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ZIMBABWE ELECTION SUPPORT NETWORK



POLICY BRIEF

**TOWARDS A PEACEFUL, FREE, FAIR AND
CREDIBLE 2018 NATIONAL ELECTION: A
CALL FOR ALIGNMENT OF LAWS WITH
THE CONSTITUTION**



Executive Summary

The promulgation of a new Constitution on 22 May 2013 necessitated the alignment of subsidiary electoral laws with the Constitution. Section 157 of the Constitution particularly obliged law-makers to enact an Electoral Law to give effect to the letter and spirit of the Constitution. The legislature has since passed a number of amendments to the Electoral law in fulfillment of Section 157. However it is submitted that the subsidiary laws still fall short of reflecting the full extent of the letter and spirit of the Constitution. As Zimbabwe heads towards its next general election in 2018, it is proposed that further legislative amendments be given consideration to enhance the credibility of the process and outcome of the forthcoming election.

Whilst not exhaustive, this policy paper highlights and discusses some of the desirable and necessary amendments that should be considered before the next election is held. Despite purported alignment efforts to date, the Electoral Act still exhibits a number of inadequacies in areas that include management of the voter registration process, the voters' roll, the right to vote, voter education, the electoral court, and the independence of the Zimbabwe Electoral Commission (ZEC), media access and code of conduct on elections. This paper contains a framework to guide lobby and advocacy efforts with parliamentarians, policy makers and other critical stakeholders such as ZEC.

In summary the following broad points are made:

- There is need for legislative amendments to align the current Electoral Laws with the Constitution. The comprehensive amendments should take into account views from all stakeholders. The continued piecemeal approach to electoral amendments is not helpful as it only leads to contestations to the electoral outcome due to the flawed process.
- There is need for electoral regulations that address the voter registration process, and particularly the operational framework on the Biometric Voter Registration (BVR) system.
- Concerns remain on the delegation and sharing of responsibility of the voter registration process between ZEC and the Registrar General (RG). The RG should have no role in any election process.
- The delegation of certain electoral legislative roles to a minister is problematic and unconstitutional. The provisions are tantamount to Executive interference as the Minister becomes both a referee and player in the elections. The ministerial functions are in conflict with and undermine ZEC's independence and effectiveness,
- The presence of the Executive in the Observers Accreditation Committee undermines the independence and integrity of ZEC as the sole authority of election management body.

- The right to vote is not guaranteed in subsidiary law. For example, Zimbabweans in the diaspora, those in hospitals, the elderly, the infirm and those in places of detention remain unable to vote.
- The Amendments fail to address the issue of having Electoral Court judges in the wake of Section 83 of the Constitution that prohibits judges from sitting in more than one court.
- In addition, other outstanding issues remain that include the responsibility on ZEC on the delimitation of constituencies and ward boundaries in terms of Sections 160 and 161 of the Constitution.

Gap analysis and a framework for alignment of subsidiary legislation with the Constitution

The framers of the Constitution clearly spelt out the minimum standards of any election held in Zimbabwe.ⁱ Ultimately any election must be peaceful, free and fair; the obligation on the State is to put in place enabling legislation, together with other policy and administrative measures that guarantee an election that meets the minimum constitutional threshold.

An analysis of the Electoral Act [CHAPTER 2:13] reveals that despite a raft of amendments enacted over the years including the last amendment in 2016ⁱⁱ, subsidiary legislation still falls far short of reflecting the letter and spirit of the Constitution. This policy is not exhaustive but focusses on the key areas requiring attention given the short period left before the next election. These issues if left unaddressed may affect the credibility of the 2018 election. The key issues are discussed in more detail below.

The holding of a peaceful, free, fair and credible election underpins the well-established principles of good governance and democracy. Section 155 of the Constitution aptly entrenches these important principles. The task of delivering an election that measures up to these ideals is exclusively vested in the Zimbabwe Electoral Commission (ZEC).ⁱⁱⁱ The cumulative import of Sections 155, 156, 233, 238, and 239 of the Constitution is that an independent electoral management body that guarantees a free, fair and credible election must be established. The subsidiary electoral laws must therefore spell out (with greater specificity) the role of ZEC and the provisions must reflect the spirit of independence, integrity and transparency, efficiency and effectiveness set out in the Constitution.

One of the key roles exclusively given to the Commission is the registration of voters¹ and the maintenance of the voters' rolls and registers.^{iv} The registration of all eligible voters and the creation of an up-to-date and comprehensive voters' roll is an integral part of and represents the first key step towards the holding of a free, fair and credible election. Unfortunately, in Zimbabwe the handling of the voters' roll has remained a contested arena

¹ Section 239 (c)

Largely because of the failure by ZEC and the Registrar General of Votes to timeously avail the voters' roll to interested parties during an election period. It is quite clear from the wording of the Constitution that its framers sought to eliminate the confusion surrounding the voters' roll by exclusively vesting all processes related to the voters' roll with ZEC and removing any reference to the RGV. Despite the clarity of provisions in the Constitution, the Electoral Act, in its present form fails to reflect the letter and spirit of the Constitution. Whilst recent amendments to Sections 18 and 19 of the principal Act purported to capture the essence of the Constitution, a closer scrutiny of the finer print betrays the shortcomings that still exist in the subsidiary law. Primarily, the retention of the role of the Registrar General (RG), though somewhat in a qualified role, is problematic, given the past challenges associated with that office and its management of the voters' roll. The Electoral Act must specifically bestow ZEC with the sole mandate of electoral management, in line with the Constitution.

Several provisions^v of the current electoral law purport to give the Commission leeway to delegate a number of its functions to other offices in a way clearly not contemplated by the Constitution. As matters stand the Act through the last amendments^{vi} not only fails to align the principal Act with the Constitution but seems to introduce provisions that further undermine the intention of the Constitution. The Electoral Act seems to still retain a role for the abolished office of the registrar general, which is referred to as the former Registrar General of Voters. Its retention even in a qualified role is troubling; given the troubled history of the RGV's office and the role it has played in overseeing disputed elections in the past decade. The amendment restores the very mischief the Constitution sought to address. It is quite clear that the Constitution sees no role for the office of the RGV in election management bodies. The retention of the role of the RGV in the Electoral Act is, with respect, unconstitutional and the relevant provisions should be repealed.

The point has been made above, that the integrity of the electoral process depends on the reality and perception of an independent and impartial election management body. Any involvement of other state actors that also become political contestants in an electoral process inevitably casts a shadow of doubt on the credibility of the whole process. It is for this reason that certain provisions in the Electoral Act that purport to give some roles to the Minister should be revisited. Section 18(5) of the Electoral Act gives the Minister power to make regulations, after consultation with the Commission and the former Registrar-General of Voters, These regulations may provide for a wide array of issues that include providing for a mandatory automatic and electronic voter registration.^{vii} This provision is problematic. Firstly, the powers given to the minister are not supported by any constitutional provision. Secondly, from the reading of the provision the minister is given a free reign to come up with the regulations without taking into consideration of the views of the Commission, as confirmed by the use of the words, "after consultation." This is strange considering that the regulations may affect the operations of ZEC, which is supposed to be an independent,

impartial body. The minister is not, and is invariably a political contestant during an election period. The Act cannot introduce provisions that potentially undermine the independence, impartiality and effectiveness of the Commission. What would be sensible and in accordance with the law, is to give the law-making powers, in terms of regulations and rules, to ZEC itself as the only constitutionally mandated body to conduct elections.

The Constitution of Zimbabwe guarantees every Zimbabwean the right to vote among other wider political rights related to participation in governance issues.^{viii} The Constitution only places two specific limitations to this right: A person must be a Zimbabwean citizen and of the age of eighteen or above. The provisions in the constitution refer to “every Zimbabwean citizen” and do not discriminate between citizens in Zimbabwe and those abroad. All citizens are entitled to political rights and the right to vote.^{ix} The Electoral Law must make provision to facilitate the exercise of the Zimbabwean Diaspora to vote in national elections. It must not restrict the rights of the Diaspora to participate in national elections. Mechanisms must be put in place to facilitate the registration of voters for citizens in the Diaspora.

Section 155(2)(c) of the Constitution imposes a mandatory obligation on the State to ensure that candidates and parties have access to material and information necessary for effective participation in the elections. This includes access to the voters’ rolls. While the Electoral Law already makes provision for the provision of the voters’ rolls, the experience during the 2013 elections showed the futility of these provisions when the responsible authorities failed to provide the voters’ rolls to the candidates. The Electoral Law must provide for consequences for the failure to provide key election materials, such as the voters roll as required by the Constitution. It must be clear that failure to provide this essential information will affect and compromise the validity and legitimacy of the elections.

Section 157(1)(c) of the Constitution requires the promulgation of a law to provide for a Code of Conduct for political parties, candidates and other participants in an election. This is critical as it creates a framework of peer review among the political participants and a good opportunity to create a bi-partisan conflict resolution mechanism during the electoral process. The mechanism must be provided for through subsidiary regulations.

Section 239(i) of the Constitution empowers ZEC to accredit observers of elections and referendums. Just like voter registration, this power over accreditation of observers has been conferred upon ZEC and it must therefore exercise it as its sole responsibility. At present, the Electoral Act, via Section 40H provides for an Observers Accreditation Committee which constitutes of five Commissioners of ZEC and four political actors who are Government ministers, thus compromising the independence and integrity of ZEC. This is not in accordance with the Constitution. It is ZEC’s constitutional function and responsibility to accredit election observers. It is therefore important to correct this anomaly so that the Electoral Law recognises ZEC’s sole responsibility and function to accredit election

observers. More particularly the independence and impartiality of ZEC must not only be there but must be seen to be there at all operational levels of its constitutional mandate.

The media plays a critical role in strengthening the pillars of good governance and democracy in any state. In the absence of clear legislative, administrative and judicial mechanisms, the media can become an appendage of the governing party that spews unbalanced and biased reporting, thereby compromising the enjoyment of other rights in the Constitution. In Zimbabwe this is particularly evident during electoral periods where sometimes the media is used to as a medium to transmit hate campaigns and unfavourably cover the political contestations. Fortunately the Constitution now recognises the importance of fair and equal access to electronic and print media.^xThe State is obliged to take all appropriate measures, including legislative measures, to ensure all political parties and candidates contesting an election have fair and equal access to electronic and print media, both public and private. While the Electoral Law deals with issues of equal access to the media by all participants, there is no effective enforcement mechanism. There is no clear way of monitoring compliance and dealing with breaches of these requirements. There must be clear consequences for breaches of this rule. The Electoral Law must set out clear monitoring mechanisms to ensure that state media complies with these basic rules and there must be clear consequences of compliance failures.

Section 239(k) empowers ZEC to receive and consider complaints from the public and to take such action in regard to the complaints as the Commission considers appropriate. This mechanism is meant to reduce matters that have to be taken to the courts. ZEC should have a clear mechanism for handling and resolving complaints. This would reduce the burden on the courts and also the costs and delays that usually come with litigation. Such a system could handle issues such as complaints over unequal media coverage during election campaigns. The Electoral Law should set out a clear public complaints handling mechanism by ZEC, with clear enforceable powers that ZEC can exercise in resolving the disputes.

An issue that will require particular attention is the implementation of Bio-metric Voter Registration (BVR). ZEC has already made policy pronouncement to the effect that the BVR system will be used for the 2018 general elections. Regionally and internationally the use of BVR has been lauded for enhancing the credibility, simplicity and transparency of electoral systems. BVR is lauded for its specific benefits of enhancing the credibility and integrity of the voters' roll through, *inter alia*, the elimination of cases of possible multiple voting, enhancement of data accuracy, and protection of privacy and security of the voters. These value-added benefits of the BVR system are consistent with the Constitution. Section 156(a) of the Constitution obliges ZEC to conduct elections using voting systems that are simple, accurate, verifiable, secure and transparent. It is suggested that the BVR system resonates with the constitutional ethos and in this regard, ZEC's policy position to implement the system is commendable. What is of concern is the absence of specific subsidiary law that

spells out the operational framework of the proposed voter registration system .It is desirable to have voter registration regulations that broadly set out how voter registration will be conducted including the operational and administrative framework of the BVR system.

Section 239(h) of the Constitution gives ZEC the power to conduct and supervise voter education. There must be a clear legislative framework that provides for voter education by ZEC and other interested parties in a transparent, unbiased and timely way. In previous elections ZEC failed to provide adequate voter education citing financial and time constraints. Given that ZEC will, for the first time, be required to come up with its own consolidated voters roll and also use a new system of voter registration (BRV) the need for timely, adequate, thorough and comprehensive voter education cannot be overemphasised. Under the circumstances there is need for specific provisions in the Act and/or regulations that are enabling rather than restrictive in relation to voter education by ZEC and all other interested parties. The laws must make it possible for more players and stakeholders to work with ZEC in providing Voter Education and more particularly the law must provide for adequate, timely and comprehensive voter.

Finally the independence, integrity and impartiality of ZEC should be guaranteed through legislative and administrative measures. ZEC must account directly to parliament and should receive full budgetary support directly from the Consolidated Revenue Fund.

Policy Recommendations

In light of the analysis above ZESN calls upon the legislature and the policymakers to move immediately to further amend the Electoral laws and bring them in conformity with the Constitution. More particularly the following issues must be addressed through subsidiary laws well before the forthcoming general election:

- The Election law must specifically spell out the sole and exclusive role of ZEC as the responsible election management body. Provisions that give powers to the Minister and the RGV to do certain election-related function must be expunged.
- Voter registration regulations that incorporate the framework of BVR and other related processes must be enacted
- Fair and equal access to print and electronic media should be guaranteed through legislative and administrative measures
- Voting must be extended to everyone wishing to exercise the right to vote whether in Zimbabwe or outside, as long as they satisfy the age and citizenship requirement. The special vote must be considered.
- The independence, impartiality and integrity of ZEC must be guaranteed through legislative provisions and necessary budgetary support from the Consolidated Revenue Fund

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- ⁱ See generally, Section 155 and 156 of the Constitution
 - ⁱⁱ General Laws Amendment Act (No. 3 of 2016)
 - ⁱⁱⁱ Section 239(c)
 - ^{iv} Section 239(d)
 - ^v See Sections 18 and 19 of the Electoral Act
 - ^{vi} See generally General Laws Amendment Act (No. 3 of 2016)
 - ^{vii} Section 18(5) of the Electoral Act
 - ^{viii} Section 67 of the Constitution
 - ^{ix} *Id.*
 - ^x Section 155(d)