

THE ZIMBABWE ELECTORAL COMMISSION BILL: WILL IT IMPROVE THE ELECTORAL PROCESS?

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Summary

The Zimbabwe Electoral Commission (ZEC) Bill is an important government initiative to provide an independent and impartial electoral authority ahead of the general election in March 2005. The previous general election in June 2000 and the presidential election in March 2002 ended in sharp acrimony with controversy over process and the fairness of the results. In this heated and politically polarized environment, an independent and impartial electoral commission could have great potential for building voter confidence in the conduct of the upcoming election. However, the Bill as currently drafted is flawed and should be withdrawn and appropriately revised.

Regionally, too, the ZEC Bill is of great significance. In August 2004, the fourteen Southern African Development Community (SADC) Heads of State, including President Robert Mugabe, adopted the SADC Principles and Guidelines Governing Democratic Elections. The document outlines the responsibilities of member states holding elections, including the establishment of an independent, inclusive, and impartial electoral authority. The SADC Principles also deal with the constitution and mandate of SADC Electoral Observer Missions (SEOMs) as well as their codes of conduct and guidelines for the observation of elections. SADC is eager for the general election in March to improve the political climate in Zimbabwe, which would likely reinforce the apparent normalization of SADC's relations with the European Union.

With most SADC member states holding regular multiparty democratic elections, SADC has sought to promote common democratic norms and standards. In particular, SADC has encouraged the establishment of independent and impartial electoral authorities to conduct democratic elections. Among member states, there is great variety in the formal institutional architecture of independent electoral authorities. A brief survey of the laws providing for electoral commissions in Botswana, Lesotho, Mozambique, Namibia, and South Africa highlights their diversity. The electoral commissions in Botswana, Lesotho, Namibia, and South Africa are established by the Constitutions and Parliamentary laws of these countries. In Mozambique, the electoral commission is constituted solely through an Act of Parliament. SADC states also differ in how commission members are appointed. The Presidents of Namibia and South Africa, and the King of Lesotho, play a role in the appointment of the commissioners. The President of Mozambique is only involved in the appointment of the President of the Commission. In Botswana, the President does not participate in making appointments. In Lesotho, South Africa, Mozambique, and Botswana, political parties in parliament are involved in the

appointment process. Some commissions explicitly exclude all or high ranking party officials from membership, as in Mozambique and South Africa.

With this regional backdrop, this paper examines the ZEC Bill. The Bill is a positive government initiative to establish an independent and impartial electoral body ahead of the March election, but falls short of emerging SADC benchmarks. Specifically, the method of appointment of Commissioners does not provide for the degree of party inclusion that exists in Botswana, Lesotho, Mozambique, or South Africa. The Commission's independence is undermined by too many opportunities or requirements for Ministerial intervention. The voter education provisions give unnecessarily intrusive and restrictive powers to the Commission and curtail freedom of information, freedom of expression, and the full political participation of citizens. Moreover, the Bill contributes to existing confusion among electoral institutions over their respective responsibilities.

Human Rights Watch urges the government of Zimbabwe to adopt the following measures to strengthen the independence and impartiality of the Electoral Commission. Zimbabwe may wish to follow the SADC trend toward making electoral commissions a constitutionally mandated institution.¹ The government should involve groups and individuals outside the presidency and the ruling party more fully in the process of selecting Electoral Commission members. In addition, the Commission should be insulated from interference by government Ministers. It should be responsible only to Parliament. Making the Electoral Commission the supreme electoral institution will require eliminating or clarifying the role of the Electoral Supervisory Commission (ESC). Revisiting the Electoral Act and the Constitutional provisions for the ESC will be necessary to eliminate the current confusion over electoral responsibilities among the various electoral institutions. Human Rights Watch also urges SADC to engage the government of Zimbabwe to ensure that the ZEC Bill is consistent with SADC requirements.

¹ Constitution of Zimbabwe, s.52 provides for the amendment of the Constitution. The text of a Constitutional Bill must be published in the Gazette at least thirty days before it is introduced in Parliament. At the final vote on a Constitutional Bill, it must receive the affirmative votes of at least two-thirds of the total membership of Parliament. Thereafter, the President must assent to the Bill.

Recommendations

To the government of Zimbabwe

To meet its objectives of creating an independent electoral authority with a clear mandate, the government of Zimbabwe should immediately withdraw and revise the ZEC Bill to ensure the Commission is truly independent and impartial.

Reforms should include:

- Revising the provisions regarding the composition of the proposed Commission. The mainly presidential power of appointments should give way to a more inclusive system under which those outside the presidency and the ruling party can provide consequential input into the appointment of members. The government of Zimbabwe might opt for one of the five models discussed, that is, the Namibia, Lesotho, Botswana, South Africa, or Mozambique model. These models represent a continuum in terms of the degree of involvement in the appointment procedure of political parties, civil society organizations, non-political experts, and executives.
- Inserting provisions to exclude, at minimum, senior office-holders in any political party from being eligible for appointment as a Commissioner.
- Eliminating intrusive ministerial control and direction over the affairs and functioning of the proposed Commission.
- Removing the provisions that would criminalize “unauthorized” voter education.
- Addressing and clarifying the confusion over the mandates of different electoral institutions. The law making provision for the ESC should be scrapped or amended so that it is not in conflict with the ZEC.

To the Southern African Development Community

- SADC and its members—together and individually—should engage and urge the government of Zimbabwe to adhere to Zimbabwe’s commitment to SADC Principles and Guidelines Governing Democratic Elections and establish an impartial, inclusive, and independent electoral authority.
- SADC should also urge the government of Zimbabwe to comply with the protocol’s principles of freedom of expression, association and full participation of citizens in the conduct of democratic elections.

Background

Zimbabwe has held regular general elections every five years since its independence in 1980. The general election scheduled for March 2005 will occur in a deeply divided society. In the general election in June 2000, the ruling party, the Zimbabwe African National Union Patriotic Front (ZANU PF), won sixty-two of the elected seats against the Movement for Democracy’s (MDC’s) fifty-seven seats and Zanu-Ndonga’s single seat. As a result of a number of by-elections and the recent imprisonment of an MDC member, ZANU PF now has sixty-seven elected seats and the MDC fifty seats. ZANU PF’s parliamentary majority is further increased by an additional thirty seats for presidential appointees. The general election in 2000 and the presidential election in 2002 were controversial. While most African observer groups declared the results a legitimate expression of the people’s will and the process largely acceptable,² Western observer teams generally found the electoral process flawed. The government’s aspiration to introduce an independent electoral authority has the potential to build voter confidence in the legitimacy of the electoral process in the run-up to the general election in March.

²The observer groups, who were generally satisfied with the conduct of the election in 2000, included the South African Parliamentary Observer team, the SADC Parliamentary Forum Election Observer Delegation, the Electoral Commissions Forum of SADC countries, and the Organization of African Unity Observer Team in Zimbabwe. Among the more critical observers were the Commonwealth Observer Group and the European Union Election Observation Mission. For the presidential elections in 2002, the SADC Parliamentary Forum Observer Group, the Norwegian Election Observer Group, and the Commonwealth Observer Group were among those observers who found the conduct of the election flawed. In contrast, official observer teams from South Africa, Nigeria, Namibia, and the Organization of African Unity, all found the election to be legitimate.

SADC's interests in the political situation in Zimbabwe are significant. The region must cope with Zimbabweans who have left their country for political and economic reasons. Moreover, SADC's relations with the European Union and the United States have been strained over the issue of Zimbabwe. After the SADC Heads of State summit approved the Principles and Guidelines Governing Democratic Elections, the Prime Minister of Mauritius and the new chairman of SADC, Paul Berenger, emphasized the significance of the upcoming election in Zimbabwe for SADC, saying: "With free and fair elections in Zimbabwe at the beginning of next year, we can already start preparing for the normalization of relations between SADC, the European Union and the US."³

SADC's Electoral Charter

From its inception in 1992, SADC has played a vital role in devising standards to help its member states to develop and consolidate democratic institutions. The majority of the fourteen member states of SADC now hold regular multiparty democratic elections.⁴ There has been no single path to democracy for member states. Multiparty elections have emerged after struggles against colonial rule, the end of civil wars, and dissatisfaction with one-party systems. In line with previous SADC efforts to promote common democratic norms and practices, the SADC Heads of State summit approved the Principles and Guidelines Governing Democratic Elections in Grand Baie, Mauritius, in August 2004. These Guidelines provide the principles for the conduct of democratic elections, stipulate the responsibilities of the member states holding democratic elections, and specify the procedures for the establishment and operation of SADC Electoral Observation Missions (SEOMs).

The principles for the conduct of democratic elections include the full political participation of all citizens; freedom of association; political tolerance; equal opportunity for all political parties to access the state media; impartial electoral institutions and an independent judiciary; voter education; acceptance and respect of the election results proclaimed by the national electoral authorities, and legal challenges of the election results.⁵ The responsibilities of member states holding elections include that they take measures to ensure the "scrupulous implementation" of these democratic election

³ Comment: "Mugabe not ready for SADC Charter," *Zimbabwe Standard*, August 29, 2004

⁴ The SADC member states are Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

⁵ SADC Principles and Guidelines Governing Democratic Elections, August 17, 2004, clause 2.

http://www.swradioafrica.com/pages/sadc_elections.htm (Retrieved September 21, 2004).

principles; establish impartial, all-inclusive, competent and accountable national electoral bodies staffed by qualified personnel; safeguard human and civil liberties of all citizens, including the freedom of movement, assembly, association, expression, campaigning and access to the media on the part of all stakeholders, during electoral processes; and provide adequate resources for carrying out democratic elections.⁶ The SADC electoral charter also identifies the responsibilities of member states to SEOMs, including that member states must accredit the members of the SEOM on a non-discriminatory basis.⁷ There are also provisions for the establishment of an SEOM,⁸ for a code of conduct for electoral observers,⁹ and for the observation of elections.¹⁰ Should a member state invite an SEOM to observe its election, the Chairperson of SADC's Politics, Defense and Security Organ must constitute the observer team.¹¹

Five Cases of Electoral Management Laws in SADC: Botswana, Lesotho, Mozambique, Namibia, and South Africa

SADC countries have increasingly recognized the important contribution of election management to holding free and fair elections.¹² There is now widespread provision for the establishment of independent electoral commissions in the constitutions of SADC countries, and for supplementing this with electoral legislation.¹³ The functions of electoral commissions in SADC cover the range of election-related activities, such as voter registration, the compilation of a national voters' roll, training of election officials, polling day activities, the compilation of results, and the resolution of disputes.¹⁴ Electoral commissions may also be tasked with demarcation and providing or applying a

⁶ Ibid, clause 7.

⁷ Ibid, clause 7.10-7.19.

⁸ Ibid, clause 3.

⁹ Ibid, clause 5.

¹⁰ Ibid, clause 4.

¹¹ Ibid, clauses 2.1 and 3.2.

¹² In 1998, twelve Electoral Commissions in SADC formed the Electoral Commissions Forum of Southern Africa to share their experiences with election management, to build local capacity, and to strengthen the role of independent electoral authorities in the region. See David Pottie with Tom Lodge, "Electoral Management in Southern Africa" in International Institute for Democracy and Electoral Assistance (International IDEA) Conference - Towards Sustainable Democratic Institutions in Southern Africa, p.71. The conference was held in Gaborone, Botswana, 8-10 May, 2000.

http://www.idea.int/ideas_work/22_s_africa/elections_1_electoral_mgmt.htm (Retrieved November 16, 2004).

¹³ Ibid, pp.49, 54. The chart on the website of The Electoral Institute of Southern Africa (EISA) shows that most individual member states have provided for electoral management institutions in their constitutions.

http://www.eisa.org.za/WEP/WEP_7.htm (Retrieved November 8, 2004).

¹⁴ David Pottie with Tom Lodge, "Electoral Management in Southern Africa," p.55.

code of conduct for political parties.¹⁵ The formal architecture of electoral commissions for Botswana, Mozambique, Namibia, Lesotho, and South Africa is briefly summarized to highlight both their commonalities and differences. Particular emphasis is given to the appointment procedures of commissioners because these have often been at the heart of controversies over the independence of the commissions and ultimately of the credibility and legitimacy of elections.¹⁶

Botswana established an Independent Electoral Commission by a Constitutional amendment in 1997 and through an Act of Parliament. The Constitution prescribes the composition and functions of the Commission. The Chairperson of the Commission must be a Judge of the High Court and the Deputy Chairperson a Legal Practitioner. Both are appointed by the Judicial Service Commission (JSC). The Commission's other five members are also appointed by the JSC from a list of persons recommended by the All Party Conference. The Constitution also provides for the President to appoint the Secretary of the Commission, who is its Chief Executive Officer. The Commission may appoint staff to assist the Secretary. The Commissioners serve for two successive terms of Parliament or ten years.¹⁷ In Botswana's general election on October 30, 2004, the All Party Conference failed to make recommendations to the JSC. Consequently, the JSC made its own recommendations, as provided for in the Constitution.¹⁸ The SADC Parliamentary Forum Election Observer Mission to Botswana concluded that the Commission had carried out its responsibilities efficiently, impartially, and professionally during the parliamentary election.¹⁹ One woman serves on the current Commission.

The Independent Electoral Commission (IEC) in Lesotho derives its existence and authority from the Second Amendment to the Constitution Act, 1997 (Act No.7, 1997). Further details of the IEC's mandate are contained in the National Assembly Elections Act, 1992, the National Assembly Election (No.1) Amendment Act, 2001, and

¹⁵ Ibid, pp.55-6 on the variety of delimitation authorities; ibid, pp.58-59, p.72 on different electoral institutions that provide for or apply codes of conduct for political parties.

¹⁶ Principles for Election Management, Monitoring, and Observation in the SADC Region: as adopted on 6 November 2003 at the Kopanong Hotel and Conference Centre, Benoni, Johannesburg. Electoral Institute of Southern Africa (EISA), Electoral Handbook No.13 (Johannesburg: EISA, c.2004), p.11. <http://www.eisa.org.za/EISA/publications/pemmo.htm> (Retrieved November 16, 2004).

¹⁷ Brochure of the Independent Electoral Commission. The relevant sections of the Constitution are Section 65A and Section 66. <http://www.gov.bw/elections04/right.html>. (Retrieved November 3, 2004). See also EISA, http://www.eisa.org.za/WEP/botswana_electoral_commission.htm (Retrieved November 8, 2004).

¹⁸ "IEC impresses SADC observer mission," *Daily News* (Botswana) (Online), November 3, 2004, http://www.gov.bw/cgi-bin/news.cgi?d+20041103&i=IEC_impresses_SADC_observer_mission/ (Retrieved November 16, 2004).

¹⁹ Ibid.

subsequent amendments.²⁰ The Constitutional amendment abolished the Constituency Delimitation Commission and the office of the Chief Electoral Officer. The Constitution makes provision for the Independent Electoral Commission to perform the functions of the former Constituency Delimitation Commission,²¹ to be independent from the control or direction of any person or authority, and to receive funds from Parliament enabling it to perform its functions in an effective manner.²² The Constitution guarantees the security of tenure of the Commissioners. The King may remove Commissioners from office only on the recommendation of a judicial tribunal for inability to exercise their office or for misconduct.²³ The procedure for appointing the Commissioners starts with the request of the Council of State to all registered political parties to jointly propose to the Council a list of not less than five names from which the Council will select three.²⁴ The King, acting in accordance with the advice of the Council of State, appoints all three Commission members for a renewable six-year term.²⁵ The Chairperson of the Commission must hold, or have previously held, high judicial office. The other two members must have the same qualifications as the Chairperson or have competence in administration or public affairs.²⁶ Members are not allowed to be an office-bearer of a political party, a member of a local authority or hold public office, other than a Judge of the High Court or the Court of Appeal.²⁷ The Commission employs its own staff, except for the Director of Elections, the Commission's Chief Executive Officer, who is a civil servant seconded from

²⁰ Lesotho - 2002 National Assembly Elections. Southern African Development Community Parliamentary Forum Election Observation Mission Report, p.13
<http://www.sadcpf.org/documents/SADCLesothoBook/SADCLesotho.pdf> (Retrieved November 16, 2004);
Report of the Commonwealth Observer Group, Lesotho General Election 25 May 2002, p.14.
<http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=36243> (Retrieved November 16, 2004).

²¹ Report of the Commonwealth Observer Group, Lesotho General Election 25 May 2002, p.14.

²² Lesotho Electoral Commission (EISA). Posted 30/10/2001.
http://www.eisa.org.za/WEP/lesotho_electoral_commission.htm (Retrieved November 10, 2004).

²³ Report of the Commonwealth Observer Group, Lesotho General Election 25 May 2002, p.16.

²⁴ Lesotho - 2002 National Assembly Elections. Southern African Development Community Parliamentary Forum Election Observation Mission Report, p.13. The Council of State includes the King, the Prime Minister, the Speaker of the National Assembly, two judges or former judges appointed by the King, the Attorney-General, the Commander of the Defense Force, the Commissioner of Police, a Principal Chief nominated by the College of Chiefs, two members of the National Assembly appointed by the Speaker from among the members of the opposition parties having the greatest numerical strength, not more than three persons appointed by the King on the advice of the Prime Minister, and a member of the legal profession in private practice nominated by the Law Society.

²⁵ Report of the Commonwealth Observer Group, Lesotho General Election 25 May 2002, p.16. Lesotho-2002 National Assembly Elections, p.13 refers to a three-year term, renewable once, for Commissioners.

²⁶ Lesotho Electoral Commission (EISA). Posted October 30, 2001.
http://www.eisa.org.za/WEP/lesotho_electoral_commission.htm (Retrieved November 10, 2004).

²⁷ Ibid.

Government to the IEC.²⁸ An amendment to the National Assembly Elections Act, 1992 in 2001 gives to the IEC the power to appoint a three-person tribunal to hear and determine complaints concerning the contravention of the Electoral Code.²⁹ The IEC that organized the general elections in May 2002 was praised for its transparency by the political parties and other stakeholders, as well as by the Commonwealth Observer Group and the SADC Parliamentary Forum Election Observation Group.³⁰ Its members comprised three men: two former senior civil servants and a management consultant.³¹

Mozambique's National Electoral Commission (CNE) is created by Electoral Law No.20, 2002.³² This law also stipulates the functions, powers, duties, and organization of the CNE.³³ The CNE is independent from public and political powers and in the exercise of its functions defers only to constitutional law.³⁴ The CNE has nineteen members.³⁵ Eighteen members of the CNE are chosen by political parties or coalition parties in proportion to their representation in parliament.³⁶ The President of the CNE is elected by the members of the Commission from among candidates presented by registered and legally recognized civil society organizations. The eighteen members agree on three candidates, from among whom the President of the Republic designates the President of the Commission.³⁷ Complaints arising from decisions by the CNE must be addressed to the Constitutional Court.³⁸ Members of the CNE hold office for five years.³⁹ During their term in office, members enjoy legal immunity except where their activities might have an improper effect on the final result of elections or referenda.⁴⁰ Members of the CNE must not be senior office-holders of any political

²⁸ Report of the Commonwealth Observer Group, Lesotho General Election 25 May 2002, p.16.

²⁹ Lesotho - 2002 National Assembly Elections. Southern African Development Community Parliamentary Forum Election Observation Mission Report, p.13.

³⁰ Report of the Commonwealth Observer Group, Lesotho General Election 25 May 2002, p.16; Lesotho - 2002 National Assembly Elections. Southern African Development Community Parliamentary Forum Election Observation Mission Report, p.13.

³¹ Report of the Commonwealth Observer Group, Lesotho General Election 25 May 2002, p.16.

³² Mozambique Electoral Law No. 20/2002. This is not an official translation of the law. http://www.idea.int/ideas_work/36_country_mozambique.htm (Retrieved November 9, 2004).

³³ *Ibid*, article 1.

³⁴ *Ibid*, article 3.

³⁵ *Ibid*, article 4.

³⁶ *Ibid*, article 5.

³⁷ *Ibid*, article 5.

³⁸ *Ibid*, article 8.

³⁹ *Ibid*, article 11.

⁴⁰ *Ibid*, article 15.

party, provincial governors, members of the military or security forces, deputies of the parliament, and so forth.⁴¹ The CNE is assisted by a secretariat, the composition, organization, and functioning of which are provided for in regulations that must be approved by the CNE.⁴² The CNE selects the Director General of the secretariat “on the basis of public advertisement and consideration of his record.”⁴³ Mozambique’s third multiparty general and presidential elections to be held in the first two days of December 2004 will be the first test of the 2002 Electoral Law.

The election commission in Namibia is established in principle in the Constitution that came into effect in March 1990.⁴⁴ The 1992 Electoral Act created the Electoral Commission of Namibia (ECN) as the sole and exclusive authority mandated to administer all electoral processes and activities in the country.⁴⁵ The ECN is composed of five members, whose term of office should not exceed five years, though they may be re-appointed. The method of appointing the five Commissioners was amended by the Electoral Amendment Act, 1998. Prospective and aspiring commissioners apply through a Selection Committee, which recommends eight candidates to the President of Namibia who then appoints five members. The Commission relies on administrative support from the Directorate of Elections, the establishment of which is provided for in the Electoral Act, 1992. The 1998 amendment provides for a Director of Elections to act as Secretary of the Commission and head of the Directorate. The Directorate relies on a permanent staff of some twenty people and the secondment of civil servants during elections. Namibia held its third presidential and general elections on November 15 and 16, 2004.⁴⁶ The current ECN is composed of four men and one woman.⁴⁷

South Africa’s Independent Electoral Commission is established in chapter 9 of the 1996 Constitution as one of six state institutions supporting constitutional democracy.⁴⁸ The core of the Commission’s mandate, to protect political rights, is provided for in section

⁴¹ Ibid, article 14.

⁴² Ibid, article 19.

⁴³ Ibid, article 29.

⁴⁴ African Democracy Profiles and Comparative Information, Namibia Electoral Commission (Electoral Institute of Southern Africa (EISA)), http://www.eisa.org.za/WEP/namibia_electoral_commission.htm and EISA, Election Update 2004. Namibia, Number 1, 5 (November 2004), p.2.

⁴⁵ Electoral Commission of Namibia. <http://www.ecn.gov.na/> (Retrieved November 12, 2004).

⁴⁶ EISA, Election Update 2004. Namibia, Number 1, 5 November 2004, p.2.

⁴⁷ Electoral Commission of Namibia. <http://www.ecn.gov.na/>

⁴⁸ The constitutional provisions relating to South Africa’s Independent Electoral Commission were obtained from <http://www.elections.org.za/Commissioners.asp> (Retrieved November 9, 2004).

19 of the Constitution.⁴⁹ The Electoral Commission Act No.51 of 1996 provides for the establishment, composition, and powers, duties and functions of the Electoral Commission and of the Electoral Court.⁵⁰ The Commission is independent and subject only to the Constitution and the law and must be impartial.⁵¹ A four-member panel, chaired by the President of the Constitutional Court and also comprising a representative of the Human Rights Commission, a representative of the Commission on Gender Equality, and the Public Protector, selects a list of at least eight suitable candidates. The panel must act in a transparent and open manner.⁵² A committee of the National Assembly, proportionally composed of members of all parties represented in that body, nominates commissioners from the panel's recommendations. A majority in the National Assembly must approve the committee's nominations. The President then appoints the five members of the Commission, one of whom must be a judge. No commissioner who holds a high party-political profile may be considered for the position.⁵³ Commissioners hold office for seven years.⁵⁴ Commissioners must serve impartially and independently and may not hold any political office or serve as a member of Parliament, a provincial legislature, or a local government body during their tenure.⁵⁵ The Commission appoints a Chief Electoral Officer to head the administration of the Commission.⁵⁶ Of the five current Commissioners, two are women.

These summaries of the legal and constitutional provisions for independent electoral commissions reveal significant diversity and some convergence. Mozambique's electoral commission is governed entirely by an Act of Parliament. The electoral commissions in Namibia, South Africa, and Lesotho rely on a combination of constitutional and parliamentary law, which as noted above, is the trend in SADC countries. In South Africa, Mozambique, Lesotho, and Botswana, there is a role for political parties in the process of choosing commissioners. The Presidents of South Africa and Namibia, and the King of Lesotho, are involved in the appointment process of all the Commissioners,

⁴⁹ Ibid.

⁵⁰ Electoral Commission Act No.51 of 1996. <http://www.info.gov.za/gazette/acts/1996/a51-96.htm> (Retrieved on November 9, 2004).

⁵¹ Ibid, section 3.

⁵² Ibid, sections 6(3)-6(5).

⁵³ Ibid, section 6.

⁵⁴ Ibid, section 7(1).

⁵⁵ Ibid, section 9. Chapter 1, which provides for the interpretation of the Electoral Commission Act, interprets "political office" to mean "any executive appointment or elected office, including any elected or nominated public representative of a party, whether involving remuneration or not, or any other paid office, in the service of a party" (Chapter 1, section (1)(1)(vii)).

⁵⁶ Ibid, section 12.

though only the Presidents of South Africa and Namibia exercise choice among candidates. The President of Mozambique participates only in the appointment of the President of the Commission. Some countries, such as South Africa and Mozambique, restrict the participation of political party office-holders and others from serving as commissioners. The degree of the commissions' control over the appointment of administrative staff also varies. The commissions of Namibia, Lesotho, and Botswana, for instance, do not appoint the chief executive officer whereas the South African commission does.

Zimbabwe's Electoral Commission Bill

Opening Parliament in July 2004, the President of Zimbabwe announced the government's intention to introduce legislation to create an independent electoral authority. The proposed Zimbabwe Electoral Commission (ZEC) Bill (H.B. 18, 2004) was therefore conceived prior to the adoption of the SADC electoral charter in August 2004, although it was only gazetted on September 10, 2004. It is fair to assume that the government hoped that the proposed new authority might assuage widespread concern among government opponents about both the partisanship of existing election institutions and their often unclear mandates ahead of the general election in March 2005. The challenge of creating an independent electoral commission at this time of deep polarization in Zimbabwe is indeed a formidable one. While the government should be credited for attempting to meet this challenge, in its present form, and all the more so given the current political environment in Zimbabwe, the ZEC Bill falls short of its objective to create an independent authority. Additionally, rather than helping to clarify the mandates of the different electoral institutions, the ZEC Bill adds another layer of confusion.

The ZEC Bill undercuts the independence and impartiality of the proposed Commission in numerous ways. The appointment procedure for Commissioners does not ensure a sufficient role for all political parties that are represented in Parliament. There are insufficient restrictions to eliminate high profile political party office-holders from becoming Commissioners. The Commission's work, its members, and its staff are subject to too much Ministerial intervention. The Commission's regulation of voter education, though in principle an acceptable goal, is unnecessarily severe and intrusive on non-governmental organizations. These issues, followed by the problem of mandate confusion among electoral institutions, are addressed next.

Independence and impartiality and the composition of the proposed Commission

The Bill provides for the President to appoint five Commissioners,⁵⁷ who serve five-year terms.⁵⁸ The President is empowered to appoint a Chairperson, subject only to consultation with the Judicial Service Commission (JSC). The Chairperson must be a person qualified to be appointed as a judge of the High Court or the Supreme Court.⁵⁹ The JSC is composed of the Chief Justice, the Chairman of the Public Service Commission, the Attorney General, and two presidential appointees.⁶⁰ The President also appoints the four other Commissioners from a list of seven nominees submitted by Parliament's Committee on Standing Rules and Orders. The standing committee has eleven ZANU PF and seven MDC members.⁶¹ Of the eleven ZANU PF members, eight are the nominees of the current *ex officio* committee Chair, Speaker of the House, Mr. Emmerson Mnangagwa, who has the right to vote on the Parliamentary Committee.⁶² The ruling party Committee members include the Vice-President, four Ministers, and three Deputy Ministers.⁶³ The President by himself may appoint a qualified person to fill a vacancy on the Commission.⁶⁴

Insufficient restrictions to eliminate partisan Commissioners

While the ZEC Bill seeks to protect the impartiality of the Commission from its members' potential financial conflicts of interest, it does not provide for adequate protection against members' potential conflicts of political interest.⁶⁵ The First Schedule of the ZEC Bill only makes members of Parliament ineligible to be appointed as Commissioners and also those who serve on two or more statutory bodies.⁶⁶ There is no provision in the Bill to exclude even high-ranking political party office-holders or government appointees such as provincial governors.

⁵⁷ ZEC Bill, clause 3(1) and (2).

⁵⁸ ZEC Bill, First Schedule, clause 1 (1).

⁵⁹ To qualify to be appointed as a judge, one must have been qualified as a legal practitioner for seven years, though one need not have been engaged in legal practice. See The Zimbabwe Electoral Commission Bill (HB 18, 2004). A Commentary prepared by the Zimbabwe Election Support Network. First revision: 21 October, 2004, p.9.

⁶⁰ *Ibid*, p.25 on the composition of the Judicial Service Commission.

⁶¹ *Ibid*, p.10.

⁶² *Ibid*, pp.25-26.

⁶³ *Ibid*, pp.25-26.

⁶⁴ ZEC Bill, First Schedule, paragraph 4.

⁶⁵ *Ibid*, clause 2(b).

⁶⁶ *Ibid*, First Schedule, paragraph 2(a) and (b).

Ministerial intervention

The impartiality and independence of the Commission is undermined by provisions for the intervention of the Minister of Justice, Legal and Parliamentary Affairs or any other Minister to whom the President may assign the administration of the proposed Bill.⁶⁷ Conferring such powers on the Minister is at odds with the goal to create an independent electoral authority and with the claim that, except for the Constitution, “the Commission shall not...be subject to the direction of any person or authority.”⁶⁸ The Commission is granted the power to make regulations to conduct its functions.⁶⁹ However, these regulations only take effect after they have been approved by the Minister.⁷⁰ The Minister also plays a major role in the suspension and dismissal of Commissioners. The Minister may suspend a Commissioner if the Minister has reasonable grounds to suspect the Commissioner of having been guilty of conduct that is deemed “unsuitable”,⁷¹ or if criminal proceedings have been instituted against a Commissioner for an offence which may result in a sentence of imprisonment without the option of a fine.⁷² Besides specifying that “unsuitable” conduct includes a contravention of the Commissioner’s duty to disclose certain connections and interests,⁷³ the Bill does not elaborate on what constitutes “unsuitable” conduct. Consequently, the Minister has considerable discretionary powers to suspend Commissioners. The same Minister appoints the three members of “the Independent Disciplinary Committee” to decide on whether to dismiss a Commissioner.⁷⁴ In many cases, the Commission shall not terminate the services of the Chief Elections Officer without the approval of the Minister.⁷⁵ The auditors that the Commission must appoint to examine its finances require Ministerial approval.⁷⁶ The Second Schedule, which provides for the ancillary powers of the Commission, has seven clauses in which the Commission’s power is contingent on the approval of the Minister.⁷⁷

⁶⁷ Ibid, clause 2.

⁶⁸ Ibid, clause 4(2). It is unclear what “Subject to the Constitution....” refers to. As noted in the following paragraph, the proposed Electoral Commission does not derive its power from the Constitution. The Electoral Supervisory Commission does, and hence its supervisory powers would prevail over the proposed Electoral Commission in the absence of constitutional changes.

⁶⁹ Ibid, clause 15(1).

⁷⁰ Ibid, clause 15(2).

⁷¹ Ibid, clause 5 (6)(a).

⁷² Ibid, clause 5(6)(b).

⁷³ Ibid, clause 5(5)(a) and First Schedule, paragraph 8.

⁷⁴ Ibid, clause 5(3).

⁷⁵ Ibid, clause 7(5).

⁷⁶ Ibid, Third Schedule, paragraph 4(1).

⁷⁷ Ibid, Second Schedule, paragraphs 4, 8, 10, 13,16, 18, 21.

Excessive Commission control over voter education

The Bill provides for the Commission to provide and control voter education. In principle, there is no reason why the Commission should not exercise these functions. However, as discussed below, the provisions for the Commission to control voter education are extreme and infringe on section 20 of the Constitution that guarantees freedom of information and section 21 that protects freedom of association. These controls also violate the SADC Principles and Guidelines Governing Democratic Elections, specifically of freedom of association, freedom of expression, and the full participation of citizens.

The Bill provides for voter education by the political parties, the Commission, and any “person” the Commission may appoint.⁷⁸ Any “person” who wishes to provide voter education must be a citizen or permanent resident of Zimbabwe domiciled in Zimbabwe, or an association registered as a private voluntary organization in terms of the Private Voluntary Organizations Act and one that also has a specific mandate to provide voter education. Moreover, such an association must be made up of citizens or permanent residents of Zimbabwe.⁷⁹ The Commission has significant control over these “persons”. It must ensure that they provide voter education and voter education materials that are adequate and not misleading or biased in favor of any political party.⁸⁰ Moreover, the Commission is empowered to require any “person”, other than a political party, providing or proposing to provide voter education, to furnish it with voter education materials; names, addresses, citizenship or residence status and individuals’ qualifications; and funding sources.⁸¹ Failure to comply with any of these provisions constitutes a criminal offence, liable to a fine or to imprisonment for at most two years or to both a fine and imprisonment.⁸² The Commission alone may receive foreign funds for voter education and may disburse the money to either those it appoints to assist with voter education, or others permitted to provide voter education, other than political parties.⁸³

The provisions on voter education privilege the Commission at the expense of existing non-governmental organizations, and thereby ensure that the Commission will have primary responsibility for voter education. Existing non-governmental organizations that provide voter education often rely on foreign funding because of the lack of domestic funding sources. These organizations, such as the Zimbabwe Electoral

⁷⁸ *Ibid*, especially clause 10(1)a, s.10(1)b, s.10 (3).

⁷⁹ *Ibid*, clause 11(1)(a), (b), (c).

⁸⁰ *Ibid*, clauses 10(b), s.11 (1)(f).

⁸¹ *Ibid*, clause 11(2).

⁸² *Ibid*, clause 11(3).

⁸³ *Ibid*, clause 12.

Support Network which is a coalition of NGOs to coordinate election-related activities and especially to promote democratic elections, will likely have to cease their work. A Commission whose members do not reflect the input of all the major political parties will be less likely to fund such politically independent organizations. Like the Non-Governmental Organizations Bill of 2004,⁸⁴ the voter education provisions in the ZEC Bill seem to deliberately seek to eliminate associations that are involved in promoting human rights and governance issues and to ensure governmental control. The ZEC Bill also unnecessarily prohibits the participation in voter education of foreigners and even of the estimated three million Zimbabweans domiciled outside the country.

Adding to confusion over mandates

The ZEC Bill provides for the functions of the new Electoral Commission. Inter alia, the commission must prepare for and conduct elections and referendums, direct and control the registration of voters by the responsible legal authority, compile voters' rolls and registers and ensure their proper custody and maintenance, conduct voter education, establish and operate polling centers, accredit observers of elections and referendums in accordance with an Act of Parliament, and instruct the Registrar-General in regard to the exercise of his or her functions in terms of the Electoral Act.⁸⁵ In the exercise of these functions, "[S]ubject to the Constitution, the Commission shall not...be subject to the direction of any person or authority."⁸⁶

The functions conferred on the proposed Commission add to the existing confusion about jurisdictional authority among the electoral institutions. There is confusion between the functions of the proposed Electoral Commission and the Electoral Supervisory Commission (ESC). The ESC's powers, which derive from the constitution, include responsibility for the supervision of the registration of voters and the conduct of elections of members of Parliament.⁸⁷ In the exercise of its functions, the ESC must not "be subject to the direction or control of any person or authority."⁸⁸ The new Electoral Commission, which has no direct constitutional authority, is also responsible for the conduct of all elections and referendums and for the registration of voters.⁸⁹ Another

⁸⁴ Non-Governmental Organisations Bill, H.B. 13, 2004. Distributed by Veritas Trust.

⁸⁵ ZEC Bill, clause 4(1).

⁸⁶ Ibid, clause 4(2). It is unclear what 'Subject to the Constitution' refers to. As noted in the following paragraph, the proposed Electoral Commission does not derive its power from the Constitution. The Electoral Supervisory Commission does, and hence its supervisory powers would prevail over the proposed Electoral Commission in the absence of constitutional changes.

⁸⁷ Constitution of Zimbabwe, section 61(3).

⁸⁸ Constitution of Zimbabwe, section 61.

⁸⁹ The Electoral Act (Chapter 2:01) provides for the Electoral Directorate to supervise the Registrar-General. Section 15(2) states that the Registrar-General "shall not be subject to the direction or control of any person or

source of confusion arises over which institution will accredit election observers and monitors. The ZEC Bill empowers the Electoral Commission to perform this task. The 2004 Electoral Bill gives the ESC rather than the Electoral Commission the function of accrediting observers.⁹⁰ If the objective is to make the new Electoral Commission the supervisory body, then the ESC should be scrapped or amended, and the powers of the former body should derive from the constitution.

Conclusion

The formal architecture of the proposed Electoral Commission, an institution with overarching functions and powers in elections, is a crucial ingredient in the holding of multiparty democratic elections. The law and the Constitution ought to provide for maximum independence and impartiality of the electoral authority and for a clear mandate. The proposed ZEC Bill, while a step in the right direction, contains too many incursions on the independence and impartiality of the proposed Commission and adds to the confusion among electoral institutions over their respective mandates. The independence and impartiality of the Commission are undermined by provisions for the appointment of Commissioners and for Ministerial intervention in the Commission's performance of its functions. There is also a need to provide more stringent restrictions to exclude, at minimum, high ranking political office-holders from being appointed as Commissioners. The introduction of the Electoral Commission should be an opportunity to clarify existing jurisdictional confusion among electoral bodies. It is unfortunate that the ZEC Bill misses such an opportunity.

Even a well-designed law providing for an Electoral Commission is only one important step toward creating an environment to build the confidence of voters in the legitimacy of the electoral process and its results. The proposed Commission will require, inter alia, adequate funds and staff, if it is to function effectively. Other electoral institutions, such as the Delimitation Commission, the Registrar-General's Office, the Electoral Supervisory Commission, and the Electoral Directorate must also be impartial and viewed as such by voters. The recently gazetted Electoral Bill provides for many of the day-to-day electoral processes. It, too, should adhere to and encourage democratic principles. Finally, voters must enjoy freedoms of assembly, association, movement, expression, and information.

authority other than the Electoral Directorate, but shall have regard to any report or recommendation of the Electoral Supervisory Commission." The Electoral Bill, which seeks to amend the Electoral Act, eliminates the supervisory role of the Electoral Directorate. Electoral Act as amended at September 1, 2003. Electoral As Am Sept2003.doc. Distributed by Veritas Trust.

⁹⁰ Electoral Bill, H.B. 19, 2004 (Chapter 2:13), clause 14. Distributed by Veritas Trust.