

Electoral Law Must Prohibit State Officials' Public Statements Threatening Free and Fair Elections

By Zimbabwe Election Support Network (ZESN)

Elections in Zimbabwe have always been marred by acts of violence and intimidation. As far back as 1980, when Zimbabwe held its first democratic elections, there were complaints of violence and intimidation. At the time, the euphoria brought by independence overshadowed the violence that had taken place. Although the elections were passed as free and fair, the benefit of hindsight shows that it set a bad precedent which would be repeated in future elections. Violence and intimidation have almost become part of the country's political culture. Elections have become synonymous with violence. This is not right.

As the world witnessed in the run-up to the Presidential Run-Off election between March and June 2008, violence claimed many limbs, lives and property – causing untold suffering amongst ordinary people. In the end, violence and intimidation meant the process and result of that election became severely compromised. The legitimacy of the result was contested and could not be sustained – and without any viable option, the political parties ended up negotiating a power-sharing deal under which the country is currently governed. There can be no doubt, however, that if any future election is to have legitimacy and universal acceptance, the cancerous strain of violence and intimidation must be removed.

It is important to critically assess how the proposed reforms to the electoral laws attempt to deal with this problem and to determine their strengths and weaknesses.

Code of Conduct

The measures against politically-motivated violence include a code of conduct set out in a schedule of the Electoral Act, with which all political parties and candidates in an election are expected to abide. The proposals place responsibility on political parties and candidates contesting an election to take steps to prevent politically-motivated violence and intimidation.

ZESN recommends however, the necessity of setting out clearly the legal consequences of any failure to comply with the code of conduct. There must be specific sanctions which detail the effect of any breaches of that code of conduct on the legality of the election. A critical question would be whether a breach of the code of conduct affects the legality of the election. At what point does politically-motivated violence and intimidation affect the legality of the election? A code of conduct without specific legal sanctions that go to the core of the election's legality can be easily flouted.

Special Structures Dealing with Political Violence

The proposals also include a fairly elaborate architecture of policing, investigating and prosecuting offenders accused of committing acts of violence and intimidation.

This includes the appointment of a special police liaison officer and special investigations committee for each province which together will be specifically responsible for the expeditious investigation of cases of politically-motivated violence or intimidation within each province. The appointment of the SPLO will be done by the Police Commissioner General ***"in consultation with"*** the Zimbabwe Human Rights Commission (ZHRC), the constitutional body which oversees the protection of human rights. If the spirit of this clause is upheld, it

would mean a more inclusive appointment process, which in theory may prevent partisanship.

The SIC will be chaired by a person representing the ZHRC and will consist of the special police liaison officer for the relevant province, two representatives of each political party taking part in the election. The SIC will direct the special police liaison officer to investigate cases of politically-motivated violence and intimidation during election periods and may also take on a hands-on role in the investigations. This multi-party body would in theory be inclusive and therefore work collectively to deal with violent activity.

Further, the Commission may, following an investigation by the SIC, warn persons accused of violence or refer the matter for prosecution by a special prosecutor designated for the purpose by the Attorney-General. They will be prosecuted before a special magistrate designated by the Judicial Service Commission. There is also provision for the creation of special police units to carry out expeditious investigations.

What we have set out above is the theoretical framework as envisaged in the proposed legislation. On a quick glance, it would appear, in theory, to be a fairly robust legal structure for curbing and dealing with politically motivated violence and intimidation during elections. Indeed, if everything were equal, the mechanisms set up might be expected to yield desirable results. The problem, however, is that the theoretical framework has to be implemented by human agents whose weaknesses may derail an otherwise noble cause. Experience has shown that it is not enough to have beautiful laws designed to curb violence. Those laws need to be complemented by professionally independent human agents charged with implementing those laws. The structure will therefore succeed or fail depending on the attitude and conduct of the men and women charged with ensuring the laws work.

Human Factor

Now, although the law requires that the SPLO is to be appointed by the Police Commissioner General **"in consultation with"** the ZHRC, there is no guarantee that the Commissioner General will not act unilaterally. Indeed, we have already seen controversy over senior government appointments – ambassadors, Governors, etc which have been done unilaterally by ZANU PF to the chagrin of its partners in the Inclusive Government. Challenging those decisions will be time-consuming and even if successful the result may only be of academic importance unless the courts decide on the matters expeditiously.

Also, even if the SIC brings matters to the AG's Office for prosecution, there is no guarantee that all matters will be prosecuted. Indeed, there is always the risk of selective application of the law – so that matters adverse to one political party may be swept under the proverbial carpet. The AG will argue that the Constitution obliges him not to be directed by any person in the execution of his duties. Therefore much will turn on the integrity and professional independence of the Attorney General.

Fit and Proper Test

Yet, evidence shows that holders of the offices of the Attorney General and the Police Commissioner General have made no secret of their support for and allegiance to ZANU PF, a key contestant in the elections. As key players in the enforcement of electoral laws, holders of these offices are expected to demonstrate impartiality and exercise professional independence, regardless of their personal political preferences. It is impossible to see how they can be regarded as fit and proper persons to exercise the functions required of them by the constitution. It is fair to say that persons of that calibre are not fit for purpose.

Adverse Public Statements

It is also against this background that violence and intimidation must be read in the widest sense to also include partisan use of office by senior state officials (including, in particular, security officials) who have constitutional duties to uphold the laws of the state. These prohibitions should cover the making of public statements that are designed to affect the outcome of an election or are made recklessly without due regard to their negative impact on the election process.

There have been instances in the past when senior security personnel have made statements to the effect that they would not salute certain candidates even if they won an election. Such statements may have affected voting decisions, causing fear and helplessness amongst members of the public, especially because they are made by senior officers of the uniformed forces in an atmosphere of violence and intimidation which also often involves members of the security forces. The law must regard such statements as acts of political violence and intimidation which must be prohibited, with adverse consequences upon those who make them.

Urgency

Finally, is the public is to have confidence in these measures, justice must be seen in action in real terms. This means matters must be brought before the courts expeditiously and the courts must handle the matters on an urgent basis, ensuring that cases are concluded without undue delay. Perpetrators of offences must suffer consequences of their actions during the relevant election period and the more this is visible to the general public, the more it will inculcate a culture of accountability and therefore build confidence in the system. It may also deter would-be offenders.

Election observers will have their work cut out. It is important to recognise that in an environment such as that obtaining in Zimbabwe, when the country has been in an almost permanent state of electioneering acts of violence and intimidation take place in any given period. They do escalate when elections are officially called but even now, before elections have been called, acts of violence and intimidation have been reported in various areas, including Mbare where regular 'mobilisation' meetings are reportedly being held – often under duress. The public are on permanent alert in regards to elections. It is therefore important that the 'election observation' process be read more widely to include other periods even before official announcement of the election season. Of particular significance is to keep a watchful eye on the selective application of the law.

Conclusion

Overall, even if the legal provisions have many admirable qualities, at the end of the day, it is the human factor that will determine the success or failure in preventing political violence and intimidation. For as long as holders of offices responsible for acting against such conduct do not exercise professional independence, the laws will remain impotent against the scourge of violence and intimidation. The ideal scenario would be a complete overhaul so that such offices are populated by persons who have greater professional integrity and independence. The best hope is that they can be compelled to exercise greater professional independence and that laws be clear on the impact of their failure to comply with those mandatory rules.

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