

ZIMBABWE ELECTION SUPPORT NETWORK

POSITION PAPER

Election Dispute Resolution in Zimbabwe

Executive summary

This paper on Election Dispute Resolution (EDR) departs from the point that the electoral competition is often accompanied by disputes and tensions as political parties and candidates jostle for power. The subject of the paper, Zimbabwe has been experiencing election disputes and election-related conflicts especially since the emergence of the opposition Movement for Democratic Change (MDC) in the late 1990s.

The antagonistic relationship between the ruling Zimbabwe African National Union Patriotic Front (ZANU PF) and the MDC have extremely polarised the country with ripple effects on the electoral processes.

The paper shows that the disputes and tensions arising from electoral competition must be managed so that they do not become either a source of violent conflict or escalators of an existing conflict.

A conceptual distinction between election disputes and election-related conflict is made for clarity. Election dispute is defined as disagreements over election processes such as; delimitation of boundaries, media coverage of elections, voter education, voter registration, candidate nominations, election campaigns, results management and transmission. On the other hand, election-related conflict means a physical violence which is distinguishable by its proximity to the elections.

The paper submits that mitigation of election disputes and election-related conflicts is unachievable in the absence of a strong link between EDR policy and implementation.

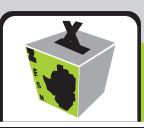
Zimbabwe recognized as having the EDR infrastructure laid out in the legal framework. The supreme law, the Constitution of Zimbabwe makes provisions for the prevention, management and peaceful resolution of disputes related following the judicial system and Alternative Dispute Resolution (ADR) routes. The constitution makes unequivocal provisions on the protection of human rights in line with international protocols and treaties.

The paper underscores the fact that whereas the judicial approach to EDR has been largely implemented without problems, the ADR approach has proven ineffective. Fault lines are identified in the timing in terms of the operationalisation of institutions and mechanisms. For instance, the MPLCs operational period is not synchronised with the election cycle.

Sequencing is also problem where the legal framework does not enable a sequential and logical introduction of institutions and processes for easier implementation. Lack of political commitment and lack of regulation of political parties are also cited as factors that paralyse implementation of the EDR architecture.

The paper therefore recommends that Zimbabwe should be investing its resource on strengthening the ADR mechanism through legal reforms and introduction of administrative arrangements for dialogue.

Finally, Zimbabwe is encouraged address the unresolved historical, political and socio-economic issues that become spoilers during elections.



Introduction

An electoral democracy is among others about a competition in which competing political parties and candidates reach out to members of the public to solicit votes to influence public policy and have control over state power. Therefore, elections as a process through which people express their choices between political parties and candidates (Matlosa and Shale 2013:2), is a competition that can lead to disputes and tensions. Those disputes and tensions must be managed so that they do not become either a source of violent conflict or escalators of an existing conflict.

For the purposes of this paper, it is important to note the distinction between election disputes and election-related conflict. Election dispute is used here to refer to disagreements over election processes and procedures while election related conflict means a physical violence which is distinguishable by its proximity to the elections.

This includes acts such as assassination of opponents or spontaneous fistfights between rival groups of supporters-and threats, coercion, and intimidation of opponents, voters, or election officials.

The cases of Lesotho 1998 and 2007, Zimbabwe 2008 and 2018, Democratic Republic of Congo (DRC) in 2011 and recently in Malawi 2019 are typical of election-related conflicts. According to the UNPD (2009:4), violent acts can be targeted against people or things, such as the targeting of communities or candidates or the deliberate destruction of campaign materials, vehicles, offices, or ballot boxes. Notwithstanding their differences, drivers for the election disputes and election-related conflict can be the same.

Zimbabwe has since its attainment of independence in 1980 experienced throat-cutting electoral contests with varying degrees of both election disputes and election-related conflicts. The country has been extremely polarised partly due to the difficult path of liberation struggle for independence, the dominant party system which led to adversarial politics soon after independence and the the formation of the Movement for Democratic Change (MDC) in 1999.

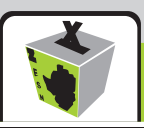
The MDC became a threat to the ruling Zimbabwe African National Union Patriotic Front (ZANU PF) when it squared off with the latter during the constitutional referendum in which ZANU PF wanted a new constitution giving powers to the presidency to confiscate white-owned land without compensation (EISA 2000-7-8).

The MDC's "no" vote campaign prevailed with 54.31% against ZANU PF's "yes" vote campaign 45.69% and Zimbabwe henceforth experienced electoral upheavals occasioned by competition between these two rival political parties. As is always the case wherever election-related conflict manifests, the security agencies particularly the army and the police have been implicated in disproportionate use of force and intimidation against opposition supporters. Election disputes and election-related conflicts are not only attributable to the ZANU PF- MDC political divide above.

There have also been instances of intra-party tensions leading to splits within the opposition MDC with consequences on the electoral process. By 2018, there were up to five splinter parties formed out of the original MDC. Divisions were also manifest when the MDC-T faction led by Dr. Thokozani Khupe contested elections as the MDC-T while the other faction led by Nelson Chamisa joined forces with other MDC splinter parties and contested the elections as the Movement for Democratic Change Alliance (MDC-Alliance).

It can be safely argued therefore that the antagonistic relations between the ruling ZANU PF and opposition MDC have been the main driver of election related disputes that have often mutated into manifest conflict. On the other hand, there are several other drivers namely:

- irregularities in the voter registration processes during the Registrar General of Voters (RGV) era and now under the Biometric Voter Registration (BVR) dispensation;
- inadequacies in the electoral system;
- perceptions on the election management body;
- Absence of political party regulation;
- lack of campaign and party funding;
- political intolerance;
- abuse of state resources;
- politicised state institutions;



Mitigation of the above remains a distant mirage because of a glaring disjuncture between policy and implementation of election dispute resolution (EDR) in Zimbabwe's electoral processes. This paper argues that EDR is key to the promotion of election integrity and that the ADR infrastructure laid out in the legal framework must be used by the Zimbabwe Electoral Commission (ZEC) and other statutory bodies in collaboration with political parties, civil society organisations (CSOs) and the media. Therefore, this paper looks at the EDR system in Zimbabwe and identifies what works, what does not work and suggests what could be improved.

Conceptually, EDR is used in this paper to refer to a set of institutions and procedures employed within democracies to adjudicate election, complaints, objections and alleged violations of election laws.

This introductory section is followed by a section looking at the legal framework. The third section provides an analysis of the problem regarding EDR in Zimbabwe. The fourth section reflects on considerations from elsewhere for comparative lesson learning. The fifth section identifies Lessons that could be drawn for Zimbabwe while the sixth and final section provides conclusions and Recommendations.

Legal Framework

The Constitution of Zimbabwe and the Electoral Act provide infrastructure for the prevention, management and peaceful resolution of disputes related to elections. This is in concert with the International Covenant on Civil and Political Rights (ICCPR), the African Union Charter on Democracy, Elections and Governance 2007 and the SADC Principles and Guidelines Governing Democratic Elections (2004, revised in 2015).

Enshrined within the Constitution is a panoply of clauses that protect the rights of citizens in line with the International Covenant on Civil and Political Rights (ICCPR), the African Union Charter on Democracy, Elections and Governance 2007 and the SADC Principles and Guidelines Governing Democratic Elections (2004, revised in 2015).

For instance, Section 58 of the Constitution provides that "every person has the right to freedom of assembly and association, and the right not to assemble or associate with others" and that "No person may be compelled to belong to an association or to attend a meeting or gathering". Section 67 lays emphasis on the political rights of citizens to participate in elections, join parties of their choice and contest political power.

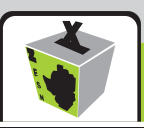
In addition, Section 156 (c) of the constitution provides that in the conduct of elections and referendums, the election management body (EMB) must ensure that appropriate systems and mechanisms are in place to mitigate electoral violence and other electoral malpractices. Section 157 (1) (c) demands of parliament an enactment of an Act of Parliament providing for the conduct of elections and referendums to which this Constitution applies. Among others, this section requires that a code of conduct for political parties, candidates and other persons participating in elections or referendums be prescribed by the Act of Parliament.

To give effect to the provisions of the constitution, the Electoral Act (Chapter 2:13) No 6 of 2018 provides an elaborate yet complex set of roles for Parliament; the Judiciary (National Prosecuting Authority and Courts); the ZEC and other statutory bodies including the Zimbabwe Human Rights Commission (ZHRC), Zimbabwe Media Commission (ZMC), Zimbabwe Republic Police (ZRP); citizens; political parties and CSOs, constituting the country's electoral disputes resolution architecture. The Act establishes several EDR mechanisms as follows:

- Section 133J: Special Investigation Committees (SICs)
- Section 160B: Multi-party Liaison Committees (MPLCs)
- Section 160K: Media Monitoring Committee (MMC)
- Section 161: Electoral Court (EC) under section 161
- Section 193: Code of Conduct (CoC) for Political Parties and Candidates

The electoral law adopts a two-pronged approach to the application of the EDR system with the judiciary on the one hand and the alternative dispute resolution (ADR) mechanisms on the other. We briefly look at each approach in seriatim below.

The judicial approach to EDR follows a three-tier format where the Constitutional Court deals with petitions relating to the presidential elections. Section 111 (1) of the Electoral Act stipulates that, an election petition complaining of an undue return or an undue election of a person to the office of President by reason of irregularity or any other cause whatsoever, may be presented to the Constitutional Court within seven days of the declaration of the result of the election in respect of which the petition is presented, by any person:-



- (a) claiming to have had a right to be elected at that election; or
- (b) alleging himself or herself to have been a candidate at such election.

The much-publicised MDC-Alliance constitutional court case through which the party sought to overturn the election of ZANU-PF presidential candidate, Emmerson Mnangagwa due to what they verily believed to be doctored results by the EMB was guided by this legal provision. Besides the Constitutional Court, the Electoral Court which is in terms of Section 161 (1) a division of the High Court of Zimbabwe, attends to appeals, applications and petitions on election processes including election results for all elective positions. In terms of Section 161 (2), the Electoral Court shall have exclusive jurisdiction: -

- (a) to hear appeals, applications and petitions in terms of this Act; and
- (b) to review any decision of the Commission or any other person made or purporting to have been made under this Act;

...and shall have power to give such judgments, orders and directions in those matters as might be given by the High Court. Provided that the Electoral Court shall have no jurisdiction to try any criminal case.

Sub-section (3) further provides that Judgments, orders and directions of the Electoral Court shall be enforceable in the same way as judgments, orders and directions of the High Court.

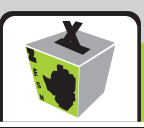
Lastly, the magistracy is responsible for hearing, making determinations on objections pertaining to voter registration (Sections 27, 28 and 29). The magistrates are also responsible for cases of politically motivated electoral violence and other criminal matters. Section 133J (3) dictates that, "Immediately after an election is called, the Judicial Service Commission shall designate one or more magistrates in each province in which the election is to be held, to try cases involving politically-motivated violence and intimidation, and the magistrates so designated shall give priority to all such cases and ensure that they are brought to trial and completed as expeditiously as possible.

Sub-section (4) provides for the urgent prosecution of cases calling on the Prosecutor-General to "ensure that during every election period sufficient competent prosecutors are provided to ensure that all cases of politically-motivated violence and intimidation arising within the area in which the election is being held are processed quickly and brought to court as soon as possible before the magistrates.

Pursuant to this provision, as many as 51 Magistrates were appointed during the 2018 Harmonised Elections to attend to the election related cases. This has been credited for not only eliminating backlogs but also for being a deterrent because once perpetrators saw that the criminal justice system was acting swiftly, there was a reduced number of cases.

The ADR mechanisms approach to EDR entails methods used to reach an agreement short of formal adjudication through the courts of law as just described. This can include both formal administrative law systems, in which regulatory agencies establish special rules and procedures for resolving disputes and complaints, and case-specific, ad hoc processes of negotiation and mediation, in which parties seek to reach voluntary agreements to resolve their disputes, often with the assistance of an impartial third party (Barnes and Kippen 2011). The Electoral Act establishes Multiparty Liaison Committees (MPLCs) at national, constituency and local authority levels for this purpose (Section 160A). In terms of Section 160B of the Act:

- (1) As soon as possible after the close of nominations in an election (or, in the case of a national multiparty liaison committee, from such date as the Commission may designate, after consultation with the Minister, by notice in the Gazette, being any date on or after the beginning of the period of six months before the end of the five-year term of Parliament as specified in section 143 of the Constitution), the Commission shall appoint:-
 - (a) a national multiparty liaison committee, in the case of a Presidential election or general election for the purpose of electing members of the National Assembly;
 - (b) a constituency multiparty liaison committee for each constituency in which the election is contested, in the case of a Presidential election, general election for the purpose of electing members of the National Assembly or by-election to fill a casual vacancy in the National Assembly;
 - (c) a local authority multiparty liaison committee for each local authority area in which the election is contested, in the case of a general election of councillors or local authority by-election or by-election to fill a casual or special vacancy in any council.



The MPLC is constituted by ZEC officials, representatives of political parties' and independent candidates contesting in the election and other persons invited by the MPLC based on their expertise. Its functions include to hear, resolve or mediate disputes arising from the electoral process (Section 160C). They are not litigating bodies but reach decisions by consensus. The law also allows the national MPLC to create sub-committees at provincial level and delegate its functions to them. Regardless of the sphere of operation, MPLC meetings are presided over by designated ZEC officials.

From the above expose of the legal framework, it not far-fetched to suggest that there are sufficient provisions concerning both the establishment and operationalisation of EDR mechanisms in Zimbabwe. The law enables the responsible institutions to identify, investigate and sanction electoral offenses through the judicial system. On the other hand, it provides a scope for the resolution of election disputes through consensus building ADR mechanisms such as the MPLCs. Having said so there are shortcomings that impinged the smooth functioning of the ADR systems. It is to this point that we now turn.

Statement of the Problem

s intimated in the introductory section of this paper, there is a glaring deficit in the link between EDR policy and its implementation. This is more the case in the ADR mechanism than in the judicial sector where handling of cases is on established procedures and statutes. The Achilles heel of the Zimbabwe ADR mechanisms is the timing and sequencing in terms of the operationalisation of institutions and mechanisms. For instance, as a consultative forum for the resolution of election-related disputes, the MPLCs operational period is not synchronised with the election cycle.

In the past they were only established after the nomination court sitting which was at least fourteen days after the proclamation date. They were then active for no more than 63 days which is the period allowed between nomination and polling (Electoral Act, Section 38). The 2018 Electoral Act amendment increased the MPLC tenure to 6 months before the end of the term of parliament.

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However, this improvement still falls short of the ideal. More so, given that Zimbabwe is a country where the electoral system is predisposed to regular by-elections and where political parties are effectively in an election mode throughout the five years. Similarly, the timing of the operationalisation of mechanisms such as the Special Investigation Committees whose role is to investigate human rights transgressions during the electoral process is problematic because they are only set up late into the electoral process when violence and intimidation has already taken place.

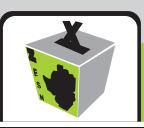
There is also a sequencing problem presented by the disharmony between some provisions of the electoral Act.

Take for instance, the code of conduct which in terms of the third schedule of Electoral Act is only enforceable "12 months before the earliest possible polling date of a general election and for the 90 days before a by-election caused by a vacancy or a general election required by the dissolution of Parliament". On the other hand, MPLCs are operationalised 6 months before the end of the term of parliament as mentioned above. Yet, Section 160C (1) states that the functions of a multiparty liaison committee shall be: -

(a) to hear and attempt to resolve any disputes, concerns, matters or grievances relating to the electoral process, including in particular any disputes arising from allegations concerning non-compliance with the Code; and (f) generally, to assist in implementing the Code.

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It is clear from the above that the Electoral Act has a sequencing dilemma when it comes to what ought to come first. Is it the appointment of the MPLCs so that they can comply with section 160C or is it the enforcement of the code in the absence of MPLCs? How would the EMB enforce the code of conduct as is presumed by the Act in the context where Zimbabwe does not have a law governing the activities of political parties during the period in-between elections?



Put differently, the ZEC cannot enforce a code of conduct on political parties that it only has an authority over for less than 3 months once the candidate nomination process has been concluded by the nomination court.

Therefore, oversight over the code of conduct and general conduct of parties can only be exercised if the supporting ADR mechanisms such as the MPLCs through which the ZEC interfaces with political parties in a structured way are established on time and in line with the election cycle. Evidence from the 2013-2018 elections cycle shows that political parties get away with acts prohibited in the code of conduct because they can afford to do so in the absence of a coherent approach to EDR.

Finally, there is the problem of authority and capacity to pursue the implementation of laws and institute EDR mechanisms. As already mentioned, the Zimbabwe EDR and ADR tapestry is complex given the overlapping roles of key institutions such as parliament, the EMB, the Judiciary, security agencies (especially the ZRP), constitutional commissions and the ZMC.

For majority of these institutions, the EDR role is new and therefore, the effectiveness, efficiency and integrity of these institutions to moderate and resolve election-related disputes is at present largely punctuated by the limited skills capacity and lack of co-ordination.

Key considerations from other contexts

Many countries in the SADC Region use judicial mechanisms and, depending on jurisdiction these include: High Courts, Electoral Courts, Magistrate Courts, Election Tribunals and Code of Conduct if embedded in the Electoral Law and therefore enforceable.

Countries also use ADR mechanisms similar to the MPLCs. Given the lack of trust and at times limitations regarding the timing of when these mechanisms may be established, some countries have resolved to put in place non-statutory administrative remedies such as political party Leaders' forums, political party working committees that work on various electoral operations. In Lesotho which has a difficult read "conflict ridden" electoral history like Zimbabwe, administrative remedies have been successfully used.

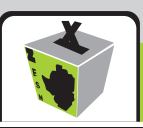
These have effectively served a trust building function beyond the specific election dispute issues. In the case of South Africa that pioneered the MPLC structures in the early 1990s, MPLCs have been successfully used as a mechanism for dialogue, greater accountability and transparency in electoral processes. These have been replicated in the rest of the continent albeit with variations.

The South African version of MPLCs comprise political party representatives who interface through formal meetings with the EMB throughout the electoral cycle. Given its violent so called "black-on-black violence" past during the final years of apartheid, South Africa also has Conflict Management Panels (CMPs) at community level. Working directly with the EMB, the CMPs are conflict management early warning system because they are embedded within communities.

It is important to note that whether statutory mechanisms such as MPLCs or administrative remedies, there are risks involved in operationalising ADR mechanisms. These are and limited to; inconsistency in the calibre of the representatives of the parties involved in the ADR process, partiality in cases where such structures are not properly constituted and their conduct not guided by the agreed procedures and regulations, Misunderstanding of the role and mandate of the dispute resolution structures, irregular co-option of persons, ill-timing and sequencing of meetings, Costs for attending the meeting and poor record keeping of the meetings of the structures.

Mitigation of these risks in Lesotho and South African is through political commitment to election dispute resolution and confidence building. Besides having the laws and codes of conduct, these countries have ensured that the ADR mechanisms are active around the election cycle to effectively deal with election disputes in a timely manner as envisaged in the African Charter on Democracy, Elections and Governance (ACDEG).

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Lessons for Zimbabwe

The strengthening of EDR systems must be one of the top priorities for Zimbabwe to address election disputes and to thwart election-related conflict. A general Lesson from some of the neighbouring countries in the SADC region where the EDR mechanisms are effective show a strong political will to election dispute resolution so that legal provisions translate into action. This is the difference between Zimbabwe and these countries because it has progressive EDR legal provisions but lacks on action. Specifically, a lesson for Zimbabwe is that given that the EMB and political parties are the key stakeholders of the electoral process, their relations must be cordial.

The onus is on both to build trust and to ensure the integrity of the EMB and the processes it oversees. A look at Lesotho and South African examples cited above shows a strong political liaison between these two actors.

There is a kind of "bottom-line" which the EMB and political parties assure its protection hence in both countries, the ADR mechanisms are active around the election cycle to effectively deal with election disputes in a timely manner.

Conclusions and Recommendations

The legal provisions for the prevention, resolution and management of election disputes in the Zimbabwean legal framework shows that election disputes and conflict resolution have been identified as priorities to ensure the integrity of the electoral process.

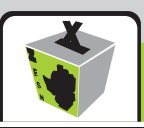
The real question about electoral dispute and election-related conflict in Zimbabwe that this paper has tried to address is to what extent is the EDR architecture delivering on its objectives?

The paper concludes that the credibility of electoral processes is determined by, among others, the existence and capacity of institutions to effectively resolve election related disputes.

Secondly, whereas there are enough provisions for the mitigation of election disputes and election-related conflict, there has not been an equally important political commitment to operationalise the legal provisions.

Third and finally, the absence of regulation of political parties and therefore their lack of accountability is a potential risk to a successful EDR implementation. To this end, the following recommendations are made:

- Given its historical past, the country should also consider investing more on:
- ADR especially MPLCs by firstly ensuring that the contradictions within the electoral law pertaining to the timing and sequencing of establishment of these structures are eliminated. Secondly, the capacity of the key factors such as the ZEC and political parties must be enhanced to ensure proper functioning MPLCs.
- Administrative remedies to build trust. The consultative meetings between ZEC and political parties that were held during the 2013-2018 election cycle must be held regularly and have guidelines for participation, business process and have binding resolutions.
- Zimbabwe must frankly deal with unresolved historical and political tensions that invariably find expression in electoral contexts and at times in forms that are openly violent. Without this, no amount of tinkering with the legal framework will help deal with election disputes and election-related conflicts.



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