

# The Rule of Law and free elections in Africa: going beyond the rhetoric

A conference report

20-21 September 2012, Victoria Falls



# Contents

<b>Introduction</b>	<b>3</b>
Conference Objectives	
Programme	4
<b>Day One</b>	<b>5</b>
Keynote Address	6
Election Management Systems	13
A review of Election Management Systems- South Africa	13
A review of Election Management Systems- Zimbabwe	21
Legal and Regulatory Framework	27
Analysis by Region of States compliance/adherence to constitutional provisions and principle governing Elections - West Africa	27
Analysis by Region of States compliance/adherence to constitutional provisions and principle governing Elections - Southern and East Africa	37
Regional trends on elections and democracy; Kenya	67
Abraham Mwansa	69
Regional trends on elections and democracy	70
<b>Day Two</b>	<b>76</b>
Democratic institutions	76
Towards strengthening and institutionalising civilian oversight: reviewing the role of the sector in elections	76
Establishing democratic institutions through enactment of constitutions	86
<b>Conference Resolution</b>	<b>91</b>
<b>Conclusion</b>	<b>94</b>
<b>Tables</b>	
List of Presidential Candidates	46
Provisional Results of the Presidential Elections	47
Elections in Southern and Central Africa since 2000	61

# Introduction

The International Commission of Jurist Africa Programme convened a regional meeting on the “The Rule of Law and Free Elections in Africa: Going Beyond the Rhetoric” on 20 September – 21 September 2012 at the Elephant Hills Hotel in Victoria Falls, Zimbabwe. The meeting was attended by delegates from 7 countries, which included the Democratic Republic of Congo, South Africa, Uganda, Zambia, Kenya, Tanzania and Zimbabwe. Amongst the delegates included two cabinet ministers from Zimbabwe, heads of electoral commissions, academics, members of parliament, political party representatives, civil society representatives, judges and practicing attorneys.

Unfortunately the meeting was unable to have equal gender representation with only 25% of the participants being female. This quarter included the head of the South Africa electoral commission, deputy chairperson of the Zimbabwean Anti-Corruption Commission, the directors of Local NGOs and a cabinet Minister.

Conference Objectives

The African Charter on Democracy, Elections and Governance provided the theoretical and structural framework upon which the meeting was predicated.

The conference was convened with the following objectives:-

- To provide African academics, parliamentarians, political analysts, election administrators, civil society organisations, political parties and government agencies with an opportunity to reflect upon the legal and regulatory framework affecting elections, in Africa;
- To provide the various stakeholders in Africa with the opportunity to meaningfully engage with issues to do with the rule of law and elections in a context that is balanced and informed by the continents political realities;
- To provide a platform upon which the experiences of other African countries that have recently held, or are preparing for, elections can be utilised to promote democracy and good governance in Africa, and
- To evaluate challenges that have in the past, cast doubt on the ability of the courts to handle electoral disputes in accordance with the principle of the rule of law. In addition also review the role that has and can be played by the African Union and SADC in mediating and/or resolving electoral disputes in Africa.

A copy of the Conference Concept Note is attached hereto and marked as Annexure “A”

## Programme

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The conference was convened over a period of two days with networking events on both nights to allow for greater engagement. The deliberations at the conference were be divided into four broad thematic areas that are informed by the conference objectives. These thematic areas are a translation and/or loosely based on Chapters of the African Charter on Democracy, Elections and Governance. There were presentations made under each thematic rubric with an open plenary session following thereafter. The last session then seek to consolidate the discussion and suggest possible recommendation, going forward. The thematic areas to be covered are:-

- Legal and Regulatory Framework;
- Election Management Systems;
- Electoral Dispute Resolution, and
- Democratic Institutions.

NB: These also provided the framework in which the conference resolutions were drafted.

There were two networking events where delegates will be able to have a general discussion on Elections in Africa and the relationship that exists between Elections and technology. A copy of the Programme is attached hereto and marked Annexure "B".



## Day One

Keynote address

Professor MakauMutua<sup>1</sup>

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<sup>1</sup> Dean and SUNY Distinguished Professor SUNY Buffalo Law School The State University of New York

## Introduction

First of all, let me thank Arnold Tsunga, the Director of the Africa Program at the ICJ, and Brian Penduka, who asked me to give this keynote address

It is my honor and privilege to address this august meeting, especially during this turbulent time not only here, but throughout the world

Nor can I think of a more fitting subject for public discourse than seemingly uncontroversial subject of "free elections" and the "rule of law" on the African continent

I say "uncontroversial" because it's difficult, imagine who in their right mind could look you in the eye and say that "free elections" and the "rule of law" were somehow not appropriate

But yet that is precisely the question – the conduct of free and fair elections and the respect for the rule of law are anything but uncontroversial in most African states

In fact, free elections are so controversial that their conduct isn't a matter of free speech – as they should be – but a matter of life and death

So also for the rule of law – the idea would seem "natural" to most people

That's what we are here for these two days to interrogate – how do we transform our reality from one in which elections are deadly to one in which they are a routine part of the lives of ordinary citizens?

Where the rule of law is taken for granted?

The subject of the conference suggests there is more than meets the eye when we talk about the rule of law and elections in Africa

The topic suggests a metaphor – if it was a car we should kick the tires and look under the hood to see whether it was functional

That's why the organizers thought we should go "beyond the rhetoric"

I took this instruction to mean that we should not be cabined by either political correctness or lip service to an ideal

I took the topic as an admonition from the organizers that we should reject the tyranny of the intellect that forces us to sing songs we don't understand or unthinkingly participate in projects we haven't fully interrogated

I think we should get away from treating ideas and ideologies as fashions to be worn simply because they are in season



We must ask the hard questions, and expect confounding answers

This, in my view, is one of the sins of African thinkers and policy-makers

We like mimic and copy, and to mediate our realities in languages that are not our own

In a word, we like to produce dumb copies of the original

This conference says that we must get away from mimicry and intellectual self-subordination

We must produce our own ideas, not simply the ideas of others

And that when we do receive the ideas of others, that we must adapt them to our circumstances, not simply implant them without acting on them for they will surely be stillborn

## Universality

At the outset, I want to level with you about the subject of intellectual bias or location, that is, even though objectivity is the name of our game, we are nevertheless products of the legacies and heritages that have forged our minds. In that sense, no one could be truly objective, and I therefore plead certain biases at the start

But I also want to warn you that with respect to the subjects at hand – those of the intersection of democracy and human rights – I think human rights scholars ought to adopt the view of an insider-outsider, that is, view the projects of human rights and political democracy with a certain degree of skepticism – that is not to say that I do not think that the projects have redemptive purposes; it is to say that academics ought to be able to distinguish between advocacy and scholarship

In this respect, I see no contradiction in using both modern and post-modern categories while at the same critiquing them

I want to suggest, also, that we must approach all claims of universality with caution and trepidation

I say this because visions of universality and predestination have been intertwined throughout modern history

And that intersection between universality and predestination has not always been a happy one: with an alarming frequency, such visions have been deployed to advance narrow, sectarian, and exclusionary ideas and practices

So at the purely theoretical level, we are chastised not look not once – but twice, and again – at universalizing creeds, messages, phenomena, and ideas

This is not to suggest that universality is always wrong-headed, or even devious, although it has been frequently been those things as well – but it is rather to assume that universality is not a natural phenomenon

Universality is always constructed by an interest for a specific purpose, with a specific intention

Secondly, I want to suggest that all social truths are initially local – they are contextual, cultural, historical, and time-bound

That is not to say that local truths cannot become universal truths

They can, and the question for me is how one gets from here to there

If we do not understand this basic admonition, we risk repeating the incalculable mistakes of yesteryear

It is with these caveats that I want to propose a new way thinking about the free elections and the rule of law

## Political democracy

I think there can be no doubt that political democracy, and all that it incubates and implies, is the most critical realization of the liberal tradition

At the center of this tradition are two basic fictions – abstract autonomy and formal equality without which the bare republican state, popular sovereignty and constitutional government would not exist

These norms and the institutional structures they produce form a historical continuum in which liberalism gives birth to political democracy which in turn is expressed morally in the human rights corpus and its movement

I am not arguing that any of these phenomena are static or frozen in time; quite the contrary, but they have a basic character

Political democracy describes a typology of government that is characterized by certain procedural and normative attributes, most of which are process-based and not substantive or consequentialist

Political democracy is more of a method and a set of techniques than a fossilized system that is frozen in place

These methods and techniques include free and open periodic elections, speech and associational rights, the rule of law and an independent judiciary, the separation of the three arms of government, and the principle of equality and the guarantee of individual rights, these are the minimum requirements of a political democracy

The most important of these procedures is periodic, open elections in which the key political decision-makers are selected or anointed

But this process of contestation and participation revolves around the individual as the center of the moral universe who is endowed with democratic rights

As it turns out, those democratic rights, and the norms, processes, and institutions

necessary to guarantee and protect them are now expressed in the human rights corpus

Some of the critical democratic rights are the rights to assembly, movement, speech, organize, etc.

But all of these are premised on the individual who is endowed with formal equality and abstract autonomy

Both political democracy and human rights would collapse as coherent doctrines if these two pre-eminent norms were subtracted from them

Political democracy has evolved from a particular historical experience into a global civilizational norm

There is growing evidence that political democracy – or the right of a people to freely elect their own leaders in a political system undergirded by liberalism – is evolving into a customary rule of international law

But this evolution from the particular to the universal doesn't tell us how Africa should adapt and practice political democracy, or as the focus of the conference puts it, create a society governed by the rule of law in which free elections are the norm

It is vitally important that we process the state not as a master, or some instrumentality for oppression, but a servant of the people, an enabler that allows each one of us to realize our potential

You see, the state would not exist but for us – we are the foundation of the state because we established it and gave it our consent to govern through us and on our behalf

In other words, we give the state the RIGHT to govern – this is the concept of popular sovereignty

In this concept, the state must not be tyrannical, and if it is we have the right to smash it

This means that the best state exists to enhance liberty and freedom, not to restrict them

The default position of the best state is that things are permitted, not prohibited – that prohibition, a limitation on freedom or liberty requires a compelling logic and a high bar for the state to meet

## Incontestable principles and tenets

Today, there are core universal civilizational values that bind us no matter where we are, who we are, what we are, what we believe or who we worship, how we look like, what we eat, what language we speak

In short, we are protected in our basic identities and human conditions

But these protections – for the weak or strong, the poor or the rich, the big or the small, the male or the female, no matter what color, creed, sexual orientation, race, and ethnicity you are – are not possible without two fundamental tenets of liberal theory and philosophy

These are formal equality and abstract autonomy of the individual

Yes, the individual (as the foundation of human civilization)

No modern society, as we know it today, is possible without these two key tenets (formal equality and abstract autonomy)

Think about what would not be possible without these two tenets – the conception of political democracy would not be possible, the notion of human rights cannot be constructed without them, in fact it would be impossible to defend the right to life, or to be free from slavery without these two concepts

Formal equality ensures that each one of us has inherent and intrinsic worth as a human being (that no one human being is more important than another in terms of their inherent worth)

Equality may be a legal fiction that liberal philosophy encodes, but whether fiction or not, we cannot imagine – and do not want to live – in a society that is explicitly based on the INEQUALITY of human beings

Visualize states and conditions of explicit inequality – Apartheid South Africa, the caste system in India, the Hutu/Tutsi dichotomy in Rwanda and Burundi, female subordination all over the world, and the enslavement of people of African descent in the United States – and you get my point

The second concept is that of Abstract Autonomy which means that as individuals were are autonomous, that no one owns us – that we are sovereign beings in our own right

This is the foundational idea of democratic citizenship, that we are rational beings who have the right to make individual choices about our fate

It is based on these two tenets (formal equality and abstract autonomy) that political society formulates two key principles (equal protection and anti-discrimination)

These principles are the flip side of one another – discrimination is prohibited because equal protection is required

It is these two principles which are the cornerstones of the human rights idea – remove them and the whole human rights idea completely collapses

Every human rights treaty or idea is based on equal protection and anti-

discrimination (think of treaties on children, women, race, etc)

In fact, the whole question of rights and the rights regime would be meaningless without them

## The Rule of Law and elections – An African context

Let me repeat, political democracy isn't possible without the basic tenets of Abstract Autonomy and Formal Equality

The question that we must ask and answer is this – are these values alien to Africa, and even if they are, so what?

Does it even matter where these norms came from?

In other words, are these moot questions?

It's not possible to answer these questions without saying a thing or two about culture

As far as far I know, culture is the dynamic sum total of a people's lived wisdom, that is, culture encompasses everything about a people

So culture isn't something that belongs to the museum of antiquities

That's why when you denigrate a culture, you denigrate its people – you say to them that they are subhuman

That's why the notion of a hierarchy of cultures is empirically indefensible, racially bigoted, and totally unacceptable

No one culture is superior to another and by the same token, no culture is pure – cultures grow out of penetration and counter-penetration

It's wrong for one culture to claim, as the West often does, that it produces ideas while others only consume – but do not produce – ideas

My argument is that even though liberal thought and philosophy have their origin in the age of Enlightenment in Europe, they have become part and parcel of the fund of universal human knowledge

Not only that – they have been enriched and transformed by human experiences and cultures outside of Europe and North America

It's true that liberalism is distinguished from other traditions by its two key tenets – abstract autonomy and formal equality

But the spirit of those tenets wasn't absent in other cultures

Nor was the notion or spirit of representative government

That is why the peoples of Africa have largely embraced the concepts of the rule of law and free elections

Post-colonial states in Africa have done so, too, but with less enthusiasm and more

trepidation for reasons we all know too well

However, the way Africans theorize and practice free elections and the rule of law – in democratic system – must have an African flavor

Liberal democracy in Africa must germinate on this continent’s native soil, or it surely will not be sustainable

### Creating a democratic culture

We all know that you can have free and fair elections and the rule of law and NOT have a democracy

But we also know that you CANNOT have a democracy without free elections and the rule of law

The suggestion is that DEMOCRACY is much more than free elections and the rule of law – these two are important variables but by themselves do not a democracy make

Creating a democracy is a cultural process that incubates techniques, processes, and norms into the cultural fabric of a society

People must willingly submit themselves to these new norms which must have a cultural purchase and legitimacy among the majority, the deep and broad majority of the people

It’s true that the political class must buy these ideals, but so must the professional classes, working people, and the rural poor

The bureaucratic state must support them within the framework of the constitution and just laws

The judiciary must uphold them as the guardian of legality

Political parties must abide by the rules of inclusion, openness, fair competition, compromise, and the critical question of accepting defeat at the polls

Pre-election campaigns and the media cannot be divisive along the society’s sharpest cleavages (race, ethnicity, gender, disability, sexual orientation, social and economic status, and religion) otherwise the political landscape will be completely broken

But above all, democracy is a system that pivots on compromise, moderation, and tolerance

These are the unarguable intangible requirements in a democracy

### Conclusion

Let me conclude

I don’t deny – in fact I accept – the fact that political democracy was alien to Africa

So was the rule of law in the forms in which they were practiced in the West

But I believe that the spirit behind the free elections (representative government in which the people participate in governance) and the rule of law (the exercise of public power without caprice by officialdom) are deeply African

The challenge of Africa is not to simply mimic Western forms of democracy

It is to find out how democratic values and processes – like free elections and the rule of law – can be germinated on the continent’s native soil to give them an African personality

Look at India – one of the most successful democracies in the world – they have done it their way

So have the Japanese, the Turks, the South Africans closer to home, the Brazilians, and so on

There isn’t a strait-jacket that fits all

Different African states will have different FORMS of democracy so long as the underlying norms are true to notions of citizen empowerment and popular participation free of tyranny and dictatorship either of an individual, party, or a class

This is the bottom line – let’s grow something that works for different African states so long as it is genuine and deeply legitimate

## Election Management Systems

### A review of Election Management Systems– South Africa Adv. Pansy Tlakula<sup>2</sup>

#### Introduction

In the past decades, numerous elections were held regularly on the continent with no serious events or consequence. However, some elections in a few parts have been marred by violent conflict mainly due to the rejection of the electoral outcomes by the losing contestants.

Questions about the credibility and legitimacy of elections are asked and there are threats to the integrity of the electoral process on the continent.

#### Safeguarding election integrity in Africa

Multi-party elections are a vital component of democracy, as they are the only

<sup>2</sup> Chairperson: Electoral Commission of South Africa

effective and reliable instrument for citizens to choose their representatives and the government to which they want to entrust their governance and administration of their social affairs. Thus an election bestows legitimacy to any particular government. Elections are the most important tool to translate civic and political rights into practice. However, elections can only perform these critical functions if they are credible and perceived as such by the vast majority of citizens.

The lack of electoral integrity has become a major challenge facing not only Africa but the world as a whole. This includes flaws in the conduct of elections; often raising questions on transparency, accountability, accuracy and ethical standards.

Mechanisms for maintaining and implementing integrity need to be established within the very organizations that administer elections. These mechanisms must make it possible to monitor actions of the electoral administration. They must ensure oversight of the electoral process by other government sectors or agencies, civil society, and the media; and they must provide for enforcement of rules and regulations through administrative or legal means.

Electoral integrity requires:

- A generally accepted code of ethical behavior in politics;
- An electoral framework that is equitable and fair;

- Fair, transparent and impartial administration of the elections;
- political freedom to participate freely and equally in an atmosphere without fear;
- accountability of all participants;
- built in mechanisms, including monitoring by civil society and a free media, to safeguard integrity and ensure accountability; and
- enforcement.<sup>1</sup>

Within the African Union, the African Heads of State and Governments have sought to establish a set of normative guidelines for the conduct of "democratic" elections in the continent. The first of such norms was the 2002 Declaration on the Principles Governing Democratic Election in Africa (the Declaration).

In terms of the Declaration, democratic elections should be held under the following principles;

- free and fair;
- under democratic constitutions and in compliance with supportive legal instruments;
- under a system of separation of powers that ensures in particular, the independence of the judiciary;
- at regular intervals, as provided for in National Constitutions;
- by impartial, all-inclusive competent accountable electoral institutions staffed by well-trained personnel and equipped with adequate logistics.<sup>2</sup>

### **The African Charter on Democracy, Elections and Governance (Charter)**

As far as elections are concerned, the Charter provides that State Parties should re-affirm their commitment to regularly hold transparent, free and fair elections in accordance with the African Union's Declaration on the Principles Governing Democratic Election in Africa. In this regard, the Charter enjoins State Parties to do the following:

- Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections
- Establish and strengthen national mechanisms that redress election related disputes in a timely manner
- Ensure fair and equitable access by contesting parties and candidates to state controlled media during elections
- Ensure that there is a binding code of conduct governing legally recognised political stakeholders, government and other political actors prior to, during and after elections. The Code shall include a commitment by political stakeholders to accept results of the elections or challenge them through exclusively legal channels.<sup>3</sup>

### **The South African example**

South Africa's venture into electoral democracy predates the adoption of the ***Declaration on the Principles Governing Democratic Election in Africa***.

On 10 December 1996, former President Nelson Mandela signed into law the 1996

Constitution of the Republic of South Africa (Constitution). This brought to a close a long and bitter struggle against apartheid. As stated in the preamble to this constitution, through its adoption, the people of South Africa committed themselves to "heal the division of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; improve the quality of life of all citizens and free the potential of each person..."

The Constitution is founded on the following values 4: human dignity; the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the constitution and the rule of law; universal suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness.

The Constitution further establishes a number of institutions to strengthen and support constitutional democracy 5. These institutions include the following: the Public Protector, the South African Human Rights Commission, The Commission for the Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission on Gender Equality, the Auditor-General and the Electoral Commission. The independence of these

institutions is guaranteed and protected by the Constitution which provides in this regard that they are independent, and subject only to the Constitution and the law, and that they must be impartial and must exercise their powers and perform their function without fear, favour or prejudice.

The Constitution also calls upon organs of the state to assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness. Furthermore, all persons and organs of state are prohibited from interfering with the functioning institutions. The independence of these institutions is further strengthened by the fact that they are accountable to the National Assembly and not to government. The separation of powers between judiciary, the executive and the legislature is also firmly entrenched in the Constitution.

### **The Electoral Commission of South Africa**

The Electoral Commission of South Africa (Commission) was established in 1997. It consists of five members, one of whom is a judge. To engender public confidence in the Commission, the appointment procedure of members of the Commission is transparent. Moreover, the Constitution recommends the involvement of civil society in the recommendation process of members of the Commission.<sup>6</sup>

The appointment procedure for the members of the Electoral Commission also ensures the impartiality. A person who holds a high political profile at

the time of appointment is disqualified from appointment as a member of the Commission.<sup>7</sup> The names of candidates are solicited from the general public and the selection process is managed by open and representative panel consisting of the Chief Justice of the Constitutional Court, who chairs the panel, representatives of the Commission on Gender Equality, the South African Human Rights Commission and the Public Protector.<sup>8</sup> The panel calls for public nominations, compiles a short-list and conduct public interviews of the short listed candidates, and thereafter makes its recommendations to a committee of the National Assembly. The Committee will in turn make recommendations to the National Assembly which must approve the recommended candidates by a resolution adopted with a supporting vote of a majority of members. The panel is required by law to act in accordance with the principle of transparency and openness and make its recommendations with due regard to a person's suitability, qualifications and experience.<sup>9</sup>

The formal appointment is then made by the President of the Republic, who also designates the chairperson and deputy chairperson. A member of the Commission can only be removed from office by the President if the National Assembly has adopted a resolution calling for that member's removal.

### **Guiding principles for an Electoral Management Body**

Every EMB has the responsibility of ensuring the legitimacy, credibility and

integrity of its electoral processes. Over the years, guiding principles have been developed internationally for election administration. These guiding principles include the following:<sup>10</sup>

- independence
- impartiality
- integrity
- transparency
- Efficiency and effectiveness
- Service –mindedness
- Professionalism

There is yet to be an agreement internationally on what constitutes an independent EMB. This has been attributed to the fact that independence is normally viewed as consisting of two elements, formal and substantive independence.<sup>11</sup> Formal independence requires the independence of an EMB to be protected in the constitution or the law. Such constitution or law should also provide for the size, composition and membership tenure of an EMB as well as the appointment and removal procedure of its members.<sup>12</sup>

Substantive independence on the other hand requires independence in decision making and functioning, in other words, independence in action, which in my view is more important than formal or structural independence. Members of an EMB should perform their functions without being directed or influenced by any person, authority or political party.<sup>13</sup> Functional independence also requires an EMB to be adequately and timeously funded.

Preferrably, the method of funding must be regulated by law.<sup>14</sup>

Impartiality requires an EMB to function impartially by treating "all election participants equally, fairly and even handedly, without giving advantage to any political tendency or interest group".<sup>15</sup> For the purpose of establishing the integrity and credibility of electoral processes and to promote universal acceptance of election results, an EMB must operate without interference and perceptions or allegations of manipulation or bias.<sup>16</sup>

To enhance the credibility of the electoral process, an EMB must function transparently but must do so in a manner that will always safeguard its independence. In this regard, it is important for EMB to consult and communicate with relevant stakeholders, in particular political parties, on the electoral process.<sup>17</sup>

Finally, an EMB must perform its functions efficiently, effectively and with utmost professionalism, and with due regard to the needs of the electorate. This means that it should manage elections cost effectively yet competently. Electoral staff must be properly trained in electoral processes. Inadequate training, coupled with unprofessional behavior of electoral officials lead to inefficiency in the organization of elections and this is often confused with corruption and fraud which may lead to the whole electoral process being discredited.<sup>18</sup>

### The role of the Electoral System

There are many electoral systems throughout the world and there is little consensus as to which promotes democratic governance and political stability. It is preferable for each country to choose a model that best suit its particular conditions, history and political context, but that will also contribute towards the deepening of democratic governance.

It is held that very few states in Africa have taken a deliberate effort to redesign their electoral systems in a manner that addresses immediate challenges of their democratic imperatives such as accountability, inclusiveness and political stability.

Some African states still use electoral systems that are part of the inherited political arrangements left behind by the departed colonial regimes. Some of these systems, which result in the lead to so called "winner takes all", are very expensive and have no relevance to the contemporary social, economic and political challenges of a country. In some cases, these systems have led to the rejection of the election results by the losing party and the subsequent establishment of a government of national unity or a coalition government. These arrangements, whilst necessary for the restoration of peace in a highly volatile situation, have often resulted in the circumvention of the will of the people.

In the interim constitution of 1994, South Africa adopted a pure proportional

representation system (PR) as its electoral system for national elections subject to it being reviewed after the adoption of the final constitution. In 2003, cabinet appointed a task team to discuss and make recommendations whether this system should be retained or not. I had the privilege of serving on the task team. The task team adopted criteria that served as guidelines for an appropriate electoral system, namely, inclusiveness, simplicity, legitimacy, fairness and accountability. Some members of the task team were of the view that pure PR system meets all these requirements except accountability. So as to improve the accountability of elected representatives, they suggested that a component of multi-member constituencies should be added to the current system.

The choice of electoral system in 1994 was informed by the spirit and values of our constitution, namely equality, multi-party democracy and universal adult suffrage amongst others. In my opinion the current system assists us to achieve these values. It assists us to achieve our commitment to the value of equality in that it ensures that the formation of political parties is based on national concerns and shared constitutional values rather than entrenched ethnic or racially exclusive interests. In a country with a history such as ours, it is important to have a system that will not exacerbate the remnants of racial and ethnic divisions that still exist in our society. This system assists us to achieve the value of universal adult suffrage in that it is accessible to

both political parties and the electorate. It also enables as many parties as possible to participate in an election. This in turn enhances voter turnout and enthusiasm in the sense that voters are more likely to participate in an election if there are parties that they can strongly identify with. For the reasons stated, our Parliament decided to retain the PR system. One of the questions that each country has to confront when it embarks on constitutional and legislative reforms is whether its electoral system continues to serve its democratic interests and challenges.

### Conclusion

Most countries on the African continent have established independent EMBs and are also looking at the reform of their electoral legislation and framework in order to enhance the credibility, integrity and legitimacy of their electoral processes. These developments must be encouraged and applauded. At the same time however, there is an emergence of new challenges which if not addressed, will continue to bedevil elections on the continent. These challenges include the following:

- Elections in most parts of the continent take place in an environment in which political office is seen as a means to access resources. Due to this, contenders for political power want to win elections "at all cost" even if it means employing undemocratic or even illegal means to do so. This normally results in factionalism which in turn affects not only the

candidate nomination process but also the integrity of the entire electoral programme particularly in jurisdictions that use the PR system. This challenge can be addressed through the following: the improvement of intra party democracy, the adoption of and effective enforcement of intra party code of ethics and the development of intra party dispute resolution mechanisms.

- The phenomenon of politics being seen as a gateway to resources has also resulted in the formation of weak political parties without any clear ideology. This has resulted in the electorate being cynical of politicians which in turn leads to waning interest in politics and concomitant decline in voter turnout.
- The problem of money in politics especially as it relates to the absence of legislation that regulates private funding of political parties and disclosure of sources of funding. This has resulted in some political parties or candidates being funded with so called "blood money" and also using money to "steal an election". Tight and enforceable legislation should be developed to address this problem.
- Most elections on the continent are conducted in an environment that is not conducive to a free and fair election. An environment in which the ruling party often uses state resources to run its election campaign, an environment

in which the ruling party often uses state resources to run its election campaign, an environment in which the state broadcaster is dominated by the ruling party to the exclusion of other contesting parties. Although some countries have laws that are supposed to regulate these matters, these laws are often ignored with impunity.

- Attacks on freedom of expression in general and press freedom in particular increase every time there an election on our continent. This takes the form of harassment, intimidation and unlawful arrest and detention of media practitioners and members of the opposition in the run up to an election. In a situation where the opposition is not allowed to operate freely, the media is normally clamped down since it is often viewed as a voice of the opposition. The flip side of this, which is something that the media should address, is whether it is ethically correct for the media to be politically aligned.

The challenges articulated above are by no means exhaustive. Until and unless we address them, our elections will forever be riddled with unnecessary conflict and violence.



## A review of Election Management Systems- Zimbabwe

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Justice Simpson Victor Mtambanengwe

### Introduction

Regular free and fair elections are the cornerstone of democracy. For there to be credible elections, it is essential that there is sound management of the entire electoral process. The public must have confidence that the body tasked with running elections is an independent institution that will carry out its mandate efficiently, effectively, transparently and in a completely non-partisan manner that is free of political interference. The management body must be adequately resourced both in terms of staffing and funding. Where the State is unable to provide adequate financial resources to the management body, non-State funding may be sought but there must be an assurance that the non-state funding will

be provided without conditionalities aimed at influencing the electoral process. The management body's administrative staff must be properly trained to carry out their various electoral responsibilities in an efficient, professional and non-partisan manner. There must be proper strategic planning and good operational systems, including effective procurement management and proper tracking of sensitive electoral materials. There must also be mechanism for disseminating useful information to participants in a timely and systematic manner. The management body must operate in a transparent manner. It must regularly report to the public by holding meetings and using the media to release factual

information on the election process. It must also hold regular meetings with political parties and candidates to provide information, answer procedural and other questions.

There must be effective systems for conflict avoidance and dispute resolution.

Obviously there must be proper financial management and audit mechanisms for accountability in respect of the use of public resources.

### **Appointment and Composition of the Zimbabwe Electoral Commission**

The body responsible for the management of elections in Zimbabwe is the Zimbabwe Electoral Commission ("ZEC"). ZEC is established in terms of section 100B of the Constitution of Zimbabwe and operates in terms of the Zimbabwe Electoral Commission Act [Chapter 2:12].

Parliament played a key role in the appointment of the current ZEC Commissioners. In terms of section 100B of the Constitution, the President appoints the ZEC Chairperson after consultation with the Judicial Service Commission and the Parliamentary Committee on Standing Rules and Orders. The Chairperson must be a Judge or former Judge of the High Court or the Supreme Court or a person qualified to be appointed as such a Judge.

The other eight Commissioners, at least four of whom must be women, are appointed by the President from a list of not fewer than twelve nominees submitted

to him by the Parliamentary Standing Rules and Orders Committee. The present eight commissioners had to apply to become Commissioners and they were only appointed after shortlisted candidates were subjected to rigorous public interviews in Parliament by an assessment panel and Parliamentarians.

### **Legal framework for elections and referendums**

The law governing elections is the Electoral Act [Chapter 2:13] and regulations made under this Act. The law governing referendums is the Referendums Act [Chapter 2:10] and regulations made under this Act.

### **Functions of ZEC**

The duties and functions of ZEC are set out in the Constitution, the Electoral Act, the Zimbabwe Electoral Commission Act and the Referendums Act.

ZEC's main function is to prepare for, conduct and supervise Presidential, Parliamentary and Local Government elections and referendums. It has the obligation to conduct these elections and referendums "freely, fairly, transparently and in accordance with the law".

The Zimbabwe Electoral Commission Act provides that Commissioners and the Commission's employees and agents must exercise their functions in a manner that promotes conditions conducive to free, fair and democratic elections.

It has various other functions as follows:

### **Delimitation of electoral boundaries**

ZEC must determine boundaries for polling stations, wards (for local government elections), House of Assembly constituencies and Senate constituencies.

### **Voters roll**

The Registrar-General of Voters registers voters but the Constitution provides that ZEC must supervise registration of voters by the Registrar-General of Voters. Section 18 of the Electoral Act further provides that in exercising his functions, the Registrar-General of Voters will be subject to the direction and control of ZEC.

The Constitution also provides that ZEC must compile voters' rolls and registers and ensure the proper custody and maintenance of these rolls and registers.

ZEC must make voters rolls available to candidates, political parties and others on request.

### **Ballot papers and ballot boxes**

ZEC must design, print and distribute ballot papers and must publicly disclose numbers of ballot papers that have been printed.

It must approve the form of ballot boxes and procure these ballot boxes.

### **Polling stations**

In consultation with the contesting political parties and independents, ZEC must decide on numbers and location of polling stations.

### **Voter education**

ZEC must conduct voter education and must approve voter education materials for use by other organisations.

### **Conflict resolution**

ZEC must set up multi-party liaison committees at national, provincial and district level to try to avoid conflict.

### **Media monitoring**

ZEC must monitor the print and electronic media during the election period to ensure that the media provides fair and accurate coverage of political campaigning.

### **Accreditation of observers**

ZEC decides which organisations and individuals to accredit to act as observers during elections and referendums.

### **Research**

ZEC conducts research into electoral matters and make recommendations for reform of the electoral laws.

### **Public information**

ZEC must keep the public informed about the entire electoral process including the registration process of voters registration, delimitation of electoral boundaries, the location of polling stations, when voters rolls can be inspected, which political parties and candidates are contesting elections and the voting process.

### **Financing of political parties**

ZEC must make recommendations to Parliament on appropriate ways to provide public financing for political parties.

**Use of technology**

ZEC must develop expertise in the use of technology for electoral processes.

**Promotion of co-operation**

ZEC must promote co-operation between Government, political parties and civil society in regard to elections.

**Independence of ZEC**

There is presently no specific constitutional provision providing for the independence of ZEC except that section 100H provides that the State must make adequate and suitable provision, through legislation and other appropriate means, to ensure that ZEC is able to exercise its functions under the Constitution efficiently and independently and that ZEC's staff carry out their duties conscientiously, fairly and independently.

Under proposed electoral amendments the following clause will be inserted in the Electoral Act:

**10A Provisions guaranteeing independence of Commission**

- (1) Every Commissioner and member of staff of the Commission shall perform their functions independently.
- (2) The State and any private person (including a private voluntary organisation), and any other person, body, organ, agency or institution belonging to or employed by the State or any private person, a local authority or otherwise, shall not interfere with, hinder or obstruct the Commission, its Commissioners or any member of staff

of the Commission, in the exercise or performance of their functions.

- (3) The State and any person, body, organ, agency or institution, belonging to or employed by the State, shall afford the Commission such assistance as may be reasonably required for the protection of the independence, impartiality and dignity of the Commission.

It should also be noted that both the Constitution and the Zimbabwe Electoral Act contain provisions barring involvement of Commissioners and its staff in political activity.

The Constitution provides that Commissioners who were members of political parties at the time of their appointment must relinquish that membership with fourteen days of their appointment.

The Zimbabwe Electoral Commission Act provides further that no Commissioners and no full time employees of ZEC may:

- hold, or seek appointment, election or nomination to, any elective or political office;
- except in the exercise of his or her functions as a Commissioner or as an employee of the Commission, perform any work for a political party or candidate in connection with an election or referendum;
- knowingly wear any badge or article of clothing that is or is reasonably likely to be associated with a political party or candidate contesting any election or

supporting or opposing any question put to a referendum.

**Funding of Commission**

ZEC is funded by the State but it does not receive a direct grant from the Ministry of Finance; instead it receives an annual grant through the Ministry of Justice and Legal Affairs. The approval of the Minister of Justice and Legal Affairs is required in order to receive donations or grants from any local or foreign source. The Minister's approval is required before ZEC can engage in various transactions such as raising loans.

Thus ZEC is accountable to the Minister of Justice and Legal Affairs and Parliament for the conduct of its activities. However, ZEC operates as an independent Commission in the sense that it must remain scrupulously impartial when running elections and is not subject to political interference or pressure. It must ensure that elections are conducted in a manner that ensures that those elections will be accepted as being free and fair.

**Accountability of ZEC**

In terms of section 12 of the Zimbabwe Electoral Commission Act ZEC has the following reporting obligations:

- As soon as possible after the result of any election or referendum has been announced, and in any event no later than six months thereafter, ZEC must submit a report on the conduct of the election or referendum to the President, the Speaker of the House of

Assembly and the Minister; and each of the political parties that contested the election or referendum;

- As soon as possible after the end of each financial year the Commission must submit to the Speaker of the House of Assembly, the President and the Minister of Justice and Legal Affairs a report on its activities during that financial year.

In terms of the Third Schedule to the Zimbabwe Electoral Commission Act:

- Not later than three months after the end of each financial year ZEC must prepare and submit to the Minister of Justice and Legal Affairs a statement of accounts in respect of that financial year or such other period as the Minister may direct;
- It must have its accounts audited and the auditors must submit its report to ZEC and the Minister of Justice and Legal Affairs;
- The Minister of Justice and Legal Affairs may also require ZEC to obtain from its auditors such reports, statements or explanations in connection with ZEC's operations, funds and property as the Minister considers expedient and ZEC must forthwith comply with this requirement.

**The Electoral Environment and the Rule of Law**

Elections do not take place in a vacuum. The conditions prevailing in the country must be such that it is possible for a free and fair election to take place. For instance, where there is widespread

political violence and intimidation, political parties will not be able to campaign freely and voters will not be able to freely exercise their right to vote. Thus it can be said that violence is a grave threat to free and fair elections. It is incumbent upon the law enforcement agencies and the courts to rigorously and impartially enforce the laws prohibiting the use of violence and intimidation so that peaceful conditions can be restored to enable free and fair elections to take place. The rule of law requires that all the laws relating to impermissible forms of conduct in relation to elections be properly and impartially enforced against all miscreants, immaterial of the political affiliations.

Effective mechanisms for conflict avoidance and conflict resolution are extremely important.



## Legal and Regulatory Framework

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Analysis by Region of States compliance/adherence to constitutional provisions and principle governing Elections - West Africa.

By Kwame Karikari<sup>3</sup>

In November, 2011, The Gambia held presidential elections as prescribed by the country's constitution. However, in an action that was rare in the history of the ECOWAS, the Commission of the regional inter-state organization boycotted sending to the Gambia an Observer Mission to monitor the elections. The ECOWAS Commission took the action following the

report of a fact-finding mission as well as reports of a regular monitoring of the political situation and preparations towards the elections undertaken by the regional body's Early Warning System.

The Commission's statement, issued two days before the elections on 24 November, said the body had taken this drastic action

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"because the preparations and political environment for the said election are adjudged by the Commission not to be conducive for the conduct of free, fair and transparent polls."(1)

According to the Commission, "Unfortunately, the reports of the fact-finding mission and the Early Warning System paint a picture of intimidation, an unacceptable level of control of the electronic media by the party in power, the lack of neutrality of state and parastatal institutions, and an opposition and an electorate cowed by repression and intimidation. In the circumstance, the ECOWAS Commission is of the view that the conditions prevailing in the country do not meet the minimum standards set under the (ECOWAS's) Protocol on Democracy and Good Governance for the conduct of elections, and has, therefore, decided to exercise the discretionary powers conferred on the Commission's President under the Protocol to stand down the ECOWAS Observer Mission."

The Commission's damning vote of no-confidence in the Gambian electoral system and processes, exposes eloquently the fundamental condition of an absence of the rule of law and the prevalence of arbitrariness that characterize the rule of the Gambian government of President YahyaJammeh. Though it may be said that elections in the Gambia, unlike elsewhere in the region, have not ended in wholesale violent conflicts and civil war, the conditions painted by the ECOWAS itself, render elections in that country

farcical and contemptuous of norms of practice established by the regional body, ECOWAS. Moreover, while particular events in elections in different countries in the region may not attract the wrath of the ECOWAS or rebuke from any international agency, they do provide examples of challenges to the maintenance of and adherence to the rule of law.

This paper attempts to provide an overview of some of the key issues of the challenges to the upholding of the rule of law in elections in West Africa. The paper uses the 2011 Gambia elections and some event or cases from other countries as an example of the problems of the rule of law in elections and electoral processes in a fledgling democratic environment.

### **The Gambia**

The Gambia became independent from Britain on 18 February, 1965 under a constitutional monarchy within the Commonwealth until 1970 when it became a republic with Sir DawdaJawara of the People's Progressive Party (PPP) as the first president. Though Jawara's rule was characterized by a virtual one-party dominance of political life, governance was widely considered to be humane and devoid of the brutish repression that predominated politics in most of contemporary Africa. It was in recognition of the country's political stability and, above all, the human rights record of the government that the OAU decided to locate in Banjul, the capital, the headquarters of the African Commission on Human and Peoples' Rights (ACHPR). But in 1994, a Lt.

YahyaJammeh led a military coup to oust the government of President Jawara.

Two years later the military regime initiated processes of restoring democratic multi-party system of government. It lifted partially the ban it had imposed on political parties, by allowing some of the pre-coup existing parties to contest but banning others from the elections. In the meantime, Lt. Jammeh, following the example of other former junta leaders turned "democrats" in the region (Rawlings in Ghana, Obasanjo in Nigeria, etc.), formed his own political party to contest the elections and legitimize his political authority. Since 1996 the Gambia has had, as prescribed by the 1997 constitution, four five-yearly presidential and Parliamentary elections under the incumbency of President Jammeh.

Each of these elections has been conducted under circumstances that have skewed the rules and processes to the benefit of Jammeh's Alliance for Patriotic Re-Orientation and Construction (APRC) party, and to the abject disadvantage of the opposition parties.

The Gambia has separate presidential and parliamentary elections. Following the November 2011 presidential polls which the ECOWAS Commission boycotted, the national assembly elections were also held on 28 February 2012. Apprehensive that the government would once again not follow laid down rules, as it had shown in previous elections, the seven opposition parties issued a joint declaration to

"Demand for a Level Ground For Multi party Contest in the Gambia to Prevent Political Exclusion of the Opposition" in the national assembly elections.(2) The four-page statement, proposing a 14-point recommendation for reforms to the Independent Electoral Commission (IEC) and the ruling party, sums up the atmosphere of frustration: "That the opposition has been pushed into a vicious corner to either boycott elections and be damned or participate in elections and be damned and caught in this loss-loss situation it would be disingenuous to continue to contest every election with our hands and feet tied and then come out complaining of electoral misconduct."

According to the opposition parties, in the Gambia, "the greatest threat to the building of a genuine electoral system is the abuse of incumbency and the complete merger between party and state that enables the ruling APRC party to exercise complete monopoly over state resources and the media and their utilization to its political advantage."

These are the general conditions, and the government's contemptuous dismissal of the opposition parties' petition for reforms in the electoral system, including measures to curb the incumbent's arbitrariness and disrespect for the rule of law, that informed the opposition parties' boycotting the National Assembly elections in February 2012.

In an observation report of the November 2011 presidential election issued by a

21-member coalition of Gambian civil society organizations (3), the non-governmental organisations affirmed that: "The Coalition is concerned that the legal, policy and institutional environment in the Gambia advertently or inadvertently favours the incumbent than the Opposition, thus do not generate a level playing field for a free and fair elections."

The catalogue of issues raised by the civil society coalition that renders Gambian elections unfair and not transparent, reiterates the same complaints by the opposition parties. They include:

- i) Access to public (state-owned and controlled) media;
- ii) Use of state resources to back the incumbent;
- iii) Involvement of armed forces and security services (and not the police alone) in the security details of the process, even as there have been no emergency security situations;
- iv) Use of local government and traditional structures to influence the voting population in communities;
- v) Lack of state funding of parties;
- vi) Disregard for the principle of separation of powers, thus making the judiciary for instant subservient to the executive;
- vii) Biases of the electoral commission toward the incumbent president; and
- viii) The blurring of the distinction between state functions and (ruling) party functions.

The Gambian case is characterized more

by the arbitrariness inherent in the impunity with which the country is ruled, than by just the blatant violations of the laws on elections. In other words, the disregard for democratic norms and rule of law in elections (or in other aspects of national and public life) is founded on the creation of an environment of fear nurtured over the years by the Jammeh government's systematic abuses of human rights, including state-sponsored extra-judicial murders.

The arbitrariness with which the regime disregards rules and procedure on elections issues can be seen in its treatment of the so-called Independent Electoral Commission (IEC). Sections 42-45 of the Constitution provide for the establishment of the IEC, and the procedures for the appointments or removal of the commissioners. The authority to appoint members is vested in the head of state. Members are appointed for a term of seven years renewable for one more term only. But since 1996 three chairpersons of the IEC have been removed and three members have also been removed. The IEC's independence is doubted by many. The Commonwealth observer team for the 2011 Presidential election stated in its report that, "the manner of past dismissals of IEC members strongly suggests that Commissioners do not enjoy the security of tenure guaranteed by the Constitution." (4)

The government's selective invocation of criminal legislation, such as sedition laws and the Public Order Act, is another

arbitrary act meant to weaken the opposition's campaign and ability to debate government positions to the electorate. The Commonwealth Expert Team cited complaints by Gambians indicating cases in which "the Public Order Act's requirements for permits from police authorities for a range of activities had been unfairly applied and overly restricted the ability of the opposition political parties to play and effective part in public life."

In the 2011 presidential election, the IEC declared just 11 (eleven) days for the campaigning period. Considering the IEC's perceived lack of independence, it is not strange that many believed the IEC had acted on the orders of the president so as to encumber the activities of the opposition parties and candidates. The government ensures, against all norms of the right of freedom of expression and in violation of the Constitution's provisions to give space to all views and shades of opinion on the national Gambia Radio and Television Service (GRTS), that in-between elections opposition parties and voices other than the government's own are allowed on the state-owned and controlled broadcasting service. Moreover, the regime of President Yahya Jammeh has over the years silenced all independent media outlets through arbitrary closure of private newspapers and radio stations, arrests, detention, criminal prosecution, and persecution, including some extra-judicial murders and forced exile, of independent-minded journalists. The regime has thus succeeded in denying the electorate the right to debate freely and in public government

policies and actions, and the right to know what alternative perspectives and ideas the opposition parties and other groups outside government have to offer. The Gambian voter is in fact denied the right to choose freely from among the contesting parties.

The Gambia represents a case of abject undermining of democratic electoral system and process through the executive's open disregard for the rule of law. On paper, the legal and policy framework for elections do not present much fundamental disagreement, overall. In practice, however, the system is denuded of any democratic essence and the incumbent ensures that its fine principles are made useless. Having compromised the independence of the judiciary, and having subjected the population at large to a state of abject fear and political impotence, opposition parties have nearly no room to protest and no hope of exacting justice and fair play. The "loss-loss" situation into which the opposition has been pushed, is a near perfect condition for the kind of desperation that can tempt an opposition to resort to non-democratic (especially violent) methods for change.

#### Other examples in the region

Whereas the Gambia represents a generalized disregard for rule of law and abject incumbent arbitrariness, cases elsewhere provide examples of attempts at manipulating the law to exclude others. Some cases provide examples of the rule of law at work in ensuring just resolution

of election-related disputes, while others present a complex problem of the rule of law versus public/popular sentiment.

### (a) Cote d'Ivoire

Cote d'Ivoire's well-known descent into civil war as a result of problems of succession and electoral disputes raises so many questions of rule of law and the commitments of the political class in an African society to the values and principles of the rule of law. In the first place, the lack of precision and clarity in the country's 1960s constitution regarding presidential succession, gave rise to an unhealthy contest between the two topmost political office holders that in two decades developed into myriad and complex political difficulties for the country.

Felix Houphouet-Boigny, the father of the nation, ruling under a one-party system over which he exercised near absolute rule, made no clear arrangements for succession. In 1990, however, when he concedes to popular demands and the continent-wide movement for political openness, by changing the constitution and introducing multi-party political system. At the same time he creates the position of Prime Minister and appoints Allasane Dramani Ouattara to the post. But it was also perceived that the President (Speaker) of the National Assembly, at the time Henri Konan Bedie, would succeed the presidency in case of a vacancy.

Following the death of the first president in December 1993, the conflict between the two top leaders add to – and even

aggravate – already growing political tensions, divisions and a general atmosphere of chaos.

"The political divisions and regroupings that follow [the death of Houphouet-Boigny] lead to the emergence of ethnonationalism which, in its turn, aggravates the cleavages between Ivorians and foreigners and, domestically, between the North and the South. The multi-party system, that opens the door to a pluralist press and an increasingly important public opinion, is marked by the progressive shift of the distinctions between political parties towards regional and ethnic identities, which is a serious drift from politics." (5)

Bedie wins, with the support of France, the contention for the succession to the presidency. To consolidate his grip on power and hoping to eliminate his biggest opponent in the 1995 elections, Bedie resorts to various maneuvers that compelled all the other major parties to boycott the elections. Towards the next elections in 2000, Bedie passes a law to exclude others: a law that limits qualification for candidacy to the presidency to only persons who can prove that both parents are Ivorian. (6) The new law is backed in political terms by a notion of "Ivorite", a concept originally supposed to encourage a cultural and political nationalism, but now turned into a slogan for "authentic" nationality and exclusion of all other Ivorians who were citizens by means other than birth to a native-born mother and father.

By the stroke of a pen, a piece of legislation narrowly conceived essentially with the intent to exclude one person from, and ensure the ascendancy of another to, power through elections serves as a catalyst to a convulsion that threatened the stability of a whole region. Cote d'Ivoire is yet to recover from the violent consequences.

### (b) Senegal

Legislation designed to abort fair competition threw Cote d'Ivoire into violent crisis. In Senegal, however, a combination of respect for the rule of law and popular mobilization utilizing the rights of freedom of expression, saved the country from descending into arbitrariness and violent conflict in a dispute over the interpretation of constitutional provisions regarding the eligibility of the incumbent president to contest for another term of office.

In 2001 Senegal's constitution was changed to reduce the mandate of the president from seven to five years. The new provisions also limited the president's tenure to only two terms. President Abdoulaye Wade, elected under the old constitution, served a seven-year term. Under the new one, he served a five-year term ending in early 2012. Wade and his Senegalese Democratic Party interpreted the constitutional changes to mean that the president was then eligible to contest and serve for another 5-year term, arguing that his first seven-year term should be discounted because it was under the old constitution and therefore it did not count against his seeking another term under

the new constitution. The opposition forces held otherwise.

This aside, Wade and his party sought to change the electoral law to lower the margin of first-round victory in elections from 51% to a mere 25%. They also sought to introduce, for the first time, the position of vice president. All of these raised suspicions that President Wade and his government planned to manipulate the electoral law and process to perpetuate their rule.

Thus emerged a popular protest movement (Movement du 23 Juin) against Wade's candidacy for the February 2012 presidential election. But in the scheme of things, the dispute over Wade's eligibility to contest for a second term under the new constitutional provisions was submitted to the interpretation of the Constitutional Court. This course of action was encouraged by the Senegalese people's confidence in the independence of the judiciary. Therefore, when the Court ruled that Wade qualified to contest, the only recourse that the opposition parties and the popular protest movement could resort to was to campaign to defeat Wade. Wade contested, and the popular movement, in an informal alliance with the opposition parties and under the slogan "Y'en a Marre" (We're fed up, in Wolof, the dominant language) campaign to defeat the incumbent president in a free and fair election.

That the dispute in Senegal ended in a peaceful election without the kind of

outcome characterising elections with similar conditions elsewhere, can be attributed essentially to the prevalence of the rule of law. That the rule of law prevailed in the country is also the outcome of a number of factors including:

- i) the independence of the judiciary;
- ii) the strong tradition of freedom of association;
- iii) the strong tradition of freedom of expression, including media freedom;
- iv) a dynamic and active civil society;
- v) opposition parties that, even for self-interest, show commitment to the rule of law; and
- vi) security forces that manifest neutrality from the political forces.

### (c) Nigeria

By appearance, election contests in Nigeria tend to produce an image of distressful signals full of elements that always threaten to turn the country into a huge mass of chaos. Reports and rumours of corruption and other factors inimical to the conduct of free and fair elections are always rife.

Whereas the veracity of such allegations are usually not easy to be made, what is certain is the critical role the judicial system of Nigeria plays in resolving elections dispute and therefore averting resort to illegality by forces with grievances resulting from or related to elections. In Nigeria the Appeals Court of the Federation sits as the election tribunal in respect of petitions arising from elections to the presidency.

Two cases arising from the April 2011 presidential elections give an example of the mechanisms established to ensure the rule of law prevails in resolving elections-related disputes and thereby reinforcing peaceful resolution and prevention of conflicts.<sup>(7)</sup> The first case, being a matter concerning the federal presidency, had been a petition filed at the Appeals Court, as the law provides. The second, arising out of a state gubernatorial election, had been a petition filed at the state Governorship Election Petition Tribunal. They were thus filed in appeals to the Supreme Court of Nigeria, as the law requires, after their respective elections tribunals had dismissed the petitions on various grounds.

In the first of the two cases, "The appellant was aggrieved with the conduct of the election" and the INEC's declaration of GoodluckEbele Jonathan and Mohammed NamadiSambo "as the candidates elected as President and Vice-President of the Federal Republic of Nigeria respectively." The Congress for Progressive Change, the appellant, whose presidential candidate was former military ruler General MuhammaduBuhari, contended that, "The election was invalid by reason of corrupt practices and substantial non-compliance with the provisions of the Electoral Act, 2010 which substantially affected the result of the election"" and that therefore the winners of the election "were not duly elected by majority of lawful voters cast at the election."

The second case was contending the

validity of gubernatorial elections held for the choice of governor and deputy governor of Zamfara state in the North-west part of Nigeria. The Peoples Democratic Party (PDP) "was not satisfied with the result of the election as declared. ... The appellant made allegations of non-voting in several polling units, disruption of election, non-conclusion of election, thumb-printing of ballot papers, falsification of election results, widespread disruptions of election, irregularities and malpractice."

At the state level, other cases contending allegations of various kinds of impropriety, had been resolved by the courts since the current republican constitution came into force. The resort to the legal mechanism for election dispute resolution indicates both confidence in the independence of the judicial system of the country and

a commitment by the political class to the rule of law in the management of the multi-party political system. It is instructive that no petitioner to the courts has flouted the decisions of the courts and resorted to extra-legal means to express their dissatisfaction or to insist on the righteousness of their case or cause.

### Conclusion

Nigeria, like many other West African countries, has in its body politic many complex factors and issues with potential for serious and even violent disruption of the electoral process, with devastating and destabilizing consequences for "normal" social, cultural, and economic life. The electoral system, however, has succeeded in establishing mechanisms of rule of law to minimize the potential for such developments. Similarly, the Senegalese experience shows that the antidote to the



tendencies for political actors resorting to arbitrary and undemocratic methods of conducting elections and undermining the rule of law, lies in confidence in the rule of law and the commitment of civil society in the defence of the rule of law.

Notes

- 1. ECOWAS Statement on the 24 Novemeber 2011 Presidential Election in The Gambia, 22 November 2011. Abuja, Nigeria.
- 2. Joint Declaration of the Opposition Parties in the Gambia on the 2012 National Assembly Elections.”
- 3. CSO Coalition on Elections, The Gambia. Final Election Observation Report. Presidential Election, 24 November, 2011.
- 4. Commonwealth Secretariat, Report of the Expert Team on the 24 November 2011 Presidential Election in The Gambia.
- 5. Jean-Louis Chaleard, Cote d’Ivoire’s Shattered Unity. African Geopolitics, No. 9. Winter 2003.
- 6. Article 35 of the Constitution of 2000.
- 7. Supreme Court of Nigeria, Congress for Progressive Change versus Independent National Electoral Commission (INEC) and 41 Others. Appeal No: SC. 426/2011, Wednesday, 28th December, 2011; and Supreme Court of Nigeria, Peoples Democratic Party versus Independent National Electoral Commission (INEC), Abdul’AzizYariAbubakar, Alhaji Ibrahim Wakkala, and All Nigeria Peoples’ Party (ANPP). Appeal No: SC. 6/2012, Friday, 17th February, 2012.

Analysis by Region of States compliance/adherence to constitutional provisions and principle governing elections - Southern and Eastern Africa

Andre MbataMangu<sup>4</sup>

1. Introduction

Since the late 1980s, as the Cold War was closing to an end, the Soviet Empire collapsed and the masses of African people embarked on a relentless struggle against leaders who had come to power by the use of force and for decades enjoyed the support of some Western governments and international financial institutions such as the World Bank and the International Monetary Fund (IMF).

After decades of military or one party rule in many African countries, the “wind of change”<sup>5</sup> finally came to Africa. Across the continent, especially in some Sub-Saharan countries, African people got to the streets and demanded democracy as much vigorously as they did for independence. To quote from Colombian singer Shakira’s words at the opening of the first soccer world cup held in Africa in 2010, this was “time for Africa” or, as Bourgi and Casteran labelled it, this was the “Spring of Africa”,<sup>6</sup> which then spared North Africa.

Democracy was then considered a “new independence” or at least a genuine one as compared to the “first independence”, which happened to be for the elites who

took advantage of the revolt of the masses against the colonial masters to access to power and rule to the detriment of the same people who brought them in power.<sup>7</sup>

During the first two decades of Africa’s independence, the bulk of the conventional Western political and even scientific discourse favoured the “dictatorships of development” in Africa and argued that a truly “developmental state” had to be an authoritarian state led by a modernising oligarchy.<sup>8</sup> Yet, a truly developmental state was seen to require what Sklar called a “developmental democracy”.<sup>9</sup>

Unlike political liberalisation, which is top-down process of change that results into a formal, cosmetic or superficial democracy, democratisation designs a bottom-up process of change which is initiated and controlled by the masses of the people, and brings about a genuine democracy.<sup>10</sup> The liberalisation

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<sup>5</sup> On the “wind of change” in Africa, the “wind of the East”, the “wind of the West” or the “wind of Africa”, see Mangu, AMB, The Road to Constitutionalism and Democracy in Post-colonial Africa: The Case of the Democratic Republic of Congo, LLD Thesis, Pretoria, University of South Africa, 2002, 297-306.

<sup>6</sup> Bourgi, A. &Casteran, C., Le Printemps de l’Afrique, Paris, Hachette, 1991.

<sup>7</sup> On the concept of “second independence”, seeNzongola-Ntalaja, G., The DemocraticMovement in Zaire 1956-1994, Harare : AAPS, 1994, 1, 13-14; Idem “Le mouvement pour la seconde indépendance au Congo/Kinshasa”, in Anyang Nyong’o, P., (ed), Afrique: la longue marche vers la démocratie. Etatautoritaireetrésistancespopulaires, Paris: Publisud, 1988, 208-251; Ake, Cl., Democracy and Development in Africa, Washington, DC: The Brookings Institution, 1996,139.

<sup>8</sup> See Gregor, A.J., Italian Fascism and Developmental Dictatorship, Princeton: Princeton University Press, 1974, 3-4; Nicol, D., “African Pluralism and Democracy”, in Ronen, D., (ed), Democracy and Pluralism en Afrique, Boulder: Lynne Rienner Publishers, 1986, 165; Sandbrook, R., “Liberal Democracy in Africa: A Socialist-Revisionist Perspective”, in Nyang’oro, J.E., (ed), Discourses on Democracy: Africa in Comparative Perspective, Dar-es-Salaam: Dar-es-Salaam University Press, 1996, 40; Sklar, R.L., “Developmental Democracy”, in Nyang’oro op cit 1-30; Sorensen, G., “Democracy and the Developmental State”, in Nyang’oro op cit 31-60.

<sup>9</sup> Sklar op cit 1-30.

<sup>10</sup> For an account of the debate on democratisation and political liberalisation, see Rijnierse, E., “Democratisation in Sub-Saharan Africa? Literature Overview”, Third World Quarterly, Vol.14, No 3, 1993, 652-653; Qadri, S., Clapham, C. & Gills, B., “Democratisation in the Third World: an

or democratisation process consisted of different phases. The first phase required constitutional and legal reforms aimed at promoting human rights and institutionalising the rule of law. During the second phase, the one party state that dominated the African post-colonial landscape was dismantled and multipartyism established. The third phase was characterised by the organisation of regular, free and fair elections in line with international and constitutional norms, principles, guidelines, and standards. Political developments that recently unfolded in Tunisia, Libya, and Egypt in the aftermath of the "Arab Spring" tend to confirm these three main phases of the process.

A number of regional and sub-regional norms, principles and standards were adopted and guidelines developed to promote the rule of law and democratic elections. Some are embodied in conventions and therefore legally binding on states parties. Some others are contained in declarations that are also morally and politically binding on states that adopted them.

The major regional instruments containing these norms, principles and guidelines are the African Charter on Human and Peoples' Rights (ACHPR),<sup>11</sup> the Constitutive Act of the African Union (AU),<sup>12</sup> the African Convention on Preventing and Combating

Corruption in Africa (ACPCC),<sup>13</sup> the African Charter of Democracy, Elections and Governance (ACGED),<sup>14</sup> the Declaration on Democracy, Good Political, Economic and Corporate Governance (DDGPECG)<sup>15</sup> that governs the African Peer-Review Mechanism (APRM), and the APRM Country self-assessment.<sup>16</sup> Some other norms, principles, standards and guidelines were adopted by different African regional economic communities (RECs). Regional and sub-regional norms and principles governing democratic elections in Africa are examined somewhere else. Accordingly, I will not dwell on them. Nevertheless, these norms and principles are generally incorporated into domestic law.

African states adopted several constitutional and legal provisions in order to promote the rule of law and democratic elections in Africa. However, to borrow an expression well used in international economics, Africa is still struggling to become an "emergent state". The "economy of democracy"

has been growing slowly. The regional "market of constitutionalism, rule of law, and democratic elections" is largely underdeveloped since these "goods" remain "rare" and their lowest "offer" cannot meet the highest "demand" expressed by all the people of the continent despite an alarming "inflation" of norms, principles, standards, and guidelines. Instead of the "rule of law" being proclaimed in many legal instruments, whether regional, sub-regional or domestic ones, there has been "rule" without "law" in many African countries. The "constitutional or normative inflation" rather resulted into what Okoth-Ogendo labelled "constitutions without constitutionalism".<sup>17</sup> On the other hand, the numerous and costly elections held in Africa have hardly contributed to democratic consolidation. Due to states' non-compliance with norms and principles governing democratic elections, people have been "voting without choosing" and the result of these "elections without democracy" has been "choiceless", "impoverished", "cosmetic" democracy, "*démocratie sans le peuple*", "particracy", "plutocracy", or "electocracy", to borrow from Thandika Mkandawire,<sup>18</sup> Claude Ake,<sup>19</sup> Duverger,<sup>20</sup> and Barack Obama<sup>21</sup> respectively.

Against this background, this paper reflects on States' compliance with regional

norms and constitutional provisions and principles governing democratic elections in Southern and central Africa. Almost half (24) of the 54 African countries are located in Southern (15) and Central Africa (9). Southern and Central African countries are regrouped into two main regional economic communities, namely the Southern African Development Community (SADC) and the Economic Community of Central African States (ECCAS).

Every year since 2000, at least one country has been going to elections in Southern and Central Africa.<sup>22</sup> In 2011, Cameroon, the DRC, Chad, Central African Republic, Seychelles, and Sao Tome & Principe went to general elections. This year, Congo, Lesotho, and more recently Angola have also held their elections. Malawi is expected to go to polls by the end of the year while South Africa, Madagascar and Zimbabwe will be voting in 2013. Unfortunately, this paper cannot assess each Southern and central African state's compliance with norms and principles governing democratic elections. Accordingly, the focus will be on the Democratic Republic of Congo (DRC) with regard to the combined presidential and parliamentary elections held on 28 November 2011. The DRC is the largest and most densely populated country in the region. Apart from belonging to both Southern and Central Africa as a member of SADC and ECCAS respectively, the DRC also belongs to Eastern Africa as a member of the Common Market of Eastern Africa (COMESA).

Introduction", Third World Quarterly, Vol. 14, No 3, 1993, 416-436; Mangu op cit 294-297.  
11 Adopted in June 1981 in Nairobi, Kenya, and entered into force in October 1986.  
12 In the Preamble to the AU Constitutive Act, Heads of State and Government of the Member States of the AU held that they were "determined to promote and protect human and peoples' rights, to consolidate democratic institutions and culture, and to ensure good governance and the rule of law". A relationship was therefore made between democracy, human rights and the rule of law. This also derives from the AU objectives and principles. The AU objectives are inter alia to "promote democratic principles and institutions, popular participation and good governance" (Article 3 (g)) while one of its major principles is "respect for democratic principles, human rights, the rule of law and good governance" (Article 4 (m)).

13 This Convention was adopted on 11 July 2003 and came into force on 5 August 2007. It promotes free and fair elections and excludes popular manipulations, corruption, and vote-rigging by ensuring transparency, equity, and efficiency in the management of tendering and hiring procedures in the public service (Article 7 (4)), by providing for the confiscation of proceeds or property derived from corruption or related offences (Article 16 (1) (b)), for the incorporation of the principle of transparency into funding of political parties (Article 10(b), the proscription of the use of funds acquired through illegal and corrupt practices to finance political parties (Article 10 (a), and by promoting the right of access to any information required to assist in the fight against corruption and related offences (Article 9.5).  
14 This is the most important regional instrument with norms, principles and standards governing elections. The ACDEG was adopted on 30 January 2007 and came into force on 15 February 2012. Of its 15 states that had deposited their instruments of ratification when it came into force, three were from Southern Africa (Lesotho, South Africa, and Zambia) and another three from Central Africa (Cameroon, Chad, and Gabon) Africa. These countries were therefore formally bound to comply with its provisions when organising their elections.  
15 This Declaration was adopted by the AU Assembly of Heads of State and Government in Durban, South Africa, in July 2002, to govern the work of the APRM. The APRM was established later as a voluntary mechanism to assess and make recommendations to improve governance among AU member states participating in the New Partnership for Africa's Development (NEPAD) and that had also adhered to this mechanism. All these instruments contained norms, principles and standards on democracy and good political governance and therefore to free and fair elections. AU member states participating in the NEPAD and that adhered to the APRM are also required to comply with them. Some of these countries belong to the Southern and Central African sub-regions. In support of good political governance, they agreed to ensure the effective functioning of parliaments and other accountability institutions, including parliamentary committees and anti-corruption bodies, and the organisation of regular, free and fair elections. Regional guidelines were also developed to govern elections.  
16 Adopted in 2004.

17 Okoth-Ogendo, H.W.O., "Constitutions without Constitutionalism: Reflections on an African Political Phenomenon", in Shivji, I.G., (ed), State and Constitutionalism: An African Debate on Democracy, Harare: SAPES, 1st Edition, 1991, 3-25.  
18 Mkandawire, T., "Crisis management and the Making of 'Choiceless democracies'", in Joseph, R., (ed), State, Conflict and Democracy in Africa, Boulder & London: Lynne Rienner Publishers, 1999, 119-135.  
19 Ake op cit 130, 132, 137.  
20 Duverger, M., La démocratie sans le peuple, Paris: Armand Colin, 1976.  
21 Obama, B., The Audacity of Hope. Thoughts on Reclaiming the American Dream, New York: Vintage Books, 1st edition, 2008, 375.

22 See the table at the end of the paper.

The DRC went to polls in a particularly difficult political, economic and financial context. It is currently confronted by a complex armed conflict, which is due to a multifaceted rebellion on the one hand and a foreign aggression on the other hand.

This is not definitely a case of a good practice to be emulated with regard to respect for the rule of law and democratic elections. Nevertheless, it is a representative case of the region's experience with elections and there may be more to learn from the rule than from those exceptions that exist. Lessons and findings as well as recommendations in relation to DRC's compliance with regional norms and constitutional principles governing democratic elections may be relevant to other African countries and contribute to the promotion and consolidation of democracy in Africa. However, prior to embarking on this reflection, it is worth revisiting briefly the key concepts of democracy and elections and the relationship between them.

2. Democracy and Elections in Africa

Democracy and elections are interrelated concepts. Nwabueze pointed out that "No word is more susceptible of a variety of tendentious interpretations than democracy".<sup>23</sup> There is a widespread agreement that it is "a good thing". The adjective or epithet "democratic" almost inevitably connotes praise, while "undemocratic" implies censure.<sup>24</sup>

23 Nwabueze, B.O., *Constitutionalism in the Emergent States*, London: C. Hurt & Co, 1973, 1.  
24 Wiseman, J.A., *Democracy in Black Africa. Survival and Revival*, New York, New York: Paragon House Publishers, 1990, 4.

Ronen pointed out that "Defining democracy is a challenge".<sup>25</sup> Many writers have spent their scholarly lifetimes teasing out the subtleties and nuances associated with democracy. The result of those endeavours remains the absence of universally accepted definitions and a concept that is still highly contested in analytical, political, and ideological discourse.<sup>26</sup>

Depending on the scope of democracy, two major conceptions of democracy may be identified, namely the minimalist and maximalist conceptions.<sup>27</sup> The clue to understanding democracy is based on this vital distinction.<sup>28</sup>

Minimalist conceptions are based on institutions of government and related institutions such as political parties and pressure groups, elections and the rule of law. They are basically procedural, formal, and institutional. Democracy is defined as a specific political machinery of institutions, processes and roles.<sup>29</sup> The notion of procedural or institutional democracy is of the sort found in Robert Dahl's concept of polyarchy.<sup>30</sup> According to Dahl, polyarchy in a political order is characterised by seven institutions, all of which must be present. These are elected officials, free and fair elections,

25 Ronen, D., "The Challenges of Democracy in Africa: Some Introductory Observations", in Ronen op cit 1.  
26 See Hoffman, J., *State, Power, and Democracy: Contentious Concepts in Practical Political Theory*, Sussex, Wheatsheaf Books, 1988, 31; Wiseman op cit 7-8.  
27 See Nyang'oro, J.E., "Discourses on Democracy in Africa: an Introduction", in Nyang'oro op cit X; Wiseman op cit 7-14; Sklar op cit 166; Shivji, I.G., "State and Constitutionalism: A New Democratic Perspective", in Shivji op cit 27-69.  
28 Hinden, R., *Africa & Democracy, Encounter*, 1963, 6-8.  
29 Ronen, D., "The State and Democracy in Africa: Some Introductory Observations", in Ronen op cit 200.  
30 See Dahl, R.A., *Polyarchy: Participation and Opposition*, New Haven CT, Yale University Press 1971, *Idem Democracy and Its Critics*, New Haven & London: Yale University Press & New Delhi: Orient Longman Ltd, 1989, 220-224; Sorensen op cit 42; Wiseman op cit 8.

inclusive suffrage, and right to run for office, freedom of expression, alternative information and associational autonomy.<sup>31</sup> In a polyarchy, "citizenship is extended to a relatively high proportion of adults, and the rights of citizenship include the opportunity to oppose and vote out the highest officials in government".<sup>32</sup>

In Sorensen's view, Dahl's notion of polyarchy has three elements: competition for government power; political participation in the selection of leaders and policies; and civil and political rights.<sup>33</sup> In minimalist terms, democracy is synonymous with competitive, multiparty democracy, and elections. It is representative democracy, also labelled "Western" or "liberal" democracy". According to Sandbrook, it is "a political system characterized by regular and free elections in which politicians organized into political parties compete to form the government, by the right of virtually all adult citizens to vote, and by guarantees of a range of familiar political and civil rights".<sup>34</sup>

Amin argues that in minimalist terms, democracy privileges individual and political rights over collective and socio-economic rights and the rights of the minority (bourgeois) over those of the people.<sup>35</sup> Glaser also blamed the Western "formal democracy" for being "irretrievably associated with individualism, formalism and reformism".<sup>36</sup>

31 See Dahl *Democracy and Its Critics* op cit 220-224; Wiseman op cit 8.  
32 *Idem*.  
33 Sorensen op cit 42.  
34 Sandbrook op cit 137-138.  
35 Amin, S., "The Issue of Democracy in the Contemporary Third World", in Nyang'oro op cit 64-70.  
36 Glaser, D., "Discourses of Democracy in the South African Left: A Critical

Shivji regretted that democracy was frequently, if unconsciously, conflated with its liberal form, parliamentary or multiparty-system and with constitutionalism, individual rights and freedoms rather than interrogated as a form of struggle and the mode of politics of the large majority of the working people.<sup>37</sup>

Whilst minimalist scholars define democracy as a process and a set of institutions and focus on political democracy emphasizing individual and political rights, maximalist conceptions concentrate on the substance and values of democracy, the most prominent among them being social equality, and on collective and socio-economic rights.<sup>38</sup>

Maximalist scholars such as Ake advocate a social democracy that places more emphasis on concrete political, social, collective and economic rights, as opposed to a liberal democracy that emphasises abstract individual and political rights.<sup>39</sup> Social democracy is a popular, participative and substantive democracy.<sup>40</sup> The concept of "popular participation", which is associated with civil society, became central to the discourse on democracy and development in Africa.<sup>41</sup> Maximalist definitions of democracy are in many ways attractive and contain a far broader notion of "good government" or "good society" than the minimalist ones.<sup>42</sup> However, they too are not immune to criticism.

Commentary", in Nyang'oro op cit 270.  
37 See Shivji, I.G., *Fight My Beloved Continent: New Democracy in Africa*, Harare: SAPRES Books, 2nd Edition, 1992, 2; *Idem "Contradictory Class Perspectives in the Debate on Democracy"*, in Shivji op cit 254-255.  
38 Glaser op cit 251.  
39 Ake op cit 132-134.  
40 See Ake op cit 137, 139; Shivji "Contradictory Class Perspectives" op cit 254-255; *Idem Fight My Beloved Continent* op cit 2.  
41 Nyang'oro op cit XII-XIII.  
42 Wiseman op cit 9.

Wiseman argues that "there is no prospect whatsoever of any African state fulfilling the total range of aspirations contained in a maximalist conception of democracy".<sup>43</sup>

Glaser also criticises the maximalist conceptions of democracy for their emphasis on social equality, substantive democracy, and collective rights to the detriment of formal, legal equality, formal democracy and individual rights.

According to Glaser, civil liberties and political pluralism are indispensable to any social order claiming to be democratic and should not be judged or jettisoned on the basis of instrumental criteria.<sup>44</sup> Therefore, democracy as a system of government includes institutions, principles, individual, civil and political rights championed by minimalist scholars and also values, collective, and socio-economic rights defended by maximalists.

In the Western conventional intellectual and political discourse, democracy is very often and abusively reduced to two components, namely elections and multiparty system. Elections and democracy have become virtually synonymous in Western political thought and analysis.<sup>45</sup>

In the liberal conception, "elections are the defining institution of democracy".<sup>46</sup> More recently, in the hurry to globalise democracy in the after the end of the

Cold War, democracy was reduced to the crude simplicity of multiparty elections to the benefit of some of the world's most notorious autocrats who were able to parade democratic credentials without reforming their repressive regimes.<sup>47</sup>

According to Olukoshi, the embrace of dubious electoral and political arrangements on the grounds that, at this stage of Africa's development, it is the only outcome that can be realistically expected is very problematic.<sup>48</sup>

As for Bratton and Posner,<sup>49</sup> formal procedures for elections do not create a democracy. It would also be wrong to reduce democracy to multipartyism. This is not to suggest that elections and multipartyism would not matter for democracy.

In our modern era, one can have elections or multipartyism without democracy, but it is difficult, if not impossible, to consider that modern democracy can go without them.<sup>50</sup>

To coin a metaphor from Ben Yahmed, elections and multipartyism are necessary ingredient of democracy like salt is to the meal in the kitchen. However, salt alone does not make a meal. Ben Ahmed warned that those African peoples who would content themselves with multipartyism

and elections no matter how they were organised would not take long to be disappointed.<sup>51</sup> In Africa as Asia and South America, for instance, experience has shown that elections can co-exist with systematic abuses of human rights and disenfranchisement of large segments of the population and authoritarianism may tie the knot with elections and multipartyism and even often does so.<sup>52</sup> African people are not interested in any kind of elections, but in competitive, free and fair or democratic elections. These elections, which would allow legitimate leaders to govern, should be based on international as well as in domestic legal norms, principles and standards. They should be held in a context respectful of human and peoples' rights and their outcome should also be the promotion of these rights. It is against this background that the DRC 28 November 2011 elections may be assessed.

### 3. The 28 November 2011 elections and Democratic Republic of Congo (DRC)'s compliance with international, constitutional and legal norms, standards and principles governing democratic elections

On Sunday 28 November 2011, for the second time under the Constitution which was adopted by referendum from 18 to 19 December 2005 and promulgated on 18 February 2006, the DRC organised a presidential election and the election of the members of the National Assembly, which is the second house of Parliament.

### 3.1 Legal and Institutional Framework

The legal framework of the DRC 28 November 2011 elections consisted of the Constitution, the Electoral Act, Guidelines from the National Independent Electoral Commission (NIEC) as well as international norms, principles and standards.

According to the 2006 DRC Constitution, the president is elected directly by the people for a 5-year term renewable once. The election is held at least 90 days before the end of the term of the incumbent president. If no candidate obtains an outright absolute majority (more than 50%) of the total number of the votes, a second round is organised. Only the two candidates who obtained the highest number of the votes participate in this run-off election and the winner is elected president. This provision was amended on 20 January 2011 to allow for the election of any presidential candidate who would obtain the majority vote during the first and only round.

The presidential election takes place on the same day as the election of the members of the National Assembly also called "National Deputies". Like the president, they are elected for 5 years. However, there are directly elected by proportional representation by the people in their different constituencies, as determined by the Electoral Act although they hold a national mandate.

Article 1 of the Constitution also provides that the DRC is a democratic state. Article 7 recognises multipartyism and the

<sup>43</sup> Idem.

<sup>44</sup> Glaser op cit 251.

<sup>45</sup> See Joseph op cit 9-11; Bratton, M. & Posner, D.N., "A First Look at Second Elections in Africa with Illustrations from Zambia", in Joseph op cit 378; Haberson, J.W., "Rethinking Democratic Transitions: Lessons from Eastern and Southern Africa", in Joseph op cit 39.

<sup>46</sup> Bratton & Posner op cit 378.

<sup>47</sup> Ake op cit 130.

<sup>48</sup> Olukoshi, A., "State, Conflict, and Democracy in Africa: The Complex Process of renewal", in Joseph op cit 456.

<sup>49</sup> Bratton & Posner op cit 378-379.

<sup>50</sup> See Bauer, G., "Challenges to Democratic Consolidation in Namibia", in Joseph op cit 439-441; Bratton & Posner op cit 379; Conac, G., "Introduction", in Conac, G., (ed), L'Afrique en transition vers le pluralisme politique, Paris : Economica, 1993, 5; Idem "Etat de droit et démocratie", in Conac op cit 492; Glaser op cit 249-250; Mangu op cit 199; Nzongola-Ntalaja, G., "The State and Democracy in Africa", in Nzongola, G. & Lee, M., (eds), The State and Democracy in Africa, Harare: AAPDS Books, 1997, 15; Pelletier, J., "L'Afrique en mouvement", in Conac op cit 477.

<sup>51</sup> Goude, P.F., "Démocratie et développement en Afrique: Perspectives internationales ou nationales, Afrique 2000, No 14, 1993, 57-58.

<sup>52</sup> Conac "Etat de droit et démocratie" op cit 492.

opposition. Sovereignty belongs to the people who exercise it through elections or referendum. The vote is secret. Every adult Congolese citizen (aged 18 at least) is entitled to vote on condition that he is a regularly registered voter. Citizens who are imprisoned, mentally ill, abroad and those who have been deprived of their political rights are not entitled to vote.

Election is also provided for the Senators, the members of the provincial assemblies (Provincial Deputies), and the governors and vice-governors of the 10 provinces of the Republic. Kinshasa, which is the capital city, has the status of a province. Like the president and the National Deputies, the Senators, the Provincial Deputies, the Governors and vice-Governors are elected for a five-year term. The Senators, Governors and Vice-Governors are elected by the Provincial Deputies who are themselves elected for the people. They may be independent or nominated by their parties.

The Senators represent the provinces but enjoy a national mandate unlike the Provincial Deputies whose mandate is a provincial one. The governor presides over the provincial government and appoints its members. He is assisted by a Vice-Governor elected on the same ticket. The provincial government is accountable to the provincial assembly in the same way as the national government is accountable to the National Assembly. The provincial assembly may vote out the provincial government or one of its members by adopting a motion of no-confidence.

Elections are national, provincial, urban and local. They are governed by the Electoral Act passed by Parliament in accordance with the Constitution. The Electoral Act determines the number of the members of the National Assembly and the Senate that are the two houses of Parliament, the number of the members of the provincial, rural and local assemblies and their respective constituencies.

As far as the institutional framework is concerned, apart from the administration, police, army and the security services that also play a role during the elections, the Constitution provides for three major institutions to ensure democratic elections, namely the National Independent Electoral Commission (NIEC) (Article 211), the judiciary (Article 161) and to some extent the High Council for the Media and Communication (Article 212).

The NIEC is mandated to manage the electoral process from voters' registration to the proclamation of the provisional results. An Act of Parliament provides for the organisation and the functioning of the NIEC. In terms of this Act, the NIEC is organised at the national, provincial and local levels. It is presided over by a Bureau consisting of seven members elected for 6 years by the National Assembly, four from the majority and three from the opposition. The Bureau is responsible for the determination of the number and places of voting and counting stations and also appoints their members. It publishes the list of registered voters and candidates. Electoral observers, whether

international or national, and candidates' or parties' witnesses in the voting stations are registered with and accredited by the NIEC, which provides guidelines regarding the conduct of elections and the electoral campaign.

Provisional results of the elections are announced by the Bureau of the NIEC. The NIEC is autonomous and apolitical and should report on its work to the National Assembly. It replaced the Electoral Independent Commission (EIC) which organised the first elections under the current DRC Constitution in July 2006.

In terms of Articles 160 to 163 of the Constitution, the Constitutional Court is the highest court in the country. It deals with all constitutional matters and is also entitled to resolve electoral disputes and confirm the provisional results proclaimed by the Bureau of the NIEC. The decisions of the Constitutional Court are final and binding. Prior to elections, the Court confirms the list of the provisional lists of the candidates established by the Bureau of the NIEC and deals with related disputes. According to Article 223 of the DRC 2006 Constitution, pending the establishment of the Constitutional Court, its functions are exercised by the Supreme Court of Justice.

Another institution that is established to promote democracy and plays an important role in the organisation of democratic elections is the High council for the media and communication (Article 212). The Council is to ensure that all the

candidates and parties have equal access to the public media. It is governed by a specific Act of Parliament.

Electoral guidelines are adopted by the NIEC in relation to the management of the electoral process. They should comply with the Constitution, the Electoral Act, and the Act of Parliament that governs the NIEC.

In line with Article 4 (p) of the AU Constitutive Act, Article 64 of the Constitution outlaws the coup d'Etat and any unconstitutional change of government while enshrining the "right to revolution" or rebellion against anyone who would seize power and rule the country in violation of the Constitution. Any attempt to overthrow the constitutional regimes constitutes an imprescriptible crime of high-treason.

### **3.2 28 November 2011 Elections**

A number of steps were taken in preparation for the 28 November 2011 elections. The first step was the adoption of the Act of Parliament related to the NIEC, its organisation and functioning.<sup>53</sup> This Act took a long time to be adopted by Parliament as both the majority and the opposition disagreed on the composition of the Bureau of the NIEC.

The second step was the constitutional amendment of 20 January 2011 that provided for the election of the president by a simple majority of the votes. The third step was the inauguration of the NIEC. The majority in Parliament rejected Senator Jacques Djoli who was among

<sup>53</sup> Act No 10/013 of 28 July 2010.

the three people nominated by the opposition to serve on the Bureau. Senator Djoli was a member of the MLC (Mouvement de Libération du Congo), which was the leading opposition party. The majority rejected his nomination, as they thought he would be an obstacle to the re-election of their leader, President Joseph Kabila.

On the other hand, the opposition rejected the nomination of Reverend Daniel NgoyMulunda who was likely to lead the NIEC. They alleged that he originated from the same province (Katanga) as the incumbent president Joseph Kabila who was running for a second term. They further alleged that he was a founding and remained an influential member of the presidential party, namely the PPRD (Parti pour le Progrès, la Reconstruction et la Démocratie), the leading party of the ruling majority. For the opposition, elections would be rigged in favour of the president and the majority and the NIEC would lose any autonomy and impartiality if Reverend Mulunda was to preside over its Bureau. Finally, both sides agreed to compromise by adopting their respective lists and the Bureau of the NIEC could be inaugurated and start its work after weeks of stalemate.

The fourth step in preparation for the 28 November 2011 elections was the passing of the Electoral Act by Parliament.<sup>54</sup> The Bureau of the NIEC could then adopt and publish its guidelines, appoint the members of its personnel at all levels, register the candidates, publish their lists prior to their confirmation by the Constitutional Court, order the electoral material, and supervise its dispatching to the voting stations in the country.

The fifth step was the confirmation by the Supreme Court of the lists of the candidates to the presidency and the National Assembly. Some were independent candidates but the overwhelming majority represented their political parties.

#### LIST OF PRESIDENTIAL CANDIDATES<sup>55</sup>

Cand. No	Candidates' Names	Political Affiliation
01	AndekaDjamba Jean	ANCC (Alliance des Nationalistes Croyants Congolais)
02	BomboleIntole Adam	Independent
03	Kabila Joseph	Independent (But Leader of Presidential Majority)
04	KakeseMalela François Nicefort	URDC (Union pour le Réveil et le Développement du Congo)
05	KamerheLwaKanyinginyi Vital	UNC (Union Nationale Congolaise)
06	KashalaLukumwena Oscar	URC (Union pour la Reconstruction du Congo)
07	KengowaDondo Léon	UFC (Union des Forces du Changement)
08	MbusaNyamuisi Antipas	Independent
09	Mobutu NzangaNgbagawe François Joseph	UDEMÔ (Union des Démocrates Mobutistes)
10	MukendiKamanaJosué Alex	Independent
11	TshisekediwaMulumba Etienne	UDPS/Tshisekedi (Union pour la Démocratie et le Progrès Social/ Tshisekedi)

<sup>54</sup> Act no 11/003 of 25 June 2011 amending Act no 06/006 of 9 March 2006 related to the organisation of presidential, parliamentary, provincial, urban, municipal, and local elections, RDC Official Journal no 13 of 1st July 2011.

<sup>55</sup> See <http://www.ceni.gouv.cd> (accessed on 30 June 2012).

Attempts for the opposition to rally around a single presidential candidate against the incumbent president failed.

As for the elections of the National Assembly, 18478 candidates (2244 female candidates only) were registered.<sup>56</sup> Most candidates were nominated by the 423 political parties that were then registered in the DRC. The Electoral Act provided for a 30-day electoral campaign that ended a day before the election on 28 November 2011.

An interesting development was that shortly before the beginning of the electoral campaign, President Joseph Kabila appointed the judges of the Constitutional Court without consulting with the judicial commission as provided by Article 82. These judges were sworn in later by the president during the electoral campaign.

### 3.3 Results of the 28 November 2011 elections

According to the schedule established by the Bureau of the NIEC, the results of the presidential election were to be announced before those of the parliamentary elections to avoid any crisis of legitimacy in the highest office in the Republic.

#### 3.3.1 Presidential Election

A day after the election, many opposition leaders and independent

observers announced the victory of opposition leader Etienne Tshisekedi. The contestation had begun. Despite several reports on massive electoral irregularities in many areas, the NIEC provisionally announced the results of the 28 November 2011 presidential election on Friday 9 December 2011. Without any surprise, the incumbent President Joseph Kabila was declared the winner with 48, 95%. He was followed by opposition candidates Etienne Tshisekedi (32, 33%), Vital Kamerhe (7, 74%), and Léon KengowaDondo (4, 95%). The remaining candidates scored less than 2%.

### PROVISIONAL RESULTS OF THE PRESIDENTIAL ELECTION<sup>57</sup>

No	Candidates' Names	Votes	Percentage
01	Kabila Joseph	8.880.944	48, 95%
02	Tshisekediwa Mulumba Etienne	5.864.775	32, 33%
03	KamerheLwaKanyinginyi Vital	1.403.372	7, 74%
04	KengowaDondo Léon	898.362	4, 95%
05	MbusaNyamuisi Antipas	311.787	1, 72%
06	Mobutu NzangaNgbagawe François Joseph	285.273	1, 57%
07	AndekaDjamba Jean	128.820	0, 71%
08	BomboleIntole Adam	126.623	0, 70%
09	KakeseMalela François Nicefort	92.737	0, 51%
10	MukendiKamanaJosué Alex	78.151	0, 43%
11	KashalaLukumwena Oscar	72.260	0, 40%

The decision of the Bureau of the NIEC was referred to the Constitutional Court for confirmation and contesting candidates were urged to lodge their complaints with the highest Court. On the basis of the reports from the witnesses of his party and several independent observers, including those of the Catholic Church, Etienne Tshisekedi rejected the results

<sup>56</sup> See <http://www.ceni.gouv.cd> (accessed on 30 June 2012).

<sup>57</sup> See <http://www.ceni.gouv.cd> (accessed on 30 June 2012).

announced by the Bureau of the NIEC and declared himself president. Accordingly, he declined to challenge them in the Constitutional Court which the opposition already accused of lacking independence and being in the service of candidate Joseph Kabila.

The only legal challenge came from Vital Kamerhe (Candidate no 5) who also rejected Joseph Kabila's election and congratulated Etienne Tshisekedi on his victory. According to the Electoral Act, the challenge was brought by Mr Kamerhe's party, namely the UNC, on Monday 12 December 2011.<sup>58</sup> Without any surprise, the Court unanimously and unreservedly dismissed the UNC's application on 16 December 2011.<sup>59</sup> The Court went on to confirm the decision of the Bureau of the NIEC. It proclaimed Joseph Kabila the winner of the 28 November 2011 presidential election before receiving his oath of office as DRC president on 19 December 2012. A week later, Etienne Tshisekedi addressed the people from his residence in Kinshasa-Limete for his own official swearing in as "DRC legitimate president".

Since then, the DRC has two presidents, namely Joseph Kabila, the official and effective president proclaimed by the NIEC, confirmed by the Constitutional Court and recognised by the international community on the one hand, and Etienne Tshisekedi, the self-proclaimed "elected" and "legitimate" president who has been

denied imperium and recognition by the international community.

The 28 November 2011 DRC elections ended up creating new political problems or aggravating the pre-existing ones rather than resolving them. One of the problems being raised is whether elections still matter and why people should continue to bother participating in a game which seems to be won in advance by the incumbent president and the ruling party.

*3.3.2 Elections of the National Assembly*  
Accusations of vote-rigging, corruption of the members of the NIEC, subordination of witnesses, falsifications of results, violence, destruction of ballot papers in areas favourable to the opposition and their multiplication in those favourable to incumbent President Joseph Kabila, his party and coalition that were aired before the announcement of the results of the presidential election intensified and aggravated while the nation awaited the results of the election of the Members of the National Assembly. These allegations of frauds were confirmed by the overwhelming majority of independent observers, including those from the Carter Foundation and the European Union (EU). They contributed to discrediting further the electoral process and the NIEC. At some stage, President Kabila himself acknowledged that a number of irregularities had been committed that could not, however, impact on his victory. The situation worsened when the NIEC delayed the announcement of the results in violation of the Electoral Act and its own guidelines.

<sup>58</sup> UNC v Kabila Kabange Joseph & Electoral National Independent Commission, 12 December 2011.

<sup>59</sup> Idem.

A team of American and British independent observers was invited to help the NIEC retain some credibility of the elections, especially the parliamentary elections as the results were still pending. They were prevented from working on their arrival and quickly left the country.

The NIEC denied inviting them as they feared that their findings could reinforce or corroborate the accusations of frauds during the presidential election which was held the same day as the parliamentary elections. This prompted (self-proclaimed) President Tshisekedi to nullify the parliamentary elections.

Nevertheless, the NIEC went on to announce the provisional results. PPRD (President Kabila's initiated party) and the Presidential Majority (MP, Kabila's coalition) were proclaimed the winners of these parliamentary elections with more than the two-thirds majority in the National Assembly. UDPS, Tshisekedi's party, came second after PPRD. However, Tshisekedi ordered the elected members of his party to resign from the National Assembly or face expulsion. The majority argued that they could not resign as they would betray the people who elected them. They therefore decided to keep their seats and ended up being excluded for remaining in an "illegitimate parliament" dissolved by the "President".

This crisis continues to have its negative consequences on the Congolese politics. "M 23", a rebellion movement launched in Eastern DRC with backing from Rwandan

which is accused of invading the DRC, recently pretended to obtain the "truth of the ballots" supposedly rigged by President Kabila and his coalition. The question that arises is whether the DRC 28 November 2011 elections complied with norms and principles governing democratic or whether these elections were democratic, free and fair.

#### **4. DRC's compliance with norms, principles, standards and guidelines governing democratic elections and international, regional, and sub-regional responses**

Any assessment of DRC's compliance with regional, sub-regional, and domestic norms and principles governing democratic elections during its 28 November 2011 elections can be made in the light of the comments from the Congolese political leaders, the findings of many independent observers, and the attitude of the NIEC and the Supreme Court of Justice. The main cases of non-compliance will then be highlighted as well as international, regional and sub-regional responses to those irregularities.

##### **4.1 Congolese leaders and the 28 November 2011 elections**

The winners, President Joseph Kabila, his party (PPRD) and his coalition (MP) accepted the results of these elections while the opponents, who were the losers, rejected them as not being free and fair. However, both parties agreed that these elections were fraudulent.

President Kabila was among the first to concede that there were irregularities but

he was quick to add that they were not of such magnitude as to render the elections non-credible, especially the presidential election. More recently, responding to the press, the president announced that a reform of the NIEC was in the pipeline since a bill had already been tabled in the National Assembly.

Among the political leaders and parties supporting the president, there were mutual accusations that ended up in the Constitutional Court which had to deal with the majority of disputes opposing the members of the MP. They too admitted that the 28 November 2011 elections were not free and fair and failed to comply with norms and principles governing democratic elections.

#### **4.2 Independent observers and the 28 November 2011 elections**

Even before the proclamation of the results by the NIEC and their contestation by opposition presidential candidates, international and national independent observers had started ringing the bell about the massive irregularities that affected the credibility of the 28 November 2011 elections. Among these observers were the delegates from the Carter Foundation, the EU, the powerful Catholic Church, which is present in the entire country and had deployed several thousand observers, and Congolese non-governmental organisations (NGOs), especially the four that formed the National Observation Mission (NOM), namely RENOSEC

(Reseau national pour l'Observation et la Surveillance des Elections au Congo), ROC (Reseaud'Observation des Confessions Religieuses), CAFCO (Cadre Permanent de Concertation de la femme Congolaise) and CNJ (Conseil National de la Jeunesse).

NOM deployed 12688 observers in 9074 voting stations across the country.<sup>60</sup> ROC deployed an additional 17.000 observers. NOM published four documents related to these elections. These included a statement on 7 November 2011 assessing the pre-electoral situation, a report on the political environment during the presidential and parliamentary elections 27 November 2011, an interim report on 16 December 2011, and a final report on 15 January 2011. The overwhelming majority of observers concurred that the electoral process managed by the NIEC was not credible and by 28 November 2011 elections were marred with numerous irregularities and could hardly be considered free and fair by international and domestic standards.

#### **4.3 The NIEC and the 28 November 2011 elections**

Despite all the reports pointing on the irregularities that spoiled the presidential and the parliamentary elections, the NIEC went on to announce the results.

Responding to a question from a reporter of a French Radio, Radio France International (RFI) a few days after the announcement of the provisional results of the presidential election, NIEC

60 NOM, Observation de la Compilation des Elections Législatives du 28 Novembre 2011, Kinshasa, Décembre 2011, 2.

Deputy-President Jacques Djoli came close to admitting these irregularities when he confessed that he was forced to agree with his colleagues within the Bureau to avoid a looming political crisis. Many people were disappointed that this constitutional law professor and opponent who had given them the image of a man of integrity during his term as a senator finally endorsed fraudulent electoral results and believed what was publicly rumoured he and his colleagues had taken millions of US dollars as a bribe to proclaim the incumbent president the winner of the election. They found his statement irresponsible for a man of his calibre and he himself did not repeat it.

Another moment when the Bureau indirectly acknowledged its wrongdoing in running the elections was during the presentation of their annual report to the National Assembly on 14 June 2012. Responding to critics on behalf of the Bureau, Deputy-President Djoli held that the quality of the Congolese leaders and politics was reflected in the November 2011 elections. He added that no elections were perfect and the NIEC was not the only institution to be blamed for failure.

The National Assembly was also responsible for passing the Electoral Act and inaugurating the NIEC late and for not providing them with the necessary resources to succeed. This was typical of political leaders in Africa in general and in the DRC in particular where mistakes are hardly acknowledged but generally justified.

#### **4.4 The Constitutional Court and the 28 November 2011 elections**

More than 500 disputes were brought before the Constitutional Court in relation to the parliamentary elections. 32 members of the National Assembly already proclaimed by the NIEC were invalidated. This fuelled criticism already levelled at the NIEC. However, the Court did not end there and added to the irregularities of the 28 November 2011 elections by proclaiming some candidates of the presidential coalition who were not retained by the NIEC and who did not even appeal to the Court.

After the NIEC, the Court was also blamed for corruption and unconfirmed reports alleged that the Court had been ordered to dismiss as many applications from the opposition as possible and to ensure that the president get the majority in the National Assembly in order for his government to easily apply his programme of action.

The Bureau of the NIEC also criticised the Supreme Court for proclaiming the candidates in constituencies where they had proposed the nullification of the election due to several irregularities. This resulted in a conflict between the two institutions and confirmed that the 28 November 2011 elections were not democratic. The NIEC had nevertheless to bow down before the Court on the ground that its decisions are final and binding. The attitude of the DRC Supreme Court in this case and many others gives rise to the question whether and why the rule of law

also requires respect for unjust but final decisions made by the highest court in the land.

#### **4.5 Cases of non-compliance with norms governing democratic elections**

Numerous cases of irregularities of the DRC 28 November 2011 elections and non-compliance with international and constitutional norms and principles governing democratic elections were reported by political leaders, parties' witnesses and independent observers. These irregularities included the following:

- Lack of independence of the highest court as well as the NIEC despite it being named "independent". These institutions remained subject to the incumbent president and to the ruling party and majority. The majority of the members of the NIEC Bureau were nominated by the president who also appointed the judges of the Supreme Court among his supporters in the judiciary, without a proper consultation with the Judicial Commission as provided by the Constitution. This appointment also took place in tempore suspecto, just before the electoral campaign, and they were sworn in by a president who was not longer entitled to do it, as he was a presidential candidate among others. Such judges were aware that they owed him. Therefore, they were accountable to the president and to the ruling majority. They could not afford to "betray" them and the only way to pay back was to announce their victory;
- Violation of Articles 6 and 8 of the Electoral Act by the NIEC for failing to publish the lists of registered voters by province and by constituency at least 30 days before the beginning of the electoral campaign. In each voting station, the lists of registered voters, including their names, places and dates of birth, sex, addresses of domiciles or habitual residences had to be published at least 30 days before the election day;
- Intimidation of voters and electoral officers as well as destruction of electoral material by some candidates and their parties;
- Late opening of the voting stations on the election day;
- Unavailability of some voting stations where voters were expected to cast their votes and unannounced change of venues of some voting stations. As a result, many registered voters were disoriented and could not cast their votes despite the fact that Article 47 of the Electoral Act provided that the NIEC should publish the list of voting stations and their addresses 30 days before the election. This did not allow candidates and parties to accredit their witnesses in time;
- Insufficient ballot papers as compared to the number of registered voters in many voting stations favourable to opposition candidates, in violation of Article 56 of the Electoral Act. However,

the number of ballot papers largely exceeded that of registered voters in areas favourable to presidential candidate no 3 (Joseph Kabila);

- Possession of unregistered ballot papers by some candidates and unauthorised persons. These papers were later introduced in the system and benefited some candidates and their parties, especially those of the ruling coalition;
- Thousands of ballot papers were already earmarked in favour of presidential candidate no 3 and some candidates of his party or majority in a number of voting stations;
- In some areas of his province of origin (Katanga), presidential candidate Joseph Kabila obtained 100% as if no registered voter had been sick, dead or unavailable while the 10 remaining candidates scored 0%. The Supreme Court<sup>61</sup> dismissed Vital Kamerhe's complaint on the ground that the Constitution did not prevent any candidate from scoring 100%;
- Some candidates were allowed to campaign after the deadline and around the voting stations, in violation of the Electoral Act;
- The minutes of vote counting in some areas were not signed by competent electoral officers and by the witnesses of the candidates or parties, in violation of Article 38 of the Electoral Act;
- Witnesses of candidates and parties were prevented from entering some voting and counting stations. The aim was to facilitate frauds. The absence of witnesses was not a ground for nullification of the vote, except if it was intentional, which unfortunately seemed to the case in many voting stations and counting centres;
- Falsification of ballot papers and election results in many areas;
- Reception of the parcels containing the ballot papers and the results of the voting in some counting stations several days after the election and manipulation or falsification of the results during their transfer, in violation of the Electoral Act;
- Non-publication of the results in the voting stations;
- Lack of independence and professionalism of public servants in the administration and security services (army and police) who felt duty bound to work for the re-election of the outgoing president, the ruling party or majority;
- Lack of independence and impartiality of the public media, which campaigned for the outgoing president, his party and coalition while closing their doors to the opposition, in violation of the Constitution and the Electoral Act;

<sup>61</sup> UNC v Kabila Kabange Joseph & Electoral National Independent Commission, 12 December 2011.

- Utilisation of state material, financial resources and state personnel in the campaign of the outgoing president, the candidates of his party or coalition, also in violation of the Constitution and Article 36 of the Electoral Act. This could lead to the invalidation of a candidate or a party list. Instead of enforcing this provision and invalidating the lists of the ruling party or majority, the NIEC rather decided to advise them without even obtaining their compliance;
- Posting of campaign messages on public buildings, in violation of Article 30 of the Electoral Act;
- Destruction of many ballot papers, especially in areas suspected of favouring the opposition;
- Discordance between the results which were published by the NIEC and confirmed by the Constitutional Court with those published in the voting stations in order to favour of the outgoing president, the ruling party or coalition and their candidates;
- Presence in the voting stations of non-authorized persons such as local heads of the administration, and the members of the security services;
- Corruption of electoral officers or their collusion with some candidates, particularly those of the ruling party or coalition in many areas.

Against this background, the DRC 28 November 2011 elections did not comply with constitutional provisions and principles governing democratic elections. However, how did the international community, the AU, and regional bodies such as SADC and ECCAS react to these irregularities?

#### ***4.6 International, regional and sub-regional responses to DRC's non-compliance with norms, principles, standards and guidelines governing democratic elections***

Instead of condemning DRC's non-compliance with international norms and principles governing democratic elections, after a false moment of suspense, the international community led by some Western "democratic" leaders and governments rather welcomed the results and congratulated President Kabila and his government on successful and exemplary elections, disappointing millions of democrats worldwide and denying themselves any authority to give lessons on democratic elections.

The first response was expected to come from the UN Mission for the DRC, MONUSCO, which deployed around 20000 blue helmets in the country, the largest UN contingent in Africa since the Cold War. The UN declined from playing a crucial role in preventing and combatting frauds. The Security Council did not even bother to listen to opposition leaders who wanted MONUSCO to be mandated to authenticate the results published by the NIEC, as this happened with the UN Mission in

Cote d'Ivoire. President Kabila was not Laurent Gbagbo and there was no Security Council permanent member like France to push for such an extended mandate of MONUSCO. President Kabila had also learnt from Gbagbo's experience that this could amount to political suicide with possible deferment to the International Criminal Court (ICC). He therefore opposed and succeeded in keeping MONUSCO out with the assistance of all UN member states represented in the Security Council.

Despite the fact that they were not represented at the highest level during his inauguration, the world major powers were not interested in having President Kabila out as a result of the presidential election and in getting him replaced by some nationalist leader who could not preserve their interests. The Belgian government was the first Western government to visit the DRC and to congratulate President Kabila on his re-election. China, which had concluded lucrative deals with the DRC government, did not need to wait as it was among the first countries to be interested in the continuation of the Kabila regime.

On the other hand, the US under the Obama administration did not take long to forget about the reports of independent observers, including those from the Carter Foundation, and pledged to reinforce its cooperation with his government. French President François Hollande kept the Congolese people in an agonising feeling of suspense. In August 2012, he finally announced his decision to support President Kabila by participating in the

14th Summit of Francophone countries to be hosted by the DRC in October 2012. He therefore proved wrong most Congolese people in the opposition who had predicted that the French president would boycott the summit because the DRC failed to comply with norms and principles governing democratic elections. Former French President General de Gaulle is reported to have once said that states had no friends but interests.

In a globalised world where the French language was losing to English and other major foreign languages, it was naïve to believe that the French president would not participate in the summit aimed at preserving or reinforcing the leadership of his country that also required the promotion of French. The scene was then set for the UN, the EU, and the rest of the international community to recognise President Kabila's re-election despite the fact that the DRC ailed to meet international and domestic norms, principles, standards and guidelines governing democratic elections. The observers of the Carter Foundation and the EU had prepared the ground and left the door open to such a worldwide recognition when they held that notwithstanding their irregularities, there was nothing suggesting that there could be change in the results giving Joseph Kabila the winner of the presidential election.

As for the observers of the AU and sub-regional organisations such as SADC, ECCAS, COMESA, and ICGL (International Conference on the Great Lakes) concluded

that the 28 November 2011 elections were globally free and fair. Accordingly, African leaders congratulated President Kabila and the DRC on such successful elections. The opposite could be surprising from those African organisations that are still dominated by authoritarian leaders who do not really believe in democratic elections while the few democratically elected ones keep quiet and tend to compromise.

Yet, democracy cannot prosper in Africa if the leaders of the international community, the governments of some key Western states, the EU, the AU, and African sub-regional organisations remain indifferent to African states' non-compliance with international and domestic norms and principles aimed at promoting democratic elections.

### Conclusion

Since independence, African people have been participating in elections even though democracy did not consolidate on the continent. Elections are democratic when they enable the people to be governed by their legitimate representatives who will also remain accountable to them. Such elections are to be governed by norms, principles, standards and guidelines that may be adopted at the international, regional, sub-regional and domestic levels.

The paper reflected on states' compliance with norms and principles governing democratic elections in Southern and Central Africa with reference to the DRC

28 November 2011 elections. The DRC was therefore considered a case study. Since the wind of change brought the one party state to an end in the late 1980s, multiparty elections have been regularly held in Africa. If a peaceful power transfer from an incumbent president or a ruling majority to a new one as a result of an election is not a *sine qua non* for democratic consolidation since the incumbent may also retain power, it nevertheless testifies to the fairness of elections, as Huntington rightly suggested.<sup>62</sup>

Southern Africa offers more good practices than Central Africa in this regard. Since the beginning of the 21<sup>st</sup> century, elections have already led to regime change in Southern African countries such as Lesotho, Mauritius, Malawi, and Zambia. Even in Namibia, Botswana, and South Africa where the power is still exercised by an ultra-dominant party, elections have been free and fair.

Accordingly, not everything or everywhere is "darkness" in Africa, as Joseph Conrad<sup>63</sup> once suggested to the point of wrongly denying democracy to Africa. Unfortunately, good practices are still outnumbered by bad practices in some parts of the continent, especially in Central Africa. Sao Tome & Principe is the only Central African country with a tradition of democratic elections.

In Central Africa perhaps more than anywhere else on the continent, elections

have been governed more by the rule of politics and the law of the rulers than by the rule of law. The DRC is a case in point. The country did not comply with international and regional norms as well as its own constitutional and legal provisions and principles governing democratic elections when it held its presidential and parliamentary elections on 28 November 2011. However, a number of useful lessons can be learnt from these elections in order to promote and consolidate democracy through the organisation of free and fair elections not only in Southern and central Africa, but also in the entire continent.

First, democratic elections are governed by law. The organisation of such elections requires a state to comply with general and impartial norms and principles. Such norms and principles already exist at the regional, sub-regional and domestic levels.

At the regional level, they are embedded in the AU Constitutive Act and the DDPECG which governs the APRM. The regional framework related to democratic elections in Africa includes the AUCPCC, the AU Charter on Values and Principles of Public Service and Administration,<sup>64</sup> and mostly the ACDEG. These treaties should be ratified and domesticated across the continent. Unfortunately, a critical instrument like the ACDEG has so far been ratified only by three states in Southern Africa (Lesotho, South Africa, and Zambia) and three in Central Africa (Cameroon, Chad, and Gabon). This speaks volume about African leaders' lack of commitment

to democracy, free and fair elections, and good governance. SADC also adopted sub-regional norms and principles governing democratic elections while ECCAS is still lagging behind. Moreover, individual countries did the same at the domestic level by adopting constitutional and legal provisions in order to achieve the same objective. The problem is that these instruments are hardly enforced and there does not seem to be any effective sanction for non-compliance.

Second, democratic elections cannot take place in a context where corruption is rampant in the administration, the public media, the army, police, and other security services and where these institutions tend to operate as sections of the ruling party or majority and remain subject to the incumbent leader and inimical to the opposition.

The latter cannot feel secured and abide by the results when demanding democratic change amounts to fighting the state and all its institutions and not just contesting the ruling party or the incumbent leader.

Three, two institutions are critical for democratic elections. These are the Electoral Commission and the Constitutional (Supreme) Court. Both should be autonomous, independent, impartial and above parties' politics. Public media should also remain "public", and equally accessible to all candidates and parties. Arguably, there is no way elections can be democratic, free and fair when the Electoral Commission and the highest court

<sup>62</sup> See Bratton & Posner op cit 378; Joseph op cit 11.  
<sup>63</sup> Conrad, J., *Au Coeur des Ténèbres*, Paris: Edition Mille et Nuit, 1999.

<sup>64</sup> Adopted on 31 January 2011, but not in force as yet.

in the land lack independence vis-à-vis all the candidates and parties, especially the incumbent president and the ruling party or coalition that tend to use them in order to retain power. The privatisation of the public media also constitutes a serious violation of the norms and principles governing democratic elections.

Four, elections cannot be democratic when the parties are not on an equal footing. The rules of the game are violated when the incumbent or outgoing president and the ruling party or coalition confiscate state material, financial and human resources in order to run their campaign and retain power.

Five, foreign democratic governments, the EU, the AU and sub-regional organisations such as ECCAS, ECOWAS, COMESA, SADC, and ICGL may play an important role in ensuring that African states comply with norms and principles governing democratic elections. Unfortunately, they have so far contributed to undermining them by recognising the leaders who acceded to power or retained it through vote-rigging and violence.

Except for Cote d'Ivoire and Zimbabwe probably due to the influence of former colonial powers (France and Britain) who were unhappy with incumbent leaders, no election held in an African country has been declared undemocratic by the EU and Western democratic governments. On the other hand, electoral observation missions from the AU and African sub-regional organisations have always ended up with

the same old story or recorded message that is music to those African leaders who have specialised in vote-rigging. All of us have memorised the verses and chorus of the favourite song of these special choirs: "apart from some minor irregularities, elections have been free and fair". On the basis of these "songs" and even without waiting from them, African leaders are quick to congratulate their peers on their re-election as the old "club" mentality survived the organisation of African Unity (OAU) and still prevails within the AU and African sub-regional organisations. Yet, complacency and even indifference should not be tolerated towards vote-rigging and fraudulent elections which should be assimilated to "unconstitutional change of government" and dealt with accordingly. Foreign and African democratic leaders should find it degrading to compromise with those who cling to power and refuse to be their accomplices in vote-rigging, electoral manipulations or frauds in order to defend or preserve their selfish interests.

Six, with the adoption of the African Charter on Democracy, Elections and Governance, a new right was added to peoples' rights under the African human rights system, namely the right to democracy, free and fair elections, and good governance. A right is to be asserted and continuously championed. Otherwise, it will be forfeited. In a democracy, the people are sovereign and not the leaders. Without the people positioning themselves at the forefront of the struggle for democracy, elections

will never be democratic in Africa as elsewhere. Any violation of the norms and principles governing democratic elections should therefore be vigorously opposed and condemned as a war crime or a crime against humanity in the African context. In the DRC, as in many other African countries, democratic elections really matter for democracy, development and peace. In the long and even short run, vote-rigging, electoral manipulations and frauds are not beneficial to the winners of an election.

State's compliance with norms and principles governing democratic elections is in the interest of the people who will then be governed by their legitimate leaders. On the other hand, it does not serve the interests of those who win by vote-rigging, electoral frauds or violence.

As a result of "cosmetic" and "choiceless" elections<sup>65</sup> and fraudulent elections without change, the people may end up feeling tired of voting with ballot papers and rather resolve to vote with their feet, AK47, and machetes as this happened in African countries such as Burundi, Cote d'Ivoire, Egypt, Liberia, Libya, Kenya, Rwanda, Sierra Leone, Sudan, Uganda, and Tunisia. This is currently witnessed in the DRC, Mali, and Sudan. People tend to resort to rebellions and wars to make change in the government since violence seems to be the language that most African authoritarian leaders understand and which has the support of the prominent members of the international

community. State's compliance with norms and principles governing elections is likely to spare Africa political violence and to contribute to peace and development on the continent. Furthermore, despite the veneration that we might and we do have as lawyers for the rule of law, we should acknowledge that general and impartial norms, principles, and standards alone do not make democratic elections or constitute a panacea to all electoral problems we are faced with in Africa. Norms, principles, standards, and guidelines and institutions to enforce them are definitely required. However, no matter how perfect and critical it may be, no legal framework will ever suffice to make democratic elections.

Africa needs political leaders (both in the majority and the opposition) who are committed to democracy, understand the rules of the electoral game, and accept to abide by them. Such commitment to democracy and democratic elections is also needed from political leaders at the international, regional and sub-regional levels, especially the leaders of the most powerful democratic nations who generally tend to compromise and endorse the results of fraudulent elections as long as they serve their national interests.

Moreover, critical institutions such as the administration, security services, electoral commission and the judiciary are in urgent need of competent, professional public servants and judges committed to democracy, free and fair elections, and

<sup>65</sup> See Mkandawire op cit 119-135; Ake op cit 130, 132, 137

good governance. They should be women and men of integrity above parties’ politics. matter or not, but what to do to make them democratic.

Finally, it is worth stressing that democracy being the government of the people for the people and by the people as US President Abraham Lincoln defined it in his famous Gettysburg Address delivered on 19 November 1863, no one will ever champion democracy and democratic elections better than the people themselves.

African people, including those in civil society organisations, academic institutions, churches, unions, political parties, the private sector, and the media, should continuously stand ready to fight for democracy and even die for it as one of their fundamental rights. They should ensure that norms and principles promoting democratic elections are entrenched in their national constitutions and legislation and states’ institutions and political leaders abide by them. They should oppose any vote-rigging and electoral frauds as a crime against their humanity. This is where Article 64 of the DRC 2006 Constitution may inspire other people on the African continent. This article makes a duty for every Congolese citizen to oppose any individual or group of individuals who seize power by the use of force or rule in violation of the Constitution. It provides that any attempt to overthrow the constitutional regime constitutes an imprescriptible crime of high treason. Elections are costly, but their importance in our modern democracy is beyond dispute. Accordingly, the question is not whether elections

ELECTIONS IN SOUTHERN & CENTRAL AFRICA SINCE 2000

No	Country	Sub-region	Dates of Elections since 2000	Results (Candidates and their parties/ coalitions)
01	Angola	Southern Africa	31 August 2012 05-06/09/2008	Pres Eduardo dos Santos (MPLA) Pres Eduardo d dos Santos Peoples’ Movement for the Liberation of Angola – Labour Party (MPLA)
02	Botswana	Southern Africa	16/10/2009 30/10/2004	Pres Ian Khama (BDP) Pres Festus Mogae Botswana Democratic Party (BDP)
03	Lesotho	Southern Africa	26/05/2012 (Parliamentary Elections, Constitutional Monarchy) 17/02/2007 25/05/2002	King Letsie III Prime Minister Tom Thabane All Basotho Convention(Coalition) PM PakalithaMosisili (LCD) PM PakalithaMosisili Lesotho Congress for Democracy (LCD)
04	Madagascar	Southern Africa	03/12/2006 16/12/2001	Pres Marc Ravalomanana (TIM) Forced to resign on 16/03/2009 following popular uprisings and replaced by opposition leader AndryRajoelina Pres Marc Ravalomanana Tiako i Madagascari (I Love Madagascar) (TIM)
05	Malawi	Southern Africa	19/05/2009 20/05/2004	PresBinguwaMutharika Democratic Progressive Party (DPP) (died in April 2002 and replaced by Ms Joyce Banda (Peoples’ Party, PP) as Interim President) PresBinguwaMutharika United Democratic Front (UDF)
06	Mauritius	Southern Africa	05/05/2010 05/07/2005 11/09/2000	Alliance for the Future (Coalition) PresKailashPurryag (MLP)(Since July 2012) & Prime Minister NavinRamgoolam (MLP) (since July 2005) Alliance Sociale (Coalition) Pres Sir AneroodJugnauth (MSM) (2003-2012) & Prime Minister Paul Berenger (Mauritian Militant Movement, MMM) (2003-2005) Pres Karl Offmann (MSM) (2002-2003) Alliance MSM-MMM (Coalition) PresCassamUteem (MSM) (1992-2002) & Prime Ministers AneroodJugnauth (Militant Socialist Movement, MSM) (2000-2003) &NavinRamgoolam (Mauritius Labour Party, MLP) (1995-2000)

No	Country	Sub-region	Dates of Elections since 2000	Results (Candidates and their parties/ coalitions)
07	Mozambique	Southern Africa	28/10/2009 01-02/12/2004	Pres Armando Guebuza (FRELIMO) Pres Armando Guebuza Liberation Front of Mozambique (FRELIMO)
08	Namibia	Southern Africa	27-28/11/2009 15-16/11/2004	PresHifikepunye Lucas Pohamba (SWAPO) PresHifikepunye Lucas Pohamba (South West Africa Peoples' Organization, SWAPO)
09	Seychelles	Southern Africa	19-21/05/2011 28-30/07/2006 31/08-02/09/2001	Pres Jean Michel (2011) People's Party (PP) Pres Jean-Michel (2006) (SPPF) Pres France-Albert René Seychelles People' Progressive Front (SPPF)
10	South Africa	Southern Africa	22/04/2009 14/04/2004	Pres Jacob Zuma (ANC) PresThaboMbekiAfrican National Congress (ANC)
11	Swaziland	Southern Africa	19/09/2008 (parliamentary elections) 18/10/2003	King Mswati III Prime Minister appointed by the King. No political parties allowed Swaziland
12	Tanzania	Southern Africa	31/10/2010 14/12/2005 29/10/2000	PresJakayaKikwete (CCM) PresJakayaKikwete (CCM) Pres Benjamin Mkapa ChamaChaMapinduzi (CCM)
13	Zambia	Southern Africa	20/09/2011 19/08/2008 28/09/2006 27/12/2001	Pres Michael Sata Patriotic Front (PF) Pres Rupiah Banda (MMD) (after the death of PresMwanawasa) Pres Levy Mwanawasa (MMD) Pres Levy Mwanawasa Movement for Multi-Party Democracy (MMD)
14	Zimbabwe	Southern Africa	29/03/2008 09-11/03/2002	Pres Robert Mugabe (ZANU/PF) Pres Robert Mugabe Zimbabwe African National Union – Patriotic Front (ZANU-PF)
15	Democratic Republic of Congo	Central/Southern Africa	28 November 2011 30 July 2006	Pres Joseph Kabila (Alliance for the Presidential Majority, AMP) Pres Joseph Kabila (Presidential Majority, MP)

No	Country	Sub-region	Dates of Elections since 2000	Results (Candidates and their parties/ coalitions)
01	Burundi	Central Africa	23/07/2010 19/08/2005	Pres Pierre Nkurunziza (CNDD-FDD) Pres Pierre Nkurunziza (National Council for the Defense of Democracy – Forces for the Defense of Democracy, CNDD-FDD)
02	Cameroon	Central Africa	09/10/2011 11/10/2004	Pres Paul Biya (RDPC) Pres Paul Biya Cameroon People's Democratic Movement (RDPC)
03	Central African Republic	Central Africa	23/01/2011 08/05/2005	Pres François Bozize National Convergence Kwa Na Kwa Pres François Bozize National Convergence Kwa Na Kwa
04	Chad	Central Africa	25/04/2011 03/05/2006	PresIdrissDebyItno (MPS) PresIdrissDebyItno Patriotic Salvation Movement (MPS)
05	Congo	Central Africa	12/07/2009 10/03/2002	Pres Denis SassouNguesso (PCT) Pres Denis SassouNguesso Congolese (Congolese Labour Party, PCT)
06	Equatorial Guinea	Central Africa	22/11/2009 15/12/2002	Pres Teodoro Obiang Nguema (PDGE) Pres Teodoro Obiang Nguema Democratic Party of Equatorial Guinea (PDGE)
07	Gabon	Central Africa	30/08/2009 27/11/2005	Pres Ali Ben Bongo (PDG) Pres Omar Bongo Gabonese Democratic Party(PDG)
08	Sao Tome & Principe	Central Africa	07/08/2011 30/07/2006	Pres Manuel Pinto da Costa (Independent) Pres Fradique de Menezes Force for Change Democratic Movement-Liberal Party

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## Regional trends on elections and democracy: Kenya

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Ken Nyaundi

### Role of elections in a democracy

Elections are at the heart of democracy. Elections offer the citizen an opportunity to evaluate, assess and scrutinize leaders for their ability to offer guidance in the social and economic spheres. To reflect the will of the voters, elections must be free and fair. If elections are not free; if they are not based on a political philosophy offering a defined political direction or if the management of elections is not focused, elections become a curse and not a cure for social ills. They produce hate, violence and collective disintegration.

It is now a mantra to say that democracy is about more than the holding of elections. Democracy looks at good governance, rule of law, accountability and transparency in the conduct of state affairs. Democracy requires that elected leaders utilize state resources efficiently and transparently so as to realize social development. Inevitably then, elections do not of necessity and on their own guarantee democratic progress. You may have elections, which do not produce a democracy. In this paper I argue that in Kenya, elections have not stimulated a full growth to democracy. They have not produced the power that propels the government to good governance principles. Elections have however facilitated the realization of a strong and vibrant liberal wing of government offering protection of fundamental liberties essential in

political organizing. Freedom of assembly, expression and association are liberally practiced unlike the situation in the Moi era. It is hoped that this may lead to further democratization and a realization of full democracy.

### Elections in Kenya

Since independence in 1963, Kenya has consistently held periodic elections. Kenya's elections are severely competitive. A combination of factors informs the voting pattern and shapes the resultant character of the government. The antagonism which characterize our elections are reflected in many instances; the first being in the establishment of the structures which manage the elections. Often, the nomination and selection of the persons who oversee the electoral processes is contentious with each political party striving to infiltrate and influence the eventual nominees. Parties are of the unfortunate belief that their nominees can sway the precepts and procedures of the elections in favor of the nominating entities. The fear and possibility of rigging is a permanent feature of Kenya's elections; pointing out the absence of a commitment to a fair process by all political parties. Parties proclaim the virtues of independent political organs but desire to have a control over the electoral process. This trend has been evident since the resumption of multi party democracy and reflects the suspicions preceding the

2007 elections, endangering the gains made in the transition from ECK to IEBC.

The trend in Kenya's politics mirrors a strong reliance on ethnic identity. Political leaders appeal to sentimental ethnicity as a tool for mobilizing their core support. The overarching theme in all election campaigns is the appeal to exclusive ethnic capture of the state apparatus. Rivalry for control of the state dominates the political environment and dwarfs any coherent discussions on social enhancement, the economy or general development. In election campaigns, candidates only make a passing reference to improvement of health care, education, taxation or the provision of social amenities including improvement of the infrastructure.

In Kenya, ethnicity as a basis for political support presents a setback to good governance and the fight against corruption. Government efforts to prosecute persons suspected of corruption are viewed as an affront against the communities where the suspects hail from. In today's coalition government, either side of the government throws a shield of protective rhetoric on behalf of any of its members facing either investigation or prosecution for abuse of office, malpractice and corruption. Elections have therefor not produced a system of government blind to ethnic affiliation and committed to the rule of law. The result is a climate of tolerance for venality for fear of losing political support.

Kenya's present segmented democracy is characterized by forceful rivalry. The

Coalition government has existed in a climate of suspicion, sabotage, witch-hunt, corruption, political insecurities and deleterious competition. This combination of elements assails the integrity of the fledging democracy making it difficult to find common ground for growth and stability. These same components rear suspicion and conflict giving rise to violence on issues that would otherwise be resolved.

The political history of the country shows a past where leaders leveraged on accumulation of power and resources and played on discretion in rewarding potential voting blocks. The 2010 constitution has whittled this down but has not entirely stripped the executive of the exercise of preference and favoritism in the positioning of public capital ventures, particularly those borne out of direct donor or foreign government investment. An elected leader, though constrained by constitutional dictates on state capital expenditure retains a measure of choice permitting discretion that bypasses accountability mechanisms, flouting the essence of democracy which requires transparent conduct on the part of leaders.

Perhaps as the country goes through more participatory and legitimate elections, the quality of elected leaders will improve permitting the government to operate in an environment of fairness, allowing voters to have regard to party ideology, principles and manifestos. Unfortunately, the prevailing atmosphere does not inspire confidence that this desirable position will soon be achieved.

Party leaders have positioned their cronies close to the inner cycles of decision making, ignoring merit and rewarding sycophancy to the exclusion of alternative thought. Parties therefor do not benefit from critical thinking, as the party leaders prefer to be surrounded by party functionaries who voice their own views. This concubinage of opinions does not engender progressive modeling of ideas.

This is not to say that all is lost. It is recognized that the basic elements of a democracy are now well grounded in Kenya; equal participation and free competition in the electoral process. There is however great concern on the skewed political party spread based on ethnic prevalence for a party led by an individual from the region. In real terms, there are places in Kenya where the politics of the community is mono party based. However popular or industrious an elected representative, he will fall by the wayside unless he supports the regional kingpin. This has been confirmed by this week's parliamentary By-elections. The results have been singularly regional party based.

There have been, nevertheless, glimpses of political party organizing across communities. In the 2002 General election the opposition put together a formidable force composed of many ethnic groups against Moi's government. Moi shifted his axis to the youth vote, promising generational change. The more attractive discourse on a transfer of power to the post independence Kenyans as a procedure for introduction of a more transparent and accountable system of government did not

carry much appeal. Even then, the entreaty to youth was only a manipulation of the voters, working on the instrumentalisation of age and playing it as one would ethnicity. There was never a willful and deliberate desire to cede power to young people. Kenya is yet to experience the politics of class, gender or even religion. The reform agenda, which currently dominates political discourse in the country, may provide a footstool for institutional changes necessary for the transformation of the dialogue that informs the voting patterns and the resultant democracy.

Finally, a consideration of whether Kenya's elections have produced a social democracy may be quantified on three key areas: First, whether elections produce a leadership in which citizens have a say in the decision making processes. This has to do with an assertive legislature and powerful decentralized units. Secondly whether elections translate into real tangible gains for the people and not democracy as an abstract concept; do elections produce a leadership that is directed at improving the lives of the people? Thirdly whether elections produce an inclusive government. Do elections produce a stratified government or a unified entity representative of the country as a whole? Answers to these questions do not provide positive indicators that Kenyan elections offer the requisite elements for the growth of democracy. But there is hope. Hope based on the new constitutional dispensation and the reform agenda.

Abraham Mwansa

## Regional trends on elections and democracy

Mr Lovemore Chipunza Sekeramayi<sup>66</sup>

### Introduction

Many African countries with the exception of a few now conduct elections. According to Professor AttahiraJega, in liberal democratic context, elections are regarded as an important mechanism which facilitates democratic transition by giving opportunities to citizens to vote for preferred candidates, political parties and their policies. How elections are conducted and managed has an important bearing on the extent to which citizens have an unfettered freedom to exercise their rights and to make their votes count in the election of their representatives and executive leaders. Where there is concrete evidence, or even a perception, of abuse or misuse of the electoral process, confidence in the process is undermined, suspicion is engendered and conflict is unnecessarily generated.

Zimbabwe is fortunate to be a member of the Southern Africa Development Community (SADC) which arguably is one of the most peaceful regions in Africa and has made great strides in consolidating and deepening democracy. This achievement can largely be attributed to the development by SADC countries of a generally accepted set of values that ensure fair electoral practice predicated on representation, accountability, inclusiveness, transparency, gender

equality, tolerance and respect for diversity. This paper will limit discussions to the experiences of the SADC region simply because Zimbabwe is a member state of the region and as individuals we can relate easily to the events of our region.

### The Critical Success Factors for SADC

Countries in the SADC region enjoy similar trends if not the same on elections and democracy due to the nature of their integrated approach to issues affecting their people. This approach has enabled the countries to define common rules relating to governance, economic, social and political issues thereby bringing relative tranquillity to the region as compared to other regions on the continent of Africa. However, this should not be taken to mean that there is no order at all in other regions of the continent.

The relative success of the SADC region on electoral and democracy issues can be traced back to the period prior to and after the signing of the SADC Treaty in 1992 when the countries chose to work collectively on a number of issues. During this period, the countries in the region identified and agreed upon basic values which are now expressed in various

declarations and instruments such as the Harare Declaration of 1991, the Windhoek Declaration on the Freedom of the Media (1991) the SADC Treaty of 1992 and the SADC Declaration on Gender and Development in 1997. SADC leaders also identified as part of their common agenda the provision of common systems and political and other shared values transmitted through institutions that are democratic, legitimate and effective as well as the consolidation and maintenance of democracy, peace and security. For example, Article 4 of the SADC Treaty stipulates that "human rights, democracy and rule of law" are principles guiding the acts of its members. Article 5 of the same Treaty, outlines the objectives of SADC, which commits the member states to "promote common political values, systems and other shared values which are transmitted through institutions, which are democratic, legitimate and effective. It also commits member states to "consolidate, defend and maintain democracy, peace, security and stability" in the region.

### Elections and Democracy in SADC

Generally speaking, the SADC region has made significant progress in the past decade or so in institutionalising democracy. The region through its governments and institutions has managed to come up with guidelines and principles that govern the conduct of elections for member states.

These principles and guidelines serve as peer review mechanisms for member states though these are not law *per se*.

Countries in the region can measure adherence of member states to these principles and guidelines and advise one another on how the electoral process can be better managed or improved. Further, the region has also created institutions for purposes of encouraging interaction and dialogue amongst the stakeholders on electoral and democracy issues. The most notable guidelines and principles which have tended to influence the regional trends on elections and democracy are the SADC Principles and Guidelines for Election Management, and the Principles for Election Management Monitoring and Observation in the SADC Region.

### SADC Principles And Guidelines Governing Democratic Elections

In the year 2004, SADC countries agreed on and signed the Principles and guidelines Governing Democratic Elections to be observed by member states when conducting elections. These Principles and Guidelines were agreed to and signed in Mauritius in August 2004. Although the Principles and Guidelines are not law *per se*, they provide a guideline upon which member states can assess one another. The Guidelines are not only informed by the SADC Legal and Policy Instruments but also by the major principles and guidelines emanating from the OAU/AU Declaration on the Principles Governing Democratic Elections in Africa and the AU Guidelines for African Union Electoral Observation and Monitoring missions. The guidelines have provisions relating to the following:-

- Principles for Conducting Democratic

<sup>66</sup> The Chief Elections Officer (CEO) Of The Zimbabwe Electoral Commission (ZEC)

- Elections
- Mandate and Constitution of the SADC Observer Mission
  - Guidelines for the Observation of Elections
  - Code of Conduct for Election Observers
  - Rights and Responsibilities of SADC Election Observers and
  - Responsibilities of the member state holding elections

In Zimbabwe, the guidelines had a heavy influence on the new legal framework for elections which became operational on the 1<sup>st</sup> of February 2005 and used for the 2005 parliamentary elections and onwards. They have continued to be used to reform the electoral law in the country up to this day.

### **Principles For Election Management, Monitoring And Observation (PEMMO) In The SADC Region**

This came about as a result of the efforts of the Regional Electoral Management Bodies (EMBs) under the auspices of the Electoral Commissions Forum (ECF) of the SADC countries and the Electoral Institute of Southern Africa (EISA) a civic society organisation. The PEMMO was adopted at a regional conference held in Johannesburg, South Africa on 6 November 2003 under the auspices of both ECF and EISA. Participants at the conference came from all the 14 SADC countries and represented EMBs and Civic Society Organisations for whom election observation was core activity.

The PEMMO document reflects the outcome of a region wide consultative

process and underlines the need to have a sound political, constitutional and legal dispensation that supports free and fair, credible and legitimate elections as a precondition for democratic election management. The document is structured in a way that reflects the chronology of events in the management of elections.

The recommended principles in the PEMMO cover the following issues among others:

- The need for a comprehensive constitutional and legal framework;
- The importance of transparent and accessible pre-election procedures;
- The equitable use of media and public resources and issues of political party finance;
- The organisation and management of the election phase;
- The post-election phase; and
- The requirements for unhindered, credible, professional and impartial monitoring and observation of the electoral process.

### **The Electoral Commission Forum (ECF) of SADC Countries**

The other factor that has tended to influence the regional trends on elections and democracy has been the creation of an institution already alluded to above, the ECF. This institution is a regional organisation which has legal personality with capacity and power to enter into contracts, acquire own or dispose of movable or immovable property and to sue and be sued. It is an autonomous and independent entity with a working

relationship with the SADC and other related institutions. The ECF consists of all Electoral Commissions of the member states of the SADC region. It is governed by a constitution and some of its objectives include the following among others:

- Encourage the establishment of independent and impartial Electoral Commissions in the region;
- Encourage the development and provision of a democratic culture and an environment conducive to the holding of free, fair and credible elections;
- Encourage the development of electoral laws that adhere to regionally and internationally accepted principles of election management;
- Promote conducive relationships between Electoral Commissions and Stakeholders through open and transparent electoral practices;
- Support and encourage the development of voter and civic education programmes;
- Facilitate access to and sharing of experiences, research and technology as well as technological information between and among member commissions;
- Support and encourage capacity building programmes of Electoral Commissions to ensure effective discharge of their mandate;
- Develop guidelines for alternative dispute resolution mechanisms; and
- Establish relations with other organisations with similar objectives.

Each year the Forum holds an Annual General Conference whereby members meet to deliberate on various electoral issues and to strategize. Members also observe each other's elections and compile a report on their observations and recommend on any issues for purposes of assisting the member state to improve on election management. There are also other regional structures apart from the Forum which have been established to support the consolidation and deepening of democracy within the region but I shall not delve into these.

### **Indications of Progress in the SADC Region**

As already stated, because of unity of purpose in the SADC, the region has achieved significant progress in the past decade by institutionalising democracy.

The following are indicators of progress in that regard

- Establishment of constitutional democracy
- Holding of regular free and fair elections
- Peaceful transfer of power
- Increase in multiparty democracy within the region
- Increased popular participation in governance
- Dialogue between governments and stakeholders
- Establishment of national and regional democratic institutions
- Sharing of common values and principles
- Peace and development

### Challenges

However, despite all these achievements there are still a number of challenges which the region is facing. These include the following among others:

- Election violence;
- Biased or false media coverage of electoral events;
- Violation of electoral laws and usurpation of EMB functions by political parties and other stakeholders;
- Inadequate funding of EMBs;
- Foreign interference in domestic governance and electoral issues;
- Non acceptance of election results by political parties and candidates;
- Politicisation of the electoral reform process e.g. shooting down of proposals by EMBs for political reasons;
- Partial or lack of voter education;
- Lack of effective dispute resolution mechanisms to election related conflict.

### Recommendations

Based on the above challenges, the following are some of the recommendations from an EMB's perspective which could go a long way in deepening democracy not only in the SADC region but on the African continent as a whole:

- Politicians in the region should unite against perpetrators of violence. In addition, they should desist from engaging youths to propagate acts of intimidation and violence.
- Politicians, political parties and individuals should avoid making

premature announcement of election results. The announcement of results should be a preserve of the EMBs only.

- The media should play a positive and proactive role in preparing people for peaceful elections by:
  - a. Avoiding sensationalising electoral issues for the sake of selling their newspapers.
  - b. Being objective when reporting on electoral issues.
  - c. Not hiding the truth for the sake of protecting candidates or political parties that they support.
- EMBs should be adequately funded through annual budget allocations to enable them to continue doing electoral work even if there are no elections.
- EMBs need to devote some of their precious time in researching on matters such as technological implementation of the electoral process.
- EMBs should also work on identifying effective dispute resolution mechanisms on election related conflicts.
- EMBs should encourage their national governments to include electoral issues in academic curricular as a strategy of enhancing potential and future voters' interest and awareness of their electoral responsibilities.
- Voter Education should be easily accessible through publication of simplified voter education material which would also be obtainable from any commercial service centres at affordable and subsidised prices.
- Foreign governments need to respect the integrity of national electoral processes by not interfering in the

electoral process. Foreign governments should avoid using NGOs to engage in clandestine political activities.

- In countries where there are different ethnic groups, EMBs should try to recruit personnel from its country's national ethnic groups as a way of gaining acceptability by all stakeholders.
- There is also need to educate voters on the roles of the MPs and Councillors in terms of how they influence ward and national issues. This will help fuel interest in elections by the citizenry. Voter education should include knowledge of how parliament links with politics and the whole electoral process.

### Conclusion

Though SADC has its own challenges, it has made significant strides in the field of elections and democracy. The relative peace in the region has enabled co-operation, solidarity and unity in the region and thereby resulting in peace and stability within this African Region. This has also enabled member states to manage domestic and regional issues in fairly the same fashion.



## Day Two

### Democratic institutions

### Towards strengthening and institutionalising civilian oversight: reviewing the role of the sector in elections

Minister Theresa Makone

I have been requested to address the topic 'Towards Strengthening and Institutionalising Civilian Oversight: Reviewing the Role of The Security Sector in Elections'. I feel greatly honoured to be part of this great gathering of colleagues committed to the rule of law, as a key ingredient to entrenching a democratic ethos in our society.

When I was first invited to present, I got the impression that the conference theme was my subject for presentation at this conference. It was only late on Monday afternoon the 17th of September, that I realized that the first part of my topic was "Towards Strengthening and Institutionalising Civilian Oversight": and the second part was "Reviewing the Role of the Security Sector"

I just did not have the temerity to revert to the Zimbabwe Republic Police who had prepared an excellent thesis to ask them to prepare another one with a different topic. However a lot they had included in their document is still relevant to this topic that I have been requested to deal with. In any case the second half of the topic is still the same, much to my relief. This is a composite topic and I propose that the subject Towards Strengthening and Institutionalising Civilian Oversight forms part of my introductory remarks after which I will delve into the intricacies of the main subject matter of my presentation that is " Reviewing the Role of The Security Sector in Elections"

#### Why do we need civilian oversight in elections?

1. In democratic processes, it is important to take steps to for ensuring higher level of accountability and transparency in the exercise of internal security services of which the electoral process is one such service.
2. To improve the quality of the outcome of an electoral process, it is important that the relationship between the citizens and the security units be enhanced by Institutionalising it.
3. It is necessary to develop policies that ensure increased and effective exercise of fundamental rights and freedoms.
4. It is more important to transition from the mentality of state security to that of citizen security in the new Democratic Africa.
5. Civilian oversight in security services will ensure transition from reactive policing to preventive policing.
6. Civilian oversight of internal security services will contribute in the transition from bureaucratic management implementation to democratic management implementations.

Such oversight will enhance the scope of governments' policies on "zero tolerance against violence and I'll treatment of citizens"

The countries of Africa have emerged from different colonial regimes which by and large, used the police to suppress African citizens, thereby denying them any democratic spaces. The rule of law was unevenly applied, with the colonials enjoying impunity while the Africans were dealt an unequal and unfair hand. It must be seen and agreed that the current security forces in post-colonial Africa were built upon the remains of the security forces of the colonial regimes. It is therefore important that in post colonial Africa we move towards the Rule of Law for all, which is the cornerstone of Democracy.

Regardless of political affiliation and social status, the law must be applied to all in a fair and just manner. Who then decides whether the application of the laws is fair and just, and that during electoral processes the application of same does not result in skewed outcomes? It is the citizenry in my opinion.. Therefore the same citizenry should have the opportunity to oversee those that enforce the rule of law. In the case of Zimbabwe, it is civic society in its different forms and groupings that should oversee the civilian oversight of the security institutions.

It is the responsibility of government through the Ministry of Home Affairs to ensure that the relevant policies and legal frameworks are in place towards strengthening and Institutionalising civilian oversight.

#### **What should be afforded by government towards this goal?**

I believe that civilian courts should be given powers to deal with breaches on civil liberties and human rights especially as regards the legitimacy of violence by the security forces on the citizenry. Matters such as budget or human resources and education should be put under some form of Civilian control under a Policing Board which provides for a democratic control and oversight of policing, and ensures that it does not become the preserve of government, sectional interests, dominant elites, or any one political party.

To label security sector reform as a Regime Change Agenda or a Colonial Masters Plot is an insult to the collective intellect of a nation. Security forces all over the world are changing in line with their changing national interests and depth of democracy. It is the citizens of the country who keep a score card of how they are governed and as to who should govern them. The whole electoral process from beginning to end is a regime change process, be it internal within a political party, or external between two or more political parties.

Governments consist of politicians who by and large would like to stay in power ad infinitum. Democratically weak states all over the world, will concoct rules and regulations which will enable them to use and abuse state power through internal security forces to manipulate the electoral playing field, in their favour, thereby yielding electoral outcomes that do not conform to local, regional and international standards.

If security sector reform is an ongoing exercise overseen by the citizenry, the era of career ministers of government will in no time become a thing of the past. Continuous training will give the security forces pride in executing their duties without fear or favour. It is not the fault of the police if the statutes contain laws that are skewed and patently unjust. Theirs is not to make the laws but to enforce them. The making of the laws is strictly for the legislature, except in weak states where the executive overrides the concept of separation of powers, where the executive dictates to the legislature.

Policing in a democracy, which is an essential ingredient of the rule of law, requires that the police be guided by three fundamental tenets, which are:

#### **Proportionality Legality and Necessity.**

To this end, the police should endeavour to balance the use of and the need to observe human rights. This balancing act, in my humble submission, is not easy to achieve in the eyes of the ordinary citizen. Notwithstanding the fact that Police officers have to make split second decisions, they should always ensure that the law is upheld, by enforcing it regularly, and applying it uniformly without considering the social circumstances of an individual.

In strong democracies, the citizenry will then oversee the application of the rule of law, more or less like a quality assurance procedure. Everyone in society is responsible for the rule of law. It is like a chain where each ring is interlinked to another, and therefore depends on the other for sustenance, like you and me. The rule of law does not depend on the best constitution or best laws for its observance. What this means is that the police are neither the sole nor the main defenders of the rule of law. It is all of us together hence the need for strengthening and institutionalising civilian oversight.

In the case of Zimbabwe, this is a brand new concept. The citizens need to be trained on the concept of oversight of the security sector. A lot of workshops would need to be put together by identified experts so that a correct relationship

is constructed between the citizenry and the security personnel before Institutionalising civilian oversight.

I am envisaging a democratic policing of the security sector which should as far as possible be devolved to the local level to a district partnership across the country. Ideally such district partnerships would be made up of representative of registered political parties and representatives from civil society. Their role would be to monitor the performance of the police services as well as to be consulted when the police develop local police service plans.

There should also be an Ombudsman especially for police complaints as the protection of human rights is a cornerstone of democratic policing. The Office of the Police Ombudsman would provide the most independent and robust mechanism for dealing with police complaints. A police Service Commission consisting mostly of ex-police officers appointed by the Ministry of the Interior or Home Affairs is not the most ideal body to provide for civilian oversight to the police service of a democracy. The Office of the Police Ombudsman should have a statutory obligation to monitor compliance with all human rights acts and protocols.

Article 5 of the Universal Declaration of Human Rights and Article 5 of the African Charter on Human and Peoples Rights have been ratified by the majority of African countries little has been achieved on the ground to give effect to the objective of the Convention in Africa. With great respect, As Africans, it would appear that we regard these rights to be foreign and fit CND SHELLAC ORDER to be conferred on western humans only.

I must hasten to add that a few countries in Africa have started to seriously implement the convention, and I have seen with my own eyes, an office similar to the one I am proposing above in the country to the north of us. Of course there will be resistance to civilian oversight, as it tends to open to scrutiny to what was usually handled quietly in-house, and what may be seen to be a process that favours complainants. This is pretty universal and should be expected.

I expect most resistance to come from politicians in countries where the security sector is used to sustain undemocratic regimes in perpetuity in exchange for favours and trinkets. Building police accountability, just as policing itself is multifaceted and challenging. The implication of this, together with the inherent police sensitivities in police reform, is that creating more and stronger policing oversight will need sustained expert support. This technical assistance must be sensitive to local dynamics, and to continental and international political agendas, while inputs will need to be relevant and appropriate to the capacity and constraints of local situations.

Before I move on to the topic of the security sector in elections in Zimbabwe I wish to make some remarks in passing on Free Elections in Africa in general. At a certain level of abstraction, States are bound to conduct their internal affairs, so that the authority to govern, shall be based on the will of the people as expressed in periodic and genuine elections.

In the Republic of South Africa, the South African Police are involved with other electoral role players, particularly the Independent Electoral Commission. The main aim of the Security forces during elections is to maintain public order and to create, by means of effective policing, a favorable climate in which a democratic election can take place. This will create a level playing field for political players and will effect political meetings as well as the casting of votes without intimidation, which is one of their main problems. Among government security structures they include in their midst, the Institute for Democracy in Africa, IDASA, Universities, the media houses, International Monitoring Groups and the Independent self- governing states as well regional and continental civic and parliamentary election monitors.

Their electoral process is divided into three phases as follows:

#### 1 PRE-ELECTION PHASE

Focuses on fostering cooperation between the role players. Other focus areas include the provision of manpower, training of police in accordance with the Electoral Act and the Independent Commission Acts, the combatting of intimidation, information and communication and logistics support for the forces.

#### 2 THE ELECTION PERIOD PHASE

During which the main focus will be on effective policing of the electoral polling booths especially for the rural areas.

#### 3 THE POST ELECTION PHASE

Will focus on the provision of visible services, the investigation of crime, provision of man-power, support of policing by means of logistical and financial support, and the maintenance of community services.

It is a gratifying fact that South African Police Service together with the South African Defence Forces has maintained and earned the voters' confidence for the manner in which they play their role in ensuring a credible electoral process.

Generally the role of the security sector during elections is to

1. Protect life and property
2. Preserve law and order and
3. Detect and prevent crime

In particular the security sector should take steps to ensure that there are secure conditions necessary for the conduct of any election in accordance with the laws of the relevant country.

In Zimbabwe, during elections, the role of the Police is transformed substantially deriving from the electoral process and accompanying activities which include:

- a) Political Parties Voter Support Mobilisation Rallies
- b) Voter registration
- c) Voter education and
- e) Announcement of results and post election conflict.

To manage elections the Zimbabwe Republic Police splits the electoral process into three phases that is, the pre-electoral, electoral and post electoral period. The issue of security during elections is paramount throughout these phases hence the need for Police involvement in all these processes.

In discharging the above obligation all officers of the Zimbabwe Republic Police are expected to carry out their duties:-

Diligently  
 Courteously  
 Without fear or favour  
 With honesty and integrity  
 Within the limits of the law and  
 With due respect for human rights.

The pre-electoral phase is very fundamental for the failure of the police to properly handle it may be disastrous which may result in chaos, thereby discrediting the whole election process. The period is sensitive in that once the security situation gets out of hand it is difficult if not impossible to bring it back to normal, and restore credibility back to the process.

The role of the ZRP during this phase will include the following:-

- a) to maintain law and order and prevent the breach of peace
- b) to ensure that political parties campaign freely and peacefully during the run-up to the elections
- c) to prevent the defacement, destruction, mutilation, removal or alteration of political graffiti displayed by different political parties
- d) to provide security of ballot boxes and election material to the polling stations and
- e) ensuring that citizens carry out their day to day activities in peace.

During the Electoral Phase which is the actual Voting Period which lasts for one day, the police must maintain peace and ensure that tension is kept under control.

The role of the police will include the following among other duties:-

- i) maintenance of law and order and prevent the breach of peace
- ii) to assist electoral officers in the administration and policing of polling stations so that voters cast their ballots in peace
- iii) to ensure that there is no electioneering or canvassing for votes in any public or private place within 200 metres of polling stations according to current laws and
- iv) to prevent defacement, mutilation, removal or alteration of all official notices displayed at polling stations.
- v) to provide security for ballot boxes, election material, election officers, and election agents during the voting exercise
- vi) to facilitate free movement of persons to and from polling stations
- vii) detection and investigation of any offenses committed inside polling stations and
- viii) to carry out preventive patrols in and around polling stations.

In the Post Electoral Phase which is the period between the closing of the polling station and the declaration of the final results, the role of the police is to:

- a) to maintain law and order and prevent the breach of peace. Ensure that both winning and losing parties observe the maintenance of peace.
- b) to guard and escort ballot boxes up to the place where they are stored.

### Elections: A Legal Framework

Probably because it is a process, an election requires an adequate legal framework that will ensure that it is managed in a credible and appropriate manner and conducted only within this framework.

Generally, the electoral legal framework includes at least the constitutional provisions on the management of elections and electoral laws and code. In Zimbabwe, the electoral process is complemented by regional, international standards and principles derived from fundamental rights and freedoms established through treaties and political commitments of countries, such as the SADC principles and guidelines governing democratic elections, the Universal Charter of Human Rights, the African Charter on Human and Peoples Rights and The African Charter on Democracy among others.

The Zimbabwe Republic Police is bound during the electoral process to take into account the

- i) Electoral Act Chapter 2:13
- ii) POSA 11:17
- iii) AIPPA ( Access to Information and Protection of Privacy Act) chapter10:27
- iv) Criminal Law Codification and Reform Act 9:23

Without going into detail, these laws have attracted much controversy and debate because of their perceived effect on citizens rights. As we speak, these are the laws that the ZRP have to enforce in order to deal with the election environment. Until amended possibly under acts of the new constitution which is currently being concluded, these are the laws that govern the electoral processes in Zimbabwe today. The interpretation of the vast array of sections under the acts leave a lot of room of misinterpretation which can lead to a creation of uneven electoral terrain for political players depending on the political disposition of the enforcers. When this happens by and large it leads to bitterness and a sense of deprivation of fundamental loss of the freedom to exercise electoral rights leading to complaints that lead to loss of legitimacy of the electoral processes.

As stated before, the ZRP only enforce the laws of the land and are not part in formulating them. The burden of straightening these laws lie fairly and squarely with the Legislature as soon the new constitution is in place after the referendum.

Elections are a period for political parties to compete qualitatively for political power. Because of the fierce competition that ensues during this period it is hoped that

the next elections in Zimbabwe will necessarily see police working together with committees of all stakeholders, to ensure free and fair enforcement of electoral laws. When there is involvement of the Police and the citizenry under the guidance of a free and independent electoral commission, during this sensitive period, it leads to engagement of political protagonists without fear of harassment, threats, assaults, electoral fraud, threats of future violence, rape, intimidation, malicious injury to property and loss of life and limb that have been associated with elections in the past decade.

There is a new climate of tolerance and general camaraderie that has been created by the advent of the Global Political Agreement and the formation of the Government of National Unity which should not be squandered at the altar of political expediency. The forthcoming elections must be managed in a way that will guarantee citizens effective participation in the choice of leaders. Quality participation of citizens in all the electoral phases should be the main goal of those charged with ensuring that a poll that emanates from such a process cannot be contested.

I want to conclude by saying that the ZRP has the capacity to ensure that a credible poll is staged in the next plebiscite. What is needed is the political will by the Executive, in the case of Zimbabwe, the executive being the State President, The Prime Minister and Cabinet Ministers, to allow the ZRP to execute their duty without undue interference. The role that the police will play in the next election cannot be overemphasized.

The maintenance of peace by police officers allows for a conducive environment paramount in the holding of free, fair, credible and democratic elections. The holding of free and transparent elections constitutes in part a sign of hope for peace building and the establishment of a strong democracy. It is therefore critical that stakeholders in the election process try not to undermine the decisive role by police in the light of changes that may occur to electoral legislation. If the police is accorded its role it will be perceived by the citizenry as a force for protection, justice, in defence of the people as well as democratic values and institutions.

## Establishing democratic institutions through enactment of constitutions

Advocate Eric Taurai Matinenga MP

### Introduction

An institution has been described as: "----- a relatively enduring collection of rules and organized practices, embedded in structures of meaning and resources that are relatively invariant in the face of turnover of individuals and relatively resilient to the idiosyncratic preferences and expectations of individuals and changing external circumstances"<sup>1</sup>

In a speech on his first visit to Ghana, President Barrack Obama said,

"In the 21st century, capable, reliable and transparent institutions are the key to success – strong parliaments and honest police forces; independent judges and journalists; a vibrant private sector and civil society. Those are the things that give life to democracy, because that is what matters in a democracy, that is what matters in people's lives."

It is clear from the above definition and the comments by President Obama that the creation and establishment of institutions is a realisation that man come and go. The irony however is that it is man who creates institutions. It is man who must nurture and grow the institutions. Without political will, institutions, particularly democratic institutions are bound to struggle. If not fail completely.

The prospects for free elections in Zimbabwe are not particularly good. This is because in the main, we pay lip service to the concept of the rule of law. Indeed some of us in Zimbabwe equate rule by law to rule of law! Hopefully, the establishment of democratic institution in our constitutions will create the necessary steps towards the observance of the rule of law leading up to free and fair elections.

I do not protest to know what is happening in the rest of Africa. Consequently, my address will concentrate on events at home, Zimbabwe.

### General Overview

In 1980, Zimbabwe had its first election on the basis of universal suffrage. Other countries in Africa had experienced the same. West Africa provided the lead. Sadly it is West Africa which took the lead in trashing elected governments. In Ghana, Nigeria, the aura with which we held their independence and democratic elections were shattered by violent coups which followed. We are told that all these coups were meant to restore legitimacy to the people, rid corrupt practices, introduce transparency and restore legitimacy to the people, rid corrupt practices, introduce transparency and restore human dignity.

The scourge of open military take overs

has not taken centre stage in East, Central, Southern Africa. This is not to say that we are any better than our friends to the North and West. There is a strong body of opinion that whilst the army has not openly taken over in these countries, there have been ominous behind the scenes manipulation of electoral practices. In Zimbabwe, senior security force, commanders have openly declared their allegiance to ZANU PF. More ominously, they declared that they will not accept any elected leader from outside the party they support. Angola has just had general elections. A writer in the Zimbabwe Independent of 14-20th September 2012 ruefully commented on the elections as follows:

"The formerly Marxist MPLA switched to a multi-party system in 1992 but opponents say a thin democratic facade hides a self-serving elite propped up by a pervasive security structure".

### Constitutional Institutions

In a modern state, and I believe Zimbabwe is one, the constitution recognises three broad institutions- the Executive, the Legislature and the Judiciary. The common parlance is that these institutions separate governmental power. They check and balance each other.

In checking and balancing each other there is bound to be some tensions, particularly between the judiciary and the executive. The tension becomes undesirable if either institution acts outside the constitution. A former Chief Justice of South Africa, Chief Justice Arthur Chaskalson describes this tension as follows:

*"It is probably inevitable that there should be some tension between judges and politicians in a country like ours, where the Constitution entrenches the rule of law, and makes provision for an independent judiciary, and for judicial review of legislative and executive action. This is inherent in the separation of powers and is not solely a South African phenomenon. A former Chief Justice of Australia, Chief Justice Gleeson explained it in these terms:*

*"It is self-evident that the exercise of (Judicial review) will, from time to time, frustrate ambition, curtail power, invalidate legislation and fetter administrative action. As the guardian of the Constitution, the High Court from time to time disappoints the ambition of legislators and governments. This is part of our system of checks and balances. People who exercise political power, and claim to represent the will of the people, do not like being checked and balanced." Lord Bingham, one of the great common law judges of our generation, refers to an inevitable and entirely proper tension between the government and the judiciary! Whilst not necessarily desirable, such tension should not come as a surprise to anyone. It is evidence that we have an independent and not a compliant judiciary."*<sup>2</sup>

The bottom line is that all institutions which check and balance each other must do so in terms of the constitution. That is the rule of law. At a time when the Executive in Zimbabwe sought to argue the rule from a partisan point of view, Chinhego J. correctly stated the position as follows:

"----- the rule of law represents a norm that any person any bring up a claim and have it determined within the framework of a body of principles which are applied to all persons equally. --- The role of the state is to maintain law and mitigate conflict within the community and the instrumentality for the maintenance of law and order is the police. The rule of law to me means that everyone must be subject to a shared set of rules that are applied universally and which deal evenly with people and which treat like cases alike.

Under a constitutional democracy such as Zimbabwe, there is recognition that society's power is dangerous to its members if it is exercised by one group of individuals. It is recognised therefore that there must be a separation of powers to perform the three jobs which have to be done ----- These pillars of the state act together. They are not isolated from another. They however act as brakes on each other."<sup>3</sup>

### Institutional Performance

The three broad institutions depend on sub institutions for their performance. These are either executive or independent commissions. But as said earlier, performance is to a large extent, dependent on political will.

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In Zimbabwe, the unfortunate experience is that the executive has moved in to nullify judicial pronouncements which are perceived to go against the policy of the day.

- When the Supreme Court held that the death penalty was unconstitutional in *Catholic Commission of Justice and Peace v A.G. and others* 1993 (1) ZLR 242, Constitutional Amendment 13 was enacted reversing the Supreme Court ruling.
- Statutory Instrument 318 of 2000 was promulgated to deny any and (2) of the constitution which affords every person the right to a fair hearing by an independent and impartial tribunal. Fortunately the instrument was struck down as unconstitutional by the Supreme Court.
- When white commercial farmers successfully challenged the compulsory acquisition of land, Constitutional Amendment 17, ousting the courts jurisdiction was passed.<sup>4</sup>

### LAWS(CONSTITUTIONALITY) vs COANSTITUTIONALISM

The conduct of the executive described above is clear indication of the pursuit of the rule b law and not rule of law.

Zimbabwe has always experienced some form of electoral violence since 1980. This became more pronounced from 2000. Immediately after the rejection of the draft constitution in 2000, white commercial farmers, their supporters and workers were violently attacked and displace. The election which followed in June of the same year recorded some nasty incidences of violence. At Murambinda Growth Point in Buhera, two MDC supports met a cruel and violence death at the hands of state security agents and ZANUPF militia. Such was the cruel nature of the killing that the judge who set aside the ZANU PF victory

for Buhera West recommended that the fingered perpetrators be brought to book.

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Inspite of the court directive the alleged perpetrators of the murders at Murambinda still walk free. The security operative fingered in the murders, as far as I am aware, is still on the government pay roll.<sup>5</sup>

For his part, the President of ZANU PF openly announced that he had degrees in violence and that whites (perceived supporters and funders of the MDC) should be made to tremble.

The elections in 2002, 2005 were no safer. This is despite the fact that over and above the law proscribing violence, Zimbabwe signed the protocol which established SADC Guidelines and Principles on the Holding of Democratic Elections in 2004. Article 2 of the Guidelines provide as follows:

"2.2 *SADC Member States shall adhere to the following principles in the conduct of democratic elections*

2.1.1 *Full participation of the citizens in the political process;*

2.1.2 *Freedom of association;*

2.1.3. *Political Tolerance;*

2.1.4 *Regular intervals for elections as provided for by the respective National Constitution;*

2.1.5 *Equal opportunity for all political parties to access the state media;*

2.1.6 *Equal opportunity to exercise the right to vote and be voted for;*

2.1.7 *Independence of the judiciary and impartiality of the elected institutions;*

2.1.8 *Vote education;*

2.1.9 *Acceptance and respect of the election results by political parties proclaimed to have been free and fair by the competent National Electoral Authorities in accordance with the law of the land; and*

5

2.1.10 *Challenge of the elections results as provided for in the laws of the land."*

A critique of the 2008 Presidential run off on the IDASA website dated July 2008 clearly shows that Zimbabwe did not follow its laws nor the SADC Guidelines and Principles it appended its signature to. The critique is attached as Annexure, A hereto.

The institutions in our constitution can easily deliver a free and fair election. However, they can only do so if the core values they speak to are respected. These values mean that nobody can conduct themselves illegally and with impunity. They direct our security services to apply the law without fear of fervor and devoid of any selective application. They expect that the executive will respect the constitution, the institutions made in its terms thereof and the court judgements arising there from no matter how detestable the rulings are. Without these, a constitution is but a worthless piece of paper and the institutions established therein from mere paper tigers.

On 3 July 2009, Alex Magaisa posted an article, titled Constitution Will Not Save Us on New Zimbabwe.com. He said, amongst others:

"Let us be reminded that not even the most beautiful words of a constitution will stop election violence. They will not compel the police to act fairly and impartially. They will not make the electoral commission fairer and more impartial. They will not stop people from being abducted. They will not cause ministers to evolve to a stage where they actually obey the orders of the courts without cherry-picking them."

In March 2008, Zimbabwe had a relatively peaceful election. The runoff in June cannot be described as an election on any account. Some have described the events between April and June as genocide masquerading as an electoral process.

It is critical to note that the laws in place in March 2008 were the same laws in place up to the farcical run-off in June. A proper and fair application of the Current Lancaster House constitution and the laws made under it would have put a stop to the lawlessness we experienced.

### Conclusion

Zimbabwe has constantly held elections when they became due. Unfortunately, the majority of these elections cannot be said to have been free and fair. In particular the 2008 Presidential runoff was more a vote for dear life rather than a vote to choose a desired leader.

Zimbabwe is in the process of writing a new constitution. It has been a tortuous process. Despite the tortuous path taken, I am confident that a relatively good document will come out of the process.

The Copac Draft currently on the table provides for security sector institutions which are subordinated to civilian authority. It provides for independent institutions which are well resourced.

Importantly these improved constitutional provisions, can only work to our good if we embrace constitutionalism. Constitutionality alone, will not lead us to free and fair elections – we will not go beyond the rhetoric!

1. Essay on Elaborating the New Institutionalism, James G March and Johan P. Olsen, The Oxford Handbook of Political Institutions, page 3.
2. Chaskalson C.J, Without fear, favour or prejudice: the courts, the constitution and transformation, Advocate, Vol 25, number 2, August 2012.
3. Commissioner of Police v Commercial Farmers Union 200 (1) ZLR 503 (H) AT 526.
4. Sheppard Mushonga and Auor v Patrick Chinamasa and Auor 2001 (1) ZLR 69
5. Buhera North Election Petition 2001 (1) ZLR 295 AT 305.

## Conference Resolution

### RESOLUTIONS ADOPTED BY

"The Rule of Law and Free Elections in Africa: Going Beyond the Rhetoric." Victoria Fall 20 September – 21 September 2012

Deeply concerned by the state of democracy in Africa, in particular the proliferation of governments of national unity;

Determined to move the continent away from articulated democracy to realized democracy;

Mindful of the coming into force of the African Charter on Democracy, Elections and Governance in accordance with the provisions of Article 48 of the Charter on 15 February 2012;

Cognisant of the need to operationalise and give effect to the provisions of the Charter;

We, the participants of this conference, have agreed on the following:

#### 1. Election Management Bodies

##### *General Recommendations*

- 1.1. There is need to facilitate increased dialogue amongst the different stakeholders in elections and election management. The findings and outcomes from these initiatives should then be communicated to the Election Management Bodies.

- 1.2. There is greater need to have strengthened peer review mechanisms built in the election monitoring mechanisms within the Southern Africa Development Community (SADC).

- 1.3. Legislative frameworks throughout the continent should be amended to guarantee the independence of EMBs. This may be achieved by having them report directly to Parliament; and ensuring that they are adequately funded.

- 1.4. The work of EMBs throughout Africa should be enhanced by the use of Information and Communication Technology (ICTs) in the registration of voters and the management of results.

- 1.5. The utilisation of state funds and resources by incumbents or any political party for electioneering should be regulated.

##### *Zimbabwe Specific Recommendation*

- 1.6. An audit of the Zimbabwe Election Commission (ZEC) staff should be conducted to remove

personnel with known political affiliations. A recruitment criterion should thereafter be established and implemented outlining the minimum requirements for employment at ZEC.

- 1.7. The Electoral laws in Zimbabwe should be amended to ensure that all aspects pertaining to election management fall under ZEC particularly the registration of voters.

## 2. Electoral Laws

- 2.1. All countries in SADC should ratify, domesticate and conform to international principles and standards on elections.
- 2.2. The legislative frameworks in all African countries should be amended to ensure appropriate penalties are imposed on people that commit and are convicted of electoral offences. These laws must be applied equally to all offenders regardless of political affiliation or any other criteria.
- 2.3. Amendment of the legislative framework on elections or any other electoral reform should be effected timeously to allow the EMB time to implement these changes.
- 2.4. The enactment of election laws, like other pieces of legislation must remain the prerogative of Parliament. It follows that the

President and executive should have no powers to pass legislation on elections.

- 2.5. The laws governing elections should be harmonized and included in one all-encompassing electoral act.

## 3. Security Sector Role in Elections

### *General Recommendation*

- 3.1. The role of security forces should be clearly defined and limited to the maintenance of law and order. It must not extend to the running or management of the elections.

### *Zimbabwe Specific Recommendations*

- 3.2. The provisions of the Global Political Agreement and other relevant founding documents that pertain to security sector reforms should be implemented or adhered to.
- 3.3. Dialogue between the security sector in Zimbabwe and the relevant parliamentary portfolios should be encouraged.

## 4. Electoral Dispute Resolution

- 4.1. Adequate resources should be allocated to courts dealing with electoral disputes and these courts should be decentralised to outlying areas.
- 4.2. The law should provide a time frame for the resolution of electoral disputes.
- 4.3. The legislative framework should

allow for or create mechanisms for the alternative resolution of electoral disputes.

- 4.4. Judges should be provided with continuous legal education to allow them to better handle electoral disputes.
- 4.5. The independence of the judiciary must be ensured.

## 5. General/Non-Theme Specific Resolutions

- 5.1. There is need to convene a Zimbabwean focused meeting on Elections to allow for dialogue between Zimbabweans. This should be held in Harare to allow for greater participation. (Ideally this should follow the referendum)
- 5.2. Voter education should be included in the curriculums of primary and secondary schools.
- 5.3. Civil society should engage on an advocacy initiative to encourage African states to ratify the African Charter on Democracy, Elections and Governance.

## Conclusion

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One of the main objectives of the meeting was to provide African academics, parliamentarians, political analysts, election administrators, civil society organisations, political parties and government agencies with an opportunity to reflect upon the legal and regulatory framework affecting elections, in Africa. The meeting did succeed in creating a platform upon which dialogue was achieved with representatives from 7 different countries. There were several issues that emerged from this discussion:-

- a. The issues affecting African democracy are similar throughout the continent;
- b. These to some extent have to do with the growth of the state in Africa and the emergence of a ruling elite that has taken advantage of this evolution;
- c. More interesting a solution that resonated from a number of the papers created was a departure from western liberal notions of democracy or a minimalist approach to democracy to a more encompassing discourse that is peculiar to Africa.

The issue of whether the African Charter has started a process towards this African ideal was never exhaustively discussed. What is clear from this meeting is that there is need to look at these issues in greater detail and to ensure that continental actors are afforded the opportunity to define this vernacular.



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