



ZIMBABWE ELECTION SUPPORT NETWORK

ELECTORAL CONFLICT MANAGEMENT MECHANISMS

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EXECUTIVE SUMMARY

There are several causes of election related conflicts, some of which are directly related to the administration of the process, but in many instances simmering political tensions experienced during the in-between elections find expression during election periods. In order for credible and legitimate elections to take place, especially in a post-conflict society or in a country that is plagued by political conflict it is critically important that the constitutional and legislative framework for the elections are clearly spelt out in the Constitution and the electoral laws and regulations. It is also necessary that the framework appropriately reflects the material conditions of the country rather than creating benchmarks that are totally unattainable for any of the contesting parties. For example, in a country where the society is polarized, it is particularly important that a level playing field is secured, through legislation, for all parties to have access to the electorate in order to campaign without fear of reprisals and without “no-go” areas.

Similarly, special efforts have to be made by the Electoral Management Body and the public and private media to facilitate equitable access for all parties contesting the elections to the media, as well as ensuring that the media reliably and faithfully reports on events taking place during the pre, during and post election periods without fuelling an already volatile political environment by favouring a particular contesting party.

The electoral legislative framework also needs to be mindful of the prevailing political culture of the country i.e. where the history of the country is rooted in a one party political culture that is intolerant of any opposition, and by control of the state and state power as well as the state institutions, the ruling party exploits the divisions and fault-lines in that society in order to manipulate the outcome of the elections. In these instances the EMB needs to be particularly vigilant and ensure that the enabling electoral legislative and regulatory environment provides for effective conflict resolution mechanisms, both formal – through the Courts and informal – through alternative dispute resolution processes. Even although there may not be a history of consensus building and negotiation in the country, it is incumbent upon the EMB, by way of its various fora such as the Conflict Management Committees (CMCs) and Party Liaison Committees (PLCs) to encourage a culture of compromise where problem solving rather than conflict and civil strife is promoted.

The Courts too need to take into account the context in which they are operating during election periods. Long delays in hearing petitions and complaints and providing judgments can only exacerbate political tensions, which will have an impact on the credibility and legitimacy of the elections. These delays could also result in the electoral process being held to ransom by postponements and rescheduling of polling. It is therefore critically important that the Court, be it the High Court or the Electoral Court has sufficient capacity to deal with the various cases brought before it, and that timeframes for each matter be limited to few days so that judgments can be delivered as soon as possible after the hearing.

Irrespective of the specificities of the institutional response established to resolve disputes related to elections there is a global consensus that these processes are fundamental to the legitimacy and integrity of the election process. The key to legitimacy and integrity is to ensure the independence and impartiality of the dispute resolution bodies, be they the informal alternative

dispute resolution processes established by the EMB¹ or the Courts i.e. the particular court that has been established to hear election related petitions and complaints. In most countries in southern Africa the High Court is the final arbiter of election related disputes, whereas in others an Electoral Court has been established to hear election related disputes and petitions. In these instances there are no appeal processes and the Electoral Court's ruling is final and binding.

Given the time constraints of the election period, the resolution of complaints and petitions are better achieved through simple, quick response systems, following a single hierarchical approach. Without this, minor disputes and conflicts could become exaggerated into major challenges to the election results. Multiple avenues of initial complaint or appeal to the EMB and judicial bodies may not only confuse but delay resolution of complaints or challenges as aggrieved parties may shop around for a favourable forum to give them the decision they desire. It is therefore critically important that a single procedure is outlined in the Electoral Act about the process to be followed for the resolution of election-related complaints, grievances and disputes. In general, administrative review mechanisms should be used before recourse to judicial intervention, though in systems where there is little confidence in the professionalism and independence of the EMB, handling all complaints through a judicial system may be the only satisfactory option.

For the results and outcomes of the dispute resolution processes to be acceptable to all parties and for the solutions to be sustainable, the people staffing these processes need to be impartial, independent and beyond reproach. Similarly the processes whereby they are nominated and appointed need to be inclusive, transparent and open, otherwise the credibility of the processes and their findings will be in question. This could have a negative impact not only on the elections but also on the future political stability of the country.

In Zimbabwe the electoral reform process anticipates that there will also be a review of the current Constitutional and legislative provisions pertaining to the Electoral Court, as well as a re-evaluation of the enabling electoral legislation. Some of the issues that have been highlighted as requiring review are:

1. The Constitutional provisions relating to the issue of 'special courts'² of which the Electoral Court is interpreted to be one. The reference to the Electoral Court as a 'special court' in the Constitution of Zimbabwe requires amendment to establish this Court as one of the permanent courts in Zimbabwe with provisions detailing its role and function, the duration of its sittings, the tenure and remuneration of the judges as well as their responsibilities and obligations.
- 1.1 Furthermore the nomination and appointment procedures pertaining to judges of the High Court and the Supreme Court need to incorporate judges to the Electoral Court. Additional amendments will also have to be made to ensure that, as with 'special courts' there is no right of appeal, directly or indirectly, from a decision made by the Electoral Court. This is particularly relevant in the jurisdiction of the Court as any delays could undermine the integrity of the electoral process and jeopardize the acceptance of the final election results. The enabling legislation, as contained in the

¹ Or established by civil society organisations.

² Section 92(4) of the Constitution of Zimbabwe

Electoral Act, will also require review and revision to align it to the provisions of the Constitution.

2. Alternatively, s 92(4)(a) of the Constitution of Zimbabwe needs to specifically identify the Electoral Court as a 'special court' alongside the Water Court, the Fiscal Appeal Court etc and again the enabling legislation in the Electoral Act needs to be reviewed to ensure that it is consistent with the provisions of the Constitution.
3. The third alternative, and less favoured is that the jurisdiction of the High Court include that of hearing complaints, petitions and election related grievances that have as issues of law at stake and that have not been able to be resolved by lower courts and alternative conflict resolution mechanisms.
 - 3.1 Some of the disadvantages associated with the High Court as the final arbiter of election related disputes is that these matters will have to compete with other non election related matters, which could impede the course of justice as far as the elections are concerned.
 - 3.2 Some of the advantages of the establishment of a permanent Electoral Court is that the same judges are allocated to the Court on a permanent basis, which allows for institutional memory to be developed over time. With the continuity created by the same judges presiding over election related matters there will no doubt also develop an understanding of the nuances of the political terrain in which the elections take place, and this will help expedite decisions swiftly.

1. BACKGROUND TO ELECTORAL CONFLICT MANAGEMENT PROCESSES

The southern African region has undergone major changes during the last two decades with significant implications for political culture and democratic development in the countries of the sub region. Although there has been a reduction in violent inter-state conflicts, resource-based intra-state conflicts are still pervasive in a majority of the countries of SADC and have the potential to undermine not only national but also regional political stability. Despite the uncertain conditions experienced in some of these countries elections continue to play an important role and are seen to be the cornerstone for both the transition to and the consolidation of democracy. However for elections to add value to democratic governance, stability, peace and reconciliation, clear rules, procedures and systems that bind all the contesting parties are required. (Matlosa, 2001; Lodge et al 2002) This is especially important where the political landscape in which the elections are being held are fraught with underlying historical tensions and unresolved conflicts - a feature of competitive elections in countries which don't have a tradition of tolerant political competition and where the prize is the control and ownership of state power – and where ultimately conflicts find expression during these heightened period of tension.

Once the electoral landscape has been clearly defined (through constitutional provisions and the legislative framework) and all the building blocks (regulations, administrative processes and systems) securely in place to ensure that the elections are 'free and fair' and perceived to be so by

all stakeholders³ it is important that the key components of the electoral process are sufficiently institutionalized to guarantee a level playing field so that electoral results are accepted by the majority of the electorate.

Some of the key components are:

1. An independent electoral management body where the nomination and dismissal procedures for Electoral Commissioners are transparent and open;
2. Sufficient funding for the conduct of the elections (secured from Parliament by the Ministry responsible for the elections or directly from the National Assembly – as the case may be),
3. A level playing field for all parties to participate in an unencumbered manner i.e. party funding to be made available, free access to voters, no ‘no-go’ areas, clear regulations regarding party registration, equitable access to the media (print and electronic), clear rules for campaigning;
4. All the necessary freedoms for the electorate to decide without fear or favour which party or candidate they would like to support;
5. Disciplined and accountable security forces (including police)
6. Independent, impartial and objective conflict management processes and mechanisms, such as an Electoral Court with complementary alternative disputes resolution processes to deal with disputes that arise during the pre, during and post election periods.

All these aspects are essential requirements to protect the integrity of the electoral process and engender trust and acceptance by the electorate in the election results.

As previously indicated election-related conflicts have several origins; they could be as a result of dissatisfaction with how the elections are being conducted, or non compliance with the provisions of the Electoral Code of Conduct or other administration-related issues. They could also be associated with long standing socio-political disputes and conflicts, which find an opportunistic or orchestrated expression during the election period – given the heightened sense of tension at these times. Whatever the cause or the context of their origin it is critically important that mechanisms are in place to detect the early warning signs and that they are able to respond effectively and timeously to managing the conflicts to prevent an undermining of the electoral process or at worse, full scale civil conflagration, as was experienced in Lesotho in 1998.

The manner in which the conflicts and disputes are dealt with is critically important for the integrity of the elections, the sustainability of the election results, as well as for the long-term stability of the country, especially in those societies that have experienced deep-rooted conflict. Similarly in countries that are holding their first transitional elections the conflict management and dispute resolution mechanisms have to be seen to be independent, impartial and objective to ensure a sustainable resolution, which is acceptable to all parties and interest groupings.

2. SOME CAUSES OF ELECTON RELATED CONFLICTS AND DISPUTES

³ Political parties, civil society, the electorate

The paper will not focus on or analyse the intricate and varied nature and causes of some of the endemic conflicts that have ravaged and undermined political stability and national peace in some of the southern African countries. For the purposes of the discussion a brief overview of some election related disputes and their causes are however outlined:

- A power struggle for the state. In the context where the post colonial state is the only source of enrichment and empowerment elections become a highly contested arena,
- One party states with a culture of intolerance towards dissenting voices or any forms of opposition. Generally this is experienced in countries where liberation parties have been in control of the state since independence. They experience a strong sense of betrayal by their people with the emergence of opposition parties;
- Cultural and ethnic diversity. Many of the conflicts experienced are caused by an intolerance of different cultural values and ethnic and communal diversity. Historical, traditional conflicts are played out in democratic national politics;
- Ideological differences that play out during election times are generally part of an attempt by contesting parties to capture the voters.
- Election related administrative problems that are used by political opponents to score points or to justify 'losing' the elections thereby undermining the acceptance of the results of the process.⁴ Some of these issues include:
 - The demarcation and delimitation processes
 - Voter registration and the compilation and finalization of voters rolls
 - The unavailability of the voters' roll for inspection by political parties and the electorate
 - Flaws in the administration of the polling day(s) and the counting process
 - Untrained electoral officials and political party agents
 - Lack of compliance with electoral regulations by political parties i.e. not adhering to the timeframes for campaigning, displaying posters within the perimeters of the polling stations and refusing to remove them- asserting bias by the officials, the wearing of party T-shirts by party agents and voters in the perimeters of the polling station etc.
 - The intervention by the Electoral Management Body can often result in further disputes whereby the erring party mobilizes its supporters to destabilize the electoral process in areas that are politically volatile, accusing the EMB staff of bias and partisanship.
- Weak institutional frameworks such as the electoral provisions of the Constitution and the enabling electoral legislation that allows for varying interpretations of the law and provide 'loop-holes' that can be taken advantage of by marginalized and disaffected political groupings,

⁴ These issues are generally contained in the Codes of Conduct agreed to by all political parties contesting the elections.

- The electoral system design and its lack of responsiveness to the socio-political, economic imperatives of the society - Against the background of ethnic and regional divisions of the apartheid era, PR offered the promise of coalitions and multiparty representation of diverse interests. It forced parties to campaign beyond narrow ethnic or regional bases of support in the hoped that they would win a majority of seats. The electoral system model was one of the mechanisms used to manage the diversity of South African society and pre-empt any conflict that may emerge due to the racially divided past.
- An abundance of mineral wealth, which does not contribute to the development of the society but fuels conflicts between different interest groupings within the country and between countries. These conflicts have a tendency to play themselves out during election periods;
- Access to state resources by the incumbent creates an un-level playing field, especially during election periods. Further difficulties are caused by the lack of distinction between the use of state resources by the ruling party for governance purposes (in-between elections) and their use during election times, for example access to government vehicles during campaigning period creates problems especially when opposition parties have no access to resources i.e. by way of political party funding;
- Dissatisfaction by factions within parties about the lack of intra-party democracy and the imposition of candidates by party leadership on either the constituency lists or PR lists or both (depending on the type of electoral system). This can result in conflicts during election periods where the elections are held ransom while party leadership try and resolve their internal disputes. It can also result in a fragmentation of the party with the disputing factions and their supporters using the electoral terrain to try and take control of the party.
- The perception that whatever decision is made by the EMB at Head Office or in the provinces/regions is biased towards the ruling party. The perceptions (whether true or false) can have profound consequences for the electoral process and the acceptability of the results.
- Similarly the reputation of the judiciary allocated to hearing election related disputes, either as part of an Electoral Tribunal, the High Court or the Electoral Court, is to be beyond reproach. In order for the Tribunal/Court to be perceived to be independent, impartial and objective in its handling of electoral related disputes, petitions and complaints the electorate must be assured of its autonomy from the Executive and the Legislature. This can be achieved by the visible presence of one of the most important checks to ensure the independence of the judiciary, namely the Judicial Services Commission. Without the necessary legislative enforcements, any form of mistrust of the judiciary, either about the manner in which the judges are appointed, or a perceived bias of their judgments can have severe consequences for the possibility of managing and resolving election related dispute and conflicts.

There are many other types and forms of conflicts that find expression during elections, but for the purposes of this presentation the above will suffice as it provides examples of some of the kinds of election related disputes that occur. Having identified the nature of the conflicts experienced, it is equally important to establish what the best form of conflict resolution mechanism will be in relation to the dispute. There may not be one response but several forms of intervention needed to manage and resolve the dispute to prevent it from threatening the elections or at worse the stability of the country. These initiatives can be complementary to each other or can be part of the various stages that the process needs to go through until the conflict is finally resolved by the ultimate arbiter, namely the Courts. It is of vital importance that the disputing parties are satisfied with the outcome/solution to the dispute. If not resolved to the satisfaction of all there is the possibility that the dispute will re-occur but in a more serious and confrontational manner.

As has been noted previously because of the heightened sense of tension during elections any dispute that is not managed correctly has the potential to become exaggerated and be further influenced by the already competitive and confrontational terrain of the electoral process. Conflict management and alternative disputes resolution mechanisms are critically important to ensure the integrity of the elections and to pre-empt through early warning signals any major confrontation that may undermine the process of democratization.

3. ELECTORAL CONFLICT: THE ELECTORAL COURTS AND ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

The Constitutional and legislative framework for elections provides the regulatory environment in which elections take place. It ensures that the political and electoral playing fields are level so that all stakeholders can participate equitably in the electoral process, and that the institutions tasked with overseeing and managing elections are independent and impartial and not influenced by the executive or the ruling party. Similar principles need to be employed to guarantee the transparency of the conflict management mechanisms. Where the judiciary is the primary mechanism for dispute resolution it is critically important that the judicial officers (be they judges or magistrates) are independent, impartial and objective and that they are able to adjudicate fairly and efficiently, given the pressures and demands of the electoral period.

From the comparative research done the following conflict management and conflict resolution mechanisms have been identified:

3.1 The Judiciary

In some countries provision has been made for conflicts and disputes to be referred to the **Constitutional Court**. This practice is found in some Latin American countries such as Brazil.

3.1.1 The High Court

But in most of the comparative case studies researched in southern Africa the **High Court** is the primary adjudicating body and most established institutional mechanism to deal with

election-related.⁵ Magistrates Courts have a similar role at local level. In some instances the legislation allows for the right of appeal to the Supreme Court. In other countries this is not provided for, because of lengthy court and appeal procedures that have the potential to delay the elections, which could further exacerbate the conflict with the result of destabilizing the country.

3.1.2 Special Electoral Tribunals

In some countries Special Electoral Tribunals have been set up to adjudicate cases arising during election periods. The Tribunals are juridical bodies and have a mandate to resolve election related disputes. Tribunals are generally staffed with judges and legal personnel but they do not have the same tenure arrangements as High Court judges. Procedural rules are established and form part of the Electoral Act. Tribunals are located at national, provincial (regional) and local district levels. They are predominantly used in Latin American countries. Where used in southern Africa, Tribunals are different in status and degree of independence to Courts but they are tasked to undertake the same duties. Tribunals were used at local level, provincial and at national level during the 1994 South African Elections.

3.1.3 Constitutional Commission

In Mozambique a **Constitutional Commission** has been set up to facilitate the resolution of disputes. The Commission has the same powers of the High Court but focuses only on election related disputes. It would in essence have the same status of an Electoral Court where the judges who sit on the bench have the same security of tenure as other judges from the High Court. The same rules and procedures of the High Court will apply to the Commission and its findings are binding in law.

3.1.4 Electoral Court

There are only a few countries in SADC that have established Electoral Courts to adjudicate election related disputes during election periods. In most instances the adjudicating body is the High Court. The judges of the Electoral Court are in most instances seconded during election periods from the High Court, having gone through the nomination and appointment procedures as set down in the Constitution and the legislation. In some cases Electoral Courts only hear cases during election periods i.e. on an ad hoc, part time basis. In other instances the Electoral Court has permanent status i.e. there is provision in the Constitution and the Electoral Act for a permanent bench of judges who are called upon to adjudicate election related disputes as and when they arise. All the same procedures and rules that apply to the High Court apply to the Electoral Court. In most instances, review and appeal procedures are not provided for by the Electoral Court and its decisions are final and binding.

⁵ In some countries provision is made for the right to appeal to the Supreme Court – this however is not the case in all instances

3.1.5 Supreme Court

In some countries, election related judgments are allowed to be taken on appeal to the Supreme Court. But some observers have noted that judicial appeals during the electoral process have the potential to delay or disrupt the process, potentially leading to non-compliance with the requirements of elections as stipulated by the Constitution and the Electoral Act. If a process of appeal is to be allowed it is critically important that they be heard and implemented prior to the elections so as not to disrupt the process. Appeal procedures could create severe administrative and legal difficulties if held during the elections.

3.2. Alternative Dispute Resolution Mechanisms

During the last decade alternative dispute resolution processes have become part of the political, economic, social and legislative landscape of most southern African countries. In South Africa, for example, conflict management processes have⁶ been evident since the 1970s when they were used to mediate, conciliate and arbitrate in the industrial relations arena between trade unions and companies. Conflict management processes were later effectively used during the pre 1994 negotiations to negotiate the transitional arrangements from apartheid rule to the democratic dispensation. Since 1994 alternative dispute resolution processes such as mediation, conciliation and arbitration have been integrated into the legislative framework of most of the country's laws, e.g. the Labour Relations Act, the Electoral Act, the Land Act etc.

Similarly, Lesotho, Botswana, Malawi, Namibia, the DRC, Zambia and other SADC countries have introduced various forms of election related dispute resolution processes into their legislative frameworks. The reasoning behind the incorporation of these processes is not because there are intrinsic difficulties with the traditional Court system but in times of confrontation and heightened tension, as experienced during elections, it is a necessary condition that disputes are dealt with expeditiously and swiftly and, if possible, at source. As has been noted above, the Court is the final arbiter of disputes in situations where all else has failed. It would therefore make sense to have complementary mechanisms that have a first stab at resolving the disputes and if these are not able to do so successfully it is incumbent on the mediators or conciliators to recommend to the electoral management bodies (EMBs) that the dispute be referred to the Electoral Court⁷

The following are some of the alternative dispute resolution mechanisms used to resolve election related conflicts:

3.2. 1. The Electoral Management Body

⁶ The decision in SA to convene the pre 1994 multi-party negotiations to negotiate transitional arrangements from apartheid rule to a democratic dispensation resulted in the parties reaching consensus on the legitimacy of the democratic system due to their willingness to negotiate with each other and respect the agreements reached during the transitional talks. The negotiations played an important conflict management and conflict prevention role. (Friedman pg 6)

⁷ Or the High Court as prescribed by the respective country

In South Africa the significance of the 1994 election as well as the way the managing body, the Independent Electoral Commission, was structured and formulated reflects the context of the transitional process of which they were part i.e. the experience of negotiation, consensus building and conflict management processes. The SA Independent Electoral Commission Act, No 150 of 1993 stipulated that the Commission was to consist of an Election Administration Directorate, a Monitoring Directorate and an Adjudication Secretariat, each operating independently of the others. The task of the Monitoring Directorate was basically to monitor the performance of the Election Administration Directorate, a rather novel idea for one arm of an organization to monitor and police another. The Monitoring Directorate established a panel of mediators and the Adjudication Secretariat a panel of adjudicators whose role was to investigate, and when appropriate, to mediate election related disputes. If unsuccessful the disputes and/or complaints were referred to the Adjudication Secretariat. These internal conflict management processes ensured that assistance was on hand if and when disputes and conflicts threatened to destabilize the pre, during and/or post election periods. The panels were a great success and were hailed by all parties as having been vital to the successful outcome of the elections.

In addition to the formal dispute resolution structures put in place the EMB in itself can play a critical conflict management and conflict resolution role. To be able to effectively act as supervisor, manager and monitor of an election it presupposes that the EMB is an independent, impartial and non-partisan institution that has the trust of the electorate and the political parties to act fairly and in an even-handed manner when supervising the elections, as well as when it is called upon to assist in managing and resolving election related disputes that have the potential to hinder the smooth functioning of the EMB and ultimately the electoral process.

3.2.2 Political Party Liaison Committees

In most southern African countries e.g. Tanzania, Lesotho, Namibia, South Africa, Malawi and Zambia party liaison committees have been established by the Electoral Management Bodies as a form of communication between themselves and the political parties contesting the elections. Issues that form part of the agenda for the Party Liaison Committees include matters related to the Code of Conduct, including infringements of its provisions, legislative infringements, amendments to electoral regulations, as well as administrative omissions and problems experienced during the pre, during and post election periods, amongst others.

In most instances the Electoral Act favours the involvement of political parties contesting the elections in all aspects of the election process in order to encourage consensus about the 'rules of game' and where this is unable to be reached to facilitate a dialogue about how best the electoral legislation and regulations can be applied. These structures provide avenues of communication between the political parties, the EMB and where necessary and appropriate representatives from government, the security forces and other stakeholders involved in ensuring that the elections will be conducted as freely and fairly as possible without threat.

3.2.3 The Electoral Code of Conduct

The ability to campaign without fear of violence is a basic political right that requires vigilance and commitment on the part of the parties, their supporters, the security forces and the EMB. The development of a Code of Conduct, ideally, one that is part of the electoral act, is one means of

contributing to the development of free and fair electoral practices. This code of conduct may prohibit and prescribe certain forms of behaviour on the part of government, the EMB, political parties, their supporters and the media. For example, the 1998 Electoral Act in South Africa recognises the desirability of involving political parties in the electoral process and the activities of political parties in this regard are regulated by the Act. Registered parties are subject to an Electoral Code of Conduct designed to regulate their behaviour throughout the election period. Among these rules, the Act cites the following prohibitions on political party behaviour:

- Parties may not use language or act in such a way that may provoke violence, or the intimidation of candidates, members of parties, representatives or supporters of parties, candidates or voters.
- Parties may not publish false or defamatory allegations in connection with an election in respect of a party, its candidates
- No person may remove conceal or destroy any voting or election material
- No one may offer an inducement to join or not join a party, to attend or not attend a public meeting, rally, demonstration, or public political event, to vote or not vote in a particular way,
- No one may carry or display weapons at a political meeting
- No one may unreasonably prevent access to voters for the purpose of voter education, collecting signatures, recruiting members, raising funds or canvassing support.⁸

In another example, the National Electoral Commission in Tanzania also has a code of conduct for political parties, which was first institutionalised in advance of the 1995 general elections, but the political parties rejected it.⁹ The Tanzanian Code of Conduct has many provisions similar to those in South Africa's 1998 Electoral Act but it also included a Code of Conduct for both government and the EMB. For example, the EMB was bound to ensure that the election results were declared as promptly as possible. While such provisions reiterate the responsibilities of the EMB as stated in the electoral law, as a public declaration they can also contribute to effective electoral management and the acceptance of the results by all parties. However, opposition parties claimed that the Code of Conduct was an attempt by the ruling CCM party to control their activities.¹⁰ Subsequently the EMB issued the contents of the Code of Conduct as a set of directives at the time of the elections and these appeared to be acceptable to the political parties. Other countries that have included Codes of Conduct for political parties in the electoral act are Namibia, Seychelles, Zambia, Angola¹¹, Lesotho, Botswana, Malawi and Madagascar and the DRC.

3.2.4 Conflict Management Committees (CMCs)

A fourth example of alternative dispute resolution processes used during elections is the establishment of Conflict Management Committees (CMCs) or community-based structures that

⁸ Republic of South Africa, Electoral Act (Act No. 73 of 1998), Schedule 2.

⁹ National Electoral Commission, United Republic of Tanzania, Report of the National Electoral Commission on the 1995 Presidential and Parliamentary Elections, Dar es Salaam, 1997, p. 9.

¹⁰ Commonwealth Secretariat, Report of the Commonwealth Observer Group, The Union Presidential and Parliamentary Election in Tanzania, 29 October 1994, p. 14.

¹¹ The 2005 Angolan Code of Electoral Conduct is prescribed to include not only political parties but also the National Electoral Commission, electoral staff, security forces, the electorate, observers, the media, religious entities, traditional authorities and civil society organisations.

assist the EMB in managing disputes between electoral stakeholders. Comprised of respected and impartial individuals, with proper training these structures have the capabilities to address concerns about the electoral process, instead of using the courts, which are often, expensive, inaccessible or too slow to be able to respond to the immediate concerns of political parties during election campaigns.

CMCs have been established in numerous SADC countries as part of the Electoral Management Bodies (EMB)¹² It is difficult to assess the success of some of these newly established mechanisms and it may take a second election to be able to test their effectiveness. However in SA they have played a crucial conflict management and conflict resolution role. In the months preceding the 1999 elections, the IEC established the structures with a wide network of local and provincial conflict resolution and conflict management structures, drawing upon prominent local personalities to sit on these committees. The CMCs provided forums in which local instances of violations of the Electoral Code of Conduct could be addressed.¹³ These mechanisms were very important to ensuring that the integrity of the electoral process was protected. A significant indication of their success however was the absence of any litigation following the election as well as the acceptance of the results by all the parties that contested the elections.

The research shows that in some countries in SADC¹⁴ the law prescribes that the High Court is the only adjudicator of election related disputes. Other countries have a mixed system where different forms of dispute resolution are used i.e. the process is characterized by the significant role played by the EMB but ultimately the responsibility is shared with both the ordinary courts and other administrative processes. One of the lessons that can be learnt from the SA experience is that with its long history and association with negotiation and consensus building about the 'rules of the political game' - at trade union level in the 1970's, with the students and scholars in the 1980's and then the transitional process in the 1990s - the dividends are evident in the success the country has achieved in resolving election related conflicts. Similarly countries like Namibia, Mozambique and Lesotho have had positive experiences in terms of resolving election related conflicts since the introduction of Conflict Management Committees (CMCs).

4. POLITICAL PARTIES

Political parties can contribute to the free and fair conduct of elections through their own efforts to ensure that the behaviour of their own candidates and supporters, as well as those of other parties, are consistent with the established Electoral Code of Conduct.¹⁵ Furthermore, political parties can play a direct role in observing one another's activities. In this regard, the primary role of political parties in the election monitoring process is to observe and to ensure that their activities are transparent and open to scrutiny. Both activities lend credibility to the elections. In the process parties can play a crucial role both in ensuring the free and fairness of the electoral outcome as well as the overall management of the electoral process. They can therefore serve as a check on the political process in addition to the administrative efforts of the Electoral Management Body.

¹² Some include Namibia, SA, Lesotho, Tanzania, Zambia, DRC

¹³ The Party Liaison Committees were resurrected and they worked collaboratively with the CMCs to deal with election related disputes, including violations of the Code of Conduct

¹⁴ Malawi, Angola, Botswana and Zimbabwe.

¹⁵ It is important that the Code of Conduct is developed in consultation with all the political parties contesting the elections.

5. ACCESS TO INFORMATION

Access to information, with a free media, is one of the most significant challenges for many countries in SADC. Most countries are dominated by state-owned media and generally it is difficult for political parties to have equitable access to TV and radio – being one of the key forms of information dissemination in developing countries. Election coverage by the media is also, in most instances, skewed towards the ruling party, because the formula used for providing access to state owned media is generally linked to the number of seats (or percentage of votes) received during the elections. This prejudices the ability of the opposition parties to canvass and reach out to voters and has the potential to fuel dissatisfaction or grievances. However if a more equitable strategy was developed to allow all parties to be able to canvass voters in a fair and equitable manner any residual tensions that may exist will not find their expression during election periods.

Recommendation:

The recommendation therefore is that the role that the media plays during election periods is crucial and that it is therefore important that all parties are given sufficient and equitable access in order to be able to put across their manifestos and views to the voters. There is a greater possibility of conflict and election related disputes without this provision being made available to all contesting parties.

6. CIVIL SOCIETY

Civil society has an important role to play during the pre, during and post election periods. Not only do they have the reach to the grassroots that is required during elections but they have also developed relationships, through their work, with the people and have an understanding of how to reach them and what their concerns are. It is key that their expertise and experience be harnessed to ensure that there is an equitable flow of impartial information relating to elections to the grassroots communities, that the significance of the Code of Conduct and the rights and responsibilities as well as the obligations of the citizenry in building a democracy be widely distributed through voter information programmes, community radio stations, pamphlets, theatre, road shows etc.

Civil society organisations are useful in terms of assisting in facilitating dialogue between communities and political parties, respectively. During the South African 1994 elections the Peace Accord provided for Peace Committees to be established across the country to assist in resolving political conflicts. Civil society organisations played a key role in facilitating dialogue between the contesting parties and were able, through this process to manage conflicts that threatened the electoral process and the agreements reached at the Kempton Park negotiations.

During pre and during election times domestic monitors are drawn from civil society organisations such as NGOs, the churches, women's groups, youth groups, to a lesser extent the private sector and universities. They monitor, in an impartial and independent manner, and on behalf of the citizenry, the various stages of the electoral process and report on their findings to the EMB, the political parties and other observer missions. Civil society organisations and their community partners are also useful early warning signals about emerging conflicts at community level. Having been alerted to the issues at stake the EMB is then able to deploy CMCs to the local area.

7. OBSERVER MISSIONS

It is accepted that international observer missions have a key role to play in preventing election related conflict. There seems to be a causal link between the presence of observer missions and the reduction in election related disputes and violence. Observer missions are to all intents and purposes “the eyes and ears” of the international community¹⁶ - and seem to inhibit the expression of conflict during election periods. It is therefore not only important that international observer missions are present in countries holding elections because they are able to objectively report on the elections and alert the EMB about the difficulties and obstacles experienced during the process, their presence acts as a form of conflict management mechanism. Their pre-emptive abilities also contribute significantly to the reduction of election related conflicts.

In Summing Up:

All the different mechanisms outlined above, have the same objectives, namely to resolve election related disputes that manifest themselves during the pre, during or post election periods. The electoral legislative framework contains regulatory provisions that prescribe for one or more or a combination of the election related conflict management mechanisms, depending on the level of experience that the country has in consensus building, its history of using conflict resolution mechanisms and its observations of how these processes work in other southern African countries.

In South Africa and some southern African countries such as Lesotho, the DRC, Zambia, Tanzania and others Conflict Management Committees (CMCs) and Party Liaison Committees (PLCs) are part of the EMBs conflict resolution procedures. These processes form an integral part of the way in which the EMB engages with all stakeholders. If however it is not possible to resolve conflicts that emerge during the pre, during and post election periods the EMB has the legislative mandate to refer the matter to the Electoral Court or the High Court, as the case may be depending on the country. Procedural rules and enforcement processes are established by the EMBs and these are shared with the political parties and other stakeholders, such as civil society organisations. These processes play a significant role in resolving administrative related conflicts. They provide useful mechanisms to pre-empt and manage conflicts that could escalate given the nature of the tension surrounding highly contested elections or in societies that are profoundly divided or have experienced deep-rooted conflict.

Given the time constraints of the election period, the resolution of complaints and petitions are better achieved through simple, quick response systems, following a single hierarchical approach. Without this, minor disputes and conflicts could become exaggerated into major challenges to the election results. Multiple avenues of initial complaint or appeal to the EMB and judicial bodies may not only confuse but delay resolution of complaints or challenges as aggrieved parties may shop around for a favourable forum to give them the decision they desire. It is therefore critically

¹⁶ Domestic monitors do not fall into the category of international observer missions.

important that a single procedure is outlined in the Electoral Act about the process to be followed for the resolution of election-related complaints, grievances and disputes. In general, administrative review mechanisms should be used before recourse to judicial intervention, though in systems where there is little confidence in the professionalism and independence of the EMB, handling all complaints through a judicial system may be the only satisfactory option.

For example, any complaints or grievances about general issues surrounding voting station operations should be dealt with by the EMB¹⁷ – e.g. the accuracy of the voters' lists or consistent patterns of incorrect procedural application across polling stations etc. Where complaints are not dealt with satisfactorily or acceptable solutions not found, immediate review should be made available at the next level of the administrative hierarchy, either within the EMB administration or by specifically appointed administrative Tribunals. If these processes are not able to resolve the matter and there is a possibility that the results could be contaminated by the allegation(s) and complaints, it is imperative that the matter then be referred to the appropriate judicial body, namely the Electoral Court or the High Court, as the case may be in that particular country. Furthermore, in order to ensure that the Court does not unduly delay or compromise the election outcomes by allowing for further review and appeals, the electoral legislation should preclude the Court from allowing for appeals.

Matters referred to the Court (High Court or Electoral Court) generally fall into 2 categories:

1. Those that allege breaches of criminal or electoral law by individuals or groups, but do not challenge election outcomes
2. Those that challenge the outcome of the election through alleged breaches of electoral law

In both instances the electoral legislation needs to be specific as to what constitutes grounds for challenge and where best these challenges will be resolved within the legislative conflict resolution landscape.

There is now a universal consensus that parties and party members are entitled to a swift resolution of their disputes by an independent and impartial tribunal or conflict management entity. The speed of dispute resolution is especially important when it comes to election related disputes, especially with regard to election results as any delays may undermine the democratic process or the stability of the country. Preventing delays in the resolution of disputes challenging election results may be strengthened through clear, transparent laws and regulations that underscore the importance of speedy decisions. For example the 1997 Cambodia election law provided for short time periods both for the submission of complaints (72 hours) and appeals (48 hours) and for the resolution of cases (72 hours). If the Courts are the only form of conflict resolution mechanisms available this short period of time will place an excessive burden on the judicial system. It is therefore key that additional conflict management and conflict resolution processes be introduced, as discussed above, to take the pressure of the Court and to facilitate disputes timeously and expeditiously.

¹⁷ These would include the CMCs and the PLCs.

In most southern African countries the President appoints the judges, selecting them from a list of nominations submitted by the Judicial Service Commission, a body itself partly appointed by the executive, partly by parliament and partly by the legal profession.¹⁸ For the integrity and reputation of the judges and the Courts, which they serve on, it is crucial that the process of appointment is open, transparent, credible and inclusive. Without clearly articulated procedures and processes the appointments of the judges could be brought into question, as would the independence of the Court.

¹⁸ The 1996 South African Constitution calls for a separation of powers between the legislature, executive and the judiciary. According to the Constitution the executive is accountable to parliament and the President exercises certain judicial powers, including the appointment of judges

8. COMPARATIVE CASE STUDIES

Country	Composition	Nomination and Appointment Procedure	Jurisdiction	Powers
Mexico	The Electoral Tribunal consists of five members: 4 appointed by the Supreme Court and one an ex President or Vice President of the Senate of Chamber of Deputies.	Judges to the Electoral Tribunal are appointed by the Supreme Court	National Elections	Federal Electoral Tribunal (TFE) with the power to rule on appeals and claims of unconstitutionality and sanction parties that do not comply with the rulings. These prescriptions are however changing to make the Supreme Court the final arbiter of elections related disputes.
Brazil	In terms of the Federal Constitution of Brazil there are 4 aspects of the Electoral Court: Electoral Board, Electoral Judges, Regional Electoral Courts and the Superior Electoral Court.	Electoral Court judges are seconded from the Supreme Court, and Justices from the Superior Court of Justice and two lawyers are appointed by the President of the Republic. The similar process is duplicated at the level of the Regional Courts where the Judges are seconded from Judges from other courts and two lawyers appointed by the President	Federal and Regional	The Electoral Court or known as Electoral Justice is responsible for verifying whether candidates comply with electoral legislation and where there are procedural and legal difficulties the complaint is heard by a respective Electoral Justice (Court)
Panama	Article 142 of the Constitution of Panama provides for an Electoral Court that is autonomous and an independent body with the primary purpose of guaranteeing the honesty, freedom and effectiveness of the popular vote	The Judges are designated by a resolution of the Cabinet and ratified by the Assembly.		The decisions of the Electoral Court in electoral matters are final. Only a motion for reconsideration and a petition for unconstitutionality before the Supreme Court of Justice is admitted.
Uruguay	The Electoral Court consists of 9 members elected by both houses of Parliament.	5 politically impartial members nominated on criteria of skill and elected by a majority vote of two thirds; & four are reps of the majority political parties elected by proportional vote by the members of the respective parties in the legislative. The person with the highest vote from the 5 politically impartial members is chosen as the president of the Electoral Court.		Article 278 of the 1935 Constitution provides that the Electoral Court is not only the manager of the elections but it is also the highest court on all election related matters and thus it also hears and reviews electoral disputes and complaints. It has the authority to declare elections null and void and to scrutinize election results for legislative compliance.

<p>South Africa</p>	<p>As part of the transitional arrangements the 1994 IEC made provision for the following conflict resolution mechanisms:</p> <ol style="list-style-type: none"> 1. An Election Adjudication Secretariat that coordinated the functions of the Electoral Tribunals, the Electoral Appeal Tribunals and the Special Electoral Court. 2. The Electoral Tribunals set up in prescribed geographical areas to adjudicate and determine alleged irregularities and infringements of the Code of Conduct. 3. Special Electoral Court established to hear appeals against and review decisions of the Appeal Tribunals and the IEC itself. Each electoral district had a tribunal and in 1994 there were 9 appeal tribunals to review the proceedings of the Appeal Tribunals under the stewardship of a Judge. 4 The Electoral Court has the status of the High Court and was established in terms of the Electoral Commission Act 51 of 1996. Consists of a Chairperson who is a Judge of the Appellate Division, Supreme Court, two other Judges of the Supreme Court & 2 other members who are SA citizens 5. High Court in whose area of jurisdiction any electoral dispute or any complaint about an infringement of the Code has arisen has jurisdiction to hear such disputes or complaint. 6 The magistrate court and the High Court can also be approached but have less powers to impose an appropriate penalty. 	<p>Staffed by an attorney, advocate, magistrate or academic lawyer. Appointed by</p> <p>Appointed by the President on the recommendation of the Judicial Services Commission.</p> <p>Appeal court Justices appointed by the King on the advice of the President of the Court of Appeal and the Judicial Service Commission and may include acting Justices of Appeal appointed in terms of the Constitution. The King on the advice of the President of the Court of Appeal and the JSC shall appoint one of the Justices of Appeal as the President of the Electoral Court. The President after consultation with the Electoral Commission may make rules for regulating the practice and procedure of the Electoral Court.</p>	<p>Electoral Appeal Tribunals would hear appeals against and review the decisions of the Electoral Tribunals. Consists of 3 persons and chaired by a judge of the Supreme Court</p> <p>The Magistrate and High Courts in the vicinity concerned are given the power to hear complaints about infringements of the Code of Conduct or any disputes and to impose penalties prescribed in the Electoral Act.</p> <p>Has jurisdiction in all electoral disputes and infringements of the Electoral Code of Conduct</p>	<p>Had the capacity to impose penalties.</p> <p>Section 20 of the Electoral Commission Act 51 of 1996 provides for:</p> <ul style="list-style-type: none"> • The review of any decision of the IEC relating to elections • May hear and determine any appeals against any decision of the IEC • Must determine which courts shall have jurisdiction to hear particular disputes and complaints about infringements of the Electoral Code of Conduct. • May hear and determine any matter relating to the interpretation of any law referred to it by the Commission; and • May investigate any allegations of misconduct, incapacity or incompetence of any member of the Commission. <p>Election petitions are heard by the courts with the Electoral Court acting as final court of appeal. Parties must submit complaints within 48 hours of the announcement of results.</p> <p>In each instance there is specification in law as to what sanctions can be imposed as set out in Section 96 of the Electoral Commission Act. 1998 (Act no 73 of 1998)</p> <p>No appeal provided from the decision of the Electoral Court.</p> <p>The IEC appoints a tribunal to hear and rule on complaints. Election petitions against IEC decisions are heard by the</p>
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	Has substituted High Court by Electoral Court (Constitution of Lesotho (Amendment) Bill, 2000) The Electoral Court will have the same powers and jurisdiction as the High Court when the latter is not sitting in terms of section 126A (4)			Electoral Court during elections or the High Court at other times; no appeals may be made against its decisions. Petitions must be submitted within 30 days of the end of the election period and the petition must be heard within 30 days of lodging
Mozambique	The judicial system comprises a Supreme Court, an Administrative Court and other lower courts as well as specialized courts. The Supreme Court consists of professional judges, appointed by the President and who decide matters of law and judges elected by the Assembly of the Republic. The Administrative Court has jurisdiction over public administration and spending. The Constitutional Council adjudicates on matters of constitutional and Electoral law.		Petitions are made to the National Electoral Commission (CNE) within two days of the results being published by the administrative body, STAE. Appeals against decisions made by the CNE are made to the Constitutional Council within three days of the decision being published and must be decided on within 5 days	The Constitutional Court supervises electoral process, verifies presidential candidates, hears petition appeals, validates and declares final results of elections.
Namibia	High Court with the rules of the high Court	The court system comprises a Supreme Court, a High Court and lower courts. The Chief Justice (head of the Supreme Court), the President of the High Court and all other judges are appointed by the President acting on the recommendation of the Judicial Service Commission. Judges are removable by the President for incompetence or misbehaviour only on the recommendation of the Judicial Service Commission.		Election petitions are heard by the High Court and petitions must be submitted within 30 days of the announcement of the result disputed. The decision of the Court must be rendered with 60 days of the registration of the petition. Appeals may be lodged with the Supreme Court
Tanzania	1. High Court 2. Magistrate Court	Judges are appointed by the Chief Justice, except those for the Court of Appeals and the High Court who are appointed by the president	1. Nat. Assembly 2. Local Government	Presidential election results are not subject to challenge under the law. Election petitions for parliamentary elections must be presented to the High Court within 14 days of the announcement of results. Resident Magistrates hear cases for local elections if submitted within 30 days of the announcement of results

<p>Zimbabwe</p>	<p>Having established a "special court" under <i>Chapter VIII</i> of the Constitution and conferred on it the judicial power to hear and determine election petitions,</p>	<p>"92(1) The power to appoint persons to preside over a special court shall vest in the President after consultation with the Judicial Service Commission; provided that Parliament may provide that the chief Justice may, after consulting the Judicial Service Commission, appoint a person holding the office of judge of the High Court to preside over a special court for such period as he may specify"</p> <p>Section 92(1) of the Constitution provides for judges of the High Court to be appointed to serve in a special court in circumstances limited to the manner of their appointment and the period of appointment. Section 92(1) ensures that during the term of office of such judges appointed to preside over a special court, their conditions of service shall not be amended and their office shall not be abolished without their consent.</p> <p>Parliament was bound by s 92(1) of the Constitution to provide for the appointment of persons to exercise the powers of that court in the manner prescribed by the Constitution. The method of appointment of the persons to preside over a "special court" prescribed under s 92(1) of the Constitution ensured that the same conditions of the discharge of the judicial functions of the court were secured for them as were guaranteed to persons appointed under <i>Chapter VIII</i> of the Constitution (dealing with judiciary) as judges of the High Court.</p>	<p>Election Petitions- where the issue of whether there was a corrupt or illegal practice and influence which resulted in a candidate being elected – the court is to establish if the candidate was duly elected and whether there was any undue influence. These include allegations consisting of criminal violations relating to elections Administrative violations relating to elections Disputes defined to be within the jurisdiction of the EC Campaign irregularities Campaign financing</p> <p>A decision of the Electoral Court on a question of fact shall be final A decision of the Electoral Court on a question of law may be subject of an appeal to the Supreme Court</p>
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9. COMPARATIVE ANALYSIS

It is clear from the review of the comparative literature that there are various judicial models that deal with election related complaints and disputes. It is clear that in most instances the High Court is the final arbiter of election related disputes. The literature further indicates that in both Latin America and southern Africa election Tribunals are used as a complementary process to deal with election administration disputes at primarily local geographic areas, and where the disputes are not successfully resolved by the Tribunals the matter is referred to the Court responsible for dealing with election related disputes.

South Africa, due to its long history of consensus building, through negotiations between historically disputing parties, has put in place conflict management processes that include informal community initiatives, alternative conflict management processes that are part of the Independent Electoral Commission's procedures and the Courts, which include the High Court and the Electoral Court as well as magistrates courts, depending on the nature of the conflict. Countries like South Africa, Lesotho, Tanzania and others have also been through an extensive process of electoral legislation reform to ensure that they have appropriate mechanisms to deal with the disputes that inevitably arise during election periods, and especially in post conflict societies where there is always the possibility of conflicts re-emerging during this heightened period of political and social tension. By participating in regional observer missions and regional election related fora SADC member states have experienced the value of multiple conflict resolution processes, that complement and support each other to resolve disputes that could, in a volatile climate, erupt into open conflict.

However in order to ensure that the conflict management processes are effective it is critically important that the electoral laws clearly distinguish between the responsibilities, parameters and jurisdiction of the Courts and the alternative conflict resolution processes of the Electoral Management Bodies. Similarly the electoral regulations should give guidance as to the process that should be followed when seeking external support to resolve disputes.

9.1 Role of the Judicial Services Commission

The role of an independent Judicial Services Commission (JSC) is key to upholding the fundamental principle of the independence of the judiciary. The Discs interviewing process, its short-listing and nomination procedures must be transparent, inclusive, credible, impartial and objective. It should preferably be a multi-party and multi-disciplinary body¹⁹, especially in post conflict societies. It is also important that the JSC works according to agreed and known rules. Even although the procedures, as set down in the Constitution, stipulates the nomination and appointment procedures of judges there is always a possibility that the President, as the final office that endorses the selected nominees, disagrees with the names put forward and overrules the recommendations of the JSC and the national assembly. Mechanisms on how to deal with this issue needs to be included in the Constitution – as this too could be create unnecessary conflict without any clear recourse to a remedy.

¹⁹ Equal representation from the legal profession, parliamentary representatives and the Executive as well as representation from non-legal bodies.

9.2 The Nature of the Electoral Court

Whether the Electoral Court is constituted as a full time court or as a court that only presides on an ad hoc basis i.e. only during election periods, is a matter that needs to be discussed in the context of the levels of anticipated conflict that may occur during the pre, during and post election periods. Only once this information has been established is it possible to decide on whether a full time Electoral Court is necessary.

There are commentators who are of the view that the High Court has the jurisdiction and capacity to hear election related complaints and petitions, and it is therefore not necessary to have a special court that focuses only on election related issues. Others are of the view that it is necessary to have Courts that focus only on election related disputes, as the High Courts are generally too busy to expedite matters in the time required, and secondly that it is also important to have judges who hear only election related issues.

Recommendation:

It is proposed that a permanent Electoral Court be duly established in Zimbabwe according to the Constitution and the Electoral Act to focus only on election related petitions and disputes. It does not necessarily mean that the Court has to sit during the in-between election periods. It is however necessary that the same judges presiding on the Court are available at all times to deal with disputes that arise out of elections. As Zimbabwe has a first past the post electoral system that requires the conduct of by-elections from time to time it is important that the Electoral Court anticipate the need for hearing of complaints and petitions and therefore it would be useful if the Court was permanent.

Given the levels of contestation prevailing in Zimbabwe currently it is imperative that as part of the electoral review process some consideration be given to the Constitutional and legislative arrangements regarding the establishment of the Electoral Court.

9.3 The Electoral Court of Zimbabwe

In the Constitution of Zimbabwe, Section 92(3) provision is made for the ad hoc establishment of "special courts". Section 92(4) a specifies that 'special court' means – Any court or other adjudicating authority established by law which exercises all or any of the functions previously exercised by –

- (i) The Fiscal Appeal Court
- (ii) The Special Court establishedof the Income Tax Act
- (iii) The Water Court, established in terms of the Water Act
- (iv) The Compensation Court established by section 3 of the Land Acquisition Act 1979

Section 92 (4) b notes that the 'special court' does not allow for any right of appeal, directly or indirectly from a decision of that court...to the Supreme Court or the High Court. Section 172(1) of the Electoral Act further substantiates that there is no right of appeal and that a judgment of the Court on a question of fact will be final.

Recommendation:

It is recommended that EITHER the definition of 'special court' as set out in Section 92(3) be applied to the Electoral Court and that this be clearly stated in the Constitution and that the enabling legislation be aligned with the principles of the Constitution.

OR that the Electoral Court be an additional court to that of the High Court and the Supreme Court with a specific section in the Constitution prescribing its role, function, its jurisdiction and the duration of service of its judges. Further, that the enabling legislation, as contained in the Electoral Act, to be in conformity with the Constitution. Additional amendments will have to be made to the Constitution if this option is agreed to, namely to ensure that there is no right of appeal, directly or indirectly, from a decision of the Electoral Court to the Supreme Court or the High Court. This is particularly relevant given the tensions and time limitations of the election period. It will also have to be reiterated that the judges who preside on the Electoral Court will be appointed in the same way that other judges of the High Court and Supreme Court are appointed with the same conditions of service and tenure.²⁰

9.4 Appointment of Judges to the Electoral Court in Zimbabwe

Having established that provision for a 'special court' is made under Chapter VIII of the Zimbabwe Constitution and that judicial power to hear and determine election petitions are conferred upon this court, Parliament then had to provide for the appointment of persons to preside over a "special court" and to ensure that they are guaranteed the same conditions of service and security of tenure as persons appointed under Chapter VIII of the Constitution that deals with the judiciary and judges of the High Court.²¹ S92 (2) of the Constitution further provided that during the term of office of the judges who have been seconded to the Electoral Court their conditions of service will not be amended and their office will not be abolished without their consent. It is therefore not possible for the Chief Justice or the Judge President, without consultation with the Judicial Services Commission, to alter the terms and conditions of service of the Judges or for there to be any interference by the Executive with their appointments.

The manner in which judges are appointed to the Electoral Court (defined as a 'special court') is critically important, especially in the context where there is extreme polarization between the ruling party and the opposition parties and there is always the temptation to, wittingly or unwittingly, stack the judiciary with supporters of the present incumbency. Not only is the role and functions of the independent Judicial Service Commission important to ensure that independent and impartial people, appropriately qualified and in good standing are nominated and appointed as judges to the Electoral Court, but that the correct procedures and due process of law is followed when seconding a judge to this 'special court'. This will ensure that there is no doubt about the transparency of the

²⁰ Another example of where there needs to be conformity between the Constitution and the legislation is s 162(1) of the Electoral Act and s 92 and s 18 of the Constitution in terms of the nomination procedures for the requisite 5 judges to preside over the Electoral Court in order to hear and determine election petitions.

²¹ The 2 issues of security of tenure and conditions of service secure for judges the necessary independence from interference by other organs of State and in the discharge of their functions.

appointment process and that the Electoral Court will be staffed by independent persons in good standing, who are objective and impartial and will apply the law fairly and justly.

Similarly provisions need to be made for the dismissal of judges so that this process is prescribed, as is the process for the appointment of judges. A transparent, inclusive and open process will ensure that judges are not dismissed without good reason, which can be substantiated to the Judicial Services Commission. This will inhibit any political interference by the Executive, the Legislature or the ruling party in the judiciary.

In terms of the appointment of the judges presiding over the Electoral Court, Section 92(1) of the Constitution states that *'the power to appoint persons to preside over a special court shall vest in the President, after consultation with the JSC: provided that Parliament may provide that the Chief Justice may, after consulting the JSC, appoint a person holding the office of judge of the High Court to preside over a special court for such period as he may specify.'* The key issue here is that the Judicial Services Commission has to be consulted either when appointing new judges or when seconding judges to these 'special courts'. Consultation with the Judicial Services Commission is mandatory for the appointment of the judge to be a valid appointment. An independent commentator observed that the process of consultation with the Judicial Service Commission by the President or the Chief Justice is such an integral part of the appointment of a judge to preside over a 'special court' that without it there cannot be a valid discharge of the judicial functions of that court by the appointee.²²

Furthermore section 162(1) of the Electoral Act indicates that Parliament empowered the Chief Justice to appoint sitting judges of the High Court to preside over the Electoral Court ("special court"), after consulting the Judge President. This however is inconsistent with Section 92(1) of the Constitution. In terms of Section 3 of the Constitution of Zimbabwe the Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with it, that law needs to be amended so as to reflect the principles of the Constitution.

Recommendation:

It is therefore recommended that the sections of the electoral law, specifically s 162(1) of the Electoral Act be reviewed in order to ensure that it is consistent with s 92(1) of the Constitution. Where there are other instances where the electoral law needs to be substantiated to support the Constitution it is critical that it be reviewed before the next elections are held.

9.5 Recourse to a fair hearing

Finally, in order for the citizens and political parties of Zimbabwe to be able to have their fundamental rights protected by the law, as set out in s 18(1) and s 18(9) of the Constitution it is crucially important that they are able to have a fair hearing and that their case be determined by an independent and impartial court. In order for the Electoral Court to be able to hear petitions and afford petitioners the right to due process and the protection of the law, the Court has to be duly established under law²³ which means that the process used to appoint Judges to sit on the

²² References from the Southern Africa Litigation Centre, 8 August 2006

²³ The Electoral Court is established according to the law as it was established by s 161 of the Electoral Act.

Electoral Court, from the High Court, has to follow the prescriptions of the Constitution as set out in s 92(1) in order to validate the existence of the Electoral Court.

However if the electoral reform process is to include in its considerations the establishment of a permanent Electoral Court, as set out in Chapter III of the Constitution, the current process used to nominate and appoint judges to the High Court will be applicable to the appointment of judges to the Electoral Court, with the same conditions of service and tenure as they would have enjoyed as judges of the High Court. If all these provisions and procedures have been faithfully and judicially adhered to the existence of the Electoral Court would be validated and petitioners would be assured of a fair and just hearing.²⁴

10. CONCLUSION

There is no doubt that African countries, including Zimbabwe need to revise the mechanisms they use to resolve election related conflicts. This includes a consideration of a multi-pronged approach that involves various forms of conflict management. Because of the weight the courts carry in terms of authority and mandate their role as final arbiter for election related disputes is not contested. However before petitions and complaints are referred to the Electoral Court there are nevertheless instances where there are disputes that can be resolved or at best managed through alternative mechanisms these should first be tried. These mechanisms include the Conflict Management Committees (CMCs) established by the South Africa Electoral Commission in 1994 and which have now been introduced to other southern African countries such as Lesotho, Tanzania, the DRC, Angola and others. The CMCs use straightforward mediation and conciliation procedures, which are facilitated by independent and impartial persons of high standing in the local communities where the dispute is taking place. If however the mediator or conciliator is unable to resolve the matter, it then needs to be referred to the Party Liaison Committees, and thereafter to the magistrate court and then to the High Court. If there still is no acceptable solution found and there is the possibility that the dispute has the potential to undermine the elections and the election results the complaint should be referred to the final arbiter i.e. the Electoral Court. It has also been previously mentioned that it is far preferable for election related disputes, which are administrative in nature to be resolved, by the EMB and the various mechanisms that it has institutionalized to respond to these types of disputes. But where the dispute has the ability to interfere with or undermine the outcome of the elections it is crucially important that the matter be referred to the High Court or the Electoral Court. However although there are advantages to filing the petitions with the High Court or the Electoral Court, as the case may be, the possibility of long delays may further exacerbate the conflict and put the electoral process and the election results at risk. It is therefore incumbent on the Courts to ensure that during election times there is a specified period allowed for argument and that the ruling be made expeditiously so as not to hold the election process to ransom. Any delays could be manipulated by the erring party and further aggravate an already tense situation which could destabilize the country.

²⁴ These assumptions are however based on the premise that there is no political interference in the nomination and appointment procedures of the judges. Furthermore the contention would also be that the Judicial Services Commission is independent and not influenced by either the Executive or the Legislature or the ruling party. (President)

The use of alternative dispute resolution methodologies contribute to creating a culture of collaborative problem solving rather than the use of external intervention which inevitably creates 'winners and losers' which in turn reinforces the polarization experienced by the disputing parties. When seeking a solution to a dispute that has the ability to undermine one of the pillars of democracy i.e. the right of the people to choose their leaders, it is key to ensure that all parties to the dispute are part of the problem solving process so that the settlement reached will be sustainable and all parties will be invested in making the solution endure.

It is therefore recommended that in the discussion and debate about electoral reform in Zimbabwe, including the establishment of a credible and legitimate Electoral Court it is important that alternative dispute resolution mechanism be considered as a critical entry point into resolving conflicts either about the election administration process or the Electoral Code of Conduct. There is no doubt a significant role for the Court in resolving conflicts that could have a fundamentally negative impact on the electoral process and the country as a whole. But the proposition is that the Court should be the last resort, and the process of resolving disputes and conflicts amicably and in a less adversarial manner, especially during a period of heightened tension, will not only assist in protecting the integrity of the electoral process but will also ring-fence the election results from the machinations of expedient and opportunistic forces in the society.

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