
THE ELECTORAL BILL, 2004

(HB 19, 2004)

A COMMENTARY

prepared by the

ZIMBABWE ELECTION SUPPORT NETWORK

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ELECTORAL BILL, 2004

EXECUTIVE SUMMARY

In August 2004 SADC heads of government adopted a set of principles and guidelines for the conduct of elections in member states. The Zimbabwean Government has committed itself to implementing them, and to that end has published two Bills, the Zimbabwe Electoral Commission Bill and the Electoral Bill. This commentary examines the latter Bill in order to determine whether it will bring our electoral law into conformity with the SADC principles and guidelines.

Generally the Electoral Bill makes some significant and positive reforms but it has also some major shortcomings and deficiencies.

The electoral environment and general principles of elections

Neither Bill deals adequately with the general background against which elections are held, including the right to hold meetings, freedom of expression and access to the media. This is regrettable.

The Electoral Bill sets out three democratic principles which must be observed in elections — that governments derive their authority from free, fair and transparent elections; that all citizens have the right to participate in elections; and that all political parties have the right to contest elections. This is a welcome innovation in our law, though the principles should have covered the general electoral environment mentioned in the previous paragraph of this commentary.

The conduct of news media during election periods is not dealt with in the Bill. It should have been. Candidates and parties contesting elections should be given a right of access to radio and television; the news media should be required to treat all candidates and parties fairly and to avoid “hate speech”; and journalists should be given a right of access to political meetings.

Confusion of roles between Commissions

There is confusion in the Bill between the roles of the constitutionally-established Electoral Supervisory Commission and the new Zimbabwe Electoral Commission. Both Commissions are responsible for supervising the registration of voters and ensuring that elections are free and fair, but only the Electoral Commission will have the powers needed to ensure that voter registration is properly carried out and that elections are indeed free and fair. Generally it appears that the Electoral Commission will be responsible for conducting elections and the Electoral Supervisory Commission will supervise them, but the position is unsatisfactory and it would have been better to have amended the Constitution in order to abolish the Electoral Supervisory Commission and confer full responsibility for conducting and supervising elections on the Electoral Commission.

Membership and procedure of Electoral Supervisory Commission

The current method of appointment of the members of the Electoral Supervisory Commission does not give any assurance that its members will be politically impartial. However, assuming that it is not feasible to amend the Constitution so as to abolish the Electoral Supervisory Commission or to alter the manner in which its members are appointed, ZESN recommends that the Bill should specify the terms of office of the Commission's members (at present their terms are fixed by the President). ZESN also recommends that the President's power to fix members' conditions of service should be limited, and that the grounds on which members may be removed from office and the procedure for their removal should be the same as for judges. The Bill should also require the Commission's members to be politically neutral.

The Bill's provisions regarding the procedure to be followed by the Electoral Supervisory Commission would be improved if there was greater transparency, for example if the public was given a right to inspect minutes of the Commission's meetings.

Observers and monitors

Elections are given legitimacy if they are endorsed by local, regional and international observers. The observers must, however, be unbiased. The Bill's provisions in this respect are unsatisfactory. Observers will have to be accredited by a committee dominated by nominees of various government Ministers, including the President's Office, and only persons invited by a Minister or by the Electoral Supervisory Commission will be eligible for accreditation.

Election monitors will be public servants appointed and deployed by the Electoral Supervisory Commission rather than by the Electoral Commission, another example of the confusion of roles between the two Commissions.

ZESN recommends that the Bill be altered to allow representatives of non-governmental organisations not only to be appointed as observers and monitors but to participate in their selection and appointment.

Retention of the current Registrar-General

ZESN recommends that the current Registrar-General should not be permitted to perform the functions of Registrar-General of Voters under the Bill.

Staff of Electoral Commission during elections

The Bill will require State employees, including members of the Defence Forces, the Police Force and the Prison Service, to be seconded to the Electoral Commission during elections. ZESN considers that only public servants should be seconded.

Registration of voters

In a welcome development, the Bill does not leave the compiling and maintaining of voters' rolls in the hands of the Registrar-General: the Electoral Commission will be required to supervise the process.

The Bill's provisions regarding access to voters' rolls are not so satisfactory, however, and are similar to those in the present Act. ZESN recommends that they be amended to give candidates and parties a right to copies of rolls in printed and electronic form,

on payment of a reasonable fee. These copies should be made available to all parties without discrimination and without delay.

As to the registration of voters, the Bill will restrict the right of voters to be registered in constituencies in which they are not resident. This will reduce opportunities for gerrymandering, and is to be welcomed. Regrettably, however, the provisions for appeals against decisions of constituency registrars are not clear.

The Bill's provisions for the closing of voters' rolls prior to an election are the same as those in the present Act. ZESN recommends that the Electoral Commission should be responsible for fixing the date on which the rolls are closed for the purposes of any election.

ZESN also recommends that the Commission should be required to check the accuracy of the current rolls before the next general election.

Calling of elections

The Bill follows the present Act in allowing more than one polling day to be fixed, and this is regrettable. Only one day should be allowed for polling in any election.

In regard to by-elections, the Bill omits any provision for the Speaker to investigate whether or not a member of Parliament has vacated his seat — the question may be disputed — and does not impose a time-limit within which the Speaker must notify the President of a vacancy. These omissions should be rectified.

Nomination of candidates

The Bill's provisions on nominations are much the same as those in the present Act. ZESN recommends that in order to avoid the violence that has occurred previously at nomination courts, nominations should be lodged with the Electoral Commission.

ZESN also recommends that the provisions regarding nominators (i.e. the voters who sign a candidate's nomination paper) should be reconsidered; there seems little purpose in them.

Regarding deposits, a provision should be inserted to the effect that deposits payable on nomination must not be fixed too high.

One useful innovation in the Bill is the requirement that candidates must submit a photograph with their nomination papers; this photograph will be used to identify the candidates on the ballot-papers.

Polling

The abolition of mobile polling stations is a welcome move, but makes it more important than ever for the Commission to ensure that there are sufficient fixed polling stations in each constituency to give all voters a reasonable opportunity to cast their votes. The Bill should give some indication of the factors that must be taken into account when locating polling stations and determining their number in each constituency.

The compartmentalisation of polling stations is a useful innovation that will speed up voting.

Postal voting will be severely restricted, and will be limited to voters who are absent from their constituencies on government business. ZESN believes this is unfair, and that the large number of Zimbabweans living abroad should be permitted to vote. Measures should also be taken to avoid members of disciplined forces being unduly influenced by their superior officers when exercising their votes.

As in the present Act, it will be permissible for presiding officers in polling stations to assist incapacitated and illiterate voters to exercise their votes. ZESN recommends that such voters should be entitled to rely on friends or relatives for assistance, if they so wish.

The provision requiring employers to release their employees to vote in an election is welcomed.

Counting of votes

Under the Bill, ballots will be counted after polling at the polling stations where the votes were cast. This innovation is supported by ZESN, so long as the counting process begins immediately after polling and is carefully monitored to ensure fairness.

Election expenses

The Bill's provisions on election expenses are the same as those in the present Act. ZESN questions whether they are necessary since they have been largely ignored in past elections.

Presidential elections

The Bill's provisions regarding presidential elections differ in only one respect from those in the present Act: there will be no second run-off poll if there are three or more candidates and none of them gets a plurality in the first poll. ZESN suggests that a run-off poll is desirable in such circumstances, to ensure that the President is elected by a majority of those voting in an election.

Conflict management

There is little in the Bill about conflict management, and ZESN recommends that provisions should be inserted allowing the Electoral Commission to engage in mediation and conciliation, and to set up party liaison committees through which consultation can take place between political parties and the Commission. The committees could also serve a role in resolving disputes between political parties and ensuring proper observance of codes of conduct. Election tribunals could also be established to sort out disputes.

Electoral offences

Though there has been an attempt to strengthen some of the offences in the Bill, they should be regrouped into intimidatory practices (covering undue influence and intimidation through physical and psychological pressure), corrupt practices (covering a wide variety of situations of bribery and corruption), and illegal practices.

Temporary postponement of elections

A provision should be inserted in the Bill empowering the Electoral Commission to postpone elections if, after consultation with the law enforcement authorities, the Commission has reasonable grounds for believing that free and fair elections cannot be held because of intimidation or violence.

Electoral Court

The establishment of an Electoral Court to hear election petitions is a welcome development, but the judges appointed to the court must be selected through an impartial process. It is unfortunate, too, that there are no time-limits laid down for the hearing of election petitions.

Presidential powers

The absence of an equivalent to section 158 of the present Act is welcomed, but ZESN would prefer the addition of a clause to the effect that the Bill will not be capable of amendment or modification by means of the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*].

INTRODUCTION

Elections are a process, not just an event that takes place on a single day of voting. For elections to be free and fair, it is necessary that the entire process leading up to and including the actual voting be free and fair. Delimitation of constituencies must be carried out in a manner that is fair and is free of political bias and manipulation. The registration of voters must be conducted in a fair and transparent manner to ensure that all those eligible to vote can be registered. The voters' rolls must be accurate and up to date. Voters' rolls must be accessible to political parties and members of the public. Political parties must be able to campaign peacefully without hindrance. No members of political parties should be permitted to use violence or intimidation against members of other political parties. Bribery and corruption as

well as other impermissible electoral practices must be prevented or, when they do occur, appropriately punished. Political parties contesting elections must have reasonable access to the public media to disseminate information about their policies. Voting stations must be accessible to voters and must be adequate in number to allow voters to cast their votes with reasonable expedition.

SADC has recently drawn up and approved a series of benchmarks against which to measure the freedom and fairness of elections. In August 2004, at a meeting in Mauritius, SADC heads of government adopted principles and guidelines for the conduct of democratic elections in member states; these principles and guidelines are set out at the end of this commentary as Appendix 1. Earlier, in 2001, the SADC Parliamentary Forum adopted a set of detailed norms and standards for elections in the region; these are set out as Appendix 2. Further guidelines are set out in Appendixes 3 and 4.

The Zimbabwean Government has committed itself to implementing the SADC principles and guidelines. In September it published a Zimbabwe Electoral Commission Bill, which will establish an Electoral Commission to conduct elections, and now it has published the Electoral Bill. The two Bills, it has said, are part of the measures it is taking to implement the SADC principles and guidelines. This commentary explores whether the combined effect of the two Bills will be that the electoral laws of Zimbabwe will fully conform to those principles and guidelines.

ZESN has already circulated its paper commenting upon the Zimbabwe Electoral Commission Bill and making certain criticisms of that Bill. In that paper ZESN stressed that the Electoral Commission must be composed of competent persons who will carry out fairly and impartially their important duty to ensure that elections are free and fair. It concluded that the method of appointment provided for in the Bill would not be likely to lead to Commission being composed of Commissioners who would be generally perceived as being politically impartial. ZESN also pointed to the need for the Commission to have various powers that would enable it to perform its duty effectively and pointed to particular areas where such powers are needed.

The new Bill is modelled on the present Act but contains a number of significant and very positive reforms which are highlighted below. However, there are several

deficiencies in the Bill, and some aspects of the existing law that needed reform have been addressed either inadequately or not all. Again these matters are dealt with below, in the order in which they appear in the Bill.

First, though, some general matters:

THE ELECTORAL ENVIRONMENT

Neither the Electoral Bill nor the Zimbabwe Electoral Commission Bill have much to say about the electoral environment, the general background against which elections are held, including such matters as the right to hold political meetings, the right to express political views freely, access to the media and so on. This is regrettable because an election cannot be regarded as free and fair if all the parties and candidates involved have not been given the right to put their policies and programmes to the electorate — and this will be so even if voters are free to cast their ballots as they wish on polling day.

General Principles of Democratic Elections

Clause 3 of the Electoral Bill sets out three general principles that are supposed to apply to every election — that is to say, to all parliamentary and presidential elections and to all local authority elections. These principles were not in the previous Electoral Act. Clause 3 reads as follows:

“Subject to the Constitution and this Act, every election shall be conducted in [a] way that is consistent with the following principles—

- (a) the authority to govern derives from the will of the people demonstrated through elections that are conducted efficiently, freely, fairly, transparently and properly on the basis of universal and equal suffrage exercised through a secret ballot; and
- (b) every citizen has the right to participate in government directly or through freely chosen representatives, and is entitled, without distinction on the ground of race, ethnicity, gender, language, political or religious belief, education, physical appearance or disability or economic or social condition and (*sic*) to stand for office and cast a vote freely; [and]
- (c) every political party has the right to put up or sponsor one or more candidates in every election.”

The inclusion of such general principles is a welcome development, although they would have had greater strength and legitimacy if they had been included in the Constitution as proposed by ZESN. They should also have dealt with the general environment in which elections take place because, as stated at the beginning of this commentary, an election is not an event but a process, and a free election cannot take place in a repressive environment.

Recommendation

ZESN recommends that the following general principles be added to as follows:

In place of (b) above there should be a separate provision dealing with political rights of citizens along these lines:

“(b) every citizen has the right—

- (i) to participate in government directly or through freely chosen representatives, and is entitled, without distinction on the ground of race, ethnicity, gender, language, political or religious belief, education, physical appearance or disability or economic or social condition, to stand for office and cast a vote freely;
- (ii) to join or participate in the activities of and to recruit members of a political party of their choice;
- (iii) to participate in peaceful political activity intended to influence the composition and policies of Government;
- (iv) to participate, through civic organisations, in peaceful activities to influence and challenge the policies of Government.”

In place of (c) above there should be a separate provision dealing with political rights of citizens along these lines:

“(c) every political party has the right—

- (i) to operate freely within the law;
- (ii) to put up or sponsor one or more candidate in every election;
- (iii) to campaign freely within the law;
- (iv) to have reasonable access to the public media.”

And, to deal with the general electoral environment, the following paragraph should be added to the clause:

“(d) democratic elections cannot be held in the absence of related internationally-recognised human rights and freedoms, including—

- (i) the right to life, liberty and security of the person; and
- (ii) freedom of opinion and expression, including freedom to seek, receive and impart ideas and information; and
- (iii) freedom of assembly and association; and
- (iv) freedom of movement throughout Zimbabwe and freedom to enter and leave Zimbabwe; and
- (v) the right to equal protection of the law and to due process of law.”

Conduct of Media During Elections

Neither the Zimbabwe Electoral Commission Bill nor the Electoral Bill deal with the conduct and ethical standards expected of news media during election periods. While these could perhaps be provided for under the Broadcasting Services Act [*Chapter 12:06*] and the Access to Information and Protection of Privacy Act [*Chapter 10:27*], they would be better controlled by the EC under the Electoral Bill.

Recommendation

ZESN recommends that provisions be inserted in the Bill:

- giving all candidates and parties contesting an election a right to free and equitable access to radio and television. The extent of the right and the conditions for its exercise should be fixed in regulations made by the EC.
- giving all candidates and parties contesting an election a right to have their advertisements published or broadcast in commercial news media, at reasonable rates and without discrimination;
- requiring news media to treat fairly all candidates and parties contesting an election, and to ensure that their reports on the election are accurate;
- requiring news media to avoid language that encourages prejudice, hatred or violence during an election;
- requiring candidates and parties contesting an election to allow journalists access to their meetings.

CONFUSION OF ROLES BETWEEN ELECTORAL COMMISSION AND ELECTORAL SUPERVISORY COMMISSION

In its commentary on the Zimbabwe Electoral Commission Bill, ZESN drew attention to the confusion and constitutional problems that arise from keeping intact the Electoral Supervisory Commission (ESC) while at the same time giving the Zimbabwe Electoral Commission (EC) overall responsibility for ensuring that elections are conducted in a free and fair manner. This confusion and overlapping of functions is even more apparent when one tries to correlate the constitutional provisions dealing with the ESC and the provisions in the Zimbabwe Electoral Commission Bill and the new Electoral Bill.

In terms of the Constitution [s 61(3)] it is the ESC that is mandated to supervise the conduct of elections of members of Parliament. The underlying purpose of this supervisory power is obviously to ensure that elections are conducted in a free and fair manner. However, in terms of the Zimbabwe Electoral Commission Bill of the EC is responsible for ensuring the efficient, proper, free and fair conduct of elections, and for that purpose will have power to give instructions to the Registrar-General and other persons employed by the State. [clause 4(1)(h)]. In terms of the Electoral Bill in the exercise of his or her functions the Registrar-General of Voters “shall be subject to the directions and control” of the EC, “and shall have regard to any report or recommendation of the” ESC. [clause 18(2)]. So although both the ESC and the EC will be responsible for ensuring that elections are free and fair, only the EC will have the necessary powers to ensure that they are; the ESC will only be able to make recommendations. These overlapping responsibilities and powers are likely to cause confusion.

In one respect — the accreditation of observers — confusion has already occurred. Under clause 14 of the Electoral Bill, the ESC is given the function of accrediting observers, which function it will exercise through a committee. In clause 4(1)(g) of the Zimbabwe Electoral Commission Bill, on the other hand, the EC is given that function.

In terms of the Constitution the ESC is the only body mandated to supervise the registration of voters [s 61(3)]. In the Zimbabwe Electoral Commission Bill, however, the functions of the EC include directing and controlling the registration of voters and compiling voters' rolls and registers [clause 4]. So too under the Electoral Bill it is provided that the EC "shall ensure that the Registrar-General of Voters compiles and maintains the voters roll" [clause 20(2)]. Again, both Commissions are given responsibilities but only the EC will have the power needed to carry them out.

Although the position is muddled, it seems that the EC will be responsible for conducting the elections and the ESC will supervise the conduct of elections. Thus in clause 16 of the Electoral Bill the EC has a series of "duties" towards the ESC. These include the following:

- The EC must provide the ESC with such reports relating to the registration of voters and the conduct of elections as the ESC may from time to time require;
- The EC must generally keep the ESC informed on all matters relating to the exercise of its functions in terms of the Electoral Act;

The EC may also refer to the ESC for its advice on any matters.

As will be seen below, the ESC, and not the EC, will also accredit observers and monitors.

The retention of the present ESC as the overall supervisory body is unsatisfactory as it is likely to cause confusion. In other countries that have set up Independent Electoral Commissions these bodies have been given the sole responsibility for ensuring that elections are freely and fairly conducted.

It must also be said that in the past the neutrality of the ESC has been doubted, as the President appoints all of its members. The President appoints the chairperson and two members after consultation with the Judicial Service Commission and appoints the other two members after consultation with the Speaker [section 61(1) of the Constitution]. Apart from this, the ESC has also been seen as having been ineffectual. A constitutional amendment would be needed to alter the method of appointment of

members of the ESC, but the Bill could and should have done something to give the ESC more powers to give effect to its decisions.

Recommendation

The ESC should be disbanded and the role of running the elections on a free and fair basis should be vested in an EC composed of competent and impartial Commissioners. This, as already noted, would require an amendment of the Constitution.

ELECTORAL SUPERVISORY COMMISSION: MEMBERSHIP, AND PROCEDURE

As already stated, ZESN strongly believes that the ESC should be disbanded and its functions taken over by the EC. If, however, the present political climate does not allow for the necessary constitutional amendment to be passed disbanding the ESC, at very least the ESC must be transformed into a credible, independent body. Additionally the relationship between the ESC and the EC and the respective functions of the two bodies must also be clearly mapped out.

The starting point for overhauling the ESC would be to replace the present method of appointment of Commissioners with a method that will ensure the appointment of Commissioners who are generally seen as being impartial. This, however, would require a constitutional amendment.

There are a number of steps that can be taken to improve the ESC that would not require a constitutional amendment. These are set out below.

Conditions of service of Commission

Part II of the Electoral Bill supplements section 61 of the Constitution by setting out provisions dealing with the conditions of service of members of the ESC.

Section 61 of the Constitution allows the President to appoint members of the ESC and, short of a constitutional amendment, that cannot be changed. Clause 6 of the Bill, however, gives the President power to fix members' terms of office, which can

be any period up to five years at the President's absolute discretion. It would have been better if the Bill had given members a fixed term of office, independent of any discretion; this would have reinforced their security of tenure and increased the Commission's independence. Its independence would have been enhanced, too, if clause 6(3) of the Bill had restricted the President's power to fix conditions of service for its members. While there can be no objection to the President fixing conditions relating to remuneration, he should not be allowed to fix conditions relating to the way in which members carry out their work.

In regard to members' security of tenure, clause 9 of the Bill sets out the grounds on which they may be removed from office and states that they cannot be removed except on those grounds. This is welcome, but it would have been better if the Bill had laid down a procedure for the removal of members. The drafter may have believed that this was covered by section 110 of the Constitution, which requires a tribunal to be appointed before certain public office-holders can be discharged, but the section does not apply to members of the ESC. Provision for the appointment of a similar tribunal should be inserted in clause 9 of the Bill.

Even more seriously, the Bill does not require members of the Commission to be politically neutral. Clause 7 will disqualify non-citizens, insolvents and criminals from appointment, and section 61(2) of the Constitution disqualifies public officers, Members of Parliament and local authority councillors. But office-bearers of political parties should also be disqualified and possibly members of political parties too, particularly if they have shown themselves to be politically partisan.

In clause 15 of the Bill the ESC is required to make a report to the President after every election other than a presidential election, in which case the report is to be made to the Minister of Justice. These reports must be laid before Parliament. The clause seems inconsistent with section 61(5) & (6) of the Constitution, which read as follows:

“(5) The Electoral Supervisory Commission may make such reports to the President concerning the matters under its supervision ... as it thinks fit and, if the Commission so requests in any such report ..., the Minister shall ensure that the report concerned is laid before Parliament.

(6) The Electoral Supervisory Commission shall not, in the exercise of its functions in terms of subsection ... (5), be subject to the direction or control of any person or authority.”

Under the Constitution, therefore, the ESC has a discretion whether or not to make reports (s 61(5) uses the word “may”) and in the exercise of that discretion it is not subject to direction or control. Clause 15 of the Bill, on the other hand, will direct the Commission to make reports on every election, whether it wishes to make them or not. While it is obviously desirable that the ESC should report on elections, the propriety of clause 15 is doubtful.

Procedure of Commission: Transparency

Part II of the Electoral Bill supplements section 61 of the Constitution by setting out the procedure to be followed by the Commission.

Clause 11 of the Electoral Bill sets out sensible provisions for the conduct of meetings of the ESC: for the most part the Commission will be able to set its own procedures. There is nothing, however, requiring the ESC to be open and transparent. Most if not all of its meetings should be held in public; at the very least, the minutes of its meetings should be open to public inspection.

Recommendation

The following subclause should be added to clause 11:

“(6) The Electoral Supervisory Commission shall conduct all its activities in a clear and open manner.”

And, to allow public access to the ESC’s minutes and the minutes of its committees (including the Observers’ Accreditation Committee), the following new clause should be inserted:

“(1) The Electoral Supervisory Commission shall cause minutes of all proceedings of and decisions taken at all its meetings and the meetings of all its committees to be entered in books kept for the purpose.

(2) Any minutes referred to in subparagraph (1) which purport to be signed, with the authority of the Electoral Supervisory Commission or the committee concerned, as the case may be, by the chairperson of the meeting to which the minutes relate or by the

chairperson of the next following meeting, shall be accepted for all purposes as *prima facie* evidence of the proceedings of and decisions taken at the meeting concerned.

(3) The Electoral Supervisory Commission shall ensure that all minutes referred to in subparagraph (1) are kept at the head office of the Commission and are open to inspection at all reasonable times by members of the public, who may take extracts from or make copies of such minutes.”

Observers and Monitors

Part II of the Electoral Bill gives the ESC the function of appointing and accrediting monitors and observers.

The presence of independent observers and monitors plays an important function in ensuring that elections are free and fair. This is recognised in the SADC principles and guidelines, which devote considerable space to the role of SADC Electoral Observer Missions (SEOM).

Observers

The Standards and Norms composed by the SADC Parliamentary Forum contains this statement:

“There is a growing realisation among SADC countries that have embraced multi-party democracy that the presence of observers (local, regional and international) generates confidence in the political process and international standing of the country. It often assists the electorate and the losing political parties and candidates to accept the election results if the election is judged by the observers to have been held under legitimate conditions ... [T]he host government of election must accept observers as a factor in fostering transparency, integrity and in institutionalising the democratic process in the conduct of elections.” (para 15).

What is important is to ensure that a range of international and local observers is allowed to observe the electoral process, and that observers are not selected on the basis of their bias in favour of one party or another.

The provisions in the Bill regarding the accreditation of observers are completely unacceptable since their end result will be that only observers who are acceptable to the ruling party and who are likely to be biased in that party’s favour will be accredited.

The Zimbabwe Electoral Commission Bill provides that one of the functions of the EC is to accredit observers in accordance with an Act of Parliament. However, as already noted, in terms of the Electoral Bill observers are to be accredited by a committee established by the ESC (not the EC). Under clause 14 of the Electoral Bill, the ESC will establish a committee known as the Observers' Accreditation Committee which will consist almost exclusively of persons nominated by the Government. Its composition will be as follows:

- a chairperson who will be the Chair or Vice-Chair of the ESC;
- one person nominated by the Office of the President and the Cabinet;
- one person nominated by the Justice Minister;
- one person nominated by the Foreign Affairs Minister;
- one person nominated by the Information Minister.

Thus this Committee consists of the chair or vice chair of the ESC and four nominees from various Ministries. Whilst representation on this Committee of the Foreign Affairs Ministry is necessary as regards foreign observers, especially foreign government observers, the representatives from the other Ministries cannot be justified, especially the representatives from the President's office and the Ministry of Information. The President may be a candidate in a Presidential election and even in a general election he or she is the head of the Government contesting the election. The President's office should not, through a representative on this Committee, be entitled to influence who is appointed as observers. The Information Ministry should also not be permitted to influence the appointment of observers through a representative as this Ministry has demonstrated that it is completely incapable of making politically non-partisan decisions.

This committee will accredit the following persons, and only the following persons, as observers:

- individuals representing foreign countries or international or regional organisations that have been invited by the Foreign Affairs Minister;

- individuals representing bodies in the region that exercise functions similar to the ESC and that have been invited by the ESC to observe any election;
- eminent persons from outside Zimbabwe who have been invited by the Foreign Affairs Minister to observe any election;
- individuals representing local organisations that have been invited by the Minister to observe any election;
- eminent persons from within Zimbabwe who have been invited by the Minister to observe any election.

No one will be allowed to enter a polling station or constituency centre as an observer unless he or she has been accredited by the ESC, so the effect of these provisions is that no one will be able to observe any election unless he or she has been invited to do so by the ESC or a Minister.

Monitors

Under clause 13 of the Electoral Bill, the ESC will appoint members of the Public Service to be monitors and will deploy them at each polling station. The ESC must supply the names of those appointed as monitors to the EC, presumably for the purposes of information. (The explanatory memorandum erroneously says that the EC will accredit monitors but that function is given to the ESC by clause 13(5); it is not at all clear what the distinction is between appointment and accreditation.)

Recommendation

ZESN believes that there is no reason why only public servants should be appointed as monitors. In terms of perception it may be thought that public servants are likely to be biased in favour of the ruling party. ZESN thus previously proposed that suitable persons drawn from civil society groups should monitor the conduct of elections by the EC. These monitors should be trained in their duties — as provided for in the Bill — and a code of conduct drawn up to govern their behaviour.

ZESN has previously proposed that foreign and local observers and monitors should be accredited by the EC on the recommendation of an Accreditation Advisory Committee established by the Commission. This committee was to consist of:

- two Commissioners, one of whom would be the chairperson of the committee;
- three persons appointed by the Commission, selected for their integrity and standing in civil society; and
- in respect of foreign observers, a person appointed by the Minister responsible for foreign affairs.

ZESN strongly believes that the Bill should be changed so that the body given the responsibility for accrediting observers and monitors should be broadly representative of the Zimbabwean society rather than simply comprising government representatives.

This Committee should be able to appoint as observers:

- eminent persons from within Zimbabwe;
- civic society representatives from civic organisations within Zimbabwe;
- individuals representing bodies in the region that exercise functions similar to the EC;
- individuals representing foreign countries;
- representatives of regional and international organisations;
- eminent persons from outside Zimbabwe;
- representative from civic society organisations in the countries in the region other than Zimbabwe.

RETENTION OF THE CURRENT REGISTRAR-GENERAL

The performance of the present Registrar-General in past elections has been severely criticised. His competence and integrity have been called into question and he is widely perceived as being partisan in favour of the ruling party.

However, in terms of the Electoral Bill, the person who was Registrar-General at the date the Bill comes into operation “shall be deemed to have been appointed as Registrar-General of Voters under the Bill.” [clause 189(3)(a)].

Recommendation

ZESN recommends that in the interests of fairness and transparency, a new Registrar-General of Voters be appointed.

STAFF OF ELECTORAL COMMISSION DURING ELECTIONS

Clause 17 of the Bill provides that at the request of the EC the chairpersons of the Defence Forces, Police, Prison and Public Service Commissions must second persons in the employment of the State to be constituency election officers, deputy constituency election officers, assistant constituency election officers and polling officers as may be necessary to perform the functions of the EC during elections. Those seconded will be under the control and direction of the EC during the election period.

Recommendation

ZESN accepts the need to second members of the Public Service to the EC during election periods. It opposes, however, the secondment of personnel from the army, police and prisons. These services have been politicised and a number of service chiefs have made public statements pronouncing their affiliation and loyalty to the ruling party. For this reason, members of parties other than the ruling party would view secondment of such personnel with suspicion.

REGISTRATION OF VOTERS

The maintenance of voters' rolls and the registration of voters are dealt with in Parts IV to VIII of the Electoral Bill. By and large they follow the provisions of the present Act.

Maintenance of Voters' Rolls

The Registrar-General of Voters will retain the function of compiling and maintaining voters' rolls, but under clause 20(1) of the Bill the EC will be required to supervise the process. This is a welcome development.

Access to voters' rolls

Clause 21 of the Electoral Bill provides that the voters roll for every constituency must be open to inspection by the public, free of charge, at the constituency registrar's office during office hours. It further provides that any person may, on payment of the prescribed fee, request the EC to provide him or her with a printed copy of the voters' roll for any constituency and the EC must then cause the roll to be printed and provided to that person within a reasonable time. If no election is pending, the roll supplied must as far as possible contain the names of voters who would be entitled to vote if an election were held on the date that the request is made. If an election is pending, the roll provided must be the one as at the date specified in the proclamation for the closure of the voters roll in that constituency.

Recommendations

ZESN agrees that voters' rolls should be open to inspection free of charge at constituency offices.

The EC should be responsible for ensuring that constituency voters' rolls are regularly updated and copies of such rolls should be available in both printed and electronic form on request and on payment of a reasonable fee. The copies must be provided without delay, because the earlier a party or candidate can obtain a voters roll the better able it is to conduct its campaign. Rather stronger words than "within a reasonable time" should be used in clause 21, therefore, to ensure that rolls are made

available as quickly as possible. There should also be a provision to ensure that rolls are made available to all parties without discrimination.

Where the date of an election has been announced, political parties and members of the public should be able to obtain in printed or electronic form on payment of a reasonable fee a particular constituency roll or all constituency rolls.

Registration of Voters

The provisions in the Electoral Bill for the registration of voters are very similar to those in the present Act. There is one welcome change, however: under section 20(1) of the present Act a person may be registered in a constituency in which he does not reside if he can satisfy the Registrar-General that, “for reasons related to his place of origin, political affiliations or otherwise, it is appropriate” for him to be registered there. This was a provision that could obviously be used for gerrymandering, and it has been replaced with one that will allow a prospective candidate to be registered in the constituency in which he or she wishes to stand for election, even if he or she is not resident in that constituency.

Regrettably, there are some anomalies and inconsistencies in regard to objections and appeals against a constituency registrar’s refusal to register a voter. Under clause 24(7) of the Bill, anyone¹ who is aggrieved by a registrar’s decision not to register him or her may lodge a complaint with the EC, and the Commission can direct the registrar to take appropriate remedial action. Under clauses 27 and 29, however, aggrieved persons have a right of appeal to a designated magistrate.² It is not clear whether the two remedies are supposed to be alternatives or in some way complementary.

It is also unclear whether persons who have ceased to be citizens of Zimbabwe, and who can be removed from a roll in terms of clause 27(7), are entitled to appeal to a designated magistrate or to complain to the EC. This should be clarified.

¹ Clause 24(7) refers to an “applicant”, whereas the term used elsewhere in the Bill is “claimant”.

² See in particular clause 27(1)(a).

Recommendations

ZESN recommends that when the date or dates for a general election has been announced, the Commission set and publicise the date when registration of voters will close prior to the election, provided that the date set must be not more than three months before the date or dates on which the election is to be held.

As voter registration for the upcoming 2005 general election has already been completed, ZESN recommends that the EC should be required to check the accuracy of the rolls prior to the polls.

The anomalies noted above in regard to rights of appeal and complaint should also be clarified. Furthermore, there should be an express statement to the effect that objections, appeals and complaints must be decided and disposed of as quickly as possible.

CALLING OF ELECTIONS

Part IX of the Electoral Bill deals with the proclamation of parliamentary general elections and by-elections. As in the present Act, these elections are called by the President, and his power to determine the times and dates of nomination and polling are wide but subject to limits imposed by the Constitution.

Fixing of Polling Day or Days

ZESN notes that the Bill follows the present Act in allowing more than one polling day to be fixed.³ This is regrettable, because international experience has shown that the longer polling takes place, the more opportunity there is for electoral fraud.

Recommendation

ZESN recommends that there should be only one day for polling in any election.

³ See the definition of “polling day” in clause 4 and clause 38(2)(b).

By-elections

Clause 39 of the Bill, which deals with the calling of by-elections, differs from section 39 of the present Act in that it omits the procedures the Speaker must go through to determine whether or not there is a vacancy in Parliament (the question may be a matter of debate where, for example, a member refuses to follow his or her party's whip and the party contends that the member's seat has become vacant by virtue of section 41(1)(e) of the Constitution). The clause follows the existing section 39 in that it allows the President 14 days within which to call a by-election after being notified of a vacancy in Parliament, but imposes no time limit within which the Speaker must notify the President of the vacancy. This omission has been misused in the past, with vacancies remaining unfilled for long periods until the ruling party is in a position to contest a by-election.

Recommendation

The provisions of section 39 of the present Act that have been omitted from clause 39 should be restored, and a time limit (say, 14 days) should be specified within which the Speaker must notify the President of a vacancy in Parliament.

NOMINATION OF CANDIDATES

Nomination Court

ZESN notes that in the past prospective candidates lodged their nominations at a public sitting of a nomination court, though there is provision in the present Act for them to lodge their papers with the constituency registrar before the nomination court sits. In recent years there have been several incidents in which violence has been used to prevent prospective candidates from lodging their nomination papers before the nomination court.

The system for the nomination of candidates proposed by ZESN would eliminate the need for the sitting of a nomination court. Candidates would simply be able to submit their nomination papers to the EC over a specified period. The EC would then decide whether the papers are in order and publicly announce which candidates had been

validly nominated. Where required information was missing from the nomination papers, the EC would be able to assist candidates to supply the necessary information. If the EC decides that a nomination was invalid, the prospective candidate would be able to appeal against this decision.

Recommendation

It is recommended that the Bill should adopt ZESN's proposals.

Photograph of Candidate

The Electoral Bill makes it mandatory for a passport-sized picture of a candidate to be submitted with his or her nomination papers and for it to be printed on the ballot paper.

This is a good measure because assists voters in making their choice. The photographs must, however, be clearly reproduced on the ballot papers.

Candidates' Nominators and Deposits on Nomination

The Bill repeats the provisions of the present Act on nominators (i.e. the voters who are required to sign a candidate's nomination paper) and the deposit payable by candidates on nomination. Nomination papers in a parliamentary election will have to be signed by at least 10 registered voters⁴, those in a presidential election by at least 10 registered voters in each province.⁵ On lodging his or her papers, a candidate will have to pay a deposit of a prescribed amount⁶; at present the deposit is \$100 000 for a candidate in a parliamentary election and \$200 000 for a candidate in a presidential election.⁷

⁴ Clause 46(1)(a) of the Electoral Bill.

⁵ Clause 102(1)(a) of the Electoral Bill.

⁶ Clauses 47 and 103 of the Electoral Bill.

⁷ Section 6 of the Electoral Regulations, 1992 (SI 58/1992), as amended by SI 175/2004.

Recommendation

ZESN recommends that these provisions should be reconsidered. Why should a candidate have to be nominated by ten or more voters? It cannot be merely to show that the candidate has support in his or her constituency, because that is what an election is supposed to show, and an election should not be pre-empted by the nomination process. In recent elections, the requirement has served no purpose except to give the Registrar-General's staff an opportunity to scrutinise lists of nominators in the hope of finding a ground to disqualify the opposition's candidates.

As for deposits, the danger with them is that they may be fixed so high as to put candidacy beyond the reach of poor people or parties. At the very least there should be a provision in clauses 47 and 103 of the Bill prohibiting the fixing of high deposits.

POLLING

The Electoral Bill makes some welcome changes in regard to polling, but more are needed.

Mobile Polling Stations

In the past there have been allegations that mobile polling stations have been used as a device to ensure that as many ruling party supporters as possible vote. Moreover they are not as easily monitored than fixed polling stations.

The Electoral Bill will abolish the use of mobile polling stations. This is in line with ZESN recommendations and is to be welcomed.

Number of Polling Stations

As mobile polling stations will not be used, it becomes particularly important that there be adequate numbers of fixed polling stations to allow all those wishing to vote a reasonable opportunity to do so. During the last Presidential election, allegations were made that far too few polling stations were established in Harare. It was alleged that this was done deliberately in order to prevent large numbers of these voters, who were predominately opposition party supporters, from exercising their votes.

However, the provision for compartmentalisation of voting at each station (see the next but one item) will help to overcome this problem.

Clause 51(1) of the Electoral Bill will give each constituency elections officer a wide discretion in regard to the number of polling stations that are to be established in his or her constituency. No limits are placed on this discretion, and there is no provision for the officer to consult voters, candidates or parties, or even the EC.

Recommendation

ZESN recommends that the Bill should contain some indication of the factors that a constituency elections officer should take into account in fixing the number of polling stations, and he or she should be obliged to consult the EC and interested parties when doing so. A provision along the following lines would achieve this:

“(2) When establishing polling stations in terms of subsection (1), a constituency elections officer shall—

- (a) so far as is practicable within the time available, consult the Commission and entertain representations from voters, political parties and other interested persons; and
- (b) endeavour to ensure that—
 - (i) every voter within the constituency will be able to reach a polling station without undue difficulty and within a reasonable time and will be able to cast his or her vote there without undue delay; and
 - (ii) the electoral officers at every polling station will be able without undue difficulty to deal with the total number of voters who are likely to cast their votes there on any polling day; and
 - (iii) persons who are in prisons, hospitals and other such institutions will be able to cast their votes.”

Location of Polling Stations

In past elections, particularly in the last presidential election, there were complaints that polling stations were sited near encampments of war veterans and other ruling-party activists. There is nothing in the Electoral Bill to prevent this. There should be.

Recommendation

ZESN recommends that the Bill should contain provisions such as the following:

“(5) Every polling station shall be located in a place that is readily accessible to the public, including persons with physical disabilities.

(6) No polling station shall be located—

- (a) in a church or other place of worship; or
- (b) in premises owned or occupied by a political party or candidate; or
- (c) in a police station, barracks, cantonment area or other place where police officers or members of the Defence Forces are permanently stationed; or
- (d) in premises licensed under the Liquor Act [*Chapter 14:12*]; or
- (e) at or in any place which, for any reason, may give rise to reasonable apprehension on the part of voters as to the secrecy of their votes or the integrity of the electoral process.”

Speeding up Voting Process

In order to speed up the voting process, at each polling station there will be three voting compartments with separate ballot boxes. There will be separate compartments for use by voters whose surnames begin with the letters ‘A to L’, for those whose surnames begin with the letter ‘M’ and for those whose surnames start with the letters ‘N to Z’.⁸ (By this system voters will be divided into three roughly equal groups and this is intended to ease congesting at polling stations.)

This is a good provision and ZESN supports it.

Postal Voting

The provisions in the Electoral Bill severely restrict the scope of postal voting. The only persons who are eligible to cast postal votes are those (and their spouses) who are away from their constituencies during voting because:

- they are members of a disciplined force;
- they are absent from Zimbabwe on Government service;
- they are electoral officers or monitors.

⁸ See clause 55(1) of the Electoral Bill.

Thus only army and police personnel deployed outside their constituencies, Zimbabwean diplomatic staff based outside the country and electoral officers or monitors can exercise postal votes.

ZESN believes that this is unfair and far too restrictive. Due to the harsh conditions within Zimbabwe large numbers of Zimbabwean have been forced to seek work abroad. If for valid reasons these persons are unable to return to Zimbabwe to vote in person, they should be entitled to vote by post. ZESN appreciates that allowing such a large number of persons to exercise postal votes will be a difficult and expensive operation. However, there are a number of international agencies that have had extensive experience in organising postal voting system. These organisations would be prepared to offer administrative and managerial assistance in this regard. Because postal voting is open to manipulation and abuse, stringent safeguards will have to be in place to avoid these pitfalls.

As regards postal voting by army and police personnel, there must be special measures in place to ensure that commanding officers do not dictate or unduly influence the way in which these votes are cast.

Assisted Voting for Illiterate and Physically Incapacitated People

The Electoral Bill provides that at the request of a person who is unable to vote in the normal manner because of illiteracy or physical incapacity such as blindness, the presiding officer, in the presence of a monitor and a police officer, may assist the voter to vote. The presiding officer may put questions to such a person to clarify the person's wishes. [clauses 59 and 60].

Recommendation

Although this provision has the safeguard of requiring the presence of a monitor, ZESN recommends that, if the voter prefers, he or she should be able to be assisted by a friend or relative, rather than the presiding officer. Even with the safeguard of having a monitor present, the assisted voter may feel apprehensive about having his or her voting preference conveyed through a bureaucrat rather than a person whom he or she knows and trusts.

Release of Employees to Vote

Clause 90 of the Electoral Bill provides that every employer of a person who is entitled to vote must allow the employee leave of absence from his or her work for the whole of either the morning or the afternoon of a polling day to afford the employee an opportunity to vote in the election.

This is obviously a good provision.

COUNTING OF VOTES AT POLLING STATIONS

Presently votes are not counted at individual polling stations; instead the ballots are taken for counting at central constituency counting centres.

Under the Bill ballots will apparently be counted at the polling stations where voting has taken place.⁹ Counting will be done within three hours after the close of polling, and the votes from the individual polling stations will then be collated at the constituency centres.

Recommendation

ZESN recommended that counting should take place at polling stations to avoid the possibility of stuffing of ballot boxes and other fraudulent manipulation whilst the ballots are being transported to central counting stations. However, ZESN would add the rider that the process of counting at individual polling stations must be scrupulously fair and must be carefully monitored and observed to ensure fairness.

ZESN also recommends that counting should commence immediately after the closing of the poll.

ZESN further recommends that in order to ensure that rigging does not take place during before or during counting, there be a mandatory requirement that, in addition

⁹ The word “apparently” is used because clauses 62 and 63 of the Bill do not state specifically where votes are to be counted; this is to be inferred from clauses 64 and 65.

to persons such as candidates and party agents, at least one monitor and at least one observer must be present during the verification process and counting of the ballots.

ELECTION EXPENSES AND ELECTION AGENTS

Part XVI of the Electoral Bill deals with election expenses and election agents in much the same manner as the present Act; indeed, the only appreciable change is one of terminology: candidates' election agents become chief election agents, and their polling agents become election agents.

While it is obviously necessary for the Bill to regulate the appointment of agents by candidates, it is not so clear why the Act should try to regulate candidates' expenses. It is doubtful if the present Act's restrictions on election expenses (reproduced in the Bill) mean very much in present-day Zimbabwe. So far as is known, no candidates since the last general election have submitted returns of their expenses; and if they did, it is doubtful if they were remotely accurate or if anyone checked them.

Recommendation

ZESN recommends that if the present Act's provisions relating to election expenses have in fact been ignored by candidates and the Government, they should be omitted from the Bill. There is no point in including provisions in legislation unless they can and will be enforced.

PRESIDENTIAL ELECTIONS

Part XVII of the Electoral Bill deals with presidential elections in much the same way as the present Act. The only significant difference is in clause 108, which states that if two or more candidates are nominated "a poll shall be taken in each constituency for the election of a President." The result of such a poll is to be determined in accordance with paragraph 3 of the Second Schedule to the Bill: the candidate who gets the most votes is declared to be duly elected, even if he does not gain a plurality, i.e. a majority of the total votes cast in the poll. Section 101 of the present Act, by contrast, states that if there are more than two candidates and none of them gains a

plurality then a fresh poll must be taken in which the only two candidates will be the ones who received the highest and next-highest number of votes in the first poll.

Recommendation

ZESN recommends that the provisions in the present Act should be retained. The President is the head of State and, under the present Constitution, wields enormous power. It is only right, therefore, that he should be elected by a majority of the electorate. In the absence of a system of proportional representation, under which voters are allowed to indicate their second and third preferences, a second poll is the only way of ensuring that the President is elected by a majority of persons voting in a presidential election.

CONFLICT MANAGEMENT

There is little in the Electoral Bill about the important issue of conflict management. ZESN recommends that either in the Electoral Commission Bill or the Electoral Bill there be explicit provisions on this matter.

In the ZESN proposals this was what was said:

“Elections in Zimbabwe have often been attended by violent confrontation, especially over the last few years. In the ZESN proposals there are a number of provisions allowing the Commission [the EC] to engage in mediation and conciliation. Party liaison committees will be established consisting of a member of the Commission and representatives of the contesting political parties. The main purposes of these committees will be

- to allow consultation between political parties and the Commission and to enable the Commission to transmit information to political parties at local level during the electoral process;
- to allow political parties to bring to the attention of the Commission, any electoral irregularities by any political party or any person or authority whatsoever to enable such irregularities to be dealt with expeditiously by the Commission;

- to resolve disputes and conflicts between political parties through mediation and conciliation processes and to prevent such disputes from escalating;
- to ensure that the codes of conduct for political parties are observed and fairly applied to all political parties and candidates.”

It is also recommended that the EC should be empowered to appoint election tribunals to sort out disputes which party liaison committees are unable to resolve. These tribunals, which should consist of lawyers and other people skilled in arbitration or mediation, could deal with disputes at a local level. Any matters that they could not resolve could be referred to the Electoral Court.

STRENGTHENING ELECTORAL OFFENCES

Some efforts have been made in the Electoral Bill to fortify some of the electoral offences. However, in the opinion of ZESN these do not go far enough. In its own proposals ZESN recommended that electoral offences be regrouped into intimidatory practices, corrupt practices and illegal practices. The first group was renamed intimidatory practices (previously these offences were grouped together under the title “undue influence”). The stronger term “intimidatory” was used to underscore the fact that these offences involve the use of violence and other forms of acceptable pressure. In the past violent intimidation has been prevalent and it must be made clear that violence and other forms of intimidation are totally unacceptable. Intimidation was defined to include not only physical violence but also psychological pressure and threats to withhold humanitarian assistance. The offence of committing an intimidatory practice was widened to include such things as

- compelling a person to vote for a particular political party or candidate;
- compelling a person to disclose how he or she has voted;
- using intimidation as a reprisal for having voted for a particular political party;
- using intimidation to prevent or obstruct a political party or a candidate from campaigning in an area prior to an election.

Corrupt practices included a wide variety of situations of bribery and corruption, including using promises of food or humanitarian aid to influence voters.

Under the ZESN proposals if a candidate or his or her agent was found after proper inquiry to have committed one or more serious intimidatory, corrupt or illegal practices, the EC was given the discretion to order the candidate to be disqualified from election.

Recommendation

ZESN recommends the fortifying of electoral offences in the Electoral Bill along the lines set out above.

POWER OF ELECTORAL COMMISSION TO POSTPONE ELECTIONS TEMPORARILY

Where conditions on the ground disallow the holding of free and fair elections there must be some device to allow for a temporary postponement of elections. Section 83 of the present Act recognises this by giving the President power to abrogate an election in any constituency where he has reason to believe that violence or intimidation makes it unlikely that a free and fair election can be held. There is no equivalent provision in the Electoral Bill.

In its own proposals ZESN recommended that the EC should be given the power to order the postponement of elections throughout the country or in a particular constituency. This would only apply where, after consultation with the law enforcement authorities, the EC had reasonable grounds to believe that, by reason of widespread actual or threatened intimidation or violence throughout the country or in a constituency, it was unlikely that a free and fair election could be held. The Commission would have the power to order the postponement of elections throughout the country for up to six months or for up to three months in a particular constituency.

ELECTORAL COURT

The setting up of a separate Electoral Court is a welcome development and is in line with recommendations made by ZESN. This court will hear and determine election petitions.

It is vitally important that the judges who sit on this court must be generally perceived to be politically neutral. ZESN is concerned that the method of appointment of judges to this court does not guarantee that they will be neutral.

In terms of the Bill the Chief Justice, after consultation with the Judge President, must appoint one or more judges of the High Court to the Electoral Court. Regrettably both the Judge President and the Chief Justice are widely seen as being politically partisan and thus judges appointed by them may equally be viewed as having been appointed because of their political biases. Unfortunately there are a number of High Court judges who are viewed as being politically biased and if these judges were to be appointed to sit on the Electoral Court, the court's decisions would be viewed with considerable distrust and suspicion.

Another cause for concern is that there is no mention in Part XXII of the Bill of the need to hear and determine election petitions as expeditiously as possible. It is notorious that not one of the election petitions filed in respect of the general election held in 2000 has been finally determined (and this is not least among the reasons why the Chief Justice, the Judge President and other judges are suspected of political bias).

Recommendation

ZESN recommends that a method of appointment of judges to the Electoral Court be found that will ensure that only judges who are generally viewed as being politically impartial are appointed to this court. In its own proposals ZESN has recommended that the Electoral Court will consist of judges or ex-judges appointed by the Judicial Service Commission in consultation with the Law Society.

ZESN also recommends that the Bill should impose time limits for the determination of election petitions, or at least should state that they must be given priority over all other cases.

AMENDING THE ELECTORAL ACT AND MAKING OF REGULATIONS UNDER THE ACT

Under the present Electoral Act the President has the power to amend the Electoral Act without reference to Parliament. The Executive President is the leader of a political party that contests elections. In presidential elections the President is a contestant in the election. It is totally unacceptable to vest this power in the President. It can be used and has been used to change the electoral laws so as to favour the ruling party. Under the current Act the Minister has powers to make regulations on a wide range of matters. Again this is unacceptable as the power can be used and has been used to create regulations that favour the ruling party

Under the ZESN proposed Electoral Bill the President's power to amend or modify electoral provisions would be removed. Only Parliament may amend the provisions of the Electoral Act. ZESN proposed that the power to make electoral regulations should be vested in the EC.

In the Electoral Bill this proposal has been followed, at least impliedly. The President's power to amend the electoral laws has been omitted and the power to make regulations has been given to the EC, although statutory instruments made by the EC will not have effect until approved by the Justice Minister. [clause 188].

This is a most welcome development. However, it must be pointed out that the President still has the power to amend existing legislation without reference to Parliament under the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*]. This Act should therefore be amended by inserting a provision that the President will not be entitled to use this Act to amend or modify any of the provisions of the Electoral Bill.

It would be better, too, if clause 188 were amended to remove the Minister's powers to veto the EC's regulations: the EC is supposed to be independent and not to be subject to the direction or control of any person or authority¹⁰, so it should be given

¹⁰ Clause 4(2) of the Zimbabwe Electoral Commission Bill.

the right to determine for itself what regulations should be enacted in regard to elections.

APPENDIX 1

SADC PRINCIPLES AND GUIDELINES GOVERNING DEMOCRATIC ELECTIONS

1. Introduction

SADC region has made significant strides in the consolidation of the citizens' participation in the decision-making processes and consolidation of democratic practice and institutions. The Constitutions of all SADC Member States enshrine the principles of equal opportunities and full participation of the citizens in the political process.

The Southern African countries, building upon their common historical and cultural identity forged over centuries, agreed to encapsulate their commonality into a single vision, that of a SHARED FUTURE. In this context, in 1992 the Southern African countries meeting in Windhoek, the Republic of Namibia, signed a Treaty establishing the Southern African Development Community (SADC).

Article 4 of the Treaty stipulates that “human rights, democracy and the rule of law” are principles guiding the acts of its members. Article 5 of the Treaty outlines the objectives of SADC, which commits the Member States to “promote common political values, systems and other shared values which are transmitted through institutions, which are democratic, legitimate and effective. It also commits Member States to “consolidate, defend and maintain democracy, peace, security and stability” in the region.

The Protocol on Politics, Defence and Security Cooperation provides that SADC shall “promote the development of democratic institutions and practices within the territories of State Parties and encourage the observance of universal human rights as provided for in the Charter and Conventions of the Organization of African Unity [African Union] and the United Nations.”

In addition, the Strategic Indicative Plan for the Organ (SIPO), as the implementation framework of the Protocol, emphasizes the need for democratic consolidation in the region. The development of the principles governing democratic elections aims at enhancing the transparency and credibility of elections and democratic governance as well as ensuring the acceptance of election results by all contesting parties.

The Guidelines are not only informed by the SADC legal and policy instruments but also by the major principles and guidelines emanating from the OAU/AU Declaration on the Principles Governing Democratic Elections in Africa – AHG/DECL.1 (XXXVIII) and the AU Guidelines for African Union Electoral Observation and Monitoring Missions – EX/CL/35 (III) Annex II.

2. Principles for Conducting Democratic Elections

- 2.1 In the event a Member State decides to extend an invitation to SADC to observe its elections, this shall be based on the provisions of the Protocol on Politics, Defence and Security Cooperation.
- 2.2 SADC Member States shall adhere to the following principles in the conduct of democratic elections:
 - 2.2.1 Full participation of the citizens in the political process;
 - 2.2.2 Freedom of association;
 - 2.2.3 Political tolerance;
 - 2.2.4 Regular intervals for elections as provided for by the respective National Constitutions;
 - 2.2.5 Equal opportunity for all political parties to access the state media;
 - 2.2.6 Equal opportunity to exercise the right to vote and be voted for;
 - 2.2.7 Independence of the Judiciary and impartiality of the electoral institutions; and
 - 2.2.8 Voter education.

2.2.9 Acceptance and respect of the election results by political parties proclaimed to have been free and fair by the competent National Electoral Authorities in accordance with the law of the land.

2.2.10 Challenge of the election results as provided for in the law of the land.

3. Mandate and Constitution of the SADC Observers Mission

- 3.1 In the event a Member State deems it necessary to invite SADC to observe elections, the SADC Electoral Observation Missions (SEOM) have an Observation role. The mandate of the Mission shall be based on the Treaty and the Protocol on Politics, Defence and Security Cooperation.
- 3.2 The Chairperson of the Organ shall officially constitute the Mission upon receipt of an official invitation from the Electoral Authority of a Member State holding the elections.
- 3.3 The Chairperson of the Organ shall mandate the Executive Secretary to issue a Letter of Credential to each Member of the SEOM prior to their deployment into the Member State holding elections.
- 3.4 The constitution of the Mission should comply with the SADC policies relating to gender balance. While recognising that the Members of the Mission may come from different political parties in the home countries, they should behave as a team.

4. Guidelines for the Observation of Elections

- 4.1 SADC Member States shall be guided by the following guidelines to determine the nature and scope of election observation:
 - 4.1.1 Constitutional and legal guarantees of freedom and rights of the citizens;
 - 4.1.2 Conducive environment for free, fair and peaceful elections;
 - 4.1.3 Non-discrimination in the voters' registration;
 - 4.1.4 Existence of updated and accessible voters roll;

- 4.1.5 Timeous announcement of the election date;
- 4.1.6 Where applicable, funding of political parties must be transparent and based on agreed threshold in accordance with the laws of the land;
- 4.1.7 Polling Stations should be in neutral places;
- 4.1.8 Counting of the votes at polling stations;
- 4.1.9 Establishment of the mechanism for assisting the planning and deployment of electoral observation missions; and
- 4.1.10 SADC Election Observation Missions should be deployed at least two weeks before the voting day.

5. Code of Conduct for Election Observers

- 5.1 The code of conduct for the elections observers of SADC are consistent with those of the OAU/AU Declaration on the Principles Governing Democratic Elections in Africa - AHG/DECL. 1 (XXXVIII). In this regard, the SADC Election Observation Missions shall adhere to the following code of conduct:
 - 5.1.1 Must comply with all national laws and regulations;
 - 5.1.2 Shall maintain strict impartiality in the conduct of their duties, and shall at no time express any bias or preference in relation to national authorities, parties and candidates in contention in the Election process. Furthermore they will not display or wear any partisan symbols, colours or banners;
 - 5.1.3 Shall neither accept nor attempt to procure any gifts, favours or inducements from a candidate, their agent, the parties or any other organisation or person involved in the electoral process;
 - 5.1.4 Shall immediately disclose to the relevant SADC structures any relationship that could lead to a conflict of interest with their duties or with the process of the observation and assessment of the elections;

- 5.1.5 Will base all reports and conclusions on well documented, factual, and verifiable evidence from multiple number of credible sources as well as their own eye witness accounts;
- 5.1.6 Shall seek a response from the person or organisation concerned before treating any unsubstantiated allegation as valid;
- 5.1.7 Shall identify in their reports the exact information and the sources of the information they have gathered and used as a basis for their assessment of the electoral process or environment;
- 5.1.8 Shall report all information gathered or witnessed by them honestly and accurately;
- 5.1.9 Shall, when meeting election officials, relevant state authorities and public officials, parties, candidates and their agents shall inform them of the aims and objectives of the SEOM;
- 5.1.10 May wish to bring irregularities to the attention of the local election officials, but they must never give instructions or countermand decisions of the election officials;
- 5.1.11 Will carry any prescribed identification issued at all times, and will identify themselves to any interested authority upon request;
- 5.1.12 Will undertake their duties in an unobtrusive manner, and will not interfere with the election process, polling day procedures, or the vote count;
- 5.1.13 Will refrain from making personal or premature comments or judgements about their observations to the media or any other interested persons, and will limit any remarks to general information about the nature of their activity as observers;
- 5.1.14 Must participate in the briefings/training provided by the SEOM;
- 5.1.15 Must provide their reports on time to their supervisors and attend any debriefings as required; and

- 5.1.16 Should work harmoniously with each other and with observers from other organisations in their area of deployment.

6. Rights and Responsibilities of SADC Election Observers

- 6.1 The rights and responsibilities of the SOEM are based on the SADC experience and the AU Guidelines for Electoral Observation and Monitoring Missions. Accordingly the following shall be the rights and responsibilities of the SADC Elections Observers:

- 6.1.1 Freedom of movement within the host country;
- 6.1.2 Accreditation as election observers on a non-discriminatory basis;
- 6.1.3 Unhindered access to and communicate freely with the media;
- 6.1.4 Free access to all legislation and regulations governing the electoral process and environment;
- 6.1.5 Free access to electoral registers or voters' roll;
- 6.1.6 Unimpeded and unrestricted access to all polling stations and counting centres;
- 6.1.7 Communicate freely with all competing political parties, candidates, other political associations and organisations, and civil society organisations;
- 6.1.8 Communicate freely with voters without prejudice to the electoral law proscribing such communication in order to protect the secrecy of the vote;
- 6.1.9 Communicate with and have unimpeded and unrestricted access to the National Election Commission or appropriate electoral authority and all other election administrators;

- 6.1.10. The SEOM shall be headed by an appropriate official from the Office of the Chairperson of the Organ who shall also be the spokesperson of the Mission;
- 6.1.11. Send regular reports on the electoral observation process to the Representative of the Organ on issues that may require urgent consideration;
- 6.1.12 Issue a statement on the conduct and outcome of the elections immediately after the announcement of the result; and
- 6.1.13 Prepare a Final Report within 30 (thirty) days after the announcement of the results.

7. Responsibilities of the Member State Holding Elections

- 7.1 Take necessary measures to ensure the scrupulous implementation of the above principles, in accordance with the constitutional processes of the country;
- 7.2 Establish where none exist, appropriate institutions where issues such as codes of conduct, citizenship, residency, age requirements for eligible voters and compilation of voters' registers, would be addressed;
- 7.3 Establish impartial, all-inclusive, competent and accountable national electoral bodies staffed by qualified personnel, as well as competent legal entities including effective constitutional courts to arbitrate in the event of disputes arising from the conduct of elections;
- 7.4 Safeguard the human and civil liberties of all citizens including the freedom of movement, assembly, association, expression, and campaigning as well as access to the media on the part of all stakeholders, during electoral processes as provided for under 2.1.5 above;
- 7.5 Take all necessary measures and precautions to prevent the perpetration of fraud, rigging or any other illegal practices throughout the whole electoral process, in order to maintain peace and security;

- 7.6 Ensure the availability of adequate logistics and resources for carrying out democratic elections;
- 7.7 Ensure that adequate security is provided to all parties participating in elections;
- 7.8 Ensure the transparency and integrity of the entire electoral process by facilitating the deployment of representatives of political parties and individual candidates at polling and counting stations and by accrediting national and/other observers/monitors;
- 7.9 Encourage the participation of women, disabled and youth in all aspects of the electoral process in accordance with the national laws;
- 7.10 Issuing invitation by the relevant Electoral Institutions of the country in election to SADC 90 (ninety) days before the voting day in order to allow an adequate preparation for the deployment of the Electoral Observation Mission;
- 7.11 Ensure freedom of movement of the members of the SEOM within the host country;
- 7.12 Accreditation of the members of the SEOM as election observers on a non-discriminatory basis;
- 7.13 Allow the members of the SEOM to communicate freely with all competing political parties, candidates, other political associations and organisations, and civil society organizations;
- 7.14 Allow the members of the SEOM to communicate freely with voters except when the electoral law reasonably prescribes such communication in order to protect the secrecy of the vote;
- 7.15 Allow the members of the SEOM an unhindered access to and communicate freely with the media;
- 7.16 Allow the members of the SEOM to communicate with and have unimpeded access to the National Election Commission or appropriate electoral authority and all other election administrators;

- 7.17 Allow the members of the SEOM free access to all legislation and regulations governing the electoral process and environment;
- 7.18 Allow the members of the SEOM free access to all electoral registers or voters' list;
- 7.19 Ensure that the members of the SEOM have an unimpeded and unrestricted access to all polling stations and counting centres.

APPENDIX 2

SADC PARLIAMENTARY FORUM : NORMS AND STANDARDS FOR ELECTIONS IN THE SADC REGION

*Adopted by the SADC Parliamentary Forum Plenary Assembly on the 25 March 2001
in Windhoek, Namibia.*

Updated by the committee – 05.12.00 and 06.12.00 (Siavonga, Zambia)

A. INTRODUCTION

The experience gained by the SADC Parliamentary Forum in observing elections in Namibia, Mozambique, Zimbabwe and Mauritius is quite revealing. There have been significant gains in promoting democratic governance in the SADC region since the advent of the re-introduction of multi-party politics in the early 1990s. Periodic elections are being conducted nearly every five years. In a few cases, elections have resulted in the change of Governments in a peaceful manner. Indeed, most SADC countries are making progress in managing succession peacefully. In addition, some of the elections have produced balanced parliamentary representation which reflect the broad spectrum of the different shades of opinions in a country. Some of the one party dictatorial constitutions have been duly amended to reflect the new dispensations. Regrettably, however, neither the constitutions, nor the electoral systems or the practices of most institutions have been aligned to the new multi-party democratic culture. This applies to intra-party democracy or lack of it across the board. Levels of tolerance of contesting views are still too low as well as the empowerment of women to participate in decision-making process in Government. Furthermore, a lot still remains to be done to improve the political environment in which elections are conducted and to ensure that the existing legal and institutional frameworks work independently and impartially. There is still need to address issues relating to levelling the playing field for all the players contesting elections, inequality in the funding of political parties, inadequate access to state-owned media and election related violence. What is being said above is not equally applicable to all

countries. We must record, for example, the well-known fact that some countries in the SADC region have served as models of democratic governance for over three decades, namely Botswana and Mauritius, both of which have made phenomenal economic gains. In addition, the new democratic states which emerged in the 1990s in the southern part of Southern Africa have brought in new systems and practices which promote legitimate elections and electoral institutions such as independent electoral commissions. The above observations are fully documented in reports on elections in the four countries named above and on research done by the Electoral Institute of Southern Africa (EISA) on the state of elections in the SADC region as a whole.

As its contribution to the emergence of plural, multi-party democracy, the SADC Parliamentary Forum has taken a keen interest in election observation and electoral processes. The immediate objective of election observation is to determine the openness, freeness and fairness of elections in the SADC Region. However, the long term goal is to use lessons learned and experiences gained in election observation to help in strengthening the democratic processes and transparency in the conduct of elections in SADC countries. Furthermore, it is expected that observation will enable the SADC Parliamentary Forum to develop a procedural manual with guidelines for observer missions. It is against this background that the workshop was being held.

The purpose of the workshop was to use the lessons learned and experiences gained in election observation in Namibia, Mozambique, Mauritius and Zimbabwe to make implementable recommendations to SADC Government leaders and SADC Parliaments.

The recommendations that were finally made at the end of the workshop are targeted at strengthening electoral institutions, reforming outdated legal frameworks and electoral practices, and entrenching the democratic process in the conduct of elections thus minimizing disputes over the outcome of elections among contesting political parties. The recommendations which form part of this report if accepted are expected to significantly contribute to political stability in Southern Africa.

B. PREAMBLE

Cognisant of the above situation, we, the election observer delegations of the SADC Parliamentary Forum created pursuant to Article 10(6) of the SADC Treaty:

- **Recalling** the Commitment of the Heads of States and Government to democracy and to the individual's inalienable Right to participate by means of free and democratic processes in framing the society in which he or she lives; and to peace and stability in the SADC region; the Windhoek Declaration on Freedom of the Press; the Blantyre Declaration on Gender Equality of 1997; the Harare Declaration of 1991 and other International Conventions and Instruments to which all SADC countries are Signatories;
- **Recalling** the provisions of Article 5 of the Constitution of the SADC Parliamentary Forum which, *inter alia*, calls for the promotion of the principles of human rights and democracy and the encouragement of good governance, transparency and accountability within the SADC region.
- **Recalling** the role of the SADC Parliamentary Forum in Election Observation in the SADC region; for the purpose of institutionalising and strengthening electoral institutions including democratic processes

DO HEREBY make the following recommendations relating to elections and individual rights; elections and the Government; and fostering transparency and integrity in electoral process.

C. RECOMMENDATIONS

Part 1 : Elections and Individual Rights

1. Registration and Nomination

Problem

While Voter registration is a prerequisite to smooth elections it is common knowledge that some individuals intending to exercise their right to vote or to be voted as candidates in an election have been prevented from doing so through cumbersome voter registration requirements, nomination technical details, removal from the voters' register, intimidation through political violence and kidnapping of candidates. For a voter to be properly identified as a national of a particular state, there is need to have an identity.

Recommendations

The right to vote and to be voted for should be accepted as a birth right in accordance with the Universal Declaration of Human Rights and the Convention on the Elimination of all Forms of Discrimination Against Women. Therefore, eligible individuals should have the right to non-discriminatory voter registration and nomination procedures. This right should be enshrined in the constitution of a country.

- i. There should be provisions and practical for continuous voter registration and an undated voters' role register must be made available to all stakeholders in the elections.
- ii. During the nomination and selection of candidates all political parties contesting elections must ensure adequate gender balance in compliance with the SADC Blantyre Declaration on Gender and Development (1997) calling on all political parties contesting an election to commit themselves to a minimum of 30 per cent women party candidates by the year 2005.
- iii. Provision be made for people with disability to participate fully in the electoral process.

- iv. Provisions should be made to ensure that prospective voters are provided with a form of national identity card in good time for registration.

2. Voting and Secrecy

Problem

There are numerous cases in our countries whereby eligible voters have been unable or prevented from exercising their right to vote through violence, lack of information on location of polling stations, intimidation and misinformation.

Furthermore, there are situations whereby the secrecy of the ballot has been severely compromised by making voters queue behind their party candidates, village headmen and threats based on the ability of competing candidates/parties to use modern communication equipment to tell which way a voter has voted.

Recommendations

- i. The right of eligible individuals to vote unimpeded and the right to vote in secrecy in a ballot box should be protected and enshrined in the constitutions of the SADC countries.
- ii. Any measures such as political violence, kidnapping, murder, threats and sanctions such as denial of development opportunities in opposition controlled areas that prevent eligible individuals to register to vote and to vote in secrecy should be perpetually outlawed by SADC member states
- iii. Illiterate persons, old people and persons with disabilities should be given assistance when voting by persons of their choice.

3. Freedom of Association and Expression

Problem

It is common in some of the SADC countries that members of the electorate belonging to other parties have been intimidated, beaten up, tortured and even murdered for belonging to opposing parties and for openly expressing their support for their preferred party. Yet one of the fundamental principles of multi-party

democracy and political development process is that there should be freedom of association and expression. This principle is violated from one election to another.

Recommendations

- i. The sanctity of the freedom of association and expression should be protected and strictly adhered to.
- ii. Relevant electoral laws and code of conduct should provide for this sanctity.
- iii. Governments should establish by law *ad hoc* Electoral Tribunals to enforce electoral laws and codes of conduct during elections. They should deal with election conflicts.

PART 2 : Elections and the Government

1. Commitment to Pluralism, Multi-party Democracy and Politics

Problem

The meeting welcomed the commitment to pluralism and multi-party democracy in the first place by all SADC countries. However, the meeting noted that there is still inadequate and lip service commitment to multi-party democracy and politics among some of our leaders and politicians. They talk democracy but use undemocratic means to gain or remain in power. Yet the success of multi-party democracy and politics depends to a large extent on Government, political parties and other stakeholders committing themselves to upholding the values and practices that go with these concepts. The existence and sustainability of pluralism, multi-party democracy and politics again depends on the Government's belief in a democratic culture and wish to practice democracy. It calls for the Government to be tolerant of opposing political views and to harmoniously co-exist with opposition political parties.

Recommendation

The concepts of pluralism, multi-party democracy and politics should be enshrined in the constitution as the preferred form of political development and a basis for good governance. All stakeholders should commit themselves to pluralism, multi-party

democracy and politics as a condition for participating in the political process of the country.

2. Date of Elections

Problem

In most SADC countries the date as to when elections are held is a prerogative of the ruling party if not of the President or Prime Minister. The announcement for when the elections will take place is often not made in good time and as such does not allow all stakeholders to prepare for elections. This has been one of the many sources of election conflicts resulting in some opposition parties boycotting the elections.

Recommendations

- i. SADC Governments should ensure that the dates for general election are fixed by provisions in their Constitutions or electoral laws.
- ii. If this is not possible the Head of Government should be required by the electoral law to give adequate notice of not less than 90 days (3 months) and not more than 120 days (4 months) from the date of dissolution of Parliament for an election date to give sufficient time to the Electoral Commission to prepare for the elections and to demonstrate fair play. Updated by the committee.
- iii. The Parliament of each SADC State should be involved in the alteration or fixing of election dates.

3. Misuse of Public Resources and Funding of Political Activities

Problem

In most countries the ruling party and its government seek an unfair advantage over opposition parties through the use of public funds and assets for its political activities, particularly meeting campaign expenses. When opposition parties get a share of public funds, there are complaints that such funds are inadequate, payment is delayed and given at the will of the ruling party to the disadvantage of opposition parties.

Recommendations

- i. In the interest of creating conditions for a level playing field for all political parties and promoting the integrity of the electoral process, parties should not use public funds in the electoral process. The electoral law should prohibit the Government to aid or to abet any party gaining unfair advantage.
- ii. Where a policy decision is taken to financially support political parties with taxpayers' money, which is necessitated by the poor resource background of most political parties, an agreed upon formula must be used and adhered to in allocating funds to the contesting parties. A commonly used formula is according to the number of seats each party holds in Parliament.
- iii. Those countries that are not yet funding contesting political parties should introduce the necessary legislation to do so in order to foster uniformity and levelling the playing field.
- iv. There must be accountability in the use of public funds.

4. Government, Political Parties, NGOs and the Media

Problem

In the majority of SADC countries the state owned media is controlled by Government. This often causes imbalance in the playing field between the stakeholders mainly the ruling party and opposition parties. It contributes to lack of transparency through selective reporting. Where the opposition parties are given air time, it is too short and the timing may be inappropriate. The recent emergence of a vibrant private media has greatly contributed to some balance in political coverage of both ruling and opposition parties.

Recommendations

- i. Governments should take the emergence of private media as a healthy development in the institutionalisation of the democratic process and the conduct of elections and should therefore refrain from taking decisions and actions that thwart the development of a strong private media. There should therefore be a domestic information law that reaffirms the existence of private media.

- ii. Governments should take cognisance of the fact that the involvement of political parties in the electoral process fosters the transparency of the system and generates public confidence in the system. Opposition parties should therefore also be given equal opportunity and agreed upon time and space on the state owned media to put forward their announcements and broadcasts and advertisements. This is a true test of the Government's commitment to pluralism and multi-party democracy and a democratic political process.
- iii. The role of the civil society, mainly in election monitoring and civic education, should be recognised by Governments.

5. Electoral Commissions

Problem

Electoral Commissions do play a very important role in the preparation for and conduct of elections. However, the establishment, composition, status, independence, impartiality and professionalism of some of the Electoral Commissions have come under serious scrutiny and doubts particularly from opposition parties and members of the public. These commissions are accused of being pro the ruling party that has appointed them.

Recommendations

- i. In the interest of promoting and entrenching pluralism, multi-party democracy and the integrity of the electoral process, the complete independence and impartiality of the Electoral Commission in dealing with all political parties should be reaffirmed in the constitution.
- ii. The commissioners should be selected by a panel of judges set up by the Chief Justice or the equivalent, on the basis of the individual's calibre, stature, public respect, competence, impartiality and their knowledge of elections and political development processes. The selection of commissioners should be done in consultation with all political parties and other interested stakeholders. The selected commissioners are to be approved by Parliament.

- iii. To further enhance the independence and impartiality of the Electoral Commission it should have its own budget directly voted for by Parliament and not get its allocation from a Ministry or a Government Department.
- iv. The Electoral Law should empower the Electoral Commission to recruit and dismiss its own support staff on the basis of professionalism and competence rather than getting seconded staff from Ministries and Departments. Such staff have no loyalty to the Electoral Commission.
- v. Security of tenure of electoral commissioners should be entrenched in the constitutions of the SADC countries.

Part 3 : Fostering Transparency and Integrity in the Electoral Process

It is necessary to start this section by defining what the terms transparency, levelling the playing field and free and fair elections mean in the context of managing elections. These concepts are important in fostering transparency and integrity in the electoral process.

Transparency

Transparency refers to the degree of openness in the election process. It is important in the conduct of elections in that it enables the public at large, political parties and candidates to be informed on a timely basis about developments concerning electoral matters. It is a confidence building measure.

Level Playing Field

In the context of elections, the expression “level playing field” refers to a requirement that the election rules and regulations apply fairly to all political parties and candidates. It requires that the Electoral Commission deals openly and on equal terms with each of the political parties to enhance transparency.

Free and Fair Elections

Whether elections are free and fair is a judgmental position on the whole process of conducting elections.

Problem

Experience has so far shown that the above three concepts feature prominently when elections are held in any of the SADC countries.

Opposition parties often complain about the lack of transparency in the manner in which Electoral Commissions manage elections, the playing field being skewed in favour of the ruling party and for the losing parties the elections being not free and fair. What is discussed below are some ingredients of good practices that Governments should seriously consider adopting to enhance transparency, ensure a level playing field, and guarantee free and fair elections.

1. Registration of Voters

Problem

Registration of voters in SADC countries is a once off thing, done when elections are imminent. Experience shows that this practice leaves out a substantial proportion of eligible voters. A properly compiled register of voters provides a sound basis for the organisation of free and fair elections. The compilation of a satisfactory voters' register is a biggest test of the impartiality and technical competence of the Electoral Commission.

Recommendation

Registration of voters should therefore be a continuous exercise and not just wait for an election.

2. Voter Education

In some cases voters' education is left to NGOs and political parties. Due to lack of funds it is inadequately funded and poorly managed.

Recommendation

The Electoral Commission should be required by law to provide for a satisfactory and adequately funded voter education programme that helps voters to be acquainted with the voting procedures and other aspects of civic awareness.

3. Boundary Delimitation Commissions

Problem

The main function of a Boundary Delimitation Commission is to draw the boundaries of constituencies in a fair manner applying a stipulated formula such as the electoral quota which uses the average electorate of the constituencies as the basic size of the electorate to be placed in a constituency. Experience has shown that this is not always adhered to. Updated by the committee.

Recommendations

- i. In the interest of promoting plural, multi-party democracy and enhancing integrity of the electoral process, the independence and impartiality of the Boundary Delimitation Commission in drawing up constituency boundaries should be reaffirmed in the constitutions of SADC countries. The tenure of office of the Commissioners should be guaranteed in the Constitution. The drawing up of constituency boundaries should be left to the technical competence of the Boundary Delimitation Commission without political interference. The Commission should consult stakeholders in this process.
- iv. Gerrymandering should be outlawed.
- v. Recommendations of the Boundary Delimitation Commission should not be altered by any stakeholder.

4. Nomination Process

Problem

The nomination process has been a vulnerable stage in election preparation. Prospective candidates have been prevented from submitting their nomination papers due to violence, procedural deficiencies and inadequate role of the courts.

Recommendation

It is therefore recommended that technical requirements/rules should be kept to the absolute minimum. The Electoral Commission should have powers to extend the time for a particular nomination centre and prospective candidates should have the right to appeal to the High Court.

5. Election Campaign

Problem

Election campaign in a number of SADC countries is often riddled

- with violence, murder, intimidation, destruction of property,
- unequal access to state owned media and accusations by opposition parties of a lack of a “level playing field” among the parties contesting an election.(updated by the committee)

Recommendations

The Electoral Commission and all stakeholders in the electoral process should therefore be required by law and be empowered to ensure that political parties and candidates should denounce violence in elections in order to ensure that:

- unimpeded freedom of campaign throughout the country;
- free and unimpeded access to Voters’ Rolls;
- all Government Security Forces should act impartially and professionally;
- Presidential candidates must be provided with free and adequate security during the election process;
- equal and free access to the state owned media;
- a code of conduct developed through consensus from all political parties to guide behaviour in the conduct of campaigns; and

- reasonable safeguards at political meetings, rallies, polling stations and party premises.

The *ad hoc* Electoral Tribunal shall enforce the foregoing recommendations.

6. Funding of Political Campaigns

Problem

The funding of election campaigns is an area where the misuse of public funds is common and the playing field is not even. Experience in most countries is that the ruling party is well resourced (financially and assets wise) while opposition parties are poorly funded. Ceilings on political expenditure are either not there or ignored by all. The rich engaged in lavish expenditure to win votes.

Recommendation

The Electoral Commission should therefore be legally empowered to prohibit certain types of expenditures so as to limit the undue impact of money on the democratic process and the outcome of an election. It should be empowered to ensure that proper election expenses returns are submitted on time, to inspect party accounts, and for parties to have properly audited and verified accounts.

7. Role of the Courts

Experience shows that the courts come into the electoral process in terms of:

- i. handling appeals during the registration and nomination stages;
- ii. dealing with election offences; and
- iii. attending to election petitions.

Problem

In most countries the courts are either under-funded or understaffed or too bureaucratic to deal promptly with election petitions and offences. Yet the courts are an important player in ensuring a plural and multi-party democratic process.

Recommendations

- i. The courts should be strengthened in terms of both human and financial resources to enable them adequately to deal with election petitions and offences and to ensure a level playing field and free and fair elections.
- ii. There must be time limits for resolving election petitions.
- iii. In enhancing democracy all election petitions should be subject of judicial review.
- iv. All cases emanating from electoral petitions should be subject to electoral review.

8. The Electoral Commission and the Media

Problem

Technical competence, impartiality in dealing with political parties and independence of government control are not the only qualities of a good Electoral Commission. Good relations with the media is a desirable quality in that it fosters public confidence in the electoral process. Experience from the SADC countries is that the relations between the Electoral Commission and the private media is not only a good one. Yet the media plays an important role in terms of fostering the integrity and transparency of the Electoral Commission and on building public confidence in the activities of the Commission. Therefore, the Electoral Commission and the media should view themselves as allies and not as adversaries in the institutionalisation of the democratic process in the conduct of elections.

Recommendations

The following good practices are offered for adoption by Electoral Commissions in our Region:

- i. periodic meetings with representatives of the media at every important stage of the electoral process as a way of communicating with the general public; and
- iv. general media briefings and general statements to the media to avoid misrepresentation.

9. Polling Stations

Problem

In some SADC countries, polling stations are in private houses, shops and stores. This compromises the integrity of the voting process and the secrecy of the ballot.

Recommendation

Polling stations should be public places such as schools, tents and mobile vehicles that are neutral.

10. Ballot Boxes

Problem

The nature of ballot boxes has become the subject of concern in the voting process. Some countries still use opaque wooden boxes which defeat the call for transparency in the electoral process. Other countries are a step ahead in that they use transparent ballot boxes in line with the general call for transparency in the electoral process.

Recommendation

Those SADC countries that still use opaque wooden ballot boxes are urged to discard them in favour of transparent ballot boxes.

11. Counting of Votes

Problem

The counting of votes is another area in the electoral process riddled with accusations of elections being rigged in favour of the winning party. The system of transporting ballot boxes from polling stations to a central counting centre creates opportunities for missing ballot boxes and other ballot boxes being sneaked in. This is a violation of free and fair elections.

Recommendations

- i. The counting of votes should be done at the polling station where the candidates and/or their election agents are present. Such candidates and agents should be

allowed to remain with the boxes from closure of polling station to counting of the votes.

- ii. There should be immediate release of official election results on completion of counting, signed by returning officers and confirmed by party agents.
- iii. Verification and reconciliation of ballots should be done before counting begins and this should be done in the presence of candidates and all their agents.
- iv. In the event of a long lapse of time between the completion of voting and the commencement of the counting, the ballot boxes should be sealed and opened in the presence of all polling agents.
- v. The Electoral Commission should prepare and make available a time-table of the electoral process, including the acquisition of electoral materials, packaging and distribution to polling centres. The time-table, including all stages of electoral events should, by law, be made accessible to all stakeholders.

12. Acceptance of Election Results

Problem

It is common in some SADC countries that both ruling and opposition parties do not easily accept election results. Some ruling parties as well as opposition parties do not accept the legitimacy of each other. In some cases, opposition parties are denied funds that are due to them. The tendency therefore is for opposition parties to act outside parliamentary jurisdiction.

Recommendations

- i. The culture of accepting election results should be cultivated and encouraged, especially when election observers have certified the results as free and fair.
- ii. Political parties contesting elections must accept defeat after fair contests.

13. Managing Post Election Conflicts

Problem

Lack of confidence, trust and dialogue has led to conflicts among political leaders before, during and after elections.

Recommendations

- i. There is need for consensus building.
- ii. There is need to create an institutional machinery at the SADC Parliamentary Forum level to handle conflicts that arise before, during and after elections.
- iii. SADC countries should work out a mechanism of ensuring that there is a harmonious relationship and cooperation between the ruling parties before and after elections.

14. Role of Observers

Problem

There is a growing realisation among SADC countries that have embraced multi-party democracy that the presence of observers (local, regional and international) generates confidence in the political process and international standing of the country. It often assists the electorate and the losing political parties and candidates to accept the election results if the election is judged by the observers to have been held under legitimate conditions. However, what is disputed is what constitutes free and fair elections and on the part of the host government who should be allowed to observe the elections. Some international bodies and local observers are suspected of having their own agenda and may not be impartial and have therefore been barred by host governments from observing the elections.

Recommendations

Despite these concerns, election observers should be accepted as part of the process to institutionalise multi-party democracy and as a mechanism to persuade governments to adhere to the ingredients of free and fair elections. These ingredients include:

- i. acceptance by all political parties that all eligible citizens have had a fair opportunity to register as voters and to cast their votes;
- ii. political parties contesting the election having a fair opportunity to campaign including an equitable access to the state owned media;
- iii. the Government of the day creating a “level playing field” condition in which all political parties have the opportunity to put their policies and programmes to the electorate;
- iv. the removal of any existing state of emergency before an election campaign begins;
- v. certification by all Polling Agents that the Voting was free and fair at respective polling stations;
- vi. the acceptance by the host government of election observers as a factor in fostering transparency, integrity and in institutionalising the democratic process in the conduct of elections.

15. The Role of the SADC Parliamentary Forum in Election Observation

Problem

The Forum has been experiencing difficulties in some member countries in respect of timely accreditation; confusion about who has authority to invite the Forum to observe the Elections; and a common understanding of how the lessons from observing elections are shared with the stakeholders. A problem also exists in SADC because of the absence of a regional body that can assist in resolving electoral disputes.

Recommendations

- (i) The SADC Parliamentary Forum should continue to observe elections so as to promote democratic practices and sustainable peace in the region in line with the objectives of the Forum.
- (ii) SADC Parliamentary Forum Observer Missions should observe the pre-election (including voter registration), election, and post-election periods. The

timing of the pre-election entry point shall be determined by the Secretariat in consultation with stakeholders.

- (iii) The SADC Parliamentary Forum should widely circulate its election Observation Reports and engage stakeholders in the aftermath of elections.
- (iv) All Governments should endorse a standing invitation to the SADC Parliamentary Forum to observe elections whenever they are held in any SADC country without having to wait for a formal invitation from the host Government.
- (v) In line with the SADC Declaration which *inter alia* calls upon all Governments to ensure the full participation of women with a minimum of 30% of women in all areas of decision making, including Parliaments. The reform of all laws that impede the full participation of women in elections, electoral processes and management of elections. To this end, each and every recommendation automatically incorporates provisions that are designed to advance the women's role in the governance of SADC countries.

16. Code of Conduct for the Forum as Regional Observers

Problem

Whereas observers have the noble duty to see that elections are held in a free and fair atmosphere it does not mean that they are 100% impartial. Some election observers may have their own hidden agendas. They therefore cannot carry out their work without some guidelines on their behaviour. However, SADC Parliamentary Forum undertakes to observe elections impartially in line with the Constitution and Code of Conduct for the Forum.

Recommendations

Election results should be accepted by both ruling and opposition parties and what is due to opposition parties should be given without delay in accordance with the law. It is therefore recommended that Governments should take a policy position recognising the role of observers, as long as:

- (i) observers must be non-partisan at all times and seen to be so; they should not express partisan political views whether by word, symbol, conduct, song or otherwise; to respect the laws of the host Government; to respect the role, status and authority of the Electoral Commission and presiding officers at all times not to communicate with the voters at any time within the precincts of the polling station; not to interfere in the electoral process at any time; and to channel any complaints that they may have to the relevant Government and electoral officials.

17. Reform of Electoral Laws

Problem

Some of the electoral laws are cumbersome and bureaucratic. This leads to the difficulties of attainment of good electoral standards and norms within the region.

Recommendation

There is need to harmonize SADC countries electoral laws. This will enhance and promote the attainment of plural politics, democracy, peace and stability in the SADC region.

D. CONCLUSION

The above recommendations on norms and standards in conducting plural and multi-party elections, if adopted and implemented by the SADC Governments, would certainly go a long way to entrenching a democratic culture, in minimising conflict and contributing to political stability and peaceful development in Southern Africa.

The SADC Parliamentary Forum should set up a monitoring mechanism to ensure successful implementation of the recommendations.

APPENDIX 3

GUIDELINES FOR ELECTION BROADCASTING

In its publication entitled *Guidelines for Election Broadcasting in Transitional Democracies* (1994) the British based organisation Article 19 suggests a series of Guidelines for broadcasters. The Guidelines themselves can be found in this publication, a copy of which is attached to this Paper. This is the summary of the Guidelines taken from this publication:

The Guidelines in Summary

The guidelines address the duty of government media:

- to inform the public about matters relevant to the elections, including to provide voter education
- to be balanced and impartial in their reporting
- not to refuse to transmit an election broadcast unless it constitutes a clear and direct incitement to violence or hatred
- to be accurate, balanced and impartial in their news and current affairs programmes
- to grant parties and candidates air time for direct access programmes on a fair and non-discriminatory basis
- to grant equal time to both sides of a referendum vote and to comply with the above Guidelines also in local and regional elections.

They further address the obligation of governments:

- to abolish any laws that restrict freedom of expression in breach of international law and standards

- to make special efforts to investigate threats and physical attacks on media personnel or offices and to bring those responsible to justice
- not to censor election programmes in any way
- to establish or designate an independent, impartial body to monitor and regulate election broadcasts
- to ensure that decisions of this body are subject to judicial review on an expedited basis.

The Guidelines strongly recommend:

- that the media be exempted from legal liability for unlawful statements made during election broadcasts by candidates or party spokespersons
- that parties and candidates be granted the opportunity to reply to or correct injurious statements or criticisms directed at them
- that government media should broadcast candidate forums and interview programmes
- that any media outlet that publicizes the results of an opinion poll or election projection should also include any relevant information about the circumstances and significance of the poll or projection.

APPENDIX 4

ELECTORAL MANAGEMENT IN SOUTHERN AFRICA

By Dr. David Pottie with Prof. Tom Lodge

Executive summary

This paper offers a broad survey of issues related to electoral management in southern Africa. After a short overview of southern African electoral systems, this paper

discusses the institutional framework for administering polls and delimiting electoral boundaries. The paper examines the criteria and values which govern and inform the ways in which these bodies function as well as the various measures which have been adopted to promote fair conduct.

Fair elections usually implies equitable treatment of all competitors; in several southern Africa countries public resources are deployed to enable parties to run effective campaigns though the extent to which distribution of such resources is even-handed varies. Broader considerations, which affect democratic culture, are discussed in a subsequent section, including civil rights, the freedom of the media, and the provision of civic education. The high cost of elections in this region makes them alarmingly dependent on externally derived resources, one reason why they continue to attract considerable international attention from observer groups.

Four case studies round off this survey. South Africa represents a level of managerial efficiency and administrative sophistication which reflects resources which few other countries in Africa can hope to command; even so questions can be raised about the financial sustainability of the South African operation. In donor dependent Mozambique politicization of electoral management has added to the difficulties of conducting polls in an extremely challenging environment. Namibia represents an impressive example of relatively smooth administration using quite limited resources but also illustrates the consequences of delegating the task of addressing disputes to the courts without any serious efforts to mediate conflict more informally. Finally Angola stands as a sad example of the requirement of a minimal degree of commitment to abiding by electoral outcomes by stakeholders before effective electoral management can happen.

Seven key strategies to support political pluralism and multiparty electoral politics in southern Africa:

1. Independent electoral administration and capacity-building

There is widespread provision for the establishment of independent electoral commissions in the constitutions of SADC countries. However, to be effective, electoral commissions must receive adequate funding, political support and

administrative capacity to undertake the most efficient, professional and cost-effective elections possible. Such capacity can be developed through strong commitment of all means of support from national government, from foreign donors, and through the development of a strong and vibrant democratic culture. Electoral commissions should also be encouraged to develop the exchange of information, practices, experiences and technical skills in order to deliver the best possible elections.

2. Code of conduct for political parties

Electoral Commissions, in association with other interests should work with political parties to generate a binding code of conduct for registered political parties. The code of conduct should govern the behaviour of political parties, their candidates and supporters. Such a code, if effectively implemented, can contribute to the sustainability of political tolerance and build legitimacy for the peaceful conduct of election campaigns. The code can be given force through the Electoral Law, enforceable through conflict management committees, the courts, or other dispute resolution mechanisms.

3. Freedom of the press

While all SADC countries are signatories to the Windhoek Declaration they must also strive to examine the best practicable means to ensure freedom of expression and freedom of the press, especially in relation to the electoral process. A free media is an essential tool for the open exchange of political opinion, and for reporting on the election process. The media too should be committed to a code of conduct.

4. Support for civic education

Countries with only recent experience with multiparty politics have a responsibility to ensure that the population understands their democratic rights and duties. Civic education is an essential foundation to the exercise of political rights. Governments, electoral commissions, political parties and non-governmental organisations can all play a role in this regard. Electoral commissions especially can drive the process to ensure that the electorate remains informed about any changes in the electoral system.

5. Public funding and disclosure of party funding

Financial support for multiparty politics extends beyond electoral commissions and includes political parties themselves. Countries should consider some mix of public funding for political parties and a regulatory environment governing private domestic or foreign. For example, foreign donations may be pooled into a publicly administered fund, or else be subject to disclosure (similar regulations should exist for domestic donations).

6. Party liaison committees

Accountable and more transparent electoral administration can contribute to the legitimacy of the electoral results. Ongoing consultation and communication with political parties through liaison committees at national, regional and local level (where applicable) can address issues and potential debates before they become disruptive to the overall election process.

7. Conflict management committees

Similar to party liaison committees, alternative conflict mediation and resolution structures can circumvent recourse to the often expensive and lengthy process of submitting court applications. Dispute resolution through such alternatives can thus bridge the gap that often results between political parties, or between the parties, candidates, individuals and the government or electoral commission.