

ZIMBABWE ELECTION SUPPORT NETWORK

POSITION PAPER

Independence of the Zimbabwe Electoral Commission

Executive summary

The independence of an electoral management body (EMB) is regarded as one of the most important pre-conditions to a credible and acceptable election. Yet achieving universally acceptable levels of independence has proven difficult for most electoral jurisdictions globally. In Zimbabwe, electoral contestations continue to be blighted by disputes emanating from real and perceived questions over the degree of independence of the electoral administration body.

This Policy Brief explores the mechanisms for strengthening independence of the Zimbabwe Electoral Commission (ZEC), unrestricted by government oversight in the administration of elections.

The discussion proceeds from reviewing the evolution of election administration since 1980, unpacking the legal framework governing electoral administration and then makes a comparative analysis of election administration architecture globally.

Examples from various countries and electoral jurisdictions are used together with international electoral standards and regional treaties or benchmarks to interrogate the independence of ZEC. The policy brief will conclude by proffering suggestions for strengthening the levels of independence of Zimbabwe's independent electoral commission.

Introduction (Historical Perspective and Context Analysis)

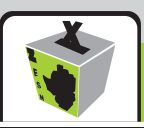
The administration of elections globally has been categorized into three main models of unique characteristics as determined by the level of government involvement in management of electoral processes.

These three election management types include governmental model, independent model and mixed model. Under the Independent Model of electoral management, elections are organized and managed by an EMB which is institutionally independent of and autonomous from the executive branch of government.

Under the Governmental Model, elections are organized and managed by the executive branch through a ministry and/or through local authorities. The Mixed Model usually involves dual structures—a policy or supervisory body, which is separate from the executive branch, overseeing the implementing body within the government (International IDEA, 2012).

Election management in Zimbabwe evolved from a governmental model during the period of 1980 to 2004 shifting to a mixed model between 2005 and 2013. Following the adoption of a new Constitution on May 22, 2013, Zimbabwe transitioned to an exclusively independent model of electoral administration which witnessed the Zimbabwe Electoral Commission (ZEC) retaining sole mandate to manage all electoral processes.

The period 1980 to 2004 had elections whose principal administrative components were the Delimitation Commission, Electoral Supervisory Commission (ESC), Election Directorate and the Registrar General of Elections. The Delimitation Commission had a responsibility of determining electoral constituencies and was composed of commissioners convened by the President on ad hoc basis prior to holding of an election. The ESC was also appointed by the President for a period not exceeding five years and was tasked with supervising all electoral processes while reporting to the President. The Election Director consisted of civil servants chaired by the Public Service Commission and was mandated with providing logistical support to the Registrar General in the management of elections.



The Registrar General of Elections was in charge of execution of the electoral operations and was therefore the central component of the election administration framework. The 1980-2004 model of election management was castigated by many stakeholders for its apparent lack of independence emanating from deep involvement of government in the management of elections.

Several observer reports also pointed out the diminished levels of confidence on the electoral administration system emanating from recruitment of pro-ruling party stalwarts or some individuals who were demonstrably spineless to sustain the integrity of elections.

In transitional societies, public servants are more likely to have been discredited as electoral officials due to their perceived links with the authoritarian rule or involvement in previous, flawed elections. (International IDEA, 2012)

Following recommendations by the Electoral Supervisory Commission, political parties and by civil society organizations, the election management system was restructured in 2004.

The reforms also took account of the Principles and Guidelines Governing Democratic Elections adopted by the SADC Heads of State and Governments in Mauritius in 2004. The Zimbabwe Electoral Commission (ZEC) was then established as a supposedly independent body in line with the recommendation in the SADC Principles and Guidelines Governing Democratic Elections. ZEC was formally instituted in February 2005 and was structurally designed to be an independent electoral management body.

However, from its formation in 2005 until May 2013, it remained operationally tied to central government ministries and/or other government departments for fulfilment of its mandate. For example, ZEC was not able to register voters, but only relied on the Registrar General department to register voters and compile the voters roll, albeit under ZEC supervision. In addition, ZEC operated without an independently defined budget, rather the electoral commission relied on funds channelled through the Ministry of Justice, Legal and Parliamentary Affairs and at times the Office of President and Cabinet. In 2013, Zimbabwe adopted a new constitution which established ZEC as one of the independent commissions supporting democracy as provided for in Chapter 12 of the Constitution. The independence of ZEC was therefore guaranteed under Section 235 of the Zimbabwe constitution.

Statement of the Problem

The evolution of election management in Zimbabwe encountered several election -related disputes which were mainly linked to stakeholder confidence in the electoral commission. Accordingly, the transition to a truly independent model of election administration was inspired by evident gaps within the restructured ZEC. While demonstrable efforts to reform were witnessed since 2005, questions over the independence of ZEC remain in place.

In the advent of a new constitution in 2013, wherein ZEC was obligated with the sole mandate of administering elections, evidence of gaps in structural, regulatory and financial independence of the electoral commission remain glaring and is attributed to incipient conflicts that often follow electoral events in Zimbabwe.

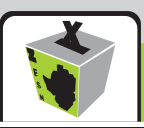
Key considerations from other contexts

Defining EMB Independence

While the concept of shifting to an independent model of election management has grown exponentially since the end of Cold War, the question of what exactly is an independent EMB has not yet been authoritatively settled (Rukambe, 2006). The International Idea (2012) prefers defining independence as referring to an electoral commission which is autonomous impartial in its conduct. White (2005) has made an attempt in this area by providing the criteria that can be used to determine the independence of Chapter nine

institutions in the South African Constitution. Accordingly, he defines the term 'independence' as meaning the following:

“An independent body is one that is outside government, whose members' tenures are governed by appropriate appointment and removal provisions which ensure that members are appropriately qualified, do not serve at the pleasure of the executive and can be removed only on objective grounds relating to job performance, one that is sufficiently well funded by parliament to enable it perform its functions and one that has control over its own functions.”



Okello (2006) argues that the concept of independence of an electoral body implies; first, that such a body is established permanently either by the national constitution or by legislation which provides for its independence from any party in the performance of its functions and exercise of its powers; secondly, that the staff of the EMB should be independent of any party on

the mode of appointment, removal and their conditions of service; and thirdly, that the budget of the EMB should not be determined by the executive. In this sense a truly independent EMB can perform its functions and exercise its powers in an environment where it is free from direction, control and supervision from any quarter.

The state of ZEC independence: comparative scope

Global electoral discourse has settled on using common characteristics categorized by Okello (2006) into two types of independence: formal independence and practical independence. Formal independence is based on the law and deals with, inter alia, the establishment of EMBs, and the mode of appointment of commissioners and their terms and conditions of service. Practical independence is concerned with the actual practice, that is, the operational independence of EMBs. Regardless of the type of EMB chosen, formal and practical independence must exist in order that an EMB can be regarded as fully independent. The following pillars determine the degree of independence of EMBs;

- i. Permanency
- ii. Criteria and procedure for appointment of EMB commissioners
- iii. Powers and functions of the commission
- iv. Conditions of service for both EMB staff and commissioners
- v. Procedures for hiring and firing staff
- vi. Financial autonomy of the commission
- vii. Reporting structure of the EMB
- viii. Accountability and auditing of the commission

Rukambe (2006) further classifies EMB independence into two concepts: structural independence, i.e. independence from government and, behavioral independence i.e. EMB does not bend to governmental, political or other partisan influences on its decisions.

Examining the degree of independence has therefore taken the form of using set benchmarks or pillars of independence which are commonly identified as depicting the nature of independence a given EMB exists under. These benchmarks are commonly used in electoral studies and by election observer missions to ascertain the level of independence of an electoral commission.

The legal framework should require that EMBs be established and operate in a manner that ensures the independent and impartial administration of elections. (International IDEA, Electoral Standards Guidelines, 2002)

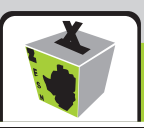
It is important to note that while EMBs can formally be recognized as independent bodies, there is notable variance in terms of compliance to such universally recognized characteristics of EMB independence. Below is a summary of the most critical characteristics of independent EMBs and an analysis of how ZEC fares in terms of adhering to such standards;

Permanency - The permanency of an EMB is at the core of its independence, institutional capacity building and sustainability. In many electoral jurisdictions, permanency is usually provided by the law through the national constitution or legislation. Many emerging and established democracies have embraced the idea of a permanent institution mandated with managing electoral processes across the electoral cycle.

Countries including South Africa, Nigeria, Ghana or Kenya have established permanent institutions to preside over electoral processes. In Zimbabwe, since 2005 and following the establishment of ZEC, permanency of the EMB was guaranteed through the law and the 2013 Zimbabwe constitution (section 238) clearly provides for the establishment of a permanent electoral management body. This allows a solid foundation for the independence of ZEC.

Appointment of commissioners - The method of appointment of commissioners is crucial in ensuring the independence of an EMB. It is a confidence building exercise and contributes greatly to the image and integrity of the EMB. The composition of the EMB, at the commissioner level and civil service level, is another important means of ensuring its effective independence (López-Pintor 2000).

Appointment of commissioners in Zimbabwe is fairly similar to other electoral jurisdictions in Zambia and Nigeria wherein parliament is centrally involved in inviting invitations for applications, interviewing of candidates and shortlisting recommended candidates for subsequent appointment by the President.



While involvement of parliament has been hailed by stakeholders, there remain disquiet over the continued involvement of the President in selecting the final list of candidates.

In the realm of deep political polarization in Zimbabwe involvement of the President in influencing the ultimate list of commissioners continues to cause erosion of perceptions around the independence of ZEC. In fact, there is a history of undesirable involvement of politicians in the appointment of ZEC commissioners.

For instance, commissioners who were appointed following the formation of the 2009 government of national unity were a product of political negotiations and balancing of political interests amongst the three political actors MDC-Tsvangirai, MDC and ZANU PF. While parliament is used to sanitize the appointment process, it is clear that political parties have entrenched interested and usually push for appointment of their favoured commissioners.

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Powers and Functions - The more powers an EMB has, the more it is likely to be perceived by the public and all stakeholders as independent. EMB powers are categorized in three ways; (a) executive power allowing it to call and conduct elections, voter registration, party registration, certify and nullify elections or suspend candidates who violate the laws etc. (b) Judicial power which mandates the EMB to investigate and resolve disputes based on the law. Relying on regular judicial processes can be too slow in the context of the tempo of electoral processes and (

c) Legislative power which allows the EMB to make subsidiary laws or regulations, give directives and reviews which are binding on the electoral process. The South African and Zambia electoral commissions enjoy extensive powers and exercise such powers fearlessly and impartially which enhances trust within the electorate. In Zimbabwe there are strong sentiments from the public that ZEC does not autonomously exercise its powers and functions.

These negative perceptions about ZEC emanate from the continued existence of electoral laws which essentially have a disempowering effect.

Firstly, ZEC has limited power to determine election dates and largely relies on the office of the President as provided in Section 38 and 39 of the Electoral Act. Secondly, ZEC lacks autonomy to invite and accredit observers. The Observer Accreditation Committee (OAC) established under section 40H has a prominent involvement of central government including ministries of Foreign Affairs, Home Affairs, State Security and Women affairs. Thirdly, as provided under Section 121 of the Electoral Act, ZEC's administration of local authority by-elections involves the Minister responsible for Local Government. Fourthly, in terms of desirable judicial powers, while ZEC is mentioned at every level of conflict management i.e. on violation of code of conduct, multi-party liaison committees, it still lacks the necessary power to investigate, adjudicate on certain disputes or sanction violators.

Performing such functions enhances the independence of the commission. Furthermore, The Electoral Act, section 192 still requires ZEC to seek approval from the Minister of Justice for its regulations on the electoral processes. This clearly undermines the regulatory autonomy of the commission. A combination of the above factors creates the perception that ZEC remains weakened legally and in practice to exercise its powers and functions outside government control or directions.

Conditions of service for commissioners and EMB staff - The provision of satisfactory conditions of service is a prerequisite for the independence of EMBs. Satisfactory conditions of service for commissioners would enable them to perform their duties without fear of prosecution or dismissal. The conditions of service in this respect include the salaries, allowances, term of office and legal immunity. Due to the importance of the conditions of service in determining the independence of an EMB, it is necessary that the law provides for them.

The electoral law in Zimbabwe (Electoral Act, Part Two, Sixth Schedule) sets out the conditions of service of the commissioners and staff. While the law positively provides a framework for such conditions of service, the government is still involved in determining such conditions through the Minister of Finance from whom ZEC must seek approval before setting out the conditions of service. The Electoral Act, section 9(8) prescribes that ZEC can only fix terms and conditions of service for employees with the approval of Minister of Finance. This arrangement is different from what happens in South Africa where conditions of service for the IEC are set out mainly by the commission, albeit in consultation with a representative body such as parliament.



Hiring and firing of staff - An independent EMB needs to have the power to hire and fire its own staff according to its needs. Such hiring in countries like Kenya and Zambia is demonstrably opened to the public on equal opportunity basis. For example, in August 2019, the Electoral Commission of Zambia conducted an open recruitment process for its Chief Elections Officer.

That recruitment process resulted in the appointment of an individual who prior to his appointment worked in the civil society sector. However, independence in hiring does not mean that the EMB cannot request the government to provide it with resources to enable it undertake certain activities such as voter registration. Since its establishment in 2005, the hiring and firing of staff of ZEC has been at the centre of electoral disputes.

The disputes emanated from the fact that at its inception ZEC largely relied on staff recommended from government ministries including those from Zimbabwe's security services i.e. the military, central intelligence and police. The manner in which such recruitments occurred raised concerns and suspicion of government control in the entire process.

The recruitment process was condemned by electoral stakeholders for its lack of openness and inclusivity. Consequently, suspicion was rife that the commission was mainly staffed by people sympathetic to the ruling ZANU PF party. This allegation against ZEC remains one of the factors causing negative citizen perception on ZEC independence.

Financial autonomy - The effectiveness of an EMB is adversely affected by the availability of resources especially its financial resources. This is because elections require a lot of financial resources. It is crucial that the legal framework contains provisions as to how funding for the ongoing operations of the EMB will be made available.

The EMB need to operate on a level of certainty over funding for its budgets by the treasury. EMBs known for their high degree of independence e.g. the IEC in South Africa do receive funding through representative bodies like Parliament as opposed with receiving funds through a functional ministry.

In Zimbabwe for example, the electoral commission is now separately allocated funds from the national treasury, which funds are channeled directly. However, it is important to note that such funds have been deemed inadequate to fund the operations of the commission across the electoral cycle.

For example, in 2018, ZEC The was allocated \$153,9 million out of a bid of \$272 million for the 2018 harmonized elections, representing 56% of the Commission budget to cover the BVR exercise and various processes leading up to polling.

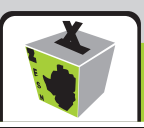
In addition to the inadequacy of funds, the electoral commission lacks certainty in terms of disbursement of such allocations leaving the commission to sometimes operate within constrained timelines due to late disbursements.

Reporting of EMB - An independent EMB is expected to report to Parliament as opposed to the executive. The IEC of South Africa functionally reports to parliament on both its administrative and election management issues. In other electoral jurisdictions such reporting may happen through a parliamentary portfolio committee overseeing the implementation of electoral laws. Section 323 of Zimbabwe's constitution provides for ZEC to report to parliament. However such reporting only happens through a responsible ministry. Such an arrangement fundamentally weakens the independence of the commission.

Accountability and auditing - To promote transparency, accountability and integrity the EMB's rules of procedure should be codified and accessible. They should emphasize transparency and accountability in the decision-making processes.

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Codes of conduct and working practices should aim to build an internal culture of transparency, accountability and integrity. Accounts of the commissions are usually subjected to scrutiny by a government Auditor General. Part 4 (15)1, Sixth Schedule of the Electoral Act still allows the Minister of Justice to approve the appointment of public auditors of the commission.



Lessons for Zimbabwe

In its quest for independence since 2005, the Zimbabwe election authority ZEC has gone through numerous challenges which have either curtailed or delayed transition into a functionally independent body.

These challenges include resource constraints, lack of political will to grant autonomy as required by law, poor communications strategy and a protracted electoral reform agenda spanning over two decades.

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While the Constitution and electoral law allow for an acceptably independent EMB, practice on the ground diminishes the chances of attaining such cherishable independence. A comparative look of election management in Zimbabwe draws the following lessons;

1. The legal framework for elections in Zimbabwe establishes a solid foundation, through the constitution for independence of the electoral commission, however such independence is not reinforced by suitable provisions in the enabling legislation.

The independence of the electoral commission can only become durable and sustainable if subsidiary laws establish a framework that allows ZEC to autonomously practice its independence. Zimbabwe is in an invidious situation where the constitution through section 235 has progressive

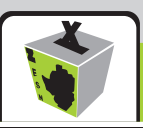
clauses that guarantee ZEC independence, but the Electoral Act still contains clauses like sections 9(8), 40H or 192 which impede on the practice of such independence.

2. It is also important to note that perceptions over the independence of an electoral commission and required citizen confidence or trust in the EMB are not only shaped by a good legal framework. Such perceptions and attitude towards an EMB are also shaped by the ability of a given EMB to practice its constitutionally guaranteed powers fearlessly and impartially. In this context, ZEC must "seen" to be independent at both law and in practice.

3. For citizens to invest their confidence on an EMB, it usually follows robust confidence building initiatives by the electoral commission itself. This comes in the form of being accessible to the electorate and openness to the public in terms of the commission's plans and data. A commission like ZEC, with a historical baggage of diminished levels of trust from the public, it has to employ aggressive communication or public relations campaign to cultivate trust and build confidence which could influence public perceptions on its independence.

Most electoral jurisdictions which use the independent model of election management are shifting towards placing EMBs under the direct oversight of parliament as a representative body instead of reporting to the executive through government ministers.

4. Most electoral jurisdictions which use the independent model of election management are shifting towards placing EMBs under the direct oversight of parliament as a representative body instead of reporting to the executive through government ministers. Parliament is to the public, is an embodiment of diversity and inclusivity as opposed to the executive arm of government which ordinarily is dominated by one political formation



Conclusions

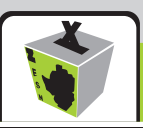
- The Zimbabwe constitution firmly establishes permanency of ZEC which meets international best practices.
- Involvement of the President in appointment of commissioners creates perceptions of compromised independence in the realm of an extremely polarized society.
- ZEC's executive functions remain tied to central government ministries which affects its functional independence.
- ZEC lacks necessary judicial powers to investigate, adjudicate and sanction violators of electoral regulations or code of conduct for political parties and candidates.
- The provision for ZEC to make electoral regulations independently is negated by the requirement for approval of Minister of Justice for any such regulation.
- Involvement of Finance Minister in fixing employee terms and conditions greatly diminishes independence.

of the commission

- Involvement of Justice Minister in ZEC's possible termination of employment for Chief Electoral Officer affects independence of the commission
- ZEC's financial autonomy is weak in terms of its ability to make budgets and secure adequate funds without involvement of the Minister of Justice and Minister of Finance. Essentially, funding regulations for the commission lacks in terms of specifying how funding for the commission will be made available. Equally important is the fact that ZEC usually operates in an atmosphere of uncertainty as to when its funds will be availed.
- Involvement of the Minister of Justice in approving auditors of the commission is a threat to ZEC's independence
- The requirement for ZEC to report through Minister of Justice weakens its independence

Recommendations

1. Parliament should be left to make final selection of commissioners through removing the provision for presidential choice of eight from a list of twelve.
2. ZEC's roles and functions must not be tied to approval by any central government ministry to sustain constitutional requirements in Section 235 of the Constitution
3. ZEC must receive its funds through parliament which is a representative body with different political formations to promote perceptions of independence.
4. ZEC should report to parliament directly instead of doing that through Minister of Justice to sustain its operational independence
5. ZEC must strengthen its public relations and messaging strategy to sustain constitutionally provided independence



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