

**EXPLORING MECHANISMS OF STRENGTHENING NON-JUDICIAL
ELECTORAL DISPUTE RESOLUTION IN ZIMBABWE**

by

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DEDICATION

I dedicate this project to my wife, Pretty and my family. To Reginald and Sandra this work must inspire you to greater heights.

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ABSTRACT

Electoral Act [chapter 2:13] establishes judicial and non-judicial electoral dispute resolution mechanisms. In view of this development, this study examines the non-judicial mechanisms of resolving electoral disputes. The study argues that non-judicial mechanisms of resolving electoral disputes are of paramount importance in ensuring the smooth functioning of the electoral process.

The thesis begins with an overview of the constitutional provisions and the relevant Act of Parliament that provide for judicial and non-judicial electoral dispute resolution mechanisms. This is followed by an analysis of the theoretical underpinnings of non-judicial electoral dispute resolution in general. The study then focuses on the Zimbabwean legal framework for non-judicial electoral dispute resolution as provided in the Electoral Act. To put the study into perspective, the analysis relies on international standards and a comparative assessment with South Africa.

The research established that Zimbabwe has non-judicial EDR mechanisms in electoral dispute resolution but they are fairly new and the structures are not fully developed as compared to other jurisdictions. It also observed that the mere existence of non-judicial EDR in the Electoral Act is not enough. Therefore, the study proposes practical recommendations which address identified weaknesses in the Zimbabwean legal framework. These suggestions are informed by lessons learnt from international standards and emerging global trends.

KEY TERMS

Electoral dispute resolution; non-judicial; alternative dispute resolution; elections; Zimbabwe; 2013 Constitution; international standards; Electoral Act; Code of conduct; democratic elections; regional instruments; Constitution of South Africa; South African Electoral Commission Act

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
CODESA	Convention for a democratic South Africa
ECHR	European Convention on Human Rights and Freedoms
EDR	Electoral Dispute Resolution
GNU	Government of National Unity
ICCPR	International Covenant on Civil and Political Rights
ICPS	International Centre for Parliamentary Studies
IDEA	International Institute for Democracy and Electoral Assistance
IEC	Independent Electoral Commission
IFP	Inkatha Freedom Party
MLC	Multiparty Liaison Committees
NP	National Party
PLC	Party Liaison Committees
SADC	Southern African Development Community
TEC	Transitional Executive Council
UNDHR	Universal Declaration of Human Rights
ZEC	Zimbabwe Electoral Commission

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CHAPTER 1

INTRODUCTION AND CONCEPTUAL OVERVIEW

1.1 INTRODUCTION

Since independence in 1980, multiparty elections have become the most important manifestation of a democratic process in Zimbabwe. However, electoral disputes can arise even in the most democratic States. Electoral disputes may arise during the pre or post-election period or on polling day.¹ These may concern any election-related issues such as voter and candidate registration, campaigning, the conduct of election day procedures or election offences among others. Therefore, the effective resolution of election disputes is critical to the overall protection of fundamental rights, conflict prevention, electoral integrity and public confidence in the election process and acceptance of election results, thus making this subject an important aspect of electoral law.²

In Zimbabwe, the Electoral Act [Chapter 2:13] establishes judicial and non-judicial electoral dispute resolution mechanisms. Judicial dispute resolution mechanisms include the Electoral Court³ and the Constitutional Court. Non-judicial mechanisms include the Multiparty Liaison Committees (MLCs).⁴ These non-judicial mechanisms of resolving electoral disputes play an important role in ensuring the smooth functioning of the election processes, assisting in ensuring electoral justice and supporting the acceptance of election results.⁵ Whilst judicial electoral dispute resolution mechanisms have received significant analysis, non-judicial mechanisms have not received the same amount of analysis. Therefore, this study critically analyses the legal framework of non-judicial mechanisms for resolving electoral disputes in Zimbabwe. The focus of the study is on the establishment of MLCs, their functions and their contribution to democratic processes. Related to this is a

¹ T Mutangi, *Handbook on Constitutional and Electoral Litigation in Zimbabwe: Context, Legal Framework and Institutions* (2018) LSZ and EU 71.

² *Handbook for the Observation of Election Dispute Resolution* (2019) 7.

³ Sec section 161 of the Electoral Act [Chapter 2:13]

⁴ See section 160A - 160D of the Electoral Act

⁵ C Napier, Political Party Liaison Committees As a Conflict Resolution Mechanisms - The South African Experience (2015) *Journal for Contemporary History* (2015) 40 (2) 157.

discussion of the role of the Electoral Code of Conduct in the resolution of electoral disputes. Other forms of non-judicial EDR are also reviewed. The ultimate aim of the study is to identify weaknesses inherent in the current framework with the hope of proposing recommendations for strengthening the system.

1.2 BACKGROUND OF THE STUDY

Electoral dispute resolution (EDR) is the resolution of all disputes relating to the electoral process, whether pre or post-election or on polling day, handled by the election administration, the judiciary and non-judicial authorities.⁶ Traditionally the judiciary has always been the primary EDR mechanism. However, in modern democracies, non-judicial dispute resolution mechanisms are now playing an important role in the functioning of election processes and conflict management. In Zimbabwe, the MLCs are an example of such a non-judicial electoral dispute resolution mechanism. They seek to enforce constitutional principles that find residence in electoral law.

On the 22nd of May 2013, Zimbabwe enacted a new Constitution entitled Constitution of Zimbabwe Amendment (No. 20) Act 2013. This Constitution was a product of the efforts made by the Government of National Unity (the GNU) established in February 2009 after the heavily disputed 2008 general elections.⁷ The 2013 Constitution replaced the 1980 Constitution which was chiefly a document crafted to transfer power from colonial Rhodesia to the people of Zimbabwe on independence in April 1980.⁸ The 1980 Constitution had become outdated, bulky, unclear and inaccessible given that it had been amended nineteen times during its three decades of existence.⁹ Further, it was agreed that the 1980 Constitution failed to provide a broad institutional framework in which voting and election contestation

⁶ *Handbook* (n 2 above) 7.

⁷ The GNU was created by the three political parties in Parliament, namely ZANU (PF), MDC-T and MDC-M. The GNU was ushered by the Global Political Agreement (GPA) signed on 15 September 2008 and Article 6 of the GPA facilitated the establishment of a Select Committee of Parliament known as COPAC that spearheaded the Constitution making process.

⁸ See Article 6 of the GPA (n 7 above)

⁹ Madebwe T, 'Constitutionalism and the new Zimbabwean Constitution' (2014) (1) *MSU Law Rev* 6-19.

could take place freely and fairly including the resolution of disputes arising within the electoral game. Thus, it was accepted that there was a need for a home-grown Constitution which was people driven, inclusive and democratic.¹⁰

The 2013 Constitution is a marked departure from the 1980 Constitution. Chapter 1 of the Constitution is dedicated to founding provisions amongst which feature supremacy of the Constitution.¹¹ Section 3 is dedicated to founding values and principles. Relevant to this study are principles of good governance, which bind the State and all institutions of government at every level in section 3(2) (a) - (c). These include a multi-party democratic political system; an electoral system based on universal suffrage, equality of voters, free, fair and regular election; adequate representation of the electorate; the orderly transfer of power following elections and respect for the rights of all political parties.¹² Electoral good governance operates in three broad areas, namely rule-making, rule application and rule adjudication.¹³ Rule making involves the designing of basic rules of electoral processes. Rule application involves the implementation of those rules and rule adjudication is concerned with the resolution of electoral disputes.¹⁴

Chapter 4 of the Constitution contains a Declaration of Rights which entrenches fundamental human rights and freedoms. By virtue of the supremacy of the Constitution, these rights and freedoms are protected from encroachment by the legislative and executive organs of the government. Unlike the 1980 Constitution which was restricted to basic civil and political rights, the 2013 Constitution not only broadens these rights but is also progressive in that it guarantees socio-economic rights, cultural rights and solidarity rights.¹⁵ Election-related rights are entrenched in section 67 of the Constitution titled 'Political rights.' This section provides for a

¹⁰ G Manyatera, 'The Constitution of the Republic of Zimbabwe - Commentary' in Wolfram R *et al* (eds) *Constitutions of the Countries of the World* (2014) 8.

¹¹ See section 2 (1) of the Constitution.

¹² See section 3(2) (a) (d) of the Constitution.

¹³ S Mozaffer & A Schedler *The Comparative study of elections and governance - Introduction* (2002) *International Political Science Review* 5-27.

¹⁴ C Napier (n 5 above) 158.

¹⁵ G. Manyatera (n 10 above) 15-18.

motley of rights with affinity to elections and electoral processes. It provides as follows:

- (1) Every Zimbabwean citizen has the right -*
 - (a) to free, fair and regular elections for any elective public office established in terms of this Constitution or any other law, and*
 - (b) to make political choices freely.*
- (2) Subject to this Constitution every Zimbabwean citizen has the right -*
 - (a) to form, to join and to participate in the activities of a political party or organisation of their choice;*
 - (b) to campaign freely and peacefully for a political party or cause;*
 - (c) to participate in peaceful political activity; and*
 - (d) to participate individually or collectively, in gatherings or groups or in any other manner, in peaceful activities to influence, challenge or support the policies of the Government or any political or whatever cause.*
- (3) Subject to this Constitution, every Zimbabwean citizen who is of or over eighteen years of age has the right -*
 - (a) to vote in all elections and referendums to which this Constitution or any other law applies, and to do so in secret, and*
 - (b) to stand for election for public office and, if elected, to hold such office.*
- (4) For the purpose of promoting multi-party democracy, an Act of Parliament must provide for the funding of political parties.*

Mutangi submits that EDR in Zimbabwe is centred on giving effect to section 67 of the Constitution and there is no EDR that falls outside the provisions of this section.¹⁶ Judicial or non-judicial electoral dispute resolution mechanisms seek to enforce one or more of the rights entrenched in section 67 of the Constitution. Therefore, section 67 of the Constitution is the grundnorm of electoral adjudication in Zimbabwe. Furthermore, section 155 of the Constitution provides for principles of the electoral system. In terms of section 155 (2) (e), the State must take all appropriate measures, including legislative measures to ensure the timely resolution of electoral disputes.¹⁷ Section 157 of the Constitution then provides that an Act of Parliament must provide for the conduct of elections and among other things a code of conduct for political parties, candidates and other persons participating in elections and challenges to election results.

The Electoral Act is the legislation which regulates EDR in Zimbabwe. The purpose of the Act is outlined in its preamble which provides as follows:

An ACT to provide for the terms of office, conditions of service, qualifications and vacation of office of member of the Zimbabwe Electoral Commission, the procedure at meeting of the Zimbabwe Electoral Commission and the appointment of the Chief

¹⁶ T Mutangi (n1 above) 74.

¹⁷ This must be read with section 69 (3) of the Constitution which provides for the right of access to courts, or to some other tribunal or forum established by law for the resolution of any dispute.

Elections Officer; to make provision for the registration of voters and for the lodging of objections thereto; to provide for the preparation, compilation and maintenance of voters rolls; to prescribe the residence qualifications of voters and the procedure for the nomination and election of candidates to and the filling in of vacancies in Parliament; to provide for elections to the office of the President; to provide for local authority elections, to provide for offences and penalties, and for the prevention of electoral malpractices in connection with elections; to establish the Electoral Court and provide for its functions; to make provision for the hearing and determination of election petitions, and to provide for matters connected with or incidental to the foregoing.

The Electoral Act distinguishes between electoral disputes concerning the election to the office of the President or Vice-President on one hand, and the election to the office of a Member of Parliament or local authority on the other hand.¹⁸ Further, the Electoral Act provides for judicial EDR mechanisms and non-judicial EDR mechanisms. Courts of law are the leading EDR mechanisms provided for in the Act. Section 161 of the Electoral Act establishes the Electoral Court. This is a specialised division of the High Court with exclusive jurisdiction to hear appeals, applications and petitions in terms of the Act and to review any decision of the Zimbabwe Electoral Commission (ZEC) or any other person made or purporting to have been made in terms of the Act.¹⁹ The Electoral Court hears all cases from the nomination of candidates, voter and candidate conduct, media coverage, electoral fraud, voter and candidate intimidation, and political violence among other disputes. Section 167 (2) (b) of the Constitution gives the Constitutional Court jurisdiction to hear and determine disputes relating to the election to the office of the President. Regrettably, judicial EDR mechanisms are beset with various challenges. These include the complexity of proceedings, independence, lack of trust, length of time it takes to resolve disputes and costs involved. As a result, the Electoral Act also establishes non-judicial EDR mechanisms which are efficient and time-saving, cheap, and offer substantive justice as opposed to technical justice, easily accessible and informal.

The Electoral Act gives ZEC jurisdiction to handle electoral disputes administratively. It makes such decisions in many areas falling under its prerogative, however, its decisions are reviewable in the Electoral Court. To support the

¹⁸ See Parts XVII and XXII - XXIII of the Electoral Act as amended.

¹⁹ Section 161 (2) (a) (b) of the Electoral Act.

provisions of the 2013 Constitution the Electoral Act also establishes MLCs in section 160B of the Act. Section 160A defines MLCs as a natural multiparty liaison committee, a constituency multiparty liaison committee or a local authority multiparty liaison committee. Therefore, MLCs are at three levels. Firstly, is the national MLC applicable in the case of a Presidential election or general election to elect members of the National Assembly.²⁰ Secondly, is the constituency MLC for each constituency in which the election is contested, in the case of a Presidential election, general election for electing members of the National Assembly or by-election to fill a vacancy in the National Assembly.²¹ Thirdly, a local authority for each local authority area in which the election is contested.²² A national MLC is constituted by a Commissioner of the ZEC who acts as the Chairperson, two representatives of each political party contesting in the election and any person invited by the representatives of every political party.²³ A constituency MLC consists of a representative of the ZEC, a representative of each political party contesting the election and any person invited by the representatives of every political party represented in the liaison committee.²⁴

The need for cooperation between political parties contesting in an election and electoral management bodies has become important in averting conflict and resolving electoral disputes. Therefore, the MLCs are designed to manage the relations between competing parties. Their functions are outlined in section 160C of the Electoral Act and include the following: to hear and attempt to resolve any disputes relating to electoral processes, report and refer to the ZEC any electoral disputes; to request the ZEC to mediate or appoint an independent mediator to resolve any disputes; to present to the ZEC any reports, assessments, records or recommendations relating to the electoral process and assist in implementing Electoral Code of Conduct for political parties set out in the Fourth Schedule to the Act.²⁵ Any disputes referred to the ZEC or an independent mediator shall be resolved

²⁰ See section 160B (1) (a) of the Electoral Act.

²¹ See section 160B (1) (b) of the Electoral Act.

²² See section 160B (1) (c) of the Electoral Act.

²³ See section 160B (2) (a) of the Electoral Act.

²⁴ See section 160B (2) (b) of the Electoral Act.

²⁵ See section 160 C (1) (a) - (f) of the Electoral Act.

within the time requested by the MLC or within a reasonable time.²⁶ Further, decisions of the MLC shall be made by consensus.²⁷ To support MLCs in executing their mandate the Electoral Act in the Fourth Schedule to the Act makes provisions for an Electoral Code of Conduct for Political Parties and Candidates and Other stakeholders.

1.3 STATEMENT OF THE PROBLEM

The recognition of non-judicial EDR mechanisms such as the MLCs by the Electoral Act is a positive development in the Zimbabwean electoral law framework. However, the challenge is that these MLCs are not well developed. Whilst the Electoral Act provides the general framework for their establishment, there is no detailed set of regulations which provide for their functioning as well as procedures and processes for dispute settlement through alternative dispute resolution mechanisms. The Electoral Code of Conduct for Political Parties set out in the Fourth Schedule to the Act is not helpful in this regard. It is limited in its scope and is largely designed to facilitate the conduct of free and fair elections by providing a code of ethics and not dispute resolution procedures. As if that is not enough, the general Zimbabwean public is not familiar with the existence and functions of the MLCs. Moreover, there is a dearth of literature on the role of MLCs in Zimbabwe. In light of the foregoing, the study seeks to ascertain the weaknesses of the current system of non-judicial EDR in Zimbabwe with the hope of proffering suggestions for strengthening the system.

1.4 RESEARCH QUESTIONS

The main research question of this study is, to what extent is the Zimbabwe legal framework on non-judicial EDR consistent with international standards and best practices? The main research question requires a determination of the following sub research questions questions:

²⁶ See section 160 C (2) of the Electoral Act.

²⁷ See section 160D of the Electoral Act.

- What historical and contextual factors have influenced the use of non-judicial EDR mechanisms in Zimbabwe?
- What are the advantages and disadvantages of non-judicial EDR?
- What are the strengths and weaknesses of the Zimbabwean framework of non-judicial EDR?
- What are the theoretical perspectives underpinning non-judicial EDR?
- Is the Zimbabwean framework on non-judicial EDR consistent with international standards and best practices?

1.5 OBJECTIVES OF THE STUDY

The main objective of this study is to critically evaluate the legal framework regulating the non-judicial EDR in Zimbabwe with particular reference to MLCs. The research examines the theoretical underpinnings of MLCs, their origins and the legal environment in which MLCs function. Of interest are the weaknesses inherent in the current system of non-judicial EDR mechanisms and how the system can be strengthened. The study also exposes the shortcomings of the current framework by engaging in a comparative analysis of South Africa.

1.6 SCOPE OF THE STUDY

EDR is a broad area of electoral law. It has since been established that in Zimbabwe, the Electoral Act provides two broad forms of EDR, that is, judicial and non-judicial EDR mechanisms. This study is concerned with non-judicial EDR mechanisms and in particular MLCs. These mechanisms have not received the same amount of analysis and attention that judicial EDR mechanisms have.

1.7 METHODOLOGY

This study entails a doctrinal analysis of non-judicial electoral dispute resolution mechanisms in the Electoral Act. The research adopts a descriptive and analytical approach to the desk, electronic and other materials available on the subject matter. This calls for an in-depth illustration, discussion and analysis of relevant

legislation, case law, common law, international law, internet and authoritative texts. The study also adopts a comparative approach by examining the non-judicial electoral dispute resolution mechanisms of South Africa. The South African jurisdiction has been chosen for various reasons. The South African non-judicial electoral dispute resolution system through Political Party Liaison Committees is formalised and well developed. Since 1994, South Africa has had a track record of good electoral governance and successful resolution of electoral disputes. Furthermore, the Electoral Act of Zimbabwe is modelled along the South African Electoral Commission Act, 51 of 1996. Lastly, Zimbabwe and South Africa share the same legal system which is based on Roman-Dutch law with some English law influence. They also share similar national demographics, endowments, national histories and cultures and above all, forces of national and international political economy. In light of the foregoing, the methodological approach is not only legal and theoretical but also comparative.

1.8 CHAPTER SYNOPSIS

This study consists of five chapters of unequal length and value. The framework of the study is as follows:

Chapter 1 introduced the study and gave a conceptual overview. It highlighted the following preliminary aspects, introduction, background to the study, statement of the problem, research objectives, scope of the study, methodology and framework of the research.

Chapter 2 gives an overview of the theoretical underpinnings of non-judicial electoral dispute resolution in general. The term EDR is defined and the various forms of electoral disputes are discussed. International perspectives on EDR are analysed followed by an evaluation of the various models of EDR. This chapter basically sets the scene for the study.

Chapter 3 analyses the Zimbabwean framework for non-judicial electoral dispute resolution as provided for in the Electoral Act. The legal framework of MLCs is

discussed. This chapter seeks to ascertain the weaknesses and strengths of the current system. The role of the Electoral Code of Conduct in the resolution of electoral disputes is also reviewed.

Chapter 4 gives a comparative analysis and considers non-judicial electoral dispute resolution in South Africa. The problem areas identified in Chapter 3 are examined by way of a comparative study of the South African Party Liaison Committees.

Chapter 5 concludes the study. It provides a summary of major findings, recommendations and final conclusions.

CHAPTER 2

ELECTORAL DISPUTE RESOLUTION IN PERSPECTIVE

2.1 INTRODUCTION

This chapter gives an overview of the theoretical underpinnings of electoral dispute resolution in general. It commences with a definition of electoral dispute resolution and a discussion of the various types of electoral disputes. In chapter 1 it was established that EDR is centred on giving effect to the right to participate in government. This right owes its origins to international human rights conventions. Therefore, to put the study in its context, this chapter evaluates electoral dispute resolution from an international perspective. Finally, the different models of electoral dispute resolution are discussed. These include the legislative model, judicial model, and non-judicial models or alternative dispute resolution.

2.2 THE CONCEPT OF ELECTORAL DISPUTE RESOLUTION

One of the basic features of democratic governance is the periodic holding of elections, “which subject the principal apparatus of government to change and reconstitution.”²⁸ Election disputes are inherent to elections. However, this should not be perceived as a reflection of weaknesses in the system of a given state, but as proof of the strength, vitality and openness of the political system.²⁹ Therefore, an important safeguard of election integrity lies in an effective resolution of electoral disputes. An election dispute can be defined as any contentious electoral matter that is presented for resolution to a competent authority, whether judicial or non-judicial.³⁰ What makes the dispute an election dispute is that it breaches the legal framework for elections or it affects the rights and interests of participants in the electoral process. It, therefore, follows that EDR is the resolution of all disputes

²⁸ L Nkansah *Electoral Justice under Ghana's Fourth Republic* (2020) 32.

²⁹ *Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System* (2000) 5.

³⁰ *Handbook* (n 16 above)

relating to the electoral process whether handled by judicial or non-judicial authorities.³¹

Electoral disputes can be classified in a variety of ways. For example, they can be classified based on the type of issue in dispute, the state of the electoral process in which the dispute arises, or the parties to the dispute. However, the common method of classifying election disputes is based on the stage of the electoral process. Thus, electoral disputes can be categorised into the following: pre-election disputes, election day disputes and post-election disputes. Pre-election disputes arise at the preliminary stage of the electoral process, that is before the polling day. These include issues such as the demarcation of a country into constituencies, voter registration, political party registration, political party primary elections, the nomination of candidates, disqualification of candidates, voters roll, election campaigns and the publication of election notices.³² Polling day disputes relate to irregularities arising from the conduct of the election. These include the following disputes, qualification of candidates to contest an election, exclusion of candidates, accreditation of voters, voter conduct, compliance with voting day legal requirements and declaration of results. As for post-election disputes, these arise after the polling day or after the return of candidates. Disputes can include the tenure of office of political office holders, vacancy of political offices and funding of political parties among others.

Therefore, an effective EDR system must anticipate disputes at different stages of the electoral process and make provision for their resolution. This is the cornerstone of democracy, in that it safeguards both “the fundamental role in the continual process of democratisation and catalyses the transition from the use of violence as

³¹ This can also be referred to as electoral justice. It requires that each action, procedure and decision related to the electoral process should be consistent with the law, it should protect or restore electoral rights when breached and should give aggrieved persons a hearing and redress. See L Nkansah ‘Transfer of power to a new administration in Ghana’s democratic system: The way forward’ in NA Apt (eds) *Positioning Ghana: Challenges and Innovation* (2015) 35-36.

³² F Ikpokonte *The Application of Alternative Dispute Resolution (ADR) Mechanisms in the Resolution of Electoral Disputes: Nigeria in Perspective* (2018) Unpublished LLM Thesis University of Cape Town 18.

a means for resolving political conflicts to the use of lawful means to arrive at a fair solution.”³³

2.3 EDR AND INTERNATIONAL STANDARDS

The resolution of election disputes, like all aspects of the electoral process, owes its origins to international standards which recognise the right to vote and the fundamental right of all persons whose rights have been infringed to an effective remedy before a pre-established independent tribunal. The relevance of international law in Zimbabwe is well settled. International trends provide guidance and a framework that serves as a point of departure in ensuring that Zimbabwe is on track and making progress towards aligning her laws with international best practices.³⁴ The 2013 Constitution also recognises the relevance of international law. For example, sections 46 (1) (c), 326 (2) and 327 (6) of the Constitution provide that international law acts as a guide to interpreting domestic law.³⁵ In this regard, the rule that settles electoral disputes is in domestic law but the rule is given its content and scope from a consideration of international law. Section 326 of the Constitution also recognises customary international law as part of Zimbabwean law, unless it is inconsistent with the Constitution or an Act of Parliament. In addition, section 327 of the Constitution provides for the incorporation of international law into domestic law by an Act of Parliament. Although reference will be to the incorporating Act, the law is essentially international law. Lastly, international law can also be used to develop the common law in terms of sections 46 (2) and 176 of the Constitution. In this regard, international law is used as the basis of either the interests of justice or the spirit of the Constitution.³⁶ Therefore, relevant international standards on EDR are key to this study and are discussed below.

³³ IDEA Handbook (2010).

³⁴ TG Kasuso & K Sithole Protection of the Rights of Employees in Insolvency Law: A Zimbabwean Perspective (2020) JAL.

³⁵ L Madhuku *Labour Law in Zimbabwe* (2015) 519.

³⁶ L Madhuku (n35 above) 519.

2.3.1 The right to vote

Political rights provide the foundation for legitimate governance, which can be achieved by the organisation of elections. These fundamental political rights provide the foundation for legitimate governance which can be achieved by the organisation of elections. Elections are, therefore, human rights events. They are the means by which people express their political will and they are the most important mechanism for the implementation of the right to participate in government.³⁷ The affirmative obligation of states to protect their citizens' right to vote is recognised in the Universal Declaration of Human Rights, 1948 (UNDHR). Article 21 of the UNDHR states that everyone has the right to take part in the government of his country, directly or through freely chosen representatives. In addition, the International Covenant on Civil and Political Rights (ICCPR) also recognises the right to participate in government. Specifically, Article 25 of the ICCPR provides as follows:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through chosen representatives,*
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.*

The principle reinforces the notion of democratic elections and ensures the freedom of opinion, assembly, movement and expression. The recognition of political rights found in international treaties is further buttressed by regional instruments. These include the European Convention on Human Rights and Freedoms (ECHR),³⁸ the African Charter on Human and People Rights (ACHPR)³⁹ and the American

³⁷ *Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections* (1994) 27.

³⁸ See Article 3 of the European Convention on Human Rights and Freedoms (ECHR) which provides that, 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.'

³⁹ See Article 13(1) of the ECHR which provides that every citizen shall have the right to participate freely in their government.

Convention.⁴⁰ Generally, these international and regional instruments on the right to vote inform the establishment of EDR forums. They seek to enforce the enjoyment and realisation of the right to vote.

2.3.2 The right of redress for election disputes

The provision of clearly defined means of remedying election disputes is critical to the maintenance of an EDR system that adequately supports the right to vote. The core function of EDR is to maintain credibility and reliability through the availability of a clear legal right of action for citizens and participants.⁴¹ This mechanism must encompass the fundamental right to judicial review with the prospect of an effective remedy and is recognised in international and domestic treaties. For example, the UNDHR convention in Article 8 provides that, “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution.” Article 3 (a) - (c) of the ICCPR provides that:

3. Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;**
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy,**
- (c) To ensure that the competent authorities shall enforce such remedies.**

A similar right is recognised in Article 7 of the ACHPR which guarantees every individual’s right to have his or her cause heard. The right to redress also requires an adequate process to pursue the claim. This follows that there must be clear guidelines on the process available to bring a claim within the EDR system. In addition, electoral dispute resolution systems must be transparent so as to build public confidence. Ultimately this legitimises the outcomes of EDR. Related to the

⁴⁰ See Article 23 of the ECHR.

⁴¹IDEA Handbook (2011) 13.

right to redress is the question of who has the standing to bring electoral disputes. As already established election disputes cover a wide range of issues. Therefore, all relevant actors who assert knowledge of an electoral irregularity must have the standing to bring complaints.

2.3.3 A clearly defined regimen of election standards and procedures

Article 10 of the UNDHR provides that everyone is entitled in full equality to “a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” A similar right is recognised in Article 14.1 of the ICCPR.⁴² Nkansah submits that based on the UNDHR and ICCPR appropriate legislative measures must be taken to define a legal right to redress and to adequately implement periodic, free and fair elections.⁴³ These measures must be clear and accessible in order to provide adequate notice and process to individuals, political parties and candidates. This substantive body of the law must be augmented by codified procedural mechanisms to adjudicate electoral disputes.⁴⁴

An effective electoral complaint mechanism must codify both the structural framework for adjudicating conflict, involving procedural guidelines for stakeholders operating within that framework. Therefore, EDR systems can only function if they work in tandem with a clearly defined body of electoral laws, regulations and procedures.⁴⁵ Accessible substantive and procedural guidelines for election disputes are critical to the enforcement of political rights. However, the codification of substantive and procedural EDR law must account for legal traditions and customs,

⁴² See Article 14.1 of the ICCPR It provides that ‘all persons shall be equal before the courts and tribunals and in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.’

⁴³ LA Nkansah ‘Electoral adjudication in Africa’s democratisation process: A prerequisite for electoral justice’ in SM Haque et al (eds) *Democratising Public Governance in Developing Nations: With Special Reference to Africa* (2016) 256.

⁴⁴ (2011) 19.

⁴⁵ See the 1994 Declaration on Criteria for Free and Fair Elections.

including non-judicial ways of resolving disputes such as negotiation, mediation and arbitration.

2.3.4 An impartial and informed arbiter

Electoral disputes are usually politically sensitive, controversial and emotive. As a result, the recognition of the importance of an impartial and informed arbiter is relevant to EDR. The role of impartial arbiters in maintaining basic human rights is explicitly recognised in international law. The ICCPR recognises the necessity for ‘a fair and public hearing by a competent, independent and impartial tribunal established by law.’⁴⁶ Regional instruments such as the ACHPR and the ECHR also address the importance of an autonomous and impartial adjudicatory body. Related to this is the requirement that EDR forums must be manned by arbiters with the necessary skills and resources to fully understand the electoral process. This is critical to the expeditious resolution of electoral disputes. The importance of a speedy remedy has thus been recognised in international law as a requirement for electoral justice and fair participation in elections.⁴⁷ Delays in adjudicating electoral disputes damage public confidence and puts the legitimacy of a government into question. Another guiding standard in adjudicating electoral disputes is the establishment of a fair burden of proof and standards of evidence.⁴⁸ These guidelines must be established well in advance of a complaint so that the parties involved will have notice and a reasonable understanding of what will be required of each side in order to resolve the dispute.

2.3.5 Right to Meaningful and Effective Remedies

International conventions recognise that once a country has designated adequate rights and designed adequate procedures, a functional dispute resolution system must provide effective and adequate remedies. The UNDHR in Article 8 provides for “the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.” A

⁴⁶ Article 14 of the ICCPR.

⁴⁷ *SADC Parliamentary Forum, Norms and Standards for Elections in the SADC Region* (2001).

⁴⁸ IDEA Handbook (n 41 above) 49.

similar right is recognised in other international and regional treaties such as the ICCPR, the American Convention, the European Convention and the ACHPR. In ensuring access to an adequate remedy, international human rights conventions also recognise implicitly and explicitly related right such as the right of appeal.⁴⁹ The outcome of an electoral dispute can also be of importance and the right of appeal can buttress the right to an effective remedy. It is also an effective safeguard against arbitrariness in the electoral process.⁵⁰ An EDR system must also set clear time limits for reviews and appeals. It has since been established that election disputes must be resolved expeditiously. The right to remedy also embraces the right to redress for the injury suffered and provides sanctions and penalties. Clearly defined violations and sanctions prevent the arbitrary imposition of penalties or failure to impose penalties. To support the effectiveness of remedies, public trust is key in EDR. Therefore, States must ensure effective education of stakeholders on electoral processes and rights. This includes civic and voter education, training of political parties and their candidates, encouraging political parties to adopt codes of conduct to regulate their activities, and training of actors with a technical role in the electoral processes, the media and election observers.⁵¹

2.4 CLASSIFICATION OF EDR SYSTEMS

Generally, EDR systems can be classified into two broad categories, namely, judicial and non-judicial. This form of classification looks at the regime for bringing electoral challenges as the basis for classifying EDR systems.⁵² Usually, a single EDR system encompasses both judicial and non-judicial EDR forums. A third classification is that of EDR systems entrusted to a legislative body or political assembly.

2.4.1 Judicial EDR

Judicial EDR systems are forums in which the authority to adjudicate upon election disputes is entrusted to a judicial body. It has been argued that the action of judging

⁴⁹ See Article 14 of the ICCPR.

⁵⁰ *European Commission for Democracy Code of Good Practice*.

⁵¹ IDEA (n 48 above) 78.

⁵² A Davis-Roberts *International Obligations for Electoral Dispute Resolution* (2009).

and certifying elections is judicial in nature. Therefore the exercise of these powers should be vested in a judicial body.⁵³ It is the only way to ensure that elections are free, fair and valid. Furthermore, vesting EDR mechanisms in judicial organs emphasizes that this power should be exercised in keeping with the principles of constitutionality, legality and rule of law. Judicial EDR mechanisms can be divided into the following categories; regular courts of the judiciary, constitutional courts, autonomous administrative courts and specialised electoral courts.

(i) Regular courts

This system entrusts EDR to ordinary judges or courts which are not specialised in electoral matters but are part of the judiciary. The power to adjudicate electoral disputes can be conferred on superior courts such as the High Court or Supreme Court of a country. Jurisdiction is assumed either as a court of first instance or through appellate and review jurisdiction. The role of the judiciary in election adjudication is hinged on its traditional role of ensuring adherence to the constitutional limits placed on them through judicial review. It allows for the compliance of validity, legality, rationality and reasonableness.⁵⁴ The use of ordinary courts in EDR is common in a Commonwealth jurisdictions such as the United Kingdom, Australia, Pakistan, Jamaica, Canada and India. A similar situation obtained in Zimbabwe before 2013.

One of the advantages of judicial EDR is the coercive power of the court to enforce its orders.⁵⁵ Secondly, there is a general perception of impartiality and neutrality of the judiciary. This instills public confidence and trust. Furthermore, litigation ensures the preservation of public values.⁵⁶ It maintains reasonable general standards and equality, thus facilitating peace and harmony in the polity. Judicial proceedings are also conducted in terms of pre-determined rules of the

⁵³ A General Classification of Election Disputes.

⁵⁴ P Cumper, *Constitutional and Administrative Law* (1999).

⁵⁵ J C Onyeche, 'Repositioning the African Customary System: A Case study of Traditional Dispute Resolution Mechanism in Nigeria in VE Nweke (ed) *Adjudication and other Strategies of Conflict Resolution in Nigeria: Essays in Honour of Honourable Justice Chukwunye Ichebo Uriri* (2010) 202.

⁵⁶ J. C Onyeche (n 55) above 84.

court. Not only does this facilitate consistency and fairness but also ensures the expeditious resolution of disputes. Another advantage of litigation in ordinary courts is the availability of the right to appeal. This promotes electoral justice. Despite these advantages, EDR in ordinary courts has its demerits. Litigation is costly and requires the engagement of lawyers. It is time-consuming and inconvenient. Since litigation is public, it lacks confidentiality.⁵⁷ Independence of the judiciary can also be compromised by political interference and corruption. Lastly, escalation of disputes and damage to relationships have also been identified as demerits of litigation.⁵⁸ Critically, any lack of credibility of the judicial system and any perception that it lacks independence seriously harms the credibility of the EDR system.

(ii) *Constitutional courts*

A significant number of countries entrust EDR systems with the Constitutional courts. They determine the validity of elections to bodies with expressly constitutional jurisdiction. Usually, the Constitutional Court is the highest court in that country with jurisdiction over constitutional matters. In Zimbabwe, Indonesia, Niger, Mozambique and several Central and Eastern European countries, the Constitutional court has the final resolution of electoral disputes involving the Head of State. Their decisions are final and not appealable.

(iii) *Administrative Courts*

This form of judicial EDR gives jurisdiction over electoral disputes to an Administrative Court that can be either autonomous or part of the judicial branch.⁵⁹ Examples of countries with Administrative courts dealing with electoral disputes include Colombia⁶⁰ and Finland.⁶¹

⁵⁷ R Matsikidze, *Alternative Dispute Resolution in Zimbabwe* (2013).

⁵⁸ Chukwunye I. U, *Adjudication and other Strategies of Conflict Resolution in Nigeria: Essays* (2010) 124-5.

⁵⁹ *A General Classification of Electoral Dispute Resolution Systems* (n 53 above)

⁶⁰ In Colombia it is called the Council of State (Consejo de Estate).

⁶¹ In Finland they have the Supreme Administrative Court.

(iv) *Specialised Electoral Courts*

With this system of EDR, the resolution of electoral disputes is conferred on courts that are specialised in electoral matters and enjoy functional independence, either as part of the judiciary or independent. These specialised courts are usually called Electoral Courts and have exclusive jurisdiction over electoral disputes. Decisions from these courts can be challenged in superior appellate courts called the Supreme Court. In Zimbabwe, the Electoral Court is a specialised division of the High Court. In South Africa, they have an Electoral Court which is autonomous and independent from any other branch of government.

2.4.2 Non-judicial EDR

Non-judicial EDR can also be referred to as Alternative Dispute Resolution (ADR). It generally refers to a motley of processes that utilise amicable means in resolving disputes outside of litigation or court-based litigation. The processes utilise non-adversarial means of resolving disputes with a focus on the interests of the parties rather than the strict determination of legal rights.⁶² Non-judicial EDR is founded upon three primary processes, namely, negotiation, mediation and arbitration. It can also include conciliation, facilitation, fact-finding, neutral evaluation, expert determination and regulatory agencies and formal administrative dispute resolution procedures.⁶³ Non-judicial dispute resolution forums can also include hybrid processes, which are a combination of conciliation, negotiation, mediation and arbitration such as Con-Arb, Med-Arb, or Arb-Med.⁶⁴

As for the form of non-judicial EDR, it can either be advisory, consensual or adjudicatory.⁶⁵ Further, it can be evaluative, facilitative, transformative, or

⁶² D Spencer & S Ardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (2014) 13-14.

⁶³ RC Reuben, 'Constitutional Gravity: A Unitary Theory of ADR and Public Civil Service' (2000) 41 *UCLA LR* 952.

⁶⁴ R Matsikidze, (n 57 above) 8.

⁶⁵ T Sourdin, 'Alternative Dispute Resolution Principles: From Negotiation, to Mediation' (2014) 179.

determinative.⁶⁶ Sourdin also contends that non-judicial dispute resolution mechanisms can also be binding or non-binding and court-assisted or private.⁶⁷ In respect of initiation, non-judicial dispute resolution mechanisms can arise *ex contractu*, *ex lege*, administratively mandated, court ordered or direct intervention initiated. The adoption of non-judicial mechanisms is not limited to the resolution of disputes, it also extends to the prevention and management of conflict. Non-judicial mechanisms are not a substitute for judicial mechanisms but a supplementary means of dispute resolution. They complement judicial dispute resolution and remedy the shortcomings of litigation such as technicalities, rigidity, lack of confidentiality, formality, cost and accessibility.⁶⁸

Although there are no international instruments that specifically endorse the use of non-judicial electoral dispute resolution, the international standards discussed in this chapter implicitly situate and necessitate the application of non-judicial dispute resolution mechanisms as an important aspect of EDR. As a result, continental and regional bodies have recognised the adoption of non-judicial mechanisms as appropriate and effective EDR mechanisms. In Africa, the AU has established organs and structures with the mandate to prevent, manage and resolve electoral disputes.⁶⁹ The AU's approaches to EDR include early warning and preventive diplomacy, election observation, post-election mediation, technical and governance assistance and post-conflict reconstruction and development. Regional groups such as the Southern African Development Community (SADC) have also successfully mediated electoral disputes in Zimbabwe⁷⁰ and Lesotho.⁷¹ At a national level, States have adopted various mechanisms, depending on the political traditions and electoral legal frameworks. These include the following.

⁶⁶ G Similar, 'Mediation, Transformation and Consultation.' A Comparative Analysis of Conflict Resolution Models' (2007) *OBJS* 445.

⁶⁷ T. Sourdin, (n65 above) 13.

⁶⁸ ME Mokorosi, *The Role of Alternative Dispute Resolution in Consumer Protection in Lesotho* (2015) Unpublished LLM Thesis, University of Cape Town 15.

⁶⁹ See African Union Panel of the Wise, *Election-Related Disputes and Political Violence: Strengthening the Role of the African Union in Preventing, Managing and Resolving Conflict* (2010) 48-57.

⁷⁰ Mediation during the post - 2008 election crisis.

⁷¹ Mediation during the post - 2007 election crisis.

(i) *Use of Electoral Management Bodies*

With this type of EDR system the responsibility of resolving some of the electoral disputes is entrusted to an independent Electoral Commission, in addition to taking charge of organising and administering electoral processes. The electoral management body employs alternative dispute resolution mechanisms such as consultation, negotiation, mediation and administrative procedures in resolving electoral disputes. Countries such as Zimbabwe, South Africa and Kenya have formally adopted this system of resolving electoral disputes. In Latin American jurisdictions, electoral management bodies not only have jurisdiction to resolve electoral challenges but also take decisions that are final, including on the validity of electoral processes, and the decisions are not open to review by any judicial, administrative or legislative body.⁷²

(ii) *Party Liaison Committees*

PLCs generally serve as vehicles for consultation and co-operation between electoral management bodies or Electoral Commissions and registered parties on all electoral matters. PLCs are also referred to as election committees, inter-party or multi-party liaison committees, peace committees, election panels or conflict management committees. They play an important role in ensuring electoral justice and supporting the acceptance of results.⁷³ These committees have been established in African countries such as Zimbabwe, Malawi, Zambia, South Africa, Kenya, Ghana, Tanzania, Lesotho and the DRC. In exercising their functions PLCs are assisted by Electoral Codes of Conduct which provide ethical rules for electoral processes as well as dispute resolution.

(iii) *EDR systems entrusted to an ad hoc body*

⁷² J Becerra, *The Possibility of Using Alternative Dispute Resolution for Election Law Disputes* (2018) *Pepp. Disp. Resol L. J.* 117.

⁷³ C Napier (n14 above) 156-157.

Non-judicial EDR systems that involve an *ad hoc* body derived from a provisional or transitional arrangement have also been used to resolve electoral disputes. This can be an institutional solution, usually sponsored by international, continental or regional bodies such as the UN, AU or SADC. Their mandate is to guarantee the holding of free and fair elections within a legal framework following a serious conflict in a country. For example, the Global Political Agreement of Zimbabwe established after the 2008 disputed elections which resulted in the formation of a Government of National Unity. This type of EDR is temporary in that it is used for a specific election or more than one, but it is a transitional measure pending the adoption of a permanent EDR system.

This form of EDR system can either be an *ad hoc* body created with international movement or an *ad hoc* body created as an internal national institution solution.⁷⁴ An *ad hoc* body created with the assistance of international, continental or regional bodies has the mandate to resolve challenges to the conduct and results of an election. It usually includes members designated by an international body and its purpose is to ensure that elections are free and fair. As for an *ad hoc* body created as an internal national institutional solution, it is the result of agreement and negotiation among the main political forces to resolve electoral disputes. This type of EDR is established by law, with transitional, constitutional or statutory provisions or peace agreements and is provisional. It can be legislative, judicial or administrative in nature.

They are several advantages of the use of non-judicial EDR. Some of the common benefits include the following: decongestion of the court system, thus promoting efficiency; being largely informal, non-judicial EDR is less costly, flexible and not encumbered by technicalities; confidentiality, timely resolution of electoral disputes; promotes confidence in the EDR system, promotes quality resolution of disputes through the use of experts, party autonomy; simplified procedures, emphasis on co-operation and reconciliation improves civil discourse and political culture, promotes access to electoral justice and the preservation of relations

⁷⁴ A General Classification of EDR Systems.(n 59 above)

between the parties.⁷⁵ Notwithstanding these advantages, non-judicial EDR has its demerits. Firstly, it lacks coercive powers for the enforcement of outcomes. The enforcement of its outcomes depends on the voluntary compliance of the parties.⁷⁶ In the event of non-compliance, one will be left with no option but to resort to judicial EDR mechanisms. This results in the possibility of frustration of resolution efforts due to non-cooperation by one or some of the disputants. Secondly, the confidentiality of non-judicial EDR has the potential of hindering the development of the law and promotes legal uncertainty.⁷⁷ It also negatively affects public standards by shielding objectionable acts of politicians from public scrutiny. Thirdly, the informality of non-judicial EDR tends to breed laxity.⁷⁸ Furthermore, some forms of non-judicial EDR are neither appealable nor reviewable. This leaves a party to the dispute with no further recourse.⁷⁹

2.4.3 EDR Systems entrusted to Legislative Bodies

In some instances, EDR is vested in the legislature, one of its committees or some other political assembly. In the French jurisdiction, this is called verification of powers and in the USA it is called qualification or certification of elections. Historically, this system was justified on the principle of the separation of powers which posits that each branch of government is independent of the other and should not, therefore, become involved in decisions that affect the composition of the others.⁸⁰ It was considered a weapon in the hands of the legislature against the executive to ensure its autonomy and independence. This would also ensure that the judiciary is not dragged into partisan political struggles. As a result of abuses by the legislative bodies and political assemblies, this system of EDR is no longer popular.

⁷⁵ See T Melling 'Dispute Resolution within Legislative Institutions' (1994) 46 *Stanford LR* 1677; JA Douglas 'Elections Law and Civil Discourse: The Promise of ADR' (2012) 27 *Ohio State Journal on Dispute Resolution* 291-310, R Green 'Mediation and Post-Election Litigation: A Way Forward' (2012) *Ohio State Journal on Dispute Resolution* 325; D Kanokanga *Commercial Arbitration in Zimbabwe* (2020) 25-28; R Matsikidze *Alternative Dispute Resolution in Zimbabwe* (2013) 4-6.

⁷⁶ M Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World Wide Access to Justice Movement' (1993) 56 *The Modern LR* 282.

⁷⁷ Chukwuemerie at 131.

⁷⁸ R. Matsikidze (n 64 above) 6.

⁷⁹ D Kanokanga *Commercial Arbitration in Zimbabwe* (2020) 29.

⁸⁰ A *General Classification of EDR Systems*(n 74 above).

Countries which still have this system such as the USA and Germany use a mixed legislative-judicial EDR system or legislative-administrative system.

2.5 CONCLUSION

This chapter provided theoretical underpinnings of electoral dispute resolution from an international perspective. It commenced with a definition of electoral dispute resolution and identified the various types of election disputes. This was followed by a discussion of international standards on EDR. Although there are no international instruments that specifically stipulate particular mechanisms for States to adopt in the resolution of electoral disputes. However, international conventions on political and electoral rights provide that States have a responsibility to ensure that electoral disputes are promptly and effectively determined speedily by an independent and impartial authority. The following standards for electoral dispute resolution were identified; the right of redress for electoral disputes; a clearly defined regimen of election standards and procedures, an impartial and informed arbiter, an EDR system that expedites decisions, established burdens of proof and standards of evidence, meaningful and effective remedies, and effective education of stakeholders. It is these standards that inform this study. Finally, this chapter considered the three broad categories of EDR systems and their merits and demerits. Of interest to this study are non-judicial EDR systems. Therefore, the next chapter non-judicial EDR in the Zimbabwean context.

CHAPTER 3

NON-JUDICIAL EDR IN ZIMBABWE

3.1 INTRODUCTION

The preceding chapter examined the theoretical underpinnings of EDR from an international perspective. It looked at the merits and demerits of both judicial and non-judicial EDR systems. This chapter evaluates the Zimbabwean legal framework of non-judicial EDR. To put the study in its context, chapter three briefly gives an overview of judicial EDR in Zimbabwe. However, it must be emphasised that the thrust of chapter 3 is on non-judicial EDR in Zimbabwe. This chapter, therefore, commences with a brief historical overview of EDR in Zimbabwe's pre-2008 elections. This is followed by a discussion of the constitutional foundations of EDR in Zimbabwe. The third part then considers EDR models recognised in the Electoral Act with specific reference to non-judicial EDR. The study exposes the strengths and weaknesses of the current framework.

3.2 THE GENESIS OF NON-JUDICIAL EDR IN ZIMBABWE

The evolution of non-judicial EDR in Zimbabwe dates back to the colonial period. However, non-judicial EDR mechanisms gained prominence during the period 2000 - 2008. This period was characterised by an economic crisis that led to shortages of basic commodities, hyper-inflation and fuel shortages.⁸¹ The political landscape was not spared. The birth of the MDC party, which was the first party to seriously challenge the ruling party ZANU-PF resulted in a volatile political landscape. Elections during this period were marred by political violence and serious electoral irregularities.⁸² Things come to head in 2008 when the opposition MDC-T won the first round of elections. The subsequent run-off was marred by unprecedented levels of political violence perpetrated by the ruling party ZANU-PF and state security

⁸¹ T Mukuhlanjani, 'Zimbabwe Government of National Unity: Successes and Challenges in Restoring Peace and Order' (2014) *Journal of Power, Politics and Governance* 169-180.

⁸² J Mapuwa, 'Government of National Unity (GNU) As a Conflict Prevention Strategy: Case of Zimbabwe and Kenya' (2010) *Journal of Sustainable Development* 247.

agents.⁸³ As a result, the main opposition MDC-T party boycotted the run-off, alleging violence and intimidation. The ruling party romped to victory in a one-man election which was described by many as a sham election.⁸⁴ The economy was not spared. After the disputed 2008 general elections inflation soared and basic commodities disappeared from supermarket shelves. The country degenerated into lawlessness.

It is against this background that SADC intervened in the internal affairs of Zimbabwe. It appointed the then President of South Africa, Thabo Mbeki to act as a mediator and assist the three major political parties in Zimbabwe to come up with a negotiated settlement. With the assistance of Thabo Mbeki and SADC, the three major political parties, namely ZANU PF, MDC-T and MDC-M signed a memorandum of understanding in July 2008 which gave birth to the Global Political Agreement (GPA) signed in September 2008. The GPA was a non-judicial way of resolving the 2008 electoral disputes. It provided for an interim structure of government and prescribed a process of drafting a new Constitution.⁸⁵ This was the first time in post-independence Zimbabwe that a non-judicial EDR forum that involved an *ad hoc* body derived from a transitional arrangement sponsored by a regional body had been effective. It can therefore be concluded that the successful application of non-judicial EDR systems in the resolution of the 2008 electoral dispute in Zimbabwe suggests that non-judicial EDR is appropriate and effective.

The establishment of the GNU in February 2009 was followed by a constitution-making process. The need for a new Constitution in Zimbabwe however did not arise in 2008. It arose earlier, especially in the early 2000s. The main concerns raised included the concentration of too much power in the Executive by the 1980 Constitution.⁸⁶ It was further argued that the 1980 Constitution was narrow in its

⁸³ J Mapuwa, (n82 above) 255.

⁸⁴ K Magaya, 'Constitution by the People or to the People: A Critical Analysis of Zimbabwe's Constitutional Development in View of the Constitution Select Committee (Copac) Led Process' (2015) (3) *Journal of Political Sciences and Public Affairs*.

⁸⁵ K Vullan, 'The Constitutional History and the 2013 Referendum of Zimbabwe' (2013) *Nordem Special Report 2*'.

⁸⁶ G A Dzinesa, 'Zimbabwe's Constitutional Reform Process: Challenges and Prospects' accessed at <https://www.ijr.org.za> (Date of use 16 June 2022).

scope. It only guaranteed political rights and failed to guarantee free and fair elections.⁸⁷ Article 6 of the GPA provided for the framework of the constitution-making process as a parliamentary-driven one. The GPA provided for the establishment and composition of the Constitution Parliamentary Select Committee (COPAC) which was made up of representatives of the three main political parties.⁸⁸ It is this Committee that led the constitution-making process which was finally signed into law on 22 May 2013. It is important to note that the 2013 Constitution is a product of a successful non-judicial EDR mechanism, an EDR system entrusted to an *ad hoc* body.

3.3 OVERVIEW OF THE 2013 CONSTITUTION AND EDR

The 2013 Constitution is the fundamental law of Zimbabwe. It is supreme over all laws, practices, customs and conduct inconsistent with it.⁸⁹ Every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government are enjoined to honour and enforce this supremacy.⁹⁰ It is therefore apparent that the Constitution is the objective standard against which lawfulness, legitimacy and legality of the Zimbabwean legal system can be measured. Unlike the 1980 Constitution, the 2013 Constitution makes provisions for founding values and principles which establish the general framework of the Constitution. Relevant to this discourse are principles of good governance, which bind the State and all institutions of government at every level in section 3 (2) (a) - (f) which provides as follows:

- (2) *The principles of good governance, which bind the State and all institutions and agencies of government at every level, include -***
 - (a) *a multi-party democratic political system;***
 - (b) *an electoral system based on -***
 - (i) *universal adult suffrage and equality of votes;***

⁸⁷ Earlier attempts to replace the 1980 Constitution included the 1999 Constitutional Commission Draft, the National Constitutional Assembly Draft Constitution of 2001 and the Kariba Draft Constitution of 2007. For a discussion of these attempts see N Kersting *Constitution in Transition: Academic Inputs for a New Constitution in Zimbabwe* (2009).

⁸⁸ See Article 6.1 (a) of the GPA.

⁸⁹ See section 2(1) of the Constitution.

⁹⁰ See section 2(2) of the Constitution.

- (ii) *free, fair and regular elections; and*
- (iii) *adequate representation of the electorate;*
- (c) *the orderly transfer of power following elections;*
- (d) *observance of the principle of separation of powers;*
- (e) *observance of the principle of separation of powers;*
- (f) *respect for the people of Zimbabwe, from whom the authority to govern is derived;*

These principles and values ‘signify the fundamental beliefs and constitutional principles of the Zimbabwean society which unite and bind all Zimbabweans.’⁹¹ Other related principles and values include the following: transparency, justice, accountability and responsiveness,⁹² fostering of national unity, peace and stability⁹³ and due respect for vested rights.⁹⁴ It has therefore been accepted that the 2013 Constitution secures transformative constitutionalism for Zimbabweans in that it demands strict adherence to its substantive provisions and laws enacted under it. Furthermore, it was held in *Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & Others*⁹⁵ that the Constitution must be interpreted in a manner that resonates with its founding values and principles as set out in section 3.

Apart from the founding values and principles, one of the major characteristics of the 2013 Constitution are national objectives set out in Chapter 2. These principles of state policy guide the State and all institutions and agencies of government at every level in formulating and implementing laws and policy decisions that lead to the establishment, enhancement and promotion of a just, free and democratic society.⁹⁶ The national objectives are also key in interpreting and determining the State’s obligations under the Constitution or any other law.⁹⁷ Section 46(1) (d) of the Constitution then puts an obligation on courts, tribunals and forums interpreting

⁹¹ G. Manyatera, *The Constitution of the Republic of Zimbabwe - Commentary* (2014) 11.

⁹² See section 3(2) (g) of the Constitution.

⁹³ See section 3(2) (h) of the Constitution.

⁹⁴ See section 3(2) (k) of the Constitution.

⁹⁵ CCZ 12/15.

⁹⁶ See section 8(1) of the Constitution.

⁹⁷ See section 8(2) of the Constitution.

the Declaration of Rights to pay due regard to all the provisions of the Constitution, and in particular the national objectives. Relevant to this study are national objectives that include good governance, national unity, peace and stability and fostering of fundamental rights and freedoms.⁹⁸ These national objectives are a declaration of intent and are not justiciable. However, they are important given that the 2013 Constitution was enacted against the backdrop of political violence and economic meltdown. They were included in the Constitution as a moral prerogative in the theory of justice.⁹⁹

Chapter 4 of the Constitution contains a Declaration of Rights that entrenches fundamental human rights including election-related rights. Therefore EDR in Zimbabwe is principally regulated by the Constitution. The electoral rights in the Constitution impact on EDR directly and indirectly. Directly section 67 of the Constitution as was established in Chapter 1 entrenches political rights. These include the right to vote, right to a free and fair election, right to regular elections, right to make political choices freely, right to form a political party of choice, right to join a political party of choice, and right to participate in the activities of a political party of choice, right to campaign freely and peacefully for a political cause, right to participate in peaceful political activity, right to participate individually or collectively in peaceful activities to influence, challenge or support policies of Government, right to vote in secret, right to stand for public office and right to hold public office if elected.¹⁰⁰ These rights are available to every Zimbabwean citizen.

Indirectly, the Constitution also provides rights that impact EDR. These include the following rights: equality and discrimination,¹⁰¹ freedom of assembly and association,¹⁰² freedom to demonstrate and petition, freedom of conscience,¹⁰³

⁹⁸ See section 9 - 11 of the Constitution.

⁹⁹ I Muvingi, 'Sitting on Powder Kegs: Socio-Economic Rights in Transitional Societies' (2009) 3 *The International Journal of Transitional Justice* 163- 182, T. Kondo 'Socio-Economic Rights in Zimbabwe: Trends and Emerging Jurisprudence' (2017) *African Human Rights Law Journal* 163 - 193.

¹⁰⁰ See section 67(1) - (4) of the Constitution.

¹⁰¹ See section 56 of the Constitution.

¹⁰² See section 58 of the Constitution.

¹⁰³ See section 60 of the Constitution.

freedom of expression,¹⁰⁴ right to a fair hearing¹⁰⁵ and right to administrative justice.¹⁰⁶ Although there are no specific provisions in the Declaration of Rights on the manner or form of EDR it is submitted that there is no EDR process that falls outside the provisions of section 67 of the Constitution and related rights. All pre-election, election day and post-election disputes seek to enforce one or more of the above rights.¹⁰⁷ These rights owe their origins to international law. For this reason, section 46(1) (c) of the Constitution provides that when interpreting the Declaration of Rights courts and tribunals must take into account international law, among other aids of interpretation.

Finally, section 155 of the Constitution outlines the principles of the electoral system. Section 155 (1) specifically provides that:

- (1) Elections, which must be held regularly, and referendums, to which this Constitution applies must be -*
- (a) peaceful, free and fair;*
- (b) conducted by secret ballot;*
- (c) based on universal adult suffrage and equality of votes; and*
- (d) free from violence and other electoral malpractices.*

One of the fundamental principles of EDR which has its foundations in international law is the timely resolution of electoral disputes.¹⁰⁸ It can therefore be concluded that one of the purposes of the Zimbabwean EDR system is to secure the speedy or expeditious resolution of electoral disputes. Section 157 (1) (c) and (g) of the Constitution then provides that an Act of Parliament must provide for the conduct of elections and referendums to which the Constitution applies and in particular a code of conduct for political parties, candidates and other persons participating in elections or referendums and challenges to election results among other issues. The above sets the tone for EDR legislation in Zimbabwe.

3.4 THE LEGAL FRAMEWORK FOR EDR IN ZIMBABWE

¹⁰⁴ See section 61 of the Constitution.

¹⁰⁵ See section 69 of the Constitution.

¹⁰⁶ See section 68 of the Constitution.

¹⁰⁷ T Mutangi, (n 30 above) 73.

¹⁰⁸ See section 155 (2) (e) of the Constitution.

The principal legislation in Zimbabwe which gives effect to electoral rights entrenched in the Constitution is the Electoral Act [Chapter 2:13]. It, therefore, follows that it is the primary EDR law for Zimbabwe. The preamble to the Act makes it clear that the purpose of the Act includes providing mechanisms for the prevention of electoral malpractices, establishing EDR forums and providing for their functions, providing mechanisms for resolving electoral disputes and providing for the hearing and determination of election petitions.¹⁰⁹ The Electoral Act distinguishes between electoral disputes concerning the election of the office of the President or Vice President on one hand and the election to the office of a Member of Parliament or local authority on the other hand.¹¹⁰ Critically, the Electoral Act also distinguishes between judicial and non-judicial EDR forums.

As for judicial EDR Zimbabwe relies on a specialised electoral court and constitution court models. These are the leading EDR mechanisms. Section 61 of the Electoral Act establishes a specialised Electoral Court which is a special division of the High Court with exclusive jurisdiction to hear appeals, applications and petitions brought in terms of the Act. Moreover, it has jurisdiction to review any decision of the election management body, ZEC, or any other person made or purporting to have been made in terms of the Act.¹¹¹ The Electoral Court also hears all cases from the nomination of candidates, voter and candidate conduct, media coverage, electoral fraud, voter and candidate intimidation and political violence among others.¹¹² Although it is a superior court, appeals from this court lie to the Supreme Court. The Electoral Act also establishes special Electoral Courts at the Magistrate Court level to deal with criminal matters arising from the Act. Section 167 (2) (b) of the Constitution gives the Constitutional Court jurisdiction to hear and determine disputes relating to the election to the office of the President of the country. The merits and demerits of judicial EDR systems have since been discussed in Chapter 2. In recognition of the challenges attendant to litigation, the Electoral Act also recognises non-judicial EDR mechanisms. This is the subject matter of this study.

¹⁰⁹ See preamble to the Electoral Act.

¹¹⁰ See Parts XVII and XXII - XXIII of the Electoral Act.

¹¹¹ See section 161 (2) (a) (b) of the Electoral Act.

¹¹² See section 161 of the Electoral Act.

3.5 NON - JUDICIAL EDR IN ZIMBABWE

The utilisation of non-judicial mechanisms in resolving electoral disputes is a recent phenomenon in Zimbabwe. It was introduced by amendments to the Electoral Act brought after the adoption of the 2013 Constitution. Before this, alternative dispute resolution was recognised in labour matters and commercial disputes. The Labour Act [Chapter 28:01] recognises and provides mechanisms for conciliation and arbitration of labour disputes.¹¹³ Commercial arbitration is regulated by the Arbitration Act. There was no provision for the application of alternative dispute resolution of electoral disputes despite the merits thereof. Accordingly, the Electoral Act in a bid to give effect to the electoral rights entrenched in the Constitution recognised various forms of ADR processes such as negotiation, mediation and arbitration. This recognition is through the establishment of non-judicial EDR systems such as the use of ZEC as an electoral management body to handle electoral disputes administratively and Party Liaison Committees.

3.5.1 Zimbabwe Electoral Commission

The ZEC is established in section 238(1) of the Constitution as Zimbabwe's electoral management body. Its functions include among others: preparing for, conducting and supervising of elections and referendums, supervising elections of the President of Senate and Speaker, registering voters, compiling voters roll, ensuring proper custody and maintenance of voters roll, delimitation of constituencies, wards and other electoral boundaries, design, print and distribute ballot papers, accredit observers of elections and referendums; give instructions to persons in the employment of the State or a local authority for the purpose of ensuring the efficient, free, fair, proper and transparent conduct of elections and referendums and receive and consider complaints from the public and to take such action in regard to the complaints as it considers appropriate.¹¹⁴ Detailed functions of the Commission are then provided for in the Electoral Act. Section 239(k) of the

¹¹³ See sections 93 and 98 of the Labour Act.

¹¹⁴ See section 239 (a) - (k) of the Constitution.

Constitution does not give ZEC powers to adjudicate electoral disputes but just to receive and consider complaints administrative in nature. ZEC is mainly involved in dispute resolution in respect of matters raised through MLCs and are referred for mediation. Therefore its role in EDR is limited.

3.5.2 Multiparty Liaison Committees

There are several theoretical perspectives through which Multiparty Liaison Committees (MLCs) activities can be viewed. It is trite that elections take place in a legal and administrative environment that covers pre-election, election day and post-election period. These activities are referred to by Mozaffer and Scheidler as electoral governance in the sense that they are the wider set of activities that create and maintain the broad institutional framework in which political contestation takes place.¹¹⁵ They argue that electoral governance operates in three areas namely, rule making, rule application and rule adjudication.¹¹⁶ Rule adjudication is concerned with the resolution of electoral disputes. Others conceptualise election activities by referring to them as electoral justice. This involves the means and mechanisms ‘for ensuring that electoral processes are not marred by irregularities, and for defending electoral rights.’¹¹⁷

These mechanisms include all the means in place for preventing electoral disputes, including judicial mechanisms and informal mechanisms such as non-judicial mechanisms or alternative dispute resolution forums.¹¹⁸ Napier submits that the “electoral governance model emphasizes the structures, processes and design involved in ensuring legitimate and credible election outcomes, whereas the electoral justice model represents the ultimate guarantee of free and fair elections, in keeping with the established electoral law.”¹¹⁹ As shall be demonstrated

¹¹⁵ S Mazaffer & A Schedler (n 13 above)

¹¹⁶ S Mazaffer & A Schedler (n115 above) 7. This is borrowed from the principle of separation of powers.

¹¹⁷ IDEA Handbook (n 33 above) 1.

¹¹⁸ (n 117 above)

¹¹⁹ C Napier (n 73 above)175.

hereinbelow the Zimbabwean MLCs' functions and processes fit within both models, the electoral governance and the electoral justice models.

(i) *Definition of MLCs*

Part XXIA of the Electoral Act is titled “Conflict Management” and deals with the establishment of MLCs. They are structures that are designed to prevent or resolve electoral disputes and ensure observance of the Code of Conduct for Political Parties and Candidates. Section 160A of the Electoral Act defines MLCs as “a national multiparty liaison committee, a constituency multiparty liaison committee or a local authority multiparty liaison.” Therefore, the Act makes provision for three types of MLCs.

(ii) *Constitution of MLCS*

MLCs are established by the ZEC as soon as possible after the close of nominations in an election.¹²⁰ They are not permanent features but are established for specific elections. The term as soon as possible is also too broad. To provide clarity of intent and certainty the Act should have prescribed the period within which the MLCs should be set up bearing in mind that electoral disputes must be resolved expeditiously. The Act only provides a specified period for the establishment of the national MLC which is any date on or after the beginning of the period of six months before the end of the five-year term of Parliament as specified in section 143 of the Constitution.¹²¹

The establishment of a national MLC is provided for in section 160B (1) (a) of the Electoral Act and is for a Presidential or general election for the electing of members of the National Assembly. A national MLC consists of a ZEC Commissioner, who acts as the Chairperson of the Committee, two representatives of each political party contesting the election selected by their parties, two representatives of an independent candidate contesting a

¹²⁰ See section 160B (1) of the Electoral Act.

¹²¹ See section 160B (1) of the Electoral Act.

Presidential election and any person invited by the representatives of every political party represented in the committee.¹²² One of the responsibilities of the national MLC is to establish MLC subcommittees in each province. It can delegate any of its functions to these subcommittees, however, it must monitor, supervise and direct their activities. A constituency MLC is established in section 160B of the Electoral Act and consists of, a representative of the ZEC, a representative of each political party contesting the election selected by the party or candidate concerned, two representatives of an independent candidate contesting a Parliamentary election and any person invited by the representatives of every political party represented in the Committee.¹²³ As for a local authority MLC, it is established in terms of section 160B (1) (c) of the Electoral Act. It consists of a representative of the ZEC selected by ZEC, a representative of each political party contesting the election, who shall be selected by the party or candidate concerned, a representative of an independent candidate contesting in the election and any person invited by the representatives of every political party represented in the committee. It is submitted that the composition of the MLCs in Zimbabwe is narrow as they do not incorporate other stakeholders such as representatives of the media, law enforcement agencies and civil society. The Act does not prescribe minimum qualifications for the other representatives appointed by political parties. Any additional appointments should be based on knowledge and experience in electoral law and EDR.

(iii) Functions of MLCs

It has already been established that the main function of MLCs is to resolve disputes through dialogue and assist in the implementation of the Code of Conduct for Political Parties. Section 160 (1) (a) - (f) of the Electoral Act provides for the following functions:

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

¹²² See section 160B (2) (a) (i) - (ii) of the Electoral Act.

¹²³ See section 160B (2) (b) (i) - (ii) of the Electoral Act.

- (b) in the case of a national multiparty liaison committee -*
- (i) to create and establish multiparty liaison committees in each province; and*
 - (ii) to delegate any of its functions to any multiparty liaison subcommittee; and*
 - (iii) to monitor, supervise or direct the activities of multiparty liaison subcommittees;*
- (c) to immediately report upon and refer to the Commission any disputes, concerns, matters or grievances relating to the electoral process; and*
- (d) to request the Commission to mediate or appoint an independent mediator to resolve any dispute, concern, matter or grievance relating to the electoral process; and*
- (e) to present to the Commission any reports, assessments, records or recommendations relating to the electoral process; and*
- (f) generally, assist in implementing the Code.¹²⁴*

From a reading of section 160(1) it is clear that the role of MLCs is limited to “attempting to resolve disputes” and not adjudicating electoral disputes. It can only conciliate or mediate disputes and make referrals. There is no provision for arbitration. As if that is not enough, the Electoral Act does not provide for rules of practice and procedure for initiating referral of disputes to MLCs and their mediation. No time frames within which the mediation must be conducted are provided. Even in the event of a dispute being referred to the Commission or independent mediator, their roles are restricted to mediation and nothing else. Further, the decisions of the MLCs shall be made by consensus.¹²⁵ Such decisions are not binding and the Electoral Act does not provide any mechanisms for their enforcement. This it is submitted undermines the speedy resolution of electoral disputes. It defeats the whole purpose of establishing MLCs. The enactment of regulations providing for the functioning and processes of MLCs is key to the enjoyment of electoral rights. It strengthens non-judicial EDR in Zimbabwe.

¹²⁴ See also section 12(1) (a) - (g) in the Electoral Code of Conduct of Political Parties and Candidates and Other Stakeholders in the Third Schedule to the Electoral Act.

¹²⁵ See section 160D of the Electoral Act read with section 12 (1) (5) of the Code in the Third Schedule to the Act.

3.5.3 Codes of Conduct

The Electoral Act provides for two codes of conduct. The First Schedule to the Act provides for a Code of Conduct for Chief Election Agents, Election Agents and Observers. This code simply provides rules of conduct for election agents and observers. It contributes nothing to EDR. The second code of Conduct is the Electoral Code of Conduct for Political Parties and Candidates and Other Stakeholders (the Code of Conduct).¹²⁶ Unlike the functions of the MLCs which commence after the nomination court, the Electoral Code covers all electoral processes including but not limited to voter registration, inspection of the voters roll, delimitation and voter education, among other processes.¹²⁷ The purpose of the Code is to promote conditions that are conducive to free and fair elections and a climate of tolerance in which electioneering activity may take place without fear or coercion, intimidation or reprisals.¹²⁸

As for the scope of its application, the Electoral Code applies to political parties, candidates for election, election agents for candidates, members and supporters of political parties.¹²⁹ In addition, the Electoral Code applies to individuals, organisations and associations that are either formally or informally associated with political parties, that formally or informally conduct political activities.¹³⁰ An obligation is imposed on political parties and candidates to give wide publicity to the Code, publicly state the electoral rights of citizens and condemn any actions that undermine free and fair elections.¹³¹ Rules of conduct for electoral processes are provided in the form of prohibited conduct.¹³² Importantly the Electoral Code repeats the functions of MLCs in its section 12(1) (a) - (g). It does not provide any rules of procedure for the conduct of the business of MLCs. In the event of non-compliance with the Electoral Code section 13(1) provides that political parties

¹²⁶See Fourth Schedule to the Electoral Act.

¹²⁷ See preamble to the Electoral Code.

¹²⁸ See section 1 of the Electoral Code.

¹²⁹ See section 3 of the Electoral Code.

¹³⁰ See section 3 of the Electoral Code. There is specific mention of traditional leaders, security and law enforcement officials, civil servants and civic society.

¹³¹ See section 4 (a)- (c) of the Electoral Code.

¹³² See section 5 - 10 of the Electoral Code.

concerned must take appropriate disciplinary action as well as seek resolution of the disputes within the MLCs.¹³³ With due respect, this provision does not take EDR anywhere as it renders the Code unenforceable. The shortcomings of the MLCs system have since been highlighted above. The only viable penalties for non-compliance are the sanctions for offences in the electoral process prescribed in the Electoral Act.

3.6 CONCLUSION

This chapter gave an overview of EDR in Zimbabwe with particular emphasis on non-judicial EDR such as the administrative functions of the ZEC, MLCs and Codes of Conduct. Whilst it is acknowledged that the Zimbabwean legal framework establishes a framework for non-judicial EDR, such a framework is shallow and underdeveloped. The framework is clogged with bureaucratic challenges and does not incorporate all stakeholders in the election process with competencies and skills to assist in the resolution of electoral disputes. Also, the Electoral Act only makes provisions for mediation as an ADR mechanism. It is limited in its scope and there are no rules of practice and procedure for initiating referral of electoral disputes and conducting of mediation. The Act does not provide timeframes for conducting the mediation. This undermines the fundamental international standards discussed in Chapter 2 and the electoral rights entrenched in the Zimbabwean Constitution. It was also demonstrated that the mediation of disputes by the MLCs can be an exercise in futility as there are no enforcement mechanisms for any resolutions adopted by consensus. To cap it all, it was shown that the Electoral Code does not take EDR further as it does not bestow on MLCs adjudicatory functions. These challenges make non-judicial EDR onerous, cumbersome, time-consuming and unnecessary. These issues require serious attention by the legislature if Zimbabwe is to continue its march toward an effective accessible and speedy alternative EDR.

CHAPTER 4

NON-JUDICIAL ELECTORAL DISPUTE RESOLUTION IN SOUTH AFRICA

¹³³ See section 13(1) of the Electoral Code.

4.1 INTRODUCTION

This chapter provides a comparative analysis of South Africa. It commences with an overview of the constitutional and legal framework of electoral dispute resolution in South Africa. This is followed by an analysis of the various forms of EDR in South Africa with a particular interest in non-judicial EDR. Developments in other jurisdictions, especially those in South Africa play a significant role in the development of Zimbabwean law. Both jurisdictions share the same legal system which is based on Roman-Dutch law with an English law influence. Zimbabwe's Constitution was heavily borrowed from the South African Constitution. Furthermore, they share similar national demographics, endowments, national histories and cultures including forces of national and international political economy.¹³⁴ Therefore, the comparative analysis presents Zimbabwe with an opportunity to interrogate the values reflected in its own system of non-judicial EDR. As advanced by Summers, 'comparative law enables us to know ourselves better, to dispel myths and question our assumptions, and to recognise the relevance of particular rules in shaping our system.'¹³⁵ Not only does South Africa provides a benchmark for the evaluation of Zimbabwean EDR laws, but the Constitution also explicitly recognises the importance of foreign law in interpreting domestic law.¹³⁶

4.2 HISTORICAL OVERVIEW

South Africa is a divided and pluralistic society. Its social and political divisions are attributed to the legacy of apartheid.¹³⁷ Before 1994, internal political contestation

¹³⁴ T. G. Kasuso, Reflections on the Constitutional Protection and Regulation of Individual Labour Law and Employment Rights in Zimbabwe (2021) Unpublished LLD Thesis, Unisa, 23.

¹³⁵ C. W. Summers "Comparisons in Labour Law: Sweden and the United States" (1985) 7 *Indus Rev LJ* 1.

¹³⁶ See section 46 (1) (e) of the Constitution.

¹³⁷ C Shulz-Herzenberg, 'South Africa' in *Election Management Bodies in Southern Africa: Comparative Study of the Electoral Commissions: Contributions to Electoral Processes* (2016) Osisa 260.

was limited to racially based parties. The majority of South Africans were also prohibited from voting depending on their race.¹³⁸ The apartheid regime was based on racial divisions, including electoral laws. It was against this backdrop that negotiations for a new constitutional order began in the 1990s. Following the signing of a national peace accord in September 1991 between various organisations and political parties, the Convention for a Democratic South Africa (CODESA) was established to negotiate a new constitutional order.¹³⁹ In addition, the establishment of an independent authority for the resolution of electoral disputes was mooted. Negotiations did not only pave the way for the first democratic election in South Africa in 1994 but also the establishment of a democratic constitutional state. The adoption of the interim Constitution Act 200 of 1994 followed by the permanent constitution adopted in 1996, reaffirmed the primacy of electoral democracy in South Africa.¹⁴⁰

4.3 THE CONSTITUTIONAL FRAMEWORK

Given the historical background of South Africa, Langa advances that the Constitution of South Africa is a transformative document in that it seeks to move the nation from a discriminatory past to a future based on human dignity, equality and freedom.¹⁴¹ This is apparent from the provisions of the Constitution. Section 2 of the Constitution reaffirms the supremacy of the Constitution. The founding provisions provide that South Africa is founded on a set of basic values, that include, ‘universal suffrage, a national common voter’s roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.’¹⁴² The Constitution also makes provision for a Bill of Rights that entrenches fundamental human rights. It has since been established that during the apartheid era the majority of the people were denied political rights because of their race. Therefore, section 19 of the Constitution guarantees political rights. Every citizen is free to make political choices, including the right to form a political

¹³⁸ Currie and De Waal *The Bill of Rights Handbook* (2013) 421.

¹³⁹ C J Napier (n 119 above)

¹⁴⁰ C Schulz - Herzenberg (n 137 above).

¹⁴¹ Langa ‘Transformative Constitutionalism’ (2006) 3 *Stellenbosch Law Rev* 352.

¹⁴² See section 1(d) of the Constitution of South Africa.

party, to participate in the activities of, or recruit members for, a political party, and to campaign for a political party.¹⁴³ Section 19(3) (a) of the Constitution guarantees every citizen's right to vote including the right to stand for public office and to hold office. Linked to section 19 is the right to freedom of expression in section 16 of the Constitution. Mhlango submits that when citizens exercise their right to vote, they directly present their personal views and/or expression concerning the choices of political leaders.¹⁴⁴ Therefore, the right to vote indirectly guarantees every citizen the freedom to express their political aspirations.¹⁴⁵ The right to vote also places a duty on the legislature and the executive to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised.¹⁴⁶ Furthermore, EDR mechanisms in South Africa seek to enforce the right to vote in section 19 of the Constitution.¹⁴⁷

The Constitution of South Africa also provides that the electoral system must be determined by national legislation and must be based on a common voters roll, on minimum voting age of eighteen years and a system that results in proportional representation.¹⁴⁸ As for the conduct of elections, the Constitution provides that there must be overseen by an electoral commission whose independence is guaranteed in section 181 of the Constitution. Section 190 of the Constitution of South Africa provides that the functions of the Independent Electoral Commission (IEC) include among others managing elections, ensuring that elections are free and fair, and declaring results and EDR among others. The role of the IEC in EDR is discussed in detail below including legislation that gives specific expression to constitutional provisions.

The South African Constitution also recognises the relevance of international and regional treaties on the right to vote. In fact, South Africa is a signatory to several

¹⁴³ See section 19(1) (b) of the Constitution of South Africa.

¹⁴⁴ L Mhlango 'A Critical Analysis of South Africa's System of Government: From A Disjunctive System to a Synergistic System of Government' (2020) *OBITER* 259.

¹⁴⁵ See *Ramakatsa v Magashule* [2012] ZACC 31; *Richer v Minister of Home Affairs* 2009 (3) SA 615 (CC).

¹⁴⁶ *New National Party of South Africa v Government of South Africa* 1999 (3) SA 191 (CC).

¹⁴⁷ Related rights in the Constitution on EDR include the right of access to the courts in section 34.

¹⁴⁸ See sections 46 and 47 of the Constitution.

international and regional standards which have influenced its legislative framework on elections and EDR. For example, South Africa is a signatory to the ICCPR, ACHPR, the SADC Charter and the UNDHR. The impact of these international and regional standards was discussed in Chapter 2. In addition, South Africa ratified the Constitutive Act of the African Union in 2001. The Act promotes popular participation and good governance, non-interference in internal affairs and respect for democratic principles, human rights, the rule of law and good governance.¹⁴⁹ South Africa also adopted the SADC Principles and Guidelines Governing Democratic Election. The principles call for citizen participation in the electoral process, the impartiality of electoral institutions, voter education, acceptance and respect of election results and expeditious resolution of electoral disputes.¹⁵⁰ Lastly, the IEC is a member of the International Institute for Democracy and Electoral Assistance (IDEA), the Commonwealth Electoral Network, the International Centre for Parliamentary Studies (ICPS), the Electoral Commissions Forum of SAD Countries, the Association of African Election Authorities, the Association of European Electoral Officials and the Association of World Election Management Bodies.¹⁵¹ All these associations assist South Africa in benchmarking its electoral processes and procedures against international best practices.

4.4 AN OVERVIEW OF SOUTH AFRICA'S EDR SYSTEM

Several pieces of legislation in South Africa give effect to constitutional political rights. However, relevant to this study are the following; the Electoral Commission Act 51 of 1996 and the accompanying Regulations on Party Liaison Committees, 1998, the Electoral Act 73 of 1998 and the accompanying Electoral Code of Conduct and the Local Government Municipal Electoral Act 27 of 2000. The Electoral Commission Act provides for the establishment of an IEC.¹⁵² It consists of five members, of whom

¹⁴⁹ Constitutive Act of the African Union accessed at <http://www.achpr.org/instruments/au-constitutive-act> (Date of use 16 July 2022).

¹⁵⁰ SADC Principles and Guidelines Governing Democratic Elections available at <http://www.ohchr.org/english/law/compilation-democracy/sadcprinc.htm> (Date of access 16 July 2022).

¹⁵¹ C Schulz-Herzenberg (n140 above)265

¹⁵² See section 3(1) of the Electoral Commission Act.

one must be a judge.¹⁵³ The IEC has a broad mandate compared to the functions of the ZEC. Section 5(1) of the Electoral Commission Act provides for the following functions: managing elections, ensuring that elections are free and fair, promoting conditions for free and fair elections, promoting knowledge of sound and democratic electoral processes, registering eligible voters and compiling a voter's roll, compile and maintain a register of political parties, establish and maintain liaison and cooperation with political parties, undertake and promote electoral research, develop electoral expertise and technology in all spheres of government, review electoral legislation and make recommendations, promote voter education, promote cooperation with and between persons, institutions, governments and administrations, adjudicate dispute which may arise from the organisation or conducting of elections, which are administrative in nature and appoint appropriate public administrations in any sphere of government to conduct elections when necessary.¹⁵⁴

EDR in South Africa can be divided into judicial and non-judicial. Judicial EDR is concerned with adjudication in the electoral Court, with the status of the Supreme Court established in terms of section 18 of the Electoral Commission Act. Section 20 of the Electoral Commission Act provides for the following functions of the Electoral Court, reviewing any decision of the IEC concerning electoral matters,¹⁵⁵ considering any appeal against a decision by the IEC¹⁵⁶ and investigating any allegations of misconduct, incapacity or incompetence of any member of the IEC.¹⁵⁷ Appeals against decisions of the IEC can only be heard with the leave of the Chairperson of the Electoral Court.¹⁵⁸ In the event of leave being granted, the appeal is considered and determined summarily upon written submissions within three days.¹⁵⁹ Section 96

¹⁵³ See section 6(1) of the Electoral Commission Act.

¹⁵⁴ See section 5(1) (a) - (p) of the Electoral Commission Act. For a detailed review of the IEC see M Ndletyana 'The IEC and the 2014 Elections.' A Mark of Institutional Maturity? (2015) *Journal of African Elections* (2014) 176-177; C Kabemba 'Electoral Administration.' Achievements and Continuing Challenges' in J Piombo and L Nijzink (eds) *Electoral Politics in South Africa: Assessing the First Democratic Decade* (2005).

¹⁵⁵ See section 20(1) (a) of the Electoral Commission Act. In terms of section 20(1) (b) any such review shall be done on an urgent basis and be disposed expeditiously.

¹⁵⁶ See section 20(2) (a) of the Electoral Commission Act.

¹⁵⁷ See section 20 (7) of the Electoral Commission Act.

¹⁵⁸ See section 20(2) (b) of the Electoral Commission Act.

¹⁵⁹ See section 20(2) (c) of the Electoral Commission Act.

of the Electoral Act gives the court final jurisdiction in respect of all electoral disputes and complaints concerning violations of the electoral code of conduct. Decisions of the Electoral Court are appealable to the Constitutional Court. This is different from the Zimbabwean Electoral Court.

4.5 NON-JUDICIAL EDR

The IEC has several stakeholders, nationally, regionally and internationally. These engage with the IEC to promote knowledge of and adherence to democratic electoral principles. As a result of these engagements, South Africa has developed an elaborate and vibrant non-judicial EDR system which include the following: the IEC, Party Liaison Committees and the use of electoral codes of conduct.

4.5.1 The IEC and EDR

Section 5(1) (c) of the Electoral Commission Act expressly gives the IEC the power to adjudicate disputes which may arise from the organisation, administration or conducting of elections and which are administrative. In addition, section 103 (a) of the Electoral Act gives the IEC authority to resolve electoral disputes through conciliation. Provincial coordinators for dispute resolution are appointed to coordinate initiatives for the creation of conditions for free and fair elections, intervene in disputes and ensure adherence to the electoral code of conduct by stakeholders. The role of provincial coordinators also includes the following: coordinate conflict management programmes in the province; recruit conflict management panelists; monitor, evaluate and report existing or potential conflict situations in the province; liaise with provincial stakeholders, facilitate access to legal recourse, and mediate and resolve conflicts by deploying a conflict panelist to affected areas.¹⁶⁰ The Zimbabwean legal framework does not provide for provincial coordinators. They are critical in mitigating the electoral petitions in judicial EDR forums as many disputes are solved amicably at an early stage.

¹⁶⁰ C Schulz-Herzenberg (n 151 above) 277.

4.5.2 Party Liaison Committees (PLCs)

In paragraph 4.2 above it was established that electoral reform in South Africa started in the early 1990s with the establishment of the CODESA. One of the working groups of CODESA was tasked with the creation of an environment for free political participation and ¹⁶¹ one of its resolutions was “to ensure that all disputes between political parties should be settled peacefully”.¹⁶² This was followed by the establishment of the interim IEC and the establishment of the Transitional Executive Council (TEC) in December 1993. The main function of the TEC was to assist with the transition of South Africa to a democratic order. The TEC was given the mandate to establish an interim PLC until the establishment of a national PLC.¹⁶³ The interim PLC comprised the national election agents of parties participating in the elections. Further, the interim PLC did not have any adjudicating powers or decision-making powers. However, it had the mandate to establish cooperation between the IEC and political parties on matters such as administration of electoral agreements, staffing, location of voting and counting stations, the demarcation of voting districts and the number of foreign voting districts.¹⁶⁴ Therefore, PLCs were developed from the interim PLCs in the 1990s.

Section 5(1) (g) of the Electoral Commission Act provides that one of the functions of the IEC is to establish and maintain liaison and cooperation with parties. To achieve this objective, the IEC established PLCs with parties represented at national, provincial and municipal levels of government. To support the establishment and functioning of PLCs, the Electoral Commission Act provides Regulations on Party Liaison Committees, 1998. The Regulations in section 2 establish three types of PLCs, namely, a party liaison committee, a provincial liaison committee and municipal liaison committees.

A party liaison committee is established by the IEC in the national sphere of government, with not more than two representatives from every registered party

¹⁶¹ C Napier (n139 above) 160.

¹⁶² South African Institute of Race Relations, Race Relations Survey 1993/1994 (1994).

¹⁶³ C Napier (n 161 above) 160.

¹⁶⁴ South African Institute of Race Relations (n 162 above).

represented in the national assembly.¹⁶⁵ A party provincial liaison committee is established for each of the nine provinces in South Africa, with not more than two representatives from every registered party represented in the legislature of the province concerned.¹⁶⁶ Lastly are municipal party liaison committees for a single municipality or a group of municipalities. They are constituted with not more than two representatives from every registered party represented in the municipal council and not more than two representatives represented in the party liaison committee for the province, but not represented in the municipal council, and not more than one representative of every independent councillor represented in a municipal council.¹⁶⁷ The IEC may co-opt any person or representative onto any one of the above PLCs.

It is critical to note that, unlike the Zimbabwean MLCs which are temporary and only established after the sitting of the nomination court, South Africa's PLCs are permanent. They are not activated during elections only but are functional throughout. However, after the date of promulgation of an election, until the date of that election, any registered party, or independent candidate who has complied with the requirements for contesting that election shall be entitled to representation on the PLC established in respect of the legislature for which that election is promulgated.¹⁶⁸ Electoral disputes have their roots in the non-electoral period. There is a strong argument to be made for regular meetings at all levels between election administrators and party representatives and those of independent candidates to ensure that parties and candidates have a clear understanding of the process and are satisfied with the procedures, thus minimising the occasion of conflict. This becomes particularly important when last-minute changes, however, justified, are made, for example, the late addition of polling stations, voters list alterations, or revised boundary delimitation, as was the case in Zimbabwe in 2013 elections. PLCs meetings offer the political parties an opportunity to make comments and suggestions, air complaints and grievances and let off steam. This

¹⁶⁵ See Section 2.1 of the Regulations, 1998.

¹⁶⁶ See section 2.2 of the Regulations, 1998.

¹⁶⁷ See section 2.3 of the Regulations, 1998.

¹⁶⁸ See ssction 4 of the Regulations, 1998.

resolves electoral conflicts before they become major issues and develop mutual sensitivity and understanding between parties and electoral officials.

Section 6 of the Regulations, 1998 provides that PLCs serve as vehicles for consultation and co-operation between the IEC and the registered parties concerned on all electoral matters, aimed at the delivery of free and fair elections. Furthermore, it is trite that an electoral process has many dimensions, processes and procedures which include rule-making, adjudication, implementation functions and dispute prevention and resolution. The PLCs perform all these functions. The PLC is also used as a vehicle for informing political parties, through their representatives about electoral issues. Apart from the 1998 Regulations, schedule 2 of the Electoral Commission Act provides for an Electoral Code of Conduct. The purpose of the Code is to promote conditions that are conducive to free and fair elections.¹⁶⁹ Also, section 5 of the Code provides that every registered party and every candidate must liaise with other parties contesting an election and endeavour to ensure that they do not call a public meeting, march, demonstration, rally or any other public political event at the same time and place as that called by another party contesting the election.

A distinct and yet welcome feature of the South African liaison committees is that the Code that they administer is enforceable, unlike the Zimbabwean one which is not justiciable.¹⁷⁰ The Code of Conduct is enforceable by law in a court of law, including an Electoral Court in terms of election day arrangements; the counting of ballots; the evaluation of the entire process; and planning for the next election and by-elections. Many of the issues are technical, but it is, nevertheless, very important that it is dealt with in order to avert possible conflict between political parties on the one hand, and the IEC on the other.

PLCs in South Africa have had major successes in the past. For instance, they played a role prior to the first inclusive democratic elections in South Africa in 1994. Following the Inkatha Freedom Party (IFP)'s decision not to participate in the 1993

¹⁶⁹ See section 1 of the Code.

¹⁷⁰ See section 96 of the SA Electoral Act.

negotiating process for a new constitution and its withdrawal from the election scheduled for 27 April 1994, a ballot paper was printed with its inclusion. A series of interparty negotiations ensued and, shortly before the election took place, the IFP agreed to participate and have its name included on the ballot paper. The ballot paper had already been printed and included the name of the former National Party (NP), whose name was last on the ballot paper. At that stage, the NP campaign had already proceeded and it was conveyed to potential voters that its name would appear last on the ballot paper. With the late inclusion of the IFP, the IEC had to add the party's name to the ballot paper. Since the ballot papers could not be reprinted, they did this by pasting a sticker of the IFP at the foot of the ballot paper. The NP could no longer inform its supporters that they are placed at the bottom of the ballot paper. Through a series of delicate negotiations in the interim PLC at the time, a potential conflict was averted.¹⁷¹

A problem arose during the 2009 South African general elections when certain polling stations ran out of a supply of ballot papers. This resulted in long queues of angry voters not being able to vote. Additional ballot papers had to be obtained, thus delaying the process which would have resulted in queues of waiting voters outside polling stations at the closing time of 21:00. The national PLC members were then summoned to decide on how to deal with the shortfall in ballot papers, so as to allow those who still wished to vote, to do so. The unanimous decision of the parties was not to keep polling stations open beyond 21:00 but to allow those already queuing to vote, thus averting a possible series of accusations of unfairness in the management of the election and, possibly, even violence.¹⁷²

4.6 CONCLUSION

This chapter provided a comparative analysis of EDR in South Africa. Useful lessons were drawn from this comparative analysis. It was established that to facilitate the expeditious judicial resolution of EDR in South Africa, the Electoral Court is a superior court with the same status as the Supreme Court. Appeals from this court

¹⁷¹ Kriegler, Judge JC 2013. Personal communication. Former chairman, IEC, 6 May.

¹⁷² Party Liaison Committee member (anonymous) 2010. Interview, 23 August.

lie to the Constitutional Court. Further, it was demonstrated that South Africa has a vibrant non-judicial EDR system. It IEC has adjudicatory powers. It resolves disputes through various ADR processes such as conciliation, mediation and arbitration and its decisions unlike the Zimbabwean ZEC are binding. In South Africa, ADR has been very effective in the pre-emption and resolution of electoral disputes. The PLCs are permanent structures not established for specific elections. They have adjudicatory powers and their decisions are binding and enforceable. The same applies to the Electoral Code, it is enforceable. The above present vital lessons for Zimbabwe to emulate, to avert electoral disputes, but the most important lesson of them all is to give ZEC power to resolve administrative disputes while making the Electoral Code of Conduct justiciable.

CHAPTER 5

SUMMARY, RECOMMENDATIONS AND CONCLUSIONS

5.1 INTRODUCTION

This study sought to evaluate Zimbabwe's legal framework for non-judicial EDR. The focus of the study was on ADR mechanisms for electoral disputes such as MLCs, the Electoral Code of Conduct and the role of the ZEC in resolving administrative disputes. The study aimed to reveal the weaknesses in the current framework. To put the study in its context, international perspectives on EDR were discussed. In addition, a comparative analysis of South Africa was also undertaken. Critical to this comparative analysis were useful lessons Zimbabwe could draw from the South African framework on non-judicial EDR. In view of these research threads, this chapter provides the major conclusions on non-judicial EDR in Zimbabwe. It commences with a summary of the main arguments and issues addressed in the preceding chapters, alongside major findings. Several recommendations are proposed in the next part. The final part of this chapter then concludes the research with a final conclusion.

5.2 SUMMARY OF KEY FINDINGS

The main objective of this study was to critically examine the legal framework regulating non-judicial EDR in Zimbabwe. It evaluated the theoretical underpinnings of non-judicial EDR in Zimbabwe. Of interest were the weaknesses inherent in the current system of non-judicial EDR and how the system can be strengthened. Therefore, the study involved enquiring into the following central research question: To what extent is the Zimbabwe legal framework on non-judicial EDR consistent with international standards and best practices? The main research question also required a determination of the following subsidiary questions:

- What historical and contextual factors have influenced the use of non-judicial EDR mechanisms in Zimbabwe?
- What are the advantages and disadvantages of non-judicial EDR?
- What are the strengths and weaknesses of the Zimbabwean framework of non-judicial EDR?
- What are the theoretical perspectives underpinning non-judicial EDR?
- Is the Zimbabwean framework on non-judicial EDR consistent with international standards and best practices?

In answering the above-mentioned research questions, the study commenced with Chapter 1 which provided an introduction and conceptual overview of the study. The major thrust of Chapter 1 was that non-judicial EDR mechanisms provided for in the Electoral Act were underdeveloped. It was established that the non-judicial mechanisms for resolving electoral disputes in the Electoral Act were limited in terms of their functions and powers. Having set out the statement of the problem chapter 1 also provided the objectives of the study, a background to the study, the scope of study and a chapter synopsis. Chapter 1 also briefly highlighted the research methodology. The methodological approaches included the historical, legal and comparative approaches.

Chapter 2 provided the theoretical underpinning of EDR and in particular non-judicial EDR. The concept of EDR was defined and the origins of the concept were traced. It was established that the resolution of electoral disputes, like all aspects of the electoral process, owes its origins to international standards which recognise the right to vote and the fundamental right of all persons whose rights have been infringed to an effective remedy before a pre-established independent tribunal. The research identified the UNDHR, ICCPR, ACHPR and the SADC Charter as the prominent international and regional standards that influenced the adoption of non-judicial EDR mechanisms. These standards provide for the following rights: the right to vote, the right to redress for election disputes, the right to a fair and public hearing by an independent and impartial tribunal, an impartial and informed arbiter and the right to meaningful and effective remedies. It was demonstrated that these international standards provide guidance and a framework for evaluating Zimbabwe's non-judicial EDR laws. Furthermore, Chapter 2 examined the three broad categories of EDR models, namely judicial, non-judicial and EDR systems entrusted to a legislative body or political assembly. The advantages and disadvantages of these systems were also interrogated. However, it was demonstrated that non-judicial EDR mechanisms are appropriate and effective. Examples identified in this chapter included the use of electoral management bodies, PLCs and EDR systems entrusted to *ad hoc* bodies created with international continental or regional bodies and internal national institutions.

Chapter 3 provided a contextualised and grounded analysis of the Zimbabwean framework on non-judicial EDR. The genesis of non-judicial EDR in Zimbabwe was discussed. It was established that the hotly contested 2008 elections dispute was successfully and effectively resolved through non-judicial EDR mechanisms. Mediation led by Thabo Mbeki and facilitated by SADC resulted in the establishment of the GPA and subsequently the formation of the GNU. EDR was entrusted to an *ad hoc* body, which also spearheaded the enactment of the 2013 Constitution. Chapter 3 also demonstrated that EDR in Zimbabwe is situated in the Constitution. Apart from founding values and principles and national objectives, the Zimbabwean Constitution has a broad Declaration of Rights. It entrenches political rights which include the right to vote, and the right to participate in the activities of political parties, among other rights. The Constitution impacts EDR directly and indirectly. It was therefore shown that no EDR process in Zimbabwe falls outside the provisions of the Constitution and these provisions are consistent with international standards. It was also demonstrated that constitutional rights are buttressed by principles of the electoral system in sections 155- 157 of the Constitution.

Furthermore, the legal framework for EDR in Zimbabwe was evaluated. It was shown that the Electoral Act provides for two forms of EDR namely judicial and non-judicial. The Electoral Court sits at the nerve centre of judicial EDR in Zimbabwe, with the Constitutional Court having a limited role in respect of challenges of Presidential elections. The Electoral Court is a Division of the High Court and its appeals lie to the Supreme Court. As for non-judicial EDR, it was established that Zimbabwe relies on the ZEC, MLCs and the Electoral Code of Conduct. Whilst this is commendable, it was demonstrated that the system is underdeveloped and dogged with bureaucratic challenges. For instance, it was shown that ZEC only assisted in the mediation of electoral disputes and the resolution of administrative issues. The Constitution and the Electoral Act do not give it adjudicatory powers. The same problems beset the MLCs. These are not permanent structures but are only established after the sitting of the nomination court for a specific election. Further, the MLCs do not have adjudicatory powers. They can only mediate disputes and refer them to ZEC for the appointment of a mediator. In the event of the dispute being resolved by consensus, such decisions are not binding and enforceable. As if that is

not enough the resolution of disputes by MLCs is also limited in scope in that there are no rules of practice and procedure for initiating referral of electoral disputes and conducting mediation. To cap it all, the Code of Conduct is unenforceable. The biggest weakness is that the decisions of the MLCs are not binding on the parties. It depends very much on the goodwill of the parties to abide by the decisions made. All these challenges have hampered the effectiveness of non-judicial EDR in Zimbabwe. Chapter 3 demonstrated that as a result of these challenges the Zimbabwean system lags behind minimum standards set by regional and international organisations.

Chapter 4 provided a comparative analysis of South Africa. The discussion was informed by international standards on EDR canvassed in Chapter 2. A brief historical overview of EDR in South Africa was given followed by a review of the constitutional framework. It was established that EDR in South Africa, just like Zimbabwe, seeks to enforce the right to vote in section 19 of the South African Constitution among other rights. An overview of South Africa's EDR framework was also given. Firstly, it was established that South Africa's framework was largely influenced by international standards which South Africa had ratified. The South African IEC is also a member of several international associations on electoral processes. This has assisted South Africa in benchmarking its own electoral processes against international best practices. Secondly, it was established that the South African EDR system can be divided into two categories, judicial and non-judicial EDR systems. Judicial EDR is the preserve of the Electoral Court. Unlike, the Zimbabwean Electoral Court the South African Electoral Court has the same status as that of the Supreme Court and is a court of final jurisdiction in respect of all electoral disputes. Any appeal against the decisions of the Electoral Court lies to the Constitutional Court. This has gone a long way in ensuring the expeditious and effective resolution of electoral disputes in South Africa.

In respect of non-judicial EDR, it was established that South Africa relied on the administrative role of the IEC and PLCs. It was demonstrated that the South African non-judicial EDR was more advanced than the Zimbabwean system in several respects. For instance, section 5(1) (c) of the Electoral Commission Act of South

Africa gives the IEC the power to adjudicate disputes which may arise from the organisation, administration or conducting of elections. Section 103(a) of the Electoral Act gives the IEC authority to resolve disputes through conciliation. The Zimbabwean Electoral Commission is not expressly given such powers by the legislature. As for the PLCs, it was demonstrated that the institutional design and the deliberative process adopted for the operation of the PLCs have proved to be suitable for the intended purpose of achieving electoral justice and securing the South African democratic state. Chapter 4 demonstrated that this is attributed to the fact that PLCs are permanent structures and are not put in place only for specific elections. Importantly, PLCs have adjudicatory powers and their decisions are binding and enforceable. Furthermore, the operations of PLCs in South Africa are backed by the 1998 Regulations which provide rules of procedure and processes for resolving electoral disputes. Lastly, it was established that the South African Electoral Code unlike the Zimbabwean Code is binding and enforceable in the Electoral Court. As a result of these strengths, it was demonstrated that non-judicial EDR has had more successes in South Africa.

In light of the above summary, it is critical at this juncture to address specific recommendations pertaining to the identified critical aspects of non-judicial EDR in Zimbabwe.

5.3 RECOMMENDATIONS

The preceding summary canvassed key issues concerning non-judicial EDR in Zimbabwe. Given this contextual background, it is necessary at this point to proffer recommendations that address the identified weaknesses and gaps in the Zimbabwean framework. These recommendations are important from both a theoretical and practical perspective. From a theoretical perspective, the research contributes to the body of knowledge as there is a dearth of authorities on non-judicial EDR in Zimbabwe. The practical importance of the study is that it proposes recommendations for consideration by policymakers on the need for alignment of Zimbabwe's non-judicial EDR framework with international standards and best

practices. Therefore, for purposes of clarity, the following recommendations are suggested.

5.3.1 Electoral Court

The Electoral Court of Zimbabwe must be re-established as a superior court with the same status as the Supreme Court. In addition, it must have final jurisdiction over all electoral disputes and complaints concerning violations of the Electoral Code of Conduct. Limited appeals against decisions of the Electoral Court must lie to the Constitutional Court.

5.3.2 Adjudicatory powers of ZEC

The Electoral Act must be amended so that it gives the ZEC adjudicatory powers in specific electoral disputes. It is proposed that Zimbabwe can draw useful lessons from section 5(1) (c) of the Electoral Commission Act of South Africa and section 103 (a) of the Electoral Act of South Africa which give the IEC power to mediate, conciliate and adjudicate electoral administrative electoral disputes. The decisions of the electoral management body in EDR must be binding and enforceable.

5.3.3 Permanent MLCs

MLCs must be permanent structures and not temporary structures established after the sitting of the nomination court. Electoral disputes usually originate during the pre-election period and to manage conflict effectively MLCs must be available throughout.

5.3.4 MLCs rules of procedure

The legislature must enact detailed Regulations which regulate the processes and procedures of EDR by MLCs. Currently, such procedures and processes are non-existent. Without these guidelines, it has always been difficult for MLCs to execute their mandate. Such Regulations are available in South Africa.

5.3.5 Decisions of MLCs

It is recommended that any decisions made by MLCs must be binding and enforceable in the Electoral Court rather than leave it to the goodwill of political parties.

5.3.6 Electoral Code

Closely linked to the preceding recommendation, the Electoral Code of Conduct must be binding and enforceable in the Electoral Court.

5.3.7 Ratification of international and regional standards

Lastly, South Africa's successes in utilising non-judicial EDR are also attributable to the fact that South Africa ratified several international standards and is a member of international associations on election management. It is proposed that Zimbabwe must also ratify important international and regional standards that have influenced EDR. Furthermore, Zimbabwe must join the membership of international associations on electoral management and dispute resolution. These provide useful guidelines for benchmarking the Zimbabwean EDR framework.

5.6 GENERAL CONCLUSION

This study has provided useful insights into the potential of non-judicial EDR. MLCs and the ZEC can be used to reduce the potential for conflict resulting from electoral disputes. Zimbabwe's procedural democracy as what happened in 2009 is more secure and better managed as a result of the deliberations between political parties in non-judicial EDR forums. It is almost incomprehensible that a democratic electoral system such as Zimbabwe could function effectively and successfully without non-judicial EDR forums such as MLCs. The EDR framework of Zimbabwe continues to improve and it is hoped that with the above-proposed recommendations Zimbabwe continues its march toward an effective EDR system. Naturally, the study cannot be expected to have dealt with all issues concerning EDR. It only dealt with non-judicial

EDR. Consequently, the study proposes judicial EDR in Zimbabwe as an area for further research.

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