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**INDEPENDENCE AND EFFICIENCY OF ELECTORAL COMMISSIONS IN AFRICA  
A CASE STUDY OF SOUTH AFRICA AND ZIMBABWE**

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Independence of the Electoral Commissions in Africa: A case study of South Africa and Zimbabwe

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## DECLARATION

I, Feresi Chakanyuka., do hereby declare that this dissertation is the result of my own investigation and research , except to the extent indicated in the acknowledgement, references and by my comment included in the body of the report, and that it has not been submitted in part, full or any other degree at any other university.

.....

**STUDENT SIGNATURE**

...../...../.....

**DATE**

## DEDICATION

To my husband Dave, children Kandice, Kayden and Kyle

You are God given

Keep soaring high

## ACKNOWLEDGEMENTS

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## ABSTRACT

Elections are critical in a democratic society. International, regional and sub regional instruments recognise the importance of free and fair election. Two things are critical; (i) the rules of engagement; and (ii) election management bodies (EMBs). EMBs are the locus of the electoral process and they play a big role as instruments of governance. They are needed to ensure that political actors adhere to the rules of electoral contest and that the outcome of the election is free and fair. These bodies charged with overseeing the election process must be impartial and independent, transparent and accountable.

The Constitution of Zimbabwe provides for legal and operational independence of its electoral commission, ZEC Section 235 of the Constitution provides for the independence of ZEC. However there are provisions in the Electoral Act which undermines the independence of the commission. South African standards provide the best standard.

The legal research analyses the Zimbabwean legal framework on the independence of ZEC in comparison with the South African jurisprudence

## ACRONYMS

|       |  |
|-------|--|
| JSC   | Judicial Service Commission                          |
| ICCPR | International Covenant on Civil and Political Rights |
| UDHR  | Universal Declaration of Human Rights                |
| SADC  | Southern Africa Development Committee                |
| ZEC   | Zimbabwe Electoral Commission                        |
| IEC   | Independent Electoral Commission                     |
| ED    | Election Directorate                                 |
| ESC   | Electoral Supervisory Commission                     |
| ZDI   | Zimbabwe Democracy Institute                         |
| CIO   | Central Intelligence Organization                    |
| ZNA   | Zimbabwe National Army                               |
| EMB   | Election Management Body                             |
| NHRI  | National Human Rights Institute                      |
| ACHPR | African Charter on Human and Peoples' Right          |

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# CHAPTER 1

## INTRODUCTION

### 1.1 INTRODUCTION

Africa experienced a wave of democratisation in the late 1990s; aspiring candidates for political office had to submit themselves to regular free and fair democratic elections<sup>1</sup>. There is a distinct departure from the one party state system where incumbents continue to reign after coming to power. In the new era, political succession mediates through competitive elections generally held every five years and publicly funded and managed by an independent election body. The demand for an independent election commission has been a main demand of the opposition in emerging or newly restored democracies; it has been part of the demand free and fair elections, respect for political rights and democracy<sup>2</sup>.

A survey of the performance of the independent election bodies in Africa in the last decade has revealed serious cases of fraud, gerrymandering, abuse, and sometimes collusion of the incumbent and the independent election body to ensure a preferred electoral outcome.

If citizens and candidates believe the electoral process is defective or dishonest, they may not accept the outcome. Such distrust often leads to violence and political instability.<sup>3</sup> The African Union's Political Affairs Commission responsible for continental electoral processes has declared that elections have become the new site of potential conflict<sup>4</sup>. The independence of the election commission attracts the confidence of all stakeholders in the electoral process and creates integrity in the process. All stakeholders for instance political parties, observers and the public have to convince that the election management body is protected from political control and influence by the incumbent government, ruling party or other partisan influence, they will question its decisions and the legitimacy of the election results<sup>5</sup>.

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<sup>1</sup> S. Huntington has defined a wave of democratisation as a group of transitions from non-democratic to democratic regimes that occur within a specified period and that significantly outnumber transitions in the opposite direction during that period. See

<sup>2</sup>(n1 above) p10

<sup>3</sup>

<sup>4</sup><https://www.journals.co.za> assessed January 23 2020

<sup>5</sup> (n1 above) p12

The administration of elections globally has been characterised into three main models of unique characteristics as determined by the country's political and cultural circumstances. The three models include (1) governmental model (2) independent model (3) mixed model. Under the governmental model elections are organised and managed by the executive branch through a ministry and or through local authorities. Independent model, elections are organised and managed by an EMB which is institutionally independent of an autonomous from the executive arm of government. The mixed model involves a dual structure a policy or supervisory body which separate from the executive branch overseeing the implementing body within the government<sup>6</sup>. The independent model has become the prevailing model of electoral administration in the last three decades of global democratization.<sup>7</sup>

The International Institute for Democracy and Electoral Assistance (IDEA) identifies five essential criteria for ethical electoral administration these are respect for the law, non-partisan and neutrality, transparency, accuracy and service to voters<sup>8</sup>. The perception of neutrality is a critical factor in successful elections. Electoral authorities should not only be independent and impartial they should not allow any perception of dependence or impartiality to occur<sup>9</sup>. Independence is the attribute that underpins a national institution's legitimacy and credibility and contribute to the effective discharge of its duties. The independence and impartiality of any National Human Rights Institution (NHRI) have been cited as prerequisite for their effective operation. The United Nations has also maintained that NHRIs must operate in such a manner that their independence is beyond reproach.<sup>10</sup>

The term independence is synonymous with neutrality, non-partisanship and impartiality. An Independent body implies that the electoral authorities have legally and in practice a degree of institutional autonomy, and are free from undue interference by the executive branch of government, political parties, and interest

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<sup>6</sup> International IDEA, 2012

<sup>7</sup> **PRINCIPLES FOR INDEPENDENT AND SUSTAINABLE ELECTORAL MANAGEMENT** *International standards for electoral management bodies* Global comparative experiences *Empowered lives. Resilient nations.*

**United Nations Development Programme**

<sup>8</sup> Allan Wall et al 2006 Electoral Management Design, The International IDEA P71

<sup>9</sup> Jstor Australian Independent Commission p5

<sup>10</sup> See United Nations Centre for Human Rights(1957) p10

groups and individual candidates<sup>11</sup>. Most importantly independence is compatible with the following:

- (i) The EMB does not implement by itself every election related activity but may share with institutions, wholly or partly, the implementation of given activities e.g. material preparation, civic education or voting abroad.
- (ii) The EMB reports to or is accountable before parliament and the public via reporting on the conduct of elections.
- (iii) The EMB is not free from financial control and is subject to internal audit and external oversight and investigation by the national accounting.
- (iv) The EMB does not make electoral legislation although it may be endowed with legal initiative or just consultative responsibility on electoral matters. The EMB certainly should have full self-regulatory power in drafting and approving its functioning bylaws, secondary regulations and specific procedures for enforcing the electoral law and guaranteeing a proper conduct of elections<sup>12</sup>

Thus, this dissertation discusses the independence and efficiency of electoral commissions in Africa with particular reference to South Africa and Zimbabwe. The study will focus on independence and efficiency of the electoral commissions in a constitutional democracy. For purposes of this study, an election commission is a governmental electoral management body or electoral authority charged with overseeing the implementation of the election laws thus the entire election procedure.<sup>13</sup> The term election commission will be used interchangeably with election management body. The study seeks to answer the following main research question: to what extent does the legal framework in South Africa and Zimbabwe provide for the independence and efficiency of their election commissions? The research adopts a comparative approach between South African and Zimbabwean provisions. The justification for selecting South Africa is that it shares the same

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<sup>11</sup>White (2005) has made an attempt in this area by providing the criteria that can be used to determine the independence of chapter 9 institutions in the South African Constitution. Accordingly he defines the term independence as meaning "an independent body is one that is outside government whose members tenures are governed by appropriate appointment and removal provisions which ensures 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 to perform its functions and one that has control over its own functions

<sup>12</sup>Principles for Independent and sustainable Electoral Management, *international standards for electoral management*

<sup>13</sup> I Amundsen *Institutions of checks and balances The Election Commission of Angola* p9

colonial history with Zimbabwe. Further South Africa is one of the African countries with a progressive Constitution.

The study proceeds as follows chapter 1 introduces the study with a brief discussion on the background, research methodology, limitation of the study, significance of the study and chapter synopsis. Chapter 2 and 3 discusses the legal framework providing for the independence and efficiency of the election commissions in South Africa and Zimbabwe and institutional framework. Chapter 4 proffers a comparison of the two jurisdictions and chapter 5 concludes the study by proffering recommendations.

## 1.2 BACKGROUND OF THE STUDY

The National Human Rights Institutions are crucial in modern democracy. These agencies have gained constitutional status as the fourth branch as they provide an additional check on government thereby making their independence of paramount importance to ensure effective checks on all forms of government.<sup>14</sup> The independence of these institutions underpins their legitimacy, credibility and effective execution of their duties. The United Nations Commissions on Human Rights has adopted the Guiding Principles Relating to the Status of the National Institutions (Paris Principles)<sup>15</sup>. The election management bodies are amongst this National Human Rights Institutions (NHRI).

## 1.3 HISTORICAL BACKGROUND ON ELECTION MANAGEMENT

Historically partisan controlled executives ran elections. It was only under the increasingly effective scrutiny of opposition groups and parliamentary committees that ministries and local officials learnt how to conduct elections.

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<sup>14</sup>K.Dalta and R.L Revesz 'Deconstructing Independent Agencies and Executive Agencies (2013) Cornell Law Review, New York University School of Law p69

<sup>15</sup> National Human Rights Institutions are expected to follow the following guidelines; independence guaranteed by statute and the constitution; autonomy from the government, pluralism including in its membership, a broad mandate based on universal human rights standards, adequate powers of investigation and adequate resources.

The Second World War brought new electoral opportunities. Citizens did not have confidence in colonial powers or new provisional governments and this led to the creation of Independent electoral commissions (IEC). These IEC came to the forefront of electoral politics. By the time of the second wave of democratization, the IEC had become the institutional model prevailing in different regions of the world.<sup>16</sup>

In February 1980, Zimbabwe held its first elections. Voters on a common roll elected eighty members of the House of Assembly. Twenty seats reserved for voters on the voters roll. The intention was to use single member constituencies but due to lack of voter registries constituencies could not be delimited. Province based proportional system was used for the election.<sup>17</sup> There was a realisation that the electoral management system could be an effective tool of manipulating the will of the people, their right to choose a government of their own choice. Electoral bodies of emerging independent states has borrowed and incorporated such a manipulative system.

The Electoral Supervisory Commission (ESC) was a partisan body composed of presidential appointees, mandated to be an independent supervisory authority. Voter registration and inspection of the voters roll was the prerogative of the Registrar General's office. The Delimitation Commission delimited the boundaries. The Zimbabwe Electoral Commission (ZEC) came up as a Southern African Development Committee (SADC) initiative.

SADC held meetings on 7 to 14 August 2014 following the 2002 contested elections in Zimbabwe. It passed the SADC standards on elections governing SADC countries. The standards resulted in the introduction of an independent election commission amongst other key changes. Article 26 of the African Charter on Human and Peoples' Rights (ACHPR) provides for the creation of National Human Rights Institutions by governments in Africa. It provides that " state parties to the present charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of rights and freedoms guaranteed by the present charter".

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<sup>16</sup> Election Administration in the Arab world

<sup>17</sup> G.A Dzinesa, Zimbabwe's Constitutional Reform Process challenges and Prospects. Institute of Justice and peace 2012

### 1.3.1 INTERNATIONAL INSTRUMENTS

International agreements provide guidance and universal regulatory framework on elections. One of the most important instruments is the Universal Declaration of Human Rights (UDHR) of 1948. Although only a declaration and in principle, not binding it is generally recognized to have acquired the status of customary international law due to the fact that it has consistently been applied by states and has considerably influenced the development of international human rights law as well as numerous international legally established. Article 21 provides the basic premise for election rights. Article 25 of the 1966 International Covenant on Civil and Political Rights (ICCPR) reinforced article 21 of the UDHR. It states that 'Every citizen shall have the right and the opportunity without any of the distinctions mentioned in Article 2 and without unreasonable restrictions to take part in the conduct of public affairs, directly or through freely chosen representative. Every citizen shall enjoy the following rights and opportunities:

- a) To take part in the conduct of public affairs, directly or through freely chosen representatives
- b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
- (c) To have access, under general conditions of equality, to the public service of his country.

The African Charter on Human and People's Rights (ACHPR) is a regional instrument that provides for regional standards on elections in Africa. Article 13(1) of the ACHPR provides that 'every citizen shall have the right to participate freely in their government'.

Although none of these instruments expressly provide for an independent EMB, it can be said that the emphasis on periodic elections, universal suffrage, and equality of vote, secret ballot and the free will of the voter creates a mandate on states to provide a genuine electoral process. Thus having regard to the critical role that elections play in society, it calls for a body to manage elections. Goodwin notes that election management by an independent and impartial body is one of the key ingredients of free and fair elections in detail. In the literature on electoral system

management it is widely accepted that to ensure free and fair and credible elections, electoral management bodies should be independent both of the government of the day and of any political partisan connections.

The electoral bodies must be legally established and insulated to preserve its independence and impartiality. There must be a constitutional clause providing for such. According to Carl W. Dundas 'an electoral body however styled is responsible for more than staging of a poll on election day it is the custodian of the integrity and legitimacy of a key phase in the democratic process. It must therefore act with impartiality and a maximum of transparency consulting on a meaningful way with interested parties...'<sup>18</sup>

The African Charter on Democracy, Elections and Governance (2007) is the most relevant instrument insofar as EMBs are concerned. It states as follows "State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections.

To this end, State Parties shall:

1. *Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.*

It clearly calls upon African states to establish and strengthen independent and impartial national election bodies responsible for the management of election<sup>19</sup>. Sub-regional bodies such as SADC and the Economic Community of West African States (ECOWAS)<sup>20</sup> have developed similar framework. ECOWAS Protocol on Democracy and Good Governance in section 11 Article 3 states that 'The bodies responsible for organizing the elections shall be independent or neutral and shall have the confidence of all the political actors.'

SADC Principles and Guidelines Governing Democratic Election; the Principles for Election Management, Monitoring and Observation in the SADC Region agreed upon in November 2003 and the SADC Parliamentary Forum: Norms and Standards

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<sup>18</sup> Electoral Management Design- the IDEA handbook

<sup>19</sup> Article 17

<sup>20</sup> ECOWAS Protocol on Democracy and Good Governance of 2001 member countries commit themselves to independent or impartial electoral administration and timely electoral dispute resolution.



for elections in the SADC region strive to promote the independence of election commissions in the region. It is however the “Principles and Guidelines on the Independence of the Election Management bodies (EMBS) in the SADC Region,” adopted by the Electoral Commissions” Forum of SADC countries<sup>21</sup> that is the most developed. It contains detail rules which define the characteristics of an EMB, its powers and duties, its financial independence, its accountability and the strategy for implementing the principles and guidelines<sup>22</sup>. It provides that the Constitution and other legal policy frameworks governing EMBs shall clearly state its independence and institutional autonomy in the performance of its mandate.<sup>23</sup>

### 1.3.2 PILLARS OF INDEPENDENCE

#### 1. Appointment process

This is important in ensuring the independence of an election commission. The law must provide the mode of appointment and this must be entrenched in the Constitution<sup>24</sup>. The setting up of the bodies as constitutional creatures makes it more difficult to alter their status and other constitutionally defined elements. Constitutional provisions are more entrenched than mere laws.<sup>25</sup>

The appointment process must be lucid, transparent and inclusive in order to enhance operational independence. Where the government controls appointment process, it is difficult to sustain confidence in the impartiality of the process<sup>26</sup>. The composition must be broad based and gender balanced. This ensures that people with the right qualifications are appointed<sup>27</sup>. Article 1 (c) of the SADC Principles provides that the manner of appointment of members of EMB could either be self nomination or nomination by voters. The appointment process shall involve a

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<sup>21</sup> This is an independent organization in which each country of the SADC region is represented by its electoral management body. The forum has been in place since 1998 . its role is to ensure that elections in the SADC countries is improved and in building the capacity of election management bodies to fulfil their role.

<sup>22</sup> C.M Fombad, *Election Management Bodies IN Eastern and Southern Africa: some reflections on their legal framework* p8

<sup>23</sup> See article 1(b)

<sup>24</sup> Principles and Guidelines on the Independence of election Management Bodies In the SADC Region *adopted by the Annual General Conference August 2007, Luanda Angola*

<sup>25</sup> IDEA Electoral Management Design p46

<sup>26</sup> N Kelly ‘The Independence of Australian Commissions’ JSTOR p42

<sup>27</sup> Sawyer p103

committee representing key electoral stakeholders which shortlists and recommends nominees to an appointing authority.

## 2. Conditions of service

The law must provide for the condition of service for the commissioners. These include salaries, allowances, term of office. There shall be no arbitrary adverse change to the members of the commission's conditions of service.<sup>28</sup> The executive entirely should not decide on the conditions of service of the IEC, this undermines the independence of the commissions. Venter has proposed that the term of office for the election bodies must not coincide with the term of an elected government.<sup>29</sup>

## 3. Removal from office

Article 2(g) of the SADC Principles provides that members of the EMB shall be appointed for a minimum of four years and a maximum of seven years and renewable where possible. The commissioners should enjoy security of tenure. The length of a commissioner's tenure can adversely affect their independence and ability to act without fear or favour. If a commissioner lacks long-term security then his or her action could be in a real or perceived sense related.<sup>30</sup> The entail is that there must be stringent removal procedures. The reasons for such dismissal must be clearly established by law. The removal shall only be for good cause shown following proper investigations and due process of the law.<sup>31</sup> For example dismissal of a top official should be requested through a special procedure for example a majority of commissioners, depending on commission model, and then parliament and signed by the chief political executive who had appointed that official usually the head of state. This serves to insulate the commissioners from arbitrary removal from office

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<sup>28</sup> (n5 above) article(1)(j)

<sup>29</sup> D Venture *Elections and electoral systems in emerging democracies: A case for electoral system re design in Malawi* a paper presented in the constitutional review in Lilongwe 28-31 March 2006

<sup>30</sup> (n8 above ) p40

<sup>31</sup> (n5 above) article (1)(i)

and promotes independence. The tenure of members of the commission must be staggered to maintain retention of institutional memory.<sup>32</sup>

#### 4. Financial autonomy

Financial independence refers to the EMB budget, how it is allocated and by whom, and the degree to which EMBs have control over their own budgets<sup>33</sup>.

Election body must enjoy financial independence from the government. The rules governing the funding must establish an appropriate, secure, and transparent funding framework that enables the institution to execute its mandate effectively.<sup>34</sup>

The EMB must develop its own budget to be funded under the national budget through an independent allocation/vote. Such budget must be approved by the legislature<sup>35</sup>. Financial autonomy can affect the independence of the election body. The electoral authority should be well endowed with public funding for both ordinary and election operations. The following are notable good practices in regard to financing (1) ordinary and electoral budgets must be prepared by the EMB itself before forwarding them to finance authorities (ii) the budget for a specific election is normally prepared and submitted by the electoral body to the parliamentary standing committee directly or through the finance ministry (iii) ad hoc election budgets prepared and decided upon by the executive branch alone should be avoided as a potential risk to the independence of electoral bodies<sup>36</sup>.

In the case of *New National Party v Government of South Africa and others*, the court held that 'financial independence implies the ability of the commission to have access to funds reasonably required to enable the commission to discharge the function it is obliged to perform under the Constitution and the Election Commission Act.<sup>37</sup> Thus, the commission must have a budget separately allocated, approved by the legislature as a specific budget line in the state budget. It should be able to

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<sup>32</sup> (n5 above) article (1)h

<sup>33</sup> C. V Ham & H.A Garnet 'Building Impartial Electoral Management? Institutional design independence and electoral integrity' *international Political Science Review* p318

<sup>34</sup> (n5 above) article C(a)

<sup>35</sup> See Article C SADC Principles

<sup>36</sup> (n10 above)

<sup>37</sup> 1999 5 BCLR 489 (CC)

manage its budget independently from the day-to-day executive interference or control.<sup>38</sup>

In budgetary matters it should not become subservient or under the control of the executive which is providing it with the funds and which could make pliability a prerequisite for adequate funding. Consideration of allocation of budgets and control of expenditures are key indicators of financial independence. Financial independence will provide EMBs with more autonomy in choosing priorities in allocating funds and will allow them freedom to operate with concern of being 'starved' by a displeased government. In addition EMB control over their internal organization and staff policy will prevent government from 'stacking' the EMB with partisan loyal supporters.

In light of the above two jurisdictions South Africa and Zimbabwe have been identified to interrogate their legal framework governing the independence of their Election Management Bodies.

#### 1.4 STATEMENT OF THE PROBLEM

The Zimbabwe election management body ZEC is not institutionally independent. This rather becomes questionable in light of international, regional and sub regional instruments calling for independent election bodies to manage elections. International, regional and sub-regional instruments acknowledge the foundational importance of free<sup>39</sup> and fair elections in any democratic society. The importance of elections calls for the need to establish an independent body to manage elections. Goodwin Gill observed that 'experience and recent state practice confirms the necessity for oversight of the electoral process by an independent body'<sup>40</sup> The Paris Principles provide international best practice for independent human rights institutions of which an electoral management body falls within this category. These international best practices provides for the qualification for appointment to the commissions, appointment and removal procedures, tenure for members and other institutional provisions providing for independence of the commissions. Zimbabwe

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<sup>38</sup> I. Amundsen *Institutions of checks and balances The Election Commission of Angola* p9

<sup>39</sup> I Amundsen *The Election Commission of Angola institutions of checks and balances* p9

<sup>40</sup> G.S Goodwin-Gill *Free and Fair elections: international law and practice* (1994) Geneva: Inter- Parliamentary Union 42

and South Africa have established electoral commissions to manage elections in accordance with the UDHR, ICCPR and AU Declaration of 2002. The Constitution of Zimbabwe provides for institutional and operational independence of the Independent Commission supporting democracy in section 235. However, the Zimbabwe Electoral Commission is not institutionally independent as envisaged in section 235 of the Constitution; there are some constitutional and legislative provisions, which do not meet the standards for independence of an election body. The commission cannot function in a non-partisan manner as it is constrained by the legislative environment in which it is required to operate. The President yields enormous powers in the appointment and removal of the commissioners. South Africa on the other hand is one of the countries with the safest safeguards on the independence of its election management body. Thus, this dissertation discusses the South African and Zimbabwean legal framework on the independence of their election management bodies with a view to examine the extent to which they promote the independence of their election commissions.

## 1.5 RESEARCH METHODOLOGY

### 1.5.1 Comparative legal research

The research will employ different complimentary methodologies. The dissertation primarily centres on desk research, which entails examination of statutes, international instruments, and journal articles on the subject matter. The research adopted a comparative approach. This involves a comparison of the South African and Zimbabwean legal framework governing their election commissions. The two countries have been singled out since they share the same colonial history. Further both countries are in the SADC region. From a comparative analysis, there is extraction of recommendations based on best practices, standards with regard to an effective independent election body. Comparative research is helpful in developing, amending and modifying the law.

## 1.6 SIGNIFICANCE OF THE STUDY

The dissertation contributes to the discussion on the basic legal principles on the independence of electoral commission thus; it generates knowledge on the subject matter. The information will benefit scholars, academics, legislators, politicians and other people appointed to design mechanism for the independence of election commissions. The gaps exposed in the study will stimulate the necessary reforms based on international best practices.

## 1.7 LIMITATION OF THE STUDY

The study relates to the independence of election commissions in South Africa and Zimbabwe to the exclusion of other African countries. The justification for the selection of these two countries is that they share the same colonial history. Further, South Africa seems to have progressive safeguards on the independence of its electoral body.

Further, the study relates to the independence of the election commission. It does not cover the aspect of integrity, transparency, accountability, professionalism, service minded, equality of access and sustainability.<sup>41</sup>

## 1.8 RESEARCH QUESTIONS

The study will seek to answer the following questions:

Main research question: to what extend does the South African and Zimbabwean legislative provisions provide for the independence of their Electoral Management Bodies?

Sub Research Questions:

- (i) To what extent does the International, regional and sub- regional instruments provide for the independence of Electoral Management Bodies?
- (ii) To what extent does the South African legal framework provides for the independence of its Election Management Body?

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<sup>41</sup> These form the basis of election management principles see preamble to the Principles and Guidelines on the Independence of Election Management Bodies in the SADC

- (iii) To what extent does the Zimbabwean legal framework provides for the independence of its Election Management Body?
- (iv) What lessons can Zimbabwe learn from South African jurisprudence on the independence of Electoral Management bodies?

## 1.9 CHAPTER SYNOPSIS

### Chapter 1

This chapter introduces the study. It provides background information, problem statement, limitations of the research, significance of the study, methodology and research questions

### Chapter 2

This chapter discusses the constitutional and legislative framework on the independence of South African election commission

### Chapter 3

It discusses the constitutional and legislative framework on the independence of Zimbabwean election commission

### Chapter 4

This chapter provides an analysis of the South African and Zimbabwean legal framework on the independence of their election commissions.

### Chapter 5

This chapter provides recommendations and concludes the study.

## CHAPTER 2

### THE CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK OF THE ELECTION MANAGEMENT BODY IN SOUTH AFRICA

#### 2.1 INTRODUCTION

The Independent Electoral Commission of South Africa (IEC) is a permanent body established in terms of chapter 9f the Constitution of the Republic of South Africa. The IEC established in 1993 is one of the state institutions supporting constitutional democracy<sup>42</sup>. It is important to note that South African constitution acclaimed by the world as truly revolutionary for 19 years the country struggled to entrench a culture of constitutional democracy.<sup>43</sup> Unlike the United Kingdom South Africa is not a parliamentary democracy, parliament is not sovereign. South Africa is a constitutional democracy with some of the most extensive legal protections on minority rights in the world. A written constitution limits the powers of the executive and parliament.<sup>44</sup>

This chapter examines the historical development of the IEC in South Africa. It explores the constitutional, legislative framework and the judicial decisions that expounded on the independence of the IEC. The chapter seeks to answer the research question to what extent does the South African legal framework guarantee the independence of the IEC. The chapter precedes as follows firstly a brief discussion on the historical background on election management in South Africa. Then an over view of international, regional and sub-regional instruments that speaks on the independence of election management bodies, which South Africa has ratified. An analysis of the constitutional, legislative framework and judicial decisions that expounded on the independence of the IEC follows. Then finally the conclusion.

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<sup>42</sup> Chapter 9 entitled State Institutions Supporting Democracy refers to seven institutions: the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of cultural, religious, Linguistics Communities, the Commission for gender equality, the Auditor General, the independent Authority to regulate Broadcasting

<sup>43</sup> [www.hsrc.ac.za/en/review/hsrc-review-november-2013/consti-democ](http://www.hsrc.ac.za/en/review/hsrc-review-november-2013/consti-democ) assessed February 4 2020

<sup>44</sup> <https://www.cfr.org/blog/constitutional-or-parliamentary-democracy-south-africa>. Assessed February 4 2020



## 2.2 HISTORICAL BACKGROUND

Prior to the 1994 elections the responsibility for elections vested in the Department of Home Affairs. The Department derived its mandate from the Electoral Act no 45 of 1979. The Electoral Act no 45 of 1979 governed the electoral processes in South Africa. During the period 1990-1994, there were negotiations between political actors aimed at creating democratic space. Some political forces challenged the Home Affairs role as potentially biased. Three factors led to the creation of the IEC (i) institutional capacity of the Department of Home Affairs to manage elections (ii) legitimacy of the elections administered by the Department (iii) existing political conditions<sup>45</sup>the negotiations led to the creation of the Interim Electoral Commission in 1993.

During the Convention for a Democratic South Africa (Codesa) delegates decided to follow a well established international model, setting up an organization, separate from government to oversee the electoral process. In creating this organization they needed to solve the dilemma of how to establish a body that would be impartial, both in actual fact and in the perception of the public, in society where stakeholders had yet built trust among themselves and among citizens. The creation of the IEC of the IEC was a gamble because had there been any suspicion that the IEC was partisan, the legitimacy of the election could have been called into question, and the transition process stalled or set back<sup>46</sup> The mandate of the IEC included administrative, monitoring and adjudicative responsibility. The Interim Electoral Commission had little time to organize the election it used its prerogative to request the secondment of skilled personnel from the public service including the Department of Home Affairs<sup>47</sup>.

In 1996, a new permanent Electoral Commission was established under the Constitution and was able to build a permanent work force and capacity. South Africa embraced three interrelated statutes that jointly created the structures to administer elections: the Constitution of the Republic of South Africa (Act no. 20 of 1993), the Electoral Act (Act no. 202 of 1993), and the Independent Electoral

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<sup>45</sup>Padmanabhan

<sup>46</sup>C. Kbemba "Electoral Administration ; Achievements and Continuing Challenges

<sup>47</sup>EISA website, South Africa: Evolution of election management

Commission Act (Act no. 150 of 1993). Of these three, the Constitution lays down the general principles and guidelines with which the electoral system and electoral process must correlate with. The specific regulations governing the actual management and administration of elections are enshrined in the Electoral Act, while the third act establishes the body that manages the elections, the IEC.

## 2.3 CONSTITUTIONAL FRAMEWORK

The Constitution of South Africa establishes the IEC. Chapter 9 of the Constitution provides the IEC as one of the state institutions that strengthen constitutional democracy<sup>48</sup>. Suffice to note that the Constitution of the Republic of South Africa provides governing principles in relation to these state institutions. It provides that these institutions are independent and subject to the Constitution and the law<sup>49</sup>. They must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice<sup>50</sup>. Other organs of the state through legislative and other measures are to assist and protect these state institutions to ensure the independence, impartiality, dignity and effectiveness of the state institutions<sup>51</sup>. It emphasize further that no person or organ may interfere with the functioning of these institutions.<sup>52</sup>

The mandate of the IEC is to manage elections at all levels of government, to ensure that elections are free and fair, to declare the results in a short time as possible

The Electoral Commission Act and the Electoral Act provides the legal foundation. In terms of section, 190 of the Constitution of the Republic of South Africa the Electoral commission must:

(a) Manage elections of national, provincial and municipal legislative bodies in accordance with national legislation

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<sup>48</sup> s181 of the Constitution

<sup>49</sup> s181(2) of the Constitution

<sup>50</sup> s181(2) of the Constitution

<sup>51</sup> s181(3) of the Constitution

<sup>52</sup> s181(4) of the Constitution

(b) Ensure that those elections are free and fair

(c) Declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible

## 2.4 LEGISLATIVE FRAMEWORK

The Electoral Act gives detailed shape to the institution and delineates its powers and functions. Section 5 of the Electoral Commission Act defines the duties and functions of the electoral commission. These are to:

- a) manage any election
- b) ensure that any election is free and fair
- c) promote conditions conducive to free and fair elections
- d) promote knowledge sound and democratic electoral processes
- e) compile and maintain a voters roll by means of a system of registering eligible voters by utilising data available from government sources and information furnished by voters
- f) compile and maintain a register of parties
- g) establish and maintain liaison and cooperation with parties
- h) undertake and promote research into electoral matters
- i) develop and promote the development of electoral expertise and technology in all spheres of government
- j) continuously review electoral legislation and make recommendations in connection therewith;
- k) promote voter education;
- l) promote cooperation with and between persons institutions, government and administrations for the achievement of its objects;
- m) declare results of elections for national, provincial and municipal legislative bodies within seven days after such elections;
- n) adjudicate disputes that may arise from the organisation, administration or conducting of elections and which are of an administrative nature; and
- o) Appoint appropriate public administrations in any sphere of government to conduct elections when necessary.

## 2.5 PILLARS OF INDEPENDENCE

### 2.5.1 APPOINTMENT OF COMMISSIONERS

The President appoints members of the Commission. The IEC comprises of 5 members. The Commissioners are recommended to a committee of the National Assembly by a panel that consists of the President of the Constitutional court, a representative of the Commission on Gender Equality, South African Human Rights Commission and the Public Protector. The panel is chaired by the chief justice of the Constitutional Court. The panel must forward a list of at least eight persons to the committee which is composed of the proportional number of members of the political parties in the National Assembly.<sup>53</sup> The committee nominates the persons for approval by the National Assembly. Persons who hold high political positions are barred from appointment.<sup>54</sup>

The process is a public one which culminates in the appointment by the President. The mode of appointment is transparent, inclusive and stringent and it prevents political appointments due to the number of actors involved. The appointment ensures the independence of the IEC since the panel is composed of independent actors.<sup>55</sup> Section 6(2) (b) of the Electoral Commission Act bars persons who hold political positions from being appointed as commissioners. Further commissioners are not allowed to take up other positions outside the IEC. This ensures the impartiality of the commissioners hence the independence of the IEC.

While the Constitution provides for some guidance as to the selection criteria for chapter 9 institutions, it lacks in other features of an efficient appointment process. For instance, the recommendation and appointment by the President of commissioners to important institutions such as the ZEC or Public Protector occurs with no mandatory public vetting process or public involvement. Section 193(6) of the Constitution provides for the involvement of civil society in the recommendation process at the discretion of parliament. This situation has the potential to limit the

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<sup>53</sup> See s6(2) of the Electoral Commission Act

<sup>54</sup> Section 6(2)(b) of the Electoral Commission Act

<sup>55</sup> C.Kabemba 'Election administration: Achievements and continuing challenges in J Piombo & L Nijizink (eds) electoral politics in South Africa: Assessing in the first democratic decade(2005) 89

awareness among the public of the important processes involving the supportive pillars of the democracy, as well as the opportunity for the public to voice concerns over the suitability of particular candidates. Having such a mandatory selection process would therefore enhance transparency and the overall credibility of the body.

## 2.5.2 REMOVAL OF COMMISSIONERS

The President upon the recommendation of the Electoral court can only remove the commissioners with the endorsement of a majority of the members of the National Assembly. A commissioner may be removed only be removed from office on (a) the ground of misconduct, incapacity or incompetence (b) a finding to that effect by a committee of the National Assembly and (c) the adoption by the Assembly of a resolution calling for that person's removal from office<sup>56</sup>. A resolution of the National Assembly concerning the removal from office of a member of a commission must be adopted with a supporting vote of a majority of the members of the Assembly<sup>57</sup>. The President may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person and must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.<sup>58</sup>

In terms of section 194(2), removal of the Auditor-General and the Public Protector require a two thirds majority. This heightened requirement is as a result of an amendment to the final Constitution in response to the failure of the initial draft to secure approval by the Constitutional Court in the *First Certification judgment*. The Court's reasoning with respect to the Public Protector was that '[t]he office inherently entails investigation of sensitive and politically embarrassing affairs of government.

The difficulty with this reasoning is that there does not appear to be any reason why it should not apply equally to any other chapter 9 institution equipped with investigative powers. The SAHRC and the Gender Commission are obliged to

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<sup>56</sup> s194(1) of the South African Constitution

<sup>57</sup> s194(2)

<sup>58</sup> s194(3)

investigate failures of the state in fulfilling its obligations with respect to fundamental rights. In many instances, the findings of such bodies would lead to the embarrassment of state institutions as well. The Constitution in effect creates a hierarchy of independence within the set of chapter 9 institutions. The hierarchy is, however, based on the assumption that some institutions are more worthy of independence due to the potential for their findings to cause the state embarrassment. This assumption should apply to members of the IEC.

The removal procedure of commissioners is however stringent, transparent and inclusive. This secures the commissioners' position which in turn enhances the independence of the IEC.

### 2.5.3 SECURITY OF TENURE

The commissioners serve for seven years and for only two terms unless he or she resigns at an earlier date, he or she is removed from office in terms of the grounds stated in section 7 (3) of the Electoral Commission Act or the President on the recommendation of the National Assembly extends the member's term of office for a specified period of time. Suffice to note that South Africa has adopted the maximum period of appointment as provided for in article 2(g) of the SADC Principles.

### 2.5.4 FINANCIAL INDEPENDENCE

An important aspect of independence of the institution is that it must be endowed with the necessary financial resources to enable it to fulfil its mandate. Funds should not be used as a lever through which to control these institutions. Justice Langa DP in the case of New National Party emphasized this. He highlighted that in dealing with the independence of the commission it is necessary to make a distinction between two factors (1) financial independence- this implies ability to have access to funds reasonably required to make the commission discharge the function it is obliged to perform under the constitution and the Electoral Commission Act. This does not mean it can set up its budget. Parliament does that. What it means is that parliament must consider what is reasonably required by the commission and deal with the request for funding rationally. It is for parliament and not the executive arm

of government to provide for funding reasonably sufficient to enable the commission to carry out its mandate. The commission must be afforded an opportunity to defend its budget requirements before parliament or its relevant committee

The IEC's budget is approved by Parliament and it releases funds to it<sup>59</sup>. It must submit an audited statement of income and expenditure annually. The chief Electoral officer is the accounting officer of the IEC and is the accounting and the auditor General audits financial record keeping and these accounts. <sup>60</sup>The chief elections officer has a duty to report to Parliament and to give that report as well as accounting related to the fund. The legislation also allows it to receive money from other sources, such as foreign donors.

#### 2.5.5 JUDICIAL DECISIONS

In the case of New National Party of South Africa (NNP), v Government of the Republic of South Africa and others<sup>61</sup> the independence of the IEC was discussed. The NNP contended that the government had infringed on the independence of the Commission as guaranteed in the Constitution in two respects. First, government's refusal to accept the advice of the Electoral Commission that bar-coded identity documents should not be the only identification document acceptable for the purposes of registration and voting, and secondly, in providing inadequate funding for the Commission. The NNP claimed that this conduct was unconstitutional as it resulted in the Commission not being able to exercise its powers and functions. In a majority judgment written by Justice Langa D.P, the Court held that the provisions requiring bar-coded identity documents for registration and voting, contrary to the recommendation of the Electoral Commission, did not infringe the independence or impartiality of the Commission. Parliament and not the Commission made the electoral law, and there was nothing in the Electoral Act, which detracted from the independence of the Commission.

The NNP also contended that because of inadequate funding, the Commission had been required to use public servants and not its own employees in conducting the

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<sup>59</sup> Section 13 Electoral Commission

<sup>60</sup> Electoral Commission Act 51, 1996 12(2)(b), 13

<sup>61</sup> CCT 9/99

registration of voters and this had detracted from its independence. The Court held that it was clear from the evidence of the former chairman of the Commission that this arrangement had been agreed to by the Commission, and that it would not infringe its independence as long as it was able to direct the registration drives and exercise control over the public servants seconded to it for that purpose. There was no evidence to suggest that this had not happened.

In the New Party case, the constitutional court stated that chapter 9 institutions require that they be able to carry out their activities without fear, favour or prejudice. The result of that freedom is the control over matters that directly relate to functions that are specified in the constitution. The court went on to state that any engagement with the executive or parliament with the chapter 9 institutions must be done in such manner as not to interfere with the operation of the institutions or the fulfilment of their constitutional obligation.<sup>62</sup>

In the case of Langerberg Municipality the constitutional court affirmed the basic principle that chapter 9 institutions must have some degree of independence. The court states that parliament has an obligation to provide 'reasonable sufficient' funding to enable the chapter 9 institutions to perform their constitutional mandate. The court however conceded that it would be difficult to determine what constitute reasonably sufficient funding. The court held that all parties should reach an agreement regarding the level of funding by negotiating in good faith.

In dealing with the inadequate funding of the Commission, the Court noted that there was competition for resources and those institutions are unlikely to obtain the full budget that they request. In dealing with the administrative independence of the Commission, the Court found that it is for Parliament, and not the executive arm of government to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must accordingly be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees. Justice Langa D.P, found that the Department of Home Affairs, the Department of State Expenditure and the Minister of Finance have failed to appreciate the true import of the requirement of the Constitution. The Constitution provides that the Commission be independent and subject only to the Constitution

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<sup>62</sup> New Party case para 74 and 162



and the law, that it has the responsibility for managing elections. Further it is accountable to the National Assembly and not to the executive, and that all other organs of the state must assist and protect it to ensure its independence.

Despite this finding the Court concluded that the evidence showed that the Commission had at all times asserted its independence, and that the actions of the Department of Home Affairs and other organs of government, though inconsistent with their obligations under the Constitution, had in fact not resulted in the independence of the Commission being impaired. The appeal was dismissed.

The IEC has arguably been a success. There has been no allegation of election fraud. It has presided over five elections which have been proclaimed free and fair<sup>63</sup>

#### 2.5.6 CONCLUSION

Given South Africa's political past, it seemed imperative at the time of transition in the early 1990s to establish an independent EMB. The political purpose was to start building a tradition of independence and impartiality, in order to engender confidence of the electorate and political parties in the electoral process. In this regard, the Constitution and ensuing legislation on electoral administration provided for measures to safeguard and insulate the Electoral Commission of South Africa from pressures that might impair its impartiality. Chapter 9 of the Constitution states that the Electoral Commission is one of the state institutions created to strengthen constitutional democracy. It is independent and subject only to the Constitution and the law, and it must be impartial. An obligation is placed on other organs of state to assist and protect the Electoral Commission through legislative and other appropriate measures to ensure its impartiality and independence. It is further stated that no person or organ of state may interfere with the functioning of the Commission. The Electoral Commission Act includes specific rules regarding the composition of the Commission, appointment of commissioners and their conduct, as well as powers, duties and functions of the institution.

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<sup>63</sup>See Election Reports published by the IEC for national and provincial elections available at <http://www.elections.org.za/content/Elections/Election-reports/>

It can be concluded that the appointment and removal processes are both transparent and stringent and it prevents political appointment due to the number of political actors involved. The President upon the recommendation of the Electoral court can only remove the commissioners with the endorsement of a majority of the members of the National Assembly. A commissioner may be removed from office based on the grounds stipulated in the Constitution. However stiffer measures as those required for the removal of the Public Protector and Auditor General which requires two thirds majority of members of the National Assembly can also be adopted. The IEC enjoy security of tenure and their conditions of service are set out by parliament. The South African legal framework is quite comprehensive on the independence of its Election Management body.

## CHAPTER 3

### THE LEGAL FRAMEWORK ON THE INDEPENDENCE OF THE ZIMBABWE ELECTORAL COMMISSION

#### 3.1 INTRODUCTION

The preceding chapter discussed the constitutional and legislative provisions governing the independence of the South African Electoral Commission. It came out that the appointment and removal processes are transparent and stringent, it prevents political appointments due to the number of political actors involved. Parliament plays a pivotal role in the removal of a commissioner. The President can only remove a commissioner from office upon the recommendation of the Electoral court with the endorsement of a majority of the members of the National Assembly. The grounds for removal from office for a commissioner are lucidly laid down in the Constitution. Further Parliament approves the IEC's budget and releases funds to it. Judicial decisions have also supported this notion that it is for Parliament and not the executive arm of government to provide for funding reasonably sufficient to enable the commission to carry out its constitutional mandate.

This chapter focuses on Zimbabwe's election management body. Suffice to note that Zimbabwe is a constitutional democracy and its founding values amongst other include supremacy of the Constitution.<sup>64</sup> Its electoral system is based on universal adult suffrage and equality of votes, free, fair and regular elections. The Zimbabwe Electoral Commission (ZEC) is the body that is tasked to manage elections in Zimbabwe. It is amongst the independent commissions supporting democracy.<sup>65</sup> It is constitutionally mandated to entrench human rights and democracy, to protect the sovereignty and interests of the people and to promote constitutionalism amongst others.<sup>66</sup> This chapter examines the legal framework governing the independence of ZEC. It seeks to answer the research question to what extent does the constitutional and legislative framework of Zimbabwe provide for the independence of ZEC. The chapter is structured as follows Firstly a brief historical background on election

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<sup>64</sup>See section 2 of the Constitution of Zimbabwe Amendment No 20

<sup>65</sup>The other commissions include the Zimbabwe Human Rights Commission, the Zimbabwe Gender Commission, the Zimbabwe Media Commission and the National Peace and Reconciliation Commission see chapter 12 of the Constitution of Zimbabwe

<sup>66</sup>See section 233 of the Constitution

management in Zimbabwe then the legal framework. The pillars of independence will be expounded in light of the legislative framework as well as judicial decisions litigated in line with the independence of the election management body then the conclusion. Doctrinal and qualitative methodology will be used.

### 3.2 HISTORICAL BACKGROUND ON ELECTION MANAGEMENT IN ZIMBABWE

Election management in Zimbabwe evolved from a governmental model during the period 1980 to 2004 shifting to the mixed model between 2005 and 2013. Following the adoption of the new Constitution in 2013 Zimbabwe transitioned to an exclusively independent model.

In 1980, Zimbabwe utilised a governmental model in the administration of its elections. A mixed model came into being from 1985 to 2004 when the Electoral Supervisory Commission (ESC) came into being.<sup>67</sup> A common voter's roll was developed through the office of the Registrar General (RG) in the Ministry of Home Affairs. There were four offices involved in the electoral process in the country, the Delimitation Commission (DC), this was created by the constitution and the President from time to time appointed its members with its chairperson being the chief justice or another judge. The office of the RG of elections, this was created in terms of section 15 of the Electoral Act. It formed part of the public service. Its function was registration of voters, inspection of the voter's roll, presiding over nomination courts, polling and announcement of election results. The Election Directorate (ED) was created in terms of section 4 of the Electoral Act. The President appointed its members. It consisted of a chairperson who was appointed by the President based on his her experience in administration. The RG and two to ten other members were part of the ED. The ED was responsible for coordinating activities of ministries and departments of governments with regard to the delimitation of constituencies, the registration of voters, the conduct of elections and all the matters connected with elections. It mobilised and coordinated election

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<sup>67</sup> P. Makoni *The Impact of the composition and staffing of the Zimbabwe Electoral Commission on its performance* p21

logistics relating to work force, finance, transport, and equipment. The ESC was established in section 61 of the constitution of Zimbabwe. It consisted of a chairperson and two commissioners appointed by the President after consultation with the judicial service commission. Two other commissioners were appointed by the President in consultation with the speaker of parliament.

In 2004, the electoral management system was restructured. The restructuring was based on the recommendations by the ESC, political parties and civic society organizations<sup>68</sup>. The reform took account of the Principles and Guidelines Governing Democratic Elections adopted by Southern African Development Committee (SADC) in Mauritius. This led to the creation of ZEC in line with the recommendation in SADC Principles and Guidelines Governing Democratic Elections, that elections should be run by an independent management body and not government department like that of the RG. The office of the RG of elections was abolished. The ESC was abolished in 2005 by constitutional amendment no 17. The RG was no longer responsible for running elections. The RG of elections was re assigned to RG of voters. Its function was to register voters under the supervision of ZEC.<sup>69</sup>

### 3.3 CONSTITUTIONAL FRAMEWORK

#### 3.3.1 NSTITUTIONAL INDEPENDENCE

Section 235 of the Constitution provides for the independence of Commissions. It provides that these commissions are independent and are not subject to the control of anyone<sup>70</sup>. They must exercise their function without fear, favour or prejudice although they are accountable to parliament to the efficient performance of their functions.<sup>71</sup> The state and all institutions and agencies of government at every level through legislative and other measures must assist the independent commissions

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<sup>68</sup><https://www.zec.org.zw/pages/history> assessed 7 April 2020

<sup>69</sup> (n2 above)

<sup>70</sup> s235(1)(a) of the Constitution

<sup>71</sup> s235(1)(c) of the Constitution

and must protect their independence, impartiality, integrity and effectiveness.<sup>72</sup> No person may interfere with the functioning of the independent commissions.<sup>73</sup>

Section 239 of the Constitution provides for the functions of ZEC. Its functions are as follows

- (a) To prepare for, conduct and supervise--
  - (i) Elections to the office of President and to Parliament;
  - (ii) Elections to provincial and metropolitan councils and the governing bodies of local authorities;
  - (iii) Elections of members of the National Council of Chiefs established by section 285; and Referendums;
  - (iv) and to ensure that those elections and referendums are conducted efficiently, freely, fairly, transparently and in accordance with the law;
- (b) To supervise elections of the President of the Senate and the Speaker and to ensure that those elections are conducted efficiently and in accordance with the law;
- (c) To register voters;
- (d) To compile voters' rolls and registers;
- (e) To ensure the proper custody and maintenance of voters' rolls and registers;
- (f) To delimit constituencies, wards and other electoral boundaries;
- (g) To design, print and distribute ballot papers, approve the form of and procure ballot boxes, and establish and operate polling centres;
- (h) To conduct and supervise voter education;
- (i) To accredit observers of elections and referendums;
- (j) to give instructions to persons in the employment of the state or local authority for the purpose of ensuring the efficient free, fair, proper, transparent conduct of any election or referendum and
- (k) To receive and consider complaints from the public and to take such action in regard to the complaints as it considers appropriate

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<sup>72</sup> s235(1)(2) of the Constitution

<sup>73</sup> s235(1)(3) of the Constitution

### 3.4 LEGISLATIVE FRAMEWORK

The Electoral Act provides for the independence of the commission. The Act provides that every Commissioner and member of staff of the commission shall perform their functions independently.<sup>74</sup> It further states that the state and any private persons (private voluntary organization) and any other person, body, organ, agency or institution belonging to or employed by the state or any private person or local authority or otherwise shall not hinder or obstruct the commission, its commissioners or any member of staff of the commission in the exercise or performance of their functions<sup>75</sup>. These agencies are to offer assistance to the commission for the protection of its independence, impartiality and dignity<sup>76</sup>. Thus, it can be noted that the aspect of independence of the commission is a crucial aspect. In the exercise of their duties the commissioners or employees must not do anything whether in the exercise of their function whether by way of action, speech, attitude or manner give rise to a reasonable apprehension that they are exercising their functions with impartiality or bias. Further, they may not place in jeopardy their independence or the perception of their independence or compromise the commission's credibility, impartiality, independence or integrity.<sup>77</sup>

### 3.5 PILLARS OF INDEPENDENCE

#### 3.5.1 PERSONAL INDEPENDENCE

#### 3.5.2 APPOINTMENT OF COMMISSIONERS

The method of appointment 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. Appointment of commissioners in Zimbabwe is similar to other jurisdictions like Zambia and Nigeria wherein Parliament is centrally involved in inviting invitations for applications, interviewing of candidates, short listing recommended candidates for subsequent appointment by the President. While involvement of Parliament has been hailed there remains disquiet over the continued involvement of the President

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<sup>74</sup> s10A(1) of the Electoral Act

<sup>75</sup> s10A(2) of the Electoral Act

<sup>76</sup> s10A(3) of the Electoral Act

<sup>77</sup> S11(2) (d)(1)(11)(111) of the Electoral Act

in selecting the final list of candidates.<sup>78</sup> In the realm of deep political polarization in Zimbabwe involvement of the President in influencing the ultimate list of the commissioners continues to cause erosion of the perception around the independence of ZEC.

Section 237 of the Constitution provides that, for appointing members of the commission the Committee on Standing Rules and Orders must

- (a) Advertise the position
- (b) Invite the public to make nomination
- (c) Conduct public interviews of prospective candidates
- (d) Prepare a list of the appropriate number of nominees for appointment and
- (e) Submit a list to the President

The chairperson is appointed by the President after consultation with the Judicial Service Commission (JSC) and the Committee on Standing Rules and Orders and eight other members are appointed by the President from a list of not fewer than twelve nominees submitted by the Committee on Standing Rules and Orders.<sup>79</sup> The chairperson must be a judge, or former judge or a person qualified for appointment as a judge.<sup>80</sup> If the appointment of a chairperson of ZEC is not consistent with a recommendation of JSC, the President must cause the Committee on Standing Rules and Orders to be informed as soon as practicable.<sup>81</sup>

### 3.5.3 REMOVAL OF COMMISSIONERS

A member of an independent Commission may be removed from office only on the ground that the member concerned—

- (a) is unable to perform the functions of his or her office because of physical or mental incapacity;
- (b) Has been grossly incompetent;

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<sup>78</sup>ZESN Position paper on the independence of ZEC

<sup>79</sup> S238(1)(a)(b) of the Constitution

<sup>80</sup> s238(2) of the Constitution

<sup>81</sup> s238(3) of the Constitution



(c) Has been guilty of gross misconduct; or

(d) Has become ineligible for appointment to the Commission concerned.

The procedure for the removal of a judge from office is the same procedure for the removal of a commissioner.<sup>82</sup> Suffice to note that where the question of removing a judge from office ought to be investigated the JSC advises the President, the President must appoint a tribunal to inquire into the matter.<sup>83</sup> The President must designate one of the members of the tribunal to be chairperson of the tribunal<sup>84</sup>. The tribunal must report its findings to the President and recommend whether or not the judge should be removed from office.<sup>85</sup>

#### 3.5.4. SECURITY OF TENURE

Appointment is for six years and can be renewed for a further six years; they cannot serve for more than twelve years. Thus commissioners can operate independently without fear of being dismissed unnecessarily.

#### 3.5.5 FINANCIAL INDEPENDENCE

Section 322 of the Constitution of Zimbabwe stipulates that Parliament must ensure that sufficient funds are appropriated to the commission to enable it to exercise its function effectively. Section 12 of the Electoral Act provides that Funds and finances of the commission shall consist of

(a) Monies appropriated to the Commission by Act of Parliament; and

(b) Fees, charges and other income accruing to the Commission from things done by it in terms of this Act; and

(c) The proceeds of any monetary penalties imposed by the Commission under this Act; and

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<sup>82</sup> s237(2)(3) of the Constitution

<sup>83</sup> s187(2) of the Constitution

<sup>84</sup> s187(6) of the Constitution

<sup>85</sup> s187(7) of the Constitution

(d) Nomination fees paid by candidates under this Act; and

(e) Donations or grants from any local or foreign source whatsoever, which have been **approved by the Minister** (emphasis mine) and the Minister responsible for finance; and

(f) Such other moneys as may vest in or accrue to the Commission, whether in the course of its operations or otherwise, and whether under this Act or any other enactment.

In a ZEC by-elections report presented in the National Assembly by the then Minister of Justice President Emmerson Mnangagwa ZEC implored treasury to disburse financial resources timely for by elections to facilitate and maintain the smooth flow of the electoral process. The electoral body argued that lack of funding was compromising the quality of the electoral process. ZEC observed that the electoral body had got far less than what it had requested in the previous elections but had to juggle to enable it to continue conducting polls in a transparent and professional manner. Justice Makarau the chairperson of ZEC as she then was reiterated that reducing the number of voter education days compromised on the quality of voter education, reducing personnel affected the swift processing of voters in queues and led to multitasking of polling officers which exposed them to error.

Further the Commission relied on aged, unserviceable and dysfunctional vehicles whilst conducting the Guruve South constituency by elections of 23 April 2016. In respect to that by election ZEC got \$340 000 against its budget of \$1.3 million. In the March 2018 harmonised elections the electoral body received \$140 million out of \$198 million it had budgeted.

The then chairperson argued that the challenge of late release of election funds and underfunding continued to recur during elections in Zimbabwe and she added that these have a negative impact on the handling of election processes especially in procurement of goods and services, deploying of human resources and implementing the electoral process. The commission said it controlled the budget by reducing the duration of voter education period, reducing number of polling stations

but maintaining the same number of polling stations. She implored the state to capacitate ZEC with funds to purchase its own vehicles<sup>86</sup>

During deliberations at a Dialogue and Transition in Zimbabwe policy conference hosted by Crisis in Zimbabwe Democracy Institute (ZDI) in Harare on October 27, 2016 Zimbabwe Election Support Network (ZESN) representative, Ellen Dingane bemoaned the high level of political interference and lack of funding for the independent commissions. Her sentiments were as follows:

*“Government is making these commissions redundant through the lack of funding. On top of this, there is high level political interference. In the case of the Zimbabwe Electoral Commission, they report to the Minister of Justice, Legal and Parliamentary Affairs who will be a contestant when we go for elections. This therefore compromises the effectiveness and independence of the commission”*

The above submissions were buttressed by the Zimbabwe Human Rights Commission (ZHRC) Education and Research Officer, Karukai Ratsauka who admitted that the commission was faced with a lot of obstacles in carrying out its constitutional mandate<sup>87</sup>.

### 3.6 JUDICIAL DECISIONS

There are judicial challenges on the independence of ZEC. The independence of ZEC was challenged in the 2018 electoral petition in the case of Nelson Chamisa v Emmerson Mnangagwa and 23 others. The applicant alleged that ZEC lacked independence in its conduct of the elections. It was alleged that the respondent appointed the chairperson of ZEC, Justice Priscilla Chigumba on 1 February 2018 but on 5 February 2018, she allowed herself to be photographed in regalia i.e. a scarf, which was used, by one of the candidates in the election. The first respondent in his promotional material used the scarf and it became symbolic of his campaign. Allegations were that ZEC had pitched tent with one of the contestants

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<sup>86</sup> <https://www.herald.co.zw/zec-bemoans-lack-of-funding/> assessed 30 April 2020

<sup>87</sup> <http://www.thezimbabwean.co/2016/10/political-interference-renders-independent-commissions-useless/>

There were allegations that the ballot paper was designed in a manner to benefit the respondent. The ballot paper was not on single page with vertical columns as described in the Electoral Regulations with some ten vertical columns and designed in such a way to give preference to the first respondent in its breach of both alphabetical orders of the names. Thus ZEC was accused of violating section 57(a) (i) of the Electoral Act and section 236(1) of the Constitution which requires ZEC to act without fear, favour or prejudice or to favour the interests of any other political party.

In the case of Justice Mavedzenge v Minister of Justice, Legal and Parliamentary Affairs and chairperson of ZEC and another<sup>88</sup> the applicant sought to have section 192(6) of the Electoral Act expunged on the basis that it violated amongst other provisions s235(1)(a) and s235(3) of the Constitution. He contended that the Minister of Justice Legal and Parliamentary Affairs (the Minister) should not have the prerogative to approve regulations made by ZEC in terms of s192 (6) of the Electoral Act. The applicant alleged that the provision empowers the Minister to control and even block the chairperson of ZEC from executing his regulations making function. In casu the Minister was an interested party in the coming elections therefore he could not be entrusted with the power to approve the elections. He averred that the chairperson of ZEC must be allowed to discharge his or her function independent of the direction or control of anyone.

The Minister opposed the application he averred that the assumption that the chairperson may be compromised was far-fetched and unjustified. He highlighted further that the approval of the regulations by himself is done in the exercise of his functions as an administrator of elections as he is accountable to Parliament. The Minister also averred that he is mandated to approve regulations should not be misconstrued to mean that he has power to direct, control and interfere with the functions of the chairperson of ZEC.

The court held that s235 (1) and (3) of the Constitution which in essence are independence clauses their purpose is to provide a safeguard against undue interference with such Commissions or offices by other persons or other institutions of government. These provisions were incorporated into the Constitution as a

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<sup>88</sup> CCZ 05/18

necessary measure to ensure that no organ of the state would usurp power from independent commissions and in effect direct the manner in which they operate. These commissions are set up essentially to ensure that the fundamental rights provided in the Bill of Rights are protected and given effect to.

The court had an occasion to discuss the meaning of the phrase ‘direction and control’ as envisaged in section 235(1) (a) of the Constitution<sup>89</sup> vis-a-vis the Minister’s requirement to approve regulations. The question was whether the approval that is required of the Minister in terms of section 192(6) of the Electoral Act tantamount to ZEC being subject to the Minister’s control. Reference was made to the Kenyan Supreme court case of in Re The matter of the Interim Independent Electoral Commission where it was held as follows; ‘while bearing in mind that the various Commissions are independent offices are required to function free of subjection to *direction or control by any person or authority* we hold this expression is to be accorded its ordinary and natural meaning and it means that the Commissions are independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit.

The European Union Election Observer Mission (EUEOM) indicated in its final report on the July 30 elections that ZEC lacked full independence and appeared not to act in an impartial manner. The involvement of the Minister of Justice, Legal and Parliamentary Affairs in the approval of regulations adopted by the Commission undermined the independence of ZEC to a certain degree.<sup>90</sup>

There has been controversy regarding the conduct of the persons holding the office of the chairperson. In 2018, photographs circulated in the media of the former ZEC chairperson, Rita Makarau kneeling before the late former President Robert Mugabe at the launch of the biometric voter registration exercise. Arguments were raised that she was not supposed to show her strength and not to be seen to be deferring to one of the interested and competing political party players to the extending of prostrating herself before him.<sup>91</sup> The opposition also expressed outrage saying Makarau was showing that she is subservient to one of the presidential candidates in

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<sup>89</sup> It provides that the Independent Commissions are independent and not subject to the direction or control of anyone

<sup>90</sup> <https://spiked.co.zw/can-government-guarantee-independence-of-zec> assessed 25 April 2020

<sup>91</sup> <https://www.newsday.co.zw/2018/05/electoral-act-zec-independence/> assessed 20 April 2020

crucial elections scheduled the following year.<sup>92</sup> Justice Makarau defended her actions raising the culture flag her comments were as follows ‘I have been brought up to say that when you are speaking to someone older than you, you kneel down. That’s how I have been brought up and it was difficult for me to change just like that when he called me to his side,” Makarau said, adding that she also finds herself kneeling when conducting her duties as a Supreme Court judge. Critics also dismissed Justice Makarau’s assertions alleging that at one point the then chairperson of ZEC met the late Morgan Tsvangirai the leader of the opposition though he was older than her she never knelt before him.<sup>93</sup> Suffice to note that kneeling is a form of submission the question would then be in the event of any influence from the late President Mugabe was she able to withstand such? There should not be any suspicion of bias from any of the contesting parties otherwise the election loses its credibility.

It is important to note that Justice Makarau’s appointment was unconstitutional. The provisions of the Constitution provided that no person could be appointed as a commissioner if he or she was already a public officer, a provision repeated in the present Constitution. Justice Makarau was a public officer when she was appointed. She was the secretary for the Judicial Service Commission (JSC) a position she had held since 2010<sup>94</sup>. A public officer was defined to mean a person holding or acting in a paid office in the service of the state. A secretary for the JSC clearly fell within the definition of a public officer. Further during that period no person could be appointed a ZEC commissioner if he or she was a member of or employee of a statutory body. The provision is repeated in the present Constitution. Both Constitutions encompassed a definition of a statutory body see section 332 of the current Constitution.

It is pertinent to note that the appointment was and is still made by the President after consultation with JSC and the Committee on Standing Rules and Orders. These two bodies ought to be a check that Justice Makarau was not rendered ineligible for the post by disqualificatory provisions set out in section 240 of the

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<sup>92</sup><https://nehandaradio.com/2017/09/22/knelt-mugabe-sign-respect-makarau/> assessed 23 April 2020

<sup>93</sup><https://news.pindula.co.zw/2017/09/21/video-zec-chairperson-justice-rita-makarau-explains-kneeled-mugabe/> assessed August 30, 2020

<sup>94</sup><http://www.thezimbabwean.co/2015/10/zec-unconstitutionally-appointed-commissioners> assessed 7 April 2020

Constitution and meet the general requirements of a Commissioner. Surprisingly the two bodies' just rubber stamped the President's choice. This raise questions on the relevance of these two bodies in the appointment process.

Another controversy stirred when Justice Makarau's successor, Justice Priscilla Chigumba appeared in another set of published images alongside members of the executive on a working visit to observe Russia's elections in February. There was an outrage on the possibility of them having travelled together and suppositions as to the import of their interactions in all the time spent.<sup>95</sup> The general suspicion is that ZEC being a state organ filled with political appointees is conflicted and biased towards the ruling party and appointing authority. It is understandably difficult to fathom that such an entity can be completely independent and impartial when all commissioners are political appointees, who owe their jobs and livelihoods to the appointing authority. All commissioners are appointed by the President so it is difficult to be convinced by the idea of complete impartiality.

In 2012 whilst addressing delegates at a workshop the then Commissioner Bessie Nhandara admitted that some of the electoral bodies employees were once employed in the Zimbabwe National Army (ZNA) and the Central Intelligence Organisation (CIO). Before the July 2013 election the Zimbabwe Democracy Institute (ZDI) called for the demilitarisation of ZEC.

### 3.7 CONCLUSION

Election management in Zimbabwe evolved from a governmental, a mixed model then independent model. Until 2004 elections in Zimbabwe were managed by 4 bodies which lacked independence from the state and the ruling Zimbabwe Peoples" National Union-Patriotic Front (ZANU-PF) party. ZEC which came into existence in 2005 progressively took over these functions and these were consolidated in sections 232-241 of the 2013 Constitution. It is important to note that the the constitution and the legislative framework of Zimbabwe lays down the appointment process for the member of the electoral commission. It also provides for the funding, security of tenure and removal from office. The President plays a critical role in the appointment, removal of the commissioners.

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<sup>95</sup> (n21 above)

## CHAPTER 4

### A COMPARISON OF THE SOUTH AFRICAN AND ZIMBABWEAN LEGAL FRAMEWORK ON THE INDEPENDENCE OF THEIR ELECTORAL COMMISSIONS

#### 4.1 INTRODUCTION

The previous chapter discussed the constitutional and legislative framework governing the independence of Zimbabwe Electoral Commission. It came out that although the constitution provides for the independence of the electoral commission ZEC is not independent. The President of Zimbabwe yields enormous powers in the appointment and removal of commissioners. The processes are not insulated from political influence. The commission is underfunded and funds for elections are not released timely. Resultantly voting processes are compromised. Austerity measures are adopted which include reducing the number of voter education days thus compromising on voter education quality, reducing personnel affecting the swift processing of voters in queues, multi tasking of polling officers thereby exposing them to error.

This chapter provides a comparison of the South African and Zimbabwean legal framework governing their election management bodies. The main thrust being to highlight their commonalities and differences. Particular emphasis is given to the following issues

- (i) Does the institution enjoy legal and operational independence?
- (ii) Does the institution have clearly defined appointment and dismissal procedures?
- (iii) Is it composed of individuals capable of acting independently?
- (iv) Does it control its finances? This criterion seeks to protect the independence of an independent commission. The chapter seeks to answer the research question, what lessons can Zimbabwe learn from South African jurisdiction on the independence of their election management body? The methodology employed is comparative.



## 4.2 INDEPENDENCE THROUGH LEGAL AND OPERATIONAL INDEPENDENCE

The OHCHR has noted that the constitutional provision or law that establishes an institution should give it distinct legal personality. In order to enhance operational independence of institutions it is important that they must have the ability to conduct day to day affairs independently of any outside influences.

It can be noted from chapter 2 and 3 that the EMBs of these two countries are established in terms of the Constitutions of these two countries. Chapter 9 of the South African Constitution establishes South Africa's Independent Electoral Commission as one of the six state institutions supporting constitutional democracy. There is a provision guaranteeing independence of the EMB. In protecting the IEC section 191 states that:

- (i) These institutions are independent and subject only to the constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.
- (ii) ii) Other organs of state, through legislative and other measures, must assist and protect these institutions, to ensure the independence, impartiality, dignity and effectiveness of these institutions.
- (iii) No person or organ of state may interfere with the functioning of these institutions.
- (iv) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the National Assembly at least once a year.

The Constitution of Zimbabwe establishes ZEC as an independent institution. It forbids any individual from interfering with its functioning. The Constitution compels ZEC to be independent in the performance of its duties and not to be subject to the direction or control of anyone. The constitution states that ZEC must act in accordance with the constitution and must exercise its functions without fear, favour

or prejudice. In order to secure the operational independence of ZEC, the Constitution mandates the State and all other institutions and agencies of government at every level, through legislative and other measures to assist ZEC and to protect its independence, impartiality, integrity and effectiveness. In order to enhance the operational independence of ZEC, the Constitution mandates members of the ZEC to be non-political. The Constitution stipulates:

(1) Members of the independent Commissions must not, in the exercise of their functions- (a) act in a partisan manner; (b) further the interests of any political party or cause; (c) prejudice the lawful interests of any political party or cause; or (d) violate the fundamental rights or freedoms of any person.

The Constitution further states "that persons who are members of a political party or organization on their appointment to an independent Commission (in this case ZEC) must relinquish that membership without delay and in any event within thirty days of their appointment". The Constitution also states that "if a member of an independent Commission (ZEC) who becomes a member of a political party or having been a member of a political party or organization on his or her appointment to the commission, but fails to relinquish that membership within thirty days of the appointment, ceases immediately to be a member of ZEC".

The protection of the legal and operational independence of ZEC is aimed at permitting it to exercise independent decision making power and to perform its functions without interference or obstruction from any branch of government or any public or private entity. Suffice to note that the South African and Zimbabwean provision protects the independence of their EMBs in similar language. The mere inception of these provisions is not enough to guarantee the independence of the EMB. In Zimbabwe there are certain provisions in the Electoral Act which undermine the operational independence of ZEC.

Sixth Schedule Part III section 8(1) (b) (i) of the Electoral Act This section requires ZEC to convene meetings at the specification of the Minister and It thus constitutes undue intrusion on the Independence of the commission as provided in section 235 of the Constitution which stipulates that the independent commissions are not subject to the direction or control of anyone. ZEC has limited power to determine

election dates it relies on the office of the President as provided in section 38 and 39 of the Electoral Act. Further ZEC lacks autonomy to invite and accredit observers. The Observer Accreditation Committee (OAC) established under section 40H has prominent involvement of central government including ministries of Foreign Affairs, Home Affairs, State Security and Women's Affairs. In terms of section 121 of the Electoral Act ZEC's administration of local authority by elections involves the Minister responsible for Local Government. Section 192 of the Act requires ZEC to seek approval from the Minister of Justice for its regulation on the electoral processes. Furthermore Section 9 (5) states that the Commission shall not terminate the services of the CEO on a ground other than one referred to in subsection 4 without Ministerial approval. In essence, it means that ZEC hires a CEO that it cannot fire without the Minister of Justice; Legal and Parliamentary Affairs' approval in contravention of Section 235 of the Constitution. The above clearly undermines the regulatory autonomy of the commission. The perception created is that ZEC remain weakened legally and in practice to exercise its powers and functions outside government control or directions.

#### 4.3 INDEPENDENCE THROUGH APPOINTMENTS

The method by which members of a NHRI are appointed is important in ensuring the independence of the institution. This is affirmed by the United Nations Centre for Human Rights which note that the method by which members of national institutions are appointed is critical in ensuring independence<sup>96</sup>. As a result, it is important that consideration should be given to entrusting the task to a representative body such as Parliament. The United Nations Centre for Human Rights also notes that the founding legislation of any NHRI must specify matters relating to the method of appointment, including the voting and other procedures to be followed. In line with the requirements of the Paris Principles, the ICC SCA has noted the critical importance of selection and appointment in maintaining the independence of any NHRI. It has stated that the appointment and selection process must be transparent,

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<sup>96</sup> See United Nations Centre for Human Rights (1995) at 10

broad consultations must be undertaken, vacancies have to be advertised widely, and that there is a need for maximizing the number of potential candidates from a wide range of societal groups<sup>97</sup>. The ICC SCA has further noted that the appointment process is fundamental in ensuring the independence and effectiveness of, and public confidence in the national institution. The selection process must be characterized by openness and transparency and should be under the control of a credible and independent body and involve open and fair consultation with the wider NGOs and civil society<sup>98</sup>.

#### 4.4 APPOINTMENT OF MEMBERS OF IEC IN SOUTH AFRICA

The IEC comprises of five commissioners appointed by the President, one of whom must be a judge<sup>99</sup>. The commissioners are recommended to a Committee of the National Assembly (the Committee) by a panel that consists of the President of the Constitutional Court, a representative of the Human Rights Commission, a representative of the Commission on Gender Equality and the Public Prosecutor. The Committee subsequently nominates the persons for approval by a majority of the members of the National Assembly<sup>100</sup>. This mode of appointment is transparent, inclusive and stringent and prevents political appointments due to the number of actors involved in the process.

#### 4.5 APPOINTMENT OF THE CHAIRPERSON OF ZEC

The appointment of the Chairperson of ZEC raises questions about its ability to act impartially. In appointing the Chairperson of ZEC, the President is not bound by the advice of the Judicial Service Commission (JSC) and the Committee on Standing Rules and Orders. Section 242(3) of the Constitution states: if the appointment of a chairperson of ZEC is not consistent with the recommendation of the JSC, the

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<sup>97</sup> ICC SCA "General observations adopted in May 2013 (Geneva :ICC SCA 2013) AT 29

<sup>98</sup> (n2 above)

<sup>99</sup> Section 6 of the ECA

<sup>100</sup> Section 6(2) of the ECA. The panel must forward a list of at least eight persons to the committee which is comprised of a proportional number of members of the political parties in the National Assembly

President must cause the Committee on Standing Rules and Orders to be informed as soon as practicable. The Constitution is, however, silent both on why the Committee on Standing Rules and Orders must be informed in such instance and the appropriate action that the Committee has to take if such a decision is made. It seems, thus that the President is given greater powers in the appointment of the Chairperson of ZEC. The silence regarding what ought to happen if the President omits to follow the recommendations of the JSC leaves scope for partiality. Concrete provisions are thus required to negate this. There is likelihood that such powers might be used to appoint individuals that may be partisan and who will support the ideologies of the ruling party and interfere with the independence and functioning of the Commission.

The independence of ZEC is arguably also less protected due to the lack of non-governmental organization (NGO) and civil society input in the appointment of the Chairperson of ZEC. Contrary to the general observation of the ICC SCA, the Constitution does not cater for extensive consultation with members of NGOs and civil society in the appointment of the Chairperson of ZEC, and thus leaves the President with greater powers of appointment. Such a clause can therefore be used to intrude on the independence of ZEC. In the realm of deep political polarization in Zimbabwe involvement of the President in influencing the final list of commissioners continues to cause erosion of perception of independence.

The Constitution sets out a different criterion for the appointment of other members of the ZEC. It states that eight other members of ZEC are appointed by the President from a list of not fewer than 12 nominees submitted by the Committee on Standing Rules and Orders. In line with the Paris Principles and the ICC SCA General Observations, the Constitution of Zimbabwe has put in place a selection process that seeks to ensure impartiality in the appointment of other members of ZEC. Section 237(1) of the Constitution states:

(1) For the purpose of nominating persons for any appointment to any independent Commission, the Committee on Standing Rules and Orders must-

(a) Advertise the position;

(b) Invite the public to make nominations;

- (c) Conduct public interviews of prospective candidates;
- (d) Prepare a list of the appropriate number of nominees for appointment; and
- (e) Submit the list to the President.

The Constitution of Zimbabwe in regard to the appointment of other members of the ZEC provides for broad consultation and participation, screening, selection, and an appointment process that seeks to promote transparency, pluralism and public confidence in ZEC. In line with the ICC SCA General Observations the advertising of vacancies maximizes the potential number of candidates and hence promotes pluralism in the appointment process. The involvement of the public in the nomination process seeks to ensure that individuals of integrity and who are competent are appointed to serve on the Commission. The above procedure in section 237(1) of the Constitution seeks to ensure that the whole appointment process of other members of ZEC is transparent. The inclusion of this transparent appointment process should be applauded as it will go a long way to securing the independence of the institution. However, it is imperative that in practice such appointment process must *be* followed in order to secure the independence of the Commission.

#### 4.6 INDEPENDENCE THROUGH SECURITY OF TENURE AND REMOVAL

The ICC SCA in its General Observations has recognized the importance of security of tenure of members of an institution's governing body as a means protecting its independence. It has noted that secure terms of office for members is an important guarantee of their independence so that they can develop expertise and be vocal without fear of hindering future prospects. The ICC SCA General Observations also require that the dismissal of a member of NHRIs should follow all substantive and procedural requirements, as prescribed by law, and should not solely be at the discretion of the appointing authorities<sup>101</sup> The length of a commissioner's tenure can have significant impacts on his or her independence and ability to act without fear or

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<sup>101</sup> See ICC SCA (2013) at 40

favour. If a commissioner lacks long-term security then his or her actions could be, in a real or perceived sense, related to a desire for reappointment.

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 would include their salaries, allowances, term of office and legal immunity. The Electoral Act Part Two sixth sets out the conditions of service of the commissioners and staff. The law provides a framework for such conditions of service the government is still involved in determining such conditions through the Minister of Finance. ZEC must seek approval before setting out the conditions of service. The Electoral Act sets out that ZEC can fix terms and conditions of service for employees with the approval of the Minister of Finance. However in South Africa terms and conditions of the IEC are set out by the commission in consultation with a representative body such as parliament.

#### 4.7 REMOVAL OF MEMBERS OF IEC

In South Africa the National Assembly plays a huge role in the appointment of members of independent commissions, and is also given a central role in the removal process. Thus section 194 of the Constitution of South Africa states:

(1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on- (a) the ground of misconduct, incapacity or incompetence; (b) a finding to that effect by a committee of the National Assembly; and (c) the adoption by the Assembly of a resolution calling for that person's removal from office; (2) (a) A resolution of the National Assembly concerning the removal from office of (a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or (b) a member of a Commission must be adopted with a supporting vote of the majority of the members of the Assembly; (3) The President (a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and (b) must remove a person

from office upon adoption by the Assembly of the resolution calling for that person's removal.

The section above presents the role that is given to the National Assembly in the appointment and removal of members of independent institutions in South Africa. It is evident that the National Assembly is given a prominent role in the appointment and removal processes, and thus acts as a necessary check on the President in order to ensure and secure the independence of the Chapter 9 institutions. The powers of the President are thus significantly limited and are guided by the recommendations of the National Assembly. Commissioners can only be removed by the President upon the recommendation of the Electoral court<sup>102</sup> and with the endorsement of a majority of the members of the National Assembly. The removal procedure is stringent, transparent and inclusive. This serves to insulate from arbitrary removal and ensures their independence. The IEC serve for seven years and for only two terms. In Zimbabwe the constitution provides that members of ZEC are appointed for a six year term and may be re-appointed for one such further term. It is quite clear in both jurisdictions the term of office for the members is provided for in the law and is almost the same. Once a commissioner has been appointed, security of tenure can be enhanced or diminished by the conditions under which an appointment may be terminated. All jurisdictions provide for dismissal from office under specified circumstances.

#### 4.8 REMOVAL OF MEMBERS OF ZEC

The Constitution of Zimbabwe envisions that members of ZEC are afforded an enabling free environment to discharge their duties without any political hindrance.<sup>72</sup> Members of the Commission are therefore required to exercise their powers without fear of dismissal or non-re-appointment. The Constitution in section 320(1) deals with the conditions of service of members of independent commissions. It states that "except as otherwise provided in this Constitution, every member of a Commission is appointed for a term of five years which is renewable for one additional term only".

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<sup>102</sup> Established under section 18 of the ECA to review the decision of the IEC. It is composed of the Supreme court judge as the chairperson and four members appointed by the President on the recommendation of the JSC



Although the Constitution and the enabling legislation seek to protect the tenure of commissioners of the ZEC by means of strict removal provisions, there are concerns about the involvement of the President in the removal process. There is a possibility that independence of the Commission might be compromised in the sense that the President is given too many powers in the removal process. The President is given the powers to solely appoint members of the tribunal to hear the question of the removal of a member of the Commission. Since the President solely constitutes the tribunal there is a chance that political considerations may play a part in the removing of commissioners. Thus, such powers pose a threat to the independence of ZEC. In order to secure the independence of members of ZEC checks and balances are needed on the powers of the President in the appointment of tribunal members.

#### 4.9 INDEPENDENCE THROUGH FINANCIAL RESOURCES

It is important that a NHRI must have adequate resources, such as, human resources and adequate funding, in order to ensure the operational efficiency of the institution. The Paris Principles stipulate that NHRIs must be adequately funded so as to guarantee their independence.

Section 322 of the Constitution of Zimbabwe stipulates that Parliament must ensure that sufficient funds are appropriated to the commission to enable it to exercise its function effectively.

Section 12 of the Electoral Act provides that Funds and finances of the commission shall consist of:

- (a) Moneys appropriated to the Commission by Act of Parliament; and
- (b) Fees, charges and other income accruing to the Commission from things done by it in terms of this Act; and
- (c) The proceeds of any monetary penalties imposed by the Commission under this Act; and
- (d) Nomination fees paid by candidates under this Act; and
- (e) Donations or grants from any local or foreign source whatsoever, which have been **approved by the Minister** and the Minister responsible for finance; and

(f) Such other moneys as may vest in or accrue to the Commission, whether in the course of its operations or otherwise, and whether under this Act or any other enactment.

Provisions in the Schedule require the commission to submit such accounts and records to the Minister as he or she may direct; requires that the auditors appointed by the Commission are approved by the Minister; and requires the Commission to obtain from them such other reports, statements or explanations in connection with the Commission's operations, funds and property as the Minister may consider expedient.

These provisions conflict with the requirement that ZEC is accountable to parliament and not to the Minister due to the severe economic challenges in Zimbabwe; the ability of the ZEC to function effectively has been adversely affected over the years. Such challenges have had a negative impact on the commission

A major stumbling block to accessing donor funds in Zimbabwe is that the approval of the Minister is required before such funds can be given to the ZEC. This goes against the recommendations of the ICC SCA which is of the view that national institutions should not be required to obtain approval for external sources of funding, as this requirement may pose a threat to its independence.<sup>101</sup> It is crucial that the ZEC must be given autonomy to source external funding without the approval of the Minister as envisaged under the Electoral Act<sup>103</sup>, and that financial systems be put in place to ensure accountability through regular financial reporting. Such accountability will ensure that the external funding sourced by ZEC does not compromise its independence.

The Electoral commission is now separately allocated funds from the national treasury which funds are channelled 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 was allocated \$153,9 million out of \$272 million it had budgeted for the 2018 harmonized elections representing 56% of the commission budget to cover the BVR exercise and various processes leading up to polling.<sup>104</sup>

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<sup>103</sup> Chapter 2:13

<sup>104</sup> Zimbabwe Election Support Network Position paper

In South Africa, section 13 of the Electoral Commission Act provides that, the expenditure of the IEC is defrayed out of money appropriated by Parliament for that purpose. The legislation also allows it to receive money from other sources, such as foreign donors. The South African approach is not the best way to fund an EMB because it makes them dependent on the goodwill of government. Such good will may not come easily where the EMB tries to assert its independence<sup>105</sup>. In Zimbabwe funding of the EMB is a constitutionally imposed duty on the government

## CONCLUSION

The purpose of the chapter was to compare the South African and the Zimbabwean legal frameworks governing the independence of their EMB. It came out that the South African legal framework has a better system of checks and balances on the powers of the President. In Zimbabwe the President yields enormous powers in appointing the chairperson of the commission. In South Africa the process involves civic society, NGOs, political parties thus the process is transparent as required by the SADC Principles. further the President of Zimbabwe is also involved in the appointment of the members of the tribunal involved in the removal of a commissioner contrary to the South African position the Electoral court plays a critical role. Finally it can be concluded that ZEC is poorly funded and hence fails to meet the standards set out in the SADC Principles and Guidelines for EMBs.

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<sup>105</sup> C.M Fombad *Election Management Bodies in Eastern and Southern Africa: some reflections on their legal framework* p17

## CHAPTER 5

### SUMMARY, CONCLUSION AND RECOMMENDATIONS

#### 5.1 INTRODUCTION

This chapter provides a summary of the study, recommendations and the conclusion. The chapter is structured as follows first a summary of the study, followed by the recommendations then the conclusion.

#### 5.2 SUMMARY OF THE STUDY

The purpose of the study was to analyse the extent to which the legal frameworks of South Africa and Zimbabwe provide for the independence of their Election Management Bodies. The main research question being to what extent does the legal framework of South Africa and Zimbabwe provide for the independence of their Election Management Bodies? The research question was further broken down into four sub research questions,

- (i) To what extent do the International, regional and sub- regional instruments provide for the independence of the Election Management Bodies?
- (ii) To what extent does the South African legal framework provides for the independence of its Electoral Management Body?
- (iii) To what extend does the Zimbabwean legal framework provides for the independence of its Electoral Management Bodies?
- (iv) What lessons can Zimbabwe learn from South African jurisprudence on the independence of Electoral Management Bodies?

Chapter 1 has presented the introductory aspects of the study, aspects such as the background, problem statement; research questions and significance of the study were outlined. The qualitative approach has been of utility in expounding the legal

frameworks governing the independence of the election management bodies. A comprehensive desk research complemented the qualitative approach. This was achieved through an examination of statutes, authoritative texts and comparison with South Africa.

Chapter 2 discussed the constitutional, legislative and judicial decisions on the independence of the IEC. It was expounded that the appointment and removal processes are transparent and stringent; it prevents political appointments due to the number of political actors involved. Parliament plays a pivotal role in the removal of a commissioner. The President upon the recommendation of the Electoral court can only remove a commissioner with the endorsement of a majority of the members of the National Assembly. The grounds for removal from office for a commissioner are laid down in the Constitution. Further Parliament approves the IEC's budget and releases funds to it. Judicial decisions have also supported this notion that it is for Parliament and not the executive arm of government to provide for funding reasonably sufficient to enable the commission to carry out its constitutional mandate

Chapter 3 discussed the constitutional and legislative framework governing the independence of Zimbabwe Electoral Commission. It came out that although the constitution provides for the independence of the electoral commission ZEC is not independent. The President of Zimbabwe yields enormous powers in the appointment and removal of commissioners. The processes are not insulated from political influence. The commission is underfunded and funds for elections are not released timely. Resultantly voting processes were compromised. Reducing number of voter education compromised on voter education quality, reducing personnel affected the swift processing of voters in queues, multi tasking of polling officers exposed them to error.

Chapter 4 provided a comparison of the South African and the Zimbabwean legal frameworks governing the independence of their EMB. It came out that the South African legal framework has a better system of checks and balances on the powers of the President. In Zimbabwe the President yields enormous powers in appointing the chairperson of the commission. In South Africa the process involves civic society, NGOs, political parties thus the process is transparent as required by the SADC Principles. further the President of Zimbabwe is also involved in the appointment of

the members of the tribunal involved in the removal of a commissioner contrary to the South African position the Electoral court plays a critical role. Further unlike its South African counterpart ZEC is poorly funded and hence fails to meet the standards set out in the SADC Principles and Guidelines for management of independent EMBs.

## CONCLUSION

It has been highlighted in chapters 2, 3 and 4 that the independence of Election Management Bodies must be realized on the international, regional and sub regional level. South Africa has managed to realize the independence of its IEC. The process of appointment and removal of these commissions should be characterised by openness and transparency and should be under control of a credible and independent body and involve open and fair consultation with the wider non-governmental organisations and civil society.<sup>106</sup> In South Africa as noted the processes involves an inter committee party which consist among others of members of human rights commission, gender commission amongst others. In Zimbabwe the President is given enamours powers in the appointment process. The President appoints the chairperson after consulting the J.S.C and the Committee on Standing Rules and Orders this raise questions of impartiality since a presidential; appointee is more likely to owe allegiance to his or her maker. This rather compromises on the independence and effectiveness of the commission. The appointment process in Zimbabwe does not cater for extensive consultation with civil society and non- governmental organizations like the South African position thus leaving the president with too much power in the appointment process.

### 5.3 FINANCIAL INDEPENDENCE

The Paris Principles stipulate that NHRIs must be adequately funded so as to guarantee their independence. Election body must enjoy financial autonomy from the government. The rules governing the funding must establish an appropriate, secure,

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<sup>106</sup> ICC SCA' General Observation adopted in May 2013@ 29

and transparent funding framework that enables the institution to execute its mandate effectively.<sup>107</sup> Financial autonomy can affect the independence of the election body. The electoral authority should be well endowed with public funding for both ordinary and election operations. Suffice to note that ZEC is poorly funded and this negatively affects the electoral process. The commission had to juggle to enable it to continue conducting polls for instance reduce the number of voter education days or reducing the personnel. This in turn affected the swift processing of voters in queues and polling officers exposed them to error. Election funds are released late and inadequate for example in March 2018 harmonized elections the electoral body received 140 million against 198 million it had budgeted. The issues above were also raised by other stakeholders during deliberations at a Dialogue and Transition in Zimbabwe policy conference hosted by Crisis in Zimbabwe Democracy Institute (ZDI) in Harare on October 27, 2016

#### 5.4 SECURITY OF TENURE

It came out that the law must provide for the conditions of service for the commissioners. The provision of satisfactory conditions of service is a prerequisite for the independence of EMBs. Satisfactory conditions of service would enable them to perform their duties without fear of prosecution or dismissal. The executive entirely should not decide on the conditions of service of the IEC, this undermines the independence of the commissions. In Zimbabwe the Electoral Act sets out the conditions of service of the commissioners.<sup>108</sup> It is quite disturbing to note that the government is still involved in determining the conditions through the Minister of Finance from whom ZEC must seek approval from before setting out the conditions of service. However in South Africa terms and conditions of the IEC are set out by the commission in consultation with a representative such as parliament.

In the removal of the commissioners it came out that in both jurisdictions grounds for removal of a member are clearly spelt out and detailed procedure to be followed. The President of Zimbabwe plays a pivotal role in the dismissal process. The

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<sup>107</sup> (n5 above) article C(a)

<sup>108</sup> Part two sixth schedule

President appoints the members of the tribunal which then report to him. On the other hand in South Africa President upon the recommendation of the Electoral court can only remove the commissioners with the endorsement of a majority of members of the National Assembly.

Whilst there is need for law reform in Zimbabwe to align the Electoral Act provisions with section 235 of the Constitution there are other jurisdictions which. A survey of the Botswana EMB show that it seems the creators of the Botswana Independent Electoral Commission had in mind an independent entity. All evidence suggests that there is a disputed understanding of independence by the government on the one hand and the IEC on the other. While the IEC is wedded to the belief that independence means unfettered independence in terms of carrying out its mandate, the government's interpretation of independence is one which is truncated. During the formative years of the IEC, these different philosophies led to strained relationships. For example, the then permanent secretary to the president (PSP) insisted that the IEC secretary was responsible to the office of the president while the commission contended that the secretary was responsible to it. Matters came to a head when it was contended that the secretary's leave and travel outside the country had to be sanctioned by the PSP. Due to this disputed interpretation of the IEC's independence, 'some in the commission were contemplating seeking the courts' intervention in order to explicitly define what the IEC's independence meant but, nonetheless, this action was stayed'. In the subsequent discussion, an understanding emerged that that the IEC's independence meant, among other things, that the IEC secretary was responsible to the commission. While this is the understanding, some contended that it stood to common reason that interpretations of the IEC's independence should not be premised on a gentleman's agreement between the IEC and government but, rather, on what the law set down in a specific IEC Act<sup>109</sup>.

*The structure and funding of the IEC leave it open to the charge that it is not truly independent of government and this has led to allegations, particularly by the opposition, that it may be biased. These perceived threats to independence should be addressed in the interests of transparency and to reassure the voters and avoid*

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<sup>109</sup> Election Management Bodies in Southern Africa : A comparative study of the electoral commission contribution to electoral processes "



*messy contestation of election results. It is recommended that the IEC should be responsible to Parliament and not to the Office of the President. It should be adequately funded to enable it to perform its tasks and obligations under the Constitution and the Act. The chief executive officer of the IEC should be appointed by the IEC itself in order to guarantee loyalty<sup>110</sup>.*

The IEC in Botswana does not have a specific legislation IEC Act. Further there is no specific law that defines the IEC, what its independence entails. The IEC was incepted 18 years ago and to date the Act has not been promulgated. While the non-commissioner staff is governed by terms and conditions as stipulated in the public service act, the same is not true of commissioners. At the same time, there is no provision for the removal of commissioners from office for good cause. In this regard, it is not clear which provision of the law would the commission apply in the event of any misconduct by a member of the IEC.

The purpose of the study was to examine the legal framework of Election Management Commissions in Africa particularly in South and Zimbabwe. It came out from the study that both countries have entrenched the establishment of their commissions in their respective constitutions. They both enjoy legal and operational independence. However in Zimbabwe the Electoral Act has certain provisions which undermine the independence of ZEC. Further the appointment process gives enormous powers to the President and raises questions on the impartiality of the commission. The commission is poorly funded. There is need for law reform regarding the appointment process such that civic societies, NGOs are involved to insulate the appointments from politics.

International, regional and sub regional treaties support the establishment of EMBs and subscribe to the independent model. Both South Africa and Zimbabwe have re structured their electoral management systems in line with the Principles and Guidelines of the Independence of Election Management Bodies (EMBs) in the SADC region. The two countries have gone a step in designing comprehensive legal

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<sup>110</sup> M. Lekorwe *the role and status of the independent Electoral Commission* p66

frameworks to deal with crucial aspects such as appointment of members, composition, and security of tenure, removal of members, financial independence, and provisions relating to its independence amongst other issues. It is quite disturbing to note that there are some provisions

## 5.5 RECOMMENDATIONS

### 5.5.1 INDEPENDENCE THROUGH APPOINTMENTS

The United Nations Centre for Human Rights notes that the method by which members of national institutions are appointed is critical in ensuring independence.<sup>111</sup>In line with the Paris Principles the

ICC SCA has stated that the appointment and selection process must be transparent, broad consultations must be undertaken. Thus the appointment process should not be solely in the hands of the executive. There is need for broad consultation from civic society, NGOs

### 5.5.2 REMOVAL AND APPOINTMENT OF COMMISSIONERS

The committee on Standing Rules and orders which plays a pivotal role in the appointment of Commissioners must also play a critical role in the removal of such commissioners. The Committee on Standing Rules and Orders must initiate and appoint members that look at the question of the removal of the commissioner. Similarly to the appointment process the Committee on Standing Rules and Orders would then communicate the recommendations of the tribunal to the President on whether or not a commissioner ought to be removed from office. The procedure adopted in South Africa is a more preferable one; the National Assembly plays a prominent role in the appointment of member of the IEC and is also given a pivotal role in the removal process. This procedure provides checks and balances on the President's powers and secures the independence of the electoral commission

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<sup>111</sup> See United Centre for Human Rights (1995) at p10

Parliament should be left to make final selection of commissioners through removing the provision for presidential choice of eight from a list of twelve. The division of EMB appointment powers between the executive and legislature provides for checks and balances in appointment process. If one branch of the government especially the executive has the sole right to appoint EMB members the danger is that such appointees even if they are men and women of integrity they may be perceived by the public and especially opposition parties as pawns of the appointing authority. Even if the power to appoint an EMB is divided between the executive and legislature this will be fettered if the same party dominates the two branches or if the executive effectively controls the legislature. In this case the requirement of two thirds majority in the legislature to approve EMB appointments could be a useful remedy because it may give minority parties veto power.

An alternative that can be used to rein in executive branch influence over appointment of the commissioner is to involve judicial and non-state actors in either the nomination or the vetting of candidates. In Botswana the Judicial Service Commission is responsible for appointment of EMB members. In Burkina Faso civil society organizations academia or the legal profession play a key role in EMB appointments.<sup>112</sup> In Namibia the Electoral Commission of Namibia consists of five commissioners appointed by the state President from a list of eight names submitted by a Selection and Interview Committee and approved by the National Assembly. The criteria for requirements for membership of the Commission are determined by Parliament's Standing Committee on Privileges. Thereafter, public advertisements are placed in the government Gazette and in newspapers. A Selection Committee is set-up to select, interview and recommend eight persons for approval by the National Assembly. It is from this approved list of eight persons that the President must appoint the five Commissioners. Once appointed, the five choose one of them as chairperson of the commission. The amendment of 1998 was particularly important since it took significant steps to secure the independence of the ECN from the Executive, for the appointment of the ECN is no longer the simple prerogative of the President<sup>113</sup>. Thus Zimbabwe should follow suit.

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<sup>112</sup> International IDEA P96

<sup>113</sup> <https://www.ecfsadc.org/en/members/80-electoral-commission-of-namibia-ecn-nambia.html>

In Benin, members of the Independent National Electoral Commission (INEC) are officially appointed by the president of the country upon the proposal of government, parliament (quotas allotted proportionally according to the size of the political parties in the National Assembly), and civil society, the latter covering all socio professional bodies or associations. In Cote d'Ivoire, the Independent Electoral Commission (IEC) comprises members appointed, also via presidential authorization, upon the proposal by parliament, institutions and several ministries as well as by political parties. In Mali, political stakeholders are also involved in the appointment of members of the National Electoral Commission (NEC), since the majority party and the opposition are both allowed to make proposal in this regard. Civil societies also have their representatives in the Commission. The representative of the Office of the Director General of Budget<sup>114</sup>

The Cape Verde electoral commission, called National Election Commission (NEC) is made up of five (5) members. Its members are elected by members of the parliament through secret ballot with two third (2/3) majority. Although the fact that members of the NEC are elected by members of parliament is not peculiar to Cape Verde, it is meanwhile interesting to note that contrary to what applies for several other countries of the sub-region, no allusion is made here to the political configuration of the parliamentary institution or to the general national political scene. This is for the simple reason that in Cape Verde, members of the NEC who do not represent political parties are expected to enjoy the confidence of a large political force represented at the National Assembly. It needs to be added that up until now, although no allusion has been clearly made to the need to take into consideration the political configuration of the parliament in the choice of members of the NEC, the opposition has always been taken into consideration (even when the majority has only 2/3 of the votes) and it does happen that the chairman of the NEC is one of the members appointed by the opposition<sup>115</sup>.

In Senegal, it is on the other hand very clearly indicated that members of the INEC must be independent minded persons, of course of Senegalese nationality, and above all, known for their political neutrality. Incompatibilities which are found in most of the laws of other countries are even declared by the law. Consequently, a member

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<sup>114</sup> M.Hounkep "Electoral Commissions in West Africa: A comparative study" p23

<sup>115</sup> M.Hounkep "Electoral Commissions in West Africa: A comparative study" p25

of the government, a sitting judge, a member of the ministerial cabinet, an elected political officer, and a member of a support group to a party may not be members of the INEC or its parts. Similarly, top functionaries of the territorial administration (governors, chairmen of local governments, chairmen of local development areas) are excluded from being members of the electoral commission. Senegal is, by every empirical standpoint, seen as opting for a “non politicized INEC” From the above jurisdictions there are lessons which Zimbabwe can learn and can reform its laws in line with best practices from other jurisdictions<sup>116</sup>.

Careful measures of avoiding politically inclined persons are applied in Sierra Leone and in the Gambia where all persons who, during the last two years preceding the presentation of their candidatures to the commission, were candidates at the legislative elections, occupied a post in an organization which supported candidates at the legislative elections, supported candidates in the local elections, or occupy a post of responsibility in the public service, are not eligible<sup>117</sup>.

The authority and procedure for the appointment of members of the electoral commissions also vary from one country to the other. There are cases where the president of the country appoints members on the proposal by other bodies (Benin, Niger). There are also cases where the appointment is done by the president of the country but with the required consent of another institution (Liberia, Senegal, Ghana, Sierra Leone). There are finally cases where parliament, e.g. an institution which handles the appointment (Togo, Guinea Bissau and Cape Verde<sup>118</sup>). A survey of all these jurisdictions indicate the need for other actors in the appointment process to insulate the process from political interference. It instils public confidence in the impartiality of the EMB.

Professor Lovemore Madhuku in an interview with Newsday reiterated that the chairperson must be appointed by a body of politicians. He moved for a Constitutional amendment to accommodate that conference of political actors that

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<sup>116</sup> See (n110 above) p26

<sup>117</sup> (n110 above) p25

<sup>118</sup> (n110 above)p25

will endorse the commission.<sup>119</sup> This is quite noble and better safeguard on the appointment process.

There is a trend in appointing judges as chairpersons the selection of members of the judiciary reflects an instinctive desire to seek persons whose independence and impartiality in handling matters of public concern is widely recognized and accepted. Where the EMB discharges its responsibilities with honour and dignity and the results are widely accepted by voters, there will be no problem. There is however risks where this does not happen and the judge become publicly identified with a discredited body in a manner that may put the reputation and prestige of the judiciary in jeopardy. There is also a risk that some judges' performance of these duties may be influenced by the expectation of some reward in the form of elevation to a higher judicial office. Furthermore, there is also a risk that a judge who was appointed to chair or participate in an EMB, may upon the resumption of his regular duties, and if disputes relating to the conduct of the elections by the EMB come before the courts, adopt a position that will try to justify or defend the position he took when acting in the body. Be that as it may, judges are certainly better placed than most ordinary citizens to help in the management of EMBs but it may well be desirable to use only retired judges who will have little to gain in acting partially and where there is little chance of putting their reputation for independence and impartiality at risk.

#### *Lack of disciplinary process*

It would be naïve to assume that the occupants of important positions within chapter 9 institutions will never fall short of ethical or lawful standards. In such cases it is important that processes are in place to allow for expeditious, independent and transparent investigation, as well as adequate disciplinary mechanisms which include sanctions that do not necessarily entail the removal of an office-bearer. Such a process would ensure that the integrity of these institutions is maintained and that the work of the institutions is not engulfed in long running scandals.

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<sup>119</sup><https://www.newsday.co.zw/2019/10/chigumba-zec-commissioners-face-axe/> assessed 7 April 2020

Most electoral jurisdictions which use the independent model of elections management are shifting towards placing EMBs under the direct control of Parliament as a representative body rather than reporting to the executive through government ministers. Parliament is to the public is an embodiment of diversity and inclusive as opposed to the executive arm of government which ordinarily is dominated by one political formation.

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 reinforced by suitable provisions in the enabling legislation. The independence of the electoral commission can only be durable by 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 clause that guarantee the independence of chapter 9 institutions.

The electoral commission should be put under the direct control of Parliament as a representative body rather than reporting to the executive through government ministers. Parliament is to the public an embodiment of diversity and inclusivity as opposed to the executive arm of government which ordinarily is dominated by one political formation. ZEC should report to parliament directly instead of doing that through Minister of Justice to sustain operational independence. The IEC of South Africa functionally reports to parliament on both its administrative and election management issues

The conditions of service especially salaries and benefits, are determined either by law or by decisions taken by the head of state/government in consultation with other offices, such as the legislature, a public service ministry (or commission or similar body), or the Treasury. Members of the EMB may be appointed under the same conditions of service as senior judicial officers, or other senior public officers.

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7. African Charter on Democracy, Elections and Governance

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