

Zimbabwe Election Support Network (ZESN)



Pre-election Update No. 6

THE CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK FOR ELECTIONS IN ZIMBABWE

INTRODUCTION

For an election to be free and fair the entire process must be free and fair and the body running the election must perform its duties efficiently and in a scrupulously impartial manner. The effectiveness of any electoral reforms depends on how the electoral laws are applied and enforced in practice. Legislation alone cannot prevent malpractices. The best remedies against them are an impartial, efficient and active Electoral Commission; rigorous observation and monitoring of all stages of the electoral process; and impartial and professional enforcement of the laws by law enforcement agencies.

Implementation of reforms will be patchy. For electoral reforms to be effective, a climate must be created before, during and after elections in which voters will believe that they can vote freely to a change government through the ballot box, and that the elections will be conducted fairly. It will take time to restore voter confidence in the electoral process. It is therefore essential that there should be a sufficient period between the coming into operation of reforms and the elections. Only when voters see the new laws being enforced will their confidence be restored. The political parties contesting the elections will also need to test the efficacy of the new laws and satisfy themselves that they are being properly implemented.

METHODOLOGY

As ZESN continues to monitor the pre-election period ahead of the harmonized elections in March 2008, this update is intended to give an overview of the legislative framework under which the election will be held. This update is based on an analysis of the Constitution of Zimbabwe, the Electoral Act [Chapter 2:11]; the Zimbabwe Electoral Commission Act [Chapter 2:12] as amended by the Electoral Laws Amendment Act of 2008 and relevant regulations. ZESN's various recommendations for reform are also included.

THE CONSTITUTIONAL FRAMEWORK

The Constitution of Zimbabwe, the Electoral Act of 2004 and Regulations and the Zimbabwe Electoral Commission Act of 2004 provide the framework for the conduct of elections in Zimbabwe. The Constitution provides generally for elections, the delimitation of constituencies and the Zimbabwe Electoral Commission.

Pursuant to the Constitution of Zimbabwe Amendment Act (No. 18) of 2007, parliamentary, presidential and local authority elections are to be held every five years commencing with the harmonized polls scheduled for March 29 2008.

In terms of the Constitution Parliament consists a lower house made up of 210 directly elected House of Assembly members and an upper house of 93 Senators. 60 members of the Senate are directly elected. The remaining members are appointed and consist of 16

chiefs elected by the Chiefs Electoral College; 10 provincial governors appointed by the President as well as 5 other members appointed by the President.

The Electoral Act among other things provides for a Registrar-General of Voters and constituency registrars; the registration of voters; the preparation, compilation and maintenance of voters rolls; the qualifications of voters; the nomination and election of candidates to Parliament, the office of President and local authorities. It also establishes the Electoral Court and provide for its functions, which include the hearing and determination of election petitions. The Zimbabwe Electoral Commission Act establishes the Zimbabwe Electoral Commission and provides for its functions in detail.

THE ELECTORAL FRAMEWORK

For the election of parliamentary and local authority representatives, Zimbabwe practices the 'first past the post' (FPTP) electoral system inherited from the Westminster-type plurality or single-member district (SMD) system, in which the candidate with the highest number of votes wins. It must be noted that a winner may be elected on the basis of less than 51 percent of voters in constituency.

ELECTION MANAGEMENT BODIES

1. The Zimbabwe Electoral Commission

Following the enactment of the Constitution of Zimbabwe Amendment Act (No. 17) Act 2005 and the Zimbabwe Electoral Commission Act No. 22 of 2004, the management and supervision of elections in Zimbabwe is now the responsibility of the Zimbabwe Electoral Commission.

Its functions are as follows:

- To prepare for, conduct and supervise all elections and referendums and to ensure that such elections are conducted freely, fairly, transparently and in accordance with the law.
- To supervise the registration of voters being conducted by the Registrar of Voters
- To compile voters' rolls and registers
- To ensure the proper custody and maintenance of voters' rolls and registers
- To design, print and distribute ballot papers, approve the form of and procure ballot boxes, and establish and operate polling centres
- To conduct voter education
- To accredit observers of elections and referendums
- To give instructions to the Registrar-General of Voters in regard to the exercise of his functions
- To instruct other persons in the employment of the state or local authority in order to ensure efficient, proper, free and fair conduct of elections, and
- To exercise any other functions the Electoral Law and any other law may impose that on the Commission.

Further reform was introduced through the Constitution of Zimbabwe Amendment Act (No. 18) Act of 2007. This effectively abolished the Delimitation Commission whose function was to determine the limits of the 120 house of assembly constituencies and 50 senate constituencies into which Zimbabwe was previously divided.

The Commission is given functions in addition to those set out in the Constitution. In particular, the Commission will be enjoined to undertake research into electoral matters, to promote co-operation between the Government and political parties and other bodies concerned with elections, and to inform the public about all issues relating to elections.

Composition of ZEC

The Commission's composition is dealt with in section 61 of the Constitution rather than in the Zimbabwe Electoral Commission Act, and amendments were made by the Electoral Laws

Amendment Act to reflect this fact. Making the Commission a constitutional body, rather than one which owes its existence to an Act of Parliament, should theoretically make the Commission more independent, and for that reason is a welcome move.

Staff of the Commission

The Electoral Commission obviously needs a substantial body of staff to carry out the work needed on the ground to fulfil the Commission's onerous functions in connection with elections. It is vitally important that these staff members be properly trained and they must perform all their duties professionally and without political bias.

In terms of the Electoral Laws Amendment Act of 2008, employees of the Police Force, Defence Forces and the Prison Service can no longer be seconded as staff of the Commission except where their services are required for the provision of security. (Section 17 of ZEC Act as amended)

The pool of persons who can now be seconded to the Commission has been expanded. Now not only persons employed by the Public Service Commission may be seconded; the Commission can also call upon the Health Services Board and responsible authorities of any statutory or local government body to make their employees available for election service.

Recommendations

However, it is hoped that seconded persons such as recently retired members of the armed forces will not circumvent this provision. It should also be pointed that on the staff of the Commission there are already a number of ex-military officers dealing with electoral management. Even though these persons resigned from their military positions when they were engaged, there is a perception that the management of elections has been heavily militarised. The law should also explicitly exclude members of intelligence services. Members of these forces are now viewed, as being politically partisan and the use of such personnel in connection with elections is intimidatory.

None of the changes made by the Act will have much effect on the functioning of the Commission unless the Commission's members are perceived to be politically independent, efficient, and dedicated to ensuring that elections are held in accordance with the law.

ZESN continues to emphasize the importance of the Electoral Commission's impartiality, all-inclusiveness, competence and accountability. The method of appointment of Commissioners should be changed to reassure political parties and the electorate that Commissioners will be impartial. ZEC should be appointed with the participation of opposition parties and key stakeholders. The selection process of commissioners should be transparent and engender confidence in all stakeholders. These selection processes should also ensure that gender and youth participation or representation is achieved.

Adequate, qualified personnel should also staff ZEC. It is necessary to ensure the independence of the ZEC, including financial autonomy Commissioners could each be given areas of responsibility to enhance accountability. The law could require the commissioners to divide among themselves responsibility for the Commission's different activities so that each commissioner would be responsible for a particular activity. This would promote equal participation of all Commissioners. An alternative way of distributing functions between Commissioners would be to give each Commissioner the responsibility for a particular Province

2. The Registrar General

The Electoral Act establishes the office of the Registrar-General of Voters and gives it extensive powers to deal with the registration of voters, prepare the voters roll and take measures to prevent electoral fraud.

The Electoral Laws Amendment Act (2008) will make the Commission, rather than the Registrar-General, responsible for keeping and maintaining voters rolls. While this is a

welcome change, but the Amendment seems to fail to make a clear demarcation between the functions of the Commission and the Registrar-General in regard to voter registration. Thus, while the Commission will “keep and maintain” the rolls, the function of registering voters and updating the rolls will remain with constituency registrars, who are under the control of the Registrar-General. The Amendment also requires the Registrar-General to get permission from the Commission, rather than the Minister, before delegating his functions to some other member of the Public Service. To the extent that this gives the Commission greater responsibility over the electoral process, it is to be welcomed.

VOTER EDUCATION

Under the current Electoral Act, the Zimbabwe Electoral Commission has primary responsibility for conducting a programme of voter education. The Amendment Act includes further provisions on voter education (Section 13, 15, 15A and 15B of the Electoral Act as amended). The Commission must commence a programme of voter education not later than 90 days before the polling day of an election. The Amendment Act provides that the Government must give the Commission whatever assistance it may require to conduct voter education.

The Zimbabwe Electoral Commission Act obliges the Commission to conduct accurate and unbiased voter education. Thus in conducting its programme the Commission is expected to ensure that those it employs have sound knowledge of the electoral laws and processes and that they remain scrupulously impartial and do not show bias for or against any particular political party.

The Zimbabwe Electoral Commission Act contains various provisions regulating the conduct programmes of voter education by civic organisations and other interested stakeholders. The Commission may require a civic organisation to furnish it with copies of all the proposed voter education materials; the materials must be adequate and not misleading or biased in favour of any political party; and only the Commission may receive foreign funds for voter education, although it may distribute these funds to other organisations involved in the provision of voter education; the persons providing voter education must be citizens or permanent residents, domiciled in the country and they must, operate through an organisation with a specific mandate to provide voter education.

The Electoral Laws Amendment Act of 2008 contains further provisions allowing the Commission to control voter education by other organisations. The Commission is empowered to close down a voter education programme being conducted by a civic organisation if it considers the organisation is providing materially false or incorrect information that is unfairly biased in favour or against a contesting political party, and the programme therefore is likely to prevent a substantial number of voters from making an informed choice in an election. Before closing down a programme the Commission must give the affected organisation an adequate opportunity to make representations in the matter.

ELECTORAL PROCESSES

1. Delimitation of electoral boundaries

The Zimbabwe Electoral Commission is now responsible for delimiting constituencies and other electoral boundaries. The Commission will be obliged to give public notice before embarking on a delimitation exercise, and “so far as is practicable within the time available” will have to entertain representations from political parties and other interested parties who are likely to be affected by its decisions. Prior to the Electoral Laws Amendment Act 2008, only the President has the power to require the Commission to give “further consideration” to its report before finalising it.

2. Voter Registration and Voter’s Roll

Registration will be continuous, with citizens entitled to apply for enrolment at any time. Rolls will not be regarded as closed for new registrations in any election until the day before

nomination day in the election concerned. Persons who claim registration on a particular roll will be able to produce any satisfactory documentary evidence reasonably proving where they live. This is a welcome change because at present the Act makes the process of establishing residence difficult, particularly for urban residents in high-density suburbs.

Copies of voters' rolls

The Commission is now obliged to provide, on payment of a fee, one electronic copy of a voters roll to each political party contesting an election. The copy will have to be provided within seven days after the calling of the election concerned, which means that the copy will never be entirely up to date since as indicated above —additional voters may be registered until the day before nomination day in the election. Printed copies of voters' rolls will be made available to interested parties on payment of a reasonable fee. It may be noted that there does not seem to be any requirement that the fee for the electronic copy of the roll must be reasonable. It is also notable that while the Electoral Laws Amendment Act requires the Commission to provide printed copies of voters roll on request at any time, its obligation to provide electronic copies is restricted to the period after an election has been called. If voter registration is continuous and the rolls are stored electronically, they should be available at any time in both printed and electronic form.

3. Electoral offences

Intimidatory Practices

The Electoral Laws Amendment Act 2008 introduced new provisions (Section 133A of the Electoral Act) specifically criminalising a range of practices, which will constitute the offence of intimidation. The provisions spell out in detail what constitutes the offence of intimidation. For example, inflicting or threatening to inflict bodily harm, causing or threatening to cause bodily harm or abducting a person is an offence if the person doing these things compels a person or persons generally to vote for a political party or to refrain from voting or to attend a political meeting. The offence will also be committed by a person who, in order to compel another person to vote for a political party, withholds or threatens to withhold any assistance to which that other person is entitled or illegally does or threatens to do anything to the disadvantage of another person.

There are further provisions, which seek to stamp out other forms of intimidation. Thus it is an offence for a person to use intimidation to prevent or obstruct or attempt to prevent or obstruct a political party or candidate from campaigning in any election. It is also an offence for a person to prevent or discourage a person from voting by taking, destroying or damaging another person's proof of identity, voters' registration certificate or other document by which that person may be identified as a voter.

The Amendment Act also contains provisions that are intended to ensure that polling stations are not located at sites, which may be intimidatory to voters. Thus polling stations may not be sited in premises owned or occupied by a political party or a candidate; in a police station, barracks or other place where police officers or Defence Forces are permanently stationed; at any other place that may give rise to a reasonable apprehension by voters that their votes will not be secret or that the integrity of the voting process could be compromised.

An intimidatory practice will also constitute an electoral malpractice. This will allow the Electoral Court to declare void an election where the Court finds in an election petition that the intimidation was committed by or with the knowledge and consent or approval of the candidate returned at that election, or by or with the knowledge and consent or approval of any of his or her agents, and the effect of such practice was such as to have materially affected the outcome of that election.

The maximum penalty for most of these practices, except theft or destruction of voter identification, is five years' imprisonment.

Other Offences

Other offences include personation, which is applying for a ballot paper in the name of some other person. It is illegal to attempt to vote twice in an election. [Section 137 of the Electoral Act]. It is also illegal for any person to impede or prevent a voter from exercising his or her rights or to compel a voter to vote or refrain from voting in an election. [Section 134] It is also illegal to bribe voters as a way of persuading them to vote for you. Bribery includes giving, lending or getting any money to, for or on behalf of any voter at any stage of the election process from registration to voting, including any procession or demonstration. [Section 136]

Recommendations

For these provisions to be effective they will need to be properly enforced by the law enforcement agencies. Where complaints of political intimidation are made to the Electoral Commission, the Commission should be given powers to direct the Commissioner-General of Police to ensure that an urgent and proper investigation is conducted into the complaints.

4. Polling

Sections 28(3) and 58(1) of the Constitution of the Constitution requires presidential, parliamentary and local authority elections to be held simultaneously, the Electoral Laws Amendment Act 2008 makes the necessary amendments to the Electoral Act.

Voters will be entitled to vote even if they are not registered on the ward voters roll, so long as they can produce a voters' registration certificate (which, presumably, must show that they are entitled to be registered on the roll)¹. Before being issued with a ballot paper, a registered voter will have to produce a voters' registration certificate or proof of identity. It should be noted that few if any voters have been issued with voter's registration certificates.

Polling days

The Electoral Act allows polling to be held over one or more days. Polling days will be regarded as public holidays, and presumably they will be fixed so as to coincide with a weekend.

Conduct of poll

Before polling begins, every presiding officer will have to count and record the number of ballot papers received at his or her polling station, and the count will have to take place in the presence of candidates, election agents and observers.²

The number of voting compartments and ballot boxes to be provided in each polling station is no longer fixed in the Act but is left to the discretion of the presiding officer. However, presumably the Commission will be able to specify the number through directives or regulations.

Role of Police

The Amendment Act provided that police officers would be excluded from polling stations, except when they are voting or when they are specifically summoned to assist election officers in quelling a disturbance.

However the exclusion of the police from the process was reversed by the Presidential Powers (Temporary Measures) (Amendment of Electoral Act) Regulations 2008 gazetted on 17 March 2008, which provides that police officers on duty are restored to the list of persons authorised to be present in a polling station.

¹ See clause 41 of the Act.

² See clause 39 of the Act.

Illiterate and physically handicapped voters

The Electoral Law Amendment 2008 stipulates that illiterate and physically handicapped voters to be assisted to vote by two electoral officers or employees of the Commission, rather than by the presiding officer of the polling station in the presence of a policeman, as was previously provided by the Act. This was in tandem with the view that the presence of police could be intimidating to some of these voters.

These provisions have however also been affected by the Presidential Powers (Temporary Measures) (Amendment of Electoral Act) Regulations 2008. Illiterate or handicapped voters will be assisted by the presiding officer in the presence of two other electoral officers and a police officer on duty.

Recommendations

The law should go further and require the Commission to disclose the total number of ballot papers printed for each election. Only a trusted friend or relative to safeguard the secrecy of their ballot and avoid intimidation should assist assisted voters.

5. Counting and Tabulation of Results

The Electoral Laws Amendment made several minor changes to the way in which votes are counted and the results of elections are collated and announced.

Counting of votes at polling stations

Candidates and their agents will no longer be allowed to put their thumb-prints, signatures or seals on ballot boxes which are sealed in a polling station at the close of polling. The rationale behind this apparently that the new translucent ballot boxes have no space for additional seals or signatures. However, this seems an inadequate reason for abolishing a small but valuable safeguard against electoral fraud.

When the votes have been counted at a polling station, the presiding officer will have to record them on a return and post them up outside the polling station before sending them to the constituency elections officer. This must be done in the presence of the candidates and their agents and will certainly go some way towards ensuring transparency in the counting process, so long as candidates and political parties are able to deploy agents at every polling station to witness the counting of votes.

Recounts

The Commission is given power to order a recount of votes at any polling station, either on its own initiative or at the request of a candidate or political party contesting the election, if the Commission has reason to believe that a miscount occurred which might affect the result. The Commission's decision to order, or not to order, a recount will not be subject to an appeal. It is however recommended that the decision be.

Recommendations

Although votes are counted at polling stations in the presence of monitors, observers and polling agents, the Electorate sometimes is fearful of retribution since polling station will be available. Voter education should help in informing the electorate to ease fears such as the fear that that translucent ballot boxes negates the secrecy of their ballots. The prevention of electoral fraud is also critical.

6. Postal voting

In terms of the Electoral Act restricts postal voting to disciplined force members and electoral officers who will be absent from their constituencies on electoral duties; Government officials who are absent from the country on Government service; and spouses of such persons.

Recommendations

The Electoral Commission should be given the power to establish a system that allows Zimbabweans living outside the country to vote by post if they are unable to return to Zimbabwe to cast their votes.

7. Election Observation

Under the new provisions of the Electoral Laws Amendment Act 2008, all observers will have to be accredited by the Electoral Commission's Observation Accreditation Committee. The observers will be accredited to observe over the election period. Election period is defined as the period from as from the calling of an election to the declaration of the result.

Previously the Observation Accreditation Committee had five members. The chairperson or vice-chairperson of the now defunct Electoral Supervisory Commission chaired it. The other four members were ministerial and presidential nominees. Under the Amendment Act, this Committee will consist of six members, three of them being commissioners (the Commission's chairperson will chair the Committee.) The Commission's vice-chairperson will also sit on it, together with one other Commissioner designated by the Commission. The other three members are ministerial and presidential nominees.

Previously the Minister of Foreign Affairs was responsible for the invitation of individuals representing foreign countries or international or regional organisations & foreign eminent persons to observe elections in Zimbabwe. In terms of the Electoral Laws Amendment Act 2008 such persons can apply to Electoral Commission & Observer Committee, which decides whom to accredit. However, the Committee cannot accredit a person if the Foreign Minister objects to such person observing the election. Thus the law gives veto powers to the Minister. These provisions also apply to individuals representing bodies in the region that exercise functions similar to those of Commission, which are invited by ZEC to observe elections.

Individuals representing local organisations & eminent persons from within Zimbabwe are similarly accredited, save that the Minister of Justice Legal and Parliamentary Affairs in addition to veto powers, has the right to invite such persons to observe the election

Observers will:

- Observe the election process between the calling of the election and the declaration of the result of the poll;
- Observe the conduct of the polling at the election;
- Be present at the counting or collating of votes cast at the election and the verification of polling station returns by presiding officers;
- Bring any irregularity or apparent irregularity in the conduct of the poll or the counting or collating of the votes to the attention of the Commission.

It is a criminal offence to obstruct the performance by an observer of his or her duties.

Recommendations

The Commission should decide on which observers to accredit and there should be no Ministerial veto power. The Electoral Commission must accredit sufficient numbers of local and international observers to allow comprehensive observation of elections. This function should lie solely in the hands of the ZEC, which should not indulge in cherry-picking observers.

8. Dispute Resolution/Conflict Management

The Electoral Court has remained in limbo since the Supreme Court's judgment in *Marimo & Anor v. Minister of Justice, Legal and Parliamentary Affairs & Ors* (S-25-2006) was delivered in July last year. The Supreme Court held that the method by which judges of the Electoral Court were appointed contravened section 92 of the Constitution. The Amendment Act corrects the Electoral Act in this regard.³

³ Clause 77 of the Act.

The jurisdiction of the Electoral Court is restricted to the hearing of appeals and petitions under the Electoral Act. The court should be able to resolve expeditiously disputes before the election has taken place. The current Electoral Act requires the Court to determine election petitions within six months of the date of its presentation. The determination of pre-election disputes should be done fairly but within a very tight time frame.

Recommendations

There is need for competent, effective, independent and impartial Judiciary and electoral institutions. There is also need to complement the judges of the Electoral Court with staff, equipment and adequate resources. This Court should be given jurisdiction to resolve disputes before the election has taken place.

MEDIA COVERAGE OF ELECTIONS

The Electoral Laws Amendment Act contains a number of provisions that seek to ensure fair media coverage during the election period.⁴ The provisions relate to public broadcasters and other news media.

Public broadcasters

The Amendment Act empowers the Zimbabwe Electoral Commission, with the approval of the Justice Minister, to pass regulations governing electoral reporting by the public media. As the Commission should be independent of political influence, the requirement that these regulations receive Ministerial approval should be removed.

Public broadcasters are obliged to “afford all political parties and independent candidates such free access to their broadcasting services as may be prescribed” in the regulations. The regulations must provide for the total time allocated to each political party or candidate; the duration of each broadcast by the party or candidate; and the times when and areas to which such broadcasts are to be transmitted.

The regulations must ensure that there is a fair and balanced allocation of time between each political party and independent candidate; each political party and independent candidate is allowed a reasonable opportunity to present a case through the broadcasting service concerned.

The Commission is placed under an obligation to monitor broadcasters during the election period to ensure that they observe these provisions.

Ideally, before the next elections in Zimbabwe more broadcasters should be allowed to start to operate so that the public can receive a greater diversity of information and viewpoints.

Print media

The Amendment Act also provides for various obligations on the print media and broadcasters. During the election period such media must ensure that

- They treat equitably all political parties and candidates in regard to the extent of their coverage and the timing and prominence of their coverage;
- Their reports are factually accurate, complete and fair;
- They make a clear distinction between factual reporting and editorial comment;
- They rectify inaccuracies in reports without delay and with due prominence;
- They give a reasonable right of reply to political parties and candidates where they claim that the reports about them are false;
- They do not promote political parties or candidates that encourage violence or hatred against any class of persons in Zimbabwe;

⁴ See clause 12 of the Act.

- They avoid in their reports language encouraging racial, ethnic or religious prejudice or hatred or inciting violence or likely to lead to undue public contempt towards any political party, candidate or class of persons in Zimbabwe.

Monitoring of media coverage

The Amendment Act imposes a duty on the Zimbabwe Electoral Commission to monitor news media to ensure that political parties, candidates, broadcasters, print publishers and journalists do not breach the new provisions of the Act. The Act does not, however, address the issue of how the Commission is to deal with any such breaches. It is not given any explicit powers to sanction the media institution concerned by imposing penalties.

The Amendment Act requires broadcasters and print publishers, when required to do so by the Electoral Commission, to publish the Commission's statements informing voters about aspects of the voting process. The Commission is required to pay a reasonable fee for such publication. In its post-election report the Commission is obliged to include a report on the coverage of the election by the news media.

It is significant that the Amendment Act provides that these provisions relating to the media will prevail even if they are inconsistent with the Broadcasting Services Act, the Access to Information and Protection of Privacy Act or any other enactment.

CONCLUSION

In conclusion, without the requisite implementation of constitutional and electoral framework, and the creation of an atmosphere in which persons can campaign and vote freely, we will miss the mark as a nation and it is unlikely that the result of the elections in March would be indisputably free, fair and democratically expressive of the will of the people. ZESN remains committed to values that ensure that citizens freely participate in elections in an informed manner and in a free political environment. The Network urges all stakeholders to work together to ensure participatory and people-driven democratic processes in the governance of the country; the security of citizens, their enjoyment of freedoms of movement, assembly and association and the existence of a political and social environment that is conducive to holding free and fair elections.

PROMOTING DEMOCRATIC ELECTIONS IN ZIMBABWE

FOR COMMENTS AND FURTHER DETAILS CONTACT

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