tlokwe to follow the process and understand how matters relating to civil rights are resolved.

In terms of South Africa's *Electoral Act*<sup>12</sup>, authority over electoral disputes can be settled by the Electoral Court of South Africa. The African Democracy Encyclopaedia Project (EISA)<sup>13</sup> compares the Electoral Court's authority to that of the Supreme Court of Appeal, acknowledging its penultimate authority on electoral related matters – only falling behind the supremacy of the Constitutional Court. Both the Courts provide a necessary service in assisting the IEC to resolve disputes, which ultimately affect South Africa's democratic civil rights. With regards to this, the current research analyses the rationale for certain key decisions made by the Court and seeks to explore its implications on the operational functions of the IEC.

Their expertise in presiding over matters of electoral governance and systems is vital for both the IEC and citizens as an additional non-partisan avenue to resolve disputes. In other words, as much as the IEC designs its processes with the best intentions in mind, the courts offer an additional check and balance in the continuous development of democratic rights. The IEC should not have the power to design and have the final word on disputes relating to it. Considering this observation, this research will consider the vital components of electoral governance and democracy, which are the checks and balances that they are subjected to. For this research, it means having to understand the importance of the ruling by the Constitutional Court in prescribing how the IEC should conduct its elections, as an autonomous body.

Importantly, despite the IEC being an independent body - accountable to legislation and the Judiciary - as an organisation, it does not have the sweeping power to deny any citizen access to voting rights. While the IEC operates under electoral law, as found in the *Electoral Act*<sup>14</sup>, the IEC has a duty to review legislation and propose changes where it feels that it is constrained in

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<sup>12</sup> (Parliament of the Republic of South Africa, 1998, p. 40).

<sup>13</sup> (EISA, 2019).

<sup>14</sup> *Electoral Act* No.73 of 1998.

protecting civil rights<sup>15</sup>. The effectiveness of having courts to provide dispute resolution in elections, allows for this research to make use of factual information where situations have occurred and affected voters' civil rights. The 2013 to 2016 Tlokwe By-Elections highlighted the importance of dispute mechanisms to protect constitutional rights in elections, as the opinions between the IEC and independent candidates could not resolve the fairness of the Voters' Roll and elections. This provides a start for the research: to use the Constitutional Court judgement as a data source to investigate how the process that unfolded in Tlokwe impacted voters' civil rights.

The fundamental importance of the courts in South Africa's electoral democracy is not to interfere with electoral processes, but, rather, to promote the highest degree of access to rights that is possible. The IEC's role as an organisation does not interfere with the political agenda of the government, rather it manages systems that provide a platform for voters to formally elect their government. In other words, the IEC is an institution that links citizens to their constitutional rights through its structured management of elections. Its structured approach to the management of elections, in concurrence with the *Electoral Act*, require the IEC to undertake a number of important tasks when preparing voters for Election Day and during Election Day. In this regard, this research uses an existing model of electoral governance by Mozaffar and Schedler (2002) to understand the significance of each electoral process and the rationale for their placement at specific points in an electoral cycle.

In South African Local Government Elections, the IEC must ensure that voters cast their ballots in the correct province, municipality, district municipality, ward and voting station. To achieve this a Voters' Roll, containing the particulars of voters - including addresses - must be created. The Voters' Roll, once complete, can be used to verify each voters eligibility to vote in a ward. The importance and procedure of compiling a detailed Voters' Roll has been explicitly published in Chapter 2 of the *Local Government: Municipal Electoral Act, 2000*<sup>16</sup>. However,

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<sup>15</sup> The IEC's duty to protect its legal obligations and promote greater political franchise does not leave citizens powerless. For example, independent candidates were prohibited from standing for political office in National and Provincial Elections. The Act permitted only members of political parties to stand for office in National and Provincial Legislatures. This matter was taken on appeal to the Constitutional Court by the New Nation Movement, as potential individual candidates felt that this restriction infringed on their rights as prescribed under the Bill of Rights. The Constitutional Court ruled in their favour and in the interest of protecting their civil rights. What is clear in this example is that citizens and civil society have an all-important mechanism to resolve electoral and constitutional disputes.

<sup>16</sup> (South Africa, and Republic of South Africa, 2000, p. 50).

in Section 7(1-3)<sup>17</sup> the Act makes specific mention of who may vote and under what conditions, which is pertinent to the scope of this research. This section specifically deals with the eligibility of a voter, which requires that he or she only registers in their voting district of ordinary residence. This requirement is unique to Local Government Elections, as the freeness and fairness of elections depend on the IEC's ability to ensure that all registered voters participate in their residential districts and not in one that they do not reside in. If these provisions were to be non-existent, then voters could vote in areas where they do not have a direct interest and elect a ward candidate, or even attempt to cast more than one ballot. The specifics of the abovementioned provisions in the Act are important to show that the IEC has the duty to register voters. Moreover, it also has the power to exercise its discretion as to who is permitted to vote and under what conditions this may occur.

With the aforementioned in mind, this research took into account the intricate relationship between how the Voters' Roll acts a mechanism for ensuring electoral and democratic freeness and fairness in Local Government Elections. Indeed, electoral management systems that seek to promote free and fair elections should also “not exclude citizens from the enjoyment of these rights”<sup>18</sup>. If the aims of South Africa's Constitution and the *Electoral Act* are aligned to the ideals of achieving free and fair elections, then the systems and body that govern elections should make a concerted effort to always ensure that they are accessible. From this point of view, this research explores what potential barriers may limit the rights of voters in fulfilling the requirements of the Voters' Roll. The research will also take into account what limitations on free and fair elections would arise if addresses on the Voters' Roll were not a requirement.

With the IEC holding such an important role in providing access to South African civil rights and where margins of error are so finely distinguished, this study seeks to examine how electoral management affects civil rights in South Africa. Errors within the system of how the Voters' Roll was managed in the Tlokwe Local Government Election can provide the necessary insight for this study, so as to understand the importance of electoral management in supporting democratic civil rights. Understanding the role and powers of the IEC are useful in this research,

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<sup>17</sup> Ibid.

<sup>18</sup> (Mathenjwa, 2017, p. 184).

as they provide insights into the organisation's ability to ensure that voters are able to access free and fair elections.

In this research, the Tlokwe events are useful for providing the contextual insight into how the issue with the Voters' Roll came into question. Additionally, its context provides the rationale for understanding Local Government Elections from which the Voters' Roll and civil rights are analysed. Electoral practice in South Africa dictates that at local government level, a Voters' Roll is a vital component for ensuring that elections are free and fair.

### **1.1.2 Overview of Events in Tlokwe**

In the 2013 Tlokwe Municipal By-Elections, problems were found in the preparation of the Voters' Roll. This escalated into a matter of major contention, with issues regarding its accuracy and availability being highlighted. South African Local Government Elections rely on the Voters' Roll for data that is used to ensure elections are free and fair. The data contained within the Voters' Roll is used for the purposes of ensuring that only registered voters participate in the areas in which they reside. For candidates, it allows them the opportunity to canvass as part of electoral activities. Its accuracy and availability are important so that all candidates have an equal opportunity to approach voters for support.

This matter was not able to be resolved by way of candidates approaching the electoral body to revise the process. Instead, this matter went on to judicial review, eventually making its way to South Africa's highest Court. The Court's relief on this matter was particularly interesting, as it highlighted a number of problematic areas with regard to the relationship between the Voters' Roll, access to civil rights and the way in which the process was being managed.

Even after this specific case was resolved, the IEC found it difficult to meet the conditions of the Court's judgment, which forced the suspension of the judgment but compelled the IEC to complete tasks over an 18-month period, in order to ensure that voters' rights were maintained.

The obvious issues with the Voters' Roll brought about questions regarding electoral management and how this mechanism affected democratic civil rights.

## **1.2 Research Rationale**

The aim of this research is to assess the impact of the Tlokwe case study on electoral democracy in South Africa. The data provided by the Constitutional Court, regarding the issues with the

Voters' Roll in Local Government Elections, highlighted a fundamental problem with the management of the Voters' Roll. The lack of addresses on the Voters' Roll highlighted a breakdown in electoral systems and governance. The inadequate attention by the EMB in ensuring addresses on the Voters' Roll were correctly captured and processed, opened it up to manipulation and electoral fraud. The Voters' Roll being left open to exposure in this way, negatively impacted the civil rights of voters and candidates to free and fair elections. As the Court established, free and fair elections in a democracy must apply universally to all types of electoral systems. As a result, an exploration of the local government system must examine how it intends to guarantee free and fair elections. This research interrogates the issues raised by the Voters' Roll situation in Tlokwe, to understand how the Voters Roll affected voters and candidates' civil rights through the lens of electoral governance.

If elections involve multiple dimensions of copious activities, there may be errors or processes that hinder the realisation of political equality. This research used Mozzafar and Schedler's<sup>19</sup> framework to individually examine electoral activities in part or as singular processes. Additionally, this research systematically took into account the processes - from the design of legislation, to the implementation of rules, and, finally, adjudication over the Tlokwe case study. The case study reveals that the Voters' Roll is a core component of achieving electoral democracy in South African Local Government Elections. In elections in South Africa, the Voters' Roll provides information to candidates for canvassing purposes and to allow voters to elect parties, candidates and independent candidates for local governance matters. As most democracies rely on EMBs to administer elections, scrutiny over the EMB's role to ensure equal liberty must be evaluated. The IEC, in the context of the case study, is the guarantor of electoral franchise for voters and South Africa as a state. As a result, data from this institution is extremely important in understanding the empirical challenges in delivering upon its mandated task. While the Court stressed the failures of the IEC in ensuring that the Voters' Roll's integrity had been upheld, there have been a number of challenges faced by the IEC in obtaining so many addresses for the Voters' Roll. This is an important aspect to bear in mind for this research, as it considers the socio and economic challenges in South Africa and their effect on the IEC's ability to maintain electoral integrity.

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<sup>19</sup> (Mozzafar & Schedler, 2002).

### 1.2.1 Research Question

Given the complexity of the election process, and the need to ensure democratic civil rights for all citizens through the management of those processes, then a ruling by a court on this will have implications on its functions. To unpack these issues, the following research question was developed:

What are the implications of the Tlokwe Ruling on South Africa's electoral democracy?

### 1.3 Research Design and Methodology

According to Noor<sup>20</sup>, “the choice of which method to employ is dependent upon the nature of the research problem”. In other words, it is important to develop a research design to identify the most appropriate method for gathering data to address the research question. From this standpoint, this research has limited its scope to the exploration of a specific case. The need to outline the context is important because the electoral management process has a vast array of multiple activities, which differ in different contexts. This research will explore a case where the management of the Voters' Roll in a Local Government Election in South Africa caused conflict with the nation's supreme civil rights.

#### 1.3.1 Case Study

Bill Gillham<sup>21</sup> identifies that a case study may contain various components, such as an individual, a group, an institution, a community or a profession. His description of a case study is useful for this research, concerning the need to identify only relevant stakeholders and actors. This is important, as elections involve a multitude of stakeholders at different points. The use of a case study has assisted this research in recognising those components that are most germane to the study of how an electoral process (the completion and availability of the Voters' Roll) affected South Africa's democratic civil rights.

Dawson and Algozzine (2017) have recognised the strengths of the case study in allowing for research to take the necessary steps in its design to closely examine a particular phenomenon. The useful nature of a case study design for this research showed its merit, as it allowed the

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<sup>20</sup> (Noor, 2008, p. 1602).

<sup>21</sup> (Gillham, 2000, p. 1).

researcher to intensively analyse “a single unit or system bounded by space and time”<sup>22</sup>. In this study, the Voters’ Roll contained in the electoral processes was the system that was closely examined, the specific time was at a Local Government By-Election and its ramifications for further upcoming 2016 Municipal Elections, specifically contained within the context of South Africa and democratic elections.

The declaration by the Constitutional Court<sup>23</sup> held that an incomplete Voters’ Roll negatively affected the IEC’s ability to hold free and fair elections. This requires that this research consider exploring what chain of events caused this issue to affect the values of electoral democracy. Moreover, what was the experience or challenge by the relevant stakeholders in this matter.

According to Yin<sup>24</sup>, there are three main categories of a case study, namely, explanatory, descriptive and exploratory. For this research, the exploratory method was selected. The exploratory method allows for a theoretical framework to be used, while considering the country’s contextual and regulatory framework. This is important for this study, as the research problem draws on various sections of legislation in establishing the duty of the EMB and considering what values are consistent with a democracy. The need for this research to analyse the data “in a great deal of depth”<sup>25</sup> serves to systematically explore the procedural electoral operations in the case study breakdown.

This exploratory approach benefits the study, as it allows for an in-depth understanding of the data, which brings to light the root causes of issues with the Voters’ Roll in the Tlokwe By-Elections. For example, this study probed the management of the Voters’ Roll, which demonstrated the scenario whereby voters were able to register in areas that they did not reside in. Once the root cause was established, it facilitated a more complete understanding as to how these issues affected democratic civil rights.

The in-depth exploration of the Tlokwe case study drew on the need to use qualitative data to interpret the root causes of how electoral management affected democratic civil rights. When a study such as this requires the in-depth investigation of data that deals with accounts,

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<sup>22</sup> (Dawson R. Hancock, 2017, p. 10).

<sup>23</sup> (Kham and Others v Electoral Commission and Another, 2015).

<sup>24</sup> (Yin, 1984).

<sup>25</sup> (Rule & John, 2011, p. 7).

descriptive analysis and the exploration of a specific case, the most applicable type of data would be qualitative data.

### **1.3.2 Qualitative Research**

Bill Gillham<sup>26</sup> indicates that qualitative research involves the close examination, description and interpretation of a phenomena. In other words, the data gathered will provide an account of the issue that was experienced. As the Tlokwe case study dealt with the experience of individual candidates, the facts presented by the Constitutional Court and the IEC represent an insight into the events that unfolded. In this case, a pure representation of numbers regarding incorrect registered voters may not describe the effect it had on individual candidates' ability to canvass votes. However, their registered dispute with the Court claimed electoral irregularities, which indicated to this researcher that data would be obtained in the qualitative form in order to explore the research problem.

The qualitative data that was gathered to answer the research question was part of the overall methodology of a case study that explored electoral management and its effect on democratic civil rights. The study relied on the Constitutional Court judgment as a data source. The Constitutional Court, in its judgment<sup>27</sup>, considered, amongst others, issues of freeness and fairness. Its consideration was not based on numerical data but rather, an in-depth account of what mechanisms work in an electoral democracy in achieving universal voter rights.

### **1.3.3 Gaining the IEC Perspective**

When dealing with the findings of the Court, it is sufficient to make use of the publicly available Court judgment, as it is the final determination of this Court. Moreover, the Constitutional Court documents were the favoured source of information regarding the Court findings, as the Constitutional Court is the most supreme court, having the final verdict on the matter. It is important to use data that does not contain any obvious bias, so as to avoid the data influencing the conclusion of the study.

While respecting the judgment of the apex Court (Constitutional Court) of South Africa, perspectives of the IEC needed to be considered, as the organisation was a direct stakeholder in

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<sup>26</sup> (Gillham, 2000, p. 1).

<sup>27</sup> (Kham and Others v Electoral Commission and Another, 2015, p. 42).

this matter. As the IEC was the first respondent in this matter, their formal views and interpretations were captured in the judgment by the Constitutional Court. However, their formal submission may not have fully captured the experiences and/or difficulties faced by IEC officials when administering these Local Government Elections. Accordingly, the study was required to consider the perspectives of the IEC. To avoid solely relying on secondary data, an interview was conducted with a senior IEC official who would be able to provide a valuable and holistic perspective from the IEC. To gather this insight, I contacted a Provincial Head of the IEC's operations<sup>28</sup>. The importance of gaining insight from an official with such a high rank was beneficial, as it helped to provide a full picture from the perspective of the IEC. This individual would be privileged enough to be aware of most facts.

The choice of person/s to interview was important for this study, as it required perspectives of senior officials of the IEC to provide accounts that were truthful, non-partisan to a particular group of society, and fair. As the IEC has elected to respect the Constitutional Court's judgment and relief in this matter, a semi-structured interview was preferred. The semi-structured approach afforded the study the opportunity to seek responses on specific questions relating to the task. Furthermore, it allowed for the interviewee to prepare and reflect on his or her response to the question and provide a contextual discussion around the issues.

#### **1.3.4 Data Sources**

This study made use of large amounts of data available from the internet and was largely desktop-based. The data deals with country-wide issues; it is not necessary to visit archives or information storage facilities physically. The information surrounding this issue deals with the Constitutional Court and the IEC. Both these institutions are public institutions and publicly accessible. Any information that is not available on their respective websites, can be requested via email from their relative information and communication departments.

The documentary sources that provide much of the context and issues associated with the case of the incomplete Voters' Roll and its point of departure, are the Constitutional Court

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<sup>28</sup> The Provincial Head's identity has been protected and no further information has been given that may potentially reveal who he/she is.

judgments. Documentary sources are not limited to the Court judgment in this case study, as documentary sources may include letters, newspaper articles, official documents and books<sup>29</sup>.

The need to analyse the judgment by the Constitutional Court is due to the fact that this matter became a national concern leading up to the 2016 Local Government Elections. The Court initially ruled on this matter on the 30th of November 2015 and declared the 2013 Tlokwe By-Elections invalid. On the 14th of June 2016, the Court suspended the declaration of invalidity due to IEC being unable to provide a complete Voters' Roll in accordance with the Court's ruling. In each, the Court explains the need for a complete Voters' Roll, with reference to the Constitution of South Africa. As this is a pertinent and underlying theme that provides reference to the research question, these rulings by the Court are extremely important to establish the basis of the case and its relation to the principles that guide the foundation of the Constitution and the local government system.

Whilst these documents are very important to this research, they are not the only documents that this study must consider in order to establish how the IEC is guided in its development of strategies to support the Constitutional Court, and other relative government frameworks, such as the *Municipal Electoral Act 27 of 2000*. To assist in narrowing the strategies that are specifically relevant for compliance with the Constitutional Court's rulings in both November 2015 and June 2016 around the issues of the Voters' Roll, this study must be guided by the progress reports that the IEC was compelled by the Court to produce.

### **1.3.5 Limitations**

This paper seeks to understand the qualitative issues regarding the electoral procedure that deals with the Voters' Roll. Due to the scope of the study, it did not concern itself with quantitative data. Quantitative data for the Tlokwe case study would determine the number of voters who were not legally permitted to vote in wards that they did not usually reside in. Furthermore, quantitative data may also uncover the extent of this problem nationally for the IEC. This study does not seek to determine the election results if voters were registered in their correct wards, therefore qualitative data for this purpose would arguably not limit the study in understanding

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<sup>29</sup> (Kelley, 1999, p. 316).

the research question. These would be useful aspects to consider, should further research be conducted on the issue.

Yin<sup>30</sup> argues that another limitation would involve the lack of ability to generalise, given the low number of subjects used. For some studies that may be the case, however, this particular study needs to understand how a contextual electoral management issue, which is designed for the purposes of South African electoral democracy, affected voter civil rights.

### **1.3.5.1 Selective Interviewing**

This inquiry sought to unpack what was presented as factual contained in the Constitutional Court's judgment. The scope of the research therefore did not require interviews. Nevertheless, gaining the perspective of the IEC was deemed useful to understand their position and a perspective of the events that took place.

The main respondents in this judgment<sup>31</sup> were the IEC and independent candidates (first applicant being Mr X.D. Kham). As the matter was heard before the Constitutional Court before the time of undertaking this research, all relevant parties were given an opportunity to present their accounts of this matter.

The purpose of an interview for this research was to garner the perspective from the IEC as to how they would go about complying with the Court's judgment<sup>32</sup> and to understand some of the challenges they would and did face<sup>33</sup>. Extending interviews further down the organogram might have yielded additional benefit for the research but was beyond the scope of the study. Additionally, employees of the IEC who do not have the authority to discuss this issue may have been unwilling to engage, or may have provided the same explanation that a senior member would have given. Furthermore, the scope of this research sought to primarily apply the theoretical principles of democratic elections to the case study of Tlokwe. The perspective of the IEC was needed so as to understand why it has faced some difficulty in performing tasks

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<sup>30</sup> (Yin, 1984).

<sup>31</sup> (Kham and Others v Electoral Commission and Another, 2015).

<sup>32</sup> Ibid.

<sup>33</sup> Please see chapter 5.2 for this discussion.

that it is duty-bound to complete under the *Municipal Electoral Act* of 2000 and the order of the Constitutional Court of South Africa.

### **1.3.6 Ethical Considerations for the Participant**

The participant of the interview in this study was a senior member of the IEC. His or her identity will not be revealed, in accordance with the confidentiality clause contained in *Appendix 3*.

His or her role within the organisation has purposely not been reflected upon or alluded to, in order to keep the identity of this individual confidential.

## **1.4 Summary of Chapters**

### **1.4.1 Chapter One**

This chapter has outlined how the 2013 Tlokwe Local Government Elections presented a number of complex and unique issues for Local Government Elections and South Africa's democratic civil rights. One of the key problems was the management of the Voters' Roll, where issues of availability and accuracy of data used to populate it affected the access to civil rights. This fact was supported when the Constitutional Court investigated the merits of the claims by electoral candidates. Their claims indicated that elections were in direct contravention of their democratic rights civil rights to free and fair elections, in accordance with the country's relevant legislative scripts.

The IEC's role – as an EMB in the Tlokwe By-Elections – was to ensure that all elections are free and fair, where reasonable. This research is concerned with exploring how electoral management may negatively impact the access to democratic civil rights. In order to explore just how the management of elections affected democratic civil rights, the 2013 Tlokwe Local Government By-Election has been used as a case study for this research. Using the Tlokwe By-Election has provided this research with a context by which to compare the connected nature of democratic electoral management in providing access to civil rights.

## 1.4.2 Chapter Two

This chapter provides a chronological schematic view of the events surrounding the Tlokwe By-Elections. In this chapter, it is important to fully understand the processes that occurred in sequence and how they came to affect democratic civil rights. This chapter reveals the role of different institutions, such as the Constitutional Court and the IEC. These key institutions play central roles in serving civil rights beyond elections. In chapter four - when the framework is discussed - it is clear that these organisations are universally important to all democratic electoral processes.

The chapter shows that there is sufficient evidence provided by the Constitutional Court that the 2013 Tlokwe By-Elections were not conducted freely and fairly through the use of the Voters' Roll. Moreover, it highlights a larger problem for when Local Government Elections are conducted nationally and the Voters' Roll - having been in that state - could cause widespread conflict for universal suffrage.

## 1.4.3 Chapter Three

To assess the need for free and fair elections, this chapter considers the values that underpin a democratic regime. This approach is important to clarify the most relevant values that need to support democratic processes, such as elections.

This chapter starts by considering the most important theories of democracy and makes a case for each, to rationalise the need for values to be present in democratic processes. After I show the relevant theories of democracy, I examine which values should be considered important for a democratic regime. In this chapter I make use of Diamond and Morlino's<sup>34</sup> framework for a quality democracy. This framework offers valuable insight as to what provides quality of democracy. The adaption of this framework is useful for this research in two important ways. The first is that it provides a description of each value, and what the intention of each is in a democracy. Secondly, it assists in identifying common values linked to democracy and rationalises the importance of its presence.

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<sup>34</sup> (Diamond & Morlino, 2004).

#### **1.4.4 Chapter Four**

This chapter considers a framework that explores the required processes of democratic elections. The framework presented by Mozaffar and Schedler<sup>35</sup> presents substantial scope to explore which components are important for democratic elections and where in the electoral cycle they occur. Additionally, it highlights the prescribed tasks and behaviour of an electoral management body in administering elections.

#### **1.4.5 Chapter Five**

From the data collected and the insights from the framework that discusses democratic normative values and electoral activities, this chapter interprets the data accordingly. Key evidence - provided by the Constitutional Court and a senior member of the IEC - presents challenges specifically related to this case study. The analysis in this chapter considers the specific problems in the Tlokwe By-Elections that pertain to electoral management.

In a systematic way, this section uses the framework by Mozaffar and Schedler<sup>36</sup> to analyse each stage of the electoral process. In adopting this method, this study is able to explore the problems of electoral management that occurred at each level in the Tlokwe By-Elections.

#### **1.4.6 Chapter Six**

This concluding chapter draws conclusions from the Tlokwe case, in relation to electoral framework.

The chapter concludes that the ruling by the Constitutional Court had implications for South Africa's electoral democracy. Consequently, the IEC needed to respond to the judgment by the Constitutional Court over irregularities pertaining to the Voters' Roll. Not only was this problem unique to the Tlokwe Municipality but it had far-reaching implications for national Local Government Elections. After close analysis of the framework, it is evident that there were, in fact, problems with the electoral management of the Tlokwe By-Elections. These problems were extensive enough to effect voters' and candidates' democratic civil rights.

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<sup>35</sup> (Mozaffar & Schedler, 2002).

<sup>36</sup> (Mozaffar & Schedler, 2002).

Further conclusions highlight the importance of electoral management with regard to rule implementation, as there were negligible issues with legislation. Even though there is responsibility placed on civil society and political parties, the accountability for elections being conducted in a free and fair way rests with the IEC.



## **CHAPTER TWO: CONTEXT OF THE TLOKWE BY-ELECTIONS**

### **2.1 Introduction**

As discussed in the methodology section, this study makes use of a case study, which helps this researcher to understand how the local government Voters' Roll for this specific By-Election presented an issue regarding the electoral procedure. The applicability of this issue may have occurred in other areas; however, it is this specific case<sup>37</sup> that led to the Constitutional Court making a judgment and offering relief over the problem with the Voters' Roll. It is important for the upcoming discussion to detail the events of the Tlokwe By-Elections in order to sufficiently provide an understanding of how an electoral process became a matter of contention for the candidates and the wider rights of voters. This matter is important, as it was not mere administrative oversight, it severely affected democratic civil rights. Consequently, it is important for this study to consider how the issue with the Voters' Roll first came to the attention of the IEC, then the Electoral and Constitutional Courts, why it occurred and what happened thereafter.

It is beneficial to understand the events of Tlokwe, as the entire body of research refers to very specific activities that had implications on access to civil rights. These activities are then analysed against the framework. For example, in chapter six the discussion is concerned with how the Voters' Roll affected the democratic rights of voters. Moreover, not only were the rights of voters affected, but an analysis of how the candidates' rights were impacted was taken into account.

#### **2.1.1 Complaint by Independent Candidates Regarding the Tlokwe By-Elections**

After the 18<sup>th</sup> of August 2013 Local Government By-Elections in Tlokwe, problems of accuracy of the Voters' Roll were raised with the IEC by independent candidates. Unfortunately, the IEC dismissed these complaints and continued with the following round of By-Elections. On the 23<sup>rd</sup> of October, objections by multiple candidates from various wards, were lodged with the IEC concerning the registration of voters. One of the candidates, who would later go on to dispute the matter in the Constitutional Court, Mr X.D. Kham, objected to the outcome of the elections. His objection to the IEC was on the basis that some voters had been allowed to

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<sup>37</sup> (Kham and Others v Electoral Commission and Another, 2015).

register in wards that they did not reside in. The candidate indicated that “voters had been registered and permitted to vote in ward 18, even though they were not entitled to do so, on the basis that they were not a resident in the ward when they registered”<sup>38</sup>. The incorrect registration of voters at the outset highlights a problem with part of the electoral system that uses voters addresses as a means of verification to determine their eligibility to vote in a specific voting district. Furthermore, it limits the ability for all voters to be fairly registered within the ward in which they reside. The ability to incorrectly register voters meant that candidates, who were affiliated to political parties, could draw on their supporters that resided in other wards to vote improperly. Improper voting in Local Government Elections could ultimately change the outcome of elections and not be a true reflection of the residents in that area. The IEC postponed the By-Elections to allow time for the Voters’ Roll to be given to the candidates. This Voters’ Roll is made available to electoral contestants for purposes of inspection and transparency. This activity is important for transparency for both voters and candidates. These developments are significant in this research because the process of making the Voters’ Roll available beforehand, allows for fairness through transparency.

### **2.1.2 Data Inaccuracy and Provision of the Voters’ Roll**

The failure to produce the Voters’ Roll beforehand primarily hinders the civil rights of candidates to participate in a fairly conducted election. In other words, if candidates cannot inspect the Voters’ Roll, they will be unable to canvass voters for support. Only those who are party-affiliated would be able to access resources, such as registration or membership forms, that may overcome not having access to the Voters’ Roll. An independent candidate may not have the resources for acquiring his or her own database nor be able to host public engagements like rallies, door-to-door campaigns or information distribution, if the Voters’ Roll has not been provided in accordance with the electoral timetable. A new round of By-Elections was scheduled for the 11<sup>th</sup> of December 2013. The Voters’ Roll was meant to be made available in accordance with the electoral timetable on the 26<sup>th</sup> of November, however, it only became available on the 4<sup>th</sup> of December<sup>39</sup>. Moreover, the Voters’ Roll was incomplete and did not contain addresses that would enable the candidates to canvass voters. The late provision of the

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<sup>38</sup> (Kham and Others v Electoral Commission and Another, 2015, p. 6).

<sup>39</sup> Ibid.

Voters' Roll causes problems for inspection<sup>40</sup>, as it does not give candidates enough time for inspection and if needed - objection. This research examines the implications of such a practice on the promotion of electoral democratic civil rights in South Africa.

The objections to the validity of registrations and the available addresses on the Voters' Roll led the candidates to view the Local Government Elections as a "fatally flawed process"<sup>41</sup>. As a result, they sought reprieve from the Electoral Court. As the Court could not deliberate over the matter immediately in order to interdict the elections, the candidates amended their case, which was eventually heard in January 2015. Considering this observation, this research primarily focuses on the facts presented to the Constitutional Court, especially since this Court is supreme.

The candidates requested the Court to order the IEC to investigate irregular registrations on the Voters' Roll and for the Court to hold political party representatives who assisted in the illegal registration of voters accountable. Unfortunately for the candidates, the Court ruled that it lacked the "jurisdiction to order the IEC to commission a forensic report into the registration of voters"<sup>42</sup>. The implications of this meant that this research would need to consider the relief provided by the Constitutional Court. The Electoral Court did not provide relief in this matter for several reasons. The most significant reasons were that firstly, it could not order the IEC to conduct a report and as a result, could not set aside elections. Secondly, that the outcome of elections would have been the same, even if the number of irregularly registered voters were deducted. Finally, the candidates who objected to irregular registrations did not follow the correct procedure in terms of the *Electoral Act* and the *Municipal Electoral Act*. In this research, these expositions help in analysing the duty played by the Constitutional Court in compelling the IEC to act in a manner that promotes civil rights, rather than presents obstacles.

The Electoral Court's judgment was held in a majority view however, only Wepener J disagreed with the ruling. He explained that there had been serious electoral process irregularities based on affidavits provided by the IEC. Judge Wepener cited the "registration/s of voters in wards

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<sup>40</sup> Chapter 3 (1,b) of the *Local Government: Municipal Electoral Act* of 2000 specifically states that the Commission must publish an Election Timetable in which the Voters' Roll will be made available by a determined date for inspection and objection. Failing such may be seen as an electoral irregularity and the elections may be set aside by the relevant Electoral or Constitutional Court.

<sup>41</sup> (Kham and Others v Electoral Commission and Another, 2015, p. 8).

<sup>42</sup> Ibid.

where they were not entitled to be registered; the failure to adhere to the election timetable in providing the candidates with a free copy of the Voters' Roll; and the fact that the Voters' Roll that was made available did not include voters' addresses"<sup>43</sup>. This judgment was useful in this research for pinpointing the exact issues with the Voters' Roll in this case.

The candidates, unhappy with the Electoral Court's majority ruling, took the matter on appeal to the Constitutional Court. The candidates slightly altered their approach and accepted the ruling by the Electoral Court over its jurisdiction to order the IEC to conduct a forensic report. They requested the Constitutional Court to consider setting aside the 2013 By-Elections in respect of the irregularities found in the IEC's own affidavit<sup>44</sup>. The Constitutional Court in its deliberation sought to establish several questions - ranging from the merits of the case and the jurisdiction of the case, to the right to free and fair elections. The Constitutional Court's consideration of whether there were electoral irregularities, were elections free and fair, and what relief should be granted, form the basis of this study's inquiry. This research has used the Court's rationale on whether elections were free and fair and view it through the lens of electoral management. In taking this approach, it is possible to understand the interconnected relationship between electoral management and civil rights.

One of the major Court findings was that the root cause of the dispute was that the Voters' Roll had incomplete sections. The incomplete sections of the Voters' Roll presented the opportunity for electoral fraud and manipulation. This is particularly relevant for this research, as it indicates a weakness in the system of electoral management, which left the integrity of elections open to abuse. The Court felt that the process of registration was particularly vulnerable if "voters can be brought from outside, into a ward where the political balance is unclear, [and] their votes may influence the outcome of the election at a ward level and even the outcome of an entire municipal election"<sup>45</sup>. The possibility for manipulation of elections through a Voters' Roll that does not contain addresses for voters brought into question whether Local Government Elections could be run freely and fairly in South Africa. For this research, the Voters' Roll is analysed closely, as it is one of the core aspects that enables access to civil rights.

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<sup>43</sup> (Kham and Others v Electoral Commission and Another, 2015, p. 12).

<sup>44</sup> Ibid.

<sup>45</sup> (Kham and Others v Electoral Commission and Another, 2015, p. 12).

In November 2015, the Constitutional Court ordered that it was the IEC's duty and obligation to obtain residential addresses of voters when registering, as per Section 8(3) of the *Electoral Act*. The Court also found that the IEC was in breach of Section 16 of the *Electoral Act* when it was unable to provide the candidates with a Voters' Roll containing addresses. At this point, the Voters' Roll would be understood to be incomplete and in breach of Section 16 if it did not contain addresses of voters. These sections are relevant for this study, as they show the legislative requirements for the electoral officer to carry out. This relates to one of the processes, as well as supporting legislation that protects the civil rights of voters.

In an attempt to promote the values and political rights of citizens, the Constitutional Court ordered that the IEC provide candidates with a copy of the Voters' Roll with addresses of voters (where reasonably available) before the scheduled elections in February 2016<sup>46</sup>. After the November 2015 judgment in the Constitutional Court, which sought to address the affected constitutional rights of voters when accessing free, "fair and regular elections"<sup>47</sup>, there were several tasks that the IEC needed to complete. One of them was to re-run elections in Tlokwe and provide a full Voters' Roll to the candidates. While the Constitutional Court reserved its decision to oblige the IEC and its structures to "ascertain whether that address" of the voter was correct upon registration, the Court did go as far to require that the IEC gain "sufficient"<sup>48</sup> particularity of the voter. This was interpreted to mean that after the Court had made this ruling, in every future election the IEC must obtain enough evidence of the voter's address. This part of the judgment showed the implications of the *Electoral Act* on the IEC to undertake tasks to meet constitutional requirements. What is relevant for this research is the understanding of how civil rights impose certain electoral activities on the IEC.

In February 2016, the IEC proceeded with Tlokwe By-Elections. However, when it provided a copy of the Voters' Roll for Tlokwe, there were still in excess of 4 000 missing or unavailable addresses<sup>49</sup>. The candidates subsequently approached the Constitutional Court over this matter and the outcome of the matter was reflected in their favour. The appeal uncovered that the IEC seemed to understand the word "available" to mean that they would provide addresses of voters

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<sup>46</sup> (Kham and Others v Electoral Commission and Another, 2015).

<sup>47</sup> (Constitution of the Republic of South Africa, 1996).

<sup>48</sup> (Kham and Others v Electoral Commission and Another, 2015, p. 35).

<sup>49</sup> (Electoral Commission of South Africa v Speaker of the National Assembly and Others ZACC 46, 2018, p. 11).

where they were available on their database however, the Constitutional Court made “clear it is only post 17 December 2003 registrations”<sup>50</sup> that the IEC was legally required to obtain. In this research, I explore the stage of electoral legislation, which gives way to its implementation. This research needs to take into account what is “understood” or imposed upon the EMB by relevant legislation.

The Constitutional Court ruling intended for the IEC to provide all historically-recorded voters’ addresses, not just the addresses it had already obtained after the 17<sup>th</sup> of December 2003. This meant that the IEC would need to acquire addresses of all voters that registered in previous elections, so that the Voters’ Roll would be complete with voters’ addresses. Whilst the IEC was not legally required to gather addresses of voters registered before the 17<sup>th</sup> of December 2003, the Constitutional Court encouraged the IEC to do so. This can be seen as an effort to “contribute to the democratisation of government” and its legitimacy<sup>51</sup>. This statement in the judgment indicates the Court’s view that the IEC’s work should not only meet its minimum requirements but rather seek to achieve a comprehensive database. However, this is also relevant to the research, as it provides a timeframe from which the IEC is compelled to record address data from.

Due to the close proximity of the 2016 Local Government Elections, the IEC realised that it would not be able to fully meet the order pertaining to the Voters’ Roll set out by the Constitutional Court and sought relief thereof. It found that of the 24 926 470 registered voters on the Voters’ Roll, 66% of voters had incomplete, generic, and postal or no addresses on the Voters’ Roll<sup>52</sup>. This statistic was important for the research, as it highlighted the magnitude of the problem. It is evident that the issues on the Voters’ Roll did not pertain to a small, select group of people but rather, the issue became relevant for the entire nation. Furthermore, it presented a mammoth task for the IEC, which they knowingly would not be able to meet in the 2016 National Local Government Elections. This evidence brought about many questions and scenarios regarding how the IEC would go about obtaining this data and whether they would

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<sup>50</sup> (Electoral Commission of South Africa v Speaker of the National Assembly and Others ZACC 46, 2018).

<sup>51</sup> (Mathenjwa, 2017, p. 184).

<sup>52</sup> (Electoral Commission of South Africa vs the Speaker of the National Assembly and Others, 2018).

have the adequate capacity to ensure such a process was successful. Finally, it forced its high-ranking officials and the Constitutional Court to evaluate its impact on civil rights.

The Constitutional Court responded on the 14<sup>th</sup> of June 2016 in the matter of *Electoral Commission v Mhlope and Others*<sup>53</sup>, two months before elections were scheduled to be run nationally. The Court, in the context of supporting the political rights of voters and unwilling to deny the right to regular elections, decided to grant the IEC adequate time to gather all the addresses and suspend its judgment of invalidity. The Constitutional Court ordered that the IEC continue to run the August 2016 elections, however, the area of Tlokwe must have a complete Voters' Roll, with all available addresses. It also provided an aggressive strategy for the IEC to have the national Voters' Roll ready by June 2018 and to report back in six months with its progress. The Court's order imposed implications on the IEC to perform additional processes in gathering the data of addresses whilst suspending the current ruling to require all addresses for the August elections. Furthermore, it also mapped a clear way forward for voters, candidates and the IEC to resolve this issue. The Court - as a dispute mechanism - provided a model to achieve relief over this issue. These instructions given by the Court are significant for this research, as they prescribe the resolution to a dispute affecting civil rights. Its importance in the electoral process is that it allows for the electoral system to be tested against civil rights by an autonomous body. Their instruction to the IEC shows that there was an obvious flaw with one of the processes in its electoral system that required urgent attention and a revision to its approach going forward.

The requirement by the Constitutional Court for the IEC to report on its progress in addressing the problems associated with the Voters' Roll, provide a rationale for this study to focus on events surrounding a Local Government By-Election of the Tlokwe Municipality in the North West Province of South Africa. The intention by the Constitutional Court to closely monitor the IEC's progress highlights the importance of fully understanding and following the events surrounding and following the 2013 Tlokwe By-Elections. From understanding the position taken by the candidates and the Constitutional Court, the study will analyse the issues that affect voter's civil rights, scrutinise the management of related processes and seek to establish the relationship between civil rights and electoral management.

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<sup>53</sup> (*Electoral Commission v Mhlope and Others* ZACC15, 2016).

### 2.1.3 Electoral and Constitutional Court Findings

The findings of the Electoral Court and the Constitutional Court in the Tlokwe case are useful in this research because they provide a factual account, which the data of this research relies on. The Tlokwe matter was sent to the Constitutional Court in 2015. The Court deliberated *inter alia* whether there were electoral irregularities, whether the By-Elections were free and fair and if they were not, what relief should be granted. The Constitutional Court in determining whether elections were free and fair, needed to deliberate over several important factors.

Firstly, they started by examining the segment of the Voters' Roll that was used in each ward where a By-Election took place. The Court used an IEC internal investigation as evidence, which found that between the year 2000 and 2013 there had been 1 040 registrations of "people in wards where they were not and had not been a resident"<sup>54</sup>. A further 322 did not have sufficient particularity in order to determine their precise residence. As mentioned above, this specifically highlights a gap in the management of the Voters' Roll. Sound electoral management of the Voters' Roll is a key component in ensuring that voters vote within their residential district.

### 2.1.4 Legislation for Registration to Participate in Local Government Elections

The Court applied the evidence that suggested that there were irregular registrations of voters on the Voters' Roll against the country's national legislation to assess whether there was factual evidence. The comparison would indicate whether the claims of accuracy were severe enough to indicate mismanagement on the part of the IEC. The Court examined the following provisions of the *Electoral Act*: persons who may apply for registration as a voter, applications for registration as a voter and registration<sup>55</sup>. Their consideration/s of these three sections of the *Electoral Act*, took into account what defines eligibility of citizens to register as a voter, the application to register as a voter in local government elections, the registration on and the purpose of the Voters' Roll and the role of an electoral officer to register a person as a voter, once the determination has been made that the person is eligible. This analysis determined who would qualify to access civil rights under the local government framework. In this thesis, this is an extremely important consideration as it shows that there is a historical requirement for the

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<sup>54</sup> (Kham and Others v Electoral Commission and Another, 2015, pp. 31-32).

<sup>55</sup> (Kham and Others v Electoral Commission and Another, 2015, pp. 31-32).

IEC to undertake such activities per their legislative obligations. If the IEC is expected to perform certain tasks, then they must be derived from relevant legislative provisions.

In dealing with the duty of the Chief Electoral Officer (the organisational head of all electoral officers)<sup>56</sup>, the Court referred to an earlier case that went before the Court. It felt that there was a need to “permit all citizens to vote in the absence of any justifiable limitation of that right”<sup>57</sup>, the consciousness of protecting the right to vote, unless justifiable conditions prevented this right from taking place. The Court felt that in accordance with Section 8(3) of the *Electoral Act*, a duty be placed on the Chief Electoral Officer to ensure that “the voter is registered only for the voting district in which that person is ordinarily resident and no other district”<sup>58</sup>. The imposed duty on the Chief Electoral Officer highlights the overall link for the IEC to maintain its commitment in granting access to civil rights, whilst protecting requirements for free and fair elections. The imposition of duty on the Chief Electoral Officer assigns the responsibility of ensuring the civil right to be registered on the Voters’ Roll to a specific person. In other words, it is not left ambiguous about who would carry out the task of ensuring that voters are registered correctly on the Voters’ Roll. It is not to say that other officials cannot capture details, but the main responsibility rests with a singular position in the organisation.

The responsibility and importance placed by the Constitutional Court for person/s to be correctly registered in the ward that they are ordinarily a resident of, was due to the nature of Local Government Elections. The Court, in its findings, recognised the need to confine voters to vote in the voting ward in which they are registered and are ordinarily a resident of in Local Government Elections. Its emphasis on this need shows the importance the Voters’ Roll plays as a mechanism in electoral management to ensure free and fair elections. The Court’s findings highlight the need for this study to examine how the possibility of voting in areas that voters do not reside in, affect the country’s democratic civil rights. Furthermore, it indicates that the system of electoral governance needs to be effective regarding the compilation of the Voters’ Roll, in order to support the design of local government.

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<sup>56</sup> Please see appendix 4, containing the IEC organogram.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

The issue extends beyond a mere legislative requirement or an exercise devoid of meaning. The Constitutional Court proceeds to unpack the impact should people be allowed to cast their votes in other wards. The Constitutional Court explained that “ward representation in municipalities is to bring the politicians dealing with the issues that most directly impact upon ordinary citizens closer to home”<sup>59</sup>. This creates a stakeholder contract between local government representatives and citizens. If a ward councillor is not responsive or acts outside the interest of the local electorate, the voters have an opportunity to directly remove him/her from office through elections. A ward councillor who is invested in retaining their public position would therefore be more responsive and accountable to the local electorate. In this research, I explain how the need for accountability in a democracy is particularly relevant to elections. In the framework section, Diamond and Morlino (2002) establish the connection between accountability in a democracy and civil rights.

If a ward councillor is not elected by the majority vote through means of electoral fraud, then he/she has less inclination to be accountable or responsive to the electorate. In this instance, the Constitutional Court found that if people could be brought from other areas to vote in areas that have closer contestation, they may have the ability to influence the outcome of elections. The ability to improperly influence the outcomes of elections uncover that these elections are not fully free and fair. Given that there is existing electoral legislation that compels voters to vote in the areas in which they reside, it indicates a failure on the part of electoral management. This is particularly relevant to this study, as both civil rights and electoral governance are negatively impacted by the above.

Considering the above, the Court determined that the IEC did not follow the correct procedure in the Tlokwe wards. The IEC’s own investigation further supported this narrative. The IEC - in the view of the Court - gave insufficient information on why and how incorrect registrations were made. As a result, the Court questioned the political neutrality and likelihood that these numerous omissions were purely coincidental. In this research, these questions will be considered in examining the electoral management of processes regarding the improper registration of voters. The Court’s statement brings into question whether the lack of sound management for the Voters’ Roll was by means of error or whether it indicates that certain individuals in the IEC acted unfairly. The framework for this research shows how certain

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<sup>59</sup> (Kham and Others v Electoral Commission and Another, 2015, p. 34).

systems ensure political neutrality and its governance are important. In the analysis section, the paper will unpack how certain procedures may affect political neutrality.

The Court argued that the majority of registrations likely occurred during registration drives where the By-Elections took place. It questioned whether voters were automatically registered to this ward without sufficiently checking their addresses. It stated that should this be the case, the system “lent itself to manipulation by a well-organised political party”<sup>60</sup>. A well-organised party, in this instance, would be able to transport political party-aligned voters into these wards and to register to vote with relative ease. Over and above the obvious advantage a political organisation has, improper voting would negatively affect the outcome of elections. Once more, this highlights the effect on democratic civil rights to free and fair elections, if manipulation were to occur under the vulnerability of an electoral management system, such as the Voters’ Roll.

The complaint by Mr Kham alleged that there had been a number of cases where the addresses were incomplete, vague and could not accurately assign a voter to a ward. The IEC, during its own investigation, found supporting evidence to the claim that voters were allowed to vote in wards that they did not usually reside in. The Court did not find it necessary to test the claims by means of investigation of each, as they said that both the IEC and Mr Kham provided enough evidence to attest that the legal principle had been broken. The Court added that there was a breach of the principle that “only those legally entitled to do so should be permitted to vote”<sup>61</sup>. This breach, as determined by the Court, shows the conflict of the legislative part, which guides the work of electoral activities. The IEC’s management thus needs to take legislative requirements into account when conducting and managing electoral activities.

The IEC responded with its argument that making addresses of voters available for inspection to any person who has paid a prescribed fee and to registered political parties and individuals would not act in the interest of voters. It stated that these addresses would be used by marketers. However, the Court responded, citing Section 16(4) of the *Electoral Act*, which deems it a criminal offence to use the addresses for anything “other than legitimate electoral purposes”<sup>62</sup>.

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<sup>60</sup> (Kham and Others v Electoral Commission and Another, 2015, p. 37).

<sup>61</sup> (Kham and Others v Electoral Commission and Another, 2015, p. 38).

<sup>62</sup> (Kham and Others v Electoral Commission and Another, 2015, p. 39).

The citation of this legislation reasonably refuses the Court from considering the argument put forward by the IEC to withhold information on the Voters' Roll. This finding by the Court highlighted the problem in accessing free and fair elections for candidates who wished to stand for office due to the inability of candidates to obtain the Voters' Roll on an agreed-upon date. In support of the above, the Constitutional Court found that the IEC ignored its obligation to provide a segment of the Voters' Roll containing addresses to all candidates. In the interest of transparency, accountability, and free and fair elections, the IEC should have provided a complete Voters' Roll, where available. The Court did not view this omission lightly and claimed that it was a "serious breach of its statutory obligations" and impaired candidates from canvassing voters significantly<sup>63</sup>.

The Constitutional Court identified irregularities within the electoral process regarding the Voters' Roll, which warranted a test of free and fair elections. This concept is difficult to answer, as a country's individual institutional design will vary. The variable designs between countries will need to be tested within their own context. The Constitutional Court understood the principle of free and fair elections to have been introduced by the *Universal Declaration of Human Rights* (UDHR). The Court noted that the UDHR "encapsulates the fundamental principles on which democratic societies rest"<sup>64</sup>. The point about context is particularly relevant for this study, as it assists in narrowing the focus to Local Government Elections in South Africa. While it is important to state the research focus on Local Government Elections due to the design differentiation, the study of free and fair elections under the scope of electoral management is applicable to other models. This is so, given that free and fair elections need to be a universal concept that must be applied to all democratic elections, regardless of their design.

The Constitutional Court's judgment deemed that all seven By-Elections, including the final December 2013 Tlokwe By-Election, failed the test of free and fair elections. The Court believed that voters were "wrongly registered in wards where they were not ordinarily a resident and not entitled to vote"<sup>65</sup>. The Court felt that the IEC offered up no reasonable argument against the claims made by the applicants. The IEC, according to the Constitutional Court,

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<sup>63</sup> (Kham and Others v Electoral Commission and Another, 2015, p. 41).

<sup>64</sup> (Kham and Others v Electoral Commission and Another, 2015, p. 43).

<sup>65</sup> (Kham and Others v Electoral Commission and Another, 2015, p. 47).

maintained that it was not obliged to verify voters' addresses. To the IEC's misfortune, the Court found that in fact the IEC was in breach of its "statutory obligation to ensure that all voters are registered in the voting districts in which they ordinarily reside" over a thirteen-year period<sup>66</sup>. Furthermore, it revealed that it did not obtain addresses or sufficient particularity that would ensure its compliance with its legislative requirements. The questionable reliability of the Voters' Roll in this aspect, forced the Court to describe the election as not free and fair. The absence and late provision of the Voters' Roll were unacceptable to the Constitutional Court, even if it was not in breach of its legislative duty to do so. The Court goes so far as to state "that would arguably be wrong even in the absence of an express provision such as Section 16(3) of the *Electoral Act*"<sup>67</sup>. With the above findings, this research will examine the system of electoral management in relation to South Africa's democratic civil rights of free and fair elections.

The Court resisted deciding on whether to decisively conclude that elections were not free and fair as a result of candidates not having sufficient information such as addresses. The Court called for further investigations of other nations, to determine how candidates would contact voters should addresses not be provided. It did, however, apply the contraventions of statutory obligations by the IEC to Section 16(3) of the *Electoral Act* and Section 11(3) of the *Municipal Electoral Act*. Section 16(3) dealt with the act of not providing a Voters' Roll containing addresses of registered voters, and section 11(3) required the IEC to make the Voters' Roll available in accordance with the provisions of the electoral timetable. This view by the Court showed the willingness to allow for democratic stability where past election results have been accepted. It did find current issues with the abovementioned Acts and ordered that all elections after its ruling should be in accordance with these Acts. This provides clarity for the study to examine some of these electoral Acts against the framework when understanding what founding provisions dictate electoral activities for the IEC.

## 2.2 Conclusion

From the above context it is quite clear that the Constitutional Court has made material findings against the IEC's process of this election. While the Court did not say whether the electoral outcome had been jeopardised, it did stress the breach of principle - this being that elections

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<sup>66</sup> Ibid.

<sup>67</sup> (Kham and Others v Electoral Commission and Another, 2015, p. 48).

were not free and fair. Thus, without testing the severity of the matter in terms of electoral results, the fundamental principle upon which an election bases its authority had been jeopardised. This was that the 2013 Tlokwe By-Elections were not conducted in a free and fair way, either in part or as a whole.

This provided enough reason for this research to continue its inquiry into what the Tlokwe judgment a) has imposed on the electoral management of elections and b) the effect of the case and judgment on electoral democracy.



## CHAPTER THREE: LITERATURE REVIEW AND CONCEPTUALISATION

### 3.1 Introduction

This Chapter will argue that there is a normative set of values that underpin democracy and civil rights. The argument proposes that a set of normative values in a democracy will shape the course of how elections are to be managed. It is important to first establish what theories of democracy form the basis from which these types of civil rights are applicable. To this end, I have made use of several authors to build the argument that democracy is interlinked to normative values. Subsequently, I then turn to the framework provided by Diamond and Morlino (2004) that provides considerable insight to the applicability of these values in a democracy. The need to view theories of democracy and the values that underpin it is useful for this research, as it will explain why values are important for electoral management and democracy.

The *African Charter on Democracy, Elections and Governance*, in Chapter 2, Article 2<sup>68</sup>, supports the argument that the legitimacy of democracy is subject to the regular holding of free and fair elections. The commitment by the African Union in this regard further emphasises the importance of having democratic values and their translation into normative standards through elections. The African Union, of which South Africa is a Member State, recognises the past conflicts that took place across the length and breadth of South Africa. Its commitment to respect human rights is supported in Article 3<sup>69</sup> of its principles. International bodies like the African Union and the Southern African Development Community<sup>70</sup> highlight that access to human and civil rights is first made available through free and fair elections. These international bodies exercise oversight on Member States to ensure that there is indeed a working framework that supports the substantive goal of free and fair elections.

This sets out the groundwork for understanding the important characteristics of democratic elections and the need for free and fair elections, as opposed to other regimes. By establishing

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<sup>68</sup> (African Union, 2004, p. 3).

<sup>69</sup> (African Union, 2004, p. 4).

<sup>70</sup> (South African Development Community , 2015).

this understanding, I will show how electoral management is a vital component for strengthening democratic values.

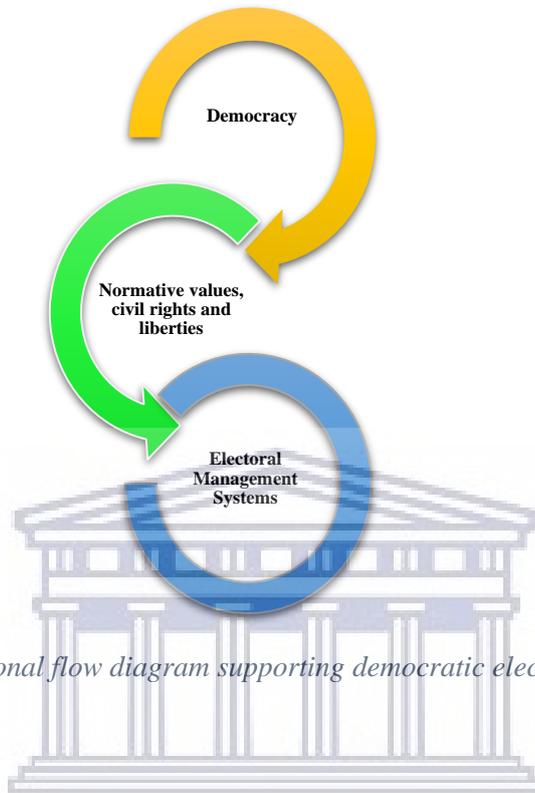


Figure 1: Institutional flow diagram supporting democratic electoral management

### 3.2 Democratic Theory Underpinned by Values

The reason for well-established electoral management processes is to promote and enhance civil rights, which form the core of any democratic regime. According to Lipset<sup>71</sup>, democracy is a political system that requires regular elections of governments and public officials. Moreover, he emphasises that democracy is a *social mechanism*<sup>72</sup> for ensuring the peaceful acceptance of the ruling class. The democratic mechanism for deciding the ruling class needs to be founded upon values that are socially accepted by the majority, so that collective decisions can be made while retaining democracy's unique characteristic of governance. In light of this definition, this research argues that the values of democracy can only be realised if they are present in electoral processes. In other words, if elections do not contain processes that promote values such as freedom and fairness, then other participatory activities may be impacted similarly. Current

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<sup>71</sup> (Lipset, 1959, p. 71).

<sup>72</sup> Ibid.

democratic climates in different countries indicate that there are varying degrees of electoral design that seek to enhance and promote these values<sup>73</sup>. Given that individual states may emphasise some values more than others, or may overall, pay greater attention to these values, a dispute may arise as to whether these values are necessary for a democracy to function. In the upcoming chapter I argue that it is indeed a necessary condition and that there is a normative baseline, which democracies need to adhere to, starting from the point of elections. In presenting this argument, it will become clear that values lay the groundwork for civil rights and that electoral management is a vital tool to access universal rights as promised in a democracy.

As democratic electoral management is the core focus of this research, it is important to establish the democratic values that prescribe electoral activities for its management to be guided by. The management of elections in a democracy concerns two main areas for consideration. The first being the values, laws, rights and constitutional requirements needed to prescribe the type of activity that elections must entail. For example, the act of casting two ballots - one for the election of a party as a government and one for the election of a president - could be done to promote the value of accountability. The second area of consideration for electoral management would involve putting into effect the values and laws of electoral governance.

### **3.2.1 Values at a Minimalist Approach to Democracy**

According to Schumpeter<sup>74</sup>, who makes use of a minimalist conception of democracy, there is no need for prerequisite conditions, such as normative values, to be present before a nation could be considered a democracy. However, electoral activities can only be managed against a framework by which its values are translated into actions. In other words, if values were not a foundation of democracy, then how would a country know what activities to undertake that would be in line with democratic best practice, such as equal and fair participation or even allowing participation at all. Therefore, elections need management that is set against democratic values, which are unique to a democracy. Without the management of elections

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<sup>73</sup> (Institute for Democracy and Electoral Assistance, n.d.). The Institute for Democracy and Electoral Assistance provides a tool by which to evaluate worldwide electoral systems that seek to provide the best compromise in terms of universal civil rights.

<sup>74</sup> (Schumpeter, 1976).

with the desire to meet the conditions of values and local laws, elections become trivial. Nevertheless, even when taking into consideration Schumpeter's minimalist view, there is a need for electoral management as a separate function to be prevalent under the most basic notions of democracy. The existence of electoral management - even at a minimalist view - needs to be guided by the foundation of democratic normative values, which is what this section seeks to explore.

Even though Schumpeter argues for a minimalist concept of democracy, he later builds upon his approach in defining democracy by acknowledging that there needs to be "free competition among would-be leaders for the vote of the electorate"<sup>75</sup>. He argues that this value of free competition must be considered on the assumption that there may be undemocratic methods used to decide leadership. This demonstrates that there is certainly a requirement for free competition among leaders, which also implies a value connotation for elections and their management. For free competition to occur among would-be leaders, voters would also expect free participation. In practice, if voters are not protected by the values of free participatory elections, then political opponents could suppress their competition's electorate into submission. In this regard, being free to participate is closely linked with fairness. Free competition in electoral processes imply that the processes of activities allow participants to partake in numerous actions. Free elections in this light, mean that there is some kind of universal access that does not discriminate or hamper the participation of voters or incumbents. In other words, a standard set of rules need to be made universally applicable to all who participate, regardless of their status or wealth. Establishing a set of rules ensures that the behaviour and conduct of any action or procedure in the electoral process would logically dictate that these rules must be fair. Otherwise, if rules were unfair, then the need to establish a set of rules to ensure free or universal participation renders itself inane.

### **3.2.2 What Democracy Can Guarantee**

The need for a normative set of values is emphasised when Adam Przeworski proposes that people should understand what democracy seeks to achieve<sup>76</sup>. He argues that democracy's key purpose is to change government without violence. While this distinction can be likened to Schumpeter's approach concerning the delegation of power and acceptance, it is different, as a

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<sup>75</sup> (Schumpeter, 1976, p. 285).

<sup>76</sup> (Przeworski, 1999).

clear rationale can be drawn for the need for a normative set of values to be established. For electoral management, this means that democratic elections need to ensure that they obtain tangible objectives that ensure peaceful transition or election of the political class who have the right to governance. The ability to ensure a peaceful transition needs to be able to deal with issues that bring disputes in terms of winners and losers, as well as processes. Thus, normative values by which to test that electoral management has achieved what democracy intends, need to be established. By this understanding it is evident that democracy's normative objective and value is to strive for a peaceful change of political governance.

Przeworski's minimalist approach premises that by merely holding elections, democracy is able to exist, as long as the so-called losers "have a sufficient chance to win and a sufficiently large payoff in the future rounds."<sup>77</sup> However, practically, it is not simple enough to ensure that losers will wait to compete in the next round of elections, as political power may shift favour before opponents receive their payoff, as he describes. Rather, the implications for electoral management are that there need to be processes that ensure all contestants feel that there are not any undue hindrances that favour other contestants. Moreover, if contestants feel that the processes were conducted fairly, they may stand a chance of winning in portion or outright power, thus incentivising the competition of elections. The premise of having a chance of winning, implies that values form the framework by which electoral activities are governed, such as fairness and competition in electoral processes. If Przeworski's minimalist notion of democracy sets the starting point of when a regime is considered to contain elements of democracy, then a case is made that normative values exist at democracies' very core.

According to Saffon and Urbinati<sup>78</sup>, Przeworski's definition of democracy as a self-enforcing equilibrium<sup>79</sup>, is one that grants an incumbent the belief that power and the spoils of leadership could shift in their favour in the next electoral round, and this implies the respect for equal liberty. Their argument is premised on the belief that a ruling majority may in a future round of competition become a minority, and thus lose control of decision-making power. If true, then the majority in control now, would restrict its use of power over the minority, on the basis of uncertainty of position in the next round of elections. The implications for electoral

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<sup>77</sup> (Przeworski, 1999, p. 13).

<sup>78</sup> (Saffon & Urbinati, 2013, p. 459).

<sup>79</sup> (Przeworski, 1999).

management from this mean that there is a need to secure processes that afford equal opportunity for all contestants in elections, for the continuation of competition. If there is little opportunity for tangible change by lack of competition, then abuse of minorities and civil rights may occur. To maintain the virtues of democratic civil rights, it is important for electoral management systems to ensure that free and equal competitive elections are upheld when conducting its processes and procedures. Electoral management plays a key role when ensuring this through how electoral activities reach its objectives in terms of normative values through its organisation and conduct.

Saffon and Urbinati argue that the minimalist conception of democracy forms the groundwork of the proceduralist approach as its alternative. For them, the procedural approach is the most relevant approach in contemporary democracies for normative reasons<sup>80</sup>. They presume that the procedural right to participation in electoral processes implies the value connotation of equal liberty. The foundation for equal liberty in a democracy sets an additional normative value for democracy. Furthermore, to establish the legitimacy of the majority laws of governance, all citizens must be able to equally participate and contribute - either directly or indirectly - in elections as a start and governance of the state. Their understanding of the proceduralist approach influencing normative values is the essence of what electoral management seeks to achieve. In other words, electoral management systems ensure that processes of elections are undertaken with the intention to achieve a particular belief or value. In this case, it would be values that underpin democracy, and these values would form a standard by which to enact a process of elections. Their approach to elections supports the concept that elections do not merely exist as a feature of democracy, rather electoral democracy demands a set of values that are key to defining it. This consideration regarding the values of democracy translates into civil rights and this is important for this study, as I make a comparison of civil rights against electoral management processes.

### **3.2.3 Establishing a Normative Set of Values**

The authors (Saffon and Urbinati), in their defence of the procedural normative approach, identify that the deliberative approach is one that seeks to achieve a result that is closest to the ‘truth’<sup>81</sup>. They argue that deliberative democracies threaten democracy from within “because

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<sup>80</sup> (Saffon & Urbinati, 2013, p. 445).

<sup>81</sup> Ibid.

the use of electoral procedures without awareness of their significance for liberty renders them inane”<sup>82</sup>. However, according to Rawls’s<sup>83</sup> definition of equal liberty, a certain standard of basic liberties must be available within each country’s context, in terms of its ability to afford equal basic liberties, particularly with regards to free and fair participation in electoral processes. Basic liberties can be subject to the financial stability and political climate of a particular nation. His definition becomes problematic for Saffon and Urbinati’s approach of procedural democracy, as equal liberty requires a minimum standard of procedures, to achieve equal freedoms among all citizens.

Equal liberty as a normative value will require arrangements to be made so that all citizens can enjoy this value. Considering this, electoral management needs to be able to realise democratic values in processes that may be influenced by the contextual arrangements. For example, in promoting fairness in voting through one vote per voter, many states use a variety of methods of procedure to ensure fairness in voting. For example, some countries, like the Democratic Republic of Congo, use biometric fingerprint technology to register whether a voter is eligible to vote and whether the voter has voted. In another case, South Africa uses a simple physical mark on the voter’s finger and scans a barcoded Identification Document linked to the voting register. While there may be variations of support when enhancing procedures that seek to achieve freeness and fairness by different states, there are also concerns of contextual economic restraints in achieving this. Nevertheless, even though it is safe to conclude that perfection of procedure is an elusive ideal in terms of freeness and fairness, there needs to be sufficient degrees of free and fair elections.

Knight and Johnson (1997) concur that democracy cannot guarantee the quality of political decisions but argue that political equality means the provision for “some version of equal opportunity”<sup>84</sup>. The authors support their position by reasoning that an individual’s circumstance, which may be out of their control and one that they cannot be held responsible for, may affect their realisation of democratic equality<sup>85</sup>. The argument for individuals to have political equality through access is important, for it does not discount the fact that democracies

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<sup>82</sup> Ibid.

<sup>83</sup> (Ladenson, 1975, p. 49).

<sup>84</sup> (Knight & Johnson, 1997).

<sup>85</sup> (Bohman, 1999, p. 281).

vary in their ability to provide equal liberty to all citizens. For example, richer countries may use tools and equipment to aid their facilitation of democratic elections, with the hope of improving conditions that allow for equal liberty. However, a state's ability to use tools to secure equal liberty to meet democratic ideals does not detract from that some sort of level of this virtue needs to be met for democratic elections to take place. The requirement for equal liberty in democracy implies a set of activities for electoral management to undertake to ensure that reasonable steps are taken for all voters to have an equal chance to elect the ruling class. As presented above, the proceduralist approach, as with the other approaches discussed, each rationalise that democratic processes must contain value connotations. The literature above supports the conception that democracy is to be founded based on different kinds of freedoms. For example, free and fair electoral processes are compulsory for a democracy to realise the equal liberty of its citizens.

Against this backdrop, one can assess whether all citizens have - or are able to practically achieve - equal liberty as a normative value of democracy. However, there is debate as to what standardised set of norms would be relevant for a democracy. The establishment of a framework with a set of standards to assess democratic elections against values that underpin its ethos would assist this research to answer the research question. Such a framework should allow for flexibility when applied in different challenges of nations, such as a country's historical and economic context. The flexibility of such analysis would need to incorporate universally-accepted values in democracy and evaluate them against electoral processes. This study will draw on two different yet interrelated frameworks to unpack which standards, and how to measure the standards of democratic elections, in securing civil rights.

### **3.3 The Need to Look for Quality in Elections**

Drawing from the previous section's conceptualisations of democracy, it is notable that this type of regime seeks to promote a universal participatory framework in elections. A framework of values in a democracy needs to be extended to all citizens, regardless of their diversity. Equally, at a global level, and like citizens within a country, not all states are equal. The inequality amongst democratic states becomes problematic for a rigid and standardised universal framework of democracy. Notably, the socio-economic and historical contexts affect individual citizens and nations' ability to access certain values, such as universal participation, access to information and political liberty.

Diamond and Morlino<sup>86</sup> present a framework intended to assess a nation's quality of democracy through eight dimensions. However, for the purpose of this study, it will be adapted to explain a set of standardised objectives that democratic elections need to achieve. In their search to provide an improved understanding of what makes a quality democracy, Diamond and Morlino developed a framework that incorporates eight dimensions, with key highlights of some conditions of democracy that are important for electoral management. Their framework is important for the topic of electoral management, as it assists in defining what dimensions are unique to a democracy. Finally, some of the dimensions explored in their framework have direct relevance to the case study and electoral management. This thesis identifies seven relevant dimensions applicable to the case study under the theme of electoral management which are: freedom, equality, rule of law, vertical and horizontal accountability, participation and competition. The remaining dimension of their framework, responsiveness of government, does not strictly deal with the contextual administrative management issues experienced within the case study used for this research. This dimension is understood to be one that is granted after the electoral period and is subject to the institution's level of power and autonomy from government instruction<sup>87</sup>.

### **3.3.1 Free and Fair Values of Democracy and its Elections**

Diamond and Morlino's explanation of the principles of freedom and equality relate to the common consensus of equal liberty in all aforementioned approaches. Freedom, in this instance, is seen to grant citizens the right to essential civil rights, which "include personal liberty ... association and organisation"<sup>88</sup>. Granting basic freedoms<sup>89</sup> or civil rights allows citizens to freely participate in democratic processes, such as elections. This dimension is very important, as it can be considered to be the cornerstone of democratic elections. The freedom to participate fairly is what ensures that democracy is unique from other regimes that may hold elections only to ensure that dictatorships remain in power. The basic assumption is that if citizens or candidates who stood for elections are denied an opportunity to participate, then the choice of who governs is, in fact, not the real choice of a nation. When it comes to the

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<sup>86</sup> (Diamond & Morlino, 2004).

<sup>87</sup> (Van Aaken, 2009, p. 305).

<sup>88</sup> (Diamond & Morlino, 2004, p. 26).

<sup>89</sup> (Ladenson, 1975).

management of elections, EMBs must ensure that all citizens and candidates have the greatest possible freedom and equality of participation. This is important so that electoral activities do not prejudice the right of participation.

The next dimension of Diamond and Morlino's framework is the essence of what symbolises democracy<sup>90</sup>. Similar to the dimension of freedom, equality is the basis for other dimensions. It is good and well to grant freedom to citizens, however, it will only be truly democratic if all citizens are granted the same minimum standard of freedom. Granting or setting freedom as a minimum standard implies that all citizens have equality in accessing what is the minimum condition for democratic participation, which includes civil and legal rights. The lack of a sound electoral management system can lead to inequality being used as a tool that limits the ability for universal participation and thus predetermining the outcome of elections. The establishment of equality in terms of process in elections, should not place great demands upon a citizen in order to avoid their personal burdens affecting whether they are able to participate or not. For example, the choice of where and how many voting stations or ballot boxes are available is a fundamental consideration, as some people may not have the means to travel long distances to cast their votes. This may be used as a tool by those with status and wealth to influence electoral participation and, no doubt, affect the outcome of elections.

### **3.3.2 Universal Application of Laws**

This overview leads the discussion to the next important dimension of democracy, which is the rule of law. The rule of law, as described by the framework, protects the legalised and equal civil rights of citizens. Considering that basic equality is a fundamental component of democracy, in order to include all citizens, the rule of law must procedurally exercise equality. In other words, theoretical access to equality cannot merely exist with a view to one day apply it universally but rather, real-world actions must ensure that the rule of law is applied to all citizens. Additionally, in terms of elections, universal rights should not be progressive rights that a state or a nation aspires to. Rather, the rule of law in democratic elections applies universally - regardless of an individual's position in society. In other words, the rule of law requires an independent institution that has the capacity to apply the law consistently and equally to all citizens<sup>91</sup>. The most common institution in democratic regimes is an independent

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<sup>90</sup> (Diamond & Morlino, 2004, p. 26).

<sup>91</sup> (Diamond & Morlino, 2004, p. 23).

Judiciary. Its independence ensures that there is non-interference by political representatives and thus it would be sovereign in its obligation to support the rule of law.

The application of the rule of law is based upon the premise that not only are citizens granted protection of equal liberty, but also to actively seek justice when these laws are broken. Equal liberty implies the right to basic freedoms, on condition that it does not erode another individual's entitlement to the same. The assumption, therefore, is that should any citizen or political actor breach the value connotations attached to democracy or laws, then they must be held accountable. In breaching one or both conditions, the framework suggests two methods of recourse in respect of accountability.

### **3.3.3 Accountability**

The first discusses vertical accountability, which is a grassroots approach, where citizens hold the political class accountable for the actions for reasons such as delivery, in terms of expectations and assessments, against behaviour during tenure. For example, if a representative has not lived up to the expectations as set out during his political campaign, or if he has breached legal principles, then at the next elections, voters may choose to hold that person accountable through a reflection of votes<sup>92</sup>.

Horizontal accountability, on the other hand, requires public servants who have not behaved lawfully or properly to answer to other established institutions who possess the necessary "expertise and legal authority for such a monitory role"<sup>93</sup>. This type of accountability accentuates the need for strong independent adjudicating institutions (Judiciary) and oversight of Parliament. Furthermore, it protects the individual rights of minorities from being eroded by majority rule. Horizontal accountability enables a more robust and active democracy, as it facilitates the resolution of disputes, helping citizens to retain their rights between elections.

### **3.3.4 The Importance of Public Participation**

Another dimension central to democracy's normative values is democratic civic participation in state affairs. However, for this research, this principle will only be used in the context of electoral management, as supported by the author's argument that "no regime can be democratic

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<sup>92</sup> (Svolik, 2013).

<sup>93</sup> (Diamond & Morlino, 2004, p. 25).

unless it grants all of its adult citizens formal rights of political participation”<sup>94</sup>. For elections, participation requires that all citizens who are eligible to vote are granted equal rights to do so. The standard of civic participation in elections requires uniformity in terms of voting procedure. However, civic participation is not limited to Election Day and can take on a variety of forms of active citizenship, such as public consultation with various stakeholders in terms of legislation, attendance of public debates and ongoing electoral activity.

Participation of citizens in democratic electoral activities does not only concern voter and civilian rights to state affairs. Additionally, equal participation in public debates is organised by EMBs to inform the public about related electoral matters. Political contestants can face prejudice in terms of participation, based on the level of access to values of freeness, equality and rule of law. If there is suffocation of universal participatory inclusion, there could be a negative impact on the very competition upon which democracy rests. Universally, democratic electoral management does not only pertain to the day of ballot casting. It ranges from voter education drives, to Voters’ Roll inspection dates as part of ongoing work for democratic elections, or any work that undertakes preparations for the day of ballot casting and results’ publication. This means that electoral activities that took place before the polling day may influence how voters behave on the day of elections. For example, if information is not spread equitably, then some voters may have an advantage of knowing the voting procedure and others may be unprepared or unaware of relevant information.

### **3.3.5 The Critical Need for Competition in Elections**

The competition in elections needs to be regular, free and fair<sup>95</sup>. This is what makes democracy more desirable than other regimes, as it ensures that the control of power is limited to time and uncertainty. Schedler and Mozaffar<sup>96</sup> argue that there is a need for uncertainty of outcome in elections, while maintaining certainty of procedure. They further contend that if uncertainty is compromised to the point where the result is predetermined, then there are few incentives for voters to participate. In this way, the dimension of true competition should ensure uncertainty in the outcome of elections. To ensure uncertainty of who the winner of elections will be, equality and certainty of procedure are the pinnacle in this dimension. If processes hinder the

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<sup>94</sup> (Diamond & Morlino, 2004, p. 23).

<sup>95</sup> (Diamond & Morlino, 2004, p. 24).

<sup>96</sup> (Mozaffar & Schedler, 2002).

equal participation of either voters or candidates, then the disadvantage may also determine the outcome of elections. In South Africa, EMBs play a central role in maintaining a standard of process by which to run elections and make available the information by which the electoral competition is conducted. For example, the IEC holds voter drives well before elections take place, in order to educate eligible voters on the procedure of voting.

Each of the dimensions discussed is important for an effective electoral democracy. Thus far, the discussion has focussed on the foundational, normative values of freeness and fairness in a democracy. While the discussion regarding possible normative values in a democracy has referred to their applicability in elections, little has been discussed about what processes can be found in elections. The next chapter addresses this by considering a structured exploration of how the process of elections can be viewed and helps to clarify the role EMBs have at each stage.

### **3.4 Conclusion**

Diamond and Morlino's (2004) dimensions provide a sufficient framework to identify what the most relevant values that research should consider are when attempting to explore civil rights within a democracy. Regardless of the approach or theory of democracy, values translate into the basic rights that determine how democratic processes are to be conducted and, to an extent, its success at meeting these requirements. While these values are also seen as ideals for all nations, democratic best practice requires that procedures be developed to best protect these values as norms in all procedures of electing the ruling class. If democracy rests on its ability to secure civil rights, such as the right to peacefully elect government and the freedom to participate, then these values form the framework of what a democracy is. Diamond and Morlino's framework assists this study to build its argument, using their rationale of each relevant dimension (or value) of democracy as a tool to view the success of a democratic electoral process in its ability to protect civil rights.

## CHAPTER FOUR: THEORETICAL FRAMEWORK

### 4.1 Introduction

Electoral Management Bodies (EMBs) “are viewed as efficient tools for fostering political participation and for lending legitimacy to electoral processes”<sup>97</sup> through their management of elections. The need to promote or advance values such as freedom, equality, participation, competition, accountability and the rule of law through a systematic set of activities, falls under the custodianship of an EMB. Such institutions are required to “oversee the electoral process with the view to ensure that all actors adhere to the rules”<sup>98</sup>. The responsibility for EMBs is to manage the electoral process in relation to a set of normative democratic values, important for the protection of universal civil rights.

If the rules set out by an EMB to ensure the freeness and fairness of elections are broken, then we may see evidence of fraud, bias and patronage. Such negative activities erode the level of available equal liberties and may lead to the breakdown of a democratic regime, if rules are not enforced by EMBs. To avoid partisanship and promote freeness and fairness of elections, rules governing electoral competition must be universally applicable to all voters and all candidates<sup>99</sup>. The applicability of universal rights, rules and procedure in elections require that the EMB responsible for administering elections proactively executes measures that pre-empt known attempts of misconduct or poor governance. The rules of electoral competition must therefore seek to avoid – through their application or as a causal factor – a procedurally unfair process that may result in predetermined election results. If such were to occur, then the incentive for continued competition diminishes.

Scholars such as Mozaffar and Schedler (2002), Mcebisi Ndletyana (2016), Luis Torres and Edwin Diaz (2015) and Rafael López-Pintor (2000) concur that EMBs are critical to the ongoing consolidation of democracy and, as such, the work/s of EMBs - at all levels - are important for ensuring peace, equal liberty and democracy. The responsibility to maintain an

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<sup>97</sup> (Gazibo, 2006, p. 116).

<sup>98</sup> (Ndletyana, 2016, p. 452).

<sup>99</sup> (Lopez-Pintor, 2000).

active democracy emphasises the fact that the work of the EMB does not end on Election Day but rather, “electoral governance involves an ongoing cycle of stakeholders acting at different stages of the electoral process”<sup>100</sup>. These stages are the pre-electoral stage, such as campaigning, the electoral stage, which mainly deals with ballot casting, and the post-electoral stage of vote counting. The ongoing efforts by the EMB ensure that at all stages, mechanisms of electoral governance must promote democratic principles, such as free and fair elections, to all stakeholders.

López-Pintor argued that free and fair elections imply expectations and norms to be present in procedural electoral activities. His approach to view values as a procedural requirement, rather than only a substantive ideal, emphasise the importance of electoral management. According to WestLaw<sup>101</sup>, procedural requirements for free and fair electoral processes are commonly defined in legislation. In other words, procedural requirements are the set of actions that are expected in order to achieve the substantive goals. This becomes particularly relevant for this research, as it supports and emphasises the case that electoral procedures can be tested against normative values. With this in mind, the normative democratic values, as discussed by Diamond and Morlino (2004), automatically trigger a set of procedural activities needed to accomplish their substantive value in a democracy. For example, if “free elections...implies unimpeded candidate registration”<sup>102</sup>, then an associated task or regulation must be enacted, such as open registration days or rallies.

Elections, in truth, will unlikely ever achieve perfection in all operations simultaneously, as there are bound to be some issues that ultimately affect the substantive ideals of fairness of laws and freeness<sup>103</sup>. Perfection of electoral processes is difficult to achieve as the “sheer magnitude and complexity of the tasks that need to be accomplished”<sup>104</sup> involve multiple variable components that may, at any stage, require unscheduled correction or attention. In other words, errors, deficiencies, or new matters arising, form part of a chain in many tasks, which may impact other interlinked tasks. Mozaffar and Schedler also highlight that the clarity of tasks and

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<sup>100</sup> (Torres & Diaz, 2016, p. 35).

<sup>101</sup> (Anon., 2016).

<sup>102</sup> (Lopez-Pintor, 2000, p. 103).

<sup>103</sup> (Mozaffar & Schedler, 2002, p. 5).

<sup>104</sup> Ibid.

administrative efficiency are some of the key elements to ensure that the margin of error does not affect or alter the electoral outcomes<sup>105</sup>. The margin of error in electoral processes, depending on size and complexity, can, in fact, change the outcome or cause unnecessary hardship to those wishing to participate through vote casting, canvassing or standing for political office. This means that while electoral management is vital to the running of democratic elections, there are imperfections within every system. However, errors that occur in elections should only be negligible in ways that do not impact the overall result, access to rights, or cast doubt over its legitimacy.

Although it is safe to presume that minor errors exist within an electoral system, it is not only limited to that of its management. Errors can be forced by attempts to fraudulently affect the outcome of elections. Electoral fraud is a well-established concept<sup>106</sup> that can range in form or method<sup>107</sup>, as deliberate attempts to affect the outcome of elections. Lehoucq (2003) and Sjoberg (2013)<sup>108</sup> both understand electoral fraud as a concept, when “illegal efforts to shape election results” occur. However, electoral fraud can be initiated any stage of the electoral process, given the time, space and opportunity.

If EMBs are given the autonomy to regulate electoral processes and procedures, their actions must additionally be closely monitored by internal and external stakeholders, to assess their ability to provide legitimate elections and results. The continued effort by EMBs to provide legitimacy of elections through Diamond and Morlino’s dimensions of democracy, may continually cement democratic consolidation. If errors within the democratic process bring about disputes regarding the concepts of free and fair elections, then election results could be declared as invalid. Declarations of invalidity in elections could threaten Schumpeter’s (1947) approach of democracy being able to avert violence. Therefore, there is genuine cause to insist that the democratic electoral process must be underpinned by concepts of free and fair elections, for the sake of its own continuity.

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<sup>105</sup> Ibid.

<sup>106</sup> (Birch, 2012), (Cox & Kousser, 1981), (Lehoucq, 2003) (Little, 2012).

<sup>107</sup> Such as, ballot stuffing, tampering or falsifying the Voters’ Roll or even multiple voting at different polling stations.

<sup>108</sup> (Lehoucq, 2003), (Sjoberg, 2014, p. 235).

## 4.2 Levels of Electoral Governance

The proposed framework by Mozaffar and Schedler from which to view the entire electoral process is a valuable tool for understanding the work of EMBs, in relation to how normative values are incorporated in the electoral process. The framework's design - to make use of levels - distinguishes the legislative process from the procedural tasks of an EMB. This is particularly useful, as it assists in developing a logical rationale of what is considered at each stage of electoral management. This research benefits from this approach, as it is able to help differentiate the application of normative values. For example, in the level of rulemaking, the research has found that legislation that defines where voting stations are located would be created by the requirement for equal accessibility as a value of equal participation. Embedded within each of the categories are substantive objectives on which each level is based upon and should ultimately seek to achieve<sup>109</sup>. For example, within the level of rule implementation, the activities undertaken to ensure compliance with the rules of electoral governance must additionally promote administrative efficiency, political neutrality and public accountability.

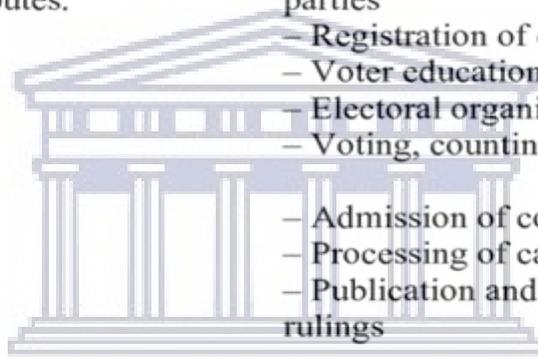
Substantive objectives that guide the manner in which processes are undertaken, provide an important element of assessment when determining whether elections are free or fair. This is specifically relevant when a study investigates a specific administrative or procedural issue or task. The framework additionally offers the ability to apply its concept to different scenarios that cross borders and context. The framework can be used for "conducting comparative research on electoral governance"<sup>110</sup>.

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<sup>109</sup> (Mozaffar & Schedler, 2002).

<sup>110</sup> (Mozaffar & Schedler, 2002, p. 7).

<p>1. Rule Making Choosing and defining the basic rules of the electoral game.</p> <p>(a) Rules of Electoral Competition:</p> <p>(b) Rules of Electoral Governance:</p>	<ul style="list-style-type: none"> <li>– Formula</li> <li>– District magnitude</li> <li>– District boundaries</li> <li>– Assembly size–Electoral time table</li> <li>– Franchise</li> </ul>
<p>2. Rule Application Organizing the electoral game.</p>	<ul style="list-style-type: none"> <li>– Voter registration</li> <li>– Party and candidate registration</li> <li>– Campaign financing and regulation</li> <li>– Election observation</li> <li>– Ballot design</li> <li>– Polling stations</li> <li>– Voting, counting, and tabulating</li> <li>– Election management bodies</li> <li>– Dispute settlement authorities</li> </ul>
<p>3. Rule Adjudication Certifying election results and resolving disputes.</p>	<ul style="list-style-type: none"> <li>– Registration of voters, candidates, parties</li> <li>– Registration of election observers</li> <li>– Voter education</li> <li>– Electoral organization</li> <li>– Voting, counting, and reporting</li> <li>– Admission of complaints</li> <li>– Processing of cases</li> <li>– Publication and implementation of rulings</li> </ul>



*Note.* Adapted from “The Comparative Study of Electoral Governance-Introduction” by S. Mozaffar & A. Schedler, 2002, *International Political Science Review*, 23, p. 8.

*Table 1 Showing the levels of Electoral Governance*

#### 4.2.1 Rule Making

Mozaffar and Schedler argue that, “electoral governance is a broad institutional framework in which voting and electoral competition take place”<sup>111</sup>. This implies that given the wide range of components in an electoral system, there are some common aspects that every country will observe. According to the framework, the starting point for any nation would be the aspect of

<sup>111</sup> (Mozaffar & Schedler, 2002, p. 7).

rulemaking. At this level, all electoral procedures, governance and type of formula involving stakeholders are determined.

Electoral procedures originate at this level through legislation, which stipulates the rules and norms that are widely adopted, to include and ensure values such as freedom, accountability and equality. For example, the publication of the rules dealing with elections offers a level of equal liberty and competition for all participants.

When the rules are designed, considerations as to whether rules will cause any undue hardship to any or all citizens are considered. This consideration should ensure equal access to civil rights for all eligible citizens, in accordance with democratic values. The responsibility to construct rules at this level is dependent on an EMB's powers and independence from other arms of state. While some EMBs may have greater control to enact legislation pertaining to elections, others do not. Countries like South Africa and the United Kingdom set rules at a constitutional level, and at parliamentary or government levels<sup>112</sup>.

The constitutional level rules often deal with fundamental rights that are difficult to alter, given that these laws are foundational to the state's values. Other rules that feature through parliamentary or government directives, deal with the governance issues of elections and can be reviewed more commonly, given the need for adaptation. Accordingly, Mozaffar and Schedler (2002) have separated the section of rulemaking into two subcomponents: a component that explores the electoral competition and a part that discusses electoral governance<sup>113</sup>. These components seek to divide rules in a manner that separates those that determine the operational rules, such as voting procedure, from the sets of rules that define the nature or type of electoral competition. The latter deals with issues such as the designation of candidates, the manner in which voting districts are defined and matters of proportionality. This is significant for the research, as it provides a logical scope by which to compare findings from the case study against legislation and the intent of its design. In the next section, which discusses the findings of this research, reference is made to legislation whereby the intent is established against problems with the electoral governance in the Tlokwe case study.

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<sup>112</sup> (Van Aaken, 2009, p. 300).

<sup>113</sup> Electoral competition is usually defined at the conditional level, while electoral governance is more relevant to lower levels of rulemaking.

Mozaffar and Schedler's framework provides a well-formed structure to understand electoral rules in various democratic settings. Many studies - and mine - concern themselves with 'newly formed' democracies, or what Samuel Huntington termed 'third wave' democracies<sup>114</sup>. The complexity of understanding the different models of democracy, regarding their institutional design, and given their historical and transitional history, is challenging<sup>115</sup>. The value provided by Mozaffar and Schedler in separating rules of electoral competition and rules of electoral governance is that we are able to consider the historical context of a particular nation or state and still apply the framework. It is worth noting that Torres and Diaz argue that the separation of rules that govern the electoral competition and electoral organisation should not be separated from the constitutional level of rulemaking. They assert that if one looks at electoral rules in this way, away from the constitutional level, the full understanding from which we see electoral governance will be distorted<sup>116</sup>.

The critique offered by Torres and Diaz is useful, as it offers the fundamental consideration that most - if not all - EMBs globally are subject to the supremacy of the state's founding provisions. In other words, the aspect of electoral competition, as proposed by Schedler and Mozaffar, is derived from supreme laws in a nation. It prescribes laws and the guidelines for enhancing electoral competition. For example, the Constitution of South Africa<sup>117</sup> prescribes the electoral formula for the composition of its national legislature - Parliament. In this case, and in countries that adopt a similar format, the hierarchy of supreme laws ultimately reduces the autonomy of EMBs. They are compelled to abide by the prescripts of supreme laws. That does not mean that their autonomy is completely dissolved. EMBs possess some level of autonomy to enact regulations, giving effect to supreme laws, such as the publication of timeframes of the electoral timetable. Both sets of authors (i.e. Torres and Diaz; Schedler and Mozaffar) make considerable arguments in supporting the split of electoral rules from rules that determine competition. The minor difference is that Torres and Diaz argue that rules regarding electoral competition be seen

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<sup>114</sup> (Huntington, 1991).

<sup>115</sup> (Mozaffar & Schedler, 2002).

<sup>116</sup> (Torres & Diaz, 2016, p. 38).

<sup>117</sup> (Constitution of the Republic of South Africa, 1996).

as part of supreme laws<sup>118</sup>, while Mozaffar and Schedler recognise the relationship of lower levels of rulemaking becoming part of the function of EMBs<sup>119</sup>.

As both arguments are valid and the institutional compositions of representatives (the formula in which elections determine public representatives) vary between countries, a system that incorporates both considerations is needed when viewing the framework from an electoral governance perspective. Electoral competition may be manipulated, as we have seen historically in the United States, including “gerrymandering or distorting legislative district lines for the purpose of electoral advantage”<sup>120</sup>. Electoral rules that govern the competition through district lines, which should attempt to determine proportionality and representation, can be altered, through legislation, below the constitutional level.

Fortunately, this study did not experience the caution advised by Torres and Diaz (2016), as this research needed to look at evidence presented in the final level (rule adjudication), which pertained to problems in the second level of rule implementation. In other words, issues with the electoral governance of the case study needed to be compared to the founding provisions referred to in the first level of rulemaking.

#### **4.2.2 Rule Implementation**

A close examination of the process, procedures and activities before, during and after an electoral period offer insight as to whether voters and candidates alike are able to access free and fair elections. For this research, this stage is identified against the background of the problems that occurred in the Tlokwe case study, which ultimately led to questions being raised regarding the management of elections and its impact on universal civil rights. The level of rule implementation closely analyses the activities and procedures that are set out or implemented. In addition, this level allows for the opportunity to evaluate best-practice models of free and fair democratic elections. The *African Union Charter on Democracy, Elections and Governance* (2004) and South Africa’s *Electoral Act*<sup>121</sup>, stress the importance for the proper implementation of procedures that ensure electoral integrity. Some of these prescribed activities

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<sup>118</sup> (Torres & Diaz, 2016).

<sup>119</sup> (Mozaffar & Schedler, 2002).

<sup>120</sup> (Blahous, 2019, p. 4).

<sup>121</sup> (*Electoral Act* 73 of 1998).

include the registration of voters before voting day, identification of voters on voting day and the way ballot papers are handled.

The rule implementation process is a set of activities that an EMB needs to make accessible so that all electoral stakeholders are aware of the methods in which to engage or participate in elections under the value of equality. According to Mozaffar and Schedler's framework, EMBs are generally tasked with developing and ensuring the smooth model of public participation within elections - they require administrative efficiency, political neutrality and accountability. These underlying requirements to support the implementation of rules inspired by Michael Maley<sup>122</sup> prove their relevance when obvious errors are unclear. These three components of rule implementation assist in explaining how certain actions may impact the experience of a voter or candidate when attempting to access universal rights.

Administrative efficiency, in terms of rule implementation, is an important aspect to ensure the smooth participation of all stakeholders. It focusses on forward planning and compliance with the law, as there are numerous situations that an EMB must plan for. For example, an EMB may need to plan how it would ensure adequate and convenient voting stations for all voters in a country. Administrative efficiency is difficult to achieve in electoral governance, as "elections entail the largest peacetime mobilisation of the national population"<sup>123</sup>. Therefore, an EMB must be able to understand the context it operates under, such as the ability of citizens to access voting stations, which may be restricted due to income constraints. On the other hand, administrative inefficiency may cause or deter voters or candidates from participating in elections. For example, if the staff who assist with the administration of an election fail to provide the required information regarding requirements for registration on time and in an efficient way, candidates may miss deadlines to submit and therefore a candidate's participation may be impeded. Likewise, with voter registration, if staff do not efficiently supply the correct information to voters wishing to register, the financial burden on some less privileged may be too high and not easily accessible to encourage participation.

Administrative efficiency or lack thereof can also be used as a tool that may indicate political bias or prejudice from the EMB to competing political parties. Civil servants brought in to

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<sup>122</sup> (Maley, 2000).

<sup>123</sup> (Mozaffar & Schedler, 2002, p. 5).

assist with elections and permanent staff of the EMB are required to exercise political neutrality to ensure the integrity of elections. Without the integrity of elections, “low levels of confidence in electoral processes ... have a direct negative impact on the likelihood of voting”<sup>124</sup> and reduce the incentives for voter participation. This means that the actions by those involved in the administrative process of elections may indeed affect the turnout of voters or even bring into question the legitimacy of the electoral process. Being impartial enables voters to exercise accountability through elections.

Within Mozaffar and Schedler’s (2002) framework, accountability features as another prominent consideration in democracy. In chapter two, Diamond and Morlino’s framework featured dimensions of a democracy, which I have argued can be seen as a set of normative values by which a democracy should be measured against, in terms of electoral management. One of the most prominent dimensions in a democracy that Diamond and Morlino focused on, was accountability. In Mozaffar and Schedler’s framework, they too, place emphasis on embedding accountability in the electoral management process. This exhibits the importance of accountability and its relationship in a democracy.

Accountability in the context of this study - which contemplates the role electoral management plays in a democracy – and in providing access to civil rights for citizens, extends its importance for monitoring, legitimacy and the deterrence of malpractice. As such, public accountability is an integral part of the electoral process and its associated procedures. Education and awareness of electoral processes allow the public to participate, engage and hold officials to account. When the public has information made available to them, their perception of legitimacy may increase, as they now have tools to make informed decisions. Moreover, the public would be able to engage with an EMB to provide corrective guidance on issues that they feel may limit their ability to participate in elections. The need for information dissemination is important, not only for participants but also non-participants when electoral observation plays a role in legitimacy from external nations.

Accountability should be the largest underlying component of rule implementation. The procedures that are undertaken in this level are closely monitored and the need for exploration of this specific section may result in electoral reforms being considered. In the South African

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<sup>124</sup> (Birch, 2010, p. 1604).

public domain, the IEC is conducting voter education drives to assist voters and stakeholders understand and comprehend the country's current electoral system. In August 2020, the IEC held a webinar on the families of Electoral Systems. As a participant in the discussion, the IEC was made aware of the need for public accountability in the system and discussed the possibility of implementing electoral reforms in the Van Zyl Slabbert Report<sup>125</sup>, with the view to support electoral democracy through accountability. The need is clear, as observation and transparency regarding the implementation of rules allows for the former aspects of rule implementation to be conducted effectively. Without accountability and information transparency, it would be difficult to determine whether officials act in a neutral manner or whether administrative inefficiency affected the participation of voters.

### **4.2.3 Rule Adjudication**

The final level of rule adjudication represents the dispute settlements, which can occur at any stage of the electoral process. According to the above framework, it is also used to improve electoral processes arising from disputes. Dispute resolution is particularly important, as democracy through elections can avoid conflict of beliefs and elect a common government<sup>126</sup>. Arguably, the most effective rule adjudication system is an institutional design that makes use of an independent and impartial judicial system. The institutionalised independent judicial system will have the capacity to resolve disputes impartially from government interference. If government was able to issue directives and influence judicial outcomes, then the importance for the rule of law could not be achieved. In this study, I have made use of the judicial findings regarding the Tlokwe case study, given the Judiciary's independence and reliability to provide information. Most importantly, the judicial considerations on the Tlokwe case study highlighted several discrepancies with regard to how the electoral management of Tlokwe affected the civil and constitutional legal rights of both voters and candidates.

Mozaffar and Schedler<sup>127</sup> further go on to argue that dispute resolution “prominently involves the authoritative resolution of disputes that arise from ambiguities in complex election rules”. These authors highlight the importance of the judicial review of electoral disputes and the need

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<sup>125</sup> (Electoral Task Team & van Zyl Slabbert, 2003).

<sup>126</sup> (Przeworski, 1999).

<sup>127</sup> (Mozaffar & Schedler, 2002, p. 10).

for settlement in order to continue consolidating principles of democracy. It is evident that the peaceful resolution of any disputes arising, offer decisive corrective measures for the continuation of electoral management and legitimacy of elections.

Torres and Diaz (2015) critique this level, claiming that little attention is paid to this level, yet rule adjudication “enables the relationship between administration, organisation and electoral management”. Their argument is valid, especially considering the fact that we understand democracy as one of the few systems “to change governments and avoid violence”<sup>128</sup>. If one were to assume Przeworski’s minimalist approach, that violence is an ever-looming aspect of our society, and only democracy can bring about the peaceful change of governments, then one may agree that this level has been under-explored. However, in terms of democratic electoral management, one cannot fully agree with the lack of attention paid to this level.

Most judicial systems tasked with resolving disputes are independent. Their independence is important to the integrity and impartiality of EMBs and, in turn, their own operations – namely electoral management. The limited exploration by Mozaffar and Schedler on Rule Adjudication is sufficient. An independent appeal process dedicated to resolving matters affecting the electoral process should not directly fall within the function of the EMB without an appeal function. If dispute resolution becomes a function of the EMB, it may be subjected to partisan views over issues, depending on power, influence and politics. Immergut<sup>129</sup> understands that “institutions are most certainly created by social actors engaged in a struggle for political power”. This means that institutions are inclined to have a particular set of beliefs regarding how operations should be conducted. Having a separate dispute function from an EMB - of judicial review - allows for additional mechanisms, which can ensure neutrality in this situation. Moreover, if an EMB had the sole power to determine disputes it may be biased and award itself victory where it thinks it has taken somewhat reasonable measures. Mozaffar and Schedler<sup>130</sup> state that EMBs are institutions that often take shape by their historical context and the struggle for influence is found within political actors who are deployed to run such institutions. For this research, it is vital that independent accounts that produce the closest versions to the truth are considered, as to avoid any potential harm against voter civil rights.

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<sup>128</sup> (Przeworski, 1999, p. 13).

<sup>129</sup> (Immergut, 1992, p. 85).

<sup>130</sup> (Mozaffar & Schedler, 2002, p. 13).

The justification to use data from the independent Judiciary supports the validity of data, as their task is to objectively make assessments of whether the facts before them were conducted in the best interest of voter civil rights.

However, one should not assume that all EMBs lack the independence or impartiality to promote democratisation and legitimacy of elections. I argue that the level of arbitration should remain limited in the context of electoral management, to avoid impeding the necessary independence of the Judiciary.

However, the mechanism of judicial review is important, in order to ensure peaceful resolutions are brought about with regard to electoral processes. The idea that democratic elections bring about competitive change of governments and successful change-overs - without political violence - should be supported by independent institutions that work to ensure the legitimacy of elections. The responsibility to administer elections and, to an extent, the rulemaking, should rest with the EMBs. Judicial review powers should rest within the competency of the EMB only to the extent that it is able to resolve internal issues that do not affect the direct outcome of elections. Reviews or arbitration that deal with issues affecting process deemed to be unfair or not free, for example, need to be reviewed by an independent institution with integrity and support, such as the Judiciary.

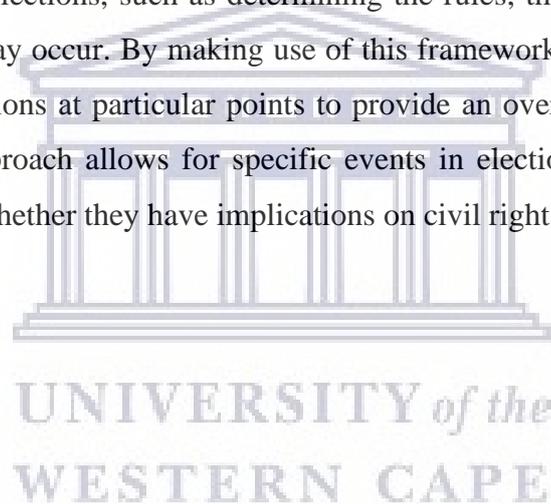
In supporting the substantive ideals of 'free and fair elections', the consideration of the systematic process of an election must be brought under scrutiny. As EMBs are responsible for administering elections, the safeguarding of ideals such as free and fair elections rest upon their ability to promote integrity within their process. The framework discussed above is by no means perfect, however, in the context of assessing a case study it allows the researcher to focus on specific actions and procedures undertaken by the EMB. From the start of rulemaking to rule adjudication, it is clear that the link exists between all levels for the purpose of promoting electoral integrity and accountability.

### **4.3 Conclusion**

As elections are an important instrument of democracy - in its attempt to ensure a peaceful transfer of political power - they become a valuable and protected activity for all stakeholders. In this regard, EMBs are essential in their management, with all efforts clearly intended to support foundational democratic normative values. The normative values of how this type of

regime should be run are intrinsic to what makes an election successful. In other words, the fairness of an election in the procedural approach can avoid disputes regarding issues of equal liberty. When EMBs are unable to satisfactorily secure the normative democratic values in electoral processes, then the processes place individual and collective civil rights in jeopardy. As democratic elections deal with several proceduralist tasks, which are designed to achieve substantive outcomes, there still remains a vast area where an error may occur. As a result, a framework is needed to systematically break down elections into portions, to understand what the implications of an error at any stage would cause. The research question, *what are the implications of the Tlokwe ruling on electoral democracy*, requires that this study consider what administrative and social implications have been imposed by a judicial ruling.

The framework proposed by Mozaffar and Schedler (2002) provides a clear categorisation of components that make up elections, such as determining the rules, their application and any adjudication matters that may occur. By making use of this framework, this study can dissect elections and draw conclusions at particular points to provide an overview in answering the research question. This approach allows for specific events in elections to be placed under scrutiny and to determine whether they have implications on civil rights.



## **CHAPTER FIVE: ANALYSIS AND DISCUSSION OF FINDINGS**

### **5.1 Introduction**

In the previous chapters (two and three), this study has set out the relevant rationale supported by a framework that seeks to establish the importance of considering certain democratic normative values in guiding electoral processes. In chapter three, the framework of categorising electoral activities into logical sets of activities was presented to systematically assess how normative values within electoral processes may affect democratic civil rights.

In this chapter, I will use the data collected through desktop research and through an interview conducted with a relevant stakeholder, and analyse the data by making use of both frameworks. By electing to use both frameworks, I will draw the necessary findings to understand the primary research question of how electoral democracy could have been affected by electoral management.

In the upcoming chapter, I consider the relevant legislation in the data provided by the Constitutional Court in its findings, and the data provided by the interview. It is crucial to note that only data that pertains to the scope of electoral management has been analysed, so as to avoid this study departing from its intended sphere of inquiry.

#### **5.1.1 Application of Framework to Case Study**

Mozaffar and Schedler's framework dealing with rulemaking in electoral governance provided the facility to systematically investigate the electoral process of the 2013 Tlokwe By-Elections. The numerous reported issues in the 2013 Tlokwe By-Elections case study largely involved procedural regulations. Instead of merely studying the issues within their individual form and without structure, the framework assisted in organising the issues into three main categories, namely: rulemaking, implementation and adjudication. The structure of the framework clarified the problems found. This step greatly assisted in avoiding conflating the problems in a process-ridden election. Additionally, by using this structured approach, it assists in highlighting further possible problems in the electoral process. In this way, an issue with the Voters' Roll could affect more than just the ability to canvass voters.

## 5.2 Perspective of the IEC (Senior Management)

The processes and regulations for elections set out by the IEC (as an EMB) in the Tlokwe By-Elections should have been intended to ensure electoral integrity. The importance of integrity in elections is needed, to ensure that every process is free and fair. The need for elections to be free and fair is not only supported by the *Electoral Act* but also as a value of democracy. By ensuring adherence to these principles and laws, conditions of electoral processes can be set that work to reduce the levels by which manipulation, irregular activities and electoral fraud could occur.

From the evidence presented to the Constitutional Court regarding the improper registration of voters, it is clear that there have been serious problems with the Voters' Roll. This problem, in specific, negatively impacted the integrity of the elections and ultimately hindered access to universal civil rights. The specific problem with the incomplete Voters' Roll, as argued by the Councillors and supported by the Constitutional Court judgment, is that it unfairly impeded their ability to competitively canvas voters through the availability of their addresses. As the first respondent in the Tlokwe By-Elections case, as well as being the only EMB responsible for elections in South Africa, it is important to investigate the IEC's perspective and the challenges they experienced. This step of the research considers the perspective of the IEC through an interview, to gather data and analyse it, so as to conclude findings.

The interview with a senior provincial leader of the IEC (*the participant*) revealed that one of the main challenges faced by the institution was the fact that political parties no longer worked cohesively with the IEC to build it as a strong institution, like they did in 1994. This date was significant for South Africa, as the year of 1994 marked the first democratic elections. According to the participant, at the time of the first democratic elections, political parties focused on the need to strengthen and build democratic practices. In 1999, when the Voters' Roll was first introduced as a tool for local government elections, political parties also supported the advent of the Voters' Roll. Political parties spent effort 'on the ground' to ensure that voters were correctly registered on the Voters' Roll. Whilst according to the *Electoral Act*, there is little obligation on the political parties to register voters, the cooperation of political parties in this regard assists the IEC with its administrative efficiency to ensure that political parties and representatives are able to access the 'most fair' competition. Therefore, it is in the interests of all stakeholders and the IEC to collaborate and thereby reduce the administrative and financial burden on the IEC, as the sole body responsible for assisting voters. A

collaboration to ensure voters are properly registered per local government requirements would allow the IEC more scope to apply resources to the aspects of electoral management.

In support of this view, the participant emphasised the responsibility of political parties to assist voters in the registration process. He outlined that political parties play important roles when it comes to ensuring voters are registered on the Voters' Roll. For example, political parties that are visible and present in wards and districts are able to assist people who lack the sufficient tools to complete the registration process, relating to literacy challenges, language barriers, access to registration offices, etc. The IEC as an electoral body is duty-bound to ensure effective communication in all the official and diverse languages of South Africa, as part of ensuring that there is a degree of equal participation.

The participant continued to sketch his view of the current political landscape in South Africa. His comparison of 1994 and the current political landscape illustrated it as one that has since diverged into a landscape where political parties exercise closer "contestation" and "tighter controls". Political parties now shift their efforts to ensure that they win elections or positions of power at almost all costs. They pay little attention to the need to continuously build morality and best practice in democracy - even if it means conceding defeat - in the interest of democracy building. He felt that their attention is directed at finding and exploiting loopholes in the system of elections in order to ensure that they are the victors of elections. He cautioned that this type of thinking is ever more prevalent at local government levels, as individuals fiercely contest between each other for positions of privilege. This depiction of his current view of the political landscape highlights concerns for accountability measures. When the main goal is to win and little attention is paid to building the character of accountability and ethical behaviour, voters will directly suffer should political contestants win in circumstances that neglect accountability.

During the interview, the participant shed light on some of the challenges that are faced when there is a requirement for addresses to appear on the Voters' Roll. The researcher questioned the practicality of this requirement when being applied to rural and unmarked areas. These types of areas are sometimes undefined, and have yet to be rezoned from industrial to residential areas by the Demarcation Board of South Africa. He mentioned a common scenario that arises in South Africa, whereby communities have established informal settlements in economic activity zones that are designated as industrial areas. This highlighted an operational concern for the IEC - the need to divert vital resources supporting the values of democracy to areas that are deemed not to contain eligible voters.

In some instances, the law does not require the IEC to request a proof of address, just an affidavit. This raises concerns as to how the affidavit is verified. The only measure currently available would be to prosecute those who have given false addresses, however, neither the IEC, nor the South African Police Service (SAPS) have the capacity or resources to conduct such a large-scale investigation. The lack of verification of affidavits and the need to only provide electoral services to eligible areas, presents a challenge for the IEC in ensuring the reliability of information feeding into the Voters' Roll. If the Voters' Roll is fed information that is unreliable, then this may impact the freeness and fairness of elections, as some voters would have an advantage of not being allocated to a specific voting area. On the other hand, some voters may be unfairly prejudiced in not receiving equal attention from the IEC, since they reside in an area that has not been zoned as eligible to partake in elections (i.e. economic and industrial zones).

The participant proceeded to discuss the relationship voters have when understanding the electoral process. He stressed that many voters were unaware that the Voters' Roll needed to be certified before it is published. However, once the Voters' Roll is published, it will be sent to the election polls. He highlighted a fundamental challenge between the time of publication and elections, which identified the challenge of economic restrictions faced by poorer individuals. For example, a person who has a car will be able to return to an area in which they formally resided, where they are registered to vote, as they are able to access this right more easily. However, a poor person may not be able to afford the cost of transport, if faced with the similar situation, as illustrated by the participant. This insight was constrained by two factors of Mozaffar and Schedler's framework<sup>131</sup>, both identifying tremendous administrative tasks for the IEC. The first being that the IEC is constrained by budget and environmental concerns when needing to supply enough paper ballots in each ward, for the purposes of overflow or access. Second, the process should be fair for all voters, regardless of economic standing and thus any inconvenience needs to be controlled equally for all voters.

Due to the nature of the Tlokwe case study being primarily focused on Local Government Elections, the discussion was steered toward understanding local government electoral challenges. The participant further highlighted the already vexing conditions that the IEC must adhere to during Local Government Elections. He cited that the ballots differ between wards,

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<sup>131</sup> (Mozaffar & Schedler, 2002).

as there are different individual or independent candidates standing for elections. The ballots being different mean that the IEC cannot just simply transfer ballots from one voting station to another, should a particular station run out of ballot papers. It is also difficult to prepare enough ballots, as voters sometimes vote in other voting stations according to their convenience if wards overlap each other. These challenges affect planning and ultimately, the ability to ensure administrative efficiency.

### **5.2.1 Rule Making**

In dealing with the findings provided through the Constitutional Court's judgment, it would be more appropriate to order these issues under the framework headings. As the Court did not attempt to explore the same question as this research paper, their considerations do not follow in the same order.

Beginning at the level of rulemaking, the investigation into the Tlokwe By-Elections must now unpack the legal framework in which South African By-Elections are organised. For arrangements to be made on how elections are to be held, there must be a legal foundation, which outlines the accepted practice. Should no legal obligations be imposed onto electoral management, then the authority to define the rules of competition and governance of elections could not be enforced. As a result, the study must take into account the relevant legal framework. The data from the Constitutional Court and the fact that its primary business is to apply applicable laws when it adjudicates a matter, provides the most appropriate facts that would identify the relevant legislation. The identification of the most appropriate legislation is important so as to avoid applying the incorrect statutory obligations to the IEC in the Tlokwe case study. Furthermore, with the Constitutional Court being the apex court of South Africa, it has the 'experts' in determining the appropriate legislation.

When the matter was brought before the Constitutional Court, the Court's first task in adjudicating this case was to establish the IEC's mandate, powers and functions. The Court needed to carry out its due diligence to establish whether there was a legal foundation that provides for the IEC to ensure that elections are free and fair. The Constitutional Court, at the outset, cited Section 190 of the Constitution of South Africa. This specific Section outlines the

role of the IEC to manage elections. Section 190(2) specifically identifies that there are further legal requirements, as well as functions of the IEC<sup>132</sup>.

The Constitution makes additional provision for the IEC, under its listing of Chapter 9 institutions. The IEC is specifically listed as a Chapter 9 institution that supports the development of democracy in the Republic and to ensure regular, free and fair elections. The provision for the IEC in this role is important, as it ensures that South Africa's citizens have the right to exercise their civil rights free from interference from the other three arms of state. This law specifically relates to Diamond and Morlino's (2002) framework of freedom and equality of participation. This means that citizen's freedom and equality to participate in elections are at the very foundation of what is needed for electoral democracy to be successful. The IEC draws its overall mandate from the Constitution's<sup>133</sup> vision to foster free and fair elections as articulated in section 190 (1b). The 'arrangements' regarding how the IEC should conduct its work, for election procedures and other relevant legislative requirements regarding elections, are contained in national legislation. The Constitutional Court identified the relevant national electoral legislation for this particular case, in specific the *Electoral Act* of 1998<sup>134</sup> and the *Municipal Structures Act* of 1998<sup>135</sup>. Accordingly, the Court's decision to cite these Acts was due to the fact that these Acts were the most appropriate legal prescripts in determining whether the 2013 Tlokwe By-Elections were free and fair.

In dealing with the problem - where voters were allowed to register to vote in wards that they did not usually reside in - the Constitutional Court cited the most appropriate legislation relating to electoral governance requirements. It extracted Chapter 2, Sections 6-8, of the *Electoral Act*, which provides for the manner in which registration takes place. The Sections read as follows:

***6 Persons who may apply for Registration as Voter***

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<sup>132</sup> (Constitution of the Republic of South Africa, 1996, p. 96).

<sup>133</sup> Ibid.

<sup>134</sup> (Parliament of the Republic of South Africa, 1998).

<sup>135</sup> (Parliament of South Africa, 1999).

*(1) Any South African citizen in possession of an identity document may apply for registration as a voter: Provided that where that citizen is ordinarily resident outside the Republic, he or she must in addition to the identity document produce a valid South African passport.*

Section 6<sup>136</sup> presents the overall requirement for voting in any type of election in South Africa. This Section defines the requirement for South African citizens who are considered to be ordinary residents of the country, to fulfil registration requirements.

Section 7<sup>137</sup> provides clarity on the expectations used in defining the ordinary residence of a voter. Section 7(3) removes any ambiguity left by the interpretation of where a person may reside. For example, if a person has multiple residential properties, it does not give that person the right pick and choose according to their pleasure where they may vote in Local Government Elections. In this regard, the legislation is clear. In addition, Section 8 elaborates on the duty of the Chief Electoral Officer to register a voter on the Voters' Roll if they are compliant with the requirements to register as a voter. Point 3 of Section 8 clearly makes provision for the requirement for an eligible person to be registered on the Voters' Roll in a district that they are ordinarily a resident of. This is important in supporting the value of equality in participation for all voters.

### ***7 Applications for Registration as Voter***

*(1) A person applying for registration as a voter must do so in the prescribed manner.*

*(3) (a) A person is regarded to be ordinarily resident at the home or place where that person normally lives and to which that person regularly returns after any period of temporary absence.*

*(b) For the purpose of registration on the Voters' Roll a person is not regarded to be ordinarily resident at a place where that person is lawfully imprisoned or detained, but at the last home or place where that person normally lived when not imprisoned or detained.*

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<sup>136</sup> (Parliament of the Republic of South Africa, 1998, p. 13).

<sup>137</sup> Ibid. p. 14

While there is a legal requirement for the Chief Electoral Officer to enter eligible citizens on the Voters' Roll for the purpose of making the information available to candidates, this is not the only purpose of this task. Manipulation and electoral fraud may also occur during voting, in districts where a citizen does not reside in and is allowed to vote through an omission of address-capturing and the enforcement of Section 7. If this were to occur, the purpose of Local Government Elections - to ensure that governance matters place residents as the primary participants - may erode the Election's entire intention of accountability and competition. For example, a scenario may occur where people would move around just to vote in an area where they think their political candidates stand the best chance of winning. Should voters be allowed to vote in circumstances not limited by Section 7, then Councillors will have little incentive to remain accountable to citizens who usually reside in an area. For a voter to be registered in accordance with Section 8(3) of the same Act, the IEC must be aware of their residential addresses. Part of Section 16(3) - on legal obligations - states that addresses should be correctly entered on a Voters' Roll, to ensure that voters vote in the places in which they usually reside. Finally, the capturing of this information is important in assisting the IEC in making sufficient arrangements in terms of the number of ballot papers, size and proximity of voting stations, and type of voting stations, among others.

### **8 Registration**

*(1) If satisfied that a person's application for registration complies with this Act, and that the person is a South African citizen and is at least 18 years of age, the chief electoral officer must register that person as a voter by making the requisite entries in the Voters' Roll.*

*(3) A person's name must be entered in the Voters' Roll only for a voting district within the ward in which that person is ordinarily resident: Provided that where that person is ordinarily resident outside the Republic, his or her name must be entered in a segment of the Voters' Roll created for that purpose.*

In the effort to provide clarity on the obligation of the IEC to provide this information and not withhold it, the Constitutional Court pointed to Section 16 of the *Electoral Act*. This Section deals with the IEC's obligation to make the relevant portion of the Voters' Roll available. Section 16 follows:

## ***16 Publication and copies of Voters' Roll***

*(1) A copy of the Voters' Roll as it exists at any time must be available for inspection during office hours at the Commission's head office, and the provincial and municipal segments of the Voters' Roll must be available for inspection at the times and venues mentioned in a notice published by the chief electoral officer in the Government Gazette.*

*(2) The chief electoral officer must provide a certified copy of, or extract from, a segment of the Voters' Roll as it exists at that time, to any person who has paid the prescribed fee.*

*(3) Notwithstanding subsection (2), the chief electoral officer must, on payment of the prescribed fee, provide copies of the Voters' Roll, or a segment thereof, which includes the addresses of voters, where such addresses are available, to all registered political parties contesting the elections.*

This Section stresses the importance of assuring transparency, equality and rule of law under the guise of administrative justice, when dealing with the Voters' Roll. The need to make sufficient provisions in legislative framework for access to the Voters' Roll is so that candidates or political parties may inspect it. The inspection of the Voters' Roll enables stakeholders to ensure that it is true and correct, for the confirmation of equality and fair participation. In this regard, Point 1 sets the legal requirement for the Voters' Roll to be available, as well as the location where a candidate may access it. In Point 2, we see that the Chief Electoral Officer holds the responsibility to provide a certified copy of the Voters' Roll. The certification of the Voters' Roll is intended to confirm that the assembling of the Voters' Roll has followed the proper procedures to confirm its legitimacy. Section 24(2)(a) - (b) of the same Act supports and expands on the details in Section 16. The Section outlines the segments of the Voters' Roll that are required to be available at the IEC's national, provincial and municipal offices. Furthermore, certification of the accuracy and publication of Voters' Roll by the Chief Electoral Officer as per the Act occurs when he or she makes such available at the said locations. The above clearly demonstrates the intention of legal prescripts to meet normative values. In its attempt to support these values, it goes a step further to prescribe the electoral activity needed to meet legal requirements.

Finally, Point 3 in Section 16, elaborates on the specific need for addresses to be captured in the Voters' Roll. Particular attention must be lent to the requirement for the inclusion of addresses on Voters' Roll, where such addresses are available, as this is one of the core issues in the case study. The entry of addresses on the Voters' Roll supports the need to ensure equality in the voting procedure. The argument presented by the Candidates, according to the Constitutional Court, was that the segment of the Voters' Roll for the Tlokwe Municipality was incomplete, as it did not contain the addresses of all the voters. Section 16 contained above makes clear the legal obligations of the Chief Electoral Officer and the IEC to provide for a complete and available Voters' Roll at any time. The supplementary provision of duty placed on the Chief Electoral Officer repeatedly supports the right to equality and fair participation. Section 16(1) of the *Electoral Act* indicates that the provincial and municipal sections of the Voters' Roll must be available to inspect as defined by the Chief Electoral Officer in the Gazette. As the Tlokwe case study fell into the context of a Local Government Election, this was of particular relevance to the case.

The above analysis at this level mainly sought insight from the Constitutional Court as a primary source of data. The data source is appropriate for these purposes, as this level establishes the legal principle for viewing the issues of the electoral management process. Data collected from the interview with a senior member of the IEC provided additional Acts for the study to consider. These Acts were not explicitly mentioned during the interview, however, some of the challenges experienced by the IEC find reference in certain sections of legislation. There are three main sections contained in the *Electoral Act* that are relevant to this study and the data provided during the interview. They are Section 15(2), regarding the objection to the Voters' Roll, Section 24(a) dealing with voting in a district where one is not registered and Section 33(a), regarding special votes.

One of the major challenges, as described by the IEC official during the interview, was that voters lack sufficient education regarding their rights and obligations. The rights and obligations of voters support the IEC in their functions. The core function of the IEC, as derived from the Constitutional Court, is to ensure free and fair elections. Without the cooperation and support of voters in fulfilling the IEC's legal mandate and obligations, voters would not be able to secure free and fair elections. Thus, if the IEC was unable to fulfil their legal and constitutional obligations, then voters would be denied their constitutional rights. For this reason, voter education is imperative. It would be erroneous of this study to omit such an

important aspect that may have had affected free and fair elections, as not all voters would have had the same level of access to the polls. This highlights the need for equality amongst voters in this scenario.

The participant broadly mentioned that voter education would go a long way towards addressing the challenges in electoral governance. Ideally, the *Electoral Act* should be broadly understood by the electorate. However, specifically relating to Tlokwe, the ability to object to the Voters' Roll may have been of value in this case. Section 15(1)(a)-(c) speaks to the grounds in which a person may object. The following:

### ***15 Objections to Voters' Roll***

*(1) In relation to any segment of the Voters' Roll or a provisionally compiled Voters' Roll, any person may object to the Commission in the prescribed manner to—*

*(a) the exclusion of any person's name from that segment;*

*(b) the inclusion of any person's name in that segment; or*

*(c) the correctness of any person's registration details in that segment.*

As the Act stipulates, any person may register an objection to the Commission on the grounds listed in Section 15(1)(a) - (c). Point (c) registers that a person/s may object to the correctness of any person's registration details. Therefore, the provision for candidates and voters to object before the election was scheduled and would have assisted the IEC in starting an investigation into the matter. The need for voters to be informed of the relevant legislation, would assist the IEC by having an active citizenry that could bring to their attention any flaws in the voting procedure. The protection of the right to free and fair elections is a universal right that is essential to the IEC's mandate. However, in certain circumstances, voters could be denied the right to vote, should their registration fall outside of standard practice. In other words, exceptional cases, such as being unable to reach a registration centre beforehand due to mobility issues, or attempting to vote in a different district to the one they registered for, may diminish an individual's right to participation.

During the interview with the IEC participant, these specific issues were raised and the difficulty in addressing these problems was emphasised. Registration between the publication

of the Voters' Roll and applications for a special vote are difficult to plan for. Both the IEC and voters will face challenges in overcoming these issues. As this section deals with rulemaking, we have consistently been identifying legislation that may help. Section 24(a) and Section 33 of the *Electoral Act* once again provide the most appropriate legislation in addressing these issues.

In the event that a person/s may have changed their address between final registration drive and voting day, section 24(a) allows for these persons to apply to vote in another district. During the interview with the IEC official, there were numerous reasons offered as to why one may change address, such as relocating. Additional challenges may range from someone being unable to reach an IEC office to vote in the new district due to mobility, or financial constraints. There may also be unforeseen reasons that force voters to restrict their ability to return to the same district in which they originally registered. In these and similar circumstances, Section 33 may provide a solution to obstacles that may limit a person's ability to notify the IEC that they would like to cast a vote in a ward that they were not registered for. Section 33 allows for special votes. It follows:

### ***33 Special votes in election for National Assembly***

*(1) In an election for the National Assembly, the Commission must allow a person to apply for and cast a special vote, prior to election day, if, on election day, that person cannot vote at a voting station in a voting district in which he or she is registered as a voter, due to his or her—*

*(a) physical infirmity or disability, or pregnancy;*

*(b) absence from that voting district while serving as an officer in the election; or*

*(c) being on duty as a member of the security services in connection with the election.*

The provision for special votes is meant - in the interest of freeness and fairness - to allow citizens additional assistance in trying to cast their vote. The reasons cited under section 33(1)(a) – (c) try to assist those in society who have physical limitations or are providing an essential service to the state on an election day. During the interview, the IEC official revealed that in his experience, he found that special votes also pose challenges for the IEC. This is in regard to the fact that special votes can be manipulated by political representatives who gather

applications from their constituents to (a) vote in a district where they do not usually reside under the protection and ease of special votes and (b) allow for their supporters to vote under special vote arrangements.

In concluding this section, we must stress the importance and suitability of reliance on the *Electoral Act* for this study. The purpose of the *Electoral Act* is to provide the legal framework for the proper management of elections. This is - as established in previous chapters - the IEC's core function. Further, the case which we explore brings into question electoral management and the rules governing competition. The various pieces of legislation - which are applicable to all the problems revealed within the data - assist us in making the observation that there are satisfactory legislative requirements. The legislation provides a lens through which we can look at the intended purpose for a Voters' Roll. While not every section cited above deals with the requirements to produce a Voters' Roll, all play a part in ensuring the legitimacy and accuracy of the Voters' Roll.

### **5.2.2 Rule Implementation**

The provisions set out in the applicable electoral legislation will not secure free and fair elections without the proper procedures to support them. The procedures falling under the regulations of the *Electoral Act* must be carried out, in order to promote free and fair elections. Legislation will set out the requirements to achieve free and fair universal suffrage, however, only the active processes can give way to those objectives. The level of rule implementation by Mozaffar and Schedler (2002) allows for the study to scrutinise the operations carried out during an electoral cycle. It is important to explore the particular issues of rule implementation in the electoral cycle of the Tlokwe case study. To find issues arising in the electoral process, a close examination of the data will uncover areas where rule implementation became a contributing factor.

The level of rule implementation is not stagnant and does not occur in a specific timeframe. In fact, it is a working model through the electoral cycle. According to Lopez-Pintor<sup>138</sup>, an electoral cycle may involve activities that occur before Election Day, during the polling day, and afterwards. The authors - as the developers of the framework - highlight three main components of rule implementation, namely, political neutrality, public accountability and

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<sup>138</sup> (Lopez-Pintor, 2000).

administrative efficiency. These three components comprise a wide range of tasks that may occur during the electoral cycle. For the scope of this study, I will focus only on the issues occurring within each of the components, as indicated by the data. In taking this approach, the study will limit itself to only explore that which is relevant to answering the research question of this case study. The data from the Constitutional Court judgment<sup>139</sup> and the perspective provided by the IEC revealed several operational challenges when measured against the three components of rule implementation, and these are political neutrality, public accountability and administrative efficiency, as discussed in detail hereunder.

### **5.2.2.1 Political Neutrality**

Political neutrality as a component of rule implementation, is vital when ensuring free and fair elections. Not only does political neutrality have the ability to shape the perspective of elections, but it also contributes to the legitimacy of results. Political neutrality needs to be present in two forms, in legislation and in the conduct of officials during an electoral cycle. At the rule implementation stage, it is appropriate to focus on the latter. Rule implementation is the point in which all legislative requirements are carried out and the actions of officials determine the perspective that voters may have of an election.

The framework by Mozaffar & Schedler<sup>140</sup> discusses the fact that electoral staff have varying degrees of authority when executing technical activities. It is important for electoral staff to uphold high levels of impartiality, as their encounters with voters leave an impression of the conditions in which elections are held. In other words, if voters are treated unfairly and face hardships in attempting to access their civil rights, or witness acts of electoral fraud, then their perspective of elections can lead to the consensus that elections were not free and fair.

For example, the previous speaker of South Africa's National Parliament's perceived political bias, often led to events of violence<sup>141</sup>. Her seemingly biased rulings were often the subject of contention in the National Parliament, which resulted in the Economic Freedom Fighters (EFF) Members of Parliament, proceeding with a series of violent protests. The disruption caused by the EFF and, at times, other political parties, demonstrated an inability for compromise within

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<sup>139</sup> (Kham and Others v Electoral Commission and Another, 2015).

<sup>140</sup> (Mozaffar & Schedler, 2002, p. 9).

<sup>141</sup> (Grootes, 2020).

the institution, which ultimately affected public confidence. During these episodes, it was apparent how a situation can escalate when the ability for democracy to peacefully resolve disputes has failed.

The perceived political neutrality in legislative terms, regulations and actions of the electoral officials contribute to the overall electoral integrity. Reduced belief in impartial elections threatens a peaceful transition or legitimacy of governance. In line with this, the Electoral Knowledge Network<sup>142</sup> provides a comprehensive list of situations, supported by examples, where electoral violence has occurred. They cite, amongst others, bias in calculating electoral results, as a possible cause of electoral violence.

In the Tlokwe case study, the incorrect registration of voters did not necessarily change the outcome of elections, however, in closer contested areas, the result may have been different. The question remains whether the incorrect registration of voters may have been as a result of bias by electoral officials, or pure error. There were approximately 1 000 voters who were registered in the incorrect ward, which was put down to human error and insufficient particularity of voter's addresses. Ideally, if the Voter Registration Regulations of 1998 - contained in the *Electoral Act* - were followed, then only those person/s who qualify to be registered in the respective wards would have been correctly recorded on the Voters' Roll. However, one of the challenges mentioned by the IEC official in the data revealed that the Regulations for registration make no mention of the requirement for the IEC to establish the accuracy of the voters' addresses.

What is suspicious, is that all 1 000 registrations were recorded in incorrect wards, and not the correct ones. Unfortunately, this study is not concerned with answering this specific question, nor was the information obtainable regarding this issue. It is reasonably conclusive that there may have been elements of political bias at play. The current methods for supplying addresses can be vulnerable to electoral fraud. Ward Councillors have the power to act as a Commissioner of Oaths, enabling them to sign a document stating that a person resides in a particular area. While most should treat this privilege with a degree of integrity, it does, however, create an opportunity for manipulation by untrustworthy individuals. In tightly-contested elections,

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<sup>142</sup> (Project, 2020).

Councillors may arrange for people to wrongfully register in wards that they do not usually reside in. There is a clear, justified need to verify the addresses of voters on the Voters' Roll.

Political neutrality - as discussed - can impact the way in which voters and candidates access their civil rights. The need for neutral and unbiased administration contributes, in part, to a wider operation to ensure values such as fairness, freedom, accountability and participation. For example, the incorrect registration of voters in wards in which they do not reside, demonstrates that bias may have occurred, causing an unfair advantage for certain political candidates.

#### **5.2.2.2 Public Accountability**

Since we know voters were registered in wards that they did not usually reside in, a number of them - through collusion - may have influenced the outcome of elections. If a candidate wins on this basis, they have no incentive to be responsive or accountable to the local community. Local governments are established with the intention to enable the community to have direct ownership of governmental programmes through direct election. An elected official, through means of manipulating the people who are eligible to vote in a particular area, deprives the local community of their constitutional right to hold those in political office to account. In terms of electoral democracy, the manipulation of voting eligibility can remove the important aspect of competition. If the Voters' Roll for a District is littered with inaccurate or unverified addresses, then it ceases to be a trustworthy mechanism of accountability and transparency in democratic elections. The decrease in confidence in the Voters' Roll negatively impacts the ability to ensure transparency of information and that political representatives are elected by majority will.

In South Africa, elections are an important vehicle for transparency and information if candidates and the public have access to the Voters' Roll for the purposes of inspection (Section 16 of the *Electoral Act*) and objection (Section 15). The ability to inspect the Voters' Roll adds a level of accuracy and transparency to the process of certifying the Voters' Roll. Once the Voters' Roll has been inspected, the public and candidates may object to entries in the Voters' Roll on the basis of inaccuracy of a person's particulars.

In the 2013 Tlokwe By-Elections case study, the ability to inspect the Voters' Roll - according to the publication dates of the electoral timetable - did not materialise, as found by the

Constitutional Court<sup>143</sup>. The insufficient time given to candidates to inspect the Voters' Roll did not allow for this mechanism, which increases the credibility of elections. In the case study, it was revealed that if candidates had been given sufficient time to inspect the Voters' Roll, they may have objected to certain entries. The delay in publication of the Voters' Roll exposes an operational shortcoming in the implementation of the law. Historically, this legal requirement of the IEC to publish the Voters' Roll according to an electoral timetable, would have allowed enough time for objection. However, in this particular case, the IEC may not have had the capacity to amend such a large number of registrations before Election Day. It is likely that a postponement of elections would have occurred, should the objections have been registered beforehand.

The Tlokwe case study highlights the importance of the public and political candidates in holding EMBs accountable. At the local government level, the public, individual Councillors and party agents have more at stake in the outcome of elections, and in ensuring that they are run with the highest levels of integrity. For independent candidates, accountability comes in the form of elections, which are used as a tool to determine if the representative has addressed the needs of the local community<sup>144</sup>. The IEC, in this case, had the responsibility of making decisions, even when faced with ambiguity. The Commission contended "that it is not obliged to verify voters' addresses". Accordingly, their decision to ignore what they felt was ambiguous legislation, impacted the process by which the IEC collected addresses. By being unwilling to approach the situation with the attitude of enhancing and improving its database and involvement, the Voters' Roll suffered, to the extent that it was not able to provide the information as intended. The EMB's decision to take this approach affected its mechanisms, which were designed to allow for free and fair elections. Therefore, it is appropriate that EMBs - and their officials - are held to account for pivotal decisions that affect hard-won freedoms.

### **5.2.2.3 Administrative Efficiency**

The Tlokwe case study demonstrated problems with a number of administrative processes occurring before the elections, which were intended to improve freeness and fairness. Looking to the Constitutional Court judgment, it is understood that one of the major issues of contention was the delivery of a Voters' Roll, containing sufficient address particulars, in accordance with

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<sup>143</sup> (Kham and Others v Electoral Commission and Another, 2015).

<sup>144</sup> (Rinfret, et al., 2018, p. 498).

the electoral timetable. Within the scope of administrative efficiency, other issues regarding logistics and manipulation of electoral processes were identified during the interview with the IEC respondent. These problems emphasise the importance of administrative efficiency during an electoral cycle.

According to Mozaffar and Schedler's framework<sup>145</sup>, administrative efficiency unpacks operational tasks, which take place at various phases of an electoral cycle. For example, the activities of registration and eligibility determine the access to civil rights before the Election Day. Thus, in relation to this case study, it is important to explore the importance for administrative efficiency at any stage of the electoral cycle. Problem identification and solving at different stages will strengthen administrative efficiency, which could be a solution to some of the issues experienced in Local Government Elections.

Firstly, the Tlokwe case study showed the practical importance of access to information in achieving accountability in electoral processes. Access to information must be supported by administrative efficiency so that people can make informed assessments timeously. When administrative efficiency is ineffective, it may compromise the speed and quality of information dissemination. Voters, candidates, civil society and other stakeholders rely on the speed and quality of information available to them to make assessments and to object to certain practices if such are found to be unfair, or a hinderance. If the electoral management of information were to be unreliable and slow, stakeholders would not be able to make informed decisions and assessments regarding the quality of free and fair elections.

In Local Government Elections, the Voters' Roll is a fundamental key component for achieving accountability and transparency, compared to other types of information. The Voters' Roll assists in the active involvement of all stakeholders to achieve free and fair elections. It indicates the number of people allowed to vote in a particular district in Local Government Elections. This is important for voters, so that individual communities are protected from outside communities voting in their district, and potentially altering the outcome of elections. For political candidates and parties, it is important in terms of canvassing potential voters and understanding the community residing in the district. Therefore, the Voters' Roll needs to be administered efficiently for it to be used as an effective tool.

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<sup>145</sup> (Mozaffar & Schedler, 2002).

The importance of the Voters' Roll needs to be supported by administrative efficiency. There are two main considerations for the Voters' Roll, which require administrative efficiency to be at the root of any processes. Firstly, the IEC - as an EMB - must ensure that enough time is provided for voters to be recorded on the Voters' Roll. If voters were not given sufficient time to register on the Voters' Roll, this may cause a lower than anticipated voter registration, causing a restriction for some potential voters to fairly access their universal civil right to vote. Secondly, the Voters' Roll must be published at an agreed date in advance of Election Day, so that candidates and political parties may have enough time to canvass those listed on the Voters' Roll. The publication of a full Voters' Roll includes the requirement for addresses to be recorded correctly. Thus, both considerations entail administrative efficiency in terms of planning and data gathering.

At the rule implementation level, administrative efficiency is vital to democratic participation and elections. It is a core component that paves the way for other checks and balances to take place and to be effective. In the case study used in this research, it is evident that the lack of administrative efficiency relating to some of the problems experienced by the IEC, led to the matter being raised in the Constitutional Court. To resolve some of the issues raised by the Constitutional Court and from the IEC participant's perspective, a renewed focus on administrative efficiency is necessary in Local Government Elections. It therefore follows that if administrative efficiency were not a fundamental requirement of democratic Local Government Elections, then the IEC as an EMB could consistently publish an incomplete Voters' Roll, which hinders mechanisms for accountability.

Administrative efficiency is an important component underpinning the Voters' Roll, which needs to be extended to several activities that further support the integrity of elections. The IEC is the institution solely in charge of holding free and fair elections and, as a result, it holds the greatest responsibility. However, it is not the only stakeholder in elections. Civil society, voters and political parties have a responsibility to ensure that their conduct is lawful and supportive of constitutional electoral values.

The interview with the IEC official revealed several ways that all stakeholders can support and assist the IEC in achieving the constitutional value of free and fair elections. The responsibility to ensure free and fair elections will not be achieved if the IEC is the only role-player that seeks to plan for free and fair elections. In fact, free and fair elections are part of the vision and requirements of the Constitution of South Africa. The Constitution - being the supreme law -

requires all who live in South Africa to abide by its vision and authority. For this reason, all stakeholders have a duty to support electoral democracy and the IEC in achieving free and fair elections.

The interview with the IEC respondent exposed the challenges with the current demarcation of land in South Africa. He identified ways in which the political actors may assist the IEC and voters in providing correct addresses for the Voters' Roll. Finally, he stressed the IEC's struggle to quell how some political actors may manipulate the electoral process for political power. The planning and production of the correct number of ballots needed in a ward - including the margin for error with ballots - starts with having access to the correct information from the Voters' Roll. The accuracy of the Voters' Roll depends on several factors, given the context in South Africa.

Statistical data by Statista, shows that South Africa's literacy rate is currently at 95%, however the true ability of comprehension in terms of information is far from impressive. According to the International Association for the Evaluation of Educational Achievement (IEA), in its Progress in International Reading Literacy Study (PIRLS), South Africa placed last out of approximately 50 other countries in terms of reading with purpose.

With the data suggesting such poor levels of comprehension, it becomes ever more vital for a large number of those who are able read and comprehend to assist the less fortunate in understanding the electoral process. For instance, Councillors, Members of Parliament, legal professionals, police, government (especially Home Affairs) and civil society should assist voters in compiling and submitting true and correct registration details. The collaborative effort of many actors in society will, in turn, strengthen electoral democracy by reducing the effect of possible avenues of manipulation of election outcomes. In this way, the IEC will be assisted in developing a sound and true database of all eligible voters in South Africa and be able to correctly locate them in their relevant voting districts.

The challenge of locating voters in wards does not only end with the ability of voters to provide sufficient particulars of where they live. South Africa also has a large quantity of unmarked areas where people reside. The insufficient details as regards informal residential settlements can be attributed to the swift and, at times, immediate way, that people establish settlements on unassigned land. The IEC's mandate is not to establish whether the people's claim to occupy land is compliant with the law but rather, to afford every citizen an opportunity to register and

to vote. However, this poses a challenge for the IEC in attempting to register people in the correct wards, if people are unable to identify where they live. Urban and more affluent areas have street names, house numbers, suburb names and postal codes. On the other hand, informal settlements that are well known do not yet have proper land registration and others have not yet been zoned as residential. Local Government Elections are dependent on exact addresses, whereas National Government Elections just require knowing where you are in a larger area. For Local Government Elections, the IEC needs to pinpoint a voter's location to street address level, in order to place them in the correct voting district.

In contrast, the Constitutional Court judgment held the view that “the voter's ordinary place of residence had to be sufficiently clear” and questioned why the IEC did not take steps to ensure that the addresses were accurate<sup>146</sup>. According to the World Bank, nearly half of South Africa's urban population lives in townships or informal settlements<sup>147</sup>. These types of communal living conditions in South Africa are unlikely to have a clearly demarcated address for individual homes. Many residents make use of generic addresses and are unable to provide an exact street number where they reside. The inability to give a precise address poses a number of challenges when voters are required to vote in a voting station or District linked to their address. In some instances, a generic address may contain thousands of applicants who reside in an area but may differ in wards that are separated by a street. This becomes problematic when the IEC needs to ensure that logistical arrangements are made for the correct number of people living within a particular voting district. Moreover, voters who vote in wards that they do not reside in, will not fully achieve the intended purpose of local government, which is to be as close a reflection as possible of the will of the people. What becomes apparent is that not ensuring that voters are registered in the correct voting district poses major problems for electoral democracy and the accuracy of the Voters' Roll.

In this regard, the Court's question as to why the IEC did not request some kind of information for verification of their addresses has merit. However, the Court did state that the IEC had a duty to register people for the ward in which they usually reside. The IEC could have implemented reasonable measures to determine whether a voter's address was correct, by requesting some sort of account, via geo-tagging or cross-referencing the Home Affairs

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<sup>146</sup> (Kham and Others v Electoral Commission and Another, 2015).

<sup>147</sup> (BusinessTech, 2016).

database. They already cross-reference Identification Document (ID) numbers with Home Affairs, so surely the IEC would be able to request a confirmation of address. Special votes may be another small but important way the electoral process may be manipulated. According to the IEC participant, there is evidence of misconduct by political parties regarding special votes.

According to the framework of this study, “universal adult suffrage and equal participation dictate the easily-accessible voting places across the country”<sup>148</sup>. As an EMB, the undertaking for the IEC at the level of rule implementation is that it must allow for the maximum participation of all voters in its processes. In order to encourage maximum participation, its processes need to be accessible, so that all voters may access their voting rights. One such mechanism would be special votes, which are intended to offer assistance to those who have legitimate difficulties in reaching their voting station on Election Day. The IEC’s website is one way in which a voter may obtain clear information regarding special votes. The online platform creates ease of access to information and for the registration thereof.

However, on the VEC1 form, used to apply for special votes (see Appendix 1), there is no requirement to verify disability, infirmity or pregnancy by a medical practitioner. The IEC has attempted to improve administrative efficiency through accessibility. Unfortunately, it has resulted in possible avenues for manipulation of the system in circumstances where addresses lack accuracy. Political candidates may abuse the system and register people from outside their residential district to vote through the mechanism of special votes. In the 2013 Tlokwe By-Elections case, voters were registered in the incorrect wards due to the fact that their particularity of addresses was insufficient. There is insufficient data to suggest that incorrect registrations were conducted under the special vote’s mechanism. It is evident that special votes may provide an additional loophole to the challenge of incorrect registrations. It is not far-fetched to believe that manipulation of these allowances has and will occur in South Africa if there are not any revisions made to the current legislative processes.

### **5.2.3 Rule Adjudication**

The rule adjudication level must not only establish whether there is sufficient electoral legislation but also consider what improvements have been made to the electoral system

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<sup>148</sup> (Mozaffar & Schedler, 2002, p. 9).

resulting from disputes<sup>149</sup>. The effective amelioration arising out of disputes indicates a well-functioning level of rule adjudication. At this level, if disputes were unable to be resolved and processes improved upon, then the concept of free and fair elections may be brought into question. In the Tlokwe case study, the independent candidates approached two Courts to seek relief over their complaints relating to the Voters' Roll. The independent candidates first approached the Electoral Court for relief over the excessive number of voters registered with incomplete or no addresses. The Electoral Court decided against their application. Subsequently, they approached the Constitutional Court for a supreme ruling. The Constitutional Court disagreed with the Electoral Court's decision and overturned it in favour of the independent applicants.

The disagreement between the two Courts demonstrates the independence and the availability of judicial review if relief is not found. The availability of dispute mechanisms in the form of courts, provide all stakeholders with the ability to access fair and impartial resolutions. In South Africa, the Constitutional and Electoral Court are both independent institutions that form a separate arm of state, thus granting them independence, which is important for impartiality. The Court's ability to act independently of any other arm of state is important for its own integrity and the legitimacy of its decisions. The Court's legitimacy and role in elections is emphasised by the IEC and according to "Section 78 of the *Municipal Electoral Act*, the Electoral Court has jurisdiction in respect of all electoral disputes and complaints about infringements of the Code, subject to Section 20(4) of the *Electoral Commission Act*."

In accordance with the theme of the framework, one must consider what contributions rule adjudication make to overall electoral management. Rule adjudication assists in providing a clear decision over matters of contention. The clarity descending from resolutions can improve the management of elections. In the judgment by the Constitutional Court,<sup>150</sup> as part of its attempt to ameliorate the IEC's current electoral data and the effectiveness of the Voters' Roll, the Constitutional Court ordered that the IEC obtain all registered voters addresses, where available.

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<sup>149</sup> (Mozaffar & Schedler, 2002).

<sup>150</sup> (Electoral Commission v Mhlope and Others ZACC15, 2016).

In ordering the IEC to obtain addresses for voters who either had incomplete addresses or no address listed, the Court left the IEC with substantial challenges. The IEC needed to capture approximately 16.2 million voters' addresses<sup>151</sup>, as per the requirements of the Court's judgment. The Court's intention was to ensure that the integrity of the national common Voters' Roll served its intended purpose, to support free and fair elections. A Voters' Roll containing complete addresses required the IEC to reconsider its approach when acquiring addresses from voters. Two approaches are needed from the IEC in this regard: the first would be to identify methods by which to obtain the addresses of voters who do not willingly approach the IEC to update their particulars. Secondly, the Commission would need to revisit how it would capture those who do not currently have addresses.

### 5.3 Summary

The structure of Mozaffar and Schedler's (2002) framework assisted the analysis to categorise the data and provide a structured discussion. Not only did the framework assist in directing the study, but it also provided insight as to what the requirements were to consider at specific levels of the electoral process<sup>152</sup>. Through making use of Diamond and Morlino's (2004) framework, the study added the richness of insight of the importance of substantive values in electoral management<sup>153</sup>.

At each stage of the electoral process, this research used the Tlokwe case study's data and analysed the relevant problems pertaining to electoral management. The importance of each stage of the democratic electoral cycle is, in itself, as presented, positioned to support democratic normative values. This provided yet another reason to support the argument that democracy rests on a set of normative values and that without them present in elections, it opens the door for the infringement of civil rights.

The analysis of the data showed that at each level there were sufficient provisions at the rulemaking stage to clearly impose protocols to ensure the integrity of elections. The level of rule implementation was where the biggest problems were experienced with the Voters' Roll, which ultimately affected citizen's access to their civil rights. In this level, the political

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<sup>151</sup> (Commission, 2020).

<sup>152</sup> (Mozaffar & Schedler, 2002).

<sup>153</sup> (Diamond & Morlino, 2004).

neutrality and accountability mechanisms of the electoral framework suffered great shortcomings when ensuring that voters were registered correctly.

It is at the rule adjudication level that we see the dissatisfaction by the Constitutional Court in the IEC's efforts to promote integrity of processes and support civil rights. The Court's declaration of elections not being held in a free and fair manner showed that the management of elections does, in fact, impact access to civil rights.



## CHAPTER SIX: CONCLUSION

### 6.1 Introduction

In this chapter, I will conclude that the ruling by the Constitutional Court over the management of the Tlokwe By-Elections was to ensure the protection of civil rights. The implications from this ruling were intended to initiate an improvement in the electoral process. The need for the IEC to improve and reprioritise its data-capturing was to develop the access to democratic civil rights. It became clear from the Tlokwe case study, that the electoral processes lacked democratic values in the decision-making process. As the framework shows, rights to franchise in democratic elections are underpinned by the value judgments in all electoral processes. The importance of exploring this case and understanding the interrelated values and processes, assist in building the capacity of democratic elections in South Africa.

Even though the Constitution of South Africa<sup>154</sup> in its Preamble specifically protects the nation's democracy and its values, and human rights are the foundation of the Republic's purpose, there are situations where these laws are not respected. According to Bishop and Hoeffler<sup>155</sup>, "having the legal right to vote is not always sufficient to ensure that citizens are able to exercise this franchise in practice." While the Constitution is clear about what it expects of South Africa's democracy and elections, meeting these conditions all the time may be challenging. Concurrently, the will to maintain democratic values and freedoms in South Africa makes these rights central to any activity of a political nature.

The research question originates from the above in its attempt to understand exactly how electoral processes - and their management - are able to fundamentally obstruct the access to constitutional rights. Moreover, there is clear intent to protect, practise and observe these constitutional rights, as this matter was not underrepresented. The issues experienced in Tlokwe warranted the efforts of independent candidates and the apex Court of South Africa to set aside elections, which are essential to democratic stability. Moreover, the Court felt that it needed to assist the IEC in setting a timeline for its management to meet the requirements for adherence to constitutional civil rights.

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<sup>154</sup> (Constitution of the Republic of South Africa, 1996, p. 1).

<sup>155</sup> (Bishop & Hoeffler, 2016, p. 611).

## 6.2 Theoretical Framework Setting the Groundwork for Assessment

In order to answer the central research question, the researcher chose to use a hybrid design that incorporated the insights of Diamond and Morlino's<sup>156</sup> framework. In doing so, this helped to lay the foundation of what the relevant components of a democracy are, for the purpose of this research. The hybrid design of the framework provides focus for this research, in order to connect the wide-ranging problems of the Tlokwe By-Elections.

Diamond and Morlino's (2004) insight provides this research with a rationale as to what values are relevant for democracy to function. While this framework initially set out to assess the quality of a democracy, it is adapted in this study to excavate the crucial role of values in a democracy in achieving civil rights. Diamond and Morlino's (2004) framework, in its adapted form, provided this research with a defined scope of core democratic values. Further, it goes on to give meaning to each of these values in a way in which we are able to understand its relevance to the regime and electoral processes.

When assessing judgments from the Constitutional Court and the importance of electoral management in relation to civil rights, Diamond and Morlino's<sup>157</sup> framework assisted in understanding the need for the presence of values in supporting democracy. In 2018, when the IEC applied for an extension to meet the Constitutional Court's prior obligation to rectify the Voters' Roll, the Court maintained its view that these values are central to elections and the Constitution. The Court quoted promises contained in the Bill of Rights that "every citizen is free to make political choices, and second, that every citizen has the right to free, fair and regular elections"<sup>158</sup>. The significance of the Court's citation of the Bill of Rights and the fact that these values are protected under a legal framework, emphasises the intent for these values to be foundational in electoral activities.

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<sup>156</sup> (Diamond & Morlino, 2004).

<sup>157</sup> Ibid.

<sup>158</sup> (Electoral Commission of South Africa vs the Speaker of the National Assembly and Others, 2018, p. 6) and (Constitution of the Republic of South Africa, 1996, p. 8)

In chapter three, I have argued that no matter the approach to the extent that democracy is present, values accompany this regime, even at the most minimalist conception. This provides further support those values do underpin democratic activities, such as elections. As established in the framework, competition as a value ensures that there is an arrangement (elections) for a possibility in which political power can shift.

In relation to the case study of this research, it is important to understand which events led to the breakdown of electoral processes, which then ultimately affected voter rights. To apply Diamond and Morlino's (2004) framework to this scenario and gain sufficient conclusions, the electoral process needed to be examined. Their framework sets out the components of a democracy where regular, free, fair and competitive elections must occur for a state to have a democracy that allows complete access to franchise. However, this framework is limited in that it provides the principle, yet does not discuss the role of electoral mechanisms in realising civil rights.

The analysis of the case study found that the issues with information and availability of the Voters' Roll breached the legal principle of access to political franchise. To understand the process of how mechanisms such as the Voters' Roll work to actively protect values and rights, a separate framework needed to be used to break the activity of elections into categories. In doing so, this research benefitted from the ability to consider different aspects of elections in terms of their roles. This research used Mozaffar and Schedler's (2002) framework's levels of electoral governance<sup>159</sup>. This framework divided the electoral process into categories, which grouped activities in different stages of the process and what is expected of its management. Additionally, it provided the link through which electoral management impacts the values of Diamond and Morlino's framework. For example, in Mozaffar and Schedler's framework, when an electoral official behaves in a manner that does not feature neutrality when providing services, it affects values contained in Diamond and Morlino's framework of competition.

The case study provided for a practical application of exploring the ways in which management systems of elections affect values of a democracy and civil rights. In the Tlokwe By-Election,

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<sup>159</sup> (Mozaffar & Schedler, 2002).

there was little justification - apart from political bias - as to why voters were allowed in great numbers to vote in wards that they did not reside in.

### **6.3 Electoral Management of the Tlokwe By-Elections**

The issues in the Tlokwe By-Elections highlighted problems with the electoral management of this process. From the review of the Constitutional Court judgment and the context discussed in earlier chapters, it is clear that the Voters' Roll became a central point of dispute. The central issue indicated that the IEC - as an electoral management body - needed to make adjustments to its management of the Voters' Roll.

According to the IEC's Chief Electoral Officer, Sy Mamabolo, in the Voters' Roll "an address has functional value to the realisation of free and fair elections"<sup>160</sup>. His statement supports the central focus of this study to explore how electoral processes, as a functional tool, assist in achieving civil rights. If Mamabolo's belief is that a sound Voters' Roll would bring about free and fair elections, then what reasons did the IEC have to oppose claims from the independent candidates when they raised their concerns? What is clear is that the IEC had neglected part of its duty to ensure the upkeep of the Voters' Roll. Whilst it did manage to include a vast amount of information on the Voters' Roll, the organisation's efforts fell short of complete protection of constitutional values, in this case. Its administrative inefficiency in doing so brought about this long-protracted issue and fundamentally caused prejudice in a process intended to be free and fair.

For candidates, the electoral inefficiency of the IEC in providing a complete Voters' Roll denied them the important values of horizontal accountability and fair competition. The IEC's failure - at key points - to reassert the principle of administrative justice, impacted the ability of candidates to hold the institution and other opponents accountable in providing a true reflection of the eligible voters in a particular area.

The incorrect registration of voters meant that candidates were not able to ensure that elections maintained a fair competitive environment. The incorrect registrations made it nearly impossible for candidates to canvass these voters. This caused unnecessary complications in partaking in an equal and fair process. The lack of diligence by the IEC to ensure voters were

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<sup>160</sup> (Barron, 2017).

correctly registered, left the important incentive created through competition open to manipulation. In chapter two, Schumpeter's<sup>161</sup> own reflection on core democratic principles established the need for free and fair competition. Without free competition, Przeworski's concept of democracy being able to ensure a peaceful transition, and free and fair elections acting as a self-enforcing equilibrium, cannot exist. The principle to maintain electoral integrity and free and fair competitive elections, has a much more important meaning than just reflecting an election result. Rather, it guards against civil conflict.

While there has been no evidence presented to identify whether this indeed was the intention of any candidate, an election that has flawed processes can impact its integrity. The irregular registrations should have never been allowed to take place. In one way, this broke down the requirement of the rule of law to be applied equally to all citizens. The *Electoral Act* prohibits voters registering for elections in wards in which they do not usually reside. Allowing for voters to register without addresses or from addresses outside of the area standing for By-Elections does not apply the law equally to all citizens.

In the Constitutional Court judgment<sup>162</sup>, the approach by the Court to lay the administrative task of gathering address data for the Voters' Roll upon the IEC, underscored the IEC's duty for elections, as listed in the Constitution<sup>163</sup>. The fact that irregular registrations were allowed to be recorded, showed that the IEC needed to redirect its approach to elections. The organisation should not only monitor and administrate the elections but needs to proactively implement decisions that consider constitutional objectives.

The incorrect registration of some of the voters meant that these voters were ineligible to take part in the ballot-casting process. Their illegitimacy is determined from the legal requirements of the *Electoral Act*<sup>164</sup>, which requires them to be a resident of the area that is holding By-Elections. In the Tlokwe By-Elections over 3000 voters<sup>165</sup> did not meet the *Electoral Act*'s requirements for registration, thereby rendering them ineligible to vote. Even though these

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<sup>161</sup> (Schumpeter, 1976, p. 285).

<sup>162</sup> (*Kham and Others v Electoral Commission and Another*, 2015).

<sup>163</sup> (Constitution of the Republic of South Africa, 1996, p. 96).

<sup>164</sup> (Parliament of the Republic of South Africa, 1998, p. 14).

<sup>165</sup> (Ndletyana, 2016, p. 457).

registrations did not affect the outcome of the Tlokwe By-Elections, it broke the legal principle intended to ensure that voters participate in free and fair elections. The need for a sound Voters' Roll is to act as a mechanism that provides for these civil rights. If the IEC does not address the need for address data on the Voters' Roll, it may lead to the entire Voters' Roll being compromised in its integrity. Should this occur, then candidates would not be able to inspect the Voters' Roll to perform due diligence in terms of inspection. Additionally, neither would they be able to canvass voters registered for district and ward elections. This impacts the way candidates as key stakeholders are able to hold the IEC's processes accountable and ensure fairness of elections through the Voters' Roll.

For eligible voters, this affects the values of vertical accountability, participation and competition. However, should a scenario occur where voters who are ineligible or incorrectly registered to vote in a particular area are of a significant number, it may result in an undesirable electoral result. This would occur when the number of incorrectly registered or ineligible voters are great enough to distort the election outcome. As a result, a community affected by poor governance may not be able to use an election to hold unsatisfactory public representatives vertically accountable. When this happens, all incentive for political actors to remain in office through responsive and good governance, is diminished. The unfairness created by ineligible voters being allowed to register on a Voters' Roll denies free and fair competition. Those who are eligible to be registered by means of residential address are less incentivised to participate, as the competition is now unfair. This starts the breakdown of public participation in elections, which is a critical component of democracy.

What is evident is that the Voters' Roll is more than just a register for democratic Local Government Elections. It serves as a mechanism that provides access to other important principles of democracy, most notably, accountability. Consequently, when the Constitutional Court found that the IEC did not meet its obligation to provide the Voters' Roll according to a mutually-agreeable timeline, the Voters' Roll not being available for inspection denied the opportunity for candidates to inspect, lodge a dispute and ensure fairness of registrations<sup>166</sup>.

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<sup>166</sup> (Kham and Others v Electoral Commission and Another, 2015, p. 6).

In the Tlokwe case, should the Voters' Roll have been made available on time, the IEC's administrative inefficiency regarding address data would have prevented the candidates from accessing values such as accountability, inspection for fairness and equal competition.

For the purposes of this research, political neutrality as a barrier for good electoral governance can only be speculated. In all elections, but particularly in closely contested elections, it is important for the IEC, as an organisation independent from party affiliation, to maintain the trust of the voters and candidates that elections are free from manipulation. If the IEC fails to do this, then violence may erupt due to their dissatisfaction. Therefore, it is vital that all decisions for electoral management be intended to promote a maximum sense of impartiality. If violence were allowed to occur due to the management of elections, then even Przeworski's most basic approach for democracy to be a peaceful change of government is obsolete.

The Tlokwe case study demonstrates how important electoral management is when maintaining civil obedience and protecting civil rights. Voters and candidates need to feel as if there is some sort of chance for fair governance or else that which makes a democracy different from other regimes, falls away. It is important for this study not to shy away from the roles and responsibilities of the IEC, given that it is such a key player in keeping electoral democracy stable. However, recognising the challenges it faces provides an equal opportunity for civil society, opposition parties and government itself, to build its capacity. As of 2014, almost 13.1 percent of households in South Africa lived in informal settlements<sup>167</sup>. The large number of the population living in informal dwellings highlights the difficulty for the IEC to obtain addresses that lack the conventional style of data. For instance, some dwellers in these types of households do not necessarily quote a house number but rather an area that is known, such as being located near a retail store, or a road name that spans a vast area.

As this issue was raised as South Africa approached the 2016 National Local Government Elections, it became apparent that the IEC could not register all address data on the Voters' Roll, as per the Constitutional Court's requirement. This was due to the fact that over 16 million registered voters had insufficient address data<sup>168</sup>. The task for the IEC - to register 16 million people - was nearly impossible, given the ever-nearing elections. The Court, on the other hand,

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<sup>167</sup> (Statistics South Africa, 2016).

<sup>168</sup> (Electoral Commission of South Africa vs the Speaker of the National Assembly and Others, 2018, p. 3).

was reluctant to deny registered voters an opportunity to vote at the polls due to administrative oversight regarding elections. The Court needed to - in this case - balance the right to free and fair elections against the right to franchise. In this case, the level of rule adjudication was a vital component in ensuring the continued obligation for electoral democracy. The significance of the Court's decision arose from the fact that there were competing values at stake. At this stage, the Court had three options. The first, to allow Local Government Elections to continue and risk free and fair elections. The second was to postpone elections until the IEC was able to gather the needed data, however this would conflict with democracy's need for regular elections. Lastly, the option was to suspend its ruling and allow voters to access their right to franchise - with a commitment to rectify the problem in a set time frame. The Court chose the latter. The decision to allow for elections to continue was primarily focused on ensuring that voters were not fully disenfranchised. Historically there had been address data missing and while the case has been made for its importance, it was not worth suspending the opportunity to vote. However, although it may seem that the right to vote is triumphant over the right to fair elections, the Court made it clear that the IEC was obliged to provide a full Voters' Roll by the next Local Government Elections in November 2021.

When the interview with the senior IEC official was conducted, emphasis was placed on a cooperative effort from political organisations. Whilst this is not imposed on political parties, it is beneficial for these organisations to assist, where possible. The reach of political parties is far greater than the efforts of just the IEC. Moreover, the IEC is not an organisation that actively works to create hardship in elections, it is one that is meant to organise a free and fair competition. If political parties assisted in building the IEC's strengths of data and education, then issues such as that of the Tlokwe By-Election would be a rare occurrence. It is also recognised that people need to be informed regarding the need for address data and that the collection thereof is an important effort to protect democratic elections.

Unfortunately, in the Tlokwe case study, the problems that affected civil rights of elections were in a large part due to weaknesses of the IEC's administration. However, a significant contributing factor that impeded the access to free and fair elections was the opportunistic attitude of certain political parties, candidates or independents, where it was alleged that they "bussed people in". While all stakeholders, such as political parties and candidates, standing for elections should have assisted in closing the address data gap, the ultimate responsibility does rest with the IEC. This approach firmly positions the IEC as being the single accountable

for ensuring that electoral mechanisms are built to offer the best possible chance for free and fair elections. The Court's ruling, compelling the IEC to work to a short deadline in gathering address data for the entire country, highlighted the need for administrative efficiency to be recognised as a core component of elections.

#### **6.4 Conclusion**

A democratic regime is one that promises the best access to civil rights through the values proposed by Diamond and Morlino (2004). The process of electoral management is fundamental to ensure the active participation and protection of these civil rights. In this case, if the IEC had premised their approach to elections towards a more proactive and administratively efficient method of updating the Voters' Roll, then the Tlokwe matter would not have escalated to the point where it jeopardised the rights of voters and candidates.

This study re-iterates that EMBs play a central role in securing and enhancing the access to democratic civil rights, through elections. The environment an EMB creates is often the first step in the level through which citizens can hold democratically elected officials accountable. The values that underpin a democracy's processes, such as elections, are components that work together to secure civil rights. In the Tlokwe case, it is evident that rulemaking, implementation and adjudication are interdependent functions of electoral governance. The breakdown of just one of these levels has dire implications for the next, yet they are necessary to support each other. Rulemaking relies on the correct approach to implement the rules and rule adjudication needs to find a balance, should there be a conflict.

There are complex issues embedded in and highlighted through an analysis of the Tlokwe case. Indeed, it jeopardised the franchise of a component of the electorate. Additionally, the Constitutional Court ruling had implications beyond the case itself. It is therefore important that the Voters' Roll be recognised as more than just a register. It should be seen as a mechanism that provides access to other important principles of democracy, most notably, accountability. Given its critical role, the IEC should take steps to ensure that the franchise is not jeopardised and access to the vote is prioritised.

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## **Appendix 2: Information Sheet**

### **Political Studies Department**

### **Economics and Management Science, University of the Western Cape**

#### Participation in a Research Study

Research title: Obstacles to Universal Voter Access? The Impact of the 2013 Tlokwe Municipal By-Elections and Related Court Decisions on Voter Access in South Africa

#### **Dear Participant**

The research is undertaken as a partial fulfilment of the requirements for a Master's Degree in the Political Studies Department at the University of the Western Cape, Cape Town, South Africa. The researcher intends to use this material for academic purposes as part of the Degree requirements. The study is being carried out by the student Justin Bassuday (3165356), under the supervision of Prof. Cherrel Africa.

Before you decide whether or not to partake, it is important for you to understand why the research is being done and what it will involve. Please take time to read the following information carefully and discuss it with others if you wish. Ask me if there is anything that is unclear and/or if you would like more information.

As a participant you have the right to end your participation at any time, or request confidentiality in any contributions that you may submit.

#### **Purpose of the Study**

The main objective of the study is to understand the issues with the By-Elections in the Tlokwe Municipality from an electoral management perspective. The study seeks to test voter access by comparing mechanisms that provide for citizen participation. The mechanisms are then compared to the founding provisions upon which they are based i.e. the Constitution of the Republic of South Africa and relevant electoral laws founded in the *Electoral Act*.

#### **Description of the Study**

The main methodological technique that will be used are document sources. Document sources need to be carefully selected in order to achieve credibility of the study. As the investigation will primarily involve a past event, document sources are able to provide the best insight as to the issues surrounding the By-Elections in Tlokwe. The requirement by the Constitutional Court still requires a continuous and ongoing involvement of the Independent Electoral Commission (IEC) in order to fully comply with its ruling. As such, it is important to gain the perspective from senior officials of the IEC in order to assess their challenges before, during and after the ruling was made.

### **Confidentiality**

Due to the way the research is structured, respondents will not be identified unless permission is given. You will not be personally identified, and your identity will be kept confidential. Complete confidentiality is guaranteed should the respondent state in the informed consent form. Anonymity is also guaranteed should the respondent state that they wish to remain anonymous. The researcher will ensure that the results of the study will be reported without referring to any participant/s directly unless he/she explicitly prefers to be referred to directly. This may be done in a formal consent for any or all parts of the interview. All records of the interview will be stored in safe-keeping until research has been completed, thereafter, it will be destroyed and disposed of.

### **Voluntary Participation and Withdrawal**

The participation in this research study is entirely voluntary, which means all participants are free to decline their participation. It is up to the participant to decide whether to take part. Refusal to take part will involve no penalty or loss of services to which they are otherwise entitled; and, it will not impact negatively on the position held in the participant's organisation or leadership. If a participant decides to take part, they will be given this information sheet to keep (and be asked to sign the consent form). If a participant agrees to participate, they may at any time still be free to withdraw without providing a reason. A participant has the freedom to choose to answer particular questions that are asked in the study; if there is anything that a participant would prefer not to discuss, they are kindly requested to clearly indicate this.

### **Benefits and Cost**

The purpose of this study is to produce new knowledge; in this regard, any participation is highly appreciated as a contribution. There are no costs for participating in this study other than the time participants will spend in the interview, which will be approximately 15 to 30 minutes. The interview will be conducted in a neutral or place convenient for the participant, in order to ensure no added travelling costs may be incurred by the participant.

### **Informed Consent**

Your signed consent to participate in this research study is required before I proceed to interview you. I have included the consent form with this sheet so that you will be able to review the consent form and then decide whether you would like to participate in the study or not.

### **For more information:**

Contact student researcher: Justin Bassuday

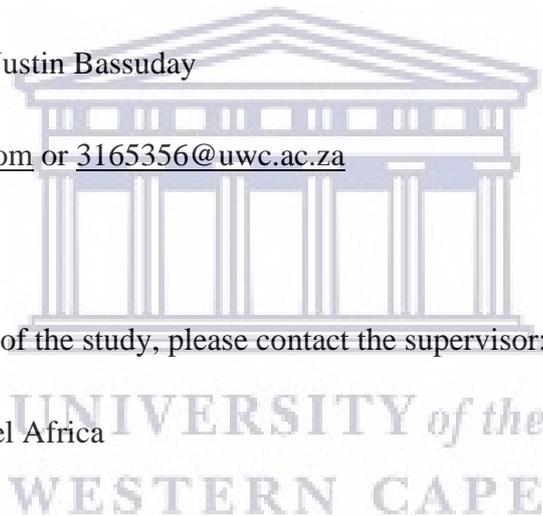
Email: [bassudayjc@gmail.com](mailto:bassudayjc@gmail.com) or [3165356@uwc.ac.za](mailto:3165356@uwc.ac.za)

Alternatively, for validation of the study, please contact the supervisor:

Supervisor: Professor Cherrel Africa

Email: [cjafrica@uwc.ac.za](mailto:cjafrica@uwc.ac.za)

Telephone: 0219592180



### **Appendix 3: Interviewee Consent Form**

**Political Studies Department**

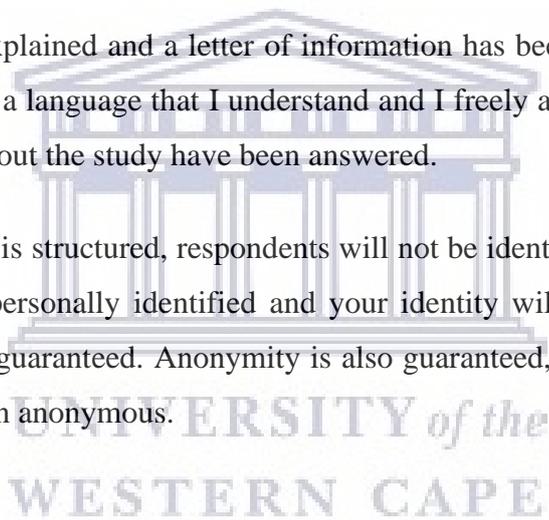
**Economics and Management Science, University of the Western Cape**

#### **Participation in a Research Study**

Research title: Obstacles to Universal Voter Access? The Impact of the 2013 Tlokwe Municipal By-Elections and Related Court Decisions on Voter Access in South Africa

This study has been fully explained and a letter of information has been provided. The study has been described to me in a language that I understand and I freely and voluntarily agree to participate. My questions about the study have been answered.

Due to the way the research is structured, respondents will not be identified unless permission is given. You will not be personally identified and your identity will be kept confidential. Complete confidentiality is guaranteed. Anonymity is also guaranteed, should the respondent state that they wish to remain anonymous.



Participant's name.....

Participant's signature.....

I understand that my identity will not be disclosed and that I may withdraw from the study without giving a reason at any time and this will not negatively affect me in any way.

Would like to remain anonymous? Yes/No (circle your response)

Witness.....

Date.....

Student researcher: Mr. Justin Bassuday

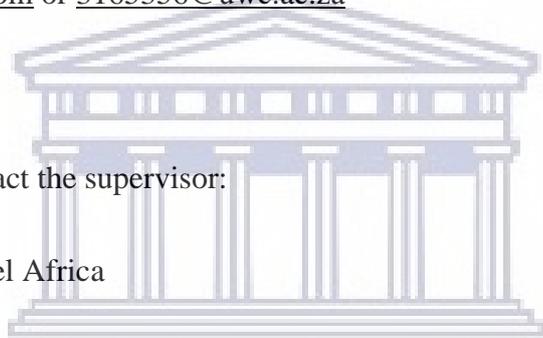
Email: [bassudayjc@gmail.com](mailto:bassudayjc@gmail.com) or [3165356@uwc.ac.za](mailto:3165356@uwc.ac.za)

For any queries, please contact the supervisor:

Supervisor: Professor Cherrel Africa

Email: [cjafrika@uwc.ac.za](mailto:cjafrika@uwc.ac.za)

Telephone: +27219592180



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WESTERN CAPE

## Appendix 4: IEC Organogram

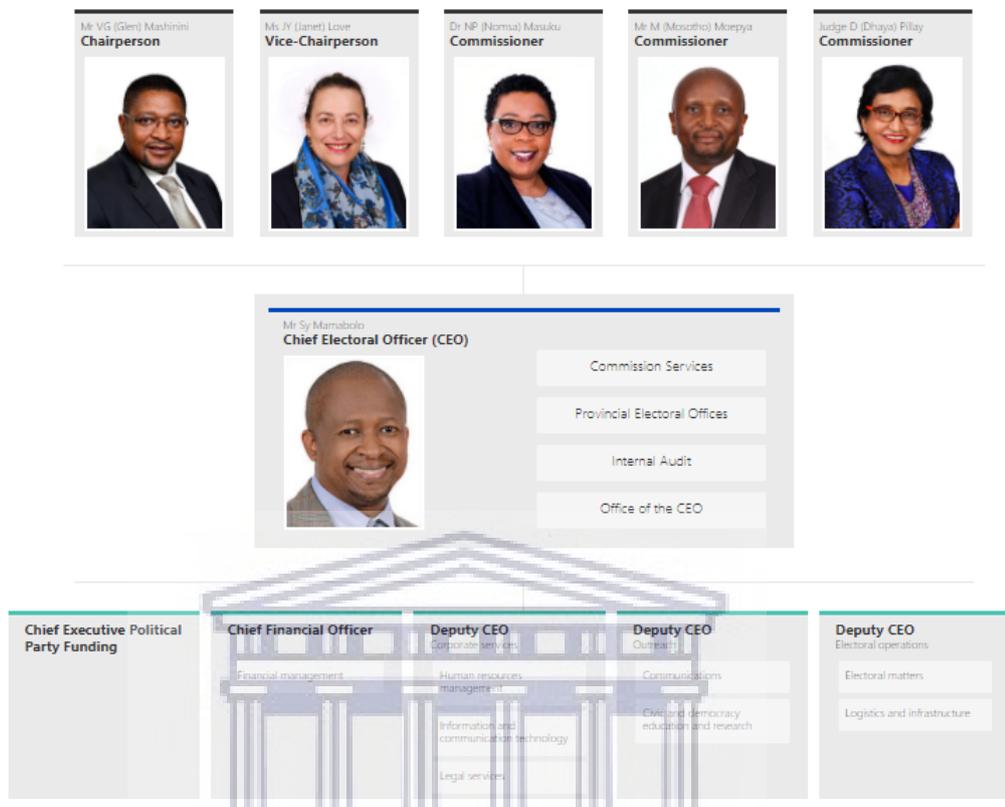


Image courtesy of the IEC website. <https://www.elections.org.za/pw/About-Us/Organogram>

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